

## MEMORANDUM

TO: John A. Hughes, Secretary

FROM: Lisa A. Vest, Hearing Officer

RE: Proposed Adoption of Section 11.0: “Area Source Lead Acid Battery Manufacturing Standard” into existing Air Regulation 1138: *Emission Standards for Hazardous Air Pollutants for Source Categories*

DATE: September 5, 2008

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### **I. Background:**

A public hearing was held on Tuesday, July 29, 2008, at 6:00 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on the proposed adoption of Section 11.0, “Area Source Lead Acid Battery Manufacturing Standard” into existing Delaware Regulation 1138, Emission Standards for Hazardous Air Pollutants for Source Categories. To serve as a brief background for this promulgation, it should be noted that Congress sought to reduce cancer and non-cancer health risks due to the exposure to hazardous air pollutants (HAPs) in the 1990 Amendments to the Clean Air Act. Under Section 112(k) – Area Source Program, Congress mandated that the EPA identify 30 or more HAPs that posed the greatest threat to public health in urban areas, and to identify the small (i.e., “area”) sources that emit any of those pollutants.

In 1999, the EPA identified 33 HAPs that posed the greatest threat to public health. A list of those HAPs is attached hereto as Attachment

“A”, and is expressly incorporated into this Hearing Officer’s Memorandum. Since that time, the EPA has identified over 60 area source categories for which standards are to be promulgated. A list of those Area Source Categories is attached hereto as Attachment “B”, and is expressly incorporated into this Hearing Officer’s Memorandum as well. The EPA promulgated its first of these area source standards in 2006, and they are under Court-ordered deadlines to complete all promulgations by June 2009. 40 CFR Part 63, Subpart PPPP constitutes the Department’s starting point for the development of this State of Delaware proposed regulation.

In July 2007, the EPA promulgated its first area source standard affecting a Delaware source: the lead acid battery manufacturing standard. The Johnson Controls facility, located in Middletown, Delaware, is the only known Delaware source that will be subject to this standard. Representatives from that facility were in communication with the Department during the pre-hearing phase of this matter to learn more about this proposed regulatory action.

Of note is the fact that no members of the public attended this hearing on July 29, 2008 to voice concerns with regard to the adoption of Section 11.0 to Delaware’s existing Regulation 1138. Neither was there any comments received from the public during the post-hearing phase of this proceeding. Proper notice of the hearing was provided as required by law.

## **II. Summary of Hearing Record:**

At the time of the hearing on July 29, 2008, Jim Snead, Engineer IV with the Air Quality Management Section of DNREC, offered the Department's 27 exhibits pertaining to the proposed adoption of Section 11.0 into Regulation 1138, as well as a brief explanation with regard to the salient points of this proposed action. Mr. Snead explained that, although lead itself is not a carcinogen, it is still a highly toxic chemical, and the health effects seem to have no apparent low threshold over which there is no impact on public health. The adverse effects of lead on the human body tend to concentrate in the nervous system. Of specific concern is that children and young adults are particularly sensitive to this lead hazard, predominantly due to the combination of inhalation and hand-to-mouth issues. Those potentially affected areas involve the reduction of IQ, the delay in cognitive development, and reduced physical growth.

Delaware's proposed rule is more stringent and, as a result, more health-protective, than the Federal rule that was adopted last year. The five major areas where Delaware is more stringent are (1) the requirement of the start-up, shutdown, and malfunction plan for area sources, which will ensure proper operation and maintenance of the facility (note: this is not included in the Federal rule); (2) the requirement of "ongoing performance testing", or "stack testing" being done on a six-year schedule to ensure ongoing compliance and performance of the

control devices; (3) the requirement of monitoring both the parametric pressure drop of the control devices as well as opacity (Federal rules required only one of those to be done, with it being the facility's choice); (4) the requirement of more frequent maintenance inspection than EPA, which provides for better assurance of the integrity of the equipment (EPA requires semi-annual inspection, and Delaware is proposing it be done quarterly); and (5) the compliance requirement for the use of other acceptable control devices (EPA was moot on this point). Mr. Snead added that, although Delaware's proposed regulations are more stringent than Federal, virtually all of these proposed changes will not have a major impact of Johnson Controls, as long as they maintain their standard operating procedures as having been met to date.

In addition to the above, the Department is also making very minor changes to these proposed regulations (as opposed to what was initially submitted to the Register of Regulations on July 1, 2008). These changes are non-substantive in nature, and are merely (1) corrections of clerical errors; and (2) language changes which provide better clarity than the original proposed regulations.

For the sake of brevity, and for the Secretary's full understanding of this action, a copy of the handout provided at the public hearing (which includes a hard copy of the Power Point presentation prepared by the Department, the formal exhibit listing, a summary data sheet on Lead from the EPA, and a strikeout copy of the proposed regulations

themselves) is attached hereto as Attachment “C”, and is expressly incorporated herein.

It should be noted that the Department adhered to all appropriate Delaware statutes and the regulatory development process during the development of this proposed regulation. Additionally, the Department maintained open communications throughout the draft and proposal process of this regulatory matter with Johnson Controls and their consultant. As previously noted, Johnson Controls (located in Middletown, Delaware) is the only known source in this state that will be affected by this proposed regulation. The Department completed its review of this proposal under the Regulatory Flexibility Act, and determined that Johnson Controls does not qualify for the additional considerations that would be afforded to small business in such matters.

Finally, the Department received no public comment in this matter, nor was the Air Quality Management Section asked by any business entity to incorporate such comment into the formal hearing record of this matter.

### **III. Conclusions and Recommendations:**

Based on the above discussion, I conclude that the Department has provided appropriate reasoning regarding the need for the proposed adoption of Section 11.0, “Area Source Lead Acid Battery Manufacturing Standard” into existing Delaware Regulation 1138, Emission Standards for Hazardous Air Pollutants for Source Categories., and has thoroughly

addressed public health issues and taken the steps necessary to protect the public health of the citizens of Delaware. Accordingly, I recommend promulgation of this proposed regulation in the customary manner provided by law.

Further, I recommend the following findings:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
2. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
3. The Department held a public hearing in a manner required by the law and regulations;
4. The Department considered all timely and relevant public comments in making its determination;
5. The Department has reviewed this proposed amendment in the light of the Regulatory Flexibility Act, and has determined that Johnson Controls does not qualify for the additional considerations that would be afforded to small business in such matters;
6. Promulgation of these proposed amendments would update Delaware's requirements to be consistent with the federal requirements, thus bringing Delaware into compliance with EPA standards;

7. The minor non-substantive changes make to this regulation will correct clerical errors which were contained in the initial regulatory language, and provide better clarity and a fuller understanding of the regulatory language contained within this regulation to the general public and the regulated community;
8. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary;
9. The Department's proposed regulation (with changes), as published in the July 1, 2008 *Delaware Register of Regulations* and set forth within Attachment "C" hereto, is adequately supported, not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*;
10. The Department shall submit the proposed regulation as a final regulation to the Delaware Register of Regulation for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

          /s/ Lisa A. Vest            
LISA A. VEST  
Hearing Officer