

**Secretary's Amended and Superseding Order 2010-W-0035**

**RE: Approving Final Amendments to 7 DE Admin. Code 7401,  
*State of Delaware Surface Water Quality Standards***

**Date of Issuance: May 17, 2011**

**Effective Date of the Amendment: June 11, 2011**

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control (“Department” or “DNREC”) under Chapter 60 and the *State of Delaware Surface Water Quality Standards* (as amended July 11, 2004), the following findings, reasons and conclusions are entered as an Amended and Superseding Order of the Secretary in the above-referenced rulemaking proceeding.

Whereas, Secretary's Order No. 2010-W-0035 (the “Original Order”) was signed by Secretary O'Mara on November 9, 2010, and forwarded to the *State of Delaware Register of Regulations* for publication in the December 1, 2010 Register. The Original Order recommended that the Department's proposed Amendments should be adopted as final regulations because Delaware would then be enabled to (1) ensure compliance with the federal Clean Water Act and will satisfy EPA requirements; and would then be able to (2) retain its ability to perform site-specific studies on inorganic arsenic in fish and shellfish when warranted, and to issue public health advisories when and where appropriate, to not only reduce the public's exposure to inorganic arsenic, but to also provide the means to justify water quality based controls. Moreover, the regulation amendments were well supported by documents in the record; and

Whereas, subsequent to the Department forwarding the Original Order to the *Delaware Register of Regulations*, it was realized that the entire promulgation process

involved with this particular action had been pending for over 12 months, with the public hearing having been held on September 2, 2009. Pursuant to 29 Del.C.§10118(f), “No agency shall adopt a regulation if more than 12 months have elapsed since the end of the public comment period or the last public hearing, whichever is later, on the proposed regulation.”; and

Whereas, in order to correct the record in this matter and have this promulgation be compliant with 29 Del.C.§10118(f) as noted above, the Department re-opened the comment period to the public for additional comments on the proposed Amendments to the *State of Delaware Surface Water Quality Standards* (as amended July 11, 2004) for a period of 30 days, beginning on March 1, 2011, and ending at close of business on April 1, 2011. Accordingly, the Department published a formal notice of the re-opening of this record in the Delaware Register of Regulations, and made all information (i.e., the proposed regulation and all supporting documents) available for review once again on the Department’s website; and

Whereas, on April 14, 2011, the Watershed Assessment Section of the Department provided an email to Hearing Officer Lisa A. Vest, which confirmed that the Department had received no additional comments whatsoever on the proposed Amendments to the *State of Delaware Surface Water Quality Standards* during the aforementioned 30 day period (from March 1, 2011 through April 1, 2011); and

Whereas, given the fact that no additional comment was received by the Department during the aforementioned 30 day period, no changes have been made to the proposed regulatory language as set forth previously in the August 1, 2009 *Delaware Register of Regulations*; and

Therefore, the Original Order is hereby amended and superseded by this *revised* Order, so as to reflect the correction of the record by the re-opening of the record to include an additional 30-day comment period as noted above, thereby making this promulgation compliant with 29 Del.C.§10118(f) as noted above.

### **Background and Procedural History**

This Order considers the proposed regulatory amendments to 7 DE Admin. Code 7401, *State of Delaware Surface Water Quality Standards*. The purpose of this regulatory action is to ensure federal compliance with the Clean Water Act, and to satisfy current EPA requirements regarding same. It is the policy of the Department to maintain within its jurisdiction surface waters of the State of Delaware of satisfactory quality, consistent with public health and public recreation purposes, the propagation and protection of fish and aquatic life, and other beneficial uses of the water. Where conflicts develop between stated surface water uses, stream criteria, or discharge criteria, designated uses for each segment are paramount in determining the required stream criteria, which, in turn, become the basis of specific discharge limits or other necessary controls. Additionally, where existing facilities operating under a permit from this Department are required to reduce pollution concentrations or loadings due to the implementation of these Standards, a reasonable schedule for compliance may be granted by DNREC, in accordance with standards or requirements established in applicable statutes and regulations. It is also the intent of the Department, in accordance with these Standards, to develop an agency-wide program to assess, manage, and communicate human health cancer risks from the major categories of environmental pollution under its jurisdiction.

The aforementioned proposed amendments to Delaware's existing Surface Water Quality Standards are the result of an exhaustive and comprehensive triennial review that started with DNREC Start Action Notice #2008-24, approved by the Secretary on October 29, 2008. The Department published the proposed regulatory amendments in the August 1, 2009 *Delaware Register of Regulation* and held a public hearing on September 2, 2009. The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated October 12, 2010 (Report). The Report recommends certain findings and the adoption of the proposed Amendments as attached to the Report as Appendix A.

Subsequently, in order to correct the record in this matter and have this promulgation be compliant with 29 Del.C.§10118(f) as noted above, the Department re-opened the comment period to the public for additional comments on the proposed Amendments to the *State of Delaware Surface Water Quality Standards* (as amended July 11, 2004) for a period of 30 days, beginning on March 1, 2011, and ending at close of business on April 1, 2011. On April 14, 2011, the Watershed Assessment Section of the Department provided an email to Hearing Officer Lisa A. Vest, which confirmed that the Department had received no additional comments whatsoever on the proposed Amendments to the *State of Delaware Surface Water Quality Standards* during the aforementioned 30 day period, and therefore no changes have been made to the proposed regulatory language as set forth previously in the August 1, 2009 *Delaware Register of Regulations*.

### **Findings and Discussion**

I find that the proposed Amendments are well-supported by the record developed by the Department, and adopt the Report to the extent it is consistent with this Order. The Department's experts developed the record and drafted the proposed Amendments. Throughout the entire regulatory development process regarding this promulgation, the Department received public comment, as noted in the Report, and considered and responded to all timely and relevant public comments in making its determination.

I find that the Department's experts in the Watershed Assessment Section of the Division of Watershed Stewardship fully developed the record to support adoption of these Amendments. With the adoption of the regulation amendments to 7 DE Admin. Code 7401, *State of Delaware Surface Water Quality Standards*, Delaware will be able to ensure compliance with the federal Clean Water Act and will satisfy EPA requirements.

In conclusion, the following findings and conclusions are entered:

- 1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these proposed Amendments as final;
- 2.) The Department provided adequate public notice of the proposed Amendments, and provided the public with an adequate opportunity to comment on the proposed Amendments, including at a public hearing;
- 3.) The Department held a public hearing on September 2, 2009 on the proposed Amendments in order to consider public comments before making any final decision, and fully considered and responded to all timely and relevant comments received from the regulated community concerning this matter;

4) The Department's Hearing Officer's Report, including its recommended record and the recommended Amendment as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;

5.) The recommended Amendments do not reflect any substantive change from the proposed regulation Amendment as published in the August 1, 2009, *Delaware Register of Regulations*;

6.) The recommended Amendments should be adopted as final regulation Amendments because Delaware will then be enabled to (1) ensure compliance with the federal Clean Water Act and will satisfy EPA requirements; and will (2) retain its ability to perform site-specific studies on inorganic arsenic in fish and shellfish when warranted, and to issue public health advisories when and where appropriate, to not only reduce the public's exposure to inorganic arsenic, but to also provide the means to justify water quality based controls. Moreover, the regulation amendments are well supported by documents in the record; and

7.) The Department shall submit this Order approving the final regulation to the *Delaware Register of Regulations* for publication in its next available issue, and provide such other notice as the law and regulation require and the Department determines is appropriate.

/s/ Collin P. O'Mara  
Collin P. O'Mara  
Secretary