

LAWS OF DELAWARE
VOLUME 84
CHAPTER 245
152nd GENERAL ASSEMBLY
FORMERLY
HOUSE BILL NO. 122

AN ACT TO AMEND TITLE 3 OF THE DELAWARE CODE RELATING TO NUTRIENT MANAGEMENT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 2202, Title 3 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and by redesignating accordingly:

§ 2202. Definitions.

For the purposes of this chapter:

“Crop rotation” means a series of crops grown in succession on a field, not to exceed 3 years.

“Fertility Index Value” or “FIV” is equivalent to the measured Mehlich 3 soil test phosphorus concentration in parts per million (ppm).

“High phosphorus soil” means soil with a soil test phosphorous exceeding 150 Fertility Index Value.

“Phosphorus Site Index” or “PSI” mean the current field-scale phosphorus risk assessment tool developed and maintained by the University of Delaware and approved by the Delaware Nutrient Management Commission. The Phosphorus Site Index score is categorized as “low,” “medium,” “high,” or “very high,” based on agricultural and environmental parameters.

Section 2. Amend § 2244, Title 3 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2244. Same — Suspension, modification; revocation.

(a) The Commission may, after notice and opportunity for a hearing, ~~suspend~~ suspend, revoke, or modify any certificate granted under this chapter or fine any person against whom a complaint has been brought, or both, ~~where the Commission has reasonable grounds to believe that the person against whom a complaint has been brought is responsible for any violations of this chapter or Commission regulations. The Commission shall furnish the person accused of a violation with notice of the time and place of hearing, which notice shall be served personally or by registered mail directly to such person’s place of business or last known address with postage fully paid no sooner than 10 days but within 21 days of the time fixed for the hearing.~~

~~(b) The Commission may, after notice and opportunity for a hearing, suspend, modify or revoke any certificate granted under this chapter if the Commission finds the person certified has been found guilty of any violation of this chapter or Commission regulations.~~

(b) The Commission may impose a fine of not less than \$25 nor more than \$1,000 for each violation. Each day of continued violation may be considered as a separate violation up to a limit of \$10,000.

(c) Any fines collected by the Department of Agriculture under this chapter shall be appropriated to the Department for use in assisting persons in achieving compliance or to demonstrate the application of research that may be of substantial benefit to many individuals seeking compliance with this chapter.

~~(e)~~ (d) All decisions of the Commission relating to suspension, modification or revocation of a certificate shall be final and conclusive unless the person whose certificate was suspended, modified or revoked appeals according to the provisions of § 2263 of this title.

Section 3. Amend § 2247, Title 3 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2247. Nutrient management plans.

(a) All animal feeding operations with greater than 8 animal units or any person who owns, leases or otherwise controls property in excess of 10 acres upon which nutrients are applied shall develop and implement a nutrient management plan in accordance with the schedule outlined in this section. All nutrient management plans shall ~~include, but not be limited to:~~ include all of the following:

(1) ~~Field maps showing reference points (such as buildings, stream, irrigation equipment, etc.), number of acres and soil types; as an arial photograph showing field identification, boundaries, acres, location of surface waters, irrigation systems, and location of designated sensitive areas with associated nutrient application restrictions or setbacks.~~

(2) ~~Soil and organic waste analyses; maps and information, including drainage class, permeability, available water capacity, depth to water table, and flooding or ponding frequency.~~

(3) ~~Current and or planned crop rotations; rotations.~~

(4) ~~Expected yields based on best 4 out of 7 year data or, in the absence thereof, soil productivity charts; and Results of applicable soil, plant, water, manure, or organic by-products analyses.~~

(5) ~~Realistic yield goals and the methods used to estimate those goals. Expected yields shall be calculated as a mathematical average of the best 4 out of 7 year data or, in the absence thereof, best professional judgement by a certified nutrient consultant under § 2241 of this title.~~

~~(5)~~ (6) Recommended nutrient rates, ~~timing~~ timing, form and methods of nutrient ~~applications.~~ applications and incorporation.

(7) Results of approved risk assessment tools for nitrogen, phosphorus, and erosion losses, if applicable.

(8) Animal information including types, number, average sizes, annual manure generation, and any manure import or export, if applicable.

(b) ~~Nutrient management plans shall specify the level of nutrient applications that are needed to attain expected crop yields as defined in paragraph (a)(4) of this section. Applications of phosphorus to high phosphorous soils cannot exceed a 3-year crop removal rate. Nitrogen applications cannot exceed the expected yield, as defined in paragraph (a)(4) of this section of the specific crop. Planned applications of phosphorous to high phosphorous soils~~

cannot exceed total phosphorous removal in a planned crop rotation unless a different management practice is permitted after conducting the Delaware Phosphorous Site Index risk assessment tool.

(1) If the PSI score for a field is “very high,” no phosphorus application is allowed.

(2) All fields with FIV exceeding 499 must have a PSI assessment prior to phosphorus application.

Results of the PSI are valid for a term not to exceed 3 years.

(3) Fields with FIV below 500 but above 150 must have a PSI assessment, unless the total planned phosphorus application to a crop rotation does not exceed the phosphorus removed by all crops in the rotation.

(c) Yield goals shall be used to determine nitrogen application rates as appropriate. Recommended nitrogen application rates cannot exceed the application rates published by the University of Delaware of the specific crop, unless an adaptive approach is used to adjust in-season nitrogen application rates based on recommendations from a certified consultant or a Commission approved nitrogen application model.

~~(e)~~ (d) All animal waste management plans, nutrient management plans and records of implementation shall be kept by the land owner or person responsible for the plans or records. Animal waste management plans, nutrient management plans and records of implementation shall not be considered as public records under the Freedom of Information Act and shall not be disclosed, except, however, that they shall be made available for inspection by the Delaware Department of Agriculture and the Commission. Records of implementation shall include:

(1) Soil test results and recommended nutrient application rates;

(2) Quantities, analyses and sources of nutrients applied;

(3) Dates and methods of nutrient applications;

(4) Crops planted, yields and crop residues removed; and

(5) Certification statement signed by the operator to document the intention of nutrient management and/or animal waste management plan implementation

Notwithstanding the foregoing, animal waste management plans, nutrient management plans and records of implementation may be retained, disclosed and made public as provided for in § 2248 of this title.

~~(d)~~ (e) Nutrient management plans shall be updated a minimum of every 3 years or upon significant alterations in facility operations, or upon a 25% or greater increase in facility operations. Such plans shall be reported to the Commission no later than December 15 of the year in which it must be updated.

~~(e)~~ (f) If a person implementing a nutrient management plan intends to store manure, other than in an approved manure storage structure or facility, such outdoor storage shall:

(1) Be reflected in the person’s nutrient management plan;

(2) Be at least 100 feet from any body of water or drainage ditch;

(3) Be at least 100 feet from any public road;

(4) Be at least 200 feet from any residence that is not located on the person’s property; and

(5) Be at least 6 feet high and in a conical shape.

(f) (g) In situations where persons other than the land owner are responsible for nutrient applications, nutrient management plans as required in this section shall be the responsibility of the person actually managing the application of nutrients to that property.

(g) (h) Upon completion and implementation of a nutrient management plan, the owner/operator/planner shall notify the Commission within 60 days of the completion of the plan.

(h) (i) In the event of circumstances that are beyond the control of the person implementing a nutrient management plan pursuant to this section, such person shall notify the Department of any actions he or she intends to take as a result of those circumstances.

(i) (j) In the case of animal feeding operations where no other nutrients are used for farming and the animal waste is not land-applied, the operator of the facility may substitute an animal waste management plan for a nutrient management plan. At a minimum, the animal waste management plan shall include:

- (1) Information concerning how the waste is stored prior to transport;
- (2) Records of where and to whom the animal waste was transported and the amount of such waste;

and

- (3) The mortality disposal method.

(j) (k) The State shall make nutrient consultants available through the conservation districts to provide free nutrient management plans assistance to anyone requesting such assistance. For those persons wishing to hire private nutrient consultants, the State, through the conservation districts, shall reimburse any person establishing a nutrient management plan or updating an established nutrient management plan at a rate and amount that shall be determined annually by the Commission and subject to annual appropriations.

(k) (l) County, municipal and industrial facilities discharging solid or liquid waste and permitted by the Department of Natural Resources and Environmental Control under The Guidance and Regulations Governing the Land Treatment of Wastes shall be exempt from the provisions of this chapter. Provided, however that they provide the Commission with an annual report as required by their land treatment permit.

Section 4. Amend § 2248, Title 3 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2248. Confined animal feeding operations subject to Clean Water Act § 402 requirements.

(c) Each person or concentrated animal feeding operation covered by this section or identified as requiring an NMP by DDA and DNREC shall develop and submit the requisite, signed NMP, on such terms and conditions as may be specified by DDA or DNREC. The NMP shall be developed in accordance with the provisions of § 2247 of this title, provided, however, that DNREC and DDA may prescribe additional or different requirements for an NMP submitted under the CAFO NPDES Program. As necessary, the NMP shall also include ~~but not be limited to,~~ the following additional site specific handling and storage considerations:

- (1) Diverting clean water from contacting animal waste or ~~litter;~~ litter.
- (2) Preventing storage, collection and conveyance systems from leaking organic matter, nutrients and pathogens to ground or surface ~~water;~~ water.

- (3) Providing adequate storage to prevent polluted ~~runoff~~; runoff.
- (4) Handling manure and litter to reduce nutrient ~~losses~~; losses.
- (5) Managing dead animals to protect ground and surface ~~waters~~; waters.
- (6) Proper chemical ~~handling~~; and, handling.
- (7) Tillage and crop residue management practices.

The NMP shall be amended pursuant to ~~§ 2247(d)~~ § 2247 of this title or whenever there is any significant change in the design, construction or operation which has a significant effect on the potential for the discharge of pollutants to state waters, or as may be otherwise required by regulation.

Section 5. Amend § 2261, Title 3 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2261. Hearings; procedural requirements.

(a) For purposes of this section, the Commission may create a hearing panel that will be subordinate to the Commission and comprised of individuals selected by the Commission. The Commission or hearing panel shall examine all complaints meeting the criteria of § 2260(a) of this title brought before it for violations of this chapter or Commission regulations within 60 days of receipt of the complaint. The Commission or hearing panel shall conduct a hearing on any matter that on its face presents a colorable claim that a violation has occurred.

~~(b) Hearings on violations shall be held within 120 days of the date the Commission received a complaint and shall be conducted in the county in which the alleged violation occurred.~~

~~(c) (b) The Commission or hearing panel shall send 10 days' notice of any hearing to all named parties, together with a recital of the complaint or issue brought before the Commission. Such notice shall be sent via certified mail, and it Commission or hearing panel. It shall be sufficient to send such notice to the attorneys of those who are represented by counsel.~~

~~(d) All hearings shall be conducted by the Commission. A record of each shall be kept by the Commission and shall include:~~

- ~~(1) A recitation of the evidence before the Commission;~~
- ~~(2) The Commission's findings of fact;~~
- ~~(3) The Commission's decision; and~~
- ~~(4) A brief statement of the reasons therefor.~~

~~(e) The Commission's decision shall recite:~~

- ~~(1) The manner in which the Commission construed the law and applied it to the facts;~~
- ~~(2) Any remunerative action a violator must take or has taken;~~
- ~~(3) Any fine a violator must pay pursuant to Department regulations and a reference to the applicable regulations; and~~
- ~~(4) Any revocation, suspension or modification to any certificate that has occurred.~~

(c) When a hearing panel presides over a hearing, the hearing panel shall prepare a proposed order for the consideration of the Commission that shall include:

(1) A brief summary of the evidence and recommended findings of fact based upon the evidence.

(2) Recommended conclusions of law.

(3) A recommended decision.

(d) When a proposed order by a hearing panel is submitted to the Commission, a copy shall be delivered to each of the parties who shall have 20 days to submit in writing to the Commission exceptions, comments, and arguments respecting the proposed order.

(e) The Commission shall make its final decision based upon the entire record of the case and the recommendations of the hearing panel, if applicable. The Commission's decision shall be incorporated into a final order which shall include:

(1) A recitation of the evidence before the commission.

(2) The Commission's findings of fact.

(3) The Commission's decision and a brief statement of the reasons for its decision.

(4) The manner in which the Commission construed the law and applied it to the facts.

(5) Any remunerative action a violator must take, including any fine, revocation, suspension, or modification to any certificate.

(f) The Commission shall have the power to compel the attendance of witnesses whose testimony is related to the alleged violation under review and the production of records related to the alleged violation under review by filing a praecipe for a subpoena through the Attorney General or a Deputy Attorney General with the Prothonotary of any county of this State, such a subpoena to be made by any sheriff of the State; failure to obey said subpoena will be punishable according to the rules of the Superior Court.

(g) All decisions of the Commission pursuant to this subsection shall be final and conclusive unless a party to such hearing shall appeal pursuant to the provisions of § 2263 of this title.

Section 6. Amend § 2280, Title 3 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

~~§ 2280. Enforcement; fines and penalties.~~

~~(a) Whoever violates this chapter, any rule or regulation duly promulgated thereunder, any condition of a certificate issued pursuant to this chapter or any order of the Secretary issued pursuant to this chapter shall be subject to the following fines and penalties, as well as any other remedy described elsewhere in this chapter.~~

~~(1) A civil penalty shall be imposed by the Justice of the Peace Court of not less than \$25 nor more than \$1,000 for each violation. Each day of continued violation shall be considered as a separate violation up to a limit of \$10,000. The Justice of the Peace Court shall have jurisdiction of a violation in which a civil penalty is sought. In setting penalty amounts under this section, consideration shall be given to offsetting any economic benefit from noncompliance or any delayed or avoided costs to any person. Further, penalty assessments shall be sufficient to deter recurrence of noncompliance. If there is a substantial likelihood that noncompliance will reoccur, the Commission may recommend that the Secretary also seek a permanent or preliminary injunction or~~

~~temporary restraining order in the Court of Chancery. Civil penalties imposed under this section may not be suspended.~~

~~(2) In its discretion, the Commission may recommend that the Secretary impose an administrative penalty of not more than \$1,000 for each violation. Prior to assessment of an administrative penalty, written notice of the Secretary's proposal to impose such penalty shall be given to the violator, and the violator shall have 30 days from receipt of said notice to request a public hearing. Any public hearing, if requested, right of appeal and judicial appeal shall be conducted pursuant to this chapter. Assessment of an administrative penalty shall be determined by the nature, circumstances, extent and gravity of the violation or violations, ability of the violator to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.~~

~~(b) Any expenses or civil administrative penalties collected by the Department of Agriculture under this chapter are hereby appropriated to the Department for use in assisting persons in achieving compliance or to demonstrate the application of research that may be of substantial benefit to many individuals seeking compliance with this chapter.~~

Section 7. Amend § 2282, Title 3 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2282. Protection from enforcement.

The Commission shall establish a list of best management practices for which funding is available from the Department and/or other local, state or federal agencies. Should any person be required under this chapter or regulations promulgated hereunder to undertake any of the activities for which funding is available and fail to receive funding due to insufficient funds available through those local, state or federal agencies, the Commission shall not begin any enforcement action under ~~§ 2280~~ of this title until such funding becomes available; provided, however, that the owner-operator must accept the first available funding after a period of 3 years, dated from nutrient management plan acceptance

Approved February 28, 2024