

**Department of Natural resources and Environmental Control  
Division of Energy & Climate**

**Summary of the legal review on whether the 3 percent and 1 percent cost caps in 26 Del. C. § 354 (i), (j) refer to a cumulative increase or year-over-year increase**

**January 7, 2015**

The DNREC Division of Energy & Climate asked the Deputy Attorney General (“DAG”) assigned to this matter whether the 3 percent and 1 percent caps in 26 Del. C. § 354 (i), (j) refer to a cumulative increase or year-over-year increase. The advice that the DAG provided to the Division is a confidential communication protected by the attorney-client privilege, and the Division is not required to produce that document. The Division has opted to provide the following summary of the legal review of this question with the understanding that *by releasing this summary, the Division is not waiving the attorney-client privilege attached to this or any other legal advice in this matter.*

The DAG reviewed the record in this proceeding and noted that commenters to the proposed rule questioned whether the cost cap provision refers to the total cost of compliance or the incremental or annual change in the cost of compliance. The DAG also noted that the language of this section of the statute could be construed as ambiguous, and as such, a reviewing court would look at the statute as a whole to understand the General Assembly’s intent. A court would refer to Section 354(a), which sets forth the compliance schedule on a year-by-year basis through 2025. Interpreting the statute so that the minimum cumulative requirement refers to the cumulative increase from the beginning of the program would lead to an unreasonable or absurd result because at that rate the statutory compliance schedule could not be achieved, and that a court would not find that the General Assembly intended that result. Therefore, the percentage caps refer to the statutory compliance schedule, which provides for year-over-year increases.