



STATE OF DELAWARE  
**DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL**

OFFICE OF THE  
SECRETARY

89 KINGS HIGHWAY  
DOVER, DELAWARE 19901

PHONE: (302) 739-9000  
FAX: (302) 739-6242

**Secretary's Order No.: 2017-EC-0017**

**RE: Approving Final Regulatory Repeal of 7 DE Admin. Code 2102:  
*Implementation of the Renewable Energy Portfolio Standards  
Cost Cap Revisions***

**Date of Issuance: July 3, 2017**

**Effective Date of the Repeal: August 11, 2017**

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") pursuant to 29 *Del.C.* §8003(7), the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced regulatory proceeding.

**Background, Procedural History and Findings of Fact**

This Order relates to the proposed regulatory repeal of 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions* ("RPS Cost Cap Regulations"), previously promulgated by DNREC in 2016 to direct when and how the Department's Director of the Division of Energy & Climate ("DEC") may freeze implementation of the Renewable Portfolio Standards ("RPS") under 26 *Del.C.* §354(i) & (j). The purpose of this action is to repeal the Department's existing 7 DE Admin. Code 2102, in order to be consistent with the State of Delaware Public Service Commission

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(“PSC”) Regulation No. 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*, and to be compliant with a recent commitment made to Delaware Superior Court Judge Abigail LeGrow in the matter of *DPA v. DNREC* (litigation initiated by the State of Delaware’s Division of the Public Advocate to challenge 7 DE Admin. Code 2102).

Delaware’s *Renewable Energy Portfolio Standards Act*, as amended by Senate Substitute 1 to Senate Bill 119 in June 2010, includes a cost cap provision for regulated electric utilities. According to that provision, the Department’s Director of the DEC may freeze the RPS if the cost of compliance exceeds 3% of the total retail costs of electricity for the RPS as a whole, or 1% of total retail costs of electricity for solar photovoltaic. 7 DE Admin. Code 2102 directs how the Department’s DEC calculates the cost of compliance, directs how the DEC Director decides whether and when to freeze the RPS, and directs how said Director decides whether and when to lift a freeze.

DNREC initially promulgated the aforementioned RPS Cost Cap Regulations in response to a Petition for Rule-making filed with its DEC on November 2, 2011. Thereafter, the Department’s Start Action Notice (“SAN”) No. 2012-03 was signed by then DNREC Secretary Collin O’Mara on April 16, 2012, and the initial proposed new regulation was published in the *Delaware Register of Regulations* on December 1, 2013. Over the course of the following two and half years, two work group sessions and three public hearings were held by the Department regarding this proposed regulatory action. Members of the public attended those public hearings, and many provided comment to the Department on the draft regulation throughout DNREC’s formal regulatory development process. Three draft regulations were published before the final regulation

was published in the *Delaware Register of Regulations* on January 1, 2016. Subsequent to said regulation having become effective on January 11, 2016, the first annual Director's Determination (pursuant to 7 DE Admin. 2102) was finalized in April of 2016.

The State of Delaware's Division of the Public Advocate ("DPA") filed parallel lawsuits in Delaware's Superior Court in 2016, which initiated litigation against both DNREC and the Public Service Commission ("Commission", "PSC") regarding the above-referenced RPS regulatory provisions. In December of 2016, Judge Abigail LeGrow issued a Memorandum Opinion in *DPA v. PSC*, which directed the PSC to revise its Regulation No. 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*, pursuant to its statutory authority under 26 Del.C. §362(b). The PSC decided not to appeal Judge LeGrow's Opinion, and thereafter, the Commission commenced the process for promulgating its own regulations consistent with the Court's decision. In light of the PSC's decision, DNREC chose to take a collaborative course of action with the Commission, and began the process to formally repeal its RPS Cost Cap Regulations.

It should be noted that DNREC did not concede any of the arguments made to Judge LeGrow in *DPA v. DNREC*. Instead, on January 30, 2017, DNREC wrote Judge LeGrow to ask for a stay in said case, to allow time to formally repeal 7 DE Admin. Code 2102, pursuant to Delaware's Administrative Procedures Act. On February 1, 2017, Judge LeGrow agreed that it was procedurally premature to issue an order voiding 7 DE Admin. Code 2102, and granted the stay. Judge LeGrow further held that once DNREC had completed the process to formally repeal its RPS Cost Cap Regulations, the Court would dismiss DPA's appeal as moot at that time.

The Department has the statutory basis and legal authority to act with regard to the proposed repeal of 7 DE Admin. Code 2102, pursuant to 29 *Del.C.* §8003(7). The repeal of an existing regulation requires the same public process as either adopting or amending an existing regulation. Thus, the Department's Division of Energy and Climate commenced its regulatory repeal of 7 DE Admin. Code 2102 with the approval of SAN No. 2017-02, signed by then DNREC Secretary David Small on February 10, 2017. Accordingly, the proposed regulatory repeal of 7 DE Admin. Code 2102 (illustrated as a strike-through of the entire existing regulatory text) was published in the *Delaware Register of Regulations* on March 1, 2017, and a public hearing was held on March 22, 2017. Consistent with 29 *Del.C.* §10118(a), the public hearing record remained open for public comment through April 7, 2017.

Members of the public attended the March 22, 2017 public hearing, and comment was received by the Department throughout the course of this regulatory process, all of which voiced support for the formal repeal of 7 DE Admin. Code 2102. It should be noted that all proper notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

Hearing Officer Vest prepared a Hearing Officer's Report dated June 15, 2017 ("Report"). The Report documents the proper completion of the required regulatory amendment process, establishes the record, and recommends the formal repeal of 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions* as attached to the Report as Appendix "B".

## Reasons and Conclusions

Based on the record developed by the Department's experts and established by the Hearing Officer's Report, I find that the proposed regulatory repeal of 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions*, is well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed regulatory repeal be promulgated as final.

I find that the Department's experts in the Division of Energy and Climate fully developed the record to support adoption of this regulatory repeal. The repeal of 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions* will allow Delaware to be consistent with the State of Delaware Public Service Commission ("PSC") Regulation No. 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*, and to be compliant with a recent commitment made to Delaware Superior Court Judge Abigail LeGrow in the matter of *DPA v. DNREC*.

In conclusion, the following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to the proposed regulatory repeal to 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions*, pursuant to 29 Del.C. §8003(7);
2. The Department has jurisdiction under its statutory authority, pursuant to 29 Del.C. §8003(7), to issue an Order adopting the proposed repeal of 7 DE Admin. Code 2102 as final;

3. The Department provided adequate public notice of the proposed regulatory repeal and all proceedings in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on the proposed regulatory repeal, including at the time of the public hearing held on March 22, 2017, and held the record open through close of business on April 7, 2017, consistent with 29 *Del.C.* §10118(a), in order to consider public comment on the proposed regulatory repeal before making any final decision;

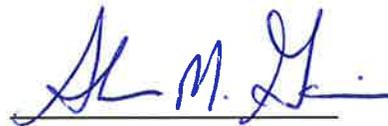
4. The Department's Hearing Officer's Report, including its established record and the recommended proposed regulatory repeal as set forth in Appendix "B", are hereby adopted to provide additional reasons and findings for this Order;

5. The proposed regulatory repeal of 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions*, will enable the Department to be consistent with the State of Delaware Public Service Commission ("PSC") Regulation No. 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*, and to be compliant with a recent commitment made to Delaware Superior Court Judge Abigail LeGrow in the matter of *DPA v. DNREC*;

6. The Department has reviewed these proposed regulatory repeal in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch.104, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;

7. The Department's proposed regulatory repeal, as published in the March 1, 2017 *Delaware Register of Regulations*, and as set forth in Appendix "B" as noted above, is adequately supported, is not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it is approved as a final regulatory repeal, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and

8. The Department shall submit this Order approving as final the proposed repeal of 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions* 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.



Shawn M. Garvin  
Secretary



## HEARING OFFICER'S REPORT

**TO:** The Honorable Shawn M. Garvin  
Cabinet Secretary, Department of Natural Resources and Environmental Control

**FROM:** Lisa A. Vest   
Public Hearing Officer, Office of the Secretary  
Department of Natural Resources and Environmental Control

**RE:** **Proposed Regulatory Repeal of 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions***

**DATE:** June 15, 2017

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### **I. BACKGROUND AND PROCEDURAL HISTORY:**

A public hearing was held on Wednesday, March 22, 2017, at 6:00 p.m. by the Department of Natural Resources and Environmental Control (“DNREC”, “Department”), at the Public Service Commission Conference Room Auditorium, 861 Silver Lake Blvd., Dover, Delaware to receive comment on the proposed regulatory repeal of 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions* (“RPS Cost Cap Regulations”), previously promulgated by DNREC in 2016 to direct when and how the Department’s Director of the Division of Energy & Climate (“DEC”) may freeze implementation of the Renewable Portfolio Standards (“RPS”) under 26 *Del.C.* §354(i) & (j). The purpose of this action is to formally repeal the Department’s existing 7 DE Admin. Code 2102, in order to be consistent with the State of Delaware Public Service Commission (“PSC”) Regulation No. 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*, and to be compliant with a recent commitment made to Delaware Superior Court Judge Abigail LeGrow in the matter of *DPA v. DNREC* (litigation initiated by the State of Delaware’s Division of the Public Advocate to challenge 7 DE Admin. Code 2102).

Delaware's *Renewable Energy Portfolio Standards Act*, as amended by Senate Substitute 1 to Senate Bill 119 in June 2010, includes a cost cap provision for regulated electric utilities. According to that provision, the Department's Director of the DEC may freeze the RPS if the cost of compliance exceeds 3% of the total retail costs of electricity for the RPS as a whole, or 1% of total retail costs of electricity for solar photovoltaic. 7 DE Admin. Code 2102 directs how the Department's DEC calculates the cost of compliance, directs how the DEC Director decides whether and when to freeze the RPS, and directs how said Director decides whether and when to lift a freeze.

DNREC initially promulgated the aforementioned RPS Cost Cap Regulations in response to a Petition for Rule-making filed with its DEC on November 2, 2011. Thereafter, the Department's Start Action Notice ("SAN") No. 2012-03 was signed by then DNREC Secretary Collin O'Mara on April 16, 2012, and the initial proposed new regulation was published in the *Delaware Register of Regulations* on December 1, 2013. Over the course of the following two and half years, two work group sessions and three public hearings were held by the Department regarding this proposed regulatory action. Members of the public attended those public hearings, and many provided comment to the Department on the draft regulation throughout DNREC's formal regulatory development process. Three draft regulations were published before the final regulation was published in the *Delaware Register of Regulations* on January 1, 2016. Subsequent to said regulation having become effective on January 11, 2016, the first annual Director's Determination (pursuant to 7 DE Admin. 2102) was finalized in April of 2016.

The State of Delaware's Division of the Public Advocate ("DPA") filed parallel lawsuits in Delaware's Superior Court in 2016, which initiated litigation against both DNREC and the Public Service Commission ("Commission", "PSC") regarding the above-referenced RPS regulatory provisions. In December of 2016, Judge Abigail LeGrow issued a Memorandum Opinion in *DPA v. PSC*, which directed the PSC to revise its Regulation No. 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*, pursuant to its statutory authority under 26 *Del.C.* §362(b). The PSC decided not to appeal Judge LeGrow's Opinion, and thereafter, the Commission commenced the process for promulgating its own regulations consistent with the Court's decision. In light of the PSC's decision, DNREC chose to take a collaborative course of action with the Commission, and began the process to formally repeal its RPS Cost Cap Regulations.

It should be noted that DNREC did not concede any of the arguments made to Judge LeGrow in *DPA v. DNREC*. Instead, on January 30, 2017, DNREC wrote Judge LeGrow to ask for a stay in said case, to allow time to formally repeal 7 DE Admin. Code 2102, pursuant to Delaware's Administrative Procedures Act. On February 1, 2017, Judge LeGrow agreed that it was procedurally premature to issue an order voiding 7 DE Admin. Code 2102, and granted the stay. Judge LeGrow further held that once DNREC had completed the process to formally repeal its RPS Cost Cap Regulations, the Court would dismiss DPA's appeal as moot at that time.

The Department has the statutory basis and legal authority to act with regard to the proposed repeal of 7 DE Admin. Code 2102, pursuant to 29 *Del.C.* §8003(7). The repeal of an existing regulation requires the same public process as either adopting or amending an existing regulation. Thus, the Department's Division of Energy and Climate commenced its proposed regulatory repeal of 7 DE Admin. Code 2102 with the approval of SAN No. 2017-02, signed by

then DNREC Secretary David Small on February 10, 2017. Accordingly, the proposed repeal of 7 DE Admin. Code 2102 (illustrated as a strike-through of the entire existing regulatory text) was published in the *Delaware Register of Regulations* on March 1, 2017, and a public hearing was held on March 22, 2017.

Members of the public attended the March 22, 2017 public hearing, and comment was received by the Department throughout the course of this proposed promulgation, all of which will be discussed further below. It should also be noted that all proper notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

## **II. SUMMARY OF THE PUBLIC HEARING RECORD:**

The public hearing record consists of the following documents: (1) a verbatim transcript; (2) five documents introduced by responsible Department staff at the public hearing held on March 22, 2017, and marked by this Hearing Officer accordingly as Department Exhibits 1-5 accordingly; and (3) Technical Response Memorandum (“TRM”), provided to this Hearing Officer by Thomas Noyes, Principal Planner for Utility Policy, DEC, dated June 2, 2017. The Department’s person primarily responsible for the drafting and overall promulgation of these proposed Amendments, Thomas Noyes, developed the record with the relevant documents in the Department’s files.

As noted previously, the purpose of this proposed regulatory promulgation is to formally repeal the Department’s existing 7 DE Admin. Code 2102, in order to be consistent with the State of Delaware Public Service Commission (“PSC”) Regulation No. 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*, and to be compliant with a recent commitment made to Delaware Superior Court Judge Abigail LeGrow in the matter of

*DPA v. DNREC*. The proposed regulatory repeal of 7 DE Admin. Code 2102 was published in the *Delaware Register of Regulations* on March 1, 2017, and a public hearing was held on March 22, 2017, as noted above. Members of the public attended said public hearing, and comment was offered to the Department throughout the course of this proposed regulatory promulgation. Pursuant to Delaware law, the record initially remained open for fifteen (15) additional days subsequent to the date of the public hearing, for the purpose of receiving additional public comment regarding these proposed Amendments. The hearing record closed for comment on Friday, April 7, 2017.

Subsequent to the close of this hearing record, the Department's DEC thoroughly reviewed all comment received from the public in this matter, and provided this Hearing Officer with a formal Technical Response Memorandum ("TRM"), dated June 2, 2017. This TRM provided a balanced discussion of the comment received, and provided the Department's reasoning for all action taken by the Department concerning this proposed repeal of 7 DE Admin. Code 2102. It should be noted that all comment received by the Department in this matter voiced support of the proposed repeal of DNREC's RPS Cost Cap Regulation, and the Department sees no reason not to proceed with said repeal at this time.

As set forth in the Department's TRM, DNREC agrees that the DEC Director's authority to declare a freeze is "...conferred by the statute, and not the regulation." Additionally, the TRM notes that the actual "...basis for any future decisions as to whether to freeze or not freeze the RPS are not at issue in this proceeding." For the Secretary's review, a copy of the aforementioned TRM provided by the Department's DEC is attached hereto as Appendix "A", and a copy of the Department's proposed repeal of 7 DE Admin. Code 2102 is attached hereto as

Appendix “B”. Again, all proper notification and noticing requirements concerning this proposed promulgation were met by the Department in this matter.

**III. RECOMMENDED FINDINGS AND CONCLUSIONS:**

Based on the record developed, I find and conclude that the Department has provided appropriate reasoning regarding the need for the proposed repeal of 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions*, as noted above. Accordingly, I recommend promulgation of said proposed repeal in the customary manner provided by law.

Further, I recommend the Secretary adopt the following findings and conclusions:

1. The Department has the statutory basis and legal authority to act with regard to the proposed regulatory repeal to 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions*, pursuant to 29 *Del.C.* §8003(7);
2. The Department has jurisdiction under its statutory authority, pursuant to 29 *Del.C.* §8003(7), to issue an Order adopting the proposed repeal of 7 DE Admin. Code 2102 as final;
3. The Department provided adequate public notice of the proposed regulatory repeal and all proceedings in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on the proposed regulatory repeal, including at the time of the public hearing held on March 22, 2017, and held the record open through close of business on April 7, 2017, consistent with 29 *Del.C.* §10118(a), in order to consider public comment on the proposed regulatory repeal before making any final decision;

4. The proposed regulatory repeal of 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions*, will enable the Department to be consistent with the State of Delaware Public Service Commission (“PSC”) Regulation No. 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*, and to be compliant with a recent commitment made to Delaware Superior Court Judge Abigail LeGrow in the matter of *DPA v. DNREC*;

5. The Department has reviewed this proposed regulatory repeal in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;

6. The Department’s proposed regulatory repeal, as published in the March 1, 2017 *Delaware Register of Regulations*, and as set forth in Appendix “B” hereto, is adequately supported, is not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulatory repeal, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and

7. The Department shall submit the proposed regulatory repeal as a final regulatory repeal of 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions* to the *Delaware Register of Regulations* for publication in its next available issue, and shall provide such other notice as the law and regulation require and the Department determines is appropriate.



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LISA A. VEST  
Public Hearing Officer

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Attachments/Appendix:  
Appendix A: DEC TRM (06/02/17)  
Appendix B: Proposed Regulatory Repeal

## **APPENDIX “A”**





STATE OF DELAWARE  
 DIVISION OF ENERGY & CLIMATE  
 100 W. WATER STREET  
 SUITE 5A  
 DOVER, DELAWARE 19904

EXHIBIT  
 tabbies  
 Ex. #3 (LAN)

RECEIVED  
 JUN 13 2017  
 DNREC Hearing Officer

Phone: (302) 735-3480  
 www.dnrec.delaware.gov/energy

Department of Natural Resources  
 and Environmental Control

MEMORANDUM

TO: Lisa Vest, Hearing Officer

THRU: Susan Love, Acting Director, Division of Energy & Climate *SL 6/7/17*

THRU: Robert Underwood, Energy Program Administrator,  
 Division of Energy & Climate *RU 6-2-17*

FROM: Thomas Noyes, Principal Planner for Utility Policy,  
 Division of Energy & Climate *TN*

DATE: June 2, 2017

SUBJECT: Repeal of DNREC Regulation 2102 Implementation of Renewable Energy  
 Portfolio Standards Cost Cap Provisions

You presided over a hearing on the Repeal of DNREC Regulation 2102 *Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions* (Reg. 2102) on March 22, 2017 at 6:00 p.m. in the Public Service Commission hearing room, 861 Silver Lake Boulevard, Dover, Delaware. Heather Thomson of the Mid-Atlantic Renewable Energy Coalition (MAREC) and John Nichols spoke at the public hearing.

The public comment period closed on April 7. The Caesar Rodney Institute and the Mid-Atlantic Renewable Energy Coalition submitted written comments. Mr. Nichols submitted several exhibits for the record.

I have reviewed the comments and exhibits submitted for the public record. The following comments and exhibits are referred to in this memorandum:

- ▶ DNREC Start Action Notice 2017-02
- ▶ PowerPoint presentation by Thomas Noyes at the hearing, March 22, 2017
- ▶ Transcript of hearing held March 22, 2017 (Hearing transcript)
- ▶ Memorandum Opinion of Judge Abigail LeGrow issued December 30, 2016

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- ▶ Powerpoint presentation by Thomas Noyes at the hearing, March 22, 2017
- ▶ Transcript of hearing held March 22, 2017 (Hearing transcript)
- ▶ Memorandum Opinion of Judge Abigail LeGrow issued December 30, 2016
- ▶ Letter to Judge LeGrow by Deputy Attorney General Devera Scott dated January 30, 2017
- ▶ Order by Judge LeGrow granting stay in *DPA v. DNREC* dated February 1, 2017
- ▶ Comments of David T. Stevenson on behalf of the Caesar Rodney Institute (CRI comments)
- ▶ Comments of Bruce Burcat on behalf of the Mid-Atlantic Renewable Energy Coalition (MAREC comments)
- ▶ Exhibits submitted by John Nichols

This memorandum provides a summary of the comments received and the response of the DNREC Division of Energy & Climate. Having reviewed the comments, the Department has concluded that the proposed repeal of DNREC Regulation 2102 Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions would be appropriate and in the public interest.

## **Background**

DNREC promulgated Regulation 2102, *Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions* in response to a petition for rulemaking more than five years ago. The public record of that proceeding can be found online at <http://www.dnrec.delaware.gov/energy/information/otherinfo/Pages/Renewable.aspx>.

DNREC Regulation 2102 is being repealed to comply with a commitment made to Superior Court Judge Abigail LeGrow in the lawsuit *Division of the Public Advocate (DPA) v. DNREC* challenging Regulation 2012. In a related matter, Judge LeGrow issued a Memorandum Opinion in *DPA v. Public Service Commission* directing the Commission to revise its Regulation 3008. The Commission decided not to appeal Judge LeGrow's Opinion, and thereafter, the Commission commenced the process for promulgating regulations consistent with the Court's decision. In light of the Commission's decision, DNREC chose to take a collaborative course of action with the Commission and begin the process to rescind Regulation 2102. DNREC did not concede any of the arguments made to Judge LeGrow in *DPA v. DNREC*. Instead, DNREC wrote Judge LeGrow to ask for a stay in *DPA v. DNREC* to allow time to repeal Reg. 2102 through the Administrative Procedures Act. On February 1, 2017, Judge LeGrow agreed that it was procedurally premature to issue an order voiding Regulation 2102. Judge LeGrow held that once DNREC had completed the process to rescind Regulation 2102, the Court would dismiss DPA's appeal as moot.

Secretary David Small signed Start Action Notice 2017-02 on February 13, 2017, which began the process of repealing Reg. 2102. Repeal of a regulation is handled in the same way as the amendment of a regulation, except that in this case the amendment is to strike the text of the regulation in its entirety.

## **Review of Comments**

David Stevenson, representing the Caesar Rodney Institute (CRI) submitted comments supporting the repeal of Reg. 2102:

We concur with this repeal for the following reasons:

- 1) The Public Service Commission (PSC) has recently reopened its Regulation Docket No. 56 to revise Regulation 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*, pursuant to its authority under 26 Del.C. §362 (b).
- 2) The PSC is reacting to a Superior Court ruling, C.A. N15A-12-002 AML, dated December 30, 2016, upholding the claim by the Delaware Public Advocate and the Caesar Rodney Institute the PSC incorrectly delegated authority to write this regulation to the Division of Energy & Climate pursuant to the clear language in the Renewable Portfolio Standards Act, and remanding the issue to the PSC for proceedings in accordance with the Court's decision.  
(CRI comments, p.1)

MAREC also cites Judge LeGrow's decision as reason for the repeal:

In the case of *Bonar v. Public Service Commission* ("PSC"), the Superior Court Judge rendered a decision that the PSC has the authority to issue regulations governing the RPS cost cap, not the Department of Natural Resources and Environmental Control ("DNREC"). A decision in the related case of *Bonar v. DNREC* is being held while DNREC repeals its regulation administratively. MAREC supports DNREC's actions to repeal its regulation, as this will help clarify the administration of the cost cap, it is consistent with the Court's decision and importantly, it retains DNREC's statutory authority to make the decision as to whether to implement the freeze.  
(MAREC comments, pp. 1-2)

MAREC also pointed out that DNREC's authority to decide whether to freeze the RPS is grounded in the statute, not Reg. 2102:

Furthermore, this decision does not remove the authority of DNREC to consider all of the costs and benefits of the renewable portfolio standards when exercising its authority.  
(MAREC comments, p. 2)

MAREC referred to the Renewable Energy Portfolio Standards Act's (REPSA) rationale in support of DNREC's authority in the RPS cost cap:

Renewable portfolio standards are enacted to support not just the electricity needs of the state, but also its goals of environmental protection, promoting the development of renewable energy in the state, reliability, and economic and health benefits. These benefits also need to be considered when evaluating the value of the RPS, and measured against the direct costs.  
(MAREC comments, p. 2)

MAREC reinforced its view of DNREC's statutory authority in its conclusion:

Therefore, MAREC supports the decision to repeal Regulation 2102: Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions and leave statutory authority to make the decision to implement the freeze to DNREC.  
(MAREC comments, p. 2)

John Nichols spoke at the public hearing and submitted four attachments in support of the repeal:

I wanted to thank the Department for repealing Regulation 2102.  
(Hearing transcript, pp. 8-9)

Mr. Nichols devoted the bulk of his comments to various issues involving Bloom Energy, including questions of environmental enforcement, which are not at issue in this proceeding. He voiced his dissatisfaction with several particulars of Reg. 2102, including the cost cap calculations, the way Bloom Energy surcharges were considered and the use of externality benefits were considered in the decision of whether to freeze.

### **Rationale for the Repeal of Reg. 2102**

All of the comments presented supported the proposed repeal of Reg. 2102. No comments opposing the repeal were presented. The Department sees no reason not to proceed with the repeal of Reg. 2102.

### **DNREC's Authority to Decide the RPS Cost Cap under REPSA**

DNREC agrees that the Director's authority to declare a freeze is conferred by the statute and not the regulation, while noting that the basis for any future decisions as to whether to freeze or not freeze the RPS are not at issue in this proceeding. The sole purpose of this proceeding is to repeal Reg. 2102 as agreed to before Judge LeGrow.

### **Other Issues Raised**

As for the other issues John Nichols raised in his oral and written comments, these questions are either mooted by the repeal of Reg. 2102 or are not directly related to the matter of repealing Reg. 2102, and the Department does not address them in this memorandum.

### **Conclusion**

All comments offered in this matter were in support of the repeal of Reg. 2102. The Department recommends that the repeal proceed without delay.

## **APPENDIX “B”**



# PROPOSED REGULATIONS

deleting the section in its entirety and substituting in lieu thereof the following. "All current or previous regulations or parts of Regulations in conflict with these Regulations are hereby repealed and these Regulations shall be in effect on July 1, 2017."

- 2-5 ~~Amend Section 16 by deleting the section in its entirety and substituting in lieu thereof the following; "Any person who shall violate any of the provisions of these Regulations shall be penalized in accordance with these Regulations and Title 16 of the Delaware Code."~~
- 2-6 ~~Amend Section 17 by deleting the section in its entirety and substituting in lieu thereof the following; "All current or previous regulations or parts of regulations in conflict with these Regulations are hereby repealed and these Regulations shall be in full force and effect on May 10, 2011."~~

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

4461 State of Delaware Milk Code

## DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

### DIVISION OF ENERGY AND CLIMATE

Statutory Authority: 29 Delaware Code, Section 8003(7) (29 Del.C. §8003(7))  
7 DE Admin. Code 2102

#### REGISTER NOTICE

SAN#: 2017- 02

#### 2102 Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions

#### 1. TITLE OF THE REGULATIONS:

Regulation 2102, *Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions*

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

DNREC is proposing to repeal Regulation 2102, *Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions*, which directs when and how the Director of the Division of Energy & Climate may freeze implementation of the Renewable Portfolio Standards under 26 Del.C. §354(i) & (j). DNREC is proposing this action to avoid inconsistencies with Public Service Commission Regulation 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*.

#### 3. POSSIBLE TERMS OF THE AGENCY ACTION:

DNREC is proposing to repeal Regulation 2102 in its entirety.

#### 4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

29 Del.C. §8003(7)

(7) Establish and promulgate such rules and regulations governing the administration and operation of the Department as may be deemed necessary by the Secretary and which are not inconsistent with the laws of this State.

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

The Public Service Commission has recently reopened its Regulation Docket No. 56 to revise Regulation 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*, pursuant to its authority under 26 Del.C. §362 (b). DNREC proposes to repeal Regulation 2102 to avoid inconsistencies with Public Service Commission Regulation 3008.

**6. NOTICE OF PUBLIC COMMENT:**

DNREC will hold a public hearing Wednesday, March 22, 2017 starting at 6:00 p.m. in the Public Service Commission Hearing Room, 861 Silver Lake Boulevard, Suite 100, Dover DE, 19901.

Any person who wishes to may submit written comments concerning the proposed repeal to: Thomas Noyes, Principal Planner for Utility Policy, DNREC Division of Energy & Climate, 100 W. Water Street, Suite 5, Dover, DE 19904, by fax to 302.735.3480, or by email to [thomas.noyes@state.de.us](mailto:thomas.noyes@state.de.us).

**7. PREPARED BY:**

Thomas Noyes  
Principal Planner for Utility Policy  
Division of Energy & Climate  
Tel: 302.735.3480, Fax: 302.739.1840  
[thomas.noyes@state.de.us](mailto:thomas.noyes@state.de.us)

**\*Please Note: The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 Del.C. Ch. 104, is available at:**

[http://regulations.delaware.gov/register/march2017/proposed/20 DE Reg 698RFA 03-01-17.pdf](http://regulations.delaware.gov/register/march2017/proposed/20%20DE%20Reg%20698RFA%2003-01-17.pdf)

**~~2102 Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions~~****4.0 Purpose**

~~These rules govern how the Director of the Division of Energy & Climate (Director) and the Division of Energy & Climate (Division) administer their obligations under 26 Del.C. §§354(i) & (j). The statute directs when and whether the Director may institute a freeze on the implementation of the Renewable Energy Portfolio Standards as provided for in 26 Del.C. §354(a).~~

**2.0 Definitions**

~~For purposes of this regulation, the following words and phrases shall have the following meaning unless the context clearly indicates otherwise:~~

~~"Alternative compliance payment" means a payment of a certain dollar amount per megawatt hour, which a Commission Regulated Electric Company may submit in lieu of supplying the minimum percentage of RECs from Eligible Energy Resources required as defined and set by 26 Del.C. §§352(1) and 358(d).~~

~~"Avoided system costs" means reductions in electric generation, transmission or distribution costs.~~

~~"Commission Regulated Electric Company" means the same as an Electric Distribution Company in 26 Del.C. §1001(12).~~

~~"Compliance year" means the calendar year beginning with June 1 and ending with May 31 of the following year, for which a Commission Regulated Electric Company must demonstrate that it has met the requirements of the subchapter known as the "Renewable Energy Portfolio Standards Act".~~

~~"Director" means the Director of the Division of Energy & Climate, who is considered the State Energy Coordinator for the purpose of these rules.~~

~~"Division" means the Division of Energy & Climate, the successor agency to the Delaware Energy Office.~~

~~"End use customer" means a person or entity in Delaware that purchases electrical energy at retail prices from regulated electric utilities.~~

~~"Exempt sales" means the retail customer sales of a Commission Regulated Electric Company that is not included in the total retail sales for RPS compliance.~~

~~"Externality benefits" means reductions in environmental, health and mortality costs and improvements in habitat resulting from reduced emissions.~~

~~"Freeze" means suspension of enforcement or implementation of the annual increase in the RPS as provided for under 26 Del.C. §§352(3) & 354(a).~~

## PROPOSED REGULATIONS

~~"Green Energy Fund"~~ means the grant program authorized under 29 Del.C. §8057.

~~"Integrated Resource Plan" or "IRP"~~ means the plan filed by the Commission Regulated Electric Company to meet the requirements of 26 Del.C. §1007(e) & (d).

~~"Non exempt sales"~~ means the retail customer sales of a Commission Regulated Electric Company that is included in the total retail sales for RPS compliance.

~~"PJM" or "PJM interconnection"~~ means the regional transmission organization that coordinates the movement of wholesale electricity in the PJM region, or its successors at law.

~~"Price suppression effects"~~ means reductions in energy or capacity costs due to competitive pressures from renewable resources.

~~"PSC"~~ means the Delaware Public Service Commission.

~~"REC costs of compliance"~~ means the total costs expended by the Commission Regulated Electric Company to achieve the applicable RPS percentage standards for RECs during a respective compliance year.

~~"REC percentage requirements" and "SREC percentage requirements"~~ mean the renewable energy portfolio requirements for each compliance year as set forth in 26 Del.C. §354(a).

~~"Renewable Energy Cost of Compliance"~~ means the total costs expended by the Commission Regulated Electric Company to achieve the applicable RPS percentage standards for all renewable energy during a respective compliance year.

~~"Renewable Energy Credit" or "REC"~~ means a tradable instrument defined by 26 Del.C. §352(18) used to demonstrate compliance with the percentage requirements set forth in 26 Del.C. §354(a).

~~"RPS"~~ means the renewable portfolio standard, the minimum percentage of total electricity sales delivered to Delaware end use customers that is derived from eligible energy resources established under 26 Del.C., §354.

~~"Solar alternative compliance payment"~~ means the payment of certain dollar amounts expended in lieu of supplying the minimum percentage from solar photovoltaics as defined and set by 26 Del.C. §§352(24) and 358(e).

~~"Solar Renewable Energy Cost of Compliance"~~ means the total costs expended by a Commission Regulated Electric Company to achieve the applicable RPS percentage standards for solar photovoltaic renewable energy during a respective compliance year.

~~"Solar Renewable Energy Credit" or "SREC"~~ means the tradable instrument defined by 26 Del.C. §352(25) used to demonstrate compliance with the percentage requirements set forth in 26 Del.C. §354(a).

~~"Third party supplier"~~ means an electricity supplier that sells power to end use customers delivered over the distribution facilities of the Commission Regulated Electric Company. It does not include the Commission Regulated Electric Company, Rural Electric Cooperatives or Municipal Electric Companies.

~~"Total Retail Costs of Electricity"~~ means the total costs paid by customers of the Commission Regulated Electric Company for the supply, transmission, distribution and delivery of retail electricity to serve non exempt customers, including those served by third party suppliers, during a respective compliance year.

### 3.0 Application

3.1 These rules shall apply only to a Commission Regulated Electric Company. These rules shall not apply to electric supply provided by either:

3.1.1 an exempted municipal electric company or a municipal utility (as set forth in 26 Del.C. §363); or

3.1.2 an exempted rural electric cooperative or a rural electric cooperative (as set forth in 26 Del.C. §363).

3.2 These rules will be applied immediately upon enactment.

### 4.0 Calculation of the Cost of Compliance

- 4.1 ~~The Division shall calculate the Renewable Energy Cost of Compliance, the Solar Renewable Energy Cost of Compliance and the Total Retail Cost of Electricity as follows.~~
- 4.2 ~~The Division shall calculate the Renewable Energy Cost of Compliance for a particular compliance year to be:~~
  - 4.2.1 ~~the total of contributions to that portion of the Green Energy Fund used to support the development of renewable resources, plus~~
  - 4.2.2 ~~the cost of RECs and SRECs retired to satisfy the RPS requirement, plus~~
  - 4.2.3 ~~all Alternative Compliance Payments.~~
- 4.3 ~~The Division shall calculate the Solar Renewable Energy Cost of Compliance for a particular compliance year to be:~~
  - 4.3.1 ~~the total of contributions to that portion of the Green Energy Fund used to support the development of photovoltaic renewable resources, plus~~
  - 4.3.2 ~~the cost of SRECs retired to satisfy the RPS requirement, plus~~
  - 4.3.3 ~~all Solar Alternative Compliance Payments for the solar photovoltaic requirement.~~
- 4.4 ~~The Division will determine the Total Retail Costs of Electricity as all customer costs for non-exempt load customers for a particular compliance year.~~

**5.0 Determination by the Director**

- 5.1 ~~The Director shall review the calculations of the Division.~~
- 5.2 ~~If the Division calculations show that the Renewable Energy Cost of Compliance is greater than 3 percent of the Total Retail Costs of Electricity for the compliance year, the Director shall, after consulting with the PSC, determine whether a freeze should be implemented.~~
- 5.3 ~~If the Division calculations show that the Solar Renewable Energy Cost of Compliance is greater than 1 percent of the Total Retail Costs of Electricity for the compliance year, the Director shall, after consulting with the PSC, determine whether a freeze should be implemented.~~
- 5.4 ~~In making a determination, the Director shall consider:~~
  - 5.4.1 ~~the overall energy market conditions;~~
  - 5.4.2 ~~the avoided cost benefits from the RPS;~~
  - 5.4.3 ~~the externality benefits due to the RPS; and~~
  - 5.4.4 ~~the economic impacts of the deployment of renewable energy in Delaware.~~
- 5.5 ~~Overall market conditions may include shifts in energy prices, long term market trends, adjustments for short term fluctuations, changes in compliance costs, consumer benefits of other state energy policies such as the implementation of energy efficiency programs, and the overall cost of energy to consumers.~~
- 5.6 ~~Avoided cost benefits from the RPS may include avoided system costs and price suppression effects attributable to the deployment of renewable energy that result in lower net electricity costs.~~
- 5.7 ~~Externality benefits of changes in energy markets may include externality savings in health and mortality costs and environmental impacts due to policies promoting cleaner energy in Delaware and regional energy generation. To the extent possible, the externality savings should be consistent with the current IRP filed by the Commission Regulated Electric Company, except where other published methods or studies are determined to be more appropriate.~~
- 5.8 ~~Economic development benefits may include the overall economic activity attributed to jobs created by the development of renewable energy in Delaware.~~

**6.0 Lifting of a Freeze**

- 6.1 ~~If a freeze has been imposed, the Division will calculate compliance costs, using the methods described in Section 4.0 of this regulation.~~
- 6.2 ~~The Director will review the calculation and determine whether to lift a freeze using the methods and criteria described in Section 5.0 of this regulation.~~

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- ~~6.3 If the total cost of compliance falls below the 3 percent threshold in subsection 5.2 of this regulation or the 1 percent threshold in subsection 5.3 of this regulation, the Director shall lift a freeze following consultation with the PSC.~~
- ~~6.4 If a freeze is lifted, the Director will promptly notify, electronically and by mail, the Commission-Regulated Electric Company that filed reports on RPS compliance. The Director will also:~~
- ~~6.4.1 provide prior notice of the lifting of the freeze to the PSC; and~~
  - ~~6.4.2 publish notice of the lifting of the freeze in the next appropriate issue of the Delaware Register of Regulations.~~

## ~~7.0 Administration~~

- ~~7.1 Within 90 days after the end of any compliance year, the Commission-Regulated Electric Company shall submit to the Division in writing and electronically the following information for the applicable compliance year:~~
- ~~7.1.1 the Renewable Energy Cost of Compliance for that compliance year;~~
  - ~~7.1.2 the Solar Renewable Energy Cost of Compliance costs for that compliance year; and~~
  - ~~7.1.3 the Total Retail Costs of Electricity for that compliance year.~~
- ~~7.2 Within 30 days from receipt of the information described in subsection 7.1 of this regulation from the Commission-Regulated Electric Company, the Division shall calculate the cost of compliance as described in Section 4.0 of this regulation and present the results to the Director.~~
- ~~7.3 Within 30 days of receipt of the calculations of the cost of compliance from the Division, the Director will, after receipt of the calculations and consultation with the PSC, make a determination as described in Section 5.0 of this regulation and notify the Commission-Regulated Electric Company that filed reports on RPS compliance. The Director will also publish notice of the freeze in the next appropriate issue of the Delaware Register of Regulations.~~
- ~~7.4 The public will have 15 business days from the publication of the Director's determination to offer comment. The Director may alter or amend the determination based on review of the public comments.~~
- ~~7.5 The Director shall make a final determination, including effective date, provide public notice to the Registrar, and notify electronically and by mail the PSC, the Commission-Regulated Electric Company, and other interested parties within 15 business days of the close of public comments.~~

## ~~8.0 Existing Contracts~~

~~In implementing a freeze under these rules, existing contracts for the production or delivery of RECs, SRECs, renewable energy supply or other environmental attributes shall not be abrogated.~~

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### OFFICE OF THE SECRETARY

Statutory Authority: 7 Delaware Code, Section 7507A(b) (7 Del.C. §7507A(b))  
7 DE Admin. Code 109

### REGISTER NOTICE

SAN#: 2017- 01

109 Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection

#### 1. TITLE OF THE REGULATIONS:

Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection

#### 2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE AND ISSUE:

As a result of amendments to the Land Protection Act, effective August 3, 2016, the Guidelines to Evaluate

