

## HEARING OFFICER'S REPORT

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

**FROM:** Lisa A. Vest  
Regulatory Specialist, Office of the Secretary  
Department of Natural Resources and Environmental Control

**RE:** **Proposed Revisions to the Delaware Erosion and Sediment Control Handbook, in support of 7 DE Admin. Code 5101, *Delaware Sediment and Stormwater Regulations*, as set forth at 7 Del.C. §4006(h) and (i) (Hearing Docket #2023-R-WS-0004)**

**DATE:** May 30, 2023

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

A virtual public hearing was held on Wednesday, March 22, 2023, at 6:00 p.m. via the State of Delaware Zoom Meeting Platform by the Department of Natural Resources and Environmental Control (“DNREC” or “Department”) to receive comment on the proposed revisions to selected sections of the Delaware Erosion and Sediment Control Handbook (“Delaware ESC Handbook” or “Handbook”). The Handbook is not a State of Delaware regulation, but rather is a regulatory guidance document in support of 7 DE Admin. Code 5101, *Delaware Sediment and Stormwater Regulations*, as set forth at 7 Del.C. §4006(h) and (i).

The current version of the Delaware ESC Handbook was adopted in February 2019, along with the Department’s most recent amendments to 7 DE Admin. Code 5101. The Handbook provides background information on erosion and sedimentation, and information on Delaware’s regulatory program to manage erosion and sediment from construction sites in Delaware. The Handbook also contains standards and specifications for a long list of best management practices (“BMPs”) that may be employed during construction to prevent polluted discharges.

The Department has the statutory basis and legal authority to develop and periodically revise the Delaware ESC Handbook, pursuant to 7 *Del.C.* §4006(h) & (i), and as provided for under 7 *Del.C.* Ch.60.

There are six selected (6) sections of the Delaware ESC Handbook that the Department is currently proposing to revise: (1) temporary sediment basin; (2) vegetative stabilization; (3) mulching; (4) construction site pollution prevention; (5) fueling and spill control; and (6) the geotextile application guide. The following is a brief summary of each of these proposed revisions for the benefit of the Record:

1. **Section 3.1.4: Temporary Sediment Basin standard and specification**

This revision concerns the computation of the required number of anti-seep collars. Anti-seep collars are used on all outlet pipes for temporary sediment basins constructed with an earthen fill or embankment. The collar extends the seepage length along the pipe conduit to prevent seepage through the embankment that could compromise the embankment and potentially cause failure.

The requirement for anti-seep collars is to increase the seepage length by a minimum of 15 percent. The Handbook provides a set of equations rearranged for computing the number (“N”) of anti-seep collars required, however, this equation is based on a seepage length of 1.15 of the saturated length (“Ls”) or 115 percent of the saturated length. The proposed revision to the equation corrects the computation for the number of anti-seep collars to require only a 15 percent increase in the saturated length, or 0.015 Ls, as shown in the second set of equations. The change results in more reasonable dimensions and numbers of anti-seep collars.

2. **Section 3.4.3: Vegetative Stabilization**

The Department’s Division of Parks and Recreation (“Parks”) reached out to the Sediment and Stormwater Program regarding the use of three species of concern: annual lespedeza, weeping lovegrass, and reed canarygrass.

Specifically, the concern is that these species, in the right environment, may become invasive and outcompete rare species. While these species are not currently listed in the Invasive Plant List included in Senate Bill 22, the Delaware Invasive Species Council has listed both weeping lovegrass and reed canarygrass on their invasive species list.

Both weeping lovegrass and annual lespedeza are invasive in our coastal parks' stabilized dune habitat, and therefore are proposed for removal from the vegetative stabilization specification. Neither annual lespedeza nor weeping lovegrass were previously primary species listed in a mix number in the temporary seeding chart. In the permanent seeding chart, each of the concerning species have been replaced by another species, as recommended by Parks. In Mix #1, weeping lovegrass has been replaced with Canada wild rye; in Mix #2, common lespedeza has been replaced with white clover; and in Mix #10, reed canarygrass has been replaced by switchgrass. It should be noted that none of these changes affect residential lawn seed mixes.

### **3. Section 3.4.5: Mulching**

This proposed revision is found in the “nettings” section under “Anchoring Mulch on page 3.4.5-3 and Sheet 2 of 3 of standard detail DE-ESC-3.4.5. Both the 3.4.6 Stabilization Matting standard and specification and Appendix A-4 (Stabilization Matting Application Guide) require all matting to have biodegradable netting. However, the netting reference in the 3.4.5 mulching specification was inconsistent. The 3.4.5 mulching specification is now being revised to remove “synthetic or organic netting” language in favor of “biodegradable netting” to be consistent throughout the Handbook.

### **4. Section 3.6.1: Construction Site Pollution Prevention**

It should be noted that all of the public hearing requests that were received by the Department in this matter referred to the waste management portion of this section in their comments. The Department is not currently proposing revisions to this section. However, the Department has discussed the comments received with those members of the public that had requested this public hearing.

As a result of the aforementioned discussions, DNREC has a proposed path forward to address those comments outside of the current revisions being proposed for the Handbook.

The revisions that are currently being proposed to Section 3.6.1 include modification of the section title from “Construction Site Waste Management and Spill Control” to “Construction Site Pollution Prevention.” Additionally, the “Fueling and Spill Control” information has been moved into its own standard and specification and has been replaced with additional information concerning pollution prevention.

The Construction Site Pollution Prevention standard detail is included on every detailed Sediment and Stormwater Plan approved in the State of Delaware and includes the following elements: material inventory; good housekeeping practices; waste management practices; equipment maintenance practices; spill prevention practices; and education. These management strategies are employed to prevent discharges of pollutants other than sediment from the construction site in order to allow sites to fully comply with the Delaware Construction General Permit (“CGP”). The Delaware CGP was most recently updated in March 2021.

The March 2021 update to the Delaware CGP includes a new requirement for signage on sites that have permit coverage under the CGP. The Department developed a standard detail to assist owners and permittees with installing the sign on the construction site. By incorporating the signage requirements into the standard detail for Section 3.6.1, this information will be included on every approved Sediment and Stormwater Management Plan that must also comply with the CGP. The purpose of the sign is to notify the public that a permit has been issued for the site to discharge stormwater from the construction activity and to provide a method for the public to view the approved plan and to notify the applicable authority if they observe a polluted discharge. The CGP requires signage to include the NOI number, contact name and phone number to obtain additional construction site information, contact name and phone number to obtain a copy of the approved plan, and a statement that includes the DNREC Spill Hotline number if stormwater pollutant discharge is observed.

Requirements for the CGP signage location are also included, as well as recommendations for minimum sign dimensions and font size. The CGP signage detail replaced the Fueling and Spill Control section of the standard detail for Section 3.6.1. Fueling and Spill Control has been developed into its own standard specification and detail under Section 3.6.4.

#### **5. Section 3.6.4: Fueling and Spill Control**

As noted above, the addition of this section concerns the Fueling and Spill Control standard and specifications, previously covered in Section 3.6.1, but has now been deemed important enough to warrant its own standard and specifications section, similar to the manner in which the Department handles concrete washouts and concrete mixing operations. The Fueling and Spill Control standard and specifications provide guidance for preventing and cleaning up spills and provide information on proper siting and required secondary containment surrounding a fuel tank. When a fuel tank will be staged on the site, this detail will be included on the plans. Those details are included on the plan when warranted by the site condition. Conversely, if a fueling operation will not be included on the site, and the detail is not on the plan, then the equipment maintenance and spill prevention and control remains in Section 3.6.1 Construction Site Pollution Prevention detail included on all plans.

#### **6. Appendix A-3: Geotextile Application Guide**

The Department's Sediment and Stormwater Program worked with the State of Delaware Department of Transportation ("DelDOT") in proposing revisions to the geotextile properties table found in Appendix A-3 of the Handbook. DelDOT initiated this effort when updating their specification for Section 1060, *Geotextiles*. Geotextile technology is constantly changing to improve performance. Thus, these updates began with a review of available products and a determination as to whether the same met the standard in the Handbook. As a result, the minimum and maximum property values in the table were adjusted to not only continue to provide the necessary performance, but also to accommodate available geotextile products.

The Department maintains a set of standards for geotextile properties rather than an approved products list. If a new product comes on the market, it does not need to be approved to be used. It would, however, need to provide documentation that it meets the geotextile properties for the application. In order to provide the regulated community with some sense of the type of products that meet the geotextile properties, a list of “example products” is provided in Figure A-3a.

The example product list is not an approved products list, and it is not exhaustive. Three example products are provided for each geotextile category. As of the date of publication of the Department’s initial proposed revisions in the *Register of Regulations* in March 2023, these were all the example products available on the market that would meet the specification.

As noted above, the Delaware ESC Handbook itself is not a regulation, but rather a regulatory guidance document in support of 7 DE Admin. Code 5101, as noted above. However, for the purposes of transparency, and to provide additional information, clarity and guidance to the regulated community, the Department published a General Notice in the December 1, 2022, edition of the *Delaware Register of Regulations*, as well as Legal Notice in both the *News Journal* and the *Delaware State News* on December 1, 2022, announcing the aforementioned proposed revisions to selected sections of the Handbook, and providing a time period in which the public may request a public hearing. Thereafter, the Department received several meritorious requests for a public hearing.

The Department subsequently published a General Notice in the March 1, 2023, edition of the *Delaware Register of Regulations*, as well as Legal Notice in both the *News Journal* and the *Delaware State News* on March 1, 2023, announcing that the Department would hold a public hearing on March 22, 2023, to receive comment on the aforementioned proposed revisions to the Delaware ESC Handbook. Thereafter, the Department held the public hearing concerning this matter as noticed.

Department staff and members of the public attended the public hearing held in this matter on March 22, 2023. It should be noted that only one comment was received from the public at the time of the public hearing, and the same will be discussed in greater detail below. The hearing record (“Record”) remained open for receipt of public comment through April 19, 2023, however, no additional comment was received by the Department during the post-hearing phase of this matter. Proper notice of the hearing was provided as required by law.

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

The Record consists of the following documents:

- (1) a verbatim transcript, as provided by Wilcox & Fetzer (Lexitas);
- (2) twenty (20) documents introduced by Department staff and marked by this Hearing Officer accordingly as Department Exhibits 1-20;
- (3) memo from Bonnie Arvay, Program Manager II, Sediment and Stormwater Program, Division of Watershed Stewardship, dated May 1, 2023, concerning the one verbal comment received at the time of the public hearing.

The Department’s persons primarily responsible for the drafting of Delaware’s proposed revisions to the Delaware ESC Handbook, Elaine Webb, Environmental Engineer VI, with the Department’s Sediment and Stormwater Program, Division of Watershed Stewardship, and Ms. Arvay, as identified above, developed the Record with the relevant documents in the Department’s files.

As set forth previously herein, the Record generated in this matter reflects that the Department received only one comment regarding the proposed revisions to the Delaware ESC Handbook. That comment was received verbally at the time of the public hearing held on March 22, 2023. Again, while the Record remained open for receipt of additional comments through April 19, 2023, no other comments were received by the Department in this matter.

In response to the one comment that was received verbally at the time of the public hearing, Ms. Arvay provided a brief memo to this Hearing Officer for the benefit of the Record being compiled in this matter. In that memo, dated May 1, 2023, Ms. Arvay acknowledged the comment received from Mike Stang, representing the Delaware Hauler's Association, and noted that the comment was specific to two topics that are not part of the Handbook revisions currently being proposed by the Department.

Ms. Arvay further noted in her memo that, while the comments presented by Mr. Stang were not germane to the subject matter of the public hearing of March 22, 2023, the Department is appreciative of the comments, and will take them into consideration when the Department seeks to modify the relevant authority and supporting section of programmatic guidance documents in the future.

I find that Ms. Arvay's memo of May 1, 2023, as referenced above, provided by the Department's experts in the Division of Watershed Stewardship, acknowledges the one comment received by the Department at the time of the aforementioned public hearing, and provides clarity for the benefit of the Record being generated in this present matter, accurately reflecting the information contained in the Record. For the Secretary's review, a copy of Ms. Arvay's memo is attached hereto as Appendix "A," and is expressly incorporated herein. It should be noted that no changes to the proposed revisions to the Delaware ESC Handbook have been made subsequent to their initial publication in the *Register of Regulations* on March 1, 2023.

### **III. RECOMMENDED FINDINGS AND CONCLUSIONS:**

Currently pending before the Department is the proposed adoption of the aforementioned revisions to selected sections of the Delaware ESC Handbook. As noted above, the Handbook is a regulatory guidance document in support of 7 DE Admin. Code 5101, *Delaware Sediment and Stormwater Regulations* ("Regulations"), as set forth at 7 *Del.C.* §4006(h) and (i).



Based on the Record developed in this matter, I find and conclude that the Department's experts in the Division of Watershed Stewardship fully developed the Record to support the proposed revisions to the aforementioned Handbook, as set forth in detail above, and that the proposed revisions are well supported. Accordingly, I recommend the adoption of the same, 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 revisions to selected sections of the Delaware ESC Handbook, pursuant to 7 *Del.C.* §4006(h) & (i), and as provided for under 7 *Del.C.* Ch.60.
2. The Department has jurisdiction under its statutory authority, pursuant to 7 *Del.C.* Ch. 60, to issue an Order adopting the aforementioned proposed revisions as final;
3. The Department provided adequate public notice of the aforementioned proposed revisions, and all proceedings associated with the same, in a manner required by the law and regulations, and provided the public with an adequate opportunity to comment on the aforementioned proposed revisions, both at the time of the public hearing held on March 22, 2023, and subsequent to the time of the public hearing (through April 19, 2023), in order to consider all public comment on the same before making any final decision;
4. The adoption of the proposed revisions to the Delaware ESC Handbook will enable the Department to update this regulatory guidance document, in support of 7 DE Admin. Code 5101, as referenced above, and provide additional information, understanding and clarity to the regulated community with regard to the six areas that are being updated with these revisions, namely: (1) temporary sediment basin; (2) vegetative stabilization; (3) mulching; (4) construction site pollution prevention; (5) fueling and spill control; and (6) the geotextile application guide;

5. The Department's proposed revisions to the Delaware ESC Handbook, as initially noticed in the General Notices section of the March 1, 2023, *Delaware Register of Regulations*, and then fully vetted to the public at the aforementioned public hearing held on March 22, 2023, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final revisions to the Delaware ESC Handbook, which shall become effective immediately upon the signing of the Secretary's Order regarding the same;

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

8. The Department shall submit a General Notice of the aforementioned proposed revisions to the Delaware ESC Handbook becoming final 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, as the Department determines is appropriate.

/s/Lisa A. Vest  
LISA A. VEST  
Regulatory Specialist

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Attachment:  
Appendix A: Avary Response Memo (05.01.23)