

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

OFFICE OF THE SECRETARY

Statutory Authority: 7 Delaware Code, Chapter 79; (7 Del.C., Ch. 79)

7 DE Admin. Code 103

FINAL

Secretary's Order No.: 2014-OTS-0003

Date of Issuance: February 25, 2014

Effective Date of the Amendment: April 1, 2014

103 Chronic Violator Regulation

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") the following findings, reasons and conclusions are entered as an Order of the Secretary in the above-referenced rulemaking proceeding.

Background and Procedural History

This Order considers proposed regulatory action to repeal 7 DE Admin. Code 103, also known as Delaware's *Chronic Violator Regulation*. In 2012, the *Chronic Violator Regulation* was rendered moot by the passage of legislation (Senate Bill 92) which amended existing state law and eliminated the Department's role as proposing and determining whether a party is a "chronic violator". Under the amended law, DNREC proposes the designation to the Environmental Appeals Board. The most recent changes in the law spell out the process, and thus alleviate the need for the existing regulation. This proposed action is based on a recommendation by the Department of Justice to repeal the regulation in its entirety.

The Department's Office of the Secretary commenced the regulatory development process with Start Action Notice 2013-34. The Department published its initial proposed regulation repeal action in the January 1, 2014 *Delaware Register of Regulations*, and held a public hearing on February 3, 2014. It should be noted that no members of the public attended said hearing.

These proposed regulatory actions were thoroughly vetted by the Department at the aforementioned public hearing on February 3, 2014. Pursuant to Delaware law, the record remained open for fifteen (15) additional days subsequent to the date of the public hearing, for the purpose of receiving additional public comment. No public comment was received by the Department from the public at any time during the course of this proposed promulgation. It should also be noted that all proper notification and noticing requirements concerning this proposed promulgation were met by the Department. Proper notice of the hearing was provided as required by law.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated February 21, 2014 (Report). The Report recommends certain findings and the adoption of the proposed regulatory actions as attached to the Report as Appendix A.

Findings and Discussion

I find that the proposed regulatory actions are well-supported by the record developed by the Department, and I adopt the Report to the extent it is consistent with this Order. The Department's experts developed the record and drafted the proposed regulatory actions. As previously noted, no public comment was received by the Department from the public at any time during the course of this proposed promulgation.

I find that the Department's experts in the Office of the Secretary fully developed the record to support adoption of these regulatory actions. The adoption of this Order will enable Delaware to streamline its existing regulations by repeal of this now moot regulation, which no longer serves its intended purpose, and to accurately reflect Delaware's most recent changes in state law regarding this process.

In conclusion, the following findings and conclusions are entered:

- 1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these proposed regulatory actions as final;
- 2.) The Department provided adequate public notice of the proposed regulatory actions, and provided the public with an adequate opportunity to comment on the initial proposed actions, including at the public hearing held on February 3, 2014;
- 3.) The Department held a public hearing on February 3, 2014 in order to consider public comment before making any final decision;

- 4.) The Department's Hearing Officer's Report, including its recommended record and the recommended regulatory actions as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;
- 5.) The adoption of this Order will enable Delaware to streamline its existing regulations by repeal of this now moot obsolete regulation, which no longer serves its intended purpose;
- 6.) The recommended regulatory actions should be adopted as final regulatory actions because Delaware will be able to (1) update its existing regulations by removing that which no longer serves its intended purpose; (2) accurately reflect Delaware's most recent changes in state law regarding this process; and, lastly, because (3) the regulation actions are well supported by documents in the record; and
- 7.) The Department shall submit this Order approving the final regulation to the *Delaware Register of Regulations* for publication in its next available issue, and provide such other notice as the law and regulation require and the Department determines is appropriate.

Collin P. O'Mara, Secretary

~~103 Chronic Violator Regulation~~

~~1.0 Authority~~

~~These regulations are promulgated pursuant to the authority granted to the Secretary by 7 Del.C. Ch. 79.~~

~~2.0 Applicability~~

- ~~2.1 The Chronic Violator regulations are administered by the Department of Natural Resources and Environmental Control pursuant to 7 Del.C. Ch. 79.~~
- ~~2.2 These regulations apply to the following DNREC Regulatory Programs adopted under Title 7: Chapters 40, 60, 62, 63, 66, 70, 72, 74, 77, 78, and 91 and Title 16 Chapters 63 and 78:-~~
 - ~~2.2.1 Erosion and Sedimentation Control (7 Del.C. Ch. 40) Control of erosion of sedimentation at construction sites and other land disturbing activities.~~
 - ~~2.2.2 Stormwater Management (7 Del.C. Ch. 60) Under the NPDES program for storm water from facilities and hard surfaces.~~
 - ~~2.2.3 Solid Waste (7 Del.C. Ch. 60) Landfill permitting, transportation of solid waste, and illegal dumping of solid waste.~~
 - ~~2.2.4 Water Discharges (7 Del.C. Ch. 60) NPDES program, all point source discharges into waters of the State.~~
 - ~~2.2.5 Air Emissions (7 Del.C. Ch. 60) All point source emissions to air, including mobile and stationary sources.~~
 - ~~2.2.6 Marinas (7 Del.C. Ch. 60) All boat docking facilities, marinas, and vessel pumpout stations.~~
 - ~~2.2.7 Scrap Tires (7 Del.C. Ch. 60) Storage requirements for scrap tires.~~
 - ~~2.2.8 Beverage Containers (7 Del.C. Ch. 60) Bottle Bill, requires stores to take returnable containers and pay the refund.~~
 - ~~2.2.9 Ocean Dumping (7 Del.C. Ch. 60) Prohibits the disposal of solid wastes in the ocean and other waters of the State.~~
 - ~~2.2.10 Water Supply (7 Del.C. Ch. 60) Permitting of water supply wells.~~
 - ~~2.2.11 On-Site Wastewater (7 Del.C. Ch. 60) Permitting of on-site wastewater treatment systems.~~
 - ~~2.2.12 Debris Pits (7 Del.C. Ch. 60) Remediation of debris disposal areas.~~
 - ~~2.2.13 Labeling of Plastic Products (7 Del.C. Ch. 60) Requires that all plastic containers sold in Delaware contain the triangle enclosed code number of the type of plastic the container is made of.~~
 - ~~2.2.14 Oil Pollution Liability (7 Del.C. Ch. 62) Prohibits the discharge of oil to the water or land.~~
 - ~~2.2.15 Hazardous Waste (7 Del.C. Ch. 63) Regulates the generation, storage, transportation, treatment and disposal of hazardous waste.~~
 - ~~2.2.16 Coastal Zone (7 Del.C. Ch. 70) Control of the location, extent, and type of industrial development in Delaware's coastal areas.~~
 - ~~2.2.17 Underground Storage Tanks (7 Del.C. Ch. 74) Controls the storage of petroleum products in underground storage tanks.~~
 - ~~2.2.18 Aboveground Storage Tanks (7 Del.C. Ch. 74A) Controls the storage of petroleum products and hazardous substances in aboveground storage tanks.~~

- 2.2.19 ~~Extremely Hazardous Substances (7 Del.C. Ch. 77) — Prevention of sudden releases of extremely hazardous substances and the generation of pressure waves and thermal exposures beyond the property boundaries of the facility where they occur and the catastrophic health consequences caused by short-term exposures to such accidental releases.~~
- 2.2.20 ~~Pollution Prevention (7 Del.C. Ch. 78) — Establish a program to demonstrate and facilitate the potential for pollution prevention and waste minimization through technical assistance, education, and outreach.~~
- 2.2.21 ~~Hazardous Substances Cleanup (7 Del.C. Ch. 91) — State Superfund program.~~
- 2.2.22 ~~Emergency Planning/Community Right to Know (16 Del.C. Ch. 63) — Requires the report of hazardous materials meeting specific threshold requirements stored at facilities for the purpose of emergency response and community right to know.~~
- 2.2.23 ~~Asbestos (16 Del.C. Ch. 78) — Regulates the practice of asbestos containment, removal, transportation, storage and disposal.~~
- 2.2.24 ~~Wetlands (7 Del.C. Ch. 66) — Protection of tidal wetlands.~~
- 2.2.25 ~~Subaqueous Lands (7 Del.C. Ch. 72) — Control of activities in state owned subaqueous lands.~~

3.0 Definitions

The following definitions shall have the meaning ascribed for the purposes of enforcing Chapter 79 and this Regulation only:

- 3.1 ~~"Chronic Violator" means a facility or regulated party that is unable to maintain compliance or has engaged in a pattern of willful neglect or disregard with respect to the State's environmental permits, laws, or regulations as administered by the Department.~~
- 3.2 ~~"Days" means calendar days.~~
- 3.3 ~~"Facility" means any site or structure regulated by the Department or subject to the provisions contained in the laws listed under Section 2.2 of this regulation.~~
- 3.4 ~~"Department" means the Department of Natural Resources and Environmental Control.~~
- 3.5 ~~"Person" means any individual, trust, firm, joint stock company, federal agency, partnership, corporation (including a government corporation or authority), limited liability company, association, state, municipality, commission, political subdivision of a state or any interstate body.~~
- 3.6 ~~"Public Meeting" means a forum to receive oral and written comments and other supporting materials from the public and the facility or regulated party as part of the administrative record.~~
- 3.7 ~~"Regulated Party" means any person regulated by the Department or subject to the provisions contained in the laws listed under Section 2.2 of this regulation.~~
- 3.8 ~~"Secretary" means the Secretary of the Department of Natural Resources and Environmental Control or the Secretary's duly authorized designee.~~

4.0 Criteria

In determining if a facility or regulated party is a chronic violator, the Secretary shall apply the following criteria with respect to the State's environmental permits, laws or regulations as administered by the Department:

- 4.1 Inability to maintain compliance; or
- 4.2 Engaged in a pattern of willful neglect; or
- 4.3 Engaged in a pattern of disregard.

A facility or regulated party need only meet one of these criteria in order to be designated a chronic violator.

5.0 Initiation of Review

- 5.1 ~~At the Secretary's discretion, he/she may initiate a review of any facility or regulated party at any time to determine if the facility is a chronic violator.~~
- 5.2 ~~The Secretary shall review a facility or regulated party to determine if it is a chronic violator if one of the following conditions apply in a time frame not to exceed 5 years:~~
 - 5.2.1 ~~Three (3) or more of any combination of administrative orders, civil judicial actions, court orders, negotiated settlements, and criminal convictions (excluding convictions pursuant to 7 Del.C. §6013(h)) at the same facility regardless of owner; or~~
 - 5.2.2 ~~Three (3) or more of any combination of administrative orders, civil judicial actions, court orders, negotiated settlements, and criminal convictions (excluding convictions pursuant to 7 Del.C. §6013(h)) under the same Department regulatory program, as defined in Section 2.0, against the same person at different locations.~~

6.0 Notification of Review

- 6.1 The Secretary shall issue a Notice of Chronic Violator Review to the facility or regulated party within ten (10) days of the Secretary's decision to conduct a review.
- 6.2 Within ten (10) days after the facility or regulated party has received the written notice, the Department shall publish a public notice stating that a review has commenced, identifying the facility or regulated party being reviewed, describing the reason why the review was initiated, and requesting public and facility or regulated party comments within sixty (60) days.
- 6.3 Any comments received by the Department shall be made available to the facility or regulated party and the public, within three (3) working days of receipt. A hard copy version of comments will be stored in the Department's facility file.
- 6.4 The Department shall issue a written notice of the status of the review to the facility or regulated party and to the public every six months from the date of the Public Notice. If, during said review, new violations come to the attention of the Department the Secretary may consider the new violations and allow a further comment period by the facility, regulated party, or the public.

7.0 Factors to be Considered When Conducting Review

The Secretary may consider any relevant factors when deciding whether a facility or regulated party meets one or more of the chronic violator criteria. In conducting his/her review, the Secretary shall consider all relevant and reliable information available or submitted to the Department from all sources. Factors that must be considered are:

- 7.1 The nature and extent of the harm caused or threatened.
 - 7.2 The impact on the integrity of regulatory programs.
 - 7.3 Duration of noncompliance.
 - 7.4 Number of violations of a similar nature.
 - 7.5 Total number of violations of all types.
 - 7.6 Economic benefit attributable to violations.
 - 7.7 Relationship/relevance of violations to activity for which permit is sought.
 - 7.8 Whether any or all of the violations were willful or grossly negligent.
 - 7.9 The extent of deviation from the permit, order or other requirement.
 - 7.10 The demonstrated attitude of new owners/ managers (if ownership and/or management has changed at the facility).
 - 7.11 Actions taken or not taken to prevent, mitigate or respond to harm caused or threatened by the violation.
 - 7.12 Whether any or all of the violations were self reported within 15 consecutive days after the date of discovery.
- All of these factors need not apply in order for a facility or regulated party to be considered a chronic violator.

8.0 Violations to be Considered When Conducting Review

The Secretary may consider any violations when conducting his/her review. The types of violations that shall be considered by the Secretary shall include, but not be limited to:

- 8.1 Violations that cause or genuinely threaten harm to the environment or to public health or safety.
- 8.2 Violations resulting in criminal convictions.
- 8.3 Tampering with monitoring or sampling equipment or interfering with samples or analytical results.
- 8.4 Filing false reports or inaccurate or misleading information.
- 8.5 Failing to maintain or use required pollution control equipment, structures or practices.
- 8.6 Repeatedly failing to submit required reports of regulated activity such as Discharge Monitoring Reports.
- 8.7 Repeatedly conducting a regulated activity without a required permit or authorization.

9.0 Secretary's Determination

In making a determination, the Secretary shall consider all relevant and reliable information available or submitted to the Department from all sources. The Secretary shall consider the following when determining if a facility or regulated party meets one or more of the chronic violator criteria in Section 4.0:-

- 9.1 Relevant factors per Section 7.0;
- 9.2 Violations per Section 8.0;

- 9.3 Public comments received per Section 6.0; and
- 9.4 Comments from the facility or regulated party per Section 6.0.

10.0 Notification of Determination

- 10.1 The Secretary shall issue a Notice of Chronic Violator Determination to the facility or regulated party once a determination has been made. The notice will describe in detail the basis for the Secretary's determination. If the facility or regulated party is determined to be a Chronic Violator, the notice will also describe the penalties, limits, requirements or restrictions being imposed in accordance with Section 11.0 and the requirements to be met in order to petition for removal of the Chronic Violator designation.
- 10.2 Once the facility or regulated party has received the Notice of Chronic Violator Determination, the Department shall publish, within ten (10) days, a public notice announcing the determination and describing the basis for the Secretary's determination, and information on how to obtain the full Determination document. If the facility or regulated party is determined to be a Chronic Violator, the Public Notice will also summarize the penalties, limits, requirements or restrictions being imposed.
- 10.3 Persons or facilities determined by the Secretary to be chronic violators shall be provided due process under 7 ~~Del.C.~~ §6008 and §6009.

11.0 Penalties and Requirements

- 11.1 The Secretary may impose limits, requirements or restrictions on a facility or regulated party determined to be a chronic violator by virtue of the exercise of his/her authority over such facility or regulated party through permitting provisions or enforcement actions. Such limits, requirements or restrictions may include, but not be limited to:
 - 11.1.1 denying permit applications or modifying, suspending or revoking operating permits;
 - 11.1.2 imposing a schedule of compliance;
 - 11.1.3 requiring capital improvements and associated performance standards;
 - 11.1.4 specifying the requirements for development and implementation of a system for managing environmental performance and compliance; or
 - 11.1.5 instituting a requirement for the facility or regulated party to submit an annual environmental performance statement. Such a statement shall include, but not be limited to:
 - 11.1.5.1 a description of the facility.
 - 11.1.5.2 a listing of environmental permits held by the facility.
 - 11.1.5.3 emissions and discharges from the facility.
 - 11.1.5.4 disclosure of environmental violations or enforcement actions taken against the facility during the previous year.
 - 11.1.5.5 a description of any pollution prevention or waste reduction activities undertaken at the facility during the previous year and the results of those activities.
 - 11.1.5.6 plans to achieve compliance with all applicable laws, regulations or permits.
- 11.2 The Secretary may reject any permit application or revoke any permit upon a finding that the applicant has been determined by the Secretary to be a chronic violator.
- 11.3 Notwithstanding other applicable enforcement provisions contained in relevant sections of Chapters covered by 7 ~~Del.C.~~ §7901(b), the Secretary is authorized to impose an administrative penalty of up to \$10,000 per day for each violation against any person that is determined to be a chronic violator in accordance with the provisions of 7 ~~Del.C.~~ §7904(a). The person's right to contest or appeal the assessment of a penalty authorized under this Section shall be in accordance with the applicable provisions of the Delaware Code under which the violation and enforcement action is being taken.

12.0 Chronic Violator Delisting

- 12.1 Any person determined to be a Chronic Violator may petition the Secretary to have the Chronic Violator designation removed once it has met the limits, requirements, or restrictions of the Notice of Chronic Violator Determination. The petition must include the following information, as appropriate:
 - 12.1.1 demonstration of compliance with the limits, requirements, or restrictions of the Notice of Chronic Violator Determination through an audit conducted by an independent third party if required by the Secretary;
 - 12.1.2 description of actions taken to prevent violations of the kind that led to the notice; and
 - 12.1.3 description of other violations that have occurred since the notice and how they were addressed.

- 12.2 Upon receipt of the petition, the Department shall issue a public notice announcing the petition and requesting public comments within 90 days.
- 12.3 Within 30 days of receipt of the petition, the Department will notify the facility or regulated party of the administrative completeness of the petition or its deficiencies.
- 12.4 Upon a meritorious request for a public meeting, as defined in Section 3.6 of this Regulation, received within a reasonable time as stated in the Public Notice, the Secretary shall conduct a public meeting to review and receive additional comments on the petition.
- 12.5 The Department shall have 90 days from the date the petition is determined to be administratively complete to conduct applicable inspections of the facility and/or the regulated party's record to confirm the petition's statements.
- 12.6 The Secretary will then have an additional sixty (60) days to review the petition, the inspection reports, audit reports if required, and public comments and issue a decision to the facility or regulated party that the Chronic Violator Status has been withdrawn or will be continued.
- 12.7 When the petition is granted or denied, the Secretary will issue a letter to the facility or regulated party, and the Department will issue a public notice indicating the Chronic Violator's status.

7-DE Reg. 1198 (3/1/04)

17 DE Reg. 985 (04/01/14) (Final)