



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

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DOVER, DELAWARE 19901

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Secretary's Order No.: 2016-WS-0023

**RE: Approving Final Revised Amendments to the
Regulation Governing Beach Protection and the Use of Beaches,
pursuant to 7 DE Admin. Code §5102**

Date of Issuance: July 15, 2016

Effective Date of the Amendment: August 11, 2016

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, and other relevant 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.

The *revised* regulatory amendments that will be adopted through this Order represent the culmination of many years of work and extensive public outreach by the Department, which includes (but is certainly not limited to) multiple discussions with stakeholders, legislators, and, of course, the public in general. These *revised* regulatory amendments are responsive to the concerns that have been raised in said discussions and through the Department's regulatory development process which has taken place over the course of the last few years.

Delaware's Good Nature depends on you!

Background, Procedural History and Findings of Fact

This Order relates to the proposed *revised* regulatory amendments to 7 DE Admin. Code §5102: *Regulation Governing Beach Protection and the Use of Beaches* (“regulatory amendments”, “Amendments”). The purpose of this action is to (1) incorporate legislative changes to Delaware’s *Beach Preservation Act* (7 *Del.C.*, Ch. 68); (2) incorporate Division policies and construction standards that will result in less damage to structures and more protection of the dune and beach resources; and (3) provide consistency and additional clarity by harmonizing various provisions of the aforementioned existing Regulation.

Delaware’s Beach Preservation Act was passed in 1972 as the General Assembly recognized that Delaware’s beaches were rapidly deteriorating due to a combination of natural processes and continuing encroachment. The Department was charged through this act to enhance, preserve and protect the public and private beaches of the state and to mitigate beach erosion and minimize storm damage.

A significant amendment to the Act was passed by the General Assembly in 1996 which required the Department to take additional steps to minimize the impacts on the beach and dunes from any construction that took place seaward of the building line. The legislation, among other things, amended 7 *Del.C.*, Ch. 68, by adding a new sentence at the end of subsection 6805(d) that reads as follows:

If any structure proposed to be built in whole or in part seaward of the building line could reasonably be reduced in size or otherwise altered in order to eliminate or diminish the amount of encroachment over the building line, the Department shall require such reduction or alternation as a condition of granting the permit or letter of approval.

The methodology by which to achieve the objective stated in the legislation was developed by the Department as a set of procedures and guidance that became known as “The Four Step Process.” This guidance has not, until now, been incorporated into the Beach Regulations. By incorporating the Four Step Process into the regulation, as it has existed and been applied during the past 20 years, assures consistency, transparency and certainty for the public.

Pursuant to 7 Del.C. §6803(c), the Department’s Division of Watershed Stewardship (“Division of WSS”, “WSS”), Shoreline and Waterway Management Section (“SWMS”), is charged with promulgating rules and regulations to effectuate the purpose of the *Beach Preservation Act* (“Act”), which is to enhance, preserve and protect the public and private beaches throughout the State of Delaware. The Department’s Division of WSS, SWMS, commenced the regulatory development process with Start Action Notice 2014-05, dated May 20, 2014. The Department published its initial proposed regulatory amendments in the October 1, 2015 *Delaware Register of Regulations*.

After six (6) public workshops, eleven (11) Regulatory Advisory Committee meetings (all of which were open to the public), and various other meetings, discussions and reviews, the Department placed legal notices in both the News Journal and the Delaware State News, advertising that a public hearing would be held on November 7,

2015 to provide an opportunity for the public to comment on these proposed regulatory amendments. Members of the public attended that hearing, and many provided comment to the Department regarding the same, both at the time of the hearing and during the post-hearing phase of this regulatory promulgation. After extending the public comment period an additional fifteen (15) days (in order to provide people a greater opportunity to participate in this process), the formal hearing record closed with regard to public comment on December 7, 2015.

Subsequent to the aforementioned record closing, the Department's Division of WSS, SWMS, then began a thorough review of the formal hearing record generated to date with respect to this proposed promulgation, including, but not limited to, a detailed review of the formal hearing transcript, and all comment received from the public. The Division of WSS, SWMS, then prepared its formal Technical Response Memorandum ("TRM"), dated January 29, 2016, which documents the exhaustive review performed by the Department with regard to this proposed regulatory promulgation, and offers the Department's response to all comments received throughout this long regulatory process.

It should be noted that the largest number of comments received by the Department in this matter was related to the issue of whether the proposed regulations represented any taking of private property. The regulations are not a taking as they allow an existing property owner to rebuild or repair structures, even on lots that are traversed by the building line established by law, as long as they work within the existing footprint and minimize encroachment. The Four Step Process, now included in the regulations, ensures that structures do not protrude excessively seaward in comparison to their adjacent neighbors. The regulation of the use of property for the benefit of the public and

the protection of natural resources, such as through zoning, has been routinely upheld by the courts as a legitimate exercise of authority. Since 1972, no Delaware Court has found that the Delaware Regulations for beach preservation constitute an unconstitutional taking.

Of note is the fact that, in response to the numerous meritorious comments and suggestions received, the Department has proposed only one change to the initially proposed regulatory amendments, to wit: the clerical correction of an erroneous definition of “National American Vertical Datum” (“NAVD”), as follows:

“National Geodetic [North] American Vertical Datum (NGAVD)”

Due to the fact that this revision does not alter the meaning or function of the proposed regulatory amendments, it is not construed to be substantive in nature. Therefore, according to 29 *Del.C.* §10118(c), no additional re-publication or re-noticing of these proposed Amendments is necessary at this time.

As set forth in the Department’s TRM referenced above, the Department has the statutory basis and legal authority, pursuant to 7 *Del.C.* §6803(c), to promulgate rules and regulations to effectuate the purpose of the *Beach Preservation Act*. It should also be noted that all proper notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

Subsequent to receiving the Division of WSS, SWMS's aforementioned TRM, the Department's presiding hearing officer, Lisa A. Vest, then prepared a Hearing Officer's Report dated May 6, 2016 ("Report"). The Report documents the proper completion of the required regulatory development process, establishes the record, and recommends the adoption of the proposed *revised* regulatory amendments, as attached to the Report as Appendix "B".

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 proposed *revised* regulatory amendments, to wit: 7 DE Admin. Code §5102: *Regulation Governing Beach Protection and the Use of Beaches*, are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed regulatory *revised* regulatory amendments be promulgated as final.

I find that the Department's experts in the Division of WSS, SWMS, fully developed the record to support adoption of these *revised* regulatory amendments. The adoption of these *revised* regulatory amendments will allow Delaware to (1) incorporate legislative changes to the *Beach Preservation Act* (7 Del.C., Ch. 68); (2) incorporate Division policies and construction standards that will result in less damage to structures and more protection of the dune and beach resources; and (3) provide consistency and additional clarity by harmonizing various provisions of the aforementioned existing 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 proposed *revised* amendments to 7 DE Admin. Code §5102: *Regulation Governing Beach Protection and the Use of Beaches*, pursuant to 7 Del.C. §6803(c);

2. The Department has jurisdiction under its statutory authority, pursuant to 7 Del.C., Ch. 60, to issue an Order adopting the proposed *revised* regulatory amendments as final;

3. The Department provided adequate public notice of the initial proposed regulatory amendments and all proceedings in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on said regulatory amendments, including at the time of the public hearing held on November 7, 2015, and held the record open through close of business on December 7, 2015, as referenced in detail above, consistent with 29 Del.C. §10118(a), in order to consider all public comment on the same before making any final decision;

4. While the Department made a clerical *revision* to the initial proposed regulatory language correcting a definition, as set forth in the above-referenced TRM of January 29, 2016, such change does not alter the meaning or function of the proposed regulatory amendments, is not substantive, and therefore, according to 29 Del.C. §10118(c), no additional re-publication or noticing of the same is necessitated at this time;

5. The Department's Hearing Officer's Report, including its established record and the recommended proposed *revised* regulation amendments, as set forth in its Appendix "B", are hereby adopted to provide additional reasons and findings for this Order;

6. Promulgation of the proposed *revised* regulatory amendments to 7 DE Admin. Code §5102: *Regulation Governing Beach Protection and the Use of Beaches*, will allow Delaware to (1) incorporate legislative changes to the *Beach Preservation Act* (7 Del.C., Ch. 68); (2) incorporate Division policies and construction standards that will result in less damages to structures and protections of the dune and beach resources; and (3) provide consistency and additional clarity by harmonizing various provisions of the aforementioned existing Regulation;

7. The Department has reviewed these proposed *revised* regulatory amendments in the light of the Regulatory Flexibility Act, consistent with 29 Del.C. Ch. 104 (version applicable to all regulations initially published on or before December 31, 2015), and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;

8. The Department's proposed *revised* regulatory amendments, as published in the October 1, 2015 *Delaware Register of Regulations*, and as *revised* and set forth in Appendix "B" of the aforementioned Hearing Officer's Report, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they are approved as final *revised* regulatory amendments,

which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and

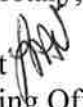
9. The Department shall submit this Order approving as final the proposed revised regulatory amendments to 7 DE Admin. Code §5102: *Regulation Governing Beach Protection and the Use of Beaches*, to the *Delaware Register of Regulations* for publication in its next available issue, and provide such other notice as the law and regulation require and the Department determines is appropriate.



David S. Small
Secretary

HEARING OFFICER'S REPORT

TO: The Honorable David S. Small
Cabinet Secretary, Department of Natural Resources and Environmental Control

FROM: Lisa A. Vest 
Public Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: **Proposed Amendments to the *Regulation Governing Beach Protection and the Use of Beaches*, pursuant to 7 DE Admin. Code §5102**

DATE: May 6, 2016

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Saturday, November 7, 2015, at 10:00 a.m. by the Department of Natural Resources and Environmental Control ("DNREC", "Department"), at the Lewes Fire Department, Station #2, 32198 Janice Road, Lewes, Delaware to receive comment on proposed regulatory amendments to 7 DE Admin. Code §5102: *Regulation Governing Beach Protection and the Use of Beaches* ("regulatory amendments", "Amendments"). The purpose of this action is to (1) incorporate legislative changes to Delaware's *Beach Preservation Act* (7 Del. C., Ch. 68); (2) incorporate Division policies and construction standards that will result in less damage to structures and protections of the dune and beach resources; and (3) provide consistency and additional clarity by harmonizing various provisions of the aforementioned existing Regulation. It should be noted that the public hearing of November 7, 2015 held by the Department regarding this proposed regulatory matter was done so only after extensive public outreach by DNREC to the numerous beach communities in Sussex County, Delaware.

Pursuant to 7 *Del.C.*§6803(c), the Department's Division of Watershed Stewardship ("Division of WSS", "WSS"), Shoreline and Waterway Management Section ("SWMS"), is charged with promulgating rules and regulations to effectuate the purpose of Delaware's *Beach Preservation Act* ("Act"), which is to enhance, preserve and protect the public and private beaches throughout the State of Delaware. To obtain an understanding of how the Department developed these proposed regulatory amendments, it is important to briefly review the history surrounding the aforementioned Act, which is the enabling legislation for this proposed action.

The historic northeaster that occurred in March of 1962 (also known as "the Ash Wednesday Storm") was a watershed event for the Delmarva Peninsula (and for Delaware in particular), which resulted in widespread structural damage to existing buildings, as well as widespread damage to dunes throughout the beach communities. A great deal of construction activity occurring in the aftermath of that storm, as many buildings located on the oceanfront were destroyed at that time. This milestone event ultimately led to a need for the development of formal regulations, to ensure that construction activities on the dunes and beaches in Delaware were done in a manner so as to minimize environmental impacts.

In 1972, Delaware's *Beach Preservation Act* was passed, as Delaware's General Assembly recognized that Delaware's beaches were rapidly deteriorating due to a combination of natural processes and continual encroachment. The charge to the Department through this Act was to enhance, preserve, and protect the public and private beaches of the state, and to mitigate beach erosion and minimize storm damage. With that historic context, interim regulations that arose from the Act were adopted in 1973. Subsequently, the first set of final beach regulations was enacted by the Department in May of 1974.

The aforementioned initial beach regulations were revised by the Department in 1981 to adopt the concept of a “mapped building line”. Prior to 1981, field assessments were done in order to determine where the landward toe of the primary dune was located, and construction limits were determined on a lot-by-lot, project-to-project basis. Given the public demand for predictability and information about how and why such construction would be regulated (as expressed to the Department in a public hearing held back in 1978), this mapped building line went into effect in 1981 (based on aerial photography and topography collected in 1979).

The current *Regulation Governing Beach Protection and the Use of Beaches* (“Regulation”) was adopted in 1983, and has not been amended by the Department since that time. There have been several amendments to the *Beach Preservation Act* since 1983 which have yet to be incorporated into the aforementioned Regulation, as well as several long-standing Departmental policies that, while not part of the actual formal Regulation itself, have been utilized to effectuate the mission as set forth in both the Act and the Regulation. In 1984, the Act was amended to redefine the term “beach”. Additional definitions and changes to the penalty provisions were also incorporated into the Regulation at that time.

An important amendment to the Act occurred in 1996. At that time, the General Assembly amended the Act to establish that, in the boardwalk fronting areas zoned “commercial” in Rehoboth and Bethany (where – at that time – there was no dune), the building line was set at the west edge of the boardwalk. Prior to that, in most cases the building line had actually been west of the boardwalk, so there had been a no-build area between the west side of the boardwalk and the building line, a location where little to no protective dune could exist. Also in 1996, there was an amendment to the Act which required the Department to take additional steps to ensure that construction seaward of the building line had as little impact on

dunes and beaches as possible. This 1996 amendment instructed DNREC to require that any construction – in whole or in part – seaward of the building line, which could be reasonably reduced in size or otherwise altered to diminish encroachment over the building line, shall be required by the Department as a condition of granting the permit or letter of approval. This amendment subsequently became a Departmental policy, in order to ensure uniform administration of that law, and was used by DNREC as a guideline for reasonably reducing construction size, or altering the same to lessen encroachment seaward of the building line. This policy ultimately became known as the Department’s “Four-Step Process” which, while existing as a formal policy, has never previously been incorporated into the formal Regulation.

In 2006, an amendment to the Act was clarified. This amendment clarified that Rehoboth, Indian River and Assawoman Bays are removed as part of the defined beach, thus resulting in no regulatory provisions of the Act pertaining to the shoreline of those bays. Also in 2006, the law was modified to require “a vertical datum commonly used by land surveyors”, instead of describing the same as “the National Geodetical Vertical Datum of 1929”, as that was no longer widely used. Additional amendments to the Act at that time included an allowance for rebuilding within the previous structure’s footprint where state or federal agencies are constructing and maintaining dunes and beaches to an engineering standard of storm protection. “Regulated area” and “substantial damage” were formally defined at that time, and the Act was also clarified to ensure that it was clear that minor repairs are no longer (if they ever were) a reason to require movement of a structure or changes in footprint.

It should be noted that there was an effort to promulgate amendments to this Regulation approximately 10 years ago. In 2003, a Start Action Notice was issued for this purpose by the Department, and workshops were held in both Dover and Rehoboth in 2003 and 2005,

respectively. A formal public hearing was held beginning on December 14, 2005, and continued to a second night of January 13, 2006. As a result of the comments and concerns voiced by the public at those hearing events, the Department made the decision to formally abandon those proposed Amendments which comprised that previous promulgation attempt. This present proposed action by the Department, initiated by Start Action Notice 2014-05, was begun with a “clean slate” approach with respect to the development of the same, and should in no way be construed as a continuation of the previous aforementioned promulgation attempt.

As noted above, the Department’s Division of WSS prepared its Start Action Notice (“SAN”) No. 2014-05 to officially begin this proposed promulgation on May 20, 2014. Also in May of 2014, a Regulatory Advisory Committee (“Committee”) was formed. Members of the Committee consisted of a broad spectrum of stakeholders affected by these proposed regulatory amendments. The initial proposed regulatory amendments, as referenced above, was published in Delaware’s Register of Regulations on October 1, 2015. After six (6) public workshops, eleven (11) Regulatory Advisory Committee meetings (all of which were open to the public), and various other meetings, discussions and reviews, the Department placed legal notices in both the News Journal and the Delaware State News, advertising that a public hearing would be held on November 7, 2015 to provide an opportunity for the public to comment on the proposed regulatory amendments. Members of the public attended that hearing, and many provided comment to the Department, both at the time of the hearing and during the post-hearing phase of this promulgation process. After extending the public comment period an additional fifteen (15) days (in order to provide people a greater opportunity to participate in this process), the formal hearing record closed with regard to public comment on December 7, 2015.

Subsequent to the aforementioned record closing, the Department's Division of WSS, SWMS, then began a thorough review of the formal hearing record generated to date with respect to this proposed promulgation, including, but not limited to, a detailed review of the formal hearing transcript, and all comment received from the public. The Division of WSS, SWMS, then prepared its formal Technical Response Memorandum ("TRM"), dated January 29, 2016, which documents the exhaustive review performed by the Department with regard to this proposed regulatory promulgation, and offers the Department's response to all comments received throughout this long regulatory process.

As set forth in the Department's TRM referenced above, the Department has the statutory basis and legal authority, pursuant to 7 *Del.C.* §6803(c), to promulgate rules and regulations to effectuate the purpose of the *Beach Preservation Act*, which is to enhance, preserve and protect the public and private beaches of the State. It should also be noted that all proper notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The public hearing record consists of the following exhibit documents, which are hereby marked by this Hearing Officer as follows: (1) a verbatim transcript; (2) six documents (with Index List) introduced at the public hearing by Jennifer Luoma, Environmental Scientist III, DNREC Division of WSS, SWMS, as Department Exhibits 1-6; (3) all public comment received by the Department, both at the time of the public hearing on November 7, 2015 and during the post-hearing phase leading up until the close of the record with respect to comment on December 7, 2015; and (4) a Technical Response Memorandum ("TRM") from Michael S. Powell, Program Manager, and Jennifer Luoma, Environmental Scientist III, of the Department's Division of

WSS, SWMS, to this Hearing Officer, dated January 29, 2016. The Department's persons primarily responsible for the drafting and overall promulgation of these proposed Amendments, Michael S. Powell and Jennifer Luoma, developed the record with the relevant documents in the Department's files.

As noted above, the purpose of this proposed regulatory promulgation is to incorporate legislative changes to Delaware's *Beach Preservation Act* (7 Del. C., Ch. 68), incorporate Division policies and construction standards that will result in less damages to structures and protections of the dune and beach resources, and provide consistency and additional clarity by harmonizing various provisions of the existing Regulation. The proposed regulatory amendments were presented and thoroughly vetted by the Department at numerous workshops and meetings over the past few years, including, but certainly not limited to, the public hearing of November 7, 2015. As noted previously, members of the public attended the public hearing, and comment was received by the Department during this proposed rulemaking process. Again, all proper notification and noticing requirements concerning this proposed promulgation were met by the Department in this matter.

As noted above, subsequent to the close of the hearing record for public comment on December 7, 2015, the Department thoroughly reviewed the hearing record and then prepared its formal Technical Response Memorandum ("TRM"), dated January 29, 2016. Over one hundred (100) comments were received concerning this proposed promulgation, the majority of which were related to property rights. Several comments were made regarding the definition of "Beach" and "Regulated Area", which are the same definitions found in the Beach Preservation Act, and therefore the Department cannot revise those definitions unless changes are made to the Act. Additionally, there were numerous comments concerning persons driving on the beach at

Broadkill Beach, which is neither condoned nor prohibited by the proposed regulatory amendments.

The aforementioned TRM documents the exhaustive review performed by the Department with regard to this proposed regulatory promulgation, and offers the Department's response to all comments which were received throughout this long regulatory process. Of note is the fact that, in response to the numerous meritorious comments and suggestions received, the Department has proposed only one change to the initially proposed regulatory amendments, to wit: the clerical correction of an erroneous definition of "National American Vertical Datum" ("NAVD"), as follows:

"National Geodetic [North] American Vertical Datum (NGAVD)"

Due to the fact that this revision does not alter the meaning or function of the proposed regulatory amendments, it is not construed to be substantive in nature. Thus, no additional re-publication or re-noticing of these proposed Amendments is necessary at this time.

The Department's aforementioned TRM does an excellent job of identifying all of the relevant issues surrounding this proposed rulemaking, and succeeds in discussing the same in a thorough and balanced manner, while accurately reflecting the information contained in the hearing record. Thus, the Department's TRM of January 29, 2016 is expressly incorporated into this Report, and attached hereto for that purpose as Appendix "A".

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

Based on the record developed, I find and conclude that the Department has provided appropriate reasoning regarding the need for the proposed *revised* amendments to 7 DE Admin. Code §5102: *Regulation Governing Beach Protection and the Use of Beaches*, as noted above.

Accordingly, I recommend promulgation of these proposed *revised* amendments, in the customary manner provided by law.

Further, I recommend the Secretary adopt the following findings and conclusions:

1. The Department has the statutory basis and legal authority to act with regard to the proposed *revised* amendments to 7 DE Admin. Code §5102: *Regulation Governing Beach Protection and the Use of Beaches*, pursuant to 7 Del.C. §6803(c);

2. The Department has jurisdiction under its statutory authority, pursuant to 7 Del.C. Ch. 60, to issue an Order adopting the proposed *revised* regulatory amendments as final;

3. The Department provided adequate public notice of the initial proposed regulatory amendments and all proceedings in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on said regulatory amendments, including at the time of the public hearing held on November 7, 2015, and held the record open through close of business on December 7, 2015, as referenced in detail above, consistent with 29 Del.C. §10118(a), in order to consider all public comment on the same before making any final decision;

4. While the Department made a *revision* to the initial proposed regulatory language, as set forth in the above-referenced TRM of January 29, 2016, such change does not alter the meaning or function of the proposed regulatory amendments, and therefore no additional re-publication or noticing of the same is necessitated at this time;

5. Promulgation of the proposed *revised* regulatory amendments to 7 DE Admin. Code §5102: *Regulation Governing Beach Protection and the Use of Beaches*, will allow Delaware to (1) incorporate legislative changes to the Beach Preservation Act (7 Del. C., Ch. 68); (2) incorporate Division policies and construction standards that will result in less damage to

structures and more protection of the dune and beach resources; and (3) provide consistency and additional clarity by harmonizing various provisions of the aforementioned existing Regulation;

6. The Department has reviewed the proposed *revised* regulatory amendments in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104 (version applicable to all regulations initially published on or before December 31, 2015), and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;

7. The Department's proposed *revised* regulatory amendments, as published in the October 1, 2015 *Delaware Register of Regulations*, and as *revised* and set forth in Appendix "B" 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* regulatory amendments, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and

8. The Department shall submit the proposed *revised* regulatory amendments as final regulatory amendments to 7 DE Admin. Code §5102: *Regulation Governing Beach Protection and the Use of Beaches*, 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.


LISA A. VEST
Public Hearing Officer

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Attachments/Appendix:

Appendix A: Div. of WSS, SWMS TRM (01/29/16)

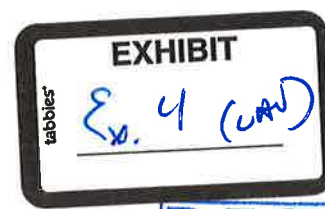
Appendix B: Proposed *revised* regulatory amendments

APPENDIX “A”



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
DIVISION OF WATERSHED STEWARDSHIP
89 Kings Highway
DOVER, DELAWARE 19901

OFFICE OF THE
DIRECTOR



PHONE: (302) 739-9921
FAX: (302) 739-6724

To: Lisa Vest, Hearing Officer

From: Michael S. Powell, Program Manager *MSP*
Jennifer Luoma, Environmental Scientist *ju*

Thru: Frank Piorko, Division Director *MSP (for Frank Piorko)*
Tony Pratt, Administrator *TP*

Subject: Division of Watershed Stewardship's Technical Response to Public Comments
Associated with Amendments to Regulations Governing Beach Protection and the
Use of Beaches 5102

Date: ~~December 15, 2015~~ January 29, 2016 *ju*

BACKGROUND

The Delaware Division of Watershed Stewardship ("the Division") is charged by 7 Del. C 6803(c) to promulgate rules and regulations to effectuate the purpose of the Beach Preservation Act, which is to enhance, preserve and protect the public and private beaches of the State. The current Regulations Governing Beach Protection and the Use of Beaches was last adopted in 1983. Since then, there have been several amendments to the Beach Preservation Act that have yet to be incorporated into the Regulations and a few long standing in-office policies that although are not regulation, have been used to effectuate the mission stated in the both the Act and the Regulations. The purpose of updating the regulations is to incorporate recent legislative changes to the Beach Preservation Act (Del. Code Title 7, Chapter 68), while also incorporating DNREC and Division of Watershed Stewardship policies and construction standards that will result in less damage to structures and protection measures for the dune and beach resource. During the regulatory development process six public workshops were held and 11 regulatory advisory committee meetings were held.

PUBLIC COMMENT

Over 100 public comments were received regarding the proposed regulations. Some comments contained multiple issues. The majority of the comments received were related to property rights. Several comments were made regarding the definitions of "Beach" and "Regulated Area," which are the same definitions in the Beach Preservation Act and cannot be changed unless changed in the Act. There were also several comments regarding driving on the beach in

Broadkill Beach, which is not condoned or prohibited by the proposed regulations. Below is breakdown of all comments received with the Division's responses. Individual comments may be included within more than one category if the commenter provided feedback related to multiple topics.

Public Comments	Number of Comments
Property Rights ("takings")	25
Definitions of "Beach" and "Regulated Area"	17
Driving on the Beach in Broadkill Beach	19
Renovation Within Existing Footprint	16
Section 3.7.1.2 (Prohibition of Boats on Dunes)	16
Building Line	6
4-Step Process	5
Notice of Regulatory Revisions	5
Regulatory Transparency & Accountability Act	5
Requesting an Extension to Comment Period	5
Criteria for Approving/Denying Permits	4
Legislative Oversight	4
In Favor of the Proposed Regulations	3
Substantial Improvement	2
Smallest Subset of Lots	1
Substantial Damage	1
Dune Crossovers	1
Structures Seaward of Mean High Waterline	1
Private vs. Public Beaches	1
Emergency Storm Protection	1
Proposing an "Integrated Structure" Definition	1
Lowest Living Floor	1
Dead Vegetation Removal	1
Clothing Optional Beach	1
Define "Stewardship"	1
NAVD	1
Boardwalks and Pools	1
Compensation	1

DIVISION OF WATERSHED STEWARDSHIP'S TECHNICAL POSITION

Property Rights

Several of the comments received stated that it was the opinion of the commenter that the proposed changes to the regulations represented a violation of property rights guaranteed by the U. S. Constitution and pose a threat to homeowners in their communities. Many of these comments compared the proposed regulations to an actual "taking" of property. A taking of private property by the government without just compensation would violate the State and U.S. Constitutions. However, unlike, for example cases of condemnation or forfeiture, the mere regulation of the use of property for the benefit of the public and the protection of natural

resources, such as through zoning, has been routinely upheld by the courts as a legitimate exercise of authority. The proposed regulations are a revision of regulations that have existed for 42 years. There was no intent in moving from the current regulations to the proposed regulations to diminish property rights. The current and the proposed regulations do not prohibit construction or reconstruction seaward of the Building Line, if there is no room to build landward of the Building Line. The intent of the Regulations is to balance the rights of individual property owners with those of their neighbors, and with the interest of the taxpayers in protecting and preserving the beaches as public resources. Since 1972 no Delaware court has found that the Delaware Regulations for beach preservation constitute an unconstitutional “taking.” Deputy Attorney General Ralph Durstein, III wrote a memo that expands on how the proposed regulations do not constitute a “taking” (attached).

Definition of “Beach” and “Regulated Area”

The suggestion was made by several commenters that the “beach” and “regulated area” include the phrase “or to a parallel roadway, whichever comes first” to limit the beach area and regulated area to lots that are seaward of the first public road. However, both of these terms are defined in the Beach Preservation Act, the regulations must reflect that, and changes cannot be made unless the General Assembly changes the Act.

Driving on the Beach in Broadkill Beach

Quite a few comments were received against allowing vehicles on Broadkill Beach (with a few exceptions), and a couple comments were received in favor of allowing driving on the beach in Broadkill Beach. The current and proposed regulations restrict vehicular traffic over the dunes, except at designated locations, but do not put a prohibition on driving on the beach. Historically, this has been regulated either by the local governments or by State Parks rules and enforcement. For the purposes of the proposed regulations, we do not recommend adding language specific to vehicular use on Broadkill Beach, but recommend that this is handled in another realm. DNREC allows vehicle use on beaches with controls in place that eliminate harm to dunes.

Renovation Within the Existing Footprint

There were some concerns over the ambiguity of what can be done to an existing structure seaward of the Building Line. Section 2.6 *Maintenance, Repairs and Emergency Action* spells out what type of construction activities can occur to existing structures within the existing footprint. Maintenance and repair work may occur without formal approval as long as the location of the proposed work is at or above the first living floor, due to damage being caused by some means other than wave action, flood or erosion or consists of non-structural work such as repainting, replacement of shingles or siding or replacement of windows and doors or cleaning. Section 3.5 expands on this stating that: No property owner shall be prevented within the regulated area from repairing, modifying, modernizing, updating, or improving their existing structure, or by performing such actions, be required to relocate or reduce in size so long as these repairs, modifications, or improvements are within the existing structure’s footprint. However, if such maintenance or repair work meets the definitions of either “substantial damage” or “substantial improvement,” not only would formal approval be required, but it could also trigger