



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

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SECRETARY

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**Secretary's Order No.: 2021-WSS-0004**

**RE: Approving Final Regulatory Amendments to 7 DE Admin. Code 7201:  
*Regulations Governing the Control of Water Pollution, Part 2 –  
Special Conditions for Stormwater Discharges from  
Construction Activities***

**Date of Issuance: February 15, 2021**

**Effective Date of the Amendment: March 11, 2021**

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 promulgation.

**Background, Procedural History and Findings of Fact**

This Order relates to the Department’s proposed regulatory amendments to 7 DE Admin. Code 7201: *Regulations Governing the Control of Water Pollution, Part 2 – Special Conditions for Stormwater Discharges from Construction Activities* (“Amendments” or “Water Pollution Regulations”). This action is being taken by the Department at this time in order to support the development of a National Pollutant Discharge Elimination System (“NPDES”) Construction General Permit (“CGP”) by (1) removing existing conflicting regulatory language; (2) adding “effective” and “expiration” dates; (3) eliminating the post-rain event inspection requirement; (4) removing the “transfer of authorization” option; and (5) correcting existing clerical errors.

Areas that engage in construction activities that result in land disturbance equal to or greater than one (1.0) acre and that discharge stormwater to waters of the state are to be covered under the NPDES CGP. The CGP will provide permit coverage for a broad range of construction projects that meet the minimum land disturbance threshold, as defined by the federal CGP.

The NPDES CGP is being converted from a permit by regulation (that currently falls under the above noted Water Pollution Regulations), to a stand-alone general permit authorizing discharges from construction. Without the aforementioned proposed Amendments, there will be conflicts between the regulatory language currently existent in the Water Pollution Regulations and the newly effective CGP. The proposed Amendments will enable Delaware to maintain the enabling language for the CGP and eliminate conflicts for this and future CGPs in Delaware.

The purpose of the federal NPDES stormwater program is to control pollution generated from runoff associated with industrial activity, including construction, and municipal separate storm sewer systems. As noted above, an individual or general permit is required for all construction activity in the state of Delaware with a planned total disturbance of one (1.0) acre or greater, as well as activities that are less than one acre, but part of a larger common plan of development or sale where the total disturbance is greater than one acre.

Conditions of the CGP include compliance with the requirements of the approved sediment and stormwater management plan, as well as visual monitoring/inspections, recordkeeping, and reporting requirements. Sediment is the primary pollutant to be controlled from construction sites. The volume of stormwater discharge from construction sites varies and will depend on the size of the site, weather conditions, as well as other factors.

The Department has the statutory basis and legal authority to act with regard to the proposed Amendments and has the statutory authority for permit issuance of Delaware's CGP, through Section 402 of the federal *Clean Water Act*, as amended, 7 *Del.C.* Chapter 60, Section 6003, and the Memorandum of Agreement ("MOA") authorizing Delaware to implement the NPDES program.

The CGP is a state permit that is subject to both federal and state regulations. The *Clean Water Act* and federal regulations provide the federal permit requirements. The CGP shall be administered in accordance with the following state requirements:

- 7 *Del.C.* Ch. 60, *Environmental Control*;
- 7 *Del.C.* Ch. 40, *Erosion and Sedimentation Control*;
- 7 DE Admin. Code 7201, Section 9.2;
- 7 DE Admin. Code 5101, *Sediment and Stormwater Regulations*; and
- Delaware Erosion & Sediment Control (ESC) Handbook, as amended.

Currently, Delaware's existing Water Pollution Regulations are not consistent with 40 CFR 122.46(a), as it has no issuance, effective, or expiration dates, and does not ensure that it is effective for a term not to exceed more than five (5) years. To address these deficiencies, the Department's Division of Watershed Stewardship, Sediment and Stormwater Program ("WSS-SSP"), has developed the Delaware CGP as a true general permit, rather than a permit by regulation.

The Department's proposed Amendments minimize duplication with the CGP and update administrative processes. The proposed CGP allows for closer alignment of construction stormwater discharge requirements with the United States Environmental Protection Agency ("EPA") and states such as Delaware that are located within EPA Region 3. The alignment of requirements is an important benefit to permittees who work in multiple jurisdictions, as it helps maintain understanding and compliance.

The CGP will expire after five (5) years, thus requiring a new permit to be reissued at that time. This is a benefit to the regulated community, as there is an opportunity to comment on changes to the CGP once every five years.

Insofar as anticipated impacts to Delegated Agencies, including DelDOT, the Department notes that there will be no anticipated impacts on the Delegated Agencies' abilities to implement the state's Sediment and Stormwater Program. When in the role of project owner, Delegated Agencies will see the same effects indicated above (i.e., improved alignment with federal and regional entities, reduced reporting requirement, and regular opportunities to provide comments during review and reissuance periods).

The Department published its proposed Amendments, along with the draft CGP, in the November 1, 2020 *Delaware Register of Regulations*. Public notice of the Department's proposed actions in this matter, as referenced above, were also published in both the *News Journal* and the *Delaware State News* on November 8, 2020. Interested persons were invited to submit their written comment on the draft permit and the proposed Amendments. Thereafter, the virtual public hearing regarding this matter was held on December 1, 2020.

Members of public attended the December 1, 2020 virtual public hearing, and verbal comment was received at that time. It should be noted that the verbal comments received during the public hearing pertained solely to the Delaware CGP. No members of the public offered comment on the Department's proposed Amendments at the time of the hearing. Pursuant to 29 *Del.C.* §10118(a), the hearing record ("Record") remained open for fifteen (15) additional days subsequent to the date of the public hearing for receipt of public comment. The Record formally closed with regard to public comment at close of business on December 16, 2020, with additional written comments being received from the public by the Department during the post-hearing phase of this 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.

Subsequent to the close of the Record, the Department's Division of WSS-SSP staff prepared a Technical Response Memorandum ("TRM"), which responded to the comments received from the public concerning the Department's proposed Amendments. The TRM also incorporated a CGP Fact Sheet that provides a very detailed description of the CGP permit development performed by the Department and offers the requisite reasoning as to why a general permit for constructive activities is the appropriate approach for the Department to take in this matter.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated February 8, 2021 ("Report"), which expressly incorporated the Department's proposed Amendments, along with the aforementioned TRM (with attachment) and draft CGP, into the 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 Department's proposed Amendments as attached to the Report as Appendix "A."

### **Reasons and Conclusions**

The Department is proposing the aforementioned Amendments to Delaware's existing Water Pollution Regulations to support the development of the NPDES CGP by removing existing conflicting regulatory language, adding "effective" and "expiration" dates, eliminating the post-rain event inspection requirement, removing the "transfer of authorization" option, and correcting existing clerical errors. As noted above, the Amendments support the development of a stand-alone CGP, which will be required for all construction activity in Delaware with a planned total disturbance of one (1.0) acre or greater, as well as activities that are less than one acre but part of a larger common plan of development or sale where the total disturbance is greater than one acre. The CGP will provide permit coverage for a broad range of construction projects that meet the minimum land disturbance threshold, as defined by the federal CGP.

All comments received by the Department in this matter were fully responded to in the aforementioned TRM of January 20, 2021. It should be noted that no changes were made to the proposed Amendments subsequent to the public hearing held on December 1, 2020. Revisions were made to the draft CGP prior to its finalization, in response to the public comments received in this matter, in order to correct prior error, and to provide greater clarity to the regulated community within that document.

Based on the Record developed by the Department's experts and established by the Hearing Officer's Report, I find that the proposed regulatory amendments to 7 DE Admin. Code 7201: *Regulations Governing the Control of Water Pollution, Part 2 – Special Conditions for Stormwater Discharges from Construction Activities*, are well-supported. I further find that the Department's experts fully developed the Record to support adoption of these proposed Amendments. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed Amendments be promulgated as final.

In conclusion, the following reasons and conclusions are hereby entered:

1. The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 7201: *Regulations Governing the Control of Water Pollution, Part 2 – Special Conditions for Stormwater Discharges from Construction Activities*;

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

3. The Department provided adequate public notice of the proposed Amendments, and all proceedings in a manner required by the law and regulations. The Department also provided the public with an adequate opportunity to comment on the proposed Amendments, including at the time of the virtual public hearing held on December 1, 2020, and during the 15 days subsequent to the hearing (through December 16, 2020), in order to consider all public comment on the same before making any final decision;

4. Promulgation of the proposed Amendments to 7 DE Admin. Code 7201: *Regulations Governing the Control of Water Pollution, Part 2 – Special Conditions for Stormwater Discharges from Construction Activities*, will enable Delaware to control pollution generated from runoff associated with construction activity that is considered a subset of industrial activity. Furthermore, the aforementioned Amendments will support the Department’s development of the NPDES CGP by (1) removing existing conflicting regulatory language; (2) adding “effective” and “expiration” dates; (3) eliminating the post-rain event inspection requirement; (4) removing the “transfer of authorization” option; and (5) correcting existing clerical errors;

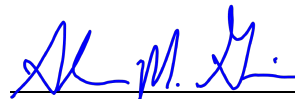
5. The Department has reviewed the proposed Amendments in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104, and believes the same to be lawful, feasible, and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;

6. The Department’s Hearing Officer’s Report, including its established Record and the recommended proposed Amendments as set forth therein in Appendix “A,” are hereby adopted to provide additional reasons and findings for this Order;

7. The Department's proposed Amendments, as published in the November 1, 2020 *Delaware Register of Regulations*, and as set forth in Appendix "A" as noted above, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they are approved as final regulatory Amendments, and shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*;

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

9. The Department shall submit this Order approving as final the proposed Amendments to the *Delaware Register of Regulations* for publication in its next available issue and provide such other notice as the law and regulation require, as the Department determines is appropriate.



Shawn M. Garvin  
Secretary