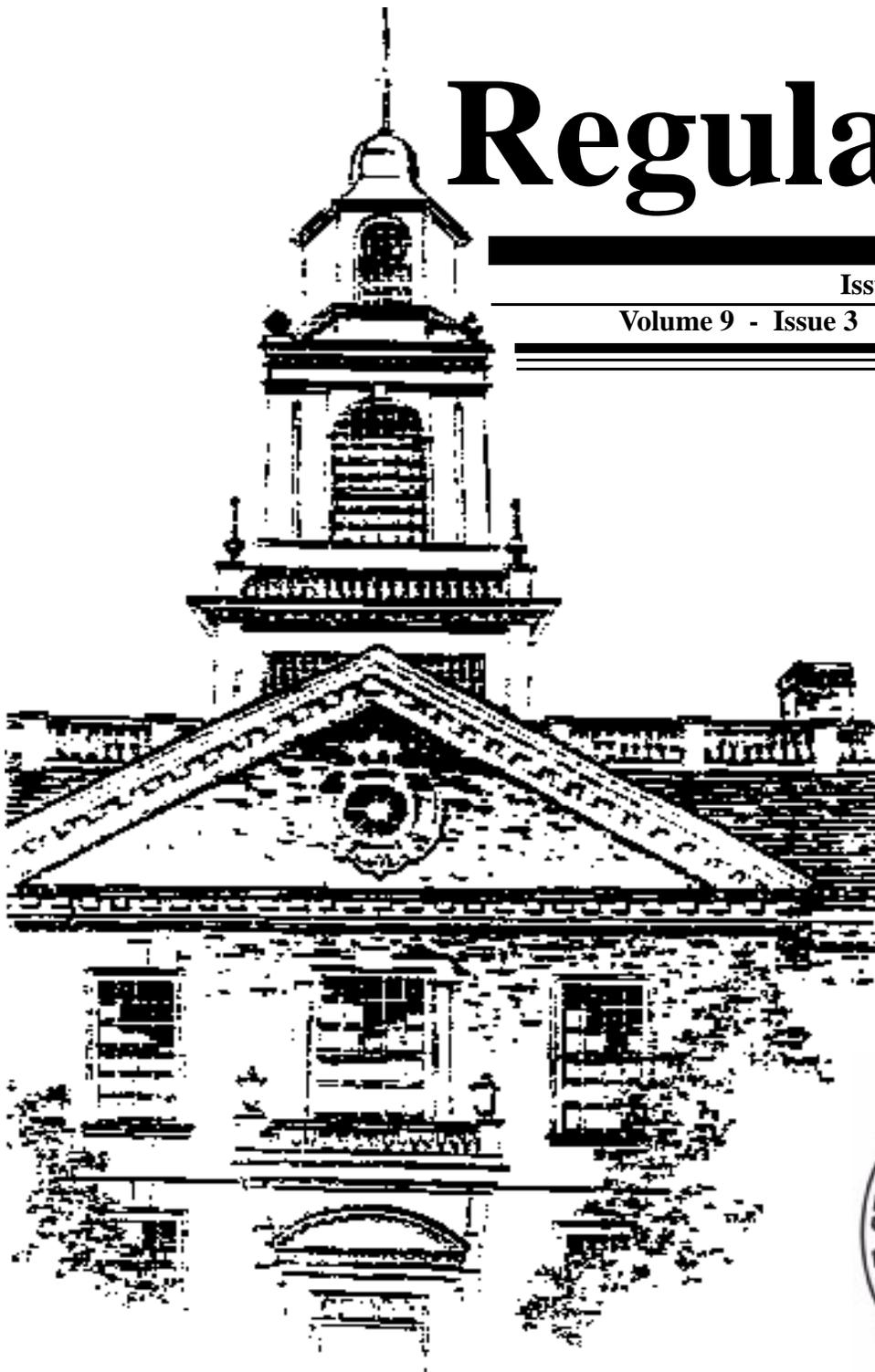

Delaware Register of Regulations



Issue Date: September 1, 2005

Volume 9 - Issue 3

Pages 297 - 467

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Proposed

Final

Governor

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Hearing Notices



Pursuant to 29 Del.C. Chapter 11, Subchapter III, this issue of the Register contains all documents required to be published, and received, on or before August 15, 2005.

INFORMATION ABOUT THE DELAWARE REGISTER OF REGULATIONS

DELAWARE REGISTER OF REGULATIONS

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

The *Delaware Register* will publish any regulations that are proposed to be adopted, amended or repealed and any emergency regulations promulgated.

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

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

CITATION TO THE DELAWARE REGISTER

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

8 **DE Reg.** 757-772 (12/01/04)

Refers to Volume 8, pages 757-772 of the *Delaware Register* issued on December 1, 2004.

SUBSCRIPTION INFORMATION

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

CITIZEN PARTICIPATION IN THE REGULATORY PROCESS

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and other interested parties may participate in the process by which administrative regulations are adopted, amended or repealed, and may initiate the process by which the validity and applicability of regulations is determined.

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file notice and full text of such proposals, together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication in the *Register of Regulations* pursuant to §1134 of this title.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

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

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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
OCTOBER 1	SEPTEMBER 15	4:30 P.M.
NOVEMBER 1	OCTOBER 15	4:30 P.M.
DECEMBER 1	NOVEMBER 15	4:30 P.M.
JANUARY 1	DECEMBER 15	4:30 P.M.
FEBRUARY 1	JANUARY 15	4:30 P.M.

DIVISION OF RESEARCH STAFF:

Deborah A. Porter, Interim Supervisor; **Sandra F. Clark**, Administrative Specialist II; **Kathleen Morris**, Unit Operations Support Specialist; **Jeffrey W. Hague**, Registrar of Regulations; **Steve Engebretsen**, Assistant Registrar; **Victoria Schultes**, Administrative Specialist II; **Lady Johnson**, Administrative Specialist I; **Rochelle Yerkes**, Administrative Specialist II; **Ruth Ann Melson**, Legislative Librarian; **Debbie Puzzo**, Research Analyst; **Judi Abbott**, Administrative Specialist I; **Alice W. Stark**, Legislative Attorney; **Ted Segletes**, Paralegal; **Deborah J. Messina**, Print Shop Supervisor; **Marvin L. Stayton**, Printer; **Don Sellers**, Printer.

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The regulations are listed alphabetically by the promulgating agency, followed by a citation to that issue of the *Register* in which the regulation was published. Proposed regulations are designated with (Prop.); Final regulations are designated with (Final); Emergency regulations are designated with (Emer.); and regulations that have been repealed are designated with (Rep.).

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Moved to Department of State, 75 Del. Laws, Ch. 88, June 30, 2005.

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Moved to Department of State, 75 Del. Laws, Ch. 88, June 30, 2005.

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Symbol Key

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

Proposed Regulations

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

**DEPARTMENT OF AGRICULTURE
NUTRIENT MANAGEMENT**

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

PUBLIC NOTICE**1201 Nutrient Management Certification Regulations**

Pursuant to 29 **Del.C.** §10115, I hereby recommend the proposed amendments to the certification regulations to be posted in the Register of Regulations.

Synopsis: Certification by the Delaware Nutrient Management Program, 2320 S. Dupont Hwy., Dover, DE 19901, is required (3 **Del.C.** §2201 - 2290) for all who apply fertilizer and/or animal manure greater than 10 acres or who manage animals greater than 8,000 pounds of live animal weight. As required by the regulations, certain continuing education credits are needed in order to maintain certification. The proposed changes reduce the required credits in order to maintain consistency with recertification requirements from regional programs.

Comments on the proposed changes will be accepted from September 1, 2005 until October 11, 2005. Any comments should be provided to William Rohrer, Program Administrator. A hearing for the proposed regulations will be conducted at the Delaware Department of Agriculture on October 11, 2005 at 7:00 p.m.

7.0 Continuing Education

7.1 After a certificate is issued, the certificate holder must take and successfully complete continuing education courses approved by the Commission or Program Administrator in accordance with the following:

7.1.1 Nutrient generator - 6 credits of continuing education in each three-year period following the issuance of the certification.

7.1.2 Private nutrient handlers - 6 credits of continuing education in each three-year period following the issuance of the certification.

7.1.3 Commercial nutrient handlers - ~~9~~ 6 credits of continuing education in each three-year period following the issuance of the certification.

7.1.4 Nutrient consultants - ~~8~~ 5 credits of continuing education each year following the issuance of the certification.

7.2 Failure to satisfy the continuing education requirements may result in the revocation of a certificate or non-renewal of the certificate.

7.3 Any dispute regarding continuing education credits may be directed to the Commission which will determine whether a hearing is necessary to resolve the dispute.

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

http://www.state.de.us/research/AdminCode/title3/1200/1201%20Nutrient%20Management%20Certification%20Regulations.shtml#P2_24

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

Statutory Authority: 16 Delaware Code,
Section 122(3)c (16 Del.C. §122)(3)c, §7906)
16 DE. Admin. Code 4462

PUBLIC NOTICE

4462 Public Drinking Water Systems

These proposed regulations, "Regulations Governing Public Drinking Water Systems," will replace by revision the current "Regulations Governing Public Drinking Water Systems," previously adopted May 14, 1971 and most recently amended July 10, 2003.

NATURE OF PROCEEDINGS

The Department is proposing amendments to the Regulations Governing Public Drinking Water Systems. The Department originally published proposed amendments to these regulations in the July 1, 2005 Register of Regulations and due to additional amendments is now re-proposing these regulations in the September 1, 2005 Register of Regulations. A summary of those amendments and amended regulations are attached below.

NOTICE OF PUBLIC HEARING

The Office of Drinking Water, under the Division of Public Health, Department of Health and Social Services (DHSS), will hold a public hearing to discuss proposed revisions to the "State of Delaware Regulations Governing Public Drinking Water Systems." The public hearing will be held on September 29, 2005 at 1:00 p.m. in the Public Health Preparedness Training Center, Suite 4F, Blue Hen Corporate Center, 655 S. Bay Road, Dover, Delaware.

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

Office of Drinking Water
Blue Hen Corporate Center, Suite 203
655 Bay Road
Dover, DE 19901
Telephone: (302) 741-8630

Anyone wishing to present his or her oral comments at this hearing should contact Mr. David Walton at (302) 744-4700 by September 28, 2005. Anyone wishing to submit

written comments as a supplement to or in lieu of oral testimony should submit such comments by September 30, 2005 to:

David Walton, Hearing Officer
Division of Public Health
417 Federal Street
Dover, DE 19901
Fax 302-739-6659

**Summary of changes to Regulations Governing Public
Drinking Water Systems**

- Elimination of Exemption and Variance provisions in lieu of the Bilateral Compliance Agreement process with water system. (Sections 2.2 and 2.3 and where referenced throughout the regulations)
- Clarifying the penalty authority of the Secretary, DHSS, and when it may be imposed. (Section 2.9.1.5)
- Requiring submission of as-built plans as requirement for obtaining final approval to operate a water system. (Section 2.12.1.6)
- Adding Approved Sampler/Tester requirements. Requirements to become effective January 1, 2006. (Section 3.6)
- Clarifying the requirement that daily testing is required when treatment is provided. (Section 4.1.1.3)
- Changing the turbidity standard to 1 NTU top comply with the new Stage 1 Surface Water Treatment Rule. (Section 4.1.5.2)
- Adding failure to have a certified operator as Tier 3 public notice. (Section 4.2.1.1.3.1.3)
- Adding requirement in public notices tiers that the Division has the discretion to require more stringent notification requirements. (Section 4.2.1.1.5)
- Adding requirement that public notices, when posted, must be posted for a minimum of 7 days. (Section 4.2.3.2)
- Changing date the Consumer Confidence Report (CCR) certification must be provided to the Division. (Section 4.3.5.3)
- Adopting CCR waiver for small systems. This will allow automatic waiver instead of requiring system to apply each year. (Section 4.3.5.7)
- Changing the MCL for fluoride from 1.8 mg/L to 2.0 mg/L and changing the compliance determination. (Section 6.1.3.1)

- Clarifying lead service line replacement requirements. (Section 6.1.7.5.4 and 6.1.7.5.5)
- Deleting the Maximum Contaminant Level (MCL) and associated requirements for Aldicarb, Aldicarb sulfone and Aldicarb sulfoxide. EPA has not established a MCL for these contaminants. (Section 6.2.1.1)
- Clarifying measurement of residual disinfectant concentrations and what are approved methods. (Section 8.2.1)
- Clarifying that analysis for disinfection byproducts must be conducted by a certified laboratory. (Section 8.4.5.1)
- Clarifying monitoring requirements when a groundwater system exceeds the MCL for TTHM or HAA5. (Section 8.4.7.1.3)
- Establishing Method Detection Limit for Uranium at 1 ug/L. (Section 9.2.4.3.1)
- Requiring systems that must perform a CPE under the surface water treatment section must implement with the recommendations. (Section 10.11.2.4)
- Adopting Long Term 1 Enhanced Surface Water Treatment Rule (LT1) requirements. Includes minor changes to Public Notice section. (Section 10.13.1)
- Incorporating corrections identified by EPA in their review. (Various sections)
- Completing adoption of all analytical methods for Secondary Maximum Contaminant Levels (SMCL) by reference. (Various sections)

***PLEASE NOTE: DUE TO THE SIZE OF THE PROPOSED REGULATION, IT IS NOT BEING PUBLISHED HERE. TO OBTAIN A COPY, CONTACT EITHER THE DIVISION OF PUBLIC HEALTH OR THE REGISTRAR'S OFFICE.**

PDF Version (Adobe Acrobat Reader required)

HTML Version

DIVISION OF PUBLIC HEALTH

Statutory Authority: 16 Delaware Code,
Section 122(3)c & 7906
(16 Del.C. §122)(3)c, §7906)
16 DE. Admin. Code 4469

PUBLIC NOTICE

4469 Regulations Governing a Detailed Plumbing Code

Nature of the Proceedings

Pursuant to 16 Delaware Code, Sections 122 and 7906, the Department of Health and Social Services is proposing to rescind the current "State of Delaware Regulations Governing a Detailed Plumbing Code" previously adopted on May 11, 2001, and replace it with an updated version incorporating the 2003 International Plumbing Code.

Notice of Public Hearing

The Health Systems Protection Section, Division of Public Health, Department of Health and Social Services will hold a public hearing to discuss the proposed Regulations Governing a Detailed Plumbing Code. The public hearing will be held on September 21, 2005 at 10:00 a.m. in the Third Floor Conference Room of the Jesse Cooper Building, 417 Federal Street, Dover, Delaware.

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

Environmental Health Field Services

Kent County	Sussex County
805 River Road	544 South Bedford Street
Dover, DE 19901	Georgetown, DE 19947

Telephone: (302) 739-5305 Telephone: (302) 856-5496

Anyone wishing to present his or her oral comments at this hearing should contact David Walton at (302) 744-4700 by September 20, 2005. Anyone wishing to submit written comments as a supplement to or in lieu of oral testimony should submit such comments by September 30, 2005 to:

David P. Walton, Hearing Officer
Division of Public Health
417 Federal Street
Dover, Delaware 19901
Fax # (302) 739-6659

**STATE OF DELAWARE
REGULATIONS GOVERNING A DETAILED
PLUMBING CODE
2000 International Plumbing Code**

These regulations were adopted April 17, 1978, effective August 1, 1978; amended December 19, 1983, effective February 1, 1984; amended April 26, 1991; amended February 19, 1992; amended May 11, 1995; amended January 11, 1998; amended May 11, 2001 by the Secretary, Delaware Health and Social Services, in conformance within Chapter 79, Section 7906 and Chapter 1, Section 122(3)(c), Title 16, Delaware Code, and supersedes regulations previously adopted by the Delaware State Board of Health and the Secretary, Delaware Health and Social Services. These Regulations shall be effective May 11, 2001.

SECTION 110.0 ADOPTION:

That certain document entitled, "The International Plumbing Code/2000" is made a part hereof and the supplements therein include, identified as "Section 111.0, Additions, Deletions, Amendments and Clarifications," are hereby adopted as the "State of Delaware Regulations Governing A Detailed Plumbing Code." NOTE: The Amendments have been numbered to identify specific changes in the International Plumbing Code/2000.

SECTION 111.0 ADDITIONS, DELETIONS, AMENDMENTS, and CLARIFICATIONS:

SECTION 111.1 TITLE SECTION 101.1: is amended to read as follows:

These Regulations shall be known as the "State of Delaware Regulations Governing A Detailed Plumbing Code hereinafter referred to as "this Code".

SECTION 111.2 SCOPE SECTION 101.2: is amended to delete the last sentence.

SECTION 111.3 EXISTING INSTALLATIONS SECTION 102.2: is amended to read as follows:

The legal use and occupancy of any structure existing on July 1, 2000, or for which it had been heretofore approved, may be continued without change except as may be specifically covered in this Code or deemed necessary by the Deputy Code Official(s) for the general safety and welfare of the occupants and the public.

Exception:

Except that upon change of permit holder in facilities and operations regulated by the Delaware Division of Public

Health such systems shall comply with the requirements of this Code and applicable regulations promulgated and standards established by the Delaware Division of Public Health.

SECTION 111.4 DUTIES AND POWERS OF THE CODE OFFICIAL AND PLUMBING INSPECTORS SECTION 104.1: is amended to add the following sentence:

For the purpose of this document "Code Official" refers to the Secretary, Delaware Health and Social Services, or their designee. "Plumbing Inspectors" shall have such duties and powers as are enumerated in Title 16, Delaware Code, Section 7907 and shall have the authority of a Deputy Code Official as referenced in Section 103.3 of this Code.

SECTION 111.5 UNLAWFUL ACTS SECTION 108.1: is amended to read:

It shall be unlawful for any person to work as a licensed plumber in the State of Delaware unless such person has received a license from the Delaware Department of Administrative Services, Division of Professional Regulation, showing that said person has been duly licensed as a plumber, except as provided by 24 Delaware Code 1813, and has a permit issued by the Division of Public Health.

Exception

The homeowner of a single-family residence occupied, or to be occupied by him/her, and not for sale, rent or lease, may perform plumbing work only on such residence itself, and/or auxiliary structures, and in compliance with a permit issued by the Division of Public Health, or applicable authority, and in compliance with all provisions of these regulations.

SECTION 111.6 VIOLATION AND PENALTIES SECTION 108.4: is amended to read:

Any person who shall violate any provisions of this Code, or shall fail to comply with the requirements thereof, or who shall install plumbing work in violation of an approved plan or directive of the Code Official or the Deputy Code Official(s), or of a permit or certificate issued under the provisions of this Code, shall be subject to penalties as provided by Chapter 79, Title 16, Delaware Code.

SECTION 111.7 STOP WORK ORDERS SECTION 108.5: is amended by deleting the language "shall be liable to a fine of not less than [AMOUNT] dollars or more than [AMOUNT]" and by adding:

shall be subject to penalties as provided by Chapter 79, Title 16, Delaware Code.

~~SECTION 111.8 – GENERAL DEFINITIONS – SECTION 202:~~ is amended by adding the following definitions:

~~“Licensed Plumber:”~~ The term ~~“Licensed Plumber”~~ shall mean a person who has complied with the provisions of the Division of Professional Regulation and the Board of Plumbing Examiners, and has further met the certification, testing, bonding, and licensing requirements of the jurisdiction in which he/she plans to engage in the business of plumbing. The Licensed Plumber shall be recognized as being responsible for all work performed under a plumbing permit issued by the Division of Public Health.

~~“Supervision of Work:”~~ For the purposes of these regulations, supervision of work shall be defined as work completed under the permit of a licensed plumber while employed by the licensed plumber, or the same firm, partnership, corporation, or owners of the company as the licensed plumber.”

~~SECTION 111.9 SEWER DEPTH – SECTION 305.6.1:~~ is deleted in its entirety.

~~SECTION 111.10 REQUIRED TESTS – SECTION 312.1:~~ is amended by adding the following sentence at the end thereof:

In lieu of the presence of the deputy code official witnessing the test, the Licensed Plumber may certify in writing upon a prescribed form, that the plumbing system piping is in accordance with Section 312 of the regulations.

~~SECTION 111.11 – ACCESSIBLE PLUMBING FACILITIES – SECTION 404.1:~~ is amended by the following:

All regulations pertaining to handicapped facilities in the International Plumbing Code will be governed by the most recent edition of the “American National Standards Institute (ANSI).”

~~SECTION 111.12 – INSTALLATION – SECTION 502.1:~~ is amended by adding the following sentence at the end thereof:

The first 12 inches of both hot and cold water lines shall be thermally rated for the maximum water temperature produced by the hot water heater.

~~SECTION 111.13 – SAFETY DEVICES – SECTION 504.6.2:~~ is amended by deleting the existing language and adding the following:

The discharge valve shall be equipped with an approved heat transfer fitting or metallic pipe.

~~SECTION 111.14 – TABLE 605.4 & 605.5:~~ are amended by deleting the letters “M” and “WM” from copper tubing.

~~SECTION 111.15 – MATERIALS, JOINTS AND CONNECTIONS – SECTION 605.16.2:~~ is amended by the adding the following sentence at the end thereof:

The use of all purpose glue is prohibited.

~~SECTION 111.16 – STANDPIPES – SECTION 802.4:~~ is amended by adding the following sentence at the end thereof:

The top of standpipes shall be 42 inches (1066mm) above the finished floor.

~~SECTION 111.17 – MAIN VENT REQUIRED – SECTION 903.1:~~ is deleted in its entirety and following is inserted in lieu of:

Every sanitary drainage system receiving the discharge of a sanitary fixture shall have a main vent three (3) inches in diameter.

~~SECTION 111.18 – PROCEDURES FOR LICENSE:~~

Every person desiring to register as a plumber engaged in the business of plumbing in the State of Delaware shall file an application with the Division of Professional Regulation, 861 Silver Lake Blvd., Dover, DE 19904.

~~SECTION 111.19 – VARIANCES:~~ is amended by adding the following to read as follows:

Upon receipt of written application for a variance, the Deputy Code Official may:

(a) From time to time recommend granting written permission to vary from particular provisions set forth in this Regulation, when the extent of the variation is clearly specified and it is documented to the Secretary, Health and Social Services, or his/her appointed designee’s satisfaction that:

(1) Such variation is necessary to obtain a beneficial use of an existing facility, and:

(2) The variation is necessary to prevent a practical difficulty or unnecessary hardship; and

(3) Appropriate alternative measures have been taken to protect the health and safety of the public and assure that the purpose of the provisions from which the variation is sought will be observed.

(b) Within thirty (30) business days of the receipt of a written application for a variance, the Deputy Code Official shall recommend either granting the variance, or denying the variance or will request further information from the applicant.

(e) If the applicant has been denied a variance upon the recommendation of the Deputy Code Official, the applicant may appeal the decision by filing a written Notice of Appeal to the Secretary, Health and Social Services, or his/her designee, Division of Public Health, P.O. Box 637, Dover, Delaware 19903.

~~SECTION 111.20 — AIR ADMITTANCE VALVES — SECTION 917.1: is amended by adding the following sentence at the end of paragraph 917.1:~~

~~Air admittance valves must be approved by the Deputy Code Official prior to use or installation.~~

~~SECTION 111.21 — COMPUTERIZED VENT DESIGN — SECTION 919: is deleted in its entirety.~~

~~SECTION 111.22 — INTERCEPTORS AND SEPARATORS — SECTION 1003.3.4: is amended by adding the following to the end:~~
~~,or, be otherwise approved by the Code Official.~~

~~SECTION 111.23 — FUEL PIPING — SECTION 1201: is deleted in its entirety.~~

~~SECTION 111.24 — SPECIAL PIPING AND STORAGE SYSTEMS — SECTIONS 1202 — 1203: is deleted in its entirety and replaced with the following:~~

~~PLUMBING REQUIREMENTS IN FOOD ESTABLISHMENT KITCHENS~~

~~I. HANDSINK~~

~~A. This fixture, when located in food preparation, food dispensing, beverage dispensing (including bar service area), food storage and warewashing areas, must be certified or classified under an approved industry standard for food equipment, such as the National Sanitation Foundation (NSF) International, Environmental Testing Lab (ETL), Underwriter's Laboratory (UL) for Sanitation, Baking Industry Sanitation Standards Committee (BISSC), or equivalent.~~

~~B. A separate, single-compartment handwashing sink is REQUIRED in food preparation, food dispensing, and warewashing areas; and in, or immediately adjacent to, toilet rooms. Handsinks shall be installed within 25 travel feet within a direct line access of each primary work location.~~

~~C. A minimum hot water temperature of 110° F, delivered through a mixing valve or combination faucet, is REQUIRED.~~

~~D. If installed, self-closing, slow-closing, or metering faucets shall provide a flow of water for at least 15 seconds without the need to reactivate the faucet.~~

~~E. A handwashing sink may not be used for any other purpose.~~

~~F. An indirect drainline connection is not required.~~

~~G. Connection to a grease trap is not required.~~

~~II. FOOD PREPARATION SINK~~

~~A. Any sink in which food is washed or thawed under running water must be certified or classified under an approved industry standard for food equipment, such as NSF International, ETL, UL for Sanitation, BISSC, or equivalent.~~

~~B. A food preparation sink may not be used for disposal of mop water or similar liquid wastes.~~

~~C. An indirect drainline connection through an air gap is REQUIRED.~~

~~D. Connection to properly sized grease trap is REQUIRED.~~

~~III. SERVICE SINK (for use as janitorial sink, utility sink or mop sink)~~

~~A. Wherever practical, install this fixture outside of the food preparation, food dispensing, food storage and warewashing areas.~~

~~B. This fixture, when located in food preparation, food dispensing, food storage and warewashing areas, must be certified or classified under an approved industry standard for food equipment, such as NSF International, ETL, UL for Sanitation, BISSC, or equivalent.~~

~~C. A minimum of one service sink or receptor is REQUIRED on each floor level of food operations. This fixture may be a sink or a curbed receptor.~~

~~D. An indirect drainline connection is not required.~~

~~E. Connection to a grease trap not required.~~

~~IV. WAREWASHING SINK~~

~~A. This fixture must be certified or classified under an approved industry standard for food equipment, such as NSF International, ETL, UL for Sanitation or equivalent.~~

~~B. A sink of at least three separate compartments shall be provided for manually washing, rinsing and sanitizing equipment and utensils. Each sink compartment shall be large enough to accommodate the immersion of the largest equipment item or utensil.~~

~~C. A warewashing sink may not be used for handwashing or disposal of liquid wastes.~~

~~D. An indirect drainline connection is not required, unless this fixture is used for food preparation. (See paragraph IV.F. below for alternative use provision.)~~

E. Connection to a properly sized grease trap is **REQUIRED**.

F. Provision for alternative use of warewashing sink:

*** If the warewashing sink will be used for washing or thawing food, a separate drainline connection from each sink compartment through an air gap into a floor sink is **REQUIRED**. The installation of a properly sized grease trap downstream of the floor sink is **REQUIRED**. The alternative use of a warewashing sink for food preparation requires prior approval from the Division of Public Health.

V. PRE-WASH SINK

A. This fixture must be certified or classified under an approved industry standard for food equipment, such as NSF International, ETL, UL for Sanitation or equivalent.

B. An indirect drainline connection is not required.

C. Connection to a properly sized grease trap is **REQUIRED**.

D. If a food waste grinder is installed on this fixture, the grease trap must be designed and rated for such application, or a solids interceptor is required upstream of the grease trap.

VI. MECHANICAL WAREWASHER

A. This equipment must be certified or classified under an approved industry standard for food equipment, such as NSF International, ETL, UL for Sanitation or equivalent.

B. An indirect drainline connection through an air gap is **REQUIRED**.

(See paragraph VI.D below for alternative installation provision.)

C. Connection to a grease trap is **NOT APPROVED**, as elevated water temperatures, higher pressures and detergents have the capability of holding grease in suspension, which may then pass through and reduce the efficiency of the grease trap.

D. Provision for alternative installation of mechanical warewasher:

If approved by the Division of Public Health, a direct drainline connection may be installed if the machine wastewater outlet is located within five feet (5 ft) of a properly trapped vented floor drain and the machine outlet is connected to the inlet side of the same properly vented floor drain trap.

VII. GREASE TRAP

A. Grease trap must be sized in accordance with PDI standard G101.

B. Grease trap connection to all fixtures that discharge grease-laden waste, including warewashing sinks, food prep

sinks, pre-wash sinks for warewashing equipment, woks and other cooking equipment is **REQUIRED**.

In kitchens where trench drains or trough drains receive liquid waste from cooking equipment such as kettles or skillets, an indirect drainline connection from the equipment to a properly sized grease trap is **REQUIRED**.

C. Provision for alternative use of warewashing sink:

*** If the warewashing sink will be used for washing or thawing food, a separate drainline connection from each sink compartment through an air gap into a floor sink is **REQUIRED**. The installation of a properly sized grease trap downstream of the floor sink is **REQUIRED**. The alternative use of a warewashing sink for food preparation requires prior approval from the Division of Public Health.

PROCEDURE FOR SIZING A GREASE TRAP TO A SPECIFIC FIXTURE

1. Determine the liquid volume of the fixture in cubic inches draining to the grease trap.

2. Determine the liquid capacity of the fixture in gallons.

3. Determine the actual drainage load (75% of fixture capacity).

4. Determine the unit flow rate minimum for drainage period of 2 minutes.

Determine the unit liquid holding capacity minimum (40% of fixture capacity).

5. Select a unit corresponding to minimum unit flow rate and liquid holding capacity.

EXAMPLE OF SIZING FOR GREASE TRAP SELECTION

Select a grease trap to receive drainage from a three compartment warewashing sink with bowl dimensions of 18" W x 24" L x 12" D

1. Volume = 18in x 24in x 12in = 5184 cubic inches

2. Capacity = Volume (cu in) / 231 (cu in/gal) = 5184 / 231 = 22.4 gal

3. Drainage load = 22.4 gal x 0.75 = 16.8 x 3 compartments = 50.4, or approx. 50 gal

4. Unit flow rate minimum = 50 gal / 2 min = 25 gpm
Unit liquid holding capacity minimum = 67.3 x 0.40 = 26.9 gals

5. Select a grease trap with a minimum flow rate equal to or greater than **25 gpm**

The selected trap also must have a minimum liquid holding capacity of 26.9 gal.

VIII. WATER HEATER - Hot Water Supply Requirements

A. The water heater shall be sized to provide hot water as required to supply both the daily requirements and the hourly peak demands of the facility. The daily and hourly demand is based on the type of equipment and number of fixtures consuming hot water as required for food operations.

B. The total hot water availability in gallons per hour (gph) from a water heater is the sum of the unit storage capacity plus the recovery rate at a 100°F rise.

IX. UTILITY SERVICE INSTALLATION

A. Utility service lines including gas, plumbing and electrical shall be installed inside walls, above ceilings and below floors whenever structurally practical and in accordance with applicable code requirements.

B. If lines are run in front of walls, lines shall be installed with stand-off brackets or other secure mounting method, such that a minimum clearance of one inch (1") exists between line and wall.

C. Exposed horizontal utility service lines may not be installed on the floor.

X. BACKFLOW PREVENTION

A. The air gap between the water supply inlet and the flood rim level of the plumbing fixture, food or non-food equipment shall be at least twice the diameter of the water supply inlet and not less than one inch (1").

B. A backflow or back siphonage prevention device installed on a water supply system shall meet American Society of Sanitary Engineering (ASSE) series 1000 standards.

C. An air gap or a backflow or back siphonage prevention device is required at water service connections on warewashing machines, steamers, and other food equipment.

D. Hose Connections, Silleocks, hose bibbs, wall hydrants and other openings with a hose connection shall be protected by an atmospheric type or pressure type vacuum breaker, or a permanently attached hose connection vacuum breaker.

E. Beverage Dispensers A double check valve with intermediate atmospheric vent conforming to ASSE 1012 is required on the water supply connection. A dual check valve conforming to ASSE 1032 is required on the beverage dispensing equipment.

F. No direct connection may exist between the sewage system and any drain originating from equipment in which food is placed.

G. Equipment and fixtures utilized for the storage, preparation and handling of food shall discharge through an indirect waste pipe by means of an air gap.

XI. JOINT SEALING

A. Joints formed where fixtures come in contact with walls or floors shall be sealed with an approved sealant to form a watertight joint against the mounting surface.

B. Where installation does not allow access for cleaning, fixtures shall be sealed to walls or adjoining equipment. Where not structurally practical, a minimum gap of one inch (1") shall exist between the fixture and walls or adjoining equipment.

SECTION 111.25 — APPENDIX F: is deleted in its entirety.

Section 111.26 — APPENDIX G: is deleted in its entirety.

4469 Regulations Governing a Detailed Plumbing Code

1.0 Adoption and Effective Date

That certain document entitled, "The International Plumbing Code 2003 " is made a part hereof and the supplements therein include, identified as "Section 2.0. Additions, Deletions, Amendments and Clarifications," are hereby adopted as the "State of Delaware Regulations Governing A Detailed Plumbing Code. These regulations shall be effective _____.

2.0 Additions, Deletions, Amendments and Clarifications

2.1 Section 101.1 Title is deleted and replaced with the following: These Regulations shall be known as the "State of Delaware Regulations Governing A Detailed Plumbing Code hereinafter referred to as 'this Code'.

2.2 Section 101.2 Scope is deleted and replaced by the following: The provisions of this code shall apply to the erection, installation, alteration, repair, relocation, replacement, addition to, use or maintenance of plumbing systems within this jurisdiction.

2.3 Section 102.2 Existing installations is deleted and replaced by the following: The legal use and occupancy of any structure existing on the effective date of this Code, or for which it had been heretofore approved, may be continued without change except as may be specifically covered in this Code or deemed necessary by the Deputy Code Official(s) for the general safety and welfare of the occupants and the public.

Exception: Except that upon change of permit holder in facilities and operations regulated by the Delaware Division of Public Health such systems shall comply with the requirements of this Code and applicable regulations promulgated and standards established by the Delaware Division of Public Health.

2.4 Section 104.1 General is deleted and replaced by the following: For the purpose of this document "Code

Official" refers to the Secretary, Delaware Health and Social Services, or their designee. "Plumbing Inspectors" shall have such duties and powers as are enumerated in Title 16, Delaware Code, Section 7907 and shall have the authority of a Deputy Code Official as referenced in Section 103.3 of this Code.

2.5 Section 108.1 Unlawful acts is deleted and replaced by the following: It shall be unlawful for any person to work as a licensed plumber in the State of Delaware unless such person has received a license from the Delaware Department of Administrative Services, Division of Professional Regulation, showing that said person has been duly licensed as a plumber, except as provided by 24 Delaware Code 1813, and has a permit issued by the Division of Public Health.

Exception: The homeowner of a single-family residence occupied, or to be occupied by him/her and not for sale, rent or lease, may perform plumbing work only on such residence itself, and/or auxiliary structures, and in compliance with a permit issued by the Division of Public Health, or applicable authority, and in compliance with all provisions of these regulations.

2.6 Section 108.4 Violation penalties is deleted and replaced by the following: Any person who shall violate any provisions of this Code, or shall fail to comply with the requirements thereof, or who shall install plumbing work in violation of an approved plan or directive of the Code Official or the Deputy Code Official(s), or of a permit or certificate issued under the provisions of this Code, shall be subject to penalties as provided by Chapter 79, Title 16, Delaware Code.

2.7 Section 108.5 Stop work orders is amended by deleting the language "shall be liable to a fine not less than [AMOUNT] dollars or more than [AMOUNT] dollars and replacing it with: shall be subject to penalties as provided by Chapters 1 and 79, Title 16, Delaware Code.

2.8 Section 109 Means of Appeal is deleted in its entirety

2.9 Section 202 General Definitions is amended by adding the following definitions:

Licensed Plumber. The term "Licensed Plumber" shall mean a person who has complied with the provisions of the Division of Professional Regulation and the Board of Plumbing Examiners, and has further met the certification, testing, bonding, and licensing requirements of the jurisdiction in which he/she plans to engage in the business of plumbing. The Licensed Plumber shall be recognized as being responsible for all work performed under a plumbing permit issued by the Division of Public Health.

Supervision of Work. For the purposes of these regulations, supervision of work shall be defined as work completed under the permit of a licensed plumber while

employed by the licensed plumber, or the same firm, partnership, corporation, or owners of the company as the licensed plumber.

2.10 Section 305.6.1 Sewer depth is deleted in its entirety

2.11 Section 312.1 Required tests is amended by adding the following sentence at the end thereof: In lieu of the presence of the deputy code official witnessing the test, the Licensed Plumber may certify in writing upon a prescribed form, that the plumbing system piping is in accordance with Section 312 of the regulations. This shall be applicable between November 1 and April 1.

2.12 Section 404 Accessible Plumbing Fixtures, Where required is deleted and replaced by the following: All regulations pertaining to handicapped facilities in the International Plumbing Code will be governed by the most recent edition of the "American National Standards Institute (ANSI).

2.13 Section 502.1 Installation, General is amended by adding the following sentence at the end thereof: The first 12 inches of both hot and cold water lines shall be thermally rated for maximum water temperature produced by the hot water heater.

2.14 Section 504.6.2 Safety Devices, Materials is deleted and replaced by the following: The discharge valve shall be equipped with an approved heat transfer fitting or metallic pipe.

2.15 Section 504.7 Required Pan is amended by adding the following:

Exception: Tankless Hot Water Heaters shall not require a drain pan.

2.16 Tables 605.4 and 605.5 are amended by deleting the letters "M" and "WM" from copper tubing.

2.17 Section 605.16.2 Solvent cementing is amended by adding the following sentence at the end thereof: The use of all purpose glue is prohibited.

2.18 Section 802.4 Standpipes is amended by adding the following sentence at the end thereof: The top of the standpipes shall be 42 inches (1066mm) above the finished floor.

2.19 Section 903.1 Stack required is amended by adding the following sentence at the end thereof: The stack shall be no less than 2" in diameter.

2.20 Section 912.1 Type of fixtures is amended by deleting the last sentence.

2.21 Section 917.1 Air Admittance Valves, General is amended by adding the following sentence at the end thereof: Air admittance valves shall be approved by the Deputy Code Official prior to use or installation.

2.22 Section 919 Computerized Vent Design is deleted in its entirety.

2.23 Section 1003.3.4 Grease trap and grease interceptors is amended by deleting the "." as it appears at the end and it with the following: , or be otherwise approved by the Code Official.

2.24 Chapter 12 Special Piping and Storage Systems is deleted in its entirety.

2.24 Plan Review and Approval Plumbing Requirements for Food Establishment Premises

2.24.1 General All plumbing shall be installed by a licensed plumber under a valid, current plumbing permit in accordance with the "State of Delaware Regulations Governing a Detailed Plumbing Code."

2.24.2 Water Supply and Sewage Disposal Facilities served by a public water supply and sewage systems do not require further evaluation. Private wells must comply with chemical and bacteriological standards; a satisfactory analysis is required before an operating permit may be issued. Individual sewage disposal systems require the approval of the Department of Natural Resources and Environmental Control prior to operating the food establishment.

2.24.3 Backflow Prevention

2.24.3.1 Air gap, supply: An air gap between the water supply and the flood rim level of the plumbing fixture, equipment, or nonfood equipment shall be at least twice the diameter of the water supply inlet and may not be less than 1 inch (DE Food Code, §5.202.13).

2.24.3.2 Air gap, drainage: No direct connection may exist between the sewage system and any drain originating from equipment in which food is placed (DE Food Code, §5-402.11). Equipment and fixtures utilized for the storage, preparation and handling of food shall discharge through an indirect waste pipe by means of an air gap (IPC2003, §802.1.1).

2.24.3.3 Floor drains: Floor drains located within walk-in refrigerators or freezers in food establishments shall be indirectly connected to the sanitary drainage system by means of an air gap (IPC2003, §802.1.2).

2.24.3.4 Backflow prevention device: A backflow or backsiphonage prevention device shall meet American Society of Sanitary Engineering (ASSE) standards for construction, installation, maintenance, inspection, and testing for that specific application and type of device (DE Food Code, §5-202.14).

2.24.3.5 Plumbing fixtures: The supply lines or fittings for every plumbing fixture shall be installed so as to prevent backflow (IPC2003, §608.2).

2.24.3.6 Devices, appliances: All devices that connect to the water supply shall be provided with protection against backflow (IPC2003, §608.3). This includes devices used for food preparation and processing,

steamers, the storage of ice or food, warewashing machines, and other food service equipment.

2.24.3.7 Hose Connections: Sillcocks, hose bibbs, wall hydrants and other openings with a hose connection shall be protected by an atmospheric-type or pressure-type vacuum breaker or a permanently attached hose connection vacuum breaker. Exceptions: water heater drain valve, clothes washing machine (IPC2003, §608.15.4.2).

2.24.3.8 Beverage Dispensers: The water supply connection to carbonated beverage dispensers shall be protected against backflow by a backflow preventer conforming to ASSE 1022 or by an air gap. The backflow preventer device and the piping downstream therefrom shall not be affected by carbon dioxide gas (IPC2003, §608.16.1).

2.24.4 Utility Service Installation

2.24.4.1 Utility lines including gas, plumbing and electrical shall be installed inside walls, above ceilings or below floors whenever structurally practical, and in accordance with applicable code requirements.

2.24.4.2 If lines are run in front of walls, lines shall be installed with stand-off brackets or other secure mounting method, such that a minimum clearance of one inch (1") exists between line and wall.

2.24.4.3 Exposed horizontal utility service, including water supply and drain lines, may not be installed on the floor.

2.24.5 Joint Sealing Joints formed by fixtures in contact with walls or floors shall be sealed with an approved sealant. Where installation does not allow access for cleaning, fixtures shall be sealed to walls or adjoining equipment. Where not structurally practical, a minimum gap of one inch (1") shall exist between the fixture and walls or adjoining equipment.

2.24.6 Toilet Facilities

2.24.6.1 At least 1 toilet and not fewer than the toilets required by law shall be provided. If authorized by law and urinals are substituted for toilets, the substitution shall be done as specified in law (DE Food Code, §5-203.12).

2.24.6.2 A handwashing facility shall be located in, or immediately adjacent to, toilet rooms (DE Food Code, §5-204.11).

2.24.6.3 A toilet room shall be completely enclosed and provided with a tight-fitting and self-closing door (DE Food Code, §6-202.14).

2.24.6.4 Toilet rooms shall be conveniently located and accessible to employees during all hours of operation (DE Food Code, §6-402-11).

Note: State of Delaware Regulations Governing a Detailed Plumbing Code adopts International Plumbing Code 2003 (IPC2003). Applicable excerpts are listed below.

2.24.6.5 IPC2003 Table 403.1 Minimum Number of Plumbing Facilities The fixtures shown are based on one fixture being the minimum required for the number of persons indicated or any fraction of the number of persons indicated. The number of occupants shall be determined by the building code.

<u>Occupancy:</u>	<u>Assembly, Restaurants</u>
<u>Water Closets:</u>	<u>Male: 1 per 75</u>
	<u>Female: 1 per 75</u>
<u>Lavatories:</u>	<u>1 per 200</u>
<u>Drinking Fountains:</u>	<u>1 per 500</u>
<u>Others:</u>	<u>1 service sink</u>

2.24.6.6 IPC2003, Section 403.5 Location of Employee Toilet Facilities In Mercantile And Assembly Occupancies. Employees shall be provided with toilet facilities in building and tenant spaces utilized as restaurants. The employees' facilities shall be either separate facilities or combined employee and public customer facilities. The required toilet facilities shall be located not more than one story above or below the employee's regular work area and the path of travel to such facilities, in other than covered malls, shall not exceed a distance of 500 feet. The path of travel to required facilities in covered malls shall not exceed a distance of 300 feet.

Exception: Employee toilet facilities shall not be required in tenant spaces where the travel distance from the main entrance of the tenant space to a central toilet area does not exceed 300 feet and such central toilet facilities are located not more than one story above or below the tenant space.

2.24.6.7 IPC2003, Section 403.6 Public Facilities. Customers, patrons, and visitors shall be provided with public toilet facilities in structures and tenant spaces intended for public utilization. Public toilet facilities shall be located not more than one story above or below the space required to be provided with public toilet facilities and the path of travel to such facilities shall not exceed a distance of 500 feet.

2.24.6.8 IPC2003, Section 403.2 Separate Facilities. Where plumbing fixtures are required, separate facilities shall be provided for each sex.

Exceptions: ...Separate employee facilities (for each sex) shall not be required in occupancies in which 15 or less people are employed. Separate facilities (for each sex) shall not be required in structures or tenant spaces with a total occupant load, including both employees and customers, of 15 or less.

2.24.7 Sinks All sinks shall be supplied with hot and cold running water under pressure.

2.24.7.1 Splashguard Dividers: Where less than 18 inches lateral separation exists between sinks and adjacent fixtures, food contact surfaces or open storage shelving, a splashguard divider constructed of a material which is durable, easily cleanable, non-toxic and impervious to moisture shall be installed; such divider may be wall-attached or fixture-attached, and shall extend outward to the leading edge of the sink and extend vertically a minimum of 18 inches above the level plane of the sink bowl.

2.24.7.2 Handwashing sinks: These fixtures, when located in food preparation, food dispensing, beverage dispensing (including bar service area), food storage and warewashing areas, must be certified or classified under an approved industry standard for food equipment, such as NSF International, ETL Sanitation, UL for Sanitation, BISSC, or equivalent.

2.24.7.2.1 A separate, single-compartment handwashing sink is REQUIRED in food preparation, food dispensing, and warewashing areas; and in, or immediately adjacent to, toilet rooms. Handsinks shall be installed within 25 travel feet within a direct line access of each primary work location. Hand soap, paper towels and a trash receptacle must be kept at these sinks.

2.24.7.2.2 A minimum hot water temperature of 100 F, delivered through a mixing valve or combination faucet, is REQUIRED.

2.24.7.2.3 If installed, self-closing, slow-closing, or metering faucets shall provide a flow of water for at least 15 seconds without the need to reactivate the faucet.

2.24.7.2.4 A handwashing sink may not be used for any other purpose.

2.24.7.2.5 An indirect drainline connection is not required. Connection to a grease trap is not required.

2.24.7.3 Food preparation sink(s): Any sink in which food is washed or thawed under running water as part of the food preparation process must be certified or classified under an approved industry standard for food equipment, such as NSF International, ETL Sanitation, UL for Sanitation, BISSC, or equivalent.

2.24.7.3.1 A food preparation sink may not be used for disposal of mop water or liquid wastes.

2.24.7.3.2 An indirect drainline connection through an air-gap is REQUIRED.

2.24.7.3.3 Connection to properly sized grease trap is REQUIRED.

2.24.7.3.4 If a food preparation sink has two or more compartments, a separate wasteline connection

from each sink compartment through an air gap into a floor sink is **REQUIRED**.

2.24.7.4 Warewashing sink: This fixture must be certified or classified under an approved industry standard for food equipment, such as NSF International, ETL Sanitation, UL for Sanitation, BISSC, or equivalent.

2.24.7.4.1 A sink of at least three separate compartments with coved corners and integral drainboards at each end shall be provided for manually washing, rinsing and sanitizing equipment and utensils. Each sink compartment shall be large enough to accommodate the immersion of the largest equipment item or utensil. A chemical test kit that matches the type of sanitizing agent in use is required in the warewashing area.

2.24.7.4.2 A warewashing sink may not be used for handwashing or disposal of liquid wastes.

2.24.7.4.3 Connection to a properly sized grease trap is **REQUIRED**.

2.24.7.4.4 An indirect drainline connection is not required, unless this fixture is used for food preparation. (See paragraph (3)(e) below for alternative use provision.)

2.24.7.4.5 Alternative use provision for warewashing sink: If the warewashing sink will be used for washing or thawing food, a separate wasteline connection from each sink compartment through an air-gap into a floor sink is **REQUIRED**. The installation of a properly sized grease trap downstream of the floor sink is **REQUIRED**. Alternative use of a warewashing sink for food preparation requires prior approval from the Division of Public Health.

2.24.7.5 Service sink: (for use as janitorial sink, utility sink or mop sink)

2.24.7.5.1 Wherever practical, install this fixture outside of the food preparation, food dispensing, food storage and warewashing areas.

2.24.7.5.2 This fixture, when located in food preparation, food dispensing, food storage and warewashing areas, must be certified or classified under an approved industry standard for food equipment, such as NSF International, ETL Sanitation, UL for Sanitation, BISSC, or equivalent.

2.24.7.5.3 A minimum of one service sink or receptor is **REQUIRED** on each floor level of food operations. This fixture may be a sink or a curbed receptor.

2.24.7.5.4 The dual use of a utility sink as a handwashing sink is not approved in new construction, conversion of a structure to a food establishment, nor remodeling of an existing facility.

2.24.7.5.5 An indirect drainline connection is not required.

2.24.7.5.6 Connection to a grease trap not required.

2.24.7.6 Prewash sink: This fixture must be certified or classified under an approved industry standard for food equipment, such as NSF International, ETL Sanitation, UL for Sanitation, BISSC, or equivalent.

2.24.7.6.1 An indirect drainline connection is not required.

2.24.7.6.2 Connection to a properly sized grease trap is **REQUIRED**.

2.24.7.6.3 If a food waste grinder is installed on this fixture, the grease trap must be designed and rated for such application, or a solids interceptor is required upstream of the grease trap.

2.24.8 Mechanical Warewasher: This equipment item must be certified or classified under an approved industry standard for food equipment, such as NSF International, ETL Sanitation, UL for Sanitation, or equivalent.

2.24.8.1 A warewashing machine, using hot water or a chemical rinse to sanitize, may be installed. Large cookware which does not fit into the machine must be sanitized in a three compartment sink. Facilities without a three compartment sink whose warewashers are found functioning improperly may be directed to temporarily close until the machine is repaired. If a chemical sanitizing agent is used, a test kit that matches the chemical sanitizing agent is required.

2.24.8.2 Connection to a grease trap is **NOT APPROVED** due to high temperature, pressure and detergents.

2.24.8.3 An indirect drainline connection through an air-gap is **REQUIRED**. (See paragraph 2.24.8.4 below for alternative installation provision.)

2.24.8.4 Alternative installation provision for mechanical warewasher: If approved by the Division of Public Health, a direct drainline connection may be installed if the machine wastewater outlet is located within five feet of a properly trapped vented floor drain and the machine outlet is connected to the inlet side of the same properly vented floor drain trap.

2.24.9 Grease trap: The grease trap must be sized in accordance with PDI standard G101.

2.24.9.1 Connection to a properly sized grease trap is **REQUIRED** for all fixtures that discharge grease-laden waste, e.g. warewashing sinks, food prep sinks, pre-wash sinks for warewashers, woks, and other cooking equipment.

2.24.9.2 Alternative use provision for warewashing sink: If the warewashing sink will be used for washing or thawing food, a separate wasteline connection

from each sink compartment through an air-gap into a floor sink is REQUIRED. The installation of a properly sized grease trap downstream of the floor sink is REQUIRED. Alternative use of a warewashing sink for food preparation requires prior approval from the Division of Public Health.

PROCEDURE FOR SIZING A GREASE TRAP TO A SPECIFIC FIXTURE

1. Determine the liquid volume of the fixture in cubic inches (cu in) draining to the grease trap.
2. Determine the liquid capacity of the fixture in gallons (gal).
3. Determine the actual drainage load (75% of fixture capacity).
4. Determine the unit flow rate minimum for drainage period of 2 minutes.
Determine the unit liquid holding capacity minimum (40% of fixture capacity).
5. Select a unit corresponding to minimum unit flow rate and liquid holding capacity.

EXAMPLE OF SIZING FOR GREASE TRAP SELECTION

Select a grease trap for a three compartment warewashing sink with bowl dimensions of 18" W x 24" L x 12" D

1. Volume = (18in x 24in x 2in) x 3 cmpts = (5,184 cu in) x 3 = 15,552 cubic inches
2. Capacity = Volume (cu in)/231(cu in/gal) = 15,552/231 = 67.3 gallons
3. Drainage load = 67.3 gal x 0.75 = 50.4, or approx, 50 gallons
4. Unit flow rate minimum = 50 gallons/2 minutes = 25 gallons per minute (gpm)
Unit liquid holding capacity minimum = 67.3 x 0.40 = 26.9 gallons
5. Select a grease trap with a minimum flow rate equal to or greater than 25 gpm
The selected trap also must have a minimum liquid holding capacity of 26.9 gal.

GREASE TRAP SIZING FOR TYPICAL SINK INSTALLATIONS

***NOTE: TABLE IS LOCATED AT THE END OF THE REGULATION.**

2.24.10 Water heater: - Hot Water Supply

2.24.10.1 The water heater shall be sized to provide hot water as required to supply both the continuous

requirements and the hourly peak demands of the facility. The continuous and hourly demands are based on the type of equipment and number of fixtures consuming hot water as required for food operations.

2.24.10.2 The total hot water availability in gallons per hour (gph) from a water heater is the sum of the unit storage capacity plus the recovery rate at a 100 F rise.

2.24.10.3 A fuel-fired (gas or oil) water heater in a food establishment shall have a minimum storage capacity of thirty (30) gallons; an electric water heater shall have a minimum storage capacity of forty (40) gallons. Storage capacities larger than the minimum shall be required, based on the type of equipment and number of fixtures consuming hot water.

2.25 Appendix F Structural Safety is deleted in its entirety

2.26 Appendix G Vacuum Drainage System is deleted in its entirety

2.27 Procedures for License

Every person desiring to register as a plumber engaged in the business of plumbing in the State of Delaware shall file an application with the Division of Professional Regulation, 861 Silver Lake Blvd. Dover, DE 19904.

2.28 Variances

Upon receipt of written application for a variance, the Deputy Code Official may:

2.28.1 From time to time recommend granting written permission to vary from particular provisions set forth in this Regulation, when the extent of the variation is clearly specified and it is documented to the Secretary, Health and Social Services, or his/her appointed designee's satisfaction that:

2.28.1.1 Such variation is necessary to obtain a beneficial use of an existing facility, and;

2.28.1.2 The variation is necessary to prevent a practical difficulty or unnecessary hardship; and

2.28.1.3 Appropriate alternative measures have been taken to protect the health and safety of the public and assure that the purpose of the provisions from which the variation is sought will be observed.

2.28.2 Within thirty (30) business days of the receipt of a written application for a variance, the Deputy Code Official shall recommend either granting the variance, or denying the variance or will request further information from the applicant.

2.28.3 If the applicant has been denied a variance upon the recommendation of the Deputy Code Official, the applicant may appeal the decision by filing a written Notice of Appeal to the Secretary, Health and Social Services, or his/her designee, Division of Public Health, 417 Federal Street, Dover, Delaware 19901.

PROPOSED REGULATIONS

Bold column at far right applies PDI G101 formula to calculate minimum required grease trap flow rate in gallons per minute (gpm).

<u>Width</u> (in)	<u>Length</u> (in)	<u>Depth</u> (in)	<u>Volume (cuin)</u> $\underline{W \times L \times D} =$ <u>Vc</u>	<u>Volume</u> (gal) $\underline{Vc / 231} =$ <u>Vg</u>	<u>No of</u> <u>cmpts</u> <u>#C</u>	<u>Total vol</u> (gal) $\underline{Vg \times \#C} =$ <u>Vtg</u>	<u>Working vol</u> (75%) $\underline{Vtg \times 0.75} =$ <u>Vw</u>	<u>Min Flow</u> <u>Rate (gpm)</u> $\underline{Vw / 2min}$ <u>= MFR</u>
<u>16.0</u>	<u>19.0</u>	<u>10.5</u>	<u>3192</u>	<u>13.8</u>	<u>1</u>	<u>13.8</u>	<u>10</u>	<u>5</u>
					<u>2</u>	<u>27.6</u>	<u>21</u>	<u>10</u>
					<u>3</u>	<u>41.5</u>	<u>31</u>	<u>16</u>
<u>16.0</u>	<u>19.0</u>	<u>13.5</u>	<u>4104</u>	<u>17.8</u>	<u>1</u>	<u>17.8</u>	<u>13</u>	<u>7</u>
					<u>2</u>	<u>35.5</u>	<u>27</u>	<u>13</u>
					<u>3</u>	<u>53.3</u>	<u>40</u>	<u>20</u>
<u>16.0</u>	<u>20.0</u>	<u>14.0</u>	<u>4480</u>	<u>19.4</u>	<u>1</u>	<u>19.4</u>	<u>15</u>	<u>7</u>
					<u>2</u>	<u>38.8</u>	<u>29</u>	<u>15</u>
					<u>3</u>	<u>58.2</u>	<u>44</u>	<u>22</u>
<u>18.0</u>	<u>20.0</u>	<u>14.0</u>	<u>5040</u>	<u>21.8</u>	<u>1</u>	<u>21.8</u>	<u>16</u>	<u>8</u>
					<u>2</u>	<u>43.6</u>	<u>33</u>	<u>16</u>
					<u>3</u>	<u>65.5</u>	<u>49</u>	<u>25</u>
<u>18.0</u>	<u>24.0</u>	<u>12.0</u>	<u>5184</u>	<u>22.4</u>	<u>1</u>	<u>22.4</u>	<u>17</u>	<u>8</u>
					<u>2</u>	<u>44.9</u>	<u>34</u>	<u>17</u>
					<u>3</u>	<u>67.3</u>	<u>50</u>	<u>25</u>
<u>20.0</u>	<u>20.0</u>	<u>16.0</u>	<u>6400</u>	<u>27.7</u>	<u>1</u>	<u>27.7</u>	<u>21</u>	<u>10</u>
					<u>2</u>	<u>55.4</u>	<u>42</u>	<u>21</u>
					<u>3</u>	<u>83.1</u>	<u>62</u>	<u>31</u>
<u>22.0</u>	<u>24.0</u>	<u>16.0</u>	<u>8448</u>	<u>36.6</u>	<u>1</u>	<u>36.6</u>	<u>27</u>	<u>14</u>
					<u>2</u>	<u>73.1</u>	<u>55</u>	<u>27</u>
					<u>3</u>	<u>109.7</u>	<u>82</u>	<u>41</u>
<u>24.0</u>	<u>24.0</u>	<u>16.0</u>	<u>9216</u>	<u>39.9</u>	<u>1</u>	<u>39.9</u>	<u>30</u>	<u>15</u>
					<u>2</u>	<u>79.8</u>	<u>60</u>	<u>30</u>
					<u>3</u>	<u>119.7</u>	<u>90</u>	<u>45</u>

DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

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

PUBLIC NOTICE**Medicare Part D Prescription Drug Program**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Medicaid & Medical Assistance (DMMA) is proposing to amend the Title XIX Medicaid State Plan and the Division of Social Services Manual (DSSM) to implement the Medicare Part D Prescription Drug Program.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Policy & Program Development Unit, Division of Medicaid & Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 by September 30, 2005.

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

SUMMARY OF PROPOSED CHANGES**Statutory Authority:**

- The Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA)
- Section 1935(a) of the Social Security Act
- 42 CFR Parts 400, 403, 411, 417 and 423

New Pre-Print State Plan Pages

- Attachment 2.2-A, Page 27
- Attachment 3.1.A.1, Page 1
- Attachment 3.1.A.1, Page 2
- Attachment 3.1.A.1, Page 2a

Background

The Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA) established the Medicare Prescription Drug Program, also known as Medicare Part D, making prescription drug coverage

available to individuals who are entitled to receive Medicare benefits under Part A or Part B, beginning on January 1, 2006.

The MMA also established the Low-Income Subsidy (LIS) to assist individuals who have low-income and resources with payment of the premiums, deductibles, and co-payments required under Part D, which began on July 1, 2005.

Effective January 1, 2006, Medicaid beneficiaries who are entitled to receive Medicare benefits under Part A or Part B will no longer receive their pharmacy benefits under the State Medicaid Program, except for excluded drugs. States are required to submit State Plan Amendments that ensure State Medicaid Program pharmacy benefits are consistent with the requirements under Part D.

Given that Medicare is the primary payor with respect to Part D drugs for full-benefit dual eligible individuals, states will continue to receive Federal Financial Participation (FFP) for the payment of the deductible and coinsurance for Medicare Part A and Part B drugs.

Summary of Proposed Changes**State Plan Amendment (SPA)**

States must amend their state plans to indicate compliance with the provisions of the MMA. CMS forwarded templates that may be used to amend the State's Medicaid Plan to reflect the provisions pertaining to LIS and to the screen and enroll requirement and to Medicaid outpatient drug coverage.

Division of Social Services Manual (DSSM)

- DSSM 14100.4, 14100.6, and 14800: revised to state definitively that verifications must be returned as requested or eligibility will be denied or terminated.
- DSSM 14970 (new): language added to reflect changes to Medicaid pharmacy benefits because of Medicare Part D.
- DSSM 16310: clarified section that describes terminations of eligibility specific to the poverty level groups.
- DSSM Section 30000 (new - 30305, 30500.1, 30502.1, 30306): provides for changes to the Delaware Prescription Assistance Program (DPAP) because of Medicare Part D.
- DSSM Section 50000 (new - 50100.4): provides for changes to the Chronic Renal Disease Program (CRDP) because of Medicare Part D.

DSS PROPOSED REGULATIONS #05-45a
 NEW STATE PLAN PAGES:

Attachment 3.1.A.1
 Page 1

Attachment 2.2-A
 Page 27

**STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT
 STATE: DELAWARE**

REQUIREMENTS RELATING TO DETERMINING ELIGIBILITY FOR MEDICARE PRESCRIPTION DRUG LOW-INCOME SUBSIDIES

Agency	Citation (s)	Groups Covered
1935(a) and 1902(a)(66)		
42 CFR 423.774 and 423.904		The agency provides for making Medicare prescription drug Low Income Subsidy determinations under Section 1935(a) of the Social Security Act. 1. The agency makes determinations of eligibility for premium and cost sharing subsidies under and in accordance with section 1860D-14 of the Social Security Act; 2. The agency provides for informing the Secretary of such determinations in cases in which such eligibility is established or redetermined; 3. The agency provides for screening of individuals for Medicare cost-sharing described in Section 1905(p)(3) of the Act and offering enrollment to eligible individuals under the State plan or under a waiver of the State plan.

**STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT
 STATE: DELAWARE**

MEDICAID PROGRAM: REQUIREMENTS RELATING TO COVERED OUTPATIENT DRUGS FOR THE CATEGORICALLY NEEDY

Citation (s)	Provision (s)
1935(d)(1)	Effective January 1, 2006, the Medicaid agency will not cover any Part D drug for full-benefit dual eligible individuals who are entitled to receive Medicare benefits under Part A or Part B.

Attachment 3.1.A.1
 Page 2

**STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT
 STATE: DELAWARE**

MEDICAID PROGRAM: REQUIREMENTS RELATING TO PAYMENT FOR COVERED OUTPATIENT DRUGS FOR THE CATEGORICALLY NEEDY

Citation (s)	Provision (s)
1927(d)(2) and 1935(d)(2)	1. The Medicaid agency provides coverage for the following excluded or otherwise restricted drugs or classes of drugs, or their medical uses to all Medicaid recipients, including full benefit dual eligible beneficiaries under the Medicare Prescription Drug Benefit –Part D. <input checked="" type="checkbox"/> The following excluded drugs are covered: <input checked="" type="checkbox"/> (a) agents when used for anorexia, weight loss, weight gain (see specific drug categories below)

- (b) agents when used to promote fertility (see specific drug categories below)
- (c) agents when used for cosmetic purposes or hair growth (see specific drug categories below)
- (d) agents when used for the symptomatic relief cough and colds (see specific drug categories below)
- (e) prescription vitamins and mineral products, except prenatal vitamins and fluoride (see specific drug categories below)
- (f) nonprescription drugs (see specific drug categories below)

specific category of drugs below)

(a) Agents when used for anorexia, weight loss, weight gain: Megestrol Acetate, Somatropin, Lipase Inhibitor. Products in these categories require prior authorization.

(d) Agents when used for the symptomatic relief cough and colds: Antihistamines, Antitussive, Decongestants, and Expectorants.

(e) Prescription vitamins and mineral products, except prenatal vitamins and fluoride: Single entity vitamins, Multiple vitamins w/minerals, Nicotinic acid, Calcium salts, and Dialysis replacement products.

(f) Nonprescription drugs: Analgesic oral and rectal; Heartburn; Antiflatulents; Antidiarrheal; Antinauseants; Cough & Cold, oral; Cough & Cold, topical; Contraceptives; Diabetic supplies; Hemantincs; Laxatives & Stool Softeners; Lice Control Preparations; Magnesium Supplement, oral; Nasal Preparations; Nicotine Cessation Preparations; Ophthalmic Preparations; Topical Anesthetics; Topical Antibacterials; Topical/Vaginal Fungicidals; Vitamins & Minerals; Digestive Enzymes; and, Miscellaneous (Colloidal Oatmeal Baths).

(h) Barbiturates: the Division of Medicaid & Medical Assistance covers all medications in these therapeutic categories.

(i) Benzodiazepines: the

Attachment 3.1.A.1
Page 24

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT
STATE: DELAWARE

MEDICAID PROGRAM: REQUIREMENTS RELATING TO PAYMENT FOR COVERED OUTPATIENT DRUGS FOR THE CATEGORICALLY NEEDY

Citation (s)	Provision (s)
1927(d)(2) and 1935(d)(2)	<ul style="list-style-type: none"> <input type="checkbox"/> (g) covered outpatient drugs which the manufacturer seeks to require as a condition of sale that associated tests or monitoring services be purchased exclusively from the manufacturer or its designee (see specific drug categories below) <input checked="" type="checkbox"/> (h) barbiturates (see specific drug categories below) <input checked="" type="checkbox"/> (i) benzodiazepines (see specific drug categories below) <p>(The Medicaid agency lists</p>

Division of Medicaid &
Medical Assistance covers
all medications in
these therapeutic categories.

__ No excluded drugs are covered.

DSS PROPOSED REGULATION #05-45b REVISIONS:

Division of Social Services Manual (DSSM)

14100.4 Disposition Of Applications

The agency must include in each applicant's case record facts to support the agency's decision on his application. The agency must dispose of each application by a finding of eligibility or ineligibility, unless:

a) there is an entry in the case record that the applicant voluntarily withdrew the application, and that the agency sent a notice confirming his decision;

b) there is a supporting entry in the case record that the applicant has died; or

c) there is a supporting entry in the case record that the applicant cannot be located.

d) Certain factors of eligibility must be verified according to specific eligibility groups. If all information requested is not received, DSS cannot determine or redetermine eligibility. This may result in denial of the application or the termination of eligibility. Verifications received and/or provided may reveal a new eligibility issue not previously realized and this may require additional verifications. Failure to provide additional requested verifications may result in denial or termination of eligibility. all verification requested is not received by the due date given to the applicant. If all verification requested is not received by the due date, an eligibility determination cannot be made. This will result in denial of the application. Verification that is received and/or provided may reveal a new eligibility issue not previously realized that requires additional verification. If the additional verification requested is not received by the due date given, this will result in denial of the application.

All applicants will receive a notice of acceptance or denial.

(Break in Continuity of Sections)

14100.6 Redetermination Of Eligibility

Eligibility for continued Medicaid coverage must be redetermined at least annually. A redetermination is a re-

evaluation of a recipient's continued eligibility for medical assistance. In a redetermination, ~~all~~ eligibility factors that are subject to change are re-examined to ensure that the recipient continues to meet eligibility requirements. When a redetermination is due, the recipient is required to complete and return a ~~new DSS application form~~ renewal form and provide requested verifications by the due date given. Failure to complete and return a ~~DSS application form~~ renewal form and the requested verifications by the due date given will result in termination of eligibility. A redetermination is complete when ~~all~~ eligibility factors that are subject to change are examined and a decision regarding continued eligibility is reached. Eligibility must be promptly redetermined when information is received about changes in a recipient's circumstances that may affect his eligibility. Some changes in circumstances can be anticipated. A redetermination of eligibility must be made at the appropriate time based on those changes. Examples are: Social Security changes, receipt of child support, return to work, etc.

Medicaid coverage should not terminate without a specific determination of ineligibility. The individual may be eligible under another category of Medicaid. For example, when an individual loses eligibility because of termination from ~~cash assistance, such as SSI~~, we must make a separate determination of Medicaid eligibility. Medicaid must continue until the individual is found to be ineligible. The individual will be found ineligible when a renewal form and the requested verifications are not returned by the due date given.

Medical assistance will be terminated when DSS or DMMA is notified by the recipient that he or she no longer wants coverage.

(Break in Continuity of Sections)

14800 Verifications

~~Generally,~~ Certain factors of eligibility must be verified according to specific eligibility groups. Verification may be verbal or written and must be obtained from an independent or collateral source. In order for verbal verification to be considered documentation, the ~~DSS~~ case worker must record the information obtained in the case record.

Documentation is the process of collecting written information to substantiate factors required for eligibility. Documentation becomes part of the ~~DSS~~ case record. Documents must be date stamped.

~~If all information requested is not received, DSS cannot determine or redetermine eligibility. This may result in denial of the application or the termination of eligibility.~~

~~Verifications received and/or provided may reveal a new eligibility issue not previously realized. That may require additional verifications.~~

~~Failure to provide requested documentation may result in denial or termination of eligibility.~~

The applicant, recipient, or his or her representative must provide verifications that are essential to the eligibility determination. Failure to provide verifications by the due date given will result in a finding of ineligibility.

(Break in Continuity of Sections)

14970 Medicare Prescription Drug Program

The Medicare Prescription Drug, Improvement and Modernization Act of 2003 established the Medicare Prescription Drug Program, also known as Medicare Part D, making prescription drug coverage available to individuals who are entitled to receive Medicare benefits under Part A or Part B, beginning on January 1, 2006. Coverage for the prescription drug benefit will be provided through private prescription drug plans (PDPs), which will offer only prescription drug coverage, or through Medicare Advantage prescription drug plans (MA-PDs), which will offer prescription drug coverage that is integrated with the health care coverage they provide to Medicare beneficiaries under Part C of Medicare.

Effective January 1, 2006, Medicaid beneficiaries who are entitled to receive Medicare benefits under Part A or Part B will no longer receive their pharmacy benefits under the Medicaid Program, except for drugs that are excluded from Part D. Any prescribed drug covered by Medicaid remains subject to the Medicaid co-payment requirement.

(Break in Continuity of Sections)

16310 Termination of Eligibility

~~Medicaid eligibility may not be terminated until we determine that the individual is not eligible under any other eligibility group. This section discusses termination of eligibility under the poverty level related groups of pregnant women, children, and adults.~~

(Break in Continuity of Sections)

30000 Delaware Prescription Assistance Program

The 140th General Assembly amended Title 16, Delaware Code, by adding Chapter 30B to enact the Delaware Prescription Drug Payment Assistance Program. The purpose of this act is to provide payment assistance for prescription drugs and certain Medicare Part D costs to low-income seniors and individuals with disabilities who are

ineligible for, or do not have, prescription drug benefits or coverage through federal (excluding Medicare Part D coverage), state, or private sources.

The program is administered by the Fiscal Agent under contract with the Delaware Department of Health and Social Services.

The rules in this section set forth the eligibility requirements for coverage under the Delaware Prescription Assistance Program (DPAP). The DPAP is implemented January 1, 2000, with benefits beginning January 14, 2000.

30100 Definitions

Contractor: the agent who is under contract with the State to administer the DPAP.

Department: the Department of Health and Social Services or DHSS

Division: ~~the Division of Social Services or DSS~~ the Division of Medicaid & Medical Assistance or DMMA

Low Income Subsidy (LIS): Assistance provided by the Centers for Medicare and Medicaid Services to pay Medicare Part D costs for individuals with limited income and resources. The LIS will provide payment assistance with the monthly premium, the yearly deductible, and the coverage gap. The LIS will also provide payment assistance for co-payments after an individual with income below 135% of the Federal Poverty Level reaches a total of \$5100 in drug expenses.

Medicare Part D: The Medicare Prescription Drug Program established by the Medicare Prescription Drug, Improvement and Modernization Act of 2003.

Medicare Part D costs: monthly premiums, yearly deductible, and drug costs that fall into the Part D coverage gap.

30200 General Application Information

The application for DPAP must be made in writing on the prescribed ~~DSS~~ form. This request for assistance can be made by the applicant, guardian, or other individual acting for the applicant with his knowledge and consent. The application filing date is the date the application is received in either the Contractor's office or a DSS office.

DPAP will consider an application without regard to race, color, age, sex, disability, religion, national origin, or political belief as per Title VI of the Civil Rights Act of 1964.

Filing an application gives the applicant the right to receive a written determination of eligibility and the right to appeal the written determination.

30201 Disposition of Applications

The Contractor must include in each applicant's case record facts to support the Contractor's decision on his

application. The Contractor must dispose of each application by a finding of eligibility or ineligibility, unless:

a) there is an entry in the case record that the applicant voluntarily withdrew the application, and that the Contractor sent a notice confirming his decision;

b) there is a supporting entry in the case record that the applicant has died; or

c) there is a supporting entry in the case record that the applicant cannot be located.

d) ~~Certain factors of eligibility must be verified. If all information requested is not received, the Contractor cannot determine or redetermine eligibility. This may result in denial of the application or the termination of eligibility. Verifications received and/or provided may reveal a new eligibility issue not previously realized and this may require additional verifications. Failure to provide additional requested verifications may result in denial or termination of eligibility. all verification requested is not received by the due date given to the applicant. If all verification requested is not received by the due date, an eligibility determination cannot be made. This will result in denial of the application. Verification that is received and/or provided may reveal a new eligibility issue not previously realized that requires additional verification. If the additional verification requested is not received by the due date given, this will result in denial of the application.~~

All applicants will receive a notice of acceptance or denial.

(Break in Continuity of Sections)

30305 Requirement to Enroll in Medicare Part D

An individual who is entitled to receive Medicare benefits under Part A or Part B must enroll in Part D in order to be eligible for DPAP. The individual must provide proof of Medicare Part D enrollment.

30306 Requirement to Apply for Low Income Subsidy (LIS)

An individual must apply for the LIS if potentially eligible. The individual must provide a copy of the LIS denial or approval notice.

~~30305~~ 30307 No Other Prescription Drug Coverage

The individual must not have or must be ineligible for, prescription drug benefits or coverage through federal (excluding Medicare Part D coverage), state, or private sources regardless of any annual limitations to the benefits.

The individual must not have or must be ineligible for:

(a) Medicaid prescription benefits

(b) ~~prescription drug benefits through a Medicare supplemental policy~~ prescription drug benefits through a third party payer

(c) the Nemours Health Clinic Pharmaceutical benefit as defined on 1/1/99

~~30305.1~~ 30307.1 Exceptions to No Other Prescription Drug Coverage

Individuals who are eligible for the following drug benefits will not be excluded from eligibility for DPAP:

(a) individuals eligible for Medicaid as Family Planning Only

(b) individuals covered under a specific disease state insurance program, for example a policy that pays only for cancer drugs

(c) individuals who are members of a discount drug program in which the policy does not actually pay for the drugs, for example American Association of Retired Persons (AARP)

(d) individuals eligible for drug coverage through the Division of Vocational Rehabilitation

(e) individuals eligible for drug coverage through the Division of Substance Abuse, and Mental Health.

(f) individuals covered under Medicare Part D

~~30306~~ 30308 Inmate of a Public Institution

An individual who is an inmate of a public institution is not eligible for DPAP.

An individual is an inmate when serving time for a criminal offense or confined involuntarily in State or Federal prisons, jail, detention facilities, or other penal facilities. An individual awaiting trial in a detention center is considered an inmate of a public institution.

(Break in Continuity of Sections)

30405 Redetermination of Eligibility

A redetermination of eligibility must be completed by ~~June 30~~ December 31 of each year. If an individual's initial coverage begins in ~~April, May, or June, October, November, or December~~, a redetermination will not be required until ~~June~~ December of the following year. A redetermination is a re-evaluation of a recipient's continued eligibility for DPAP coverage. In a redetermination, ~~all~~ eligibility factors that are subject to change are re-examined to ensure that the recipient continues to meet eligibility requirements. When a redetermination is due, the recipient is required to complete and return a ~~new DSS application form~~ renewal form and provide requested verifications by the due date given. Failure to complete and return a ~~DSS application form~~ renewal form and provide requested verifications by the due

date given will result in termination of eligibility. A redetermination is complete when ~~all~~ eligibility factors that are subject to change are examined and a decision regarding continued eligibility is reached.

DPAP coverage will be terminated when the Contractor or DSS is notified by the recipient that he or she no longer wants coverage.

30500.1 Benefits for Individuals with Medicare Part D Coverage

DPAP will provide payment assistance for Medicare Part D monthly premiums, yearly deductible, those drug costs that fall into the Part D coverage gap, and drugs that are excluded from Medicare Part D.

Medicare Part D coverage will be primary to payment assistance under DPAP.

30501 Limitations on Benefits

Payment assistance to each eligible individual shall not exceed \$2,500.00 per ~~State fiscal~~ benefit year. Individuals will receive a notice when 75% of the \$2,500.00 cap has been expended.

30502.1 Co-payment Requirement for Individuals with Medicare Part D Coverage

There is a co-payment of \$5.00 or 25% of the cost of the prescription (whichever is greater) during the Part D deductible and coverage gap and for drugs that are excluded from Part D. DPAP will not provide payment assistance for Medicare Part D co-payments. When the individual receives a prescription drug that is covered under Medicare Part D, the individual is responsible for the Medicare Part D co-payment.

(Break in Continuity of Sections)

50100 Services Provided by CRDP

~~Services provided by the CRDP can consist of payment for medications, nutritional supplements, and transportation. Services provided by the CRDP can consist of payment for medications, nutritional supplements, transportation, and payment of Medicare Part D costs.~~ Electronic Data Systems (EDS) is the CRDP's fiscal intermediary. They are responsible for processing all eligible CRDP claims.

50100.1 Medications

The CRDP has the ability to fund prescription medications, over-the-counter medications (OTC's) or both. Services covered include generic and brand name prescription drugs that have been approved as safe and effective by the Federal Food and Drug Administration as

well as cost effective over-the-counter drugs prescribed by a practitioner. Prescription drugs covered under CRDP are restricted to products manufactured by pharmaceutical companies that agree to provide manufacturer rebates.

Reimbursement for medications will be made only for clients authorized by the CRDP. A client's eligibility for the medication benefit is based upon the outcome of their medical and financial assessment.

Prescription medications potentially will be funded if prescribed by a physician for eligible clients. Refills may be authorized in compliance with appropriate pharmacy laws.

Reimbursements for OTC products for eligible clients are those, which the physician/practitioner has provided written or verbal authorization to the pharmacist. These products must be for the client's personal use only. There will be no reimbursement for OTC products that are not prescribed by a physician/practitioner. Supplies such as mouthwash, toothpaste, shampoo, etc. will not be reimbursed.

At point of sale, the pharmacist will determine electronically if CRDP will fund the requested product. In order for the pharmacy to receive CRDP payment, they must have a Delaware Medicaid provider number.

Note: All third party resources must be used before CRDP funds are utilized.

(Break in Continuity of Sections)

50100.4 Medicare Part D Costs

The Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA) established the Medicare Prescription Drug Program, also known as Medicare Part D, making prescription drug coverage available to individuals who are entitled to receive Medicare benefits under Part A or Part B, beginning on January 1, 2006.

The MMA provides for a Low Income Subsidy (LIS) for individuals with limited income and resources. The LIS is assistance provided by the Centers for Medicare and Medicaid Services to pay Medicare Part D costs for eligible individuals. The LIS will provide payment assistance with the monthly premium, the yearly deductible, and the coverage gap. The LIS will also provide payment assistance for co-payments after an individual with income below 135% of the Federal Poverty Level reaches a total of \$5100 in drug expenses.

The CRDP will provide coverage for Medicare Part D costs including monthly premiums, yearly deductible, drug costs that fall into the Part D coverage gap, and co-payments. If an individual is eligible for the LIS, this assistance will be primary to CRDP assistance.

(Break in Continuity of Sections)

50200 Services Not Provided by CRDP

The CRDP will not pay health insurance premiums (except Medicare Part D premiums); nor will the program pay for medical, hospital, or ancillary services, medical supplies, or transportation not directly related to the care of End State Renal Disease (ESRD).

(Break in Continuity of Sections)

50500 Technical Eligibility

Only persons who are residents of the State of Delaware shall be eligible for services. Additionally, the individual must be an U.S. citizen or a lawfully admitted alien.

An individual who is entitled to receive Medicare benefits under Part A or Part B must enroll in Part D in order to be eligible for CRDP. The individual must provide proof of Medicare Part D enrollment. Exception: Medicare eligible individuals who have creditable coverage are not required to enroll in Part D as a condition of eligibility. Coverage is creditable if the actuarial value of the coverage equals or exceeds the actuarial value of the standard prescription drug coverage under Part D.

An individual must apply for the LIS if potentially eligible. The individual must provide a copy of the LIS denial or approval notice.

Individuals may be found eligible for CRDP pending their Medicare Part D enrollment and application for LIS for a period of no longer than 90 days from the date of application for CRDP. Current recipients will be notified about the Medicare Part D enrollment requirement and the LIS requirement. They will be given a deadline date by which they must meet this requirement.

DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

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

PUBLIC NOTICE

Title XIX Medicaid State Plan Inpatient Hospital Services

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 512, Delaware Health and Social Services (DHSS) / Division of Medicaid & Medical Assistance is proposing to amend the Title XIX Medicaid State Plan regarding the reimbursement cycle and the payment methodology for inpatient hospital services.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Policy & Program Development Unit, Division of Medicaid & Medical Assistance, P.O. Box 906, New Castle, Delaware 19720-0906 by September 30, 2005.

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

SUMMARY OF PROPOSED CHANGES

Title of Regulation

Methods and Standards for Establishing Payment Rates – Inpatient Hospital Care

Statutory Authority

42 CFR, Subpart C – Payment for Inpatient Hospital and Long-Term Care Facility Services

Amending the Following State Plan Pages

Attachment 4.19-A, Pages 1 and 3

Summary of Proposal

This regulatory action proposes to amend the reimbursement methodology for inpatient hospitals with two (2) changes regarding the: 1) reimbursement cycle and, 2) interim outlier payment methodology.

Reimbursement Cycle

Effective July 1, 2006, the proposed amendment would revise state plan language changing the reimbursement cycle for hospital payments from a twelve (12) month period to a fifteen (15) month period.

Interim Outlier Payment Methodology

Effective January 1, 2006, the proposed amendment revises the methodology for determining payment for high cost outliers. An interim payment will be made for that inpatient stay when the client's charges have reached twenty-five (25) times the general discharge rate of that facility, or when the client's stay is greater than sixty (60) days.

Additional interim payments will be made when either of the outlier conditions for an interim payment is met again.

**DSS PROPOSED REGULATION #05-41
REVISIONS:**

ATTACHMENT 4.19-A
Page 1

**STATE PLAN UNDER TITLE XIX OF THE SOCIAL
SECURITY ACT
STATE OF DELAWARE**

**METHODS AND STANDARDS FOR ESTABLISHING
PAYMENT RATES – INPATIENT HOSPITAL CARE**

Reimbursement Principle

Effective for discharges on or after July 1, 1994, the Delaware Medicaid Program will reimburse all acute care hospitals at prospective per discharge rates.

The prospective rates are set by accommodation type. Reimbursement rates have been set for two accommodation types: general services and nursery services. For each of these accommodation types, there are three components to the payment: operating payment per discharge, capital payment per discharge and medical education payment per discharge.

Rate Setting Method – Operating Payment

The base year is the Delaware hospitals' 1992 fiscal year. The operating payment per discharge for the base year was calculated by applying a cost-to-charge ratio to allowed charges from the Medicaid claims data. This allowed cost value was then divided by the total charges to obtain the operating payment per discharge.

The cost-to-charge ratio was identified from FY92 hospital cost reports; the categories of cost included in the cost-to-charge ratio are those related to routine services (including hospital-based physicians' costs and malpractice costs) and ancillary services.

The allowed charge data was taken from the FY92 Medicaid claims data for Delaware hospitals. Medicaid allowable hospital-specific charges associated with inpatient revenue codes appropriate to the accommodation type were identified. The hospital-specific cost-to-charge ratio was applied to the allowed charges to obtain hospital-specific allowed costs for the accommodation type.

Effective July 1, 2006, the fiscal year/period for the reimbursement of Medicaid hospital services will be based

on a fifteen month period. A rate adjustment will be made on July 1, 2006 and for every fifteen month period thereafter.

The total hospital-specific allowed costs for the accommodation type were then divided by the total number of discharges on the claims date for the accommodation type to obtain the hospital-specific operating payment per discharge in the base year.

(Break In Continuity of Sections)

ATTACHMENT 4.19-A
Page 3

**METHODS AND STANDARDS FOR ESTABLISHING
PAYMENT RATES – INPATIENT HOSPITAL CARE
(Continued)**

Rate Setting Methods - Development of Implementation Year Operating Rates, Updates and Rebasing (Continued)

The implementation year rates will be updated in FY96 using published TEFRA inflation indices. Rates will be rebased using fiscal year 1994 claims and cost report data for implementation in State FY97, ~~and every three years thereafter.~~

Other Related Inpatient Reimbursement Policies

Outliers - High cost outliers will be identified when the cost of the discharge exceeds the threshold of three times the hospital operating rate per discharge. Outlier cases will be reimbursed at the discharge rate plus 79 percent of the difference between the outlier threshold and the total cost of the case. Costs of the case will be determined by applying the hospital-specific cost to charge ratio to the allowed charges reported on the claim for discharge.

~~For certain high cost cases, providers may request an interim payment, that is, a payment prior to the discharge of the patient when the discharge is not likely to occur in the near future. Cases that are approved by the State for reimbursement on an interim payment basis must meet all of the following conditions: (1) length of stay over one year, and (2) over one million dollars in costs as determined in the paragraph above, and (3) attempts to find non acute care placements have proven unsuccessful and are documented to the State's satisfaction. Interim payment cases will be subject to the same outlier payment calculations as described in the paragraph above and reimbursed at the outlier amount less a 5% discount. Interim payments that are renewed must meet all of the following conditions: (1) an additional length~~

~~of stay over one year (2) an additional one million dollars in costs as determined in the paragraph above and (3) continued attempts to find non-acute care placements have proven unsuccessful and are documented to the State's satisfaction. Any interim payment cases that are renewed will also be subject to the same outlier payment calculations as described in the paragraph above and reimbursed at the outlier amount less a 5% discount.~~

Effective January 1, 2006, any provider with a high cost client case (outlier) will receive an interim payment; that is, a payment prior to the discharge of that patient when the charge amount reaches the designated level. An interim payment will be made for that inpatient stay when the client's charges have reached twenty-five (25) times the general discharge rate of that facility, or when the client's stay is greater than sixty (60) days. Additional interim payments will be made when either of the outlier conditions for an interim payment is met again. The interim payment amount is based on the current reimbursement methodology used to pay outliers. Upon the discharge of the client, the facility will receive the balance of the payment that would have been paid if the case were paid in full at the time of discharge.

DIVISION OF SOCIAL SERVICES

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

PUBLIC NOTICE

Delaware's Temporary Assistance for Needy Families Employment and Training

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Social Services is proposing to amend the Division of Social Services Manual (DSSM) regarding changes to Delaware's Temporary Assistance for Needy Families (TANF) Employment and Training policies.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Policy & Program Development Unit, Division of Social Services, P.O. Box

906, New Castle, Delaware 19720-0906 by September 30, 2005.

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

SUMMARY OF PROPOSED CHANGE

Citation

Senate Bill 101, 140th General Assembly: Delaware Welfare Reform Education and Training Assistance Act

Summary of Proposal

Senate Bill 101, effective July 2, 1999, allows participants in Delaware's Temporary Assistance for Needy Families (TANF) program to engage in secondary education, post-secondary education, and vocational training as part of the work activity requirement. The participants in this program must be enrolled as full-time students, must be students in good standing, and will be required to have a combination of credit hours and work hours equaling at least 20 hours per week while they are in school. Participants must attend accredited or approved programs and will receive the same support services while in school, such as child care and transportation, as do other TANF participants. By enabling TANF participants to pursue secondary education, post-secondary education, and vocational training, Delaware will create a workforce that is more financially stable and less likely to need public assistance again, while at the same time increasing its tax revenue as these same people earn higher wages. This is a correction to the previously published policy which increased the minimum combination of credit hours and work to 25 hours.

DSS PROPOSED REGULATION #05-42

REVISIONS:

3006.6 Senate Bill 101- ~~1997~~ 1999 and Employment & Training Activities

Under Senate Bill 101- ~~1997~~ 1999, persons who must participate in Delaware's Temporary Assistance for Needy Families Program, can qualify for participation purposes if they are engaged in secondary education, post-secondary education up to the baccalaureate level, adult basic education or vocational training. Participants must meet the following Senate Bill 101-~~1997~~ 1999 requirements in order to meet participation rates.

(a) Persons who qualify for assistance under Delaware's Temporary Assistance for Needy Families

program shall be eligible to participate in adult basic education, secondary education, post-secondary education up to the baccalaureate level, adult basic education or vocational training as an approved work activity provided each of the following requirements are met:

1. The person does not hold a baccalaureate degree.
2. The secondary, post-secondary education up to the baccalaureate level or vocational training is pursued through an accredited or approved school program.
3. The person is enrolled with enough credit hours to have full-time student status and is in good standing as it relates to attendance and achievement as defined by the program the person is attending.
4. If the person attending school would otherwise be subject to a work requirement in order to receive assistance under TANF, the combination of credit hours and work hours shall equal at least ~~25~~ 20 hours per week while the program is in session. This work requirement may be met through work-study, internships, externships, or through work as a research assistant. If possible, during scheduled breaks, the work requirement will be the same as for other program participants, with work experience related to the field of study. However, if the student is enrolled full-time for the next semester and work activity placement cannot be arranged for the duration of the break in classes, it may be excused.

For every 1 credit hour, count 1.5 hours of study as part of the fulfillment of the required work participation hours. Therefore, if a persons full-time status is 12 credit hours count the 12 hours plus an additional 18 hours (12 x 1.5=18) for a total of 30 hours of weekly participation.

(b) Loans, scholarships, grants and work-study received by the recipient to pay for tuition and materials are excluded in determination of eligibility for assistance under TANF or the amount of assistance received by the recipient.

(c) The Department of Health and Social Services shall advise all persons of this section at application interviews and, at a minimum, at each recertification appointment.

(d) Persons attending education and training programs under this section shall receive support services, such as assistance with transportation and child care, while they attend the educational or vocational training program on the same basis as support services are provided other persons who are receiving assistance under TANF.

(e) If program completion will occur within one semester or quarter after the time limit expires, an extension may be granted for that semester or quarter.

(f) Persons sanctioned while attending educational or vocational programs shall be afforded the same due process as provided other persons under TANF.

**DEPARTMENT OF NATURAL
RESOURCES AND
ENVIRONMENTAL CONTROL
DIVISION OF WATER RESOURCES**

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

**REGISTER NOTICE
SAN #2003-03**

1. TITLE OF THE REGULATIONS:

Regulations Governing Storm Water Discharges Associated with Industrial Activities

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

The Department of Natural Resources and Environmental Control, Surface Water Discharges Section, is proposing to reissue the Regulations Governing Storm Water Discharges Associated with Industrial Activities. The regulations are required to be reissued once every five years, expanding the existing regulations in place to include all current federal requirements for discharges of storm water associated with industrial activities.

Two major revisions are: (1) a conditional "no exposure" exclusion that allows facilities with industrial materials and activities entirely sheltered from storm water a simplified way to comply with the permitting requirements by submitting a "No Exposure" certification form for exclusion from monitoring and storm water plan requirements in their permits; and (2) benchmark monitoring which requires facilities with a high potential to discharge a pollutant at concentrations of concern to conduct semi-annual analytical monitoring of storm water samples for comparison with benchmark monitoring concentration values used for indications of potential impairment of water quality in water bodies receiving the storm water discharge.

3. POSSIBLE TERMS OF THE AGENCY ACTION:

N/A

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

7 Del.C. Chapter 60, Section 6010

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

Regulations Governing the Control of Water Pollution
(As amended May 14, 2003)

6. NOTICE OF PUBLIC COMMENT:

The Department of Natural Resources and Environmental Control will hold a public hearing on September 29th, 2005 at 6 PM in the DNREC Auditorium, 89 Kings Highway the Richardson & Robbins Building in Dover, to receive comments on proposed amendments to the Regulations Governing Storm Water Discharges Associated with Industrial Activities. Comments regarding the General Permit Program should be sent in writing to Amber Moore, Surface Water Discharges Section, Division of Water Resources, DNREC, 89 Kings Highway, Dover, DE 19901. Comments regarding construction activities should be sent in writing to Elaine Webb, Sediment and Stormwater Program, Division of Soil and Water, DNREC, 89 Kings Highway, Dover, DE 19901.

7. PREPARED BY:

Amber N. Moore (302) 739-9946, August 10, 2005

SECTION 9 - THE GENERAL PERMIT PROGRAM

Subsection 1 - Regulations Governing Storm Water Discharges Associated with Industrial Activities

INDEX

Part 1 - Baseline General Permit (§9.1.01)

Part 2 - Special Conditions for Storm Water Discharges Associated with Construction Land Disturbing Activities (§9.1.02)

~~Part 3 - Special Conditions for Storm Water Discharges Associated with Concrete Manufacturing Activities (§9.1.03.)~~

~~Part 4 - Special Conditions for Storm Water Discharges Associated with Asphalt Manufacturing Activities (§9.1.04.)~~

~~Part 5 - Special Conditions for Storm Water Discharges Associated with Chemical Manufacturing Activities (§9.1.05.)~~

~~Part 6 - Special Conditions for Storm Water Discharges Associated with Activities Regulated by the Delaware Regulations Governing Solid Waste (§9.1.06.)~~

~~Part 7 - Special Conditions for Storm Water Discharges Associated with Automotive Salvaging Activities (§9.1.07.)~~

~~Part 8 - Special Conditions for Storm Water Discharges Associated with Scrap Recycling Activities (§9.1.08.)~~

~~Part 9 - Special Conditions for Storm Water Discharges Associated with Watercraft Maintenance Activities (§9.1.09.)~~

~~Part 10 - Special Conditions for Storm Water Discharges Associated with Air Transportation Maintenance and Deicing Activities (§9.1.10.)~~

~~Part 11 - Special Conditions for Storm Water Discharges Associated with Rail Transportation Maintenance Activities (§9.1.11.)~~

~~Part 12 - Special Conditions for Storm Water Discharges Associated with Automotive Transportation Maintenance Activities (§9.1.12.)~~

~~Part 13 - Special Conditions for Storm Water Discharges Associated with Food Processing Activities (§9.1.13.)~~

~~Part 14 - Special Conditions for Storm Water Discharges Associated with Metals Manufacturing Activities (§9.1.14.)~~

APPENDIX A - WATER PRIORITY CHEMICALS

APPENDIX B- BEST MANAGEMENT PRACTICES (BMPs)

INTRODUCTION

Storm water discharges contribute significantly to water quality degradation across the United States. Storm water-related sources of potential water quality degradation include the following: manufacturing and processing facilities; transportation maintenance areas; urban areas; resource extraction; hydro-habitat modification; land disposal of wastes; and contaminated sediments present in stream and river beds. In November 1990 the USEPA issued Phase I of the NPDES Storm Water Permit Application Regulations for Storm Water Discharges indicating storm water as a major source of impairment to the quality of rivers, streams, and wetlands in the U.S.

In 1993 issued, Section 9 (The General Permit Program), of the State of Delaware, Department of Natural Resources and Environmental Control. The General Permit Program is designed to provide permit coverage for the wide range of discharges which who could not practicably obtain individual permits in the foreseeable future. This approach will allow DNREC resources to concentrate on individual permits for facilities with discharges which have a more significant potential for impacting water quality in the State of Delaware.

A General Permit, as defined by federal law in 40 C.F.R. §122.28, authorizes the discharge of storm water associated with industrial activity from sources within a defined area or that share certain similarities. A General Permit is a self-implementing standard that can apply to multiple discharges which the DNREC has determined can most efficiently be regulated as a category. Conversely, an individual permit contains special conditions specifically tailored to one specific facility. A General Permit is a Department statement of general applicability. A General Permit is a regulation since it implements and prescribes law which affects existing and future facilities.

Subsection 1 of the General Permits Program contains the Regulations Governing Storm Water Discharges Associated With Industrial Activity and is referred to as the "General NPDES Storm Water Program." In order to obtain coverage through the General NPDES Storm Water Permit Program, persons ~~t~~ will be required to file with the DNREC a Notice of Intent (NOI). The NOI requirement is in accordance with 40 C.F.R. §122.28(b)(2) of the USEPA NPDES Program. The NOI is equivalent of an NPDES permit application for General NPDES Storm Water Permit coverage. Part 1 of the NPDES General Storm Water Permit Program consists of general provisions applicable to all discharges associated with industrial activity. A letter verifying acquisition of permit coverage instead of an actual permit will be issued to the discharges covered by Subsection 1.

The goal of the General NPDES Storm Water Permit Program is to establish, over a period of time, accepted practices for protecting and improving water quality and minimizing adverse impacts on waters of the State of Delaware by storm water discharges associated with industrial activity. To apply water quality based numerical limits to storm water runoff, a large expenditure of the DNREC and industry resources (time and money) would be needed to develop and perform the myriad of assessments (e.g. modeling, analytical testing, statistical reviews of the varied rain event occurrences, event intensities, event intensity deltas, event durations, and rainfall quantities). Therefore, the General NPDES Storm Water Permit Program requires Best Management Practices (BMPs) to be implemented by all facilities as a more efficient approach to protect and improve water quality in the State of Delaware. The BMPs requirements in this regulation will serve in place of numerical limits in accordance with 40 Code of Federal Regulations (CFR) Part 122.44(k).

Subsection 1 of the General NPDES Storm Water Permit Program is divided into 2-14 Parts. Part 1 establishes the baseline of the General NPDES Storm Water Permit Program is established. Parts 2 through 14 apply to

construction activities and specific categories of industrial activity. A facility is required to obtain coverage under the each applicable Part. If there is not an applicable industry-specific Part for a facility, then the facility is required to obtain and maintain coverage under Part 1.

The numbering sequence for the regulations is displayed by the following graphic:

§9.1.01.0 DEFINITIONS

The following words and phrases shall have the meaning ascribed to them in this Subsection unless the context clearly indicates otherwise: As used in this Subsection, the following terms shall be defined as outlined herein:

Appropriate Plan Approval Agency: means the Department, Conservation District, county, municipality, or State agency that is responsible in a jurisdiction for review of a Sediment and Stormwater Management Plan.

Best Available Control Technology (BACT): means the latest stage of development (state of the art) of processes, facilities, measures of operation, indicating the practical suitability of such processes, facilities, and measures and methods for preventing or reducing the discharge of pollutants. In determining the BACT, special consideration is given to comparable measures, technological advances, changes in scientific understanding, economic feasibility, time limitations and harmful effects that are likely as a result of the discharge of pollutants.

Background Concentration: means the concentration of a substance that is consistently present and naturally occurring, or that is the result of human activities unrelated to a discharge or release from the facility. Background concentrations can be divided into two (2) classes: naturally occurring background concentrations and anthropogenic background concentrations.

- **Naturally Occurring Background Concentration:** means the concentration of a substance present in the environment, which has not been influenced by humans and which existed before any industrial activities occurred at a facility. Because most organic compounds are not naturally occurring, the term background concentration refers to inorganic metals that are commonly found in soil. However, some organic compounds associated with petroleum hydrocarbons may be present at naturally occurring concentrations because of natural events such as decaying organic matter.
- **Anthropogenic Background Concentration:** means the concentration of substances present in the environment, which are caused by humans

and which originate from off-site sources such as industry, automobiles and agriculture. Anthropogenic concentrations generally result from indirect human activities that are unrelated to waste management and industrial activities at a facility. Common examples of these indirect activities are deposition of hazardous substances from automobile and industrial emissions, and widespread use or application of hazardous substances such as pesticides. The key aspects of anthropogenic concentrations are that they are not specifically related to facility activities and that they occur at uniformly low concentrations across a wide region.

Both classes of background concentrations have equal applicability. At any given site, naturally occurring and anthropogenic concentrations may be present.

Benchmark Concentration: means a pollutant concentration used by Part 1 of this Subsection as a threshold, below which a pollutant is considered unlikely to cause a water quality violation and above which it may. Benchmark concentrations are not water quality criteria and site-specific conditions must still be considered to determine if an actual water quality violation exists.

Best Management Practices(BMPs): means schedules of activities, prohibition of practices, maintenance procedures, and other management practices or measures to prevent or reduce the discharge of pollutants. BMPs include the following, among other practices and measures: structural and non-structural controls; treatment requirements; and operating procedures and practices to control plant site runoff, or sludge disposal, or waste disposal, or spillage, or leaks, or drainage from raw materials storage.

Certified Construction Reviewer (CCR): means those individuals, having passed a Department-sponsored or approved training course, who provide on-site inspection for sediment control and storm water management in accordance with the *Delaware Sediment and Stormwater Regulations*.

CFR: means the Code of Federal Regulations.

Clean Water Act: means 33 U.S.C. 1251 et seq. (formerly known as the Federal Water Pollution Control Act Amendment of 1972).

Clean Water Act, Section 303(d) List: means a list of all surface waters in the State for which beneficial uses of the water - such as for drinking, recreation, aquatic habitat, and industrial use - are impaired by pollutants. These are water quality limited estuaries, lakes and streams that fall short of the State's Surface Water Quality Standards (SWQS).

Waters placed on the 303(d) list require the preparation of Total Maximum Daily Loads (TMDLs).

Co-Located Industrial Activities: means a facility where multiple categories of industrial activities are conducted on-site. An activity at a facility is not considered co-located if the activity, when considered separately, does not meet the description of a category of industrial activities identified in §9.1.01.1. A.

Co-Permittee: means a discharger of storm water associated with construction activity who is jointly and individually responsible for compliance with all conditions of this Subsection and applicable laws with another entity.

Comparable Level: means an estimated level of environmental benefit, related to the quality of the storm water discharges, equivalent to what would be achieved by implementing the requirements described under "Storm Water Plan" (§9.1.01.5) listed in Parts 3 through 14 of Subsection 1.

Construction Activity: means clearing, grading and excavating activities that result in a land disturbance equal to or greater than one (1) acre, including the disturbance of less than one acre of land that is part of a larger common plan of development or sale that will ultimately disturb more than one acre.

Department: means the State of Delaware Department of Natural Resources and Environmental Control.

Discharge of Storm Water Associated With Industrial Activities: means storm water runoff storm water runoff that exits any system that is used for collecting and conveying storm water that originates from manufacturing, processing, or raw materials storage areas at an industrial facility. The term does not include discharges from facilities or activities excluded from the NPDES program under 40 CFR Part 122. For the categories of industrial activities identified in §9.1.01.1.A., the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas for raw materials, and intermediate and finished products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. The definition is restricted, for the purposes of this Subsection, to those storm water discharges that qualify for authorization under the provisions of this Subsection (on an outfall by outfall consideration).

DISCHARGE BUFFERING: means to use various BMPs that are designed to remove, capture or retain pollutants or minimize hydraulic extremes generated by storm water, through the application of detention, settling, biofiltration, or filtering (e.g. settling basins, wet ponds, vegetated swales, sand filters, inlet filters, oil/water separators, sediment traps, berms for diversion, buffer strips). Straw bale and fabric fence may be used for sheet flow or in conjunction with other

Effective Date: means the date when these regulations have formally passed through a public comment period, a public hearing and have been formally adopted by the Department and start being operative.

Emergency: means a situation in which human safety is at risk and/or significant destruction of property is a possibility.

Enclosed Areas: means an area(s) which consists of an impervious surface, such as a floor, that is shielded from precipitation and storm water run-on.

Equivalent Best Management Practices (BMPs): means operational, source control, treatment, or innovative BMPs which result in equal or better quality of storm water discharge to surface water or to ground water than BMPs selected from Appendix B.

Facility: means any building; any structure; any complex of buildings or structures; or any process, production, equipment or machinery which makes it possible for an industrial activity to be conducted.

General Permit: means a permit which covers multiple discharges of a point source category within a designated geographical areas, in lieu of individual permits being issued to each discharge.

Grab Sample: means an individual sample collected in less than 15 minutes.

Good Housekeeping Practices: means the maintenance of an orderly work environment in order to minimize material losses and prevent unnecessary waste generation through routine procedures. Good housekeeping practices must include measures to eliminate or reduce the exposure of garbage and refuse materials to precipitation or runoff prior to their disposal. Typical good housekeeping practices include activities that are performed on a daily basis by employees during the course of normal work activities. Good housekeeping practices not only contribute to the prevention of accidents, but also support employee health and safety programs, eliminate wastes and generally prevent the deterioration of facility property and equipment.

Inactive Industrial Facility: means a facility that is no longer actively engaging in industrial activity (i.e., no longer engaging in business, production, the provision of services or any auxiliary operation) but either still has industrial

materials stored on-site or that may resume industrial activity at any time.

Impervious Surface : means a hard surface area which either prevents or retards the entry of water into the soil mantle at a rate lower than that present under natural conditions prior to development; and/or a hard surface area which causes water to runoff the surface in greater quantities and at an increased rate of flow from the flow present under natural conditions prior to development. Common impervious surfaces include, but are not limited to, roof tops, walkways, patios, driveways, parking lots, storage areas, concrete or asphalt paving, gravel roads, packed earthen materials, or other surfaces which similarly impeded the natural infiltration of surface and storm water runoff.

Individual Permit: means a permit which is written for one specific facility or site.

Industrial Activity: refers to the eleven (11) categories of industrial activities included in the definition of "storm water discharges associated with industrial activities", 40 CFR 122.26(b)(14). These activities are indicated in §9.1.01.1.A. of this Subsection

Industrial Significant Materials: means substances, products, or wastes that are exposed to precipitation and that can potentially contribute pollutants to storm water runoff or storm water infiltration (Materials which cannot contribute pollutants to storm water runoff are not considered **Industrial Significant Materials**. Industrial materials or activities include, but are not limited to: material handling equipment or activities; industrial machinery; raw materials; intermediate products; by-products; final products; or waste products, however packaged.

LAND DISTURBING ACTIVITIES: means a land change or construction activity for residential, commercial, silvicultural, industrial and institutional land use which may result in soil erosion from water or wind, or movement of sediments or pollutants into State waters or onto lands in the State, or which may result in accelerated storm water runoff, including, but not limited to, clearing, grading, excavating, transporting, and filling of land. (Contact Division of Soil & Water Conservation for more details.)

Maintenance: means the work required to keep vehicles, equipment and/or machinery in proper condition (e.g. painting, paint removal, sanding, grinding, washing, fueling, cleaning, repair, lubrication, replacement of parts or structures, draining or replacing fluids).

Material Handling Activities: means the storage, loading, unloading, transportation, or conveyance of any raw material, intermediate product, finished product, by-product or waste product. The term excludes areas located on facility lands separate from the facility's industrial activities, such as office buildings and accompanying parking lots as long as

the drainage from the excluded areas is not mixed with storm water drained from the previous described areas.

MAXIMUM EXTENT PRACTICABLE (MEP): means to complete an objective or requirement of this Part, to a level which bears the most benefit from an environmental standpoint, but not to a level that is physically or economically infeasible or that would jeopardize human health or safety, or that would the conductance of work at the facility.

Municipal Separate Storm Sewer System: means a conveyance system which is not intended to convey anything but storm water and is owned by a municipal or public entity.

National Pollutant Discharge Elimination System (NPDES): means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits for the discharge of any pollutant or combination of pollutants and imposing and enforcing pretreatment and sludge requirements pursuant to Sections 307, 402, 318, and 405 of the Clean Water Act.

NPDES Permit: means any permit authorizing the potential or actual point source discharge of pollutants to State waters, under prescribed conditions, pursuant to Section 6 of the State of Delaware *Regulations Governing the Control of Water Pollution*.

“No Exposure”: means a condition where all industrial materials and activities are protected by storm resistant shelters, or equivalent measures, so that they are not exposed to rain, snow, snowmelt, or runoff.

“No Exposure” Certification Form: serves as facility affirmation that a condition of “no exposure” exists. By receiving Department approval of the submitted “No Exposure” Certification Form, the facility is covered under this Subsection; however excluded from having to comply with requirements of §9.1.01.4. (Monitoring) and §9.1.01.5. (Storm Water Plan) of this Subsection.

Non-Contact Cooling Water: means that which is contained within a leak-free system, i.e., has no contact with any gas, liquid or solid other than the container used for transport.

Non-Structural Controls: means practices that are specifically intended to reduce the amount of pollution getting into surface waters. Non-structural controls are generally implemented to address the problem at the source. They do not require any structural changes to the facility. Examples of non-structural control practices include good housekeeping practices and preventative maintenance programs.

Notice of Intent form: serves as an application for NPDES permit coverage under this Subsection.

Operator: means the owner or person that is responsible for the management of an industrial facility subject to the provisions of this Subsection.

Operational Control: means the responsibility for managing a construction activity subject to the provisions of this Subsection.

Part: means a component of Subsection 1 (~~Part 1~~ generally contains foundation language for Subsection 1, where ~~Part 2~~ contains the language specific to land disturbing activities through 14 contain language specific to certain categories of industry).

Permit Coverage: means an authorization granted to a category of storm water discharges pursuant to this Subsection.

Permittee: means any person to whom coverage under this Subsection has been granted.

Person: means any individual, trust, firm, partnership, corporation (including a government corporation), association, institution, enterprise, federal agency, state, municipality, commission, agency, political subdivision of a State or any interstate body, or an agent or employee thereof duly established entity.

Pervious Surface: means a surface area that allows the entry of water into the soil mantle at a rate present under natural conditions.

PROTOCOLS: means ~~non-structural Best Management Practices such as preventive maintenance, good housekeeping and training measures designed to minimize the contribution of Significant Materials to storm water runoff (e.g., moving Significant Materials closer to the point of use, providing more space between stacked drums containing Significant Materials).~~

Qualified Facility Personnel: means personnel that are trained and responsible for performing tasks which are related to Significant Material management.

Residual: means a solid waste that consists of the accumulated solids and associated liquids which are by-products of a physical, chemical, biological, or mechanical process.

Secretary: means the Secretary of the State of Delaware Department of Natural Resources and Environmental Control or his duly authorized designee.

Sediment and Stormwater Plan: means an engineered plan developed in accordance with the requirements of the Delaware Sediment and Stormwater Law and Regulations.

Significant Quantities: means the volume, concentrations, or mass of a pollutant that can cause or threaten to cause pollution, contamination, or nuisance; adversely impact human health or the environment; and/or cause or contribute to a violation of any applicable water quality standard for the receiving water.

Significant Spills: means including, but not limited to, releases of oil or hazardous substances in excess of reportable quantities under Section 311 of the Clean Water Act or Section 102 of CERCLA.

Storm-Resistant Shelters: means the mechanism(s) by which facilities limit the exposure of industrial materials to precipitation and runoff. Storm resistant shelters include completely roofed and walled buildings or structures, as well as structures with only a top cover but no side coverings, provided material under the structure is not otherwise subject to any run-on and subsequent runoff of storm water.

Storm Water: means run-on or runoff of water from the surface of the land resulting from precipitation or snow or ice melt.

Storm Water Associate with Industrial Activities: refers to storm water, that if allowed to discharge, would constitute a storm water discharge associated with industrial activities as defined in 40 CFR 122.26(b)(14).

Structural Controls: means curbs, dikes, berms, walls, sheds, impervious pads, ditches, diversions or other structures which limit the contribution of Significant Industrial Materials to storm water discharges from a facility.

These Regulations: means the State of Delaware Regulations Governing Storm Water Discharges Associated with Industrial Activity (Subsection 1).

“Total Maximum Daily Load” or “TMDL”: means the amount of a given pollutant that may be discharged to a waterbody from point, nonpoint and natural background sources and still allow attainment or maintenance of the applicable narrative and numerical water quality standards. A “TMDL” is the sum of the individual wasteload allocations (WLAs) for point sources and load allocations (LAs) for nonpoint sources of pollution and natural background. A “TMDL” may include a reasonable margin of safety (MOS) to account for uncertainties regarding the relationship between mass loading and resulting water quality. In simplistic terms, a “TMDL” attempts to match the strength, location and timing of pollution sources within a watershed with the inherent ability of the receiving water to assimilate the pollutant without adverse impact.

Transferee: means the person who accepts permit responsibility from the original permittee.

Transfer Of Authorization: means to transfer control of permitted activities on a construction site to either a duly authorized person who will control the permitted activities, or a new owner/operator for the site which the permit has been issued.

Transferor: means the original permittee who transfers permit responsibility to another entity.

TRUCK RINSE: means the water used to rinse the inside of a rotating barrel (after the barrel has been emptied

of concrete) which is used to mix concrete and is mounted on a truck.

Water Priority Chemicals: means the list of chemicals presented in Appendix A of these Regulations. Appendix A is a list of chemicals or chemical categories which:

- are listed at 40 CFR 372.65 pursuant to Section 313 of Title III of the Superfund Amendments and Reauthorization Act (SARA) of 1986; also titled the Emergency Planning and Community Right-to-Know Act of 1986;
- are present at or above threshold levels at a facility subject to SARA Title III, Section 313 reporting requirements; and
- that meet at least one of the following criteria:
 - are listed in Appendix D of 40 CFR 122 on either Table II (organic priority pollutants), Table III (certain metals, cyanides, and phenols) or Table V (certain toxic pollutants and hazardous substances);
 - are listed as hazardous substances pursuant to Section 311(b)(2)(A) of the Clean Water Act at 40 CFR 116.4; or
 - are pollutants for which EPA has published acute or chronic water quality criteria.

Waters of the State: means all water, on the surface and under the ground, wholly or partially within, or bordering the State of Delaware, or within its jurisdiction including but not limited to:

- Waters which are subject to the ebb and flow of the tide including, but not limited to, estuaries, bays and the Atlantic Ocean;
- All interstate waters, including interstate wetlands;
- All other waters of the State, such as lakes, rivers, streams (including intermittent and ephemeral streams), drainage ditches, tax ditches, creeks, mudflats, sandflats, wetlands, sloughs, or natural or impounded ponds;
- All impoundments of waters otherwise defined as waters of the State under this definition; and
- Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in (a) – (d).

Waste and storm water treatment systems including, but not limited to, treatment ponds or lagoons designed to meet the requirements of the Clean Water Act (other than cooling ponds which otherwise meet the requirements of subparagraphs (a) thru (e) of this definition) are not “waters of the State.”

~~§9.1.01.1 FACILITIES REQUIRED TO OBTAIN Permit Coverage~~

~~A. This Subsection shall apply to storm water discharges from the following categories of industrial activities:~~

~~Storm water associated with industrial activity which is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. This Subsection does not include discharges from facilities excluded from the NPDES program.~~

~~Subsection 1 applies to the categories of industries identified in subparagraphs (i) through (x) of this Part for, but not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling activities; refuse sites; sites used for application or disposal of process waste waters (as defined at 40 C.F.R. §401); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and finished products; and areas where industrial activity has taken place in the past and Significant Materials remain.~~

~~Subsection 1 applies to the categories of industries identified in subparagraph (xi) of this Part for storm water discharges from all areas listed in the previous paragraph (except access roads) where Significant Material handling equipment or activities, raw materials, intermediate products, final products, waste materials, by-products, or industrial machinery are exposed to storm water.~~

~~For the purpose of this Subsection, material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, finished product, by product, or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above-described areas.~~

~~Industrial facilities (including industrial facilities that are municipally owned or operated that meet the descriptions listed in this paragraph (i) through (xi)) include those facilities designated under 40 C.F.R. Part 122.26(a)(1)(v) of the NPDES Storm Water Regulations. The following categories of facilities are considered to be engaging in "industrial activity" for purposes of this Subsection. Facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic~~

~~pollutant effluent standards under 40 C.F.R. subchapter N [except facilities exempt under category xi];~~

~~(ii) Facilities classified in the Standard Industrial Classification Manual (Office of Management and Budget, 1987) as: 24 [Lumber and Wood Products] except 2434 [Wood Kitchen Cabinets]; 26 [Paper & Allied Products] except 265 [Paperboard Containers and Boxes] and 267 [Converted Paper & Paperboard Products]; 28 [Chemicals & Allied Products] except 283 [Drugs] and 285 [Paints, Varnishes, Lacquers, Enamels & Allied Products]; 29 [Petroleum Refining & Asphalt]; 311 [Leather Tanning]; 32 [Stone, Clay & Glass Products]; except 323 [Glass Products, Made of Purchased Glass] 33 [Primary Metals Industry]; 3441 [Fabricated Structural Metal]; 373 [Ship Building & Repair];~~

~~(iii) Facilities classified as Standard Industrial Classifications 10 [Metal Mining], 11 [Anthracite Mining], 12 [Coal Mining, except for areas of coal mining operations meeting the definition of a reclamation area under 40 C.F.R. §434.11(1)], 13 [Oil & Gas Extraction including exploration, production, processing, or treatment operations, or transmission facilities, that discharge storm water contaminated by contact with or that has come in contact with, any overburden, raw material, intermediate products, finished products, by-products, or waste products located on the site of such operations], 14 [Nonmetallic Minerals Mining] including active or inactive mining operations. Inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator;~~

~~(iv) Hazardous waste treatment, storage, or disposal facilities;~~

~~(v) Landfills, land application sites, and open dumps that have received any industrial wastes (waste that is received from any of the facilities described under this Subsection);~~

~~(vi) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but not limited to those classified as Standard Industrial Classification 5015 [Motor Vehicle Parts, Used] and 5093 [Scrap & Waste Materials], but not including recycling collection centers consisting solely of "igloos" or similar structures;~~

~~(vii) Steam electric power generating facilities, including coal handling sites;~~

~~Transportation facilities classified as Standard Industrial Classifications 40 [Railroad Transportation], 41 [Local & Suburban Transits], 42 [Motor Freight & Warehousing] except 4221 [Farm Product Warehousing & Storage]; 4222 [Refrigerated Warehousing & Storage]; 4225 [General~~

Warehousing & Storage]; 43 [U.S. Postal Service] 44 [Water Transportation], and 45 [Transportation by Air] and 5171 [Bulk Petroleum Terminals]. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (i) through (vii) or (ix) through (xi) of this Subsection are associated with industrial activity;

Treatment works with a design flow of one million gallons per day or more treating domestic sewage or any other sewage sludge or waste water treatment device or system, used in storage, treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, or required to have an approved pretreatment program under 7 Del. C §6033. Not included are farm lands, domestic gardens, or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with 40 C.F.F §503.

Construction activity including clearing, grading, and excavation activities.

(xi) Facilities under Standard Industrial Classifications 20 [Food & Kindred Products]; 21 [Tobacco Products]; 22 [Textile Mill Products]; 23 [Apparel & Other Finished Products Made From Fabrics & Similar Materials]; 2434 [Wood Kitchen Cabinets]; 25 [Furniture & Fixtures]; 265 [Paperboard Containers & Boxes]; 267 [Converted Paper & Paperboard Products]; 27 [Printing, Publishing & Allied Industries]; 283 [Drugs]; 285 [Paints, Varnishes, Lacquers, Enamels, & Allied Products]; 30 [Rubber & Miscellaneous Plastics Products]; 31 [Leather & Leather Products] except 311 [Leather Tanning & Finishing]; 323 [Glass Products, Made of Purchased Glass]; 34 [Fabricated Metal Products] except 3441 [Fabricated Structural Metal Products]; 35 [Industrial & Commercial Machinery & Computer Equipment]; 36 [Electronic & Other Electrical Equipment & Components, Except Computer Equipment]; 37 [Transportation Equipment] except 373 [Ship & Boat Building & Repairing]; 38 [Measuring, Analyzing & Controlling Instruments/Photographic, Medical and Optical Goods/Watches & Clocks]; 39 [Miscellaneous Manufacturing Industries]; 4221 [Farm Product Warehousing & Storage]; 4222 [Refrigerated Warehousing & Storage]; 4225 [General Warehousing & Storage]; (and which are not otherwise included within categories (i) through (x)).

A. Coverage Under This Subsection

Storm water discharges from facilities engaging in industrial activities are point source discharges of pollutants and are subject to the National Pollutant Discharge Elimination System (NPDES) Permit Program requirements of Section 6 of the State of Delaware "Regulations Governing the Control of Water Pollution." Section 6 requires storm water discharges associated with industrial activities to comply with the requirements set forth within this Subsection. This Subsection does not include discharges from facilities or activities excluded from the NPDES Program, as identified by Section 6.

1. Permit Coverage

Coverage under this Subsection authorizes discharges of storm water associated with industrial activities from regulated facilities to waters of the State or to municipal separate storm sewer systems (MS4s). Private entities, State and local government facilities are required to obtain coverage under this Subsection for both new and existing facilities. Storm water discharges that must be covered under this Subsection include, but are not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling activities; refuse sites; sites used for the application or disposal of process waste waters (as defined at 40 CFR §401); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and finished products; and areas where industrial activity has taken place in the past and Industrial Materials remain.

This Subsection contains effluent limitations and requirements applicable to industrial activities that are eligible for coverage.

2. Permit Applicability

Owners or operators of facilities identified in subparagraphs a. and b. below must obtain authorization to discharge storm water under this Subsection (The General Permit Program). Unless otherwise precluded, such facilities are eligible for coverage under this Subsection. Commercial facilities that do not perform any of the activities identified in subparagraphs a. and b. are not required to obtain coverage unless specifically designated in writing by the Director as a Sector "AD" facility.

a. Construction Activities: Construction activities including clearing, grading, and excavation activities;

b. Industrial Activities: Coverage under this Subsection may be obtained to authorize discharges of storm

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water associated with industrial activities, and certain other non-storm water discharges (see §9.1.01.7), from the following sectors. Industrial activities are grouped into thirty sectors of similar activities based on either Standard

Industrial Classification (SIC) codes or Industrial Activity Codes. References to “sectors” in this Subsection refer to these sectors.

SIC Code or Activity Code	ACTIVITY REPRESENTED
Sector A: Timber Products	
2421	General Sawmills and Planning Mills
2491	Wood Preserving
2411	Log Storage and Handling
2426	Hardwood Dimension and Flooring Mills
2429	Special Product Sawmills, Not Elsewhere Classified
2431-2439 (except 2434)	Millwork, Veneer, Plywood and Structural Wood
2448, 2449	Wood Containers
2451, 2452	Wood Buildings and Mobile Homes
2493	Reconstituted Wood Products
2499	Wood Products, Not Elsewhere Classified
Sector B: Paper and Allied Products	
2611	Pulp Mills
2621	Paper Mills
2631	Paperboard Mills
2652-2657	Paperboard Containers and Boxes
2671-2679	Converted Paper and Paperboard Products, Except Containers and Boxes
Sector C: Chemical and Allied Products	
2812-2819	Industrial Inorganic Chemicals
2821-2824	Plastics Materials and Synthetic Resins, Synthetic Rubber, Cellulosic and Other Manmade Fibers Except Glass
2833-2836	Medicinal Chemicals and Botanical Products, Pharmaceutical Preparations, Invitro and In vivo Diagnostic Substances and Biological Products Except Diagnostic Substances
2841-2844	Soaps, Detergents and Cleaning Preparations, Perfumes, Cosmetics and Other Toilet Preparations
2851	Paints, Varnishes, Lacquers, Enamels and Allied Products
2861-2869	Industrial Organic Chemicals
2873-2879	Agricultural Chemicals (including facilities that make fertilizer solely from leather scraps and leather dust)
2891-2899	Miscellaneous Chemical Products
3952 (limited to list)	Inks and Paints, Including China Painting Enamels, India Ink, Drawing Ink, Platinum Paints for Burnt Wood or Leather Work, Paints for China Painting, Artist's Paints and Artist's Watercolors
Sector D: Asphalt Paving and Roofing Materials and Lubricants	
2951, 2952	Asphalt Paving and Roofing Materials
2992, 2999	Miscellaneous Products of Petroleum and Coal
Sector E: Glass Clay, Cement, Concrete and Gypsum Products	
3211	Flat Glass
3221, 3229	Glass and Glassware, Pressed or Blown
3231	Glass Products Made of Purchased Glass
3281	Cut Stone and Stone Products
3291-3292	Abrasive and Asbestos Products
3296	Mineral Wool
3299	Nonmetallic Mineral Products, Not Elsewhere Classified
3241	Hydraulic Cement
3251-3259	Structural Clay Products
3261-3269	Pottery and Related Products

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3297	Non-Clay Refractories
3271-3275	Concrete, Gypsum and Plaster Products
3295	Minerals and Earth's, Ground or Otherwise Treated
Sector F: Primary Metals	
3312-3317	Steel Works, Blast Furnaces and Rolling and Finishing Mills
3321-3325	Iron and Steel Foundries
3331-3339	Primary Smelting and Refining of Nonferrous Metals
3341	Secondary Smelting and Refining of Nonferrous Metals
3351-3357	Rolling, Drawing, and Extruding of Nonferrous Metals
3363-3369	Nonferrous Foundries (Casting)
3398, 3399	Miscellaneous Primary Metal Products
Sector G: Metal Mining (Ore Mining and Dressing)	
1011	Iron Ores
1021	Copper Ores
1031	Lead and Zinc Ores
1041, 1044	Gold and Silver Ores
1061	Ferrous Alloy Ores, Except Vanadium
1081	Metal Mining Services
1094, 1099	Miscellaneous Metal Ores
Sector H: Coal Mines and Coal Mining Related Facilities	
1221-1241	Coal Mines and Coal Mining-Related Facilities
Sector I: Oil and Gas Extraction and Refining	
1311	Crude Petroleum and Natural Gas
1321	Natural Gas Liquids
1381-1389	Oil and Gas Field Services
2911	Petroleum Refineries
Sector J: Mineral Mining and Dressing	
1411	Dimension Stone
1422-1429	Crushed and Broken Stone, Including Rip Rap
1481	Nonmetallic Minerals Services, Except Fuels
1442, 1446	Sand and Gravel
1455, 1459	Clay, Ceramic and Refractory Minerals
1474-1479	Chemical and Fertilizer Mineral Mining
1499	Miscellaneous Nonmetallic Minerals, Except Fuels
Sector K: Hazardous Waste Treatment, Storage, or Disposal Facilities	
HZ	Hazardous Waste Treatment, Storage, or Disposal Facilities <u>subject to the "Delaware Regulations Governing Solid Waste" (DRGSW)</u>
Sector L: Landfills and Land Application Sites	
LF	Landfills, Land Application Sites and Open Dumps that <u>receive or</u> have received any industrial wastes (waste that is received from any of the facilities described under this Subsection) <u>subject to the DRGSW.</u>
Sector M: Automobile Salvage Yards*	
5015	Automobile Salvage Yards
Sector N: Scrap Recycling Facilities*	
5093	Scrap Recycling Facilities
Sector O: Steam Electric Generating Facilities	
SE	Steam Electric Generating Facilities
Sector P: Land Transportation and Warehousing**	
4011, 4013	Railroad Transportation
4111-4173	Local and Highway Passenger Transportation
4212-4231	Motor Freight Transportation and Warehousing
4311	United States Postal Service
5171	Petroleum Bulk Stations and Terminals
Sector Q: Water Transportation**	

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4412-4499	Water Transportation
Sector R: Ship and Boat Building or Repairing Yards	
3731, 3732	Ship and Boat Building or Repairing Yards
Sector S: Air Transportation	
4512-4581	Air Transportation Facilities
Sector T: Treatment Works***	
TW	Treatment Works
Sector U: Food and Kindred Products	
2011-2015	Meat Products
2021-2026	Dairy Products
2032	Canned, Frozen and Preserved Fruits, Vegetables and Food Specialties
2041-2048	Grain Mill Products
2051-2053	Bakery Products
2061-2068	Sugar and Confectionary Products
2074-2079	Fats and Oils
2082-2087	Beverages
2091-2099	Miscellaneous Food Preparations and Kindred Products
2111-2141	Tobacco Products
Sector V: Textile Mills, Apparel, and Other Fabric Product Manufacturing, Leather and Leather Products	
2211-2299	Textile Mill Products
2311-2399	Apparel and Other Finished Products Made From Fabrics and Similar Materials
3131-3199 (except 3111)	Leather Products
Sector W: Furniture and Fixtures	
2511-2599	Furniture and Fixtures
2434	Wood Kitchen Cabinets
Sector X: Printing and Publishing	
2711-2796	Printing, Publishing, and Allied Industries
Sector Y: Rubber, Miscellaneous Plastic Products and Miscellaneous Manufacturing Industries	
3011	Tires and Inner Tubes
3021	Rubber and Plastics Footwear
3052, 3053	Gaskets, Packing and Sealing Devices, and Rubber and Plastics Hose and Belting
3061, 3069	Fabricated Rubber Products, Not Elsewhere Classified
3081-3089	Miscellaneous Plastics Products
3931	Musical Instruments
3942-3949	Dolls, Toys, Games and Sporting and Athletic Goods
3951-3955 (except 3952 facilities as specified in Sector C)	Pens, Pencils, and Other Artists' Materials
3961, 3965	Costume Jewelry, Costume Novelties, Buttons and Miscellaneous Notions, Except Precious Metals
3991-3999	Miscellaneous Manufacturing Industries
Sector Z: Leather Tanning and Finishing	
3111	Leather Tanning and Finishing
Sector AA: Fabricated Metal Products	
3411-3499	Fabricated Metal Products, Except Machinery and Transportation Equipment and Cutting, Engraving and Allied Services
3911-3915	Jewelry, Silverware and Plated Ware
3479	Coating, Engraving and Allied Services
Sector AB: Transportation Equipment, Industrial or Commercial Machinery	
3511-3599 (except 3571, 3579)	Industrial and Commercial Machinery (Except Computer and Office Equipment – see Sector AC)
3711-3799 (except 3731, 3732)	Transportation Equipment (Except Ship and Boat Building and Repairing – see Sector R)

Sector AC: Electronic, Electrical, Photographic and Optical Goods	
3612-3699	Electronic, Electrical Equipment and Components, Except Computer Equipment
3812-3873	Measuring, Analyzing and Controlling Instrument, Photographic and Optical Goods, Watches and Clocks
3571-3579	Computer and Office Equipment
Sector AD: Non-Classified Facilities	
N/A	Other storm water discharges designated by the Department as needing a permit or any facility discharging storm water associated with industrial activities not described by any of Sectors A-AC. Note: Facilities may not elect to be covered under Sector AD. Only the Department may assign a facility to Sector AD.
* Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers and salvage yards, including but not limited to those classified as Standard Industrial Classification codes 5015 [Motor Vehicle Parts, Used] and 5093 [Scrap & Waste Materials], but not including recycling collection centers consisting solely of "igloos" or similar structures.	
** Only those portions of the facility that are involved in vehicle maintenance activities (including vehicle rehabilitation, mechanical repairs, painting, fueling and lubrication), equipment cleaning operations, and/or airport deicing operations are associated with industrial activity.	
*** Treatment works with a design flow of one (1) million gallons per day or more treating domestic sewage or any other sewage sludge or waste water treatment device or system, used in the storage, treatment, recycling and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, or required to have an approved pretreatment program under 7 Del. C. §6033. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with 40 C.F.R. §503.	

3. Co-Located Activities

Facilities conducting industrial activities identified by two (2) or more sectors indicated in subparagraph b. above, must comply with all applicable sector-specific requirements indicated in this Subsection. The extra sector-specific requirements apply only to areas of the facility where the extra-sector activities occur.

B. Eligibility

The following discharges and activities are eligible for coverage under this Subsection (NPDES General Permit Program).

1 This Subsection covers All new and existing discharges that are composed in whole or in part of storm water associated with industrial activities. This includes any inactive industrial facility where Industrial Materials remain on-site and are exposed to storm water.

2. Facilities with existing individual NPDES permits for discharges other than storm water, may be are covered by this Subsection, for any storm water discharges not covered by the existing individual NPDES permit. For those facilities, coverage under this Subsection shall exist until amendments which fully address storm water discharges can be made to the existing individual NPDES permits.

3. Facilities with individual NPDES permits which do not fully address storm water are covered by this Subsection Regulation until amendments which fully

~~address storm water can be made to on the existing individual NPDES permits.~~

4.3. No person shall discharge storm water associated with an industrial activity except as authorized by an individual NPDES permit or this Subsection. Part 1 of this Subsection shall apply to all discharges of storm water associated with industrial activities. Parts 2 through 14 of this Subsection shall apply to construction activities certain categories of industrial activity and modifies certain parts of Part 1 and/or add requirements for certain specified industrial activities. Coverage under this Subsection Authorization can be obtained through this Subsection by submitting a Notice of Intent (NOI) Form in accordance with the respective Part of this Subsection. Once coverage under through this Subsection has been obtained, the person is authorized to discharge storm water only from the specific outfalls that were listed location indicated on the submitted NOI form.

C. Limits on Eligibility

The following discharges and activities are not eligible for coverage under this Subsection (General Permit Program).

1. Discharges of storm water associated with industrial activities fully addressed by facilities with individual NPDES permits, which fully address storm water discharges associated with the industrial activity at the facility.

2. Activities that have been determined by the Secretary to be significant contributors of a pollutant to storm water runoff and required to be covered under an individual NPDES permit.

3. Discharges of pollutants occurring in watersheds for which there is a Total Maximum Daily Load (TMDL) allocation for associated water bodies are not eligible for coverage under this Subsection unless the facility has an approved Storm Water Plan (SWP) that is shown to reduce pollutant loading to the level required by the TMDL or to the maximum extent practicable. To be eligible for coverage under this Subsection, the facility must incorporate into their SWP any conditions applicable to their discharges necessary for consistency with any TMDL implementation plan for achieving State surface water quality standards. For discharges not eligible for coverage under this Subsection, the discharger must apply for and receive an individual NPDES Permit.

4. Discharges of pollutants in quantities that would cause or contribute to an exceedance of any applicable surface water quality standard for the receiving waters, the discharger must apply for and receive an individual NPDES Permit, including:

a. Discharges of substances or materials in amounts that are toxic, or that would be toxic to humans, fish, aquatic life, or wildlife;

b. Discharges of floatable debris, oils, scum, foam, or grease in other than trace amounts. Excluded from this are naturally occurring substances such as leaves and twigs provided no person has placed such substances in or near the discharges; and

c. Discharges that cause or contribute to degradation or loss of State designated beneficial uses of the receiving waters and violation of State water quality standards.

5. Discharges of materials other than storm water are prohibited and are not authorized by this Subsection.

D. Requesting an Individual NPDES Permit Coverage or Coverage under an Alternative Regulation of this Subsection

1. Any person covered by this Subsection may request to seek coverage under an individual NPDES permit by submitting an individual application (Form 1 and Form 2F²³) as prescribed in Section 6 of the "Regulations Governing The Control of Water Pollution." may request to obtain coverage under an individual NPDES permit or Parts 2 through 14 of this Subsection. The person shall submit an individual application (Form 1 and Form 2F) and shall submit in writing the reasons supporting the request or an appropriate Notice Of Intent (NOI). Coverage under this

Subsection will continue until authorization for coverage under ~~alternative regulation is granted~~ or an individual permit has been issued to the person making the request.

* Form 1: NPDES permit application containing general information about the applicant and facility. This form must accompany the NPDES permit application, Form 2F.

Form 2F: NPDES permit application to discharge storm water associated with industrial activities.

2. ~~Part 1 shall no longer apply to any person otherwise subject to it when the person is issued an individual NPDES Storm Water permit for Industrial Activities. Termination of coverage under Part 1 shall occur on the effective date of the individual NPDES Storm Water Permit.~~

3. ~~No person who is otherwise eligible for coverage under Part 1 whose activities are described in Parts 2 through 14 of this Subsection shall discharge storm water except in compliance with Parts 2 through 14. When a person is approved for coverage under Parts 2 through 14 of this Subsection, some provisions of Part 1 may be superseded or replaced by the requirements of that Part. In the event that the requirements of Parts 2 through 14 supersede, replace, amend, or delete any requirement of Part 1, the requirements of Part 2 through 14 shall control.~~

2. The Secretary may require any person covered by this Subsection to submit an application and seek coverage under an individual NPDES permit as described in §9.1.01.1.C.4.

a. The Secretary shall notify a person in writing when an individual permit application is required. The notice shall include a brief statement of the reasons for the decision, an application and a statement setting a deadline for the person to file the application.

b. If a person fails to submit an individual permit application in compliance with a notice from the Secretary, the applicability of this Subsection to the person shall automatically terminate at the end of the day specified for application.

3. When an individual NPDES permit is issued to a person for discharges otherwise covered by this Subsection, the applicability of this Subsection is automatically terminated on the effective date of the individual NPDES permit.

E. Requiring an Individual NPDES Permit

1. The Secretary may require any person covered by Part 1 of this Subsection to obtain either an individual NPDES permit or coverage under Parts 2 through 14 of this Subsection. Any interested citizen may also petition the Secretary to take action under this paragraph. The Secretary may take action when:

a. ~~there is noncompliance with the provisions of this Subsection;~~

b. ~~there is newly demonstrated, higher efficiency control technology or practices applicable to an activity subject to this Subsection;~~

e. ~~the U. S. Environmental Protection Agency develops effluent limitation guidelines for an activity covered by this Subsection;~~

d. ~~this Subsection is no longer appropriate for a discharge or type of activity;~~

e. ~~there is evidence indicating potential or realized impacts on water quality due to any storm water discharge covered by this Subsection; or~~

f. ~~other circumstances merit the application of this Subsection.~~

2. ~~The Secretary shall notify a person in writing when an individual permit application or an alternative NOI is required. The notice shall include a brief statement of the reasons for the decision, an application or appropriate NOI form, and a statement setting a deadline for the person to file the application or NOI. The Secretary shall notify the person in writing that permit coverage has been obtained under an alternative Part of this Subsection once a completed, an alternative NOI has been received by the Department, or that permit coverage under this Subsection shall automatically terminate on the effective date of the individual NPDES permit that is issued to the person.~~

3. ~~If a person fails to submit an individual permit application or an NOI in compliance with a notice from the Secretary, the applicability of Part 1 of this Subsection to the person shall automatically terminate at the end of the day specified for application or NOI submittal.~~

E. Conditional "No Exposure" Exclusion

1. A Conditional "No Exposure" Exclusion from the requirements of §9.1.01.4. (Monitoring) and §9.1.01.5. (Storm Water Plan) of this Subsection is available for industrial facilities whose processes and materials are protected by storm resistant shelters to prevent exposure to rain, snow, snowmelt, and/or runoff, as defined herein. This exclusion is applicable to all industrial categories identified in §9.1.01.1.A.2.b. of this Subsection. To qualify for a Conditional "No Exposure" Exclusion, the facility must submit and receive written Department approval of a "No Exposure" Certification Form. A facility who obtains an approved Conditional "No Exposure" Exclusion is covered under this Subsection, but excluded from having to comply with the requirements of §9.1.01.4. and §9.1.01.5.

2. A "No Exposure" Certification Form must be provided for each facility qualifying for the Conditional "No Exposure" Exclusion. The exclusion is available on a facility-wide basis only, not for individual outfalls.

3. A storm resistant shelter is not required for the following industrial materials and activities:

a. Lidded Dumpsters: Lidded dumpsters containing waste materials, providing the containers are completely covered and there are no holes in the bottom of the container to allow leakage. Industrial refuse and trash that is stored uncovered, however, is considered exposed.

b. Adequately Maintained Vehicles: Adequately maintained vehicles such as trucks, automobiles, forklifts, trailers, or other general purpose vehicles found on-site (but no industrial machinery) which are not leaking or are otherwise a potential source of contaminants.

c. Fueling Activities: Vehicle or vessel maintenance facilities in which the only maintenance activity conducted on-site is vehicle fueling. If the fuel is dispensed from an above ground storage tank, there must be adequate secondary containment for the tank or the tank must be double walled. In addition, a spill containment and clean-up kit must be maintained on-site.

d. Above Ground Storage Tanks: Storm resistant shelters are not required for above ground storage tanks provided the following conditions are met:

1. Above ground storage tanks must be physically separated from and not associated with vehicle maintenance operations;

2. There must be no piping, pumps or other equipment leaking contaminants that could contact storm water;

3. The tanks must be double walled tanks or must be provided with secondary containment. Secondary containment structures must be constructed to hold at least 110% of the entire contents of the tank plus 6 inches to allow for precipitation;

4. Precipitation collected in secondary containment structures must be properly managed; and

5. A spill containment and clean-up kit must be available for personnel dispensing product.

e. Final Products: Final products built and intended for use outdoors (e.g., new cars), provided the final products have not deteriorated or are otherwise a potential source of contaminants. Types of products not qualifying for "no exposure" certification:

1. Products that would be mobilized in storm water discharges (e.g., rock salt);

2. Products which may, when exposed, oxidize, deteriorate, leak, or otherwise be a potential source of contaminants (e.g., junk cars, stockpiled train rails); and

3. Final products which are, in actuality, intermediate products. Intermediate products are those used in composition of yet another product (e.g., sheet metal, tubing and paint used in making tractors). Even if the

intermediate product is final for a manufacturer and destined for incorporation in a final product intended for use outdoors, these products are not allowed to be exposed because they may be chemically treated or are insufficiently impervious to weathering.

4. There are circumstances where permanent, uninterrupted sheltering of industrial activities or materials is not possible. Under such conditions:

a. Materials and activities may be sheltered with temporary covers (e.g., tarpaulins) until permanent enclosure can be achieved; and

b. The "No Exposure" provision does not specify every such situation, but the Secretary can address this issue on a case-by-case basis, i.e., determine if the temporary covers will meet the requirements of §9.1.01.1.E.

5. The "No Exposure" Exclusion is conditional. If there is a change in circumstances that causes the exposure of industrial activities or materials to storm water, the owner/operator is required to comply immediately with all requirements of this Subsection.

6. The Secretary retains the authority to require the facility to comply with the requirements of this Subsection if it is determined that there is exposure at the facility, or that the discharge of storm water is contributing to the violation of water quality standards.

§9.1.01.2 Standard Conditions

A. Entry and Inspection

Any person subject to this Subsection shall allow the Department to:

1. enter the facility subject to this Subsection during standard business hours;

2. inspect and copy at reasonable times, any records that must be kept under the conditions of this Subsection;

3. inspect at reasonable times any facilities or equipment; and

4. perform sampling of the storm water discharges from the site.

B. Signature Requirements

1. All Notice Of Intent (NOI) *Forms and "No Exposure" Certification Forms* shall be signed by:

a. a president, vice-president, secretary or treasurer for a corporation; or

b. a general partner or proprietor for a partnership or sole proprietorship; or

c. a principal executive officer or ranking official for a municipality or public agency.

2. All other reports or information required by this Subsection shall be signed by a person described above

or by a duly authorized representative. A person is a duly authorized representative only if:

a. the authorization is made in writing by the person described above and is submitted to the Department; and

b. the authorization specifies either an individual or position having responsibility for the overall operation of the regulated facility, such as the position of manager, operator, superintendent, or position of equivalent responsibility or an individual or position having overall responsibility of environmental matters (A duly authorized representative may thus be either a named individual or any individual occupying a named position).

3. Any person signing documents in accordance with this Subsection shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for willful violations."

C. Proper Procedures Operation and Maintenance

Any person subject to this Subsection shall at all times properly operate and maintain all facilities, systems and practices of pollution control which are installed, or implemented to achieve compliance with the requirements conditions of this Subsection and with the measures requirements of the Storm Water Plan.

D. Need to Halt or Reduce Activity Not a Defense

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

E. Duty to Mitigate

Any person subject to this Subsection shall take all reasonable steps to minimize or prevent any discharge of pollutants in violation of this Subsection.

F. Duty to Provide Information

The permittee shall furnish to the Secretary, within a reasonable timeframe, any information which the Secretary may request to determine cause for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish to the Secretary upon request, copies of records required to be maintained by this Subsection.

G. Property Rights

Coverage under this Subsection does not convey any property rights of any sort, any exclusive privileges, any authorization to damage, injure or use any private property, any authority to invade personal rights, any authority to violate federal, State, or local laws or regulations, or any taking, condemnation or use of eminent domain against any property owned by third parties. The State does not warrant that the permittee's compliance with this permit and operation under this permit will not cause damage, injury, or use of private property, an invasion of personal rights, or violation of federal, state, or local laws or regulations. The permittee is solely and severably liable for all damage, injury or use of private property, invasion of personal rights, infringement of federal, State, or local laws and regulations, or taking or condemnation of property owned by third parties, which may result from actions taken under the permit.

H. Adverse Impacts

Any person subject to the requirements of this Subsection shall take all reasonable steps to minimize any adverse impact to State waters resulting from noncompliance with this Subsection, including such accelerated or additional monitoring as necessary to determine the nature and extent of the non-complying discharge.

I. Transfers

1. For industrial activities identified in §9.1.01.1.A.2.a. (construction activities), coverage under this Subsection is transferable. Coverage under this Subsection shall be transferred in accordance with the provisions outlined in §9.1.02.

2. For industrial activities identified in §9.1.01.1.A.2.b., coverage under this Subsection is not transferable. When the ownership of a facility changes, the new operator must submit either an NOI Form or "No Exposure" Certification Form within ten (10) days of the change in ownership.

J. Continuation of Regulatory Requirements

The requirements of this Subsection shall continue in force and effect until this Subsection is re-promulgated.

K. Severability

Any portion of this permit that is found to be void, or that is challenged, shall not affect the validity of the various permit requirements that are not void or challenged.

~~**E. L. Other State or Federal Laws**~~

~~Nothing in this Subsection shall be construed to preclude the institution of any legal action or relieve any person subject to this regulation from any responsibilities, liabilities, or penalties established pursuant to any applicable State or Federal law or regulation.~~

~~**F. M. Penalties for Violations**~~

Any person who violates conditions of this Subsection may be subject to penalties in accordance with 7 Del.C. Chapter 40, 7 Del.C. Chapter 60, or both. Violation of this Subsection is also a violation of the Clean Water Act and may be subject to penalties established under that statute.

~~**G. N. Oil and Hazardous Substance Liability**~~

~~Nothing in this Subsection shall preclude the institution of any legal action or relieve any person from any responsibilities, liabilities, or penalties to which a person is or may be subject under 40 C.F.R. Part 117 or 7 Del.C. Chapters 60, 62 or 63.~~

~~**H. Additional Requirements for Salt Storage**~~

~~Storage piles of salt (including pure salt or salt mixed with other materials) shall be enclosed or covered to prevent exposure to precipitation, except for exposure resulting from adding or removing materials from the pile. Dischargers shall demonstrate compliance with this provision as expeditiously as practicable, but in no event later than three years after the date of issuance of this Subsection.~~

§9.1.01.3 Notification

~~A. Any person who intends to obtain coverage for storm water discharges associated with industrial activity through this Subsection, must submit a Notice of Intent (NOI) in accordance with this Subsection. The Notice of Intent should be submitted by certified mail.~~

~~1. Any person intending to obtain coverage through this Subsection for storm water discharges associated with industrial activities, existing before the effective date of this Subsection, must submit an NOI within 90 days after the effective date of this Subsection.~~

~~2. Any person intending to obtain coverage through this Subsection for storm water discharges associated with industrial activities, commencing after the effective date of this Subsection, must submit an NOI at least 180 days prior to the commencement of industrial activities that could potentially impact storm water at the facility listed on the NOI.~~

~~**A. Application For Coverage**~~

~~1. Any person who intends to obtain coverage for storm water discharges associated with industrial activity under through this Subsection, must submit a Notice of Intent (NOI) Form in accordance with this Subsection. For those persons who intend to certify that a condition of "no exposure" exists at their facility, a "No Exposure" Certification Form must be submitted in accordance with this Subsection. Once the submitted documentation has been approved, the permittee will receive a letter either acknowledging coverage under this Subsection or exclusion~~

of coverage under this Subsection. Failure to submit a complete and accurate Form will result in the facility being denied coverage under this Subsection.

2. Where a facility or activity is owned by one person but is operated by another person, it is the operator's duty to submit the NOI Form or the "No Exposure" Certification Form.

3. When ownership changes, the new owner of the facility must submit a new NOI Form or a new "No Exposure" Certification Form consistent with the Transfers provision of §9.1.01.2.I.

B. Deadlines

1. Industrial Activities identified in §9.1.01.1A.2.b., excluding Industrial Activity Codes HZ and LF. Any person intending to obtain coverage under this Subsection for storm water discharges associated with the industrial activities identified in §9.1.01.1A.2.b., excluding those facilities classified as Industrial Activity Codes HZ and LF, shall meet the following deadlines.

a. Facilities Currently Covered Under This Subsection

Coverage will continue for all facilities with existing coverage under this Subsection unless otherwise notified by the Department. Any person intending to obtain a Conditional "No Exposure" Exclusion from the requirements of this Subsection, that presently have and intend to maintain coverage, but will attain a condition of "no exposure" in the future, may submit a "No Exposure" Certification Form at any time during the permit's term following completion of the on-site changes that will result in the condition of "no exposure".

b. Facilities With Coverage Pending

Facilities that submitted NOI Forms for coverage under the previous regulations that were received before the effective date of this Subsection, but processing was incomplete, will be processed for coverage under the reissued Subsection. Those with pending NOI Forms are not required to submit new NOI Forms unless otherwise notified by the Department.

c. New Facilities or Existing Facilities Not Covered Under This Subsection

New facilities and existing facilities that currently are not covered under this Subsection must submit an NOI Form or, if eligible, a "No Exposure" Certification Form to obtain coverage. New facilities shall submit an NOI Form or "No Exposure" Certification Form within 10 days prior to the commencement of industrial activities. Existing facilities shall submit an NOI Form or "No Exposure" Certification Form within 10 days of notification by the Department that coverage is required.

d. Where a facility that has been granted a Conditional "No Exposure" Exclusion proposes changes to its activities that will result in industrial activities or materials being exposed to storm water, the Conditional "No Exposure" Exclusion shall become void. The facility must then obtain full coverage under this Subsection or apply for an individual NPDES permit within 30 days prior to implementing proposed changes.

2. Industrial Activities Classified as Industrial Activity Codes HZ and LF

Any person intending to obtain coverage under this Subsection for storm water discharges associated with the industrial activities identified as Industrial Activity Codes HZ and LF, shall meet the following deadlines.

a. Facilities Currently Covered Under This Subsection

Coverage will continue for all facilities with existing coverage under this Subsection unless otherwise notified by the Department.

b. Facilities With Coverage Pending

Facilities that submitted NOI Forms for coverage under the previous regulations that were received before the effective date of this Subsection, but processing was incomplete, will be processed for coverage under the reissued Subsection. Those with pending NOI Forms are not required to submit new NOI Forms unless otherwise notified by the Department.

c. New Facilities or Existing Facilities Not Covered Under This Subsection

Any person who intends to obtain coverage under this Subsection for storm water discharges associated with the industrial activities classified as Industrial Activity Codes HZ and LF, which commence after the effective date of this Subsection, shall submit a certification that a permit or approval has been obtained in accordance with the "Delaware Regulations Governing Solid Waste" (DRGSW). Activities subject to the DRGSW shall not commence and coverage under this Subsection shall not apply until a permit or approval has been obtained in accordance with the DRGSW.

(1) The requirements of notification will be satisfied when an NOI Form with accompanying information is submitted in accordance with this Subsection.

(2) Persons complying with §9.1.01.3.B.2., shall be considered in compliance with the NOI provisions outlined in §9.1.01.3, B.1.c. of this Subsection.

(3) Persons identified in any plans required by a DRGSW permit or approval shall sign and maintain on-site a copy of the following certification statement before conducting any professional service identified in the plans:

"I certify under penalty of law that I understand the terms and conditions of the Delaware National Pollutant Discharge Elimination System (NPDES) General Permit Regulation for Storm Water Discharges Associated with Activities subject to the DRGSW."

3. Construction Activities

Any person who intends to obtain coverage under this Subsection for storm water discharges associated with the industrial activities described in §9.1.01.1.A.2.a. (construction activities) of this Subsection shall comply with the provisions of §9.1.02. of the Regulations.

B. C. Contents of the Notice of Intent Form

The Notice of Intent (NOI) shall be submitted on a form provided by the Department. ~~The NOI form shall include, but not be limited to, the following information:~~

1. For industrial activities described in §9.1.01.1.A.2.b., the NOI Form shall include, at a minimum, the following information:

a. ~~1.~~ The name of the owner, the facility, facility mailing address and location, if different from the mailing address;

b. ~~2.~~ The latitude and longitude of the facility;

c. ~~3.~~ Up to four Standard Industrial Classification (SIC) codes that best represent the principal products or activities of the facility;

d. ~~4.~~ A brief description of the type of industrial activities conducted and products manufactured at the facility.

e. ~~5.~~ The name, address and telephone number of the individual who is directly responsible for development, implementation, maintenance, and revision of the Storm Water Plan; and

f. ~~6.~~ The name of the receiving waters or municipal storm water system.

g. ~~7.~~ The following certification:

"I certify under penalty of law this document and all attachments were prepared under my direction, or supervision, in accordance with a system designed to assure that qualified personnel gathered and evaluated the information submitted. Based upon my inquiry of the person(s) directly responsible for gathering the information, the information is, to the best of my knowledge, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for willful violations."

6. Whether the facility has participated in a Group application and the EPA number assigned to that Group.

2. For industrial activities described in §9.1.01.1.A.2.a. (construction activities), the NOI Form shall be submitted in accordance with the provisions of §9.1.02.

D. Contents of the "No Exposure" Certification Form

The Conditional "No Exposure" Certification shall be submitted on a form provided by the Department. The "No Exposure" Certification Form shall include, at a minimum, the following information:

1. The name of the owner, the facility, facility mailing address and location (if different from the mailing address);

2. The latitude and longitude of the facility;

3. Up to four Standard Industrial Classification (SIC) Codes that best represent the principal products or activities of the facility;

4. Indication as to whether or not the facility was previously covered under a NPDES storm water permit;

5. Indication as to whether or not the facility paved or roofed over a formerly exposed, pervious area in order to qualify for the Conditional "No Exposure" Exclusion; and

6. An Exposure Checklist. The facility must indicate whether or not the following areas are exposed to precipitation, now or in the foreseeable future. If any of the following areas are or will be exposed to precipitation, the facility is not eligible for the Conditional "No Exposure" Exclusion:

a. Industrial materials used, stored, or cleaned and that remain and are exposed to storm water;

b. Materials or residuals on the ground or in storm water inlets from spills/leaks;

c. Materials or products from past industrial activity;

d. Material handling equipment (except adequately maintained vehicles);

e. Materials or products during loading/unloading or transporting activities;

f. Materials or products stored outdoors (except final products intended for outside use [e.g., new cars] where exposure to storm does not result in the discharge of pollutants).

g. Materials contained in exposed storage drums, barrels, tanks (provided the tanks do not meet the conditions outlined in §9.1.01.E.3.c.), and similar containers;

h. Materials or products handled/stored on roads or railways owned or maintained by the discharger;

i. Waste material (except waste in covered, non-leaking containers [e.g., dumpsters]);

j. Application or disposal or process wastewater (unless otherwise permitted); and

k. Particulate matter or visible deposits of residuals from roof stacks and/or vents not otherwise regulated (i.e., under an air quality control permit) and evident in the storm water outflow.

7. The following certification:

"I certify under penalty of law that there are no discharges of storm water contaminated by exposure to industrial activities or materials from the industrial facility. I understand that I am obligated to submit a "No Exposure" Certification Form as required by the Department. I understand that I must allow the Department to perform inspections to confirm the condition of "no exposure." I understand that I must obtain coverage under a NPDES permit prior to any point source discharge of storm water from the facility."

C.E. Other Additional Information

When any person subject to this Subsection becomes aware that any relevant facts were omitted or submitted incorrectly on the NOI Form, the "No Exposure" Certification Form, or on any other records required by this Subsection, that person shall promptly submit such corrected information to the Department.

D.F. Where to Submit

Persons intending to obtain coverage through this Subsection must submit an NOI to the following address:

1. Persons intending to obtain coverage under this Subsection for industrial activities identified in §9.1.01.1.A.2.b. must submit an NOI Form or "No Exposure" Certification Form to the following address:

Delaware Department of Natural Resources and Environmental Control
Division of Water Resources
Surface Water Discharges Section - NPDES Storm Water Program
89 Kings Highway, Dover, DE 19901

2. Persons intending to obtain coverage under this Subsection for industrial activities identified in §9.1.01.1.A.2.a. (construction activities), must submit an application with accompanying information in accordance with the provisions of §9.1.02. of the Regulations.

G. Failure to Notify

Persons who discharge storm water associated with industrial activity, who fail to notify the Department of their intent to be covered under this Subsection, and who discharge to waters of the State without an individual NPDES permit, are in violation of 7 Del. C. Chapter 60 and the federal Clean Water Act and may be subject to penalties.

§9.1.01.4 Monitoring

A. Persons subject to this Part shall monitor the discharges of storm water associated with industrial activity

as specified below beginning on the effective date of this Subsection:

1. analyze a grab taken within the first half hour of a storm water discharge.

2. allow for two full days of standard operating activities at the facility since the last rainfall event that resulted in runoff from the facility.

3. samples taken shall be representative of the monitored discharge. Sampling and analysis must be conducted according to test procedures approved under 40 C.F.R. Part 136, or an alternative method approved by the Department for this purpose.

4. allow for at least 180 days from the last sample; and

5. analyze samples in accordance with the following parameters:

a. please refer to applicable Part (Parts 2-14) for requirements.

b. Water Priority Chemical Facilities

Facilities that have released a Water Priority Chemical (WPC), (see Appendix A for a list of WPCs) that are subject to §313 of SARA Title III or have WPCs exposed to storm water, are required to sample the storm water discharges associated with the area of the release or exposure. The storm water discharges shall be analyzed for the constituents which will indicate the presence of WPCs as follows:

Discharge Parameter	Units	Frequency	Sample Type
Flow	gal/min	at each sampling	estimated 1-
Indicator #1	2mg/l	2/year	grab
Indicator #2	2mg/l	2/year	grab
Indicator #3	mg/l	2/year	grab

6. Representative Discharge

If any person subject to this Subsection reasonably believes that two or more outfalls discharge storm water substantially identical (based on a consideration of industrial activity, Significant Materials, management practices and activities within the area drained by the outfalls, that person may test the discharges of one of such outfalls and report that the quantitative data also applies to the substantially identical outfalls.

A. Beginning on the effective date of this Subsection, persons conducting industrial activities:

1. identified in §9.1.01.1.A.2.b., excluding those facilities classified as Industrial Activity Codes HZ and LF, shall monitor the discharges of storm water associated with industrial activities as specified by this Part.

2. identified in §9.1.01.1.A.b. as Industrial Activity Codes HZ and LF shall perform monitoring in accordance with the DRGSW.

3. identified in §9.1.01.1.A.2.a. (construction activities) shall perform monitoring in accordance with the provisions of §9.1.02 (Part 2) of this Subsection.

B. Sampling Procedures and Conditions

Storm water must be sampled according to the instructions below.

1. Sample Type

A grab sample shall be collected from a storm water discharge resulting from a storm event that is greater than 0.1 inches of magnitude and that occurs at least 72 hours from the previously measured (greater than 0.1 inch rainfall) storm event. The required 72 hour interval is waived where a preceding measurable storm event did not result in a measurable discharge from the facility. The grab sample shall be taken within the first thirty (30) minutes of a storm water discharge. If it is not practicable to take the sample during the first 30 minutes, sample during the first hour of discharge and indicate why a grab sample during the first 30 minutes was impracticable. The permittee shall also allow for two (2) full days of standard operating activities at the facility since the last rainfall event that resulted in runoff from the facility.

For discharges from holding ponds or other impoundments with a 24-hour or greater retention capability, grab samples of the discharge may be obtained at any time.

2. Sample Location

Sampling is conducted to capture storm water with the greatest exposure to significant sources of pollution. Each distinct point of discharge (outfall) off-site must be sampled and analyzed separately if activities and site conditions that may pollute the storm water are likely to result in discharges that will significantly vary in the concentration or type of pollutants. All samples, except storm water discharges from coal piles, are to be taken as close to the point of discharge as reasonably practical and can be achieved safely. Storm water from coal piles is sampled before the storm water from the coal pile commingles with storm water for other sources.

3. Test Methods

Samples shall be representative of the monitored discharge. Sample collection and analysis must be conducted according to test procedures approved under 40 CFR Part 136, or an alternative method approved by the Department.

4. Representative Discharge

If any person subject to this Part reasonably believes that two or more outfalls discharge storm water substantially identical (based on consideration of industrial activity, Industrial Materials, management practices and activities within the area drained by the outfalls) that person may test the discharges of one of such outfalls and report that

the quantitative data also applies to the substantially identical outfall(s).;

5. Flow Measurement

For each representative sampled storm event, person subject to this Part must provide the following information:

a. the date and duration (in hours) of the storm event(s) sampled;

b. rainfall measurements (in inches) or estimates of runoff (in gallons) of the storm event that generated the sampled runoff;

c. the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and

d. an estimate of the total volume (in gallons) of the discharge sampled.

6. Monitoring Frequency

Persons subject to the monitoring requirements of this Part, shall implement their monitoring program in the first full calendar quarter following submission of the NOI Form. In accordance with §9.1.01.4.C., visual monitoring shall be performed on a quarterly basis and analytical monitoring shall be performed on a semi-annual basis.

C Industry-Specific Monitoring Requirements and Effluent Limitations

Storm water must be sampled according to the instructions below unless persons subject to this Part submit an alternative plan as a modification of coverage and it is approved by the Department. Persons subject to this Part are not required to sample outside of regular business hours or during unsafe conditions. There are three (3) individual and separate categories of monitoring requirements [Visual Monitoring, Benchmark Monitoring and Numeric Effluent Limitations] that a facility may be subject under §9.1.01.4. The monitoring requirements applicable to a facility depend on the types of industrial activities generating storm water runoff from the facility. Persons subject to the monitoring requirements of this Part must review Tables 2.a. through 2.r. below and determine which monitoring requirements apply.

Sector-specific monitoring requirements and limitations are applied discharge by discharge at facilities with co-located activities. Where storm water from the co-located activities are commingled, the monitoring requirements and limitations are additive. Where more than one numeric limitation for a specified parameter applies to a discharge, compliance with the more restrictive limitation is required.

1. Quarterly Visual Monitoring

All facilities required to monitor storm water discharges, must perform and document quarterly visual

examinations of storm water discharges associated with industrial activities from each storm water outfall. The examination(s) must be made at least once in each of the following three-month periods: January through March, April through June, July through September, and October through December. The examination must document observations of color, odor, clarity, floating solids, settled solids, suspended solids, foam, oil sheen and other obvious indicators of storm water pollution. The examination must be performed during daylight hours and must be made of samples collected within the first thirty (30) minutes of when runoff or snowmelt begins discharging from the facility. If no storm event resulted in runoff from the facility during a monitoring quarter, the permittee is excused from visual monitoring for that quarter provided that documentation is included with the monitoring records indicating that no runoff occurred.

2. Analytical Monitoring – Benchmark Monitoring Concentrations and Effluent Limitations

Analytical monitoring is required for the industry sectors or sub-sectors that are determined to have a high potential to discharge a pollutant at concentrations of concern. Facilities conducting industrial activities shall analyze grab samples for the parameters identified in Tables a. through r. below on a semi-annual basis. Monitoring shall be completed at least once in each of the following six-month periods: January through June and July through December. Industry-specific monitoring requirements and limitations are applied discharge by discharge at facilities with co-located activities. Where indicated, monitored results shall be compared to Numeric Effluent Limitations or

Benchmark Monitoring Concentration values. The Numeric Effluent Limitations and Benchmark Monitoring Concentrations are requirements applicable to a facility and depend on the types of industrial activities generating storm water runoff from the facility. The discharge of pollutants at a level more than that identified and authorized by a specified Numeric Effluent Limitation shall constitute a violation of this Part. The Benchmark Monitoring Concentration values represent target pollutant concentrations for a facility to achieve through implementation of its Storm Water Plan (SWP) {§9.1.01.5.}. Analytical results that exceed Benchmark Monitoring Concentration values are not a violation of this Part as these values are not Numeric Effluent Limitations. However, results that exceed a Benchmark Monitoring Concentration value are indications that the storm water discharge could potentially cause, or contribute to causing, water quality impairment in the receiving waterbody. The Benchmark Monitoring Concentration values are also viewed as a level, that if below, the discharge presents little potential for water quality concern.

a. Sector A – General Sawmills and Planning Mills

1. Numeric Effluent Limitation

Facilities identified by SIC code 2411 shall analyze grab samples for the parameters listed in the following table and shall not exceed the indicated Numeric Effluent Limitations. Persons subject to these Numeric Effluent Limitations must be in compliance with these limitations through the duration of coverage.

Parameter	Units	Effluent Limitations
Wet Decking Discharges at Log Storage and Handling Areas (SIC Code 2411)		
Debris (woody material such as bark, twigs, branches, heartwood, or sapwood)	-----	No discharge of debris that will not pass through a 2.54 cm (1 inch) diameter round opening.
pH	standard units	6.0-9.0

(2) Benchmark Monitoring
Facilities identified by SIC codes 2411, 2421, 2426, 2429, 2431-2439 (except 2334), 2448, 2449,

2451, 2452, 2491 and 2593 shall analyze grab samples in accordance with the following parameters:

Parameter	Units	Benchmark Monitoring Concentrations
Log Storage and Handling (SIC Code 2411)		
Total Suspended Solids (TSS)	mg/l	100.0
General Sawmills and Planning Mills (SIC Code 2421)		
Chemical Oxygen Demand (COD)	mg/l	120.0
Total Suspended Solids (TSS)	mg/l	100.0
Total Recoverable Zinc	mg/l	0.117

PROPOSED REGULATIONS

pH	standard units	6.0-9.0
Wood Preserving (SIC Code 2491)		
Total Arsenic	mg/l	0.16854
Total Copper	mg/l	0.0636
pH	standard units	6.0-9.0
Hardwood Dimension and Flooring Mills (SIC Codes 2426, 2429, 2431-2439 (except 2434), 2448, 2449, 2451, 2452, 2499 and 2593)		
Chemical Oxygen Demand (COD)	mg/l	120.0
Total Suspended Solids (TSS)	mg/l	100.0
pH	standard units	6.0-9.0

- b. **Sector B – Paper and Allied Products** Facilities identified by SIC code 2631 shall analyze grab samples in accordance with the following parameters:
Benchmark Monitoring Requirements

Parameter	Units	Benchmark Monitoring Concentrations
Paperboard Mills (SIC Code 2631)		
Chemical Oxygen Demand (COD)	mg/l	120.0
pH	standard units	6.0-9.0

- c. **Sector C – Chemical and Allied Product Manufacturing** following table and shall not exceed the indicated Numeric Effluent Limitations. Persons subject to Numeric Effluent Limitations must be in compliance with these limitations through the duration of coverage.
1. Numeric Effluent Limitations
 Facilities identified by SIC code 2874 shall analyze grab samples for the parameters listed in the

Parameter	Units	Effluent Limitations	
		Daily Maximum	30-Day Average
Phosphate Subcategory of the Fertilizer Manufacturing Point Source Category (SIC Code 2874) – applies to precipitation runoff that, during manufacturing or processing, comes into contact with any raw materials, intermediate product, finished product, by-products or waste product			
Total Phosphorus (as P)	mg/l	105.0	35.0
Fluoride	mg/l	75.0	25.0
pH	standard units	6.0-9.0	

2. Benchmark Monitoring Requirements
 Facilities identified by SIC codes 2812-2819, 2821-2824, 2841-2844 and 2873-2879 shall analyze grab samples in accordance with the following parameters:

Parameter	Units	Benchmark Monitoring Concentrations
Industrial Inorganic Chemicals (SIC Codes 2812-2819)		
Total Recoverable Aluminum	mg/l	0.75
Total Recoverable Iron	mg/l	1.0
Nitrate plus Nitrite Nitrogen	mg/l	0.68
pH	standard units	6.0-9.0
Plastics, Synthetics, and Resins (SIC Codes 2821-2824)		
Total Recoverable Zinc	mg/l	0.117
pH	standard units	6.0-9.0
Soaps, Detergents, Cosmetics, and Perfumes (SIC Codes 2841-2844)		
Nitrate plus Nitrite Nitrogen	mg/l	0.68
Total Recoverable Zinc	mg/l	0.117
pH	standard units	6.0-9.0
Agricultural Chemicals (SIC Codes 2873-2879)		
Nitrate plus Nitrite Nitrogen	Nitrate plus Nitrite Nitrogen	0.68
Total Recoverable Iron	mg/l	1.0

PROPOSED REGULATIONS

Total Recoverable Zinc	mg/l	0.117
Phosphorus	mg/l	2.0
Total Recoverable Lead	mg/l	0.0816
pH	standard units	6.0-9.0

d. Sector D – Asphalt Paving and Roofing Materials and Lubricant Manufacturers

1. Numeric Effluent Limitations
Facilities identified by SIC codes 2951 and 2952 shall analyze grab samples for the parameters

listed in the following table and shall not exceed the indicated Numeric Effluent Limitations. Persons subject to Numeric Effluent Limitations must be in compliance with these limitations through the duration of coverage.

Parameter	Units	Effluent Limitations	
		Daily Maximum	30-Day Average
Discharges from areas where production of asphalt paving and roofing emulsions occurs (SIC Codes 2951 and 2952)			
Total Suspended Solids (TSS)	mg/l	23.0	15.0
Oil and Grease	mg/l	15.0	10.0
pH	standard units	6.0-9.0	

(2) Benchmark Monitoring Requirements

Facilities identified by SIC codes 2951 and 2952 shall analyze grab samples in accordance with the following parameters:

Parameter	Units	Benchmark Monitoring Concentrations
Asphalt Paving and Roofing Materials and Lubricant Manufacturers (SIC Codes 2951 and 2952)		
Total Suspended Solids (TSS)	mg/l	100.0
pH	standard units	6.0-9.0

e. Sector E – Glass, Clay, Cement, Concrete and Gypsum Products

- (1) Numeric Effluent Limitations
Facilities conducting cement manufacturing activities shall analyze grab samples for the

parameters listed in the following table and shall not exceed the indicated Numeric Effluent Limitations. Persons subject to Numeric Effluent Limitations must be in compliance with these limitations through the duration of coverage.

Parameter	Units	Effluent Limitations
		Daily Maximum
Cement Manufacturing Facility, Material Storage Runoff: Any discharge composed of runoff that derives from the storage of materials including raw materials, intermediate products, finished products and waste materials that are used in or derived from the manufacture of cement.		
Total Suspended Solids (TSS)	mg/l	50.0
pH	standard units	6.0-9.0

(2) Benchmark Monitoring Requirements

Facilities identified by SIC codes 3245-3259, 3261-3269 and 3271-3275 shall analyze grab samples in accordance with the following parameters:

Parameter	Units	Benchmark Monitoring Concentrations
Clay Product Manufacturers (SIC Codes 3245-3259 and 3261-3269)		
Total Recoverable Aluminum	mg/l	0.75
pH	standard units	6.0-9.0
Concrete and Gypsum Product Manufacturers (SIC Codes 3271-3275)		
Total Suspended Solids (TSS)	mg/l	100.0
Oil and Grease	mg/l	15.0
Total Recoverable Iron	mg/l	1.0
pH	standard units	6.0-9.0

- f. Sector F – Primary Metals
Benchmark Monitoring Requirements

PROPOSED REGULATIONS

Facilities identified by SIC codes 3312-3317, 3321-3325, 3351-3357 and 3363-3369 shall analyze grab samples in accordance with the following parameters:

Parameter	Units	Benchmark Monitoring Concentrations
Steel Works, Blast Furnaces, and Rolling and Finishing Mills (SIC Codes 3312-3317)		
Total Recoverable Aluminum	mg/l	0.75
Total Recoverable Zinc	mg/l	0.117
pH	standard units	6.0-9.0
Iron and Steel Foundries (SIC Codes 3321-3325)		
Total Recoverable Aluminum	mg/l	0.75
Total Suspended Solids (TSS)	mg/l	100.0
Total Recoverable Copper	mg/l	0.0636
Total Recoverable Iron	mg/l	1.0
Total Recoverable Zinc	mg/l	0.117
pH	standard units	6.0-9.0
Rolling, Drawing, and Extruding of Nonferrous Metals (SIC Codes 3351-3357)		
Total Recoverable Copper	mg/l	0.0636
Total Recoverable Zinc	mg/l	0.117
pH	standard units	6.0-9.0
Nonferrous Foundries (SIC Codes 3363-3369)		
Total Recoverable Copper	mg/l	0.0636
Total Recoverable Zinc	mg/l	0.117
pH	standard units	6.0-9.0

g. Sector J – Mineral Mining and Dressing

1. Numeric Effluent Limitations

Facilities identified by SIC codes 1422-1429, 1442 and 1446 shall analyze grab samples for the parameters listed in the following table and shall not

exceed the indicated Numeric Effluent Limitations. Persons subject to Numeric Effluent Limitations must be in compliance with these limitations through the duration of coverage.

Parameter	Units	Effluent Limitations	
		Daily Maximum	30-Day Average
Mine Dewatering Activities at Construction Sand and Gravel; Industrial Sand; and Crushed Stone Mining Facilities (SIC Codes 1422-1429, 1442 and 1446)			
Total Suspended Solids (TSS)	mg/l	45.0	25.0
pH	standard units	6.0-9.0	

2. Benchmark Monitoring Requirements

Facilities identified by SIC codes 1411, 1422-1429, 1442, 1446, 1481 and 1489 shall analyze grab samples in accordance with the following parameters:

Parameter	Units	Benchmark Monitoring Concentrations
Dimension Stone Crushed and Broken Stone and Nonmetallic Minerals (except fuels)(SIC Codes 1411, 1422-1429, 1481 and 1499)		
Total Suspended Solids (TSS)	mg/l	100.0
pH	standard units	6.0-9.0
Sand and Gravel Mining (SIC Codes 1442 and 1446)		
Nitrate plus Nitrite Nitrogen	mg/l	0.68
Total Suspended Solids (TSS)	mg/l	100.0
pH	standard units	6.0-9.0

h. Sector M – Automobile Salvage Yards

Benchmark Monitoring Requirements

Facilities identified by SIC code 5015 shall analyze grab samples in accordance with the following parameters:

PROPOSED REGULATIONS

Parameter	Units	Benchmark Monitoring Concentrations
Automobile Salvage Yards (SIC Code 5015)		
Total Suspended Solids (TSS)	mg/l	100.0
Total Recoverable Aluminum	mg/l	0.75
Total Recoverable Iron	mg/l	1.0
Oil and Grease	mg/l	15.0
Total Recoverable Lead	mg/l	0.0816
pH	standard units	6.0-9.0

- i. **Sector N – Scrap Recycling and Waste Recycling Facilities** Facilities identified by SIC code 5093 shall analyze grab samples in accordance with the following parameters:
- Benchmark Monitoring Requirements

Parameter	Units	Benchmark Monitoring Concentrations
Scrap Recycling and Waste Recycling Facilities (SIC Code 5093)		
Total Suspended Solids (TSS)	mg/l	100.0
Total Recoverable Aluminum	mg/l	0.750
Total Recoverable Copper	mg/l	0.0636
Total Recoverable Iron	mg/l	1.0
Total Recoverable Lead	mg/l	0.0816
Total Recoverable Zinc	mg/l	0.117
Oil and Grease	mg/l	15.0
Chemical Oxygen Demand (COD)	mg/l	120.0
pH	standard units	6.0-9.0

- j. **Sector O - Steam Electric Generating Facilities** required to analyze grab samples in accordance with the following parameters:
- Benchmark Monitoring Requirements
Facilities identified by Industrial Activity Code SE (Steam Electric Power Generating facilities) are

Parameter	Units	Benchmark Monitoring Concentrations
Steam Electric Generating Facilities (Industrial Activity Code SE)		
Total Recoverable Iron	mg/l	1.0
pH	standard units	6.0-9.0

- k. **Sectors P – Land Transportation and Warehousing** Facilities identified by SIC Codes 4011-4013, 4111-4173, 4212-4273, 4311 and 5171 shall analyze grab samples for the following parameters:
- Benchmark Monitoring Requirements

Parameter	Units	Benchmark Monitoring Concentrations
Land Transportation and Warehousing (SIC Codes 4011-4013, 4111-4173, 4212-4273, 4311 and 5171)		
Oil and Grease	mg/L	15.0
Total Surfactants	mg/L	1.0
Total Suspended Solids	mg/L	100.0
pH	standard units	6.0-9.0

- l. **Sector Q – Water Transportation** Facilities identified by SIC codes 4412-4499 shall analyze grab samples in accordance with the following parameters:
- Benchmark Monitoring Requirements

Parameter	Units	Benchmark Monitoring Concentrations
Water Transportation Facilities (SIC Codes 4412-4499)		

PROPOSED REGULATIONS

Total Recoverable Aluminum	mg/l	0.75
Total Recoverable Iron	mg/l	1.0
Total Recoverable Zinc	mg/l	0.117
Total Recoverable Lead	mg/l	0.0816
pH	standard units	6.0-9.0

m. **Sector S – Air Transportation** Facilities identified by SIC codes 45xx shall analyze grab samples in accordance with the following parameters:
Benchmark Monitoring Requirements

Parameter	Units	Benchmark Monitoring Concentrations
Facilities at airports that use more than 100,000 gallons of glycol-based deicing/anti-icing chemicals and/or 100 tons or more of urea on an average annual basis: monitor only those outfalls from the airport facility that collect runoff from areas where deicing/anti-icing activities occur (SIC Codes 45xx)		
Biochemical Oxygen Demand (BOD ₅)	mg/l	30.0
Ammonia	mg/l	19.0
Chemical Oxygen Demand (COD)	mg/l	120.0
pH	standard units	6.0-9.0

n. **Sector U – Food and Kindred Products** Facilities identified by SIC codes 2041-2048 and 2074-2079 shall analyze grab samples in accordance with the following parameters:
Benchmark Monitoring Requirements

Parameter	Units	Benchmark Monitoring Concentrations
Grain Mill Products (SIC Codes 2041-2048)		
Total Suspended Solids (TSS)	mg/l	100.0
pH	standard units	6.0-9.0
Fats and Oils Products (SIC Codes 2074-2079)		
Biochemical Oxygen Demand (BOD ₅)	mg/l	30.0
Nitrate plus Nitrite Nitrogen	mg/l	0.68
Total Suspended Solids (TSS)	mg/l	100.0
Chemical Oxygen Demand (COD)	mg/l	120.0
pH	standard units	6.0-9.0

o. **Sector Y - Rubber, Miscellaneous Plastic Products and Miscellaneous Manufacturing Industries** Facilities identified by SIC codes 3011-3069 shall analyze grab samples in accordance with the following parameters:
Benchmark Monitoring

Parameter	Units	Benchmark Monitoring Concentrations
Tires and Inner Tubes; Rubber Footwear; Gaskets, Packing and Sealing Devices; Rubber Hose and Belting; and Fabricated Rubber Products, Not Elsewhere Classified (SIC Codes 3011-3069, rubber)		
Total Recoverable Zinc	mg/l	0.117
pH	standard units	6.0-9.0

p. **Sector Z - Leather Tanning and Finishing** Facilities identified by SIC code 3111 shall analyze grab samples in accordance with the following parameters:
Benchmark Monitoring

Parameter	Units	Benchmark Monitoring Concentrations
Leather Tanning and Finishing (SIC Code 3111)		
Total Kjeldahl Nitrogen	mg/l	1.5
pH	standard units	6.0-9.0

PROPOSED REGULATIONS

q. **Sector AA – Fabricated Metal Product**
Benchmark Monitoring

Facilities identified by SIC codes 3411-3471, 3479, 3482-3499 and 3911-3915 shall analyze grab samples in accordance with the following parameters:

Parameter	Units	Benchmark Monitoring Concentrations
Fabricated Metal Products Except Coating (SIC Codes 3411-3471, 3482-3499, 3911-3915)		
Total Recoverable Aluminum	mg/l	0.750
Total Recoverable Iron	mg/l	1.0
Total Recoverable Zinc	mg/l	0.117
Nitrate plus Nitrite Nitrogen	mg/l	0.68
pH	standard units	6.0-9.0
Fabricated Metal Coating and Engraving (SIC Code 3479)		
Total Recoverable Zinc	mg/l	0.117
pH	standard units	6.0-9.0

r. **Coal Pile Runoff**

Facilities that have discharges of storm water from coal storage piles regardless of a facility's sector of industrial activity shall analyze grab samples in accordance with the following parameters and shall not exceed the indicated Numeric Effluent Limitations. The coal

pile runoff must not be diluted with other storm water flows in order to meet the Numeric Effluent Limitations indicated below. Persons subject to Numeric Effluent Limitations must be in compliance with these limitations through the duration of coverage

Parameter	Units	Numeric Effluent Limitation
Coal Pile Runoff		
Total Suspended Solids	mg/l	50.0
pH	standard units	6.0-9.0

~~D.B. Records Keeping of all Sampling and Analysis shall include the following:~~

1. Records of all analytical monitoring shall include the following:

- 1- a. the date, exact place and time of sampling or measurements;
- 2- b. the name(s) of the individual(s) who performed the sampling or measurements as well as the procedures used for sample collection and preservation;
- 3- c. the date and time when the analysis of the samples took place along with the name of the individual(s) who performed the analysis;
- 4- d. references and written procedures, when available, for the analytical techniques or methods used; and
- 5- e. the results of such analyses, including the bench sheets, instrument read-outs, computer disks or tapes, used to determine these results.

f. In the event that analytical results exceed Benchmark Monitoring Concentration values or Numeric Effluent Limitations, the facility shall investigate the cause for such exceedance and the results of this investigation shall be documented. The results of the investigation shall identify potential sources of pollution, additional Best Management Practices (BMPs) necessary, revisions to the Industrial Material Management Section of the SWP, or identify other

areas of the SWP that may require revision in order to meet the goal of the Benchmark Monitoring Concentration values. Background concentrations of specific pollutants may also be considered during the investigation.

2. Records of all quarterly visual monitoring shall include the following:

- a. the date, outfall location and time of examination;
- b. the name(s) of the individual(s) who performed the examination;
- c. the nature of the discharge (i.e., runoff or snowmelt);
- d. visual quality of the storm water discharge (including observations of color, odor, clarity, floating solids, settled solids, suspended solids, foam, oil sheen and other obvious indicators of storm water pollution); and
- e. probable sources of any observed storm water contamination.

E. **Additional Monitoring**

The Secretary may provide written notification to any facility, including those otherwise exempt from sampling requirements, requiring additional storm water monitoring.

F. **Monitoring Waiver**

The Department may waive specific monitoring requirements, as follows:

1. Adverse Climatic Conditions

When the permittee is unable to collect samples or perform visual examinations within a specific sampling period due to adverse climatic conditions, the permittee shall collect a substitute sample from a separate qualifying event in the next sampling period. Adverse weather conditions are those that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc) or otherwise make the collection of a sample impracticable (drought, extended frozen conditions, etc.).

2. Inactive or Unstaffed Facilities

When the permittee is unable to conduct the required monitoring at an inactive or unstaffed facility, the permittee may seek a Department approved waiver from the monitoring requirements as long as the facility remains inactive and unstaffed. The facility must maintain the Department approval letter with its Storm Water Plan (§9.1.01.5.).

3. Benchmark Monitoring Waivers

Waivers from Benchmark Monitoring requirements are available to facilities whose discharges are below benchmark monitoring concentration values. On both a parameter by parameter and outfall by outfall basis, the permittee may petition the Department, after the completion of 4 consecutive sampling events, to be exempted from the subsequent 4 sampling events as long as the permittee provides verification that the following conditions have been met. However, a facility that conducts a significant process change must continue monitoring and may not use previous monitoring to demonstrate consistent attainment.

a. Samples were collected in four (4) consecutive monitoring periods and the parameter concentrations were below the benchmark monitoring concentration values indicated.

b. A waiver request is submitted and approved by the Department. The waiver request should include supporting monitoring data for 4 consecutive monitoring periods and a certification that based on current potential pollutant sources and Best Management Practices (BMPs) used, discharges from the facility are reasonably expected to be essentially the same (or cleaner) compared to when the monitoring for the 4 consecutive periods was completed.

Following the sampling suspension, sampling shall resume as specified in this Part.

5. Representative Discharge

If any person subject to this Subsection reasonably believes that two or more outfalls discharge storm water substantially identical (based on a consideration of industrial activity, Significant Materials, management practices and activities within the area drained by the outfalls) that person

may test the discharges of one of such outfalls and report that the quantitative data also applies to the substantially identical outfalls.

§9.1.01.5 Storm Water Plan (SWP)

Persons covered by this Subsection shall develop and administer a Storm Water Plan (SWP). The goal of developing and administering the SWP is to create a program for continually assessing the potential for Significant Materials to be exposed to precipitation and storm water run-on, implementing and maintaining practices which eliminate or minimize the transport of Significant Materials from the facility by storm water runoff, as well as reviewing the success of the implemented practices and amending the SWP when appropriate.

A. Persons covered by this Subsection:

1. Who engage in industrial activities identified in §9.1.01.1.A.2.b., excluding those facilities classified as Industrial Activity Codes HZ and LF, shall develop and continually implement ~~administer~~ a Storm Water Plan (SWP). The SWP shall identify potential sources of pollutants, which may reasonably be expected to affect the quality of storm water discharges associated with industrial activities from a facility. In addition, the SWP shall describe and ensure the implementation of practices and programs which are used to reduce or eliminate the pollutants in storm water discharges associated with industrial activity at a facility and to assure compliance with the terms and conditions of this Subsection. The goal of developing and administering the SWP is to create a program for continually assessing the potential for Significant Materials to be exposed to precipitation and storm water run-on, implementing and maintaining practices which eliminate or minimize the transport of Significant Materials from the facility by storm water runoff, as well as reviewing the success of the implemented practices and amending the SWP when appropriate.

2. Who engage in industrial activities identified as Industrial Activity Codes HZ and LF shall, in place of the SWP, maintain at the site/central location of activities subject to the "Delaware Regulations Governing Solid Waste" (DRGSW), any certifications and/or approved plans for complying with the DRGSW.

3. Who engage in industrial activities identified by §9.1.01.1.A.2.a. (construction activities), shall comply with the provisions of §9.1.02.5. (Sediment and Stormwater Plan) of the Regulations.

B. Facilities must implement §9.1.01.5 as a condition of this Subsection.

B.C. The SWP shall be signed in accordance with this Subsection Part and maintained kept at the facility.

C. Persons covered by this Subsection shall retain records of all information required by the SWP (i.e., monitoring results, inspection reports, and any other documentation of compliance with this Subsection) for a minimum of five (5) years.

D. SWP Deadlines

1. Existing Facilities

a. Persons covered by this Subsection shall comply with the following deadlines unless granted a different deadline by any of Parts 2 through 14:

(1) develop a SWP within 90 days of the effective date; and

(2) initiate implementation of the SWP within 180 days of the effective date.

b. Persons Not Covered by Any of Parts 2 through 14

(1) Persons with a current NOI on file at the Department shall maintain the existing SWP. Persons subject only to Part 1 shall continue to implement the existing SWP unless informed of SWP deficiencies in writing by the Department.

(2) Persons without a current NOI on file at the Department shall develop a SWP in accordance with this Part. Persons without a current NOI on file at the Department shall submit the SWP to the Department for review within 60 days of the effective date of these Regulations. The SWP shall be implemented within 60 days after the date of approval.

2. New Facilities

Facilities which were not engaged in industrial activity prior to the effective date shall be required to develop a SWP 90 days before the start of industrial operations at the facility. Full implementation of the SWP shall coincide with the start of industrial activity at the facility.

D. Keeping the SWP Current

Persons covered by this Subsection shall amend the SWP whenever:

1. there is a change in the design, construction, operation, or maintenance of activities associated with industrial activities conducted at the facility, which has a significant effect on the potential for the discharge of pollutants to the waters of the State;

2. the SWP proves to be ineffective in eliminating or significantly minimizing pollutants from Industrial Materials identified in §9.1.01.5.G2.c., or in otherwise achieving the general objectives of controlling pollutants in storm water discharges associated with industrial activity;

3. any sources or potential sources of pollution identified as a result of a facility's Inspection Program pursuant to §9.1.01.5. G4.; or

4. notified by this Department that the SWP does not adequately address the requirements of this Subsection, persons subject to this Subsection shall amend the SWP and submit these amendments to this Department within 30 days of notification. The notification from the Department shall list and describe deficiencies of the SWP. The Department may grant additional time for amending the SWP. This extension must be obtained from the Department in writing.

E. Failure to Prepare or Amend the SWP

In no event shall failure to complete or update a SWP in accordance with this Part relieve any persons covered under this Subsection of responsibility to implement actions required to protect the waters of the State, complete any actions that would have been required by such Storm Water Plan and to comply with all conditions of this Subsection.

F. SWP Deadlines

1. Existing Facilities

a. Facilities that were covered under the 1998 regulation who are continuing coverage under this Subsection shall update and implement any revisions to the SWP within 45 days of the effective date of this Subsection. Once updated, the SWP shall be submitted to the Department for review.

b. Where the owner of an existing facility that is covered by this permit changes, the new owner of the facility must update and implement any revisions to the SWP within 30 days of the ownership change.

2. New Facilities

New facilities, facilities covered by an individual permit, and existing facilities not currently covered by a NPDES permit who elect to be covered under this Subsection must prepare and implement the SWP prior to submitting the NOI Form. The SWP must be submitted with the NOI form.

3. Extensions

Upon a showing of good cause, the Director may establish a later date in writing for the preparation and compliance with the SWP.

E.G. Contents of the SWP

Persons covered by this Subsection shall comply with the following requirements when developing and administering the SWP. The SWP shall include at a minimum, but not be limited to, the following items:

1. Facility Identification

The name, address, and telephone number of the individual who is responsible for development, implementation, maintenance and revision of the SWP.

2. Facility Assessment

a. Facility Description:-

A narrative description must be developed to describe all activities and potential sources of pollutants that may reasonably be expected to add pollutants to storm water discharges or that may result in dry weather discharges from the storm water conveyance system. Examples include the following activities and potential sources when they are exposed to storm water:

1. loading and unloading areas (including areas where chemicals and other materials are transferred);

2. outdoor storage areas;

3. outdoor processing areas;

4. dust producing activities;

5. on-site waste disposal;

6. vehicle/equipment maintenance, cleaning and fueling areas;

7. liquid storage tanks;

8. railroad sidings, tracks, and rail cars;

and

9. other.

Ab. A Map of the Facility

All markings, delineations and designations on the map shall be clearly identifiable. A narrative description of the markings, delineations and designations shall accompany the facility map. The map shall identify:

1. all of the buildings at the facility;

2. the areas where Significant Industrial Materials are stored, handled or used in processes and the types of Significant Industrial Materials associated with each areas;

3. the drainage areas associated with each storm water discharge from the facility/site and the associated ground cover;

4. all storm water related drainage and discharge structures including all conveyances systems and appurtenances;

5. any structural storm water controls (i.e. detention basins, secondary containment, storm water diversions);

6. all surface waters that receive storm water discharges from the facility;

7. directions of storm water flow;

8. locations of the following activities where such activities are exposed to precipitation: fueling stations, vehicle and equipment maintenance and/or cleaning areas, loading/unloading areas, locations used for the treatment, storage or disposal of wastes and liquid storage tanks;

9. locations of non-storm water discharges;

10. locations of the following activities where such activities are exposed to precipitation: processing and storage areas, access roads, rail cars and tracks, the location of transfer of substance in bulk and machinery;

11. location and source of runoff from adjacent property containing significant quantities of pollutants of concern to the facility (an evaluation of how the quality of the storm water running onto your facility impacts your storm water discharges may be included); and

12. locations of where major spills or leaks have occurred.

b.c. An Inventory of Industrial Significant Materials

An estimate of the yearly quantities of Industrial Significant Materials handled by the facility, unless subject to ~~only~~ Part 2. This inventory of materials shall ~~will~~ list all of the types of materials handled at the site that potentially may be exposed to precipitation or runoff and that may be transported off-site or that may contaminate storm water. ~~could result in storm water.~~

e.d. An Inventory of Spills and Leaks

Clearly identify areas where potential spills and leaks, which can contribute pollutants to storm water discharges, can occur and their accompanying drainage points. A list of substantial spills, leaks or residual deposits of Significant Industrial Materials that have occurred within the last three years in areas that are exposed to precipitation or that otherwise drain to a storm water conveyance at the facility. The list shall be updated annually unless subject to Part 2.

3. Industrial Significant Material Management

The Storm Water Plan shall ~~contain, but not be limited to,~~ language which identifies and describes the practices which will be implemented by the permitted in order to conform with the following requirements unless subject to any of Parts 2 through 14: describe storm water management controls appropriate for a facility and implementation of such controls. The appropriateness for implementing controls listed in the SWP must reflect identified potential sources of pollutants at the facility. The SWP must describe the location of existing non-structural and structural controls selected for the areas where industrial materials or activities are exposed to storm water. For areas where controls are not currently in place, the SWP must describe appropriate controls that will be used to control pollutants in storm water discharges.

The description of storm water management controls must, at a minimum, address the following and provide a reasonable schedule for implementing such controls:

~~a. Non-structural control practices implemented to eliminate or minimize the exposure of Significant Materials to precipitation and storm water run-on during handling, transferring and shipping of Significant Material;~~

a. Good Housekeeping Practices

The SWP shall identify the practices/programs used to define the ongoing maintenance and clean-up, as appropriate, of areas which may contribute pollutants to storm water discharges.

~~b. Structural Controls, when needed, to store, cover, enclose, contain, trap or treat Significant Materials or storm water containing Significant Materials;~~

b. Preventative Maintenance Program

The SWP shall include a program that identifies qualified facility personnel to conduct inspections and maintenance of storm water management devices (structural controls) as well as inspections, testing, maintaining and repairing facility equipment and systems to avoid breakdowns and failures that may result in the exposure of industrial materials to storm water. A set of tracking or follow-up procedures shall be used to ensure that appropriate actions are taken in response to the inspections. A log of inspections and any actions taken shall be maintained on-site.

c. Spill Prevention and Response Measures

The SWP must describe the procedures that will be followed for cleaning up spills or leaks. The procedures and necessary spill response equipment must be made available to those employees who may cause or detect a spill or leak. Where appropriate, the plan must include an explanation of existing or planned material handling procedures, storage requirements, secondary containment, and equipment (e.g., diversion valves) that are intended to minimize spills or leaks at the facility. If applicable, a the spill response plan which shall addresses prevention and minimization of releases of oil and hazardous material into the storm water system. When required, the management of oil and hazardous material shall be performed in accordance with 40 CFR Part 117 and 7 Del. C. Chapters 60, 62, and 63.

The SWP shall identify a team of individuals responsible for implementing spill response procedures. Personnel identified as the spill response team are responsible for follow-up inspections to ensure that spills have been properly handled to meet environmental and safety standards.

d. Maintenance

~~A maintenance program shall describe a schedule of inspections in order to prevent or correct any functional deficiencies of management devices or equipment used to control or prevent the transport of pollutants from the facility~~

~~by storm water including any equipment that has the potential to release pollutants to the storm water system as a result of failure or breakdown.~~

Qualified facility personnel shall be identified to inspect designated equipment and areas of the facility at appropriate intervals specified in the SWP. A set of tracking or follow-up procedures shall be used to ensure that appropriate actions are taken in response to the inspections. A log of inspections and any actions taken shall be maintained at the site.

d. Minimizing Exposure

Where practicable, industrial materials and activities should be protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt or runoff.

e. Erosion Control Practices

All facilities must evaluate the risk of soil erosion on their site that could contaminate storm water. At a minimum, the SWP must include a narrative that describes whether there is reasonable potential for soil erosion of a significant amount at the site. Where reasonable potential exist, the permittee must include BMPs to prevent or minimize the potential for soil erosion on-site.

f. Best Management Practices

The SWP shall include a section that establishes BMPs to reduce the discharge and potential discharge of pollutants in storm water. Appendix B includes a list of BMPs for specific industrial activities. Facilities conducting activities described in Appendix B shall implement the corresponding BMPs, as appropriate. Those BMPs listed are considered the minimum set of required structural BMPs for a specific industrial activity. The permittee may select equivalent BMPs that provide the same result as those listed.

Nothing in Appendix B is intended to preclude the application of innovative treatment, source control, reduction or recycle, or operational BMPs that are not identified by this Part. The permittee may substitute equivalent/superior BMPs for those listed in Appendix B but must document the basis for the substitution in the SWP, and the permittee assumes the liability if the BMPs are not equivalent/superior to the SWP. Additional BMPs beyond those identified in Appendix B could be necessary to achieve compliance with standards. However, treatment BMPs that include the addition of chemicals to provide treatment must be approved by the Department prior to implementation.

g. Additional Requirements for Salt Storage

The SWP shall provide that storage piles of salt (including pure salt or salt mixed with other materials) shall be enclosed or covered to prevent exposure to precipitation, except for exposure resulting from adding or removing materials from the pile.

h. Management of Runoff

The SWP must contain a narrative assessment of the appropriateness of all existing storm water management controls and practices at the facility. Based on an assessment of the potential of various sources at the site to contribute pollutants to storm water discharges, the SWP must provide that storm water management controls, determined to be reasonable and appropriate, are implemented and maintained.

i Off-Site Vehicle Tracking

Off-site vehicle tracking of raw, final, or waste materials or sediments, and the generation of dust must be minimized. Tracking or blowing of raw, final, or waste materials from areas of no exposure to exposed areas must be minimized.

4. Interim Significant Material Management Practices

During the time between the effective date of this Part and the date when any of §9.1.01.5, E.3.a.b., c., or d. are completed, all Significant Materials shall be managed in a responsible manner.

4. Inspections. The SWP shall detail the following inspection programs. Results of each inspection shall be maintained with the SWP.

a. Routine Inspections

The facility shall conduct routine inspections of the equipment and areas of the facility designated in the SWP. The SWP shall identify the frequency for which these inspections are conducted. At a minimum, routine inspections shall be conducted once per quarter. These inspections shall ensure the proper operation of plant equipment and storm water controls. A set of tracking or follow-up procedures shall be used to ensure that appropriate actions are taken in response to the inspections. Records of inspections shall be maintained with the SWP. Any deficiencies noted shall be corrected as soon as practicable, but no later than 14 days after the inspection.

b. Comprehensive Site Evaluations

Persons subject to this Part shall conduct comprehensive site evaluations. The comprehensive site evaluations shall be used to assess the effectiveness of the current SWP. The evaluation(s) are in addition to the periodic inspections required by this Part. The evaluations may substitute for a periodic inspection if it is conducted during the regularly scheduled periodic inspection. The comprehensive site evaluations shall be conducted for the frequency indicated in the table below:

<u>SIC Code/Industrial Activity Code</u>	<u>Compliance Evaluation Frequency</u>
<u>Sectors A, B, G, H, I, J, O, T, V, W, X, Y, Z, and AD</u>	<u>Annual</u>
<u>Sectors C, D, E, F, P, Q, R, S, U, AA, AB, and AC</u>	<u>Semi-annual</u> <u>evaluations shall be conducted once in the fall (September-November) and once during the spring (April-June)]</u>
<u>Sectors M and N</u>	<u>Quarterly</u> <u>evaluations shall be conducted at least once in each of the following three-month periods: January through March, April through June, July through September, and October through December]</u>

The evaluations shall be conducted by one or more qualified employees or contractor personnel, who are familiar with the industrial activities performed at the facility and the elements of the SWP, and shall evaluate:

- (1) areas identified in the Inventory of Industrial Materials of the SWP;
- (2) structural controls, including their maintenance and effectiveness;
- (3) non-structural controls, including good housekeeping measures and spill prevention;
- (4) storm water outfalls and reasonably accessible areas immediately downstream of each storm water outfall that is authorized under this Subsection; and
- (5) records required by this Subsection.

Records of each evaluation shall be maintained, indicating the following: date and time of

the inspection; person(s) responsible for conducting inspection; findings of the inspection; and any corrective actions taken. Persons subject to this Part must correct any deficiencies noted during the inspection as soon as practicable, but no later than 14 days after the inspection.

c. Secondary Containment Inspections

A visual inspection by a facility employee shall be conducted before accumulated storm water is released from a secondary containment system. The secondary containment system shall be visually observed for color, foam, outfall staining, visible sheen and dry weather flow prior to release. Accumulated storm water shall be released if found to be uncontaminated by the material stored within the containment area. Records documenting the individual making the observation, the description of the

accumulated storm water and the date and time of the release shall be maintained.

~~b. Structural Control Practices when needed, shall be implemented to store, cover, enclose, contain, trap or treat Significant Materials or storm water containing Significant Materials.~~

~~4. Interim Significant Material Management Practices~~

~~During the time between the effective date of this Part and the date when any of §9.1.01.5, G.E.3.a., b., c., or d. are completed, all Significant Materials shall be managed in a responsible manner.~~

~~5. Inadequate Significant Material Management~~

~~If a continued transport of substantial amounts of Significant Material through a facility's storm water discharges persists, the Department may require treatment of the contaminated storm water discharges along with limits for contaminant levels. If treatment of the contaminated storm water discharges or along with limits for contaminant levels is required, permit coverage through an individual NPDES Storm Water Permit may be required.~~

5. Monitoring Data

The SWP shall include a description of the monitoring program and sampling data for storm water discharges at the facility, in accordance with §9.1.01.4.

H. 6. Training

Facility employees and contractor personnel that work in areas where Significant Industrial Materials are used or stored shall be appropriately trained to meet the requirements of the SWP. Employee training shall be conducted and documented not less than once per year. Training should address topics such as spill response, good housekeeping practices, material management practices, truck wash out procedures, equipment washdown procedures, etc.

7. Non-Storm Water Certification

The SWP shall include the Non-Storm Water Certification required by §9.1.01.6.

J. 8. Facility Security

Facilities shall have the necessary security systems to prevent an accidental or intentional discharge of hazardous material or oil through vandalism.

K. 9. Additional Requirements for Facilities Subject to SARA III §313 (Water Priority Chemicals)

The SWP shall indicate that appropriate containment, drainage control and/or diversionary structures are shall be provided in all areas where Water Priority Chemicals (WPCs) are stored, processed or otherwise handled. At a minimum, the appropriate preventive systems

or its equivalent shall be used (an equivalent practice may be used if approved by the Department in writing for this purpose).

a. Storage locations for Non-liquid WPCs shall have roofs, covers or other forms of appropriate protection to prevent exposure of storage piles to storm water and wind; and

b. Storage locations for Liquid WPCs shall include secondary containment providing at least 110% of the entire contents of the largest single tank plus 6 inches to allow for precipitation.

F. Non-storm Water Discharges

~~Discharges to a storm water system of anything other than storm water shall be eliminated or be in compliance with an appropriate NPDES permit. If non-storm water discharges to a storm water system occur, compliance with this part must be attained by performing one of the following:~~

~~1. Obtain coverage through an appropriate Part (general permit) of these regulations; or~~

~~2. Develop and submit to the Department a schedule which shall include~~

~~a. a date for submittal of an application for individual NPDES permit coverage for the non-storm water discharges; or~~

~~b. a sequence of steps which will result in the elimination of the non-storm water discharges to the storm water system; and~~

~~The schedule shall be submitted to the Department within 15 days of when the permittee has knowledge of the non-storm water discharge unless granted a written extension by the Department.~~

~~Enclosed areas where Significant Material is used, stored, handled, shipped, or received shall not have drains connected to any storm water conveyance unless approved by the Department in writing.~~

G. Review of Plans, Reports, Records or SWP

~~1. Upon notification from this Department that the SWP does not adequately address the requirements of this Subsection, persons subject to this Subsection shall amend the SWP and submit these amendments to this Department within 30 days of notification. The notification from the Department shall list and describe the deficiencies of the Storm Water Plan.~~

~~2. This Department may grant additional time for amending a SWP. This extension must be obtained from the Department in writing.~~

H. Inadequate Industrial Material Management

If a continued transport of substantial amounts of Industrial Material through a facility's storm water discharges persists, the Department may require treatment of

the contaminated storm water discharges along with limits for contaminant levels. If treatment of the contaminated storm water discharges or limits for contaminant levels is required, permit coverage through an individual NPDES Storm Water Permit may be required.

I. Consistency with Other Plans

The Storm Water Plan must comply with any other plans developed for the facility to control discharges of ~~Significant~~ Industrial Materials into the environment.

J. Copy of Permit Requirements

Persons subject to this Part must include a copy of your letter indicating acquisition of coverage under this Subsection with the SWP.

§9.01.1.6 EFFECTIVE DATE OF COVERAGE UNDER THIS PART

A. Commencement of Coverage

~~Coverage under this Part begins when the Department has received notification pursuant to the NOI requirements outlined in §9.1.01.3.~~

B. Renotification

~~Any person subject to the provisions of this Subsection is required to submit a new NOI in accordance with the requirements of the reissued Subsection.~~

§9.01.1.6 Outfall Identification

All persons conducting industrial activities identified in §9.1.01.1.A.2.b. with discharges that flow through a regulated outfall, shall identify each storm water outfall covered under this Subsection with a legible outfall tag or stencil. The mechanism for identification should be attached to an outfall pipe, stenciled on an outfall pipe, or posted in close proximity of the outfall area. The identification shall indicate the designated outfall number.

§9.1.01.7 Non-Storm Water

A. Discharges to a storm water system of anything other than storm water, except those discharges described in subparagraph (B) below, shall either be eliminated or in compliance with an appropriate individual NPDES permit.

If non-storm water discharges to a storm water system occur, compliance with this Part must be attained by submitting a schedule to the Department within 15 days of identifying the non-storm water discharge, unless granted a written extension by the Department. The schedule shall indicate a sequence of steps which will either result in the elimination of the non-storm water discharge to the storm water system or that will result in obtaining an appropriate individual NPDES permit.

B. Industrial facilities that qualify for coverage under this Subsection may discharge the following non-storm water discharges, through outfalls identified in the SWP:

1. discharges from fire fighting activities and fire hydrant flushings;

2. uncontaminated potable water sources including waterline flushings;

3. lawn watering and similar irrigation drainage;

4. water from the routine external washing of buildings, conducted without the use of detergents or other chemicals;

5. water from the routine washing of pavement conducted without the use of detergents or other chemicals and where spills or leaks or toxic or hazardous materials have not occurred (unless a spilled material has been removed);

6. uncontaminated air conditioner condensate, compressor condensate, and condensate that externally forms on steam lines;

7. water from foundation or footing drains where flows are not contaminated with pollutants (e.g. process materials, solvents, and other pollutants);

8. springs and other uncontaminated ground water; and

9. mist discharges which originate from cooling towers (as long as the discharge has been evaluated for contaminated chemicals used in the cooling tower and determined that the levels of such chemicals in discharges would not cause or contribute a violation of applicable water quality standards).

C. The facility shall include a certification that the storm water discharges have been evaluated or tested for the presence of non-storm water discharges. Such certification shall be signed in accordance with §9.1.01.2.B. and shall be maintained with the SWP. The certification shall include:

1. the identification of potential sources of non-storm water at the site;

2. a description of the results of any tests or evaluation for the presence of non-storm water discharges;

3. the evaluation criteria or testing method used;

4. the date of any testing or evaluation; and

5. the on-site drainage points that were directly observed during the test.

D. Any facility that is unable to provide the certification required by §9.1.01.7.C., shall notify the Department 60 days after submitting an NOI Form to be covered by this Subsection. If the failure to certify is caused by the inability to perform adequate tests for evaluations, such notification shall describe:

1. the procedure of any test conducted for the presence of non-storm water discharges;

2. the results of such test or other relevant observations;

3. potential sources of non-storm water discharges to the storm water conveyance system(s); and

4. why adequate tests for such storm water conveyance system(s) were not feasible.

§9.1.01.8 Effective Date of Coverage Under This Part Subsection

A. Commencement of Coverage

Coverage under this ~~Part~~ Subsection begins when the Department has received and approved of notification pursuant to the NOI or “No Exposure” Certification requirements outlined in §9.1.01.3.

B. Duration of Coverage

Coverage under this Subsection shall be granted for a specific duration which will be determined by the Department. In no case shall coverage be valid for more than five years.

B-C. Re-notification

1. Any person wishing to extend or renew coverage under this Subsection must submit a new NOI Form or a new “No Exposure” Certification Form not less than 60 days prior to the expiration date of coverage, unless permission for a later date has been granted by the Department. In the event that the permittee submits a timely request to extend or renew existing coverage, and the Department through no fault of the permittee, is unable to make a final determination on the request before the expiration date of coverage, the terms and conditions of the existing coverage shall be continued and remain fully effective and enforceable until the Department makes a final determination on the request.

2. Any person subject to the provisions of this Subsection is required to submit a new NOI Form or a new “No Exposure” Certification Form in a timeframe specified by the Department upon re-promulgation of this Subsection.

Part 2 - SPECIAL CONDITIONS FOR STORM WATER DISCHARGES ASSOCIATED WITH CONSTRUCTION-~~LAND-DISTURBING~~ ACTIVITIES

§ 9.1.02.0 Definitions

Appropriate Plan Approval Agency: means the Department, Conservation District, county, municipality, or State agency that is responsible for review and approval of the Sediment and Stormwater Plan.

Best Available Technology (Bat): means a level of technology based on the very best (State of the art) control and treatment measures that have been developed or are

capable of being developed and that are economically achievable within the appropriate industrial category.

Best Management Practices (Bmps): means schedules of activities, prohibition of practices, maintenance procedures, and other management practices or measures to prevent or reduce the discharge of pollutants. BMPs include the following, among other practices and measures: structural and non-structural controls; treatment requirements; operating procedures and practices to control site runoff, or sludge disposal, or waste disposal, or spillage, or leaks, or drainage from raw materials storage.

Certified Construction Reviewer: means those individuals, having passed a Department-sponsored or approved training course, who provide on-site inspection for sediment control and storm water management in accordance with the *Delaware Sediment and Stormwater Regulations*.

C.F.R.: means the Code of Federal Regulations.

Clean Water Act (Cwa): means 33 U.S.C. 1251 et seq. (formerly known as the Federal Water Pollution Control Act Amendment of 1972).

Co-permittee: is a discharger of storm water associated with construction activity who is jointly and individually responsible for compliance with all conditions of this Part and applicable laws with another entity.

Construction Activity: means clearing, grading and excavating activities that result in a land disturbance equal to or greater than one acre, including the disturbance of less than one acre of land that is part of a larger common plan of development or sale that will ultimately disturb more than one acre.

Department: means the State of Delaware Department of Natural Resources and Environmental Control.

Discharge Of Storm Water Associated With Construction Activity: means a discharge of storm water from areas where soil disturbing activities (e.g. clearing, grading, or excavations), construction materials or equipment storage or maintenance (e.g. fill piles, borrow areas, concrete truck washout, fueling), or other industrial storm water directly related to the construction process (e.g. concrete or asphalt batch plants) are located.

Effective Date: means the date when these regulations have formally passed through a public comment period, a public hearing and have been formally adopted by the Department and become operative.

Facility: means any building, any structure, any complex of buildings or structures, or any process, production, equipment, or machinery, which makes it possible for any activity to be conducted.

Final Stabilization : means that:

- All soil disturbing activities at the site have

been completed and either of the two following criteria are met:

- A uniform (e.g. evenly distributed, without large bare areas) perennial vegetative cover with a density of 70% of the native background vegetative cover for the area has been established on all unpaved areas and areas not covered by permanent structures, or
- Equivalent permanent stabilization measures (such as the use of riprap, gabions, or geotextiles) have been employed.
- When background native vegetation will cover less than 100% of the ground (e.g., arid areas, beaches), the 70% coverage criteria is adjusted as follows: if the native vegetation covers 50% of the ground, 70% of 50% ($0.70 \times 0.50 = 0.35$) would require 35% total coverage for final stabilization. On a beach with no natural vegetation, no stabilization is required.
- For individual lots in residential construction, final stabilization means that either :
 - The homebuilder has completed final stabilization as specified above, or
 - The homebuilder has established temporary stabilization including perimeter controls for an individual lot prior to occupation of the home by the homeowner and informing the homeowner of the need for, and benefits of, final stabilization.
- For construction projects on land used for agriculture purposes (e.g., pipelines across crop or range land, staging areas for highway construction, etc.) final stabilization may be accomplished by returning the disturbed land to its preconstruction agriculture use. Areas disturbed that were not previously used for agricultural activities, such as buffer strips immediately adjacent to “water of the United States” and areas which are not being returned to their preconstruction agricultural use must meet the final stabilization criteria (1) or (2) above.

Individual Permit: means a permit which is written for one specific facility or site.

Municipal Separate Storm Water System: means a conveyance system which is not intended to convey anything but storm water and is owned by a municipal or public entity.

Notice Of Intent (Noi): serves as an application for NPDES permit coverage under this Part.

Notice Of Termination (Not): serves as an application for termination of NPDES permit coverage under this Part.

Npdes (National Pollutant Discharge Elimination System): means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring, and enforcing permits for the discharge of any pollutant or combination of pollutants and imposing and enforcing pretreatment and sludge requirements pursuant to Sections 307, 402, 318, and 405 of the Clean Water Act.

Npdes Permit: means any permit authorizing the potential or actual point source discharge of pollutants to State waters, under prescribed conditions, pursuant to Section 6 of the State of Delaware “Regulations Governing the Control of Water Pollution.”

Operational Control: means the responsibility for managing a construction activity subject to the provisions of this Part.

Operator: for the purpose of this Part, means any person associated with construction activity who has operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications.

Permit Coverage: means an authorization granted to a category of storm water discharges pursuant to this Subsection.

Permittee: is a discharger of storm water associated with construction activity who is responsible for compliance with all conditions of this part and to whom coverage under this Part has been granted.

Person: means any individual, partnership, corporation, association, institution, enterprise, municipality, commission, political subdivision, or duly established entity.

Project Completion: occurs when all items and conditions of the Plan have been satisfied, as-built documentation has been approved by the Plan approval agency, and final stabilization has been achieved in accordance with the definition in this document. It is at project completion that permit coverage is terminated.

Secretary: means the Secretary of the State of Delaware Department of Natural Resources and Environmental Control or his duly authorized designee.

Sediment And Stormwater Plan: means a plan for the control of soil erosion, sedimentation, storm water quantity, and water quality impacts resulting from construction activity. For the purposes of this Part, a Sediment and Stormwater Plan is a plan developed in accordance with the requirements of the *Delaware Sediment and Stormwater Law and Regulations*.

PROPOSED REGULATIONS

Storm Water: means run-on or runoff of water from the surface of the land resulting from precipitation or snow or ice melt.

These Regulations: means the State of Delaware Special Conditions for Storm Water Discharges Associated with Construction Activity.

Total Maximum Daily Load or TMDL: means the amount of a given pollutant that may be discharged to a waterbody from point, nonpoint and natural background sources and still allow attainment or maintenance of the applicable narrative and numerical water quality standards. A "TMDL" is the sum of the individual wasteload allocations or WLAs for point sources and load allocations or LAs for nonpoint sources of pollution and natural background. A "TMDL" may include a reasonable margin of safety (MOS) to account for uncertainties regarding the relationship between mass loading and resulting water quality. In simplistic terms, a "TMDL" attempts to match the strength, location and timing of pollution sources within a watershed with the inherent ability of the receiving water to assimilate the pollutant without adverse impact.

Transferee: means the person who accepts permit responsibility from the original permittee.

Transfer Of Authorization: means to transfer control of permitted construction activities to either a duly authorized person who will control the permitted activities, or a new owner/operator for the site for which the permit has been issued.

Transferor: means the original permittee who transfers permit responsibility to another entity.

Waters Of The State: means all water, on the surface and under the ground, wholly or partially within, or bordering the State of Delaware, or within its jurisdiction including but not limited to:

- Waters which are subject to the ebb and flow of the tide including, but not limited to, estuaries, bays and the Atlantic Ocean;
- All interstate waters, including interstate wetlands;
- All other waters of the State, such as lakes, rivers, streams (including intermittent and ephemeral streams), drainage ditches, tax ditches, creeks, mudflats, sandflats, wetlands, sloughs, or natural or impounded ponds;
- All impoundments of waters otherwise defined as waters of the State under this definition; and
- Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in (a) – (d).

Waste and storm water treatment systems that would otherwise meet this definition are not "waters of the State."

§ 9.1.02.1 Coverage

~~This Part covers all new and existing storm water discharges that are composed in whole or in part of storm water associated with land disturbing activities. The coverage area under this Part includes all areas within the State of Delaware.~~

A. Eligibility

The following discharges and activities are eligible for NPDES General Industrial Storm Water Permit coverage under this Part.

1. This Part covers all new and existing storm water discharges that are composed in whole or in part of discharges associated with construction activity [as defined by 40 Code of Federal Regulations (CFR), Section 122.26 (b)(14)(x), (15); see §9.1.02.0 DEFINITIONS]

2. Discharges from support activities (e.g., concrete or asphalt plants, equipment staging yards, material storage areas, excavated material disposal areas, borrow areas) provided:

a. The support activity is directly related to the construction site required to have NPDES permit coverage for discharges of storm water associated with construction activity;

b. The support activity is not a commercial operation serving multiple unrelated construction projects by different operators, and does not operate beyond the completion of the construction activity it supports; and

c. Appropriate controls and measures are identified in a Sediment and Stormwater Plan covering the discharges from the support activity areas.

3. Discharges composed of allowable discharges listed in 9.1.02.1.A and 9.1.02.6.B commingled with a discharge authorized by a different NPDES permit and/or a discharge that does not require NPDES permit authorization.

4. Storm water discharges associated with construction activity at facilities which have permit coverage for a discharge other than storm water can be covered by this Part, or at the discretion of the Secretary, an existing individual permit may be amended to cover storm water discharges associated with construction activities.

B. Limits on Eligibility

The following discharges and activities are not eligible for NPDES General Industrial Storm Water Permit coverage under this Subsection.

1. Discharges of storm water associated with industrial activity fully addressed by facilities with individual NPDES permits.

2. Discharges of pollutants occurring in watersheds for which there is a Total Maximum Daily Load (TMDL) allocation for associated water bodies are not eligible for coverage under this Part unless the facility has an approved Sediment and Stormwater Plan (Plan) that is shown to reduce pollutant loading to the level required by the TMDL or to the maximum extent practicable. To be eligible under this Part, the facility must incorporate into their Plan any conditions applicable to their discharges necessary for consistency with any TMDL implementation plan or plan for achieving State surface water quality standards. For discharges not eligible for coverage under this Part, the discharger must apply for and receive an individual NPDES permit.

3. Discharges of pollutants in quantities that would cause or contribute to an exceedance of any applicable surface water quality standard for the receiving waters, including:

a. Discharges of substances or materials in amounts that are toxic, or that would be toxic to humans, fish, aquatic life, or wildlife;

b. Discharges of floatable debris, oils, scum, foam, or grease in other than trace amounts. Excluded from this are naturally occurring substances such as leaves and twigs provided no person has placed such substances in or near the discharge; and

c. Discharges that cause or contribute to degradation or loss of State designated beneficial uses of the receiving waters.

4. Discharges of materials other than storm water are prohibited and are not authorized by this Subsection.

5. Discharges of storm water from post-construction that originate from the site after project completion, including any temporary support activity.

6. Discharges mixed with non-storm water. This exclusion does not apply to discharges identified in 9.1.02.6(B).

7. Storm water discharges, allowable non-storm water discharges, and storm water discharge-related activities that are likely to jeopardize the continued existence of any species that are federally-listed as endangered or threatened ("listed") under the Endangered Species Act (ESA) or result in the adverse modification or destruction of habitat that is federally-designated as critical under the ESA ("critical habitat").

8. Storm water discharges, allowable non-storm water discharges, or storm water discharge-related activities that would cause a prohibited "take" of federally-listed endangered or threatened species (as defined under section 3 of the ESA and 50 CFR 17.3), unless such takes are authorized under sections 7 or 10 of the ESA.

9. Storm water discharges, allowable non-storm water discharges, or storm water discharge-related activities that would negatively affect a property that is listed or is eligible for listing in the National Historic Register.

C. Individual NPDES Permit Coverage

1. Any person covered by this Subsection may request to seek coverage under an individual permit by submitting an individual application (Form 1 and Form 2F^{*}) as prescribed in Section 6 of the *Regulations Governing The Control of Water Pollution*. Coverage under this Subsection will continue until authorization for coverage under an individual permit has been issued to the person making the request.

Form 1: NPDES permit application containing general information about the applicant and facility. This form must accompany the NPDES permit application, Form 2F.

Form 2F: NPDES permit application to discharge storm water associated with industrial activity.

2. The Secretary may require any person covered by this Subsection to submit an application and seek coverage under an individual NPDES permit.

a. The Secretary shall notify a person in writing when an individual permit application is required. The notice shall include a brief statement of the reasons for the decision, an application, and a statement setting a deadline for the person to file the application. The Secretary shall notify the person in writing that permit coverage under this Subsection shall automatically terminate on the effective date of the individual NPDES permit that is issued to the person.

b. If a person fails to submit an individual permit application in compliance with a notice from the Secretary, the applicability of this Subsection to the person shall automatically terminate at the end of the day specified for application or NOI submittal.

3. When an individual NPDES permit is issued to a person for discharges otherwise covered by this Subsection, the applicability of this Subsection is automatically terminated on the effective date of the individual NPDES permit.

D. Authorization

To be authorized to discharge storm water under this Part, a person planning a construction activity must submit, in accordance with the requirements of §9.1.02.3, an NOI form prior to commencement of any construction activities. Unless notified by the Secretary to the contrary, persons who submit such notification and have either obtained approved Sediment and Stormwater Plans or have been deemed exempt in accordance with the *Delaware*

Sediment and Stormwater Law and Regulations, are authorized to discharge storm water associated with construction activity under the terms and conditions of this Part.

E. Transfer of Authorization

1. Transfer of control of permitted activities at the site.

A person submitting an NOI who does not intend to control the permitted activities on the site shall transfer authorization under this Part, at least ten (10) days prior to any land disturbing activities, to a duly authorized person who will control the permitted activities. To transfer authorization under this Part, the facility must submit and receive written Department approval of a completed Transfer of Authorization form, signed by both the transferor and transferee.

2. Transfer of property to a new owner.

A permittee/transferor may transfer coverage under this Part to a new owner should ownership change during the construction period. To transfer authorization under this Part, the facility must submit and receive written Department approval of a completed Transfer of Authorization form, signed by both the transferor and transferee.

3. Obligations of the permittee/transferor.

The permittee/transferor must familiarize the person who is assuming control of the permitted activities, the transferee or new owner, with the program and provide the transferee/new owner with a copy of the Sediment and Stormwater Plan as required in §9.1.02.5. All conditions and obligations outlined in this Part will apply to the transferee/new owner upon transfer.

4. The Department will maintain guidance related to Transfer of Authorization.

F. Shared Operational Control (Co-Permittee Status)

1. Construction activities at a permitted site may become the responsibility of multiple persons when more than one person has operational control (see §9.1.02.0 Definitions) of the site. When multiple persons maintain operational control, all are considered co-permittees of the site.

2. A person submitting an NOI who will share control of the permitted activities on the site shall require a duly authorized person to submit to the Department a Co-Permittee form. The co-permittee condition shall become effective upon receipt and written Department approval of a completed Co-Permittee form, signed by both the original and subsequent co-permittee. If operational control will be shared by more than one additional co-permittee, a Co-Permittee form shall be submitted for all subsequent co-permittees.

3. The original permittee must familiarize the subsequent co-permittees with the program and provide the subsequent co-permittees with a copy of the Sediment and Stormwater Plan as required in §9.1.02.5. All conditions and obligations outlined in this Part will apply to the co-permittees upon completion of the Co-Permittee form.

4. The Department will maintain guidance related to Co-Permittees.

§ 9.1.02.2 Standard Conditions

Activities covered by this Part shall comply with all of the provisions of §9.1.01.2 of Part 1 of the Regulations.

A. Entry and Inspection

Any person subject to this Subsection shall allow the Department to:

1. enter the facility subject to this Subsection during standard business hours;

2. inspect and copy at reasonable times, any records that must be kept under the conditions of this Subsection;

3. inspect at reasonable times any facilities or equipment; and

4. perform sampling of the storm water discharges from the site.

B. Signature Requirements

1. All Notice Of Intent (NOI) Forms shall be signed by:

a. a president, vice-president, secretary or treasurer for a corporation; or

b. a general partner or proprietor for a partnership or sole proprietorship; or

c. a principal executive officer or ranking official for a municipality or public agency.

2. All other reports or information required by this Subsection shall be signed by a person described above or by a duly authorized representative. A person is a duly authorized representative only if the authorization is made in writing by the person described above and is submitted to the Department.

3. Any person signing documents in accordance with this Subsection shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false

information, including the possibility of fine and imprisonment for willful violations.”; and

“I certify under penalty of law that I understand the terms and conditions of the Delaware National Pollutant Discharge Elimination System (NPDES) Special Conditions for Storm Water Discharges Associated with Construction Activities.”

C. Proper Procedures

Any person subject to this Subsection shall at all times properly operate and maintain all facilities, systems and practices of pollution control which are installed, or implemented to achieve compliance with the requirements of this Subsection and with the measures of the Sediment and Stormwater Plan.

D. Duty to Mitigate

Any person subject to this Subsection shall take all reasonable steps to minimize or prevent any discharge of pollutants in violation of this Subsection.

E. Adverse Impacts

Any person subject to the requirements of this Subsection shall take all reasonable steps to minimize any adverse impact to State waters, including such accelerated or additional monitoring as necessary to determine the nature and extent of the non-complying discharge.

F. Transfers

Coverage under this Part is transferable. Coverage under this Part shall be transferred in accordance with the provisions outlined in §9.1.02.1.E.

G. Continuation of Expired Coverage

The requirements of this Part shall continue in force and effect until this Part is re-promulgated.

H. Other State or Federal Laws

Nothing in this Subsection shall be construed to preclude the institution of any legal action or relieve any person subject to this regulation from any responsibilities, liabilities, or penalties established pursuant to any applicable State or Federal law or regulation.

I. Penalties for Violations

Any person who violates conditions of this Subsection may be subject to penalties in accordance with 7 Del. C. Chapter 60. Violation of this Subsection is also a violation of the Clean Water Act and may be subject to penalties established under that statute.

J. Oil and Hazardous Substance Liability

Nothing in this Subsection shall preclude the institution of any legal action or relieve any person from any responsibilities, liabilities, or penalties to which a person is or may be subject under 40 C.F.R. Part 117 or 7 Del.C. Chapters 60, 62 or 63.

K. Need to Halt or Reduce Activity Not a Defense

Persons subject to this Part may not use as a defense in an enforcement action that it would have been necessary to halt or reduce the construction activity subject to this Part to maintain compliance with the conditions of this Part.

L. Property Rights

The issuance of a permit under the requirements of this Part does not convey any property rights of any sort, nor any exclusive privileges, nor does it authorize any injury to private property nor any invasion of personal rights, nor any infringement of Federal, State, or local laws or regulations.

M. Severability

The provisions of this Part are severable, and if any provision of this Part, or the application of any provision of this Part to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this Part shall not be affected thereby.

§ 9.1.02.3 Notification

A. Deadlines

~~Persons who intend to obtain coverage under this Part for storm water discharges associated with land disturbing activity which commence after the effective date of this Part shall submit certification that a Sediment and Stormwater Management Plan has been approved, and shall be implemented, in accordance with 7 Del. C. Chapter 40 and the Delaware Sediment and Stormwater Regulations. Land disturbing activities shall not commence and coverage under this Part shall not apply until the Sediment and Stormwater Management Plan for a site has been approved, stamped, signed, and dated by the Appropriate Plan Approval Agency in accordance with the review schedule outlined in Section 8 of the Delaware Sediment and Stormwater Regulations.~~

~~The requirements of the NOI will be satisfied when an application with accompanying information is submitted in accordance with the Delaware Sediment and Stormwater Regulations. The NOI shall be submitted through the Appropriate Plan Approval Agency to:~~

~~The Department of Natural Resources and Environmental Control~~

~~Division of Soil and Water Conservation~~

~~89 Kings Highway, P.O. Box 1401~~

~~Dover, DE 19903~~

1. New Projects

Any person who intends to obtain coverage under this Part for storm water discharges associated with construction activity, commencing after the effective date of this Part, must submit a Notice of Intent (NOI) Form in accordance with this Part prior to the onset of construction as a condition of approval of the Sediment and Stormwater Plan.

PROPOSED REGULATIONS

2. Permitted Ongoing Projects

a. Any person who has or had permit coverage for storm water discharges associated with construction activity immediately prior to the effective date of this Part, who wishes to continue coverage must submit a new Notice of Intent (NOI) within 90 days of re-promulgation of this Part.

b. Any person who has or had permit coverage for storm water discharges associated with construction activity prior to the effective date of this Part, and meets the termination of coverage requirements in accordance with § 9.1.02.7.B must submit a Notice of Termination (NOT) within 90 days of re-promulgation of this Part.

3. Unpermitted Ongoing Projects

For any person subject to this Part who has or had not obtained permit coverage for storm water discharges associated with construction activity taking place prior to the effective date of this Part, authorization to discharge under the renewed Part occurs at the time that the NOI is submitted. The Department reserves the right to seek enforcement action for any unpermitted discharges or noncompliance that occurs between commencement of construction and discharge authorization.

4. Late Notification

Any person subject to this Part is not precluded from submitting an NOI in accordance with the requirements of this Part after initiating construction activities. Authorization to discharge occurs at the time that the NOI is submitted. The Department reserves the right to seek enforcement action for any unpermitted discharges or noncompliance that occurs between commencement of construction and discharge authorization.

B. Contents of the Notice of Intent (NOI) Form

The Notice of Intent (NOI) shall be submitted on a form provided by the Department. The NOI shall include, at a minimum, the following information.

1. Applicant information including the operator name, contact person, mailing address, and telephone number;

2. Project information including the project name, location, county, and municipality, if applicable;

3. The project type and proposed methods of permanent storm water management;

4. The latitude and longitude of the facility;

5. The name of the receiving waters or municipal separate storm water system;

6. The plan approval agency name;

7. The total land area and the estimated area to be disturbed; and

8. The estimated construction start and project completion dates.

~~Persons complying with §9.1.02.3, A. shall be considered in compliance with the NOI provisions outlined in §9.1.01.3, A. through D. of Part 1 of the Regulations.~~

C. Additional Information

When any person subject to this Part becomes aware that any relevant facts were omitted or submitted incorrectly on the NOI Form, or any other records required by this Part, that person shall promptly submit such corrected information to the Department.

~~Any person identified in the Sediment and Stormwater Management Plan shall sign a copy of the following certification statement before conducting any professional service identified in the Sediment and Stormwater Management Plan:~~

~~"I certify under penalty of law that I understand the terms and conditions of the Delaware National Pollutant Discharge Elimination System (NPDES) General Permit Regulation for Storm Water Discharges Associated with Land Disturbing Activities."~~

D. Where to Submit

Persons intending to obtain permit coverage under this Part must submit an NOI Form to the following address:

The Department of Natural Resources and
Environmental Control
Division of Soil and Water Conservation
Sediment and Stormwater Program
89 Kings Highway Dover, DE 19901

E. Fees

The completed NOI Form must be accompanied by the appropriate fee required by the Department and established by the State regulations to be considered complete.

F. Failure to Notify

Persons who discharge storm water associated with construction activity, who fail to notify the Department of their intent to be covered under this Part, and who discharge to waters of the State without an individual NPDES permit, are in violation of 7 **Del.C.** Chapter 60 and the federal Clean Water Act and may be subject to penalties.

§9.1.02.4 Monitoring

In lieu of the monitoring requirements of §9.1.01.4 of Part 1, all monitoring shall be conducted in accordance with the Delaware Sediment and Stormwater Regulations.

A. Effluent Limitations

The Department has not established specific effluent limitations for storm water discharges associated with construction activity. Therefore, this Part establishes effluent limitations in terms of performance standards

established with the Best Available Technology (BAT) for erosion and sediment control and storm water management. Compliance with BAT associated with the *Delaware Sediment and Stormwater Regulations*, and/or Sediment and Stormwater Program standards and specifications, guidance, and policy will constitute compliance with effluent limitations for storm water discharges associated with construction activity.

B. For the purposes of monitoring, persons subject to this Part must:

1. During construction, maintain at the site the approved Sediment and Stormwater Plan (see §9.1.02.5).

2. Conduct the following:

a. weekly maintenance inspections of erosion and sediment controls, and constructed storm water management measures; and

b. inspections of erosion and sediment controls and storm water management practices the next business day after a rainfall event that results in runoff.

C. Record Keeping

1. During construction, persons subject to this Part must maintain at the site, written reports of all inspections conducted in accordance with item B above, that include:

a. the date and time of the inspection;

b. the name(s) of the individual(s) who performed the inspection;

c. as assessment of the condition of erosion and sediment controls, and constructed storm water management measures;

d. a description of any erosion and sediment control and storm water management measures construction or implementation and maintenance performed on those measures; and

e. a description of the site's present phase of construction.

2. Persons subject to this Part shall maintain all inspection reports, notices of violations, enforcement actions, and correspondence issued by the Department, its authorized agents, the appropriate plan approval agency, or a required Certified Construction Reviewer.

3. Reporting Requirements

Persons subject to this Part must retain the records described in §9.1.02.4, B(1), and §9.1.02.4.C and submit the information upon request to the Department at the following address:

The Department of Natural Resources and
Environmental Control
Division of Soil and Water Conservation
Sediment and Stormwater Program
89 Kings Highway

Dover, DE 19901

D. Additional Monitoring

The Secretary may provide written notification to any facility, requiring additional monitoring.

§ 9.1.02.5 Sediment And Stormwater Plan (Plan Storm Water Plan (Swp))

A. Persons covered by this Part shall develop, fully implement, and maintain at the site, the approved Sediment and Stormwater Plan (Plan) and any other records that are required in accordance with 7 Del.C. Chapter 40 and the *Delaware Sediment and Stormwater Regulations*. The Plan shall cover all site activities from the date of initiation of construction activity to the date of project completion. Pollution prevention measures, in accordance with Delaware Erosion and Sediment Control Handbook standard and specification for Construction Site Pollution Prevention, shall be incorporated into the Plan for construction activity.

In lieu of the Storm Water Plan required by §9.1.01.5 of Part 1, persons covered by this Part shall maintain at the site of land disturbing activities the approved Sediment and Stormwater Management Plans and any other records that are required in accordance with 7 Del. C. Chapter 40, and the *Delaware Sediment and Stormwater Regulations* from the date of initiation of land disturbing activity to the date of permanent stabilization.

B. The Plan shall be signed in accordance with this Part and kept at the facility.

C. Persons covered by this Part shall retain records of all information required by the Plan for a minimum of five (5) years.

D. Keeping the Plan Current

1. Persons covered by this Part shall amend the Plan whenever:

a. There is a change in the design, construction, operation, or maintenance of erosion and sediment controls or storm water management measures on the site; or

b. The Plan proves to be ineffective in eliminating or significantly minimizing the discharge of pollutants, or in otherwise achieving the general objectives of controlling pollutants in storm water discharges associated with construction activity; or

c. To address any sources or potential sources of pollution identified as a result of a site inspection pursuant to §9.1.02.4.B.; or

d. Upon notification by the Department or the appropriate plan approval agency that the Plan does not adequately address the requirements of this Part. The notification from the Department or the appropriate plan

approval agency shall list and describe the deficiencies of the Plan.

2. Persons subject to §9.1.02.5.D.1.(a) shall amend the Plan and submit these amendments to the Department or appropriate plan approval agency and receive approval for the amendments prior to construction or modification of the erosion and sediment controls or storm water management measures on the site.

3. Persons subject to Part §9.1.02.5.D.1.(b), (c), and (d) shall amend the Plan and submit these amendments to the Department or appropriate plan approval agency and receive approval for the amendments within 30 days of notification by the persons subject to this Part, inspector, Certified Construction Reviewer, Department, or appropriate plan approval agency that the current Plan is inadequate. The Department may grant additional time for amending the Plan. A written request for an extension shall be made by the person subject to this Part to the Department.

4. Under the requirements of the *Delaware Sediment and Stormwater Law and Regulations*, the Plan remains valid for three (3) years following the date of approval. If construction continues beyond that three-year time period, an extension or renewal of the Plan may be granted by the Department or the appropriate plan approval agency. Unless the plan is extended or renewed, the plan is considered expired and any construction activity that occurs after the expiration date occurs in violation of the *Delaware Sediment and Stormwater Law and Regulations* and this Part. For the purposes of this Part, permit coverage is only valid within the three (3) year period as long as construction activity is taking place.

E. Failure to Prepare or Amend Plan

In no event shall failure to complete or update a Plan in accordance with this Part relieve any persons covered under this Part of responsibility to implement actions required to protect the waters of the State, complete any actions that would have been required by such Plan, and to comply with all conditions of this Part.

F. Sediment and Stormwater Plan Deadlines

The Plan must be approved, and the NOI Form submitted to the Department, prior to the onset of construction activity at the site for which coverage has been granted. Failure to obtain an approved Plan prior to construction activity constitutes a violation of the *Delaware Sediment and Stormwater Law and Regulations* and this Part.

§ 9.1.01.6 Non-storm Water Discharges

A. Discharges to a storm water system of anything other than storm water, except those discharges described in subparagraph (B) below, shall either be eliminated or in compliance with an appropriate individual NPDES permit.

B. Industrial facilities that qualify for coverage under this Subsection may discharge the following non-storm water discharges, through outfalls identified in the Plan:

1. discharges from fire fighting activities and fire hydrant flushings;

2. uncontaminated potable water sources including waterline flushings;

3. lawn watering and similar irrigation drainage;

4. water from the routine external washing of buildings, conducted without the use of detergents or other chemicals;

5. water from the routine washing of pavement conducted without the use of detergents or other chemicals and where spills or leaks or toxic or hazardous materials have not occurred (unless a spilled material has been removed);

6. uncontaminated air conditioner condensate, compressor condensate, and condensate that externally forms on steam lines;

7. water from foundation or footing drains where flows are not contaminated with pollutants (e.g. process materials, solvents, and other pollutants);

8. springs and other uncontaminated ground water; and

9. mist discharges which originate from cooling towers (as long as the discharge has been evaluated for contaminated chemicals used in the cooling tower and determined that the levels of such chemicals in discharges would not cause or contribute a violation of applicable water quality standards).

§ 9.1.02.67 Effective Date Of Coverage

A. Commencement of Coverage

Coverage under this Part begins when the Department has been notified pursuant to the provisions outlined in §9.1.02.3 of this Part.

B. Termination of Coverage

Coverage under this Part ~~Subsection~~ continues until a completed Notice of Termination (NOT) form has been submitted to the Department or appropriate plan approval agency and it is determined and final site stabilization has been approved by the Department or appropriate plan approval agency that:

1. All items and conditions of the Plan have been satisfied in accordance with the *Delaware Sediment and Stormwater Regulations*,

2. As-built documentation verifies that the permanent stormwater management measures have been constructed in accordance with the approved Plan and the *Delaware Sediment and Stormwater Regulations*, and

3. Final stabilization has been achieved in accordance with the definition in 9.1.02.0.

*** PLEASE NOTE: THE DEPARTMENT IS PROPOSING THAT PART 3 THROUGH PART 14 BE REPEALED. DUE TO THE LENGTH OF THE REGULATORY MATERIAL IT IS NOT BEING PUBLISHED HERE. THE PROPOSED REPEALED TEXT CAN BE VIEWED AT:**

**Section 9 - The General Permit Program;
Parts 3 - Parts 14**

[Adobe PDF](#) | [HTML](#)

Due to their length Appendix A and B are not being published here. They can be viewed at either:

[Adobe PDF](#) | [HTML](#)

**DEPARTMENT OF STATE
DIVISION OF PROFESSIONAL REGULATION**

3500 Board of Examiners of Psychologists
Statutory Authority: 24 Delaware Code,
Section 3506(a)(1) (24 **Del.C.** §3506(a)(1)
24 **DE. Admin. Code** 1400

PUBLIC NOTICE

The Delaware Board of Examiners of Psychologists in accordance with 24 **Del.C.** §3506(a)(1) has proposed changes to Regulation 6 of the Board's rules and regulations regarding *Evaluation of Credentials*. Specifically, the proposal amends regulation 6.1 and the subsections therein to conform to the American Psychological Association requirements for accreditation.

A public hearing will be held on October 3, 2005 at 9:30 a.m. in the second floor conference room A of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware where members of the public can offer comments. Anyone wishing to receive a copy of the proposed rules and regulations may obtain a copy from the Delaware Board of Examiners of Psychologists. Persons wishing to submit written comments may forward these to the Board at the above address. The final date to receive written comments will be at the public hearing.

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

6.0 Evaluation of Credentials

6.1 Candidates for licensure as psychologists in the State of Delaware shall:

6.1.1 Have received a doctoral degree based on a program of studies which is psychological in content and specifically designed to train and prepare psychologists. The doctoral degree must be from a college or university, accredited as required by 24 **Del.C.** §3508(a)(1) having a graduate program which states its purpose to be the training and preparation of psychologists Graduates of non-United States (U.S.) degree programs will be required to have their credentials evaluated by a credential evaluation service approved by the National Association of Credential Evaluation Services, to determine equivalency to the accreditation requirements of §3508(a)(1) and equivalency of psychological content and training. The Board will consider programs to be psychological in content by the criteria established by the joint designation project of the Association of State and Provincial Psychology Boards and the Council for the National Register of Health Service Providers in Psychology, as follows:

6.1.1.1 Programs that are accredited by the American Psychological Association are recognized as meeting the definition of a professional psychology program. The criteria for accreditation serves as a model for professional psychology training.

6.1.1.2 Or, all of the following criteria, (1) through (9):

6.1.1.2.1 Training in professional psychology is doctoral training offered in a regionally accredited institution of higher education.

6.1.1.2.2 The program, wherever it may be administratively housed, must be clearly identified and labeled as a psychology program. Such program must specify in pertinent institutional catalogues and brochures its intent to educate and train professional psychologists.

6.1.1.2.3 The psychology program must stand as a recognizable, coherent organizational entity within the institution.

6.1.1.2.4 There must be a clear authority and primary responsibility for the core and specialty areas whether or not the program cuts across administrative lines.

6.1.1.2.5 The program must be an integrated, organized sequence of study.

6.1.1.2.6 There must be an identifiable psychology faculty and a psychologist responsible for the program.

6.1.1.2.7 The program must include a body of students who are matriculated in that program for a degree.

6.1.1.2.8 The program must include supervised practicum, internship, field or laboratory training appropriate to the practice of psychology.

~~6.1.1.2.9 The curriculum shall encompass a minimum of three (3) academic years of full time graduate study. In addition to instruction in scientific and professional ethics and standards research design and methodology, statistics, and psychometrics, the core program shall require each student to demonstrate competence in each of the following substantive content areas. This typically will be met by including a minimum of three or more graduate semester hours (5 or more graduate quarter hours) in each of these 4 substantive content areas:~~

~~6.1.1.2.9.1 Biological bases of behavior: Physiological psychology, comparative psychology, neuropsychology, sensation and perception, psychopharmacology.~~

~~6.1.1.2.9.2 Cognitive-affective bases of behavior: Learning, thinking, motivation, emotion.~~

~~6.1.1.2.9.3 Social bases of behavior: Social psychology, group processes, organizational and systems theory.~~

~~6.1.1.2.9.4 Individual differences: Personality theory, human development, abnormal psychology.~~

6.1.1.2.9 The program specifies education and training objectives in terms of competencies expected of its graduates. Those competencies must be consistent with:

6.1.1.2.9.1 The program's philosophy and training models.

6.1.1.2.9.2 The substantive area(s) of professional psychology for which the program prepares students at the entry level of practice.

6.1.1.2.9.3 An understanding of professional issues, including ethical, legal, and quality assurance principles.

6.1.1.2.10 In achieving its objectives, the program has implemented a clear and coherent curriculum plan that provides the means whereby all students can acquire and demonstrate substantial understanding of and competence in the following areas:

6.1.1.2.10.1 The breadth of scientific psychology, its history of thought and development, its research methods, and its applications. To achieve this end, the students shall be exposed to the current body of knowledge in at least the following areas: biological aspects of behavior; cognitive and affective aspects of behavior; social aspects of behavior; history and systems of psychology; psychological measurement; research methodology; and techniques of data analysis:

6.1.1.2.10.2 The scientific, methodological, and theoretical foundations of practice in the substantive area(s) of professional psychology in which the program has its training emphasis. To achieve this end, the students shall be exposed to the current body of knowledge in at least the following areas: individual differences in behavior; human development; dysfunctional behavior or psychopathology; and professional standards and ethics:

6.1.1.2.10.3 Diagnosing or defining problems through psychological assessment and measurement and formulating and implementing intervention strategies (including training in empirically supported procedures). To achieve this end, students shall be exposed to the current body of knowledge in at least the following areas: theories and methods of assessment and diagnosis; effective intervention; consultation and supervision; and evaluating the efficacy of interventions; and

6.1.1.2.10.4 Issues of cultural and individual diversity that are relevant to all of the above.

~~6.1.1.3 In addition, all professional education programs in psychology will include course requirements in specialty areas.~~

6.2 Have had, after receiving the doctoral degree, at least 2 years of supervised experience in psychological work satisfactory to the Board; and

6.3 Have achieved the passing score on the written standardized Examination for Professional Practice in Psychology (EPPP) developed by the Association of State and Provincial Psychology Boards (ASPPB) or its successor; or

6.4 The Board will qualify for licensing without examination any person who applies for licensure and who is a Diplomate of the American Board of Professional Psychology. All such applicants must meet all other requirements for licensure.

2 DE Reg. 776 (11/1/98)

4 DE Reg. 980 (12/1/00)

***Please Note: As the rest of the sections were not amended they are not being published. A complete set of the rules and regulations for the Board of Examiners of Psychologists is available at:**

<http://www.state.de.us/research/AdminCode/title24/3500%20Board%20of%20Examiners%20of%20Psychologists.shtml#TopOfPage>

PUBLIC SERVICE COMMISSION

Statutory Authority: 26 Delaware Code,
Section 209(a) (26 Del.C. §209(a))

IN THE MATTER OF THE SALE,
RESALE, AND OTHER PROVISIONS
OF INTRASTATE
TELECOMMUNICATIONS
SERVICES (OPENED MAY 1, 1984;
REOPENED NOVEMBER 17, 1998;
REOPENED JULY 24, 2001;
REOPENED AUGUST 9, 2005)

PSC
REGULATION
DOCKET NO. 10

IN THE MATTER OF THE
DEVELOPMENT OF REGULATIONS
FOR THE FACILITATION OF
COMPETITIVE ENTRY INTO THE
TELECOMMUNICATIONS LOCAL
EXCHANGE SERVICEMARKET
(OPENED NOVEMBER 21, 1995;
REOPENED NOVEMBER 17, 1998;
REOPENED JULY 24, 2001;
REOPENED AUGUST 9, 2005)

PSC
REGULATION
DOCKET NO. 45

**PUBLIC NOTICE OF PROPOSED AMENDMENTS
TO THE PUBLIC SERVICE COMMISSION'S
"RULES FOR THE PROVISION OF
TELECOMMUNICATIONS SERVICES"**

TO: ALL TELECOMMUNICATIONS CARRIERS,
ALL CONSUMERS, AND OTHER
INTERESTED PERSONS

In 2001, the Public Service Commission ("PSC ") adopted "Rules for the Provision of Telecommunications Services" ("Telecom Rules") to govern its regulatory oversight of telecommunications carriers operating within Delaware. Those Rules apply to all current telecommunications carriers, except Verizon Delaware Inc.

By PSC Order No. 6690 (Aug. 9, 2005), the PSC now proposes to amend Rule 4(f) and Rule 10 of those Telecom Rules. The proposed change to Rule 4(f) will allow telecommunications carriers to submit irrevocable stand-by Letters of Credit as a substitute for the filing of surety bonds currently required under Rule 4(f)(i) & (ii). Such Letters of Credit, like the now required bonds, will provide financial assurances that carriers will pay financial liabilities for inadequate performance (Rule 4(f)(i)) and that sufficient funds will remain available in case refunds of customer deposits and prepaid monies might be required (Rule

4(f)(ii)). The proposed amendment to Rule 10 will allow a "qualified carrier," one with less than \$2,500,000 in annual gross intrastate revenues in the preceding year, to forego filing most of the financial, merger, and transfer of control applications now required by 26 Del.C. §215(a) & (b). The exemption will not apply to local exchange carriers, will not be available during the first year after the carrier's certification, and will not apply to mergers or acquisitions involving another carrier with more than \$2,500,000 in annual gross Delaware revenues.

The text of these proposed amendments are attached to PSC Order No. 6690. That Order and the exhibits are reproduced in the September 2005 edition of the Delaware Register of Regulations. The Order and exhibits can also be reviewed on-line at the PSC's website at www.state.de.us/delpsc. You can also obtain a paper copy of the Order at the PSC's Dover office. Those paper copies will cost \$0.25 per page.

You can file written comments, suggestions, briefs, compilations of data, or other materials concerning these proposed amendments to the Telecom Rules. Such material (10 copies) must be submitted to the Commission on or before Friday, September 30, 2005. Send the material to the Commission's Dover office at the following address:

Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building
Suite 100
Dover, Delaware, 19904
Attn: PSC Reg. Dckts. Nos. 10 & 45

In addition, the PSC will conduct a public hearing on these proposed changes on Wednesday, October 19, 2005, beginning at 10:00 AM. The hearing will take place in the Third Floor Conference Room of the Carvel State Office Building, 820 North French Street, Wilmington, Delaware. You can submit additional materials then.

If you are handicapped and might need assistance or aids in participating in this matter, please contact the PSC to discuss the needed assistance or aids. You can contact the PSC with questions or requests about this matter at the Commission's toll-free telephone number (800) 282-8574 (Delaware only) or (302) 739-4333 (including text telephone). You can also send inquiries by Internet e-mail addressed to karen.knickerson@state.de.us.

ORDER NO. 6690

This 9th day of August, 2005, the Commission determines and Order the following:

A. BACKGROUND AND SUMMARY

1. More than three years ago, this Commission adopted its “Rules For The Provision of Competitive Intrastate Telecommunications Services,” a set of unified regulations applicable to most, but not all, telecommunications carriers providing telecommunications services in Delaware.¹ Those Rules include not only criteria related to the initial certification but also explain how the Commission will supervise carriers’ offerings and prices. In some cases, the Rules require different presentations or impose differing duties, depending on the category of services to be offered by the carrier (for example, local exchange or interexchange). In other instances, the Rules apply across the board.

2. By this Order, the Commission now proposes to make two amendments to those Telecom Rules. Both changes are mostly administrative. The first proposed revision will enable telecommunications carriers to utilize the banking device of a stand-by “Letter of Credit” (“the Letter”) as the security instrument to ensure both the carrier’s performance and the availability of funds to remit its customers’ prepaid deposits. Under the current Rules, the carrier must guarantee both its performance and its refunds by filing a bond executed by a Delaware surety. By the second change – more substantive in nature – the Commission proposes to forebear from enforcing the provisions of 26 Del.C. §215(a) & (b) in the case of those telecommunications carriers that have been certificated for at least a year but have little Delaware revenues. If so “qualified,” such carrier would no longer have to obtain Commission approval for its financings, mergers, or transfers of control. However, under the proposal, the exemption is not absolute. The proposed forbearance would not extend to carriers offering local exchange and exchange access voice services, and would not apply where a contemplated merger or transfer of control involves another carrier with significant Delaware earnings.

1. See PSC Findings, Opinion, and Order No. 5833 (Nov. 6, 2001) (adopting such “Telecom Rules”). The Telecom Rules do not apply to carriers electing regulation under the Telecommunications Technology Investment Act, 26 Del.C. §§ 704-11 (2004 Supp.). Thus, Verizon Delaware Inc. is not currently governed by the Telecom Rules.

B. AUTHORITY FOR AMENDMENTS

3. The Commission is generally empowered to promulgate regulations governing the operations of public utilities. See 26 Del.C. §209(a)(1). In addition, the Commission is empowered to grant Certificates of Public Convenience and Necessity to public utilities, including telecommunications carriers. See 26 Del.C. §203(A)(a), (b) (3)-(5). Moreover, since 1992, the Commission has been authorized to adopt alternative forms of regulation for telecommunications carriers, including both de-tariffing and deregulation. See 26 Del.C. §703(3)(2004 Supp.).

C. “LETTER OF CREDIT” ALTERNATIVE

4. Under the present Telecom Rules, a telecommunications carrier must file as a condition of its certification, and must maintain during its operations, a \$10,000 performance bond executed by a Delaware surety. That bond is to be renewed annually. Telecom Rule 4(f)(i). Similarly, if a carrier will require its customers to pay a deposit or make any form of advance payment, the carrier must initially file a bond, issued by a corporate surety licensed to do business in this State, guaranteeing the repayment of all such customer deposits and advances. Telecom Rule 4(f)(ii).²

5. Recently, several carriers have requested waivers from the requirement to file a surety bond to guarantee their performance or their repayment of customer deposits. Those carriers report that corporate insurers often refuse to stand as sureties on such commitments or charge carriers extremely high premiums for such guarantee instruments. See e.g., PSC Order No. 6437 at ¶¶ 1 & 3 (June 22, 2004) (Commission waives surety bond requirement in favor of stand-by Letter to secure carrier’s performance obligations).

6. The Commission now proposes to amend Rule 4(f) to add a new subparagraph (iii). The new subparagraph would allow telecommunications carriers to fulfill security obligations imposed by Rule 4(f)(i) or Rule 4(f)(ii) (or both) by use of a banking instrument: an irrevocable stand-by Letter of Credit. The Letter would be an alternative to the carrier filing the otherwise required insurance instruments –

2. This advance deposit bond must secure repayment in the amount of the greater of either 150% of the projected balance of such deposits at the end of three years or \$50,000. If at any time during the carrier’s operations its deposits exceed the bond amount, the carrier must submit a new bond in an amount to cover the higher pre-paid deposit balance. After three years, a carrier may obtain a waiver of the advance payment bond obligation by establishing sufficient financial resources to insure repayment of the deposits or advance payments held by the carrier.

bonds with Delaware sureties. However, the Letter alternative would track the requirements for a surety bond. The amount payable under the Letter would have to be equivalent to the level of bond guarantee required by either Rule 4(f)(i) or Rule 4(f)(ii). Also, the Letter must be consistent with the provisions of 6 Del.C. §§ 5-101 through 5-117.³ The Letter must name the Commission as its beneficiary and authorize draws on presentation of a Commission Order, ruling, or decision finding or reciting that the carrier is liable for a monetary amount due to its failure to comply with applicable rules or statutes or that the carrier is obligated to make refunds of deposits on advance payments to its customers. The Letter must be issued by a bank or other entity doing business in Delaware, or, if not, be subject to an agreement by a confirming bank doing business in Delaware that the confirming bank will honor the Letter issued by the other bank or entity.⁴

7. The text of this amendment to allow such Letters is set forth in Exhibit "A" as a new Rule 4(f)(iii) subparagraph. The Commission believes that the public interest will be served by allowing such an alternative form of security. While not a true guarantee, the Letter seemingly provides similar assurances that monetary amounts will be available in case of defaults by carriers. Indeed, in contrast to bonds where the surety can avail itself of various defenses held by the carrier, the Letter creates an independent obligation for the issuing entity to pay if the called-for documents are presented. Moreover, by allowing another security device, more carriers may be able to meet, without additional delay and cost, the requirements of Rule 4(f)(i) or (ii).

D. FORBEARANCE FROM §215(a) AND (b) OBLIGATIONS FOR CERTAIN NON-LOCAL EXCHANGE TELECOMMUNICATIONS CARRIERS WITH LIMITED INTRASTATE REVENUES

8. As a second amendment, the Commission proposes to include within Rule 10 of the Telecom Rules a new subparagraph by which the Commission will lift, in the case of certain certificated telecommunications carriers, the statutory obligation to seek and obtain Commission approval for certain transactions. See 26 Del.C. §215(a) and (b). Under such forbearance exemption, "qualifying"

3. The Letter would have to include a "choice of law" provision agreeing that Delaware law would govern the relationship between the issuer and the Commission as the Letter's beneficiary.

4. This requirement parallels the present requirement that the surety on a bond must be one licensed to do business in this State.

telecommunications carriers would not need to file applications to gain approval to issue or assume long-term securities and debt obligations, to dispose of utility assets, or, in some situations, to merge. See 26 Del.C. §215(a)(1)-(3). Similarly, the qualifying carrier would not, in many situations, have to seek approval for transfers in its ownership or its acquisition of other carriers. See 26 Del.C. §215(b). Rather, the qualifying carrier would only have to report such merger or transfer of control in its year-end Annual Report filed under Rule 10(a) of the Telecom Rules.

9. The above forbearance would apply only to telecommunications carriers fulfilling all the following criteria:

(a) the carrier is currently certificated to provide intrastate telecommunications services and has held such certification for at least one year;

(b) the carrier does not provide or offer local exchange or exchange access voice services (see Telecom Rule 8) in Delaware;

(c) the carrier earned less than two and one-half million dollars (\$2,500,000) in annual gross intrastate revenues as reported in the carrier's last timely filed annual gross revenue return (26 Del.C. §115(e)); and

(d) the carrier's principal operations' office is not located in Delaware.

Thus, the forbearance exemption will not apply to any carrier offering local exchange voice services, regardless of its annual intrastate operating revenues. A carrier offering such voice services will have to continue to comply with the §215 filing and approval regime. The Commission desires to track ownership of such carriers in light of the network access services being provided. For the same reason, the exemption will not apply to a carrier who operates its network from a principal place of business in Delaware.⁵ If the carrier has its operations headquartered in Delaware, the Commission believes it appropriate to track its financial dealings and its owners. The revenue qualifier is triggered by looking to the "annual gross intrastate revenues" reported in the carrier's relevant annual gross return filed by the carrier. If a carrier has not timely submitted such a return reporting its revenues for the prior year, the exemption is not available.

5. For a similar reason, the exemption is not available until a carrier has been certificated for one year. The Commission desires to have the opportunity to know both who controls a newly certificated carrier and what financial obligations such a new carrier is assuming during its first year of certification within this State.

10. At the same time, the forbearance proposed to be granted to qualifying carriers does not extend to all transactions covered by §215(a) and (b). If a transfer of control (§215(b)) or a merger (§215(a)(1)) involves another certificated carrier – as either the acquired or acquiring entity – and such other entity is not a “qualifying” one, then the statutory provisions must be followed. Similarly, if the transfer of control or merger transaction (regardless of the other carrier) will result in the dissolution of the qualifying carrier or the creation of a new carrier, then the qualifying carrier must still file a petition for abandonment and the new resulting entity must still seek certification as a carrier.⁶

11. The Commission recognizes that the §215(a) and (b) filing and approval obligations are ones imposed by statute; they are part of the Public Utilities Act of 1974. However, in 1992, the General Assembly and Governor, in the “Telecommunications Regulatory Authorization Act of 1992,”⁷ granted this Commission the ability to respond to the changing structure of the telecommunications industry by modifying the regulation of telecommunications services in cases where such modification might “promote efficiency in public and private resource allocation.” The Commission believes that the elimination of most of the §215(a) and (b) obligations for non-local exchange carriers with less than \$2,500,000 in annual intrastate gross revenues will serve such goal of the efficient use of resources. The proposed change lifts not only from qualified carriers, but this Commission, the burdensome - and really no longer useful - reporting and approval requirements.⁸ Moreover, a large part of the §215(a) duty to obtain Commission approval for certain transactions can be traced to a component of the Commission’s exercise of rate regulation under a cost-of-service, rate of return regime. However, by the Telecom Rules, this Commission lifted the latter type of rate regulation regime from most of the carriers covered by those Rules. In fact, the Commission has already granted to carriers governed by those Rules relief from other statutory filing obligations that historically accompanied such cost-of-service supervision.⁹

6. See 26 **Del.C.** §203A(a) (certification), (c) (abandonment).

7. 26 **Del.C.** §703(3) (2004 Supp.)

8. In current practice, the Commission allows many §215 applications filed by certificated carriers with no or only minimal business in Delaware to be “deemed approved” without any affirmative action by the Commission. See 26 **Del.C.** § 215(d).

12. The text of the proposed amendment granting such forbearance to qualified carriers is set forth in Exhibit “B” as new subsection (e) to Rule 10 of the Telecom Rules.

Now, therefore, **IT IS ORDERED:**

1. That, pursuant to 26 **Del.C.** §§209 and 703(3), the Commission proposes to amend Rule 4(f) and Rule 10 of its “Rules for the Provision of Telecommunications Services” (initially adopted by PSC Findings, Opinion, and Order No. 5833 (Nov. 6, 2001)). The proposed amendment to Rule 4(f) is set forth in Exhibit “A” to this Order; the proposed amendment to Rule 10 is set forth in Exhibit “B”.

2. That, pursuant to 29 **Del.C.** §§1133 & 10115, the Secretary shall transmit a copy of this Order, with the attached exhibits, to the Registrar of Regulations for publication in the *Delaware Register of Regulations*.

3. That, pursuant to 26 **Del.C.** §209 and 29 **Del.C.** §10115(a)(2) & (b), the Secretary shall cause the form of public notice attached as Exhibit “C” to be published in two-column format, outlined in black, in the following two newspapers on the following dates:

The News Journal (August 29, 2005)

Delaware State News (August 30, 2005)

The Secretary shall also ensure, pursuant to 29 **Del.C.** §10115, that a copy of such notice is sent to the Registrar of Regulations for its publication in the *Register of Regulations*. In addition, the Secretary shall mail a copy of this Order, with its exhibits, to the Division of the Public Advocate and to all persons or entities who have made written requests for advanced notice of this Commission’s rule-making proceedings. The Secretary shall file a certification of the completion of these tasks by September 16, 2005.

4. That interested persons or entities may submit written suggestions, compilations of data, briefs, or other written materials concerning these proposed amendments on or before Friday, September 30, 2005. Pursuant to 26 **Del.C.** §209(a), the Commission, through its designated Hearing Examiner, will hold a public hearing on the proposed amendments on Wednesday, October 19, 2005, beginning at 10:00 AM in the Third Floor Conference Room of the Carvel

9. See Rule 5(a)-(c) (allowing use of price lists in lieu of tariffs; allowing services to be introduced on 10 days notice and price changes to be made on 3 days notice); 5(d) (upon Commission investigation, a carrier must establish that price or rate is expected to cover the incremental cost of providing the service).

State Office Building, 820 North French Street, Wilmington, Delaware.

5. That, pursuant to 26 **Del.C.** §502 and 29 **Del.C.** §10117, the Commission designates Hearing Examiner Ruth Ann Price to organize, classify, summarize, and make recommendations concerning the rule changes proposed by this Order in light of the submitted materials and public hearings. Hearing Examiner Price is specifically authorized to conduct further hearings or direct submission of additional documents if deemed necessary or appropriate.

6. 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.

BY ORDER OF THE COMMISSION:

Arnetta McRae, Chair
Joann T. Conaway, Commissioner
Jaymes B. Lester, Commissioner
Dallas Winslow, Commissioner

ATTEST:

Karen J. Nickerson, Secretary

EXHIBIT "A"

**RULES FOR THE PROVISION OF
TELECOMMUNICATIONS SERVICES**

- Docket 10: The Sale, Resale, and Other Provisions of Intrastate Telecommunications Services
Docket 45: Regulations For The Facilitation of Competitive Entry into the Telecommunications Local Exchange Service Market

Effective: December 10, 2001

**PART A
CERTIFICATION AND REGULATION OF
CARRIERS**

1.0 Definitions

“**Rules**” shall mean these Rules, including PARTS A and B, governing the provision of telecommunications services in Delaware.

“**Carrier**” shall mean any person or entity offering to the public Telecommunications service that originates or terminates within the State of Delaware. The term “Carrier” does not include:

- Any political subdivision, public or private institution of higher education or municipal

corporation of this State or operated by their lessees or operating agents that provides telephone service for the sole use of such political subdivision, public or private institution of higher learning or municipal corporation;

- A company that provides telecommunications services solely to itself and its affiliates or members or between points in the same building, or between closely located buildings which are affiliated through substantial common ownership and does not offer such services to the available general public;
- Providers of domestic public land mobile radio service provided by cellular technology excluded from the Commission’s jurisdiction under 26 **Del.C.** §202(c); and
- Payphone service providers regulated by this Commission under Rules promulgated in Regulation Docket No. 12.

“**CPCN**” shall mean a Certificate of Public Convenience and Necessity issued by the Commission.

“**Commission**” shall mean the Public Service Commission of Delaware.

“**Competitive Local Exchange Carrier (“CLEC”)**” shall mean a Carrier, other than the Incumbent Local Exchange Carrier, offering and/or providing local telecommunications exchange services within the State of Delaware.

“**Incumbent Local Exchange Carrier (“ILEC”)**” shall mean in Delaware Bell Atlantic-Delaware, Inc., and any successor thereto.

“**Facilities-based Carrier**” shall mean a Local Exchange Carrier that directly owns, controls, operates, or manages plant and equipment through which it provides local exchange services to consumers within the local exchange portion of the public switched network.

“**Local Exchange Carrier (“LEC”)**” shall mean a Carrier offering and/or providing local telecommunications exchange services (i.e., CLECs and ILECs); including both facilities-based and non-facilities-based Carriers.

“**Local Telecommunications Exchange Service**” shall mean non-toll, intrastate Telecommunications Services provided over a Local Exchange Carrier’s network, including, but not limited to, exchange access services and basic local services.

“**Resale**” shall mean the sale to an end user of any telecommunications service purchased from another Carrier.

“**Telecommunications**” shall mean the transmission, between or among points specified by the user, of

information of the user's choosing, without change in the form and content of the information as sent and received.

"Telecommunications Service" shall mean the offering of telecommunications for a fee directly to the public within the State of Delaware (originating or terminating within the State, without regard to how the Carrier decides to route the traffic), or to such classes of users as to be effectively available to the public, regardless of the facilities used. "Telecommunications Service" does not include:

- The rent, sale, lease, or exchange for other value received, of customer premises equipment, except for specialized terminal equipment as defined in 48 U.S.C. § 610(g);
- Telephone or telecommunications answering services, paging services, and physical pickup and delivery incidental to the provision of information transmitted through electronic or electromagnetic media, including light transmission;
- The one-way distribution of entertainment services or informational services with no more than incidental customer interaction required for selection of such entertainment or information services; and
- Telecommunications service provided by either primary cellular technology or by domestic public land mobile radio service, even in the event that such transmission originates or terminates in a wireline telephone.

2.0 Applicability

These Rules shall apply to all Carriers, as defined by these Rules, and shall be construed consistently with Rule 3 of these Rules.

3.0 Application of and Conflict With Other Rules, Regulations, Tariffs and/or Price Lists

3.1 The ILEC.

3.1.1 The ILEC will remain subject to the Telecommunications Technology [Investment] Act (TTIA), **26 Del.C.** sub. Ch. VII-A, and any implementing regulations promulgated by the Commission during the term of its election thereunder. During such term, the ILEC shall not be subject to the requirements of these Part A. Rules; and

3.1.2 The ILEC has Carrier of last resort obligations in its service territory.

3.2 Telephone Service Quality Regulations (Docket No. 20).

3.2.1 All Carriers shall provide telephone service in accordance with the Telephone Service Quality

Regulations the Commission adopted in PSC Regulation Docket No. 20, by Order No. 3232 (January 15, 1991) as such may from time to time be amended, except to the extent these Rules impose obligations or grant privileges inconsistent therewith.

3.3 Negotiation and Mediation Guidelines.

3.3.1 All Carriers must abide by the Commission's Guidelines for Negotiations, Mediation, Arbitration and Approval of Agreements between Local Exchange Telecommunications Carriers (Order No. 4245).

3.4 Rules of Practice and Procedure

3.4.1 The practice and procedure governing any proceedings required or authorized by these Rules shall be as set forth by the Commission's Rules of Practice and Procedure adopted in PSC Docket No. 99-9, by Order No. 5057 (April 6, 1999) as the same may be hereafter from time to time amended.

3.5 Other Rules and Statutes.

3.5.1 These Rules shall prevail over any inconsistent requirements imposed by prior Order or regulation of the Commission, except for Rule 3.1 preceding and where expressly authorized by a Commission Order granting a waiver. All Carriers remain subject to any and all applicable provisions of state and federal law.

3.6 Tariffs or Price Lists.

3.6.1 To the extent that a tariff or price list of any Carrier is inconsistent with these Rules, then, and in that event, these Rules shall control, subject to Rule 3.1 preceding, unless where expressly authorized by a Commission Order granting a waiver.

4.0 Certification

4.1 Certification Requirement.

4.1.1 No person or entity shall offer public intrastate or local exchange telecommunications service within the State of Delaware without first obtaining from the Commission a Certificate of Public Convenience and Necessity authorizing such service. A Carrier offering telecommunications service within the State of Delaware without a CPCN duly issued by this Commission is acting unlawfully and shall immediately cease offering such service until a CPCN is granted.

4.2 Application.

4.2.1 An applicant for a CPCN shall file with the Commission an original and ten (10) copies of an Application for Certificate of Public Convenience and Necessity, together with the statutory filing fee set forth in **26 Del.C.** §114, as the same may from time to time be amended. Such application shall contain all the information and exhibits hereinafter required and may contain such additional information as the applicant deems appropriate to

demonstrate to the Commission that it possesses the technical, financial and operational ability to adequately serve the public and that the public convenience and necessity requires or will require the operation of such business. If the applicant fails to provide the required information and exhibits within six months of the application, the Commission may take action to close this docket and the applicant will forfeit its application fee.

4.3 Notice.

4.3.1 The applicant shall serve a notice of the filing of such an application upon the Public Advocate, and to such other entities as may be required by the Commission. The applicant shall provide public notice of the filing of the application in two (2) newspapers having general circulation throughout the county or counties where service is to be offered in a form to be prescribed by the Commission.

4.4 Business License and Registered Agent.

4.4.1 An applicant shall demonstrate that it is legally authorized and qualified to do business in the State of Delaware, including that it has received authorization to do business issued by the Secretary of State. An applicant shall provide the name, address, and telephone number of its Delaware Resident Agent. Following certification, all Carriers shall promptly notify the Commission in writing of changes of Resident Agent or the name, address, or telephone number thereof.

4.5 Identification and Billing of Intrastate and Interstate Traffic.

4.5.1 An applicant shall be required to set forth an effective plan for identifying and billing intrastate versus interstate traffic, and shall pay the appropriate LEC for access at the LEC's prevailing access charge rates. If adequate means of categorizing traffic as interstate versus intrastate are not or cannot be developed, then, for purposes of determining the access charge to be paid to the LEC for such undetermined traffic, the traffic shall be deemed to be of the jurisdiction having the higher access charges and billed at the higher access charges.

4.6 Bonds.

4.6.1 Performance Bonds.

4.6.1.1 All applicants must post a \$10,000 performance bond with Delaware surety and renew such bond annually.

4.6.2 Carriers requiring deposits, or any form of payment in advance for service.

4.6.2.1 No Carrier shall require its customers in Delaware to pay a deposit or pay or otherwise provide any security or advance as a condition of service unless that Carrier first has filed with the Commission a bond, issued by a corporate surety licensed to do business in Delaware, guaranteeing the repayment of all customer deposits and

advances upon the termination of service. The bond need not be filed with the application, but no CPCN will be issued until such bond is filed with the Commission. The amount of the bond shall be the greater of: (A) 150% of the projected balance of deposits and advances at the end of three years of operation; or (B) \$50,000. If at any time the actual amount of deposits and advances held by a Carrier exceeds the bond, then the Carrier promptly shall file with the Commission a bond with surety to comply with the requirement of the preceding sentence. A Carrier may petition for waiver of the bond requirement three years from the date the certificate was issued and such waiver will be granted upon a demonstration of an adequate operating history and financial resources to insure the repayment to customers of any advance payments or deposits held.

4.6.3 In order to comply with Rule 4.6.1 or 4.6.2, an applicant or carrier may file an irrevocable stand-by Letter of Credit in lieu of a bond executed by a Delaware corporate surety. Such Letter of Credit shall:

4.6.3.1 allow a draw or demand against such Letter in the amount prescribed by Rule 4.6.1 or 4.6.2;

4.6.3.2 be irrevocable, and not subject to modification, except upon the consent of the Commission;

4.6.3.3 be issued by a federal or state chartered financial institution which does business in Delaware or be subject to an agreement with a confirming bank doing business in Delaware that such confirming bank will honor drafts or demands under such Letter;

4.6.3.4 be consistent with provisions of 6 Del.C. §§5-101 through 5-117 and include terms that make Delaware law govern the relationship between the issuer and the Commission as beneficiary;

4.6.3.5 name the Commission as the beneficiary under such Letter; and

4.6.3.6 contain terms obligating the issuer to honor demands upon presentation of an Order, ruling, or decision from the Commission which finds, determines, or reports that the carrier is: (1) liable for a specified monetary sanction for its failure to perform an obligation imposed by the Public Utility Act, a Commission rule or regulation, or an Order of the Commission (Rule 4.6.1); or (2) is liable to refund an amount representing prepaid deposits or advances paid by customers of the carrier (Rule 4.6.2)).

4.6.3.7 The form and terms of the Letter of Credit shall be subject to approval by the Commission staff.

4.7 Minimum Financial Requirements for LECs.

4.7.1 Any applicant for certification as a facilities-based CLEC shall demonstrate in its application that it possesses a minimum of \$100,000 of cash or cash equivalent, reasonably liquid and readily available;

4.7.2 Any applicant for certification to do business as a non-facilities-based CLEC shall demonstrate in its application that it possesses a minimum of \$25,000 of cash or cash equivalent, reasonably liquid and readily available;

4.7.3 Any applicant that has profitable interstate operations or operations in other states may meet the minimum financial requirements of subparagraphs 4.7.1 and 4.7.2 above by submitting an audited balance sheet and income statement demonstrating sufficient cash flow to meet the above requirements; and

4.7.4 An applicant may demonstrate cash or cash equivalent by the following:

4.7.4.1 Cash or cash equivalent, including cashier's check, sight draft, performance bond proceeds, or traveler's checks;

4.7.4.2 Certificate of deposit or other liquid deposit, with a reputable bank or other financial institution;

4.7.4.3 Preferred stock proceeds or other corporate shareholder equity, provided that use is restricted to maintenance of working capital for a period of at least twelve (12) months beyond certification of the applicant by the Commission;

4.7.4.4 Letter of credit, issued by a reputable bank or other financial institution, irrevocable for a period of at least (12) months beyond certification of the applicant by the Commission;

4.7.4.5 Line of credit, issued by a reputable bank or other financial institution, irrevocable for a period of at least twelve (12) months beyond certification of the applicant by the Commission;

4.7.4.6 Loan, issued by a qualified subsidiary, affiliate of applicant, or a qualified corporation holding a controlling interest in the applicant, irrevocable for a period of at least twelve (12) months beyond certification of the applicant by the Commission, and payable on an interest-only basis for the same period;

4.7.4.7 Guarantee, issued by a corporation, copartnership, or other person or association, irrevocable for a period of at least twelve (12) months beyond certification of the applicant by the Commission;

4.7.4.8 Guarantee, issued by a qualified subsidiary, affiliate of the applicant, or a qualified corporation holding controlling interests in the applicant irrevocable for a period of at least twelve (12) months beyond the certification of the applicant by the Commission.

4.8 Initial Tariffs or Price Lists.

4.8.1 An applicant shall file proposed initial rates, prices, rules, regulations, terms and conditions of service specifically adopted for the State of Delaware. Upon an investigation into unjust and unreasonable pricing

practices, the Commission Staff may require the applicant to provide cost data demonstrating that rates are reasonably expected to cover the incremental cost of offering the service. Copies of the applicant's rates and terms and condition of service in other jurisdictions must be provided to the Commission upon request. Any applicant's tariff or price lists must include at a minimum specific policies regarding:

4.8.1.1 customer deposits and advances;

4.8.1.2 prompt reconciliation of customer billing problems and complaints; and

4.8.1.3 timely correction of service problems.

4.9 Demonstration of Fitness.

4.9.1 An applicant shall be required to demonstrate to the Commission its financial, operational, and technical ability to render service within the State of Delaware. Such demonstration shall include, but is not limited to, the following:

4.9.1.1 The applicant's certified financial statements current within twelve (12) months of the filing, and, where applicable, the most recent annual report to shareholders and SEC Form 10-K;

4.9.1.2 A brief narrative description of the applicant's proposed operations in Delaware, any present operations in all other states, and states for which service applications are pending;

4.9.1.3 A description of the relevant operations experience of applicant's personnel principally responsible for the proposed Delaware operations;

4.9.1.4 A specific description of the applicant's engineering and technical expertise showing its qualifications to provide the intended service, including the names, addresses, and qualifications of the officers, directors, and technical or engineering personnel or contractors who will be operating and/or maintaining the equipment to be used to provide such service; and

4.9.1.5 A description, including location, of the applicant's facilities that the applicant will use to provide the proposed service in the next three years. Upon written request of the Commission Staff, the applicant shall provide a one year construction, maintenance, engineering, and financial plan for all services intended to be provided within the State of Delaware with a technical description of the equipment which will be used to provide such service.

5.0 New Options or Offerings; Changes to Existing Rates, Prices or Terms and Conditions

5.1 Notice Required for New Service Options and Offerings.

5.1.1 No Carrier shall offer new telecommunication service options or offerings except ten

(10) days after filing with the Commission the proposed tariff or price list.

5.2 Notice Required to Revise Existing Tariff or Price List.

5.2.1 No Carrier shall revise an existing tariff or price list except three (3) days after filing with the Commission the proposed tariff or price list.

5.3 Service of Notice.

5.3.1 A Carrier filing a new service or changes to an existing service pursuant to this Rule shall serve the filing on:

5.3.1.1 the Public Advocate; and

5.3.1.2 all interested persons that submit a written request to the Commission to receive such notice.

5.3.1.2.1 A Carrier shall file with the Commission a certificate of service as part of its notice requirement. To the extent that any such documents contain information claimed to be proprietary and interested persons have submitted a written request for notice, but have not executed an appropriate proprietary agreement, the Carrier shall provide an expurgated version of the notice to such parties.

5.4 Investigation of Filings.

5.4.1 A filing made pursuant to this rule shall not preclude the Commission or its Staff from an informal or formal investigation into the filing in order to protect fair competition, including requiring the Carrier to provide cost data demonstrating that rates are reasonably expected to cover the incremental cost of offering the service.

5.5 Special Contracts

5.5.1 A Carrier shall file under this rule all contracts with a customer to the extent the contract changes the terms or conditions generally offered to the public in the carrier's tariff or price list on file with the Commission.

6.0 Discrimination Prohibited

No Carrier shall unreasonably discriminate among persons requesting a service within the State of Delaware. Any finding of unreasonable discrimination shall be grounds for suspension or revocation of the Certificate of Public Convenience and Necessity granted by the Commission, as well as the imposition of monetary and other penalties pursuant to 26 Del.C. §§217 and 218.

7.0 Abandonment or Discontinuation of Service

A Carrier may abandon or discontinue service, in whole or in part, in accordance with the terms of 26 Del.C. §203A(c). The Carrier shall provide notice of its application to discontinue or abandon service to its customers subscribing to such service and to the Division of Public Advocate. Such notice shall describe the options available to

the customers. The Carrier's application to abandon or discontinue a service shall contain proposed provision for payment of all relevant outstanding liabilities (deposits and advance payments), if any, to customers within the State of Delaware.

8.0 Services to be Provided By CLECs Providing Voice Telephone Service

8.1 Any CLEC providing voice telephone service shall offer, at a minimum, the following telecommunication services to its customers:

8.1.1 access to the public switched network;

8.1.2 dial tone line services;

8.1.3 local usage services;

8.1.4 access to all available long distance

Carriers;

8.1.5 TouchTone services;

8.1.6 White page listing;

8.1.7 Access to 911 enhanced emergency system;

8.1.8 Local directory assistance service;

8.1.9 Access to telecommunications relay service.

9.0 Resale Prohibitions

9.1 Cross-Class Selling.

9.1.1 A Carrier that by tariff or price list makes a service available only to residential customers or a limited class of residential customers may prohibit the purchaser from offering such services to classes of customers that are not eligible for such services from the providing Carrier.

9.2 Other.

9.2.1 With respect to any restrictions on resale other than cross-class selling as described in paragraph 9.1 above, a Carrier may impose a restriction only if the Commission determines that the restriction is reasonable and nondiscriminatory.

10.0 Reports to the Commission.

10.1 Annual and Periodic Reports.

10.1.1 All Carriers shall file with the Commission an Annual Report as described below and such other reports or information as the Commission may from time to time require to fulfill its statutory obligations. The Annual Report shall include standard financial reports (balance sheet, statement of operations, supporting schedules, etc.). This report shall also include:

10.1.1.1 the same after-the-fact information that management is provided concerning the measurement of performance provided in Delaware;

10.1.1.2 the information used to determine Delaware income tax liability;

10.1.1.3 financial and operating information for the smallest management unit that includes Delaware;

10.1.1.4 intrastate revenues (net of uncollectible) by service category;

10.1.1.5 intrastate access and billing and collection cost by service category;

10.1.1.6 total number of customers by service category;

10.1.1.7 total intrastate minutes of use by service category;

10.1.1.8 total intrastate number of calls by service category;

10.1.1.9 a description of service offered;

10.1.1.10 a description of each complaint received by service category (in the form of a single Complaints Log); and

10.1.1.11 verification of deposits, customer advances, the bond requirement and the bond with surety, where applicable.

10.2 Accounting System.

10.2.1 All Carriers shall use an accounting system in accordance with Generally Accepted Accounting Principles or such other uniform system of accounts previously approved in writing by the Chief of Technical Services of the Commission.

10.3 Attestation.

10.3.1 All Carriers shall file all reports required by these Rules with a sworn statement by the person under whose direction the report was prepared, that the information provided in the report is true and correct to the best of the person's knowledge and belief.

10.4 Time for Filing.

10.4.1 All periodic reports to be filed with this Commission must be received on or before the following due dates, unless otherwise specified herein, or unless good cause is demonstrated by the Carrier:

10.4.1.1 Annual Report: one hundred twenty (120) days after the end of the reported period; and

10.4.1.2 Special and additional reports: as may be prescribed by the Commission unless good cause to the contrary is demonstrated.

10.5 Forbearance from Filing Application for Approval Under 26 Del.C. §215 (a) and 215 (b)

10.5.1 A qualified carrier (as defined below) need not file an application for approval of the financial and asset transactions set forth in 26 Del.C. §215 (a)(1), (a)(2), or (a)(3);

10.5.2 Except in the case of transactions described below, a qualified carrier (as defined below) need not file for approval of mergers or consolidations under 26 Del.C. §215 (a)(1) or for transfer of control under 26 Del.C. §§215 (b). However, if the other entity involved in such proposed transaction is a carrier certificated in this State that, in the preceding year, reported annual gross intrastate revenues of \$2,500,000 dollars, a qualifying carrier must continue to file an appropriate application for merger or transfer of control under 26 Del.C. §215 (a)(1) and 215 (b). An entity is involved in the transaction if:

10.5.2.1 it is a party to the merger agreement;

10.5.2.2 it is the entity to be acquired in the merger or transfer of control by the qualified carrier or its corporate parent;

10.5.2.3 it is the entity acquiring the qualified carrier; or

10.5.2.4 it will, as a result of the transaction, be owned by the same corporate owner as the qualified carrier.

10.5.3 A qualified carrier is a carrier:

10.5.3.1 that does not provide or offer local exchange and intrastate exchange access voice services;

10.5.3.2 that is currently certificated and that has held such certification for at least one year;

10.5.3.3 that had less than \$2,500,000 in annual gross intrastate revenues, as reported in the carrier's timely filed Annual Gross Revenue return submitted under 26 Del.C. §215 (e); and

10.5.3.4 that does not operate its network from a principal place of business in Delaware.

10.5.4 A qualified carrier shall include in its Annual Report under Rule 10.1, the date and nature of any mergers or transfers of control occurring during the preceding calendar year.

10.5.5 If any transfer of control, merger, or other similar transaction shall result in the change of the corporate, or trade, name of the certificated qualified carrier, the qualified carrier must file, within 10 days after such transaction, a statement identifying the new name of the certificated carrier.

10.5.6 The forbearance from filing granted by Rule 10.5.1 and 10.5.2 do not relieve any carrier of the obligation to file for abandonment of service under 26 Del.C. §203A, nor does such forbearance remove the obligation that any new entity created by a merger, transfer of control, or other transaction obtain a Certificate of Public Convenience and Necessity from the Commission.

11.0 Enforcement**11.1 Commission Oversight.**

11.1.1 The Commission shall have the authority and the discretion to take such action, upon complaint, motion, or formal or informal investigation, to remedy any alleged violations of these Rules. The Commission shall have available to it all remedies and enforcement powers bestowed by statute and consistent with due process.

11.2 Violation and Penalties.

11.2.1 Failure of a Carrier to comply with any provision of these Rules may result in the suspension or revocation of its CPCN, and/or of the imposition of monetary or other penalties as authorized by 26 Del.C. §§217 and 218.

11.3 Proceedings.

11.3.1 Upon application by any person affected, including the Division of the Public Advocate or another Carrier, or upon its own motion, the Commission may conduct a proceeding to determine whether a Carrier has violated any provision of these Rules. Such proceedings shall be conducted according to the Commission's Rules of Practice and Procedure.

11.4 Investigations.

11.4.1 For the purpose of determining whether it is necessary or advisable to commence a proceeding, the Commission or its Staff may, at any time, investigate whether a Carrier is in compliance with these Rules. Upon request, the Carrier shall provide to the Commission or its Staff sufficient information to demonstrate its compliance or noncompliance with the Rules, including such data as shall demonstrate that the Carriers' services are provided at rates that generate sufficient revenue to cover the incremental cost of offering that service.

11.5 Customer Complaints as Ground for Proceeding or Investigation.

11.5.1 The Commission may hold a proceeding to determine whether to suspend or revoke the certificate of, or otherwise penalize any Carrier for reason of customer complaints. The Commission may investigate any customer complaints received.

12.0 Waiver of Rules Upon Petition

12.1 A Carrier may petition the Commission for waiver of a Rule or Rules on a temporary or permanent basis by demonstrating to the satisfaction of the Commission that a waiver is in the public interest or for other good cause, including unreasonable hardship or burden. The Carrier shall comply with all Rules until the petition for waiver has been granted.

PART B**CUSTOMER ELECTION OF PREFERRED CARRIER****13.0 Additional Definitions**

For purposes of this PART B, in addition to the Definitions set forth by PART A, the following definitions shall apply:

13.1 Preferred Carrier shall mean the Carrier providing service to the customer at the time of the adoption of these Rules, or such Carrier as the customer thereafter designates as the customer's Preferred Carrier.

13.2 Preferred Carrier Change Order shall mean generally any order changing a customer's designated Carrier for local exchange service, intraLATA intrastate toll service or both.

14.0 Applicability

Any Carrier offering intrastate and/or local exchange service for public use within the State of Delaware, including the ILEC, Bell Atlantic-Delaware, Inc., shall be subject to the provisions of these Part B Rules.

15.0 Verification of Orders for Telecommunications Service

No Carrier shall submit a Preferred Carrier Change Order unless and until the Order has been first confirmed in accordance with one of the procedures set forth in 47 C.F.R. § 64.1120.

16.0 Letter of Agency Form and Content

A Carrier may use a letter of agency to obtain written authorization and/or verification of a customer's request to change his or her Preferred Carrier selection. A letter of agency that does not conform with the requirements set forth in 47 C.F.R. § 64.1130 is invalid.

17.0 Submission and Execution of Changes in Customer Carrier Selections

Submission and execution of changes in customer carrier selection shall comply with 47 C.F.R. § 64.1120.

18.0 Preferred Carrier Freezes

A Preferred Carrier freeze prevents a change in a customer's Preferred Carrier selection unless the customer has given the Carrier from which the freeze was requested his or her express consent. All Carriers who offer Preferred Carrier freezes must comply with the provisions of 47 C.F.R. § 64.1190.

19.0 Customer Protection

19.1 Procedures To Be Followed By The Customer.

19.1.1 A customer who believes his or her Carrier or Carriers have been changed, without the customer's authorization, and/or that the customer has been billed for charges not authorized by the customer, should first attempt to resolve the matter with the Carrier or Carriers responsible for the unauthorized changes and/or charges. If the customer is not satisfied with the resolution offered by the Carrier, the customer may file a complaint with the Commission.

19.2 Procedures To Be Followed By Carriers.

19.2.1 A Carrier who is informed by a customer that the customer believes the Carrier has caused or allowed a change in the customer's Carrier without the customer's authorization, or that the Carrier has caused or allowed the customer to be billed for charges not authorized by the customer shall attempt to resolve the complaint promptly and in good faith. If the customer and Carrier are not able to resolve the complaint, then the Carrier shall inform the customer orally or in writing of the right to file a complaint with the Commission and shall provide the customer with the Commission's address and telephone number.

19.3 Carriers to Maintain Record of Complaints.

19.3.1 Each Carrier shall maintain a record of the complaints received by it alleging that the Carrier has caused or allowed a customer's Carrier to be changed without the customer's authorization or has caused or allowed the customer to be billed for charges not authorized by the customer. The Carrier shall maintain the record of each complaint for a period of two years following initial notification of the complaint. Upon request by the Commission or its staff, a Carrier shall furnish a copy of its complaint records and such other information as the Commission Staff may require. A Carrier's complaint records shall include at least the following information:

19.3.1.1 name, address, and telephone number of complainant and the date and manner received by the Carrier; and

19.3.1.2 a chronological summary of the dispute and its current status, including any resolution and date of resolution.

19.4 Refund and Penalties.

19.4.1 In the event the Commission determines that a Carrier has caused a customer's Carrier for a service to be changed without the customer's authorization obtained in exact compliance with these Rules, or has caused the customer to be billed for charges imposed without exact compliance with these Rules, then the Commission shall require the Carrier to promptly refund or void to the customer any charges the Carrier has caused to be billed as a result of the unauthorized change or charge, and/or any other remedies available for violation of these Rules as allowed by law. 26 Del.C. §924(c). The Commission's remedies are in

addition to those required under 47 C.F.R. § 64.1170 to the extent the FCC's remedies have not provided a refund or credit to the subscriber in the amount of 100% of all charges the Carrier caused to be billed as a result of the unauthorized change or charge.

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**OFFICE OF THE SECRETARY**

Statutory Authority: 14 Delaware Code,
Section 122(d) (14 Del.C. §122(d))
14 DE Admin. Code 106

REGULATORY IMPLEMENTING ORDER**275 Charter Schools****I. Summary of the Evidence and Information Submitted**

The Secretary of Education seeks the consent of the State Board of Education to amend 14 DE Admin. Code 275 Charter Schools. The proposed amendments are based on changes made in House Bill No. 156 during the 143rd General Assembly. The legislative change was based on a recommendation of the Charter Schools Standards and Licensing Task Force created by House Resolution No. 78 of the 142nd General Assembly. The legislation allows a modification requested by a charter school relating to financial matters, enrollment preferences, number of students, or other such matters to be considered a minor modification. The amendments in 9.0 clarify what matters are to be considered minor modifications, major modifications, and modifications that are considered as a new charter. The amendments also clarify the process by

which minor modifications are to be considered and decided. Also, due to legislative changes made last year that state that Charters are granted for an initial period of 4 years of operation and are renewable every 5 years thereafter, the number three (3) in 10.1 has been changed to four (4) to correspond to the change in the statute. The second sentence in 10.1 about filling an application for renewal has been removed as it is addressed in the statute. The reference in 9.9.1.8 to section 9.4.4 has been changed to 9.4.3.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on June 22, 2005, in the form hereto attached as *Exhibit "A"*. Comments were received from Governor's Advisory Council for Exceptional Children and the State Council for Persons with Disabilities.

The Councils suggested amending the regulation so that parents would be notified of any "minor" modifications to the school's charter. The Department is not in support of imposing additional requirements on charter schools that are not mandated for school districts in similar situations.

The Councils suggested defining "minor" modifications and then stating that anything not defined as minor modifications be deemed a "major" modification. The Department discussed this issue and prefers that except for those incidences specifically designated as "major" any modification be considered a "minor" modification.

The Councils expressed a concern that charter schools may submit sequential applications for minor modifications

a few months apart. The Department will keep this concern in mind but does not believe that it will be a problem.

Finally the Councils were concerned that the regulations only define the process for processing “minor” modifications. The Department reiterates that currently “major” modifications must follow the same process as new applications and that process remains in place.

II. Findings of Facts

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code 275** in order to bring the regulation in line with the changes made in the statute.

III. Decision to Amend the Regulation

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code 275**. Therefore, pursuant to 14 **Del.C. Ch. 5**, 14 **DE Admin. Code 275** attached hereto as *Exhibit “B”* is hereby amended. Pursuant to the provision of 14 **Del.C. §122(e)**, 14 **DE Admin. Code 275** hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

IV. Text and Citation

The text of 14 **DE Admin. Code 275** amended hereby shall be in the form attached hereto as *Exhibit ‘B’*, and said regulation shall be cited as 14 **DE Admin. Code 275** in the *Administrative Code of Regulations* for the Department of Education.

V. Effective Date of Order

The actions hereinabove referred to were taken by the Secretary pursuant to 14 **Del.C. Ch. 5** on August 18, 2005. The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*.

IT IS SO ORDERED the 18th day of August 2005.

DEPARTMENT OF EDUCATION

Valerie A. Woodruff, Secretary of Education

Approved this 18th day of August 2005

STATE BOARD OF EDUCATION

Jean W. Allen, President

Richard M. Farmer, Jr., Vice President

Mary B. Graham, Esquire

Barbara Rutt, Esquire

Dennis J. Savage

Dr. Claibourne D. Smith

275 Charter Schools

1.0 Purpose and Effect

1.1 The purpose of these regulations is to provide rules to govern the implementation of 14 **Del.C. Ch. 5** (hereafter, the “Charter School Law”).

1.2 These regulations establish the requirements for applying for a charter to operate a public school, and for opening and operating the school, when a charter is granted by the Department of Education with the approval of the State Board of Education.

1.3 These regulations affect students who attend Charter Schools, the parents and other caregivers of these students, the directors, staff and administrators of the Charter Schools, and the students, staff, administrators and boards of the reorganized school districts of the State.

1.4 These regulations shall bind all Charter Schools and are incorporated into all charters approved by the Department with the consent of the State Board.

6 DE Reg. 274 (9/1/02)

2.0 Definitions

2.1 The following definitions apply for purposes of interpreting the Charter School Law and these regulations:

“**Accountability Committee**”: Any Charter School Accountability Committee established by the Department to review and report to the Department as provided in Sections 511 and 515 of the Charter School Law.

“**Applicant**”: A legal entity organized under the Delaware General Corporation Law that has applied to the Department for, but not yet received, a charter to operate a charter school, or the renewal or modification of such a charter, as the context indicates.

“**Audit**”: An informal financial, programmatic, or compliance audit of a charter school.

“**Charter Holder**”: The legal entity organized under the Delaware General Corporation Law to which a charter is issued by the Department with the approval of the State Board.

“**Charter School**”: A non-home based full time public school that is operated in an approved physical plant under a charter granted by the Department with the approval of the State Board for the personal physical attendance of all students.

“**DSTP**”: The Delaware Student Testing Program established at 14 **Del.C. §151**, et.seq., and, as the context requires, the assessments administered pursuant to the program.

“Department”: The Delaware Department of Education

“First Instructional Day”: The first day a Charter School is open with students in attendance.

“Formal Review”: The lawful investigation of a Charter School to determine whether the school is violating the terms of its charter. Formal reviews may include, but are not limited to, on site visits, inspection of educational records and other documents, and interviews of parents, Charter School employees and others with knowledge of the school's operations and educational programs.

“Founding Board of Directors”: The duly elected Board of Directors of an Applicant at the time the original application for a charter is filed with the Department.

“Parent”: The natural or adoptive parent, or the legal guardian, of a student enrolled in the charter school. “Parent” also includes individuals authorized to act as Relative Caregivers under the provisions of 14 Del.C. §202(e)(2).

“Performance Review”: Reserved

“Renewal”: The approval of an application to continue operating an existing Charter School for an additional five year period, available after the school has been in operation for three years.

“Secretary”: The Secretary of the Delaware Department of Education.

“State Board”: The Delaware State Board of Education.

6 DE Reg. 274 (9/1/02)

7 DE Reg. 928 (1/1/04)

3.0 Application Process

3.1 Application Deadlines: Applications to establish new Charter Schools must be submitted to the Department between November 1st and December 31st for schools preparing to admit students the second September 1st thereafter.

3.2 All applications, whether for an original charter, a modification of a charter or the Renewal of a charter, shall be made on forms approved by the Department.

3.3 The Department may require a criminal background check on any person involved in the preparation of an application, whether for an original charter, a major modification or a charter Renewal, and on any person involved in the development of the proposed Charter School.

3.4 An original and ten (10) copies of a completed application must be received by the Department by the application deadline in order for the application to be considered. Incomplete applications, or applications received after the deadline, will not be considered.

3.5 All written communications from the Department or the Accountability Committee to an Applicant shall be

sent to the contact person identified in the application, at the address provided in the application. An Applicant is responsible for notifying the Department in writing of any change in the contact person or contact address after its application is submitted.

3.6 An application is not complete unless all of the following requirements are met:

3.6.1 All questions on the application form are answered.

3.6.2 All documentation required by the application form or subsequently requested by the Department or the Accountability Committee is received.

3.7 No application for a new Charter School will be accepted by the Department in any year in which the Department with the approval of the State Board has decided not to accept applications.

3.8 Applications will not remain pending from year to year. Applications that do not result in the issuance of a charter must be resubmitted in full in subsequent years to be considered in subsequent years.

3.9 The State Board of Education may designate one or more of its members to sit as non-voting members of the Accountability Committee.

3.10 In deciding whether to approve or disapprove any application for an original charter, a major modification of a charter or the Renewal of a charter, the Secretary and State Board shall base the decision on the record. The record shall consist of the application and any documents filed therewith in support of the application, the preliminary and final report of the Accountability Committee, any response or other evidence, oral or otherwise, provided by the Applicant to the Accountability Committee prior to the issuance of its final report, any comments received at any public hearing conducted pursuant to the provisions of the Charter School Law, including comments made at any such hearing by the applicant in response to the Accountability Committee's final report and any written or electronic comments received at or before any such public hearing. No other evidence shall be considered. Written and electronic comments must be received by the Education Associate for Charter Schools no later than the beginning of the public hearing to be included in the record.

6 DE Reg. 274 (9/1/02)

4.0 Standards and Criteria for Granting Charter

4.1 Applicant Qualifications

4.1.1 The Applicant must demonstrate that its board of directors has and will maintain collective experience, or contractual access to such experience, in the following areas:

4.1.1.1 Research-based curriculum and instructional strategies, to particularly include the curriculum and instructional strategies of the proposed educational program.

4.1.1.2 Business management, including but not limited to accounting and finance.

4.1.1.3 Personnel management.

4.1.1.4 Diversity issues, including but not limited to outreach, student recruitment, and instruction.

4.1.1.5 At-risk populations and children with disabilities, including but not limited to students eligible for special education and related services.

4.1.1.6 School operations, including but not limited to facilities management.

4.1.2 The application must identify the certified teachers, the parents and the community members who have been involved in the preparation of the application and the development of the proposed Charter School.

4.1.3 The Applicant's bylaws must be submitted with the application and must demonstrate that:

4.1.3.1 The Charter Holder's board of directors will include a certificated teacher employed as a teacher at the Charter School and a Parent of a currently enrolled student of the school no later than the school's First Instructional Day;

4.1.3.2 The Applicant's business is restricted to the opening and operation of: Charter Schools, before school programs, after school programs and educationally related programs offered outside the traditional school year.

4.1.3.3 The board of directors will meet regularly and comply with the Freedom of Information Act, 29 **Del.C.** Ch. 100 in conducting the Charter School's business.

4.2 Student Performance

4.2.1 Minimum Requirements

4.2.1.1 The Applicant must agree and certify that it will comply with the requirements of the State Public Education Assessment and Accountability System pursuant to 14 **Del.C.** §§151, 152, 153, 154, and 157 and Department rules and regulations implementing Accountability, to specifically include the Delaware Student Testing Program.

4.2.1.2 The Applicant must demonstrate that it has established and will apply measurable student performance goals on the assessments administered pursuant to the Delaware Student Testing Program (DSTP), and a timetable for accomplishment of those goals.

4.2.1.3 At a minimum, the Applicant must agree and certify that the Charter School's average student performance on the DSTP assessments in each content area will meet the statewide average student performance of

students in the same grades for each year of test administration.

4.2.2 Special Student Populations

4.2.2.1 An Applicant for a charter proposing enrollment preferences for students at risk of academic failure shall comply with the minimum performance goals established in Subsections 4.2.1.2 and 4.2.1.3. This requirement may be waived where the Applicant demonstrates to the satisfaction of the Department and State Board that the Charter School will primarily serve at risk students and will apply performance goals and timetables which are appropriate for such a student population.

4.2.2.2 An Applicant for a charter proposing an enrollment preference other than a preference for students at risk of academic failure shall comply with the Section. 4.2.1. In addition, the Department, with the approval of the State Board, may require such an Applicant to establish and apply additional and higher student performance goals consistent with the needs and abilities of the student population likely to be served as a result of the proposed enrollment preferences.

4.2.3 If the Applicant plans to adopt or use performance standards or assessments in addition to the standards set by the Department or the assessments administered pursuant to the DSTP, the application must specifically identify those additional standards or assessments and include a planned baseline acceptable level of performance, measurable goals for improving performance and a timetable for accomplishing improvement goals for each additional indicator or assessment. The use of additional performance standards or assessments shall not replace, diminish or otherwise supplant the Charter School's obligation to meet the performance standards set by the Department or to use the assessments administered pursuant to the DSTP.

4.3 Educational Program

4.3.1 The application must demonstrate that the school's proposed program, curriculum and instructional strategies are aligned to State content standards, meet all grade appropriate State program requirements, and in the case of any proposed Charter High School, includes driver education. The educational program shall include the provision of extra instructional time for at risk students, summer school and other services required to be provided by school districts pursuant to the provisions of 14 **Del.C.** §153. Nothing in this subsection shall prevent an Applicant from proposing high school graduation requirements in addition to the state graduation requirements.

4.3.2 The application must demonstrate that the Charter School's educational program has the potential to

improve student performance. The program's potential may be evidenced by:

4.3.2.1 Academically independent, peer reviewed studies of the program conducted by persons or entities without a financial interest in the educational program or in the proposed Charter School;

4.3.2.2 Prior successful implementation of the program; and

4.3.2.3 The Charter School's adherence to professionally accepted models of student development.

4.3.3 The application must demonstrate that the Charter School's educational program and procedures will comply with applicable state and federal laws regarding children with disabilities, unlawful discrimination and at risk populations, including but not limited to the following showings.

4.3.3.1 The school's plan for providing a free appropriate public education to students with disabilities in accordance with the Individuals with Disabilities Education Act, with 14 **Del.C.** Ch. 31 and with 14 **DE Admin. Code** 925, specifically including a plan for having a continuum of educational placements available for children with disabilities.

4.3.2.2 The school's plan for complying with Section 504 of the Rehabilitation Act of 1973 and with the Americans with Disabilities Act of 1990.

4.3.3.3 The school's plan for complying with Titles VI and VII of the Civil Rights Act of 1964.

4.3.3.4 The school's plan for complying with Title IX of the Education Amendments of 1972.

4.4 Economic Viability.

4.4.1 The application must demonstrate that the school is economically viable and shall include satisfactory documentation of the sources and amounts of all proposed revenues and expenditures during the school's first three years of school operation after opening for instructional purposes. There must be a budgetary reserve for contingencies of not less than 2.0% of the total annual amount of proposed revenues. In addition, the application shall document the sources and amounts of all proposed revenues and expenditures during the start-up period prior to the opening of the school.

4.4.2 The Department may require that the Applicant submit data demonstrating sufficient demand for Charter School enrollment if another Charter School is in the same geographic area as the Applicant's proposed school. Such data may include, but is not limited to, enrollment waiting lists maintained by other Charter Schools in the same geographic area and demonstrated parent interest in the Applicant's proposed school.

4.4.3 The application shall identify with specificity the proposed source(s) of any loan(s) to the Applicant including, without limitation, loans necessary to implement the provisions of any major contract as set forth below, and the date by which firm commitments for such loan(s) will be obtained.

4.4.4 The application shall contain a timetable with specific dates by which the school will have in place the major contracts necessary for the school to open on schedule. "Major contracts" shall include, without limitation, the school's contracts for equipment, services (including bus and food services, and related services for special education), leases of real and personal property, the purchase of real property, the construction and/or renovation of improvements to real property, and insurance. Contracts for bus and food services must be in place no later than August 1st of the year in which the school proposes to open and August 1st of each year thereafter. Contracts for the lease or purchase of real property, and/or the construction and/or renovation of improvements to real property must be in place sufficiently far in advance so that the Applicant might obtain any necessary certificate of occupancy for the school premises no later than June 15th of the year in which the school proposes to open.

4.4.5 Reserved

4.5 Attendance, Discipline, Student Rights and Safety

4.5.1 The application must include a draft "Student Rights and Responsibilities Manual" that meets applicable constitutional standards regarding student rights and conduct, including but not limited to discipline, speech and assembly, procedural due process and applicable Department regulations regarding discipline.

4.5.1.1 The "Student Rights and Responsibilities Manual" must comply with the Gun-Free Schools Act of 1994 (20 U.S.C.A. §8921) and Department Regulation 878.

4.5.1.2 The application must include a plan to distribute the "Student Rights and Responsibilities Manual" to each Charter School student at the beginning of each school year. Students who enroll after the beginning of the school year shall be provided with a copy of the "Student Rights and Responsibilities Manual" at the time of enrollment.

4.5.2 The application must include the process and procedures the Charter School will follow to comply with the following laws:

4.5.2.1 14 **Del.C.** Ch. 27 and applicable Department regulations regarding school attendance, including a plan to distribute attendance policies to each Charter School student at the beginning of each school year. Students who enroll after the beginning of the school year

shall be provided with a copy of the attendance policy at the time of enrollment.

4.5.2.2 11 **Del.C.** Ch. 85 and applicable Department regulations regarding criminal background checks for public school related employment.

4.5.2.3 14 **Del.C.** §4112 and applicable Department regulations regarding the reporting of school crimes.

4.5.2.4 The Family Educational Rights and Privacy Act (FERPA) and implementing federal and Department regulations regarding disclosure of student records.

4.5.2.5 The provision of free and reduced lunch to eligible students pursuant to any applicable state or federal statute or regulation.

4.5.3 The requirement that the Applicant provide for the health and safety of students, employees and guests will be judged against the needs of the student body or population served. Except as otherwise required in this regulation, the Applicant must either agree and certify that the services of at least one (1) full time nurse will be provided for each facility in which students regularly attend classes, or demonstrate that it has an adequate and comparable plan for providing for the health and safety of its students. Any such plan must include the Charter School's policies and procedures for routine student health screenings, for administering medications to students (including any proposed self-administration), for monitoring chronic student medical conditions and for responding to student health emergencies. Any applicant which receives funding equivalent to the funding provided to school districts for one or more school nurses shall provide its students the full-time services of a corresponding number of registered nurses.

6 DE Reg. 274 (9/1/02)

7 DE Reg. 928 (1/1/04)

5.0 Nature of Charter

5.1 When granted, a charter is an authorization for the Charter Holder to open and operate a Charter School in accordance with the terms of the charter, including the terms of any conditions placed on the charter by the Department with the approval of the State Board.

5.1.1 It is the responsibility of the Charter Holder to notify the Department in writing of its compliance with any time frames or other terms or conditions contained in or imposed on the charter. The Department may require the Charter Holder to produce satisfactory evidence, including written documentation, of compliance.

5.2 Compliance with the charter, including compliance with the terms of any conditions placed on the charter, is a

condition precedent to the authority to open and operate the Charter School. Failure to comply with the terms of the charter and any conditions placed on the charter, including deadlines, operates as a forfeiture of the authority to open the Charter School regardless of previous approval. These regulations are incorporated into and made a part of each charter approved by the Department with the consent of the State Board. A Charter School's failure to comply with these regulations may be treated as a failure on the part of the school to comply with its charter.

6 DE Reg. 274 (9/1/02)

6.0 Funding

6.1 The Department may withhold State and local funding from a Charter Holder not in compliance with the terms of the charter being funded, including compliance with any conditions placed on such charter.

6.2 The Department may withhold State and local funding from a Charter Holder while one or more of its charters is under formal review.

6.3 State and local funding of any charter on probationary status will be released in accordance with the terms of the probation.

6.4 Federal funding for a Charter Holder and under the control of the Department will be disbursed according to the laws, regulations and policies of the federal program providing the funding and the terms of any applicable federal grant approval including state requirements.

6 DE Reg. 274 (9/1/02)

7.0 Reserved

6 DE Reg. 274 (9/1/02)

8.0 Enrollment Preferences, Solicitations and Debts

8.1 Enrollment Preferences

8.1.1 An Applicant to establish a new Charter School shall indicate in its application whether children of the Charter School's founders will be given an enrollment preference. If a founders' preference will be given, the application shall include the standard adopted by the Founding Board of Directors to determine the founders. The standard used to determine the founders shall be consistent with the requirements of Section 506(b)(4) of the Charter School Law. If the application is approved, the Charter Holder shall provide the Department with the identity of its founders no later than March 1 immediately preceding the First Instructional Day.

8.2 Solicitations.

8.2.1 Any person or entity soliciting contributions, gifts or other funding on behalf of or for the benefit of an existing or potential Charter School shall notify

the person or entity solicited that enrollment of an individual student in the Charter School is not contingent on, or assured by, any such contribution, gift or other funding.

8.2.2 Written notices of fund raising activities for the benefit of a Charter School must contain the following statement: "The [name of school] is a public school. Contributions and gifts are not required for admission to the school and will in no way affect or improve a student's opportunity for admission."

8.3 Debts

8.3.1 Any person or entity offering a loan to a Charter School must be advised by the school that debts of the school are not debts of the State of Delaware and that neither the State nor any other agency or instrumentality of the State is liable for the repayment of any indebtedness.

6 DE Reg. 274 (9/1/02)

7 DE Reg. 928 (1/1/04)

9.0 ~~Reserved~~ Modifications of Charters

9.1 A charter holder may apply to the Department for a modification of the charter following the granting of the charter.

9.2 The application shall be submitted on a form approved by the Department and shall specify the exact modification requested and describe the need for the modification.

9.3 The standards for deciding a modification application shall be as provided in Section 4.0 of these regulations for the original grant of the charter.

9.4 The following are considered applications for a new charter and shall not be processed or considered as a modification application:

9.4.1 An application to collectively change the mission, goals for student performance and educational program of the charter school; or

9.4.2 An application, at any time before the First Instructional Day, to offer educational services at a site other than the site approved as part of the school's charter, when the charter has previously been amended to change the school's site; or

9.4.3 An application to replace, remove or permit the school to operate without an educational management organization providing administrative, managerial or instructional staff or services to the charter holder at any time before the First Instructional Day.

9.5 An application for a major or minor charter modification may not be filed while a school's charter is on formal review, except where the Secretary determines that the requested modification is unrelated to the reason the school's charter has been placed on formal review or where the modification addresses the reason the school was placed

on formal review provided the modification is filed before the preliminary report is approved by the Accountability Committee.

9.6 A charter shall not be modified to permit a charter school's first instructional day to occur later than the third September 15th after the date the charter is originally granted. In the event that the first instructional day does not occur by that date, the charter shall be deemed forfeited and the authority to open and operate a charter school expired. Further, no charter shall be modified to permit a charter school to obtain a certificate of occupancy, either temporary or final, for all or any part of the premises to be occupied by the school, later than June 15 immediately preceding the authorized opening date of the school.

9.7 An increase or decrease of up to 5% in a charter school's current authorized enrollment shall not be considered a modification of the school's charter. Any modification application to increase or decrease a charter school's current authorized enrollment by more than 5% must be filed between November 1st and December 31st and, if approved, shall be effective the following school year.

9.8 Major modifications.

9.8.1 A major modification is any proposed change to a charter, including proposed changes to any condition placed on the charter, which would:

9.8.1.1 Replace, remove or permit the school to operate without an educational management organization providing administrative, managerial or instructional staff or services to the charter school at anytime on or after the First Instructional Day; or

9.8.1.2 Alter enrollment preferences; or

9.8.1.3 Result in an increase or decrease in the school's total authorized enrollment of more than 15%, provided further the major modification request must be filed between November 1st and December 31st and, if approved, shall be effective the following school year; or

9.8.1.4 Alter grade configurations; or

9.8.1.5 At any time after the First Instructional Day, offer educational services at a site other than the site approved as part of the school's charter, except where such change is the unavoidable result of a loss by fire or other "casualty" as that term is defined in *Black's Law Dictionary*; or

9.8.1.6 At any time before the First Instructional Day, offer educational services at a site other than the site approved as part of the school's charter, provided that the charter has not previously been amended to change the school's site; or

9.8.1.7 Alter any two of the following: the school's mission, goals for student performance, or educational program; or

9.8.1.8 Alter the charter school's performance agreement with the Department.

9.9 Minor modifications.

9.9.1 A minor modification is any proposed change to a charter, including proposed changes to any condition placed on the charter, which is not a major modification. Minor modifications include, but are not limited to:

9.9.1.1 Changes to the name of either the charter school or charter holder; or

9.9.1.2 The first extension of any deadline imposed on the charter school or charter holder by thirty (30) working days or less (or by 15 calendar days in the case of the First Instructional Day); or

9.9.1.3 Changes in the standards or assessments used to judge student performance (other than the State standards or the assessments administered pursuant to the DSTP); or

9.9.1.4 In the case of a charter school which is open with students in attendance, offering educational services at a site other than, or in addition to, the site approved as part of the school's charter, when use of the approved site has unavoidably been lost by reason of fire or other casualty as that term is defined in *Black's Law Dictionary*; or

9.9.1.5 Changes to alter not more than one of the following: the school's mission, goals for student performance, or educational program; or

9.9.1.6 An increase or decrease in the school's total authorized enrollment of more than 5%, but not more than 15%, provided further the minor modification request must be filed between November 1st and December 31st and, if approved, shall be effective the following school year; or

9.9.1.7 Alter, expand or enhance existing or planned school facilities or structures, including any plan to use temporary or modular structures, provided that the applicant demonstrates that the school will maintain the health and safety of the students and staff and remain economically viable as provided in 4.4 above; or

9.9.1.8 Any change in the school's agreement with an educational management organization other than as set forth in ~~[9.4.4 9.4.3]~~ and 9.8.1.1 above; or

9.9.1.9 A change to the current authorized number of hours, either daily or annually, devoted to actual school sessions. Regardless of any proposed change, the school shall maintain the minimum instructional hours required by 14 Del.C.; or

9.9.1.10 A change in the terms of the current site facilities arrangements including, but not limited to, a lease to a purchase or a purchase to a lease arrangement; or

9.9.2 The Secretary may decide the minor modification application based on the supporting documents supplied with the application unless the Secretary finds that additional information is needed from the applicant.

9.9.3 The Secretary may refer a minor modification request to the Accountability Committee for review if the Secretary determines, in her/his sole discretion, that such review would be helpful in her/his consideration of the application. If the Secretary refers a minor modification application to the Accountability Committee, she/he may decide the application based on any report from the Committee and the supporting documents related to the application. The applicant for a minor modification shall be notified if the minor modification request has been forwarded to the Accountability Committee. The applicant may be asked to provide additional supporting documentation.

9.9.4 The Secretary may deny a minor modification request if the supporting documentation is incomplete or insufficient provided the applicant has been advised additional information was needed

9.9.5 Upon receiving an application for a minor modification, the Secretary shall notify the State Board of the application and her/his decision on whether to refer the application to the Accountability Committee.

9.9.6 The meeting and hearing process provided for in Section 511(h), (i) and (j) of the Charter School Law shall not apply to a minor modification application even where the Secretary refers the application to the Accountability Committee.

9.9.7 Decisions for minor modifications to a charter shall be decided by the Secretary, with the concurrence of the State Board of Education, within 30 working days from the date the application was filed, unless the timeline is waived by the Secretary and the applicant.

6 DE Reg. 274 (9/1/02)

10.0 Renewals

10.1 Charters are granted for an initial period of ~~[3 4]~~ years of operation and are renewable every 5 years thereafter. ~~[A Charter School shall file its application for Renewal not less than six months prior to the end of any Renewal Period.]~~

10.2 Renewals are only available to the current Charter Holder and may not be used to transfer a charter to a different legal entity.

10.3 Charters shall be renewed only if the school receives a satisfactory Performance Review.

6 DE Reg. 274 (9/1/02)**7 DE Reg. 928 (1/1/04)****11.0 Public Hearings**

11.1 Any public hearing conducted by the Department pursuant to the provisions of the Charter School Law shall be conducted as a joint public hearing with the State Board of Education.

6 DE Reg. 274 (9/1/02)

**DEPARTMENT OF EDUCATION
OFFICE OF THE SECRETARY**

Statutory Authority: 14 Delaware Code,
Section 122(d) (14 Del.C. §122(d))
14 DE Admin. Code 716

REGULATORY IMPLEMENTING ORDER**716 Maintenance of Local School District and Charter School Personnel Records****I. Summary of the Evidence and Information Submitted**

The Secretary of Education intends to amend 14 DE Admin. Code 716 Maintenance of Local School District Personnel Records in order to align it with the new rules of the Delaware Public Archives concerning the retention of the personnel records of inactive employees. The retention period has been reduced from sixty (60) years to thirty (30) years by the Delaware Public Archives. In addition, the title and references in 2.0 and 3.0 have been changed to include charter schools and a few formatting changes have been made.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on June 22, 2005, in the form hereto attached as *Exhibit "A"*. No comments were received.

II. Findings of Facts

The Secretary finds that it is appropriate to amend 14 DE Admin. Code 716 in order to align it with the new rules of the Delaware Public Archives concerning the retention of the personnel records of inactive employees and to include in the title and in 2.0 and 3.0 references to charter schools.

III. Decision to Amend the Regulation

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 DE Admin. Code 716. Therefore, pursuant to 14 Del.C. §122, 14 DE Admin. Code 716 attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 Del.C. §122(e), 14 DE Admin. Code 716 hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

IV. Text and Citation

The text of 14 DE Admin. Code 716 amended hereby shall be in the form attached hereto as *Exhibit 'B'*, and said regulation shall be cited as 14 DE Admin. Code 716 in the *Administrative Code of Regulations* for the Department of Education.

V. Effective Date of Order

The actions hereinabove referred to were taken by the Secretary pursuant to 14 Del.C. §122 on August 9th, 2005. The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*.

IT IS SO ORDERED the 9th day of August 2005.

DEPARTMENT OF EDUCATION

Valerie A. Woodruff, Secretary of Education

716 Maintenance of Local School District and Charter School Personnel Records**1.0 Definitions**

"Delaware Public Archives (DPA)" means the division within the Department of State that is charged with administering, implementing and enforcing all provisions of the Delaware Public Records Law.

"Employee" shall in this case mean any person whose terms of employment are adequate to qualify the employee for the earning of credit toward pension.

"Termination" in this case does not refer only to retirement but to any reason for the employee to leave the district.

2.0 Records retention

Records for all school district and charter school employees shall be kept up to date including:

2.1 Salary data records for each year of employment in the school district or charter school. (Total salary paid identified as fiscal or calendar year); and

2.2 Records that show sick leave days earned and used and the number of days available at any time; and

2.3 The record of vacation time for those employees whose terms of employment provide for earned vacation.

3.0 Records retention time period.

Each school district and charter school shall keep the records referred to in section 2.0 above for all ~~employee's~~ employees' inactive personnel files for at least ~~sixty~~ thirty years following termination of employment.

3.1 For the security of records and the protection of the personnel for whom the information is recorded, it is recommended that original records are to be maintained at the school district or charter school for three (3) years after termination of an employee and a successful audit of such records. Records ~~are to~~ shall be purged in accordance with ~~Delaware Public Archives (DPA) School Districts General Records Retention Schedule~~ the Delaware Public Archives School Districts General Records Retention Schedule and prepared for storage according to ~~DPA's Records Management Handbook "Preparation of Records for Short-Term Storage."~~ the "Delaware Public Archives Records Management Handbook Preparation of Records for Short-Term Storage". Records ~~may~~ shall remain in their original format and ~~will~~ shall then be transferred to DPA and retained in storage for the balance of the ~~60~~ thirty (30) required years. Local District and charter school ~~R~~records ~~O~~fficers and ~~A~~ authorized ~~A~~gents may request files from storage in accordance with DPA's procedures for requesting files. At the end of the retention period, the documents will be destroyed in accordance with DPA's destruction procedures.

3.2 The style and form of the records shall be at the discretion of the local school districts or charter schools, except that records transferred to the Delaware Public Archives for storage shall be in a format acceptable to DPA. Individual local school districts and charter schools may elect to have their records recorded onto a different type of media at district expense, in accordance with DPA guidelines.

3.2.1 The information referred to above shall be maintained and available for any employee or former employee seeking information concerning their own employment records for a period of ~~60~~ thirty (30) years after termination of employment. (It is recommended that for the convenience of employees and former employees that school districts and charter schools develop an alphabetically arranged file showing the name of each employee and the disposition of his or her records.)

3 DE Reg. 1077 (2/1/00)

4 DE Reg. 989 (12/1/00)

DEPARTMENT OF EDUCATION OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code,
Section 122(d) (14 Del.C. §122(d))
14 DE Admin. Code 727

REGULATORY IMPLEMENTING ORDER

727 Credit for Experience for Educators and for Secretarial Staff

I. Summary of the Evidence and Information Submitted

The Secretary of Education intends to amend 14 DE Admin. Code 727 Credit for Experience for Educators and for Secretarial Staff. The purpose of the amendment is to clarify who is an eligible employee by adding a definition of an 'Eligible Employee' in 1.0 and amending 1.3 to reflect the addition of the definition.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on June 22, 2005, in the form hereto attached as *Exhibit "A"*. No comments were received.

II. Findings of Facts

The Secretary finds that it is appropriate to amend 14 DE Admin. Code 727 in order to add a definition of an "Eligible Employee" and amend 1.3 to reflect the addition of the definition. .

III. Decision to Amend the Regulation

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 DE Admin. Code 727. Therefore, pursuant to 14 Del.C. §122, 14 DE Admin. Code 727 attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 Del.C. §122(e), 14 DE Admin. Code 727 hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

IV. Text and Citation

The text of 14 DE Admin. Code 727 amended hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 DE Admin. Code 727 in the *Administrative Code of Regulations* for the Department of Education.

V. Effective Date of Order

The actions hereinabove referred to were taken by the Secretary pursuant to 14 **Del.C.** §122 on August 9, 2005. The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*.

IT IS SO ORDERED the 9th day of August 2005.

DEPARTMENT OF EDUCATION

Valerie A. Woodruff, Secretary of Education

727 Credit for Experience for Educators and for Secretarial Staff**1.0 Educators Graduating from a 5-Year or 4-Year Preservice Program****1.1 Definitions**

1.1.1 The following words and terms when used in this subsection shall have the following meaning unless the context clearly indicates otherwise:

“Eligible Employee” includes, but is not limited to, teachers, nurses, librarians, psychologists, therapists, and counselors paid in accordance with 14 **Del.C.** §1305 that were hired into their first professional position after June 30, 2001 and zero years of experience. The exception to the zero years of experience would be an employee who qualified for military experience credit under 14 **Del.C.** §1312(a) and 14 **DE Admin.Code** 706.

“**Four Year Preservice Program**” means a regionally accredited college or university four year preservice undergraduate bachelor degree program.

“**Five Year Preservice Program**” means a regionally accredited college or university five year planned degree program which includes an extensive clinical component or internship in the fifth year.

“**Grade Point Average (GPA)**” means the grade point average (GPA) stated on the official transcript of the regionally accredited college or university granting the bachelor’s degree in the Four Year Preservice Program.

1.2 Pursuant to 14 **Del.C.** §1312(a), a graduate of a five year preservice program, or a graduate of a four year preservice program who graduates with a GPA of 3.75 or higher on a 4.0 scale or the equivalent, shall be granted one year of experience on the applicable state salary schedule.

1.3 ~~Eligible Employees for the one year credit of experience shall include any employee paid in accordance with 14 **Del.C.** §1305 who meets the requirements in 1.2 and was hired after July 1, 2001. Eligible employees include, but are not limited to, teachers, nurses, librarians, psychologists, therapists, counselors, and school and district level~~

~~administrators. An employee eligible for one year of credited experience shall meet the definition of Eligible Employee in 1.1 and meet the requirements of 1.2.~~

2.0 Administrators

2.1 No credit for experience shall be given for part time employment in administrative or supervisory positions.

3.0 Teachers

3.1 Days taught as a substitute or as a paraeducator may not be used toward credit for experience; however, employment as a teacher on a regular part time basis may be used toward credit for experience.

3.1.1 A "regular part time" employee is one who is employed in a position which requires at least 50 hours per month for at least 9 months during any 12 consecutive month period.

4.0 Secretarial Staff

4.1 Secretaries may be granted one (1) year's experience for each creditable year of experience as a secretary in private business, public or private school, or other governmental agency.

5.0 Creditable experience includes experience obtained while working outside of Delaware.**6.0 Applicability.**

This regulation applies to the determination of creditable experience for salary purposes only, and does not apply to the determination of creditable experience for pension purposes which is specified in 29 **Del.C.** Ch. 55. Laws on employment and salary for administrators, teachers, and secretaries are found in 14 **Del.C.** Ch. 13.

3 DE Reg. 1542 (5/1/00)

8 DE Reg. 1607 (5/1/05)

**DEPARTMENT OF EDUCATION
OFFICE OF THE SECRETARY**

Statutory Authority: 14 Delaware Code,
Section 122(d) (14 Del.C. §122(d))
14 DE Admin. Code 920

REGULATORY IMPLEMENTING ORDER

**920 Educational Programs for Students with Limited
English Proficiency**

I. Summary of the Evidence and Information Submitted

The Secretary of Education intends to amend 14 **DE Admin. Code** 920 Educational Programs for Students with Limited English Proficiency. The purpose of these amendments is to align the regulation with the federal statute No Child Left Behind. The title of the regulation has also been changed to Educational Programs for English Language Learners (ELLs) to reflect the new terminology.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on June 22, 2005, in the form hereto attached as *Exhibit "A"*. Comments were received from Governor's Advisory Council for Exceptional Children and the State Council for Persons with Disabilities.

The Councils expressed concern that not all programs for English language learners are referenced in the regulation. The Department states that the definitions of Bilingual Programs and English as a Second Language Programs include different types of "approaches" under each category such as "Dual Language Programs" which are a type of Bilingual Program.

The Councils expressed concern that the time line for assessing English language learners for placement purposes is too long. The Department points out that this timeline is the same as it is in the existing regulation. The position of the Department is to retain this same requirement as a realistic time line for schools and districts to meet. Students who enroll in June and during the summer months are assessed over the summer and are placed in the appropriate program when school begins in the fall. Students who enroll in September are assessed as soon as possible but no later than twenty five days following enrollment.

The Councils expressed concern that seniors that are English language learners and who are in the program for the first year may be unable to take the DSTP and hence be unable to graduate in 2008 as per statements in the *Guidelines for the Inclusion of Students with Disabilities and Students with Limited English Proficiency*. The Department

points out that the *Guidelines* only address students who are in the United States for the first time. The *Guidelines* do not forbid the first time student from taking the DSTP but allows that they may not be ready to take it after their first year of enrollment. If the student has all the credits needed for graduation, the *Guidelines* are flexible enough to let the student sit for the DSTP in the first year of enrollment as a senior in high school.

The Councils expressed concern about a parent's ability to choose the type of program they want for their student who is an English language learner from both Bilingual Programs and English as a Second Language Programs. The Federal Regulations require that each eligible entity receiving funds provide instruction to increase English language proficiency but the Regulations do not require that they have both Bilingual Programs and English as a Second Language Programs.

II. Findings of Facts

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 920 in order to align the regulation with the federal statute No Child Left Behind.

III. Decision to Amend the Regulation

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 920. Therefore, pursuant to 14 Del.C. §122, 14 **DE Admin. Code** 920 attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 Del.C. §122(e), 14 **DE Admin. Code** 920 hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

IV. Text and Citation

The text of 14 **DE Admin. Code** 920 amended hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code** in the *Administrative Code of Regulations* for the Department of Education.

V. Effective Date of Order

The actions hereinabove referred to were taken by the Secretary pursuant to 14 Del.C. §122 on August 9, 2005. The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*.

IT IS SO ORDERED the 9th day of August 2005.

DEPARTMENT OF EDUCATION

Valerie A. Woodruff, Secretary of Education

920 Educational Programs for Students with Limited English Proficiency

1.0 General: Each district shall identify upon enrollment every student with limited English proficiency, and each district shall make available to every student who has been determined to be eligible for limited English proficiency services a program of instruction until such time as the student becomes fully proficient in English in accordance with 5.0 below.

2.0 Student with Limited English Proficiency Defined. For the purpose of this section, a student with limited English proficiency is one who, by reason of foreign birth or ancestry, speaks a language other than English, and either comprehends, speaks, reads or writes little or no English, or who has been identified as a pupil of limited English proficiency by a valid English language proficiency assessment approved by the Department of Education for use statewide.

3.0 Determination of Eligibility for Limited English Proficiency Programs. Each school district shall implement a system for the timely and reliable identification of students with limited English proficiency and determination of such students' eligibility for limited English proficiency programs. This system shall include a home language survey and an assessment of English language proficiency.

3.1 A home language survey or the questions contained in the survey shall be administered as part of the registration process for all registering students and shall elicit from the student's parent or guardian the student's first acquired language and the language(s) spoken in the student's home.

3.2 Any student for whom a language other than English is reported on the home language survey as the student's first acquired language or as a language used in the student's home shall be administered an English language proficiency assessment. Such assessment shall be conducted in conformance with the following standards:

3.2.1 The assessment shall be based on a standardized instrument, validated for this purpose and approved by the Department of Education for use statewide;

3.2.2 The assessment shall measure English proficiency in reading, writing, speaking and oral comprehension, except that reading and writing proficiency will generally not be assessed for students below grade 2;

~~3.2.3 The assessment shall be conducted by qualified personnel trained in the administration of the assessment instrument;~~

~~3.2.4 The assessment shall be conducted as soon as practicable, but not later than 25 school days after enrollment.~~

3.3 Any student who achieves a score on the English language proficiency assessment that is lower than the eligibility cut-off score in reading, writing, or oral English established by the Department of Education shall be entitled to a program of instruction for students with limited English proficiency. Reading and writing proficiency will not be considered for students below grade 2.

3.4 For each student enrolled in the 2000-2001 school year, each district shall conduct a home language survey, to the extent practicable, of every enrolled student as in 3.1 and, as applicable pursuant to 3.2, an English language proficiency assessment in accordance with 3.2.1 through 3.2.3. Beginning with the 2000-2001 school year, each district shall conduct such a home language survey, and as appropriate, an English language proficiency assessment of every new student at the time of enrollment in a school.

4.0 Specially Designed Program. Each enrolled student who is eligible for services pursuant to 3.3 above, shall be provided with a program of instruction for students with limited English proficiency.

4.1 A program of instruction for students with limited English proficiency shall include: formal instruction in English language development; and instruction in academic subjects which is designed to provide students with limited English proficiency with access to the District's curriculum.

4.2 In selecting program(s), each district may choose from a variety of programs that are research-based and best practice in the education of limited English proficient students. Beginning with the 2001-2002 school year, programs of instruction for students with limited English proficiency are to be reviewed by the Department of Education. Such programs include bilingual programs as well as programs that are delivered exclusively in English.

4.2.1 Bilingual programs shall include:

4.2.1.1 Standards-based instruction for students with limited English proficiency, using the student's native language and English;

4.2.1.2 Instruction in reading and writing in the student's native language; and

4.2.1.3 English as a second language instruction.

4.2.2 Programs delivered exclusively in English shall include:

4.2.2.1 Standards-based instruction for students with limited English proficiency, using English in a manner that takes into account the student's level of English proficiency;

4.2.2.2 Instruction which builds on the language skills and academic subject knowledge the student has acquired in his or her native language; and

4.2.2.3 English as a second language instruction.

4.2.3 Programs shall be implemented consistent with the goal of prompt acquisition of full English proficiency. Programs shall include instruction in academic subjects which is equivalent in scope to the instruction that is provided to students who are not limited in English proficiency.

4.2.4 Instruction shall be delivered by teachers who meet Department of Education certification requirements and who are trained in the delivery of instruction to students with limited English proficiency.

4.2.5 Where a bilingual program is offered, the parent or guardian of an eligible student may opt for the eligible student to be served in a program for students with limited English proficiency carried out exclusively in English.

5.0 Reclassification Procedures. At least once each school year, each eligible student shall be considered for reclassification as a fully English proficient student who no longer needs a program for students with limited English proficiency.

5.1 Reclassification shall include an assessment of English proficiency in accordance with the standards in 3.2.1–3.2.4 above.

5.2 Any student who achieves a score on the English language proficiency assessment which is lower than the eligibility cut-off score in reading, writing, or oral English established by the Department of Education shall be regarded as a student with limited English proficiency and shall continue to be eligible for a program of instruction for students with limited English proficiency. Reading and writing proficiency will not be considered for students below grade 2.

5.3 Any student who achieves a score on the English language proficiency assessment at or above the eligibility cut-off score in reading, writing, and oral English established by the Department of Education shall be reclassified as fully English proficient and considered ineligible for a program of instruction for students with limited English proficiency. Reading and writing proficiency will not be considered for students below grade 2.

5.4 Before removing any student from a program for students with limited English proficiency, the district shall assess the student's level of performance in academic subject areas. Any reclassified student found to have incurred academic deficits while in the program for students with limited English proficiency shall be provided with supplemental instructional services in the relevant subject areas.

6.0 Monitoring Performance of Ineligible and Reclassified Students. For at least two school years following the determination of ineligibility or reclassification, a district shall monitor the academic performance of each student who has been: assessed pursuant to 3.2 above and found ineligible for a program; or reclassified as fully English proficient pursuant to 5.3 above. Students who experience academic performance problems during this period shall, based on further assessment, be considered for entry/reentry into a program of instruction for students with limited English proficiency and shall be provided with supplemental instructional services as necessary and appropriate.

7.0 Program Evaluation. Each district shall prepare an annual evaluation of its program(s) for students with limited English proficiency. Such evaluation shall be available for review upon request and shall be submitted to the Department of Education beginning with the 2001-2002 school year. This evaluation may be part of the district's annual evaluation required for other district programs. At a minimum, this program evaluation shall:

7.1 Consider the validity of the assessment processes carried out pursuant to 3.2 and 3.3, and 5.1, 5.2, 5.3, and 5.4 above, in terms of predicting student success in the regular instructional program;

7.2 Consider the effectiveness of each program of instruction for students with limited English proficiency in achieving the goal and standards in 4.2. above; and

7.3 Describe any modifications that have been proposed or implemented, based on the evaluation data.

8.0 Student Information Reports. Each district shall provide the Department of Education annually with the language background, the current English proficiency level of each LEP student enrolled in the district, and the type of program in which the LEP student receives services, and related information. Such reporting shall take place in a manner prescribed by the Department of Education. A district shall provide such other information as the Department of Education may request, in order to assure adherence to this regulation.

~~9.0 Communications with Language Minority Parents/Guardians. Each district shall ensure that communications with parents/guardians, including notices of eligibility for a program for students with limited English proficiency, notices about the student's educational performance and progress in such programs, and school information that is made available to other parents/guardians, are provided to each language minority parent/guardian in a language the parent/guardian can understand to the extent practicable.~~

~~10.0 Accountability. Students with limited English proficiency and students reclassified as fully English proficient shall be included in the Delaware Student Testing Program (DSTP). Alternative assessment measures may be used as provided in Department of Education guidelines, including the Guidelines for the Inclusion of Students with Disabilities and Students with Limited English Proficiency, as the same may, from time to time, be amended hereafter.~~

~~10.1 Differential analysis of the results of the DSTP and any alternative assessment measures shall be conducted on the performance of students with limited English proficiency and students reclassified as fully English proficient. Such data shall be made available with other accountability data for each district and the state as a whole.~~

~~10.2 The Department of Education and each district shall ensure that consequences and benefits under Delaware's system of statewide accountability are dispensed in a manner that is equitable to students with limited English proficiency and students reclassified as fully English proficient. This shall be based on assessments which accurately measure the student's performance in the area being assessed and are reflective of the curriculum which was delivered to the student.~~

~~4 DE Reg. 467 (9/1/00)~~

920 Educational Programs for English Language Learners (ELLs)

This regulation shall apply to any district or charter school applying for or receiving funds to provide services or programs for English Language Learners (ELLs).

1.0 Definitions:

The following words and terms, when used in this regulation shall have the following meaning unless the context clearly indicates otherwise:

"Bilingual Programs" Bilingual programs are programs that provide instruction using the student's native language and English across all subject areas or provide instruction in English across all subject areas with support in the native language.

"English as a Second Language (ESL) Programs"

English as a Second Language Programs are programs providing instruction in English across all subject areas. This program takes into account the student's level of English proficiency and builds on the language skills and academic subject knowledge the student has acquired in his or her native language.

"English Language Learners (ELLs)" English Language Learners are students with limited English proficiency (also referred to as (LEP) Limited English Proficient Students). ELLs are individuals who, by reason of foreign birth or ancestry, speak a language other than English, and either comprehend, speak, read or write little or no English, or who have been identified as English Language Learners by a valid English language proficiency assessment approved by the Department of Education for use statewide.

2.0 A home language survey or the questions contained in the survey shall be administered as part of the registration process for all registering students and shall elicit from the student's parent, guardian or Relative Caregiver the student's first acquired language and the language(s) spoken in the student's home or by the student.

2.1 Any student for whom a language other than English is reported on the home language survey or on the registration form as the student's first acquired language or as a language used in the student's home or by the student shall be administered an English language proficiency assessment. The assessment shall be conducted as soon as practicable, but not later than twenty five (25) school days after enrollment and shall be conducted by qualified personnel trained in the administration of the assessment instrument.

2.1.1 The English language proficiency assessment shall be based on the English Language Proficiency Standards for English Language Learners K-12 and shall assess listening, speaking, reading and writing. The assessment shall be validated for this purpose and approved by the Department of Education for use statewide.

2.1.2 Any student who achieves a score on the English language proficiency assessment that is lower than the eligibility cut-off score in listening, speaking, reading and writing established by the Department of Education shall be identified as an ELL and shall be entitled to a program of instruction for ELLs.

3.0 Programs of instruction for ELLs shall include formal instruction in English language development; and instruction in academic subjects which is designed to provide ELLs with access to the regular curriculum. In selecting a program(s),

each district shall choose programs that are research-based and that have been demonstrated to be effective in the education of ELLs.

3.1 Programs shall be implemented consistent with the goal of prompt acquisition of full English proficiency. Programs shall include instruction in academic subjects which is equivalent in scope to the instruction that is provided to students who are not limited in English proficiency.

3.2 Instruction shall be delivered by individuals who meet Department of Education licensure and certification requirements and who are trained in the delivery of instruction to ELLs.

3.3 The student's parent, guardian or Relative Caregiver has a right to refuse placement of their child(ren) in either the Bilingual or the ESL program and also has the right to withdraw an identified student from either program. Parents, guardians or Relative Caregivers of eligible students who refuse placement of their student in either program or withdraw students from either program shall do so in writing.

4.0 Every student identified as an ELL will be administered an English language proficiency assessment annually.

4.1 Any student who achieves a score on the annual English language proficiency assessment that is higher than the eligibility cut-off score in listening, speaking, reading and writing established by the Department of Education shall be transitioned as fully English proficient and placed in a regular classroom.

4.1.1 For at least two school years following the identification of the student as fully English Proficient, the district or charter school shall monitor the academic performance of the student. Students who experience academic difficulty in the regular classroom during the transition period shall, based on further assessment re-enter a Bilingual or ESL program or shall be provided with additional instructional services as necessary and appropriate.

5.0 Each district and charter school receiving funds to provide services or programs for ELL's shall prepare an annual evaluation of its program(s). This evaluation shall be part of the district's annual evaluation process under and in compliance with the Consolidated Application.

6.0 Each district and charter school shall enter such data and information concerning ELLs as instructed by the Department of Education and as otherwise required by the Department into the statewide database.

7.0 Each district and charter school shall ensure that communication with parents, guardians and Relative Caregivers, including notices of eligibility for programs for ELLs, notices about the student's educational performance and progress in such programs, and school information that is made available to other parents, guardians and Relative Caregivers shall be provided in English or to the extent practicable in a language the parent, guardian or Relative Caregiver can understand.

8.0 ELLs and students transitioned as fully English proficient shall be included in the Delaware Student Testing Program (DSTP) as provided for in the Department of Education document *Guidelines for the Inclusion of Students with Disabilities and Students with Limited English Proficiency*, as the same may from time to time be amended hereafter.

DEPARTMENT OF EDUCATION OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code,
Section 122(d) (14 Del.C. §122(d))
14 DE Admin. Code 930

REGULATORY IMPLEMENTING ORDER

930 Supportive Instruction (Homebound)

I. Summary of the Evidence and Information Submitted

The Secretary of Education intends to amend 14 DE Admin. Code 930 Supportive Instruction (Homebound) in order to clarify the wording in 2.4 and 3.0 concerning supportive instruction which is in the school setting and supportive instruction that takes place at the student's home. The word "documentation" in 2.0 has been changed back to "certification" in the final version of the regulation. The regulation defines Supportive Instruction, describes who is eligible for services and how to implement the program.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on June 22, 2005, in the form hereto attached as *Exhibit "A"*. Comments were received from Governor's Advisory Council for Exceptional Children and the State Council for Persons with Disabilities. The Department has changed the word "documentation" in 2.0 back to "certification" as recommended by the Councils. The Department has not added the words "either or" to 2.0 as suggested since

transitional programs are only available following Supportive Instruction.

II. Findings of Facts

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 930 in order to clarify the wording in 2.4 and 3.0 concerning supportive instruction which is in the school setting and supportive instruction that takes place at the student's home.

III. Decision to Amend the Regulation

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 930. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 930 attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 930 hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

IV. Text and Citation

The text of 14 **DE Admin. Code** 930 amended hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code** 930 in the *Administrative Code of Regulations* for the Department of Education.

V. Effective Date of Order

The actions hereinabove referred to were taken by the Secretary pursuant to 14 **Del.C.** §122 on August 9, 2005. The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*.

IT IS SO ORDERED the 9th day of August 2005.

DEPARTMENT OF EDUCATION

Valerie A. Woodruff, Secretary of Education

930 Supportive Instruction (Homebound)

1.0 Definition.

Supportive instruction is an alternative educational program provided at home, in a hospital or at a related site for students temporarily at home or hospitalized for a sudden illness, injury, episodic flare up of a chronic condition or accident considered to be of a temporary nature.

1.1 Procedures for eligibility shall be limited to appropriate certification that the student cannot attend school.

1.2 Services for children with disabilities as defined in the Individuals with Disabilities Act (IDEA) and the State Department of Education's regulations on Children with Disabilities shall be provided according to the Administrative Manual: Special Education Services, and shall be processed under the district's special education authority. Nothing in this regulation shall prevent a district from providing supportive instruction to children with disabilities in a manner consistent with the Individuals with Disabilities Education Act (IDEA) and the Administrative Manual.

1.3 Nothing in this regulation shall alter a district's duties under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act to students who are qualified individuals with disabilities. Nothing in this regulation shall prevent a district from providing supportive instruction to such students.

2.0 Eligibility.

A student enrolled in a school district is eligible for supportive instruction when the school receives the required certification documentation that an accident, injury, sudden illness or episodic flare up of a chronic condition will prevent the student from attending school for at least ten (10) school days.

2.1 A physician must certify absences due to a medical condition.

2.2 Absences due to severe adjustment problems must be certified by a psychologist or psychiatrist and confirmed through a staff conference.

2.3 A physician must certify absences due to pregnancy complicated by illness or other abnormal conditions.

2.3.1 Students do not qualify for supportive instruction for normal pregnancies unless there are complications.

2.3.2 Students who remain enrolled in school are eligible for supportive instruction during a postpartum period not to exceed six weeks. Postpartum absences must be certified by a physician.

2.4 ~~When the request for supportive instruction is for transitional in-school programs immediately following supportive instruction provided outside school, the request must be certified through a staff conference. Supportive instruction can be requested as an in-school transitional program that follows a period of supportive instruction that was provided outside of the school setting. If the supportive instruction is provided as an in-school transitional program, it must be approved through a staff conference.~~

3.0 Implementation.

~~Supportive instruction for students shall begin as soon as the certification required by 2.0 is received and may continue upon return to school only in those exceptional cases where it is determined that the student needs a transitional program to guarantee a successful return to the school program as in 2.4.~~

Supportive instruction for students shall begin as soon as the documentation required by 2.0 is received. Supportive instruction may continue upon the return to school setting only in those exceptional cases where it is determined that a student needs a transitional program to guarantee a successful return to the school program as delineated in 2.4.

3.1 Supportive instruction shall adhere to the extent possible to the student's school curriculum and shall make full use of the available technology in order to facilitate the instruction.

3.1.1 The school shall provide a minimum of 3 hours of supportive instruction each week of eligibility for students K-5th grade, and a minimum of five hours each week of eligibility for students 6-12th grade. There is no minimum for in-school transition.

3.1.2 Nothing in this regulation shall prevent a school district from providing additional hours of supportive instruction to eligible students from either its Academic Excellence allotment or other available funding sources.

3.2 Summer instruction is permitted for a student who is otherwise eligible for supportive instruction and as determined by the student's teachers and principal, needs the instruction to complete course work or to maintain a level of instruction in order to continue in a school program the following school year.

**DEPARTMENT OF EDUCATION
OFFICE OF THE SECRETARY**

Statutory Authority: 14 Delaware Code,
Section 122(d) (14 **Del.C.** §122(d))
14 **DE Admin. Code** 1105

REGULATORY IMPLEMENTING ORDER

1105 School Transportation

I. Summary of the Evidence and Information Submitted

The Secretary of Education seeks the consent of the State Board of Education to amend 14 **DE Admin. Code** 1105 School Transportation. The amendments are necessary in order to clarify the reimbursement procedure for school bus ownership and the contracts concerning payment dates in section 13.2.1 and for fuel adjustments in section 13.7. The reference to parents in 4.2.11, 6.1, 6.4, 8.6, 11.1.1, 11.1.1.1, 11.2.1, 15.1, 19.7 and 19.9 is also amended to parents, guardians and Relative Caregivers.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on June 22, 2005, in the form hereto attached as *Exhibit "A"*. Comments received from Governor's Advisory Council for Exceptional Children and the State Council for Persons with Disabilities were supportive of the amendments to the regulation.

II. Findings of Facts

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 1105 in order to clarify the reimbursement procedure for school bus ownership and the contracts concerning payment dates.

III. Decision to Amend the Regulation

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 1105. Therefore, pursuant to 14 **Del.C.** Ch. 29, 14 **DE Admin. Code** 1105 attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

IV. Text and Citation

The text of 14 **DE Admin. Code** 1105 amended hereby shall be in the form attached hereto as *Exhibit "B"*, and said

regulation shall be cited as 14 **DE Admin. Code** 1105 in the *Administrative Code of Regulations* for the Department of Education.

V. Effective Date of Order

The actions hereinabove referred to were taken by the Secretary pursuant to 14 **Del.C.** Ch. 29 on August 18, 2005. The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*.

IT IS SO ORDERED the 18th day of August 2005.

DEPARTMENT OF EDUCATION

Valerie A. Woodruff, Secretary of Education
Approved this 18th day of August 2005.

STATE BOARD OF EDUCATION

Jean W. Allen, President
Richard M. Farmer, Jr., Vice President
Mary B. Graham, Esquire
Barbara Rutt, Esquire
Dennis J. Savage
Dr. Claibourne D. Smith

1105 School Transportation

1.0 Responsibilities of Local Superintendents:

Local District Superintendents or their designees shall assume the following responsibilities concerning the transportation of students:

1.1 Implement state school transportation regulations. Local school disciplinary policies shall include pupil behavior and discipline on the school bus.

1.2 Define and coordinate changes to school transportation operations impacting local district budget allocations with the Department of Education.

1.3 Provide resource material and encourage teachers to include instruction in passenger safety in the school curriculum.

1.4 Provide for close and continuous supervision of the unloading and loading zones on or near the school plant, and of the emergency drills.

1.5 Provide supervision for those students whose bus schedules require them to arrive at school before classes begin and remain after classes terminate.

1.6 Promote public understanding of, and support for the district's school transportation program.

1.7 Assume prime responsibility for student conduct.

2.0 Conditions for School Bus Contractors:

School Bus Contractors shall agree to the following conditions in their contracts:

2.1 Follow all applicable federal, state, and local school bus regulations and policies.

2.2 Communicate effectively with the district transportation supervisor.

2.3 Dismiss a school bus driver when it can be shown that the driver is not satisfactorily performing driver tasks. District transportation supervisors may restrict a driver from operating in their school district.

2.4 Pay drivers and aides and provide substitute drivers and aides.

3.0 Responsibilities of School Bus Drivers:

Local school districts shall have a policy concerning the responsibilities of school bus drivers which, at a minimum, includes the following:

3.1 A statement that the school bus driver is in full charge of the bus and pupils, has the authority of a classroom teacher and is responsible for the health, safety, and welfare of each passenger.

3.2 Statements listing the following specific responsibilities of the bus driver:

3.2.1 Operate the school bus in a safe and efficient manner.

3.2.2 Conduct pre-trip and post-trip checks on the vehicle.

3.2.3 Establish and maintain rapport with passengers.

3.2.4 Maintain discipline among passengers.

3.2.5 Meet emergency situations effectively.

3.2.6 Communicate effectively with district and school staff.

3.2.7 Maintain effective contact with the public.

3.2.8 Complete reports as required by the state or school district.

3.2.9 Complete required training programs satisfactorily.

3.2.10 Refrain from using profane or indecent language or tobacco while on duty.

3.2.11 Dress appropriately.

3.2.12 Pickup and drop-off students at designated stops.

3.2.13 Submit to periodic random drug and alcohol testing and be subject to actions specified in the Delaware Code and in federal requirements.

3.2.14 Report suspected cases of child abuse to the school principal or designated official.

3.2.15 Notify the district transportation supervisor of any school bus accident.

3.3 A statement requiring a report of a physical examination on forms designated by the Department of Education.

4.0 Qualifications and Responsibilities of School Bus Aides

4.1 Qualifications for School Bus Aides include the following and shall apply to all new applicants and for any person whose employment as an aide has lapsed for a period of over one year.

4.1.1 Be at least 18 years of age.

4.1.2 Be fingerprinted to allow a criminal history check at both state and federal level and meet the same requirements (pre-licensing) specified for school bus drivers in the **Delaware Code**.

4.1.3 File with the district transportation supervisor a notarized affidavit (the same as the school bus driver affidavit) attesting to acceptable criminal history pending an official state and federal criminal record report.

4.1.4 Submit to the federal drug and alcohol testing procedures established for school bus drivers.

4.2 Local school districts shall have a policy concerning school bus aides which, at a minimum, lists the following responsibilities:

4.2.1 Assist in loading and unloading of students, including lift operation.

4.2.2 Ensure that students and equipment are properly strapped in seats. Adjust, fasten, and release restraint devices for students and equipment, as required. Monitor overall safety of students and equipment.

4.2.3 Ensure that all students remain seated at all times.

4.2.4 Assist the driver during unusual traffic conditions; act as a lookout if necessary when bus must be backed.

4.2.5 Assist the driver in the enforcement of all state and school district bus safety regulations.

4.2.6 Perform record keeping tasks related to student attendance and bus assignment.

4.2.7 Monitor and report student misbehavior according to established procedure.

4.2.8 Assist the driver in keeping the interior of the bus clean.

4.2.9 Assist students with disabilities with personal needs associated with their disabilities.

4.2.10 Assist in bus evacuation drills.

4.2.11 Work cooperatively with all school personnel and parents, guardians and Relative Caregivers.

4.2.12 Perform other duties as assigned by the district transportation supervisor or designee.

6 DE Reg. 643 (11/1/02)

5.0 Student Conduct on School Buses:

School Districts shall have a policy concerning the behavior of students on school buses that shall, at a minimum, contain the following rules which if not followed may result in the suspension of bus riding privileges.

5.1 Obey the driver promptly, and be courteous to the driver and to fellow students. Students are to conduct themselves while on the bus in such a way that it will not distract the driver from the job of driving.

5.2 Be at their bus stop on time for pickup.

5.3 Wait for the bus on the sidewalk or shoulder, not the roadway.

5.4 Keep a safe distance from the bus while it is in motion.

5.5 Enter the bus without crowding or disturbing others and occupy their seats immediately.

5.6 Get on or off the bus only when it is stopped.

5.7 Remain seated and facing forward. No student shall occupy a position in the driver area in front of a stanchion, barrier, or white floor line that may distract the driver's attention or interfere with the driver's vision.

5.8 Stay out of the driver's seat. Also, unnecessary conversation with the driver is prohibited while the bus is in motion.

5.9 Follow highway safety practices in accordance with the Motor Vehicle Laws of the State of Delaware and walk on the side of the road facing traffic when going to or from the bus or bus stop along the highway. Before crossing the road to board the bus or after being discharged from the bus cross only upon an audible clearance signal from the driver.

5.10 Do not cross the road until it is clear of all traffic or that traffic has come to a complete stop and then walk in front of the bus far enough to be seen by the driver at all times.

5.11 Observe classroom conduct when on the bus.

5.12 Do not call out to passers-by or open the bus windows without permission from the driver, nor extend head or arms out of the windows.

5.13 Do not leave the bus without the driver's consent, except on arrival at their regular bus stop or at school.

5.14 Keep the bus clean, sanitary, and orderly and not damage or abuse the equipment.

5.15 Do not smoke, use profanity or eat or drink on the bus.

5.16 Do not throw articles of any kind in, out, or around the bus.

5.17 Other forms of misconduct that will not be tolerated are acts such as, but not limited to, indecent exposure, obscene gestures, spitting, and others that may be addressed in the school code of conduct.

6.0 Procedures for Operating Buses:

Each school district shall adopt the following procedures for the operation of their school buses:

6.1 No person other than a pupil, teacher, school official, aide or substitute driver shall be permitted to ride on a school bus while transporting pupils. Exceptions may be made for parents, guardians and Relative Caregivers involved in Department of Education educational programs that provide for transportation and others approved by the district transportation supervisor.

6.2 The driver shall maintain a schedule in the bus and shall at all times adhere to it. Drivers shall not be required to wait for pupils unless they can be seen making an effort to reach the bus stop.

6.3 The driver shall maintain discipline on the bus, and shall report cases of disobedience or misconduct to the proper school officials. No pupils may be discharged from the bus for disciplinary reasons except at the home or school. The principal or designated school official shall be notified of such action immediately. Any change to the action taken by the driver or any further disciplinary action to be taken is the responsibility of the principal or designated school official.

6.4 Pupils shall have definite places to get on and leave the bus, and should not be allowed to leave the bus at any place other than the regular stop without written permission from their parents, guardians or Relative Caregiver and approval by the principal or designated school official, except in cases of emergency. Districts may adopt a more restrictive policy.

6.5 Buses shall be brought to a full stop before pupils are allowed to get on or off. Pupils are not permitted to ride outside or in any hazardous location in the bus including the area ahead of the stanchions, barriers, or white floor line designating the driver-area.

6.6 Buses shall not stop near the crest of hills, on curves, or on upgrades or downgrades of severe inclination. When stopped for the purpose of receiving or discharging pupils, the bus shall always be stopped on the right side of the road and as far off the paved or main traveled portion of the highway as the condition of the shoulder permits.

6.7 Pupils who must cross the road to board the bus or after leaving the bus shall cross at a distance in front of the bus and beyond the crossing control arms so as to be clearly seen by the driver and only upon an audible clearance by the driver. The driver shall attempt to signal pupils to cross by instructions through the external speaker of the public address system.

6.8 All loading and unloading of pupils shall be made from the service door. The rear exit door is not to be used except in cases of emergency or emergency drills. No object

shall be placed in the bus that restricts the passage to the emergency door or other exits.

6.9 No one but the driver shall occupy the driver's seat. Pupils shall remain behind the white floor line.

6.10 Seats may be assigned to pupils by the driver, subject to the approval of a school official.

6.11 The doors of the bus shall be kept closed while the bus is in motion, and pupils shall not put their head or arms out of open windows.

6.12 When the bus is stopped on school grounds, students are aboard, and the motor is running, the transmission shall be in neutral (clutch disengaged) and the parking brake set. While on school grounds, drivers shall not leave their seat while the motor is running or leave the key in the ignition switch.

6.13 Fuel tanks shall not be filled while the engine is running or while pupils are in the bus.

6.14 Weapons of any kind are not permitted on a school bus.

6.15 Animals are not permitted on school buses; however, a service animal is permitted if a physician certifies that it is required.

6.16 A school bus shall not be used for hauling anything that would make it objectionable for school use or unsafe for passengers.

6.17 Band instruments, shop projects and other school projects shall not be permitted on the bus if they interfere with the driver or other passengers. The aisle, exits, and driver's vision shall not be blocked.

6.18 Bus stops on roadways with three or more lanes (with oncoming traffic) must be made on the right side of the road. Students shall not be required to cross more than two lanes of traffic when entering or leaving the bus.

6.19 Headlights or daytime running lights shall be on at all times when the bus is in motion.

6.20 On the bus route every effort should be made to load children before turn-arounds are made and unload them after the turn-around is made.

6.21 Backing of school buses is prohibited, except in unusual circumstances:

6.21.1 A school bus shall not be driven backwards on school grounds unless an adult is posted to guard the rear of the bus.

6.21.2 When backing is unavoidable extreme caution must be exercised by the bus operator and an outside observer should be used if possible.

3 DE Reg. 942 (1/1/00)

7.0 Accident Reports

All drivers or contractors shall complete accident reports and submit them to the district person in charge of

transportation in order to assure accurate information pertaining to school bus accidents.

7.1 The following information shall be included on all school bus accident reports and be maintained in the district transportation files:

7.1.1 A description, preferably using diagrams, of the damage to each vehicle in addition to estimates of damage costs.

7.1.2 A description of all personal injuries.

7.1.3 A list of passengers and witnesses.

7.1.4 Name, address and telephone number of the driver.

7.1.5 Follow-up information, such as the actual cost of repairs, should be added to the accident report wherever it is filed; i.e., in federal, state or local offices, so that the record of the accident is completed. Other pertinent information relating to the accident that should be added later, if the information is readily available, includes:

- Disposition of any litigation.
- Disposition of any summonses.
- Net effects of all personal injuries sustained, including medical care given, physician's fees, hospital expenses, etc.
- Amount of property damage other than to vehicles involved.
- Any corrective actions taken against the school bus driver, e.g., training, suspension, or dismissal.
- A summation of the driver's total accident record so that each completed report form will contain a listing of the total number of accidents that the driver has had.

3 DE Reg. 942 (1/1/00)

8.0 Transportation Benefits:

Transportation benefits shall be provided for pupils in grades K-6 whose legal residences are one (1) mile or more from the public schools to which they would normally be assigned by the district administrations and for pupils in grades 7-12 whose legal residences are two (2) miles or more from the public schools to which they would normally be assigned by the district administrations.

8.1 For the purpose of these regulations, the "legal residence" of the pupil is deemed to be the legal residence of the parent(s), legal guardian(s), or Relative Caregiver as described in 14 Del.C. §202(e)(3). Daycare facilities may be designated as a pupil's residence for pickup and drop off.

8.2 To determine pupil eligibility for transportation benefits, measurement shall be by the most direct route provided by a public road or public walkway. The

measurement shall be from the nearest point where a private road or walkway connects the legal residence of the pupil with the nearest public entrance of the school building to which the pupil is normally assigned by the school district administration.

8.3 All school bus routes shall be measured from the first pick-up point to the respective schools served in the approved sequence, and then by the most direct route back to the first pick-up point.

8.4 Additional bus routes required after the opening of school shall be approved by the Department of Education and supported by evidence of need to include: enrollment number changes, descriptions of existing routes in the area of proposed additional service, the run times, and actual loads. A description of the proposed route shall also accompany the request.

8.5 Transportation for eligible pupils may be provided from locations other than their legal residence provided that:

8.5.1 Such pickup and discharge points as approved by the district administration are in excess of the relevant one and two mile limits from the school to be attended, and such transportation to be provided will be to the public school to which the pupil is assigned by the district administration.

8.5.2 Such transportation to be provided be on the same bus and/or route to and from the school attended by the pupil (i.e. each student is entitled to one seat on one bus) except that permission may be granted on a year-by-year basis by the district administration for eligible pupils to ride other buses if seats are available and does not create additional expense to the State.

8.5.3 The limitation pertaining to "same bus and route" indicated above is not applicable to pupils attending vocational-technical schools or kindergartens operating one-half day sessions.

8.6 A spur to a bus route (where a bus leaves a main route) shall not be scheduled unless the one-way distance is greater than ½ mile. Requests for exception due to a unique traffic hazard from a parent, guardian or Relative Caregiver must be in writing, approved by the local school board, and submitted through the Chairman of the Unique Hazard Committee for review.

8.7 Students otherwise ineligible to ride a bus may ride if a physician certifies that a student is unable or should not walk from home to school and return.

8 DE Reg. 541 (10/1/04)

9.0 Bus Capacities:

9.1 Bus capacities for children in grades K-6 shall be established by the manufacturer on the basis of 13 inches per

child, and for Grades 7-12 secondary pupils the capacity shall be established on the basis of 15 inches per child.

9.2 A mixture of the criteria will be used to plan loads when pupils come from both of the above groups.

9.3 Actual bus loads may not exceed this guidance. Standees shall not be permitted under normal circumstances; however, exceptions may be made in emergency situations on a temporary basis.

10.0 Loading and Unloading:

Each school shall have a loading and unloading dock or area, rather than load or discharge passengers onto the street. On school grounds all other traffic is prohibited in the loading and unloading area during school bus loading/unloading operations.

11.0 Unique Hazards:

Unique hazards are considered to be conditions or situations that expose the pedestrian to rare or uncommon traffic dangers. This definition is not intended to include hazards representative of situations which may exist throughout the State.

11.1 Procedures for handling Unique Hazards requests.

11.1.1 When the request for relief originates with parents, guardians or Relative Caregivers of pupils affected or vested officials, such as State and local police representatives, Safety Council representatives, and legislators, it shall be presented in writing to the local school authorities.

11.1.1.1 The local school administration shall make every effort to resolve problems identified by the parents, guardians and Relative Caregivers vested officials, or by the local district staff.

11.1.1.2 If the problem cannot be resolved by the local school administration, the request shall be forwarded to the local board of education for appropriate action. If the local board of education has explored all of the local alternatives to resolve the problem without success, a request by board action shall be made to the Chairman of the Unique Hazards Committee (Education Associate for School Transportation).

11.2 The request to the Unique Hazards Committee must include:

11.2.1 The original request from the parents, guardians or Relative Caregivers, vested officials, or the district staff.

11.2.2 A statement of the specific hazard and area involved including maps showing the specific location, points of concern and schools attended.

11.2.3 Number and grades of children involved.

11.2.4 School schedule and the time children would normally be walking to and from school in the area of concern.

11.2.5 List any actions to resolve the problem taken by the local school administration.

11.2.6 List any actions to resolve the problem taken by the local board of education.

11.2.7 List any actions to resolve the problem taken by the town, the city or county.

11.3 The Unique Hazards Committee will process the request and report its findings and recommendations to the Department of Education for their consideration and action. A copy of the report will also be forwarded to the local board of education involved.

11.4 The Unique Hazards Committee consists of representatives from the Department of Transportation; the New Castle County Crossing Guard Division; Delaware Safety Council; Traffic Control Section, the Delaware State Police; and the Department of Education Education Associate for School Transportation (Chairman).

11.5 Unique Hazards Committee Recommendations Appeal Process

11.5.1 Appeals to the Unique Hazards Committee recommendations approved by the State Department of Education must be in writing and from the local board of education.

11.5.2 The local school board shall, before making an appeal, make every effort to resolve the problem. If, in the opinion of the local board of education, reconsideration is needed by the Unique Hazards Committee, the appeal, along with pertinent information, should be forwarded to the Chairman of the Unique Hazards Committee.

11.5.3 The Unique Hazards Committee will submit to the State Department of Education its recommendations regarding the appeal for reconsideration by the local board of education. A copy of the report will also be forwarded to the local board of education involved.

12.0 Contingency Plans:

12.1 Each school district shall have contingency plans for inclement weather, accidents, bomb threats, hostages, civil emergencies, natural disasters, and facility failures (environmental/water, etc.). These plans shall be developed in cooperation with all those whose services would be required in the event of various types of emergencies.

12.2 The school transportation supervisor, school administrators, teachers, drivers, maintenance and service personnel, students, and others shall be instructed in the

procedure to be followed in the event of the contingencies provided for in the plans.

13.0 Reimbursements for School Bus Ownership and or Contracts:

School buses may be either state owned/district operated or contracted.

13.1 Reimbursements for buses operated by the district shall be on the basis of the formula for district operated buses unless otherwise approved by the Department of Education.

13.1.1 Drivers employed by the district shall be paid on the regular payroll of the district. When drivers are employed in a dual capacity there shall be strict accounting for salary division.

13.2 Reimbursement for buses operated on contract shall be on the basis of the approved formula or of a bid if the amount should be less.

13.2.1 Contractors shall be paid regularly at the end of the month. The total contract shall be paid in ten (10) installments, with the first payment at the end of September or twenty (20) installments with the first payment on or about September 15th. For those school districts opening before September 1 and making ten (10) installments, payments may be made as early as thirty (30) days following the start of the school year with follow-up monthly payments to be made no earlier than the date used for the first payment. For those school districts opening before September 1st and making twenty (20) payments, payments may be made as early as fifteen (15) days following the start of the school year with follow up monthly payments to be made no earlier than the dates used for the first two payments.

13.3 Any transportation costs caused by grade reorganizations and/or pupil re-assignments during the school term after October 1, other than the occupancy of a new school building, shall be at the expense of the local school district unless approved by the Department of Education.

13.4 Bills unpaid from Transportation funding lines that have not been encumbered as of June 30, shall be the responsibility of the local school district.

13.5 Reimbursement to the local school district for contracts or for district- owned or leased buses shall be made on the basis of a Department of Education formula approved by the State Board of Education. This formula shall take into consideration school bus cost and depreciation, fixed charges, operations, maintenance, driver and aide wages. Reimbursement shall be made only for transportation of eligible pupils and exceptions approved by the Department of Education and the State Board of Education.

13.6 Contract allowances for buses when there are Emergency Days (forgiven by the Department of Education with the consent of the State Board of Education), Specially Declared Holidays or Strikes by Teachers.

13.6.1 School bus contractors and school districts shall be paid the normal rate of pay as provided for in their contract, less the allowance for fuel, maintenance and administration. Driver (including layover allowance) and aide allowances shall be paid.

13.6.2 School bus contractors and school districts with buses assigned to midday kindergarten or vocational-technical trips shall be paid the normal rate of pay as provided for in their contract, less the allowance for fuel.

13.6.3 The additional mileage allowance for contractor and school district buses will not include fuel and maintenance allowances.

13.6.4 The Delmar School District shall be reimbursed on the basis of the additional days necessary to operate as a result of the agreement with the Wicomico County Board of Education for the Delmar, Maryland elementary schools.

13.7 Fuel adjustments shall be made in accordance with the State Budget Bill. When fuel adjustment additions are made, the school districts shall pay a lump sum for the number of days driven up to the date of the adjustment and the remainder shall be paid equally over the remaining months of the school year. For contract reductions, the adjustments shall be spread equally over the remaining months of the school year.

7 DE Reg. 1546 (5/1/04)

8 DE Reg. 541 (10/1/04)

14.0 Transportation Formulas for Public School Districts Operating District, Lease, or Lease Purchase Buses

Items which are not on this list must be approved by the State Department of Education. Any purchase, commitment, or obligation exceeding the transportation allocation to the district is the responsibility of the district.

14.1 The following items may be used for the purpose of providing pupil transportation in accordance with the regulations of the Department of Education.

14.1.1 Advertising including equipment, routes, supplies, and employees.

14.1.2 Communication systems including two-way radios, cellular phones, and AM-FM radio.

14.1.3 Fuel including gasoline, diesel, propane, kerosene, storage tanks, pumps, additives, and oil.

14.1.4 Leasing/rental including tools, equipment, storage facilities, buses, garage space, and office space.

14.1.5 Office supplies and materials including computer hardware, computer software, data processing, maps, postage, printing, subscription, and measuring devices.

14.1.6 Safety materials including audio-visual aids, restraining vests, belts, safety awards, pins, patches, certificates, wheelchair ramps, wheelchair retainers, printing, handout materials, pamphlets, training materials, subscriptions, and bus seats.

14.1.7 Salary/wages including attendants (aide) as approved by the Department of Education when required in a student's IEP, dispatchers, drivers, maintenance helpers, mechanics, mechanics helpers, office workers, secretarial, substitute drivers, supervisory (other than State supported supervisor or manager), and State provided employee benefits.

14.1.8 Shop facilities including heat, electric, water, sewer, security, fences, lights, locks, guards, bus storage, janitorial supplies, brushes, mops, buckets, soap, tools, maintenance vehicles, grease, service vehicles, and work uniforms for maintenance staff.

14.1.9 Sidewalks including construction of sidewalks, footbridges, etc. that would be offset in reduced busing costs in 5 years or less, with prior approval of Supervisors of Transportation and School Plant Planning.

14.2 Special 01-60 state funds are provided to school districts for training supplies. This account may also be used for reimbursements for state provided equipment and services.

14.3 Examples of Programs Excluded from State Reimbursement:

14.3.1 Extracurricular Field trips

14.3.2 Transportation of pupils from one school to another for special programs (e.g., music festivals, Christmas programs, etc.)

14.3.3 Transportation of pupils to and from athletic contests, practices, tutoring, band events, etc.

14.3.4 Post-secondary classes

14.3.5 Federal programs

14.3.6 Alternative school transportation when not using a shuttle concept that is as efficient as a shuttle concept.

14.3.7 Choice school transportation outside of the school district or outside of the attendance area of school that the bus normally serves.

14.3.8 Charter school transportation outside of the school district.

15.0 Transportation Allowances for Individuals:

Requests for transportation allowances shall be made in writing to the Department of Education by districts with

justification. This information is necessary in order for the Department to determine a pupil's eligibility. The responsibility for establishing a claim for transportation allowances rests upon the district and claimant.

15.1 All requests shall be signed by the ~~parent or guardian~~ parent, guardian or Relative Caregiver and certified by the superintendent, principal or the principal teacher of the school to be attended. In case of a car pool, only the driver shall be paid.

15.2 Payments or reimbursements for transportation by private means shall be on the following basis:

15.2.1 When adequate public services is available, the public service rates shall be used.

15.2.2 When public service is not available and it is necessary to provide transportation by private conveyance, the allowance shall be calculated at the prevailing state rate per mile for the distance from the home to the school or school bus and return twice a day, or for the actual distance traveled.

15.2.3 Districts shall maintain a monthly record of mileage travelled on a form provided by the Department of Education.

15.2.4 Any exception or variation must be approved by the Department of Education.

16.0 Cost Records:

Cost Records shall include the following costs directly attributable to the transportation of eligible students on district school buses:

16.1 Total expenditures by funding code.

16.2 Wages of the Drivers.

16.3 Bus maintenance costs (expenditure for all bus supplies, repairs and routine service).

16.4 Cost of accidents, including bus repairs.

16.5 Indirect costs (all those costs not included in above categories and all costs associated with those who supervise the school transportation operation).

17.0 Bus Replacement Schedules

The time begins for a new bus when it is placed in service. A bus shall have the required mileage prior to the start of the school year. Once a bus is placed in service for the school year, it will not be replaced unless it is unable to continue service due to mechanical failure.

17.1 The following age and mileage requirements apply:

17.1.1 12th year must be replaced (it may then be used as a spare); or

17.1.2 150,000 miles no matter age of bus; or

17.1.3 7 years plus 100,000 miles; or

17.1.4 ~~it~~ May be replaced after 10 years.

17.2 Contractors shall be reimbursed for their eligible school buses for the annual allowances permitted by the Formula. New (unused) buses placed in service in a year following their manufacture shall begin their 7 years of capital allowances with the rate specified for the year of manufacture and continue in year increments until completed.

17.3 School buses purchased with state-allocated transportation funds may be used by the school districts for purposes other than transportation of pupils to and from school. This type of use shall be at the district's expense and shall occur only during a time when the bus is not making its normal school run.

17.4 In accordance with the Attorney General's opinion of June 18, 1974, regarding the use of buses purchased from State-allocated transportation funds for purposes other than the regular transportation of pupils to and from school, the provisions of Title 14, Section 1056, School Property, Use, Control and Management, shall apply.

18.0 School Bus Inspections:

The Delaware Motor Vehicle Division has two periods of time when all school bus owners shall have their buses inspected each year, once during January or February and the second yearly inspection during June, July, or August.

19.0 Transportation for Students with Disabilities:

Transportation or a reimbursement for transportation expenses actually incurred shall be provided by the State for eligible persons with disabilities by the most economically feasible means compatible with the person's disability subject to the limitations in the following regulations:

19.1 When the legal residence of a person receiving tuition assistance for private placement is within sixty (60) miles (one way) of the school or institution to be attended, the person shall be eligible for round trip reimbursement for transportation on a daily basis at the per mile rate allowed by the Internal Revenue Service for business use of a private vehicle, or for transportation at State expense which may be provided in lieu of the per mile reimbursement. (Round trip mileage is considered to be from the person's legal residence to the school or institution and return twice a day, or for actual mileage traveled, whichever is less.)

19.2 When the legal residence of a person receiving tuition assistance for private placement is in excess of sixty (60) miles (one way) but less than one hundred (100) miles (one way) from the school or institution to be attended, the person shall be eligible for round trip transportation reimbursement at the per mile rate allowed by the Internal Revenue Service for business use of a private vehicle, or for transportation at State expense which may be provided in

lieu of the per mile reimbursement on a weekly basis and on such other occasions as may be required when the school is not in session due to scheduled vacations or holidays of the school or institution. (Round trip mileage is considered to be from the person's legal residence to the school or institution and return twice a week. The weekly basis is to be determined by the calendar of the school or institution to be attended.)

19.3 When the legal residence of a person receiving tuition assistance for private placement is in excess of one hundred (100) miles (one way) of the school or institution to be attended, the person shall be eligible for round trip reimbursement on the basis of one round trip per year from the person's legal residence to the school or institution and return, and at such other times when care and maintenance of the person is unavailable due to the closing of the residential facility provided in conjunction with the school or institution. (Round trip is considered to be from the person's legal residence to the school or institution to be attended and from the school or institution to the legal residence of the person on an annual basis or at such times as indicated above.)

19.4 Reimbursement shall be computed on the per mile rate allowed by the Internal Revenue Service for business use of a private vehicle from the legal residence to the point of embarkation and return to the legal residence and for the actual fares based on the most economical means of transportation from the point of embarkation to the school or institution to be attended; the return trip shall be computed on the same basis.

19.5 Transportation at State expense may be provided from the legal residence to the point of embarkation in lieu of the per mile reimbursement when it is determined by the local district to be more economically feasible.

19.6 The local district of residence shall be responsible for payment of all such transportation reimbursement when it is determined by the local district to be more economically feasible.

19.7 All requests for payment shall be made by ~~the parent or legal guardian or other person who has control of the child~~ parent, guardian or Relative Caregiver to the transportation supervisor responsible for transportation in the district of residence at a time determined by the district but prior to June 5 of any year.

19.8 When reimbursements are made they shall be based on required documentation to support such payment.

19.9 The legal residence for the purpose of these regulations is defined as the residence of the parent, ~~legal guardian or other persons in the state having control~~

guardian or Relative Caregiver of the child with disabilities and with whom the child actually resides.

19.10 School Transportation Aides: With the approval of the Department of Education, a state funded school bus aide may be provided on school buses serving special schools/ programs for children with disabilities.

3 DE Reg. 1548 (5/1/00)

20.0 Transportation for Alternative Programs:

Costs for transportation shall be paid by the state from funds appropriated for student transportation if transportation is provided by extending already existing routes. Shuttle services that extend existing routes will be allowed. Additional routes established to transport students to and from the Alternative Programs or other special transportation designs will not be paid by the state from the school transportation appropriation and shall be included in the Alternative Program budget and be paid from the state allocation for alternative programs and/or the districts 30% share. Planning committees for these programs shall include the transportation supervisors who will be providing services. In addition, those supervisors must coordinate planning with and submit their transportation plans to the Education Associate for School Transportation at the Department of Education.

21.0 Drugs and Alcohol Testing

21.1 Content:

21.1.1 Pursuant to 14 **Del.C.** §2910, this regulation shall apply to the contracting for a program of drug and alcohol testing services necessary to enable public school districts, charter schools, and any person or entity that contracts with a school district or charter school to provide transportation for State public school students, to comply with such drug and alcohol testing requirements applicable to Delaware public school bus drivers as are now, or may hereafter be, imposed by federal law.

21.1.2 School bus aides shall be subject to the same federal and state drug and alcohol testing requirements as school bus drivers. They shall use non-DOT forms, and the employer shall follow the same procedures set forth herein.

21.2 Definitions: The following words and terms, when used in this regulation, shall have the following meaning unless the context clearly indicates otherwise:

“**Alcohol**” means the intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohols, including methyl or isopropyl alcohol.

“**CDL**” means a commercial drivers license issued pursuant to 21 **Del.C.** Ch. 26.

“**Department**” means the Delaware Department of Education.

“**DOT**” means the United States Department of Transportation.

“**Drug**” means the controlled substances for which tests are required under the provisions of 49 U.S.C. §31306, 49 CFR Part 382 and 49 CFR Part 40, and include marijuana, cocaine, amphetamines, phencyclidine (PCP), and opiates.

“**Employer**” means school bus contractors or school districts and charter schools when they directly employ school bus drivers.

“**Negative Result**” means a verified negative drug test result or an alcohol test result lower than the Federal standard as defined by the provisions of 49 U.S.C. §31306, 49 CFR Part 382 and 49 CFR Part 40.

“**Positive Result**” means a verified positive, adulterated, or substituted drug test result, an alcohol test result equal to or greater than the Federal standard or a refusal to take a drug or alcohol test as defined by the provisions of 49 U.S.C. §31306, 49 CFR Part 382 and 49 CFR Part 40.

21.3 Federal Regulations

Employers shall comply with the drug and alcohol testing regulations issued by the Secretary of Transportation of the United States pursuant to 49 U.S.C. §31306 and located at 49 CFR Part 382 and 49 CFR Part 40.

21.4 Drug and Alcohol testing program requirements:

21.4.1 The employer shall:

21.4.1.1 Be responsible for compliance with all federal and state regulations;

21.4.1.2 Maintain drug and alcohol testing records for their school bus drivers and aides.

21.4.1.2.1 Documentation of drug and alcohol testing results shall flow directly from the Consortium/Third Party Administrator Medical Review Officer (C/ TPA/MRO), as defined by the provisions of 49 CFR Part 382 and 49 CFR Part 40, to the employer. Copies of positive results shall be sent to the transportation supervisor for the school district or charter school and the Department for accounting and audit purposes.

21.4.1.2.2 Documentation of results shall be addressed to the individual, or employer, and the transportation supervisors for the school district, charter school or Department so as to ensure confidentiality.

21.4.2 The Department shall:

21.4.2.1 Bid the contract for the drug and alcohol testing program;

21.4.2.2 Monitor the drug and alcohol testing program;

21.4.3 Any school bus driver or aide who is not in compliance with federal and state drug and alcohol testing requirements shall not perform driver or aide duties until they have satisfied the federal and state requirements.

21.4.3.1 Any school bus driver or aide who has a positive drug or alcohol test result shall comply with DOT regulations regarding a Substance Abuse Professional (SAP) evaluation, treatment and return-to-duty testing before another pre-employment test is allowed.

21.4.3.2 An employer who hires a school bus driver or aide who has previously failed a drug or alcohol test shall ensure that all follow-up drug and/or alcohol testing recommended by the SAP evaluation is implemented.

21.5 Pre-employment Testing

21.5.1 School bus drivers with no CDL and aides with no prior experience must have a negative pre-employment drug test, and the employer must receive a negative result before the prospective employee can operate a school bus or serve as an aide.

21.5.2 Bus drivers with a CDL and school bus aides with past experience shall follow DOT rules and regulations to determine the necessity for pre-employment drug testing.

21.5.3 Employers shall provide Federal Drug Testing Custody and Control (CCF) forms to new school bus drivers and non-DOT forms to school bus aides who shall take the forms to the appropriate collection facility where the driver or aide shall be administered a drug test. Forms shall note the employer and school district or charter school.

21.5.4 Negative results shall be forwarded from the C/TPA/MRO to the employer.

21.5.5 Positive results shall be forwarded from the C/TPA/MRO to the employer. Copies of positive results shall be sent to the transportation supervisor for the school district or charter school and the Department for accounting and audit purposes.

21.5.6 Employers shall notify prospective school bus drivers and aides in writing of a positive result. Copies of this letter shall be sent to the transportation supervisor for the school district or charter school and the Department.

21.6 Random Testing

21.6.1 Employers shall provide the C/TPA/MRO a quarterly list of eligible drivers and aides to be drug and alcohol tested no later than one week before the testing quarter. The list shall note the primary school district or charter school of the drivers and aides. Copies of the lists shall be provided to the school district or charter school transportation supervisors.

21.6.2 The C/TPA/MRO shall send the employer lists of drivers and aides to be tested by the end of the first week of the quarter.

21.6.3 Employers shall provide CCF and alcohol testing forms to the drivers and aides who shall take the forms and go immediately to the appropriate collection facility where the driver or aide shall be administered a drug test or a drug and alcohol test. Forms shall note the employer and the school district or charter school.

21.6.4 Employers shall complete the required random tests before the end of the calendar quarter.

21.6.5 Negative results shall be forwarded from the C/TPA/MRO to the employer.

21.6.6 Notification of positive results shall be forwarded from the C/TPA/MRO to the employer. Copies of the positive results forms shall be sent to the transportation supervisor for the school district or charter school and the Department for accounting and audit purposes.

21.6.7 Employers shall notify school bus drivers and aides in writing of a positive result. Copies of this letter shall be sent to the transportation supervisor for the school district or charter school and Department.

21.7 Post-Accident and Reasonable Suspicion Testing

21.7.1 Employers shall provide CCF and alcohol testing forms to the school bus drivers and aides who shall take the forms and go immediately to the appropriate collection facility where the driver or aide shall be administered a drug and/or alcohol test. Forms shall note the employer and school district and charter school.

21.7.2 Negative results shall be forwarded from the C/TPA/MRO to the employer.

21.7.3 Notification of positive results shall be forwarded from the C/TPA/MRO to the employer. Copies of the positive result form shall be sent to the transportation supervisor for the school district or charter school and the Department for accounting and audit purposes.

21.7.4 Employers shall notify school bus drivers and aides in writing of a positive result. Copies of this letter shall be sent to the transportation supervisor for the school district or charter school and the Department.

3 DE Reg. 942 (1/1/00)

6 DE Reg. 643 (11/1/02)

22.0 Nonpublic, Nonprofit schools:

The nonpublic, nonprofit schools shall be responsible for the administration and supervision of the family transportation allowance provided by the State Department of Education.

22.1 The nonprofit, nonpublic school shall act as the administrator and fiscal agent. If the nonpublic, nonprofit school chooses to use an agent to receive payment other than the nonpublic, nonprofit school, written authorization from the governing board of the nonpublic, nonprofit school, such

as the board of trustees or the school board, specifying such agent shall be forwarded to the Education Associate for School Transportation in the Department of Education. The use of an agent to accept payment shall not relieve the nonpublic, nonprofit school from its responsibility to administer and supervise the transportation program, to maintain records, or to submit such reports as may be required.

22.2 Those nonpublic, nonprofit schools with families requesting transportation allowances shall have a Federal ID number.

22.3 Transportation allowances shall be made only for those eligible students (Delaware residents attending Delaware schools) who meet residence-to-school proximity guidance of one (1) mile or more for grades K-6 and two (2) miles or more for grades 7-12 and who make application to the nonpublic, nonprofit school for such transportation allowances. These applications for transportation allowances shall be signed by the parent, guardian, or Relative Caregiver and certified by a school administrator. Families of a student who would not otherwise be eligible for the allowance may receive the allowance if a physician certifies that the student is unable to walk or should not walk from home to school and return. The responsibility for establishing a claim for transportation allowances rests upon the claimant, and all records of this request shall be kept on file in the nonpublic, nonprofit school office. Such records shall be made available for audit by a representative of the Department of Education or the State Auditors.

22.4 The State shall provide the transportation funds to the nonpublic, nonprofit school or designated agent for eligible families. The family shall direct the nonpublic, nonprofit school or designated agent how the funds are to be dispersed [e.g; some or all of the funds to the parent, guardian or Relative Caregiver for tuition, for school-provided transportation costs, for an allowance, etc.] The nonpublic, nonprofit school shall ensure that its tuition, transportation fees, and other costs of attendance are independent of the allowances.

22.5 Payment shall be made only on the basis of one trip to and one trip from nonpublic, nonprofit school daily. Families who transport more than one child to the same school by private conveyance shall be reimbursed on the basis of the number of trips rather than on the number of children transported. No family shall qualify for more than one reimbursement for students it transports to a single school except for families with two or more children, one of whom is enrolled in a half day kindergarten program. In the event of car pools, each family is entitled to reimbursement, but a family shall not receive more than the annual allowance.

22.6 The nonpublic, nonprofit school shall submit the initial transportation form, provided by the Department of Education, no later than August 31st of each year. The nonpublic, nonprofit school or designated agent shall submit the final transportation form provided by the Department of Education no later than October 3rd of each year. All information shall be based on September 30th enrollment and eligibility. After the submission of the final transportation form no further adjustments for eligibility shall be made for the remainder of the school year.

22.7 Upon receipt of the initial form required by the Department of Education the first payment shall be made at the end of September. Upon receipt of the final form the remaining payments will be made at the end of October, January, and April. The school shall return funds not distributed to parents, guardians or Relative Caregivers to the State of Delaware.

8 DE Reg. 541 (10/1/04)

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF PUBLIC HEALTH

Statutory Authority: 16 Delaware Code,
Section 123(3)(m) (29 Del.C. §123(3)(m))

ORDER

Nature Of The Proceedings:

In accordance with 29 **Delaware Code**, Section 10113 (b) the Delaware Health and Social Services (“DHSS”) is making informal amendments to the State of Delaware Regulation Pertaining to the Delivery of Hospice Services. The DHSS authority to amend such regulations is as prescribed by 16 **Delaware Code**, Section 122(3)(m).

Findings Of Fact

The Department finds that certain portions of Sections 1.0 and 3.0 of the State of Delaware Regulation Pertaining to the Delivery of Hospice Services are invalid and unenforceable as written. Specifically, Section 1.0, definition of Interdisciplinary Care Team and subsection 3.1 to the extent both require the membership of a pastor or clergy on the Interdisciplinary Care Team, and subsection 3.2.4 in its entirety, are invalid and unenforceable. As a result, those portions of Sections 1.0 and 3.0 will be struck through, as set forth in the attached copy and such amendments will be

adopted in the best interest of the general public of the State of Delaware.

THEREFORE, IT IS ORDERED, that amendments to the State of Delaware Regulation Pertaining to the Delivery of Hospice Services as set forth in the attachment to this order are adopted and shall become effective September 10, 2005, after publication of the final regulation in the *Delaware Register of Regulations*.

Vincent P. Meconi, Secretary, DHSS, 8-15-05

4468 Delivery of Hospice Services

1.0 Definitions

“Hospice” means a coordinated program of home, outpatient and inpatient care under the direction of an identifiable hospice administration providing palliative and supportive medical and other health services to terminally ill patients and their families. Hospice is an option for care which utilizes a medically directed interdisciplinary team, which may also include services provided by trained volunteers. A hospice program provides care to meet the physical, psychological, social, spiritual and other special needs which are experienced during the final stages of illness, and during dying and bereavement. Hospice care shall be available twenty-four hours a day, seven days a week.

“Bereavement” means that period of time, usually at least one year, during which survivors mourn the death and resolve their grief.

“Bereavement Service” means counseling and support services to be offered during the bereavement period.

“A Coordinated Program” (including both services and personnel) implies the capacity to respond to patient/family needs whenever they arise. It also implies enough administrative and staff integration to ensure continuation of the same high quality care when the patient moves from home to inpatient care or vice versa.

“Family” means the hospice patient's kin. Other relations and individuals with significant personal ties to the hospice patient may be designated as members of the hospice patient's family.

“Governing Authority” means the policy-making body of a government agency, the Board of Directors or trustees of a not-for-profit corporation, or the proprietor or proprietors of an organization.

“Home Care Services” means services which are provided primarily in the patient's home. These services may include, but are not necessarily limited to, one or more of the following services: nursing services, physician services, home health aide services, homemaker services, physical

therapy, social services, pastoral counseling and trained volunteer services.

“Identifiable Hospice Administration” means an administrative group, individual or legal entity. This administration shall be responsible for the management of all aspects of the program.

“Inpatient Services” means those services to patients/families who require either 24 hour supervision in a health care facility; i.e., acute care hospital, skilled or intermediate care facility or services which necessitate the admission of the patient for treatment in the health care facility.

“Institution” as it appears in these regulations is used to refer to acute care hospitals, skilled nursing care facilities and intermediate care facilities (Title 16, **Delaware Code**).

“Interdisciplinary Care Team” means a care group of qualified individuals consisting of at least a physician, registered nurse, ~~pastor~~, and social worker who collectively have expertise in assessing the special needs of hospice patients/families and in providing palliative and supportive care to meet the special needs arising out of the physical, psychological, spiritual, social and economic stress which are experienced during the final stages of illness, dying, and bereavement.

“Optional Mode of Care” means the patient volunteers to become a hospice patient after meeting certain eligibility criteria and signs a consent agreement to participate in the program.

“Outpatient Services” means those services which are delivered in other than the home setting or as an inpatient in a hospital facility. They are delivered on an ambulatory basis either in a physician's office, clinic setting, emergency room or other area such as an x-ray department.

“Palliative Services” means those services, and/or treatments which produce the greatest degree of relief from the symptoms caused by disease for the longest period of time, minimizing side effects. The goal of hospice care is to provide symptom control through appropriate palliative therapies.

“Patient/family Unit” means the patient and family are considered as one, and are the primary unit of care.

“Symptom Control” means the relief of distressing physical, emotional, social and spiritual symptoms of both patient and family. It does not mean "cure of disease".

“Terminally Ill Patient” means an individual in the terminal stage of illness, with an anticipated life expectancy of six months or less, who, alone or in conjunction with a family member, or members, has voluntarily requested admission and been accepted into a hospice.

“Trained Volunteers” means individuals who are required to participate in a structured orientation and training

program before they become participants in the hospice program.

2.0 Licensing Requirements

2.1 The term hospice (or any like term such as hospice care, palliative care, etc.) shall not be used as a part of the name of any institution or description of services in the State unless it has been so classified by the Department of Health and Social Services.

2.2 Skilled care regulations, Intermediate care regulations, Hospital regulations shall apply when hospice inpatient care is to be provided.

2.3 All organizations whether or not they are currently licensed in the State of Delaware and/or are eligible to receive Medicare/Medicaid certification are required to apply for a hospice license if they plan to call themselves a hospice or to offer services described by them in terms such as hospice type care, palliative care, etc.

2.4 A license is not transferable from person to person nor from one location to another.

2.5 The license shall be conspicuously posted. All applications for renewal of licenses shall be filed with the Department of Health and Social Services at least thirty (30) days prior to expiration. Licenses will be issued for a period not to exceed one (1) year (twelve months), and may be issued for that period only if the hospice is in full compliance with these regulations. (Application fee is \$100.00 and annual licensure fee is \$50.00).

2.6 In addition to the annual license noted in 2.5 above provisional licensure may be granted by the Department of Health and Social Services for a period not exceeding three (3) months, when the hospice is in compliance with most but not all of these regulations and has demonstrated the ability and willingness to comply within the three (3) month period.

3.0 Hospice Care

3.1 Hospice is an option for care which utilizes an interdisciplinary team of the patient's choice. The team shall consist of at least a physician, nurse, social worker, clergy, trained volunteer, and the patient/family.

3.2 The interdisciplinary team shall have the following qualifications:

3.2.1 Licensed physician shall mean a physician who is licensed in the State of Delaware according to 24 **Del.C.** Ch. 17, Subchapter III.

3.2.2 Licensed nurse shall mean a registered nurse who is licensed in the State of Delaware according to 24 **Del.C.** §§1909-1912.

3.2.3 A social worker shall mean a person who is licensed in the State of Delaware according to 24 **Del.C.** Ch. 39.

~~3.2.4 Clergy shall mean a person who has been ordained for religious services with a theological degree from a school accredited by the Association of Theological Schools in the United States and Canada. If the clergyman of the patient's choice is not so qualified, the hospice shall insure the availability of a properly trained consulting clergyman to assist the clergyman of the patient's choice.~~

3.2.54 A volunteer will be qualified to participate in the hospice program after completion of a structured orientation and training program.

3.2.65 Specialized services as deemed necessary by the interdisciplinary team shall be performed by persons qualified to perform such functions and licensed by the **Delaware Code**, if required.

3.2.76 Providers of special services such as homemaker/ home health aides, physical therapists, nutritional, pharmaceutical, psychiatric, psychological, radiological, pediatric, oncologic specialists or other therapists may also be included on the team as deemed necessary by the team.

3.2.87 One qualified health care professional member of the team shall be designated as the patient care coordinator.

3.3 The interdisciplinary team shall have the following responsibilities:

3.3.1 Perform an admission history which includes medical, social, spiritual, emotional aspects of the patient/family.

3.3.2 Develop the care plan for each patient/family. The patient care coordinator will be responsible for assuring the implementation and ongoing review of the care plan.

3.3.3 Hold an interdisciplinary care team meeting at least semimonthly or more often if needed to review and update the care plan.

3.3.4 Emphasize prevention and control of pain and other distressing symptoms.

3.3.5 Make provision for 24 hours per day, seven days a week coverage.

4.0 Personnel/Administrative

4.1 No rules shall be adopted by the licensee or administrator of the hospice program which are in conflict with these regulations.

4.2 The Department of Health and Social Services shall be notified, in writing, of any changes in the hospice administration.

4.3 Hospice program shall comply with applicable local, state and federal laws and regulations governing the organization and delivery of health care to patients and families.

4.4 The hospice administration shall adopt by-laws identifying the purpose of hospice and the means of fulfilling them.

4.5 A hospice administrator will be identified and be responsible for the overall coordination and administration of the hospice program.

4.6 A governing authority must be established. Hospice established within existing licensed hospitals, nursing homes and home health agencies need not establish a separate governing authority specifically for hospice but must provide a hospice advisory committee.

4.7 Governing authority shall:

4.7.1 Adopt by-laws which identify the purposes of hospice and the means of fulfilling them.

4.7.2 The governing authority shall establish a procedure for and regularly conduct a systematic professional and administrative review and program evaluation of the services. Licensed hospitals, nursing homes and home health agencies may establish a committee specifically for this purpose or they may assign the responsibility to an existing committee.

4.7.3 Governing authority shall prepare an annual review and program evaluation which should include, but not be limited to the following, and should be available upon request to the licensing agency:

- Review and reevaluation of the program objectives.
- Evaluation of the appropriateness of the scope of services offered.
- Review of admission, discharge and patient care policies and procedures.
- Annual review of a random sample of patient/family records and written evaluation on quality of services provided.
- Annual review of staffing qualifications, responsibilities and needs.

5.0 Patient Care Policies

5.1 Every hospice shall develop written policies pertaining to the services they provide. Such policies shall include:

- 5.1.1 The goal of hospice care.
- 5.1.2 The scope of program services.
- 5.1.3 Interdisciplinary team services.
- 5.1.4 Bereavement services.
- 5.1.5 Home care services.
- 5.1.6 Inpatient services.
- 5.1.7 Palliative services.
- 5.1.8 A written policy denoting care of patients:
 - 5.1.8.1 In an emergency.

5.1.8.2 During a communicable disease episode.

5.1.9 Criteria for discharge from hospice programs.

5.2 The policies should reflect the philosophy and objectives of the hospice program.

5.3 Admission to a hospice is limited to the following:

5.3.1 Patient in the terminal state of illness whose survival is anticipated to be less than six months.

5.3.2 Patients who are no longer receiving treatment for cure.

5.3.3 The patient and physician agree that palliative care is appropriate.

5.3.4 The patient or the patient's legal guardian choose hospice care.

5.3.5 A hospice program shall not admit any persons under the age of eighteen (18) years without a signed parent/guardian consent.

5.3.6 Each hospice program must have a policy and procedures regarding informed consent agreement.

5.3.7 At the time of admission to the hospice and thereafter, a patient/family must be under the care of a physician who shall be responsible for medical care.

5.3.8 Admission is limited to those patients who have a family member, or designated person who is able and willing to assume the role of primary care giver.

5.4 The patient/family is the unit of care.

5.5 The hospice program must establish written policies regarding the rights and responsibilities of patients and these policies and procedures are to be made available to patient/family or patient/guardian. The rights of patients shall be consistent with Titles 16 and 31 of the **Delaware Code** and the Department of Health and Social Services Regulations regarding Patient's Rights.

5.6 The program shall exhibit with the admission agreement to all patients or their sponsors a complete statement enumerating all charges for services, materials and equipment which shall, or may be, furnished to the patient during the period of participation in the program.

5.7 The hospice program shall present to the patient, in writing, the prepayment and refund policies at the time of admission, and in the case of third party payment, an exact statement of responsibility in the event of retroactive denial. The patient shall be notified in writing of any changes in third party coverage prior to the implementation of such changes.

6.0 Service to Patients

6.1 General services:

6.1.1 The hospice organization shall be considered the responsible provider of the services and shall

be ultimately responsible for the quality of services rendered.

6.1.2 A hospice contracting for components of its program shall require as part of the contract, that the contractor comply with the provisions of the hospice regulation regarding a coordinated program of home and inpatient care services.

6.1.3 The hospice organization shall develop, implement and revise, as necessary, written policies and procedures for the operation of a coordinated program of home and inpatient services to cover at least the following:

6.1.3.1 Delineation of responsibility for delivering and for maintaining coordinate care.

6.1.3.2 Direct provision of services provided by the hospice organization.

6.1.3.3 Mechanisms for assuring quality hospice care when segments of care are provided by contracting parties.

6.1.3.4 Statement of how coordination of services is to be assured.

6.1.3.5 Home care services shall be provided by an organization which has received Medicare/Medicaid certification.

6.1.3.6 Inpatient care shall be provided in a licensed facility which is primarily engaged in providing to inpatients those services defined in Title 16 of the Delaware Code pertaining to Acute Care Hospitals, Intermediate Care Facilities and Skilled Care Facilities.

6.1.3.7 Bereavement services shall be available to the family for at least one year following the death of the patient.

6.2 Medical services:

6.2.1 All persons admitted to a hospice shall be under the care of a licensed physician.

6.2.2 All hospice programs shall arrange for one (1) or more licensed physicians to be called in an emergency. Names and phone numbers should be posted.

6.2.3 Patient/physician encounters shall be at a frequency not less than that described in the written plan of care or as otherwise required to meet demonstrated patient/family needs.

6.2.4 Medical services to be provided in an inpatient setting shall be consistent with those regulations established in Title 16 of the Delaware Code pertaining to Acute Care Hospitals, ICF and SNF.

6.2.5 Transfer Agreements shall be negotiated between the hospice organization and inpatient facilities to insure a smooth transition should the need for such services develop.

6.3 Specialized services:

6.3.1 All specialized services shall be ordered, in writing, by the interdisciplinary care team physician, such as physical therapy, occupational therapy, speech therapy, etc.

6.3.2 An interdisciplinary care team member will notify the patient/family, as soon as possible, when a special service has been ordered.

6.4 Nursing services:

6.4.1 Nursing services provided within an inpatient facility will be consistent with the regulations contained within Title 16 of the Delaware Code pertaining to Acute Care Hospitals, ICF and SNF.

6.4.2 Hospice nursing services shall be available directly, via written agreement seven days a week, 24 hours per day under the supervision of a director of nurses who is licensed in the State of Delaware.

6.4.3 Written policies and procedures for nursing services shall be developed and implemented by the hospice to incorporate objectives and maintain the standards of nursing practice as well as coordinate, integrate and provide continuity of patient/family care in conjunction with other services during illness and after discharge/death to assure physician orders are followed.

6.5 Medications:

6.5.1 All medications administered to patients shall be ordered in writing and signed by the patient's physician or the interdisciplinary care physician.

6.5.2 Existing regulations for medications administered to patients in inpatient facilities will be applicable to hospice patients in inpatient facilities.

6.5.3 Medication administered to hospice patients should be consistent with the hospice philosophy which focuses on palliation; i.e., controlling pain and relieving other symptoms which are manifested during the dying process.

6.5.4 Resource materials relating to the administration and untoward effects of medications and treatments used in pain and symptom control will be readily available to nursing personnel.

6.6 Inpatient services:

6.6.1 Develop and implement written policies and procedures for inpatient services which provide for facilities and services which create a home-like atmosphere and reflect hospice philosophy insofar as possible under physical and utilization constraints. These policies may include, but should not be limited to, the following:

- Visiting
- Food preparation by the patient and family
- Provision for family sleeping area
- Personal items

6.7 Inservice training and continuing education shall be offered on a regular basis. Documentation of this training and continuing education will be maintained and available on request to the licensing authority.

6.8 Records:

6.8.1 The hospice organization shall maintain a complete record for each patient/family which contains all information pertaining to supportive management of the patient/family and which is maintained in conformance with generally accepted medical record practices. Records necessary to record the daily treatment of the patient should be maintained at the site of treatment.

6.8.2 Each patient/family record shall be retained by the hospice organization for a five-year period after death or discharge from the hospice. In the case of a minor, records shall be kept for a five year period after death. If the minor is discharged from the hospice, records shall be kept for a five year period after the minor attains majority.

6.8.3 The patient care plan will give direction to the care given in meeting the physiological, psychological, sociological and spiritual needs of patient/family. The plan will identify those care givers who will be participating in this plan. The plan will specifically address maintenance of patient independence and control.

6.8.4 The plan will be recorded in ink and maintained as part of the patient/family record.

6.8.5 All services ordered and rendered shall be entered in the patient/family record.

6.8.6 Written documentation of all interdisciplinary care team meetings is necessary.

6.8.7 The plan of care must be prepared within three days of the patient's admission to the home care component of the hospice program and within two days of admission to the inpatient component of the hospice program.

6.8.8 All required records maintained by the hospice organization shall be open to inspection by the authorized representatives of the Department of Health and Social Services.

7.0 Suspension or Revocation of Licenses

7.1 The Department of Health and Social Services may suspend or revoke a license issued pursuant to these regulations on any of the following grounds:

7.1.1 Violation of these rules and regulations issued pursuant thereto.

7.1.2 Permitting, aiding or abetting the commission of any illegal act in the hospice operation.

7.1.3 Conduct or practices detrimental to the health or welfare of the patient.

7.2 Before any license issued pursuant to these regulations is suspended or revoked, thirty (30) days notice shall be given in writing to the holder of the license, during which time he may appeal for a hearing before the Department of Health and Social Services. The Department of Health and Social Services shall hear the appeal at the next regularly scheduled meeting of the Department of Health and Social Services and shall render its decision within fifteen (15) days following such hearing.

8.0 Renewal of License After Suspension or Revocation

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

9.0 Severability

Should any section, sentence, clause or phrase of these regulations be legally declared unconstitutional or invalid for any reason, the remainder of said regulations shall not be affected thereby.

DIVISION OF SOCIAL SERVICES

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

ORDER

Nature Of The Proceedings

Delaware Health and Social Services ("Department") / Division of Social Services initiated proceedings to amend the Title XIX Medicaid State Plan with respect to the Pharmaceutical Services Program: 1) to implement a prior authorization process with a preferred drug list (PDL); 2) to revise the prescription quantity and duration provisions; and, 3) to seek supplemental drug rebates from pharmaceutical manufacturers. The Department's proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the July 2005 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by July 31, 2005 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

Summary Of Proposed Changes**Purpose**

This action implements a preferred drug list and prior authorization for pharmacy services. The agency submitted an amendment to the Title XIX Medicaid State Plan to the Centers for Medicare and Medicaid Services (CMS) to implement:

- a prior authorization process with a preferred drug list (PDL) for certain designated drugs in selected therapeutic classes covered under the prescription drug program;
- revisions to prescription quantity and duration provisions; and,
- supplemental drug rebates.

Statutory Basis

- Social Security Act, Title 19, Section §1927
- 42 United States Code s1396r-8

Amending the Following State Plan Page

Attachment 3.1-A, Page 5 Addendum, Limitations

Summary of Provisions

To ensure that the state delivers a medical assistance prescription drug program, which is both cost effective and prudently administered, the following describes the coverage changes for prescribed drugs and/or supplies, effective April 1, 2005 for Prior Authorization with Preferred Drug List and Supplemental Rebates:

1) Prior Authorization with a Preferred Drug List

a) A process is established which utilizes a preferred drug list (PDL) for selected therapeutic classes. Drugs included on the preferred drug list (PDL) are automatically prior authorized. Drugs in those classes that are not included on the PDL shall require prescribers to obtain prior authorization. The Pharmaceutical & Therapeutics (P&T) Committee, comprised of physicians, pharmacists and community members appointed by the Secretary, Delaware Health & Social Services, selects drugs for the PDL.

b) Providers are notified of the drugs selected for placement on the PDL by selected therapeutic classes prior to implementation of the prior authorization process and as additional drugs are subsequently added to the list. This information is posted on the DMAP website.

c) The prior authorization process provides for a turn-around response within 24 hours of receipt of a completed prior authorization request from a prescribing provider by telephone, mail or electronic communication. In emergency situations, providers may dispense at least a 72-

hour supply of medication as mandated and pursuant to 42 United States Code s1396r-8.

d) The Drug Utilization Review (DUR) Board will make recommendations to the Department regarding drugs to be considered for prior authorization.

2) Prescription Quantity and Duration

a. Dosage limits: Medications are limited to a maximum dose recommended by the FDA, peer review journals that indicate that doses that exceed FDA guidelines are both safe and effective or doses that are specified in regional or national guidelines.

b. Quantity limits are placed on therapeutic categories that will allow for coordinated care and improve outcomes. Limits exist for:

- 1) Sedative hypnotics-15 doses per 30 days
- 2) Triptans, acute treatment of migraines, 9 doses per 45 days
- 3) Opioid analgesics-200 doses per 30 days
- 4) Skeletal muscle relaxants-120 tablets/capsules per 30 days

5) Benzodiazepines-120 tablets per 30 days

6) Tramadol-240 tablets per 30 days

7) Narcotic cough medications-480ml per 30 days

8) Adjunctive anticonvulsants-240 tablets/capsules per 30 days

9) Nebulizer solutions-3 acute exacerbations per 30 days

10) Clients utilizing greater than 15 unique medications per 30 days

11) Medications that are dosed once a day are limited to one dose per day unless that total dosage required is within the limits stated above and require more than one tablet/capsule to obtain the required therapeutic amount.

c. Duration of therapy

1) Nicotine cessation products are limited to the duration that has been approved by the FDA.

2) Palivizumab-6 months during the high viral period of the year.

d. Prescriptions are limited to a quantity not to exceed the greater of 100 dosing units or a 34-day supply except for drugs selected and received through the mail order process.

3) Supplemental Drug Rebates

a. CMS has authorized the state of Delaware to enter into The State of Delaware Department of Health and Social Services supplemental drug rebate agreement. This supplemental drug rebate agreement was submitted to CMS on April 7, 2005 and has been authorized by CMS.

b. The Division of Social Services (DSS) has contracted with an independent organization to negotiate supplemental rebate agreements with manufacturers.

By implementing these processes, the Department ensures that all eligible Medicaid beneficiaries have the same comprehensive pharmacy coverage available to them, while reducing the cost of pharmaceutical products to the state. Physicians and patients continue to have access to the same FDA-approved drugs as they have had in the past.

Summary of Comments Received with the Agency Response

Delaware Health & Social Services (DHSS) / Division of Medicaid & Medical Assistance (DMMA) received the following comments from the public on the current proposal to amend Title XIX of the Medicaid State Plan to implement Prior Authorization, Preferred Drug List and Supplemental Drug Rebates, effective April 1, 2005. The emergency and proposed regulations were published as 8 DE Regs. 6 & 73 in the July 1, 2005 issue of the *Delaware Register of Regulations*. DSS received comments on the policy from four (4) organizations. Their comments do not support the adoption of this amendment; they fall in nine discrete areas. Comment areas and agency responses are summarized below.

DSS has considered each comment and responds as follows:

1. Concept of Preferred Drug Lists or Formularies

- The Department remains committed to obtaining the best and most cost-effective services for Medicaid clients, including prescription drugs.

Prior Authorization, Preferred Drug List and Supplemental Drug Rebates are essential parts of the Department's strategy to contain costs in its pharmaceutical services program as well as helping prescribers and pharmacists assure Medicaid clients are receiving the most effective medications.

Medicaid covers all FDA-approved drugs but requires clinical criteria be met before certain drugs are dispensed. The Department believes this initiative empowers prescribers to prescribe based on their expertise, specialty, and proven track record in prescribing to their Medicaid patients.

The Department has the fiscal responsibility to provide medically necessary drugs in the most cost-effective manner. The Department informs providers through various methods, including mailings, website postings, newsletters, and e-mail notification of changes that are discussed at the Drug Utilization Review (DUR) Board and Pharmaceutical

& Therapeutics (P & T) Committee meetings or is proposed through rulemaking.

No change to the state plan amendment will be made because of this comment.

2. Prior Authorization

- Please be aware that these drug policies are dynamic and will be revised as necessary to remain consistent with changes in Department policy and evidence based medical standards.
- Drug prior authorization requests are individually reviewed and approvals granted on a case-by-case basis, as submitted information/documentation warrants.
- Pharmacy overrides are still available for emergency medically necessary situations.
- As for "an unwieldy prior authorization process" creating a need for increased use of emergency room care, etc., the Department maintains that access for Medicaid clients to effective and cost-effective medications is intended to prevent more expensive medical treatments and ultimately to save the state money.
- As recommended by the Kaiser Commission, the Department is already reviewing "due process" procedures for the prior authorization process. Additionally, the Department also communicates with providers by way of mailings, on-line newsletters, provider bulletins, site visits, and meetings.

No change to the state plan amendment will be made because of this comment.

3. Preferred Drug List with Prior Authorization

- The formula for inclusion on the preferred drug list looks first at effectiveness and then at other factors such as cost and patient compliance.
- The Pharmaceutical & Therapeutics Committee will identify certain drugs from each therapeutic drug class of medications as "preferred". The Preferred Drug List posted on the DMAP website shows a "grandfathered" designation for preferred agents (no PA required) and non-preferred agents (PA is required).
- Regarding the recommendation to publicize the availability of the PA process, please view the following notices on the DMAP website addressing prior authorization,

preferred drug list, limitations on prescribed drugs and co-payments:

<http://www.dmap.state.de.us/downloads/bulletins.html>

1) "IMPORTANT NOTICE Only for Clients currently eligible for Delaware Medical Assistance Program Pharmacy Benefits; PLEASE READ!";

2) Client Brochure: DMAP Pharmacy Changes;

3) DUR Notification: a form of this letter is mailed to all clients when a drug they are taking is placed on the Preferred Drug List;

4) PDL Notification: a form of this letter is mailed to all prescribing practitioners when a drug taken by one of their clients is placed on the Preferred Drug List.

No change to the state plan amendment will be made because of this comment.

4. Consumer Protections

- In response to the following recommendations: "adequate and written notice"; "written explanation of the reasoning...to deny approval for any drug"; "person's right to appeal";

The Department intends the Prior Authorization provisions to add information to the prescribing process, not to replace the clinical judgment of the prescriber. By more carefully assessing patterns of utilization and identifying opportunities to educate prescribers and participants, this will increase the cost-efficiency of the drug benefit and allow taxpayer funds to help the greatest number of eligible persons. The Prior Authorization initiative does not deny benefits or eligibility to any participant, rather it places the request in a pending status until required documentation is received from the prescriber and therefore does not trigger notice and appeal rights.

No change to the state plan amendment will be made because of this comment.

5. Pharmacy Co-pay

- The proposed amendment published in the July 1, 2005 issue of the *Delaware Register of Regulations* relates only to Prior Authorization, Preferred Drug List and Supplemental Drug Rebates. This comment is beyond the scope of the proposed regulation. The maximum co-payment chargeable to a Medicaid client is set by federal law at 42 CFR §447.54. At present, the policy remains as is.

No change to the state plan amendment will be made because of this comment.

6. Retroactive Regulations

- The Department notes that it published in the April 1, 2005 issue of the *Delaware Register of Regulations* a "Notice of Intent" to submit a state plan amendment to the Centers for Medicare and Medicaid Services (CMS) to implement effective April 1, 2005: 1) a prior authorization process with a preferred drug list (PDL) for certain designated drugs in selected therapeutic classes covered under the prescription drug program; 2) revisions to prescription quantity and duration provisions; and, 3) supplemental drug rebates.

The "Notice of Intent" includes the following information: 1) Statement of Purpose of the Amendment; 2) Statutory Basis for the proposal; 3) A list of state plan pages to be amended; and, 4) A detailed summary of the provisions of the amendment that included the following headings: Prior Authorization with Preferred Drug List, Standards for Prescription Quantity and Duration and, the Benefit of Supplemental Drug Rebates.

You have obviously noted the "Notice of Intent" and the "Proposed Regulation" are almost identical in content. In the proposed regulation we simply clarified that medications are limited to a maximum dose recommended by the FDA; listed the therapeutic categories with limits; and, clarified the duration of therapy.

The Department acknowledges that the "Notice of Intent" should have been promulgated as a "Proposed Regulation". However, the Department has since submitted the appropriate documents to the *Registrar of Regulations* pursuant to the Administrative Procedures Act and posted on the Delaware Regulations website. The Department has taken steps to ensure that this does not happen again. Notwithstanding the mistake, the Department has not received any information that any interested party did not have actual notice or the correct information regarding the process for adopting the state plan amendment, or was in any way prejudiced in availing itself of the opportunity for comment. The Department does not regard this mistake as a fatal defect in the notice and comment procedures.

No change to the state plan amendment will be made because of this comment.

7. Dosage Limits

- Dosage limits are currently listed in the regulations as guidelines. The Department will use FDA guidelines, peer review journals, or guidelines published by established expert groups. The Prior Authorization process allows for deviations from those guidelines where appropriate.

- All Medicaid services must be medically necessary; therefore, no conflict exists between the amendment provisions and the EPSDT mandate.

No change to the state plan amendment will be made because of this comment.

8. Quantity Limits

- Deviations from quantity limits are currently allowed through the prior authorization process.

No change to the state plan amendment will be made because of this comment.

9. Recommendations for Inclusion on the Preferred Drug List

- One commenter indicated that a list compiled from input of neurologists statewide will be provided to the Pharmaceutical & Therapeutics Committee. This is the appropriate venue to present your recommendations. Establishing the Medicaid preferred drug list is a public process. Committee meetings are public and interested individuals may submit information for consideration.
- Please visit the following Pharmacy Corner website for further information, including meeting agendas, minutes and guidelines for providing public testimony:

<http://www.dmap.state.de.us/information/pharmacy.html>

No change to the state plan amendment will be made because of this comment.

Summary of Agency Initiated Change

Please note that DMMA has initiated one change to this regulation, under the section titled, "Preferred Drug Lists with Prior Authorization". This change deletes the second sentence that reads, "Drugs included on the PDL are automatically prior authorized." This sentence is unnecessary because preferred drugs do not require prior authorization (PA). Only non-preferred drugs require PA.

[Bracketed Bold Language] indicates text added at the time the final order is issued. [Bracketed stricken through] indicates text deleted at the time the final order is issued.

Findings of Fact

The Department finds that the proposed changes as set forth in the July 2005 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to establish the provisions related to prior authorization, preferred drug list and supplemental drug rebates is adopted and shall be final effective September 10, 2005.

Vincent P. Meconi, Secretary, DHSS, Aug. 16, 2005

DSS FINAL ORDER REGULATION #05-46

REVISIONS:

Attachment 3.1-A

Page 5 Addendum

LIMITATIONS

Prescribed Drugs:

~~The following drugs are not covered by Delaware Medicaid or are covered with limitations:~~

- ~~**DESI Drugs** — products and known related drug products that lack substantial evidence of effectiveness. The State of Delaware does not cover DESI drugs for reimbursement purposes.~~
- ~~**Drugs Used for Cosmetic Purposes** — products, such as Minoxidil Lotion and Retin A are not covered for adults, except for certain medical conditions.~~
- ~~**Fertility Drugs** — are not covered when prescribed to stimulate fertility (example: Clomid).~~
- ~~**Anorectic Drugs** — for the purpose of weight control are not covered. They may be reimbursed when prescribed to remedy hyperactivity in children and for certain sleep disorders.~~

~~Delaware Medicaid does not limit the quantity, days supply, or the number and/or frequency of refills for any prescription.~~

~~Participating manufacturers' new drugs are covered (except excluded/restricted drugs specific in section 1927(d)(1)-(2) of the Social Security Act) for six months after FDA approval and upon notification by the manufacturer of a new drug.~~

Prosthetic Devices:

~~Prosthetic and orthotic devices, as well as other durable medical equipment and assistive technology services, are covered when documented as medically necessary.~~

Diagnostic Services:

Medicaid will pay for the rental of an apnea monitor to monitor the breathing of an infant for whom a diagnosis of apneic episodes (near-miss Sudden Infant Death Syndrome) has been made.

12.a. Prescribed Drugs:**Drug Coverage**

1. Drug products are covered when prescribed or ordered by a physician, or other licensed practitioner within the scope of their practice and when obtained from a licensed pharmacy. Covered drugs, as defined in Section 1927(k)(2) of the Act, are those which are prescribed for a medically accepted indication, medically necessary, and produced by any pharmaceutical manufacturer, which has entered into and complies with a drug rebate agreement under Section 1927(a) of the Act.

2. Drugs excluded from coverage as provided by Section 1927(d)(2) of the Act, include:

a. Drugs designated less than effective by the FDA (DESI drugs) or which are identical, similar, or related to such drugs;

b. Drugs when used for cosmetic purposes or hair growth (products, such as Minoxidil Lotion and Retin A are not covered for adults, except for certain medical conditions);

c. Drugs when used to promote fertility;

d. Drugs that have an investigational or experimental or unproven efficacy or safety status;

e. Drugs when used for anorexia, weight loss, or weight gain. Drugs for the purpose of weight control may be reimbursed when prior authorized following established criteria as reviewed and approved by the DUR Board and deemed medically necessary.

3. Non-covered services also include: drugs used to correct sexual dysfunction and compound drugs (compound prescriptions must include at least one medication that on its own would be a covered entity).

4. Participating manufacturers' new drugs are covered (except excluded/restricted drugs specified in Section 1927[d][1]-[2] of the Social Security Act) for six months after FDA approval and upon notification by the manufacturer of a new drug.

Quantity and Duration

1. Dosage limits: Medications are limited to a maximum dose recommended by the FDA [and appropriate medical compendia described in section 1927(k) of the Social Security Act, ~~peer review journals~~] that indicate that doses that exceed FDA guidelines are both safe and effective or doses that are specified in regional or

national guidelines published by established expert groups such as the American Academy of Pediatrics, or guidelines recommended by the Delaware Medicaid Drug Utilization Review (DUR) Board and accepted by the DHSS Secretary.

2. Quantity limits are placed on therapeutic categories that will allow for coordinated care and improve outcomes.

Limits exist for:

a. Sedative hypnotics-15 doses per 30 days
b. Triptans, acute treatment of migraines, 9 doses per 45 days

c. Opioid analgesics-200 doses per 30 days
d. Skeletal muscle relaxants-120 tablets/capsules per 30 days

e. Benzodiazepines-120 tablets per 30 days
f. Tramadol-240 tablets per 30 days

g. Narcotic cough medications-480ml per 30 days
h. Adjunctive anticonvulsants-240 tablets/capsules per 30 days

i. Nebulizer solutions-3 acute exacerbations per 30 days

j. Clients utilizing greater than 15 unique medications per 30 days

k. Medications that are dosed once a day are limited to one dose per day unless that total dosage required is within the limits stated above and require more than one tablet/capsule to obtain the required therapeutic amount.

3. Duration of therapy

a. Nicotine cessation products are limited to the duration that has been approved by the FDA.

b. Palivizumab-6 months during the high viral period of the year.

4. Prescriptions are limited to a quantity not to exceed the greater of 100 dosing units or a 34-day supply except for drugs selected and received through mail order.

Prior Authorization

1. Prior authorization requirements may be established for certain drug classes or particular drugs, or a medically accepted indication for uses and doses.

2. The DUR Board determines which prescription drugs may require prior authorization. The Board assesses data on drug use in accordance with predetermined standards. The standards shall be:

a. monitoring for therapeutic appropriateness
b. over-utilization and underutilization
c. appropriate use of generic products
d. therapeutic duplication
e. drug-disease contraindications
f. drug-drug interactions
g. incorrect drug dosage or duration of drug treatment

- h. clinical efficacy
- i. safety
- j. medical necessity
- k. potential for abuse, misuse and diversion
- l. experimental use opportunity
- m. cost effectiveness relative to similar therapies

The recommendations of the DUR Board constitute interpretive guidelines to be used in determining whether to grant or deny prior authorization of a prescription drug. The make up and membership authority for the DUR Board complies with 42U.S.C. S1396r-8.

3. A request for prior authorization for covered outpatient drugs is processed within 24 hours of receipt of a completed prior authorization request from a prescribing provider by telephone, mail or electronic communication. A 72-hour supply of medically necessary covered drugs is provided in an emergency situation as mandated and pursuant to 42 United States Code s1396r-8.

Preferred Drug Lists with Prior Authorization

A process is established which utilized a preferred drug list (PDL) for selected therapeutic classes. ~~Drugs included on the PDL are automatically prior authorized.~~ Drugs in those classes that are not included on the PDL shall require prior authorization. A Pharmaceutical & Therapeutic (P&T) Committee, comprised of pharmacists, physicians, and community members, appointed by the Secretary, Delaware Health & Social Services, selects drugs for the PDL.

Drug Rebate Agreements

CMS has authorized the state of Delaware to enter into The State of Delaware Department of Health and Social Services supplemental drug rebate agreement. This supplemental drug rebate agreement was submitted to CMS on April 7, 2005 and has been authorized by CMS.

- Pharmaceutical manufacturers are allowed to audit utilization rates;
- Compliance with the reporting requirements for state utilization information and restrictions to coverage;
- The unit rebate amount is confidential and cannot be disclosed for purposes other than rebate invoicing and verification; and,
- Rebate agreements between the state and a pharmaceutical manufacturer that are separate from the drug rebate agreements of Section 1927 are approved by the Centers for Medicare and Medicaid Services. The state reports rebates from separate agreements to the Secretary of Health and Human Services. The state will remit the federal portion of any cash state supplemental

rebates collected.

Diagnostic Services:

Medicaid will pay for the rental of an apnea monitor to monitor the breathing of an infant for whom a diagnosis of apneic episodes (near-miss Sudden Infant Death Syndrome) has been made.

DIVISION OF SOCIAL SERVICES

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

ORDER

Nature Of The Proceedings:

Delaware Health and Social Services ("Department") / Division of Social Services initiated proceedings to amend the policies of the Food Stamp Program in the Division of Social Services Manual (DSSM) as it relates to income exclusions. The Department's proceedings to amend its regulations were initiated pursuant to 29 Delaware Code Section 10114 and its authority as prescribed by 31 Delaware Code Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 Delaware Code Section 10115 in the July 2005 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by July 31, 2005 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

Summary Of Proposed Change

Citation

Robert T. Stafford Disaster Relief and Emergency Assistance Act (Public Law 100-707)

Disaster Unemployment Assistance received by individuals who suffered a job loss or were unemployed due to a recent disaster is not counted as income or as a resource for food stamp purposes.

Summary Of Comments Received With Agency Response

The State Council for Persons with Disabilities (SCPD) offered the following endorsement: SCPD endorses the proposed regulation since it would expand financial eligibility for the Food Stamp Program.

Agency Response: DSS thanks Council for the endorsement.

Findings of Fact:

The Department finds that the proposed changes as set forth in the July 2005 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Food Stamp Program as it relates to income exclusions is adopted and shall be final effective September 10, 2005.

Vincent P. Meconi, Secretary, DHSS, 8/15/05

9059 Income Exclusions

[273.9(c)]

Only the following items will be excluded from household income and no other income will be excluded:

A. Any gain or benefit which is not in the form of money payable directly to the household.

This includes in-kind benefits and certain vendor payments. In-kind benefits are those for which no monetary payment is made on behalf of the household and includes meals, clothing, housing, or produce from a garden. A vendor payment is a money payment made on behalf of a household by a person or organization outside of the household directly to either the household's creditors or to a person or organization providing a service to the household.

Payments made to a third party on behalf of the household are included or excluded as income as follows:

1. Department of Housing and Urban Development (HUD) vendor payments. Rent or mortgage payments made to landlords or mortgages by HUD are excluded.

2. Vendor payments that are reimbursements. Reimbursements made in the form of vendor payments are excluded on the same basis as reimbursements paid directly to the household as described in DSSM 9059 E.

3. Other third party payments. Other third party payments shall be handled as follows: Moneys legally obligated and otherwise payable to the household which are diverted by the provider of the payment to a third party for a

household expense shall be counted as income and not excluded. If the person or organization makes a payment to a third party on behalf of a household using funds that are not owed to the household, the payment shall be excluded from income. The following are examples of third party payments:

a) A friend or relative uses his or her own money to pay the household's rent directly to the landlord. This vendor payment shall be excluded.

b) A household member earns wages. However, the wages are garnished or diverted by the employer and paid to a third party for a household expense, such as rent. This vendor payment is counted as income. However, if the employer pays a household's rent directly to the landlord in addition to paying the household its regular wages, the rent payment shall be excluded from income. Similarly, if the employer provides housing to an employee in addition to wages, the value of the housing shall not be counted as income.

c) A household receives court-ordered monthly support payments in the amount of \$400. Later, \$200 is diverted by the provider and paid directly to a creditor for a household expense. The payment is counted as income.

Money deducted or diverted from a court-ordered support or alimony payment to a third party for a household's expense shall be included as income because the payment is taken from money that is owed to the household. However, payments specified by a court order or other legally binding agreement to go directly to a third party rather than the household are excluded from income because they are not otherwise payable to the household.

Examples of court-ordered payments:

a) A court awards support payments in the amount of \$400 a month and in addition orders \$200 to be paid directly to a bank for repayment of a loan. The \$400 payment is counted as income and the \$200 payment is excluded from income.

b) A civil service retiree is entitled to a retirement payment of \$800 a month. However, \$400 is diverted to his ex-wife by court order for child support. This is similar to a wage garnishment. Since the retirement benefits are legally obligated and otherwise payable to the retiree's household, the \$800 is budgeted for food stamp purposes.

Support payments not required by a court order or other legally binding agreement (including payments in excess of the amount specified in a court order or written agreement) which are paid to a third party on the household's behalf shall be excluded from income.

4. Payments made by the Division or by another government agency to a child care institution to provide day care for a household member are also excluded as vendor payments.

5. All or part of a public assistance grant which would normally be provided in a money payment but which is diverted to a protective payee will be considered income to the household.

6. Emergency Assistance payments will be excluded if they are made directly to a third party for a household expense. This rule applies even if the household has the option of receiving a direct cash payment.

7. Under some pay/benefit plans, an employee may choose to have the employer withhold from the employee's earnings money to pay certain expenses such as child care and medical expenses as a vendor payment to a third party when the expenses are incurred. The amount is counted as earned income when withheld because the money is legally obligated and otherwise payable to the employee at that time.

8. Some companies make credits available to employees to use to buy health insurance, annual leave, sick leave or life insurance. The employee cannot elect to receive a cash payment and loses the credits if not used. The amount shows up on the pay stub when used. These flexible benefits are not counted as income because they are not legally obligated and otherwise payable to the employee as earnings.

Some companies give employees "points" as incentive to arrive to work on time, work so many weeks without taking leave, etc. These points have a monetary value that appears on the pay stub and the points are subject to taxes. The employee can only redeem the points for commodities or goods from a catalog provided by the employer; they cannot convert the points to cash. These points are excluded from income because the funds are not otherwise payable to the household.

B. Any income in the certification period which is received too infrequently or irregularly to be reasonably anticipated, but not in excess of \$30 a quarter.

C. Grants, Loans and Scholarships - Do not count educational financial assistance received from school grants, scholarships, vocational rehabilitation payments, Job Training Partnership Act payments, educational loans, and other loans that are expected to be repaid as income. Exclude any other financial assistance received that is intended for books, tuition, or other self-sufficiency expenses.

D. All loans, including loans from private individuals as well as commercial institutions.

E. Reimbursements for past or future expenses, to the extent that they do not exceed actual expenses, and do not represent a gain or benefit to the household.

Reimbursements for normal household living expenses such as rent or mortgage, personal clothing, or food eaten at home are a gain or benefit and, therefore, are not excluded. To be excluded, these payments must be provided specifically for an identified expense, other than normal living expenses, and used for the purpose intended. When a reimbursement, including a flat allowance, covers multiple expenses, each expense does not have to be separately identified as long as none of the reimbursement covers normal living expenses. The amount by which a reimbursement exceeds the actual incurred expense will be counted as income. However, reimbursements will not be considered to exceed actual expenses, unless the provider or the household indicates that the amount is excessive.

Examples of excludable reimbursements which are not considered to be a gain or benefit to the household are:

Reimbursements or flat allowances for job or training related expenses such as travel, per diem, uniforms, and transportation to and from the job or training site. Reimbursements which are provided over and above the basic wages for these expenses are excluded; however, these expenses, if not reimbursed, are not otherwise deductible. Reimbursements for the travel expenses incurred by migrant workers are also excluded, as are maintenance funds provided to VR clients for uniforms, supplies, etc.

Reimbursement for outofpocket expenses of volunteers incurred in the course of their work.

Medical or dependent care reimbursements.

Reimbursements received by households to pay for a service provided under Title XX of the Social Security Act.

Do not consider the following as excludable reimbursements:

No portion of benefits provided under Title IVA of the Social Security Act, (TANF) to the extent such benefit is attributed to an adjustment for work related or child care expenses, will be considered excludable under this provision.

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.

F. Monies received and used for the care and maintenance of a thirdparty beneficiary who is not a household member.

If the intended beneficiaries of a single payment are both household and nonhousehold members, any identifiable portion of the payment intended and used for the care and maintenance of the nonhousehold member will be excluded.

If the nonhousehold member's portion cannot be readily identified, the payment must be evenly prorated among intended beneficiaries and the exclusion applied to the nonhousehold member's prorata share or the amount actually used for the non household member's care and maintenance, whichever is less.

G. The earned income of a student under age 18 who attends elementary or secondary school or classes to obtain a GED at least half-time and lives with a natural, adoptive or step parent, is under the control of a household member other than a parent, or is certified in a separate food stamp household but lives with a natural, adoptive or step parent.

This exclusion continues to apply during temporary interruptions in school attendance due to semester or vacation breaks, provided the child's enrollment will resume following the break. If the child's earnings or amount of work performed cannot be differentiated from that of other household members, prorate the total earnings equally among the working members. The child's prorata share is excluded.

H. Money received in the form of a nonrecurring lump sum payment.

These include, but are not limited to: income tax refunds, rebates or credits; retroactive lump sum Social Security, SSI, cash assistance, railroad retirement benefits, or other payments; lump sum insurance settlement; or refunds of security deposits on rental property or utilities. TANF payments made to divert a family from becoming dependent on welfare may be excluded as a non-recurring lump-sum payment if the payment is not defined as assistance. (All TANF diversion payments are excluded.) These payments will be counted as resources in the month received unless specifically excluded from consideration as a resource by other federal laws.

Payments of large retroactive SSI benefit amounts are required to be made in installments for SSI recipients. These SSI retroactive lump sum installments are excluded from income.

Earned Income Tax Credit (EITC) payments, whether paid in advance or made as tax refunds, are considered to be nonrecurring lump sum payments.

I. The cost of producing selfemployment income (See DSSM 9074.4).

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

The following laws provide such an exclusion:

PART A -- GENERAL

1. P. L. 79-396, Section 12(e) of the National School Lunch Act, as amended by Section 9(d) of P. L. 94-105, provides that,

The value of assistance to children under this Act shall not be considered to be income or resources for any purposes under any Federal or State laws, including laws relating to taxation and welfare and public assistance programs.

This law authorizes the School Lunch Program, the Summer Food Service Program for Children, the Commodity Distribution Program, and the Child and Adult Care Food Program. Note that the exclusion applies to assistance provided to children rather than that paid to providers.

2. P. L. 89-642, the Child Nutrition Act of 1966, Section 11(b), provides in part that,

The value of assistance to children under this Act shall not be considered to be income or resources for any purpose under any Federal or State laws including, but not limited to, laws relating to taxation, welfare, and public assistance programs.

This law authorizes the Special Milk Program, the School Breakfast Program, and the Special Supplemental Food Program for women, infants, and children (WIC).

3. P. L. 91-646, Section 216, the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970. Reimbursements are excluded from income and resources.

4. P. L. 93-113, the Domestic Volunteer Services Act of 1973, Titles I and II, as amended.

Payments under Title I of that Act, including payments from such Title I programs as VISTA, University Year for Action, and Urban Crime Prevention Program, to volunteers shall be excluded for those individuals receiving food stamps or public assistance at the time they joined the Title I program, except that households which were receiving an income exclusion for a Vista or other Title I Subsistence allowance at the time of conversion to the Food Stamp Act of 1977 shall continue to receive an income exclusion for VISTA for the length of their volunteer contraction in effect at the time of conversion. Temporary interruptions in food stamp participation shall not alter the exclusion once an initial determination has been made. New applicants who were not receiving public assistance or food stamps at the time they joined VISTA shall have these volunteer payments included as earned income.

Payments to volunteers under Title II, including the Retired Senior Volunteer Program (RSVP), Foster Grandparents Program and Senior Companion Program, are excluded from income.

5. P. L. 93-288, Section 312(d), the Disaster Relief Act of 1974, as amended by P. L. 100-707, Section 105(i), the Disaster Relief and Emergency Assistance Amendments of 1988, 11/23/88. Payments precipitated by an emergency or major disaster as defined in this Act, as amended, are not counted as income or resources for food stamp purposes. This exclusion applies to Federal assistance provided to persons directly affected and to comparable disaster assistance provided by States, local governments, and disaster assistance organizations.

A major disaster is any natural catastrophe such as a hurricane or drought, or, regardless of cause, any fire, flood, or explosion, which the President determines causes damage of sufficient severity and magnitude to warrant major disaster assistance to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

An emergency is any occasion or instance for which the President determines that Federal assistance is needed to supplant State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe.

Most, but not all, Federal Emergency Management Assistance (FEMA) funds are excluded. For example, some payments made to homeless people to pay for rent, mortgage, food, and utility assistance when there is no major disaster or emergency is not excluded under this provision.

6. P. L. 97-300, the Job Training Partnership Act (JTPA), 10/13/82. Section 142(b) provides that allowances, earnings and payments to individuals participating in programs under JTPA shall not be considered as income. Subsequently P. L. 99-198, the Food Security Act of 1985, 12/85, amended section 5(1) of the Food Stamp Act to require counting as income on-the-job training payments provided under section 204(5) of Title II of the JTPA except for dependents less than 19 years old. Section 702(b) of P.L. 102-367, the Job Training Reform Amendments of 1992, further amended the Food Stamp Act (by changing the reference) to exclude on-the-job training payments received under the Summer Youth Employment and Training Program. This means that currently only on-the-job training payments to (1) youths, other than dependents under 19, in year-round programs and (2) adults can be counted. All other JTPA income is excluded.

7. P. L. 99-425, Section (e), the Low-Income Home Energy Assistance Act, 9/30/86. The amount of any home energy assistance payments or allowances provided directly to, or indirectly on behalf of, a household is excluded from income and resources. In determining any

excess shelter expense deduction, the full amount of such payments or allowances shall be deemed to be expended by such household for heating or cooling expenses.

8. P. L. 99-498, the Higher Education Act Amendments of 1986, Section 479B, as amended by P. L. 100-50, June 3, 1987. Amounts made available for tuition and fees and, for students attending an institution at least half-time, books, supplies, transportation and miscellaneous personal expenses (other than room, board and dependent care) provided under Title IV of the Act and by the Bureau of Indian Affairs were excluded from income and resources.

P. L. 102-325, the Higher Education Amendments of 1992, dated 7/23/92, contain two separate provisions that affect the treatment of payments made under the Higher Education Act. In regard to Title IV-- Student Assistance, Part F, Section 479B provides that:

Notwithstanding any other provision of law, student financial assistance received under this title, or under Bureau of Indian Affairs student assistance programs, shall not be taken into account in determining the need or eligibility of any person for benefits or assistance, or the amount of such benefits or assistance, under any Federal, State, or local program financed in whole or in part with Federal funds.

Student assistance authorized under Title IV includes the following: (State and local agencies select students for some of these programs. In addition, some State and local agencies have separate programs of their own with similar names.)

- Basic Educational Opportunity Grants (BEOG or Federal Pell Grants)
- Presidential Access Scholarships (PAS-Super Pell Grants)
- Federal Supplemental Educational Opportunity Grants (FSEOG)
- State Student Incentives Grants (SSIG)
- Federal Direct Student Loan Programs (FDSLPL) (Formerly GSL and FFELP):
- Federal Direct Supplemental Loan Program (provides loans to students)
- Federal Direct PLUS Program (provides loans to parents)
- Federal Direct Stafford Loan Program
- Federal Direct Unsubsidized Stafford Loan Program, and
- Federal Consolidated Loan Program
- Federal Perkins Loan Program - Direct loans to students in institutions of higher education (Perkins Loans, formerly NDSL)

- Federal Work Study Funds (Note: Not all Federal work study funds come under Title IV of the Higher Education Act.)

- TRIO Grants (Go to organizations or institutions for students from disadvantaged backgrounds):

- Upward Bound (Some stipends go to students)

- Student Support Services

- Robert E. McNair Post-Baccalaureate

Achievement

- Robert C. Byrd Honors Scholarship

Program

- College Assistance Migrant Program (CAMP) for students whose families are engaged in migrant and seasonal farm work

- High School Equivalency Program

(HEP)

- National Early Intervention Scholarship and Partnership Program (NEISP).

There is only one BIA student assistance program per se. It is the Higher Education Grant Program, which is sometimes called the Scholarship Grant Program. However, education or training assistance received under any BIA program must be excluded. There is an Adult Education Program that provides money to adults to get a GED, attend technical schools, and for job training. There is also an employment assistance program. In addition, education and training may be made available under separate programs like the Indian Child and Family Programs. Each tribe has a BIA agency that may be contacted for more information about education and training assistance.

Section 480(b) provides that:

The changes made in part F of title IV of the Act by the amendment made by this section shall apply with respect to determinations of need under such part F for award years beginning on or after July 1, 1993.

Title XIII, Indian Higher Education Programs, Part E--Tribal Development Student Assistance Revolving Loan Program (Tribal Development Student Assistance Act), Section 1343(c) provides in part that:

... for purposes of determining eligibility, loans provided under this program may not be considered in needs analysis under any other Federal law, and may not penalize students in determining eligibility for other funds.

The Part E exclusion was effective October 1, 1992.

P. L. 98-524, the Carl D. Perkins Vocational Education Act, Section 507, as amended by P. L. 101-392, 9/25/90, Sections 501 and 701 of the Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1990. Amounts made available for tuition

and fees and, for students attending an institution at least half-time, books, supplies, transportation, dependent care, and miscellaneous personal expenses (other than room and board). This provision was effective July 1, 1991. The programs under this Act include the following:

- Indian Vocational Education Program

- Native Hawaiian Vocational

Education Program

- State Vocational and Applied

Technology Education Program which contains the:

- State Program and State Leadership

Activities

- Program for Single Parents, Displaced

Homemakers, and Single Pregnant Women

- Sex Equity Program

- Programs for Criminal Offenders

- Secondary School Vocational

Education Program

- Postsecondary and Adult Vocational

Education Program

- State Assistance for Vocational

Education Support Programs by Community-Based

Organizations

- Consumer and Homemaking

Education Program

- Comprehensive Career Guidance and

Counseling Program

- Business-Labor-Education

Partnership for Training Program

- National Tech-Prep Education

Program

- State-administered Tech-Prep

Education Program

- Supplementary State Grants for

Facilities and Equipment and Other Program Improvement

Activities

- Community Education Employment

Centers Program

- Vocational Education Lighthouse

Schools Program

- Tribally Controlled Postsecondary

Vocational Institutions Program

- Vocational Education Research

Program

- National Network for Curriculum

Coordination in Vocational and Technical Education

- National Center or Centers for

Research in Vocational Education

- Materials Development in

Telecommunications Program

- Demonstration Centers for the Training of Dislocated Workers Program
- Vocational Education Training and Study Grants Program
- Vocational Education Leadership Development Awards Program
- Vocational Educator Training Fellowships Program
- Internships for Gifted and Talented Vocational Education Students Program
- Business and Education Standards Program
- Blue Ribbon Vocational Education Program
- Educational Programs for Federal Correctional Institutions
- Vocational Education Dropout Prevention Program
- Model Programs of Regional Training for Skilled Trades
- Demonstration Projects for the Integration of Vocational and Academic Learning Program
- Cooperative Demonstration Programs
- Bilingual Vocational Training Program
- Bilingual Vocational Instructor Training Program
- Bilingual Materials, Methods, and Techniques Program

(Federal Perkins Loans authorized under Part E of Title IV of the Higher Education Act must be handled in accordance with other Title IV income.)

Section 5(d)(3) of the Food Stamp Act, as amended by P. L. 101-624, Food, Agriculture, Conservation and Trade Act of 1990, Title XVIII, Mickey Leland Memorial Domestic Hunger Relief Act, 11/28/90, and P. L. 102-237, Food, Agriculture, Conservation, and Trade Act Amendments of 1991, Section 903, provides that educational monies are excluded from income:

- when they are awarded to a person enrolled at a recognized institution of post-secondary education, at a school for the handicapped, in a vocational education program, or in a program that provides for completion of a secondary school diploma or obtaining the equivalent thereof,

- to the extent that they do not exceed the amount used for or made available as an allowance determined by such school, institution, program, or other grantor, for tuition, mandatory fees (including the rental or purchase of any equipment, materials, and supplies related to the pursuit of the course of study involved), books, supplies,

transportation, and other miscellaneous personal expenses (other than living expenses), of the student incidental to attending such school, institution, or program, and

- to the extent loans include any origination fees and insurance premiums.)

9. P. L. 99-576, Veterans' Benefits Improvement and Healthcare Authorization Act of 1986, Section 303(a)(1), 8/7/86, which amended Section 1411(b) and 1412(c) of the Veterans' Educational Act of 1984 (GI Bill) provides that any amount by which the basic pay of an individual is reduced under this subsection shall revert to the Treasury and shall not, for purposes of any Federal law, be considered to have been received by or to be within the control of such individual. Title 38 of the USC, Chapter 30, Section 1411 refers to basic educational assistance entitlement for service on active duty and Section 1412 refers to basic educational assistance entitlement for service in the Selected Reserve. (Section 216 of P. L. 99-576 authorized stipends for participation in study of Vietnam-era veterans' psychological problems. These payments are not excluded by law.)

10. P. L. 100-175, Section 166, Older Americans Act, 11/29/87. Funds received by persons 55 and older under the Senior Community Service Employment Program under Title V of the Older Americans Act are excluded from income. Each State and eight organizations receive Title V funds. The organizations that receive some Title V funds are as follows:

- Green Thumb
- National Council on Aging
- National Council of Senior Citizens
- American Association of Retired Persons
- U.S. Forest Service
- National Association for Spanish Speaking Elderly
- National Urban League
- National Council on Black Aging

11. P. L. 100-242, Section 126(c)(5)(A), 11-6-87, The Housing and Community Development Act of 1987, excludes most increases in the earned income of a family residing in certain housing while participating in HUD demonstration projects authorized by section 126. Demonstration projects are authorized by this law for Charlotte, North Carolina, and 10 additional locations. The affected regional offices will be contacted individually regarding these projects.

12. P. L. 100-383, section 105(f)(2), Wartime Relocation of Civilians, 8/10/88 (the Civil Liberties Act of 1988). Payments to U.S. citizens of Japanese ancestry and permanent resident Japanese aliens or their

survivors and Aleut residents of the Pribilof Islands and the Aleutian Islands West of Unimak Island are excluded from income and resources.

13. P. L. 100-435, Section 501, 9/19/88, which amended Section 17(m)(7) of the Child Nutrition Act of 1966. Under WIC demonstration project, food stamp benefits that may be exchanged for food at farmers' markets are excluded from income and resources.

14. P. L. 101-201, Agent Orange Compensation Exclusion Act, 12/6/89. All payments from the Agent Orange Settlement fund or any other fund established pursuant to the settlement in the Agent Orange product liability litigation are excluded from income and resources retroactive to January 1, 1989. The disabled veteran will receive yearly payments. Survivors of deceased disabled veterans will receive a lump-sum payment. These payments were disbursed by the AETNA insurance company.

P. L. 101-239, 12/19/89, the Omnibus Budget Reconciliation Act of 1989, Section 10405, also excluded payments made from the Agent Orange settlement fund or any other fund established pursuant to the settlement in the Agent Orange product liability litigation, M.D.L. No. 381 (E.D.N.Y.) from income and resources in determining eligibility for the amount of benefits under the Food Stamp Program.

(Note: P. L. 102-4, Agent Orange Act of 1991, 2/6/91, authorized veterans' benefits to some veterans with service connected disabilities resulting from exposure to agent orange. Most of the eligible veterans received a lump sum payment for retroactive benefits due them, followed by regular monthly payments. The lump sum payment is excluded as income but the subsequent monthly payments are counted as unearned income. These payments from the Department of Veterans Affairs are issued by the U.S. Treasury. These VA payments are not excluded by law.)

P. L. 101-426, Section 6(h)(2), the Radiation Exposure Compensation Act, dated October 15, 1990, excludes payments made under this public law from food stamp income and resources.

16. P. L. 101-508, 11/5/90, the Omnibus Budget Reconciliation Act of 1990, Title XI Revenue Provisions, Section 11111, Modifications of Earned Income Tax Credit, subsection (b) provides that any Federal earned income tax credit shall not be treated as income and shall not be taken into account in determining resources for the month of its receipt and the following month. This provision was effective with taxable years beginning after December 31, 1990.

The September 1988 amendments to the Food Stamp Act require the exclusion from income of any payment made to the household under section 3507 of the Internal Revenue Code of 1986 (relating to advance payment of earned income credit). The August 1993 amendments to the Food Stamp Act require the exclusion from resources of any earned income tax credits received by any member of the household for a period of 12 months from receipt if such member was participating in the food stamp program at the time the credits were received and participated in such program continuously during the 12-month period.

17. P. L. 101-610, Section 177(d), 11/16/90, National and Community Service Act (NCSA) of 1990, provides that Section 142(b) of the JTPA applies to projects conducted under Title I of the NCSA as if such projects were conducted under the JTPA. See item 6 above for the JTPA income exclusion. Title I includes three Acts: (1) Serve-America: The Community Service, Schools and Service-Learning Act of 1990, (2) the American Conservation and Youth Service Corps Act of 1990, and (3) the National and Community Service Act. There are about 47 different NCSA programs, and they vary by State. Most of the payments are made as a weekly stipend or for educational assistance. The Higher Education Service-Learning program and the AmeriCorps umbrella program come under this Title. The National Civilian Community Corps (NCCC) is a federally managed AmeriCorps program. The Summer for Safety program is an AmeriCorps program under which participants earn a stipend and a \$1000 post-service educational award. The National and Community Service Trust Act of 1993, P.L. 103-82, 9/23/93, amended the National and Community Services Act of 1990 but it did not change the exclusion.

18. P.S. 101-625, section 22(i), Cranston-Gonzales National Affordable Housing Act, dated 11/28/90 (42 USCS 1437t(i)) provides that,

(i) Treatment of Income - No service provided to a public housing resident under this section [Family Investment Centers] may be treated as income for purposes of any other program or provision of State or Federal law.

This exclusion applies to services such as child care, employment training and counseling, literacy training, computer skills training, assistance in the attainment of certificates of high school equivalency and other services. It does not apply to wages or stipends.

This same public law, Section 522(i)(4), excludes most increases in the earned income of a family residing in certain housing while participating in HUD demonstration projects authorized by this public law. Demonstration projects are authorized by this law for

Chicago, Illinois, and 3 other locations. The affected regional offices will be contacted individually regarding these projects.

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

20. P. L. 102-586, signed 11/4/92, Section 8, amended the Child Care and Development Block Grant Act Amendments of 1992 by adding a new Section 658S to exclude the value of any child care provided or arranged (or any amount received as payment for such care or reimbursement for costs incurred for such care) under this subchapter from income for purposes of any other Federal or Federally-assisted program that bases eligibility, or the amount of benefits, on need. (These payments are made under the Social Security Act, as amended.)

21. P. L. 103-286, dated 8/1/94, Section 1 (a) provides in part that:

Payments made to individuals because of their status as victims of Nazi persecution shall be disregarded in determining eligibility for and the amount of benefits or services to be provided under any Federal or federally assisted program which provides benefits or services based, in whole or in part, on need.

22. P. L. 103-322, section 230202, dated 9/13/94, amended Section 1403 of the Crime Act of 1984 (42 U.S.C. 10602) to provide in part that:

(e) Notwithstanding any other law, if the compensation paid by an eligible crime victim compensation program would cover costs that a Federal program, or a federally financed State or local program, would otherwise pay,

(1) such crime victim compensation program shall not pay that compensation; and

(2) the other program shall make its payments without regard to the existence of the crime victim compensation program.

Based on this language, payments received under this program must be excluded from income and resources for food stamp purposes.

23. P. L. 104-193, section 103(a), dated 8/22/96, amended Section 404(h) of Part A of Title IV of the Social Security Act to provide that for the purpose of determining eligibility to receive, or the amount of, any benefit authorized by the Food Stamp Act, funds (including interest accruing) in an individual development account under the TANF block grant program shall be disregarded with respect to any period during which such individual maintains or makes contributions into such an account.

24. P.L. 104-204, section 1804(d), dated 9/26/96 provides that:

Notwithstanding any other provision of law, the allowance paid to a child under this section shall not be considered income or resources in determining eligibility for or the amount of benefits under any Federal or federally assisted program.

A monthly allowance (from \$200 - \$1200) is paid to a child of a Vietnam veteran for any disability resulting from spina bifida suffered by such child.

PART B - AMERICAN INDIAN OR ALASKA NATIVE

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

1. P. L. 92-203, section 29, dated 1/2/76, the Alaska native Claims Settlement Act, and Section 15 of P. L. 100-241, 2/3/88, the Alaska Native Claims Settlement Act Amendments of 1987 - All compensation (including cash, stock, partnership interest, land, interest in land, and other benefits) received under this Act are excluded from income and resources.

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

25 USCS 1407 Judgment Funds (as amended by P. L. 93-134 and P. L. 97-458) provides that:

None of the funds [appropriated in satisfaction of judgements of the Indian Claims and Commission or Claims Court in favor of any Indian tribe, band, etc.] which--

(1) are distributed per capita or held in trust pursuant to a plan approved under the provisions of this Act [25 USCS §§ 1401 et seq.], or

(2) on the date of enactment of this Act [enacted Jan. 12, 1983], are to be distributed per capita or are held in trust pursuant to a plan approved by Congress prior to the date of enactment of this Act [enacted Jan. 12, 1983], or

(3) were distributed pursuant to a plan approved by Congress after December 31, 1981 but

prior to the date of enactment of this Act [enacted Jan. 12, 1983], and any purchases made with such funds, including all interest and investment income accrued thereon while such funds are so held in trust, shall be subject to Federal or State income taxes, nor shall such funds nor their availability be considered as income or resources nor otherwise utilized as the basis for denying or reducing the financial assistance or other benefits to which such household or member would otherwise be entitled under the Social Security Act [42 USCS § 301 et seq.] or, except for per capita shares in excess of \$2,000, any Federal or federally assisted program.

The \$2,000 amount applies to each payment made to each person. Initial purchases made with exempt payments distributed between January 1, 1982 and January 12, 1983, are excluded from resources to the extent that excluded funds were used.

3. P. L. 98-64, 8/2/83, applied the exclusion in 25 USCS 1407 to per capita payments from funds which are held in trust by the Secretary of Interior (trust fund distributions) for an Indian tribe. (Per capita payments may be authorized for specific tribes under other public laws.)

4. 25 USCS 1408 (as amended by P. L. 93-134, P. L. 97-458, and P. L. 103-66, Section 13736, 10/7/93) provides that interests of individual Indians in trust or restricted lands shall not be considered a resource and up to \$2,000 per year of income received by individual Indians that is derived from such interests shall not be considered income in determining eligibility for assistance under the Social Security Act or any other Federal or federally assisted program. Interests include the Indian's right to or legal share of the trust or restricted land and any income accrued from the funds in trust or the restricted lands. The exclusion applies to each individual Indian than has an interest. The income exclusion applies for both eligibility and benefit level purposes for food stamp purposes. The income exclusion applies to calendar years.

5. P. L. 93-531, section 22 - Relocation assistance payments to members of the Navajo and Hopi Tribes are excluded from income and resources.

6. P. L. 94-114, section 6, 10/17/75 - Income derived from certain submarginal land held in trust for certain Indian tribes is excluded from income and resources. The tribes that may benefit are:

- Bad River Band of the Lake Superior Tribe of Chippewa Indians of Wisconsin
- Blackfeet Tribe
- Cherokee Nation of Oklahoma
- Cheyenne River Sioux Tribe
- Crow Creek Sioux Tribe

- Lower Brule Sioux Tribe
- Devils Lake Sioux Tribe
- Fort Belknap Indian Community
- Assiniboine and Sioux Tribes
- Lac Courte Oreilles Band of Lake Superior
- Chippewa Indians
- Keweenaw Bay Indian Community
- Minnesota Chippewa Tribe
- Navajo Tribe
- Oglala Sioux Tribe
- Rosebud Sioux Tribe
- Shoshone-Bannock Tribes
- Standing Rock Sioux Tribe

7. P. L. 94-189, Section 6, 12/31/75 - Funds distributed per capita to the Sac and Fox Indians or held in trust are excluded from income and resources. The funds are divided between members of the Sac and Fox Tribe of Oklahoma and the Sac and Fox Tribe of the Mississippi in Iowa. The judgments were awarded in Indian Claims Commission dockets numbered 219, 153, 135, 158, 231, 83, and 95.

8. P. L. 94-540 - Payments from the disposition of funds to the Grand River Band of Ottawa Indians are excluded from income and resources.

9. P. L. 95-433, section 2 - Indian Claims Commission payments made pursuant to this Public Law to the Confederated Tribes and Bands of the Yakima Indian Nation and the Apache Tribe of the Mescalero Reservation are excluded from income and resources.

10. 25 USCS 1931 Indian Child Welfare (P. L. 95-608, 11/8/78), subparagraph (a) provides for child and family service grant programs on or near reservations in the preparation and implementation of child welfare codes. Such programs may include, but are not limited to, family assistance, including homemaker and home counselors, day care, after school care, and employment, recreational activities, and respite care; home improvement; the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters; and education and training of Indians; including tribal court judges and staff, in skills relating to child and family assistance and service programs. Subparagraph (b) provides that assistance under 25 USCS 1901 et seq. shall not be a basis for the denial or reduction of any assistance otherwise authorized under any federally assisted programs. (Similar off-reservation programs are authorized by 25 USCS 1932. We have asked the Office of General Counsel if the exclusion applies to these programs.)

11. P. L. 96-420, section 9(c), 10/10/80, Maine Indian Claims Settlement Act of 1980 - Payments

made to the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet are excluded from income and resources.

12. P. L. 97-403 - Payments to the Turtle Mountain Band of Chippewas, Arizona are excluded from income and resources.

13. P. L. 97-408 - Payments to the Blackfeet, Grosventre, and Assiniboine tribes, Montana, and the Papago, Arizona, are excluded from income and resources.

14. P. L. 98-123, Section 3, 10/13/83 - Funds distributed under this Act to members of the Red Lake Band of Chippewa Indians are excluded from income and resources. Funds were awarded in docket number 15-72 of the United States Court of Claims.

15. P. L. 98-124, Section 5 - Per capita and interest payments made to members of the Assiniboine Tribe of the Fort Balknap Indian Community, Montana, and the Assiniboine Tribe of the Fort Peck Indian Reservation, Montana, under this Act are excluded from income and resources. Funds were awarded in docket 10-81L.

16. P. L. 98-500, Section 8, 10/17/84, Old Age Assistance Claims Settlement Act, provides that funds made to heirs of deceased Indians under this Act shall not be considered as income or resources nor otherwise used to reduce or deny food stamp benefits except for per capita shares in excess of \$2,000.

17. P. L. 99-146, Section 6(b), 11/11/85 - Funds distributed per capita or held in trust for members of the Chippewas of Lake Superior are excluded from income and resources. Judgements were awarded in Dockets Numbered 18-S, 18-U, 18-C, and 18-T.

Dockets 18-S and 18-U are divided among the following reservations.

Michigan:

Keweenaw Bay Indian Community
(L'Anse, Lac Vieux Desert, and

Ontonagon Bands) Wisconsin:

Bad River Reservation
Lac du Flambeau Reservation
Lac Courte Oreilles Reservation
Sokaogon Chippewa Community
Red Cliff Reservation

St. Croix Reservation

Minnesota:

Fond du Lac Reservation
Grand Portage Reservation
Nett Lake Reservation (including
Vermillion Lake and Deer Creek)
White Earth Reservation

Under dockets 18-C and 18-T funds are given to the Lac Courte Oreilles Band of the Lake Superior Bands of Chippewa Indians of the Lac Courte Oreilles Reservation of Wisconsin, the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, the Sokaogon Chippewa Community of the Mole Lake Band of Chippewa Indians, and the St. Croix Chippewa Indians of Wisconsin.

18. P. L. 99-264, White Earth Reservation Land Settlement Act of 1985, 3/24/86, Section 16 excludes moneys paid under this Act from income and resources. This Act involves members of the White Earth Band of Chippewa Indians in Minnesota.

19. P. L. 99-346, Section 6(b)(2) - Payments to the Saginaw Chippewa Indian Tribe of Michigan are excluded from income and resources.

20. P. L. 99-377 - Section 4(b), 8/8/86, - Funds distributed per capita to the Chippewas of the Mississippi or held in trust under this Act are excluded from income and resources. The judgements were awarded in Docket Number 18-S. The funds are divided by reservation affiliation for the Mille Lac Reservation, Minnesota; White Earth Reservation, Minnesota; and Leech Lake Reservation, Minnesota.

21. P. L. 101-41, 6/21/89, the Puyallup Tribe of Indians Settlement Act of 1989, Section 10(b) provides that nothing in this Act shall affect the eligibility of the Tribe or any of its members for any Federal program. Section 10(c) provides that none of the funds, assets, or income from the trust fund established in Section 6(b) shall at any time be used as a basis for denying or reducing funds to the Tribe or its members under any Federal, State, or local program. (The Puyallup Tribe is located in the State of Washington.)

22. P. L. 101-277, 4/30/90, funds appropriated in satisfaction of judgements awarded to the Seminole Indians in dockets 73, 151, and 73-A of the Indian Claims Commission are excluded from income and resources except for per capita payments in excess of \$2,000. Payments were allocated to the Seminole Nation of Oklahoma, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, and the independent Seminole Indians of Florida.

23. P. L. 101-503, Section 8(b), Seneca Nation Settlement Act of 1990, dated November 3, 1990, provides that none of the payments, funds or distributions authorized, established, or directed from this Act, and none of the income derived therefrom, shall affect the eligibility of the Seneca Nation or its members for, or be used as a basis for denying or reducing funds under, any Federal program.

24. P.L. 103-436, 11/2/94, Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act, Section 7(b), provides that payments made pursuant to that Act are totally excluded from income and resources for food stamps purposes.

K. Energy Assistance as follows:

(a) Any payments or allowances made for the purpose of providing energy assistance under any Federal law other than Part A of Title IV of the Social Security Act, including utility reimbursements made by the Department of Housing and Urban Development and the rural Housing Service, or

(b) A one-time payment or allowance applied on an as needed basis and made under a Federal or State law for the costs of weatherizing or emergency repair or replacement of an unsafe or inoperative furnace or other heating or cooling device. A down payment followed by a final payment upon completion of the work will be considered a one-time payment for the purposes of this provision.

Federal or State one-time assistance for weatherization or emergency repair or replacement of heating or cooling devices are also excluded as income.

L. Cash donations based on need received on or after February 1, 1988 from one or more private nonprofit charitable organizations, but not to exceed \$300 in a Federal fiscal year quarter.

M. Earned income tax credit payments received either as a lump sum or payments under section 3507 of the Internal Revenue Code of 1986 (relating to advance payment of earned income tax credits received as part of the paycheck or as a reduction in taxes that otherwise would have been paid at the end of the year).

N. Any payment made to an E & T participant for costs that are reasonably necessary and directly related to participation in the E & T program. These costs include, but are not limited to, dependent care costs, transportation, other expenses related to work, training or education, such as uniforms, personal safety items or other necessary equipment, and books or training manuals. These costs shall not include the cost of meals away from home.

O. Governmental foster care payments received by households with foster care individuals who are considered to be boarders in accordance with DSSM 9013.3.

P. Income of an SSI recipient necessary for the fulfillment of a plan for achieving self-support (PASS). The income set aside for this special PASS account is excluded for income purposes.

Q. Marines living on base in adequate quarters are not entitled to receive a Basic Allowance for Quarters (BAQ) even though the amount is listed under entitlements

and a deduction is shown for the same amount under deductions on the Leave and Earnings Statement (LES). For these cases the BAQ is disregarded under the entitlement and deduction sections when verified. Staff must advise applicants to get a letter from their commanding officer stating that the LES is incorrect, the applicant is not entitled to the BAQ and does not receive it.

R. In HUD's Family Self-Sufficiency (FSS) Program, participants sign a contract to achieve economic independence within five years. As the participant's employment income rises, a portion of the rent increases they would normally be charged would be waived. The amount waived will be credited to an escrow account to be given to the family at the end of the program.

The participating household must fulfill its employment obligation under the contract or HUD may terminate the FSS supportive services. The family will then forfeit any escrow account funds.

While the funds are in the FSS Escrow Account, they are totally unavailable to the household and excluded as a resource. When the household achieves economic independence and is given the escrow account, the money will be excluded as income as a nonrecurring lump-sum payment.

S. The earnings of temporary census workers from the Bureau of Census is not counted as income for food stamp purposes effective April 1, 2000 through December 31, 2000.

25. Public Law 100-707 authorizes the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act to pay Disaster Unemployment Assistance to any individual unemployed as a result of a major disaster. Individuals cannot be eligible for any other unemployment compensation and also receive disaster unemployment benefits. Benefits are limited to 26 weeks.

Disaster unemployment assistance is considered Federal major disaster and emergency assistance under the Stafford Act. It cannot be considered as income or as a resource when determining Food Stamp Program benefits.

Staff needs to verify the source of the unemployment income only if the client suffered a job loss or was unemployed due to a recent disaster.

DEPARTMENT OF INSURANCE

18 Delaware Code, Sections 3311(a) and (2304)

(18 Del.C. §§3311(a) and (2304)

18 DE Admin. Code 702

ORDER

A public hearing was held on May 25, 2005 to receive comments on proposed Regulation 702 relating to Required Disclosures for Residential Homeowners. Public notice of the hearing and publication of proposed Regulation 702 in the *Register of Regulations* and two newspapers of general circulation was in conformity with Delaware law. By my order, Deputy Insurance Commissioner Michael L. Vild was appointed hearing officer to receive comments and testimony on the proposed amendments to the regulation. Westfield Group, the American Association of Insurance Services, State Farm Insurance Companies, Allstate Insurance Company, the Property Casualty Insurers Association of America ("PCI"), Assurant Solutions Nationwide Insurance, and the Delaware Community Reinvestment Action Council, Inc. ("DCRAC") filed written comments with respect to the proposed regulation. Deputy Attorney General Michael J. Rich represented the Delaware Insurance Department in support of the proposed regulation.

Summary of the Evidence and Information Submitted

The oral testimony relating to the proposed regulation can be summarized as follows:

Richard Stokes of PCIAA stated that there was no need for the proposed regulation since the consumers were already receiving the disclosures required by the proposed regulation and suggested that it would be better for the Department to prepare a form of disclosure rather than leaving it to the insurers to do so. He suggested that the only disclosure that might be helpful to the consumer was the one related to flood insurance.

Sally Estvanic of Westfield Group incorporated the two previously filed written submissions submitted by the Westfield Group. Because of Delaware's small volume market, compared to all of the other states who don't require this type of disclosure on personal property coverage, she suggested that the Department follow California's version and not include section 5.1.2. She said that section 5.2 would be very costly for the insurer in terms of the computer programming necessary to track the consumers' policies so that the appropriate notice could be provided to each consumer.

Mary Rowland of the IIAD (the independent producers in Delaware) stated that the proposal is a good one but creates unnecessary costs and difficulties for the companies in terms of the nature of the specific disclosures and the programming costs to statistically track whether each consumer was getting the correct form of notice. She pointed out that there was a difference between full replacement and guaranteed replacement which was not addressed by the regulation. Mr. Rich noted that one of the reasons for the annual notice was to assure that consumers would be notified of such replacement coverage limitations, especially where inflation might result in less than full replacement coverage if a policy doesn't have an inflation protection feature.

Mr. Rich noted that the regulation was proposed because there was sufficient reason to believe that disclosures with respect to flood damage were insufficient to put consumers on notice about what a consumer needs to do to obtain flood coverage under circumstances where such coverage isn't required by the mortgagee but the community participates in the National Flood Program.

While supporting the goals of full disclosure to consumers, the insurers' overall written comments were concerned about the difficulties, the costs and the workability of the proposed regulation. The primary concerns enumerated in the written comments included:

- the flood program is subject to national standards and they are concerned that the regulation will impose an affirmative burden not required by the National Flood Program
- the form should only be used at initial issue
- the nonrenewal provisions require the disclosure of underwriting guidelines that are not subject to filing or approval in Delaware
- potential liability if an insurer doesn't include all items that may be a factor in nonrenewal
- the required language is misleading for customers who already have elected to have maximum or special coverages
- the notices required by sections 5.1.2 and 5.1.3 should use the phrase "may not cover" instead of "does not cover"

Findings of Fact

In promulgating the regulation, the Department has correctly concluded that as good as some of the disclosure practices may be, by and large, consumers are not getting adequate disclosures when they buy homeowners protection. In too many instances, there is little or no information provided about flood coverage and how to obtain it, theft

coverage limitations and personal property protection and the factors that affect renewal. The purpose of the proposed regulation is to assure that the consumer gets the best possible information in advance and that the consumer's final decision is as informed as it can be.

The insurers' concerns are more technical than substantive. They express concerns about the potential complexity of the notice and the associated costs required by a disclosure but provide no specifics with respect to those costs. Nevertheless, it was acknowledged that the insurers and the agents bear the responsibility to fully disclose the extent and/or the limitations of coverage to the consumer.

In large part the insurers' concerns can be met through the form approval process. Section 6.0 of the proposed regulation requires advance approval of the forms to be used. This accomplishes two purposes: it allows the insurer to tailor the form to its customers without having to do exactly what another insurer is doing and the approval gives the insurer a "safe harbor" against future claims (other than breach of contract) by the consumer in the event of a dispute about the disclosure form. There is nothing in the proposed regulation that makes the disclosure a part of the insurance contract. There is nothing in the proposed regulation that requires an insurer to disclose proprietary or trade secret information with respect to events that could contribute to nonrenewal. The form approval process would allow for such concerns to be addressed as part of the form filing and it should be noted that 18 **Del.C.** Chapter 25 has appeal provisions if a company believes that Department has erred in reviewing a form for use. Section 8.0 specifically denies a cause of action to all but the Department for a violation of the regulation.

I am persuaded that the word "may" instead of "does" and "will" in sections 5.1.2 and 5.1.3 of the proposed regulation is more appropriate and does not represent a substantial change in the proposed regulation to require a re-hearing of this regulation under 29 **Del.C.** §10113. The change in that wording would not alter the disclosure requirement embodied in the proposed regulation.

Decision and Effective Date

A copy of the amended regulation and a clean copy of the final regulation are appended hereto. I hereby adopt Regulation 702 as modified by the changes noted above to be effective on January 1, 2006.

Text and Citation

The text of the proposed amendments to Regulation 702 last appeared in the *Register of Regulations* Vol. 8, Issue 11, pages 1566-68.

IT IS SO ORDERED this 14th day of July, 2005

Matthew Denn, Insurance Commissioner

Regulation 702 Required Disclosures For Residential Homeowners Policies

1.0 Authority

This regulation is adopted by the Commissioner pursuant to 18 **Del.C.** §§311(a) and 2304(1). It is promulgated in accordance with 29 **Del.C. Chapter 101.**

2.0 Purpose

The purpose of this regulation is to ensure that homeowners insurance policyholders are aware that they are not insured for certain types risks or claims, to the extent that they do not have such coverage. This regulation does not mandate any coverage by any carrier issuing homeowners insurance in the State of Delaware.

3.0 Applicability

This regulation shall apply to homeowners insurance policies. A homeowners insurance policy for purposes of this regulation means a property or casualty contract of insurance covering residential properties as defined by 18 **Del.C.** §4120.

4.0 Requirement of Disclosure

Insurers, upon initial delivery of a homeowners policy terms and declaration page, and not less than once annually after delivery, shall provide a form to the policyholder entitled "Important Information About Your Homeowners Insurance." The title of the document shall be in at least 30 point type.

5.0 Content of Disclosure

5.1 Each form presented pursuant to Section 4.0 of this Regulation shall make the following disclosures:

5.1.1 Disclosure that the policy does not cover damage caused by flooding, and sufficient information to allow the policyholder to contact the National Flood Insurance Program in order to purchase flood insurance if so desired. The following language shall be sufficient to ensure compliance with this subsection 5.1: "This policy does not cover damage to your property caused by flooding. Flood insurance is available for communities and property that

participate in the National Flood Insurance Program ("NFIP"). Not all communities participate in the NFIP. Flood insurance may be available even if you do not live in a flood hazard area as defined by the NFIP. Please call the NFIP at 1-800-427-4661 to see if your community and property are eligible for coverage. If your community does not participate in the NFIP, you may contact your insurance agent or broker to see if there is other flood insurance coverage available to you." The disclosure may also inform the policyholder that the insurer offers flood insurance as a participant in the NFIP's "Write Your Own" program. The disclosure required by this subsection shall be entitled "Flood Insurance," and the subsection title shall be in at least 18 point type.

5.1.2 Disclosure that the policy [may does] not cover the full cost of replacement without depreciation of the property, and sufficient information to allow the policyholder to purchase such coverage from the carrier if it is offered by the carrier. The following language shall be sufficient to ensure compliance with this subsection 5.2: "This policy [may will] not cover the full cost of replacing your home if your home should be destroyed in an event otherwise covered by this policy. You may purchase additional coverage from us sufficient to cover the full cost of replacing your home, at an additional cost." The disclosure required by this subsection shall be entitled "Replacing Your Home," and the subsection title shall be in at least 18 point type.

5.1.3 Disclosure of any limitations in the policy regarding reimbursement for items stolen from the property, including but not limited to jewelry, furs, fine art, etc. and sufficient information to allow the policyholder to purchase insurance which would not contain such limitation if such coverage is offered by the insurer. The following language shall be sufficient to ensure compliance with this subsection 5.3: "This policy [may does] not cover the value of all items stolen from your home. Please carefully review your policy to determine which items stolen from your home are not covered by this policy." The disclosure required by this subsection shall be entitled "Reimbursement for Stolen Items," and the subsection title shall be in at least 18 point type.

5.1.4 Disclosure of any formal practice followed by the insurer regarding non-renewal of the policy on the occurrence of certain factors or on the basis of claims asserted by the policyholder. The following language shall be sufficient to ensure compliance with this subsection 5.4: "We have a policy of declining to renew homeowners insurance policies under the following circumstances: (list the claim activities or occurrences that are likely to cause non-renewal of a policyholder's policy)." The disclosure

required by this subsection shall be entitled "Non-Renewal of Your Policy," and the subsection title shall be in at least 18 point type.

5.2 Where a policy provides full coverage for any of the items required by sections 5.1.1 through 5.1.3, the insurer may indicate that the disclosure, as to each such item, is not applicable or "N/A."

6.0 Review and Approval of Forms

All forms required by this regulation shall be submitted to and approved by the Commissioner, or his representative, pursuant to 18 **Del. C.** §2712 *et seq.*

7.0 [Severability Separability]

If any provision of this regulation, or the application of any such provision to any person or circumstances, shall be held invalid, the remainder of such provisions, and the application of such provisions to any person or circumstance other than those as to which it is held invalid, shall not be affected.

8.0 Causes of Action

This regulation shall not create, nor form the basis for, a cause of action for any person or entity, other than the Delaware Department of Insurance, against any insurer for violation of the provisions hereof.

9.0 Effective Date

The effective date of this regulation shall be January 1, 2006.

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL DIVISION OF WATER RESOURCES

Statutory Authority: 7 Delaware Code, Section
6010 (7 **Del.C.** §6010)

Secretary's Order No.: 2005-W-0037

I. Background

The Department of Natural Resources and Environmental Control, the Department of Agriculture and the Nutrient Management Commission held public hearings on January 25, January 27, June 22, and June 23, 2005 to receive comments on proposed revisions to the Department's

Regulations Governing the Control of Water Pollution. The proposed revisions and a notice advertising the aforementioned public hearings were published in the *Delaware Register of Regulations* on January 1, and June 1, 2005.

Subsequent to the public hearings, the Hearing Officers prepared their report and recommendations in the form of a Hearing Officer's Report to the Secretary dated August 9, 2005, and that report is expressly incorporated herein by reference. Proper notice of the hearings was provided as required by law.

II. Findings and Conclusions

All of the findings and conclusions contained in the Hearing Officer's Report dated August 9, 2005, are expressly incorporated herein and explicitly adopted as the findings and conclusions of the Secretary.

III. Order

In view of the above, I hereby order that the proposed revisions be promulgated and implemented in the manner and form provided by law, as recommended in the Hearing Officer's report.

IV. Reasons

This rulemaking represents careful, deliberate and reasoned action by the Department of Natural Resources and Environmental Control, the Department of Agriculture and the Nutrient Management Commission to address Concentrated Animal Feeding Operations. The adoption of these regulations will help to improve the overall water quality of the State of Delaware in furtherance of the policies and purposes of 7 **Del.C.** Ch. 60 and 3 **Del.C.** Ch. 22.

Regulations Governing the Control of Water Pollution

9.0 The General Permit Program

Introduction

This section of the regulations, the General Permit Program, is designed to provide NPDES permit coverage to a specified group, category or class of discharges that are substantially similar in nature or type of pollutants discharged. These regulations outline the general provisions or requirements that apply to all discharges within the specified category. This approach eases the administrative burden of developing and issuing a large number of individual NPDES permits for essentially the same type of discharge. By issuing general permits, the Department can provide a quicker and less expensive mechanism for the

regulated community to obtain permit coverage. It also allows staff resources to concentrate on discharges that may have more significant potential for impacting the quality of Delaware's surface waters.

General NPDES Permits as defined by federal regulations in 40 C.F.R. §122.28, authorize a category of discharges from sources within a defined area that share certain similarities. General NPDES Permits are self-implementing standards applicable to multiple dischargers that the DNREC has determined can best be regulated as a class. Conversely, individual NPDES permits are issued to a potential discharger who applies for a permit with special conditions specifically tailored to the discharger. Thus, a General NPDES Permit is an agency statement of general applicability and future effect that implements and prescribes law and as such is a regulation.

Although no individual permits will be issued to the categories of dischargers covered by this section of the regulations, the subsections dealing with each category may be referred to as "General NPDES Permits" and the entire Section of these regulations may be referred to as the "General NPDES Permit Program."

In order to obtain coverage under this section of these regulations (the General NPDES Permit Program), most persons will be required to file with the Department a Notice of Intent to be covered in accordance with 40 C.F.R. §122.28(b)(2). The Department will consider this the equivalent of an NPDES Permit application for a General NPDES Permit.

§9.1 provides NPDES permit coverage for storm water discharges associated with industrial activity. Industrial activity is that which is directly related to manufacturing, processing, raw material handling or waste handling. The regulations in §1 seek to define a program for controlling material handling and other industrial activities such that the potential for exposing significant materials to precipitation and the subsequent transport of such materials via storm water runoff or infiltration is eliminated or minimized to the maximum extent practicable. Significant materials are those substances, products or wastes that become exposed to precipitation as a result of the industrial activity and potentially contribute pollutants to storm water runoff or storm water infiltration. The types of activities or categories of industries covered under this subsection are listed in §9.1.1.1, as well as in the federal regulations, 40 CFR Part 122.26(b)(14).

§9.1 consists of general provisions that apply to each category of industrial activity specified in §9.1.1.1. Part 2 outlines specific provisions applicable to storm water discharges associated with land disturbing activities (i.e. construction activities). The regulations in Part 2 are

designed to mesh NPDES permit program requirements with existing provisions for sediment and erosion control under 7 **Del.C.** Ch. 40 and the Delaware Sediment and Stormwater Regulations. The remaining Parts under Subsection 1 outline category-specific storm water requirements that are tailored to the activity conducted.

§§9.2 through 9.6 provide NPDES permit coverage for the following categories of discharges: discharges from aquaculture or aquatic animal production facilities; discharges from the clean up of gasoline and fuel oil released from underground storage tanks; discharges from feedlot or concentrated animal feeding operations; discharges associated with car washes and other motor vehicle washing operations; and discharges associated with the operation of swimming pools and spas.

9.1 Regulations Governing Storm Water Discharges Associated with Industrial Activities

Part 1 - Baseline General Permit (§9.1.1)

Part 2 - Special Conditions for Storm Water Discharges Associated with Land Disturbing Activities (§9.1.2.)

Part 3 - Special Conditions for Storm Water Discharges Associated with Concrete Manufacturing Activities (§9.1.3)

Part 4 - Special Conditions for Storm Water Discharges Associated with Asphalt Manufacturing Activities (§9.1.04.)

Part 5 - Special Conditions for Storm Water Discharges Associated with Chemical Manufacturing Activities (§9.1.05.)

Part 6 - Special Conditions for Storm Water Discharges Associated with Activities Regulated by the Delaware Regulations Governing Solid Waste (§9.1.06.)

Part 7 - Special Conditions for Storm Water Discharges Associated with Automotive Salvaging Activities (§9.1.07.)

Part 8 - Special Conditions for Storm Water Discharges Associated with Scrap Recycling Activities (§9.1.08.)

Part 9 - Special Conditions for Storm Water Discharges Associated with Watercraft Maintenance Activities (§9.1.09.)

Part 10 - Special Conditions for Storm Water Discharges Associated with Air Transportation Maintenance and De-icing Activities (§9.1.10.)

Part 11 - Special Conditions for Storm Water Discharges Associated with Rail Transportation Maintenance Activities (§9.1.11.)

Part 12 - Special Conditions for Storm Water Discharges Associated with Automotive Transportation Maintenance Activities (§9.1.12.)

Part 13 - Special Conditions for Storm Water Discharges Associated with Food Processing Activities (§9.1.13.)

Part 14 - Special Conditions for Storm Water Discharges Associated with Metals Manufacturing Activities (§9.1.14.)

APPENDIX -Water Priority Chemicals

9.2 Regulations Governing Discharges from Aquaculture or Aquatic Animal Production Facilities (Reserved)

9.3 Regulations Governing Discharges from the Clean Up of Gasoline and Fuel Oil Released from Underground Storage Tanks (Reserved)

9.4 The Concentrated Animal Feeding Operation (CAFO)

PREAMBLE

These regulations have been developed pursuant to 3 **Del.C.** §2201-2290 and 7 **Del.C.** §6000 et.al., 40 Code of Federal Regulations (C.F.R) §122.23 and 40 C.F.R. §122, Appendix B and 40 CFR part 412. These statutory and regulatory authorities establish the requirement that a National Pollutant Discharge Elimination System (NPDES) permitting program for Concentrated Animal Feeding Operations (CAFOs) be implemented. These regulations will function as the baseline CAFO standards for compliance of NPDES permits applicable to certain farms. The Delaware Department of Agriculture (DDA) will administer these regulations, while the legal framework and authority is maintained by the Delaware Department of Natural Resources and Environmental Control. In general, NPDES general permits, as provided in these regulations, are effective for five years. After five years, new or updated CAFO General Permit regulations will be promulgated. These regulations were developed by the Delaware Nutrient Management Commission, the Delaware Department of Agriculture and the Delaware Department of Natural Resources and Environmental Control. They are to be adopted with the guidance, advice and consent of the Commission.

9.4.1 Authority.

These regulations are promulgated pursuant to the authority provided by 3 **Del.C.** §2200 et.al. and 7 **Del.C.** §6000 et.al.

9.4.2 Purpose.

The purpose of these regulations is to establish requirements for certain animal feeding operations defined as a Concentrated Animal Feeding Operation (CAFO) in order to protect water quality from activities associated with CAFO management sustain and provide a profitable agricultural industry and to help meet or exceed Federal and State mandated water quality standards.

9.4.3 Definitions.

For purposes of these regulations, the following words or terms shall have the meanings as indicated:

“Agricultural Storm Water Exemption” means an exempt discharge of manure, litter or process wastewater provided the manure or process wastewater has been applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure or process wastewater. [The agricultural storm water exemption does not apply to the production area.]

“Animal Feeding Operation” or **“AFO”** means a lot or facility (other than an aquatic animal production facility) where the animals have been, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and the animal confinement areas do not sustain crops, vegetation, forage growth or post-harvest residues in the normal growing season. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals in an operation, if the production areas adjoin each other or if the AFOs use a common area or system for the disposal of wastes. (For example, facilities or production areas that are commonly managed, co-located and share manure storage systems are considered a single AFO. A poultry operation with many facilities in a single location or address is deemed a single AFO).

“Animal Waste Management Plan” means a plan written by a certified nutrient management consultant that documents and recommends a combination of conservation practices and management measures for the handling, storage, treatment and management of any or all of the following for use on cropland and pastureland: animal wastes, manures, composted dead animals, or process wastewater from any animal feeding operation.

“Applicant” means any person seeking and or required to obtain an individual CAFO permit or coverage under a general permit.

“Application Area” means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, or which manure, litter or process wastewater from the production area is or may be applied.

“Apply,” “applying,” or any variation of the word “apply,” as it relates to the application of nutrients, means the human controlled mechanical conveyance of nutrients to land for the purpose of applying organic and/or inorganic nutrients.

“Best Management Practices” or **“BMP”** means those practices that have been approved by the Delaware Nutrient Management Commission.

“Catastrophic Mortalities” means any mortality that exceeds the approved disposal system capacity to accommodate losses within 24 hours. Most disposal systems are designed to handle the normal anticipated mortality. If enough animals are lost and the disposal system cannot hold them all without causing serious disruption in the disposal process, then it is a catastrophic loss.

“Concentrated Animal Feeding Operation” or **“CAFO”** is an animal feeding operation that is subject to the terms and conditions of these regulations. A CAFO is designated by the confinement of the number of animals specified in Section 9.4.4 of these regulations.

“Delaware Nutrient Management Commission,” **“DNMC,”** or **“Commission”** means the Commission established by 3 Del.C. §2220 “or its designee.”

“Department” means the Delaware Department of Agriculture.

“Discharge of a Pollutant” means the addition of any pollutant or combination of pollutants, to state waters or contiguous zones, or the ocean, from any source or activity other than a vessel or other floating craft when being used as a means of transportation and in compliance with §312 of the Act. This definition includes additions of pollutants into State waters from:

Surface runoff that is collected or channeled by man;

Discharges through pipes, sewers, and other conveyances which do not lead to a treatment works; and

Discharges through pipes, sewers, or other conveyances, leading into a treatment works other than a publicly owned treatment works (POTW).

“Drainage Ditch” is defined as a constructed or reconstructed watercourse with a drainage area less than 800 acres. A constructed or reconstructed watercourse with a drainage area greater than 800 acres is considered a stream.

“Effluent Limitation” means any restrictions, prohibitions, or permit requirements established under State or Federal law, including but not limited to, standards of performance for new sources, best management practices or BMPs, effluent standards and ocean discharge criteria on the quantities, rates, and concentrations of the chemical, physical, biological, or other constituents discharged into State waters.

“Freeboard Action Level” is the liquid level within a lagoon or other liquid storage structure that indicates the structure is full and implies that immediate steps be taken to transfer liquid out of the waste storage structure.

“General Permit” means an authorization granted to a category of point sources discharges pursuant to §9.0 of the Regulations Governing the Control of Water Pollution.

“Ground Water” means any water naturally found under the surface of the earth.

“Inorganic Fertilizer(s)” means a fertilizer comprised of chemically synthesized plant nutrient elements that are essential for plant growth and include at least nitrogen or phosphorus.

“Liquid Manure” means usually less than 8.0% solids. Wash water, runoff, precipitation, and so forth are added, if needed to dilute the manure and lower the solids content.

“Liquid Manure Handling System” means an operation where animals are raised outside with swimming areas or ponds, or with a stream running through an open lot, or in confinement buildings where water is used to flush the manure to a lagoon, pond, or some other liquid storage structure.

“Manure” is defined to include fecal and urinary defecations of livestock and poultry; may include spilled feed, bedding, soil, compost and raw materials if commingled with manure.

“NPDES” (National Pollutant Discharge Elimination System) means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits for the discharge of any pollutant or combination of pollutants and imposing and enforcing pretreatment and sludge requirements pursuant to §307, 402, 318, and 405 of the Act.

“Notice of Intent (NOI)” means the form used to serve as a notification of the intention of the facility identified on the form to adhere to the provisions of The Concentrated Animal Feeding Operation Regulations.

“Nutrient Management Plan” or **“Plan”** means a plan by a certified nutrient consultant to manage the amount, placement, timing and application of nutrients in order to reduce nutrient loss or runoff and to maintain the productivity of soil when growing agricultural commodities and turf grass.

“Nutrients” means nitrogen, nitrate, phosphorus, organic matter and any other elements necessary for or helpful to plant growth.

“Phosphorus Site Index or PSI” means the assessment tool developed by the University of Delaware designed to evaluate the site characteristics and management factors in determining Phosphorus loss to the environment.

“Person” means any individual, partnership, association, fiduciary, corporation, or any organized group of persons, whether incorporated or not.

“Pollutant” means any substance, which causes or contributes to, or may cause or contribute to, pollution.

“Process Wastewater” means any process-generated wastewater directly or indirectly used in the operation of an AFO (such as spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits; direct contact swimming, washing, or spray cooling of animals; and dust control) or any precipitation (rain or snow) which comes into contact with any manure or litter, bedding, or any other raw material or intermediate or final material or product used in or resulting from the production of animals or poultry or direct products (e.g., milk, eggs).

“Production Area” means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw material storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility and any area used in the storage, handling, treatment or disposal of mortalities.

“Secretary” means the Secretary of the Delaware Department of Agriculture or his/her designee.

“Sinkhole” is defined as a depression in the landscape where limestone has been dissolved.

“Soil Productivity” means the capacity of a soil, in its normal environment, to produce a specified plant or sequence of plants under a specified system of management. The “specified” limitations are needed because no soil can produce all crops with equal success and a single system of management cannot achieve the same effect on all soils. Productivity means the capacity of soil to produce crops and is expressed in terms of yields.

“State Nutrient Management Program” or **“SNMP”** means all the nutrient management program elements developed by the Commission, whether or not reduced to rules or regulations.

“State Waters” or **“Waters of the State”** means all water, on the surface and under the ground, wholly

or partially within, or bordering the State, or within its jurisdiction including but not limited to:

Waters which are subject to the ebb and flow of the tide including, but not limited to, estuaries, bays and the Atlantic Ocean;

All interstate waters, including interstate wetlands;

All other waters of the State, such as lakes, rivers, streams (including intermittent and ephemeral streams), drainage ditches, tax ditches, creeks, mudflats, sand flats, wetlands, sloughs, or natural or impounded ponds;

All impoundments of waters otherwise defined as waters of the State under this definition;

Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in the above four statements.

Waste and storm water treatment systems or waste storage structures including, but not limited to, treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds which otherwise meet the requirements of this definition) are not "State waters" or "waters of the State." This exclusion applies only to manmade bodies of water, which neither were originally created in waters of the State nor resulted from the impoundment of waters of the State

"Realistic Yield Goals" are defined as the expected crop yields based on the best 4 out of 7 years of recorded data. Without yield records, one shall use soil productivity classes. Yield goals higher than the average, require written justification from a certified consultant.

"Vegetated Buffer" means a narrow, permanent strip of dense perennial vegetation established parallel to the contours of and perpendicular to the dominant slope of the field for the purposes of slowing water runoff, enhancing water infiltration, and minimizing the risk of any potential nutrients or pollutants from leaving the field and reaching surface waters.

"Water Quality Standard" means any rule or limit established by the Secretary of the Department of Natural Resources and Environmental Control which consists of a designated use or uses for waters of the State and the water quality criteria for such waters based upon such designated uses.

"25-Year, 24-Hour Rainfall Event" means the maximum 24-hour precipitation event with a probable recurrence interval of once in 25 years, as defined by the National Weather Service Technical Paper Number 40, "Rainfall Frequency Atlas of the United States", equivalent to regional or state rainfall probability information developed there from, or a rain event greater than 5.7 inches

for New Castle county, 5.9 for Kent county and 6.3 for Sussex county.

"100-Year, 24-Hour Rainfall Event" means the maximum 24-hour precipitation event with a probable recurrence interval of once in 100 years, as defined by the National Weather Service Technical Paper Number 40, "Rainfall Frequency Atlas of the United States", equivalent to regional or state rainfall probability information developed there from, or a rain event greater than 7.3 inches for New Castle county, 7.6 for Kent county and 7.9 for Sussex county.

9.4.4 Applicability

9.4.4.1 Any person who owns or operates a CAFO (Concentrated Animal Feeding Operation) may request general or individual CAFO NPDES permit coverage under these regulations.

9.4.4.2 These NPDES permit requirements shall apply to any person who engages in the management of a CAFO where animal manure is, has been or will be generated and the AFO (Animal Feeding Operation) is not currently compliant with the State Nutrient Management Law and Regulations. An AFO is a CAFO if the number of animals equal or exceed the following criteria:

9.4.4.2.1 More than the numbers of animals specified in any of the following categories:

9.4.4.2.1.1 1,000 beef cattle or heifers.

9.4.4.2.1.2 700 mature dairy cattle (whether milked or dry cows).

9.4.4.2.1.3 2,500 swine each weighing over 55 pounds.

9.4.4.2.1.4 10,000 swine weighing under 55 pounds.

9.4.4.2.1.5 500 horses.

9.4.4.2.1.6 10,000 sheep or lambs.

9.4.4.2.1.7 55,000 turkeys.

9.4.4.2.1.8 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system.

9.4.4.2.1.9 125,000 chickens except laying hens (if other than a liquid manure handling system).*

9.4.4.2.1.10 82,000 laying hens (if other than a liquid manure handling system).

9.4.4.2.1.11 1,000 veal calves.

*Note: An alternative criterion for square footage calculations may be utilized and adopted as policy that qualifies a CAFO based on the area within the confined facility. For example the animal density of 0.75 square feet per bird calculates to 93,750 square feet and can be defined as a CAFO. This alternative may not supersede the actual number of chickens maintained.

9.4.4.2.2 Provided one of the following conditions are met and the number of animals is equal to or greater than the number specified below, the operator has a duty to apply:

9.4.4.2.2.1 Pollutants are discharged into waters of the State through a man-made ditch, flushing system, or other similar man-made device; or

9.4.4.2.2.2 Pollutants are discharged directly into waters of the State, which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation;

9.4.4.2.2.3 Pollutants are discharged into waters of the State caused by the improper handling of animal mortalities or improper manure management as identified by standards adopted by NRCS and or the commission; or

9.4.4.2.2.4. Pollutants are discharged into waters of the State from the application area as agricultural storm water, except for agricultural storm water exemption.

9.4.4.2.2.4.1 300 beef cattle or heifers,

9.4.4.2.2.4.2 210 mature dairy cattle (whether milked or dry cows),

9.4.4.2.2.4.3 750 swine each weighing over 55 pounds,

9.4.4.2.2.4.4 3,000 swine weighing under 55 pounds,

9.4.4.2.2.4.5 150 horses,

9.4.4.2.2.4.6 3,000 sheep or lambs,

9.4.4.2.2.4.7 1 6,500 turkeys,

9.4.4.2.2.4.8 9,000 laying hens or broilers, if the AFO uses a liquid manure handling system,

9.4.4.2.2.4.9 37,500 chickens except laying hens (if other than a liquid manure handling system).*

9.4.4.2.2.4.10 24,600 laying hens (if other than a liquid manure handling system),

9.4.4.2.2.4.11 300 veal calves.

9.4.4.2.2.3 These General NPDES permit requirements shall apply to any person notified in writing by the Secretary and covered by the Nutrient Management Law (3 **Del.C.** §2200 et.al.) as specified in §9.4.7 of these regulations or anyone requesting coverage.

9.4.5 Application for Coverage

9.4.5.1 Any one who owns or operates a CAFO or is designated as a CAFO must submit a Notice of Intent (NOI) on a form provided by the Department, to the Secretary within 120 calendar days of the effective date of

these regulations or upon operation of a new facility. Anyone who expands their operation and becomes a CAFO must submit a NOI within 90 days of becoming a CAFO. The NOI will serve as a formal commitment by the CAFO applicant to comply with the standards established in these regulations. The NOI shall include, but not be limited to, the following information:

9.4.5.1.1 The name of the farm/facility, mailing address, manager or applicant, contact information to include emergency address or closest road name intersection of the CAFO.

9.4.5.1.2 The name, address and contact information of the farm/facility owner if different than the applicant.

9.4.5.1.3 Annual operation data to include, animal type(s), number of animals confined, estimated manure generation by type per year, manure storage capacity, manure storage system, animal mortality system, process waste water (quantity where applicable), and total number of acres under control and available for land application.

9.4.5.1.4 The NOI must be signed by the owner or other person who performs similar policy-making or decision-making functions for the facility. Any person signing documents in accordance with this subsection shall certify that the information submitted is, to the best of his/her knowledge and belief, true, accurate and complete. Such person is advised that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for willful violations.

9.4.5.1.5 A copy of the Nutrient Management Plan, containing at a minimum the following components:

9.4.5.1.5.1 Field maps showing reference points (such as building, stream, irrigation equipment, etc.), number of acres and soil types:

9.4.5.1.5.2 Soil and organic nutrient analyses;

9.4.5.1.5.3 Current and planned crop rotations;

9.4.5.1.5.4 Expected yields based on best 4 out of 7 years data or, in absence thereof, soil productivity charts;

9.4.5.1.5.5 Recommended rates, timing and methods of nutrient applications. This information must accompany the NOI and shall be submitted to the Delaware Department of Agriculture, Nutrient Management Program, 2320 S. DuPont Highway, Dover, DE 19901.

9.4.5.1.6 A person's obligation to independently seek and secure an NPDES permit is not

conditioned upon or qualified by having received a notice that an NPDES permit is required from the Secretary.

9.4.5.2 Effective date of coverage: Permit coverage under these regulations begins at the time when the NOI is received by the Department.

9.4.5.3 Expiration date of coverage: Permit coverage for a CAFO under these regulations will continue until an individual NPDES permit is issued to the CAFO or until the deadline for notices of intent to be filed under new general permit regulations that are promulgated for CAFOs. These regulations shall expire five years from the effective date.

9.4.5.4 Duty to maintain permit coverage: No later than 180 days before the expiration of the permit, the permittee must submit an application to renew its permit, unless the facility has ceased operation or is no longer a CAFO.

9.4.6 Requirements For General CAFO NPDES Permits. Each person covered by these regulations shall meet or exceed the minimum standards of a general permit that consists of the following and applicable contents:

9.4.6.1 A nutrient management plan or animal waste management plan required by the Commission and developed by a Delaware certified consultant. A required nutrient management plan or animal waste management plan consists of the following applicable contents:

9.4.6.1.1 Plan Identification:

9.4.6.1.1.1 Applicant name, mailing address, county road number or name, telephone number and watershed designation of operation.

9.4.6.1.1.2 The name of the farm/facility, mailing address, manager or applicant, contact information to include emergency address or closest road name intersection of the CAFO.

9.4.6.1.1.3 Nutrient consultant's name and company:

9.4.6.1.1.3.1 Address and telephone number.

9.4.6.1.1.3.2 Nutrient management consultant certification number.

9.4.6.1.1.3.3 Date of plan and duration of animal waste or nutrient management plan (not to exceed 3 years).

9.4.6.1.1.4 Total acres under control (owned, rented or leased) of the CAFO represented in the nutrient management plans and a brief description of agricultural commodities produced within the operation.

9.4.6.1.1.5 Certification statement signed by the applicant documenting the intention to

implement the nutrient management and/or animal waste management plan.

9.4.6.1.2 Field maps or aerial photographs that include the following:

9.4.6.1.2.1 Individual field identification and boundaries for all owned, rented or leased fields under control of the CAFO.

9.4.6.1.2.2 A copy of soil survey map showing all soil types on each field or the soil texture identification of all pertinent soils.

9.4.6.1.2.3 The location of all surface waters including drainage ditches, streams, ponds, etc.

9.4.6.1.2.4 Irrigation systems where applicable.

9.4.6.1.3 Crop and Nutrient Information:

9.4.6.1.3.1 The total number and type of animals, annual quantity estimate of waste generation and storage methods.

9.4.6.1.3.2 Description and method of temporary outside storage/stockpiling of manure.

9.4.6.1.3.3 Total acres (controlled by the CAFO, owned, rented or leased) represented by the animal waste management plan and/or nutrient management plan and summary of needed nutrients.

9.4.6.1.3.4 Realistic yield goal determined (average yield for the best 4 of the last 7 years).

9.4.6.1.3.5 Without yield records use soil productivity classes or provide written justification if realistic yield goals are higher than average.

9.4.6.1.3.6 Soil test (no older than 3 years) from an agronomic laboratory approved by the Commission.

9.4.6.1.3.7 Current and planned crop rotation.

9.4.6.1.3.8 Determine nitrogen rate based on realistic yield goal of crop(s) to be grown.

9.4.6.1.3.9 The application rate of phosphorus to high soil phosphorus levels, as defined by the Commission, cannot exceed a three-year crop removal rate. Optionally, a University of Delaware approved Phosphorus Site Index (PSI) may be performed and Phosphorus may be added as indicated by the PSI value.

9.4.6.1.3.10 Manure analysis (annually) results or a nutrient value average with written justification.

9.4.6.1.3.11 Estimate residual nitrogen (organic nutrients, fertilizer, or legume crops from prior year) in absence of a Pre-sidedress Soil Nitrate Test (PSNT).

9.4.6.1.3.12 Nutrient source(s) selected, rates and approximate timing of application(s).

9.4.6.1.4 Best Management Practices (BMPs) are recommendations to enhance agronomic and environmental practices should be recommended to better advise and educate persons and are not to be interpreted as mandatory implementation actions of a plan (e.g., Presidedress Soil Nitrate Test, cover crops, vegetative buffer strips, litter additives, manure incorporation, timing/method, etc.) unless specified in site-specific practices covered in §9.4.6.2 below.

9.4.6.2 Site-specific management requirements that supplement the animal waste management plan and/or nutrient management plan by addressing the following site-specific measures to protect waters of the State shall include:

9.4.6.2.1 An overall manure balance budget that clearly identifies available manure, intended manure use, manure storage capacity, and excess manure determined by the animal waste management plan and/or nutrient management plan. This budget must identify intended use to include land application, exportation, or other described uses. Operations must account for excess manure in the Annual Nutrient Management Report.

9.4.6.2.2 A description of manure storage capacity and general schedule or timeframe when manure is removed or transported from storage site to include but not be limited to:

9.4.6.2.2.1 Management practices to prevent storage, collection, and conveyance systems from leaking pollutants to ground or surface water.

9.4.6.2.2.2 For liquid storage: storage must be conducted to prevent a discharge and must include a calendar plan for liquid and sediment removal, with a freeboard action level of not less than one foot, with a depth marker.

9.4.6.2.2.3 For solid storage: permanent and temporary storage must be conducted to prevent a discharge and be consistent with standards adopted by NRCS and/or the Commission.

9.4.6.2.2.4 Emergency actions for spills and catastrophic events for existing CAFO liquid storage systems to include the volume of water generated and collected by a 25-year, 24-hour rainfall event or as specified in Section 9.4.14.2.1.1.

9.4.6.2.3 A description and action plan to divert or segregate all clean water as appropriate from the production area and/or for collecting all water coming in contact with the production area to include but not limited to the following categories:

9.4.6.2.3.1 Roof runoff control to prevent contact of clean runoff with production areas where animal manures are present;

9.4.6.2.3.2 Direct contact between animals and waters of the State; and

9.4.6.2.3.3 Runoff coming into contact with animal waste.

9.4.6.2.4 A detailed animal mortality plan indicating as outlined. Burial of dead animals is prohibited except with approval and under special circumstances such as serious bio-security circumstances as approved by the state veterinarian.

9.4.6.2.4.1 Daily handling and disposal of dead animals in a manner that prevents contamination of ground/surface waters as recommended by the BMPs approved by the Commission.

9.4.6.2.4.2 Methods for handling catastrophic mortalities as recommended by the BMPs approved by the Commission.

9.4.6.2.5 Manure and processed wastewater application setbacks. These setbacks are defined as the distance between the application area and any down-gradient surface waters, open tile line, intake structures, sinkholes or other conduits to surface waters. The direct application of manure or processed wastewater to ditches or surface waters is prohibited. These setback standards are provided as three options:

9.4.6.2.5.1 100-foot application setback, or

9.4.6.2.5.2 35-foot vegetated buffer where applications of manure, litter, and process wastewater are prohibited, or

9.4.6.2.5.3 Alternative compliance practices as follows:

9.4.6.2.5.3.1 For surface waters other than drainage ditches:

9.4.6.2.5.3.1.1 50-foot application setback for the field under the conservation practice of incorporation or planting a winter cover crop following the crop receiving manure, litter or process wastewater.

9.4.6.2.5.3.1.2 15-foot application setback for the field under the conservation practice of incorporation within 2 days of application and planting a winter cover crop following the crop receiving manure, litter or process wastewater.

9.4.6.2.5.3.2 For drainage ditches:

9.4.6.2.5.3.2.1 20-foot application setback for the field under the conservation practice of incorporation or planting a winter cover crop

following the crop receiving manure, litter or process wastewater.

9.4.6.2.5.3.2.2 10-foot application setback for the field under the conservation practice of incorporation within 2 days of application and planting a winter cover crop following the crop receiving manure, litter or process wastewater.

9.4.6.2.5.3.3 Any alternative compliance practice approved by the Commission.

9.4.6.2.6 Chemicals and other contaminants handled on-site are not to be disposed of in any manure, litter, process wastewater, or storm water storage or treatment system unless specifically designed to treat such chemicals and contaminants.

9.4.6.3 A nutrient management plan and/or animal waste management plan and site-specific management requirements shall be updated a minimum of every three years or upon significant alteration to include, but not be limited to, a 25 percent increase in animal units or acres of crops grown. Such plans shall be reported to the Commission no later than December 15 of the year in which they must be updated.

9.4.7 Requirements for Individual CAFO NPDES Permit

9.4.7.1 With the guidance, advice and consent of the Commission, the Secretary may require any person covered by these regulations and the Nutrient Management Law (3 Del.C. §2248) to apply for and obtain an individual NPDES permit. Cases where an individual NPDES permit may be required include but not limited to the following:

9.4.7.1.1 There is noncompliance with the provisions of these regulations, the Nutrient Management Law (3 Del.C. §2200 et.al.), or the SNMP.

9.4.7.1.2 There is evidence indicating that a person is a significant contributor of a pollutant to waters of the State as specified in Section 9.4.4.2.2.

9.4.7.1.3 There is a request for coverage by an applicant who is not required to obtain coverage.

9.4.7.2 Each person designated to need an individual CAFO permit will be notified in writing by the Secretary. Such notice shall include a brief statement of the reasons for the decision, an application form, a deadline for submission of the application and a statement regarding the effective date of coverage.

9.4.7.3 A CAFO Individual NPDES Permit will establish standards for mitigating or preventing pollutants from entering waters of the State and will consist of, but not be limited to, the following information:

9.4.7.3.1 All applicable contents found in a General Permit (§9.4.6).

9.4.7.3.2 Conditions and compliance measures to mitigate or prevent pollutants from entering waters of the State.

9.4.7.3.3 The time line for implementation requirements and an expiration date not to exceed five years.

9.4.8 Reporting and Emergency Notification Requirements

9.4.8.1 Reporting Requirements: Each person covered by these regulations shall submit to the Department and the Commission by March 1 of every calendar year, on a form developed and supplied by the Commission, a report detailing, at a minimum, the following:

9.4.8.1.1 Annual plan identification to include:

9.4.8.1.1.1 Applicants name, mailing address and telephone number.

9.4.8.1.1.2 Nutrient consultant's name and company.

9.4.8.1.1.3 Date Nutrient Management plan was prepared and duration of plan not to exceed 3 years.

9.4.8.1.1.4 Total acres represented by the nutrient management plan and a brief description of agricultural commodities produced within the operation.

9.4.8.1.2 The annual operating data to include animal type(s), number of animals confined and manure generation by type.

9.4.8.1.3 The quantity of animal manure in tons or thousand gallons applied to land managed within operation and the quantity of land to which applied.

9.4.8.1.4 The quantity of inorganic fertilizers applied to the land and the quantity of land to which applied.

9.4.8.1.5 The quantity and type of manure exported from operation; and the name, address and organization of person(s) responsible for utilizing the manure.

9.4.8.1.6 All reports submitted under this subsection shall not be considered public records under the Delaware Freedom of Information Act and shall not be disclosed. Such data may be used for data compilation.

9.4.8.1.7 A statement indicting that the current nutrient management plan was developed by a certified Nutrient Consultant.

9.4.8.2 Emergency Notification: If for any reason, there is a discharge from a CAFO the applicant shall verbally notify the Department within 24 hours of becoming aware of the discharge and document the incident in writing within five (5) days. In general, discharges occur when

manure is conveyed by means of surface flow from a confinement facility, holding area, manure storage structure. The information to be provided shall include:

9.4.8.2.1 A description of the discharge and cause, including a description of the flow path to the receiving waters, an estimate of the flow and volume discharged.

9.4.8.2.2 The period of discharge, including exact dates and times and if not corrected, the anticipated time the discharge is expected to continue and the steps being taken to reduce, eliminate and prevent recurrence of the discharge.

9.4.8.2.3 If the discharge was caused by a precipitation event(s), the amount of rainfall, as measured with a rain gauge at the site.

9.4.8.2.4 Results of any sampling and analysis of the discharge, if available.

9.4.8.2.5 For further questions or assistance, call the Delaware Department of Agriculture at 1-800-282-8685, (Nutrient Management Program), or DNREC Emergency at 1-800-662-8802.

9.4.9 Record Keeping

9.4.9.1 Those persons requiring coverage by these regulations must maintain records of implementation for six years. All animal waste management plans, nutrient management plans, site-specific management requirements and records of implementation shall be kept by the landowner or person responsible for the plans or records. Animal waste management plans, nutrient management plans and records of implementation ~~[shall not be considered as public records under the Delaware Freedom of Information Act and shall not be disclosed, except, however, that they]~~ shall be made available for inspection as specified in Section 9.4.10. Records of implementation shall include:

9.4.9.1.1 Soil test results and recommended nutrient application rates or the nutrient management plan.

9.4.9.1.2 Quantities, analyses and sources of all nutrients applied to fields.

9.4.9.1.3 Dates, weather conditions (as specified by the Commission) and methods of nutrient application(s).

9.4.9.1.4 Crops planted, yields, and plant matter (grain, silage, etc.) removed from the land.

9.4.9.1.5 The annual report and supporting documents.

9.4.9.2 Off site use of manure

9.4.9.2.1 If the manure is sold or given to other persons for disposal and/or utilization, the following

applicant information shall be maintained at the facility generating the waste or manure:

9.4.9.2.1.1 The date of manure removal.

9.4.9.2.1.2 Name of receiver and contact information.

9.4.9.2.1.3 Quantity (tons/gallons) of waste removed.

9.4.9.2.1.4 A copy of the manure nutrient analysis shall be given to the receiver.

9.4.9.3 Corrective actions taken as a result of visual inspections of storm water diversion devices, water lines, manure, litter, and process wastewater impoundments.

9.4.10 Entry and Evaluation

9.4.10.1 The Secretary or the Commission, or authorized designee shall be authorized to evaluate implementation of these regulations and furthermore be allowed to:

9.4.10.1.1 Enter and inspect the facility subject to these regulations following proper notification.

9.4.10.1.2 Have access to and the right to copy, at reasonable times, any records that must be kept under the conditions of these regulations.

9.4.10.1.3 Sample or monitor any discharges from the site.

9.4.10.2 Facility applicant and/or the landowner shall be notified 48 hours in advance. Entry and evaluation shall be in accordance with any biosecurity requirements of the individual or commodity industry involved.

9.4.10.3 In cases where there is a probable blatant violation, in the sole judgment of the Secretary to these regulations, no advanced notice is required.

9.4.10.4 The implementation of these regulations shall not deny any property rights of either real or personal property, nor shall it authorize any injury to private property or any invasion of personal rights.

9.4.11 Duty to Comply. All practices required by these regulations shall be consistent with the terms and conditions of these regulations. The discharge of any pollutant more frequently than, or at a level in excess of, that identified and authorized herein shall constitute a violation of these regulations and shall be grounds for enforcement action as provided in 3 Del.C. §2200 et.al. and 7 Del.C. §6000 et.al.; for loss of authorization to discharge pursuant to these regulations; or for denial of a permit renewal application. The Department may seek voluntary compliance with a warning, notice or other educational means. However, the law does not require that such voluntary means be used before proceeding with enforcement.

9.4.12 Transfer of Ownership

9.4.12.1 In the event of any pending change in ownership of facilities covered by a CAFO general or individual permit, the new owner or applicant shall submit either an application for an individual NPDES permit or Notice Of Intent (NOI) to the Department as outlined in 9.4.5. (Application for Coverage).

9.4.12.2 Such written notice shall include the proposed date of transfer. The new owner is encouraged to provide notice at least 30 days prior to the proposed transfer to avoid any lag in coverage.

9.4.12.3 The Secretary per 3 Del.C. §2248(d) may require the new owner to apply for and obtain an individual NPDES permit, as provided in 9.4.7.

9.4.13 Effluent Standards and Limitations. Discharge limitations: No discharges of process wastewater from any animal feeding operation subject to these regulations may enter waters of the United States. The requirements do allow a discharge caused by a rainfall event, provided the following conditions are met:

9.4.13.1 The production area must be designed, built, operated and maintained to handle all of the process wastewater, plus the runoff and direct precipitation from a 25-year, 24-hour rainfall event.

9.4.13.2 The discharge may consist only of overflows caused by the rainfall event. Dry weather discharges are not permitted. Discharges caused by poor management are never permitted.

9.4.14 Criteria for New Facilities. New CAFO facilities permitted after the effective date of these regulations shall meet the following criteria:

9.4.14.1 Siting of Control Facilities.

9.4.14.1.1 Waste storage structures shall not be located in the 100-year flood plain unless the facility is designed and constructed such that the manure from a facility is protected from floodwaters from a storm of 24 hours duration having a one (1) percent chance of recurrence within a given year. Such events are defined as 100-year 24-hour rainfall event. Waste storage structures and treatment lagoons are to be designed as essentially watertight structures in accordance with NRCS practices and standards.

9.4.14.1.2 Waste storage structures shall not be located closer than 300 feet from a public water well nor 200 feet from domestic water well.

9.4.14.1.3 No waters of the State shall come into direct contact with the animals confined at the facility. Fences or other practices may be used to restrict such access.

9.4.14.1.4 Animal confinement areas shall not be located:

9.4.14.1.4.1 In the 100 year flood plain unless they are protected from inundation and damage that may occur during that flood event.

9.4.14.1.4.2 Closer than 300 feet from a public water well, nor 200 feet from a domestic water well.

9.4.14.1.5 The handling, treatment, and management of AFO wastes shall not:

9.4.14.1.5.1 Result in the inadvertent destruction or adverse modification of the critical habitat of endangered or threatened species of plant, fish, or wildlife.

9.4.14.1.5.2 Create a public health hazard.

9.4.14.1.5.3 Result in groundwater contamination.

9.4.14.2 Effluent Limitations

9.4.14.2.1 No discharges of process wastewater from any animal feeding operation subject to these regulations may enter waters of the United States. The requirements do allow a discharge caused by a rainfall event, provided the following conditions are met:

9.4.14.2.1.1 The production area for horse, sheep, duck, dairy and beef (other than veal) must be designed, built, operated and maintained to handle all of the process wastewater, plus the runoff and direct precipitation from a 25-year, 24-hour rainfall event.

9.4.14.2.1.2 The production area for swine, veal calf, turkey and chickens must be designed, built, operated and maintained to handle all of the process wastewater, plus the runoff and direct precipitation from a 100-year, 24-hour rainfall event.

9.4.14.2.1.3 The discharge may consist only of overflows caused by the rainfall event. Dry weather discharges are not permitted. Discharges caused by poor management are never permitted.

9.4.15 Enforcement, Fines, and Penalties

9.4.15.1 Whoever violates these regulations shall be subject to the following fines and penalties:

9.4.15.1.1 A civil penalty shall be imposed by the Justice of the Peace Court of not less than \$25 nor more than \$1,000 for each violation. Each day of continued violation shall be considered as a separate violation up to a limit of \$10,000. The Justice of the Peace Court shall have jurisdiction of a violation in which a civil penalty is sought. In setting penalty amounts under this section, consideration shall be given to offsetting any economic benefit from non-compliance or any delayed or avoided costs to any person. Further, penalty assessments shall be sufficient to deter recurrence of non-compliance. If there is a substantial likelihood that non-compliance will reoccur, the Commission may recommend that the Secretary

also seek a permanent or preliminary injunction or temporary restraining order in the Court of Chancery. Civil penalties imposed under this section may not be suspended.

9.4.15.1.2 In its discretion, the Commission may recommend that the Secretary impose an administrative penalty of not more than \$1,000 for each violation. Prior to assessment of an administrative penalty, written notice of the Secretary's proposal to impose such penalty shall be given to the violator and the violator shall have 30 days from receipt of said notice to request a public hearing. Any public hearing, if requested, right of appeal and judicial appeal shall be conducted pursuant to this section. Assessment of an administrative penalty shall be determined by the nature, circumstances, extent and gravity of the violation or violations, ability of the violator to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any), resulting from the violation and such other matters as justice may require.

9.4.15.2 Any expenses or civil administrative penalties collected by the Department under this section are hereby appropriated to the Department for use in assisting persons in achieving compliance or to demonstrate the application of research that may be of substantial benefit to any individuals seeking compliance with this section.

9.4.15.3 Any person wishing to file a complaint against any person regarding an alleged violation of these regulations shall follow the process established by *Regulations Governing the Processing of Complaints and Violations published in the January 1, 2001 Register of Regulations*.

9.4.16 Effective Date. These regulations shall become effective [September 11, 2005].

9.5 Regulations Governing Discharges Associated with Car Washes and Other Motor Vehicle Washing Operations (Reserved)

9.6 Regulations Governing Discharges Associated with the Operation and Maintenance of Swimming Pools and Spas (Reserved)

DEPARTMENT OF STATE
DIVISION OF PROFESSIONAL REGULATION
3500 Board of Examiners of Psychologists
24 DE Admin. Code 3500

Statutory Authority: 24 Delaware Code,
Section 3506(a)(1) (24 Del.C. §3506(a)(1))

ORDER

After due notice in the *Register of Regulations* and two Delaware newspapers, a public hearing was held on March 7, 2005 at a scheduled meeting of the Delaware Board of Examiners of Psychologists to receive comments regarding proposed Regulation 17.0. The proposed regulation identifies crimes substantially related to the practice of psychology. The proposed regulation was published in the *Register of Regulations*, Vol. 8, Issue 7, January 1, 2005.

As the result of the comments received on March 7, 2005, the Board decided to review the proposed regulation further. A revised list of related crimes was developed at a subsequent subcommittee meeting held on March 21, 2005. The Board approved and adopted the subcommittee's recommendations at a Board meeting held on April 4, 2005. The revised list of crimes includes substantive deletions and clarifications from the proposal originally published in the *Register of Regulations*, Vol. 8, Issue 6, on December 1, 2004.

After due notice in the *Register of Regulations* and two Delaware newspapers, a second public hearing was held on June 6, 2005 at a scheduled meeting of the Delaware Board of Examiners of Psychologists to receive comments regarding proposed Regulation 17.0.

Background

Under Title 24, Chapter 35, one of the qualifications for licensure as a psychologist or psychological assistant is that the applicant shall submit evidence verified by oath and satisfactory to the Board that that the applicant "has not engaged in any of the acts or offenses that would be grounds for disciplinary action under this chapter and has no disciplinary proceedings or unresolved complaints pending against him or her in any jurisdiction where the applicant has previously been or is currently licensed." 24 Del.C. §3508(a)(4). 24 Del.C. §3514(a)(2), as amended by SB 229, provides that a practitioner shall be subject to disciplinary action set forth §3516 if, after a hearing, the Board finds that the psychologist or psychological assistant "has been convicted of a crime that is substantially related to the practice of psychology or a crime involving the violation of a

patient's trust; a copy of the record of conviction certified by the clerk of the court entering the conviction shall be conclusive evidence therefore." " 'Substantially related' means the nature of the criminal conduct, for which the person was convicted, has a direct bearing on the fitness or ability to perform 1 or more of the duties or responsibilities necessarily related to the practice of psychology."

The Board's authority to promulgate rules and regulations implementing or clarifying specific sections of Chapter 35 is set forth in 24 Del.C. §3506(a)(1). The specific mandate for this rule is set forth in 24 Del.C. §3506(b). The proposed regulation specifically identifies those crimes which are substantially related to the practice psychology.

Summary of the Evidence and Information Submitted

1. *The affidavits of newspaper publication for the March 7, 2005 hearing were marked as Board Exhibits 1 and 2. The written comment received at the March 7, 2005 public hearing is summarized as follows:*

Melvin Slawick, Chief of Support Services, Public Defenders Office, submitted an e-mail that was marked as Board Exhibit 3. Mr. Slawick interpreted the rule as preventing "anyone convicted of anything" from becoming a psychologist. He found that to be "an amazing position when you consider it is supposed to be a helping position."

He submitted further that [the public Defenders' Office] employs many psychologists as consultants to help clients but that practice should stop if the rule is adopted because a client with a conviction would not be eligible for licensure no matter how well they did. He questioned how the "vote was determined" and "what is the point if no change is possible", which he interpreted to be the Board's position.

Priscilla Putnam, Ph.D., submitted a letter dated February 6, 2005 on behalf of the Delaware Psychological Association which was marked as Board Exhibit 4. Dr. Putnam raised four points. First, Dr. Putman submitted that the practice of psychology is based on empirically based research, which guides clinicians in their professions, and questioned what empirically based research demonstrates that the regulation would improve the practice of Psychology in Delaware.

Second, Dr. Putman questioned why the Board was changing the tradition of having the ethical practice of psychology in Delaware governed by the ethics guidelines of the American Psychological Association ("APA") which lists offenses such as fraud, conviction of a crime that is substantially related to the practice of psychology or a crime involving the violation of a patient's trust, or abuse of drugs or alcohol. She questioned why the Board was including a

new list of laws and regulations many of which she believed have no bearing on the practice of psychology.

As a third point, Dr. Putnam submitted that the 2003 code of ethics of the APA, applies only to the activities of a psychologist that are part of their scientific, educational or professional role as psychologists, distinguished from their purely private conduct. She stated that the code of ethics has been sufficient to monitor the activities of psychologists in the nation across the decades and questioned the need to change it now.

Finally, Dr. Putnam stated that many of the laws listed in the proposed rules and regulations are not relevant to the practice of psychology and others are ambiguous. She questioned what mechanism exists to determine which laws are relevant, what role context plays, what individual circumstances may mitigate against loss of license, and what mechanism exists for reinstatement of a license.

2. The verbal comment received at the March 7, 2005 public hearing is summarized as follows:

Dr. Joseph Zingaro gave a brief recitation of the history of the profession of psychology's reliance on judgments, theories, and research based on the collection of objective evidence to the extent such evidence is known. Newer data leads to refinement or abandonment of older theoretical positions consistent with the ethical principles of psychologists. Psychologists use research methodology to shed light on and take positions on such difficult and emotion-laden topics as racial and sexual discrimination, the effects of having an abortion, school based discrimination, i.e., hearings on desegregation, media violence and children, and children and the use of medication such as Ritalin. He stated the APA provides standards for resolving conflicts between ethical responsibilities and the law, regulations, and other governing legal authority.

Dr. Zingaro submitted that most of the crimes listed in the proposed rules and regulations are likely to generate little debate that they are heinous and reflect a disregard for human life, let alone that they are related to the practice of psychology such as unlawfully administering drugs, murder, incest and bigamy. However, in his opinion some of the crimes listed do not seem to be substantially related such that a conviction for one of them would automatically result in the revocation of one's license to practice psychology. As an example, he cited an employee's sale of tobacco to a minor and the possibility of an owner being held accountable for something done by an employee.

Dr. Priscilla Putnam addressed the Board and raised a concern that no distinction is made between misdemeanors and felonies. She stated that the law makes a distinction as to the severity of an offense by designating it as a misdemeanor or felony and questioned why misdemeanors

were being included. She questioned whether there was some way of dealing with less severe infraction other than revocation of a license. Dr. Putman also questioned the double jeopardy aspect of the list with regard to punishing some by revoking their license after the person's crimes has already been dealt with by the legal system.

Dr. Putman also expressed as a principle concern the lack of understanding of context and the lack of differentiation between a lapse of judgment crime and a long standing pattern of disregard for the rights of others. She also raised developmental issues and questioned whether a young man's conviction for an alcohol related crime associated with a fraternity implies that he will never be suitable to be a psychologist.

As additional examples of the need for context, she questioned what happens to the psychologist who may be in the midst of a divorce and is charged with an act of domestic violence; an alcoholic who has been in recovery for years but has multiple DUI convictions; crimes that are the result of conscience like those of Martin Luther King; or a driver who opens the door of his car in the face of oncoming traffic and a bicyclist swerves and is killed in traffic and is charged with vehicular homicide. Dr. Putman submitted that the list by virtue of its extreme comprehensiveness does not allow for errors of the youth, errors of judgment due to impairment, arrest due to civil disobedience, and does not allow for rehabilitation. She urged the Board to go back to the list and limit the list to offenses that are the most serious and egregious examples of moral turpitude. She suggested limiting the list to crimes involving abuse of power, crimes of the most serious nature against another person, fraudulent business practices having to do with the practice of psychology, as well as violations of the ethics code of the APA that are indications of character defects strong enough to prohibit a person from practicing psychology. Other offenses may warrant limitations such as practicing temporarily or under supervision and should be dealt with on a case by case basis. Dr. Putnam did not believe that limiting the list would prevent the Board from acting when necessary to sanction a psychologist. She questioned why there are no levels of sanctions, suspension, probation, and some rehabilitation procedure involving supervision and rectification. She also questioned who would police the convictions and whether the Board is setting up a police state mentality where someone with an axe to grind would, for example, report a psychologist's college age marijuana conviction.

Dr. Putnam urged the Board to significantly limit the list to very serious felony convictions and to build into the process the understanding of age, context, and the intent of the psychologist. She encouraged the Board to consider a

process of graded sanction versus automatic revocation and to develop a fair way to report infractions. Dr. Putnam supported deleting all misdemeanors and cited misdemeanors such as abandonment of a child and obscenity violations where the law could be twisted in such a way that a psychologist could be in trouble for what they believe is the moral and ethical right thing to do yet would result in trouble for their license. Those types of crimes should be left off of the list

Finally, Dr. Putnam stated that she had prepared a list of crimes that she and others believe should be deleted. She cited the examples of the 19 and 17 year old who get body piercing or tongue splitting done and the 19 year old gets charged, or the soccer coach who gets charged by an angry parent because a student on a trip got body pierced while there. She questioned why the list needed to be so black and white suggested limiting the list to laws which are very clearly examples of wrongdoing and malfeasance where the characterological defects are so great that there is no question about it and then leaving the rest up to the Board's discretion.

Dr. Putman submitted a letter to the Board that was marked as Putnam Exhibit 1. Putnam Exhibit 2 consists of three lists of crimes that should be deleted. She prepared one of the lists, another was prepared by Ellen Gay and Carrie Johnson and the last by Dan Weintraub; all of whom are psychologists.

Dr. Leland Orlov stated that he is a psychologist in New Castle County. He believes it is unduly harsh to include misdemeanors. He stated that it is extremely challenging dealing with custody and visitation cases because invariably someone is going to be made angry or irritated and want to seek revenge. It has happened to him in his own practice. Accusations that are groundless or have only a tiny bit of truth taken out of context can get someone into trouble that is not easy to get out of. He gave an example of a groundless felony charge brought against him in his practice that was dropped. He stated that the charge was initially brought against him to disqualify him from testifying in a custody matter.

Dr. Orlov agreed with Dr. Putnam's concerns over crimes of conscience. He also stated that he does a fair amount of work involving human sexual behavior and has asked a patient to bring in examples of sexually oriented material to evaluate what got the individual in trouble. He believed it was conceivable that he could be in trouble with the law under that scenario. He asked the Board to use discretion.

Dr. Mandell Much stated that he is a licensed psychologist and has practiced in Delaware for 20 years. He is also licensed in Pennsylvania. Dr. Much provided the

Board with an example of a licensed psychologist with an impeccable reputation who had practiced for 20 years. However, as the result of debilitating pain from Chron's disease he developed a dependency to narcotics. Despite his addiction, he worked regularly and diligently, except for the times his Chron's disease caused him to be hospitalized. His medication abuse occurred in the privacy of his own home and his patients benefited from his care and were never directly affected by his dependency. Eventually, because of his addiction, he committed the felony crime of fraudulently obtaining narcotics and was caught. The Board referred him to treatment with Dr. Much, temporarily restricted his license, and prohibited him from working with individuals with addiction problems. After two years of treatment the individual's license was fully restored and he has been practicing in a very responsible position for the federal government in another state for several years. Dr. Much stated that were it not for the rehabilitative and restorative stance of the Board, the individual's professional life would have ended.

Dr. Jane Crowley stated that she is a psychologist licensed in Delaware. She believes that the list is far too inclusive and that statutes were listed that were clearly not related to the practice of psychology. As an example, she cited tongue splitting and stated that the inclusion of such crimes would engage the Board in a great deal of activity that would not be useful in its public interest of safeguarding the profession of psychology. In her experience as a former Board member, the sheer volume would distract the Board from much more meaningful and appropriate work. The list offered is too broad and would engage the Board in considerable fruitless activity and would not serve the purpose of protecting the public.

3. The Board received no written or verbal comment at the second public hearing held on June 6, 2005.

Findings of Fact With Respect to the Evidence and Information Submitted

The Board carefully reviewed and considered the crimes presented as a compilation of crimes extracted from the Delaware Code. The overarching concern of the Board was the safety of the public since psychologists and psychological assistants work closely in a position of trust and responsibility with the members of the public they serve gaining access to the details of their clients' personal, family, business, health and financial information. In addition, they deal with individuals and families who are often in crisis and vulnerable to undue influence and manipulation. The nature of psychology requires the highest standards of honesty and integrity in dealing with confidential issues and patient

records. It also requires that the practitioner is able to exercise appropriate judgment in dealing with a multitude of issues, including but not limited to, a client's criminal conduct, physical disabilities, addictions, behavior disorders, sexual abuse and other mental health issues.

In addition, practitioners work in a variety of settings including, but not limited to, hospitals, clinics, schools, prisons, detention centers and private offices. They frequently counsel individuals on a one to one basis when no one else is present. They are called upon to testify in court proceedings and file reports with courts and governmental agencies.

The "primary objective of the Board of Examiners of Psychologists, to which all other objectives and purposes are secondary, is to protect the general public, specifically those persons who are the direct recipients of services regulated by this chapter, from unsafe practices and from occupational practices which tend to reduce competition or fix the price of services rendered.

The secondary objectives of the Board are to maintain minimum standards of practitioner competency and to maintain certain standards in the delivery of services to the public. In meeting its objectives, the Board shall develop standards assuring professional competence; shall monitor complaints brought against practitioners regulated by the Board; shall adjudicate at formal hearings; shall promulgate rules and regulations; and shall impose sanctions where necessary against practitioners, both licensed and unlicensed." 24 Del.C. §3501.

The Board finds that the crimes identified in the proposed rule are substantially related to fitness or ability to perform 1 or more of the duties and responsibilities of a psychologist or psychological assistant in that they involve: the use of physical violence or force, or the threat thereof, toward or upon the person of another; sexual abuse or inappropriate sexual conduct; violation of privacy; dishonesty, or false or fraudulent conduct; mistreatment or abuse of children, the elderly or animals; offenses indicative of issues with power and control; offenses against public administration including but not limited to bribery and perjury, and offenses involving the illegal possession or the misuse or abuse of narcotics, or other addictive substances and those non-addictive substances with a substantial capacity to impair reason or judgment.

The Board revisited its proposed list as the result of the comments received at the first public hearing held on March 7, 2005 and the attached list is the result of that review. The Board shares the concerns of the psychologists who commented on the proposal with regard to the lack of ability regarding context but finds that the legislation as enacted

does not allow the Board to exercise the discretion suggested.

The Board finds that there seemed to be a general misunderstanding that conviction after licensure would automatically result in revocation of a license. A conviction of an offense after licensure will subject a licensee to potential discipline up to and including revocation as provided by 24 Del.C. §3516. Conviction of an offense listed in the Board's regulation after licensure does not mandate automatic revocation.

Finally, the Board declines to limit the regulation to misdemeanor convictions only, finding that the designated misdemeanors are substantially related to the practice of psychology for the reasons stated above as to both felonies and misdemeanors.

Decision and Effective Date

In summary, the Board finds that adopting regulation 17.0 as proposed is in the best interest of the citizens of the State of Delaware and is necessary to protect the health and safety of the general public, particularly the recipients of the services provided by psychologists and psychological assistants.

The Board hereby adopts Regulation 17.0 to be effective 10 days following publication of this order in the *Register of Regulations*.

Text and Citation

The text of the regulation remains as published in *Register of Regulations*, Vol. 8, Issue 11, May 1, 2005, without any changes, and as attached hereto as Exhibit A.

SO ORDERED this ____ day of _____, 2005.

BOARD OF EXAMINERS IN PSYCHOLOGY

Joseph B. Keyes, Ph.D., President, Presiding
Martha Boston, Ph.D., Vice President
Lisa C. Gardner, Public Member
Frank Szczuka, Public Member
William Ulmer, Jr., M.Ed., Professional Member

*** Please note that no changes were made to the regulation as originally proposed and published in the December 2004 issue of the Register at page 779 (8 DE Reg. 779). Therefore, the final regulation is not being republished. Please refer to the December 2004 issue of the Register or contact the Board of Examiners of Psychologists.**

A complete set of the rules and regulations for the

Board of Examiners of Psychologists is available at:
<http://dpr.delaware.gov/boards/psychology/index.shtml>

DIVISION OF PROFESSIONAL REGULATION

3600 Board of Registration of Geologists
Statutory Authority: 24 Delaware Code,
Section 3606 (24 Del.C. §3606)

ORDER

After due notice in the *Register of Regulations* and two Delaware newspapers, a public hearing was held on August 5, 2005 at a scheduled meeting of the Delaware Board of Geologists to receive comments regarding proposed amendments to Regulation 7.0. The proposed regulation clarifies that the ASBOG Fundamentals of Geology (FG) exam may be taken at any time after the applicant meets the educational requirements set forth in the statute. This regulation clarifies that the ASBOG Fundamentals of Geology (FG) exam and ASBOG Practice of Geology (PG) may be taken at separate times allowing the Fundamentals exam to be taken immediately after graduation if an applicant so desires.

The proposed regulation was originally published in the *Register of Regulations*, Vol. 8, Issue 10, on April 1, 2005. Notice of the rescheduled hearing on the proposed regulation was published in the *Register of Regulations*, Vol. 8, Issue 12, on June 1, 2005.

Summary of the Evidence and Information Submitted

No written comments were received. No members of the public attended the hearing.

Findings of Fact and Conclusions

1. The public was given notice and an opportunity to provide the Board with comments in writing and by testimony at the public hearing on the proposed amendments to the Board Regulation 7.0. The Board received no written or verbal comments on the proposed amendment.

2. The Board finds that the proposed amendments to the regulation are necessary to clarify that the ASBOG Fundamentals of Geology (FG) exam may be taken at any time after the applicant meets the educational requirements set forth in the statute. This regulation as amended clarifies that the ASBOG Fundamentals of Geology (FG) exam and ASBOG Practice of Geology (PG) may be taken at separate

times allowing the Fundamentals exam to be taken immediately after graduation if an applicant so desires.

3. Pursuant to 24 **Del.C.** §3606 the Board has statutory authority to promulgate regulations clarifying specific statutory sections of its statute. The amendments to Regulation 7.0 clarify the provisions of 24 **Del.C.** §3608(a)(3) with regard to the examination required for licensure.

Decision and Effective Date

The Board hereby adopts the changes to Regulation 7.0 to be effective 10 days following publication of this order in the *Register of Regulations*.

Text and Citation

The text of the revised rules remains as published in *Register of Regulations*, Vol. 8, Issue 10, April 1, 2005, as attached hereto as Exhibit A.

SO ORDERED this 5th day of August, 2005.

STATE BOARD OF REGISTRATION OF GEOLOGISTS

William S. Schenck, President, Professional Member

Steven M. Smailer, Vice-President,
Professional Member

Erik Trinkle, Secretary, Professional Member

Mark Harvey, Public Member

Stephen Williams, Professional Member

Exhibit A

7.0 ASBOG Examination

7.1 An applicant ~~for wishing to sit for any portion for the ASBOG examination and qualification required~~ for a license as a Geologist shall make application in writing, on forms provided by the Board, ~~and shall furnish evidence satisfactory to the Board that he/she has met the pre-examination requirements as provided for 24 Del.C. Ch. 36, §3608.~~

7.1.1 An applicant wishing to sit for the ASBOG Fundamentals of Geology (FG) Exam may do so provided they meet the minimum educational requirements set forth in 24 Del.C. §3608(a)(1). To apply, the applicant must fill out the request to sit for the fundamentals application and submit their transcripts [to date] to the Board for approval. Once taken, the applicants score will be held on file indefinitely by ASBOG.

7.1.2 An applicant wishing to sit for the ASBOG Practice of Geology (PG) must have acquired 5 years of professional work experience as defined in Rule 1.0 and must submit a full application for licensure to the Board for review. Approval to sit for the PG will be dependant upon the applicant providing sufficient evidence, satisfactory, to the Board that he/she meets the qualifications for licensure set forth in 24 Del.C. §3608.

7.2 An applicant for licensure must have satisfactorily passed each part of the ASBOG examination with a scaled score of not less than 70%.

7.3 An applicant's approval to sit for either part of the ASBOG exam shall be valid for a period not to exceed two years.

*** Please Note: As the rest of the sections were not amended they are not being published. A complete set of the rules and regulations for the Board of Registration of Geologists is available at:**

<http://dpr.delaware.gov/boards/geology/index.shtml>

8 DE Reg. 1388 (4/1/05)

STATE OF DELAWARE
EXECUTIVE DEPARTMENT
DOVER

EXECUTIVE ORDER
NUMBER SEVENTY

RE: STATE EMPLOYEES AND THE RIGHT TO ORGANIZATION AND EFFECTIVE UNION REPRESENTATION

WHEREAS, in accordance with state and federal law, state employees have the right of organization and union representation;

WHEREAS, experience in the public and private sector indicates that fully protecting the right to participate in employee organizations contributes to fair and effective human resource policies and programs;

WHEREAS, the decision to organize must rest with state employees and management should not seek to intervene or influence such decisions;

WHEREAS, state employees must be afforded the opportunity to make such decisions, free of undue influence from management;

WHEREAS, it is the policy of this Administration to strictly observe the right of state employees to organize and engage in collective bargaining;

WHEREAS, it is the policy of this State to ensure that employees have access to information provided by employee organization representatives and other bargaining unit representatives concerning union representation and collective bargaining;

WHEREAS, it is important that state employee union representatives be afforded the opportunity to fully represent their members; and

WHEREAS, state employee union representatives should be afforded the opportunity to make formal presentations before the Director of the Office of Management and Budget so that state employee concerns are given full consideration.

NOW, THEREFORE, I, RUTH ANN MINNER, by virtue of the authority vested in me as Governor of Delaware, do hereby order and declare that:

1. Managers and supervisors shall not interfere or otherwise hinder state employee efforts to exercise their right to organize for purposes of collective bargaining.

2. It is the policy of this State to maintain a neutral position as to whether employees become involved in an organizing campaign.

3. Managers and supervisors shall not express any view, argument, or opinion on employee organization or collective bargaining except to:

a. Publicize the fact of a union representation election and encourage employees to vote; and

b. Inform employees of the requirements of this executive order relating to labor management relations and representation.

4. The distribution of literature and solicitation of employees during working hours in violation of the Public Employee Relations Act is strictly prohibited. State agencies shall authorize such activity in non-work areas, during non-work hours when the activity does not otherwise interfere with operations, provided that such authorization is otherwise consistent with state and federal law.

5. State employee union representatives shall be afforded the opportunity to make presentations to the Director of the Office of Management and Budget at public hearings held pursuant to 29 **Del. C.** §6332.

6. Executive Order Number 72, dated December 30, 1999, is hereby rescinded.

APPROVED: July 7, 2005

Ruth Ann Minner,
Governor

ATTEST:
Harriet Smith Windsor, Secretary of State

GOVERNOR'S APPOINTMENTS

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BOARD/COMMISSION OFFICE	APPOINTEE	TERM OF OFFICE
Board of Geologists	Mr. Mark T. Harvey	7/1/2008
Board of Examiners of Psychologists	Merris A. Hollingsworth, Ph.D.	7/1/2008
	Gary M. Johnson, Ph.D.	7/1/2008
	Joseph B. Keyes, Ph.D.	7/1/2008
	Ms. Joan T. McDonough	7/1/2008
Board of Professional Counselors of Mental Health and Chemical Dependency Professionals	Ms. Carmetah L. Murray	7/1/2008
	Ms. Vera E. Murrell	7/1/2008
Council on Game and Fish	Mr. Terrance L. Higgins	12/27/2005
Council on Housing	Ms. Roseann H. Harkins	7/1/2008
	Mr. Joseph M. McDonough	7/1/2008
	Ms. Ruth S. Sokolowski	7/1/2008
	Ms. Norma H. Zumsteg	7/1/2008
Human Relations Commission	Mr. Eastern Ramsey	7/1/2009
	Mr. Michael R. Robinson	7/1/2009
Justice of the Peace Court, Chief Magistrate	Mr. Alan G. Davis	7/12/2009
Justice of the Peace in and for New Castle County	The Honorable Sidney J. Clark, Jr.	7/25/2011
	The Honorable Rosalind Toulson	7/15/2011
Justice of the Peace in and for Sussex County	Mr. Christopher A. Bradley	7/12/2009

**DEPARTMENT OF STATE
PUBLIC SERVICE COMMISSION**

IN THE MATTER OF THE ADOPTION OF RULES AND PROCEDURES TO IMPLEMENT THE RENEWABLE ENERGY PORTFOLIO STANDARDS ACT, 26 DEL. C. §§351-363, AS AS APPLIED TO RETAIL ELECTRICITY SUPPLIERS (OPENED AUGUST 23, 2005)	PSC REGULATION DOCKET NO. 56
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ORDER NO. 6697

This 23rd day of August, 2005, the Commission determines and Orders the following:

1. In July, the General Assembly and Governor enacted the Renewable Energy Portfolio Standards Act (“the Act”), 75 Del. Laws ch. 205 (July 12, 2005), codified in main part at 26 Del.C. §§351-363. The Act directs each retail supplier of electricity in this State to demonstrate, each year, that it has accumulated a specified level of “renewable energy credits.” “Renewable energy credits” are tradable instruments representing electricity derived from “eligible energy sources” or “customer-owned generation.” The requirement level of such credits is keyed to a percentage of the supplier’s overall adjusted retail load and the percentage increases each year. The Act gives this Commission the duty to implement and enforce the new renewable energy portfolio standards in the case of non-municipal “retail electricity suppliers.”¹ The Act charges the Commission to complete its start-up tasks and have its implementing regulations in place by July 31, 2006.²

1. See 26 Del.C. §§352(20), 353(a), 358(a) & (b), and 359. The State Energy Office and the Controller General are to monitor compliance by municipalities and municipal companies that supply electricity. See 26 Del.C. §§352(12), 358(c). An electric supplier that is an electric rural cooperative will be treated as a municipal supplier if it has exempted itself from this Commission’s authority under the option set forth in 26 Del.C. §353(a). In addition, a municipal supplier or a cooperative (even if it has not chosen the exemption under §223) may “opt-out” of the entire portfolio renewable energy credit regime if, by June 2006, it implements an alternative voluntary program offering renewable energy to its customers and participates in an energy fund. 26 Del.C. §363.

2. The Commission now opens this docket to begin to consider its assigned obligations in implementing the Act. The list of things to be done appears to be long; running from determining what can be certified as an “eligible energy resource,” to how, and by whom, “renewable energy credits” are to be tracked. Given the tasks, and given that Staff has identified some questions that might need further exploration or clarification, the Commission is not yet in a position to propose the text for its implementing regulations. Rather, by this Order, the Commission adopts a broad procedural flight path to make sure the Commission’s regulations arrive before July 31, 2006. Thus, initially, the Commission sets aside two months for the Staff to conduct informal, but public, workshops in order to better educate Staff. At those workshops, Staff can obtain interested persons’ views on the meaning of some parts of the statutory text and also listen to possible scenarios for how the various requirements of the Act can be efficiently implemented. After such workshops, Staff can prepare proposed rules, or other needed documents, for the Commission’s review. The Commission would hope to have such drafts by November 10, 2005. If the Commission accepts Staff’s drafts, the proposed regulations will then be subject to scrutiny and comment under the rule-making process dictated by the Administrative Procedures Act.³

3. So far, Staff, and counsel, have identified some instances in the Act where, in their reading, the text allows for various interpretations. Consequently, the Commission specifically invites those persons or entities who had a hand in the drafting of the Act to participate in Staff’s initial workshops. While drafters’ intent cannot change enacted text, an appreciation of the background for specific language can aid Staff’s ability to get a clear view of textual meaning.

4. Also, under the Act’s regime, the State Energy Office and the Controller General are given the duty to supervise compliance by municipal electric power entities (who have not chosen the “opt-out” alternative).⁴ The Commission believes it would be beneficial for those other

2. See 26 Del.C. §362; 75 Del. Laws ch. 205 §2 (2005).

3. The Commission notes that 75 Del. Laws ch. 205 §6 requires the Commission, in its adoption of regulations, to “promote the use of best industry practices and policies by regulated entities,” and to seek public comment and participation and give such public input “great weight.” At the same time, the Act also directs the Commission to make its rules as consistent as possible with the rules adopted by other states in the region acting under similar statutory renewable energy portfolio directives. 26 Del.C. §362.

4. See 26 Del.C. §358(c).

offices and this Commission to act under a shared understanding of the Act's requirements. Consequently, the Commission extends to those offices an invitation to participate both in the informal workshops and the later rule-adoption proceedings.⁵

5. The Act also allows the Commission to consider the use of the "Generation Attribute Tracking System" ("GATS") developed by PJM Environmental Services, Inc. ("PJM-EIS"), to assist in both the assignment and tracking of "renewable energy credits."⁶ *ee, e.g.,* The GATS system will soon be operational and the utility commissions in both neighboring New Jersey and Maryland have decided to use its functions in administering those jurisdictions' renewable energy procurement regimes. The Commission invites PJM-EIS to participate in Staff's workshops and the subsequent Delaware rule adoption. In particular, the Commission seeks PJM-EIS's views whether its GATS program can satisfy the attributes of a tracking system required by the Delaware Act.⁷ Even more specifically, the Commission asks PJM-EIS whether its GATS system will provide in an Internet-accessible format, available to both other suppliers and the public, current aggregated information on the status of renewable energy credits created, sold, or transferred relative to Delaware.⁸

Now, therefore, **IT IS ORDERED:**

1. That this docket is instituted to adopt rules and regulations and other directives needed to implement the Renewable Energy Portfolio Standards Act, 75 Del. Laws ch. 205 (July 12, 2005), codified in main part at 26 **Del.C.** §§351-363, and to govern the Commission's responsibilities under such enactment provisions.

2. That, as an initial step in the process, the Commission Staff shall conduct public informal workshops to better educate the Commission about the terms of the Renewable Energy Portfolio Standards Act and such

5. The Act also directs the Commission to look to rules adopted by, or decisions made by, the Department of Natural Resources and Environmental Control ("DNREC") to determine whether certain types of sources of energy can be labeled "eligible energy resources." *See, e.g.,* 26 **Del.C.** §352(6)g., (6)h. The Commission thus also invites DNREC to the workshops to help the Commission understand when that agency will make the called-for determinations.

6. 26 **Del.C.** §§358(a), 359(b)

7. *See* 26 **Del.C.** §359(a), (c)-(d).

8. *See* 26 **Del.C.** §359(d).

statute's requirements. The number, timing, place, and agendas for such workshops shall be set by Staff. Staff shall endeavor to have a wide range of interested persons participate.

3. That, after conducting such workshops, Staff shall present to the Commission a draft of a proposed set of implementing rules or regulations as well as recommendations for any other action by the Commission. Staff shall endeavor to file its draft rules and recommendations by November 10, 2005.

4. That the Secretary shall initiate a service list for participants in the informal workshops conducted under Ordering paragraph 2. Persons or entities choosing to be included on the service list will receive notice of the workshop and documents considered at those workshops. Staff shall, if necessary or appropriate, provide public notice of the informal workshops.

5. That the Secretary shall publish in the manner described below the notice attached as Exhibit "A". Such notice shall be published in The News Journal newspaper on or before September 1, 2005. The notice shall also be sent to the Delaware Registrar of Regulations for publication in the notice section of the Delaware Register of Regulations.

6. That the Secretary shall send by United States mail a copy of this Order with exhibit to:

(a) the Division of the Public Advocate;

(b) the State Energy Coordinator of the State Energy Office;

(c) the Controller General of Delaware;

(d) PJM-Environmental Services, Inc.; and

(e) the Secretary, Department of Natural Resources and Environmental Control.

7. After receipt of the documents described in Ordering paragraph 3, the Commission will enter such further Orders as may be appropriate.

8. 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:

EXHIBIT "A"

**NOTICE OF INITIATION OF DOCKET AND
PROCEEDINGS TO IMPLEMENT THE
RENEWABLE ENERGY PORTFOLIO STANDARDS
ACT**

TO: ALL CONSUMERS, RETAIL ELECTRIC
SUPPLIERS, GENERATORS, AND OTHER
INTERESTED PERSONS

In 2005, the General Assembly and Governor enacted the Renewable Energy Portfolio Standards Act (“the Act”), 75 Del. Laws ch. 205 (July 12, 2005). The Act will require all entities selling electric supply in Delaware to meet, in each compliance year, certain minimum thresholds for “renewable energy credits.” The credits are linked to electricity produced by “eligible energy resources” and by “customer-owned generation.”

The Public Service Commission (“PSC”) has initiated this docket to develop regulations and other directives to implement this new Act for “retail electric suppliers.” As an initial step in that process, the PSC Staff will conduct a series of informal public workshops to educate Staff about the requirements of the Act, the PSC’s duties in both implementing the renewable credit regime and supervising future compliance, and the availability of the PJM-EIS GATS system to assist in monitoring compliance. After the workshops, the PSC Staff will propose draft regulations that will be considered by the PSC and then proposed for adoption under the rule-making procedures of the Delaware Administrative Procedures Act.

If you wish to be given notice of these workshops, you must file to be included on the PSC’s initial service list in this docket. To be listed, you must deliver a letter to the address set out below. You must include your name, organization (if any), address, voice and facsimile telephone numbers, and Internet e-mail address. Such letter should be delivered to:

Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, DE 19904
Attn: PSC Reg. Dckt. No. 56

You should try to deliver that letter by September 12, 2005. You can read PSC Order No. 6697 (Aug. 23, 2005) (available at www.state.de.us/delpsc) to gain more information about the initial stage of this matter. You can also direct inquiries to David Bloom at either 1-800-282-8574 (Delaware only) or (302) 739-4247 (text telephone also) or by Internet e-mail addressed to david.bloom@state.de.us. The public is particularly invited to participate in this docket.

**DELAWARE RIVER BASIN
COMMISSION****NOTICE OF PUBLIC HEARING**

The Delaware River Basin Commission will hold a public hearing and business meeting on Monday, September 26, 2005 at 10:00 a.m. at the Commission's offices, 25 State Police Drive, West Trenton, New Jersey. For more informations contact Pamela M. Bush, Esq., Commission Secretary and Assistant General Counsel, at 609-883-9500 extension 203.

**DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
1200 Nutrient Management****NOTICE OF PUBLIC HEARING**

Pursuant to 29 **Del.C.** §10115, I hereby recommend the proposed amendments to the certification regulations to be posted in the *Register of Regulations*.

Synopsis: Certification by the Delaware Nutrient Management Program, 2320 S. Dupont Hwy., Dover, DE 19901, is required (3 **Del.C.** §2201 - 2290) for all who apply fertilizer and/or animal manure greater than 10 acres or who manage animals greater than 8,000 pounds of live animal weight. As required by the regulations, certain continuing education credits are needed in order to maintain certification. The proposed changes reduce the required credits in order to maintain consistency with recertification requirements from regional programs.

Comments on the proposed changes will be accepted from September 1, 2005 until October 11, 2005. Any comments should be provided to William Rohrer, Program Administrator. A hearing for the proposed regulations will be conducted at the Delaware Department of Agriculture on October 11, 2005 at 7:00 p.m.

Amendments: Paragraph 7.0, reference 1200 Nutrient Management, 1201 Nutrient Management Certification Regulations.

DEPARTMENT OF EDUCATION

The State Board of Education will hold its monthly meeting on Thursday, September 15, 2005 at 1:00 p.m. in the Townsend Building, Dover, Delaware.

**DEPARTMENT OF HEALTH AND
SOCIAL SERVICES
DIVISION OF PUBLIC HEALTH
PUBLIC NOTICE****4462 Public Drinking Water Systems**

These proposed regulations, "Regulations Governing Public Drinking Water Systems," will replace by revision the current "Regulations Governing Public Drinking Water Systems," previously adopted May 14, 1971 and most recently amended July 10, 2003.

NATURE OF PROCEEDINGS

The Department is proposing amendments to the Regulations Governing Public Drinking Water Systems. The Department originally published proposed amendments to these regulations in the July 1, 2005 Register of Regulations and due to additional amendments is now re-proposing these regulations in the September 1, 2005 Register of Regulations. A summary of those amendments and amended regulations are attached below.

NOTICE OF PUBLIC HEARING

The Office of Drinking Water, under the Division of Public Health, Department of Health and Social Services (DHSS), will hold a public hearing to discuss proposed revisions to the "State of Delaware Regulations Governing Public Drinking Water Systems." The public hearing will be held on September 29, 2005 at 1:00 p.m. in the Public Health Preparedness Training Center, Suite 4F, Blue Hen Corporate Center, 655 S. Bay Road, Dover, Delaware.

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

Office of Drinking Water
Blue Hen Corporate Center, Suite 203
655 Bay Road
Dover, DE 19901
Telephone: (302) 741-8630

Anyone wishing to present his or her oral comments at this hearing should contact Mr. David Walton at (302) 744-4700 by September 28, 2005. Anyone wishing to submit written comments as a supplement to or in lieu of oral testimony should submit such comments by September 30, 2005 to:

David Walton, Hearing Officer
Division of Public Health
417 Federal Street
Dover, DE 19901
Fax 302-739-6659

**DIVISION OF PUBLIC HEALTH
PUBLIC NOTICE****4469 Regulations Governing a Detailed Plumbing Code****Nature of the Proceedings**

Pursuant to 16 Delaware Code, Sections 122 and 7906, the Department of Health and Social Services is proposing to rescind the current "State of Delaware Regulations Governing a Detailed Plumbing Code" previously adopted on May 11, 2001, and replace it with an updated version incorporating the 2003 International Plumbing Code.

Notice of Public Hearing

The Health Systems Protection Section, Division of Public Health, Department of Health and Social Services will hold a public hearing to discuss the proposed Regulations Governing a Detailed Plumbing Code. The public hearing will be held on September 21, 2005 at 10:00 a.m. in the Third Floor Conference Room of the Jesse Cooper Building, 417 Federal Street, Dover, Delaware.

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

Environmental Health Field Services

Kent County
805 River Road
Dover, DE 19901

Sussex County
544 South Bedford Street
Georgetown, DE 19947

Telephone: (302) 739-5305 Telephone: (302) 856-5496

Anyone wishing to present his or her oral comments at this hearing should contact David Walton at (302) 744-4700 by September 20, 2005. Anyone wishing to submit written comments as a supplement to or in lieu of oral testimony should submit such comments by September 30, 2005 to:

David P. Walton, Hearing Officer
Division of Public Health
417 Federal Street
Dover, Delaware 19901
Fax # (302) 739-6659

**DIVISION OF MEDICAID AND MEDICAL
ASSISTANCE
PUBLIC NOTICE****Medicare Part D Prescription Drug Program**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Medicaid & Medical Assistance (DMMA) is proposing to amend the Title XIX Medicaid State Plan and the Division of Social Services Manual (DSSM) to implement the Medicare Part D Prescription Drug Program.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Policy & Program Development Unit, Division of Medicaid & Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 by September 30, 2005.

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

SUMMARY OF PROPOSED CHANGES**Statutory Authority:**

- The Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA)
- Section 1935(a) of the Social Security Act
- 42 CFR Parts 400, 403, 411, 417 and 423

New Pre-Print State Plan Pages

- Attachment 2.2-A, Page 27
- Attachment 3.1.A.1, Page 1
- Attachment 3.1.A.1, Page 2
- Attachment 3.1.A.1, Page 2a

Background

The Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA) established the Medicare Prescription Drug Program, also known as Medicare Part D, making prescription drug coverage available to individuals who are entitled to receive Medicare benefits under Part A or Part B, beginning on January 1, 2006.

The MMA also established the Low-Income Subsidy (LIS) to assist individuals who have low-income and

resources with payment of the premiums, deductibles, and co-payments required under Part D, which began on July 1, 2005.

Effective January 1, 2006, Medicaid beneficiaries who are entitled to receive Medicare benefits under Part A or Part B will no longer receive their pharmacy benefits under the State Medicaid Program, except for excluded drugs. States are required to submit State Plan Amendments that ensure State Medicaid Program pharmacy benefits are consistent with the requirements under Part D.

Given that Medicare is the primary payor with respect to Part D drugs for full-benefit dual eligible individuals, states will continue to receive Federal Financial Participation (FFP) for the payment of the deductible and coinsurance for Medicare Part A and Part B drugs.

DIVISION OF MEDICAID AND MEDICAL ASSISTANCE
PUBLIC NOTICE

Title XIX Medicaid State Plan Inpatient Hospital Services

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 512, Delaware Health and Social Services (DHSS) / Division of Medicaid & Medical Assistance is proposing to amend the Title XIX Medicaid State Plan regarding the reimbursement cycle and the payment methodology for inpatient hospital services.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Policy & Program Development Unit, Division of Medicaid & Medical Assistance, P.O. Box 906, New Castle, Delaware 19720-0906 by September 30, 2005.

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

SUMMARY OF PROPOSED CHANGES

Title of Regulation

Methods and Standards for Establishing Payment Rates – Inpatient Hospital Care

Statutory Authority

42 CFR, Subpart C – Payment for Inpatient Hospital and Long-Term Care Facility Services

Amending the Following State Plan Pages

Attachment 4.19-A, Pages 1 and 3

Summary of Proposal

This regulatory action proposes to amend the reimbursement methodology for inpatient hospitals with two (2) changes regarding the: 1) reimbursement cycle and, 2) interim outlier payment methodology.

Reimbursement Cycle

Effective July 1, 2006, the proposed amendment would revise state plan language changing the reimbursement cycle for hospital payments from a twelve (12) month period to a fifteen (15) month period.

Interim Outlier Payment Methodology

Effective January 1, 2006, the proposed amendment revises the methodology for determining payment for high cost outliers. An interim payment will be made for that inpatient stay when the client's charges have reached twenty-five (25) times the general discharge rate of that facility, or when the client's stay is greater than sixty (60) days. Additional interim payments will be made when either of the outlier conditions for an interim payment is met again.

DIVISION OF SOCIAL SERVICES
PUBLIC NOTICE

Delaware's Temporary Assistance for Needy Families Employment and Training

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Social Services is proposing to amend the Division of Social Services Manual (DSSM) regarding changes to Delaware's Temporary Assistance for Needy Families (TANF) Employment and Training policies.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Policy & Program Development Unit, Division of Social Services, P.O. Box 906, New Castle, Delaware 19720-0906 by September 30, 2005.

The action concerning the determination of whether to adopt the proposed regulation will be based upon the results of Department and Division staff analysis and the

consideration of the comments and written materials filed by other interested persons.

SUMMARY OF PROPOSED CHANGE

Citation

Senate Bill 101, 140th General Assembly: Delaware Welfare Reform Education and Training Assistance Act

Summary of Proposal

Senate Bill 101, effective July 2, 1999, allows participants in Delaware's Temporary Assistance for Needy Families (TANF) program to engage in secondary education, post-secondary education, and vocational training as part of the work activity requirement. The participants in this program must be enrolled as full-time students, must be students in good standing, and will be required to have a combination of credit hours and work hours equaling at least 20 hours per week while they are in school. Participants must attend accredited or approved programs and will receive the same support services while in school, such as child care and transportation, as do other TANF participants. By enabling TANF participants to pursue secondary education, post-secondary education, and vocational training, Delaware will create a workforce that is more financially stable and less likely to need public assistance again, while at the same time increasing its tax revenue as these same people earn higher wages. This is a correction to the previously published policy which increased the minimum combination of credit hours and work to 25 hours.

**DEPARTMENT OF NATURAL
RESOURCES AND
ENVIRONMENTAL CONTROL**

DIVISION OF WATER RESOURCES

REGISTER NOTICE

SAN #2003-03

TITLE OF THE REGULATIONS:

Regulations Governing Storm Water Discharges Associated with Industrial Activities

BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE AND ISSUES:

The Department of Natural Resources and Environmental Control, Surface Water Discharges Section, is proposing to reissue the Regulations Governing Storm Water Discharges Associated with Industrial Activities. The regulations are required to be reissued once every five years, expanding the existing regulations in place to include all

current federal requirements for discharges of storm water associated with industrial activities.

Two major revisions are: (1) a conditional "no exposure" exclusion that allows facilities with industrial materials and activities entirely sheltered from storm water a simplified way to comply with the permitting requirements by submitting a "No Exposure" certification form for exclusion from monitoring and storm water plan requirements in their permits; and (2) benchmark monitoring which requires facilities with a high potential to discharge a pollutant at concentrations of concern to conduct semi-annual analytical monitoring of storm water samples for comparison with benchmark monitoring concentration values used for indications of potential impairment of water quality in water bodies receiving the storm water discharge.

NOTICE OF PUBLIC COMMENT:

The Department of Natural Resources and Environmental Control will hold a public hearing on September 29th, 2005 at 6 PM in the DNREC Auditorium, 89 Kings Highway the Richardson & Robbins Building in Dover, to receive comments on proposed amendments to the Regulations Governing Storm Water Discharges Associated with Industrial Activities. Comments regarding the General Permit Program should be sent in writing to Amber Moore, Surface Water Discharges Section, Division of Water Resources, DNREC, 89 Kings Highway, Dover, DE 19901. Comments regarding construction activities should be sent in writing to Elaine Webb, Sediment and Stormwater Program, Division of Soil and Water, DNREC, 89 Kings Highway, Dover, DE 19901.

PREPARED BY:

Amber N. Moore (302) 739-9946, August 10, 2005

**DEPARTMENT OF STATE
DIVISION OF PROFESSIONAL REGULATION
3500 Board of Examiners of Psychologists**

The Delaware Board of Examiners of Psychologists in accordance with 24 Del.C. §3506(a)(1) has proposed changes to Regulation 6 of the Board's rules and regulations regarding *Evaluation of Credentials*. Specifically, the proposal amends regulation 6.1 and the subsections therein to conform to the American Psychological Association requirements for accreditation.

A public hearing will be held on October 3, 2005 at 9:30 a.m. in the second floor conference room A of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware where members of the public can offer comments. Anyone wishing to receive a copy of the proposed rules and

regulations may obtain a copy from the Delaware Board of Examiners of Psychologists. Persons wishing to submit written comments may forward these to the Board at the above address. The final date to receive written comments will be at the public hearing.

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

PUBLIC SERVICE COMMISSION
PUBLIC NOTICE OF PROPOSED AMENDMENTS
TO THE PUBLIC SERVICE COMMISSION'S
"RULES FOR THE PROVISION OF
TELECOMMUNICATIONS SERVICES"

In 2001, the Public Service Commission ("PSC ") adopted "Rules for the Provision of Telecommunications Services" ("Telecom Rules") to govern its regulatory oversight of telecommunications carriers operating within Delaware. Those Rules apply to all current telecommunications carriers, except Verizon Delaware Inc.

By PSC Order No. 6690 (Aug. 9, 2005), the PSC now proposes to amend Rule 4(f) and Rule 10 of those Telecom Rules. The proposed change to Rule 4(f) will allow telecommunications carriers to submit irrevocable stand-by Letters of Credit as a substitute for the filing of surety bonds currently required under Rule 4(f)(i) & (ii). Such Letters of Credit, like the now required bonds, will provide financial assurances that carriers will pay financial liabilities for inadequate performance (Rule 4(f)(i)) and that sufficient funds will remain available in case refunds of customer deposits and prepaid monies might be required (Rule 4(f)(ii)). The proposed amendment to Rule 10 will allow a "qualified carrier," one with less than \$2,500,000 in annual gross intrastate revenues in the preceding year, to forego filing most of the financial, merger, and transfer of control applications now required by 26 **Del.C.** §215(a) & (b). The exemption will not apply to local exchange carriers, will not be available during the first year after the carrier's certification, and will not apply to mergers or acquisitions involving another carrier with more than \$2,500,000 in annual gross Delaware revenues.

The text of these proposed amendments are attached to PSC Order No. 6690. That Order and the exhibits are reproduced in the September 2005 edition of the Delaware Register of Regulations. The Order and exhibits can also be reviewed on-line at the PSC's website at www.state.de.us/delpsc. You can also obtain a paper copy of the Order at the PSC's Dover office. Those paper copies will cost \$0.25 per page.

You can file written comments, suggestions, briefs, compilations of data, or other materials concerning these

proposed amendments to the Telecom Rules. Such material (10 copies) must be submitted to the Commission on or before Friday, September 30, 2005. Send the material to the Commission's Dover office at the following address:

Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building
Suite 100
Dover, Delaware, 19904
Attn: PSC Reg. Dckts. Nos. 10 & 45

In addition, the PSC will conduct a public hearing on these proposed changes on Wednesday, October 19, 2005, beginning at 10:00 AM. The hearing will take place in the Third Floor Conference Room of the Carvel State Office Building, 820 North French Street, Wilmington, Delaware. You can submit additional materials then.

If you are handicapped and might need assistance or aids in participating in this matter, please contact the PSC to discuss the needed assistance or aids. You can contact the PSC with questions or requests about this matter at the Commission's toll-free telephone number (800) 282-8574 (Delaware only) or (302) 739-4333 (including text telephone). You can also send inquiries by Internet e-mail addressed to karen.knickerson@state.de.us.

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