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DEPARTMENT OF NATURAL RESOURCES  
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Secretary

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**Secretary's Order No.: 2019-WS-0007**

**RE: Approving Final Regulations to Amend 7 DE Admin. Code 5101:  
*Delaware Sediment and Stormwater Regulations* ("Stormwater Regulations")**

**Date of Issuance: January 16, 2019**

**Effective Date of the Amendment: February 11, 2019**

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC"), pursuant to 7 *Del.C.* §§6006 and 6010, and all other relevant statutory authority, 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 proposed regulation amendments ("Amendments") to 7 DE Admin. Code 5101: *Delaware Sediment and Stormwater* ("Stormwater Regulations"). This action is being taken by the Department to correct previous procedural flaws, as determined by both the Delaware Superior Court and the Delaware Supreme Court, and as set forth in greater detail below. Additionally, numerous other revisions are being proposed at this time to provide additional clarity to the regulated community, and to correct various clerical and consistency errors presently contained therein.

The Department's *Stormwater Regulations* were first promulgated in 1991. Under those provisions, all land disturbing activity in an area greater than 5,000 square feet was required to operate under a plan that encompasses both temporary erosion and sediment control during construction, as well as permanent stormwater management controls for both water quantity and water quality. Stormwater management design, at that time, was based upon peak rates of runoff, typically expressed as a quantity per unit of time, such as cubic feet per second.

Following a series of damaging storm events, Governor Ruth Ann Minner signed Executive Order No. 62 on December 17, 2004, which established a Task Force on Surface Water Management. The goal was to develop a statewide surface water management strategy to integrate drainage, flood control and stormwater management. The Task Force submitted its final report to the Governor on April 1, 2005. Among the Task Force's major recommendations was to strengthen Delaware's existing *Stormwater Regulations* to address volume management, conveyance adequacy, pollutant loadings, floodplain management, and implement strict standards for operation and maintenance of structures and management areas.

The Department subsequently amended its *Stormwater Regulations* in April, 2005 to incorporate the recommendations of the Governor's Task Force, as noted above, and also to encourage the use of green technology Best Management Practices ("BMPs"), or, those practices that would achieve stormwater management objectives by applying the principles of filtration, infiltration and storage, while minimizing reliance on structural components. These regulations were further amended in October, 2006, by legislative action, to include volume control in stormwater management, as well as the utilization of various methods such as infiltration and recharge, which were feasible for certain watersheds in New Castle County, so as not to increase flood elevations downstream. Volume control was required in these watersheds, to the maximum extent practicable ("MEP"), for all storm events up to the 100-year storm. Additional provisions to these regulations were made, at that time, to ensure that there was not an increase in flood elevations if volume reduction was not feasible.

The Department's Sediment and Stormwater Program promulgated additional regulatory amendments to its *Stormwater Regulations* in 2013, which were published in the January 1, 2014 edition of the State of Delaware *Register of Regulations*. These amendments were largely based upon the previous 2006 revisions, which at that time were expanded by the Department on a state-wide basis. A companion Technical Document (consisting of both the Department's *Erosion and Sediment Control Handbook* and BMPs, as referenced above) was also created by the Department. The Department's 2014 *Stormwater Regulations* were immediately challenged by the regulated community with an appeal to the Delaware Superior Court, due to the fact that the accompanying Technical Document referenced by those regulations was not published in the *State of Delaware Register of Regulations* in accordance with the requirements set forth in Delaware's *Administrative Procedures Act* (29 Del. C. Ch. 101, *Administrative Procedures*). A Delaware Superior Court decision of October 7, 2015, which was subsequently upheld by the Supreme Court on April 15, 2016, invalidated the Department's 2014 *Stormwater Regulations* on those procedural grounds. The Department immediately enacted Emergency Regulations, by the issuance of Secretary's Order No. 2016-WS-0019 (April 16, 2015), which incorporated both the 2014 version of the Department's *Stormwater Regulations* and the latest version of the aforementioned Technical Document (April 2016) to correct the previous procedural error, and to ensure that Delaware was not without regulations to govern construction activities until such time as the Department was able to formally adopt such finalized regulations.

Subsequent to enacting the Emergency Regulations, the Department convened its Stormwater Regulatory Advisory Committee ("RAC") and began the process of formally drafting proposed Amendments. The RAC, and its subcommittees, met regularly from November 2015 through May 2016. At its June 1, 2016 meeting, the RAC recommended proposed amendments to the *Stormwater Regulations*.

While the Department was going through the extensive regulatory drafting process via the RAC efforts noted above, several pieces of legislation were also introduced by Delaware's 148<sup>th</sup> General Assembly. Due to the fact that Emergency Regulations expire after 180 days, Delaware's legislature passed legislation to codify certain requirements of the Amendments (which, at that time, were still in the process of being drafted by the Department), and to allow the RAC to continue its work without the constraint of the standard Emergency Regulation time limit.

Of those legislative actions, three were ultimately codified: Senate Bill 253 and House Bill 194 (which both became effective in 2016), and most recently, Senate Bill 204 (which was introduced by Delaware's 149<sup>th</sup> General Assembly and became effective in July, 2018). The most significant of these was Senate Bill 253, signed into law by Governor Markell on June 24, 2016. Senate Bill 253 included several stormwater provisions, the most notable of which allowed additional time for the RAC to thoroughly discuss all of the necessary revisions and amendments to the *Stormwater Regulations* by eliminating the 180 day expiration of the Emergency Regulations. Senate Bill 253 included the following provisions:

- Exempted residential land disturbing activity of less than 1 acre from the stormwater management requirements of the regulations;
- Directed the Department to develop standard plans for agriculture structures that disturb 10 acres or less, and precludes them from having to complete a detailed plan;
- Established that stormwater discharges into tidal areas/waters that are non-erosive are not subject to the quantity management provisions of these regulations, including volume reduction (they continue to be subject to the water quality provisions);
- Allowed alternative methods to calculate the Resource Protection Volume based on 1" of runoff;
- Allowed applicants to use the modified language or continue under the 2016 Emergency Regulations, at the discretion of the applicant;
- Allowed applicants to use additional BMPs that are deemed to be functionally equivalent to the Post-Construction Stormwater BMP Standards & Specifications that were published with the 2016 Emergency Regulations;

- Extended the approval period for Sediment and Stormwater Plans from 3 years to 5 years; and
- Extended the re-delegation period from 3 years to 5 years.

A second legislative action was taken under House Bill 194 (signed into law by Governor Markell on August 10, 2016), which exempted linear utility projects with a maximum disturbed width of 30 feet and maximum disturbed area of 1 acre from post-construction stormwater management requirements. Immediately following the passage of Senate Bill 253 and House Bill 194, the RAC met to make recommendations for regulatory components to address the specific items of those bills.

Most recently, Senate Bill 204 (signed into law by Governor Carney in July, 2018) incorporated interim standards for redevelopment criteria, which the RAC was in the process of revising, but had not yet formally incorporated into Delaware's *Stormwater Regulations*. Of note is the fact that the redevelopment portion of Senate Bill 204 was drafted so as to "sunset" upon the Department's formal adoption of these proposed Amendments. Additionally, Senate Bill 204 established the criteria for offsets, and formally clarified the procedural status of supporting materials, known as regulatory guidance documents, published by the Department to facilitate compliance with the *Stormwater Regulations*. Regulatory guidance documents, including the BMP standards and specifications and the Delaware *Erosion and Sediment Control Handbook*, do not need to go through the Department's formal regulatory adoption process. The Department is, however, required to provide public notice with regard to any changes to those supporting materials.

The Department has thoroughly engaged the regulated community during the course and scope of this proposed regulatory promulgation. Over the past three years, the Department has held nineteen (19) full RAC meetings, along with an additional sixty (60) subcommittee meetings, the bulk of which were technical in nature. The RAC has spent over 235 hours in public meeting time alone since November, 2015 reviewing and drafting this proposed regulatory language, and reviewing the aforementioned Technical Document for inclusion of required elements into these Amendments.

The regulatory amendments being proposed at this time by the Department are meant to correct the previous procedural flaw, as determined by both the Delaware Superior Court and the Delaware Supreme Court, by incorporating portions of the Technical Document as part of the actual *Stormwater Regulations*. Specifically, the Standard Plan section of the Technical Document has now been incorporated into Section 3.7 of the proposed Amendments. Additionally, the regulatory elements of the BMP standards and specifications from the aforementioned Technical Document have now been incorporated into (new) Sections 11 and 12 of the proposed Amendments. Numerous other revisions have been proposed at this time to provide addition clarity to the regulated community and to correct various clerical and consistency errors presently contained therein.

With regard to the proposed Amendments, in addition to the legislative actions referenced above, the following issues have been addressed by the Department's Division of Watershed Stewardship:

- All standard plan applicability criteria and conditions have been reviewed and included in subsection 3.7;
- Each of the 17 standards and specifications for post construction stormwater management BMPs have been reviewed by the Committee's technical subcommittee, and required elements have been brought into the proposed Amendments as (new) Section 11.0, *Post Construction BMP Standards and Specifications*;
- (New) Section 12.0, *Supplemental Requirements for Best Management Practices*, was added to provide clear requirements for soil investigation procedures and setbacks for stormwater management BMPs;
- (New) Section 13.0, *Stormwater Management Offsets*, was added to take the place of subsection 1.7, and to provide more explanation and clarification with regard to stormwater management offsets, including fees-in-lieu, banking, and stormwater management offset districts; and
- Section 5.0, *Performance Criteria for Post Construction Stormwater Management*, has been updated to address compliance methods updated by Senate Bills 253 and 204.

The Department has the statutory basis and legal authority to act with regard to promulgation of the proposed amendments to 7 DE Admin. Code 5101: *Delaware Sediment and Stormwater Regulations*, pursuant to 7 Del. C. Ch. 40, *Erosion and Sedimentation Control*, specifically, Section 4006(c). The Department published its initial proposed regulation Amendments in the September 1, 2018 *Delaware Register of Regulations*. Thereafter, the public hearing regarding this matter was held on October 10, 2018.

It should be noted that, subsequent to the initial proposed regulatory Amendments having been published in the *Delaware Register of Regulations* on September 1, 2018, but prior to the public hearing held on October 10, 2018, several revisions were made by the Department in the initial proposed Amendments. The Division of Watershed Stewardship provided handouts for those in attendance at the aforementioned hearing, which charted all of the revisions made to the initial proposed Amendments. Thus, all pre-hearing revisions to the Department's initial proposed Amendments were fully vetted to the public at the time of the hearing, and no additional re-noticing or re-publication of the same is necessary in this matter.

Members of the public attended the aforementioned public hearing, with comment being received by the Department at that time. Pursuant to Delaware law, the hearing record remained open for fifteen (15) additional days subsequent to the date of the public hearing for receipt of public comment. The hearing record formally closed for comment in this matter at the close of business on October 25, 2018, with comment having been received by the Department during all phases of this formal regulatory promulgation. It should be noted that all notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

After the comment period formally closed on October 25, 2018, the Department performed a thorough review of the record, including all of the comments received on the proposed Amendments. At the request of the presiding Hearing Officer, a Technical Response Memorandum ("TRM") was prepared by the Department's Division of Watershed Stewardship staff to serve as a comprehensive summary of the comment received in this matter.

The Department's TRM provides two documents: (1) a chart illustrating all revisions made to the initial proposed Amendments, which were fully vetted at the public hearing on October 10, 2018; and (2) a chart summarizing all comments received through October 25, 2018, along with the Department's responses and recommendations concerning the same. Where changes to the proposed Amendments resulted from the comment offered, the response detailing each specific revision has been provided in bold font.

Hearing Officer Vest subsequently prepared a Hearing Officer's Report dated January 7, 2019 ("Report"), which expressly incorporated both the Department's proposed *revised* Amendments and the aforementioned TRM into the hearing record generated in this matter. The Report documents the proper completion of the required regulatory amendment process, establishes the record, and recommends the adoption of the proposed *revised* Amendments as attached to the Report as Appendix "A."

### **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 *revised* regulatory amendments to 7 DE Admin. Code 5101: *Delaware Sediment and Stormwater Regulations*, are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed *revised* Amendments be promulgated as final. I further find that the Department's experts in the Division of Watershed Stewardship fully developed the record to support adoption of these *revised* Amendments.



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 *revised* Amendments to 7 DE Admin. Code 5101: *Delaware Sediment and Stormwater Regulations*, pursuant to 7 Del. C. Ch. 40, *Erosion and Sedimentation Control*, specifically, Section 4006(c);

2. The Department has jurisdiction under its statutory authority, pursuant to 7 Del.C. Ch. 60, to issue an Order adopting these proposed *revised* Amendments as final;

3. The Department provided adequate public notice of the initial proposed Amendments and all proceedings in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on the proposed *revised* Amendments, including at the time of the public hearing held on October 10, 2018, and during the 15 days subsequent to the hearing (through October 25, 2018), before making any final decision;

4. Promulgation of the proposed *revised* Amendments to 7 DE Admin. Code 5101: *Delaware Sediment and Stormwater Regulation*, will enable the Department to (1) update Delaware's *Stormwater Regulations* to be consistent with recent changes in Delaware law; (2) correct the previous procedural flaw as determined by the Delaware Superior Court and the Delaware Supreme Court, as referenced above, by incorporating the aforementioned portions of the Technical Document as part of the Department's finalized *Stormwater Regulations*; and (3) provide additional clarity to the regulated community while correcting various clerical and consistency errors presently contained therein;

5. The Department has reviewed the proposed *revised* Amendments 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 Hearing Officer's Report, including its established record and the recommended proposed *revised* Amendments as set forth in Appendix "A," are hereby adopted to provide additional reasons and findings for this Order;

7. The Department's proposed regulatory Amendments, as initially published in the September 1, 2018 *Delaware Register of Regulations*, and then as *revised*, as set forth in Appendix "A" of the Hearing Officer's Report, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final regulatory Amendments, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and

8. The Department shall submit the proposed *revised* Amendments as final regulatory amendments to 7 DE Admin. Code 5101: *Delaware Sediment and Stormwater Regulations*, 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.

A handwritten signature in blue ink, appearing to read "Shawn M. Garvin". The signature is stylized and cursive.

Shawn M. Garvin  
Secretary