

**DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY**

Statutory Authority: 3 Delaware Code, Section 2220(a) (3 **Del.C.** §2220(a))
3 **DE Admin. Code** 1201

FINAL

ORDER

1201 Nutrient Management Certification Regulations

The Delaware Nutrient Management Commission pursuant to 3 **Del.C.** §2220(a), proposed to revise its regulations adding a new regulation incorporating by reference the State Technical Standards developed by an appointed committee to establish appropriate standards for nutrient application, development and implementation of nutrient management and animal waste management plans, compliance with CAFO permits, and siting new CAFO facilities.

Summary of the Evidence and Information Submitted

Following publication in the Delaware *Register of Regulations* on July 1, 2017 a written public comment period was held open for thirty days. At its meeting on August 1, 2017, the Commission deliberated upon a single written comment submitted by Dr. Amy Shober of the University of Delaware requesting that the State Technical Standard pertaining to field staging be amended to allow for 120 days instead of 90. After deliberation upon the comment received, the Commission determined that substantive changes were necessary to change the field staging standard to 120 days. The regulations were amended, and republished in the Delaware *Register of Regulations* on September 1, 2017. A written public comment period was opened from September 1, 2017 until October 2, 2017. No comments were received during that time.

FINDINGS OF FACT AND CONCLUSIONS

1. The public was given notice and an opportunity to provide the Commission with comments in writing on the proposed amendments to the Board's regulations.
2. There were no public comments provided to the Commission during the second written public comment period.
3. Pursuant to 3 **Del.C.** §2220(a), the Commission has statutory authority to promulgate rules and regulations clarifying specific statutory sections of its statute.
4. The proposed changes seek to incorporate by reference the State Technical Standards developed by an appointed committee to establish appropriate standards for nutrient application, development and implementation of nutrient management and animal waste management plans, compliance with CAFO permits, and siting new CAFO facilities.
5. The public was given notice and an opportunity to provide the Commission with comments in writing on the proposed changes to the Commission's rules and regulations.
6. Having received no public comments, the Commission finds no reason to amend the regulations as proposed.

DECISION AND ORDER CONCERNING THE REGULATIONS

Having found that the proposed changes to the regulations are necessary as outlined herein, the Commission finds that the regulation shall be adopted as final in the form as proposed. The exact text of the regulations, as amended, is attached to this order as Exhibit A. This change will become effective ten days following publication of this order in the Delaware *Register of Regulations*.

William Vanderwende, Chairman
Mark Adkins
Ken Horeis (absent)
Scott Webb (absent)
Jessica Inhof
Bud O'Neill
Richard Sterling

F. Kenneth Blessing, Jr., Vice Chairman (absent)
Brenna Goggin (absent)
Laura Hill
N. Wayne Hudson (absent)
Larry Jester (absent)
Bob Palmer
Jim Elliott

1201 Nutrient Management Certification Regulations

PREAMBLE

These regulations have been developed pursuant to 3 **Del.C.** Ch. 22. That statute established the Delaware Nutrient Management Commission and authorized the Commission to develop, review, approve, and enforce nutrient management regulations, including regulations governing the certification of persons who conduct certain activities that involve the generation or application of nutrients to lands or water, or who are involved in providing advice or consultation regarding such application of nutrients. These regulations were developed by the Commission and the Delaware Department of Agriculture. They are adopted with the guidance, advice, and consent of the Commission.

1.0 Authority

These regulations are promulgated pursuant to the authority provided by 3 **Del.C.**, Ch. 22, §2221.

2.0 Purpose

The purpose of these regulations is to establish certification requirements for certain generators or handlers of nutrients, or who engage in advising or consulting with others regarding the formulation, application, or scheduling of nutrients within the State of Delaware.

3.0 Definitions

For purposes of these regulations, the following words or terms shall have the meanings as indicated:

"Animal Feeding Operation" or **"AFO"** means any area or facility where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period.

"Animal Unit" shall be as defined by the United States Department of Agriculture Natural Resources Conservation Service, and is approximately 1,000 lbs. "average" live body weight.

"Applicant" means any person seeking a certificate from the Commission.

"Application Area" means land under the control of a person, whether it is owned, licensed, or leased, which manure, litter or fertilizer may be applied.

"Apply, Applying", or any derivation of the word "apply", as it relates to the application of nutrients, means the human controlled mechanical conveyance of nutrients to land for the purpose of applying organic and/or inorganic nutrients.

"Certification" means the recognition by the Commission that a person has met the qualification standards established by the Commission and has been issued a written certificate authorizing such person to perform certain functions specified in these regulations.

"Commercial Nutrient Handler" means a person who applies organic or inorganic nutrients to lands or waters in the State as a component of a commercial or agricultural business in exchange for a fee or service charge.

"Commercial Processor" means any individual, partnership, corporation, association or other business unit that controls, through contracts, vertical integration or other means, several stages of production and marketing of any agricultural commodity.

"Commission" or **"DNMC"** means the Delaware Nutrient Management Commission.

"Credit" represents a unit of measuring education for certification as defined by the Commission and is dependent upon such factors as curricula intensity and class time.

"Direct Supervision" refers to actions by a person who is certified with the State Nutrient Management Program and directs individuals within the same organization/company in applying nutrients. Direct supervisors hold responsibility for nutrient application actions for those under his/her supervision.

"Fertilizer" means any synthetic or carbon based substance that is added to the soil to supply one or more plant nutrients.

"Frozen" relates to frozen ground and is the top 2-inches of surface area receiving nutrients where the moisture has changed to ice for a period of 72 consecutive hours or a condition where any ice formation below the 2-inch zone restricts the natural flow of moisture through the soil profile.

"Manure" means fecal and urinary defecations of livestock and poultry; may include but is not limited to spilled feed, bedding, soil, and compost if commingled with manure.

"Nutrient Consultant" means a person who is engaged in the activities of advising or consulting with another person who is required to have a certificate under these regulations, regarding the formulation, application, or scheduling of organic or inorganic nutrients within the State. Provided, however, any employee of any federal, State or local government agency or the University of Delaware, or other organization duly recognized by the

Commission for such purpose, who provides advice or consultation in his/her capacity as such an employee, without compensation, shall not be deemed to be a nutrient consultant unless such advice and consultation constitutes a direct and substantial part of a nutrient management plan developed pursuant to these regulations.

"Nutrient Generator" means a person who owns or operates a facility within the State that produces organic or inorganic nutrients.

"Nutrient Management Plan" or "plan" means a plan by a certified nutrient consultant to manage the amount, placement, timing, and application of nutrients in order to reduce nutrient loss or runoff and to maintain the productivity of soil when growing agricultural commodities and turfgrass.

"Nutrients" means nitrogen, nitrate, phosphorus, organic matter, and any other elements necessary for or helpful to plant growth.

"Person" means any individual, partnership, association, fiduciary, or corporation or any organized group of persons, whether incorporated or not.

"Private Nutrient Handler" means a person in the State who applies organic or inorganic nutrients to lands or waters he/she owns, leases, or otherwise controls.

"Production Area" means that part of an AFO that includes the "animal confinement area", the "manure storage area", the raw materials storage area and the "waste containment areas", egg washing or processing facility and any area used in the storage, handling, treatment or disposal of mortalities. The Production Area should be defined in the operation's Nutrient Management Plan.

"Program Administrator" or "Nutrient Management Program Administrator" means the exempt employee of the Delaware Department of Agriculture who is responsible for the operation of the State Nutrient Management Program.

"Secretary" means the Secretary of the Delaware Department of Agriculture or his/her designee.

"State Nutrient Management Program" or **"SNMP"** means all the nutrient management program elements developed by the Commission, whether or not reduced to rules or regulations.

"State Technical Standards" are the practices and conduct required of individuals or entities overseen by the Nutrient Management Commission that were developed by a group of environmental scientists, agronomists, engineers, planners, agricultural operators, and policy makers from the Nutrient Management Commission, Department of Agriculture, the Department of Natural Resources and Environmental Control, the University of Delaware, USDA NRCS and the private sector. The Commission hereby adopts the State Technical Standards in their entirety by reference.

"Stockpiling" means the temporary location of manure piles in the production area for no more than 14 days unless the manure/litter is located under cover in an approved Manure Storage Structure. Stockpiling must be conducted and positioned in accordance with State Technical Standards.

"Temporary Field Staging" means the location of manure for 90 days or less prior to its application within the application area and is considered a part of the application process. Temporary Field Staging criteria and performance standards are further described in State Technical Standards. In addition, staging must be performed in accordance with site specific Nutrient Management Plans.

10 DE Reg. 1794 (06/01/07)

14 DE Reg. 645 (01/01/11)

4.0 Certification Categories And Activities Requiring Certification

- 4.1 No later than January 1, 2004, any person who engages in any of the following activities must have the applicable certificate or certificates required by and issued pursuant to these regulations, as follows:
 - 4.1.1 Nutrient generator certification - A nutrient generator who owns or operates any animal feeding operation in excess of eight animal units must have a nutrient generator certificate.
 - 4.1.2 Private nutrient handler certification - A private nutrient handler who, on an annual basis, applies nutrients to 10 acres or greater of land or waters owned, leased, or otherwise controlled by such handler must have a private nutrient handler certificate.
 - 4.1.3 Commercial nutrient handler certification - A commercial nutrient handler who, on an annual basis, applies nutrients to 10 acres or greater of land or waters of the state must have a commercial nutrient handler certificate.
 - 4.1.4 Nutrient consultant certification - A nutrient consultant who is engaged in the provision of nutrient management advice or the formulation of a nutrient management plan or in nutrient management planning as it relates to the application or disposal of nutrients at or from a specific site in the State of Delaware must have a nutrient consultant certificate.

- 4.2 These certification requirements shall not apply to individuals who perform services under the direct supervision of a certified person, provided that the certified person assures that such individuals act in accordance with the standards or practices which the certified person would follow if such person performed the service. Nor shall the certification requirements of this section apply to persons who utilize a person certified under these regulations to conduct the activities identified in this section, provided that such persons do not engage in any of the activities themselves and the certified person is certified at the time the activities are undertaken.
- 4.3 Conditional certifications may be issued for any reason specified by the Commission and shall be issued for periods not to exceed one year.

5.0 Certification Requirements

- 5.1 Any person who seeks a certification shall file with the Commission an application on a form provided by the Commission, along with the application fee. The minimum requirements for the certifications follow.
- 5.2 Nutrient generator certificates - To obtain a nutrient generator certificate, the applicant must take and successfully complete at least 6 credits of educational course work as approved by the Commission or Program Administrator. Proof of such completion of course work shall be submitted with the application.
- 5.3 Private nutrient handler - To obtain a private nutrient handler certificate, the applicant must take and successfully complete at least 9 credits of educational course work as approved by the Commission or Program Administrator. Proof of such completion of course work shall be submitted with the application.
- 5.4 Commercial nutrient handler - To obtain a commercial nutrient handler certificate the following criteria must be satisfied:
 - 5.4.1 The applicant must take and successfully complete at least 12 credits of educational course work as approved by the Commission or Program Administrator. Proof of such completion of course work shall be submitted with the application.
 - 5.4.2 The applicant must pass a written test approved by the Commission.
- 5.5 Nutrient consultant - To obtain a nutrient consultant certificate the following criteria must be satisfied:
 - 5.5.1 The applicant must take and successfully complete at least 12 credits of educational course work as approved by the Commission or Program Administrator. Proof of such completion of course work shall be submitted with the application.
 - 5.5.2 The applicant must pass a written test approved by the Commission.

6.0 Nutrient Handling Requirements

- 6.1 As required by 3 **Del.C** §2201 et.al, Nitrogen and Phosphorus fertilizers shall be applied according to an approved Nutrient Management plan.
- 6.2 For land areas not required to have a Nutrient Management plan, applications of Nitrogen and Phosphorus fertilizers by anyone holding a commercial nutrient handler or nutrient consultant certification, or anyone required to be certified at said level pursuant to 3 **Del.C.** §2242 and section 4.0 herein, are prohibited when one of the following conditions exist:
 - 6.2.1 The surface area of application is impervious such as sidewalks, roads and other paved areas and the misdirected fertilizer is not removed on the same day of application;
 - 6.2.2 The surface area is covered by snow or frozen; or
 - 6.2.3 The date of application is between December 7 and February 15.
- 6.3 Nutrient Storage and Staging Requirements
 - 6.3.1 For any person required to develop and implement a nutrient management plan and who stores, handles, or stages any manure in any area that may be exposed to rainfall, the following requirements must be met.
 - 6.3.2 Any outdoor storage of manure within the production areas, or staging within the application areas must be the result of exhausting manure storage structure space available by the nutrient generator or nutrient applicator of such manure. Stockpiling must be performed in accordance with State Technical Standards.
 - 6.3.3 Any outdoor stockpiling of poultry manure within the production area or any area other than the application area will be limited to 14 days without a cover.
 - 6.3.4 Any outdoor temporary field staging of poultry manure within the application area will be limited to 90 days.
 - 6.3.4.1 Authorization for exceeding the 90 day time period may be granted on a case by case situation if approved by the nutrient consultant and reported to the nutrient management program administrator. Please refer to State Technical Standards.

6.3.5 In order to prevent discharges of pollutants to surface waters, any outdoor staging of poultry manure within the application area shall be handled according to the following:

- 6.3.5.1 The manure must be at least 6 feet high and in a conical cross section shape; and
- 6.3.5.2 Poultry litter manure shall not consist of more than 5% crust out material; and
- 6.3.5.3 The selection of the staging site must consider the highest, most practical site possible and shall not use the same site more than once every two years (unless allowable under conditions as described in the State Technical Standards). Refer to State Technical Standards; and
- 6.3.5.4 The staging site must be located at least 100 feet from a public road, 100 feet from any surface water and 200 feet from any residence not located on the property; and
- 6.3.5.5 The staging site must be at least 200 feet from a domestic well and 300 feet from a public water supply well; and
- 6.3.5.6 Post litter removal treatment must include the removal of all litter and the top 1-2 inches of topsoil if the topsoil is co-mingled with the litter to prevent nutrient loads; and
- 6.3.5.7 A production crop or vegetative cover crop must be established and maintained at the staging site as soon as practical following post removal treatment.

10 DE Reg. 1794 (06/01/07)

14 DE Reg. 645 (01/01/11)

7.0 Reciprocity

- 7.1 Notwithstanding the requirements of Section 5.0, supra, any person may obtain a certificate under these regulations if all the following requirements are satisfied.
- 7.2 The applicant must submit an application for the applicable certificate on a form provided by the Commission, along with the application fee.
- 7.3 The applicant must have a valid certificate or equivalent authorization, such as a license for the certificated activity, from another state or organization that requires qualifications at least as rigorous as those required under these regulations and approved by the Commission.
- 7.4 The applicant must pass a test approved by the Commission related to specific Delaware Nutrient Management requirements. The Commission may in its sole discretion waive this test requirement.

10 DE Reg. 1794 (06/01/07)

8.0 Continuing Education

- 8.1 After a certificate is issued, the certificate holder must take and successfully complete continuing education courses approved by the Commission or Program Administrator in accordance with the following:
 - 8.1.1 Nutrient generator - 6 credits of continuing education in each three-year period following the issuance of the certification.
 - 8.1.2 Private nutrient handlers - 6 credits of continuing education in each three-year period following the issuance of the certification.
 - 8.1.3 Commercial nutrient handlers - 6 credits of continuing education in each three-year period following the issuance of the certification.
 - 8.1.4 Nutrient consultants - 5 credits of continuing education each year following the issuance of the certification.
- 8.2 Failure to satisfy the continuing education requirements may result in the revocation of a certificate or non-renewal of the certificate.
- 8.3 Any dispute regarding continuing education credits may be directed to the Commission which will determine whether a hearing is necessary to resolve the dispute.

9 DE Reg. 966 (12/01/05)

10 DE Reg. 1794 (06/01/07)

9.0 Duration Of Certificates And Certification Fees

- 9.1 Certificates normally will be issued and renewed for periods of three years for nutrient generators, private nutrient handlers, and commercial nutrient handlers. Certified nutrient consultants will be issued and renewed certifications annually.
- 9.2 Certificate fees are due with the application. The fee for a one-year certificate issued to nutrient consultants shall be \$100.00. The certificate fee for commercial nutrient handlers for a three-year certificate shall be \$150.00.
- 9.3 No fee will be charged for certification of a nutrient generator or a private nutrient handler.

10 DE Reg. 1794 (06/01/07)

10.0 Suspensions, Modifications, And Revocations

- 10.1 The Commission may, after notice and opportunity for hearing, suspend, modify, or revoke any certificate where the Commission has reasonable grounds to believe that the certificate holder is responsible for violations of the nutrient management statute (Title 3, Chapter 22, of the **Delaware Code**) or Commission regulations. The Commission shall furnish the person accused of a violation with notice of the time and place of the hearing, which notice shall be served personally or by registered mail directly to such person's place of business or last known address with postage fully paid no sooner than 10 days but within 21 days of the time fixed for the hearing.

10 DE Reg. 1794 (06/01/07)

11.0 Certification Renewals

- 11.1 At least 45 days before the expiration of a certificate, the certificate holder shall file an application with the Commission for renewal of the certificate, along with the certification fee.
- 11.2 Nutrient consultants must file with the application and fee evidence that the consultant prepared at least one nutrient management plan during the preceding three-year period. If no such plan was prepared, the certificate shall not be renewed.
- 11.3 The certificate holders must also supply with the application and renewal fee evidence that they have complied with the continuing education and record keeping and reporting requirements contained in these regulations.
- 11.4 Absent good cause for failure to timely file an application for renewal in compliance with these requirements, the certificate holder must reapply for the certificate in the same manner required for the issuance of the original certificate.
- 11.5 Decisions to refuse renewal of a certificate shall be final and conclusive unless appealed to the Commission pursuant to Section 2262, Chapter 22, of the **Delaware Code**.

10 DE Reg. 1794 (06/01/07)

17 DE Reg. 317 (09/01/13)

12.0 Appeals To The Secretary

All decisions of the Commission under this regulation shall be final and conclusive unless appealed to the Secretary pursuant to Section 2263, Chapter 22, of the **Delaware Code**. Provided, however, that the denial of a certificate pursuant to Sections 2243 or 2245, Chapter 22, of the **Delaware Code** shall first be appealed to the Commission which shall hold a hearing.

10 DE Reg. 1794 (06/01/07)

13.0 Record Keeping.

- 13.1 Nutrient generators shall record and keep the following available for inspection by the Secretary or the Commission:
- 13.1.1 A contemporaneously recorded log that contains the dates, approximate quantities, locations, and disposition (stored, shipped, etc.) of nutrients that are applied to land or transported from land owned, leased or otherwise controlled by the Nutrient Generator.
- 13.1.2 A copy of any applicable nutrient management plan.
- 13.2 Private nutrient handlers shall record and keep the following available for inspection by the Secretary or the Commission:
- 13.2.1 A contemporaneously recorded log showing the dates, locations, approximate quantities, acreage and methods of nutrient application.
- 13.2.2 A copy of any applicable nutrient management plan.
- 13.3 Commercial nutrient handlers shall prepare and keep available for inspection by the Secretary or the Commission, a contemporaneously recorded log showing the dates, locations, approximate quantities, acreage, and methods of nutrient application.
- 13.4 Nutrient consultants shall prepare and/or keep available for inspection by the Secretary or the Commission, copies of any written materials prepared by the nutrient consultants or at their direction that establish how nutrients are to be managed at specific sites within Delaware, such as nutrient management plans.
- 13.5 The information required in this section shall be kept and maintained for a period of 6 years.

10 DE Reg. 1794 (06/01/07)

14.0 Effective Date.

These regulations shall become effective on January 11, 2011

4 DE Reg. 1117 (01/01/01)

10 DE Reg. 1794 (06/01/07)

14 DE Reg. 645 (01/01/11)

17 DE Reg. 317 (09/01/13)

21 DE Reg. 623 (02/01/18) (Final)