

**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
OFFICE OF THE SECRETARY**

Statutory Authority: 7 Delaware Code, Section 7507A(b) (7 **Del.C.** §7507A(b))

FINAL

Secretary's Order No.: 2018-P-0030

**RE: Approving Final New Regulations: 7 DE Admin. Code 109:
Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection**

Date of Issuance: May 15, 2018

Effective Date of the Amendment: June 11, 2018

109 Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") pursuant to 7 **Del.C.** §§6006, 6010, 7 **Del.C.** §7507A(b), 29 **Del.C.** §8003(7), and any other relevant statutory authority, the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced regulatory proceeding.

Background, Procedural History and Findings of Fact

This Order relates to proposed new Regulations, to wit: 7 **DE Admin. Code** 109: *Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection* (hereinafter referred to as "Open Space Regulations"). Title 7, Chapter 75 of the Delaware Code, known as the *Delaware Land Protection Act* ("LPA"), gives State agencies the ability to permanently protect land through the acquisition of a property in fee simple interest or through the acquisition of a conservation easement on a property. The Open Space Program, established by the LPA, was created to fund these acquisitions. The associated Open Space Council, which consists of seven members appointed by the Governor, was created to advise the Cabinet Secretary of DNREC on all matters relating to the administration, implementation, and financing of the Open Space Program, pursuant to 7 **Del.C.** §7505.

The entities of the State that are eligible to purchase land through the Open Space Program are as follows: (1) the DNREC Division of Parks and Recreation; (2) the DNREC Division of Fish and Wildlife; (3) the Department of Agriculture; (4) the Delaware Forest Service; and (5) the Department of State Division of Historic and Cultural Affairs. All land transactions are voluntary, and are done to permanently protect land in the State of Delaware. To be eligible for permanent protection, an area of land must include or exhibit, in whole or in part, one or more of the criteria described in 7 **Del.C.** §7507A. Support staff of the Open Space Program evaluates a property based on a set of guidelines before presenting the same to the Open Space Council for consideration. These guidelines take into consideration the ecological value of a property, land use of the property and the surrounding properties, cultural and historic resources, water features, recreation, and descriptive evaluation.

The guidelines that staff uses for evaluation purposes were approved by the Open Space Council, as required by the LPA; however, the public expressed interest in having input as to how properties were evaluated as well. During the process of amending the LPA in 2016, legislators decided the best way to incorporate public comment was through notice and public hearing, pursuant to the Administrative Procedures Act ("APA"), pursuant to 29 *Del.C.* Chapter 101, Subchapter II.

In consultation with the Department of Justice, the Department crafted the proposed Open Space Regulations, which were developed to comply with the aforementioned APA requirement. As stated therein, the purpose of the proposed Regulations is to detail the *Guidelines to Evaluate Land Being Considered for Permanent Protection* that the State agencies, as defined in 7 **Del.C.** §7504(10), utilize to evaluate land(s) that have been offered for permanent protection, to ensure that such land(s) should be permanently protected, and that such permanent protection furthers the purposes of the Land Protection Act, pursuant to 7 **Del.C.** Ch. 75.

The Department has the statutory basis and legal authority to promulgate the proposed new Regulations, pursuant to 7 **Del.C.** §7507A(b) and 29 **Del.C.** §8003(7). The Department's Division of Parks and Recreation, Planning, Preservation and Development Section, commenced the regulatory development process with Start Action Notice #2017-01 (signed by then-DNREC Secretary David Small on February 7, 2017). The Department published its initial proposed Open Space Regulations in the March 1, 2017 Delaware *Register of Regulations*. It should be noted that the Department's initial proposed new Regulations incorporated the now formally named "*Guidelines to Evaluate Land Being Considered for Permanent Protection*" in Section 4.1. The aforementioned proposed new Regulations were then presented and thoroughly vetted by the Department at the public hearing on March 23, 2017. Members of the public attended the public hearing, and

comment was received by the Department regarding this proposed regulatory promulgation.

Subsequent to the public hearing of March 23, 2017, responsible Department staff reviewed the comments that were received prior to the hearing record closing for comment on April 8, 2017. As a result of that review, the Department determined that several revisions should be made to the proposed Regulations, in order to provide additional clarity and a greater understanding to the public with regard to how the Open Space Program evaluates land(s) that have been offered for permanent protection. Since these revisions were substantive in nature, and were made subsequent to the public hearing of March 23, 2017, the revised proposed Open Space Regulations were re-noticed and re-published in the Delaware *Register of Regulations* on August 1, 2017. Accordingly, the hearing record was re-opened for an additional thirty (30) days at that time in order to receive comment from the public.

The hearing record remained open for public comment through close of business on August 31, 2017. No additional comment was received by the Department concerning this proposed promulgation. It should be noted that all notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

Hearing Officer Vest prepared a Hearing Officer's Report dated April 25, 2018 ("Report"). The Report documents the proper completion of the required regulatory development process, establishes the record, and recommends the adoption of the revised proposed new Open Space Regulations as attached to the Report as Appendix "A."

Reasons and Conclusions

Based on the record developed by the Department's experts and established by the Hearing Officer's Report, I find that the revised proposed new Regulation, to wit: **7 DE Admin. Code 109: Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection**, are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the revised proposed new Open Space Regulations be promulgated as final. I further find that the Department's experts in the Division of Parks and Recreation in the Planning, Preservation and Development Section fully developed the record to support adoption of this revised proposed new Regulation.

In conclusion, the following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to the revised proposed new Regulations, to wit: **7 DE Admin. Code 109: Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection**, pursuant to **7 Del.C. §7507A(b)** and **29 Del.C. §8003(7)**;
2. The Department has jurisdiction under its statutory authority, pursuant to **7 Del.C. §7507A(b)** and **29 Del.C. §8003(7)**, to issue an Order adopting these revised proposed new Regulations as final;
3. The Department provided adequate public notice of the initial proposed new Regulations and all proceedings in a manner required by the law and regulations, and provided the public with an adequate opportunity to comment on the same, including at the time of the public hearing held on March 23, 2017, and during the 15 days subsequent to the hearing (through April 8, 2017). Moreover, the Department provided the public an additional period of time in which to offer comment in this matter when the revised proposed Regulations were re-noticed and re-published in the *Register of Regulations* August 1 - 31, 2017, consistent with **29 Del.C. §10118(a)**, before making any final decision;
4. Promulgation of the revised proposed new Regulations will enable the Department to detail the *Guidelines to Evaluate Land Being Considered for Permanent Protection* that the State agencies, as defined in **7 Del.C. §7504(10)**, utilize to evaluate land(s) that have been offered for permanent protection, to ensure that such land(s) should be permanently protected, and that such permanent protection furthers the purposes of the Land Protection Act, pursuant to **7 Del.C. Ch. 75**;
5. The Department has reviewed the revised proposed new Regulations in the light of the Regulatory Flexibility Act, consistent with **29 Del.C. Ch. 104**, and has selected Exemption "A" regarding same, as this proposed promulgation is not subject to Chapter 104, Title 29 of the Delaware Code, because it will not apply to small businesses or individuals at all;
6. The Department's Hearing Officer's Report, including its established record and the recommended revised proposed new Regulations as set forth in Appendix "A," are hereby adopted to provide additional reasons and findings for this Order;
7. The Department's initial proposed new Regulations, as initially published in the March 1, 2017 Delaware *Register of Regulations*, and then subsequently revised, re-noticed and re-published, and as set forth in Appendix "A" hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final revised new Regulations, which shall go into effect ten days after their publication in the next available issue of the Delaware *Register of Regulations*; and
8. The Department shall submit this Order approving as final the revised proposed new Regulations as final new Regulations, to wit: **7 DE Admin. Code 109: Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection**, to the Delaware *Register of Regulations* for publication in its next available issue, and provide such other notice as the law and regulation require and the Department determines is appropriate.

Shawn M. Garvin
Secretary

109 Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection

1.0 Purpose of the Regulations

The purpose of the Regulations contained herein is to detail the Guidelines to Evaluate Land Being Considered for Permanent Protection that the State agencies, as defined in 7 Del.C. §7504(10), shall use to evaluate land(s) that have been offered for permanent protection to ensure that the land(s) should be permanently protected and that permanently protecting the land furthers the purposes of the Land Protection Act, 7 Del.C. Ch. 75.

2.0 Definitions

As used in these Regulations, the following terms shall have the meanings set forth here:

"Act" refers to the Land Protection Act (7 Del.C. Ch. 75).

"Buffer" refers to a vegetated area near a stream or other water feature which helps improve water quality by serving as protection from impacts of adjacent land use.

"Cultural/ Historic Resources" means those structures, improvements, sites or lands that are listed as significant in or eligible for listing in the National Register of Historic Places, either as individual listings or as contribution elements in listed or eligible historic districts (30 Del.C. §1803).

"Early Successional Habitat or ESH" refers to mixed stand of grasses and herbaceous flowering plants, old field habitat, pastureland, and shrubland.

"ERES Waters" refers to waterways or waterbodies having the designation requiring the highest level of protection for waters that are of "Exceptional Recreation or Ecological Significance" (ERES). These waterways are important habitats for a multitude of wildlife and are also popular recreation destinations.

"Fisheries Access Area" refers to an area where fish could be caught, such as a shoreline or pier or somewhere a boat could get access to the water for the purpose of fishing.

"Fisheries Resource Protection Areas" means critical nursery or spawning habitat for anadromous fish, bivalves, and shellfish.

"Floodway" means an area of land that impacts or is impacted by flooding.

"Habitat of Conservation Concern (HCC)" refers to habitats that are rare, have special significance in Delaware, are particularly sensitive to disturbance, and/or have a high diversity of rare plants.

"Management Plan" refers to a plan for the stewardship of land that would support the purposes of the Act.

"Mean High Water (MHW)" refers to the average of all the high water heights observed over a period of several years.

"Nutrient Management Critical Priority Areas" refers to areas established to help the Delaware Nutrient Management Commission decide where to focus their efforts with respect to their Nutrient Management Planning and Nutrient Relocation programs. The Delaware Nutrient Management Act (3 Del.C. Ch. 22) was enacted in June 1999 as part of an effort to address water quality concerns in Delaware.

"One-Hundred-Year Floodplain" refers to the area of inundation when the expected 100-year flood flow rate is mapped. A one-hundred-year flood is a flood event that has a 1% probability of occurring in any given year.

"Open Space" or "open space land" means any land the permanent protection of which will further any of the purposes listed in the Act.

"Open Space Program" means the conservation program created to carry out the purposes of the Act.

"Permanent protection", "permanently protected", "permanently protect", or "preservation" means the acquisition by purchase, gift, grant, bequest, devise, or otherwise of the fee or any lesser interest, development right, easement, covenant, or other contractual right in land in perpetuity necessary to achieve the purposes of the Act.

"Proximity to Population Base" refers to the Strategies for State Policies and Spending document, which is developed by the Office of State Planning Coordination and adopted by Executive Order. Levels 1-3 are the areas wherein State policies will support growth and economic development activities, with Levels 1 and 2 being the primary focus.

"Regional Priorities" means priorities that an organization has developed that could support the purposes of the Act.

"Restoration" means renewing degraded, damaged, or destroyed ecosystems and habitats in the environment by active intervention and action.

"S1 Species" refers to species classified as extremely rare with typically 5 or fewer occurrences statewide.

"S2 Species" refers to species classified as very rare with typically 6 to 20 occurrences statewide.

"S3 Species" refers to species classifies as rare to uncommon with approximately 21 to 100 occurrences statewide.

"Sea Level Rise (SLR) Adaptation" means adaptations that allow for landward migration of a resource or loss of land due to sea level rise.

"Species of Greatest Conservation Need (SGCN)" refers to species identified according to a set of criteria provided in the Delaware Wildlife Action Plan. SGCN are species indicative of the overall diversity and health of the State's wildlife resources. Some may be rare or declining, may be vital components of certain habitats, and/or may have a significant portion of their population in Delaware.

"Stand-alone" means land that is not adjacent to properties that are already protected, or part of a greater management plan for an area that is already protected.

"State agency" means the Department of Natural Resources and Environmental Control (Division of Parks and Recreation or the Division of Fish and Wildlife), Department of State (Division of Historical and Cultural Affairs), or the Department of Agriculture (Delaware Forest Service) (7 Del.C. §7504(10)).

"State Registry of Natural Areas" means a list identifying all State-registered Natural Areas accompanied by a map on file at the Office of Nature Preserves.

"Statewide Comprehensive Outdoor Recreation Plan (SCORP)" refers to a planning and policy document that identifies needs in outdoor recreation throughout the State of Delaware.

"Utilities" means aboveground public utilities that serve more than one entity, such as electric transmission or distribution lines, fiber optic/cable lines, cell tower and/or solar panel array.

"Viewshed" means an area of particular scenic or historic value that is deemed worthy of preservation against development or other change.

"Watershed Impairment" refers to waters that do not meet the standards of Section 303(d) of the Clean Water Act (CWA). Section 305(b) of the CWA requires reporting of the conditions of the waters of the State. If monitoring reveals that a stream has high pollutant levels that prevent it from achieving all of its designated uses, it is considered impaired and will be placed on the 303(d) list. This information is organized by watershed, or the land area draining to a particular water body.

3.0 Open Space Criteria

To be eligible for permanent protection, an area of land must include or exhibit, in whole or in part, one or more of the criteria set forth in 7 Del.C. §7507A(a).

4.0 Open Space Evaluation

- 4.1 State agencies shall use the Guidelines to Evaluate Land Being Considered for Permanent Protection, last updated 12/7/16, to evaluate land(s) which a landowner has offered for permanent protection to ensure that permanently protecting the land furthers the purposes of the Act. The Guidelines can be found here:

Guidelines to Evaluate Land Being Considered for Permanent Protection

- 4.2 A representative of the Open Space Council or State agency may access the land being considered for permanent protection to perform onsite verification to gather information about the land only after the landowner executes the written permission form attached to the aforementioned guidelines granting the representative permission to enter upon the land.