

2.05

Regulatory Interpretation and Variances

Regulatory Interpretation - Background

7 Del. C. §4006 clearly defines the Department's role in developing a state stormwater management program. §4006 (b) gives the Department the authority to provide technical assistance to local agencies in implementing this chapter, and also to develop standards, guidelines and criteria for program elements.

(b) In carrying out this chapter, the Department shall have the authority to:

(1) Provide technical and other assistance to districts, counties, municipalities and state agencies in implementing this chapter;

(2) Develop and publish, as regulation components, minimum standards, guidelines and criteria for delegation of sediment and stormwater program components, and model sediment and stormwater ordinances for use by districts, counties and municipalities;

The Department's role in providing technical assistance extends to the technical interpretation of the standards, guidelines and criteria supporting the *Regulations* when necessary or as requested by Delegated Agencies. Because of the different types of Delegated Agencies, including municipal governments, State agencies and Conservation Districts, there is a need for different methods of clarifying the requirements of the *Regulations*.

Local municipalities are governed by codes and ordinances and some local governments contain references to state requirements or set local standards that meet or exceed the state requirements. When local codes and ordinances are in conflict with the state requirements, the conflict should be brought to the attention of the Department to determine whether the conflict needs a legal opinion for resolution or whether the technical interpretation may be made by the Department program experts to resolve the conflict.

More commonly, Department and Delegated Agency staff are asked during the plan review and approval process or during construction to interpret the *Regulations* or Technical Document and offer an interpretation or a decision based on that review.

Local Review and Interpretation

Because program implementation is delegated by the Department to local agencies, an initial request by an owner or owner representative to clarify a program requirement should be made to the local Delegated Agency. A written response to requests for interpretations of a program requirement will be provided to the owner or owner representative making the request.

The Department meets with each Delegated Agency on a regular basis and there is constant contact between the Department and Delegated Agencies to answer questions, interpret standards, and make decisions regarding interpretations. The Department will offer guidance to the Delegated Agency to render a local decision on an issue having local implications.

If a local Delegated Agency is unable to interpret a requirement of the regulations or any other program issue, or if the interpretation will have greater than local implications, the Delegated Agency will request a Department interpretation. Conversely, if an owner or owner representative has a program concern, policy question or conflict with a local interpretation of the Regulations or standards, they may seek an interpretation from the Department as well.

Department Review and Interpretation

When the Department is asked to provide an interpretation of the *Regulations* or Technical Guidance document, a simple and straightforward issue will be handled with an informal request procedure. An e-mail request for interpretation will be accepted and an e-mail response will be provided to all affected parties, including the local Delegated Agency. When an informal interpretation has more than local implications, all Delegated Agencies will be provided with a copy of the response, so that future requests for interpretation of the same issue may be handled locally.

When the interpretation is more complex, including those cases when a legal interpretation is necessary to assist the program staff, the request for a Department decision must be made in writing with supporting documentation as necessary to evaluate the request. When necessary, based upon the opinion of Department Sediment and Stormwater Program staff, the Division Director will respond to the interpretation request. Further discussion within the Department may also involve a consultation with legal counsel or an informal opinion from the Secretary.

All formal interpretations of the regulations and supporting Technical Documents will be memorialized in writing and distributed to the owner or owner representative making the request for interpretation as well as all affected parties and all Delegated Agencies.

Professional Judgment Disputes

If an impasse over interpretation of technical and/or policy issues related to the Delaware Sediment & Stormwater Regulations occurs between the design consultant and the Delegated Agency, the consultant may request through the Delegated Agency to have the Department intercede. The consultant will itemize the issues in writing along with their position on each issue and forward the document and any supporting plans or computations to the Department and the appropriate Delegated Agency. The Department will review the itemized list of issues and include the issues on the agenda for discussion at the next regularly scheduled meeting between the Department and the Delegated Agency. The Department will coordinate a written response to the consultant through the Delegated Agency. The process may include a meeting among all affected parties if deemed necessary.

Alternative Compliance Review Requests

An owner or owner representative who cannot achieve strict compliance with an element of the policy, procedure, guideline or specifications included in the Technical Document may offer an alternative method of compliance and request an alternative compliance review by the Department or Delegated Agency. Documentation of the acceptance or rejection of the alternative compliance will be made in writing through an e-mail, memorandum, or plan review comment correspondence.

When a written decision of the program staff supported by legal review, Division Director or Secretary's decision is not sufficient to satisfy the Delegated Agency or owner requesting the alternative compliance review, the variance process in 7 Del. C. §6011 should be followed.

Variations and Appeals

Compliance with the requirements of the *Delaware Sediment and Stormwater Regulations* is expected of all projects subject to the regulations. Excluding items covered by Regulations section 1.7 Offset Provisions, the Department shall consider and decide applications for a variance from the provisions of the Regulations Section 5 of the Regulations provides alternative methods to comply with the post construction stormwater management requirements, including an

~~offset provision. However, if none of the methods to comply with the Regulations can be met, an owner may apply for a variance in accordance with the procedures under provisions of 7. Del.C. §6011. A general application form for requesting a variance from the strict requirements of the DSSR is included as Appx. 2.05.1 of this Technical Document. A separate application form specifically related to expired plans is included as Appx. 2.05.2.~~

The variance application requires public notice of the request giving the public 15 days to submit a meritorious request for a public hearing. Requests for a public hearing must be in writing and show familiarity with the proposed Technical Document changes and a reasoned statement of the changes' probable impact. The Secretary or his designee shall publish his decision on the requested variance and the decision shall be effective immediately. Any party may appeal the Secretary's decision to the Environmental Appeals Board. No variance can be in effect longer than 1 year, but may be renewed after another hearing pursuant to 7. Del.C. §6011.

A temporary emergency variance to the requirements of the Regulations may be granted by the Department Secretary under the 7. Del.C. §6012 procedure when the emergency is unforeseeable and severe hardship would be caused by the time period involved in obtaining a variance in accordance with the §6011 procedure. Temporary emergency variances are granted for a period not to exceed 60 days, and may not be extended more than one time. A temporary emergency variance may be granted in the case of a dam break, for example.