

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
DIVISION OF AIR QUALITY

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

GENERAL NOTICE

REGISTER NOTICE

1. TITLE OF THE REGULATIONS:

State Implementation Plan (SIP) Revision to address the requirements of Clean Air Act (CAA) §§110(a)(2)(E)(ii) and 128.

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

The Department of Natural Resources and Environmental Control (DNREC), Division of Air Quality (DAQ) is proposing to revise the SIP to include a document that address the requirements of CAA §§110(a)(2)(E)(ii) and 128, which relate to disclosure and conflicts of interest. The SIP document consists of a determination that the applicable requirements of 29 Del.C., Ch. 58, "*Laws Regulating the Conduct of Officers and Employees of the State*," meet the requirements of CAA §110(a)(2)(E)(ii) and 128, and proposes to include these requirements into the SIP.

3. POSSIBLE TERMS OF THE AGENCY ACTION:

None

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

7 Delaware Code, Chapter 60

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

None

6. NOTICE OF PUBLIC COMMENT:

Statements and testimony may be presented either orally or in writing at a public hearing to be held on Thursday, October 23, 2012 beginning at 6:00 PM in the DNREC's Richardson & Robbins Building Auditorium, 89 Kings Hwy, Dover, DE 19901. Interested parties may submit comments in writing to: Ron Amirikian, DNREC Division of Air Quality, 655 S. Bay RD, Suite 5N, Dover, DE 19901.

7. PREPARED BY:

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Revision to Delaware's State Implementation Plan To Address Clean Air Act §110(a)(2)(E)(ii) and §128
September 12, 2012

1.0 Introduction and Background

A State Implementation Plan ("SIP") is a state plan that identifies how that state will attain and maintain air quality that conforms to each primary and secondary National Ambient Air Quality Standard ("NAAQS"). The SIP is a complex, fluid document containing regulations, source-specific requirements, and non-regulatory items such as plans and emission inventories.

Delaware's initial SIP was approved by the US Environmental Protection Agency (EPA) on May 31, 1972. Since this initial approval the Delaware SIP has been revised numerous times to address air quality non-attainment and maintenance issues. The revisions consisted of updated plans and inventories, and new and revised regulatory control requirements. Delaware's SIP is compiled at 40 C.F.R. Part 52 Subpart I.

Clean Air Act (CAA) §110(a)(2)(E)(ii) requires the SIP to provide "*requirements that the State comply with the requirements respecting State boards under section 128 of this title.*" CAA §128, "State Boards," requires:

(a) *Not later than the date one year after August 7, 1977, each applicable implementation plan shall contain requirements that—*

(1) *any board or body which approves permits or enforcement orders under this chapter shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders under this chapter, and*

(2) *any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed.*

A State may adopt any requirements respecting conflicts of interest for such boards or bodies or heads of executive agencies, or any other entities which are more stringent than the requirements of paragraph (1) and (2), and the Administrator shall approve any such more stringent requirements submitted as part of an implementation plan.

The purpose of this document is to revise Delaware's SIP to meet the requirements of CAA §110(a)(2)(e)(ii) and §128.

2.0 Delaware's plan to comply with CAA §110(a)(2)(e)(ii) and §128.

The requirements of CAA §128(a)(1) are not applicable to Delaware because it does not have any board or body which approves air quality permits or enforcement orders. The requirements of CAA §128(a)(2) are applicable to Delaware because the Department of Natural Resources and Environmental Control (DNREC) cabinet level Secretary (i.e., the head of an executive agency) makes the referenced decisions.

The conduct of the DNREC Secretary, and that of his employees, is subject to the requirements of 29 **Del.C.** Chapter 58, Laws Regulating the Conduct of Officers and Employees of the State. State employees are required to follow the laws in Chapter 58 regarding employee conduct and Delaware is incorporating the relevant provisions of Chapter 58 into its SIP. The State of Delaware hereby presents the following portions of Chapter 58, Subchapter 1, *State Employees', Officers' and Officials' Code of Conduct*, and Subchapter II, *Financial Disclosure*, for incorporation into the Delaware SIP:

§5804. Definitions.

For the purposes of this subchapter:

- (1) "Close relative" means a person's parents, spouse, children (natural or adopted) and siblings of the whole and half-blood.*
- (2) "Commission" means the State Public Integrity Commission established by this chapter.*
- (3) "Commission Counsel" means the legal counsel appointed by the Commission pursuant to this chapter.*
- (4) "Compensation" means any money, thing of value or any other economic benefit of any kind or nature whatsoever conferred on or received by any person in return for services rendered or to be rendered by oneself or another.*
- (5) A person has a "financial interest" in a private enterprise if:*
 - a. The person has a legal or equitable ownership interest in the enterprise of more than 10% (1% or more in the case of a corporation whose stock is regularly traded on an established securities market);*
 - b. The person is associated with the enterprise and received from the enterprise during the last calendar year or might reasonably be expected to receive from the enterprise during the current or the next calendar year income in excess of \$5,000 for services as an employee, officer, director, trustee or independent contractor; or*
 - c. The person is a creditor of a private enterprise in an amount equal to 10% or more of the debt of that enterprise (1% or more in the case of a corporation whose securities are regularly traded on an established securities market).*
- (6) "Honorary state official" means a person who serves as an appointed member, trustee, director or the like of any state agency and who receives or reasonably expects to receive not more than \$5,000 in compensation for such service in a calendar year (not including any reimbursement for expenses).*
- (7) "Matter" means any application, petition, request, business dealing or transaction of any sort.*
- (8) "Person" means an individual, partnership, corporation, trust, joint venture and any other association of individuals or entities.*
- (9) "Private enterprise" means any activity conducted by any person, whether conducted for profit or not for profit and includes the ownership of real or personal property. Private enterprise does not include any activity of the State or of any political subdivision or of any agency, authority or instrumentality thereof.*
- (10) "State" means the State of Delaware and includes any state agency.*
- (11) "State agency" means any office, department, board, commission, committee, court, school district, board of education and all public bodies existing by virtue of an act of the General Assembly or of the Constitution of the State, excepting only political subdivisions of the State, their agencies and other public agencies not specifically included in this definition which exist by virtue of state law, and whose jurisdiction:*
 - a. Is limited to a political subdivision of the State or to a portion thereof; or*
 - b. Extends beyond the boundaries of the State.*
- (12)a. "State employee" means any person:*
 - 1. Who receives compensation as an employee of a state agency;*

2. *Who serves as an appointed member, trustee, director or the like of any state agency and who receives or reasonably expects to receive more than \$5,000 in compensation for such service in a calendar year (not including any reimbursement for expenses); or*
 3. *Who is an elected or appointed school board member.*
- b. *"State employee" does not include:*
1. *Members of the General Assembly;*
 2. *The Chief Justice and Justices of the Supreme Court;*
 3. *The Chancellor and Vice-Chancellors of the Court of Chancery;*
 4. *The President Judge and Judges of Superior Court;*
 5. *The Chief Judge and Judges of Family Court;*
 6. *The Chief Judge and Resident Judges of the Court of Common Pleas;*
 7. *The Chief Magistrate and Justices of the Peace;*
 8. *State officers; or*
 9. *Honorary state officials.*
- (13) *"State officer" means any person who is required by subchapter II of this chapter to file a financial disclosure statement but does not include:*
- a. *Members of the General Assembly;*
 - b. *The Chief Justice and Justices of the Supreme Court;*
 - c. *The Chancellor and Vice-Chancellors of the Court of Chancery;*
 - d. *The President Judge and Judges of Superior Court;*
 - e. *The Chief Judge and Judges of Family Court;*
 - f. *The Chief Judge and Judges of the Court of Common Pleas; or*
 - g. *The Chief Magistrate and Justices of the Peace.*

§5805. Prohibitions relating to conflicts of interest.

(a) Restrictions on exercise of official authority. --

(1) *No state employee, state officer or honorary state official may participate on behalf of the State in the review or disposition of any matter pending before the State in which the state employee, state officer or honorary state official has a personal or private interest, provided, that upon request from any person with official responsibility with respect to the matter, any such person who has such a personal or private interest may nevertheless respond to questions concerning any such matter. A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter.*

(2) *A person has an interest which tends to impair the person's independence of judgment in the performance of the person's duties with respect to any matter when:*

- a. *Any action or inaction with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons; or*
- b. *The person or a close relative has a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interests in the same enterprise.*

(3) *In any case where a person has a statutory responsibility with respect to action or nonaction on any matter where the person has a personal or private interest and there is no provision for the delegation of such responsibility to another person, the person may exercise responsibility with respect to such matter, provided, that promptly after becoming aware of such conflict of interest, the person files a written statement with the Commission fully disclosing the personal or private interest and explaining why it is not possible to delegate responsibility for the matter to another person.*

(b) Restrictions on representing another's interest before the state. --

(1) *No state employee, state officer or honorary state official may represent or otherwise assist any private enterprise with respect to any matter before the state agency with which the employee, officer or official is associated by employment or appointment.*

(2) *No state officer may represent or otherwise assist any private enterprise with respect to any matter before the State.*

(3) *This subsection shall not preclude any state employee, state officer or honorary state official from appearing before the State or otherwise assisting any private enterprise with respect to any matter in the exercise of such person's official duties.*

(c) *Restrictions on contracting with the state.* -- No state employee, no state officer and no private enterprise in which a state employee or state officer has a legal or equitable ownership of more than 10% (more than 1% in the case of a corporation whose stock is regularly traded on an established securities market) shall enter into any contract with the State (other than an employment contract) unless such contract was made or let after public notice and competitive bidding. Such notice and bidding requirements shall not apply to contracts not involving more than \$2,000 per year if the terms of such contract reflect arms' length negotiations. For the period of July 1, 1990 through June 30, 1991, nothing in this subsection shall prohibit a state employee, a state officer, or a private enterprise in which a state employee or a state officer has a legal or equitable ownership of more than 10% (more than 1% in the case of a corporation whose stock is regularly traded on an established securities market) from contracting with a public school district and/or the State Board of Education for the transportation of school children without public notice and competitive bidding as is permitted under § 6923 of this title.

(f) *Criminal sanctions.* --

(1) Any person who knowingly or willfully violates any provision of this section shall be guilty of a misdemeanor, punishable for each such violation by imprisonment of not more than 1 year and by a fine not to exceed \$10,000.

(2) A prosecution for a violation of this section shall be subject to the time limitations of §205 of Title 11.

(3) The Superior Court shall have exclusive jurisdiction over prosecution for all criminal violations of this section.

(g) *Contracts voidable by court action.* -- In addition to any other penalty provided by law, any contract entered into by any state agency in violation of this subchapter shall be voidable by the state agency; provided, that in determining whether any court action should be taken to void such a contract pursuant to this subsection, the state agency shall consider the interests of innocent 3rd parties who may be damaged thereby. Any court action to void any transaction must be initiated within 30 days after the state agency involved has, or should have, knowledge of such violation.

(h) *Exceptions for transportation contracts with school districts.* -- Except for transportation supervisors for any school district within this State, nothing in this section shall prohibit an employee or the employee's spouse or children (natural or adopted) from contracting for the transportation of school children. Such transportation contracts may be entered into by an employee or the employee's spouse or children without public notice and competitive bidding as is provided in §6916 of this title.

§5806. Code of conduct.

(c) No state employee, state officer, or honorary state official shall acquire a financial interest in any private enterprise which such official has reason to believe may be directly involved in decisions to be made by such official in an official capacity on behalf of the State.

(d) Any state employee or state officer who has a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, any state agency (and any honorary state official who has a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, the state agency on which the official serves as an appointee) shall file with the Commission a written statement fully disclosing the same. Such disclosure shall be confidential and the Commission shall not release such disclosed information, except as may be necessary for the enforcement of this chapter. The filing of such disclosure statement shall be a condition of commencing and continuing employment or appointed status with the State.

§5812. Definitions.

(a) "Business enterprise" means corporation, partnership, sole proprietorship or any other individual or organization carrying on a business or profession.

(b) "Capital gain" means capital gains required to be reported to the Internal Revenue Service pursuant to federal internal revenue laws.

(c) "Commission" means the State Public Integrity Commission.

(d) "Constructively controlled" means:

(1) A financial interest in the name of another which is controlled by a public officer by virtue of any relationship of the public officer to another person and which directly benefits the public officer;

(2) Any financial interest of a public officer held jointly with the spouse or child of such public officer;

(3) Any financial interest of the spouse or minor child of a public officer.

(e) "Debt instrument" means bonds, notes, debentures, mortgages or other securities having a fixed yield if not convertible to equity instruments.

(f) "Equity instrument" means any ownership interest in a corporation or other legal entity giving rights to the holder upon liquidation of the entity.

- (g) "Fair market value" means, if a security, the quoted price as of January 1 of the year in which the report required by §5813 of this title is filed, or, if not a security, the price at which the public officer would sell as of January 1 of the year in which the report required by §5813 of this title is filed.
- (h) "Gift" means a payment, subscription, advance, forbearance, rendering or deposit of money, services or anything of value unless consideration of equal or greater value is received. "Gift" shall not include a political contribution otherwise reported as required by law, a commercially reasonable loan made in the ordinary course of business, or a gift received from a spouse or any relative within the 3rd degree of consanguinity of the person or person's spouse or from the spouse of any such relative.
- (i) "Honoraria" means fees received for speeches, written articles and participation in discussion groups and similar activities, but does not include reimbursement for expenses.
- (j) "Income for services rendered" means income from a single source and includes salary, wages, consulting fees and professional services.
- (k) "Instrument of ownership" includes, but is not limited to, common or preferred stock, rights, warrants, articles of partnership, proprietary interest, deeds and debt instruments, if convertible to equity instruments.
- (l) "Position of management" means officer, director, partner, proprietor or other managerial position in a business enterprise.
- (m) "Professional organization" means an individual engaged in, or an association organized pursuant to, federal or state law for the practice of medicine, law, accounting, engineering or other profession.
- (n)(1) "Public officer" shall mean:
- a. Any person elected to any state office; and
 - b. Any person appointed to fill a vacancy in an elective state office; and
 - c. Any candidate who has filed for any state office; and
 - d. The Research Director and Controller General of the Legislative Council; and
 - e. The Chief Justice and Justices of the Supreme Court; and
 - f. The Chancellors and Vice-Chancellors of the Court of Chancery; and
 - g. The President Judge and Judges of Superior Court; and
 - h. The Chief Judge and Judges of Family Court; and
 - i. The Chief Judge and Judges of the Court of Common Pleas; and
 - j. The Chief Magistrate and justices of the peace; and
 - k. The State Court Administrator and the administrators of Superior Court, Family Court, the Court of Common Pleas, and the Justice of the Peace Courts; and
 - l. The Public Guardian, the Executive Director of the Victims' Compensation Assistance Program, the Executive Director of the Child Placement Review Board; and
 - m. All Cabinet Secretaries and persons of equivalent rank within the Executive Branch; and
 - n. All division directors and persons of equivalent rank within the Executive Branch; and
 - o. The State Election Commissioner and the Directors and Deputy Directors of the Department of Elections; and
 - p. The State Fire Marshal and the Director of the State Fire School; and
 - q. The Adjutant General of the Delaware National Guard; and
 - r. The Alcoholic Beverage Control Commissioner and the members of the Appeals Commission, pursuant to §306(c) of Title 4.
- (2) For purposes of this subchapter, the term "public officer" does not include elected and appointed officials of political subdivisions of the State, of public school districts of the State, and of state institutions of higher learning.
- (o) "Reimbursement for expenditures" means any payments to a public officer for expenses incurred by that public officer.
- (p) "Time or demand deposits" means checking and savings account in banks or deposits or share in savings and loan institutions, credit unions or money market funds.

§5813. Report disclosing financial information.

- (a) Every public officer as defined in §5812 of this title shall file a report disclosing financial interests, as hereinafter provided. Each report shall be on a form prescribed by the Commission, shall be signed by the public officer and shall include at least the following information:
- (1) The name and position of the public officer; and

- (2) *The name, instrument and nature of ownership, and any position of management held by, or constructively controlled by, the public officer in any business enterprise in which legal or equitable ownership is in excess of \$5,000 fair market value or from which income of more than \$5,000 was either derived during the preceding calendar year or might reasonably be expected to be derived during the current calendar year. Time or demand deposits in a financial institution, or any debt instrument having a fixed yield shall not be listed unless convertible to an equity instrument; and*
- (3) *The name, address and type of practice, without reference to the identity of any individual clients served, of any professional organization in which the public officer is the sole practitioner, officer, director or partner, or serves in any advisory capacity, or which is constructively controlled by the public officer, from which income of more than \$5,000 was either derived during the preceding year or might reasonably be expected to be derived during the current calendar year; provided, however, that any such organization construed as a business enterprise and reported pursuant to paragraph (a)(2) of this section need not be reported under this subsection; and*
- (4) *The source of each of the following items received during the preceding calendar year, or reasonably expected to be received during the current calendar year:*
 - a. *Any income derived for services rendered exceeding \$1,000 from a single source, unless such income is otherwise identified pursuant to paragraph (a)(2) or (3) of this section; or*
 - b. *Any capital gain exceeding \$1,000 from a single source other than from the sale of a residence occupied by the public officer; or*
 - c. *Any reimbursement for expenditures exceeding \$1,000 from a single source; or*
 - d. *Any honoraria; or*
 - e. *Any gift with a value in excess of \$250 received from any person, identifying also in each case the amount of each such gift. For purposes of compliance with this gift reporting obligation, the recipient may rely in good faith upon the representation of the source of the gift as to the gift's value; and*
- (5) *Each creditor to whom the public officer was indebted for a period of 90 consecutive days or more during the preceding calendar year in an aggregate amount in excess of \$1,000.*
 - (b) *Each report required by this section shall contain a certification by the public officer that the officer has read the report, and that to the best of the officer's knowledge and belief it is true, correct and complete, and that the officer has not and will not transfer any assets, interests or property for the purpose of concealing it from disclosure while retaining an equitable interest therein.*
 - (c) *Not later than 14 days after becoming a public officer as defined in §5812 of this title, the report required by this subchapter shall be filed. Thereafter, the report shall be filed on March 15 of each year.*
 - (d) *Each report required by this section shall be filed with the Commission.*

§5813A. Report disclosing council or board membership.

- (a) *Every person elected to a state office or appointed to fill a vacancy in an elective state office, or who has filed as a candidate for an elective state office shall disclose in writing to the Commission, and the Commission shall record in its public officer docket, the name and address of every nonprofit organization, excluding religious organizations, civic association, community association, foundation, maintenance organization, or trade group incorporated in the State or having activities in the State, or both, of which the person is a council member or board member.*
- (b) *The disclosure required by subsection (a) of this section must be submitted along with, or as part of, the financial disclosure information required to be provided to the Commission pursuant to §5813 of this title.*

§5815. Violations; penalties; jurisdiction of Superior Court.

- (a) *Any public officer who wilfully fails to file a report in violation of §§5813, 5813A of this title shall be guilty of a class B misdemeanor.*
- (b) *Any public officer who knowingly files any report required by §§5813, 5813A of this title that is false in any material respect shall be guilty of a class A misdemeanor.*
- (c) *The Commission may refer to the Commission Counsel for investigation and/or may refer any suspected violation of this subchapter to the Attorney General for investigation and prosecution; provided however, that the Commission shall refer any suspected violation of this subchapter by a member of the General Assembly or the Judiciary to the Attorney General, who shall have the exclusive authority to investigate and prosecute or otherwise recommend remedies or sanctions for such suspected violation.*
- (d) *Superior Court shall have jurisdiction over all offenses under this subchapter.*

The portions of 29 **Del.C.** Chapter 58, Subchapter I and 58, Subchapter II not specifically identified above are not included in the SIP because they are unrelated to CAA §110(a)(2)(E). and §128.

3.0 Conclusion

Through this revision to the Delaware SIP, the State of Delaware meets the requirements of CAA §110(a)(2)(E)(ii) and §128, relating to conflicts of interest by members of boards and the heads of executive agencies. Delaware meets these requirements because the requirements of 29 **Del.C.** Chapter 58 are more stringent than those required by CAA §110(a)(2)(E)(ii) and §128.

16 DE Reg. 448 (10/01/12)