

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF AIR AND WASTE MANAGEMENT

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

FINAL

Secretary's Order No.: 2007-A-0010

I. Background

A public hearing was held on Wednesday, January 31, 2007 in the DNREC auditorium located at 89 Kings Highway in Dover, Delaware, to receive public comment on proposed amendments to the State of Delaware's Regulation No. 1113, i.e., the Open Burning Regulation. This regulation revision is primarily proposed to: (1) expand the open burning ban window from June 1st through August 31st in the current regulation, to May 1st through September 30th; (2) expand the burning ban from only New Castle and Kent counties to statewide; and (3) clarify the prohibitions in the existing regulation and their interaction with other applicable laws and regulations.

On April 15, 2004, the United States Environmental Protection Agency designated Delaware's Sussex County as non-attainment for meeting the 8-hour national ambient air quality standard for ozone. The Department's proposed revisions now intend to include Sussex County in the Ozone Season Open Burning Ban. Due to the expansion of the burning ban statewide, the format of the entire regulation required significant changes since the prohibitions attributable to certain areas would no longer exist. As a result, the approach taken to the amendment by the Department was to delete the existing regulation in its entirety and propose an adoption of a new version at this time. Except for the expansions detailed above, the intent of the proposed changes made are to clarify the implementation of the regulation, based on experience of Departmental staff, and are not intended to be more stringent than the existent regulation.

Numerous members of the public were present at this public hearing on January 31, 2007, including, but certainly not limited to, Michael Valenti, Assistant Forestry Administrator for the Delaware Forest Service, Burt Messick of the Sussex County Farm Bureau, numerous private citizens, and Alan Muller, Executive Director of Green Delaware. Questions and comments from those in attendance at the hearing, along with the Department's responses to the same, were fully addressed by the Department's Response Document dated March 6, 2007, which was expressly incorporated into the Hearing Officer's Report dated March 13, 2007. Proper notice of the hearing was provided as required by law.

II. Findings

The Department has carefully considered all relevant public input regarding its proposed regulation, and has provided a reasoned analysis and a sound conclusion with regard to the response given to each such comment, as reflected in the Hearing Officer's Report of March 13, 2007, which is attached and expressly incorporated into this Order. Moreover, the following findings and conclusions are entered at this time:

1. Proper notice of the hearing was provided as required by law.
2. Sussex County, Delaware, has recorded 8-hour ozone standard exceedances since 1997. Moreover, Sussex County has yet to record three (3) successive years without an 8-hour ozone exceedance.
3. The Clean Air Act (CAA), Section 110, requires states with areas that fail to meet the National Ambient Air Quality Standards (NAAQS) to develop a State Implementation Plan (SIP), describing how the state will attain and maintain the NAAQS. SIPs must include a description of control strategies or measures to control pollution. The Ozone SIP submittal is due USEPA in June 2007, and the attainment demonstration deadline is 2010. While the Department respects the opinion of various citizens and/or agencies, it believes the inclusion of Sussex County in the Ozone Season Burning Ban will aide the State of Delaware in attaining compliance with the Ozone National Ambient Air Quality Standard.
4. The Response Document from AQM dated March 6, 2007 provided to the Hearing Officer provides a thorough, accurate and balanced summary of the record developed in this matter, by addressing all of

the issues, presenting the evidence, providing a reasoned analysis, and offering a recommended course of action, and is therefore expressly incorporated herein for that purpose.

5. In accordance with the Regulatory Flexibility Act, the Department believes that the clarifications made in response to the public comments received in this matter are lawful, feasible and desirable, and that the revisions as proposed should be applied to all Delaware citizens equally in order to create a sufficient reduction toward Delaware's progress to achieving the NAAQS attainment for ozone and particulate matter.

6. The proposed Regulation No. 1113, in its revised final version, is supported by the record developed in this matter, and should be adopted as the Department's final action and be published as a Notice in the *Delaware Register of Regulations* in the next available issue.

7. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary.

III. Order

Based on the record developed, as reviewed in the Hearing Officer's Report dated March 13, 2007, and expressly incorporated herein, it is hereby ordered that the State of Delaware Regulation No. 1113 be promulgated in final form in the customary manner and established rule-making procedure required by law.

IV. Reasons

The promulgation of Regulation No. 1113, specifically, the inclusion of Sussex County in the Ozone Season Burning Ban, will aide the State of Delaware in attaining compliance with the Ozone National Ambient Air Quality Standard. Additionally, this rulemaking represents careful, deliberate and reasoned action by this agency to address the air quality issues affecting Delaware at this time. In developing this regulation, the Department has balanced the absolute environmental need for the State of Delaware to promulgate regulations concerning this matter with the important interests and wide array of public concerns surrounding the same, in furtherance of the policy and purposes of 7 Del.C. Ch. 60.

John A. Hughes, Secretary

Regulation No. 13 **Open Burning**

02/08/95

1.0 Prohibitions—All Counties

- 1.1 No person shall cause or allow the disposal of refuse by open burning.
- 1.2 No person shall cause or allow open burning in the conduct of a salvage operation.
- 1.3 No person shall cause or allow the open burning of fallen leaves.

02/08/95

2.0 Prohibitions—Specific Counties

- 2.1 Kent and New Castle Counties:

- 2.1.1 No person shall cause or allow open burning from June 1 through August 31.

- 2.1.2 The Department may grant permission to conduct open burning between June 1 and August 31 for circumstances that threaten the health, safety or welfare of any person or persons. Such circumstances must pose a more serious threat than the health threat posed by the open burning. Permission will be granted to applicants on a case-by-case basis.

02/08/95

3.0 General Restrictions—All Counties

- 3.1 Open burning, as permitted by this regulation, may be conducted without prior approval of the Department, except as provided in Sections 3.2.3, 3.2.4, and 3.9.

- 3.2 No person shall cause or allow open burning except for the purposes of:

- 3.2.1 Domestic burning of branches and limbs that have been cut from trees or shrubbery

originating on the premises and conducted by individuals domiciled on the premises;

3.2.2 The clearing of land in agricultural or silvicultural operations to cultivate and/or prepare the soil for the purpose of producing crops or supporting livestock;

3.2.3 Prescribed burning for conservation practices, wildlife habitat management, or plant, pest, or disease control, provided that:

3.2.3.1 The applicant documents to the satisfaction of the Department that prescribed burning is the most effective method to achieve this purpose; and

3.2.3.2 Permission to burn is given by the Department before such burning takes place;

3.2.4 The burning of wooden buildings solely for fire fighting instruction conducted by authorized fire companies, provided that:

3.2.4.1 The company documents to the satisfaction of the Department that all refuse has been removed from the building prior to burning; and

3.2.4.2 Permission to burn is given by the Department before such burning takes place.

3.3 No person shall conduct any open burning allowed by this regulation without giving prior notice to the Fire Call Board for the county in which the fire will occur.

3.4 No person shall conduct open burning as permitted by this regulation when, in the judgement of the Department:

3.4.1 A condition of air stagnation exists;

3.4.2 Any national ambient air quality standard may be violated; or

3.4.3 The open burning causes unreasonable interference with a person's health, safety, comfort, or use or enjoyment of his or her real property.

3.5 Upon notification by the Department, open burning shall be terminated immediately.

3.6 All fires shall remain under supervision until completely extinguished.

3.7 Tires, waste oil, or any oil heavier than No. 2 shall not be used as an auxiliary fuel. Only the minimum amount of auxiliary fuel needed to initiate the fire shall be used.

3.8 Open burning, as permitted by this regulation, may be conducted only between the hours of 8:00 am and 4:00 pm.

3.9 Burning outside of the hours permitted in Section 3.8 may be conducted, provided that:

3.9.1 The applicant documents to the satisfaction of the Department that burning outside of the permissible hours will lead to smoke reduction, or a more efficient, complete, or safer burn; and

3.9.2 Permission to burn during the extended hours is given by the Department before such burning takes place.

02/08/95

4.0 Exemptions—All Counties

4.1 The following operations are exempt from Sections 1.0 through 3.0 of this regulation provided that they are not used for the disposal of refuse and are of a minimum size sufficient for their intended purpose:

4.1.1 Fires used for cooking of food for human consumption, provided that only unpainted/untreated wood, charcoal, propane, or natural gas is burned;

4.1.2 Fires used for recreational purposes such as campfires, provided that only unpainted/untreated wood is burned;

4.1.3 Ceremonial fires, provided that only unpainted/untreated wood is burned;

4.1.4 Flares;

4.1.5 Backburning to control or suppress wildfires;

4.1.6 Fire fighting instruction conducted by the Delaware State Fire School.

1113 Open Burning

~~[xx/xx/07]~~ 04/11/07]

1.0 Purpose.

The purpose of this regulation is to control air emissions by establishing rules for open burning activities.

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2.0 Applicability.

This regulation applies to all open burning activity in Delaware.

[~~xx/xx/07~~ 04/11/07]

3.0 Definitions.

The following words and terms, when used in this regulation, shall have the following meanings:

"10-Day Notification" means a notification that shall be made in accordance with 40 CFR Section 61.145.

"Agricultural operations" means an activity on land currently used or intended to be used primarily for the purpose of obtaining a profit in money by raising, harvesting and selling crops or by raising and selling livestock or poultry. Agricultural operation also means activities conducted by not-for-profit agricultural research organizations, which activities are necessary to serve that purpose. It does not include the construction and use of structures customarily provided in conjunction with the agricultural operation.

"Asbestos" means any or all of the forms of asbestos including Actinolite, Amosite, Anthophyllite, Chrysotile, Crocidolite, or Tremolite.

"Asbestos containing material" means asbestos or any material containing asbestos.

"Ceremonial fires" means bonfires used for ceremonies sponsored by educational, cultural, or religious institutions.

"Code Orange Day" means a day which has been designated by the Department as a "Code Orange" day for expected pollution intensity.

"Code Red Day" means a day which has been designated by the Department as a "Code Red" day for expected pollution intensity.

"Crop Residue" means any vegetative material remaining after harvesting, including leaves, stalks, roots.]

"Department" means the Department of Natural Resources and Environmental Control as defined in Title 29, **Delaware Code**, Chapter 80, as amended.

"Friable asbestos material" means any material that contains more than 1% asbestos by weight and that can be crumbled, pulverized, or reduced to powder, when dry, by hand pressure.

"Fuel" means any combustible matter including, but not limited to coal, gas, oil, and refuse.

"Garbage" means animal or vegetable waste matter originating in houses, kitchens, restaurants, hotels, produce markets or similar installations.

"Incineration" means the process of igniting and burning solid, semi solid, liquid, or gaseous combustible waste to their products of combustion.

"Industrial waste" means any waste produced by a manufacturing process.

"Material" means any gas, liquid, or solid or any combination thereof.

"Open burning" means any outdoor fire or outdoor smoke-producing process from which the products of combustion are emitted directly into the ambient air. This does not include incinerators, boilers, or heaters used in process operations.

"Person" means any individual, firm, association, organization, partnership, business trust, corporation, company, contractor, supplier, installer, developer, user or owner or operator, or any Federal, State or Local governmental agency or public district or any officer or employee thereof.

"Perimeter field maintenance" means the open burning and removal of vegetation from the perimeter of a field in crop production or livestock for the specific purpose of keeping the field free and clear of vegetative obstruction that prohibit the agricultural operations.]

"Prescribed burning" means open burning of undisturbed vegetation for the specific purpose of conservation practices, wildlife habitat management, or plant, pest or disease control under such conditions that the fire is confined to a predetermined area.

"Private dwelling" means a domestic residence housing no more than three (3) families and where no commercial or industrial activity is conducted.

"Recreational purposes" means any purpose which, in the judgment of the Department, fulfills a physical or social need, including, but not limited to, camping, ceremonies, and religious rites.

“Refuse” means garbage, rubbish, or trade waste.

“Rubbish” means waste solids or liquids including but not necessarily limited to, rags, clothes, leather, rubber, carpets, excelsior, paper, ashes, furniture, tin cans, glass, crockery, masonry, tires, or waste oil.

“Salvage operation” means any business, trade or industry engaged entirely or partially in salvaging or reclaiming any product or material, including, but not necessarily limited to metal, chemicals, motor vehicles, shipping containers or drums.

“Silviculture” means the care and cultivation of forest trees.

“Solid fuel” means a fuel which is fired as a solid, such as anthracite or semi anthracite, bituminous or sub bituminous coal, lignite, coke, wood, or any solid by product of a manufacturing process that may be substituted for any of the above specifically mentioned fuels.

“Solid waste” means refuse, more than 50 percent of which is municipal type waste consisting of a mixture of paper, wood, yard wastes, food wastes, plastics, leather, rubber, and other combustibles and noncombustible materials such as glass and rock.

“Standard for Demolition and Renovation” of the asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP), as adopted through July 1, 2006.

“Trade waste” means any solid, liquid, or gaseous waste material or rubbish resulting from construction, land clearing for construction or development, building operations, or the prosecution of any business, trade, or industry including, but not necessarily limited to, wood, plastic products, cartons, paint, grease, oil and other petroleum products, chemicals or cinders.

“Waste oil” means used or spent oil or solvents or other volatile hydrocarbons, including but not limited to crankcase oil.

[xx/xx/07 04/11/07]

4.0 Prohibitions and Related Provisions

4.1 No person shall cause or allow open burning of refuse.

4.2 No person shall cause or allow open burning in the conduct of a salvage operation.

4.3 No person shall cause or allow the open burning of fallen leaves.

4.4 No person shall cause or allow open burning otherwise permitted by this regulation when, in the judgment of any Department employee, fire marshal or law enforcement officer:

4.4.1 A condition of air stagnation exists or a Code Red or Code Orange has been issued; or

4.4.2 The open burning impacts a person's health, comfort, use, or enjoyment of his or her real property.

4.5 No person shall conduct any open burning allowed by this regulation without giving prior notice to the Fire Call Board for the county in which the fire will occur.

4.6 No person shall use tires, waste oil, off-specification oil or any oil heavier than No. 2 as an auxiliary fuel for an open burn.

4.7 Any person causing or allowing open burning shall remain present and closely supervise all fire(s) at all times until the fire(s) are completely extinguished.

4.8 No person shall use more than the minimum amount of auxiliary fuel needed to initiate an open burn.

4.9 Upon being instructed to do so by any Department employed enforcement officer, fire marshal, fire officer in charge or law enforcement officer, any person shall immediately cease open burning and shall immediately extinguish all active open burning on their property or under their control.

4.10 No person shall cause or allow any open burning when a burn ban has been issued by the Delaware State Fire Marshal, even though the activities would have otherwise been permitted by this Regulation.

4.11 This regulation shall not be construed to permit open burning where it is otherwise prohibited.

4.12 No person shall burn for the purpose of land clearing except as permitted in 6.2.2 of this regulation.

[xx/xx/07 04/11/07]

5.0 Season and Time Restrictions

5.1 No person shall cause or allow any open burning from May 1 through September 30, without prior

written approval by the Department. The Department may grant approval to conduct open burning between May 1 and September 30 for circumstances that threaten the health, safety, or welfare of a person or persons. ~~[The applicant must demonstrate to the satisfaction of the Department that such circumstances pose a more serious threat than the health threat posed by the open burning. Approval will be granted to applicants on a case by case basis.]~~

[5.1.1 The applicant must demonstrate to the satisfaction of the Department that such circumstances pose a more serious threat than the health threat posed by the open burning; or

5.1.2 The applicant will consult with the Delaware Department of Agriculture to insure that the proposed open burning activity meets best management practices prior to the Department approving requests for an emergency agricultural/silvicultural open burning activity during the ozone season; and

5.1.3 Approval will be granted by the Department to applicants on a case-by-case basis.]

5.2 No person shall cause or allow open burning, as permitted by this regulation, except between the hours of 8:00 a.m. and 4:00 p.m.

5.3 Burning outside of the hours permitted in 5.2 of this regulation may only be conducted, if the person causing or allowing the fire meets the following criteria:

5.3.1 In order to burn during extended hours, the person causing or allowing the open burn must submit an application to the Department containing documentation sufficient to satisfy the Department that burning outside of the permissible hours will lead to smoke reduction, or a more efficient, complete, or safer burn; and

5.3.2 Approval to burn during extended hours is given by the Department before such burning takes place.

~~[xx/xx/07 04/11/07]~~

6.0 Allowable Open Burning

6.1 Open burning, as permitted by this regulation, may be conducted without prior approval of the Department, except as provided in 5.1, 5.3, 6.2.2, 6.2.3, and 6.2.4 of this regulation.

6.2 Subject to other restrictions in this regulation, open burning may occur for the exclusive purposes of:

6.2.1 Domestic burning of brush, branches, and limbs that have been cut from trees or shrubbery originating on the premises and conducted by individuals domiciled in a private dwelling on the premises, of a size no greater than 27 cubic feet of material, in total, to be burned and where burning is conducted as far as practicable from any adjacent property;

6.2.2 Clearing land in agricultural use and clearing land in silvicultural operations of vegetative material in order to cultivate and/or to prepare the soil for the purpose of producing crops or supporting livestock, provided that:

6.2.2.1 ~~[The applicant documents to the satisfaction of the Department that burning in the most effective method to achieve this purpose; and~~ The applicant notifies and provides the Department with information regarding the proposed open burning activity on the Department's approved form; and]

6.2.2.2 **[Permission Approval]** to burn is given in writing by the Department before such burning takes place; and

6.2.2.3 The ability to utilize open burning for purposes of clearing land pursuant to this section shall not apply to land on which residential, industrial or commercial house, dwellings or other structures are constructed with a period of five years after the land clearing by burning takes place. In the even a person is found to have violated the requirements of 6.2.2, in that actions are taken after the burn sot that the burn no longer qualifies as allowable because it falls outside the scope of this exception, the Department, in addition to pursuing an enforcement action for violating this regulation, may recover through its enforcement action an amount equal to the savings that the violator incurred by clearing the land by burning as opposed to using traditional clearing methods.

[6.2.3 Maintaining the land which includes perimeter field maintenance and crop residue management in continued agricultural operations to produce crops or support livestock, provided that:

6.2.3.1 The applicant notifies and provides the Department with information regarding the proposed open burning activity on the Department's approved form; and

6.2.3.2 The applicant receives confirmation by the Department of receipt of the complete application before such burning takes place.]

6.2.~~[3 4]~~Prescribed burning for conservation practices, wildlife habitat management, or plant, pest, or disease control, provided that:

6.2.~~[3 4]~~.1 The applicant documents to the satisfaction of the Department that prescribed burning is the most effective method to achieve this purpose; and

6.2.~~[3 4]~~.2 ~~[Permission Approval]~~ to burn is given by the Department before such burning takes place;

6.2.~~[4 5]~~ The demolition by intentional burning of a structure solely for fire fighting instruction conducted by authorized fire companies, provided that:

6.2.~~[4 5]~~.1The fire company documents to the satisfaction of the Department that all building fixtures such as hot water heaters, boilers and air conditioning units, all materials including household appliances and/or refuse, have been removed from the building prior to burning any portion of the building; and

6.2.~~[4 5]~~.2The fire company documents that any internal asbestos containing materials (including pipe coverings and other insulation) and any external asbestos containing materials (including siding) have been removed from the building prior to burning any portion of the building, and that the 10-day notification of this demolition activity, as required by EPA and the Department has been submitted; and

6.2.~~[4 5]~~.3The fire company documents that it is familiar with the Delaware State Fire Prevention Regulations and it will comply with those regulations and all other applicable health and safety regulations; and

6.2.~~[4 5]~~.4Permission to burn is given by the Department before such burning takes place.

[6.2.6 Fire fighting instruction that involves burning materials other than structures (e.g. vegetation - wild land fires; fuels used to simulate industrial scale fires) by established fire companies or government agencies (e.g. Delaware Forest Service), provided that:

6.2.6.1 The applicant documents to the satisfaction of the Department that burning is the most effective method to achieve this purpose; and

6.2.6.2 Approval to burn is given by the Department before such burning takes place.]

[~~xx/xx/07~~ 04/11/07]

7.0 Exemptions.

The following operations are exempt from 4.5 of this regulation, and from all provisions of 5.0 and 6.0 of this regulation, provided that the fire is no larger than reasonably necessary to meet the purpose of the activity:

7.1 Fires used for cooking of food for human consumption of a size no greater than 10 cubic feet of material, in total, to be burned, where only the following materials are burned: unpainted and untreated wood, charcoal, propane, or natural gas;

7.2 Recreational fires such as campfires of a size no greater than 27 cubic feet of material, in total, to be burned, where only unpainted and untreated wood is burned;

7.3 Ceremonial fires of a size no greater than 27 cubic feet of material, in total, to be burned, by established groups or tribes, provided that only unpainted and untreated wood is burned;

7.4 Emergency signaling flares;

7.5 Emergency burning or use of any other appropriate technique, by governmental agencies or fire companies to control or suppress on-going fires;

7.6 Fire fighting instruction conducted by the Delaware State Fire School ~~[and by established fire companies on a case by case basis after submitting an application and obtaining specific approval of that application from the Air Quality Management Section of the Department].~~

10 DE Reg. 1621 (04/01/07) (Final)