

Regulatory Flexibility Act Response for  
Proposed Revisions to the *Delaware Sediment and Stormwater Regulations*  
January 2012

**Regulatory Action and Background**

The Delaware Sediment and Stormwater Program proposes revisions to the *Delaware Sediment and Stormwater Regulations*. The *Delaware Sediment and Stormwater Regulations* have undergone revisions three previous times since their adoption in 1991 to address changing Federal requirements and to address flooding within certain watersheds. The Sediment and Stormwater Program has adapted over time to provide optimum sediment control and stormwater management in the State of Delaware. The regulation revisions being proposed at this time are meant to satisfy one of the major recommendations of the April 1, 2005 report of Governor Minner's Task Force on Surface Water Management, a response to Executive Order No. 62. The Task Force recommended that enhanced stormwater standards be established through revisions to the existing *Delaware Sediment and Stormwater Regulations* to address volume management, conveyance adequacy, pollutant loadings, floodplain management, and operation and maintenance. The proposed revisions to the *Regulations* reflect these goals.

The Start Action Notice for this regulatory revision was filed in July of 2006. Since that time, a Regulatory Advisory Committee made up of industry representatives and regulated groups have met for more than twenty hours to discuss the proposed revisions to the regulations. In addition, seven subcommittees made up of RAC members, interested parties, and staff have met a combined total of 37 times for over 75 hours. Over 200 individuals make up the interested parties list. In addition, those interested parties have provided 722 comments on drafts of the regulation as well as the Technical Document written to support the revised regulations. Each of the comments have been given consideration in the development of regulatory language and guidance documents.

As a result of the revisions to the *Delaware Sediment and Stormwater Regulations*, there are no new groups of individuals or small businesses that will be regulated that are not currently regulated. The compliance requirements for those subject to the regulations will be modified to meet the goals set forth by Governor Minner's Task Force. While compliance requirements are being modified, the impact to individual homeowners and small businesses such as agricultural producers is expected to be minimized by development of standard plan criteria for activities typically undertaken by those individuals and small businesses.

## **Regulatory Flexibility Act Compliance Form Responses**

1) The nature of any reports and the estimated cost of their preparation by individuals and/or small business which would be required to comply with the new rule:

### **Sediment and Stormwater Management Plan**

A Sediment and Stormwater Management Plan is required to be developed prior to the onset of any land disturbing activity that exceeds 5,000 square feet of disturbance. The minimum land disturbance threshold for compliance with the *Delaware Sediment and Stormwater Regulations* has not been altered with the proposed revisions to the regulations. Furthermore, land disturbance associated with tilling the ground to plant a crop remains exempt from the regulations.

Detailed Sediment and Stormwater Management plans are required to be developed by design professionals licensed in the State of Delaware. There is a design and consulting cost association with development of the plan. The cost is dependent upon the size of the project and complexity of the design. The requirement to develop a plan has not changed with revisions to the *Delaware Sediment and Stormwater Regulations*.

The modified compliance requirements are expected to alter the stormwater management design approach from the approaches currently used in design of a detailed Sediment and Stormwater Management Plan. However, with the modified requirements alternative compliance options are proposed, offering the regulated community more flexibility in the way that they may comply with the *Delaware Sediment and Stormwater Regulations* than in the past. In addition, a Technical Document including Standards and Specifications has been developed that is expected to provide technical assistance to design professionals in developing the plans. Depending upon the project site, the cost to develop a plan under the revised regulations could be more or could be less, depending upon the site conditions and compliance options chosen for the site.

Initially, the cost to develop a plan may increase because of the learning curve associated with implementing new regulations. The Sediment and Stormwater Program will offer training for design professionals to aid in the transition to a new design paradigm. In addition, the Technical Document has been developed as guidance for design professionals.

### **Certified Construction Reviewer Reports**

Some construction sites, based on the size and type of the project, will require a Certified Construction Reviewer (CCR) to perform weekly reviews of the construction site and complete a report for the owner and approval agency. The CCR performs under the direction of a Delaware registered Professional Engineer (P.E.). The weekly cost of CCR reviews is approximately \$500.00. Reviews must be completed weekly as long construction is ongoing. The required reporting by CCRs on sites that require them has not changed; therefore, the cost of conducting CCRs reporting on sites is not expected to change following revisions to the regulations.

Under the current regulations CCRs are required for all sites that exceed 50 acres; however, Delegated Agencies may require a CCR at any time. Delegated Agencies are local governments or conservation districts that have been delegated the authority to implement the Sediment and Stormwater Program at the local level in their jurisdiction. Most Delegated Agencies throughout the state have established policies for the use of CCRs on sites that are far less than 50 acres in size. The CCR requirement threshold in the proposed revised regulations has been lowered to 20 acres. The 20-acre threshold aligns the CCR requirement with the standard design criteria for erosion and sediment control BMPs, which is also set at 20 acres. Lowering the threshold requirement for CCRs is not expected to capture many more projects in that requirement than those that are currently required under Delegated Agency policies.

### **Standard Plan Projects**

For straightforward projects, such as construction of an individual home or agricultural structure, that meet the Standard Plan criteria established in the Technical Document, a detailed Sediment and Stormwater Management plan is not required. The Standard Plan eliminates the cost of detailed plan development for those individuals and small businesses that meet Standard Plan criteria. In addition, projects that meet Standard Plan criteria also do not require a CCR during construction, eliminating the CCR cost for construction of the project.

### **Post Construction Maintenance**

Once the construction project is complete, monitoring and maintenance of permanent stormwater management facilities is the responsibility of the owner. However, no regular reporting is required once the construction is complete.

2) The nature and estimated costs of other measures or investments that would be required by individuals and/or small businesses in complying with the rule:

### **Detailed Sediment and Stormwater Plan Projects**

As the *Delaware Sediment and Stormwater Regulations* currently exist, there is a cost for implementing the plan, including construction and maintenance costs. Those same construction and maintenance costs are expected to remain following implementation of the proposed Regulations.

For sites that require a detailed plan, implementation of the plan is expected to vary depending upon the site conditions and design approach taken by the design professional. The runoff reduction requirements proposed in the revised regulations are based upon site characteristics and will differ site to site. Runoff reduction requirements for each site will be the basis for the BMPs designed for construction on the site. Sites that have the greatest ability to recharge their runoff are expected to see the least difference in implementation costs when comparing current regulations to proposed regulations.

Project sites that have more restrictions, such as lower permeability soil, high groundwater table, or a poor outlet condition may need to construct additional BMPs in order to meet runoff reduction requirements. In addition, if the downstream condition is not adequate to convey the

design storms, additional storage must be provided onsite or the downstream condition improved, at a cost to the developer. Sites having these design restrictions may, depending upon the design alternatives used for the site, see an increase in cost of implementation of the regulations over current requirements. This developer cost in construction of BMPs on sites having restrictions, however, is expected to reduce the future public costs to improve drainage infrastructure.

Because of all the variables involved, including site parameters such as groundwater table, soil permeability, topography, watershed position, and development type, as well as the many design options offered, it is not possible to quantify the cost of developing a project comparing current regulations to the regulations proposed. The flexibility in design options offered in the proposed regulation revisions could make some sites, including redevelopment projects, less expensive to develop under the proposed regulations than current regulations. There are sites that may not be able to comply with runoff reduction requirements due to site conditions. Those sites are offered an offset fee-in-lieu option for compliance.

#### **Standard Plan Projects**

Straightforward projects, such as individual homes or agricultural structures, which qualify for a Standard Plan by meeting the prescribed Standard Plan criteria, will only be required to implement the construction site stormwater controls necessary during construction to prevent a discharge of sediment or other pollutants during construction. This is unchanged from current regulations to proposed regulation revisions.

Post construction stormwater goals for Standard Plan projects are met through implementation and maintenance of low impact best management practices (BMPs) such as impervious disconnection. Impervious disconnection is accomplished by directing runoff from roofs, sidewalks and driveways to grass areas to allow for the runoff to soak into the ground rather than discharging directly to a storm drain or waterway. Impervious disconnection is used on most residential lots without a requirement established. Implementation of impervious disconnection is not expected to add to the overall construction cost. There is an anticipated cost savings associated with fewer infrastructure elements as a result of disconnecting the runoff.

3) The nature and estimated cost of any legal, consulting and accounting services which individuals and/or small businesses would incur in complying with the rule:

There are legal and consulting costs associated with developing the Sediment and Stormwater Plan for approval prior to construction. The legal and consulting costs are expected to remain and are not expected to be significantly affected by the proposed revisions to the *Delaware Sediment and Stormwater Regulations*.

4) The ability of individuals and/or small businesses to absorb the costs estimated under questions 1, 2 and 3 of this form without suffering economic harm and without adversely affecting competition in the marketplace:

Standard Plan criteria has been developed for certain categories of projects that are subject to the requirements of the *Delaware Sediment and Stormwater Regulations*. Several Standard Plan categories apply to individuals and small businesses. The Standard Plan criteria have been developed for those individuals and small businesses that by the nature of their development types are expected to have the most minor impact on stormwater quantity and quality.

There is no consulting cost associated with developing the Standard Plan if the proposed construction meets the Standard Plan criteria. This is the same condition as the current *Delaware Sediment and Stormwater Regulations*. Implementation cost of Standard Plan elements will be from non-structural stormwater management BMPs such as impervious disconnection, re-establishing vegetation following construction, and in some cases construction swales, rain gardens, and possibly planting trees. These types of low impact BMPs are less costly to construct and maintain than structural measures such as ponds and pipes. Impervious disconnection and re-vegetation are BMPs that are implemented on residential lots already without establishing a requirement.

Individuals acting as their own general contractor for single residential lot construction and meeting the Standard Plan criteria will not be required to construct stormwater management improvements on their lot beyond impervious disconnection. They will not be required to construct any on-lot controls that would not be required in a subdivision having an overall stormwater management plan. Therefore, competition in the marketplace is not affected.

Agricultural producers constructing agricultural structures where the disturbed area exceeds 5,000 square feet are not exempt from the regulations and are required to have a plan. Standard Plan criteria have been established for agricultural producers constructing agricultural structures. Construction of agricultural structures when the disturbance exceeds 1.0 ac requires a detailed plan in order to conform with Federal NPDES Construction Site Stormwater discharge requirements.

If a site meets the Standard Plan criteria, Conservation Districts have the ability to offer technical assistance to agricultural producers that are cooperators. A cooperator is a landowner that receives technical assistance from the Conservation District and agrees to implement BMPs recommended by the Conservation District. Conservation Districts can develop these plans for construction site stormwater management at a low cost to cover Conservation District expenses. All agricultural producers meeting Standard Plan criteria will have the opportunity to work with Conservation Districts for technical assistance in developing a plan. This is expected to help agricultural producers to comply at the lowest cost to the producer.

5) The additional cost, if any, to the agency of administering or enforcing a rule which exempts or sets lesser standards for compliance by individuals and/or small business:

Under the Federal Clean Water Act, the State of Delaware is required to meet water quality goals. The Delaware Sediment and Stormwater Regulations are in place to help the state meet water quality improvement initiatives from developing urban lands. Failure to implement or enforce the state regulations could lead to increased enforcement by EPA for the same projects.

Setting lesser standards for one or more groups, as we have done for individual homebuilders and agricultural producers, may lead to other regulated groups requesting lesser standards. All requests for lesser standards are expected to require evaluations by staff. The expected cost to the state would be in the staff time to review, and possibly in a loss of ground in achieving water quality goals.

6) The impact on the public interest of exempting or setting lesser standards of compliance for individuals and/or small businesses.

The result of exempting or setting lesser standards of compliance for individuals or small businesses is expected to be an impact to stormwater water quantity and quality. The size of the business does not necessarily correlate to the impact from stormwater runoff both during and following construction. Exempting projects or setting lesser standards for managing water quantity can compound to an increase in flooding at some point in the future. Likewise, lesser requirements or exemptions from water quality management can have an adverse effect on our water resources. That can lead to increased drinking water treatment costs or have a detrimental effect on tourism dollars.

The Standard Plan criteria have been developed for projects that by the nature of their development types are expected to have the most minor impact on stormwater quantity and quality.

7) What accommodations, if any, have been made in the regulations to address individual or small business concerns identified above?

Standard Plan criteria have been developed for certain categories of projects, which may apply to individuals and small businesses. As long as those sites meet the criteria established, a design professional will not be required to develop a detailed plan, resulting in a consulting cost savings as well as a time savings. Non-structural BMPs can be established on the site and ponds or other structural BMPs will not need to be constructed on the site resulting in construction cost savings and future maintenance cost savings. Finally, a CCR will not be required for Standard Plan projects, resulting in a construction review cost savings.