

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
DIVISION OF WATERSHED STEWARDSHIP

Statutory Authority: 7 Delaware Code, Section 4006(h) and (i) (7 **Del.C.** §4006(h) & (i))

GENERAL NOTICE

NOTICE

Delaware Erosion and Sediment Control Handbook for 5101 Sediment and Stormwater Regulations

Secretary's Order No.: 2023-WS-0012

RE: Approving Final Revisions to the Delaware Erosion and Sediment Control Handbook, in support of 7 DE Admin. Code 5101, *Delaware Sediment and Stormwater Regulations*, as set forth at 7 *Del.C.* §4006 (h) and (i)

Date of Issuance: June 5, 2023

Effective Date: June 5, 2023

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC"), and pursuant to 7 *Del.C.* §4006 (h) and (i), as well as 7 *Del.C.* §6010(a) and (c), and all other relevant statutory authority, the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced promulgation.

Background, Procedural History and Findings of Fact

This Order relates to the Department's proposed revisions to selected sections of the Delaware Erosion and Sediment Control Handbook ("Delaware ESC Handbook" or "Handbook"). The Handbook is not a State of Delaware regulation, but rather is a regulatory guidance document in support of 7 **DE Admin. Code** 5101, *Delaware Sediment and Stormwater Regulations*, as set forth at 7 *Del.C.* §4006(h) and (i). The current version of the Delaware ESC Handbook was adopted in February 2019, along with the Department's most recent amendments to 7 **DE Admin. Code** 5101. The Handbook provides background information on erosion and sedimentation, and information on Delaware's regulatory program to manage erosion and sediment from construction sites in Delaware. The Handbook also contains standards and specifications for a long list of best management practices ("BMPs") that may be employed during construction to prevent polluted discharges. The Department has the statutory basis and legal authority to develop and periodically revise the Delaware ESC Handbook, pursuant to 7 *Del.C.* §4006(h) & (i), and as provided for under 7 *Del.C.* Ch.60.

The proposed revisions to the Delaware ESC Handbook are limited to the following six (6) sections of the Delaware ESC Handbook:

1. **Section 3.1.4: Temporary Sediment Basin** - Corrected the anti-seep collar equation on p. 3.1.4-5.
2. **Section 3.4.3: Vegetative Stabilization** - Updated to remove invasive or undesirable species.
3. **Section 3.4.5: Mulching** - Clarified that synthetic netting is not acceptable.
4. **Section 3.6.1: Pollution Prevention** - Modification of the section title from "Construction Site Waste Management and Spill Control" to "Construction Site Pollution Prevention." Additionally, the "Fueling and Spill Control" information has been moved into its own standard and specification and has been replaced with additional information concerning pollution prevention and Delaware Construction General Permit ("CPG") signage recommendations.
5. **Section 3.6.4: Fueling and Spill Control** - Creation of new specification (as noted above), with expanded guidance from Section 3.6.1.
6. **Appendix A-3: Geotextile Application Guide** - Updated material specification and example products.

As noted above, the Delaware ESC Handbook itself is not a regulation, but rather a regulatory guidance document in support of 7 **DE Admin. Code** 5101. As such, there is no legal requirement for the Department to follow the standard regulatory promulgation process as provided under current Delaware law. However, for the purposes of transparency, and to provide additional information, clarity and guidance to the regulated community, the Department published General Notice in the December 1, 2022, edition of the *Delaware Register of Regulations*, as well as Legal Notice in both the *News Journal* and the *Delaware State News* on December 1, 2022. These Notices announced the proposed revisions to selected

sections of the Handbook, provided hyperlinks within those documents that directed the public to the actual proposed revisions for further review, and specified the time period in which the public could request a public hearing, should they wish to do so. Thereafter, the Department received four (4) requests for a public hearing.

The Department subsequently published General Notice in the March 1, 2023, edition of the *Delaware Register of Regulations*, as well as Legal Notice in both the *News Journal* and the *Delaware State News* on March 1, 2023, announcing that the Department would hold a public hearing on March 22, 2023, to receive comment on the proposed revisions to the Delaware ESC Handbook. Thereafter, the Department held the public hearing concerning this matter as noticed. Department staff and members of the public attended the public hearing held in this matter on March 22, 2023.

It should be noted that only one comment was received from the public regarding the aforementioned proposed revisions to the Handbook. That comment was received verbally at the time of the public hearing held on March 22, 2023. The hearing record ("Record") remained open for receipt of public comment through April 19, 2023, however, no additional comment was received by the Department during the post-hearing phase of this matter. Proper notice of the hearing was provided as required by law.

In response to the one comment that was received at the time of the public hearing, Bonnie Arvay, Program Manager II, from the Sediment and Stormwater Program of the Department's Division of Watershed Stewardship, provided a brief Response Memorandum to Hearing Officer Lisa A. Vest for the benefit of the Record being compiled in this matter. In that Memorandum, dated May 1, 2023, Ms. Arvay acknowledged the Department's receipt of the comment, and noted that the same was specific to two topics that are not part of the Handbook revisions currently being proposed by the Department. Ms. Arvay further noted in the Memorandum that, while the comment presented was not germane to the subject matter of the public hearing of March 22, 2023, the Department was appreciative of the comment, and will take the same into consideration when the Department seeks to modify the relevant authority and supporting section of programmatic guidance documents in the future.

It should be noted that all of the public hearing requests that were received by the Department in this matter referenced concerns to the waste management portion of the Delaware ESC Handbook. The Department is not currently proposing revisions to that section, and therefore those concerns are not germane to the subject matter of the public hearing. Nevertheless, the Department decided to honor the public's request for a public hearing in this matter in the event additional comments regarding the sections of the Handbook that were part of the proposed revisions would be received. As noted above, no such comments were submitted by the public in this matter. It should also be noted that the Department has discussed the concerns raised by those members of the public that had requested this public hearing. As a result of those discussions, DNREC has a proposed path forward to address those concerns outside of the current revisions being proposed for the Handbook.

I find that Ms. Arvay's Response Memorandum, as provided by the Department's experts in the Division of Watershed Stewardship, fully addresses the sole comment received by the Department at the time of the public hearing and provides clarity for the benefit of the Record being generated in this present matter. I further find that no changes to the proposed revisions to the Delaware ESC Handbook have been made by the Department subsequent to the initial publication of the proposed revisions in the *Register of Regulations* on March 1, 2023.

Following her review of the Record, Hearing Officer Vest prepared her Hearing Officer's Report, dated May 30, 2023 ("Report"), which expressly incorporated into the Record the above-referenced Response Memorandum regarding the sole comment received from the public in this matter, attached thereto as Appendix "A." The Report documents the proper development of the aforementioned proposed revisions, establishes the Record, and recommends the adoption of the Department's proposed revisions to the Delaware ESC Handbook, as referenced above.

Reasons and Conclusions

Currently pending before the Department is the proposed adoption of the aforementioned revisions to selected sections of the Delaware ESC Handbook. As noted above, the Handbook is a regulatory guidance document in support of **7 DE Admin. Code 5101, Delaware Sediment and Stormwater Regulations**, as set forth at *7 Del.C. §4006(h)* and (i).

Based on the Record developed by the Department's experts and established by the Hearing Officer's Report, I find that the Department has fully developed the Record to support the proposed revisions to the Delaware ESC Handbook, and that the same is well-supported. Thus, for the reasons stated above, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed revisions to the Delaware ESC Handbook be adopted as final, in the customary manner provided by law.

In conclusion, the following reasons and conclusions are hereby entered:

1. The Department has the statutory basis and legal authority to act with regard to the proposed revisions to selected sections of the Delaware ESC Handbook, pursuant to 7 *Del.C.* §4006(h) and (i), and as provided for under 7 *Del.C.* Ch.60.
2. The Department has jurisdiction under its statutory authority, pursuant to 7 *Del.C.* Ch. 60, to issue an Order adopting the aforementioned proposed revisions as final;
3. The Department provided adequate public notice of the proposed revisions, and all proceedings associated with the same, in a manner required by law and regulations, and provided the public with an adequate opportunity to comment on the same, both at the time of the public hearing held on March 22, 2023, and subsequent to the time of the public hearing (through April 19, 2023), in order to consider all public comment on the same before making any final decision;
4. The adoption of the proposed revisions to the Delaware ESC Handbook will enable the Department to update this regulatory guidance document, in support of 7 **DE Admin. Code** 5101, as referenced above, and provide additional information, understanding and clarity to the regulated community with regard to the six areas that are being updated with these revisions, namely: (1) temporary sediment basin; (2) vegetative stabilization; (3) mulching; (4) construction site pollution prevention; (5) fueling and spill control; and (6) the geotextile application guide;
5. The Department's proposed revisions to the Delaware ESC Handbook, as initially noticed in the General Notices section of the March 1, 2023, *Delaware Register of Regulations*, and then fully vetted to the public at the aforementioned public hearing held on March 22, 2023, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final revisions to the Delaware ESC Handbook, which shall become effective immediately upon the signing of the Secretary's Order regarding the same;
6. The Hearing Officer's Report, including its established Record and the Department's Response Memorandum dated May 1, 2023, as set forth therein in Appendix "A," is hereby adopted to provide additional reasons and findings for this Order;
7. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and
8. The Department shall submit this Order approving as final the proposed revisions to the Delaware ESC Handbook to the *Delaware Register of Regulations* for publication in its next available issue and provide such other notice as the law and regulation require, as the Department determines is appropriate.

Lisa BorinOgden, Deputy Secretary for
Shawn M. Garvin
Secretary

27 DE Reg. 65 (07/01/23) (Gen. Notice)