



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

OFFICE OF THE
SECRETARY

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Secretary's Order No. 2014-WS-0022

**Re: Adoption of Amendment to 7 DE Admin Code 5101 Sediment and Stormwater
Regulations**

Date of Issuance: October 15, 2015
Effective Date: November 11, 2015

This Order of the Secretary of the Department of Natural Resources and Environmental Control (Department) considers the record developed on a proposed amendment to *7 DE Admin. Code 5101* (Regulation 5101).

Background

The Department's Division of Watershed Stewardship (Division), through experts in its Sediment and Stormwater Program, prepared a proposed amendment to Regulation 5101, which the Department had published in the September 1, 2014 issue of the *Delaware Register of Regulations*. Legal notices also were published in the *News Journal* and *Delaware State News*. The notices also provided the opportunity for public comment, including at a September 25, 2014 public hearing. The time period for written public comment ended on October 10, 2014. In an October 13, 2014, Hearing Officer's Report, the Department's presiding hearing officer reviewed the record and recommended approval of the proposed amendment.

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Discussion

The Department proposed amendment to Regulation 5101 is made to clarify and remove any ambiguity that may be in Regulation 5101 concerning the role of the Technical Documents (TD). As stated by the Department's counsel, the amendment is curative. Indeed, the Department's counsel currently is defending Regulation 5101 and Secretary's Order No. 2013-WS-0026 issued July 18, 2013 (2013 Order), which approved the currently effective Regulation 5101 in Superior Court in *Baker v DNREC*, CA No. S13C-08-026 THG (Appeal).

This appeal of the 2013 Order is based upon a misunderstanding of the role of TD. This amendment seeks to clarify and cure any misunderstanding of the role of the TD. The amendments approved by this Order are curative in that Regulation 5101, as approved by the 2013 Order, will not change nor will the Department's implementation of Regulation 5101. Instead, the language changes are to clarify and remove any ambiguity that may exist in Regulation 5101 about the role of the TD in the administration of Regulation 5101.

This Order relies on the October 10, 2014 letter from the Department's counsel in the Appeal because this change is prompted by the Appeal, which the Department believes may have been filed based upon a misunderstanding of Regulation 5101 or admittedly less than clear language. It is the language that refers to the TD that this amendment clarifies and/or corrects so as to remove any misunderstanding or confusion. The Department of Justice letter includes an analysis of the procedural issues raised on appeal and in the public comments, and concludes that the amendment is curative and could have been promulgated as exceptions to the *Administrative Procedures Act, 29 Del.*

C. 10101 et seq. (APA). Instead, the Department promulgated this amendment under the APA's full public hearing process as opposed to the abbreviated process allowed for curative changes such as proposed by this amendment.

The changes reinforce the Department's stated intent that the TD was not to be a regulation. Instead, the TD was provided and cited in Regulation 5101 in order to provide the regulated community with assistance in understanding and implementing Regulation 5101, particularly in the new provision whereby Sediment & Stormwater Plans may be approved using methods not contained in the TD if they provide "functional equivalency" to achieve the necessary environmental protection from urban stormwater runoff, which also poses a significant risk to public health and safety. Regulation 5101, as approved in the 2013 Order, was a comprehensive change to the sediment and stormwater regulation in Delaware after years of meetings and discussions with all interested participants.

The Appeal seeks to reverse the 2013 Order and its approval of Regulation 5101. The Appeal is based upon the alleged failure to include the TD as part of Regulation's APA procedure. Instead, the 2013 Order discussed the issue, but Regulation 5101 included language that could cause ambiguity in the role of the TD. This amendment is promulgated as a curative change in order to resolve any uncertainty that may exist.

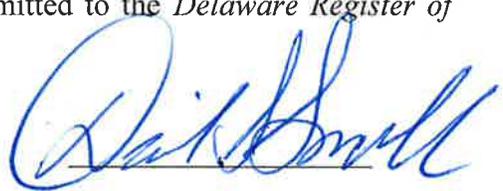
The letter from the Department's counsel in the litigation before Superior Court in *Baker v DNREC, CA No. S13C-08-026 THG* is the Department's legal position that the proposed amendment seeks to implement in language changes to Regulation 5101 to remove any ambiguity and satisfy the appeal, if possible, through such changes.

In conclusion, the following findings and conclusions are entered:

1. The Department, acting through this Order of the Secretary, adopts as a final regulation the amendment to Regulation 5101 as set forth in the Appendix A;

2. The approved amendment to Regulation 5101 is based upon the version published in the September 1, 2014 *Delaware Register of Regulations*; and

3. The Department shall provide written notice to the persons affected by the Order, as determined by the Department, including those persons who requested to receive notice on Regulation 5101, and shall be submitted to the *Delaware Register of Regulations* for publication in its next available issue.



David S. Small
Secretary

Appendix A (Final Clean Copy)

TITLE 7 NATURAL RESOURCES & ENVIRONMENTAL CONTROL
DELAWARE ADMINISTRATIVE CODE

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DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
DIVISION OF WATERSHED STEWARDSHIP
Sediment and Stormwater Program

5101 Sediment and Stormwater Regulations

1.0 General Provisions

1.1 Findings of Fact

1.1.1 It is determined that:

- 1.1.1.1 Erosion and sedimentation and delivery of other nonpoint source pollutants such as nutrients through stormwater runoff continue to present serious problems throughout the State.
- 1.1.1.2 The removal of a stable ground cover in conjunction with the decrease in the infiltration capability of soils resulting from the creation of additional impervious areas such as roads and parking lots has accelerated the process of soil erosion and sediment deposition and nonpoint source runoff of other pollutants resulting in pollution of waters of the State. This damages domestic, agricultural, industrial, recreational, fish and wildlife and other resource uses.
- 1.1.1.3 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 cost of public facilities in carrying and controlling stormwater, undermines floodplain management and flood control efforts in downstream communities, reduces groundwater recharge, and threatens public health, welfare and safety.

1.1.2 The regulation of stormwater runoff from land development activities will control stormwater runoff, soil erosion and nonpoint source pollution and will mitigate the adverse effects of stormwater runoff from development and will reduce threats to public health and safety.

1.2 The purpose of this regulation is to enhance and extend the present erosion and sediment control activities and programs of the State for both rural and urban lands and to provide for control and management of stormwater runoff consistent with sound water and land use practices. These activities will reduce, to the maximum extent practicable, adverse effects of stormwater runoff on the water and lands of the State.

1.3 Applicability

1.3.1 On and after January 1, 2014, unless a particular activity is exempted by these regulations, a person shall not disturb land without an approved Sediment and Stormwater Management Plan from the Department or Delegated Agency. A Sediment and Stormwater Management Plan shall not be approved for a property unless it is consistent with the following items:

- 1.3.1.1 These regulations;
- 1.3.1.2 7 Del.C. Ch. 40, relating to erosion and sediment control and stormwater management;
- 1.3.1.3 7 Del.C. Ch. 60, relating to the development, utilization, and control of the land, water, underwater and air resources of the State, and;
- 1.3.1.4 *Regulations Governing the Control of Water Pollution*, Section 9.1.02, known as Special Conditions for Stormwater Discharges Associated with Construction Activities.

1.3.2 Applicability of these regulations for plans that have been approved to comply with previous regulations shall be consistent with the following:

1.3.2.1 Plans approved to comply with previous regulations where construction has not commenced on January 1, 2014 may have the plan approval extended under the requirements of the previous regulations in subsequent three-year approval periods. Any plan approved to comply with previous regulations must commence construction no later than December 31, 2019. A plan approved to comply with previous regulations where construction has not commenced by December 31, 2019 shall expire and a new plan in compliance with these regulations shall be submitted to the Department or Delegated Agency for review and approval before commencement of construction.

1.3.2.2 Plans approved to comply with previous regulations where construction has commenced may be extended based on the requirements in place at the time of original Plan approval.

- 1.6.1.2 The establishment of fees, not involving stormwater utilities, shall be in accordance with the following items:
 - 1.6.1.2.1 The number of needed personnel and the direct and indirect expenses associated with those personnel shall be developed by the agencies requesting delegation in a specific jurisdiction in conjunction with and with the concurrence of the Department. Those expenses will then form the basis for determining plan review, construction review and maintenance review costs.
 - 1.6.1.2.2 The fee schedule and revisions to the fee schedule of the Delegated Agency shall be subject to applicable State or local public notice requirements. State public notice requirements shall be governed by 7 Del.C. §6004.
- 1.6.2 Financial Guarantee
 - 1.6.2.1 The Department or Delegated Agency may require and implement a financial guarantee for construction of the elements of the approved Sediment and Stormwater Management Plan. The Owner shall submit when required to the Department or Delegated Agency a financial guarantee before the onset of construction activities. The financial guarantee will ensure that action can be taken by the Department or Delegated Agency to complete required elements of the approved Sediment and Stormwater Management Plan, at the Owner's expense, should the Owner fail to initiate, complete, or maintain those measures identified in the approved Sediment and Stormwater Management Plan after being given proper notice and within a reasonable time specified by the Department or Delegated Agency.
 - 1.6.2.2 Following approval of the Department, the financial guarantee provisions of the Delegated Agency shall be subject to applicable State or local public notice requirements. State public notice requirements shall be governed by 7 Del.C. §6004.
- 1.7 Offset Provisions
 - 1.7.1 The Department may require an offset as an alternative to full or partial compliance with the Resource Protection Event requirements as provided in Sections 5.2 and 5.6.3 of these regulations.
 - 1.7.2 Offset requirements shall be subject to Departmental review and approval as well as to the public notice requirements of 7 Del.C. §6004.
 - 1.7.3 Procedures for determining offset options may be developed by the Department and published in the technical document supplement to these regulations.
- 1.8 These regulations are adopted pursuant to authority conferred by and in accordance with 7 Del.C. Ch. 40 and 7 Del.C. Ch. 60.
- 1.9 These regulations are not intended to interfere with, abrogate, or annul any other ordinance, rule or regulation, statute, or other provision of law. The requirements of these regulations should be considered minimum requirements, and where any provision of these regulations imposes restrictions different from those imposed by any other ordinance, rule or regulation, or other provision of law, whichever provisions are more restrictive or impose higher protective standards for human health or the environment shall be considered to take precedence.
- 1.10 If any section, subsection, sentence, clause, phrase or portion of these regulations is for any reason held invalid or unconstitutional by any court or competent jurisdiction, such provision and such holding shall not affect the validity of the remaining portions of these regulations.
- 1.11 Any person who undertakes or causes to be undertaken any land disturbing activities shall ensure that soil erosion, sedimentation, increased pollutant loads and changed water flow characteristics resulting from these activities are controlled so as to minimize pollution of state waters. The requirements of these regulations are minimum standards and a person's compliance shall not relieve the person from the duty of enacting all measures necessary to minimize pollution of, or detrimental impacts to state waters.
- 1.12 The conduct of all hearings conducted pursuant to these regulations shall be in accordance with the relevant provisions of 7 Del.C. Ch. 60.
- 1.13 The Department is responsible for the implementation and supervision of the sediment and stormwater program which is established by 7 Del.C. Ch. 40. The program shall be administered pursuant to these regulations. The Department may also develop and maintain a Technical Document to serve as a guide for the regulated community and Delegated Agencies in complying with Chapter 40 and these regulations.
- 1.14 Technical Document
 - 1.14.1 The Technical Document may include policies, procedures, technical specifications and other advisory documents as deemed necessary by the Department to carry out implementation and supervision of the sediment and stormwater program.

“**Dedication**” means transferring ownership of a stormwater management system to a delegated agency, public utility, municipality, stormwater utility, or private entity, along with all associated easements, escrow funds, and maintenance responsibilities.

“**Delegated Agency**” means the Conservation District, county, municipality, or State agency that has accepted responsibility in a jurisdiction for implementation of one or more elements of the Sediment and Stormwater Program within that jurisdiction.

“**Delegation**” means the acceptance of responsibility by a Conservation District, county, municipality, or State agency for the implementation of the Sediment and Stormwater Program.

“**Department**” means the Department of Natural Resources and Environmental Control.

“**Designated Watershed or Subwatershed**” means a watershed or subwatershed proposed by a conservation district, county, municipality, or State agency and approved by the Department. The Department may establish additional requirements due to existing water quantity or water quality problems. These requirements shall be implemented on an overall watershed or subwatershed master plan developed for water quality or water quantity protection.

“**Detailed plan**” means a plan developed by a Licensed Professional in the State of Delaware which does not meet standard plan criteria.

“**Drainage area**” means that area contributing runoff to a single point measured in a horizontal plane, which is enclosed by a ridge line.

“**Easement**” means a grant or reservation by the Owner of land for the use of land by others for a specific purpose or purposes, and which must be included in the conveyance of land affected by the easement.

“**Effective imperviousness**”, for the purposes of these Regulations, means the equivalent percentage of a site’s impervious area that directly contributes stormwater runoff during the Resource Protection Event after all runoff reduction practices have been implemented.

“**Erosion and sediment control**” means the control of solid material, both mineral and organic, during a land disturbing activity, to prevent its transport out of the disturbed area by means of wind, water, gravity, or ice.

“**Final stabilization**” means that:

- (1) All soil disturbing activities at the site have been completed and either of the two following criteria are met:
 - (a) A uniform (e.g. evenly distributed, without large bare areas) perennial vegetative cover with a density of 70% of the native background vegetative cover for the area has been established on all unpaved areas and areas not covered by permanent structures, or
 - (b) Equivalent permanent stabilization measures (such as the use of riprap, gabions, or geotextiles) have been employed.
- (2) When background native vegetation will cover less than 100% of the ground (e.g., arid areas, beaches), the 70% coverage criteria is adjusted as follows: if the native vegetation covers 50% of the ground, 70% of 50% ($0.70 \times 0.50 = 0.35$) would require 35% total coverage for final stabilization. On a beach with no natural vegetation, no stabilization is required.
- (3) For individual lots in residential construction, final stabilization means that either:
 - (a) The homebuilder has completed final stabilization as specified above, or
 - (b) The homebuilder has established temporary stabilization including perimeter controls for an individual lot prior to occupation of the home by the homeowner and informing the homeowner of the need for, and benefits of, final stabilization.
- (4) For construction projects on land used for agriculture purposes (e.g., pipelines across crop or range land, staging areas for highway construction, etc.) final stabilization may be accomplished by returning the disturbed land to its preconstruction agriculture use. Areas disturbed that were not previously used for agricultural activities, such as buffer strips immediately adjacent to a “water of the United States” and areas which are not being returned to their preconstruction agricultural use must meet the final stabilization criteria (1) or (2) above.

“**Financial guarantee**” means a bond, security, letter of credit, etc. provided by the Owner to serve as a payment source should the Owner fail to meet the obligations and requirements of the approved Sediment and Stormwater Management Plan.

“**Flooding Event**” means the runoff event produced by a storm having an annual probability of occurrence of 1.0%.

“**Flooding Event Volume (Fv)**” means the volume of runoff generated by the Flooding Event that is not otherwise reduced for the Resource Protection Event and the Conveyance Event.

“Resource Protection Event” means the runoff event produced by a storm having an annual probability of occurrence of 99%.

“Resource Protection Event Volume (RPv)” means the annualized volume of runoff generated by the Resource Protection Event.

“Responsible personnel” means a foreman or superintendent who is in charge of on-site clearing and land disturbing activities for sediment and stormwater control associated with a construction project.

“Runoff reduction practices” means stormwater best management practices that reduce total runoff volume from a developed site through canopy interception, surface recharge, evaporation, rainfall harvesting, engineered infiltration, or evapotranspiration and may include practices that delay the delivery of stormwater to a surface discharge.

“Sediment” means soils or other surficial materials transported or deposited by the action of wind, water, ice or gravity as a product of erosion.

“Sediment and Stormwater Management Plan” means a plan for the control of soil erosion, sedimentation, stormwater quantity, and water quality impacts resulting from a land disturbing activity, through both the construction and post construction phases of development.

“Standard plan” means a set of pre-defined standards or specifications for minor land disturbing activities that may preclude the need for the preparation of a detailed plan under specific conditions.

“Standards-based approach” means a stormwater quantity management technique that utilizes a pre-determined discharge rate to determine compliance.

“State waters” means any and all waters, public or private, on the surface of the earth which are contained within, flow through or border upon the State or any portion thereof.

“Stormwater” means the runoff of water from the surface of the land resulting from precipitation, or snow or ice melt.

“Stormwater management” means:

- (a) For water quantity control, a system of vegetative, structural, and other measures that controls the volume and rate of stormwater runoff which may be caused by land disturbing activities upon the land; and
- (b) For water quality control, a system of vegetative, structural, and other measures that controls adverse effects on water quality that may be caused by land disturbing activities upon the land.

“Stormwater management system” means vegetative, structural, and other facilities or measures, singularly or in combination, that provide stormwater management.

“Stormwater utility” means an administrative organization that has been established for the purposes of funding sediment control, stormwater management or flood control planning, design, construction, maintenance, and overall resource needs by authorized and imposed charges.

“Temporary stabilization” means planting quick-growing vegetation and applying anchored straw mulch or other means to stabilize the soil and prevent erosion of a disturbed area until permanent vegetation or other stabilization measures can be established.

“Tidal waters” means any water that alternately rises and falls in a predictable and measurable rhythm or cycle due to the gravitational attraction of the moon and sun and is under the regulatory authority of 7 Del.C. Ch. 72.

“Transfer” means to convey responsibility for maintenance of a stormwater management system to a new Owner.

“Variance” means a permitted deviation from an established rule or regulation, or plan, or standard or procedure.

“Water quality” means those characteristics of stormwater runoff from a land disturbing activity that relate to the chemical, physical, biological, or radiological integrity of water.

“Water quantity” means those characteristics of stormwater runoff that relate to the rate, volume and duration of flow to downstream areas resulting from land disturbing activities.

“Watershed” means the drainage area contributing stormwater runoff to a single point.

“Watershed plan” means a comprehensive study of the activities and sources that contribute to water quality or water quantity problems and identifies the location of those problem areas within a specific watershed boundary. It also serves as a framework for how, where and what stormwater management tools will be applied to address those water quality or water quantity problems.

- 3.5.2 The Department or Delegated Agency shall have the right to reject an incomplete application at any time during the 30-calendar day review period. If an application is rejected for incompleteness, the Owner will be informed in writing of the information necessary to complete the application.
 - 3.5.3 In cases where modifications are required to approve the plan, the Department or Delegated Agency shall have an additional 30 calendar days to review the revised plan from the initial and any subsequent resubmission dates.
 - 3.5.4 The sediment and stormwater management plan shall not be considered approved without the inclusion of an original approval stamp on the plans with signature and date by the plan approval agency. If the plan is approved, a minimum of one (1) copy bearing the signed approval stamp shall be returned to the Owner or Owner's agent. If the plan is not approved, the Owner shall be notified in writing of the reasons.
 - 3.5.5 No changes shall be made to an approved plan without review and written approval by the Department or Delegated Agency. The Department or Delegated Agency may request additional data with a plan amendment as may be necessary for a complete review of the plan and to ensure that changes to the plan will comply with the requirements of these regulations.
 - 3.5.6 Administratively complete sediment and stormwater management plans, as determined by Department policy, that have been submitted for review and ultimate approval before January 1, 2014 shall be subject to the regulations in effect at the time that the plan was first submitted to the Department or Delegated Agency. Unless administratively extended by the Department, a plan undergoing the review process on January 1, 2014 but is not approved within eighteen months of January 1, 2014 shall be subject to these regulations.
- 3.6 Expiration of Plan Approval
- 3.6.1 Approved plans remain valid for 3 years from the date of an approval, unless specifically extended by the Department or Delegated Agency. The basis for extension may include, but is not limited to, the following items:
 - 3.6.1.1 Failure to initiate the approved project for reasons acceptable to the Department or Delegated Agency such as funding or other agency permit delays; or
 - 3.6.1.2 Time duration for a type of activity that typically exceeds three years.
 - 3.6.2 The Department or Delegated Agency may extend plan approval following a written request for extension providing justification for the extension request. Plan approval extension may be granted no more than 90 days before plan expiration, and will be granted for a maximum extension of an additional 3 years. In no case shall the plan extension supersede the sunset provisions of the county or local government.
 - 3.6.3 Plan extension requests for projects that have not commenced construction shall be granted for a maximum of one additional 3-year period.
 - 3.6.4 Plan extension requests for projects that have commenced and have been actively under construction within the latest approval or extension period will not be limited in the number of extensions that may be approved.
- 3.7 Standard Plans
- 3.7.1 The Department may develop criteria for standard plans when a detailed plan is deemed not necessary. Project types that may qualify for a standard plan include, but are not limited to, individual parcel construction or improvements, tax ditch maintenance, minor linear disturbances, stormwater facility maintenance, agricultural structure construction, or other activities approved by the Department.
 - 3.7.2 All standard plans shall contain standard conditions for construction site stormwater management and may contain standard conditions for post construction stormwater management.
 - 3.7.3 The inclusion of an activity into the standard plan classification does not exclude that activity from the requirements of 7 Del.C. Ch. 40. Rather, the standard plan precludes that activity from the necessity of a detailed plan review for a qualifying project.
 - 3.7.4 Failure to implement control practices pursuant to conditions included in the standard plan may necessitate appropriate enforcement action as provided in 7 Del.C. Ch. 40 and these regulations.
 - 3.7.5 A detailed plan may be required for a site that would otherwise meet standard plan criteria as deemed appropriate by the Department or Delegated Agency on a case-by-case basis.

- 4.4.3 In no case shall the area of disturbance draining to a common discharge point exceed 20 acres. Grading of subsequent sections within that drainage area shall not proceed unless temporary or permanent stabilization has been accomplished such that the 20 acre limit of disturbance is maintained.
- 4.4.4 All plans shall include a limit of disturbance line (L.O.D.) establishing the maximum necessary extent of land disturbance required to implement and accomplish the permitted site construction for land disturbing activities subject to these Regulations.

4.5 Stabilization

- 4.5.1 Following soil disturbance or re-disturbance, Permanent or Temporary Stabilization shall be completed for perimeter sediment controls, topsoil stockpiles, and all other disturbed or graded areas on the project site within 14 calendar days unless more restrictive Federal requirements apply.
- 4.5.2 Documentation of soil testing and materials used for temporary or permanent stabilization including but not limited to soil test results, seed tags, soil amendment tags, etc. shall be provided to the Department or Delegated Agency to verify that the permanent or temporary stabilization has been completed in accordance with the approved plan.
- 4.5.3 The Department or Delegated Agency may require additional soil testing and reapplication of permanent or temporary stabilization in accordance with the specifications in the Delaware Erosion and Sediment Control Handbook, or alternative measures that provide functional equivalency.
- 4.5.4 Release of either a financial guarantee or issuance of Notice of Completion or both shall not occur until final stabilization of exposed areas is achieved.

5.0 Performance Criteria for Post Construction Stormwater Management

- 5.1 The Technical Document may be utilized as a reference for the design and preparation of post construction stormwater management plans. Alternative measures that provide functional equivalency may be considered on a case-by-case basis in accordance with Section 1.14 of these Regulations.
 - 5.1.1 Stormwater management designs shall reduce runoff, mimic natural watershed hydrologic processes, and cause no adverse impact to property. This shall be accomplished by treating runoff at the source, disconnecting impervious surfaces, preserving or enhancing natural flow paths and vegetative cover, conserving or enhancing natural open spaces and riparian areas, and other measures that simulate natural watershed hydrologic processes.
 - 5.1.2 Residential, commercial, institutional or industrial developments shall apply these stormwater management criteria to land development as a whole. Smaller sites, such as individual residential lots in new subdivisions that are part of a larger, common plan of development or sale shall be subject to these requirements as part of that larger plan.
 - 5.1.3 No portion of a stormwater system that is owned and maintained by a joint ownership such as a homeowner's association or maintenance corporation in a residential development shall be located on private property, except for those areas designated as common areas, community open space, community-owned property, jointly owned property, or within a recorded easement dedicated to public use. A stormwater system owned by a single Owner, as in the case of a commercial, institutional or industrial development, may be located on that Owner's private property.
 - 5.1.4 If runoff from a land development will flow to a permitted or non-permitted municipal separate storm sewer system (MS4) or other drainage infrastructure, the land development applicant shall notify the system's owner of the intent to discharge into the system before plan approval. The Department, Delegated Agency, or system's owner may require the land development applicant to demonstrate that the system has adequate conveyance.
 - 5.1.5 All applications that propose to use infiltration or natural recharge shall include a soils investigation to determine the appropriate design criteria.

- 5.4.2 The Flooding Event Volume (Fv) is the volume of runoff produced by the post-development storm having a one percent (1%) probability of occurrence, or the 100-year, 24-hour rainfall event less any volume reduction achieved for the RPv and Cv in accordance with Sections 5.2 and 5.3.
- 5.4.3 Compliance with this section shall be accomplished through the following provisions:
- 5.4.3.1 The Fv shall be reduced to the maximum extent practicable using runoff reduction practices. For any portion of the Fv that is not reduced, quantity management shall be provided using either a standards-based or performance-based approach such that there is no adverse impact; or
 - 5.4.3.2 Provisions will be made or exist for a non-erosive conveyance system to tidal waters by either a closed drainage system or by open channel flow that has adequate conveyance for the Fv; or
 - 5.4.3.3 Demonstration that the location of a project within a watershed would aggravate downstream flooding or channel erosion by the imposition of peak control requirements, as evidenced by a downstream analysis approved by the Department or Delegated Agency; or
 - 5.4.3.4 The proposed project will generate only a de minimis discharge and will have no adverse impact on the receiving wetland, watercourse, or downstream property as determined on a case-by-case basis.
- 5.4.4 Projects that qualify for and meet standard plan criteria developed by the Department shall be considered in compliance with the Flooding Event criteria.
- 5.5 Alternative Criteria
- 5.5.1 Land development that discharges to State Waters included in a Designated Watershed, or other watershed management plan approved in accordance with these Regulations, shall meet the alternative criteria identified in the approved watershed plan.
 - 5.5.2 The Department or Delegated Agency, at its discretion, may require alternative stormwater treatment practices or criteria if a receiving waterbody has been identified as impaired, or designated with a specific pollutant reduction target necessary to meet State of Delaware water quality regulations.
 - 5.5.3 The Department or Delegated Agency, at its discretion may require alternative stormwater treatment practices designed to reduce pollutant loading from a specific source.
- 5.6 Redevelopment Criteria
- 5.6.1 The Department recognizes the benefits of redevelopment. The requirements under this section are intended to encourage redevelopment while establishing compliance criteria that meet the overall goals and intent of these regulations.
 - 5.6.2 In the case of development of a contaminated site or Brownfield, a remediation plan approved by the Department may meet the stormwater management goals and the intent of these regulations with prior consent and subsequent approval by the Department.
 - 5.6.3 Compliance with the Resource Protection Event as defined in 5.2.2 shall be accomplished to the maximum extent practicable for redevelopment projects through the following provisions:
 - 5.6.3.1 Runoff from redeveloped areas within the project limit of disturbance that were wooded or meadow in the existing condition shall be reduced to an equivalent wooded condition using runoff reduction practices.
 - 5.6.3.2 All remaining redeveloped areas within the project limit of disturbance shall employ runoff reduction practices to achieve a 30% reduction in the effective imperviousness based on the existing condition. For those cases in which the minimum runoff reduction requirements are not met:
 - 5.6.3.2.1 The allowable discharge for any remaining runoff shall not exceed the equivalent 24-hr detention time of the RPv, and
 - 5.6.3.2.2 An offset shall be provided for any portion of the RPv that does not meet the minimum runoff reduction requirements.
 - 5.6.3.3 Additional water quality treatment BMPs may be provided if the runoff reduction requirements of this section are not sufficient to meet Total Maximum Daily Load (TMDL) requirements for the receiving water. Pollutant reductions achieved through the use of these treatment BMPs may be used to partially reduce a runoff reduction offset requirement provided in accordance with Section 5.6.3.2.2 above.
 - 5.6.4 Any redevelopment project that increases the rate, volume or duration of flow to a new or existing point of discharge during the Conveyance Event shall comply with the requirements of Section 5.3.
 - 5.6.5 Any redevelopment project that increases the rate, volume or duration of flow to a new or existing point of discharge during the Flooding Event shall comply with the requirements of Section 5.4.

- 6.1.8.4 Referral of the project through the Delegated Agency to the Department for appropriate enforcement action if the Owner fails to address the items contained in the written construction review report. Verbal notice shall be made to the Department within two calendar days and written notice shall be provided to the Department within five calendar days.
- 6.1.9 The Owner shall notify the Department or Delegated Agency any time a new Certified Construction Reviewer begins providing construction review for the site.
- 6.1.10 Upon written notice by the Department, Delegated Agency, or Certified Construction Reviewer, any portion of the work which does not comply with the approved Sediment and Stormwater Management Plan or these regulations shall be corrected by the Owner within the time period specified in the written notice.
- 6.2 Contractor Training Program
 - 6.2.1 A certificate of attendance shall be issued to Responsible Personnel who have attended and successfully completed the Contractor Training Program sponsored or approved by the Department.
 - 6.2.2 Training shall be required of a foreperson or superintendent who is in charge of on-site clearing and land disturbing activities for construction projects subject to the requirements of these regulations.
 - 6.2.3 The Contractor Training Program certification shall be valid until the Department notifies the individual or announces in local newspapers that additional training is required due to a change in course content.
 - 6.2.4 The Department shall provide public notification of the date and location of training programs for attendance by responsible personnel and other interested persons.
 - 6.2.5 Enrollment of existing and future responsible personnel is the responsibility of individuals or their employers.
- 6.3 Certified Construction Reviewer Requirements
 - 6.3.1 The Certified Construction Reviewer shall function under the direction of a registered professional engineer licensed to practice engineering in the State of Delaware.
 - 6.3.2 Certified Construction Reviewers shall attend and successfully complete the Departmental sponsored or approved Certified Construction Reviewer course. The Certified Construction Reviewer shall be responsible for reviewing construction activities and reporting on the adequacy of construction in accordance with the approved Sediment and Stormwater Management Plan, these regulations, and training received in the Certified Construction Reviewer training course.
 - 6.3.3 Certification as a CCR shall be valid for five years. Recertification may extend certification for an additional five years.
 - 6.3.4 A Certified Construction Reviewer who is not performing the duties prescribed by Section 6.1.8 of these regulations may be referred by the local Delegated Agency to the Department for action by providing written notification to the Department and supporting documentation.
 - 6.3.5 In a situation where a Certified Construction Reviewer's certification is being suspended or revoked, an opportunity for hearing before the Secretary or his designee shall be provided. During a suspension, the Certified Construction Reviewer shall not be allowed to provide construction reviews in accordance with these regulations on any construction sites within the state.
- 6.4 Department or Delegated Agency Construction Reviews
 - 6.4.1 The Department or Delegated Agency may, at a reasonable time, visit a site subject to these regulations to determine compliance with these regulations, including implementation of the Sediment and Stormwater Management Plan.
 - 6.4.2 The Department or Delegated Agency shall conduct regular reviews of the construction site at a frequency to ensure that all elements of the approved Sediment and Stormwater Management Plan are implemented and all construction site stormwater management BMPs and post construction stormwater management systems are installed and maintained in accordance with that plan.
 - 6.4.3 All Department or Delegated Agency construction reviews shall be documented in writing with a copy provided to the Owner. The review report shall document site conditions relevant to the Sediment and Stormwater Management Plan, identify deficiencies that warrant correction, and provide a time period for the Owner to take corrective action.
 - 6.4.4 When the Department or Delegated Agency determines a deficiency in the approved Sediment and Stormwater Management Plan, a revision to the approved plans may be required. A change to the approved Sediment and Stormwater Management Plan shall be approved by the Department or Delegated Agency before construction.

- 7.2.2 The Owner shall ensure that the stormwater management system is functioning in accordance with the approved engineering design, within the tolerances of the accepted post construction verification documents, and in compliance with these regulations. The Owner will promptly repair and restore stormwater management systems.
 - 7.2.2.1 Such repairs, restoration, or maintenance shall be conducted in accordance with the approved Sediment and Stormwater Management Plan, the Operation and Maintenance Plan, Standard Guidelines for Operation and Maintenance of Stormwater Management Systems, and directions provided by the Department or Delegated Agency.
 - 7.2.2.2 When the Department or Delegated Agency gives direction for maintenance, those maintenance activities shall be conducted by the Owner within the time period established by the Department or Delegated Agency.
- 7.2.3 Any change made to the stormwater management system shall require the Owner to obtain approval of the Department or Delegated Agency, including updating of the Operation and Maintenance Plan as necessary.
- 7.2.4 The Owner shall submit a scope of work for non-routine maintenance to the Department or Delegated Agency for approval prior to implementation.
- 7.2.5 Maintenance responsibilities may be shared through a legal agreement between the Owner and another entity such as a delegated agency, public utility, municipality, stormwater utility, maintenance company, or other private entity. Responsibility for maintenance shall be joint and several among the parties to the agreement to share those responsibilities.
- 7.2.6 If the Sediment and Stormwater Management Plan includes structural or nonstructural stormwater management measures located within a tax ditch right-of-way the Owner shall enter into an agreement with the tax ditch organization for maintenance of those stormwater management measures.

7.3 Maintenance Reviews

- 7.3.1 The Department, Delegated Agency, or duly authorized agent shall conduct maintenance reviews of completed stormwater management systems. The Department, Delegated Agency, or duly authorized agent shall have the right of entry and access at reasonable times to perform stormwater management system maintenance reviews.
- 7.3.2 The maintenance review performed by the Department, Delegated Agency, or duly authorized agent shall document maintenance and repair needs and any discrepancies from the Operation and Maintenance Plan. A copy of the review shall be provided to the Owner.
- 7.3.3 The Owner of the stormwater management system shall comply with the conditions of the maintenance review within the timeframe specified by the Department or Delegated Agency.

7.4 Enforcement of Maintenance Responsibilities

- 7.4.1 The Department may seek enforcement action against an Owner deemed negligent in fulfilling the requirements of Section 7 of these regulations.
- 7.4.2 Enforcement will be conducted in accordance with Section 8 of these regulations.

8.0 Enforcement and Penalties

- 8.1 Any action or failure to act, which violates any of the following: the provisions of this regulation, the requirements of an approved Sediment and Stormwater Management Plan, permit, Notice of Intent, construction review report, notice of violation, or the requirements of a final Operation and Maintenance Plan, may be subject to the provisions of any of the following: 7 Del.C. §§4012, 4013, 4015, and 4016; 7 Del.C. §§6005, 6013, and 6018.
- 8.2 The Delegated Agency may, in addition to local enforcement options, refer a site violation to the Department for additional enforcement action. Referral of a site violation to the Department may initiate a Departmental construction review of the site to verify site conditions. That construction review may result in the following actions:
 - 8.2.1 Notification through appropriate means to the Owner and the contractor to comply with the approved Sediment and Stormwater Management Plan within a specified time frame; or
 - 8.2.2 Notification of plan inadequacy and the establishment of a date certain for the Owner to submit a revised Sediment and Stormwater Management Plan to the Department or Delegated Agency and to receive its approval with respect thereto. The Department shall notify the Delegated Agency in a timely manner of what enforcement action is taken on the site.

- 10.2 The financing of a stormwater utility must be reasonable and equitable so that each user within the stormwater utility jurisdiction, including state agencies, contributes to the financing according to the users' pro rata share of runoff.
- 10.3 The intent of the utility must be clearly defined regarding program components that are to be funded through the utility. Those components may include but are not limited to the following: program administration, planning and engineering, maintenance operations, regulation and enforcement, and capital construction.
- 10.4 The authority for the creation of the stormwater utility and the imposition of charges to finance sediment and stormwater activities is conferred in 7 **Del.C.** Ch. 40. The implementation of a stormwater utility by means of a local ordinance shall not be deemed a limitation or repeal of any other powers granted by State statute.

7 DE Reg. 1147 (3/1/04)

8 DE Reg. 1172 (2/01/05)

10 DE Reg. 735 (10/01/06)

17 DE Reg. 240 (08/01/13)

HEARING OFFICER'S REPORT

TO: The Honorable David S. Small
Secretary, Department of Natural Resources and Environmental Control

FROM: Robert P. Haynes, Esquire
Senior Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: **Proposed Curative Amendment to 7 DE Admin. Code 5101, Sediment and Stormwater Regulations**

DATE: October 13, 2014

I. BACKGROUND AND PROCEDURAL HISTORY

This Report recommends that the Secretary of the Department of Natural Resources and Environmental Control (Department) adopt the attached proposed amendment to regulation, 7 *DE Admin. Code 5101, Sediment and Stormwater Regulations* (Regulation)

On July 29, 2014, the Department's Sediment and Stormwater Program (SSP) in the Division of Watershed Stewardship began the formal regulatory development process to amend the Regulation in response to issues raised in the appeal of the last amendment to the Regulation, which was adopted by Secretary's Order No. 2013-S-0026 on July 13, 2013. DNREC Ex. 4. The regulatory development process indicated that the changes were to Sections 1.5, 1.7, 1.13, 1.14, 3.11, 4.1, 4.5, 5.1 and 6.1 and that the a definition of functional equivalency would be added. The Start Action Notice 2014-06 indicated that the Technical Document (TD) "that supports the regulations is guidance to be used as a reference for compliance and is not the only means of complying with the regulations." In addition, typographical errors were to be corrected. The notice also indicated that no regulatory requirements would change and that the no Sediment and Stormwater Advisory Committee review would occur although the committee would be notified.

On September 1, 2014, the Department had published in the *Delaware Register of Regulations* a proposed amendment to Regulation 5101 and public notice of the opportunity for public comment, including at a public hearing (DNREC Ex. 1). In addition, the Department published legal notices in the *News Journal* and *Delaware State News* on September 3, 2014 of the proposed amendment and the public comment opportunity. (DNREC Ex. 4).

On September 25, 2014, I presided over a public hearing and the public comment period for written comments remained open until October 10, 2014.

Following the close of the public comment period, I requested assistance from the Department of Justice on the legal issues raised and on October 10, 2014 Ralph Durstein, Deputy Attorney General, provided a letter response. I consider the record complete to support a decision that approves the proposed amendment.

II. SUMMARY OF THE RECORD

The record contains the verbatim transcript of the public hearing and the documents timely received at the public hearings or during the time period for written public comments, which commenced September 1, 2014 and ended October 10, 2014. The Division of Watershed Stewardship representatives from SSP Jamie Rutherford, Program Manager II, Cheryl Gmuer, Program Manager 1, and Elaine Webb, Engineer attended the public hearing. SSP provided for the record the following documents:

- DNREC Ex 1- clean version of proposed regulation;
- DNREC Ex. 2-strikethrough version of proposed regulation;
- DNREC Ex. 3-Start Action Notice 2014-06;
- DNREC Ex. 4-Public legal notices published September 3, 2014 in State News and News Journal;
- DNREC Ex. 5-Regulatory Flexibility Act analysis
- DNREC Ex. 6-Sediment and Stormwater Program Prepared Statement
- DNREC Ex. 7-Public comment received prior to the public hearing from Richard Abbott, Esquire.

In addition, below is a summary of the public speakers at the public hearing and other hearing exhibits received at the hearing or the post-hearing public comment period.

Sally Ford spoke seeking a clarification on the effective date and Ms. Rutherford provided the explanation that the change was to include January 1, 2014 as a specific date that was the actual effective date of Regulation 5101 as adopted by the 2013 Order. Ms. Ford also questioned the adequacy of commenting on the Technical Documents including the recent change that had fifteen days' notice, which she said was not adequate. Instead, she requested a 45-60 day review period. She also questioned whether the TD was to be followed when it said that bioswales and bioretentions are not permitted in the 100 year floodplain. She questioned the provision in Section 7.1.1 on notices of transfer 30 days before a property is transferred. Finally she commented on the problems with locating stormwater systems on small properties where a stormwater management system could use approximately 10% of the total property.

Tom Ford was the second speaker who commented as a land planner on Delaware's situation, which he sees as facing sea level rise and sinking land. He commented on how the proposed amendment was not friendly to small businesses. He also commented on the News Journal article on the proposed amendment and indicated that no new projects have begun in Sussex County under the new Regulation 5101. He commented on the process whereby small projects could be hit with significant fees to comply with the new Regulation.

Richard Collins, Executive Director of the Positive Growth Alliance, was the third speaker who commented at length about the economic downturn and the lack of development projects due in part he claims to the Regulation. He also commented on that the administrative process did not comply with the APA in the discretionary power in the use of the TD adopted without the benefit of the APA's procedural protections. His letter was admitted as PGA Ex 1.

The record also contains the attached letter from Deputy Attorney General Ralph Durstein. The letter responds to the public comments from Mr. Abbott and Mr. Collins on the issue of compliance with the Administrative Procedures Act.

I consider that the record fully supports a Secretary's final decision to adopt the proposed attached amendment to the Regulation.

III. DISCUSSION AND REASONS

The Department's proposed amendment to the Regulation would make curative changes to Regulation 5101, as approved by Secretary Order No. 2013-S-0026. I find that the changes are proper and should be made with some clarification and change.

The first Section to be changed is 1.3.1, which seeks to include the actual date when the Regulation adopted by the 2013 Order went into effect. A similar change is proposed in Section 3.5.6. The public comments raised this issue as being a retroactive regulation, which was not the intent. The public comments misinterpret the change into something more than it is. The Regulation adopted by the 2013 Order went into effect January 1, 2014 and this amendment merely converts a date unknown to the casual reader of the Regulation into a date certain, January 1, 2014, which is the same date as "the effective date of these regulations." The intent of the current proposed amendment to make curative changes, and this minor change was not intended to retroactively impose new regulations. A more appropriate interpretation would read as these regulations adopted by the 2013 Order, but I find no word change is needed if the Department's Order provides this clarification. The only parts of Regulation 5101 that will change as a result of this amendment are shown in the marked up version set forth in DNREC Ex. No. 2. I am satisfied that this interpretation is appropriate without any need for further clarifying change in the Regulation.

The changes in Section 1.3.2 replace the prior effective date with a date certain on December 31, 2019 and this change is reasonable to avoid any possible confusion as discussed above.

Section 1.5 removes the reference to technical documents as a source of enforcement authority and this is consistent with the Department's intent and the Department's legal position.

Section 1.7 changes "requirements" to "options" and makes optional the publication of offset provisions in a TD. This change would be consistent with removing any regulatory authority from the TD to be consistent with the Department's legal position.

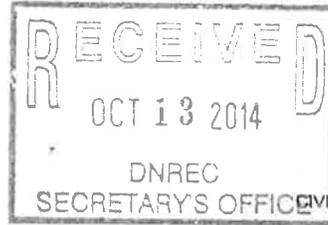
Section 1.13 and 1.14 are the heart of the changes that involve the role of the TD, along with the newly added definition of functional equivalency in Section 2.1. I defer to the Department of Justice's letter for the legal support for this change and its comprehensive analysis.

IV. RECOMMENDATION

Based on the record developed, I find and conclude that the proposed regulation, as published in the *Delaware Register of Regulations* on September 1, 2014 and attached hereto, should be adopted as an amendment to Regulation 5101 and be submitted to the *Delaware Register of Regulations* to go into effect no earlier than ten days after the publication in the *Delaware Register of Regulations*.



Robert P. Haynes, Esquire
Senior Hearing Officer



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October 10, 2014

Robert P. Haynes, Esquire
Senior Hearing Officer
Office of the Secretary
Dept. of Natural Resources and Environmental Control
89 Kings Highway
Dover, DE 19901

Re: Curative Amendments to Sediment and Stormwater Regulations

Dear Bob:

I am responding on behalf of the DNREC Sediment and Stormwater Program to a letter dated September 19, 2014 from Richard Abbott, Esquire to Elaine Webb of DNREC. Mr. Abbott is the lawyer for the plaintiffs who have raised theoretical objections to the Sediment and Stormwater Regulations in a lawsuit, captioned as *Baker v. DNREC, C.A. No. S13C-08-026 THG*, currently pending in the Superior Court of Delaware, in and for Sussex County, and assigned to Judge Graves. I have filed a Motion for Summary Judgment on behalf of DNREC in that case, and the parties are presently engaged in briefing.

There is no merit to the conclusion reached in the letter, that the curative amendments "run afoul of the E&S Act & are legally invalid"[sic]. To the contrary, the process of adoption conforms to the Delaware Administrative Procedures Act ("APA"), Chapter 101 of Title 29, and to Chapter 60 and Chapter 40 of Title 7. There is no procedural bar to the final adoption of the curative amendments.

Unless specifically exempted, new regulations are to be adopted according to the requirements of the APA, as set forth in Subchapter II of Chapter 101. Where exemptions to the procedural requirements apply, amendments to regulations may be adopted informally. 29 Del.C. §10113(b). Among the exceptions listed are “codifications of existing agency or judicial principles of decision derived from previous decisions and rulings”; §10113(b)(6), “amendments to existing regulations to make them consistent with changes in basic law but which do not otherwise alter the substance of the regulations”, §10113(b)(5), and “nonsubstantive changes in existing regulations to alter style or form or to correct technical errors”, §10113(b)(4). Each of these exceptions could have been applied to the pending amendments.

The proposed curative amendments are intended to clarify the role of the technical document in the application of the Regulations. The minor revisions codify past and existing agency practice, and make nonsubstantive changes for purposes of clarification and consistency. As such, the curative amendments would qualify for exemption from the formal procedural requirements of the APA. However, DNREC, for purposes of transparency, determined to proceed voluntarily with formal public notice, a public hearing, and a comment period. See 29 Del.C. §§10115-10118. In doing more than what the APA required in such circumstances, it should go without saying that DNREC fully complied with the APA procedural requirements for amendments to regulations.

Chapter 40 of Title 7, regarding the state stormwater management program, provides that DNREC “may adopt, amend, modify or repeal rules or regulations after public hearing to effectuate the policy and purposes of this chapter. The conduct of all hearings conducted pursuant to this chapter and the promulgation process shall be in accordance with the relevant provisions of Chapter 60 of this title.” 7 Del.C. §4006(d). It is undisputed that DNREC has complied with the requirements of §6006 with regard to public hearings. DNREC has further complied fully with §6010, which provides as follows at subsection (a):

“The Secretary may adopt, amend, modify or repeal rules or regulations, or plans, after public hearing, to effectuate the policy and purposes of this chapter. No such rule or regulation shall extend, modify or conflict with any law of this State or the reasonable implications thereof.”

The curative amendments clarify the existing regulations, and there has been no showing that these minor changes extend, modify, or conflict with the Sediment and Stormwater law enacted by the General Assembly. Compare §4001.

The central flaw in the procedural argument advanced in the letter is apparent confusion over what constitutes a stormwater management program. The comprehensive regulatory changes adopted last year and effective on January 1, 2014¹

¹ Mr. Abbott is confused, in alleging an intent for the curative amendments now pending to be, in his words, “retroactive”. Nothing of the sort had been proposed. The proposed changes would merely substitute “January 1, 2014” for “the effective date of these regulations” at Sections 1.3.1, 1.3.2.1, and 3.5.6,

represented a statewide plan for “stormwater management”, as defined by §4002(9). The record of those proceedings reflects that DNREC, in cooperation with appropriate state and federal agencies, conservation districts, other governmental subdivisions of the State, and the regulated community, developed a state stormwater management program, taking into consideration water quantity and quality, that was integrated with the existing state erosion and sediment control program to create a sediment and stormwater program. §4006(a). The regulations creating the state stormwater management program were implemented in full conformity with §4006(c), including the substantial concurrence of a regulatory advisory committee, appointed by the Secretary, which included representatives of the regulated community and others affected by Chapter 40, which presented its recommendations at public workshops and hearings.

Contrary to the allegations in the letter, the present curative amendments in no way constitute an attempt by DNREC to implement a new stormwater management plan, or even to make substantive changes in the existing plan. Therefore, Mr. Abbott is mistaken in suggesting that the Secretary is required to appoint a new regulatory advisory committee, before undertaking mere curative amendments. The General Assembly contemplated the use of such a group, and public workshops, only where a new state stormwater management plan was to be adopted. That is clearly not the case here. The curative amendment process is governed by §4006(d), and not by the process for adoption of a statewide stormwater management plan (“such regulations”) set forth at §4006(c).

Finally, the letter contains substantive objections to the content of the stormwater management regulations, which have already been adopted, and have been effective since January 1, 2014. This is essentially the same attack made unsuccessfully during the long process leading to the adoption of the stormwater management plan. It also replicates the attack undertaken in the pending lawsuit. The attorney and his clients have had full opportunity to contest the adoption of Chapter 40 by the General Assembly, to oppose the adoption of the comprehensive regulations last year, and now to challenge the regulations in court. Their policy arguments have no place in the present proceeding, which is limited to the curative amendments, which are well within the power of the Secretary to propose for purposes of clarification. §4006(d).

Ironically, the curative amendments respond to such criticism by clarifying the interplay between the criteria set forth in the regulations, and the technical guidance provided in the supporting materials, including the handbook.² As set forth in the Start

to clarify that the stormwater management plan previously adopted became effective on that date.

2. In a footnote, Mr. Abbott professes to be confused by references to the handbook. Developers, contractors, engineers, architects, and builders with actual experience in the application of the regulations and the support provided by the technical document and the handbook would not be confused, and would credit the references and assistance thus provided in achieving compliance with the regulations.

Action Notice:

“These changes will be made to clarify that the Technical Document that supports the regulations is guidance to be used as a reference for compliance and is not the only means of complying with the regulations. Functionally equivalent methods to those provided in the technical document may be considered on a case-by-case basis.”

This approach is fully consistent with the authority granted by the General Assembly to carry out the goals of Chapter 40, by providing technical assistance publishing minimum standards, guidelines and criteria for sediment and stormwater program components, and model sediment and stormwater ordinances for use by districts, counties and municipalities. §4006(b)(1),(2).

The letter makes a critical error in claiming that the items set forth at §4006(c) are mandatory requirements that must be included in the sediment and stormwater regulations. That argument ignores the language of the statute, which in fact reads that “the regulations may include, but are not limited to, the following items...” (emphasis added). DNREC clearly had discretion in determining the mandatory criteria found in the regulations, while addressing other issues in the supporting materials. The curative amendments make clear where mandatory compliance with the regulations is required, and where the technical document can be used to propose functionally equivalent methods to achieve compliance.

To summarize, these curative amendments were proposed and adopted in conformity with the APA and the procedural requirements of Chapter 40 and Chapter 60 of Title 7. This effort to clarify the existing regulations is well within the broad discretion granted to the Secretary by the General Assembly. The regulations together with the technical supporting materials provide a comprehensive approach to sediment and stormwater issues and allow for flexibility and innovation. The letter represents nothing more than an attempt to subvert valid agency action through unwarranted and unjustified attacks.

I would ask that this letter, as to which the usual confidentiality accorded legal advice is waived, without prejudice to asserting the privilege in the future, be made a part of the record of comments with respect to the curative amendments.

Respectfully submitted,

/s/ Ralph K. Durstein III

Ralph K. Durstein III

Deputy Attorney General