

Secretary's Order No. 2011-P-0031

**RE: Approving Final Regulations to Amend 7 DE Admin. Code 9209,
*Regulations Governing Natural Areas and Nature Preserves***

Date of Issuance: June 15, 2011

Effective Date of the Amendment: July 11, 2011

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") the following findings, reasons and conclusions are entered as an Order of the Secretary in the above-referenced rulemaking proceeding.

Background and Procedural History

This Order considers proposed regulations to amend 7 DE Admin. Code 9202, *Regulations Governing Natural Areas and Nature Preserves*. The Department's Division of Parks and Recreation commenced the regulatory development process with Start Action Notice 2010-18. The Department published its initial proposed regulation Amendments in the November 1, 2010 *Delaware Register of Regulations*, and held a public hearing on December 1, 2010. Public comment was received by the Department during both the pre-hearing phase of this promulgation and at the time of the public hearing, and the Department responded fully and thoroughly to all questions from the public regarding this proposed promulgation.

A "natural area" in Delaware is defined by DNREC as an area, consisting of land and water, that provides the best example of our State's diverse natural heritage. Marshes, forests, waterways, plant and animal communities, and important geological and/or archaeological sites, such as the Great Cypress Swamp, Trussum Pond, Blackbird

Delmarva Bays, Doe Bridge, and Island Field Site, are all examples of such areas. Current DNREC regulations provide no definitions with regard to natural areas, and are often unclear to the reader, as they are somewhat convoluted and demonstrate confusion with regard to the terms “natural preserve” and “natural area”. The Department needs to better explain how the Natural Areas Program is managed. The proposed regulatory changes provide (1) more clarity regarding the management of DNREC’s Natural Areas Program; (2) information on dedicating a natural area as a nature preserve; and (3) provide a process for both nominating and delisting a site as a State-registered natural area.

Any person or entity may nominate a site to be a State-registered natural area, and may also request an existing site to be delisted as such. Forms for either action can be obtained by contacting the Office of Nature Preserves. All requests require site visits to consider the ecological, geological, and/or archaeological significance of a nominated site, or a site proposed for delisting. The Department’s guidelines define criteria and standards necessary in selecting a State-registered natural area, and are based on vegetation communities, species’ rarity, and geological and/or archeological features.

In contrast, the dedication of a natural area as a “natural preserve” is a voluntary action taken by the land owner. The purpose of dedicating a natural area as a nature preserve is to protect the conservation values located on the site in perpetuity. Tax benefits may be realized by the land owner. All nature preserves are dedicated through Articles of Dedication, a legal document that dictates the activities that may or may not take place within the nature preserve through the development of management guidelines.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated June 1, 2011 (Report). The Report recommends certain findings and the adoption of the proposed Amendments as attached to the Report as Appendix A.

Findings and Discussion

I find that the proposed Amendments are well-supported by the record developed by the Department, and I adopt the Report to the extent it is consistent with this Order. The Department's experts developed the record and drafted the proposed Amendments.

I find that the Department's experts in the Division of Parks and Recreation fully developed the record to support adoption of these Amendments. With the adoption of this Order, Delaware will provide (1) clarity regarding the management of DNREC's Natural Areas Program; (2) information on dedicating a natural area as a nature preserve; and (3) a process for both nominating and delisting a site as a State-registered natural area

In conclusion, the following findings and conclusions are entered:

- 1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these proposed Amendments as final;
- 2.) The Department provided adequate public notice of the proposed Amendments, and provided the public with an adequate opportunity to comment on the proposed Amendments, including at the public hearing held on December 1, 2010;
- 3.) The Department held a public hearing on December 1, 2010 in order to consider public comment before making any final decision;

4.) The Department's Hearing Officer's Report, including its recommended record and the recommended Amendments as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;

5.) The recommended Amendments should be adopted as final regulation Amendments because Delaware will be able to (1) provide clarity regarding the management of DNREC's Natural Areas Program; (2) offer information on dedicating a natural area as a nature preserve; (3) provide a process for both nominating and delisting a site as a State-registered natural area; and, lastly, because (4) the amendments are well supported by documents in the record;

6.) The Department shall submit this Order approving the final regulation 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.

_____/s/ Collin P. O'Mara_____
Collin P. O'Mara
Secretary

HEARING OFFICER'S REPORT

TO: The Honorable Collin P. O'Mara
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 Regulations Amendments to 7 DE Admin. Code 9202, Regulations Governing Natural Areas and Nature Preserves**

DATE: June 1, 2011

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Wednesday, December 1, 2010, at 5:00 p.m. at the Department of Natural Resources and Environmental Control ("DNREC", "Department"), 89 Kings Highway, Dover, Delaware to receive comment on proposed amendments ("amendments") to 7 DE Admin. Code 9202, *Regulations Governing Natural Areas and Nature Preserves*. The Department is proposing extensive revisions to the aforementioned existing regulations in order to provide a better focus on identifying Natural Areas and dedicating Nature Preserves within the State of Delaware. The existing regulations, as set forth in 7 Del. Code, Chapter 73, are confusing and erroneous in some sections, and the Department's proposed amendments will clarify the processes associated with nominating and delisting Natural Areas.

The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 9202, pursuant to The Natural Areas Preservation System Act of 1978 (7 Del. C., Chapter 73). Public comment was received by the Department during both the pre-hearing phase of this promulgation and at the time

of the public hearing, and the Department responded fully and thoroughly to all questions from the public regarding this proposed promulgation. 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 documents: (1) a verbatim transcript; and (2) nine documents introduced at the public hearing held on December 1, 2010, and marked by this Hearing Officer accordingly as Department Exhibits 1 through 8. The Department's person primarily responsible for the drafting and overall promulgation of these proposed amendments, Eileen Butler, Natural Area Program Manager, developed the record with the relevant documents in the Department's files. Along with the submission of the Department's exhibits into the record at the aforementioned public hearing, Ms. Butler offered a brief summary as to the Department's proposed actions in this matter.

Ms. Butler began her presentation by explaining that a "natural area" in Delaware is defined by DNREC as an area, consisting of land and water, that provides the best example of our State's diverse natural heritage. Marshes, forests, waterways, plant and animal communities, and important geological and/or archaeological sites, such as the Great Cypress Swamp, Trussum Pond, Blackbird Delmarva Bays, Doe Bridge, and Island Field Site, are all examples of such areas. Current DNREC regulations provide no definitions with regard to natural areas, and are often unclear to the reader, as they are somewhat convoluted and demonstrate confusion with regard to the terms "natural preserve" and "natural area". The Department needs to better explain how the Natural Areas Program is managed. The proposed regulatory changes provide (1) more clarity

regarding the management of DNREC's Natural Areas Program; (2) information on dedicating a natural area as a nature preserve; and (3) provide a process for both nominating and delisting a site as a State-registered natural area.

Any person or entity may nominate a site to be a State-registered natural area, and may also request an existing site to be delisted as such. Forms for either action can be obtained by contacting the Office of Nature Preserves. All requests require site visits to consider the ecological, geological, and/or archaeological significance of a nominated site, or a site proposed for delisting. The guidelines for natural area selection have been previously approved by the DNREC Secretary. These guidelines define criteria and standards necessary in selecting a State-registered natural area, and are based on vegetation communities, species' rarity, and geological and/or archeological features.

In contrast, the dedication of a natural area as a "natural preserve" is a voluntary action taken by the land owner. The purpose of dedicating a natural area as a nature preserve is to protect the conservation values located on the site in perpetuity. Tax benefits may be realized by the land owner. All nature preserves are dedicated through Articles of Dedication, a legal document that dictates the activities that may or may not take place within the nature preserve through the development of management guidelines.

As noted above, the proposed amendments to the Department's existing regulations in this matter were extensive. Subsequent to the proposed regulation amendments being published by the Delaware Register, however, the Department made additional revisions to the proposed regulatory language, and the same were vetted fully at the time of the aforementioned public hearing. These additional revisions to the proposed regulatory language were made to (1) correct typographical, numbering and/or

grammatical errors; and (2) to better clarify and provide a more complete understanding to the public of the proposed promulgation. After noting these changes had been made, Ms. Butler then began to discuss each and every such additional revision to the published proposed regulation amendments at the time of the public hearing, so that the record would be clear with regard to the Department's additional revisions in this matter.

The first such additional revision to these proposed regulation amendments is found under Section 2.0, "Definitions". The Department defines "delisting" as a process "...whereby a person or entity can submit a delisting form provided by the Office of Nature Preserves to request a specific site for removal from the State Registry of Natural Areas". The term "natural area" is defined as follows:

"...an area of land or water, or of both land and water, whether in public or private ownership, which either retains or has reestablished its natural character, although it need not be undisturbed, or has unusual flora or fauna, or has biotic, geological, scenic, or archeological features of scientific or educational value."

Additionally, the term "registration" is defined as "...the act of accepting a site as a State-registered natural area by the Secretary". Ms. Butler also went on to highlight all of the sections that had been revised subsequent to the original publication of the same in the Delaware Register of Regulations in its November 2010 edition, to wit: Sections 3.2, 3.4, 3.8, 3.10, 4.1, and 5.0.

At that time, the public hearing turned to receive comment from those members of the public in attendance that evening. John Williams, Chairman of the Delaware Natural Areas Advisory Council, offered that their organization had carefully considered the Department's proposed regulation amendments in this matter, as well as all of the

implications regarding the same. Mr. Williams stated that he endorsed the current draft of the Department's actions in this matter, and believed that the public will be able to more clearly understand what it is that the Council does for the citizens of Delaware as a result of this proposed promulgation.

While Mr. Williams was the only person to offer comment at the public hearing, the Department had received written comments from Lorraine Fleming prior to the hearing, as she was unable to attend that evening. Ms. Fleming, while supportive of the revisions to Sections 1.0 (Purpose of the Regulations), 4.0 (Nature Preserves), and 5.0 (Severability), voiced concerns with the proposed revisions to Sections 2.0 and 3.0 (General Definitions and Natural Areas). Specifically, Ms. Fleming wondered whether there might be inconsistencies between the Department's proposed regulation amendments in this matter and the actual law as set forth in 7 Del. C., Chapter 73, and was concerned that the Department's proposed promulgation reached beyond current Delaware law.

Concerns were also voiced over the Department's proposed "delisting" process, and questioned the approach as proposed in this promulgation. For example, Ms. Fleming commented that current Delaware law does not provide for removal of a Natural Area from the Registry. However, the Natural Areas Advisory Council is given broad authority to review and advise the Office of Natural Preserves and the DNREC Secretary, which Ms. Fleming believes "...includes removal from the Registry under extreme conditions of degradation or total destruction." Furthermore, Ms. Fleming stated that the "...attempt to combine nominating an area to the Registry and removing an area from the Registry is confusing and complicated", and believes that there is *not* a need for a specific

regulation on “delisting”. She did, however, concede that, “...if there is insistence on one, its text should be in a separate section.”

Given the concerns voiced, this Hearing Officer requested that the Department provide a formal Technical Response Memorandum (“TRM”) to address the public comments received by DNREC in this matter. Ms. Butler, from the Department’s Division of Parks and Recreation, provided the requested TRM to this Hearing Officer on February 17, 2011. In its TRM, the Department addressed the concerns voiced by Ms. Fleming, specifically with regard to “delisting”, as well as other concerns regarding proposed definitions. With regard to the creation of a formal delisting process, the Department states the following:

Even though the law does not specifically address a delisting process, it is the position of the Department that such a process is beneficial, as it clarifies what will be considered in that process, having the process based on science, and is implemented equally across the state, and recognizes changes in land use.

With regard to the comments focusing upon proposed definitions in this matter, the TRM once again states for the record that the changes made by the Department subsequent to the Register publication were made to (1) correct typographical, numbering and/or grammatical errors; and (2) to better clarify and provide a more complete understanding to the public of the proposed promulgation. However, upon further review of the record generated in this matter, the Department agrees with the following:

- The comment that the wording “to carry out” in the definition for Management Practices will be replaced by “consistent with”, so that the regulation will now read as follows: “Management Practices means

activities that may or may not take place within a Nature Preserve consistent with the uses and purposes for which the land is dedicated.”

- The comment that the definition for Registry be changed to refer to the “State Registry of Natural Areas”. Thus, the definition for Registry will be changed to read as follows: “State Registry of Natural Areas” means a list identifying all State-registered Natural Areas accompanied by a map on file at the ONP. Additionally, the definition for Registration will be changed to read as follows: “Registration means the act of accepting a site onto the State Registry of Natural Areas.”

With regard to the comment received on Section 3.2 (Nominating and Removing an area from the State Registry of Natural Areas), the Department notes that there is only one form used for either nominating a site to or requesting a site be delisted from the State Registry of Natural Areas. Much of the same information is required for either activity and the forms have been modified for members of the public to clearly understand how to fill out the form. Therefore, the Department does not believe this section needs to be modified further.

Additionally, comment was received on Section 3.7, specifically, if conflicting recommendations for either nominating or delisting a site could be received by the DNREC Secretary. After further consideration by the Division of Park and Recreation, it is the position of the Department that this Section shall be maintained as currently written. The TRM notes that, while the Department agrees that it would be undesirable for two conflicting recommendations from the Council and the Department to the Secretary, the Department “...is not prepared to relinquish its scientific expertise in

offering its recommendation regarding accepting a site for, or delisting a site from, the State Register of Natural Areas.”

It should be noted that all proper notification and noticing requirements concerning this proposed promulgation were met by the Department.

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 amendments to 7 DE Admin. Code 9209, *Regulations Governing Natural Areas and Nature Preserves*, as noted above. Accordingly, I recommend promulgation of these proposed amendments in the customary manner provided by law.

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

1. Proper notice of the hearing was provided as required by law.
2. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
3. The Department provided adequate public notice of all proceedings in a manner required by the law and regulations;
4. The Department held its public hearing in a manner required by the law and regulations;
5. The Department considered all timely and relevant public comments in making its determination;
6. Promulgation of the proposed regulatory amendments to 7 DE Admin. Code 9202, *Regulations Governing Natural Areas and Nature Preserves*, will clarify processes associated with nominating and delisting Natural Areas and

dedicating Nature Preserves, and will provide a better focus on identifying Natural Areas and dedicating Nature Preserves within the State of Delaware;

7. The Department has reviewed these proposed regulatory amendments in the light of the Regulatory Flexibility Act, 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 aforementioned proposed regulatory amendments concerning *Regulations Governing Natural Areas and Nature Preserves*, as published in the November 1, 2010 *Delaware Register of Regulations* 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 regulatory amendments, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and
9. The Department shall submit the proposed *revised* regulation amendments as final amendments to the *Delaware Register of Regulations* for publication in its next available issue, and shall provide such other notice as the law and regulations require, and as the Department determines is appropriate.

/s/ Lisa A. Vest
LISA A. VEST
Public Hearing Officer