

**STATE
ENVIRONMENTAL LAWS AFFECTING
DELAWARE AGRICULTURE**

*(See NASDA's Website for Federal Environmental
Laws Affecting U. S. Agriculture)*

A Project of the

**National Association of State Departments
of Agriculture Research Foundation**

through the

**National Center for Agricultural Law
Research and Information**



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The Project Participants

National Association of State Departments of Agriculture Research Foundation

The National Association of State Departments of Agriculture (NASDA) is a nonprofit, nonpartisan association of public officials comprised of the Commissioners, Secretaries, and Directors of the fifty State Departments of Agriculture in the fifty states and the territories of Puerto Rico, Guam, American Samoa, and the Virgin Islands. NASDA's mission is to represent the State Departments of Agriculture in the development, implementation, and communication of sound public policy and programs which support and promote the American agricultural industry while protecting consumers and the environment. The NASDA Research Foundation is a 501(c)(3) nonprofit, tax-exempt corporation for educational and scientific purposes.

National Center for Agricultural Law Research and Information

The National Center for Agricultural Law Research and Information (NCALRI) was created in 1987 under Public Law 100-202, 101 Stat. 1329-30 to address the complex legal issues that affect American agriculture. The NCALRI focuses its efforts on research, writing, publishing, development of library services, and the dissemination of information to the public. The NCALRI is located at the University of Arkansas School of Law in Fayetteville, Arkansas.

Natural Resources Conservation Service

The Natural Resources Conservation Service (NRCS), formerly known as the Soil Conservation Service (SCS), is a federal agency within the U.S. Department of Agriculture (USDA). NRCS conservationists work with private landowners and operators to help them protect their natural resources.

U.S. Environmental Protection Agency

The U.S. Environmental Protection Agency (EPA) is a federal agency with primary responsibility for implementation of most federal laws designed to protect, enhance, and conserve the nation's natural resources.

Disclaimer

This guide is designed for use by farmers, ranchers, landowners, and their consultants in understanding the effect environmental laws have on agricultural operations. It is not a substitute for individual legal advice. Agricultural producers should always confer with their own attorneys, consultants, or advisors as well as federal, state, and local authorities responsible for the applicable environmental laws.

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Although every effort has been made to ensure the accuracy of the information contained in this book, environmental statutes, regulations, and ordinances are constantly changing. In addition, the overwhelming complexity and extent of environmental law make it impossible for a single book to describe in complete detail and depth all of the environmental laws and regulations impacting agricultural operations. The following material is simply a basic primer on environmental law for agricultural producers. For these reasons, the utilization of these materials by any person constitutes an agreement to hold harmless the authors, the National Center for Agricultural Law Research and Information, the University of Arkansas, the United States Department of Agriculture, the National Association of State Departments of Agriculture Research Foundation, the Natural Resources Conservation Service, and the United States Environmental Protection Agency for any liability, claims, damages, or expenses that may be incurred by any person or organization as a result of reference to, or reliance on, the information contained in this book.

The background research and final documents were completed in March 2003. Updates of the information contained in the guide will occur on an as needed basis and be available on the internet.

Anyone with comments concerning the guide should contact the NASDA Research Foundation at 1156 15th Street, N.W., Suite 1020, Washington, D.C. 20005, or phone (202) 296-9680.

Quick Reference Guide

Producer Note: The following chart is intended as a quick reference guide to permits which may be necessary for a particular operation. If a permit is necessary, refer to the page numbers listed referencing this document for further information and contact the agencies listed in the final column information on applications and procedures for securing a permit for an operation. A list of agencies and contact information is also provided in Appendix A.

Regulatory Area	Type of Activity	Permit Required	Agency
Water Quality <i>pp. 1-36</i>	Livestock and aquaculture operations, depending on size	National Pollutant Discharge Elimination System (NPDES) permit or Delaware Department of Natural Resources and Environmental Control (DNREC) permit	U.S. Environmental Protection Agency (U.S. EPA) and Delaware Department of Natural Resources and Environmental Control (DNREC)
	Wetlands dredge and fill activity or dam or bridge building activities	Section 404 Clean Water Act (CWA) permit or DNREC permit	U.S. Army Corps of Engineers with U.S. EPA and DNREC
Groundwater <i>pp.37-42</i>	Groundwater protection	No permit, but Best Management Practices (BMPs) must be followed	DNREC
	Water well construction and use	No permit or drilling license required, but construction standards must be followed, voluntary well testing available for potable waters	DNREC and Delaware Department of Health and Senior Services (DHSS)

Regulatory Area	Type of Activity	Permit Required	Agency
Air Quality <i>pp. 42-45</i>	Installation, construction, or modification of equipment and facilities with potential to emit	Permit to operate required if emissions are not de minimis	DNREC and local municipalities
	General agricultural operations including odor, dust, or flies	No permit required, but could be subject to nuisance suits if right to farm defense does not apply	U.S. EPA and DNREC
	Burning	Burning permit usually required	DNREC and local municipalities
Solid Waste and Hazardous Waste <i>pp. 45-62</i>	Storage, treatment, and disposal of solid waste	DNREC permit usually required	DNREC
	Underground storage tanks	Annual registration required, contractors, servicers, installers, testers, removers, etc., must be certified	DNREC
	Storage, treatment, and disposal of hazardous waste	DNREC permit required for disposal, treatment, or storage activities	DNREC
Pesticides and Chemigation <i>pp. 63-74</i>	Application and use of pesticides	Certification required for private applicators, licensing required for businesses, registration of non-certified individuals under licensed applicators	U.S. EPA and Delaware Department of Agriculture (DDA)
	Use of pesticides around farmworkers	No permit required, but training and notification is required	U.S. EPA and DDA
	Record keeping	No permit required, but all requirements must be met	U.S. EPA and DDA
Wildlife Protection <i>pp. 74-82</i>	Taking of protected wildlife	Permit or written DNREC authorization required	U.S. Fish and Wildlife Service and DNREC

STATE ENVIRONMENTAL LAWS AFFECTING DELAWARE AGRICULTURE

Producer Note: The information on environmental regulation provided in this guidebook is presented for the purpose of educating agricultural producers on the breadth and scope of environmental laws which may impact their daily production activities. Environmental regulation is a complex area with both federal, state, and often local government involvement. Rapid changes in industrialization, computer-based technology, and market dynamics also affect agricultural producers in a number of ways and present many challenges. Staying informed is the producer's most useful tool for meeting these challenges.

I. WATER QUALITY

Producer Note: In order for agricultural producers to maintain compliance with water quality legislation, they must be aware of not only federal water quality standards, NPDES permit requirements, wetland permits, and oil spill liability issues but also state water quality standards, state permit requirements, state and local nonpoint source pollution programs, state environmental liability issues, and whether there are any waters requiring special protection in their area. The states take active roles in ensuring that agricultural producers comply with environmental requirements.

A. Delaware Water Quality Laws

1. *Delaware Water Quality*

Most states have enacted clean water legislation. While these state statutes usually contain provisions similar to those found in parallel federal legislation, there may be significant differences. In fact, state statutes may impose requirements that are even more restrictive than federal law.

Subject to certain standards and conditions, the federal Clean Water Act (CWA)¹ authorizes the United States Environmental Protection Agency (U.S. EPA) to delegate to the individual states the administration of the federal National Pollutant Discharge Elimination System (NPDES), i.e., the point source water pollution permit program.² Most states, including

¹ 33 U.S.C. §§ 1251 *et seq.* (1994).

² The term "point source" is defined in the CWA and means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged; this term, however, does not include agricultural stormwater discharges and return flows from irrigation;

Delaware, assume the responsibility for administering the federal point source discharge permit program and additionally administer their own state programs. Delaware has responsibility to administer the federal CWA and the federal Safe Drinking Water Act (SDWA)³ as well as state water pollution control provisions in order to maintain, protect, and enhance the state's water quality. State statutes address water pollution control, agency rulemaking authority, the creation of an EPA-approved state NPDES permit program, and penalties for violations. State statutes are intended to facilitate restoration and maintenance of unpolluted surface and groundwaters of the state in order to protect water and the environment. The state's antidegradation policy is designed to prevent or minimize any alteration in water quality below existing water quality levels. The antidegradation policy originates from the language of the federal CWA, i.e., the legislative goal is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters", and the policy requires the states to develop antidegradation implementation procedures.⁴ Nevertheless, in all cases, federal CWA requirements must be followed and enforced along with state laws and state regulations implemented by that state's administrative agencies.

a. Department of Natural Resources and Environmental Control

The Delaware Department of Natural Resources and Environmental Control (DNREC) is the state agency that has responsibility to administer and implement the the federal CWA as well as the state's water quality and groundwater statutes within Delaware. The DNREC is also the

see 33 U.S.C. § 1362(14); *see also* 40 CFR § 122.2 (1986). In contrast to point source pollution, non-point source pollution derives from non-discernable sources and is defined as all "other" pollution into waters of the state other than point source pollution sources.

³ 42 U.S.C. §§ 300f - 300j (1994).

⁴ Under the federal antidegradation policy, all waters are provided one (1) of three (3) different levels of antidegradation protection. These levels are referred to as tier 1 (for existing use protection, tier 2 (for protection of high quality waters), and tier 3 (for protection of waster designated as outstanding national resources). In Delaware antidegradation scheme, there is an additional tier referred to as 2.5 which applies to waters of exceptional recreational or ecological significance (ERES) waters. All waters are subject to a base level of protection, i.e., tier 1. Other waters depending on certain factors require a different level of protection; *see* Delaware Department of Natural Resources and Environmental Control Policy, ANTIDEGRADATION IMPLEMENTATION PROCEDURES FOR SURFACE WATERS OF THE STATE, May 28, 1999.

air quality agency for Delaware for all purposes of the federal Clean Air Act (CAA),⁵ the solid waste agency for all purposes of the federal Resource Conservation and Recovery Act (RCRA),⁶ the hazardous waste and superfund agency for purposes of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁷ and the environmental restoration agency concerning the federal Defense Environmental Restoration Program (DERP).⁸

Within the DNREC, various offices and divisions carry out its many responsibilities including pollution prevention, environmental emergencies, public communications, environmental investigations and hearings, air pollution control, water pollution control, solid and hazardous waste management, laboratory analysis, and administrative functions and services.

Regarding water quality, the DNREC has authority to adopt and enforce reasonable rules and regulations in order to prevent, control, or abate water pollution and to carry out the intent of federal and state statutes.

Under the federal NPDES program and the corresponding Delaware state program, any person discharging an effluent into the surface or groundwaters is required to obtain and comply with a point source water pollution discharge permit. Point source water pollution derives from discharges from discernible, confined, and discrete sources but by legislative exclusion does not include runoff from stormwater and snowmelt from agricultural, urban, mined, and other lands. In contrast to point source water pollution, nonpoint source water pollution is defined as water pollution from all other sources other than point sources. Thus, nonpoint source water pollution comes from diffuse sources rather than discernable sources. Delaware state laws also regulate nonpoint source water pollution discharges.

Caution: Because environmental laws and regulations change frequently, agricultural producers must stay in touch with both state and federal officials in order to remain in compliance and aware of changes in the law.

⁵ 42 U.S.C. §§ 7401 *et seq.* (1994).

⁶ 42 U.S.C. §§ 6901 *et seq.* (1994).

⁷ 42 U.S.C. §§ 9601-9675 (1994); *see also* 40 CFR § 30.505, Subpart F.

⁸ 10 U.S.C. §§ 2701 - 2708 (2000).

Producer Note: Often the specifics of environmental laws are found in state or federal agency regulations. In addition, agency regulations are likely to be amended frequently. As a result, agricultural producers must stay in touch with agency offices administering specific programs in order to keep up with all changes which may occur. In Delaware, the primary agency for environmental issues is the Department of Natural Resources and Environmental Control (DNREC). Within DNREC, there are several divisions (See Appendix A, page DE-90.) that administer specific environmental areas.

b. Water Quality Findings, Purposes, and Policies

Water quality legislation for the state of Delaware begins with the findings of its legislature. The findings set forth that the development, utilization, and control of the water and underwater resources of the state:

- Are vital to the people in order to assure adequate supplies for energy and domestic, industrial, agricultural, recreational, and other beneficial uses;
- Should be regulated to ensure that the resources are utilized for beneficial uses and not wasted;
- Must be protected and conserved to assure the conservation of wildlife and aquatic life the continued availability for public recreational purposes;
- Are best utilized, conserved, and protected if utilization is restricted to beneficial uses and controlled by a state agency; and
- Should be subjected to planned development and utilization to correspond to the expanding economic activity and population growth within the state.⁹

Generally, the intent of Delaware's water resource programs is to make those who create or contribute to pollution of water resources responsible for correction of the pollution. The protection of the environment is paramount. The DNREC establishes standards for water quality and administers a complete program for water conservation, pollution abatement, and pollution control. As part of the duties under the CWA, specifically section 303(d), the DNREC must prepare a list of impaired waters within the state.

Delaware statutory policy establishes that the state's water resources must be protected, conserved, and controlled to assure their reasonable and beneficial use in the best interest of the people. The policy also establishes:

⁹ DEL. CODE ANN. tit. 7, § 6001(a) (2001).

- That those resources be directed to make the maximum contribution to the public benefit; and
- That the development and use of the water resources be controlled by the state to effectuate full utilization, conservation, and protection of the resources.¹⁰

Paralleling its findings and policies, the state has:

- A water resources management program to protect the public's health, safety, and welfare;
- A water resources protection and conservation program for public recreation and conservation of aquatic life and wildlife;
- A program for conducting and fostering research and development of the water resources in order to encourage maximum resource utilization;
- A program for cooperating with federal, interstate, state, and local governmental agencies and public utilities in the development and utilization of the resources; and
- A program to ensure that improved waste collection, storage, and transportation, processing, and disposal occurs in an environmentally acceptable manner pursuant to a permit obtained from the Delaware Department of Natural Resources and Environmental Control (DNREC).¹¹

¹⁰ DEL. CODE ANN. tit. 7, § 6001(b) (2001).

¹¹ DEL. CODE ANN. tit. 7, § 6001(c) (2001). A permit may also be issued by a county which requests authority to administer septic tank permits within that county and satisfies to the DNREC that it has the capability to regulate and enforce a permit program prescribed by the state statutes; *see* DEL. CODE ANN. tit. 7, § 6001(d) (2001). The DNREC may adopt, amend, modify, or repeal rules or regulations or plans after public hearing to effectuate the policy and purposes of environmental and water quality legislation; *see* DEL. CODE ANN. tit. 7, § 6010(a) (2001). The DNREC is charged with the responsibility of a statewide comprehensive water plan for the immediate and long-range development and use of state water resources and procedures for the issuance of water allocation permits to be used concurrent with a permit to construct, extend, or operate an irrigation well or surface water intake on any farm; a water allocation permit reserves the right to utilize up to twenty (20) acre-inches per year, but not more than ten (10) acre-inches per month; the term "acre-inch" is the amount of water required to cover one (1) acre of land to a depth of one (1) inch and is equal to 27,154 gallons of water, and the term "irrigation well" is an agricultural well used exclusively for the watering of lands or crops other than household lawns and gardens; *see* DEL. CODE ANN. tit. 7, §§ 6010(b) and (h) (2001). Delaware water use is based upon the principle of equitable apportionment; no increase of water use may be made by a user without prior approval by the DNREC; *see* DEL. CODE ANN. tit. 7, §§ 6010(f) and 6030 (2001).

A state permit is required for any activity that:

- May cause or contribute to the discharge of a pollutant¹² into any surface or ground water;
- May cause or contribute to the collection, storage, transportation, processing or disposal of solid wastes;¹³
- Involves the construction, maintenance, or operation of a pipeline system including appurtenances such as a storage tank or pump station;
- Involves the construction of any water facility;
- Involves the planning or construction of any highway corridor which may cause or contribute to the discharge of pollutants into any surface water or groundwater;
- Involves the construction, installation, replacement, modification, or use of any equipment or device or other article which may cause or contribute to the discharge of a pollutant into any surface water or groundwater or is intended to prevent or control pollutants into surface water or groundwater or is intended to withdraw surface water or groundwater for treatment and supply or for disposal of solid waste.¹⁴

¹² The term “pollutant” means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, hydrocarbons, oil, and product chemicals, and industrial, municipal, and agricultural waste discharged into water; notification of environmental releases or discharges that activate an emergency site plan is required; notification must include 1) facility name and location or release, 2) chemical name or substance released, 3) whether the substance is extremely hazardous, 4) an estimate of the quantity, 5) time and duration of the release, 6) medium into which release occurred, 7) health risks and advice for exposure, 8) proper precautions, 9) contact names and telephone information for further information, and 10) other information that the DNREC may require; failure to provide notification is unlawful and subject to penalties; wholly contained discharges within a building are exempt from reporting; factors that affect reporting requirement standard may include 1) time of day discharge occurs, 2) discharge location staffing, 3) staff ability to judge nature and extent of discharge, 4) potential threat to health and safety of employees, 5) potential threat to bystanders, 6) number and timeliness of contacts to emergency response personnel, 7) ability to notify DNREC for subsequent quick response, and 8) overall circumstances surrounding the discharge; *see* DEL. CODE ANN. tit. 7, §§ 6002(18) and 6028 (2001).

¹³ DEL. CODE ANN. tit. 7, § 6025 (2001).

¹⁴ DEL. CODE ANN. tit. 7, §§ 6003(a-b) (2001). Environmental control statutes do not apply or alter a landowner’s right to place a dam across a gully on the landowner’s property or across a stream that originates on the property where a provision exists for continued established average minimum flow occurring for seven (7) consecutive days within the lowest flow year of record or the right to build and maintain a dam or construct a pond and divert water from any stream having a minimum flow not more than one-half million (500,000) gallons of water per day and utilize up to three hundred sixty (360) acre inches of impounded water per year so long as it does not affect the established minimum flow in the stream below the dam at any time or ponds not larger than sixty thousand 60,000 square feet constructed for conservation, recreation, propagation, and protection of fish and wildlife, watering

In seeking a state permit from the DNREC, the permit is granted only when the county or municipality having jurisdiction has first approved the activity by zoning procedures.¹⁵ Fees for permits are established by the DNREC in conjunction with the Delaware General Assembly although the DNREC has authority to reduce the fee charged for these permits, i.e., particular types of permits or particular classes or categories of permittees.¹⁶

c. Permit Applications

Although there are some exceptions, generally, in order to obtain a permit or a variance,¹⁷ a person must submit a completed application accompanied by plans and specifications.¹⁸ After receiving an application, the DNREC publishes¹⁹ in a daily newspaper of general circulation throughout the state:

- The fact that the application has been received;
- A brief description of the nature of the application; and
- The place where a copy of the application may be inspected.

The DNREC may hold a public hearing on the application if the DNREC deems that it would be in the best interest of the State to do so, but it must hold a public hearing on the application if a meritorious request is received within a reasonable time as stated in the newspaper advertisement. Furthermore, notice must be sent by mail from the DNREC to any

of stock or fire protection; *see* DEL. CODE ANN. tit. 7, § 6029 (2001).

¹⁵ A permit or license for building, placement, storage, or occupancy may not be granted until the property owner has obtained the necessary permits from the DNREC for underground discharge of wastewater and withdrawal of groundwater; *see* DEL. CODE ANN. tit. 7, § 6003(g) (2001).

¹⁶ DEL. CODE ANN. tit. 7, § 6003(h) (2001).

¹⁷ Other information may be required by statute or DNREC regulation. A variance may be granted by the DNREC upon a person's application if 1) good faith efforts were made to comply, 2) compliance is not possible because of necessary technology or control methods are unavailable or the financial costs of compliance is disproportionately high with respect to the benefits bestowed by compliance to health, safety, and welfare, and the variance would not substantially and adversely affect the legislative environmental policy and purposes, 3) available procedures or control measures will be used to reduce any impact from the source, and 4) continuation of the source is necessary to national security or to health, safety, and welfare; with few exceptions, variance decisions are published; variances are valid up to one (1) year; temporary emergency variances up to sixty (60) days may be granted upon 1) severe hardship, 2) application time limitations caused by unforeseeable emergencies, and 3) conditions that qualify for variances; *see* DEL. CODE ANN. tit. 7, §§ 6011 and 6012 (2001).

¹⁸ DEL. CODE ANN. tit. 7, § 6004(a) (2001).

¹⁹ Required newspaper advertisements may be placed by permit applicants provided the advertisement meets the requirements specified by the DNREC; *see* DEL. CODE ANN. tit. 7, § 6004(d) (2001).

person who has requested such notification and provided their name and mailing address. A reasonable time to respond to the advertisement is fifteen (15) days unless federal law requires a longer time, in which case, the longer time must be stated. A request for a public hearing is deemed meritorious if it exhibits familiarity with the permit application and a reasoned statement of the permit's probable impact. The permit applicant is responsible for the cost of the advertisements and notices made by the DNREC, but costs may not exceed five hundred dollars (\$500.00).²⁰ Exceptions to advertisement and notice requirements exist for water quality control permit applications for a sewage system for three (3) or fewer families, municipalities, publicly owned or operated sewage collection systems used to dispose five hundred (500) gallons or less per day of domestic wastewater only, water well construction permit applications where withdrawal under normal operations will not exceed fifty thousand (50,000) gallons per day.²¹

The DNREC²² has authority to publish a list of activities which do not require a permit.²³ If any applicant has submitted a timely and complete application for a permit as required by environmental control statutes but final action has not been taken, failure to have the permit is not considered a violation unless the delay was due to failure of the applicant to timely submit information to process the application.²⁴

d. Permit Enforcement

The DNREC is charged with the enforcement of water resource and water quality laws.²⁵ Violations of water quality permit statutes or violations of any term or condition of a water quality permit is punishable by criminal, civil, and administrative penalties. Civil penalties up to ten thousand dollars (\$10,000.00) for each violation and each day of violation may be imposed. The Superior Court of Delaware has jurisdiction in these instances. If necessary, a permanent or preliminary injunction or a temporary restraining order may be sought in the Court of Chancery.²⁶ At the discretion of the DNREC, written notice consists of:

- Specifying a complaint of violation;
- Proposing a reasonable time for correction;

²⁰ DEL. CODE ANN. tit. 7, § 6004(b) (2001).

²¹ DEL. CODE ANN. tit. 7, § 6004(c) (2001).

²² After holding public hearings.

²³ DEL. CODE ANN. tit. 7, § 6003(e) (2001).

²⁴ Except for sources required to have a permit prior to construction or modification; *see* DEL. CODE ANN. tit. 7, § 6098 (2001)

²⁵ DEL. CODE ANN. tit. 7, § 6005(a) (2001).

²⁶ DEL. CODE ANN. tit. 7, § 6005(b)(1) (2001).

- Advising that a hearing may be held if requested by a stated date; and
- Notifying the alleged violator that a proposed correction will be ordered if no hearing is requested.²⁷

The DNREC has discretion to impose an administrative penalty up to ten thousand dollars (\$10,000.00) for each day of violation.²⁸ In these situations, the responsible party has thirty (30) days following the notice to request a public hearing. The right of appeal²⁹ must be carried out as prescribed by state statute. The amount of any administrative penalty is determined by the nature, circumstances, extent, and gravity of the violation, the ability of the violator to pay, any prior history of violations, the degree of culpability, any economic benefit or savings resulting from the violation, and other such matters that justice may require. A civil action may be brought by the DNREC in the Superior Court to collect an administrative penalty including interest, attorneys' fees, and costs; however, the validity, amount, and appropriateness of such administrative penalty is not subject to review.³⁰

In addition to civil and administrative penalties, criminal penalties up to twenty-five thousand dollars (\$25,000.00) may be imposed for each day of a willful or negligent violation.³¹ Other criminal penalties including up to ten thousand dollars (\$10,000.00), imprisonment up to six (6) months, or both may be imposed for each day of violation that consists of:

- Making false statements, representations, or certifications in any application, record, report, plan, or document required to be maintained under any environmental permit, rule, regulation, or order;³² or
- Falsifying, tampering with, or knowingly rendering inaccurate any monitoring device or method required to be maintained.³³

Violators are liable for all DNREC expenses incurred in abating a violation or controlling a pollution incident related to the violation or cleanup and restoration of the environment. These

²⁷ However, the DNREC may upon its initiative convene a public hearing and hear the responsible party; *see* DEL. CODE ANN. tit. 7, § 6005(b)(2) (2001).

²⁸ After providing written notice of the intent to do so.

²⁹ Including public hearings and judicial appeals.

³⁰ DEL. CODE ANN. tit. 7, § 6005(b)(3) (2001).

³¹ DEL. CODE ANN. tit. 7, § 6013(a) (2001).

³² Issued in accordance to Delaware environmental statutes.

³³ DEL. CODE ANN. tit. 7, § 6013(b) (2001). Criminal penalties up to five hundred dollars (\$500.00) may also be imposed for violation of a permit condition; *see* DEL. CODE ANN. tit. 7, § 6013(c) (2001).

expenses include but are not limited to the costs of investigation, legal assistance, public hearings, materials, equipment, human resources, contractual assistance, plus salary and overtime pay for all state employees involved in the effort.³⁴ The DNREC must, however, provide a detailed billing of expenses. Challenges to a billing must include a request for a DNREC administrative hearing. Testimony at such hearings are given under oath and are restricted to the issues related to the billing. The official record consists of a verbatim transcript of the testimony along with the exhibits and documents introduced. The DNREC then makes findings of fact based upon the record and enters an administrative order which contains the reasons supporting its decision. To appeal the administrative order, one must file with the Superior Court within thirty (30) days of the decision. However, a civil action initiated by the DNREC in Superior Court may be brought, if necessary, to collect any unpaid civil or administrative penalties imposed.³⁵

Legislation makes it unlawful to obstruct, hinder, delay, or interfere with DNREC personnel engaging in the performance of any duty imposed under environmental statutes or any related rule, regulation, permit, or order.³⁶ DNREC personnel or authorized designees may enter at reasonable times upon private or public property for the purpose of determining whether a violation exists after providing verbal notice and presenting official identification to the owner, occupant, custodian, or agent of the property.³⁷

The DNREC has power to subpoena witnesses and compel testimony³⁸ as well as subpoena documents relevant to an investigation or study to enforce Delaware's environmental control statutes.³⁹

The DNREC may, after consultation with the state's attorney general, seal any pollution source required to have a permit which may be being installed, altered, used, or operated without a permit or is in violation of a cease and desist order. Once sealed, no person may tamper with or remove a seal⁴⁰ unless it is with written authorization of the DNREC.⁴¹

³⁴ DEL. CODE ANN. tit. 7, § 6005(c) (2001).

³⁵ DEL. CODE ANN. tit. 7, § 6005(c) (2001).

³⁶ DEL. CODE ANN. tit. 7, § 6015 (2001).

³⁷ DEL. CODE ANN. tit. 7, § 6024 (2001).

³⁸ Testimony is under oath and may be heard by the public; *see* DEL. CODE ANN. tit. 7, § 6016 (2001).

³⁹ DEL. CODE ANN. tit. 7, § 6016 (2001).

⁴⁰ Without violation.

⁴¹ The DNREC may remove the seal after correction of the reason that caused the sealing; *see* DEL. CODE ANN. tit. 7, § 6017 (2001). The DNREC has authority to issue cease and desist orders to persons violating environmental statutes and related rules, regulations, permits, and orders, however, it may also attempt to achieve voluntary

e. Public Hearings

Notice for any public hearing on a permit application, an alleged violation, or a variance request must be served as a summons by registered or certified mail not less than twenty (20) days before the time of the hearing. When notice of a public hearing is provided by publishing in a newspaper, it must be published no less than twenty (20) days in advance in a newspaper of general circulation in the county in which the activity is proposed or the alleged violation has occurred and no less than twenty (20) days in advance in a daily newspaper of general circulation throughout the state.⁴²

Notice for public hearings on any proposed regulations or any proposed plan for adoption must be published in a newspaper of general circulation in each county and in a newspaper of general circulation in the state. Notification must include a brief description of the regulation or plan, the time and place of hearing, and the time and place where a copy of the regulation or plan is available for public scrutiny. Notice must also be sent to anyone having requested such notification from the DNREC and provided their name and mailing address.⁴³

A permit applicant or alleged violator or party requesting a variance may appear personally or by counsel at the hearing and produce any competent evidence on the party's behalf. The DNREC secretary or designee may administer oaths, examine witnesses, and issue subpoenas for witnesses or document relevant to the matter. Subpoenas are issued by the DNREC upon a party's request. If a DNREC subpoena is ignored, jurisdiction then lies with the Superior Court in the county where the hearing was to have been held. The court has jurisdiction to order persons to appear and testify or produce evidence.⁴⁴

The expense for the preparation of any transcript is borne by the person requesting the hearing. Following a hearing, the DNREC secretary or designee makes findings of fact based on the record and enters an order with supporting reasons. Prompt notice is provided by the DNREC to those affected by such order. Necessary DNREC expenses related to a hearing may be collected from an adjudged guilty party. These collections are reported annually by the DNREC.⁴⁵

compliance by warning, notice, or other educational means; *see* DEL. CODE ANN. tit. 7, §§ 6018 and 6019 (2001).

⁴² DEL. CODE ANN. tit. 7, § 6006(1) (2001).

⁴³ DEL. CODE ANN. tit. 7, § 6006(2). (2001)

⁴⁴ DEL. CODE ANN. tit. 7, § 6006(3) (2001)

⁴⁵ DEL. CODE ANN. tit. 7, § 6006(4) (2001).

f. Environmental Appeals Board

The Environmental Appeals Board (EAB)⁴⁶ consists of seven (7) Delaware residents appointed by the governor with the advice and consent of the senate, two (2) members from each of the three (3) counties and a chairperson. The term of service is three (3) years. The balance of any members who have registered affiliation with a major political party must not exceed another major political party by more than one (1).⁴⁷

The purpose of the EAB is a quasi-judicial review board to hear appeals of DNREC decisions. The EAB has power to issue subpoenas by certified mail for witnesses or evidence, administer oaths to witnesses, and conduct pre-hearing conferences to simplify issues on review, to dispose of procedural requests or disputes, and to regulate and expedite the hearing.⁴⁸ A simple majority is a quorum, and a simple majority is sufficient to override a DNREC decision. An EAB hearing must be scheduled within thirty (30) days following receipt of an appeal, and it must begin within one hundred eighty (180) days following receipt of the appeal. Although a verbal decision may be announced at the conclusion of the hearing, a written decision must be mailed to the parties by certified mail within ninety (90) days after the completion of the hearing. If the EAB fails to conduct a hearing or to issue the written opinion as required, the DNREC decision is considered a final decision for the purposes of making any further appeal.⁴⁹ The EAB adopts such rules and regulations as necessary to provide procedures to carry out the hearings and implement its assignments. The adoption of rules and regulations must follow a public hearing regarding the proposed rules and regulations. Twenty (20) days prior notice of the scheduled public hearing in a newspaper of general circulation in the state is required. Copies of the proposed regulations must be available to the public upon request.⁵⁰ A reasonable scheduled fee to cover expenses for the EAB appeal is charged. The fee is established by the Delaware General Assembly.⁵¹

Any person whose interest is substantially affected by any action of the DNREC may appeal to the EAB provided the appeal is initiated within twenty (20) days after the receipt of the DNREC decision or its publication. The EAB appeal procedure consists of a public hearing where the entire record is presented and all parties may appear and produce competent evidence

⁴⁶ An EAB member with a personal or private financial interest in the outcome of an appeal before the board must inform the EAB chairperson and disqualify any consideration of that matter; the financial interest must be noted on the record; *see* DEL. CODE ANN. tit. 7, § 6006(d) (2001).

⁴⁷ DEL. CODE ANN. tit. 7, § 6007(a) (2001).

⁴⁸ DEL. CODE ANN. tit. 7, § 6007(b) (2001).

⁴⁹ DEL. CODE ANN. tit. 7, § 6007(c) (2001).

⁵⁰ DEL. CODE ANN. tit. 7, § 6007(f) (2001).

⁵¹ DEL. CODE ANN. tit. 7, § 6007(g) (2001).

in their behalf. In an appeal to the EAB, the burden of proof is upon the appellant to show that the DNREC decision was not supported by the evidence.⁵² Although EAB deliberations may be conducted in executive session, every member voting must indicate their vote in the written decision.⁵³ Any person aggrieved by an EAB decision may bring a subsequent appeal before the Superior Court.⁵⁴

g. Environmental Information System

The DNREC is charged with the responsibility for developing an Environmental Information System (EIS) to include general information about facilities and sites under DNREC's regulatory jurisdiction for environmental concerns. The EIS consists of information relating to permitting requirements, emissions and discharge monitoring, reporting data, compliance inspections, violations, and enforcement actions. The EIS provides the public with information that indicates when a facility has been inspected, what violations are detected, when the facility comes into compliance, and any enforcement action that results from violations at the facility.⁵⁵

The DNREC must make available any records, reports, or information obtained under environmental statutes and any permits, permit applications, and related documentation available to the public for inspection and copying.⁵⁶ The DNREC is responsible for a unified notification system to warn of environmental releases within twelve (12) hours of DNREC knowledge of a release.⁵⁷

h. Water Related Licenses

A DNREC license is required to drill, bore, core, drive, dig, construct, install, remove, or repair a water well⁵⁸ or to install, maintain, or repair pumping equipment in or from a well unless

⁵² DEL. CODE ANN. tit. 7, § 6008(b) (2001).

⁵³ DEL. CODE ANN. tit. 7, § 6008(a) (2001). An immediate or expedited EAB review requires slightly different notice requirements; *see* DEL. CODE ANN. tit. 7, § 6008(h) (2001).

⁵⁴ DEL. CODE ANN. tit. 7, § 6009(a) (2001). To succeed in this appeal, appellant must show that the records contain no substantial evidence that would reasonably support the findings; *see* DEL. CODE ANN. tit. 7, § 6009(b) (2001).

⁵⁵ DEL. CODE ANN. tit. 7, § 6014(a) (2001).

⁵⁶ DEL. CODE ANN. tit. 7, § 6014(d) (2001). Exceptions exist for information determined to be trade secrets or confidential.

⁵⁷ DEL. CODE ANN. tit. 7, § 6014(c) (2001).

⁵⁸ Or a water test well.

it is under the supervision of a licensed plumber or it is an agricultural well on land owned or leased by the person installing, maintaining, or repairing the pumping equipment.⁵⁹

A septic tank installer's license is required to construct, repair, install, or replace a septic tank system or any part of the system. A liquid waste treatment plant operator's license is required to operate any liquid waste treatment system. In Delaware, it is unlawful to haul, convey, or transport any liquid waste in any container without a license.

License applications may be filed with the DNREC and may require any information considered necessary by the DNREC. Acceptable past performance or an examination may be required in order to obtain a license.⁶⁰ The DNREC is authorized to charge fees for these licenses.⁶¹

i. Source Water Protection

Beginning in 2003, the DNREC must prepare a report of any potential threats, including contaminants not currently regulated, to any public drinking water systems and identify proposed actions to control the threats. Also beginning in 2003, the DNREC must prepare and make available a report to counties and municipalities that denotes DNREC assessments of source water and the status of its mapping project on groundwater recharge potential.⁶²

j. Oil Pollution

The transfer of oil petroleum products and by-products from vessels within the state and state waters is a hazardous undertaking, and spills, discharges, and escape of oil petroleum

⁵⁹ Here, the term "agricultural well" means a well used for irrigation of crops, watering livestock or poultry, aquaculture uses, or other on-farm purposes but not for human consumption or to service a residential dwelling; *see* DEL. CODE ANN. tit. 7, § 6023(a) (2001).

⁶⁰ DEL. CODE ANN. tit. 7, §§ 6023(c - f) (2001).

⁶¹ DEL. CODE ANN. tit. 7, § 6026 (2001). Beginning December 31, 2004, the DNREC must develop a guidance manual in conjunction with the Source Water Protection Citizens Technical Advisory Committee (a citizen and technical advisory committee established by the Delaware Source Water Assessment Plan) for desirable land uses that promote long-term protection of public drinking water supplies; counties having greater than two thousand (2,000) persons must adopt in conjunction with DNREC regulations governing land uses to protect critical areas from water quantity and water quality harm along with the overlay maps delineating critical areas, source water assessment, wellhead protection, and excellent groundwater recharge potential areas as part of the 2007 Comprehensive Land Use Plans; *see* DEL. CODE ANN. tit. 7, §§ 6082(a-b) (2001). Municipalities having less than two thousand (2,000) persons may adopt regulations and overlay maps by ordinance; *see* DEL. CODE ANN. tit. 7, § 6082(c) (2001).

⁶² DEL. CODE ANN. tit. 7, § 6081 (2001). The DNREC must make source water assessment, wellhead protection, and excellent groundwater recharge potential area delineations available as maps; *see* "SHAPING DELAWARE'S FUTURE: MANAGING GROWTH IN 21ST CENTURY DELAWARE, STRATEGIES FOR STATE POLICIES AND SPENDING" and DEL. CODE ANN. tit. 7, § 6083 (2001).

products and by-products pose threats of great danger and damage to marine, estuarine, and adjacent terrestrial environment as well as shorefront property and the coast. The DNREC has authority to deal with these hazards and threats of danger and damage and to require prompt containment and removal of pollution as well as minimum financial responsibility requirements for those participating in oil transfers. Transferers of oil petroleum products and by-products bear absolute liability for oil pollution damages.⁶³ The discharge of oil which causes an incident is a violation.⁶⁴ Violators are subject to penalties up to ten thousand dollars (\$10,000.00) for each day of violation. The DNREC may seek appropriate relief including injunctive relief to prohibit and prevent violations or continuing violations. The DNREC is authorized to bring a court action to collect for DNREC expenses incurred which resulted from violation of any oil pollution liability statutes and related rules and regulations.⁶⁵ Other damages for economic loss may be asserted other than necessary costs of investigation and prosecution including:

- Cleanup costs;
- Injury to, or destruction of, real or personal property;
- Loss of use of real or personal property;
- Injury to, or destruction of, natural resources;
- Loss of use of natural resources; and
- Loss of tax revenue or profits or earnings due to injury or destruction of real or personal property or natural resources;⁶⁶ as well as
- Interest, court costs, and attorney fees.⁶⁷

The owner and operator of a vessel or of a facility which is the source of oil pollution or which poses a threat of oil pollution is jointly, severally, and strictly liable for all damages for which a claim may be asserted.⁶⁸ A claim may be asserted by the Delaware Attorney General on

⁶³ DEL. CODE ANN. tit. 7, §§ 6201(c - e) (2001).

⁶⁴ DEL. CODE ANN. tit. 7, § 6203 (2001). The term “incident” means any occurrence or series of occurrences involving one (1) or more vessels, facilities, or any combination which causes or poses any threat of oil pollution in or upon the waters and lands of the state; *see* DEL. CODE ANN. tit. 7, § 6202(7) (2001)

⁶⁵ DEL. CODE ANN. tit. 7, § 6205 (2001).

⁶⁶ DEL. CODE ANN. tit. 7, § 6207(a) (2001).

⁶⁷ DEL. CODE ANN. tit. 7, § 6208(g)(2001).

⁶⁸ DEL. CODE ANN. tit. 7, § 6208 (2001).

behalf of the state, its citizens, or any of its subdivisions and by any claimant⁶⁹ on their own behalf or by the governor who acts as trustee for natural resources which the state has sovereign rights.⁷⁰ Liability limits exist for incidents⁷¹ other than those caused by gross negligence or willful misconduct when it occurs within the knowledge or privity of the owner or operator or misconduct concerns applicable safety, construction, or operating standards or regulation or fails to provide the required financial responsibility certificate. No liability is imposed for an act of war, hostilities, civil war, or insurrection or a natural phenomenon of an unforeseen, exceptional, inevitable, and irresistible character.⁷²

k. Delaware River Basin Compact

A joint advisory body known as the Interstate Commission on the Delaware River Basin (INCODEL) consists of the states of Delaware, New Jersey, New York, and Pennsylvania. The signatory states together recognize through the Delaware River Basin Compact⁷³ the importance of the water and water related resources of the Delaware basin as regional assets of national interest for which a joint responsibility exists. The purpose of INCODEL is to:

- Ensure the conservation, utilization, development, management, and control of the water and related resources of the Delaware River Basin;
- Prevent duplication, overlap, and uncoordinated or splintered administration; and
- Avoid the catastrophe of unexpected floods or prolonged drought and other purposes that may arise.⁷⁴

⁶⁹ A claimant may elect to submit the claim to the DNREC for adjudication; if chosen, the election is irrevocable and exclusive; *see* DEL. CODE ANN. tit. 7, § 6212 (2001). A person whose interest is substantially affected by the adjudication of the DNREC may appeal to the EAB provided it is within twenty (20) days after the decision or its announcement; *see* DEL. CODE ANN. tit. 7, § 6213 (2001). Further appeal by persons aggrieved by the EAB decision is by petition to the Superior Court in the county where the incident occurred provided it is submitted within thirty (30) days of the written EAB decision; *see* DEL. CODE ANN. tit. 7, § 6214 (2001).

⁷⁰ DEL. CODE ANN. tit. 7, § 6207(b) (2001).

⁷¹ The person in charge of a vessel or facility must immediately notify the DNREC as soon as there is knowledge of the incident; failure to report the incident is a violation subject to a civil penalty up to ten thousand dollars (\$10,000.00) for each day of violation; *see* DEL. CODE ANN. tit. 7, § 6210 (2001).

⁷² DEL. CODE ANN. tit. 7, §§ 6208(a - c) (2001).

⁷³ DEL. CODE ANN. tit. 7, §§ 6501 to 6511 (2001).

⁷⁴ DEL. CODE ANN. tit. 7, § 6501 (2001).

l. Wetlands

Delaware addresses its wetlands⁷⁵ under The Wetlands Act (TWA).⁷⁶ Because the legislature recognized that much of Delaware's wetlands were lost or despoiled by unregulated dredging, dumping, filling, and similar activities and were in jeopardy of being lost, it has enacted laws that protect these areas. Wetland areas are valuable because they:

- Supply nutrients to finfish, crustacea, and shellfish of significant economic value;
- Serve as habitat for plants and animals of significant economic and ecological value;
- Support marine commerce, recreation, and aesthetic enjoyment; and
- Assist in control and reduction of flood damage and siltation of channels and harbor areas.

Furthermore, preservation of coastal wetlands is crucial to the protection of the natural environment of coastal areas.⁷⁷

Any activity⁷⁸ in wetlands requires a permit from the DNREC. No permit is granted unless the county or municipality with jurisdiction first approves the activity through its zoning procedures.⁷⁹ Any expansion or extension of a preexisting use also requires a permit. The following factors are considered by DNREC in its determination of whether a permit may be issued:

⁷⁵ The term "wetlands" means those lands above the mean low water elevation including any bank, marsh, swamp, meadow, flat, or other low land subject to tidal action in the state along the Delaware Bay and Delaware River, Indian River Bay, Rehoboth Bay, Little and Big Assawoman Bays, the coastal inland water ways or along any inlet, estuary, or tributary waterway including areas connected to tidal waters whose surface is at or below an elevation of two (2) feet above local mean high water and upon which may grow or support a specific list of water loving plants and those lands not currently used for agricultural purposes consisting of four hundred (400) acres or more of contiguous nontidal swamp, bog, muck, or marsh exclusive of narrow stream valleys where fresh water stands mostly due to high water table which significantly contribute to groundwater recharge and would require intensive artificial drainage for the production of agricultural crops; *see* DEL. CODE ANN. tit. 7, § 6603(h) (2001).

⁷⁶ DEL. CODE ANN. tit. 7, §§ 6601 to 6620 (2001).

⁷⁷ DEL. CODE ANN. tit. 7, § 6602 (2001).

⁷⁸ Activities related to the following are exempted from the permit requirement: mosquito control, directional aids for navigation, duck blinds, foot bridges, boundary stakes, wildlife nesting structures, grazing of domestic animals, haying, hunting, fishing, and trapping.

⁷⁹ The DNREC may also require a bond sufficient to secure compliance with the permit conditions and limitations; *see* DEL. CODE ANN. tit. 7, § 6604(c) (2001).

- Environmental impact;
- Aesthetic effect;
- Number and type of supporting facilities required for the activity;
- Effect on neighboring land uses;
- Existing comprehensive development and conservation plans; and
- Economic effect.⁸⁰

The DNREC is responsible for developing and maintaining wetland boundary maps for public inspection.⁸¹ DNREC personnel⁸² have authority to enter at reasonable times upon property for the purpose of determining whether a violation of any statute or related regulation exists after providing written notice and presenting official identification to the owner, occupant, custodian, or agent of the property.⁸³

Applications for permits must be advertised by the DNREC in a daily newspaper of statewide circulation and in a newspaper of general circulation in the county affected. The advertisement must include that the application was received and a brief description of the proposed activity. A public hearing may be scheduled by the DNREC if it is deemed to be in the best interest of the public or if a meritorious written objection is submitted within twenty (20) days of the newspaper advertisement.⁸⁴ Any person whose interest is substantially affected by any DNREC action may appeal to the EAB provided the appeal is submitted within twenty (20) days of the announced DNREC decision. Any person affected or any taxpayer or governmental authority of the state may appeal an EAB decision or nondecision relating to wetlands. The appeal is made to the Superior Court in the county affected provided the appeal is perfected within thirty (30) days of the EAB decision.⁸⁵ The DNREC has authority to issue cease and

⁸⁰ DEL. CODE ANN. tit. 7, §§ 6604(a - b) (2001).

⁸¹ DEL. CODE ANN. tit. 7, §§ 6607(a-b) (2001). A public hearing on proposed boundaries must first be held before adoption; *see* DEL. CODE ANN. tit. 7, § 6607(c) (2001).

⁸² Or its designee.

⁸³ DEL. CODE ANN. tit. 7, § 6616 (2001).

⁸⁴ A meritorious request for a public hearing must exhibit a familiarity with the application and a reasoned statement of the probable impact of the proposed activity; *see* DEL. CODE ANN. tit. 7, § 6608 (2001).

⁸⁵ DEL. CODE ANN. tit. 7, § 6612 (2001).

desist orders or to seek an injunction to prevent a violation through the Court of Chancery. At the court's discretion, it may require bond in the appropriate amount.⁸⁶

Violators of TWA or its related rules, regulations, orders, or permit conditions may be subjected to fines up to five hundred dollars (\$500.00) for each violation and each day of violation. Justices of the Peace courts have jurisdiction of these offenses.⁸⁷

Knowing and intentional wetland violations have increased fines up to ten thousand dollars (\$10,000.00) for each violation and each day of violation. Superior Courts have jurisdiction of these offenses.⁸⁸

Violators of state wetland statutes, related rules, regulations, orders, and permit conditions or limitation may be subjected to civil penalties up to ten thousand dollars (\$10,000.00) for each violation. Superior Courts have jurisdiction of these offenses.⁸⁹

In all cases of violation or invocation of injunctive relief, a person who effects or allows an unpermitted activity is liable to the state for the cost of restoration of the affected wetland. The attorney general is authorized to bring a civil action to recover damages or costs of restoration.⁹⁰

m. Drainage of Lands and Tax Ditches

It is the policy of the state to consider the drainage⁹¹ and the prevention of flooding of lands and the management of water for resource conservation as a public benefit conducive to public health, safety, and welfare.⁹² State statutes set forth the procedures to establish a uniform system called tax ditch⁹³ organizations under the supervision of the DNREC such that the

⁸⁶ DEL. CODE ANN. tit. 7, §§ 6614 and 6615 (2001).

⁸⁷ DEL. CODE ANN. tit. 7, § 6617(a) (2001).

⁸⁸ DEL. CODE ANN. tit. 7, § 6617(b) (2001).

⁸⁹ DEL. CODE ANN. tit. 7, § 6617(c) (2001).

⁹⁰ DEL. CODE ANN. tit. 7, § 6617(d) (2001).

⁹¹ The term "drainage" means water management by drainage areas or watersheds, to safely remove or control both excess, surface flood waters, and damaging, excess subsurface waters; *see* DEL. CODE ANN. tit. 7, § 4104 (2001).

⁹² DEL. CODE ANN. tit. 7, § 4101 (2001).

⁹³ A tax ditch constitutes a public body and governmental subdivision of the state; *see* DEL. CODE ANN. tit. 7, § 4116 (2001).

conservation and management of the soil, water, wildlife, forest, and other resources of the state may be accomplished in a workable and practicable manner.⁹⁴

Landowners who desire their lands to be drained or protected from flooding may petition for the establishment of a tax ditch.⁹⁵ To form a tax ditch, one (1) or more landowners must present a formation petition through the board of supervisors of the soil conservation district to the Superior Court of the county where the area proposed to be drained or protected is located. The DNREC employs personnel who are qualified in hydraulic engineering, drainage, and soil work to assist landowners in the preparation of such petitions⁹⁶ and to carry out other duties within its division of soil and water conservation.⁹⁷

n. Coastal Zone

Delaware's Coastal Zone Act (CZA)⁹⁸ governs activities in the state's coastal areas. It is the declared policy of the state to control the location, extent, and type of industrial development in Delaware's coastal zone⁹⁹ areas. By regulating development and activities in these areas, the state believes it can better protect the natural environment of its bay and coastal areas and safeguard the use of coastal areas primarily for recreation and tourism. While public policy encourages the introduction of new industry in Delaware, heavy industry in coastal areas is entirely prohibited as is industry determined to be incompatible with the protection of the natural environment. To strike a balance of these two (2) policies, control of industrial development is implemented through a permit system.¹⁰⁰ Permit applications are review by the DNREC and the following factors are considered to determine whether issuance is appropriate or not:

- Environmental impact;
- Aesthetic effect;
- Economic effect;

⁹⁴ DEL. CODE ANN. tit. 7, § 4102 (2001).

⁹⁵ DEL. CODE ANN. tit. 7, § 4104 (2001).

⁹⁶ DEL. CODE ANN. tit. 7, § 4117 (2001).

⁹⁷ DEL. CODE ANN. tit. 7, § 4110 (2001).

⁹⁸ DEL. CODE ANN. tit. 7, §§ 7001 to 7013 (2001).

⁹⁹ DEL. CODE ANN. tit. 7, § 7001 (2001). The term "coastal zone" means the area of the state between the territorial limits of Delaware in the Delaware Rive, Delaware Bay, and Atlantic Ocean and a line formed by certain Delaware highways and roads; *see* DEL. CODE ANN. tit. 7, § 7002(a) (2001).

¹⁰⁰ DEL. CODE ANN. tit. 7, § 7001 (2001).

- Number and type of supporting facilities required for the permit request;
- Effect on neighboring land uses; and
- Existing comprehensive development and conservation plans.¹⁰¹

A State Coastal Zone Industrial Control Board (CZB) was created to hear appeals of DNREC decisions regarding coastal areas. The CZB consists of nine (9) voting members appointed by the governor and confirmed by the senate with alternating five (5) year terms. A simple majority constitutes a quorum and is sufficient to make a final decision on a permit request.¹⁰² The CZB has power to hear appeals from DNREC decisions related to industrial development and activities in coastal zone areas. Any person aggrieved by a DNREC decision may appeal provided the notice of appeal is filed within fourteen (14) days of the final announced DNREC decision. The CZB must hold its public hearing and render a decision in the form of a final order within sixty (60) days following the appeal notification. Scheduled CZB hearings must be publicly announced¹⁰³ by publication in at least one (1) newspaper of daily production in the affected county and in at least one (1) newspaper of daily and general circulation throughout the state.¹⁰⁴ Any person aggrieved by a final order of the CZB may further appeal to the Superior Court in the county affected provided it is brought within twenty (20) days of the CZB's announced decision. The appellant bears the burden of proof to show that the CZB abused its discretion in applying standards set forth in the Delaware statutes and DNREC related regulations. Appeals, however, do not stay any cease and desist order or injunction issued.¹⁰⁵ Violators of the CZA are subject to fines up to fifty thousand dollars (\$50,000.00) for each violation and each day of violation.¹⁰⁶

o. Subaqueous Lands

Subaqueous lands¹⁰⁷ constitute an important resource of the state and require protection against uses or changes which impair the use of tidal or nontidal waters by the public. The

¹⁰¹ DEL. CODE ANN. tit. 7, § 7004 (2001).

¹⁰² DEL. CODE ANN. tit. 7, § 7006 (2001).

¹⁰³ Citing the time, location, and subject.

¹⁰⁴ DEL. CODE ANN. tit. 7, § 7007 (2001).

¹⁰⁵ DEL. CODE ANN. tit. 7, § 7008 (2001).

¹⁰⁶ DEL. CODE ANN. tit. 7, § 7011 (2001).

¹⁰⁷ The term "subaqueous lands" mean land lying below the line of mean low tide in the beds of all tidal waters within the boundaries of the state, lands lying below the plane of the ordinary high water mark of nontidal rivers, streams, lakes, ponds, bays, and inlets within the boundaries of the state, and specific manmade lakes or ponds designated as such by the DNREC; *see* DEL. CODE ANN. tit. 7, § 7202 (2001).

DNREC has authority to deal with and dispose of the public's interest in these lands and to place reasonable limits on the use and development of these lands by utilizing a permit system.¹⁰⁸ The DNREC has jurisdiction over projects involving any ungranted subaqueous lands including the authority to eject trespassers. Owners of private subaqueous lands must obtain a permit from the DNREC before making use of any lands¹⁰⁹ that might:

- Contribute to the pollution of public waters;
- Infringe upon the rights of the public or the rights of other private owners; or
- May adjoin or make connection with public subaqueous lands.¹¹⁰

It is unlawful to deposit material upon, remove or extract materials from, or construct, modify, repair, or reconstruct, or occupy any structure or facility upon submerged lands or tidelands without first having obtained a permit, lease, or letter of approval from the DNREC.¹¹¹ The DNREC has exclusive jurisdiction and authority over all projects to convey a fee simple or a lesser's interest or to grant easements belonging to the state to another.¹¹²

Applications for leases, permits, or grants of interest related to subaqueous lands are advertised in a daily newspaper of statewide circulation and in a newspaper of general circulation in the affected county.¹¹³ Appeals of DNREC decisions granting permits are made to the EAB.¹¹⁴

Violators of subaqueous land statutes and related rules, regulations, or permit conditions are subject to a civil penalty up to ten thousand dollars (\$10,000.00) for each violation and each day of violation plus a criminal penalty up to five hundred dollars (\$500.00) for each violation and each day of violation. A criminal penalty up to five thousand dollars (\$5,000.00),

¹⁰⁸ DEL. CODE ANN. tit. 7, § 7201 (2001).

¹⁰⁹ Some exemptions exist for work performed by governmental bodies, conservation districts, related contractors, related work in agricultural drainage ditches, related upland pond construction, stormwater or farm ponds whose only source of hydrology is groundwater, and wastewater conveyance or treatment works system operated by governmental units; *see* DEL. CODE ANN. tit. 7, § 7217 (2001).

¹¹⁰ DEL. CODE ANN. tit. 7, §§ 7203 and 7204 (2001).

¹¹¹ Repairs or structural replacements which are above the mean low tide and do not increase dimensions of a structure or change the use of a structure in existence are exempted; *see* DEL. CODE ANN. tit. 7, § 7205 (2001).

¹¹² However, members of the Delaware General Assembly must be given two (2) weeks notice of any such conveyance; *see* DEL. CODE ANN. tit. 7, § 7206 (2001).

¹¹³ DEL. CODE ANN. tit. 7, §§ 7207 and 7209 (2001).

¹¹⁴ DEL. CODE ANN. tit. 7, § 7210 (2001).

imprisonment up to six (6) months, or both may be imposed for any false statement, representation, or certification of any application, record, report, plan, or other required document filed if the violator had knowledge of its falsity including falsification, tampering, or rendering inaccurate any monitoring device or method required to be maintained by statute.¹¹⁵ The DNREC has power to issue cease and desist orders to violators,¹¹⁶ and it is unlawful to obstruct, hinder, delay, or interfere with DNREC personnel in the performance of a duty under subaqueous land statutes and related rules, regulations, orders, permits, or decisions.¹¹⁷

p. Pollution Prevention Act

It is the policy of the state to prevent pollution. To establish a foundation for that policy, the legislature enacted the Pollution Prevention Act (PPA).¹¹⁸ The PPA sets out that:

- Waste should be reduced or eliminated by recovering, reusing, treating, or disposing the waste in order to minimize threats to human health or the environment;
- Promising technologies may exist to reduce the generation of waste;
- Financial commitments for development and implementation of waste reduction depends on further research.¹¹⁹

Stated PPA objectives include:

- Targeting industries and locations for technical assistance; and
- Providing pollution prevention education and outreach.¹²⁰

¹¹⁵ DEL. CODE ANN. tit. 7, § 7214 (2001).

¹¹⁶ DEL. CODE ANN. tit. 7, § 7215 (2001).

¹¹⁷ DEL. CODE ANN. tit. 7, § 7216 (2001).

¹¹⁸ DEL. CODE ANN. tit. 7, §§ 7801 to 7805 (2001).

¹¹⁹ DEL. CODE ANN. tit. 7, § 7802(a) (2001). The various methods to reduce and eliminate waste are listed in order of priority.; *see* DEL. CODE ANN. tit. 7, § 7802(b)(2) (2001).

¹²⁰ DEL. CODE ANN. tit. 7, § 7802(b)(1) (2001).

Under the PPA, the DNREC established the Implementation Committee (IC). The IC consists of fifteen (15) members.¹²¹ The IC selects one target industry at a time to provide technical assistance in determining pollution prevention technologies. Among its methods, the IC utilizes educational workshops, industry seminars, and a pollution prevention newsletter to accomplish its objectives.¹²²

q. Environmental Permit Applicant Background Statements

To ensure that the state would have adequate information about the historical background of all environmental permit applicants or regulated parties, the legislature enacted the Environmental Permit Application Background Statement Act (EPABSA).¹²³ This legislation allows the state to identify applicants or regulated parties with histories of environmental violations or criminal violations or applicants who cannot demonstrate the required responsibility, expertise, or competence which is necessary for the proposed activity or operation to be permitted. The permits and activities encompassed by this legislation include NPDES permits, stormwater management permits, oil pollution liability permits, air permits, hazardous waste permits, solid waste permits, commercial subaqueous permits, wetland permits, coastal zone permits, underground storage tank permits, extremely hazardous substances permits, hazardous substances cleanup permits, emergency planning permits, and community right-to-know permits. The EPABSA allows the DNREC to require the following information from an environmental permit applicant:

- A list of all board of directors owning more than twenty percent (20%) of the stock or resources and all subsidiary companies, parent companies, and any companies which share two (2) or more directors and describe any felony and any criminal conviction of any director or company that resulted in a fine greater than one thousand dollars (\$1,000.00) or a sentence longer than seven (7) days regardless of whether the fine or sentence was suspended;
- Describe any and all notices of violation, criminal citations, arrests, convictions, civil penalties, or administrative penalties assessed against the applicant for violation of any environmental statute and related regulation, permit, license, or order during the five (5) years prior to the application date and describe the disposition of each item including actions taken to correct the violations; and

¹²¹ Representing the DNREC, the Delaware Economic Development Office (DEDO), the Department of Agriculture (DOA), the Department of Administration Services (DAS), the Delaware State Chamber of Commerce (COC), the Education Department (ED), the Delaware Solid Waste Authority (SWA), the League of Local Governments (LLG), the Chemistry Industry Council (CIC), the Delaware Technical and Community College (TCC), the University of Delaware, a private solid waste collection industry, a civic organization, and an environmental organization.

¹²² DEL. CODE ANN. tit. 7, § 7804 (2001).

¹²³ DEL. CODE ANN. tit. 7, §§ 7901 to 7906 (2001).

- Submit copies of any and all settlements of environmental claims whether or not the applicant did not admit liability.¹²⁴

Although the requested information listed above is considered public information, confidential information may be protected if releasing the information would constitute an invasion of personal privacy or seriously affect the applicant's business or competitive situation. Information that is sufficiently demonstrated to the DNREC as confidential information is released only to law enforcement personnel performing the background investigation, representatives of the attorney general, or sworn law enforcement personnel of other jurisdictions performing similar background investigations of the applicant.¹²⁵ The DNREC in conjunction with a committee of stakeholders representing environmental organizations and environmental industry is charged with the duty to establish criteria to identify a chronic violator and also when a chronic violator determination may be lifted.¹²⁶

Administrative penalties for chronic violators may be imposed up to one thousand dollars (\$1,000.00) for each violation and each day of violation.

r. Nutrient Management

The Delaware legislature enacted the Nutrient Management Act (NMA)¹²⁷ to:

- Regulate nutrients in order to help improve and maintain the quality of Delaware's groundwater and surface waters;
- Meet or exceed federal water quality standards;
- Establish a certification program that encourages the implementation of best management practices (BMPs) in generating, handling, or applying nutrients;
- Formulate a systematic and economically viable nutrient management program that will maintain agricultural profitability and improve water quality in Delaware.¹²⁸

¹²⁴ DEL. CODE ANN. tit. 7, § 7902 (2001).

¹²⁵ DEL. CODE ANN. tit. 7, § 7903 (2001).

¹²⁶ Factors used as guidelines to determine a chronic violator are listed by statute; *see* DEL. CODE ANN. tit. 7, § 7904 (2001).

¹²⁷ DEL. CODE ANN. tit. 3, §§ 2201 to 2290 (2001).

¹²⁸ DEL. CODE ANN. tit. 3, § 2201 (2001).

i. Delaware Nutrient Management Commission

The Delaware Nutrient Management Commission (DNMC) consists of fifteen (15) voting members and four (4) ex officio members. At least seven (7) members must be full time farmers.¹²⁹ The DNMC is charged with the responsibility to develop, review, approve, and enforce regulations governing the certification of individuals engaged in the business of land application of nutrients and engaged in the development of nutrient management plans. The DNMC:

- Considers the establishment of critical areas used as target areas for other voluntary or regulatory programs;
- Establishes BMPs to reduce nutrient losses to the environment;
- Develops educational and awareness programs designed to voluntarily curtail use of nutrients by persons not otherwise governed or regulated;
- Considers the development of a transportation and alternative use incentive program to move nutrients from areas with overabundance to areas needing nutrient sources;
- Makes other recommendations to the DNREC that it deems important to the goals established under the nutrient management statutes; and
- Establishes the elements and general direction of the State Nutrient Management Program (SNMP).¹³⁰

In carrying out its work, the DNMC must consider comments from affected stakeholders and other interested parties including the University of Delaware, state and federal agencies, nonprofit groups, plus others interested in nutrient management and consider prior work of the governor's Agricultural Industry Advisory Committee on Nutrient Management.¹³¹ The DNREC, in conjunction with the DNMC, must develop and adopt corresponding NMA regulations. The regulations adopted must consider waste management planning requirements imposed on animal producers or nutrient users by their commercial processor to prevent or reduce duplication in efforts for the nutrient contractor or property owner.¹³² Regulations must not be developed to require tilled lands to be converted for grass filter strips or vegetated and/or

¹²⁹ DEL. CODE ANN. tit. 3, § 2222 (2001).

¹³⁰ DEL. CODE ANN. tit. 3, § 2220(a) (2001).

¹³¹ DEL. CODE ANN. tit. 3, § 2220(b) (2001).

¹³² DEL. CODE ANN. tit. 3, §§ 2221(a - b) (2001).

forested buffer strips along rivers, lakes, streams, ponds, drainage ditches or any other natural or artificial conveyance system.¹³³

ii. *State Nutrient Management Program*

The SNMP consists of:

- Certification of persons involved with the generation or application of nutrients;
- Development and implementation of BMPs to improve water quality, optimize nutrient use, and maintain a profitable agricultural industry;
- Educational programs that provide instructions involving BMPs to applicants;
- Evaluation methods for determining an applicant's comprehension of BMPs; and
- Any other program elements the DNMC institutes related to the SNMP.¹³⁴

Beginning January 1, 2004, certain activities require certification. Application for certification must be submitted in writing to the DNMC for the following activities:¹³⁵

- Operating any animal feeding operation having greater than eight (8) animal units;
- Applying nutrient to lands exceeding ten (10) acres or waters as a component of a commercial venture or land owned, leased, or otherwise controlled; and
- Advising or consulting with persons statutorily required to be certified.

Various classifications exist for certification of nutrient handlers under the SNMP:

- Nutrient generator;
- Private nutrient handler;
- Commercial nutrient handler; and
- Nutrient consultant.¹³⁶

¹³³ DEL. CODE ANN. tit. 3, § 2221(c) (2001).

¹³⁴ DEL. CODE ANN. tit. 3, § 2240 (2001).

¹³⁵ Reasons for denial of certification are provided by the DNMC in writing; *see* DEL. CODE ANN. tit. 3, §§ 2242 and 2243 (2001).

¹³⁶ The SNMC may create subclasses as necessary to differentiate the method of nutrient application, specific quantities, types of nutrients or any other identifiable characteristic of nutrient management; certification requirements do not apply to individuals under the direct supervision of a certified person as a private or commercial

The DNMC may after notice and opportunity for a hearing suspend or modify any nutrient related certificate granted. The DNMC may also impose a fine upon any person against whom a complaint has been brought where it determines that it has reasonable grounds to believe the person is responsible for violations under the NMA. Persons accused of a violation are provided notice of the opportunity to request a hearing.¹³⁷

iii. Commercial Nutrient Processors

Beginning July 1, 2000, commercial nutrient processors must file nutrient management plans that:

- Provide technical assistance to contract growers for management and storage of waste utilizing BMPs;
- Provide continuing education on proper waste management to protect the state's environment;
- Conduct or fund research and demonstration programs that will contribute to improved waste management practices; and
- Formulate and implement nutrient reduction strategies that minimize nutrients discharged into the environment without adverse growth or health impacts on animals.

Commercial processors must also file an annual report with the DNMC on all activities undertaken during the prior year.

iv. Nutrient Management Plans

Nutrient management plans (NMPs) are required for all animal feeding operations having greater than eight (8) animal units or any person owning, leasing, or otherwise controlling property greater than ten (10) acres where nutrients are applied. NMPs must include:

- Field maps showing number of acres, soil types, and reference points and details such as buildings, streams, irrigation equipment, etc.;
- Soil and organic waste analyses;
- Current and planned crop rotations;

nutrient handler; *see* DEL. CODE ANN. tit. 3, § 2241 (2001).

¹³⁷ DEL. CODE ANN. tit. 3, § 2244 (2001).

- Expected yields¹³⁸ or soil productivity charts; and
- Recommended rates, timing, and methods of nutrient applications.¹³⁹

NMPs and animal waste management plans must be kept by the land owner or person responsible for the plans and made available for inspection¹⁴⁰ by DNMC personnel and DDA personnel. Implementation records for a plan must include:

- Soil test results;
- Sources, quantities, and analyses of the nutrients applied;
- Dates and methods of nutrient applications;
- Certification statement signed by the operator to document the purpose or intent of the animal waste or NMP.¹⁴¹

NMPs must be updated at least every three (3) years if a significant alteration or a twenty-five percent (25%) or greater increase occurs in facility operations. The NMP must be submitted no later than December 15 of the calendar year in which the annual report is due.

Storage of manure in a manner other than in an approved manure storage structure or facility must be reflected in the nutrient management plan and located at least:

- One hundred (100) feet from any drainage ditch or body of water;
- One hundred (100) feet from any public road;
- Two hundred (200) feet from any off-premise residence; and
- Six (6) feet high or less in a conical shape.¹⁴²

¹³⁸ Expected yields based on best four (4) out of seven (7) year data; nutrient management plans must also specify the level of nutrient applications that are needed to attain the expected crop yields; phosphorous application must not exceed a three (3) year crop removal rate and nitrogen applications must not exceed the expected yield; *see* DEL. CODE ANN. tit. 3, §§ 2247(a)(4) and (b) (2001).

¹³⁹ DEL. CODE ANN. tit. 3, § 2247 (2001).

¹⁴⁰ These records are not considered public records and are not subject to disclosure; *see* DEL. CODE ANN. tit. 3, §§ 2247(c) and (f) (2001).

¹⁴¹ DEL. CODE ANN. tit. 3, § 2247(c) (2001).

¹⁴² DEL. CODE ANN. tit. 3, § 2247(e) (2001).

Notification must be provided to the DNMC upon any events or circumstances that occur outside the parameters of and beyond the control of the person implementing the NMP. Notice must provide the response actions intended to be taken.¹⁴³

An animal waste management plan may be substituted for a NMP when the operator of an animal feeding operation applies no animal waste or no nutrients to the land for farming. However, the animal waste management plan must include:

- How the waste is stored prior to transport;
- Where and to whom the animal waste is transported;
- How much waste is transported; and
- How dead animals are disposed.¹⁴⁴

The state provides nutrient consultants to assist anyone requesting assistance in the preparation of a NMP and, subject to annual appropriations, reimburses persons hiring private nutrient consultants to meet NMP requirements.¹⁴⁵ Each person required to maintain a NMP or an animal waste management plan must submit a report to the DNMC by March 1 of every calendar year detailing the:

- Amount of animal wastes applied to the land and the area of land to which it was applied;
- Amount of animal wastes transferred for alternative uses, if any; and
- Amount of inorganic fertilizers applied to the land.¹⁴⁶

v. *Confined Animal Feeding Operations*

Under the federal legislation, specifically the CWA, concentrated animal feeding operations (CAFOs) are considered point sources for discharges into navigable waters and, thus, are subject to the permit requirements of the NPDES program. A CAFO is defined as an animal

¹⁴³ DEL. CODE ANN. tit. 3, § 2247(h) (2001).

¹⁴⁴ DEL. CODE ANN. tit. 3, § 2247(i) (2001).

¹⁴⁵ Reimbursement is handled through conservation districts at a rate and amount determined by the DNMC; county, municipal, and industrial facilities permitted by the DNREC to discharge solid or liquid waste are exempt from nutrient management requirements; *see* DEL. CODE ANN. tit. 3, § 2247(j) (2001).

¹⁴⁶ These reports are not considered public records and are not disclosed except as may be used for data compilation; *see* DEL. CODE ANN. tit. 3, § 2290 (2001).

feeding operation where more than one thousand (1,000) animal units are confined at the facility.¹⁴⁷ The DNREC is responsible for developing the state NPDES program for CAFOs that meets EPA approval.

NMPs for CAFOs must be signed and kept under the control of the person developing the NMP. NMPs for CAFOs must be amended whenever there is any significant change in the design, construction, or operation which has a significant effect on the potential for discharge of pollutants into state waters.¹⁴⁸ NMPs for CAFOs are subject to the same NMP requirements mentioned above but must additionally include site specific handling and storage consideration for:

- Diverting clean water from contact with animal waste or litter;
- Preventing storage, collection, and conveyance systems from leaking organic matter, nutrients, and pathogens to groundwater or surface water;
- Providing adequate storage to prevent polluted runoff;
- Handling manure and litter to reduce nutrient losses;
- Managing dead animals to protect groundwater and surface waters; and
- Managing tillage and crop residue practices.¹⁴⁹

In general, most CAFO operations may utilize a general NPDES discharge permit. An individual NPDES discharge permit is usually required for new operations, exceptionally large operations, operations undergoing significant expansion, operations with historical compliance problems, and operations with significant environmental concerns.¹⁵⁰

With the advice and consent of the DNMC, the DNREC may require a NPDES permit if the person is in significant noncompliance with the provisions of the state nutrient management plan or evidence exists that the person is a significant contributor of a pollutant to waters of the state.¹⁵¹ The DNREC is responsible for providing written notification to a person that a NPDES discharge permit is required. The notice provided must include the reasons for the decision, an application form, a deadline for submitting the application, and a statement regarding the

¹⁴⁷ DEL. CODE ANN. tit. 3, § 2248(a) (2001).

¹⁴⁸ DEL. CODE ANN. tit. 3, § 2248(c)(2) (2001).

¹⁴⁹ DEL. CODE ANN. tit. 3, § 2248(c)(1) (2001).

¹⁵⁰ DEL. CODE ANN. tit. 3, § 2248(d) (2001).

¹⁵¹ DEL. CODE ANN. tit. 3, § 2248(e) (2001).

effective date of coverage; however, the obligation to independently seek and secure a NPDES discharge permit is not conditioned upon or qualified by the DNREC duty to provide notice of the need for a permit.¹⁵²

The DNMC establishes the regulations for submitting, investigating, and resolving nutrient management complaints. Anonymous complaints are not investigated; however, nutrient management complaints are confidential.¹⁵³ Upon the receipt of a complaint, the DNMC must within sixty (60) days examine the facts and circumstances to determine whether a violation exists. A hearing is held on any matter that on its face presents a colorable claim that a violation has occurred. The hearing¹⁵⁴ is held in the county where the initial complaint arose within one hundred twenty (120) days of the date the complaint was received by the DNMC.¹⁵⁵ Hearings are conducted by the DNMC, and an official record is made to include a recitation of the evidence, findings of fact, the DNMC's decision, and the reasons for the decision. The DNMC's decision must recite the manner in which the law was construed and applied to the facts, the action proscribed for the violator including any remuneration, any fine assessed including the citation of DNREC regulations, and whether any revocation, suspension, or modification is applied to any certificate held. The DNMC has authority through the attorney general to compel the attendance of witnesses and the production of records related to the alleged violation. Decisions of the DNMC are considered final decisions for purposes of an appeal.¹⁵⁶ DNMC decisions regarding the denial of a certificate or refusal to renew a certificate are final unless the person denied or refused renewal appeals to the DNMC within fifteen (15) days after receiving notice of the decision. The DNMC must hold a hearing within sixty (60) days of the appeal to develop a record to base its certificate decision.¹⁵⁷ Decisions of the DNMC may be further appealed to the DNREC provided the appeal is brought within fifteen (15) days of the decision appealed, the reasons are stated, and the remedy sought is stated. The DNREC decision is based solely upon the record developed by the DNMC unless the DNREC determines that additional evidence should be taken.¹⁵⁸ Decisions by the DNREC are final unless the party appeals to the Superior Court within ten (10) days of receiving notice of the DNREC decision.¹⁵⁹

¹⁵² DEL. CODE ANN. tit. 3, § 2248(e) (2001).

¹⁵³ DEL. CODE ANN. tit. 3, § 2260 (2001).

¹⁵⁴ Notice is provided via certified mail at least ten (10) days in advance of the date the hearing is scheduled to all named parties along with a recital of the complaint or issue before the DNMC; *see* DEL. CODE ANN. tit. 3, § 2261(c) (2001).

¹⁵⁵ DEL. CODE ANN. tit. 3, §§ 2261(a - b) (2001).

¹⁵⁶ DEL. CODE ANN. tit. 3, §§ 2261(c - g) (2001).

¹⁵⁷ DEL. CODE ANN. tit. 3, § 2262 (2001).

¹⁵⁸ DEL. CODE ANN. tit. 3, § 2263(a) (2001).

¹⁵⁹ DEL. CODE ANN. tit. 3, § 2263(b) (2001).

Violators of nutrient management statutes are subject to a civil penalty imposed by a Justice of the Peace Court in an amount up to one thousand dollars (\$1,000.00) for each violation and up to ten thousand dollars (\$10,000.00) for each day of violation. In determining the amount of penalty, consideration is given to any economic benefit gained by committing the violation and to the amount of penalty sufficient to deter recurrence.

An administrative penalty may also be imposed in an amount up to one thousand dollars (\$1,000.00) for each violation. Before administrative penalties are imposed, notice is given to the alleged violator. In these instances, the alleged violator has thirty (30) days from the receipt of notice to request a public hearing. Administrative penalties are determined by considering the nature of the circumstances, extent and gravity of the violation, ability of the violator to pay, any prior history of such violations, the degree of culpability, economic benefit or savings resulting from the violation, and any other matters as justice may require.¹⁶⁰

Any person may file suit in Chancery Court for:

- Against a violator of the nutrient management statutes and related regulations for injunctive relief;
- Against the DDA for failure to perform any act or duty mandated by the nutrient management statutes;
- Against the DNMC for any failure to perform any act or duty mandated by the nutrient management statutes and for failure to enforce such statutes or related regulations.¹⁶¹

Should funding not be available because of insufficient funds to implement fundable BMPs, persons required to implement or undertake BMPs are protected from DNMC enforcement actions until funding becomes available. The first available funding must be accepted after a period of three (3) years from the date of the NMP acceptance.¹⁶²

The DNMC must submit an annual report to the governor and the general assembly about its activities and the environmental results that accrued during the year. The report is due on April 1 of each year and must include:

¹⁶⁰ DEL. CODE ANN. tit. 3, § 2280 (2001).

¹⁶¹ DEL. CODE ANN. tit. 3, § 2281 (2001).

¹⁶² DEL. CODE ANN. tit. 3, § 2282 (2001).

- Specific recommendations for incentives to promote BMPs within the industry;
- A complete list and delineation of all critical areas identified in conjunction with the DNREC which will be targeted for actions along with the determinative reasoning;
- A listing of all nutrient management training and educational opportunities provided and records of participation in those events; and
- BMP practices implemented and the number of acres by each watershed that are under NMPs.¹⁶³

s. Aquaculture

The state of Delaware enacted the Delaware Aquaculture¹⁶⁴ Act (DAA)¹⁶⁵ to promote and encourage aquacultural activities. The DAA is administered by the DDA. The DDA provides technical assistance along with an aquaculture marketing program to encourage the viability and profitability of aquaculture operations.¹⁶⁶

A twelve (12) member Delaware Aquaculture Council (DAC)¹⁶⁷ exists to promote and enhance aquaculture activities and operations within the state. The DAC duties include:

- Providing recommendations on the impact of laws and regulations affecting the aquaculture industry such as suggestions for the simplification of laws and the efficient citing and operation of the aquaculture industry;
- Examining research and educational needs as they relate to the improvement of the management and operations of the aquaculture industry; and
- Providing reports to the DDA on its findings and respond to the DDA requests to examine other issues.¹⁶⁸

¹⁶³ DEL. CODE ANN. tit. 3, § 2290(a) (2001).

¹⁶⁴ The term “aquaculture” means the controlled propagation, growth, harvest, and subsequent commerce in cultured aquatic stock by an aquaculturist; aquacultural activities must not promote the introduction of nonindigenous species that harbor disease, parasites, or are capable of surviving and adversely competing with indigenous plant or animal species; *see* DEL. CODE ANN. tit. 3, §§ 403(1) and 406 (2001).

¹⁶⁵ DEL. CODE ANN. tit. 3, §§ 401 to 411 (2001).

¹⁶⁶ DEL. CODE ANN. tit. 3, § 404 (2001).

¹⁶⁷ The twelve (12) members represent the the DDA, the DNREC, the Delaware Economic Development Office, the University of Delaware, Delaware State University, Farm Bureau Aquaculture, commercial aquaculture, and other individuals having an interest in aquaculture activities; *see* DEL. CODE ANN. tit. 3, § 405(b) (2001).

¹⁶⁸ DEL. CODE ANN. tit. 3, § 405(a) (2001).

The DDA has authority to promulgate and adopt regulations to administer the DAA. It also has authority without obtaining a warrant to:

- Search, examine, and inspect any vehicle or conveyance in which cultured aquatic stock may be present in order to determine compliance with aquaculture statutes and related regulations;
- Detain any person or vehicle for a reasonable length of time to conduct a search, examination, and inspection for determining compliance; and
- Inspect, search, and examine any registered aquaculture facility in the presence of an occupant of an aquaculture facility to determine compliance.¹⁶⁹

Persons fishing within an aquaculture facility must be licensed to fish in Delaware, and the facility must be:

- Designated and registered¹⁷⁰ as a fee fishing operation by the DDA; and
- A closed system containing no wild finfish.¹⁷¹

Unless otherwise authorized, it is unlawful to possess any live cultured aquatic stock after legally taking the stock from a fee fishing operation.¹⁷² It is unlawful to remove, destroy, or release cultured aquatic stock from a registered aquaculture facility or introduce any toxic substance into the waters of a registered aquaculture facility without the written consent of the owner.¹⁷³

It is lawful to take and possess species or hybrids from a fee fishing operation when authorized by the fee fishing owner without regard to any seasonal restrictions, size limits, or creel limits. A person in possession of cultured aquatic stock lawfully taken must possess a

¹⁶⁹ DEL. CODE ANN. tit. 3, § 407 (2001).

¹⁷⁰ Registration is conducted through the DDA and, generally, is valid for five (5) years from the date of issuance; registration must be renewed upon any change in ownership or a significant change in operations; after due notice of noncompliance, a registration may be suspended or revoked; a hearing is held following a registration suspension or revocation provided a request is submitted to the DDA; appeal of the DDA decision following a hearing may be brought before the Superior Court provided the appeal is made within thirty (30) days of the DDA decision; *see* DEL. CODE ANN. tit. 3, §§ 409 and 410 (2001).

¹⁷¹ DEL. CODE ANN. tit. 3, §§ 408(a - b) (2001).

¹⁷² DEL. CODE ANN. tit. 3, § 408(e) (2001).

¹⁷³ DEL. CODE ANN. tit. 3, § 411 (2001).

receipt¹⁷⁴ until such time as the person enters a personal abode or place of lodging; the receipt must note the name and address of the operation, the date the stock were taken, the identification and number of each species of stock taken, and the signature of the person who issued the receipt.¹⁷⁵

II. GROUNDWATER

A. Delaware Groundwater Laws

1. Delaware Groundwater Laws

In general, Delaware's groundwater laws are not addressed separately but are addressed collectively with surface water, land, and air laws in its natural resources and environmental control statutes. Thus, the legislative findings, purposes, and policies for Delaware's groundwater resources are exactly the same as those stated above in the water quality section. (See pages DE-3 to 7.) Permit applications and enforcement involving groundwater are the same as permit applications and enforcement in the water quality section. (See pages DE- 7 to 10.) Public hearings held in regard to groundwater issues are as described in the water quality section. (See pages DE-10 to 11.)

2. Delaware Underground Storage Tank Act

The Delaware General Assembly recognizes that groundwater resources are vital to the state's population and economy and that the storage of petroleum products and other hazardous liquids in underground storage tanks (USTs)¹⁷⁶ is a significant cause of groundwater contamination in the state due to corrosion, structural defects, and improper installation because of prior difficulty in detecting leaks in the early stages. In response to its findings, the general assembly enacted the Delaware Underground Storage Tank Act (DUSTA)¹⁷⁷ The DUSTA addresses the necessity to provide for more stringent control of the installation, operation,

¹⁷⁴ The receipt must be issued by the fee fishing operation, and copies of receipt records must be maintained for one (1) year from the date of issuance; *see* DEL. CODE ANN. tit. 3, § 408(d) (2001).

¹⁷⁵ DEL. CODE ANN. tit. 3, §§ 408(c - d) (2001).

¹⁷⁶ The term "underground storage tank" means a containment vessel, including connected underground pipes, which may be used to contain an accumulation of regulated substances where the volume including the connected underground pipes is ten percent (10%) or more beneath the surface of the ground but excludes septic tanks, pipeline facilities otherwise regulated under federal or intrastate natural gas or hazardous liquid laws regarding pipelines, surface impoundments, pits, ponds, lagoons, stormwater wastewater collection systems, flow-through process tanks, liquid traps or associated gathering lines related to oil or gas production, or storage tanks situated in an underground area such as a basement or cellar or tunnel provided the storage tank is situated upon or above the surface of the floor; *see* DEL. CODE ANN. tit. 7, § 7402(20) (2001).

¹⁷⁷ DEL. CODE ANN. tit. 7, §§ 7401 to 7425 (2001).

retrofitting,¹⁷⁸ and abandonment¹⁷⁹ of USTs to prevent leaks and to detect leaks at their earliest possible stage to minimize further degradation of groundwater.¹⁸⁰

In administering the DUSTA and developing related regulations, the DNREC uses the recommendations and standard procedures of the:

- National Fire Protection Association;
- American Petroleum Institute;
- National Association of Corrosion Engineers;
- Underwriters Laboratories; and
- American Society for Testing and Materials.¹⁸¹

Tanks that are exempt from UST regulations include:

- Agricultural and residential tanks of one thousand one hundred (1,100) gallons or less if used for storing motor fuel for noncommercial purposes; and
- Tanks containing heating fuels of one thousand one hundred (1,100) gallons or less if used for consumptive purposes on the premises where the tank is located.¹⁸²

Registration of USTs with the DNREC is required for all new USTs used for storing regulated substances at least ten (10) days prior to installation. Notice must specify the intended

¹⁷⁸ The term “retrofit” means modification or correction of an UST system to meet standards contained in related DNREC regulations through such means as replacement of valves, fill pipes, vents, and liquid level monitoring systems and the installation of overfill protection, transfer spill protection, leak detection, and cathodic protection devices but not the process of relining and UST through application of such materials as epoxy resins no the process of conducting a tightness test to establish the integrity of the tank; *see* DEL. CODE ANN. tit. 7, § 7402(17) (2001).

¹⁷⁹ The term “abandoned storage system” means a storage system which is a) not intended to be returned to service; b) has been out of service for over three (3) years; or c) has been rendered permanently unfit for use; *see* DEL. CODE ANN. tit. 7, § 7402(1) (2001).

¹⁸⁰ DEL. CODE ANN. tit. 7, § 7401 (2001).

¹⁸¹ DEL. CODE ANN. tit. 7, § 7403 (2001).

¹⁸² DEL. CODE ANN. tit. 7, § 7404 (2001).

date of installation, location, type of tank construction, size or capacity of tank, and type of substance to be stored.¹⁸³

It is unlawful to knowingly allow a release to continue from an UST without taking immediate steps to report the release to the DNREC. Responsible parties must impose measures for the prompt control, containment, and removal of released substances to the satisfaction of the DNREC. If responsible parties do not assume control of a release situation or are not responding promptly, the DNREC may assume control although the responsible party maintains all liability.¹⁸⁴

DNREC regulations address tank integrity, tank location, type of tank, age of tank, surrounding soil conditions, soil hydrology, compatibility of tank materials with stored substances, current industry recommended practices, national consensus codes, and the impact of the regulations upon those regulated by UST statutes and regulations.¹⁸⁵ The DNREC regulations also require that a control system or substance inventory be employed and maintained to identify releases; that procedures be established to follow when an abnormal loss or gain is indicated and unexplainable by spillage, temperature variations, or other known causes; that appropriate corrective actions be taken, in response to an UST release, to protect human health and the environment; that an enforcement program be established; and that standards be established that ensure against future releases from closed or abandoned USTs.¹⁸⁶

It is unlawful for any owner or operator of an UST to refuse a request by DNREC personnel or its agents for information relating to the UST or its contents or to refuse access to an UST to copy records, conduct monitoring, inspect, or obtain samples of its contents or surrounding soils as needed at any reasonable time when commenced and completed with reasonable promptness.¹⁸⁷

a. Underground Petroleum Storage Tank Response Fund

The state has established a Delaware Underground Petroleum Storage Tank Response Fund as a nonlapsing revolving fund to be used by the DNREC for the investigation and remediation of petroleum USTs. All expenses, cost, and judgments recovered and all moneys

¹⁸³ All existing and abandoned USTs were to be registered before 1989; *see* DEL. CODE ANN. tit. 7, §§ 7405(a)(2) - 3) (2001).

¹⁸⁴ DEL. CODE ANN. tit. 7, § 7406 (2001).

¹⁸⁵ DEL. CODE ANN. tit. 7, §§ 7407(a - b (2001)).

¹⁸⁶ DEL. CODE ANN. tit. 7, § 7407(c) (2001). All USTs must be clearly marked to indicate the system fill lines, the size of the tank, and the type of regulated substances stored; *see* DEL. CODE ANN. tit. 7, § 7407(d) (2001).

¹⁸⁷ DEL. CODE ANN. tit. 7, § 7408(a) (2001). Designated data may be entitled to protection; *see* DEL. CODE ANN. tit. 7, §§ 7408(b - c) (2001).

received as reimbursement under UST statutes and related regulations must be used to credit the fund. Disbursements from the fund may be used for the following purposes:

- Costs incurred in investigation and assessment of a site otherwise eligible;
- Cost associated with restoration or replacement of potable water supplies;
- Costs incurred in taking corrective action for any release of petroleum in excess of the minimum financial responsibility requirement up to one million dollars (\$1,000,000.00) per occurrence per facility;¹⁸⁸
- Costs incurred in compensating third parties for bodily injury and property damage caused by petroleum release up to one million dollars (\$1,000,000.00) per occurrence per facility;
- Costs incurred in taking immediate corrective action to contain or mitigate the effects of any petroleum release to protect human health and the environment;
- Cost associated with maintenance and monitoring of containment sites;
- Costs incurred in inspection and supervision of cleanup activities; and
- Costs as the “cost share” of a corrective action with respect to any petroleum release under a cooperative agreement with the U.S. EPA.¹⁸⁹

Disbursements of the fund may not be used for any other purpose than those listed above. DNREC’s administration of the UST program and costs incurred by the state that are recoverable from a responsible party are funded by the UST registration fee.¹⁹⁰

b. UST Financial Responsibility

DNREC regulations require all owners and operators of USTs to maintain financial responsibility in an amount not less than one hundred thousand dollars (\$100,000.00) per occurrence for corrective action in response to a release and not less than three hundred thousand dollars (\$300,000.00) for compensation for bodily injury and property damages arising from an

¹⁸⁸ The term “facility” means any location or part containing one (1) or more USTs; *see* DEL. CODE ANN. tit. 7, § 7402(5) (2001).

¹⁸⁹ DEL. CODE ANN. tit. 7, §§ 7409(a - b) (2001).

¹⁹⁰ DEL. CODE ANN. tit. 7, § 7409(c) (2001).

UST. Financial responsibility may be established by insurance, guarantee, surety bond, letter of credit or qualification as a self-insurer.¹⁹¹

Violators of UST statutes and related regulations who fail to take corrective action within the time specified in a DNREC order are subject to a civil penalty up to twenty-five thousand dollars (\$25,000.00) for each day of noncompliance and revocation of any permit issued to the violator. Notice by the DNREC is provided to the alleged violator thirty (30) days before a violation order issues. An order or a suspension or revocation of a permit becomes final thirty (30) days following notice unless the person named requests a public hearing.¹⁹² Failure to register an UST or to submit other notifications as required may result in a civil action in the Justice of the Peace Court and a penalty up to one thousand dollars (\$1,000.00) for each violation.¹⁹³ Penalties collected and any expenses collected are credited to the administration fund.¹⁹⁴ Any person whose interest is substantially affected by a DNREC action may appeal to the EAB. Any person who has an appeal before the EAB and is substantially affected by a decision of the EAB may further appeal to the Superior Court.¹⁹⁵

Variations and temporary emergency variations may be granted by the DNREC provided the variations are not inconsistent or no less stringent than the federal RCRA and its related regulations.¹⁹⁶

Delaware has a Leaking Underground Storage Tank Committee (LUSTC) that consists of the heads of the DNREC, the Department of Administrative Services, and the Delaware Geological Survey, plus the State Fire Marshal and a member of the Delaware Petroleum Council, the Pennsylvania/Delaware Service Station Dealers Association, an UST installer, the Insurance Commissioner or designee, and a representative of the insurance industry, the agricultural community, the chemical industry, and the environmental interest group plus two (2)

¹⁹¹ DEL. CODE ANN. tit. 7, § 7410(a) (2001).

¹⁹² DEL. CODE ANN. tit. 7, § 7410(b) (2001). The DNREC has authority to issue subpoenas to produce witnesses or documents; *see* DEL. CODE ANN. tit. 7, § 7410(c) (2001). Orders issued must state the nature of the violation, specify a time for compliance, and assess a penalty that is reasonable taking into consideration the seriousness of the violation and any good faith efforts to comply with applicable requirements; *see* DEL. CODE ANN. tit. 7, § 7410(d) (2001). Alternatively, in lieu of a DNREC compliance order, a responsible party violator may be liable for a civil penalty up to twenty-five thousand dollars (\$25,000.00) for each day of violation. The Superior Court has jurisdiction over UST offenses; *see* DEL. CODE ANN. tit. 7, § 7410(e) (2001).

¹⁹³ DEL. CODE ANN. tit. 7, § 7410(f) (2001).

¹⁹⁴ DEL. CODE ANN. tit. 7, § 7410(g) (2001).

¹⁹⁵ DEL. CODE ANN. tit. 7, § 7412 (2001).

¹⁹⁶ DEL. CODE ANN. tit. 7, § 7413 (2001) and 42 U.S.C. § 6991 (1994).

state senators and two (2) state representatives. The LUSTC acts as a guide in the development of the UST regulations.¹⁹⁷

c. UST Registration

All owners/operators of USTs must pay an annual per tank registration fee of fifty dollars (\$50.00) to the DNREC before February 1 of each calendar year. Tanks owned or operated by ambulance companies, volunteer fire companies, and the state are exempt from the fee requirement. Registration fees must be used by the DNREC only for the purpose of administering UST programs.¹⁹⁸ The DNREC has authority to recover any moneys expended from the fund for corrective action when an owner or operator has engaged in grossly negligent conduct or violated substantive UST regulations.¹⁹⁹

d. UST Contractor Certification

The DNREC is authorized to adopt regulations that require certification of businesses and individuals to install, retrofit, remove, abandon, or reline USTs used to store regulated substances. Certification must include written examinations to determine the ability to properly perform installations, retrofitting, relinings, removals, or abandonments. Certification by other states may be recognized for waiver of the written examination for similar work that is to be performed in Delaware. Uncertified individuals may only perform UST work under persons possessing a valid certificate issued by the DNREC; however, certification is not required for owners of farm or residential USTs who wish to remove or abandon their own nonregulated USTs. UST certifications are valid for two (2) years. The certification is two hundred fifty dollars (\$250.00) for companies and one hundred dollars (\$100.00) for on-site supervisors. Certification fees are appropriated to the DNREC to carry out the UST program.²⁰⁰

III. AIR QUALITY

A. Air Quality Laws

In general, Delaware's air quality laws are not addressed separately but are addressed collectively with surface water, groundwater, and land air laws in its natural resources and environmental control statutes. Thus, legislative findings, purposes, and policies for Delaware's air resources are the same as those stated above in the water quality section. (See pages DE-3 to

¹⁹⁷ DEL. CODE ANN. tit. 7, § 7414 (2001).

¹⁹⁸ DEL. CODE ANN. tit. 7, § 7418 (2001).

¹⁹⁹ DEL. CODE ANN. tit. 7, § 7419 (2001).

²⁰⁰ DEL. CODE ANN. tit. 7, § 7425 (2001).

7.)²⁰¹ Separate legislation, however, does address major air emission sources in Delaware's Clean Air Act Title V Operating Permit Program²⁰² statutes. Major air emission sources or sources referred to as Title V sources under the federal Clean Air Act (CAA)²⁰³ are:

- Sulfuric acid plants; municipal incinerators; fossil-fuel burners; petroleum storage and transfer units with a total storage capacity exceeding three hundred thousand (300,000) barrels; petroleum refineries; sulfur recovery plants; chemical process plants;
- Any stationary source or group of sources located within a contiguous area and under the common control or ownership consistent with federal CAA requirements that emits or has the potential to emit ten (10) tons per year (tpy) or more of any hazardous air pollutant under Title I federal guidelines of the CAA, twenty-five (25) tpy or more of any combination of such hazardous air pollutants unless the DNREC determines a lesser quantity by regulation;
- A source that emits one hundred (100) tpy or more of any air pollutant;²⁰⁴
- Sources with the potential to emit one hundred (100) tpy or more of volatile organic compounds or oxides of nitrogen in areas classified as marginal or moderate;²⁰⁵
- Sources with the potential to emit fifty (50) tpy or more of volatile organic compounds;²⁰⁶ or
- Any other sources designated by the DNREC or mandated by the EPA.²⁰⁷

²⁰¹ Permit applications and enforcement involving air quality are the same as permit applications and enforcement in the water quality section. (See pages DE- 7 to 10.) Public hearings held in regard to air quality issues are as described in the water quality section. (See pages DE-10 to 11.)

²⁰² DEL. CODE ANN. tit. 7, §§ 6095 to 6099 (2001).

²⁰³ 42 U.S.C. §§ 7412 *et seq.* (1994).

²⁰⁴ Including any major source of fugitive emissions of any such pollutant as the DNREC may establish by regulation; *see* DEL. CODE ANN. tit. 7, § 6095(3) (2001).

²⁰⁵ In ozone nonattainment areas, fifty (50) tpy or more in areas classified as serious, twenty-five (25) tpy or more in areas classified as severe, and sources subject to the requirements for preconstruction review; except that the references to 100, 50, and 25 tpy of nitrogen oxides does not apply with respect to any source which the DNREC has made a finding pursuant to regulations that requirements do not apply; *see* DEL. CODE ANN. tit. 7, § 6096(4) (2001).

²⁰⁶ In the northeast transport region; *see* DEL. CODE ANN. tit. 7, § 6095(5) (2001).

²⁰⁷ DEL. CODE ANN. tit. 7, § 6095 (2001).

The DNREC collects annual fees from air emission sources that are required to obtain a Title V Operating Permit pursuant to the Title V Program and from sources that voluntarily limit their potential emissions to emissions below the Title V applicability thresholds. Annual fees are based on emissions. These fees are utilized to pay for costs required to develop, administer, and implement the Title V Operating Permit Program. Costs include:

- Preparing applicable regulations or guidance documents regarding the permit program or its implementation or enforcement;
- Reviewing and acting on any application for a permit, permit revision, or permit renewal;
- General administrative costs of implementing the permit program;
- Implementing and enforcing the terms of any Title V Operating Permit;
- Emissions and ambient monitoring;
- Modeling;
- Preparing inventories and tracking emissions; and
- Supporting the ombudsman program.²⁰⁸

User fees are based on tpy emissions, for example:

- 0 to 25 tpy: \$1,000.00;
- 26 to 100 tpy: \$2,000.00;
- 101 to 300 tpy: \$5,000.00;
- 301 to 1000 tpy: \$10,000.00;
- 1001 to 2500 tpy: \$40,000.00;
- 2501 to 10,000 tpy: \$100,000.00;
- Greater than 10,000 tpy: \$225,000.00.²⁰⁹

²⁰⁸ DEL. CODE ANN. tit. 7, § 6097(b) (2001).

²⁰⁹ Adjusted on an annual basis up to the federal consumer price index; *see* DEL. CODE ANN. tit. 7, §§ 6097(e) and (g) (2001). Sources not included in the 1996 Delaware Point Source Emission Inventory of Estimated Actual Regulated Air Contaminants are assessed a base fee that is consistent with the categories listed here; estimated hours includes new source review, new source performance standards, toxic requirements, and continuous emission monitoring requirements; *see* DEL. CODE ANN. tit. 7, § 6097(f) (2001). Maximum actual emissions is four thousand (4,000) tpy of an air contaminant, consistent with 40 C.F.R. Part 70; *see* DEL. CODE ANN. tit. 7, § 6097(h) (2001).

Other than sources required to have an air emissions permit before construction or modification begins, air emission sources are deemed to have an air emissions permit provided the applicant has submitted a timely and complete application for a permit as required although final action on the application may not have been taken. Thus, failure to have an air emissions permit is not a violation unless the delay in obtaining the final action was due to the failure of the applicant to timely submit the information required or requested to process the application.²¹⁰

A Title V Operating Permit Program Advisory Committee provides the governor and the general assembly with a report by February 1 each year to identify the amounts and sources of air emission fees collected during the prior calendar year, the expenditures of the DNREC to implement the air emissions program, and recommendations to remedy or improve any deficiencies or elements of the air emissions program. The final report is due by February 2003 at which time, the committee will cease to exist unless further legislation determines otherwise.²¹¹

IV. SOLID AND HAZARDOUS WASTE

Producer Note: There are many laws which control the use, disposal, and cleanup of solid and hazardous wastes. Agricultural producers who use hazardous chemicals, petroleum, or other products stored in storage tanks should be aware of requirements governing their actions.

Funds collected must be used solely to develop, administer, and implement the program; *see* DEL. CODE ANN. tit. 7, § 6097(i) (2001). An air emissions report is prepared two (2) times per year by the air quality management section of the DNREC, April 15 and October 15, and announced by published notice that the report is available; *see* DEL. CODE ANN. tit. 7, § 6097(j) (2001).

²¹⁰ DEL. CODE ANN. tit. 7, § 6098 (2001).

²¹¹ DEL. CODE ANN. tit. 7, § 6099 (2001).

A. DELAWARE SOLID WASTE LAWS

I. *Delaware Solid Waste Authority*

The General Assembly declares that the people of the state have a right to a clean and wholesome environment and recognizes that some solid waste²¹² disposal practices cause unnecessary environmental damage, substantially degrade surface and groundwater, waste valuable land and other resources and constitute a continuing hazard to the health and welfare of the people of the state. Because local governments would be pressed to provide adequate services at reasonable costs and because volunteer recycling²¹³ programs show that solid wastes contain recoverable resources and environmental benefits could be achieved, the state of Delaware established a statewide Solid Waste Authority (SWA) that includes disposal and resources recovery²¹⁴ facility to be implemented by a statewide plan by the state or under state auspices in order to provide safe, effective and affordable disposal services and to protect, preserve, and enhance the environment of the state. Private industry is utilized, however, to assist in the development of solid waste management to perform planning, design, construction, operation, collection, manufacturing, and marketing. Infectious waste²¹⁵ is monitored by the Department of Health and Social Services to determine proper compliance with DNREC regulations and related statutes.²¹⁶

Delaware's solid waste goals include:

- A statewide comprehensive program for management, storage, collection, transportation, utilization, processing, and disposal of solid waste;

²¹² The term "solid waste means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded material including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations and from community activities but not solid or dissolved material in domestic sewage or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to other federal legislation; *see* DEL. CODE ANN. tit. 7, § 6402(9) (2001).

²¹³ The term "recycling" means the process by which solid waste and other discarded materials are transformed into usable materials or disposed separately in an authorized manner to reduce adverse environmental impacts; *see* DEL. CODE ANN. tit. 7, § 6451(2) (2001).

²¹⁴ The term "resources recovery" means the recovery of energy and materials from solid wastes in a saleable form which will allow their reuse in specific market applications; *see* DEL. CODE ANN. tit. 7, § 6402(7) (2001).

²¹⁵ The term "infectious waste" means those wastes which may cause human disease and may reasonably be suspected of harboring human pathogenic organisms or may pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed, or otherwise managed; *see* DEL. CODE ANN. tit. 7, § 6402(17) (2001).

²¹⁶ DEL. CODE ANN. tit. 7, §§ 6401(a - b) (2001).

- A program for the maximum recovery and reuse of materials and energy resources derived from solid wastes;
- A program for protecting the land, air, surface, and groundwater resources of the state from depletion and degradation caused by improper disposal of solid waste;
- A program in cooperation with the U.S. EPA or other federal and state agencies for the demonstration of systems and techniques of materials recovery, market development, and reuse of solid waste;
- A statewide program and facility for disposal of infectious waste.²¹⁷

The SWA consists of seven (7) directors appointed by the governor with the advice and consent of the senate. There must be at least one (1) director from each of the three (3) counties and the city of Wilmington. The SWA is responsible for:

- Adopting the statewide solid waste management plan and subsequent amendments after proper notice and public hearing;
- Establishing a fee schedule, user charges, other charges for the use and/or operation of solid waste facilities; and
- Adopting rules and regulations to carry out solid waste statutes and to govern the composition, quality, quantity, and delivery of source separated recyclable materials²¹⁸ to recycling centers.²¹⁹

Under legislation known as the Delaware Recycling and Waste Reduction Act (RWRA),²²⁰ it is the SWA's responsibility to provide:

- Solid waste management services to municipalities, regions, and persons within the state;
- Planning, design, construction financing, management, ownership, operation, and maintenance of solid waste disposal, volume reduction, and resources recovery facilities and all related solid waste reception, transfer, storage, transportation,

²¹⁷ DEL. CODE ANN. tit. 7, § 6401(c) (2001).

²¹⁸ The term "recyclable material" means any material or group of materials that can be collected and sold or used for beneficial purposes or separated from the waste stream and disposed separately in an authorized manner to reduce environmental impacts; *see* DEL. CODE ANN. tit. 7, § 6451(1) (2001).

²¹⁹ DEL. CODE ANN. tit. 7, § 6403 (2001).

²²⁰ DEL. CODE ANN. tit. 7, §§ 6401 to 6460 (2001).

and waste handling plus general support facilities considered necessary, desirable, convenient, or appropriate;

- Utilization of private industry for implementation of some or all of the state solid waste management plan and other activities considered necessary, desirable, or convenient;
- Assistance in the development of industries and commercial enterprises within the state based upon resources recovery, recycling, and reuse; and
- Development, implementation, and supervision of a program requiring all persons who haul, convey, or transport any solid waste container to be licensed by the SWA.²²¹

Judicial review of any solid waste rule, regulation, or other action of the SWA may be brought in the Superior Court provided the request for review is submitted within thirty (30) days from the date of the promulgation of the rule or regulation or SWA action.²²²

Violation of a licensing condition or solid waste regulation promulgated pursuant to the solid waste statutes results in a civil penalty up to five thousand dollars (\$5,000.00) for each violation and each day of violation. Legal actions are brought in the Court of Common Pleas. Penalties for violations involving infectious waste are more severe and result in a civil penalty up to ten thousand dollars (\$10,000.00) per violation and each day of violation. Restraining orders may be invoked to prevent a continuous violation if there is substantial likelihood that it will reoccur. The injunction, temporary or permanent, is obtained in the Court of Chancery.²²³

Other penalties for solid waste violations include revocation or suspension of a license and assessment of an administrative penalty up to two thousand five hundred dollars (\$2,500.00) for each violation and each day of violation. Revocation or suspension of a license is carried out by notice via registered mail at least twenty (20) days in advance of a hearing held by the SWA on the matter. The alleged violator may bring counsel and submit any competent evidence. All testimony is under oath. Witnesses and documents may be subpoenaed by the SWA and the Superior Court if necessary. The official record is produced at the hearing and consists of the verbatim transcript along with the exhibits and documents introduced into evidence.²²⁴ Decisions to revoke or suspend license or to assess an administrative penalty are made by majority vote of the directors of the SWA in executive session. The reasons for the decision are

²²¹ Although the SWA may contract with any county, municipality or other political subdivision to conduct the licensing program; *see* DEL. CODE ANN. tit. 7, § 6404 (2001).

²²² DEL. CODE ANN. tit. 7, § 6412 (2001).

²²³ DEL. CODE ANN. tit. 7, § 6417(a) (2001).

²²⁴ DEL. CODE ANN. tit. 7, § 6417(b) (2001).

presented as findings of fact based on and supported by the record. Dissenting decisions and reasons may be stated by any director. The alleged violator is notified of the SWA decision via registered mail. Nonpayment of any administrative penalty including interest and attorney's fees and costs may result in its collection in a civil action in Superior Court. The validity, amount, and appropriateness of an uncollected administrative penalty is not subject to review unless an appeal of the SWA assessment decision is brought before the Superior Court in the county where the hearing was held within thirty (30) days of first receiving the SWA notification. No SWA decision is stayed except upon application and for good cause by the SWA or the Superior Court.²²⁵

2. Delaware Recycling and Waste Reduction

It is the policy of the state to reduce solid waste disposal and to recover usable materials from solid waste before disposal to minimize the environmental impact of land filling. A statewide comprehensive system of waste reduction,²²⁶ recycling, and resource recovery is promoted. Reclamation projects, waste-to-energy projects, and a source separation²²⁷ program via strategic recycling centers are all part of the comprehensive system along with long range planning, public education, research, and marketing. Measures to remove harmful materials from solid waste before disposal is also important.

The statewide solid waste management plan provides for the:

- Long term planning of a coordinated program of source separation of recyclable materials and utilization of large scale resources recovery projects;
- Establishment of recycling centers to receive and handle source separated recyclable materials; and
- Development of:
 - A marketing program for sale of recovered materials;
 - An informational program regarding recyclable marketable materials;

²²⁵ DEL. CODE ANN. tit. 7, §§ 6417(b - c) (2001).

²²⁶ The term "waste reduction" means the efforts exercised by generators of useless discarded materials to avoid or minimize usage of such materials; *see* DEL. CODE ANN. tit. 7, § 6451(5) (2001).

²²⁷ The term "source separation" means the process by which recyclable materials are separated and kept apart from the waste stream by its generator for the purpose of collection, disposition, recycling, or resources recovery; *see* DEL. CODE ANN. tit. 7, § 6451(4) (2001).

- A program of cooperation and coordination with public interest groups and municipalities to further statewide recycling and waste reduction;
- A program of public education and promotion;
- A program to separate harmful materials from the solid waste stream for separate authorized disposal;
- A system of accountability regarding the nature and extent of recycling and waste reduction undertaken and achieved;²²⁸ and
- Incentive programs to encourage recycling and waste reduction.²²⁹

Recyclable materials are identified as newsprint, computer paper, white paper, cardboard, plastics, ferrous (iron) metals, nonferrous metals, white goods, organic yard waste, used motor oil, asphalt, batteries, and household paint, solvents, pesticide and insecticide containers.²³⁰ The SWA provides an annual report of its operations and transactions involving recycling and waste reduction including its fiscal affairs and information regarding its cooperative efforts with DNREC.²³¹

²²⁸ Recycling and resource recovery facilities are required to annually register with the SWA but no fees are charged; *see* DEL. CODE ANN. tit. 7, § 6456 (2001). Costs of implementing programs related to recycling and waste reduction may be funded to the fullest extent; *see* DEL. CODE ANN. tit. 7, § 6457 (2001).

²²⁹ DEL. CODE ANN. tit. 7, § 6452 (2001).

²³⁰ Other recyclable materials may be added to the list by the SWA; *see* DEL. CODE ANN. tit. 7, § 6453 (2001).

²³¹ DEL. CODE ANN. tit. 7, § 6459 (2001). A separate feasibility study and report for establishing material and energy recovery in Kent and Sussex counties was required by January 15, 1991; *see* DEL. CODE ANN. tit. 7, § 6460 (2001).

3. *Delaware Scrap Tires*

Owners and operators of scrap tire piles²³² are responsible and liable for compliance with all environmentally statutes and related rules, regulations, permits, and orders. Approval for recycling solid wastes into specific market applications or a solid waste resource recovery permit is deemed compliance. Violators of scrap tire piles are subject to daily environmental penalties. Imposition of any penalty does not limit an action as a public nuisance or an illegal disposal of solid waste.

Beginning September 30, 2002, all scrap tire piles must have a buffer distance at least two hundred (200) feet from any residence or full-time human occupied structure and:

- Be stacked in orderly and stable stacks no higher than fourteen (14) feet and rows not greater than twenty-five (25) feet by one hundred (100) feet and aisles at least twenty-four (24) feet wide on solid, level ground;
- Completely surrounded by a secure fence at least six (6) feet in height and twenty-five (25) feet beyond perimeter stacks of tire to exclude unauthorized persons, arsonists, and animals;
- Be free from weeds, debris, and other combustible materials upon the yard or land; and
- Covered with waterproof covers or treated with a pesticide or larvicide twice per calendar year, in a manner to prevent mosquito breeding.²³³

B. Delaware Hazardous Waste Laws

1. Delaware Hazardous Waste Management

The state of Delaware recognizes that increasing manufacturing and technological progress generally increase quantities of hazardous wastes²³⁴ threatening public health and safety

²³² The term “scrap tire” means a tire that is no longer prudent or practical for vehicular use or a tire that has not been used on a vehicle for more than six (6) months. The term “scrap tire pile” means an accumulation of one hundred (100) or more scrap tires, whether or not they are lying one upon another, that has been accumulated or located in the same general vicinity or parcel of real property not enclosed by a building in existence before July 1, 1997; *see* DEL. CODE ANN. tit. 7, § 6040(a)(4) (2001).

²³³ DEL. CODE ANN. tit. 7, § 6040(b) (2001).

²³⁴ The term “hazardous wastes” means a solid waste or a combination of solid wastes because of quantity, concentration, or physical or chemical characteristics may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating irreversible illness or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed or otherwise managed; *see* DEL. CODE ANN. tit. 7, § 6302(7) (2001). Vegetative waste and construction debris disposed

and the environment. The problem of managing hazardous wastes is a matter of statewide concern. Delaware's hazardous waste statutes and related rules and regulations were enacted to respond to and to reduce the effects of improper, inadequate, or unsound management of hazardous wastes.²³⁵

The DNREC is authorized to study and investigate the problems of hazardous waste control and management in Delaware and must publish a statewide hazardous waste management plan that includes:

- A description of hazardous waste sources, the types and quantities of hazardous waste generated and the location of the generators, the disposal facilities, and storage sites;
- Current management practices;
- An informational reporting system of quantities generated and disposed;
- Criteria for determining the sites for disposal facilities; and
- Information on methods of reuse, recycling, and reduction of hazardous wastes including the feasibility of establishing facilities, encouraging reuse, recycling, reduction, and utilization of hazardous wastes for useful purposes.²³⁶

a. Hazardous Waste Enforcement Reporting

It is unlawful to generate, store, transport, treat, or dispose of hazardous wastes without reporting the activity to DNREC and in accordance with law.²³⁷ A description of the source of the hazardous waste, the type and quantity, the location of the generating facility, and the storage and disposal sites is required.²³⁸ Accurate identification and labeling of hazardous waste

in trenches near development site were hazardous waste within the meaning of the hazardous waste definition even though it did not display hazardous characteristics because its quantity, concentration, physical characteristics, or chemical characteristics posed a substantial present hazard to human health, e.g., buried tree debris can form methane gas that can seep into houses; see *T.V. Spano Bldg. Corp. v. Wilson*, Del. Super. Ct., 584 A.2d 523 (1990) and *T.V. Spano Bldg. Corp. v. Dept. Nat. Res. & Env'tl. Contr'l.*, Del. Supr. 628 A.2d 53 (1993).

²³⁵ DEL. CODE ANN. tit. 7, §§ 6301 to 6319 (2001).

²³⁶ DEL. CODE ANN. tit. 7, § 6303 (2001).

²³⁷ DEL. CODE ANN. tit. 7, §§ 6403(a - b) (2001). Information obtained by DNREC is available to the public unless the DNREC certifies the information to be proprietary where a person satisfactorily shows that disclosure would divulge methods, processes, or activities entitled to protection as trade secrets; *see* DEL. CODE ANN. tit. 7, § 6304(c) (2001).

²³⁸ DEL. CODE ANN. tit. 7, § 6306(a) (2001).

containers in storage, transport, or intended for disposal is required.²³⁹ The use of manifests is required to track hazardous waste and to ensure proper treatment, storage, or disposal.²⁴⁰ It is also unlawful to destroy, alter, or conceal any hazardous waste records maintained with respect to any generation, treatment, disposal, storage, or transportation of hazardous waste.²⁴¹ The transportation or delivery of hazardous waste to any facility operated by the SWA or on behalf of the SWA is prohibited unless the transportation or delivery is authorized by SWA as small-quantity-source, separated, designated materials delivered to recycling centers for authorized disposal.²⁴²

A commission called the Commission on the Transportation of Hazardous Materials (CTHM) serves in an advisory capacity to the DNREC to consider matters relating to hazardous waste legislation and related regulations.²⁴³ The DNREC is responsible for promulgating²⁴⁴ state criteria consistent with EPA regulations under the federal Resource Conservation and Recovery Act (RCRA)²⁴⁵ to identify the characteristics of hazardous waste and to govern the transportation, storage, treatment, and disposal of hazardous waste including contingency plans for response actions to minimize related unanticipated damage of hazardous waste and to prescribe conditions and times when generators may accumulate hazardous wastes on site without a permit. The DNREC must set forth hazardous waste permit requirements including issuance, modification, review, suspension, revocation, and denial. The DNREC permits address hazardous waste or solid waste constituents that if released require corrective action for the site and beyond the facility boundary if necessary to protect human health and the environment. Permits also contain schedules for corrective actions following any release as well as assurances of financial responsibility to ensure the corrective action is completed.²⁴⁶ DNREC regulations:

- Establish standards and procedures for the safe operation and maintenance of hazardous waste transfer, treatment, storage, and disposal including requirements for long-time care, closing, and termination of facilities or sites;

²³⁹ DEL. CODE ANN. tit. 7, § 6306(b) (2001).

²⁴⁰ DEL. CODE ANN. tit. 7, § 6307(c) (2001).

²⁴¹ DEL. CODE ANN. tit. 7, § 6403(d) (2001).

²⁴² DEL. CODE ANN. tit. 7, § 6403(g) (2001).

²⁴³ DEL. CODE ANN. tit. 7, § 6305(f) (2001).

²⁴⁴ After notice and public hearing; *see* § 6305(a) (2001).

²⁴⁵ 42 U.S.C. § 6921 (1994).

²⁴⁶ Including when substances pass through a sewer system into a publicly owned treatment works are adequately controlled to protect human health and the environment; *see* DEL. CODE ANN. tit. 7, § 6305(a) (2001).

- Specify hazardous wastes which are not compatible and may not be stored or disposed together without appropriate treatment that ensures compatibility;
- Establish procedures and requirements for reporting the generation, storage, transportation, treatment, or disposal of hazardous wastes;
- Establish procedures and requirements for the use of a hazardous waste manifest;
- Establish a schedule of reasonable fees²⁴⁷ for hazardous waste transporters and owners of facilities or sites to defray the cost of DNREC administration of hazardous waste statutes and related rules and regulations;
- Establish the creation and maintenance of records and reports on:
 - Sampling, testing, analyzing hazardous waste;
 - Installation, calibration, and usage of monitoring equipment or methods; and
 - When other information may be necessary;
- Establish financial responsibility requirements for hazardous waste management facilities and adequate resources for corrective actions plus appropriate measures to prevent damage to public health, safety, and the environment;
- Set forth the reuse, recycling, and reduction of hazardous waste including the use of waste oil or materials used as a dust suppressant and the production, distribution, marketing, and burning of fuels that contain hazardous waste;
- Establish record keeping practices for generators of hazardous waste to identify the types, quantities, and constituents of such waste to protect human health and the environment including:
 - Appropriate containers;
 - Furnishment of chemical composition information to persons involved in the management of the hazardous waste;
 - Use of a manifest system;
 - Submission of reports to DNREC; and

²⁴⁷ Not greater than ten thousand dollars (\$10,000.00) or for small businesses, not greater than five hundred dollars (\$500.00); *see* DEL. CODE ANN. tit. 7, § 6305(9) (2001).

- Disposition of hazardous waste generated during a particular period;
- Set forth inspection and pre-operation of hazardous waste management facilities;
- Set forth standards for location, design, construction, and remedial actions and other related matters necessary to maintain the state's program.²⁴⁸

b. Hazardous Waste Generators and Transporters

Generators of hazardous wastes must submit to the DNREC a description of the source of hazardous wastes including the types and quantities and the location of the generating facility, the storage site, and the disposal site of the hazardous wastes.²⁴⁹ Generators of hazardous waste are also responsible for proper labeling of any containers used for the storage, transportation, or disposal of hazardous wastes and any testing necessary to determine whether the material generated is a hazardous waste.²⁵⁰ Testing procedures must comply with DNREC approved procedures.²⁵¹ A release report is required upon the discharge of any hazardous waste during transportation by the transporter to appropriate officials and clean up or other such proper action proscribed must be conducted so that the discharge no longer presents a hazard to human health or the environment.²⁵²

c. Hazardous Waste Treatment, Storage, and Disposal

Persons owning or operating, substantially altering, or constructing a hazardous waste treatment, storage, or disposal facility or site must report the activity to the DNREC along with a description of the facility, the types and quantities of any solid and hazardous wastes treated, stored, or disposed, the location of the facility, the capacity of the facility, and the source of any wastes treated, stored, or disposed.²⁵³

A permit is required for construction, substantially altering, owning, or operating any hazardous waste treatment, storage, or disposal facility or site as well as for storing, treating, or

²⁴⁸ DEL. CODE ANN. tit. 7, § 6305(a) (2001). The DNREC may consider variations within the state as to its geology, population density, and other factors relevant to the management of hazardous wastes; regulations are promulgated after notice and public hearings in consultation with the CTHM consistent with and no more stringent than EPA and the U.S. Department of Transportation regarding regulations on transportation, containerization, and labeling of hazardous wastes; *see* DEL. CODE ANN. tit. 7, §§ 6305(b - c) (2001).

²⁴⁹ DEL. CODE ANN. tit. 7, § 6306(a) (2001).

²⁵⁰ DEL. CODE ANN. tit. 7, § 6306(b) (2001).

²⁵¹ DEL. CODE ANN. tit. 7, § 6306(d) (2001).

²⁵² DEL. CODE ANN. tit. 7, § 6306(f) (2001).

²⁵³ DEL. CODE ANN. tit. 7, § 6307(a) (2001).

disposing any hazardous wastes except that generators may accumulate hazardous waste without a permit for certain periods and under certain conditions prescribed in DNREC regulations.²⁵⁴

To obtain a permit, a completed application must be submitted to the DNREC including plans, specifications, and other information prescribed by DNREC regulations pursuant to Delaware hazardous statutes plus evidence of necessary financial responsibility and liability insurance established by DNREC regulation to insure that during operation or upon abandonment, cessation, or interruption of operation that all appropriate measure are taken to remedy or prevent present and future damage to the public health and safety to the environment plus evidence that personnel engaged in the treatment, disposal, or storage of hazardous wastes have met DNREC prescribed training qualifications.²⁵⁵ Operating permits are issued for prescribed times and under terms as the DNREC may prescribe. Permits are revoked for noncompliance after DNREC notice of noncompliance and an opportunity for an adequate hearing and written notice of the intent to revoke the permit including the reasons for the revocation. Appeal of a revocation does not stay the revocation.²⁵⁶

A person acquiring rights of ownership, possession, or operation of a facility or site permitted by the DNREC or that is accepting hazardous waste for treatment, storage, or disposal is in addition to the original owner, possessor, operator, or permittee subject to all DNREC requirements and hazardous waste laws pursuant to Delaware statutes. A new permit issues if the previous permittee is no longer connected with the operation of the site or facility and the proposed permittee meets all applicable statutory and regulatory requirements.²⁵⁷ An owner or operator of a permitted facility or site must conduct maintenance, monitoring, and surveillance as deemed necessary by the DNREC during operation, upon cessation or interruption of the operation, closure, abandonment in order to protect the public health and to prevent or control air, land, water, or groundwater pollution.²⁵⁸

In situations where an imminent and substantial hazard to the health of persons or to the environment is determined to exist that involves the storage, transportation, treatment, or disposal of any hazardous waste, the DNREC may:

- Issue an order directing the present or former operator or custodian to take the necessary steps to prevent or eliminate the hazard as well as assess penalties for the enforcement of hazardous statutes and related rules and regulations plus permit conditions or variances;

²⁵⁴ DEL. CODE ANN. tit. 7, § 6307(b) (2001).

²⁵⁵ DEL. CODE ANN. tit. 7, §§ 6307(c - d) and (h) (2001).

²⁵⁶ DEL. CODE ANN. tit. 7, §§ 6307(e - f) (2001).

²⁵⁷ DEL. CODE ANN. tit. 7, § 6307(i) (2001).

²⁵⁸ DEL. CODE ANN. tit. 7, § 6307(j) (2001).

- Direct emergency clean up and remedial measures to mitigate groundwater contamination or significant threats to human health and/or the environment.²⁵⁹

d. Hazardous Waste Enforcement

Violators of any hazardous waste statutes, rules, regulations, permits, or variances are provided with notice of the violation, notice of noncompliance, and notice that an order to comply may issue in thirty (30) days. Failure to comply with the order subjects the violator to a civil penalty up to twenty-five thousand dollars (\$25,000.00) for each day of continued noncompliance and revocation of any permit issued or facility transfer approval. Orders are stated with reasonable specificity, provide a specific time for compliance, and assess a penalty determined by the DNREC taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.²⁶⁰ In the alternative, the Superior Court has jurisdiction over the penalty assessment.²⁶¹

Thirty (30) days following an order or notice of revocation or suspension of a transfer facility approval or permit becomes final unless the person requests a public hearing. Public hearings are on the record where testimony and competent evidence are offered.²⁶²

If the violation is threatened, continuing, or a substantial likelihood exists that the violation will reoccur or the DNREC receives information that the hazardous waste generation, storage, transportation, treatment, or disposal presents an imminent and substantial hazard to public health or to the environment, the DNREC may seek a temporary restraining order or a preliminary or permanent injunction in the Court of Chancery.²⁶³ The Chancery Court has discretion to additionally impose a civil penalty.²⁶⁴

Criminally negligent violators or violators who fail to perform an imposed duty or violates any hazardous waste provision, order, or facility permit are further subject to criminal misdemeanor charges, a fine up to ten thousand dollars (\$10,000.00), imprisonment up to six (6) months, or both.²⁶⁵ Violators who knowingly violate hazardous waste provisions or knowingly fail to perform any imposed duty and cause a release of hazardous waste into the environment are also subject to criminal misdemeanor charges, a fine up to twenty-five thousand dollars

²⁵⁹ DEL. CODE ANN. tit. 7, § 6308 (2001).

²⁶⁰ DEL. CODE ANN. tit. 7, § 6309(a) (2001).

²⁶¹ DEL. CODE ANN. tit. 7, § 6309(b) (2001).

²⁶² DEL. CODE ANN. tit. 7, § 6309(a) (2001).

²⁶³ DEL. CODE ANN. tit. 7, § 6309(c) (2001).

²⁶⁴ DEL. CODE ANN. tit. 7, §§ 6309(d - e) (2001).

²⁶⁵ DEL. CODE ANN. tit. 7, § 6309(f) (2001).

(\$25,000.00), imprisonment up to one (1) year, or both. Superior Court has jurisdiction of these offenses.²⁶⁶

Penalties increase to felony charges for more serious offenses that include dumping, discharging, abandoning, or disposing hazardous waste into any place other than an authorized hazardous waste facility with a valid permit. More serious violations also include transporting hazardous waste for treatment, storage, or disposal to any place other than a currently permitted facility or authorizing, directing, or participating in any dumping or transporting offense. These more serious violations subject the violator to fines up to fifty thousand dollars (\$50,000.00), imprisonment up to two (2) years, or both.²⁶⁷

The most serious penalties are imposed for violations which include knowingly transporting, treating, storing, exporting, or otherwise disposing hazardous waste that would constitute a more serious violation while knowing at the time that the violation places another person in imminent danger of death or serious bodily injury. These violations result in felony charges, fines up to one hundred thousand dollars (\$100,000.00), imprisonment up to five (5) years, or both.

False statements, false representation, or false certification in any application, record, report, plan, manifest, label, or other document filed or required to be maintained by hazardous waste statutes and related rules, regulations, order, permit, or facility approval and falsification or tampering with any monitoring device or method subject the violator to fines up to twenty-five thousand dollars (\$25,000.00), imprisonment up to one (1) year, or both. Subsequent violations escalate up to fifty thousand dollars (\$50,000.00), imprisonment up to two (2) years, or both. The Superior Court has jurisdiction of these offenses.²⁶⁸

Whenever the DNREC determines that a hazardous waste release into the environment has occurred or is occurring, the DNREC may:

- Issue an order for corrective action or any response action or measure deemed necessary to protect human health or the environment; this order may include a suspension or revocation of authorization to operate; the order must, however, state with reasonable specificity the nature of the required corrective action or response measure and state a specific time for compliance;²⁶⁹ or

²⁶⁶ DEL. CODE ANN. tit. 7, § 6309(g) (2001).

²⁶⁷ DEL. CODE ANN. tit. 7, § 6309(h) (2001).

²⁶⁸ DEL. CODE ANN. tit. 7, § 6309(j) (2001).

²⁶⁹ Failure to comply with the order may subject the person named to be liable to the DNREC for a civil penalty up to twenty-five thousand dollars (\$25,000.00) for each day of noncompliance with the order; *see* DEL. CODE ANN. tit. 7, § 6309(m) (2001).

- Commence a civil action in the Superior Court or Court of Chancery for appropriate relief including a temporary or permanent injunction.²⁷⁰

e. Hazardous Waste Inspections

The DNREC has authority at any reasonable time upon presentation of appropriate credentials to enter any place or conveyance where hazardous wastes are generated, stored, transported, treated, or disposed to develop or to enforce any hazardous waste statute or related regulation, permit, or requirement or to inspect and obtain samples of wastes, any containers of waste, and labeling of wastes. Receipts are given for samples taken, and upon request a portion of each sample equal in volume or weight to the portion taken are given to the owner, operator, or agent in charge. Copies of any analysis performed must be promptly furnished as well. A warrant to enter, inspect, sample, or copy records may be sought if the DNREC are prevented from these actions. Injuries or damages sustained by DNREC personnel while on such premises does not present the right to file a cause of action against the owner, operator, or occupier unless such injuries or damages were caused by the willful or wanton disregard of the rights of others.²⁷¹ It is unlawful to obstruct, hinder, delay, or interfere with the performance of DNREC with any duty under hazardous waste statute or related regulation, order, permit, or decision issued.²⁷²

f. Waste-end Assessments

The DNREC is authorized to impose and collect assessments called waste-end assessments up to forty thousand dollars (\$40,000.00) regardless of the number of facilities where hazardous waste is generated, treated, stored, or disposed. The annual assessment payments calculated on a per ton basis but excludes resource recovery amounts must be paid to the DNREC by October 1 of each year. These assessments are used to carry out the purposes of hazardous waste statutes. Assessments not paid voluntarily are subject to a fifteen percent (15%) penalty. The Superior Court of the State has jurisdiction over action to collect assessments and penalties.²⁷³

Any person whose interest is substantially affected by any action of the DNREC may appeal to the EAB.²⁷⁴ Public hearing are held on any permit application, revocation, or appeal to

²⁷⁰ DEL. CODE ANN. tit. 7, § 6309(m) (2001).

²⁷¹ DEL. CODE ANN. tit. 7, § 6310 (2001).

²⁷² DEL. CODE ANN. tit. 7, § 6315 (2001).

²⁷³ DEL. CODE ANN. tit. 7, § 6319 (2001).

²⁷⁴ DEL. CODE ANN. tit. 7, § 6313 (2001).

the EAB, or any regulation or variance request.²⁷⁵ Variances and temporary emergency variances may be granted by the DNREC from hazardous waste regulation, permit condition, or transfer facility approval provided it is not inconsistent with the RCRA and is consistent or substantially equivalent to state programs.²⁷⁶

g. Extremely Hazardous Substances Risk Management Act

The state of Delaware recognizes a need to educate the public about extremely hazardous substances (EHSs) to minimize the probability of catastrophic events²⁷⁷ and address the potential exposure from accidental releases of EHS. The purpose of the Extremely Hazardous Substances Risk Management Act (EHSRMA)²⁷⁸ is to protect the lives and health of citizens living and working in the vicinity of facilities with EHSs. The focus of the legislation is on the prevention of sudden releases of EHSs and resulting pressure waves and thermal exposures that could occur beyond the property boundaries of the facility and on catastrophic health consequences caused by short-term exposures to EHSs. The EHSRMA directs persons responsible for EHSs to take all feasible actions to minimize the probability of catastrophic events.²⁷⁹ The EHSRMA requires a risk management plan for each ESH site to be submitted and reviewed for DNREC approval.²⁸⁰

h. Hazardous Substance Cleanups

The Delaware General Assembly recognizes the need to require prompt containment and removal of hazardous substances. The legislation that addresses the need, the risk, and the funding to carry out the cleanup of hazardous substances is known as the Delaware Hazardous Substance Cleanup Act (HSCA).²⁸¹ The HSCA establishes standards of liability with respect to a facility from which there is or has been a release or imminent threat of release. That liability includes:

²⁷⁵ DEL. CODE ANN. tit. 7, § 6312 (2001).

²⁷⁶ DEL. CODE ANN. tit. 7, § 6314 (2001).

²⁷⁷ The term “catastrophic event” means a sudden release of a sufficient quantity of an EHS, a pressure wave, or a thermal exposure beyond the property boundaries of a facility which may cause death or permanent disability to a person because of a single short-term exposure. In this definition, an accidental fire at a nonregulated facility is excluded from consideration as a catastrophic event creating EHS; *see* DEL. CODE ANN. tit. 7, § 7705(2) (2001).

²⁷⁸ DEL. CODE ANN. tit. 7, §§ 7701 to 7717 (2001). The U.S. Congress authorized the U.S. EPA and the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) to develop similar federal requirements in the Clean Air Act (CAA); OSHA promulgated its standard in 1992, and EPA, on 1994 and 1996; the CAA allows EPA to delegate its federal authority for Accidental Release Requirement to a state agency; *see* DEL. CODE ANN. tit. 7, § 7702 (2001).

²⁷⁹ DEL. CODE ANN. tit. 7, § 7703 (2001).

²⁸⁰ DEL. CODE ANN. tit. 7, § 7704 (2001).

²⁸¹ DEL. CODE ANN. tit. 7, §§ 9102 to 9120 (2001).

- Any person who owned or operated the facility at any time;
- Any person who owned or possessed a hazardous substance;
- Any person who arranged with a transporter for transport, disposal, or treatment of a hazardous substance to the facility;
- Any person who generated, disposed, or treated a hazardous substance at the facility;
- Any person who accepted any hazardous substance for transport to the facility when the facility was selected by the transporter; and
- Any person who is responsible in any other manner for a release or imminent threat of release.²⁸²

Liability for releases of hazardous substances is strictly liable, jointly and severally for all costs associated with a release from a facility and for all natural resource damages resulting from the release. The DNREC may recover all costs and damages from all responsible parties including interest on the amounts recoverable.²⁸³ However, liability is not assigned if:

- A responsible person can establish that the release or imminent threat of release was caused solely by an act of God, an act of war; or an act or omission of a third party other than:
 - An employee or agent of the person asserting the defense or
 - Any person whose act or omission occurs in connection with a contractual relationship with the person asserting the defense to the liability and provided that the person asserting the defense has exercised due care;
- Any person who is an operator, past operator, owner, or past owner of a facility and who can establish that at the time the person had no knowledge or reason to know of any release or imminent threat of release; and
- A person who acquires ownership or control of a property to realize on a security interest held by the person in that property or a fiduciary which has legal title to

²⁸² DEL. CODE ANN. tit. 7, § 9105(a) (2001).

²⁸³ DEL. CODE ANN. tit. 7, § 9105(b) (2001).

and manages any property for purposes of administering an estate or trust of which the property is part.²⁸⁴

Any person who expends moneys performing a remedy or any remedial action may bring an action against any responsible party provided the person has not entered into a settlement agreement with the DNREC.²⁸⁵ After the DNREC issues a certification of completion of remedy, liability for the release or imminent threat of release and any future release ends provided the person does not interfere with any aspect of the remedy as it relates to the certification.²⁸⁶ An exemption also applies to any person in connection with the sale, lease, acquisition, or transfer of a facility who enters into a settlement agreement with the DNREC for a remedy provided the remedy is satisfactorily conducted.²⁸⁷

V. PESTICIDES AND CHEMIGATION

Producer Note: Use of pesticides and other farm chemicals is regulated by federal and state statutes plus most states have some form of pesticide licensing or certification requirements controlling those who use pesticides. Additionally, most states including Delaware have laws that address safety concerns about pesticide use by agricultural employees or around agricultural employees.

A. Delaware Pesticide Laws

1. Delaware Pesticides

Delaware governs pesticides²⁸⁸ and their use for several reasons including:

- For the best interest of overall public welfare;
- To protect the consumer;

²⁸⁴ DEL. CODE ANN. tit. 7, § 9105(c) (2001).

²⁸⁵ DEL. CODE ANN. tit. 7, § 9105(d) (2001).

²⁸⁶ DEL. CODE ANN. tit. 7, § 9105(e) (2001).

²⁸⁷ DEL. CODE ANN. tit. 7, § 9105(f) (2001).

²⁸⁸ The term “pesticide” means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest or any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant; *see* DEL. CODE ANN. tit. 3, § 1202(27) (2001).

- To restrict the use of pesticides that are found to be hazardous to man or the environment.²⁸⁹

a. Pesticide Registration

Delaware regulates the sale and or use of pesticides and related devices and requires that they be properly registered with the Delaware Department of Agriculture (DA). Registration includes a biennial registration fee.²⁹⁰ The DA has authority to adopt regulations for the application of pesticides relating to the time, place, manner, materials, amounts, and concentrations including restriction or prohibition in designated areas and encompassing all reasonable factors the DA deems necessary to prevent damage or injury by drift or misapplication to plants, wildlife, fish and other aquatic life, humans, animals, or beneficial insects.²⁹¹

A registration application is filed with the DA. The application must include information to allow the DA to determine the:

- Pesticide composition warrants the proposed claim;
- Pesticide labeling and other material comply with pesticide statutes;
- Pesticide will perform its intended function without unreasonable adverse effects on the environment;
- Pesticide use, when it is used in accordance with widespread and commonly recognized practice, will not generally cause unreasonable adverse effects upon the environment;
- Pesticide classification for general or restricted use is in conformity with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA);²⁹² and
- Pesticide meets a special local need.²⁹³

The registration of a pesticide may be revoked by the DA. The DA, however, must first provide due notice to the registrant and an opportunity for a hearing. A person affected by the

²⁸⁹ DEL. CODE ANN. tit. 3, § 1201 (2001).

²⁹⁰ The fee must not exceed seventy dollars (\$70.00); *see* DEL. CODE ANN. tit. 3, § 1203(a) (2001).

²⁹¹ DEL. CODE ANN. tit. 3, § 1203(b) (2001).

²⁹² 7 U.S.C. § 136a(d) (2001).

²⁹³ DEL. CODE ANN. tit. 3, § 1204(c) (2001).

proposed revocation may request a hearing before the DA.²⁹⁴ Registration may be revoked for the following reasons:

- If the pesticide or its labeling does not comply with state pesticide statutes and related regulations;
- To prevent unreasonable adverse effects on the environment.²⁹⁵

The DA may suspend the registration of any pesticide pending the completion of revocation proceedings if the continued use of a pesticide during the time required for revocation proceedings would be likely to result in the unreasonable adverse effects on the environment. A revocation order must be issued with the suspension order so that the hearing procedure may be initiated. If no request for a hearing is made within thirty (30) days of the suspension order, the revocation order becomes effective, and the registration is revoked.²⁹⁶

b. Restricted Pesticides

The DA promulgates regulations to establish and enforce standards for the certification of pesticide applicators. The standards relate to the use and handling of pesticides or class of pesticides covered by the individual's certification and the hazards involved. Characteristics considered include:

- The acute mammalian toxicity;
- The persistence, mobility, and susceptibility to biological concentration;
- The use experience which could expose either an inherent misuse or an unexpected good safety record which does not always follow laboratory toxicological information;
- The relative hazards of patterns of use such as granular soil applications, ultra low volume or aerial dust applications, or air blast sprayer applications; and
- The extent of intended use.²⁹⁷

²⁹⁴ The hearing must be held within thirty (30) days after the request, and the DA decision to affirm, withdraw, or modify its action by its order based upon the record of the hearing must be issued within thirty (30) days after the hearing; an appeal of the DA order may be taken to the Superior Court within thirty (30) days of the date of the DA order; *see* DEL. CODE ANN. tit. 3, § 1205(a) (2001).

²⁹⁵ DEL. CODE ANN. tit. 3, § 1205(a) (2001).

²⁹⁶ DEL. CODE ANN. tit. 3, § 1205(b) (2001).

²⁹⁷ DEL. CODE ANN. tit. 3, § 1217(a) (2001). The DA must adopt by DA regulation the U.S. EPA certification standards; *Id.*

The DA has authority to determine state restricted pesticide use,²⁹⁸ restricted-use pesticide classifications, and to require a permit for possession and application for such pesticides. DA pesticide regulations may only be adopted after a public hearing which follows due notice to the public. The DA must also give consideration to research and other reliable sources of information including other agencies, state and federal.²⁹⁹

c. Pesticide Licensing

Persons engaged in the business of applying pesticides to lands or personal property of another must be licensed by the DA, and the person must also be a certified applicator or employ a certified applicator and meet the experience requirement. Private applicators are not required to be licensed.³⁰⁰

The DA provides a program for registration of noncertified individuals employed by licensees. A fee up to twenty-five dollars (\$25.00) may be charged for each registrant in the registration program although no fee is required from certified commercial applicators holding a valid certificate.³⁰¹

The DA is authorized to require licensees or certified commercial applicators to maintain records of pesticide application and other relevant information the DA may deem is necessary through its regulations. The DA may also require the pesticide licensee to maintain records of pesticide applications of certain state restricted pesticide uses. The time period for maintain records is a period of two (2) years from the pesticide application date. DA records are made available for inspection to the licensee or certified applicator upon written request to the DA.³⁰²

d. Pesticide Enforcement

The DA has authority to enter any public premises and private premises upon the written approval of the occupier of the premises to:

²⁹⁸ The term “state restricted pesticide use” means any pesticide use which when used as directed or in accordance with a widespread and commonly recognized practice that the DA determines subsequent to a hearing that requires additional restrictions to prevent unreasonable adverse effects on the environment; *see* DEL. CODE ANN. tit. 3, § 1203(31) (2001).

²⁹⁹ DEL. CODE ANN. tit. 3, §§ 1203(c - e) (2001).

³⁰⁰ DEL. CODE ANN. tit. 3, § 1206(a) (2001).

³⁰¹ DEL. CODE ANN. tit. 3, § 1212 (2001).

³⁰² DEL. CODE ANN. tit. 3, § 1234 (2001).

- Inspect and sample lands exposed or reported exposed to pesticides;
- Inspect storage or disposal areas;
- Inspect or investigate complaints of injury to humans or land;
- Sample pesticides being applied or to be applied;
- Observe the use of a restricted-use pesticide or state restricted pesticide use;
- Inspect books and records relating to the shipment, sale, or use of pesticides; or
- Sample pesticides being held for sale or distribution.³⁰³

When the DA has reasonable cause to believe a pesticide or device is being distributed or used in violation of pesticide provisions or related regulations, it may issue and serve a written stop sale, use, or removal order upon the owner or custodian. Until the DA releases the pesticide or device in writing, it cannot be sold, used, or removed unless the violation has been otherwise disposed by a court of competent jurisdiction. The owner or custodian of any pesticide or device involved in a stop sale, use, or removal order may request a hearing to demonstrate compliance. The hearing is scheduled within fifteen (15) days of the request. The burden is on the owner or custodian to show compliance. Any appeal of the DA decision is brought before the Superior Court on the established record.³⁰⁴

Upon approval of the pesticide provisions by the U.S. EPA, the Delaware DA will enforce the pesticide provisions in lieu of the DA and establish related regulations. The adoption of regulations must follow due notice and a public hearing. Due notice must be provided at least ten (10) days prior to the scheduled public hearing and consist of publication in newspapers of general circulation or a registered letter to the PAC. Notice may be sent to representative of pesticide application trade associations.³⁰⁵

The DA may obtain assistance in the implementation of pesticide provisions, secure uniformity of regulations, cooperate in the enforcement of federal pesticide control laws using state and federal personnel and facilities to implement cooperative enforcement programs, develop and administer state plans for training and for certification, contract with other agencies for training certified applicators, contract for monitoring pesticides for the national plan, prepare and submit state plans to meet federal certification standards, and regulate certified applicators.³⁰⁶ The DA may cooperate with the University of Delaware, Delaware State

³⁰³ DEL. CODE ANN. tit. 3, § 1226(a) (2001).

³⁰⁴ DEL. CODE ANN. tit. 3, § 1236 (2001).

³⁰⁵ DEL. CODE ANN. tit. 3, § 1237 (2001).

³⁰⁶ DEL. CODE ANN. tit. 3, § 1238 (2001).

University, and other educational institutions or trade associations to publish information and conduct short courses of instruction in areas of knowledge required for pesticide provisions.³⁰⁷

The DA is authorized to apply to a court of competent jurisdiction to obtain a warrant if necessary to gain access to any land the DA is denied access for the purpose of performing its duty under pesticide provisions.³⁰⁸ Pesticides and devices distributed in Delaware are subject to forfeiture and DA seizure through its application to the Superior Court in the county where pesticides or devices are located. The court must order forfeiture without compensation to the possessor or owner if a pesticide is adulterated or misbranded; is not registered; fails to bear the proper label or label information; or is a white powder pesticide not colored as required or if a pesticide device is misbranded.³⁰⁹ Following the court's decree, forfeited or condemned pesticides or devices are disposed by destruction or sale. Proceeds of any sale are deposited by the DA, less legal costs, to the general fund.³¹⁰ DA costs, fees, storage, and other proper expenses are awarded against the owner.³¹¹

The DA has power to issue an order to cease and desist to any person violating any statute or related rule, regulation, or order. The order expires after thirty (30) days from its issuance or upon DA withdrawal or when it is superceded by an injunction whichever occurs first.³¹² Various classifications of licensing exist and include:

- Pest control operators and ornamental applications;³¹³
- Agricultural applications;
- Right-of-way applications.³¹⁴

³⁰⁷ DEL. CODE ANN. tit. 3, § 1239 (2001).

³⁰⁸ DEL. CODE ANN. tit. 3, § 1226(b) (2001).

³⁰⁹ DEL. CODE ANN. tit. 3, § 1227(a) (2001).

³¹⁰ Following forfeiture, upon payment of costs and execution plus delivery of a good and sufficient bond stating that the pesticide or device will not be disposed unlawfully, the DA may direct that the pesticide or device be returned to the owner for labeling or reprocessing; *see* DEL. CODE ANN. tit. 3, § 1227(b) (2001).

³¹¹ DEL. CODE ANN. tit. 3, § 1227(c) (2001).

³¹² DEL. CODE ANN. tit. 3, § 1203(i) (2001).

³¹³ Licensing and licensing requirements do not relate to research personnel applying pesticides to bona fide experimental plots; persons applying pesticides to turf or ornamental plants and others as determined by the DA are exempted from the experience requirements; *see* DEL. CODE ANN. tit. 3, § 1211.

³¹⁴ DEL. CODE ANN. tit. 3, § 1206(b) (2001).

Subclassifications of the above may also be specified as to ground, aerial, or manual methods. Although a licensing fee is required, no additional fees are assessed for multiple category licensing.³¹⁵ The licensing fee for a one (1) year license is fifty dollars (\$50.00) or one hundred dollars (\$100.00) for a license valid for two (2) years. License renewals not filed prior to January 1 of any year are penalized an additional twenty percent (20%) of the licensing fee.³¹⁶ Licenses may be withheld from any person who has committed any unlawful acts.³¹⁷

Licenses are limited to the classifications of pesticide use for which an applicant is qualified. To be qualified, the applicant must be certified for the pesticide use classification or employ an individual who is certified. Certification includes:

- A minimum of two (2) years of practical experience³¹⁸ under the supervision of a certified applicator;
- Proper proof of financial responsibility;³¹⁹ and
- Fulfillment of all Federal Aviation Administration requirements and any other federal or state laws or regulations if the applicant is applying for a license for aerial application.³²⁰

Certification exists to prevent unreasonable adverse effects on the environment including injury to users of pesticides and others. Use of restricted-use pesticides requires DA certification or supervision by a DA certified applicator. An applicant for certification must be at least eighteen (18) years old.³²¹

³¹⁵ DEL. CODE ANN. tit. 3, § 1206(b) (2001).

³¹⁶ DEL. CODE ANN. tit. 3, § 1207(e) (2001). All licenses become invalid after December 31 of the year the license expires; however, a renewal application submitted by November 30 remains in full force and effect until the DA gives written notice of denial; *see* DEL. CODE ANN. tit. 3, § 1210 (2001)

³¹⁷ DEL. CODE ANN. tit. 3, § 1208(b) (2001).

³¹⁸ During the previous three (3) year period.

³¹⁹ Financial responsibility may consist of either a surety bond or a liability insurance policy or certification; the DA sets the necessary amount of financial responsibility according to the type of pesticide activity that will be engaged; the DA may determine the financial requirements after due notice and a hearing; *see* DEL. CODE ANN. tit. 3, § 1208 (2001).

³²⁰ DEL. CODE ANN. tit. 3, §§ 1207(a - c) (2001). The DA has the discretion to limit a license to certain pesticides, areas, or types of equipment if the applicant's qualifications are in its determination limited but must provide written notice to the applicant if its license issuance differs from the application; *see* DEL. CODE ANN. tit. 3, § 1207(d) (2001).

³²¹ DEL. CODE ANN. tit. 3, § 1216 (2001).

The DA may suspend or modify any pesticide license granted when it has reasonable grounds to believe that the licensee is responsible for any unlawful acts related to pesticide statutes and related rules, regulations, orders, licenses, and certifications. The DA must provide notice³²² to the licensee stating the time and place of the hearing to be conducted on the determination of the matter. The DA may revoke a license if it finds that the licensee has committed any unlawful act related to pesticide provisions.

e. Pesticide Permitting

Use of pesticides designated as state restricted-use pesticides requires a DA permit. Sale of restricted-use pesticides requires a dealer permit. Annual permits are granted to purchase and/or use a restricted-use pesticide with restrictions as the DA finds is necessary to protect the overall public interest and welfare. The permit may specify the area, time, amount, rate of application, or other conditions of use.³²³ The DA may charge a fee for a permit.³²⁴ The DA also has authority, following due notice and public hearings, to promulgate rules, regulations, and fees as necessary to carry out Delaware's pesticide statutes. Appeal of DA pesticide regulatory decisions are before the Superior Court provided the appeal is brought within thirty (30) days of the date of the order of decision.³²⁵

Experimental permits may be issued to accumulate information necessary to register a pesticide. Such permits are filed before, at the time of, or after an application for pesticide registration. Experimental permits may have prescribed terms, conditions, and time periods ascertained by the DA that delineate the validity of authorized pesticide use. The DA has authority to revoke or modify any experimental use permit at any time if it finds that permit terms or conditions are being violated or are inadequate to avoid unreasonable adverse effects on the environment.³²⁶ The DA provides written notice to permit holders by October 1 for renewals and denials.³²⁷

The DA has authority to deny a permit if it finds after a hearing that the denial would serve the public's interest. The DA may revoke a permit after due notice to the permit holder if it finds that the holder has violated pesticide provisions or if an emergency creates a clear and present danger to the overall public interest and welfare from the pesticide uses authorized by the

³²² Notice is personal notice or notice by registered mail to the licensee's place of business or last known address within ten (10) days prior to the proposed hearing; *see* DEL. CODE ANN. tit. 3, § 1209(a) (2001).

³²³ DEL. CODE ANN. tit. 3, §§ 1214(a - b) (2001).

³²⁴ DEL. CODE ANN. tit. 3, § 1214(d) (2001).

³²⁵ DEL. CODE ANN. tit. 3, § 1214(c) (2001).

³²⁶ DEL. CODE ANN. tit. 3, § 1214(e) (2001).

³²⁷ DEL. CODE ANN. tit. 3, § 1214(f) (2001).

permit. A holder whose permit was denied or revoked may request a DA hearing. The hearing must be held within thirty (30) days after the request, and within thirty (30) days of the hearing, the DA must affirm, withdraw, or modify its earlier action by an order based upon the record from the hearing. An appeal of the DA order is brought before the Superior Court provided it is filed within thirty (30) days of the date of the DA order.³²⁸

The DA may require the reporting of pesticide accidents or incidents. Any person claiming damage from a pesticide application must file a written statement describing the damage within sixty (60) days after the date that the damage occurred except that growing crop damage claims must be filed prior to the time that twenty-five percent (25%) of the crop is harvested. Claims must include the name of the person allegedly responsible for the pesticide application, if known, the name of the owner or lessee of the land on which the damaged crop is grown, and the date the alleged damage occurred.³²⁹

f. Civil Penalties

Violators are subject to civil penalties up to two thousand five hundred dollars (\$2,500.00)³³⁰ for each pesticide related offense unless the violator is a private applicator. Private applicator violations are only subject to civil penalties up to five hundred dollars (\$500.00) for each pesticide related offense. However, no civil penalty may be assessed unless the alleged violator is given notice and an opportunity for a hearing on the matter. In determining the civil penalty, the DA may consider the gravity of the violation and the appropriateness of the penalty in comparison to the person's ability to continue in business.³³¹

³²⁸ DEL. CODE ANN. tit. 3, § 1214(g) (2001).

³²⁹ DEL. CODE ANN. tit. 3, §§ 1233(a - b) (2001). Upon receipt of a written damage statement, the DA must notify the pesticide licensee and owner or lessee of the land and furnish copies of the damage statement; the DA must inspect reported damages whenever possible and the complaint has sufficient merit; the DA also makes this information available to the person who is alleged to have caused the damage; *Id.* The filing of a written damage statement need not be alleged in any complaint filed in a court of law, and the failure to file the report is not a bar to any criminal or civil action; *see* DEL. CODE ANN. tit. 3, § 1233(c) (2001). The claimant must allow the DA, the licensee and representatives including bondsman or insurer to observe within reasonable hours the lands or nontarget organisms alleged to have been damaged in order to examine the reported damage; failure of the claimant to allow such observation and examination of damaged lands automatically bars the claim against the pesticide licensee; *see* DEL. CODE ANN. tit. 3, § 1233(d) (2001).

³³⁰ Private applicators are exempt.

³³¹ The DA may consider whether the violation occurred despite the exercise of due care or that the violation did not cause significant harm to health or the environment; the DA may refer the matter to the attorney general to collect the civil penalty in a legal action in the appropriate court; *see* DEL. CODE ANN. tit. 3, § 1225(a) (2001). Civil penalties do not apply to any carrier lawfully engaged in transporting a pesticide or device within Delaware if the carrier allows the DA to copy all records of transaction in and movement of the pesticide or device, any person who prepares or packs any pesticide or device intended solely for export to a foreign country according to the specifications or directions of the purchasers, the manufacture or shipper of a pesticide for experimental use under the supervision of a state agency or the federal government properly authorized to conduct research with pesticides

g. Criminal Penalties

Certain unlawful acts or conduct related to pesticides and their use constitute criminal acts and are subject to criminal penalties. Justices of the Peace Courts and the Court of Common Pleas have concurrent jurisdiction.³³² The following acts are considered class A misdemeanors:

- Making a pesticide recommendation, use, or application inconsistent with the labeling, U.S. EPA or state restrictions following a prior offense;
- Making false or fraudulent records, invoices, or reports;
- Engaging in the business of applying a pesticide on the lands of another without having a DA license;
- Applying a restricted-use pesticide without a certified applicator providing direct supervision;
- Using fraud or misrepresentation in making an application or renewal of a license, permit, or certification;
- Aiding or abetting a licensed or an unlicensed person to evade pesticide provisions, conspiring to evade pesticide provisions, or allowing one's license, permit, or certification to be used by another person;
- Distributing, selling, or offering for sale within Delaware:
 - Any pesticide unless it is in the manufacturer's or registrant's unbroken immediate container which has visibly affixed an U.S. EPA approved or DA approved label;
 - Any pesticide which is adulterated, unbranded, or misbranded; or
 - Any pesticide container which is misbranded or unbranded;
- Detaching, altering, defacing, or destroying any label prior to purchase by the ultimate consumer or to add or take any substance from a pesticide in a manner that may defeat the purpose of pesticide provisions;

or if the pesticide is not sold and the container is plainly and conspicuously marked "for experimental use only, not to be sold," plus the manufacturer's name and address provided that if a DA experimental permit has been obtained, pesticides may be sold as set forth in the permit; *see* DEL. CODE ANN. tit. 3, § 1225(b) (2001).

³³² DEL. CODE ANN. tit. 3, § 1224(d) (2001).

- Using for one's own advantage any information relative to formulas acquired through DA authority; or
- Neglecting or refusing to comply with the provisions of pesticide statutes after notice is provided.³³³

The following acts constitute class B misdemeanors:

- The first offense of making a pesticide recommendation, use, or application inconsistent with the labeling, U.S. EPA, or state restrictions;
- Refusing or neglecting to comply with any limitations or restrictions on or in a duly licensed, permit, or certification;
- Distributing, selling, offering for sale within Delaware any pesticide required to be colored or colorless unless it is so colored or colorless;
- The use of fraud or misrepresentation in connection with the application of pesticides.³³⁴

The following acts involving pesticides constitute a class C misdemeanor:

- Operating in a faulty, careless, or negligent manner;
- Refusing or neglecting to keep and maintain pesticide records and reports as required;
- Purchasing or using a restricted-use pesticide except in accordance with a duly issued DA certification;
- Selling or offering to sell a pesticide designated for state restricted pesticide use except in accordance with a DA permit;
- Engaging in the business of applying pesticides to the lands of another without financial security as required;
- Distributing, selling, or offering for sale within Delaware any pesticide:

³³³ DEL. CODE ANN. tit. 3, § 1224(a) (2001).

³³⁴ 3 § 1224(b) (2001).

- Not properly registered;
- If its claims or directions for use differ in substance from the representations made in its registration; or
- If the pesticide composition differs from that represented in its registration;³³⁵ or
- Selling or offering to sell a restricted-use pesticide or a state restricted-use pesticide without a duly issued dealer permit.³³⁶

2. *Pesticide Advisory Committee*

A pesticide advisory committee (PAC) exists to advise the DA on problems relating to the sale, use, disposal, and storage of pesticides within the state.³³⁷ The PAC consists of members appointed by the governor including four (4) pesticide applicators, one (1) entomologist, one (1) health specialist, one (1) toxicologist, one (1) plant pathologist, one (1) representative of each of the following: the agricultural chemical industry, the food processing industry, producer of agricultural crops or products where pesticides are applied or which may be affected by pesticide application, plus two (2) representatives of the DA.³³⁸

VI. PROTECTION OF WILDLIFE

Producer Note: Agricultural producers have responsibilities concerning wildlife and migratory birds which may have habitat on the producer's property. Federal and state laws contain measures designed to protect or enhance wildlife and wildlife habitat.

Producer Note: Many states have laws and regulations that either enhance the protections under federal laws or address issues peculiar to wildlife found within the state. States also may address frequent problems caused by wildlife. Delaware has laws and regulations protecting wildlife.

³³⁵ However, it is in the discretion of the DA to make a labeling or formula change within a registration period without requiring reregistration; *see* DEL. CODE ANN. tit. 3, § 1224(c)(8) (2001).

³³⁶ DEL. CODE ANN. tit. 3, § 1224(c) (2001).

³³⁷ DEL. CODE ANN. tit. 3, § 1230 (2001).

³³⁸ DEL. CODE ANN. tit. 3, § 1229 (2001).

A. Delaware Protected Wildlife Laws

The DNREC is given the duty to:

- Protect, manage, and conserve all forms of protected wildlife in the state;
- Enforce wildlife laws;
- Authorize wildlife studies that are necessary to carry out DNREC work;
- Collect, classify, and preserve statistics, data, and information that in its discretions will promote the objectives of wildlife legislation.³³⁹

The DNREC employ Fish and Wildlife agents who have the power to make arrests as needed to enforce wildlife provisions and related rules and regulations. Fish and Wildlife Agents may search and examine without warrant any person, conveyance, vehicle, game bag, game coat, or other receptacle for protected wildlife. In the presence of an occupant of any camp or tent, the agent may search and examine, without warrant, for protected wildlife when the agent has reason to believe that wildlife laws have been violated and has stated the reason. The agent may seize and possess (take) any protected wildlife illegally discovered in possession.³⁴⁰

The DNREC issues licenses and collects all fees for licenses³⁴¹ along with fines and forfeitures imposed for violations of the game and fish laws and makes arrests with and, in specific instances, without the necessity of warrants.³⁴² The DNREC has authority to promulgate rules and regulations as well as make expenditures³⁴³ necessary to:

³³⁹ DEL. CODE ANN. tit. 7, § 102(a) (2001).

³⁴⁰ A Fish and Wildlife agent does not have authority to enter a dwelling house without a search warrant; *see* DEL. CODE ANN. tit. 7, § 111 (2001).

³⁴¹ License fees for hunting and trapping are deposited and retained until expended upon proper vouchers for matching money and securing money allotted to Delaware by acts of the U.S. Congress, 16 U.S.C. § 777 *et seq.* (2000) and expended upon the fish and wildlife resources of Delaware to manage fish and wildlife resources according to federal guidelines; *see* DEL. CODE ANN. tit. 7, § 107 (2001). License fees for fishing are earmarked for matching money and securing money under the Dingell-Johnson Act, 16 U.S.C. § 777 *et seq.* (1994) and any balance remaining is expended by the DNREC for coordinated fish and wildlife management projects; *see* DEL. CODE ANN. tit. 7, § 108 (2001). Other funds not exempted are deposited into the general fund of the state; *see* DEL. CODE ANN. tit. 7, § 109 (2001).

³⁴² DEL. CODE ANN. tit. 7, §§ 102(b - c) (2001).

³⁴³ After investigation and a public hearing to assure the conservation of wildlife and freshwater fish and the maintenance of an adequate supply or to limit the supply when conditions warrant; *see* DEL. CODE ANN. tit. 7, § 103(a)(1) (2001).

- Fix and regulate seasons;
- Fix and regulate bag limit on any species of protected wildlife or freshwater fish;³⁴⁴
- Establish and close wildlife refuges or any lake, stream, or pond to hunting,³⁴⁵ trapping, and/or fishing to conserve any species of wildlife or fish;
- Acquire marshes or waters to:
 - Provide fish nursery ponds and game farms;
 - Provide lands or waters suitable for upland game, waterfowl, fish, or fur-bearing animal propagation and protection;
 - Provide public hunting, fishing, or other recreational grounds or waters;
 - Extend and consolidate lands, marshes, or waters by exchange of other lands or waters;
 - Capture, propagate, transport, buy, or exchange any species of protected wildlife needed for stocking any lands, marshes, or waters.³⁴⁶

The DNREC cooperates and performs acts necessary to conduct cooperative wildlife restoration projects and fish restoration projects as directed by the U.S. Congress and the Secretary of the Interior.³⁴⁷

³⁴⁴ Except muskrat in specified localities.

³⁴⁵ The term “hunting” means chasing, pursuing, killing, trapping, or taking or attempting to chase, pursue, kill, trap, or take any form of wild bird or wild animal; *see* DEL. CODE ANN. tit. 7, § 101(6) (2001).

³⁴⁶ DEL. CODE ANN. tit. 7, § 103(a)(2-3) (2001). The DNREC may take any game birds, animals, or fish in season or out of season in any way for strictly propagating and restocking purposes; *see* DEL. CODE ANN. tit. 7, § 115 (2001).

³⁴⁷ An Act to Provide that the United States Shall Aid the States in Wildlife-Restoration Projects, and for Other Purposes, 16 U.S.C. § 669, *et seq.* (2000) and An Act to Provide that the United States Shall Aid the States in Fish-Restoration and Management Projects, and for Other Purposes, 16 U.S. C. § 777 *et seq.* (2000); *see* DEL. CODE ANN. tit. 7, §§ 105 and 106 (2001).

Field trials are held in the state at recognized sportsmen's clubs on liberated game legally possessed under DNREC permit, and the game may be taken by shooting.³⁴⁸

Agricultural producers should note that when information is furnished to the DNREC that any species of protected wildlife becomes, under extraordinary conditions, seriously injurious to agriculture or other interests in any particular community, the DNREC must investigate to determine:

- The nature and extent of the injury; and
- Whether the protected wildlife alleged to be doing damage should be captured or killed.

If capture or killing is warranted, the DNREC must issue an order as to whom should perform the task, by what means, and when.³⁴⁹ Furthermore, if an owner, tenant, or sharecropper informs the DNREC that one (1) or more species of protected wildlife are detrimental to crops, property, or other interests at their residence or on the land they control, the DNREC will investigate the injury when the information provided includes:

- A statement of the location of the land;
- The nature of the crops, property, or interests being damaged or destroyed;
- The extent of the injury; and
- The particular species of protected wildlife committing the injury.³⁵⁰

The DNREC makes a determination of whether the injury complained of is substantial and whether it can be abated only by capturing or killing the protected wildlife or as many wildlife as the DNREC determines is necessary. If capturing or killing is necessary, the DNREC must issue a permit to capture or kill the protected wildlife in any number as it determines is required along with any other restrictions necessary and appropriate in the circumstances of the case.³⁵¹

³⁴⁸ The game taken must immediately tagged for identification with DNREC seals or tags; tagged game may be possessed, transported, bought, and sold at any time, and seals must not be removed until game is finally prepared for consumption; *see* DEL. CODE ANN. tit. 7, § 102(d) (2001).

³⁴⁹ DEL. CODE ANN. tit. 7, § 113 (2001).

³⁵⁰ DEL. CODE ANN. tit. 7, § 114 (2001).

³⁵¹ DEL. CODE ANN. tit. 7, § 114 (2001).

B. Delaware Nongame Wildlife and Habitat Preservation

1. Delaware Nongame Preservation Policy

The state of Delaware believes that it is in the best interest of the state to:

- Preserve and enhance the diversity and abundance of nongame³⁵² fish and wildlife; and
- Protect the habitat and natural areas harboring rare and vanishing species of fish, wildlife, plants, and areas of unusual scientific significance or importance.³⁵³

Furthermore, the state declares that:

- Rare and endangered species are a public trust that requires active, protective management; and
- It is in the broad public interest to preserve and enhance such species.³⁵⁴

Historically fish and wildlife conservation programs have focused on the more recreationally and commercially important species. Consequently, these programs were financed primarily by hunting and fishing license fees and federal assistance. The state policy is that these traditional financing mechanisms are not adequate to meet the needs of all fish and wildlife, and to enable and encourage taxpayers to voluntarily support nongame fish and wildlife, nongame habitat, and natural areas preservation program including rare plants protection through contributions designated on state income tax forms.³⁵⁵

2. Delaware Nongame Preservation Fund

Delaware establishes a special fund to carry out its nongame wildlife and habitat preservation programs. It is known as the Nongame Fish and Wildlife, Nongame Habitat and Natural Areas Preservation Fund of the Treasury of the State. The moneys received are all

³⁵² The term “nongame” is fauna which are not commonly trapped, killed, captured, or consumed for sport or profit; *see* DEL. CODE ANN. tit. 7, § 202(a) (2001).

³⁵³ DEL. CODE ANN. tit. 7, § 201(1) (2001).

³⁵⁴ DEL. CODE ANN. tit. 7, § 201(2) (2001).

³⁵⁵ DEL. CODE ANN. tit. 7, § 201 (4) (2001).

voluntary contributions. The fund is transferred to the DNREC to carry out the objectives of the preservation programs.³⁵⁶

3. *Delaware Endangered Species*

It is unlawful in the state of Delaware to import, transport, possess, or sell any endangered³⁵⁷ species of fish or wildlife or their hides or other parts. It is also unlawful to sell or possess with the intent to sell any article made wholly or in part from the skin, hide, or other parts of any endangered species of fish or wildlife except under a specific license or permit from the Division of Fish and Wildlife of the DNREC.³⁵⁸

No skin or any part of the body of the following species of wild animals may be sold or offered for sale by any individual, firm, corporation, association, or partnership in Delaware:

- All endangered species as designated by the U.S. Department of the Interior;
- Leopard (*panthera pardus*);
- Snow leopard (*unica unica*);
- Clouded leopard (*neofelis nebulosa*);
- Tiger (*panthera tigris*);
- Cheetah (*acinonyx jubatur*);
- Alligators, crocodiles, or caiman;
- Vicuna (*vicugna vicugna*);
- Red wolf (*canis niger*);
- Polar bear (*thalarctos maritimus*); and
- Harp seals (*phoca groenlandica*).³⁵⁹

³⁵⁶ The DNREC must make an annual report to the General Assembly concerning the funding and a summary of projects undertaken; time to time another report, sufficiently descriptive to be concise and informative, is provided to the Delaware State Clearinghouse Committee; the committee may request the DNREC to appear before it to answer related questions; *see* DEL. CODE ANN. tit. 7, § 204 (2001).

³⁵⁷ The term “endangered species” means those species of fish and wildlife designated by the Division of Fish and Wildlife as seriously threatened with extinction including any endangered species so designated by the U.S. Secretary of the Interior; *see* DEL. CODE ANN. tit. 7, § 601 (2001).

³⁵⁸ DEL. CODE ANN. tit. 7, § 601 (2001).

³⁵⁹ DEL. CODE ANN. tit. 7, § 602 (2001).

The Division of Fish and Wildlife may issue a permit for the importation of any species or subspecies of fish or wildlife listed as endangered species for zoological, educational, and scientific purposes and for the propagation of such fish or wildlife in captivity for the preservation of a species unless the importation is prohibited by federal law or regulation.³⁶⁰

4. *Delaware Endangered Species Enforcement*

Any agent or representative of the DNREC or any officer or agent authorized by the Division of Fish and Wildlife or any police officer has authority to execute any warrant in search for and seizure of any goods, merchandise, or wildlife sold or offered for sale in violation of endangered species provisions or any property or item used in connection with a violation. Seized items are held pending court proceedings. Upon conviction, seized goods, merchandise, or wildlife must be forfeited and either offered to a recognized institution for scientific or educational purposes or destroyed.³⁶¹ Violators of endangered species provisions are subject to a class A environmental misdemeanor charge for each offense.³⁶²

5. *Delaware Wild Birds and State Lands*

It is unlawful to catch, kill, have in possession (living or dead), purchase, sell or expose for sale, transport or ship any wild bird other than a game bird, or any part of the plumage, skin or body of any such bird, or any game bird except that expressly allowed by law.³⁶³ Furthermore, it is unlawful to possess or take or needlessly destroy the nests or eggs of any wild bird.³⁶⁴

In Delaware, all state lands including state, county, and municipal parks, unless otherwise provided, are considered state game refuges, and no hunting, injuring, and killing of game is allowed.³⁶⁵

³⁶⁰ The permit may have terms and conditions prescribed to limit or restrict the importation; *see* DEL. CODE ANN. tit. 7, § 604 (2001).

³⁶¹ DEL. CODE ANN. tit. 7, § 603 (2001).

³⁶² DEL. CODE ANN. tit. 7, § 605 (2001).

³⁶³ However, house sparrows, and starlings may be killed; *see* DEL. CODE ANN. tit. 7, § 734 (2001).

³⁶⁴ DEL. CODE ANN. tit. 7, § 735 (2001). Sections 734, 735, and 736 do not apply to a person holding a license to take birds and their nests and eggs for scientific purposes; *see* DEL. CODE ANN. tit. 7, § 737 (2001).

³⁶⁵ Wild duck, wild geese, brant, and snipe on state lands bordering on the Delaware Bay, Atlantic Ocean, Indian River, and Assawoman Bay may be shot and killed during open season; *see* DEL. CODE ANN. tit. 7, §§ 736(a-b) (2001).

6. *Delaware Bald Eagles and Terrapins*

The following acts involving bald eagles are subject to class A environmental misdemeanor charges:

- Disturbing, destroying, or damaging a bald eagle's nest or aerie;
- Shooting, killing, or attempting to kill a bald eagle; or
- Removing or attempting to remove eggs or eaglets from their nest or aerie.³⁶⁶

Taking or destroying terrapin eggs on or near where the water is salt or upon a salt marsh or beach results in class D environmental misdemeanor charges. Possession of eggs is deemed to have taken eggs.³⁶⁷

VII. OTHER DELAWARE STATUTES AFFECTING AGRICULTURE

Producer Note: Many other state statutes have the potential of impacting agricultural operations and their relationship to the environment. The following is a brief discussion of some of these state laws in Delaware.

A. Delaware Soil and Water Conservation Districts

It is the policy of the state to provide for the preservation of the productive power of land and the optimum development and use of certain surface water resources of the state by furthering the conservation, protection, development, and utilization of land and water resources. Impoundment and disposal of water are ways to prevent and to control floodwater and sediment damages which preserves natural resources and promotes their beneficial use. Conservation methods which include controlling floods, preventing impairment of dams and reservoirs, maintaining navigability of rivers and harbors, preserving wildlife, providing recreation development protect the tax base, protect public lands and highways, and protect and promote the health, safety, and general welfare of the people.³⁶⁸

There are three (3) soil and water conservation districts in Delaware, the Kent Conservation District, the New Castle Conservation District, and the Sussex Conservation

³⁶⁶ DEL. CODE ANN. tit. 7, § 739 (2001).

³⁶⁷ Unless the person proves the contrary; *see* DEL. CODE ANN. tit. 7, § 781 (2001).

³⁶⁸ DEL. CODE ANN. tit. 7, § 3901 (2001).

District.³⁶⁹ The DNREC is the agency responsible for the administration of soil and water conservation districts. To carry out its duties, the DNREC:

- Formulates policies and general programs for the prevention of erosion, floodwater, and sediment damages for the conservation, preservation, development, and utilization of the state's soil and water resources; and
- Conducts surveys, investigations, and research related to erosion, floodwater, and sediment damages and to the conservation, protection, development, and utilization of land and water resources and publishes the results;
- Develops comprehensive plans for preventative and control measures and works of improvement;
- Constructs, improves, operates, and maintains necessary structures to fulfill its purposes;
- Maintains tax ditches;
- Utilizes and protects rights-of-way; and
- Cooperates with other state and federal agencies and landowners for the use of the state dredge.³⁷⁰

Each conservation district is organized with a board of supervisors consisting of four (4) elected supervisors with designated farmer or non-farmer member representation plus one (1) to three (2) optional supervisors with designated members representing the court, the county executive, and non-farmer interests. The county agricultural agent serves as secretary but is not allowed a vote.³⁷¹ The conservation district is considered a governmental subdivision of the state and has authority to exercise certain powers as stated above.³⁷² Currently, annual appropriations to the soil and water conservation districts by the general assembly may not exceed seventy-five thousand dollars (\$75,000.00), but whatever the appropriation, the county government is

³⁶⁹ DEL. CODE ANN. tit. 7, § 3903 (2001).

³⁷⁰ DEL. CODE ANN. tit. 7, § 3905 (2001).

³⁷¹ DEL. CODE ANN. tit. 7, § 3906 (2001).

³⁷² DEL. CODE ANN. tit. 7, § 3908 (2001). Any owner of land within the drainage area of the watershed or tax ditch who is aggrieved by a DNREC action may appeal to the Superior Court within thirty (30) days after the date of the DNREC hearing; the sold ground for reversal by the court, without a jury, is 1) abuse of DNREC discretion, 2) infringement of constitutional rights, or 3) impairment of vested rights; *see* DEL. CODE ANN. tit. 7, § 3911 (2001).

required to appropriate a matching dollar amount.³⁷³ The money appropriated must be used by each district to pay its costs including those for personnel required for planning, construction, installation, and maintenance of tax ditches and resource conservation projects.³⁷⁴

B. Delaware Erosion and Sedimentation Control

The state of Delaware has an ongoing and serious problem of the removal of stable ground cover resulting in a decrease in the filtration capacity of soils, i.e., creating impervious areas such as parking lots and roads, that accelerates this problem. Erosion and sediment deposition result in polluted waters which damage resource uses including domestic, agricultural, industrial, recreational, fish, wildlife, and other resource uses. Increased stormwater also increases flood flows and velocities and undermines flood plain management and flood control efforts of downstream communities, reduces groundwater recharge, and threatens public health, welfare, and safety.³⁷⁵ It is the policy of the state to strengthen and extend erosion and sediment control activities and programs through a statewide comprehensive and coordinated management program.³⁷⁶

Having this erosion and sedimentation policy in Delaware, it is unlawful to engage in land disturbing activities without submitting a sediment and stormwater management plan and obtaining a permit before beginning the activity. Even projects which do not alter stormwater runoff may be required to provide water quality enhancement. All approved land disturbing activities must have at least one (1) individual who functions in a responsible personnel capacity.³⁷⁷

Erosion and sedimentation provisions, however, do not apply to agricultural land management practices unless the conservation district or the DNREC determines that the land requires a new or updated soil and water conservation plan and the owner or operator of the land has refused to apply for the development of a plan or to implement a plan developed by a conservation district. Without a waiver, the construction of agricultural structures such as broiler houses, machine sheds, repair shops, and other major buildings must follow the approval of a sediment and stormwater management plan.³⁷⁸ The DNREC develops a state stormwater management plan which takes into consideration both the quantity and quality of water and

³⁷³ DEL. CODE ANN. tit. 7, §§ 3921-22 (2001).

³⁷⁴ DEL. CODE ANN. tit. 7, § 3923 (2001).

³⁷⁵ DEL. CODE ANN. tit. 7, § 4001(a) (2001).

³⁷⁶ DEL. CODE ANN. tit. 7, § 4001(b) (2001).

³⁷⁷ DEL. CODE ANN. tit. 7, § 4003 (2001).

³⁷⁸ Utility projects disturbing less than five thousand (5,000) square feet of land are not subject to these requirements; *see* DEL. CODE ANN. tit. 7, § 4004 (2001).

integrates with the erosion and sediment control program to create a sediment and stormwater program.³⁷⁹

If the conservation district, or state, county, or municipality agency has failed to implement program elements the DNREC has delegated, the DNREC provides written notice of the violation and within sixty (60) days of notice receipt, the agency must report to the DNREC the actions it has taken according to the notice to comply. If one hundred twenty (120) days passes without satisfactory compliance, the DNREC may suspend or revoke the authority delegated to the district or agency.³⁸⁰

Designated watersheds or subwatersheds and approved by the DNREC have regulatory requirements specified by a watershed approach to nonpoint pollution control or flood control. The watershed approach results in a specific plan that contains the following information:

- Stormwater quantity or quality problem identification;
- Overall needs of the watershed, not just the impacts of new development;
- Alternative approaches to address existing and future problems;
- Overall costs and benefits;
- Implementation schedule;
- Funding;
- Public hearing process prior to DNREC approval.³⁸¹

The DNREC has the power to issue a cease and desist order to any person violating any erosion and sedimentation control provision, and the DNREC may request that the appropriate plan approval agency refrain from issuing any further building or grading permits to violators unless the related violations have been remedied.³⁸² The person engaged in a land disturbing activity may be required to provide for construction review by a certified construction reviewer.³⁸³ Certified construction reviewers must attend and pass a DNREC training course and

³⁷⁹ DEL. CODE ANN. tit. 7, § 4006 (2001).

³⁸⁰ An opportunity for a hearing before the DNREC must be provided prior to a suspension or revocation; *see* DEL. CODE ANN. tit. 7, § 4009 (2001).

³⁸¹ DEL. CODE ANN. tit. 7, § 4011(a) (2001).

³⁸² DEL. CODE ANN. tit. 7, § 4012 (2001).

³⁸³ DEL. CODE ANN. tit. 7, § 4013(a) (2001).

must also function under the direction of a registered, licensed professional engineer.³⁸⁴ The engineer is responsible for weekly construction site review or as required by regulation and must report within five (5) calendar days any violations or inadequacies of the approved plan and inform the person engaged in the land disturbing activity.³⁸⁵

Violators of erosions and sedimentation control provisions and related rules, regulations, orders, and conditions imposed in an approved plan are subject to fines up to two thousand dollars (\$2,000.00) for each offense and each day of violation. The Justice of the Peace Courts have jurisdiction. Intentional, knowing, and violations after written notice or refusal to comply after notice are fined up to ten thousand dollars (\$10,000.00) for each offense and each day of offense. The Superior Court has jurisdiction of these offenses.³⁸⁶ The Court of Chancery has jurisdiction to enjoin violations. Any aggrieved person who suffers damage or is likely to suffer damage due to a violation or threatened violation may apply to the Chancery Court for injunctive relief. The Chancery Court may direct the violator to restore the affected land or water.³⁸⁷

C. Delaware Agricultural Land Preservation

1. Delaware Agricultural Land Preservation Act

Through the Delaware Agricultural Land Preservation Act (DALPA)³⁸⁸ the state of Delaware declares as its policy to conserve, protect, and encourage the improvement of agricultural lands and to encourage, promote, and protect farming as a valued occupation. Furthermore, the DALPA establishes that valuable and irreplaceable farmlands and forestlands are being lost due to nonagricultural development pressures so that preservation of farmlands and forestlands is essential to maintaining agriculture as a viable industry and important contributor to the state's economy. To carry out this policy, the state:

- Minimizes or avoids limiting the exercise of eminent domain³⁸⁹ because its power has an adverse impact on viable agricultural lands; creates economic incentives and benefits to encourage agricultural landowners to voluntarily place viable

³⁸⁴ DEL. CODE ANN. tit. 7, § 4013(b) (2001).

³⁸⁵ DEL. CODE ANN. tit. 7, § 4013(d) (2001).

³⁸⁶ DEL. CODE ANN. tit. 7, § 4015 (2001).

³⁸⁷ DEL. CODE ANN. tit. 7, § 4016 (2001).

³⁸⁸ DEL. CODE ANN. tit. 3, §§ 901 to 931 (2001).

³⁸⁹ Compensation paid through the power of eminent domain or condemnation for lands located in preservation districts is based on the highest and best development use of the property with no consideration given to the restrictions or limitations imposed by the preservation district but include any additional lands unusable or unprofitable for agricultural uses; *see* DEL. CODE ANN. tit. 3, § 922 (2001).

agricultural lands under protective restriction by the creation of agricultural preservation districts and the sale of development rights of agricultural lands;

- Creation of permanent agricultural areas comprised of viable farmlands and forestlands to serve the long-term needs of the agricultural community and the citizens of the state by purchasing development rights located near and adjacent to designated growth zones.³⁹⁰

Agricultural use of lands mean all forms of farming and agriculture including horticulture, aquaculture, silviculture, and activities devoted to the production of food for sale as well as other products useful to humans grown, raised, or harvested on lands and waters.³⁹¹

2. *Delaware Agricultural Lands Preservation Foundation*

The Delaware Agricultural Lands Preservation Foundation (DALPF) consists of nine (9) trustees appointed by the governor with the advice and consent of the state senate.³⁹² The DALPF is a public instrumentality of the state. It oversees the agricultural preservation districts and:

- Adopts criteria for establishing agricultural preservation districts and purchasing easements;³⁹³
- Adopts a statewide preservation strategy;³⁹⁴
- Administers the preservation fund;
- Monitors and enforces preservation provisions and related regulations and instruments;
- Establishes a program to coordinate and cooperate with other governmental bodies and nonprofit or public organizations to assist in pursuing its purposes;

³⁹⁰ A type of buffer zone approach; *see* DEL. CODE ANN. tit. 3, § 901 (2001).

³⁹¹ DEL. CODE ANN. tit. 3, § 902(3) (2001).

³⁹² DEL. CODE ANN. tit. 3, § 903 (2001).

³⁹³ After public hearing; *see* DEL. CODE ANN. tit. 3, §§ 913 to 918 (2001).

³⁹⁴ After public hearing and consultation with the DNREC, county farmland preservation advisory boards, and planning and zoning commissions; *see* DEL. CODE ANN. tit. 3, § 904(a)(3) (2001). Each county has a farmland preservation advisory board that consists of four (4) active farmers or agribusinessmen plus one (1) county legislator who acts as the chairperson; the advisory board advises the DALPF on proposed regulations and any regulation having an adverse effect upon preservation purposes; *see* DEL. CODE ANN. tit. 3, § 906 (2001).

- Acquires available federal funding;
- Performs yearly reports of its activities and annual audits for accountability of funds;
- Establishes an educational and a promotional program to further the preservation of agricultural lands; and
- Develops the implementing program to effect its duties.³⁹⁵

The DALPF has authority to enter upon lands as necessary to perform surveys, appraisals, and investigations to accomplish its preservation purposes. The DALPF may receive funds from the sale of general bonds, revenue bonds, or other obligations under its name or of the state. The DALPF also has authority to recover reasonable costs for services it may provide. All monies received by the DALPF are deposited into the Delaware Farmland Preservation Fund.³⁹⁶

An agricultural district may be established upon application to the DALPF by any owner or owners of contiguous farmland and/or forestland containing at least two hundred (200) usable acres. Upon satisfying establishment criteria, the DALPF seeks a recommendation from the county planning and zoning commission and the DALPF board of trustees. Approval by any two (2) of the three (3) entities, i.e., the foundation, the board, and the planning and zoning commission, is sufficient. An owner of farmland and/or forestland consisting of less than two hundred (200) acres may request expansion of a preservation district to include the land provided it satisfies the eligibility criteria, i.e., contiguously located or within a three (3) mile radius of an established district.³⁹⁷

³⁹⁵ DEL. CODE ANN. tit. 3, § 904(a) (2001).

³⁹⁶ DEL. CODE ANN. tit. 3, §§ 904(b) and 905 (2001).

³⁹⁷ DEL. CODE ANN. tit. 3, § 907 (2001). Criteria for eligibility for inclusion in an agricultural preservation district includes having fee simple title, no major subdivision plan exists, viable and productive land meeting the land evaluation and site assessment (LESA) requirements, recordable declaration of land restrictions, and no excluded parcels; *see* DEL. CODE ANN. tit. 3, § 908(a) (2001). Establishment factors considered include viability and productivity based on the LESA scoring system, extent of active agricultural utilization, consistency with long-term preservation goals, potential for expansion and compatibility with surrounding land uses, benefit of additional open space, potential for acquisition of agricultural preservation easements, socio-economic benefits from agricultural and historic perspective, and consistency with statewide preservation strategy; *see* DEL. CODE ANN. tit. 3, § 908(b) (2001).

An agricultural preservation district is subject to the following restrictions:

- No rezoning or major subdivision allowed;
- Activities allowed are limited to agricultural and agriculturally related activities;³⁹⁸
- Residential activities are allowed provided no more than one (1) acre for each twenty (20) acres of usable land but no more than ten (10) acres for dwelling housing for owner, owner relatives, and persons providing owner farm labor services but no more than three (3) dwellings or dwelling lots.³⁹⁹

Normal agricultural uses and activities conducted in accordance with good husbandry and best management practices (BMPs) in agricultural preservation districts enjoy protections from claims or complaints of nuisance including any future county or municipal code or ordinance. When formal complaints are brought as a legal action and the preservation district landowner prevails, the landowner is entitled to recover reasonably incurred costs and expenses related to the defense including attorney's fees.⁴⁰⁰

Other benefits that landowners having unimproved land in preservation districts enjoy are:

- Annual property taxation at unimproved land rates;
- Exemption or relief from a realty transfer tax; and
- Exemption of ad valorem taxes.⁴⁰¹

³⁹⁸ Normal agricultural uses and activities conducted in a lawful manner are allowed which averts and negates complaints arising from normal noise, dust, manure, other odors, use of agricultural chemicals, and nighttime farm operations; residential lots within any new subdivision development located within three hundred (300) feet of the boundary of an agricultural preservation district must provide in the deed restrictions or in any lease or agreements of sale a specifically worded agricultural preservation district notice expressly conditioning the use and enjoyment of the property; new subdivision developments located within fifty (50) feet of a district have restrictions on construction requiring occupancy approvals; *see* DEL. CODE ANN. tit. 3, § 910(a) (2001).

³⁹⁹ DEL. CODE ANN. tit. 3, § 909(a) (2001). Transferable dwelling lots have specific limitations and require repayment of twenty-five percent (25%) of the fair market value of the land subject to transfer; *see* DEL. CODE ANN. tit. 3, §§ 909(a)(2)(b - c) (2001). Preservation lands are released from a district at the expiration of ten (10) years if at least six (6) months prior to the ten (10) year expiration date written notification of the owner's intent to withdraw the land is submitted to the DALPF; otherwise the lands remain in the district for additional five (5) year periods until the owner provides a written notice at least six (6) months prior to an expiration date; a purchase of a preservation easement by the DALPF is, however, permanent subject only to specific termination criteria after twenty-five (25) years in the preservation district; *see* DEL. CODE ANN. tit. 3, §§ 909(b - c) and 907 (2001).

⁴⁰⁰ DEL. CODE ANN. tit. 3, § 910(b) (2001).

⁴⁰¹ DEL. CODE ANN. tit. 3, § 911 (2001).

The DALPF has authority to take legal action in any court having jurisdiction to enforce any land restrictions or requirements imposed by an agricultural preservation district. The DALPF may also take legal action to enforce liens and collect roll-back taxes and penalties. If the DALPF prevails, it may recover its reasonable costs and expenses including attorney's fees and any tax benefits conferred. Violators of preservation provisions are subject to civil penalties up to two hundred dollars (\$200.00) for each violation and each day of violation.

Review of any DALPF decision, rule, regulation, or other action may be brought in the Superior Court provided the review is requested within thirty (30) days of the date of the decision, promulgation of the rule or regulation, or other action.⁴⁰² The DA has the authority to conduct a hearing to investigate any actions or recommendations related to preservation provisions if there is reason to believe that a public agency's action will have an adverse impact on agriculture without a finding of ample public need or is harmful to the maintenance and preservation of agricultural activities.⁴⁰³

D. Delaware Noxious Weed Control

The existence of a noxious weed is a public and common nuisance. The DA has authority to make investigations, studies, and determinations it deems advisable in order to ascertain the extent of growth and infestation of noxious weeds in the state and the effect on agricultural production.⁴⁰⁴

The DA is responsible for designating the list of noxious weed species and for instituting programs of control and eradication.⁴⁰⁵ A weed advisory committee consisting of five (5) persons serves in an advisory capacity to the DA.⁴⁰⁶

It is unlawful to import any designated noxious weed into the state or to transport it within the state in any form capable of growth except for research purposes with prior written approval of the DA. It is also unlawful to knowingly contaminate any uninfested land or

⁴⁰² DEL. CODE ANN. tit. 3, § 927 (2001). Public hearings conducted must provide at least twenty (20) days advance notice published in a daily newspaper of general circulation throughout the state; hearings for proposed plans or regulations must include a brief description of the plan or regulation, the time and place of the hearing, and the time and place where copies of the proposal information may be reviewed or obtained; a record is made of all public hearings which includes testimony, exhibits, and documents introduced; *see* DEL. CODE ANN. tit. 3, § 928 (2001).

⁴⁰³ DEL. CODE ANN. tit. 3, § 930 (2001).

⁴⁰⁴ DEL. CODE ANN. tit. 3, §§ 2401 and 2402(a) (2001).

⁴⁰⁵ DEL. CODE ANN. tit. 3, §§ 2402(b - e) (2001).

⁴⁰⁶ The weed advisory committee consists of a cooperative extension representative from the University of Delaware, the state noxious weed specialist, a representative of the DA, and one person from each of the three (3) counties chosen by the governor's council on agriculture; *see* DEL. CODE ANN. tit. 3, § 2402(f) (2001).

roadway with noxious weeds through the movement of rootstocks, seed, soil, mulch, nursery stock, farm machinery, or other medium and to knowingly allow designated noxious weeds to set seed on any land or allow any portion of the weed plant to reach a height of twenty-four (24) inches.⁴⁰⁷

Violators of noxious weed provisions are subject to civil penalties up to five hundred dollars (\$500.00) per violation or count. Civil penalties are not, however, imposed until an administrative hearing is held before the DA after due notice is given to the landowner or person who possesses or has use of the land. The DA makes a full record of the administrative hearing which may be purchased by any interested person. A DA decision is issued within thirty (30) days of the administrative hearing. An individual aggrieved by the DA decision may appeal to the Superior Court provided the request is filed within thirty (30) days of the decision. Written notice of an appeal including grounds for the appeal must be served upon the secretary of the DA.⁴⁰⁸ Compliance with a written agreement with the DA for the control and eradication of designated noxious weeds is not considered a violation of noxious weed provisions as long as all the terms and conditions of the agreement are fulfilled.⁴⁰⁹

The Delaware Department of Transportation or its agents must cut down noxious weeds growing in the rights-of-way over which it has supervision as often as is sufficient to prevent them from going to seed. Particular problem areas may also be sprayed to eradicate the weeds.⁴¹⁰

E. Delaware Plant Pests

Through plant pests legislation,⁴¹¹ the DA is given responsibility and authority to eradicate, repress, and prevent the spread of plant pests within the state, to points outside the state from within it, and from outside the state to points within the state.⁴¹² The DA seeks out all dangerously injurious plant pests destructive to the agricultural, forest, or horticultural interests of the state including the state's general environmental quality. The DA conducts research to make these determinations and issues orders to prevent the spread of such pests.⁴¹³

⁴⁰⁷ The landowner or person with the right to possess and/or use the land has a duty to mow, cultivate, treat with chemicals, or use other effective practices prescribed by the DA to prevent seed set or elimination of the noxious weed plant; *see* DEL. CODE ANN. tit. 3, § 2404 (2001).

⁴⁰⁸ DEL. CODE ANN. tit. 3, § 2406 (2001).

⁴⁰⁹ DEL. CODE ANN. tit. 3, § 2405 (2001).

⁴¹⁰ DEL. CODE ANN. tit. 3, § 2408 (2001).

⁴¹¹ DEL. CODE ANN. tit. 3, §§ 1101 to 1110 (2001).

⁴¹² DEL. CODE ANN. tit. 3, § 1102 (2001).

⁴¹³ DEL. CODE ANN. tit. 3, §§ 1103(a - b) (2001).

The DA, upon learning of the existence of a dangerously injurious plant pest, may conspicuously mark all plants known or suspected to be infected or infested with the plant pest. The owner or tenant or person in possession of the premises is notified by the DA and informed of the prescribed control measures. The possessor is expected to implement the conditions prescribed within the time specified or face civil penalties up to one thousand dollars (\$1,000.00) for each violation or count.⁴¹⁴ Removal of any marking placed by the DA constitutes a civil violation. The DA has authority to destroy plant pests or apply plant pest control measures when the measures are not otherwise carried out according to its notification at the expense of the person notified.⁴¹⁵ The DA or its agents may also apply necessary control measures to plants or areas in dangerous proximity at the expense of the person notified.⁴¹⁶

When actionable infestations or infections of dangerously injurious plant pests exist, the DA warns farmers and other interested persons residing in the county and provides its information and knowledge of measures to be used to control the plant pests.⁴¹⁷ The DA may establish quarantine restriction in infested or infected areas and adjacent areas. Quarantine restrictions prevent the movement, shipment, or transportation of agricultural, forest, horticultural, or other material capable of infestation or infection. Under quarantine restrictions, the DA may detain for official inspection any person, car, vessel, truck, wagon, or other conveyance suspected or known to carry any material in violation of the related restrictions or rules or regulations. Violation of a quarantine restriction is unlawful and subjects the violator to civil penalties as described above.⁴¹⁸ A civil penalty is not imposed until an administrative hearing is held. A person charged with a violation is notified in writing and notified of the time of the administrative hearing. The DA has authority to issue subpoenas, compel attendance of witnesses and production of documents, administer oaths, and take testimony. A full record of the hearing is made and is available for purchase by any interested person.⁴¹⁹ Any person aggrieved by the administrative hearing may appeal to the Superior Court provided the request is made within thirty (30) days. Notice of an appeal is made to the secretary of the DA.⁴²⁰

All plant pests or biological control agents must be permitted in order to sell, offer for sale, move, convey, transport, deliver, ship, or offer it for shipment.⁴²¹

⁴¹⁴ DEL. CODE ANN. tit. 3, §§ 1103(c) and 1110 (2001).

⁴¹⁵ DEL. CODE ANN. tit. 3, §§ 1103(d - e) (2001).

⁴¹⁶ DEL. CODE ANN. tit. 3, §§ 1103(f - i) (2001).

⁴¹⁷ DEL. CODE ANN. tit. 3, § 1104 (2001).

⁴¹⁸ DEL. CODE ANN. tit. 3, § 1106 (2001).

⁴¹⁹ DEL. CODE ANN. tit. 3, § 1108 (2001).

⁴²⁰ DEL. CODE ANN. tit. 3, § 1109 (2001).

⁴²¹ A permit from the United States Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS), Plant Protection and Quarantine, Permit to Move Live Plant Pests and Noxious Weeds or its state equivalent; *see* DEL. CODE ANN. tit. 3, § 1107(a) (2001).

F. Delaware Pest Control Compact

The migratory character of pest infestations makes it important and/or necessary for state to complement each other's pest control activities. The establishment of an insurance fund from which individual states may obtain financial support for pest control programs is beneficial. The compact states contribute in accordance with their relative interests to achieve an equitable means of financing pest eradication and control programs.⁴²²

The insurance fund is established for the purpose of financing pest control other than normal pest control operations. It contains monies appropriated to it by the participating states along with any donations and grants.⁴²³

Each participating state pledges to the other participating states that it will employ its best efforts to eradicate or control any and all pests. To obtain monies for expenditures from the insurance fund, the requesting state must submit:

- Detailed statements of the circumstances;
- Evidence the pest constitutes a danger to an agricultural or forest crop, product, tree, shrub, grass, or other plant having a substantial value in the requesting state;
- Present and projected eradication;
- Proof the expenditures represent a full effort of control or eradication;
- Reasons why the insurance fund of the compact is invoked and whether its abatement program will succeed within one (1) year or need future installment payments; and
- Other information as the governing board may require.⁴²⁴

The secretary of the DA acts as the compact administrator for Delaware.⁴²⁵ The governor makes any request for funding from the insurance fund.⁴²⁶

⁴²² DEL. CODE ANN. tit. 3, § 9001 Article I (2001).

⁴²³ DEL. CODE ANN. tit. 3, § 9001 Article III (2001).

⁴²⁴ DEL. CODE ANN. tit. 3, § 9001 Article VI (2001).

⁴²⁵ DEL. CODE ANN. tit. 3, § 9024 (2001).

⁴²⁶ DEL. CODE ANN. tit. 3, § 9025 (2001).

Appendix A - Agencies

Producer Note: State and federal agencies are available to answer questions regarding environmental matters and a producer's compliance with environmental laws and regulations. The following is a list of agencies which should be able to answer questions or provide materials for a producer.

State Agencies:

(800) 282-8685

(302) 697-6287 Fax

<http://www.state.de.us/deptagri/>

Attorney General

<http://www.state.de.us/attgen/index.htm>

3 County Offices:

1. New Castle County

Carvel State Building
820 North French Street
Wilmington, DE 19801

Civil Division

(302)577-8400

(302)577-6630 Fax

Criminal Division

(302)577-8500

(302)577-2496 Fax

Fraud & Consumer Protection

(302)577-8600

2. Kent County

102 West Water Street, Suite 2
Dover, DE 19904

Civil Division

(302)739-7641

(302)739-7652 Fax

Criminal Division

(302)739-4211

(302)739-7652 Fax

3. Sussex County

114 East Market Street
Georgetown, DE 19947

(302) 856-5353

(302) 856-5369 Fax

Department of Agriculture

2320 S. DuPont Hwy.

Dover, DE 19901

(302) 739-4811

Delaware Geological Survey

University of Delaware

Delaware Geological Survey Building

Newark, DE 19716-7501

(302) 831-2833

(302) 831-3579 Fax

<http://www.udel.edu/dgs/>

Department of Health & Social Services

1901 North Du Pont Highway, Main Bldg.

New Castle, DE 19720

(302) 255-9040 or (302) 744-4556

(302) 255-4429 Fax

(800) 464-HELP toll free

<http://www.state.de.us/dhss/dhss.htm>

Division of Public Health

P.O. Box 637 or

Federal & Water Streets

Dover, DE 19903

(302) 739-4701 General

(302) 739-6659 Fax

Department of Natural Resources and Environmental Control

89 Kings Highway

Dover, DE 19901

(302) 739-4764

(800) 662-8802 toll free, 24-hr hotline

(302) 739-5072 Enfrmt. Complaints

<http://www.dnrec.state.de.us/dnrec2000/>

5 Divisions:

1. Division of Air & Waste Management

(302) 739-4764 General

(302) 739-4791 Air Quality

(302) 739-5072 Envir'l Protection
(302) 739-3694 Envir'l Response
(302) 395-2600 Site Investig. & Restor.
(302) 739-5071 Recycling
(302) 739-4761 Septic Tank Permits
(302) 739-3689 Solid & Haz. Waste Mgmt.
(302) 395-2600 Superfund
(302) 395-2500 Underground Storage Tank
2. Division of Fish & Wildlife
(302) 739-3440 Enforcement
(302) 739-3441 Fisheries
(302) 739-5297 Hunting, Trapping
(302) 739-4431 Licensing
(302) 739-3493 Mosquito Ctrl.
(302) 739-5297 Wildlife
3. Division of Parks & Recreation
(302) 739-4702 Information, Operations
4. Division of Soil & Water Conservation
(302) 739-4411 Conservation Districts
(302) 739-4411 General
5. Division of Water Resources
(302) 739-3451 Coastal Mgmt.
(302) 856-5488 Drainage (Grgtown)
(302) 739-8014 Non-Point Source Prog.
(302) 739-6400 Permitting