

**A Review and Analysis of the 2013-2014 Revisions
to the Delaware Sediment and Stormwater
Regulations**

Spring 2015



MID-ATLANTIC ENVIRONMENTAL LAW CENTER

**A Review and Analysis of the 2013-2014 Revisions to the Delaware Sediment
and Stormwater Regulations**

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Purpose

This paper serves as an objective review and analysis of environmental effects of the Delaware Department of Natural Resources and Environmental Control's 2013-2014 revisions to Regulation No. 5101 Sediment and Stormwater Regulations ("Stormwater Regulations" or "Regulations").

The Mid-Atlantic Environmental Law Center ("the Center") is a public interest environmental law firm that provides free legal services to non-profit environmental organizations and individuals in New Jersey, Pennsylvania, Delaware, Maryland, Virginia and West Virginia. The Center's mission is to restore and protect the environment by providing legal services to help solve environmental challenges in the Mid-Atlantic region. The Center aims to ensure that environmental requirements are met, and that legislation and regulations are adequately implemented by the responsible federal, state, and local agencies.

The Center is located at the Widener University Delaware Law School and works in tandem with students in Widener's Environmental and Natural Resources Law Clinic.

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	A BRIEF HISTORY OF THE DELAWARE STORMWATER REGULATIONS.....	1
III.	CHANGES TO THE DELAWARE STORMWATER REGULATIONS.....	3
IV.	ENVIRONMENTAL ACHIEVEMENTS IN THE DELAWARE STORMWATER REGULATIONS.....	7
V.	REGULATORY GAPS IN THE DELAWARE STORMWATER REGULATIONS....	9
	a. Lack Of Clarity.....	10
	b. Public Participation and Accountability.....	12
	c. Technical Provisions.....	13
VI.	CONCLUSION.....	14

I. INTRODUCTION

In 1990 the Delaware General Assembly found that erosion and sedimentation, accelerated by stormwater runoff, pollutes waterways, overtaxes the carrying capacity of streams and sewers, reduces groundwater recharge, and threatens public health, welfare and safety.¹ Title 7, Chapter 40 of the Delaware Code, Erosion and Sediment Control (“Chapter 40”), requires the Department of Natural Resources and Environmental Control (“Department” or “DNREC”) to develop and supervise a stormwater management program.² To implement the program, Chapter 40 gives DNREC authority to develop regulations describing minimum standards and guidelines for Stormwater Management Plans (“Stormwater Plan” or “Plan”), inspection and reporting requirements, and criteria for delegating the stormwater program.³ The Sediment and Stormwater Regulations are developed in conjunction with a regulatory advisory committee (“RAC”) appointed by the Secretary of DNREC.⁴ In 2004, Governor Minner created the Task Force on Surface Water Management through Executive Order 62.⁵ This task force initiated and recommended major changes to DNREC’s Sediment and Stormwater Regulations in its report, dated April 1, 2005, that are the subject of this paper.

This paper will first review the regulatory history of the Regulations by exploring when and why the Regulations were amended, how they were amended, and areas of controversy. Next, it will highlight the major changes in the 2013 and 2014 versions of the Regulations and why those changes were important. Third, it will review the aspects of the Regulations that are particularly beneficial to addressing stormwater runoff and protecting of the environment. Finally, the paper will highlight areas of the Regulations that leave regulatory gaps, which could result in inconsistent implementation of the Regulations and inadequate protection of the waters of the state.

II. A BRIEF HISTORY OF THE STORMWATER REGULATIONS

The process of revising the Regulations began in 2007 with the first RAC meeting. The RAC is composed of members of various organizations affected by the Regulations, including local government officials, environmental advocates and experts, land use planning personnel and

construction and trade groups.⁶ The RAC divided into subcommittees to focus on specific issues according to the expertise of its members.⁷ Meetings were held biannually or annually for approximately four years until the completion of a draft of the Regulations in 2011.⁸ On February 1, 2012, the Regulations were published in the Delaware Register of Regulations in accordance with the Delaware Administrative Procedures Act, 29 Del. C. §10115, and Chapter 60 of the Delaware Code.⁹ DNREC accepted public comment on the Regulations for a period of 60 days.¹⁰ In response to the comments, DNREC proposed substantive changes to the Regulations that necessitated a second public comment period and public hearing.¹¹ Notice was published in the April 1, 2013 issue of the Register and a public hearing was held on April 23, 2013, with the written comment period ending May 8, 2013.¹² Finally, on July 18, 2013, Secretary Collin P. O'Mara adopted as a final regulation the version of the Regulations published in the April 1, 2013 Register.¹³ The Regulations were finally published in the August 1, 2013.¹⁴

One of the more contentious aspects of these Regulations was the language regarding the Technical Document (“TD”), also referred to as the Technical Guidance Document (“TGD”). The Technical Document is a set of procedures, guidelines, minimum standards and recommended Best Management Practices (“BMPs”) compiled by the various subcommittees of the RAC. In the 2013 version of the Regulations, the language suggested that the Technical Document was mandatory, similar to the mandatory nature of the Regulations themselves, with phrases such as, “shall comply” and “shall conform.”¹⁵

However, DNREC maintained that

The Department does not intend to use the TGD as a regulation that has the force and effect of law and which may be enforced as such. Instead, the TGD is an interpretive or advisory document that the Department will use to administer the regulation, and which will provide greater detail and explanation for the public. [. . .] The TGD was included in the record to interpret and support the highly technical aspects of the proposed regulation. [. . .] The Department obtained a letter opinion from a Deputy Attorney General that supports the reliance on the TGD to support the regulation without requiring formal APA regulatory development treatment of the TGD.¹⁶

Notwithstanding this statement, the Department issued a “public notice” of revisions to the Technical Document, and opened a fifteen day written comment period for each revision.¹⁷ These notices were not published in the Register of Regulations and DNREC stated, “A public hearing will not be held unless the Secretary receives a meritorious request for a hearing within 15 days of this notice.”¹⁸ Whether this notice procedure was intended to cure a defect or clarify DNREC’s original intent regarding the Technical Document, opponents of the Regulations used the Technical Document as a point of attack.

The procedure used by DNREC instigated a lawsuit against the agency by opponents claiming that because the Regulations made the guidelines of the Technical Document mandatory and because the public notice procedure was faulty, the Regulations as a whole are invalid.¹⁹ This litigation is currently unresolved, but in July 2014 DNREC took advanced action that it maintains cures any potential defects regarding the Technical Document.

On July 29, 2014, the Department sent a Start Action Notice (“SAN”) to the Register of Regulations announcing its intent to make changes to the Stormwater Regulations.²⁰ These changes were meant 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.”²¹ Moreover, DNREC stated that because the Regulations did not change, there was no need for a separate review committee for these revisions.²² To further clarify the role of the Technical Document, DNREC added the term “functional equivalency,” to the Regulations, allowing DNREC to accept, on a case-by-case basis, alternative measures to the guidelines and standards suggested by the Technical Document. The import of the addition of this term will be discussed further below. This version of the Regulations was published in the September 1, 2014 issue of the Register of Regulations pursuant the Delaware Administrative Procedures Act.²³ A public hearing was held on September 25th and the comment period closed on October 10, 2013. On October 15th, the Secretary issued an Order (2014-WS-002) to submit the final version to the State Registrar, the Regulations were published on November 1st and finally went into effect on November 11, 2014, with the applicability of the new provisions dating back to January 1, 2014.²⁴

III. CHANGES TO THE SEDIMENT AND STORMWATER REGULATIONS

The Delaware Stormwater Regulations went through a complete overhaul in 2012 and 2013. Governor Minner's Task Force on Surface Water Management spent about seven years reforming the Regulations and the final result saw the implementation of new administration, new techniques and new goals. The 2014 revisions were put out for public notice less than ten months after the 2013 revisions, causing confusion over which standards and requirements applied to stormwater management. The motivation for amending the 2013 Regulations and implementing the current 2014 Regulations was, as previously discussed, to clarify that the Technical Document is intended to be guidance and does not have to strictly be followed in order to create a detailed plan that complies with the Regulations. The major changes seen in the 2013 and 2014 Regulations are outlined below.

Plan Review and Approval Process

The cornerstone of the Stormwater Regulations is the requirement of a Stormwater Plan for land disturbance activities. The process of the getting a plan approved and the efficiency by which this is achieved is an important aspect of the administration of the Regulations. The pre-2013 Regulations only called for a review of the Plan by the plan approval agency.²⁵ The Department used a three step process, but one which was outlined in an agency policy, not the Regulations.²⁶ The 2013 version, however, uses a three step approval process for detailed plans, as defined in the Regulations.²⁷

The new three step process results in a thorough review of a detailed plan at its earliest stages. First, the owner must submit a Stormwater Assessment Study and then schedule a project application meeting with DNREC or the Delegated Agency.²⁸ The agency will then submit a Stormwater Assessment Report to the local land use approval agency.²⁹ The second step is submittal of a Preliminary Sediment and Stormwater Management Plan.³⁰ This document must include a Construction Site Stormwater Management Plan, Post Construction Stormwater Management Plan, final hydraulic and hydrologic computations, operation and maintenance plan, and a copy of the preliminary Record Plan.³¹

A detailed Plan must be developed and signed by a Licensed Professional in Delaware.³² The licensed professional ensures that the plan complies with Best Management Practices and other

management systems defined in the Regulations.³³ A detailed plan is required unless the project type is one that allows for a standard plan.

DNREC has developed criteria for standard plans when a detailed plan is deemed unnecessary. Project types that may qualify include, but are not limited to, individual parcel construction or improvement; tax ditch maintenance; minor linear disturbances; stormwater facility maintenance; agricultural structure construction; or other activities approved by DNREC.³⁴ Standard plans preclude the activity from the necessity of a detailed plan, but must still comply with Chapter 40 of the Delaware Code.³⁵

Regulatory Storm Events

When land is disturbed from its natural form and covered with impervious surface during construction, rain water runs off the land and into nearby streams and rivers. This results in pollution, sedimentation and erosion. The Regulations contemplate how to accommodate new construction while maintaining surfaces that mimic natural surfaces and allow for water to infiltrate the ground. The degree to which Best Management Practices have to be integrated into the Stormwater Plans and how effective the BMPs must be depends on how much rain is anticipated. To estimate how much rain to plan for, the Regulations use Regulatory Storm Events. The pre-2013 Regulations used four storm events as bench marks: an event resulting in two inches of rainfall, a rain event that happens every two years, a rain event that happens every ten years and a rain event that happens every one hundred years.³⁶ The 2013 Regulations, however, used three regulatory storm events: a one-year storm, called a Resource Protection Event (RPv);³⁷ a ten-year storm, called a Conveyance Event (Cv);³⁸ and a one hundred year storm, called a Flooding Event (Fv).³⁹ The performance criteria for each storm event is defined in Section 5.0 of the 2013 Regulations. These criteria call for stormwater management designs that “reduce runoff, mimic natural watershed hydrologic processes, and cause no adverse impact to property. [...]”⁴⁰

Redevelopment and Brownfields

Contractors and prospective homeowners attempting to build on land that had already been developed or on a designated Brownfield found no leniency in the pre-2013 Regulations. The Regulations made no distinction between new development and redevelopment, and the

water quality and quantity aspects of the Regulations had to be complied with fully. The 2013 Regulations, however, included specific provisions on how to treat Brownfield development and redevelopment differently from new development.⁴¹ For Brownfield development, compliance with the Regulations could be achieved with the approval of a Department-approved remediation plan.⁴² And for redevelopment projects, Section 5.6.3 provides for compliance criteria that more lenient than for new development. For example, redevelopment projects only need reduction practices that achieve a 30% reduction in effective imperviousness based on the existing surface, and offset provisions.⁴³

Variances

The administration of variances is a provocative subject that has been commented on and amended in almost every version of the Regulations. In the pre-2013 version, variances were defined and granted at the delegated agency level.⁴⁴ This meant that throughout the state, there existed differing policies and procedures for granting variances. The applicant need only show “sufficient specific reasons justifying the variance” and compliance with the Regulations. In the 2013 version, however, variances are approved or denied by the Department.⁴⁵

The Department will grant a variance if the applicant can show that it will not be detrimental to the environment, that compliance with the Regulations will result in hardship, and that the goals of the Regulations and the Technical Documents will be met if the variance is granted.⁴⁶ Furthermore, the application procedure for a variance is laid out in the 2013 Regulations. First, the applicant submits a request to the Sediment and Stormwater Program.⁴⁷ Next, the Secretary or his designee publishes his decision on the request, which is effective immediately.⁴⁸ And finally, any person whose interests are substantially affected may appeal to the Environmental Appeals Board within 15 days of the publication of the Secretary’s decision.⁴⁹

Technical Document

In 2014, the Department made changes to the language associated with the Technical Document to “clarify” the document’s role in the Stormwater Plans. However, the Department contends that these revisions made no substantive changes to the Regulations. Several examples of language changes include the addition of phrases around the Technical Document including,

“serves as a guide,” and “utilized as a reference,” to emphasize the non-mandatory nature of the policies, procedures, and specifications outlined in the Technical Document.⁵⁰

Functionally Equivalent

The 2014 Regulations also added the phrase “Functionally Equivalent,” to further “clarify” the role of the Technical Document as only guidance. Alternative measures for sediment and stormwater management can be offered by applicants to in place of those measures specified in the Technical Document, to comply with the Stormwater Regulations so long as they are functionally equivalent to those in the Technical Document.⁵¹ According to the Regulations,

“The Technical Document may be utilized as a reference for all activities subject to these regulations. Alternative measures that provide functional equivalency to the policies, procedures, technical specifications and other advisory provisions contained in the Technical Document and meet the provisions of these regulations may be considered on a case-by-case basis following Departmental review and approval.”⁵²

Furthermore, any delegated agency may submit documentation to the Department for determination of whether a practice is functionally equivalent.⁵³

A great deal of was made to the Stormwater Regulations in the 2013 and 2014 revisions, many of which greatly strengthened erosion and sediment control in the state. These increased controls will be discussed next.

IV. ENVIRONMENTAL ACHIEVEMENTS OF THE DELAWARE STORMWATER REGULATIONS

The Delaware Sediment and Stormwater Regulations serve as a strong protection for the State’s waterways. The 2013 revisions to the Stormwater Regulations further strengthened sediment and stormwater controls for new development and redevelopment in Delaware. The environmental community was overall very supportive of the 2013 revisions. The general consensus among environmental groups was that the Department was taken a big step in reducing erosion and stormwater runoff to better protect the surrounding environment and wildlife. However, environmental groups still felt that there were parts of the Regulations that

were not stringent enough. Meanwhile, as expected, many of the development groups, while understanding the need to protect waters from stormwater runoff, were concerned about the costs associated with the new Stormwater Regulations. The environmental achievements of the current Delaware Sediment and Stormwater Regulations are highlighted below.

5,000 Square Feet

Unlike Federal law, which only requires stormwater controls for lots greater than one acre, the Delaware Erosion and Sediment Control Statute, 7 Del. C. § 4004, covers land 5,000 square feet or more.⁵⁴ While this may cause hardship for smaller development projects, Delaware's more stringent provision acknowledges the general notion that the impact of many small development projects can have a strong cumulative effect on stormwater runoff.⁵⁵

Fees and Financial Guarantee

The increase in regulation requires more resources from the Delegated Agencies. However, DNREC wrote into the provisions the agencies' ability to establish fees to cover costs associated with the Regulations. In Section 1.6, fees are established by Delegated Agencies and allow the agencies to increase fees to allow them to adequately review, inspect, and monitor Stormwater Plans.⁵⁶ The Financial Guarantee, Section 1.6.2.1, requires that a bond, security, or letter of credit, provided by the Owner, is given to the Delegated Agency "should the Owner fail to meet the obligations and requirements of the approved Sediment and Stormwater Management Plan."⁵⁷ This provision allows the Delegated Agencies to enforce the Stormwater Regulations without exhausting their own resources. So long as these provisions are utilized by the Delegated Agencies, resources should never be an excuse for lack of enforcement.

Three Step Approval Process

The inclusion of the three step approval process for Stormwater Plans was a major step taken by DNREC to ensure a thorough review of the Plans. The project application meeting requires the Department and the applicant to discuss the Plan prior to the applicant submitting a finalized application.⁵⁸ This allows DNREC and the applicant to settle on agreed upon controls before the applicant incurs any significant costs and permits the Department to push for more stringent

controls without causing the applicant undue economic hardship later in the process. Furthermore, the review process includes multiple plans and approvals from both the state Department and local agencies, resulting in an exhaustive assessment of each Stormwater Plan.

Inspections and Reporting

An important aspect of the Stormwater Regulations is the requirement of submittal of periodic progress reports to DNREC or the Delegated Agency. Submitting reports is required at several steps during construction with a Stormwater Plan. Stormwater Plans for projects disturbing activities greater than one acre of land must be certified by a Certified Construction Reviewer (“CCR”).⁵⁹ CCRs must have completed a Departmental-sponsored training course to become certified “responsible personnel” in charge of construction in accordance with the Stormwater Plan.⁶⁰ The landowner or landowner’s representative and the CCR are responsible for weekly construction reviews and “reporting on the adequacy of construction in accordance with the SMP” until released from review responsibility by DNREC or Delegated Agency.⁶¹ Construction reviews are also required following rain events.⁶² The owner or owner’s representative shall maintain written records of all construction reviews.⁶³ Even after project completion the owner must conduct regular maintenance reviews of the stormwater management system.⁶⁴

DNREC or the Delegated Agency must conduct regular reviews at a frequency to ensure that the Stormwater Plan is being followed and Best Management Practices are installed and maintained.⁶⁵ These reviews must be completed in writing and include any site deficiencies and a time period for the owner to correct the deficiencies.⁶⁶ Upon project completion, DNREC or the Delegated Agency must complete a final construction review.⁶⁷ DNREC or the Delegated Agency must also complete maintenance reviews of completed projects, documenting maintenance and repair needs.⁶⁸ DNREC may seek an enforcement action against the owner for not fulfilling his maintenance duties post-construction.⁶⁹ Constant monitoring, reviewing, and reporting allows for the oversight necessary to ensure that each Stormwater Plan is in and will stay in compliance with the Stormwater Regulations.

As demonstrated above, the Department took tremendous strides in strengthening the erosion and sediment control with the revisions to the Stormwater Regulations. However, as mentioned, environmental groups would have liked to have seen a few more changes made to the Stormwater Regulations that would have further reduced the environmental effects of development.

V. REGULATORY GAPS IN THE DELAWARE STORMWATER REGULATIONS

While the strengthening of the Stormwater Regulations should be applauded by those whose aim is to protect the health of our waters and communities, the Regulations can be reinforced by future modifications. Below are a few provisions in the Regulations that were highlighted by commenters as needing further considerations, as well as some areas that the Center feels need to be addressed with further review.

a. Lack of Clarity

One consistent failure of the 2013-2014 revisions is the lack of clarity throughout the Regulations. The terms, the Technical Document, and the inclusion of the functional equivalency determination are a few examples of the lack of clarity in the new revisions.

Terminology

Some of the terms used throughout the Regulations suffered from ambiguity. For example, DNREC includes the terms “hardship,” “Land Disturbance,” and “water flow characteristics” without clearly defining them. These terms were questioned by environmental groups in the 2013 public comment period, but were brushed off by DNREC for various reasons.

The “hardship” term was mentioned in the public comments as being undefined.⁷⁰ DNREC’s response to this concern was that “all factors will be considered” before a hardship determination is made, allowing a developer to be exempt from stormwater management requirements.⁷¹ However, it is unclear what DNREC considers to be “all factors” to be deliberated in the hardship determination.

Several terms were identified by groups as being vague or weak, such as “land disturbance” or “water flow characteristics.”⁷² The Department’s response to these comments was that the

definition used in the Stormwater Regulations were either in accordance with a prior definition used in the Erosion and Sediment Control Statute (Chapter 40) or in accordance with the federal definition.⁷³ The weakness of these terms was not addressed.

Technical Document

While DNREC intended for the 2014 revisions to clarify any issues related to the Technical Document, the actual result of the revision was to create more ambiguity. The Technical Document plays a crucial role in the implementation of the Stormwater Regulations. Applicants look to the Technical Document to determine whether their Plan is in compliance with Best Management Practices and the current standards followed by DNREC. For this reason, the constant revisions by the Department may prove to be a stumbling block for developers and those reviewing Stormwater Plans.

First, the Technical Document is constantly being revised by the Department. Since February 2014, and at the time of publication of this review, there have been revisions to 34 sections of the Technical Document.⁷⁴ These revisions include changes to Best Management Standards and Specifications for Vegetated Channels, Offset Provisions, Compost Material Properties, and Bioretention Best Management Practices Standard and Specification.⁷⁵

Adding to the confusion surrounding the Technical Document is current litigation that is challenging the 2013 Stormwater Regulations revisions based upon the argument that the Technical Document, which the Plaintiff alleges is part of the Regulations, not a mere guidance document, was not included in the public notice of the 2013 revisions.⁷⁶ DNREC's 2014 revisions to the Stormwater Regulation, "clarifying" the role of the Technical Document as guidance, before the litigation is settled, further confuse the legality of the Regulations and the role of the Technical Document.

Finally, even if the Department has "clarified" the role of the Technical Document, there is still some residual confusion that needs to be resolved. The Technical Document is divided into five articles, which include policies, procedures, forms, checklists, and standards. With the new "functional equivalency" determination, it is unclear what parts of the Technical Document allow for the use of alternative measures.

Functional Equivalency

The theme of uncertainty continues with the new “functional equivalency” determination. There are no criteria listed for DNREC’s “functional equivalency” determination nor is there a test for such determination within the Stormwater Regulations. The term “functional equivalency” gives DNREC a considerable amount of discretion to determine which measures are in fact “functionally equivalent” to the standards within the Technical Document. Although defined in the Stormwater Regulations, the term is still rather vague and gives no indication on what criteria DNREC will consider when making such a determination. DNREC has defined “Functional equivalency” as “Alternative measures that are consistent with the policies, procedures, technical specifications, and advisory provisions found in the Technical Document, and which satisfy these Regulations.”⁷⁷

The Department’s presumed desire is to give applicants the option of proposing alternative measures for satisfying the requirements of their Stormwater Plans in order to meet the end goal of “reduc[ing], to the maximum extent practicable, adverse effects of stormwater runoff on the water and the lands of the State.”⁷⁸ However, there is no specificity as to what “consistent with” will mean and whether, when an alternative measure is used, there will be any explanation from DNREC or other Delegated Agencies as to how that determination was made.

Additionally, there is no guarantee that the term will be applied consistently throughout the state. Under Section 9.1.2, the delegated agencies may ask DNREC for a determination.⁷⁹ With this option, the delegated agencies, of which there are nine,⁸⁰ may determine on their own whether an alternative measure meets the functional equivalency requirement under Section 2.1. As a result, there could be nine different understandings of what alternative measures are acceptable. Each district may have a different determination without more specific definition or criteria. This could lead to inconsistent determinations throughout the state.

b. Public Participation and Accountability

Under the revised Stormwater Regulations, the public has little oversight over DNREC’s actions. The Department maintains a large amount of discretion to determine which standards and specifications will meet the sediment and stormwater control requirements, with little oversight as to whether these determinations are accurate. This discretion is bolstered by the

minimal public participation provided for under the Regulations.

Public Review Process

A consistent critique of the Regulations among environmental groups was the short amount of time given to the public to review and challenge DNREC variance approvals. Under the new Regulations, the public is given fifteen (15) days to review and appeal a variance decision to the Environmental Appeals Board.⁸¹ Environmental groups believed that DNREC did not give the public enough time to properly review a decision.⁸² Fifteen days is a short amount of time for individuals and groups to learn about a Stormwater Plan decision, review and analyze that decision, and appeal that decision. In its response to such comments, DNREC stated that under 7 Del. C. Ch. 60 it was only required to give fifteen days for an appeal.⁸³ However, what is required may not be adequate.

Maintenance Reviews

While there are monitoring and reporting requirements, the Regulations heavily rely on owner-driven monitoring. Likewise, review of the implementation of Stormwater plans is largely monitored by the owners of the land themselves. The Regulation states “The Owner shall ensure that all elements of the approved Sediment and Stormwater Management Plan are implemented and construction site stormwater management BMPs and post construction stormwater management systems are installed and maintained in accordance with that plan. All construction sites shall comply with these Regulations.”⁸⁴ As a result, DNREC is relying upon owners to review their own compliance with their Stormwater Plans. Additionally, owner maintenance reports are not required to be submitted to the Department. Furthermore, most of the inspections and monitoring is done by the owners and DNREC inspection requirements are vague and non-committal.

c. Technical Provisions

In some instances, the provisions of the Regulations, whether requirements for Best Management Practices or offsets, allow the developers some room for how they can comply with

the law. These provisions create alternative measures that could be detrimental to the environment.

Requirements for Best Management Practices

The current definition of Best Management practices is actually less stringent than the pre-2013 Stormwater Regulations definition, requiring only:

“schedules of activities, prohibition of practices, maintenance procedures, and other management practices or measures to prevent or reduce the discharge of pollutants. BMPs include the following, among other practices and measures: structural and non-structural controls; treatment requirements; operating procedures and practices to control site runoff.”⁸⁵

A group opposed this definition due to its broad inclusion of structural controls and lack of a clear definition and hierarchy of which BMPs are “given preferential consideration.”⁸⁶ In DNREC’s response to the group’s concerns, it stated that it wanted to term “Best Management Practices” to be “as broad as possible.”⁸⁷

The pre-2013 Stormwater Regulations actually had a more thorough definition of Best Management Practices called “Green Technology Best Management Practices.” This term was defined as

“practices that achieve stormwater management objectives by applying the principles of filtration, infiltration, and storage most often associated with natural vegetation and undisturbed soils while minimizing a reliance on structural components. They may also be constructed using an imported soil medium and planted with vegetation designed to promote the natural hydrologic process.”⁸⁸

The new use of a broad BMPs definition removes the preference for promoting natural processes and takes a step backwards in protecting the environment.

Ability to Use Offsets

In the 2013 revisions, DNREC created offsets “as an alternative to full or partial compliance with the Resource Protection Event requirements.”⁸⁹ The Offset requirements are not specified in the Regulations. Environmental groups contested the lack of guidance and definition for offset requirements.⁹⁰ According to DNREC, if developers can show that construction costs exceed \$10/ c. ft. (determined to be the “maximum extent practicable”) they become eligible for an

offset.⁹¹ However, there is currently no procedure and no clarification on what exactly is required for DNREC to approve of an offset. The procedure for determining offset requirements, when finalized, will be in the Technical Document.

Additionally, as an alternative to compliance with the Resource Protection Event requirements, the Regulations allow a fee-in-lieu.⁹² The fee-in-lieu is supposed to serve as “compensation when the requirements of these Regulations cannot be reasonably met on an individual project basis.” While developers were unhappy with the requirement of fee-in-lieu of provision due to the potential for added costs to projects,⁹³ environmental groups were unhappy about the provision because of the apparent “out” it gives developers to actually meeting the stormwater control requirements.⁹⁴

VI. CONCLUSION

The Delaware Department of Natural Resources and Environmental Control should be commended for its open and lengthy revision process over the past eight years. The 2013-2014 revisions take great steps to improve control over sediment and stormwater runoff in the state. However, the Department’s work is not complete. Regulations always have room for improvement and these Stormwater Regulations are no different.

In the upcoming years, we will see how these new Stormwater Regulations are implemented and what the economic and environmental effects of them will be. Only then will environmental groups and developers be able to fully assess the impact of the Regulations and make proposals for future changes.

¹ Del.Code Ann. tit. 7, § 4001 (West 2015).

² *Id.* at §4006.

³ *Id.* at §4006(b)(2).

⁴ *Id.* at §4006(c); The powers and duties of the Secretary are promulgated in Title 7 Chapter 60.

⁵ *Governor Minner's Task Force on Surface Water Management*, 6 (April 1, 2005).

⁶ *Revisions to Delaware's Sediment and Stormwater Regulations*, "Regulatory Advisory Committee (RAC) Member Agencies, Dep't of Natural Res. and Env'tl. Control, <http://www.dnrec.delaware.gov/swc/Drainage/Pages/RegRevisions.aspx> \\ (last visited April 7, 2015)(hereinafter "*Revisions to Delaware Sediment and Stormwater Regulations*").

⁷ The RAC subcommittees include the Technical Subcommittee, Maintenance Subcommittee, Planning and Land Use Subcommittee, Policies and Procedures Subcommittee, Urban Considerations Subcommittee, and the Economic Impacts Subcommittee.

⁸ The RAC met on 10/16/2007, 1/22/2008, 3/27/2008, 2/9/2009, 2/25/2010, 5/27/2010, 6/8/2011, 1/10/2012, and 2/25/2013. For each meeting, the agenda and meeting notes are posted on the DNREC webpage.

⁹ 15 DE Reg. 1119-21 (Feb. 1, 2012).

¹⁰ The February 1, 2102 Notice in the Register of Regulation included notice of a public hearing, held on March 1, 2012. At the hearing, DNREC accepted public comments and also extended the written comment period from 30 days to 60 days.

¹¹ 16 DE Reg. 1048 (April 1, 2013).

¹² *Id.* at 1103 (April 1, 2013).

¹³ *See*, Secretary's Order No. 2013-WS-0026

¹⁴ 17 DE Reg. 240-41 (August 1, 2013).

¹⁵ For example, "All activities subject to these regulations *shall* comply with the [. . .] accompanying technical documents." 7 Del. Admin. Code § 5101.1.14 (published August 1, 2013) (emphasis added).

¹⁶ Secretary's Order No. 2013-WS-0026 at 3-4; 17 DE Reg. 241 (August 1, 2013).

¹⁷ Notice was given separately for each section of the Technical Document.

¹⁸ *Accord*, Public Notice, Dep't of Natural Res. and Env'tl. Protection (Feb. 26, 2014).

¹⁹ *See Baker, et al v. DNREC*, CA S13C-08-026 THG.

²⁰ SAN 2014-06 (July 29, 2014).

²¹ *Id.*

²² *Id.*

²³ Del. Code Ann. tit. 29, § 10101 *et seq* (West 2015); "Whenever an agency proposes to formulate, adopt, amend or repeal a regulation, it shall file notice and full text of such proposals, together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication, in full or as a summary, in the Register of Regulations pursuant to § 1134 of this title. [. . .]" Del. Code Ann. tit. 29, § 10115 (a) (West 2015); 18 DE Reg. 204-08 (Sept. 1, 2013).

²⁴ 7 Del. Admin. Code § 5101.1.3.1 (2014).

²⁵ *Id.* § 5101.3.2 (2006).

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- ²⁶ *Revisions to Delaware Sediment and Stormwater Regulations: Why, What, How?*, Public Workshop, Dep't of Natural Res. and Envtl. Control (June 16, 2011) available at: http://www.dnrec.delaware.gov/swc/Drainage/Documents/Sediment%20and%20Stormwater%20Program/Reg%20Revisions/Public_Workshop_2011-06-16.pdf.
- ²⁷ *See*, 7 Del. Admin. Code § 5101.3.0 (2013).
- ²⁸ 7 Del. Admin. Code § 5101.3.2.2 (2013). This requirement may be waived on a case-by-case basis. *Id.* § 5101.3.2.1 (2013).
- ²⁹ *Id.* § 5101.3.2.5 (2013).
- ³⁰ *Id.* § 5101.3.3 (2013).
- ³¹ *Id.* § 5101.3.3.1 (2013).
- ³² *Id.* § 5101.3.8.1 (2013).
- ³³ *Id.*
- ³⁴ *Id.* § 5101.3.7.1(2013).
- ³⁵ Delaware Stormwater Regulations, Technical Guidance Document § 3.01, “Project Types,” provides guidelines for the project types that could qualify for a standard plan. The Technical Document is available at http://www.dnrec.delaware.gov/swc/Drainage/Pages/Technical_document.aspx (last visited April 7, 2015).
- ³⁶ *Revisions to Delaware Sediment and Stormwater Regulations*, supra note 6.
- ³⁷ 7 Del. Admin. Code § 5101.5.2.2 (2013).
- ³⁸ *Id.* § 5101.5.3.2 (2013).
- ³⁹ *Id.* § 5101.5.4.2 (2013)..
- ⁴⁰ *Id.* § 5101.1.1 (2013).
- ⁴¹ *See, Id.* § 5101.5.6 (2013).
- ⁴² *Id.* § 5101.5.6.2 (2013).
- ⁴³ *Id.* §§ 5101.5.6.3.2, 5101.5.6.3.2.2 (2013).
- ⁴⁴ *Id.* § 5101.3.2. (2006).
- ⁴⁵ *Id.* § 5101.3.3. (2006).
- ⁴⁶ *Id.* § 5101.1.5. (2013).
- ⁴⁷ *Id.* § 5101.1.5.4 (2013).
- ⁴⁸ *Id.* § 5101.1.5.5 (2013).
- ⁴⁹ *Id.* § 5101.1.5.6 (2013).
- ⁵⁰ *See* 7 Del. Admin. Code §§ 5101-1.13, 1.14.3 (2014).
- ⁵¹ *Id.* § 5101.1.14.3 (2014).
- ⁵² *Id.* § 5101.1.14.3 (emphasis added).
- ⁵³ *Id.* § 5101.9.1.2 (2014)
- ⁵⁴ *Id.* § 5101.1.4.2; One of the more strongly supported provisions was the regulation’s coverage of developments disturbing as little as 5,000 square feet
- ⁵⁵ *See* Memorandum from Elaine Z. Webb, DNREC Sediment and Stormwater Program to Robert Haynes, Hearing Officer, Responses to Comments Received – Proposed Revision to Regulation No. 5101 Sediment and Stormwater Regulations (May 20, 2013) 52 (hereinafter “Response to Comments”).
- ⁵⁶ *Id.* § 5101.1.6.1.1 (2013)
- ⁵⁷ *Id.* § 5101.1.6.2 (2014).
- ⁵⁸ 7 Del. Admin. Code § 5101.3.3.1 (2013)

⁵⁹ 7 Del. Admin. Code § 5101.3.8.3 (2014).
⁶⁰ *Id.*
⁶¹ *Id.* § 5101.6.1.8.1 (2014).
⁶² *Id.* § 5101.6.1.3.2 (2014).
⁶³ *Id.* § 5101.6.1.3.3 (2014).
⁶⁴ *Id.* § 5101.7.2.1 (2014).
⁶⁵ *Id.* § 5101.6.4.2 (2014).
⁶⁶ *Id.* § 5101.6.4.3 (2014).
⁶⁷ *Id.* § 5101.6.5.6 (2014).
⁶⁸ *Id.* § 5101.7.3.1 (2014).
⁶⁹ *Id.* § 5101.7.4.1 (2014).
⁷⁰ Response to Comments, *supra* note 55 at 21, 33, 52.
⁷¹ *Id.*
⁷² *Id.* at 22, 27, 32, 35, 54.
⁷³ *Id.* at 32, 35.
⁷⁴ Technical Document Public Notices, Dep’t of Natural Resources and Env’tl. Control, *available at* <http://www.dnrec.delaware.gov/swc/Drainage/Pages/Technical-Document-Updates.aspx> (last visited May 29, 2015).
⁷⁵ *Id.*
⁷⁶ *Baker, et al v. DNREC*, CA S13C-08-026 THG.
⁷⁷ 7 Del. Admin. Code § 5101-2.1 (2014).
⁷⁸ *Id.* § 5101-1.2.
⁷⁹ *Id.* § 5101-9.1.2 (2014).
⁸⁰ List of Delegated Agencies, Division of Watershed Stewardship, Dep’t of Natural Res. and Env’tl. Protection, *available at* <http://www.dnrec.delaware.gov/swc/Drainage/Pages/DelegatedAgencies.aspx>.
⁸¹ 7 Del. Admin. Code § 5101.1.5.6 (2014).
⁸² Response to Comments, *supra* note 55 at 21, 33, 53.
⁸³ *Id.*
⁸⁴ 7 Del. Admin. Code § 5101.6.1.1(2014).
⁸⁵ *Id.* § 5101.2.1 (2014).
⁸⁶ Response to Comments, *supra* note 55 at 34.
⁸⁷ *Id.*
⁸⁸ 7 Del. Admin. Code § 5101.2.0 (2006)
⁸⁹ *Id.* § 5101.1.7 (2014).
⁹⁰ Response to Comments, *supra* note 55 at 19, 21, 24, 31, 33, 45, 53, 54, 67.
⁹¹ Response to Comments, *supra* note 55 at 19.
⁹² “Offset” means an alternate to strict adherence to the regulations including, but not limited to trading, banking, fee-in-lieu, or other similar program that serves as compensation when the requirements of these regulations cannot be reasonably met on an individual project basis. 7 Del. Admin. Code §§ 5101-2.0 (2014).
⁹³ Response to Comments, *supra* note 55 at 19, 43, 61, 62.
⁹⁴ *Id.* at 33.