

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

OFFICE OF THE SECRETARY

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

PROPOSED

REGISTER NOTICE

SAN#: 2017- 01

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

1. TITLE OF THE REGULATIONS:

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

2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE AND ISSUES:

As a result of amendments to the Land Protection Act, effective August 3, 2016, the Guidelines to Evaluate Land Being Considered for Permanent Protection, last updated 12/7/16, currently being used by staff to support the Open Space Program must go through notice and public hearing pursuant to 29 Del.C. Ch. 101. The Regulations were published in the March 1, 2017 Delaware *Register of Regulations* and a public hearing was held on March 23, 2017. As a result of comments received for the public hearing, there has been some clarifying language inserted in the Regulations and associated Guidelines.

3. POSSIBLE TERMS OF THE AGENCY ACTION:

N/a

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

7 Del.C. Ch. 75

5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL:

N/a

6. NOTICE OF PUBLIC COMMENT:

The hearing record on the proposed amendments to the Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection will be re-opened August 1, 2017 for a 30-day public comment period ending close of business August 31, 2017. Individuals may submit written comments regarding the revisions to the proposed amendments via e-mail to Lisa.Vest@state.de.us or via the USPS to Lisa Vest, Hearing Officer, DNREC, 89 Kings Highway, Dover, DE 19901 (302) 739-9042.

7. PREPARED BY:

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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.

21 DE Reg. 130 (08/01/17) (Prop.)