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HOUSE OF REPRESENTATIVES

140th GENERAL ASSEMBLY

HOUSE SUBSTITUTE NO. 1

FOR

HOUSE BILL NO. 250

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:

(Two-Thirds of all members elected to each house thereof concurring therein):

1 Section 1. Amend Title 3 of the Delaware Code by adding a new chapter thereto, designated as

2 Chapter 22, to read as follows:

3 "Chapter 22. Nutrient Management.

4 Subchapter I. General Provisions.

5 § 2201. Declaration of purpose.

6 The purposes of this chapter are:

7 (1) To regulate those activities involving the generation and application of nutrients in order

8 to help improve and maintain the quality of Delaware's ground and surface waters and to

meet or exceed federally mandated water quality standards, in the interest of the overall public welfare;

(2) To establish a certification program that encourages the implementation of best management practices in the generation, handling or land application of nutrients in Delaware; and

(3) To establish a nutrient management planning program, and

(4) To formulate a systematic and economically viable nutrient management program which will both maintain agricultural profitability and improve water quality in Delaware.

§ 2202. Definitions.

For the purposes of this chapter:

(1) ‘Agricultural Commodity’ means any agricultural product, including, but not limited to plants and animals and plant and animal products, grown, raised or produced within the State for use as food, feed, seed, or any aesthetic, industrial or chemurgic purpose.

(2) ‘Animal unit’ shall be as defined by the United States Department of Agriculture.

(3) ‘Applicant’ means any person seeking a certificate from the Commission.

(4) ‘Best management practices’ means those practices that have been identified as such by the Commission.

(5) ‘Certification’ means the recognition by the DNMC that a person has met the qualification standards as established by the DNMC and has been issued a written certificate authorizing them to perform certain functions.

(6) ‘Commercial processor’ means an individual, partnership, corporation, association, or other business unit that controls, through contracts, vertical integration, or other means, several stages of production and marketing of any agricultural commodity.

(7) ‘Commission’ or ‘DNMC’ means the Delaware Nutrient Management Commission.

(8) ‘Commissioner’ means a member of the DNMC.

(9) ‘Critical area targets’ means watersheds, sub-watersheds, or sectors where water quality conditions merit special attention and where resources should be directed and for which incentives should be provided.

(10) ‘Environmental coordinator’ means an employee of the Department of Agriculture who acts on behalf of the commission, as a liaison between the commission and persons against whom a complaint for a violation of this chapter or commission regulation has been brought.

(11) ‘Nutrient management plan’ or ‘plan’ means a plan by a certified nutrient consultant to manage the amount, placement, timing, and application of nutrients in order to reduce nutrient loss or runoff and to maintain the productivity of soil when growing agricultural commodities and turfgrass.

(12) ‘Nutrients’ means nitrogen, nitrate, phosphorus, organic matter, and any other elements necessary for or helpful to plant growth.

(13) ‘Person’ means any individual, partnership, association, fiduciary, corporation or any organized group of persons whether incorporated or not.

(14) ‘Program administrator’ or ‘NMPA’ means the one, exempt employee of the Department of Agriculture who is responsible for the operation of the State Nutrient Management Program.

(15) ‘Secretary’ means the Secretary of the Delaware Department of Agriculture or his/her designee.

(16) ‘State nutrient management program’ or ‘SNMP’ means all the program elements developed by the Commission including, but not limited to, establishing critical areas for targeting programs, establishing best management practices to reduce nutrient losses, developing educational and certification programs, nutrient management plan requirements, developing incentive programs that encourage compliance, making recommendations for transportation of nutrients and determining appropriate alternative uses.

Subchapter II. Delaware Nutrient Management Commission.

§ 2220. Delaware Nutrient Management Commission; general powers and duties.

(a) The Delaware Nutrient Management Commission is hereby established. The Commission shall have the power to develop, review, approve and enforce regulations governing the certification of individuals engaged in the business of land application of nutrients and the development of nutrient management plans as set forth in this Chapter. In addition, the Commission shall:

- (1) consider the establishment of critical areas for targeting of other voluntary or regulatory programs;
- (2) establish best management practices to reduce nutrient losses to the environment;
- (3) develop educational and awareness programs designed to voluntarily curtail use of nutrients by persons not otherwise covered by this Chapter;
- (4) consider the development of a transportation and alternative use incentive program to move nutrients from areas with overabundance to areas needing nutrient sources;
- (5) make such other recommendations to the Secretary that it deems important for the furtherance of the goals of this Chapter; and
- (6) establish the elements and general direction of the State Nutrient Management Program.

(b) The Commission, in carrying out its duties under this Chapter, shall consider comments from affected stakeholders and others interested in the activities of the Commission, including, but not limited to, the University of Delaware and other state and federal agencies, non-profit groups and others with an interest in nutrient management. In addition, the Commission shall consider prior work of the Governor's Agricultural Industry Advisory Committee on Nutrient Management.

(c) Notwithstanding the foregoing, the Commission shall not hold any person or persons certified pursuant to this Chapter responsible for violations committed by another person.

85       § 2221. Adoption of regulations; voting; considerations.

86           (a) With the guidance, advice, and consent of the Commission, the Secretary shall, by  
87               July 1, 2000, develop and adopt regulations to implement this Chapter. A majority  
88               vote of the full Commission shall constitute consent for purposes of this subsection.  
89               Regulations shall be adopted in accordance with the provisions of the Delaware  
90               Administrative Procedures Act.

91           (b) In developing regulations concerning nutrient management planning, the Secretary and the  
92               Commission shall consider any waste management planning requirements imposed on animal  
93               producers or nutrient users through their commercial processor and shall, to the maximum  
94               extent possible, strive to reduce any duplication in effort on the part of the contractor or  
95               property owner.

96           (c) The Commission may not approve any regulation and the Secretary may not promulgate any  
97               regulation that requires tilled lands to be converted for grass filter strips, vegetated and/or  
98               forested buffer strips along Delaware's lakes, streams, rivers, ponds, drainage ditches or any  
99               other natural or man-made conveyance system.

100       § 2222. Composition; appointment; qualifications and term; compensation; vacancies; civil  
101       liability.

102           (a) The Delaware Nutrient Management Commission shall consist of 15 voting members  
103               and 4 ex-officio members. The 15 voting members shall consist of the Director of the  
104               Division of Soil and Water Conservation of the Delaware Department of Natural  
105               Resources and Environmental Control or his/her designee, 4 members appointed by the  
106               Governor, 3 members appointed by the President Pro Tempore of the Senate and 2  
107               members appointed by the Senate Minority Leader, and 3 members appointed by the  
108               Speaker of the House and 2 members appointed by the House Minority Leader.

(b) The 14 appointed members of the Commission shall be residents of the State of Delaware, shall have participated in the industry or organization they represent for at least 5 years, and shall consist of 7 full-time farmers (2 from New Castle County, 2 from Kent County, and 3 from Sussex County), 1 commercial/agricultural nutrient applicator, 1 member of the commercial nursery industry, 1 golf course/lawn care industry representative, 2 members from one or more community based environmental advocacy groups, 1 Nutrient Consultant, and 1 public citizen.

The 7 full-time farmers shall further consist of:

- (1) 1 dairy farmer;
- (2) 1 swine producer;
- (3) 3 poultry farmers; and
- (4) 2 row-crop farmers (1 grain and 1 vegetable).

(c) The Governor shall appoint 1 farmer from Sussex County, the representatives from the commercial nursery industry, the golf course/lawn care industry, and the public citizen. The Senate shall appoint 3 farmers (1 from each county), the nutrient consultant and one member from a community based environmental group. The House shall appoint 3 farmers (1 from each County) the commercial applicator, and 1 member from a community based environmental advocacy group.

(d) The Governor shall appoint the Chairman of the Commission from the 7 full time farmers whose duty it will be to call, adjourn, and preside over all Commission meetings.

(e) The term of office of each appointed member of the Commission shall be 3 years from the 15<sup>th</sup> day of March in the year of his appointment and until his successor shall qualify.

(f) Each appointed member of the Commission shall receive compensation of \$100.00 per meeting and shall be entitled to be paid his reasonable expenses for traveling to and from any meeting of the Commission on official business.

(g) Vacancies in any appointed position on the Commission, for any reason other than the expiration of term of office, shall be filled by the previous appointing authority for the unexpired term of any Commissioner. In each year where there are five appointed positions available, the

Governor, the President Pro Tempore of the Senate, the Minority Leader of the Senate, the Speaker of the House, and the Minority Leader of the House shall each appoint one Commissioner to the Commission. In each year where there are four appointed positions available, the Governor shall appoint two Commissioners and the Speaker of the House and the President Pro Tempore of the Senate shall each appoint one Commissioner to the Commission.

(h) All appointed Commissioners shall remain eligible for reappointment upon the expiration of their term with the exception of the public citizen who may serve only one term, unless rendered ineligible for reappointment by the provisions of this Code or Commission regulations. The public citizen appointment shall be alternated between the three counties.

(i) Any appointed member of the Commission who misses three consecutive meetings or is otherwise recommended for removal by the Commission, may be removed by the appointing authority.

(j) Appointed commissioners shall be appointed to their first terms in the following manner:

(1) 5 commissioners shall be appointed for a term of one year;

(2) 5 commissioners shall be appointed for a term of two years; and

(3) 4 commissioners shall be appointed for a term of three years.

(4) Thereafter, each appointed commissioner shall be appointed for a term of 3 years.

(k) The Nutrient Management Program Administrator (NMPA) shall be a full time, exempt State position selected by the Commission and created within the Department of Agriculture who shall act as the administrator of, and be responsible for the operation of, the State Nutrient Management Program.

(l) The 4 ex-officio members of the Commission shall include the Secretary of the Department of Agriculture, the Secretary of the Department of Natural Resources and Environmental Control, the Secretary of the Department of Health and Social Services, or their respective designees, and the Nutrient Management Program Administrator.

(m) In any civil action against the Commission, or any of its members, civil liability shall be determined pursuant to the provisions of 10 Del. C. Ch. 40.

Subchapter III. State Nutrient Management Program.

§ 2240. State Nutrient Management Program; powers and duties of the Commission.

The State Nutrient Management Program (SNMP) shall consist of:

- (1) Certification of persons directly involved with the generation or application of nutrients within the State of Delaware as limited by sec. §2241
- (2) The development of and implementation of best management practices designed to improve water quality, optimize nutrient use and maintain a profitable agricultural industry in the State;
- (3) Educational programs through which applicants shall be instructed in the best management practices established by the Commission; and
- (4) A method developed by the Commission, and instituted prior to granting of any certificate, to evaluate an applicant's comprehension of the best management practices established by the Commission, and
- (5) Any other program elements instituted by the Commission.

§ 2241. Requirement for certification; classifications.

(a) Beginning January 1, 2004, all persons who conduct the following activities shall be duly certified by the Commission in accordance with Commission regulations or shall utilize a duly certified person or firm:

- (1) operate any animal feeding operation in excess of eight animal units, or
- (2) apply nutrients to lands in excess of 10 acres or waters as a component of a commercial venture or lands that he or she owns, leases, or otherwise controls; or
- (3) advise or consult with persons required by this chapter to be certified by the Commission.

(b) The Commission shall establish by regulation the following classifications for certification of nutrient handlers for use in the SNMP:

- (1) Nutrient Generator: a person within the State of Delaware who operates a facility that produces organic or inorganic nutrients;



(2) Private Nutrient Handler: A person in this State who applies organic or inorganic nutrients to lands or waters he or she owns, leases, or otherwise controls;

(3) Commercial Nutrient Handler: A person in this State who applies organic or inorganic nutrients to lands or waters as a component of a commercial or agricultural business in exchange for a fee or service charge.

(4) Nutrient Consultant: A person in this State who is engaged in the activities of advising or consulting regarding the formulation, application, or scheduling of organic or inorganic nutrients within the State of Delaware.

(c) The Commission may subclassify any certificates described in subsection (b) of this section as necessary. Separate subclassifications may be specified as to the method used by nutrient handlers to apply nutrients, the use of specific quantities or types of nutrients, or any other identifiable characteristics of nutrient management the Commission deems necessary.

(d) These certification requirements shall not apply to individuals who are performing nutrient application services under the direct supervision of a certified person as a private or commercial nutrient handler.

#### § 2242. Certification; applications.

(a) Applications for certification shall be made to the Commission in writing on a form designated by the Commission.

(b) The Commission shall develop and approve minimum criteria for certification which shall be included in Regulations promulgated by the Secretary.

(c) The Commission may establish by regulation a yearly fee for each certificate.

(d) If the Commission finds the applicant qualified to handle nutrients in the classifications he has applied for, the Commission may issue a certificate limited to the classifications for which the applicant is qualified. The Commission may limit the certificate of the applicant based on any subclassification the Commission has established. If a certificate is not issued as applied for, the Commission shall inform the applicant in writing of the reasons therefor.

#### § 2243. Same – Denial.

(a) The Commission may refuse to grant any certificate if the applicant fails to meet the minimum criteria for certification or has been found to have violated this chapter or Commission regulations related to the generation or application of nutrients in this State.

(b) All decisions of the Commission relating to the denial of a certificate shall be final and conclusive unless the person who was denied a certificate shall appeal that denial pursuant to provisions of § 2262 of this Chapter.

§ 2244. Same; Suspension, modification; revocation.

(a) The Commission may, after notice and opportunity for a hearing, suspend 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 regulation. 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 his 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 person certified has been found guilty of any violation of this chapter or Commission regulations.

(c) 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 Chapter.

§ 2245. Same – Renewal.

(a) The Commission shall establish the length of time that certificates shall remain in full force and effect, and if they are to expire, the procedure for renewal.

(b) All decisions of the Commission relating to the refusal of the Commission to renew a certificate shall be final and conclusive unless the person whose certificate was not renewed shall appeal pursuant to the provisions of § 2262 of this Chapter.

§ 2246. Commercial Processors.

(a) On or before July 1, 2000, or prior to commencing operations, each commercial processor operating in the State shall file with the Commission a plan under which the commercial processor either directly or under contract with a third party shall:

- (1) provide, or assist in providing, technical assistance to growers with whom it contracts on the proper management and storage of waste in accordance with best management practices approved by the Commission;
- (2) provide, or assist in providing, continuing education programs on proper waste management that is protective of Delaware's environment for the growers with whom it contracts as well as other persons who may handle or utilize such waste;
- (3) conduct or fund research and demonstration programs that will contribute to improved waste management practices;
- (4) formulate and implement nutrient reduction strategies that effectively minimize the addition of nutrients to the environment without having adverse health impacts on animals or reduction in the growth of animals; and
- (5) report annually to the commission on the activities it has undertaken pursuant to its plan and any amendments thereto.

(c) This section is not to be construed as a mandate to involve commercial processors in farm activities not related to waste management.

§ 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:

- (1) field maps showing reference points (such as buildings, stream, irrigation equipment, etc.) number of acres and soil types;
- (2) soil and organic waste analyses;
- (3) current and planned crop rotations;
- (4) expected yields based on best 4 out of 7 year data or, in the absence thereof, soil productivity charts; and
- (5) recommended rates, timing and methods of nutrient applications.
- (b) Nutrient management plans shall specify the level of nutrient applications that are needed to attain expected crop yields as defined in (a)(4) above. 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 (a)(4) above of the specific crop.
- (c) 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. 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.
- (d) Nutrient Management Plans shall be updated a minimum of every three 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<sup>th</sup> of the year in which it must be updated.

(e) 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 persons 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) 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) 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) 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) 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) mortality disposal method.

(j) The State shall make nutrient consultants available through the Conservation Districts to provide free nutrient management plans assistance to anyone requesting such

321 assistance. For those persons wishing to hire private Nutrient Consultants, the State, through  
322 the Conservation Districts, shall reimburse any person establishing a Nutrient management  
323 Plan or updating an established Nutrient Management Plan at a rate and amount that shall be  
324 determined annually by the Commission and subject to annual appropriations.

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

330 §2250. Confined Animal Feeding Operations Subject to Clean Water Act Section 402  
331 Requirements

332 (a) Section 301(a) of the Clean Water Act (CWA) establishes statutory requirements for  
333 the discharge of pollutants from point sources to waters of the United States. Under  
334 the CWA Section 502(14) and implementing regulations at 40 CFR Section 122.23  
335 and 40 CFR Part 122, Appendix B, and "concentrated animal feeding operations" are  
336 point sources subject to the National Pollutant Discharge Elimination System  
337 (NPDES) program. Generally, these regulations define a CAFO as an animal feeding  
338 operation where more than 1000 animal units are confined at the facility.

339 (b) Within six months of the enactment of this Act the Secretary, in consultation with the  
340 Commission and the Secretary of the Department of Natural Resources and  
341 Environmental Control, shall prepare and submit for approval a State NPDES  
342 program for Confined Animal Feeding Operations in accordance with 40 CFR Part  
343 123.21 to the Administrator of the U.S. Environmental Protection Agency.

(c) In preparing the State's NPDES program submission for CAFOs, the Secretary shall rely to the maximum extent practicable on the authorities, requirements, and procedures established in this Act. The State NPDES Program submission shall include the following provisions in addition to those specified in this Act:

(1) Each person covered by this section shall develop a nutrient management plan (NMP) which is signed and kept under their control. This NMP shall be developed per §2247 and shall also include, as necessary, the following additional site specific handling and storage considerations: diverting clean water from contacting animal waste or litter; preventing storage, collection, and conveyance systems from leaking organic matter, nutrients, and pathogens to ground or surface water; providing adequate storage to prevent polluted runoff; handling manure and litter to reduce nutrient losses; managing dead animals to protect ground and surface waters; and tillage and crop residue management practices.

(2) The NMP shall be amended per §2247(d) 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.

(3) NMPs developed under this Subsection shall be made available per §2247(c).

d) Upon approval of the State NPDES program for Confined Animal Feeding Operations, the Secretary shall give first priority to the issuance of statewide or watershed general permits for operations covered by subsection (a). With the guidance, advice and consent of the Commission, the Secretary may use individual NPDES permits for exceptionally large operations, new operations or those undergoing significant expansion, operations with historical compliance problems, or operations with significant environmental concerns.

e) With the guidance, advice and consent of the Commission, the Secretary is hereby authorized to require any person otherwise covered by this Act to apply for and obtain an NPDES permit if that person:

(1) is in significant noncompliance with the provisions of the SNMP; and

(2) there is evidence indicating that person is a significant contributor of a pollutant to waters of the State.

The Secretary shall notify a person in writing that an NPDES permit is required. Such notice shall include a brief statement of the reasons for the decision, an application form, a deadline for submission of the application and a statement regarding the effective date of coverage. A person's obligation to independently seek and secure an NPDES permit is not conditioned upon or qualified by the Secretary's duty to notify a person that an NPDES permit is required.

#### Subchapter IV. Complaints, Hearings and Appeals

##### § 2260. Complaints; investigations; enforcement.

(a) The Commission shall establish by regulation a process whereby any person may file a complaint with the Commission against any person for a violation of any of the provisions of this chapter or any regulations promulgated pursuant thereto.

(b) The Commission shall establish by regulation the procedure for investigating any complaints brought before the Commission and the manner in which those complaints shall be resolved.

(c) The Commission shall, when requested, keep confidential the names of complainants, and shall not investigate or respond to anonymous complaints.

##### § 2261. Hearings; procedural requirements.

(a) The Commission shall examine all complaints meeting the criteria of §2260(a) brought before it for violations of this chapter or Commission regulations within 60 days of receipt of



the complaint. The Commission 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) The Commission 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 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.

(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 Chapter.

#### § 2262. Certification Appeals.

(a) All decisions of the Commission pursuant to § 2243 or § 2245 of this Chapter shall be final and conclusive unless within 15 days after notice thereof, the person who was denied a certificate, or whose certificate was not renewed, shall appeal to the Commission for a hearing on the matter. The Commission shall hold a hearing within 60 days of receipt of the appeal and develop a record on the case upon which they shall base their decision on the appeal. The Commission may uphold, modify or reverse their decision to issue or renew the certificate.

#### §2263 Appeals to the Secretary.

(a) All decisions of the Commission pursuant to this Chapter shall be final and conclusive unless within 15 days after notice thereof, the Secretary receives an appeal for a review of any Commission decision. Such appeal shall state the nature of the appeal, the reasons therefor, and the remedy sought. The Secretary may uphold the action of the Commission, remand the decision back to the Commission for further consideration, or repeal the action of the Commission. The Secretary may appoint a hearing officer who shall hold a hearing pursuant to the Administrative Procedures Act. The Secretary shall base his decision solely on the record developed by the Commission at the hearing unless the Secretary finds that additional evidence should be taken. If the Secretary finds that additional evidence should be taken, the Secretary may take the additional evidence or remand the cause to the Commission for completion of the record.

(b) All decisions of the Secretary on appeals brought pursuant to this section shall be final and conclusive unless, within 10 days after notice thereof, a party appeals to the Superior Court of the county in which the violation occurred. In every appeal from a decision of the Secretary, the cause shall be decided by the Court on the record, without aid of the jury; and may affirm, reverse, or modify the Secretary's decision. The findings of fact made below shall not be set aside unless the Court determines that the record contains no substantial evidence that would reasonably support the findings. If the Court finds that additional evidence should be taken, the Court may take the additional evidence or remand the cause to the Secretary for completion of the record. If the Court finds that an error of law has been made, the Court shall reverse or modify the Secretary's decision and render an appropriate judgement.

Subchapter V. Enforcement, Suits for Enforcement, and Incentives.

§ 2280. Enforcement; fines and penalties

(a) Whoever violates this chapter or any rule or regulation duly promulgated thereunder, or 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) If the violation is completed, by a civil penalty 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.

§ 2281. Suits for Enforcement.

Any person may file suit in Chancery Court for injunctive relief against:

(a) Any person found pursuant to Section 2260 to have violated this Chapter or regulations promulgated thereunder;

(b) The Department of Agriculture for any alleged failure to perform any act or duty mandated to the Department under this Chapter; or

(c) The Commission for any failure to perform any act or duty mandated to the Commission under this Chapter or for failure to enforce the Chapter or regulations promulgated thereunder.

#### § 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 Chapter until such funding becomes available. Provided, however that the owner-operator must accept the first available funding after a period of three years dated from nutrient management plan acceptance.

#### Subchapter VI. Program Reports

##### § 2290. Annual reports.

(a) The Commission shall prepare and submit an annual report of its activities and the environmental results that have accrued during the previous year for the Governor and the General Assembly by the first day of April each year. Each annual report shall include: specific recommendations for incentives to promote best management practices within the industry; a complete list and delineation of all critical areas identified jointly with the Secretary of the Department of Natural Resources and Environmental Control that will be targeted for action and the reasons therefor; a listing of all nutrient management training and education opportunities that were available in the State or within a reasonable travel distance and any records of participation in those events; and

best management practices implemented and the amount of acres under nutrient management plans by watershed.

(c) Each person required to maintain a nutrient management plan or animal waste management plan shall submit to the Commission, by March 1<sup>st</sup> of every calendar year, on a form developed and supplied by the Commission, a report detailing, at a minimum, the following:

(1) The amount of animal wastes applied to the land and the quantity of land it was applied to;

(2) The amount of animal wastes transferred for alternative uses (if applicable), and

(3) The amount of inorganic fertilizers applied to the land.

All reports submitted under this subsection, shall not be considered public records under Delaware's Freedom Of Information Act and shall not be disclosed. Such data may be used for data compilation."

Section 4. Within 6 months of enactment of this Act, the Department of Agriculture shall develop a comprehensive list of entities and industries within this State who may be required to become certified or required to develop nutrient management plans pursuant to this Act and shall provide such list to the Commission.

Section 5. The Commission shall select, by a random method to be determined by the Commission, those persons who shall report a Nutrient Management Plan to the Commission in the years 2003, 2004, 2005, 2006 and 2007. Except those persons already in possession of nutrient management plans which meet or exceed Commission standards, one fifth (1/5) of these plans shall be reported by January 1, 2003, 1/5 by January 1, 2004, 1/5 by January 1, 2005, 1/5 by January 1, 2006, and 1/5

541 by January 1, 2007. Contingent upon adequate funding the Commission shall have  
542 fully implemented the SNMP by the year 2007.

543 Section 6. Continuation of the SNMP is dependent upon continued adequate funding.

544 Section 7. If any provision of this Act or the application thereof to any person or  
545 circumstances is held invalid, such invalidity shall not affect other provisions or  
546 applications of this Act which can be given effect without the invalid provision or  
547 application, and to this end the provisions of this Act are severable.

548 Section 8. This Act shall become effective upon the date of its enactment into law.

SYNOPSIS

With the goal and intention of improving water quality in the State of Delaware through the regulation of the generation and application of nutrients, this Act establishes the Delaware Nutrient Management Commission and directs it to establish a Statewide Nutrient Management Program. Pursuant to this Act, the Commission is empowered to promulgate regulations relating to certification of nutrient applicators and the development of nutrient management plans. The Commission is further empowered to enforce its regulations, develop incentive based programs to achieve early and full compliance and report on its activities to the General Assembly on an annual basis.