



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

OFFICE OF THE
SECRETARY

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SECRETARY'S ORDER NO: 2015-WS-0040

Pursuant to 29 Del. C. §10119

AUTHORITY

Pursuant to 29 Del. C. §10119, the Department of Natural Resources and Environmental Control adopts as an emergency regulation the previously adopted 2014 Delaware Sediment & Stormwater Regulations, together with adoption of the October 2015 Technical Document (7 DE Admin Code 5101), without prior notice or public hearing, in the interest of public health, safety and welfare, consistent with the authority of 7 Del. C. Ch. 40, Erosion and Sedimentation Control. It should be noted that the emergency regulations are intended as interim measures, necessary to avoid harm to the public health, safety, and welfare, pending the formal adoption of regulations pursuant to the APA, within the 120-day period (renewable for an additional sixty days) allotted to emergency regulations.

REASON FOR THE EMERGENCY REGULATION ORDER

A recent ruling by the Delaware Superior Court in *Baker, et al. v. DNREC, et al.* (C. A. No. S13C-08-026 THG) on October 7, 2015 invalidated the 2013 and 2014 version of the Delaware Sediment & Stormwater Regulations on procedural grounds. The Department appealed this ruling to the Delaware Supreme Court on Friday, October 9 and simultaneously submitted a Motion for Stay in the decision of the Superior Court pending appeal. While awaiting determination of the appeal, circumstances dictate that the Department take action immediately to resolve the regulatory vacuum left by the Superior Court decision.

The Superior Court decision is silent as to what version of the regulations should be in place pending appeal. The Court Order as to the 2013/2014 regulations does not automatically revive any previous version of the regulations. Rather, the Court's prohibition on the use of the Technical Document in the exercise of regulatory authority effectively bars use of prior regulations, which rely on the same interplay with the Technical Document ruled invalid by the Court, and cannot stand alone. In order to proceed with regulatory actions while respecting the Court Order, and pending a ruling on the Motion for Stay, the Department must issue an emergency regulation in order to have a valid set of regulations in place to implement the Delaware Sediment & Stormwater Law pursuant to 7 Del. C., Ch. 40, Erosion and Sedimentation Control. Delaware is required by federal law to have a valid erosion and sedimentation program in place for all construction activities, and Delaware's erosion and sedimentation program must have regulations in place to be valid – 7 Del. C. Ch. 40, Erosion and Sedimentation Control.

In its decision, the Court ruled that supplementary technical documents that contain guidelines, standards and requirements necessary for compliance must be treated the same as regulations, and must therefore be adopted in accordance with the Administrative Procedures Act (APA). By issuing an emergency

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regulation re-adopting the 2014 Regulations in conjunction with adoption of the October 2015 Technical Document, pursuant to the APA, the Department cures this defect.

Contrary to what some have argued, merely reverting to a previous version of the regulations would not cure the procedural defect identified by the Court, but would continue it, due to the interplay between prior regulations and prior versions of the technical support materials. In the absence of an interim regulation, the Department would find itself without a regulatory framework to carry out its statutory authority. A prolonged lapse in regulatory authority would create a situation of imminent peril to the public health, safety and welfare, with respect to the management of both the quantity and quality of stormwater runoff associated with land development and the inability of any development projects to legally move forward. The importance of this regulatory authority was cited by the General Assembly in enacting Chapter 40 to Title 7, in finding "...that accelerated stormwater runoff increases flood flows and velocities, contributes to erosion, sedimentation, and degradation of water quality, overtaxes the carrying capacity of streams and storm sewers, greatly increases the costs of public facilities in carrying and controlling stormwater, undermines flood plain management and flood control efforts in downstream communities, reduces groundwater recharge, and threatens public health, welfare, and safety."

The threat to the public welfare from lapse or uncertainty in the regulatory climate would be reflected in significant potential economic impacts. As of the date of the ruling, a total of 311 applications were under review by the Department and its Delegated Agencies. This includes two major public school projects in Sussex County, and a great number of DeIDOT roadway improvement projects, including portions of the US 301 project. A total of 285 development plans and tax ditch maintenance plans have been approved under the 2013/2014 regulations. The owners and developers of these projects, who have invested millions of dollars in a good faith effort to comply with the regulations in place at the time, could be left in limbo, wondering whether they would need to expend even more money to re-engineer their projects. DeIDOT projects are in jeopardy of losing Federal highway funds if the projects are not implemented according to schedule, and public school projects may not meet projected school opening dates, if the plan approval process is delayed by having to redesign. Additionally, the Department has invested a total of 3,905 contact hours to 675 attendees in various training sessions intended to train regulated parties and interested professionals in the application of the 2013/2014 Sediment & Stormwater Regulations. For many of the attendees, these are the only regulations under which they have designed plans.

It is worth noting not all applications that meet the 2014 Regulations would also meet the requirements of the previous regulations from 2006. The 2014 Regulations were more stringent in some respects and less so in others than the previous 2006 regulations, depending upon individual site conditions and watershed position. Therefore, there is no benefit or utility for the regulated community to be gained by merely adopting the 2006 regulations by emergency order.

The 2014 Regulations that are being re-adopted through this emergency order were originally adopted in compliance with the APA. While the March 2013 Technical Document and subsequent updates were not published by the Registrar of Regulations, they did go through public notice and an extensive public comment period, and were posted publicly on the Department's web site. The final document was the

result of over 40 Regulatory Advisory Committee and Subcommittee public meetings with ongoing public comment which produced over 700 comments and responses on the Technical Document.

For the reasons cited above, the Department issues the 2014 Sediment & Stormwater Regulations in place at the time of the Superior Court Ruling, along with the most recent version of the Technical Document, dated October 2015, as a regulation, in accordance with the APA requirements, through this Emergency Regulation Order. The Department requests that the Registrar publish these regulations in the next issue of the Register of Regulations on November 1, 2015.

As stated above, the Department intends to initiate a formal APA rulemaking process for the 2014 Regulations and October 2015 Technical Document, in compliance with all public hearing and notice requirements. In addition, DNREC will publish the emergency regulations on its webpage and reach out to stakeholders and the Delegated Agencies in order to assure continuity and to facilitate compliance.

EFFECTIVE DATE OF ORDER

This Emergency Order shall take effect at 12:01 AM on October 16, 2015 and shall apply to all activities subject to these regulations as of October 7, 2015, and shall remain in effect for 120 days; however, at the expiration of 120 days, the Department may choose to renew this Emergency Order once for a period not exceeding 60 days, consistent with 29 *Del. C.* §10119(3), to allow for meaningful public comment and Department response to such comment.

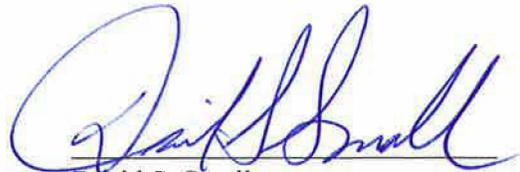
PETITION FOR RECOMMENDATIONS

Consistent with the requirements of 29 *Del. C.* §10119(4) the Department will receive, consider and respond to petitions by any interested person for the reconsideration or revision of this Order. Petitions should be presented to the Division of Watershed Stewardship, 89 Kings Highway, Dover, Delaware, 19901.

ORDER

It is hereby ordered, the 15th day of October 2015 that the above referenced 2014 Delaware Sediment & Stormwater Regulations with the October 2015 Technical Document, are adopted pursuant to 29 *Del. C.* §10119 and supported by the evidence contained herein. A copy of the 2014 Delaware Sediment & Stormwater Regulations and the October 2015 Technical Document can be viewed at the following link:

<http://www.dnrec.delaware.gov/swc/Drainage/Pages/Sediment-and-Stormwater-Emergency-Regulations.aspx>



David S. Small
Secretary