



STATE OF DELAWARE  
DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL

OFFICE OF THE  
SECRETARY

89 KINGS HIGHWAY  
DOVER, DELAWARE 19901

PHONE: (302) 739-9000  
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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;

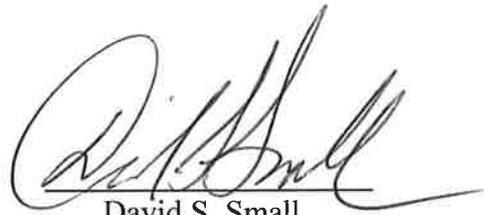
6. Promulgation of the proposed *revised* regulatory amendments to 7 DE Admin. Code §5102: *Regulation Governing Beach Protection and the Use of Beaches*, will allow Delaware to (1) incorporate legislative changes to the *Beach Preservation Act* (7 Del.C., Ch. 68); (2) incorporate Division policies and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

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### **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

EXHIBIT  
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 Ex. 4 (cont)

RECEIVED  
 FEB - 1 2016  
 DNREC Hearing Officer

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.

<b>Public Comments</b>	<b>Number of Comments</b>
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

design modifications to eliminate or minimize encroachment seaward of the Building Line (i.e. the 4-step process).

If someone is keeping at least 75% of their dwelling, but want to replace the piling foundation, Section 3.1.1.5 allows for this activity requiring only that the structure be moved landward of the Building Line or as far landward as possible, rather than having to go through the whole 4-step process. This was an issue that was brought to the Division's attention during one of the public workshops and was incorporated for this purpose. We believe there is little to no ambiguity in this.

#### Section 3.7.1.2 (Prohibition of Boats on Dunes)

There were some concerns that the prohibition of boats being stored on or transported across the dunes would prevent property owners from using their waterfront access for boating activities. If someone wishes to store a boat during the summer at the toe on the dune (not on vegetation) then they would not be violating this Section of the Regulations. If someone is carrying a kayak through the dune on a designated dune crossover, then they would not be violating this Section of the Regulations. If someone tows, or otherwise transports, a boat over a vehicle crossover, they are not violating this Section of the Regulations. If for some reason, the beach has eroded or tides are high to the effect that there is no dry beach upon which to hold a boat, as per Section 3.8 *Temporary Structures*, a letter of approval application could be submitted to construct a temporary boat rack that holds a boat up off of the dune, thereby protecting the dune vegetation and limiting disturbance. Approval of such a temporary rack would be contingent on it not being deemed a threat to the dune. It is noted that the area of primary concern is Lewes Beach where there has been a habit of hauling boats into the vegetated, State-owned dune. This practice will have to be stopped.

#### Building Line

There seemed to be some confusion and concern over how the Building Line would affect properties in the Regulated Area. When located within the Regulated Area, construction activities will require approval from the Division. The Regulated Area includes 3 buildable lots from the mean high waterline. Note that this change actually reduces the total number of lots that are regulated. Currently, properties from the mean high waterline to the first parallel public road are required to get approval from the Division for construction activities. If proposed construction activities are landward of the Building Line, a letter of approval will need to be obtained, but there are no requirements to design a certain way. If proposed construction activities are seaward of the coastal Building Line, a Permit must be obtained and proposed structures will have to be designed to minimize impacts to the beach and dune, such as by following the 4-step process for the construction of buildings. Since 1981, the mapped Building Line has been established and referenced in the regulations. At this time, there is no proposal to remap it. The Building Line can be found by surveyors using the State Plane coordinates placed at points every 250 feet along the line. Copies of maps are available from the Shoreline and Waterway Management Section and on the DNREC website.

The area seaward of the Building Line is the area where a natural dune should exist and that this natural dune provides community protection against severe coastal storms. Building seaward of the Building Line diminishes the community protection.

There is a proposed language change to Section 2.11 from Section 2.13 of the current regulations. The word “permanent” has been changed to “long term,” because permanent means the shoreline has changed forever – an unrealistic and ultimately unknowable condition. Beaches are dynamic, and consideration of long-term changes are more realistic, in order to accomplish the purposes of the Beach Preservation Act. Remapping of the line would only occur through a transparent and public process, including a hearing, and would utilize the topography of the area to find the line. Another reason a change in language was proposed, is to allow for keeping the current Building Line for portions of the coastline that have not endured erosion, and to allow for remapping where a substantial amount of erosion has occurred.

There was some concern that, following a natural disaster, the Secretary would re-establish the Building Line to prevent properties from being repaired or rebuilt. The proposed regulations state that long-term change would have to occur to remap the building line. Post natural disaster is not a “long term” change. Furthermore, under the current and proposed Regulations the Building Line does not prevent properties from being repaired or rebuilt, although it may impact the size and location of replacement buildings. Any change to the Building Line requires a public process, including a public hearing.

There is some question as to why the Building Line is necessary in areas where continued beach nourishment is occurring. The National Academies of Science recommend that beach nourishment activities should not affect how construction setbacks are regarded. At some point beach nourishment may no longer be available, because of other limitations such as sand sources and funding. It is almost certain that once beach nourishment activities are curtailed at a location long term erosion would resume, at rates that are difficult to predict, making coastal setbacks vital for continued storm protection and recreational beach benefits.

### The Four Step Process

A common theme with some comments is that the 4-step process implies an intention to prevent construction of properties or to force existing structures into smaller footprints. It is also thought by some members of the public that the purpose of the 4-step process is to prevent gentrification of certain communities. This is not an accurate characterization of how the process works or when it applies. The intent of the 4-step process is to bring, non-conforming structures into compliance, or closer to being in compliance, at the time that it makes most sense, when construction activity is proposed. Also, the 4-step process was established as a direct result of a mandate by the General Assembly to better control construction seaward of the Building Line.

If construction activities seaward of the Building Line are not deemed a “substantial improvement” (the total cost of which equals or exceeds 50 percent of the market value of the structure before the start of construction of the improvement), then Section 3.5.1 applies: “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.”

The 4-step process also supports the provision of the Beach Preservation Act that states that “if any structure proposed to be built 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 alteration as a condition of granting the permit or letter of approval.” This was an amendment made by the General Assembly to the Beach Preservation Act in 1996. The 4-step process has been used as a policy since 1996 and 51 dwellings have been designed and constructed using this process to date.

If someone loses their dwelling due to an Act of God (a sudden and inevitable occurrence caused by natural forces and not by the agency of man, such as a flood, earthquake, or a similar catastrophe), then Section 3.6.1 may apply “When considering the *reconstruction* of buildings on lots fronting the Ocean or Delaware Bay that are either partially or completely seaward of the Building Line that have *sustained substantial damage* through acts of God or other accidental events, the Division will consider the effect of beach nourishment work that has enhanced the beach and dune in such areas. Furthermore, in any such case, where Federal or State agencies have constructed and continue to maintain a beach and dune that conforms to coastal engineering standards of storm protection (as defined in these regulations) property owners shall be permitted to *rebuild a structure*, in a location which has this level of protection, *in the same footprint*. The intent of Section 3.6.1 was for involuntary hardships, not for when someone voluntarily chooses to tear down and rebuild.

The 4-step process was developed to apply the criteria of the 1996 amendment to the Act, and its use provides a model to guide homeowners. By entering it into the regulations, the public is given a reasonable expectation of what could be built seaward of the Building Line. The 3<sup>rd</sup> step of the 4-step process requires the proposed dwelling to not exceed the square footage (i.e. footprint) of the dwellings within the smallest subset of lots. This allows the proposed structure to be in keeping with the houses around it. The addition of stories to the 1<sup>st</sup> floor could increase the overall size of the house.

The 4-step process is not applicable unless a structure located or proposed to be located seaward of the Building Line is “substantially damaged,” “substantially improved,” or a new dwelling. If a structure currently exists seaward of the Building Line, it may remain in its current condition and footprint, unless substantially damaged or improved. If that be the case, then a structure will be able to replace it with approval from the Division.

It was also asked how the 4-step process would apply to townhouses. Townhouses, both as multi-unit structures or as single unit structures, fall within the definition of building and are regarded as such. Therefore, if reconstructed seaward of the Building Line, they would have to go through the 4-step process. In order to determine the average square footage and average encroachment seaward of the Building Line, the smallest subset of lots would probably consist of the townhouses that are attached to the one in question, if regarded as a single unit, or if a multi-unit building as a whole, it would be compared to other multi-unit buildings.

## Notice of Regulatory Revisions

Some of the comments received claimed that there was scant notification to the public that the regulations were being revised. The record reflects otherwise. Not only did the Division undertake the formal notice required by the Administrative Procedures Act, but a total of six public workshops were also held. Two workshops were held in late October/early November of 2014 in Slaughter Beach and Rehoboth Beach respectively. The next two were held in May 2015 in Milford and in Bethany Beach, and the last two were held in September 2015 in Milton and Bethany Beach. Notice of the workshops was posted on the State Public Meeting Calendar; notice was posted in two newspapers of statewide circulation; and a DNREC press release was issued to the media. Articles appeared in several newspapers following the workshops. Newspapers include the News Journal and the Cape Gazette. Furthermore, e-mails were sent to those on the interested persons list from the last prior public hearing on regulations, to the newly-created interested persons list, to local municipal leaders and community leaders, and to others from the beach community who might find interest in such subject matter. A regulatory advisory committee (RAC) was formed, consisting of representatives from a realm of stakeholders. Eleven RAC meetings were held on an almost-monthly basis from May 2014 through October 2015 and notice of each meeting was posted on the State Public Meeting Calendar. Each RAC was open to the public.

The Regulatory Advisory Committee (RAC) advised DNREC to hold public workshops and public hearings during the early spring and the late fall in order to allow the most participation from the beach property owners. It is for this reason that early November was chosen for a hearing. Both the workshops and the public hearing were well-attended, and numerous comments were received during the expanded written comment period. The eighteen-month process for review and adoption of the amendments was fully transparent and well-publicized, with a high degree of public participation and input at all stages.

## Regulatory Transparency & Accountability Act

During the hearing and in public comments received after the hearing, it was suggested to the DNREC panel and the Hearing Officer, that the implementation and effective date of the new Regulations be delayed, in order to subject the Regulations to the amended provisions of the Regulatory Flexibility Act ("RFA") effective January 1, 2016, and to give the Legislature a role in approving the new Regulations. The Regulations were submitted for initial publication in September of 2015, and thus are not subject to the RFA amendments. A delay in the effective date would not change this, nor would postponing adoption of these regulations prompt an additional role for the General Assembly.

The General Assembly enacted significant and far-reaching changes to the RFA in the last session, through the adoption of Senate Bill 113 and Senate Bill 120. Among other things, these amendments require that an agency promulgating new regulations, or amendments to existing regulations, prepare a "regulatory impact statement" detailing the financial impact on individuals and small businesses, as well as a "regulatory flexibility analysis" exploring alternative methods of achieving the desired result in a way less burdensome to small businesses. Both Bills apply to regulations submitted to the Registrar on or after January 1, 2016. The General Assembly also

provided for the issuance of guidelines for implementation of the new requirements, on or before November 15, 2015. This timeline allowed just seven weeks for agencies to prepare to implement the RFA amendments, for regulations issued in the new year. The guidelines have been issued, and are extensive and include two sets of forms to guide agencies in the preparation of submissions and disclosures under the new law. It is clear from these deadlines that the General Assembly did not intend to apply the RFA amendments to new regulations or amended regulations submitted to the Registrar before January 1, 2016. Nor did the General Assembly evidence any intent to suspend the process of adoption of regulations underway before January 1, 2016. The RFA changes do not apply retroactively to regulations proposed before January 1, 2016. Thus, the recent RFA amendments do not apply to the adoption of the Beach Preservation Act Regulation amendments, which were first undertaken more than a year ago, and first submitted to the Registrar for publication in the Register months ago. The Start Action Notice was approved and submitted to the Legislature and Governor on May 20, 2014 and the proposed regulations were published by the State Register of Regulations on October 1, 2015.

Arguably, the process utilized by DNREC for the review and revision of the Beach Preservation Regulations has more than fulfilled the goals of the RFA. While the RFA amendments call for extensive disclosures and detailed findings in filed documents, Title 7 mandates a process of actual outreach to regulated parties, and insures that alternative methods of regulation will be fully explored. The use of a Regulatory Advisory Committee, including individuals and small business representatives, guaranteed that the impact of regulatory changes on homeowners, realtors, builders, developers, and property developers would be fully reviewed. The numerous open meetings, presentations, public workshops, hearings, and comments allowed for consideration of both the impact of proposed changes, and the review of alternative and less-intrusive measures to accomplish the goal of beach preservation. In contrast to the unilateral filings mandated for future regulatory changes by the RFA amendments, the process undertaken by DNREC has been interactive, transparent, thorough, and comprehensive. There is no valid reason to stall that process after years of work, when the goals of the RFA have been more than satisfied.

It was pointed out that the final Regulations were sent to the Register of Regulations for publication prior to the final public workshops. The Division has the ability to change language in the proposed regulation after it has been published by the Register, but any changes must be brought to the public's attention during the public hearing. The Division scheduled the last set of workshops knowing that if substantive changes were needed as a result of the workshops, they could be made. Furthermore, Section 10118(b) of the Administrative Procedures Act spells out the ability of the agency to make changes to the text after the public hearing and comment period. According to Section 10118(c), if the changes are non-substantive, they can merely be added to the final version of the regulations submitted to the Registrar. However, if the changes are deemed (by the Secretary) to be substantive, the process (of publication, notice, hearing, comment) must re-start. Thus, there is limited ability to revise the draft Regulations at this stage.

#### Requesting an Extension to Comment Period

There were multiple requests for the 15 day comment period to be extended. The original closing date for public comment was on November 22, 2015. The Hearing Officer granted an

extension for another 15 days, doubling the time for comment, and the closing date for public comment became December 7, 2015.

### Criteria for Approving/Denying Permits

There seemed to be some concern regarding the fact that during the permit review process spelled out in Section 5.3 that the Division has the power to deny a permit application. Since the first set of Regulations Governing Beach Protection and the Use of Beaches that were adopted in 1973, the Division has had criteria on which to base the decision of whether or not to approve or deny a permit application. There are no proposed substantive changes to Section 5.3 from the current regulation. Section 5.3 will remain intact and continue to be applied as it has since 1983. The criteria by which the Division makes its decision to approve or deny permits will not change.

### Legislative Oversight

There was a comment that “DNREC does pretty much what pleases them and wholly without legislative oversight.” The majority of the proposed changes to the regulations were necessary due to legislative actions by the General Assembly in amending the Beach Preservation Act. The current Regulations were adopted in 1983. Since then, amendments have been made to the Act by the General Assembly in 1984, 1996 and 2006. It is these changes that must be incorporated into the Regulations. Furthermore, DNREC staff, kept all the legislators who have constituents in the beach area abreast of what was happening during the regulatory development process. A number of these legislators participated in the process. The Start Action Notice was sent to the members of the Senate Natural Resources and Environmental Control Committee and members of the House Environment and Natural Resources Committee. E-mails were also sent to the legislature regarding the Workshops and the Hearing and a couple Legislators did attend the workshops and/or the hearing.

### In Favor of the Proposed Regulations

We received comments that were in favor of the regulations and wished for them to be adopted as is. Specifically, a commenter representing the Delaware Bay beach communities stated that these regulations “are in the best interest of preserving and protecting” the shorelines and dune system.

### Substantial Improvement

Some commenters disliked how the term “substantially improved” was defined and utilized in the proposed regulations. When the General Assembly incorporated the definition of “Substantial Damage” into the Beach Preservation Act, it replaced the term “complete destruction,” but only accounted for damage or destruction caused by an “Act of God.” In order to cover damage or destruction by other means, the Division had to incorporate a term separate from “substantial damage.” Substantially improved was derived from the FEMA National Flood Insurance Program (NFIP) regulations. In keeping with what the local municipalities already have written in their floodplain ordinances, the Division proposes the same definition.

To make a substantial improvement determination, an appraisal would have to be done for the market value of the existing structure (not including the land) and it would be weighed against the cost of the proposed project. If it is determined that the proposed project costs more than 50% of the market value of the existing dwelling, then it would be considered a substantial improvement and subject to regulations regarding new construction.

#### Smallest Subset of Lots

A comment was made that the 4-step process “as written in the regulations clearly discriminates against property owners with smaller homes on a stable beach such as Primehook Beach. Restricting the size of homes to the ‘smallest subset of lots’ and imposing zoning setbacks that are more restrictive than Sussex County has already been litigated. This clearly is a discriminatory taking of property rights and devalues investment backed expectations.” This is part of a 4-step process policy that has been in place for almost 20 years, and is directly the result of Beach Preservation Act language requiring encroachment over the building line to be reasonably reduced.

Steps 1 and 2, of the 4-step process, do not require encroachment of local municipal side yard and landward property boundary setbacks, but requires the structure to meet such setbacks. The 3<sup>rd</sup> step of the 4-step process requires the proposed dwelling to not exceed to square footage (i.e. footprint) of the dwellings within the smallest subset of lots. This allows the proposed structure to be in keeping with the houses around it. The addition of stories to the 1<sup>st</sup> floor could increase the overall size of the house. A strict prohibition on construction seaward of the Building Line does not exist in the current nor proposed regulations. The Regulations will continue to allow for consideration of factors unique to the encroaching property, including a balancing of hardships claimed by the property owner. Far from discriminating against any one owner, the Regulations balance the rights of nearby property owners to storm protection by the dune with those of the encroaching owner, as well as the public interest in preserving and enhancing beaches. This goal would be expected to have the general long-term effect of allowing for the realization of legitimate investment-backed expectations, and thus protecting property values.

#### Substantial Damage (Private vs. Public Beaches)

Concern was expressed that Section 3.6.1, “*When considering the reconstruction of buildings on lots fronting the Ocean or Delaware Bay that are either partially or completely seaward of the Building Line that have sustained substantial damage through acts of God or other accidental events, the Division will consider the effect of beach nourishment work that has enhanced the beach and dune in such areas. Furthermore, in any such case, where Federal or State agencies have constructed and continue to maintain a beach and dune that conforms to coastal engineering standards of storm protection (as defined in these regulations) property owners shall be permitted to rebuild a structure, in a location which has this level of protection, in the same footprint,*” was an attempt to impose stricter setback and construction standards on stable private beaches that do not require public funding. Section 3.6.1 is derived from 7 *Del.C.* §6802 (4), a provision that the General Assembly added to the Beach Preservation Act in 2006. The legislature amended the beach preservation act to give property owners in locations where public funds are spent to maintain a protective beach and dune system, a way to keep their position during a hardship.

It was also asked how “substantial damage” would affect townhouses that are located seaward of the Building Line. In the event that a townhouse is substantially damaged and the property owner decides to rebuild, the Division would try to define the “structure” for the purpose of a substantial damage determination in a way that is consistent with other applicable codes, and the substantial damage determination made by insurance adjusters, and local code enforcement officials.

### Dune Crossovers

There was a question as to whether we should specify in the regulations the type of dune crossovers allowed, since the width requirements were specified. Through a letter of approval process several types of dune crossovers are permissible and will continue to be. To specify the types of crossovers allowed in the regulations would possibly be too limiting, considering new ideas of how to construct these crossovers could be presented in the future.

### Structures Seaward of Mean High Waterline

The definition of beach extends seaward from the mean high waterline 2,500 feet. A comment was made that, structures seaward of the high tide line, such as buoys and crab pots, would then be liable to be a citable offense if not approved through a letter of approval or permit.

For issues regarding items seaward of the mean high waterline, that have no material physical effect on the beach or dunes, the Division of Watershed Stewardship’s Shoreline and Waterway Management Section would defer to the Division of Water’s Wetlands and Subaqueous Lands section which has co-jurisdiction over this area.

### Emergency Storm Protection

Concern was expressed that “before an owner installs protective measures for a beachfront property, he/she must first obtain written permission from DNREC – even as a dangerous storm races up the coast on nature’s clock.” Section 2.6.2.4 is not a change from the current to proposed regulations. Furthermore, it allows DNREC to give approval orally or written. Approval could be given through a phone call or e-mail. This section is unchanged, and the Division is unaware of a single instance in which emergency protective measures, in the face of an oncoming storm, were prevented by these Regulations.

### Proposing an “Integrated Structure” Definition

Due to its unique nature, Sea Colony has made the suggestion of incorporating language that would allow the Sea Colony complex certain capabilities to rebuild following destruction. Sea Colony proposed defining Integrated Structure as the entirety of five (5) or more multiple unit common interest ownership buildings and the associated and integrated common element infrastructure all of which are bound by a Declaration promulgated under the Unit Property Act. They suggested inserting “integrated structure” into the definition of structure after the words “means any building.” The Division has come to the conclusion that suggested language of this sort is too substantial for these regulations at this time and thus beyond the scope of this revision.

It also comes too late for consideration by the RAC and in the public workshops. Further, such changes would likely require legislative action. Sea Colony should seek such changes through action by the General Assembly as amendments to the Beach Preservation Act.

### Lowest Living Floor

The comment was made that “the definition of ‘lowest living floor’ permits the ground floor beneath it to be allowed only for storage, which includes car and boat storage. It excludes the use of the garage as a workshop for maintenance of vehicles or boats, as well as a place to house tools work benches needed for those activities.”

The Division responds that the definition will not change from current regulation to proposed regulation and will continue to be interpreted as it has. The Division interprets “storage” to include garages and places to store tools.

### Dead Vegetation Removal

A comment was made that the proposed regulations do not technically allow for the removal of dead vegetation or the planting of new dune vegetation. Removal of dead vegetation is not prohibited by the current nor proposed regulations. The Division has allowed for cutting of dead trees at grade, but not for digging stumps out of the dune, because it may cause too much disturbance. Planting of native dune vegetation is permissible under Section 4.3.1 in the current and proposed regulation.

### Clothing Optional Beach

The Division received the respectful request for the consideration that a small portion of an appropriate Delaware ocean beach within the park system be made available as a designated clothing optional area. The current and proposed regulations and the Beach Preservation Act are for protecting beaches and dunes, and the Division does not have the statutory authority to create or prohibit a designated clothing optional area. This is therefore an area that would need to be addressed by the General Assembly or the Division of Parks and Recreation.

### Define “Stewardship” and “Maintained”

It was suggested to have a definition of the term “Stewardship” and how it relates to DNREC. The name change of the Division is not a proposed change in the Regulations. In fact, the term “stewardship” is not in the regulations, only at the top as the header. It was the result of a reorganization of the Department (DNREC) when Secretary O’Mara was appointed.

The Division does not support defining “maintained” in that the commenter is requesting language that would obligate the State to perform maintenance or nourishment. Although, the Division is charged with preventing and repairing damages from erosion of public beaches, action taken by the Division is constrained by budget limits.

## NAVD

It was pointed out that the proposed regulations define “National American Vertical Datum (NAVD)” when the definition should refer to “North American Vertical Datum of 1988 (NAVD 1988)”. This was indeed a clerical issues and the Division will recommend that change.

## Boardwalks and Pools

A late comment came in suggesting that anything regarding boardwalks and pools existing at the time of a storm will/can be replaced. We accepted the late comment, because the commenter also spoke at the hearing.

The proposed regulations includes language which is already in the existing Regulations (Section 3.1.1.4) which allow an exception if the proposed structure must be located seaward of the building line to achieve its intended purpose. It is worth noting that this section of the Regulations excludes pools (but not boardwalks) from being considered a type of structure which must be located seaward of the building line to achieve its intended purpose. No changes are being proposed to this section that would involve pools or boardwalks.

## Compensation

Another late comment was that property owners should be compensated for anything condemned as a result of a storm.

There is nothing in the current Regulations nor is there any language in the proposed Regulations which provide for either condemnation as a result of a storm or compensation to property owners for damages from storms. Condemnation is carried out through the local building code enforcement, not DNREC. We suspect that to allow these provisions would require changes to the Beach Preservation Act.

## **REQUESTED CHANGES TO PROPOSED REGULATIONS**

Numerous meritorious public comments and suggestions on the proposed regulations were provided during the public hearing and comment period. The Division is therefore requesting the following change to the initially proposed regulations in consideration of these public comments to help clarify the regulations and improve upon their intent and to accommodate other meritorious suggested changes. The Division’s position is that these changes are not substantive in nature.

### Redefining “NAVD”

The Division received a comment suggesting changing the definition “National American Vertical Datum (NAVD)” to “North American Vertical Datum (NAVD).” The Division agrees that the definition was incorrect in the proposed regulation and is proposing the following change to 1.0 Definitions:

**National Geodetic North American Vertical Datum (NGAVD)**” means a fixed reference adopted by the U. S. Government as a standard geodetic datum for vertical elevations.

## **APPENDIX "B"**



Department of Natural Resources and Environmental Control  
Division of Watershed Stewardship  
Shoreline and Waterway Management Section  
Statutory Authority: 7 Del. C. §6803(c)  
7 DE Admin. Code 5102 Regulation Governing Beach Protection and the Use of Beaches

1.0 Definitions

~~As used in these Regulations, t-~~ 1.1 The following words and terms shall have the meanings indicated below, unless the text clearly indicates otherwise; when used in this regulation, have the following meaning unless the context clearly indicates otherwise:

**"Accidental Event"** means a sudden, unintended, and unexpected occurrence that results in damage or loss of property.

**"Act"** means the Beach Preservation Act of 1972, (Title-7, ~~Del~~**EL.C.** Ch. 68).

**"Act of God"** means a sudden and inevitable occurrence caused by natural forces and not by the agency of man, such as a flood, earthquake, or a similar catastrophe.

**"Beach"** means that portion of the shore of any body of water which extends from the mean high water mark inland one thousand feet, or to a roadway for automobiles, whichever is closer means that area from the Delaware/Maryland line at Fenwick Island to the Old Marina Canal immediately north of Pickering Beach, which extends from the mean high water line of the Atlantic Ocean and Delaware Bay landward 1,000 feet and seaward 2,500 feet, respectively.

**"Beach Access Facility Structure"** means any structure, improvement or facility constructed, installed or maintained for the primary purpose of obtaining or facilitating access to and from the berm and the foreshore of the beach over, on or across the primary coastal dune.

**"Beach Enhancement"** means the process of improving or increasing the recreational and/or storm protection value of a beach.

**"Beach Erosion"** means the wearing away of a beach by water or the elements.

**"Beach Nourishment"** means the process of replenishing a beach with material (usually sand) obtained from another location.

**"Beach Preservation"** ~~means the process of maintaining the recreational and/or storm protection value of a beach~~ means the protection and control of the beach by the conduct and regulation of work and activities likely to affect the physical condition of the beach or shore, and includes, but is not limited to, erosion control, hurricane protection, coastal flood control, shoreline and offshore rehabilitation.

**"Beach Protection"** means the process of preventing the decrease of recreational and/or storm protection values of a beach.

**"Berm"** means the nearly horizontal part of the beach between the foreshore and primary dune formed by the deposit of material by wave action.

**"Breakwater"** means a marine structure constructed to protect a shore area, harbor, anchorage, or basin from the undesirable effects of wave action.

**Department of Natural Resources and Environmental Control**  
**Division of Watershed Stewardship**  
**Shoreline and Waterway Management Section**  
**Statutory Authority: 7 Del. C. §6803(c)**  
**7 DE Admin. Code 5102 Regulation Governing Beach Protection and the Use of Beaches**

“Buildable Lot” means a lot upon which construction of a structure is permissible by all State, Federal and local codes and regulations.

“Building” means any roofed and walled structure built for permanent or semi-permanent use.

“Building Line” means the line generally paralleling the coast, set forth of maps prepared by the Division with reference to the National Geodetic Vertical Datum (NGVD) and the Delaware State Plane Coordinate System, and based upon information provided by topographic survey means a line generally paralleling the coast, seaward of which construction of any kind shall be prohibited without a permit or letter of approval from the Department. The Building Line shall be set forth on maps prepared by the Department with reference to a vertical datum commonly used by land surveyors, the Delaware State Plane Coordinate System and topographical surveys. The Building Line is located as follows:

- a. Along beaches extending from the Delaware/Maryland line to the tip of Cape Henlopen – 100 feet landward of the adjusted seawardmost 4~~0~~ 9-foot elevation contour above NGVD NAVD;
- b. Along beaches extending from the tip of Cape Henlopen to the southernmost limit of Rosemary Street in Primehook Prime Hook Beach – 100 feet landward of the adjusted seawardmost 7~~6~~-foot elevation contour NGVD NAVD;
- c. Along beaches extending from the southernmost limit of Rosemary Street in Primehook Prime Hook Beach to the Old Marina Canal north of Pickering Beach – 75 feet landward of the adjusted seawardmost 7~~6~~-foot elevation contour above NGVD NAVD;
- d. ~~Or~~ at the landward limits of the Beach, as defined in these Regulations; whichever is most seaward.

Within the corporate limits of Rehoboth Beach and Bethany Beach, in commercial areas containing boardwalks and where no natural dune exists, the Building Line shall be along the westerly edge of the boardwalk.

“Bulkhead” means an upright structure or partition built parallel or nearly parallel to the shoreline, primarily to retain or prevent land from sliding and secondarily, to protect upland from beach erosion and damage from wave action. A bulkhead is generally of lighter construction than a seawall.

“Coastal Engineering Standards of Storm Protection” means level of protection for a location that consists of at least 100 feet of vegetated dune landward of the seawardmost 9-foot elevation contour above NAVD from the Delaware/Maryland line to the tip of Cape Henlopen, 100 feet landward of the seawardmost 6-foot elevation contour above NAVD from the tip of Cape Henlopen to Rosemary Street in Prime Hook Beach, and 75 feet landward of the seawardmost 6-foot elevation contour above NAVD from Rosemary Street in Prime Hook Beach to the Old Marina Canal north of Pickering Beach.

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~~“Complete Destruction” means the damage or destruction of any structure by any means whatsoever to the extent that, in the judgement of the Division, 75% or more of the original structure, or if a building, more than 50% of the original foundation pilings, are unsuitable for incorporation into reconstruction of the structure~~

~~“Construction” means any work or activity which is likely to have a substantial physical effect on existing coastal conditions or natural shore processes. Construction as used in these Regulations shall also include reconstruction, restoration, repair, alteration and placement if said terms are not otherwise included for clarification~~ means any work or activity which is likely to have a material physical effect on existing coastal conditions or natural shore and inlet processes.

“Deck” means an open platform extending from a house or other building.

**“Department”** means the Department of Natural Resources and Environmental Control.

**“Dike”** means a wall or mound built around a low lying area to prevent flooding.

**“Division”** means the Division duly authorized by the Secretary as responsible for administering these Regulations.

**“Dune”** means a mound, hill or ridge of windblown sand, either bare or covered with vegetation, naturally or artificially accumulated.

~~“Dune Zone” means that area lying between the Building Line and elevation contours, which are used as a basis for determining the location of the Building Line. (See Building Line definition.)~~

~~“Emergency” means the existence of beach conditions unreasonably dangerous to persons or property~~ means any unusual incident which endangers the health safety or resources of the general public, including damages or erosion of any shoreline resulting from a hurricane, storm or any such natural disturbance.

**“Excavation”** means the process of digging out material.

**“Expansion”** means the enlargement of a structure.

**“Filling”** means the process of depositing or placing material to raise to the level of a certain area.

**“Foreshore”** means the part of the shore lying between the crest of the seaward berm (or upper limit of wave action at high tide) and the ordinary low water mark, that is ordinarily traversed by the uprush and backrush of the waves as the tides rise and fall.

**“Geology”** means the relationship of the earth and the materials of which it is composed, to the changes which it has undergone, is undergoing or is likely to undergo.

**“Geomorphology”** means the form and general configuration of the earth's surface and the changes that take place in the evolution of land forms.

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**"Groin"** means a shore protection structure built (usually perpendicular to the shoreline) to trap littoral drift or retard erosion of the shore.

**"Hydraulics"** means the effects of water or other fluids in motion.

**"Improve"** means to change an existing structure in order to enhance its integrity or value.

**"Jetty"** means a structure extending into a body of water, and designed to prevent shoaling of a channel by littoral materials, and to direct and confine the stream or tidal flow.

**~~"Littoral Current"~~** ~~means a longshore current generated by waves breaking at an acute angle to the shoreline, and which moves generally parallel and adjacent to the shoreline within the surf zone~~

**"Littoral"** means pertaining to the shore of a sea.

**"Littoral drift"** means material such as sand and stones moved near the shore in the littoral zone under the influence of waves and currents.

**"Lowest Living Floor"** means the lowest portion of the lowest horizontal support member of the lowest enclosed space used for living purposes, which includes working, sleeping, eating, cooking, recreation, or combination thereof. A floor used only for storage shall not be considered a living floor.

**"Maintenance"** means any work aimed at keeping a structure in an efficient operating and usable condition. Maintenance does not mean expansion or modification of a structure. Maintenance does not mean changing the general form or extent of the structure.

**"Material Physical Effect"** means, including, but not limited to, any alteration to the existing characteristics of the beach or dune that could significantly, increase the danger of erosion, storm damage or flooding and includes the moving, digging, or removal of beach or the erection of any temporary or permanent structure.

**"Meteorology"** means the atmosphere and its phenomena especially as relating to weather.

**"Modernizing"** means the act of updating portions of a structure to give a new character or appearance.

**"Modification"** means a partial change in the form of a structure.

**~~["National] [North] Geodetic American Vertical Datum (NGAVD)"~~** means a fixed reference adopted by the U. S. Government as a standard geodetic datum for vertical elevations.

**"Parcel of Real Property"** means a single lot, the boundaries of which are set forth in a single deed or similar document.

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**"Person"** means any legal entity including individual, firm, association, organization, partnership, business trust, corporation, company, contractor, user, operator, owner, or any State or local governmental agency (except as noted in Section 2.3) or public district or any officer or employee thereof means any individual, partnership, corporation, association, institution, cooperative enterprise, municipality, commission, political subdivision or duly established legal entity.

**"Porch"** means a roofed open or screened area adjoining an entrance to a building.

**"Primary Dune"** means that dune which roughly parallels the shoreline in a more or less continuous fashion and is generally the first and largest dune encountered moving landward from the shoreline.

**"Private Beach"** means any beach which is not a public beach as defined in these regulations.

**"Public Beach"** means any beach owned in fee simple title by the Federal or State government or any county, city, town or municipality; or any beach for which the State has obtained an easement or agreement for public use.

**"Regulated Area"** means the specific area within the defined beach that the Department is directed to regulate construction to preserve dunes and to reduce property damage. The regulated area shall be from the seaward edge of the beach as defined above to the landward edge of the third buildable lot in from the mean high water line.

**"Regulation"** means unless stated otherwise, means the Regulations Governing Beach Protection and the Use of Beaches, promulgated pursuant to the Beach Preservation Act of 1972 (7 Del. C. Ch. 68) and all amendments thereto.

**"Repair"** means the act of restoring a structure to good condition after it has been damaged. Repair does not mean expansion or modification of a structure.

**"Revetment"** means a facing of stone, concrete, or similar material built to protect a shore, or shore structure against erosion by wave action or currents.

**"Roadway"** means any improved (hot-mix bituminous concrete or Portland cement concrete) public roadway (maintained by any governmental agency for use by the general public) in existence on the effective date of these Regulations.

**"Sand Fence"** means a barrier made of posts, wires and boards or synthetic materials including plastic, nylon and polyester intended primarily to trap and collect wind-blown sand, but which may also be used to channel human and vehicular traffic.

**"Seawall"** means an upright structure separating land and water areas, primarily designed to prevent erosion and other damage to upland areas due to wave action. A seawall is generally of heavier or more massive construction than a bulkhead.

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**"Secretary"** means the Secretary of the Department of Natural Resources and Environmental Control.

**"Shoreline"** means the line of intersection of a body of water with the land.

**"Smallest Subset of Lots"** means smallest identifiable group of lawfully subdivided, contiguous lots that exist within a subdivision, development or community separated by either roads or subdivision boundaries. If there are no roads or subdivision boundaries separating groups of lots, the smallest set of lots shall be seven lots.

**"Structure"** means any building, pipeline, dock, pier, wharf, boat ramp, groin, jetty, seawall, bulkhead, revetment, or any other piece of work artificially built.

**"Subdivide"** means the lawful division of any parcel of land into smaller parcels.

**"Substantial Amount"** means any amount, the moving, alteration, or removal of which could significantly increase danger of erosion, storm, damage or flooding.

**"Substantial Damage"** means the damage or destruction of any structure by an act of God to the extent that, in the judgment of the Department, 75% or more of the original structure, or if a building, more than 50% of the original foundation pilings, are unsuitable for incorporation into reconstruction of the structure.

**"Substantial Change"** means any alteration in the existing characteristics of the beach, as determined by the Secretary, that could significantly increase the danger of erosion, storm damage or flooding and including the moving, digging, or removal of beach material or the erection of any permanent or semi-permanent structure.

**"Substantially Improved"** means any reconstruction, rehabilitation, addition or other improvement to a structure, the total cost of which equals or exceeds 50 % of the market value of the structure before the start of construction of the improvement.

**"Temporary Structure"** means any not permanent, non-habitable structure that can be easily removed from the site within a short time frame using minimal equipment and man power. Examples include, but are not limited to, signs, benches, sheds, ramps, steps or walkways.

**"Update"** means a change to an existing structure intended to improve its integrity or value.

**2.0 Administrative Principles- Permits and Letters of Approval**

2.1 Purpose, Application of Current and Earlier Regulations. The primary purpose of these Regulations is to enhance, protect, and preserve public and private beaches of the State through a permit and letter of approval process. These current Regulations shall not apply to any project for which a valid letter of approval, permit, or extension of the same has been issued by the Division prior to the effective date of these Regulations. However, those provisions of the Department's regulations that governed beach protection and the use of beaches that were in effect prior to the effective date of these current Regulations

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shall apply to the projects, permits, and letters of approval that were authorized or issued before the effective date of these Regulations.

2.2 Approval Requirement:

2.2.1 No person shall commence or conduct construction for which approval is required under these Regulations (see Section 4.0) unless and until a letter of approval or the proper permit has been issued.

2.2.2 Before any person shall commence construction of any modification or expansion pursuant to the provisions of this Section, said person shall apply for and be issued a letter of approval or a permit from the Division.

2.2.3 The provisions of Section 3.0 of the Regulations have provided for certain exceptions to the general prohibition against construction seaward of the Building Line. However, prior to the commencement of any construction of any structure, or portion thereof, that is included within one or more of the exceptions set forth in said Section 3.0, the owner of the proposed structure or portion thereof shall apply to the Division for a permit pursuant to the provision set forth in subsection 4.5 of the Regulations. The permit application will be processed pursuant to procedures set forth in Section 5.0 of the Regulations.

2.3 Department Exemption:

2.3.1 The Department shall be subject to all the rules and requirements of these Regulations, except that in the performance of its erosion control duties pursuant to the authority granted by the Beach Preservation Act of 1972 (7 Del.C. Ch. 68), the Department shall be exempt from the permit requirements of these Regulations. The Department shall, however, still be subject to any substantive standards and guidelines generally applicable to the construction and placement of shore protection structures and facilities.

2.4 Extensions for Letter of Approval or Permit:

2.4.1 These Regulations shall not apply to any project for which a valid letter of approval, permit, or extension of same has been issued by the Division prior to the effective date of these Regulations. After the effective date of these regulations no extension shall be granted for a letter of approval or permit issued prior to the effective date of these regulations. Any letter of approval or permit for which was issued without specific time limits has become null and void if construction has not been initiated within one year or completed within two years from ~~August 13, 1984~~ the effective date of these regulations.

2.4.2 An extension to the time limits of a permit or letter of approval that was issued after the effective date of these regulations may be granted by the Division. Before any such extension may be granted, the person who was issued the letter of approval or permit shall submit a written request for the extension. The written request must be received by the Division at least ~~fifteen~~ (15) days prior to the expiration date of the letter of approval or permit and shall contain a detailed explanation of why the extension is necessary, and the date when the project will

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be completed. In determining whether such an extension will be granted the Division may consider the following: (1) whether reasonable progress is being made toward completion of the project; and (2) any changes that may have occurred in which are contrary to aspects of the project that had been originally approved by the Division. In lieu of an extension of the time limits in a letter of approval or permit, the Division may require a person to reapply for a letter of approval or a permit if the Division determines that the facts and circumstances relating to a previously approved project require a re-evaluation by the Division.

2.4.2.1 An extension to a letter of approval or permit shall not be granted more than three times.

- 2.5 Construction Setback Lines – Prior Approvals:
- 2.5.1 At those locations where dune reconstruction has been approved by permit prior to the Regulations promulgated and effective date of these Regulations on August 13, 1981 and a construction setback line mutually agreed upon in writing between an owner/developer and the Division to be the landward toe of the reconstructed dune, that agreed upon line shall prevail over the current Building Line for the purposes of initial construction of a structure upon each affected parcel. Any subsequent additions to, or replacements of, the initially approved structure shall be subject to the Building Line as established pursuant to these Regulations and the appropriate sections thereof. Regardless of the developmental status of the parcels affected by this Section, all construction activities shall be subject to the Building Line upon its future re-establishment pursuant to Section subsection 2.13 of this regulation.
- 2.6 Maintenance, Repairs, and Emergency Action:
- 2.6.1 Except as otherwise provided in Section subsections 2.6.2 and 2.6.3, any Person intending to commence any maintenance or repair work on any structure located in part or entirely seaward of the Building Line, shall apply in writing to the Division for a letter of approval or a permit. No person shall commence such maintenance or repair work until after being issued a letter of approval or a permit by the Division (See also the provisions of Section 3.0 Prohibited Activities and Section 4.0 – Activities Requiring a Permit or Letter of Approval from the Division).
- 2.6.2 The provisions of Section 2.6.1 shall not apply where the maintenance or repair work on a structure located in part or entirely seaward of the Building Line is undertaken pursuant to the following limitations or causes:
- 2.6.2.1 Where a building is involved, and the location of the finished maintenance or repair work is at or above the lowest living floor.
- 2.6.2.2 The maintenance consists solely of non-structural work such as repainting, replacement of shingles or siding or replacement of windows and doors and any cleaning necessary to maintain the structure.

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~~2.6.2.2~~ 2.6.2.3 The maintenance or repair work is to a structure, and is necessary because of damage being caused to the structure by some means other than wave action, a flood or erosion.

~~2.6.2.3~~ 2.6.2.4 In the event of an extreme emergency, or warning thereof, which may involve grave and imminent danger of substantial property loss and/or personal injuries (e.g., an impending coastal storm), a person may perform work on a structure that is related to the protection of persons and said structure. However, before a person can commence any such emergency protection work, the person owning the structure on which such work shall be performed, or any agent thereof, shall contact the Division to request approval to perform the emergency protection work. The Division's approval or disapproval may be given to the owner, or agent thereof, either orally or in writing. After the emergency, or emergency warning period, the Division may require the removal of any emergency protection work performed pursuant to the provisions of this Section.

~~2.7~~ 2.7 Restoration or Reconstruction After Destruction

~~2.7.1~~ 2.7.1 If a structure located seaward of the Building Line is completely destroyed, no person shall undertake any restoration or reconstruction of the destroyed structure before the Division issues the person a permit or letter of approval pursuant to the procedures set forth in 4.0 of these Regulations.

~~2.8~~ 2.8 Siting Requirements for Construction and Reconstruction of Structures

~~2.8.1~~ 2.8.1 If a structure is to be either constructed or reconstructed following the complete destruction of the original structure, and such a structure does not have to be located seaward of the Building Line in order to achieve its intended purpose pursuant to Section 3.01 (a)(4) of these Regulations, then such a structure shall be required to be located entirely landward of the Building Line. However, if the Division determines that there is inadequate space available entirely landward of the Building Line for the construction or reconstruction of a completely destroyed structure, said constructed or reconstructed structure shall be physically located as far landward as possible on the parcel of real property in question, taking into consideration all Federal, State and local laws, rules, regulations, and zoning and building ordinances.

~~2.9~~ 2.7 Other Requirements and Approvals:

~~2.9.4~~ 2.7.1 A person who is issued a permit or letter of approval by the Division pursuant to these Regulations is not exempted from obtaining any other permit or approval required by Federal, State or local laws, rules, regulations, and building and zoning ordinances.

~~2.10~~ 2.8 General Permit Consideration:

~~2.10.4~~ 2.8.1 The Division, in considering applications, shall take into account the geology, geomorphology, meteorology and hydraulics of the area.

~~2.11~~ 2.9 Sole Jurisdiction:

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~~2.11.4~~ 2.9.1 All structures, devices and facilities for enhancement, preservation or protection of beaches shall be under the sole jurisdiction of the Department. None of these shall be changed in any way except as provided in these Regulations.

~~2.12~~ 2.10 Building Line Format:

~~2.12.4~~ 2.10.1 The Building Line shall be shown on topographic maps at a scale of one (1) inch equals ~~fifty (50)~~ feet for all shoreline areas of Delaware Bay and Atlantic Ocean Coast from, and including, Pickering Beach to the Delaware-Maryland line at Fenwick Island, where privately owned structure, either existing or potential, may be affected by the establishment of the Building Line. The Building Line shall be shown as a series of straight lines connected together at points whose locations are identified by the reference to the Delaware State Plan Coordinate System. No point shall be located more than 500 feet from an adjoining point.

~~2.13~~ 2.11 Building Line Re-establishment:

~~2.13.4~~ 2.11.1 When, in the opinion of the Secretary, storms or other natural phenomena cause a substantial ~~permanent long term~~ change in the seaward contour used to establish the Building Line, the Division may, following public hearing, re-establish the Building Line in its entirety or for the portions of the coast where the natural phenomena have caused substantial long term changes from information provided by topographic survey.

~~2.14~~ 2.12 Re-establishment Effects on Lot Status:

~~2.14.4~~ 2.12.1 Re-establishment of the Building Line may place parcels of land, lawfully subdivided after the effective date of these Regulations, in a position of having insufficient space to construct a structure landward of the newly established Building Line. These parcels shall be subject to the appropriate permit requirements of Section 4.0 of this regulation.

~~2.15~~ 2.13 Savings Clause:

~~2.15.4~~ 2.13.1 If any provision of these Regulations, or the application of such provision to any person or circumstances, is held invalid, the remainder of these Regulations, and the application of such provision to persons or circumstances other than those to which it shall have been held invalid, shall not be affected.

**3.0 Prohibited Activities:**

3.1 Construction Seaward of the Building Line:

3.1.1 No person shall commence the construction of any structure, or portion thereof, seaward of the Building Line on any parcel of real property, except where one or more of the following conditions exist:

3.1.1.1 The Division has made a determination during the permit application processing stage that the size of the area of the parcel of real property located landward of the Building Line is inadequate for construction of the proposed structure or a portion thereof. However, the Division's determination as to the adequacy of the modification or redesign shall

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not conflict with any Federal, County or local laws, regulations, or planning, zoning and building ordinances.

3.1.1.2 That the dimensions and location of the structure, or portions thereof, as proposed and in other design aspects of the proposed construction project, including, but not limited to, parking lots and landscaping, cannot be modified or redesigned in order to have the final structure or portion thereof located either less seaward or completely landward of the Building Line in accordance with the four-step process outlined in subsections 3.1.1.2.1 through 3.1.1.2.4 of this regulation. (See Section subsection 5.3.2 of this regulation for further explanation of what the Division will examine when a permit application is processed and whether or not the proposed structure, or portion thereof, may have to be modified or redesigned). However, the Division's determination as to the adequacy of the area of the parcel of land located landward of the Building Line, or as to any modification or redesign shall not conflict with any Federal, County or local laws, regulations or planning, zoning and building ordinances. (Note that this exception shall not apply if the provisions of subsection 3.1.1 of this regulation are applicable to the parcel of land in issue.) A person is not required to follow the requirements of the four-step process if they demonstrated through the submission of a sealed survey of the lot that all construction will be located entirely landward of the Building Line. In this case, the applicant must apply for a letter of approval as required by subsection 4.8 of this regulation.

3.1.1.2.1 All construction must begin at the setback line established for the landward property boundary by the county or local municipality in which the property is located. Porches, decks and entrance ways are not permitted along this wall of the building, except those which are recessed into the exterior wall of the structure or alongside the structure. Steps may extend into the setbacks as long as permissible by county and local regulations, and;

3.1.1.2.2 The structure must occupy all of the area available between the side yard setbacks, and;

3.1.1.2.3 The square footage of the footprint of the structure (living area only, not including porches or decks) shall not exceed the average square footage that exists among adjacent structures within the smallest subsets of lots, and;

3.1.1.2.4 Seaward penetration over the Building Line shall not exceed the average encroachment that exists among adjacent structures within the smallest subset of lots. Any decks constructed along with the

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structure must meet the requirements of subsection 3.1.1.3 of this regulation.

3.1.1.3 Whenever a deck or porch is being constructed along with a new building, and said deck or porch is located at or above the lowest living floor of the building, said deck or porch is also making use of the foundation of said building (i.e. cantilevering) and said deck or porch shall not extend beyond the most seaward point that is the average distance seaward of the Building Line of any lawfully constructed building, ~~or~~ deck or porch of a similar nature that is already existing on any immediately adjacent parcels of real property located within the smallest subset of lots, within the same subdivision as the parcel of real property on which the building, ~~or~~ deck or porch is proposed. Future enclosure of the cantilevered deck or porch is prohibited and the area underneath the deck shall remain open and free of all obstructions.

3.1.1.4 The Division has made a written determination that the proposed structure, or a portion thereof, must be located seaward of the Building Line on a parcel of land in order that the intended purpose of the structure, or portion thereof, will be achieved. The provisions of this Section and subsection may apply to the following types of structures: pipelines, docks, piers, wharves, boat ramps, and other harbor structures, as well as other types of structures that have the purpose of protecting the beach or shore, preventing beach erosion, and carrying out the purposes of the Act and the Regulations. However, for purposes of this Section and subsections, a building, patio, deck, swimming pool, carport, driveway, or similar type of structure shall not be considered by the Division as being the type of structure that must be located seaward of the Building Line on a parcel of land in order to achieve the intended purpose of the structure. The Division may require that these latter types of structures, or portions thereof, be constructed landward of the Building Line, or not constructed at all.

3.1.1.5 If a structure is completely removed from its foundation for replacement of said foundation, and 75% or more of the original structure remains intact, and such a structure does not have to be located seaward of the Building Line in order to achieve its intended purpose pursuant to subsection 3.1.1.4 of this regulation, then such a structure shall be required to be located entirely landward of the Building Line or shall be located as far landward as possible on the parcel of real property in question, taking into consideration all Federal, State and local laws, rules, regulations and zoning and building ordinance. Under these circumstances subsection 3.1.1.2 of this regulation (the 4-step process) would not apply.

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3.1.1.6 In those cases where the mapped Building Line either transects or is landward of lots that, in turn, are landward of lots with existing habitable structures, the Building Line will not be used to modify either location or dimension of buildings on the more landward lot

3.1.2 Except as provided in subsections 3.1.1.3 and 3.1.1.4 of these Regulations, no person shall construct any structure, or portion thereof, on any parcel of real property, or portion thereof, that is located seaward of the Building Line whenever the following facts and circumstances exist:

3.1.2.1 The parcel of real property, or a portion thereof, on which a proposed structure, or portion thereof, would be constructed, was subdivided from a large parcel of real property after August 13, 1981. In addition, at the time said parcel of real property, or portion thereof, was subdivided from a larger parcel of real property, construction of a structure, or portion thereof, would not have been approved by the Division because the size of the area landward of the Building Line on the smaller subdivided parcel of real property was inadequate. (See Section subsection 2.14 2.12 and Section 4.0 of the Regulations.)

~~3.1.3 The provisions of 3.0 of the Regulations have provided for certain exceptions to the general prohibition against construction seaward of the Building Line. However, prior to the commencement of any construction of any structure, or portion thereof, that is included within one or more of the exceptions set forth in said 3.0, the owner of the proposed structure or portion thereof shall apply to the Division for a permit pursuant to the provision set forth in Section 4.5 of the Regulations. The permit application will be processed pursuant to procedures set forth in 5.0 of the Regulations.~~

3.2 Modification or Expansion of Structures Seaward of the Building Line:

~~3.2.1 Before any person shall commence construction of any modification or expansion pursuant to the provisions of this Section, said person shall apply for and be issued a letter of approval or a permit from the Division.~~

~~3.2.2~~ 3.2.1 A person is prohibited from modifying or expanding any structure, or portion thereof, seaward of the Building Line, including those structures, or portions thereof, that were (1) constructed prior to the effective date of these Regulations, or (2) were constructed pursuant to the provisions of subsection 2.4 of this regulation, unless one or more of the following exceptions apply to the proposed modification or expansion at issue:

~~3.2.2.1~~ 3.2.1.1 The provisions of subsection 3.1.1.4 of the Regulations should be applied to the proposed modification or expansion because the intended purpose of the structure, or portion thereof, that is to be modified or expanded must be achieved. A permit shall be required for work under this Section. See Section 4.0 of these Regulations.

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~~3.2-2-2~~ 3.2.1.2 The modification or expansion consists only of a deck or porch located at or above the lowest living floor of a building, and the modification or expansion makes use of the foundation of said building (i.e. cantilevering) that existed prior to said modification or expansion. However, any deck or porch or portion thereof, that is modified or expanded pursuant to any provision of this Section shall not extend beyond the most average distance seaward point of the Building Line of any existing lawfully constructed buildings or decks or porches of a similar nature that is already existing on any immediately adjacent parcels of real property that is are located within the smallest subset of lots, within the same subdivision as the parcel of real property on which the modification or expansion is proposed. A letter of approval shall be required for work under the Section. See Section 4.0 of these Regulations.

3.3 Restoration or Reconstruction of Structures Seaward of the Building Line:

3.3.1 If a structure located seaward of the Building Line is substantially damaged, no person shall undertake any restoration or reconstruction of the damaged structure before the Division issues the person a permit or letter of approval pursuant to the procedures set forth in Section 4.0 of this regulation.

3.4 Siting Requirements for Construction and Reconstruction of Structures:

3.4.1 If a structure is to be either repaired or reconstructed following substantial damage or is to be substantially improved, and such a structure does not have to be located seaward of the Building Line in order to achieve its intended purpose pursuant to subsection 3.1.1.4 of this regulation, then such a structure shall be required to be located entirely landward of the Building Line. However, if the Division determines that there is inadequate space available entirely landward of the Building Line for the repair or reconstruction of a substantially damaged or substantially improved structure, said repaired or reconstructed structure shall be physically located as far landward as possible on the parcel of real property in question, taking in to consideration all Federal, State and local laws, rules, regulations and zoning and building ordinance. (See subsection 3.1.1 of this regulation.)

3.5 Footprint Requirement:

3.5.1 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.

3.6 Effect of Beach Nourishment

3.6.1 When considering the reconstruction of buildings on lots fronting the Ocean or Delaware Bay that are either partially or completely seaward of the Building Line that

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have sustained substantial damage through acts of God or other accidental events, the Division will consider the effect of beach nourishment work that has enhanced the beach and dune in such areas. Furthermore, in any such case, where Federal or State agencies have constructed and continue to maintain a beach and dune that conforms to coastal engineering standards of storm protection (as defined in these regulations) property owners shall be permitted to rebuild a structure, in a location which has this level of protection, in the same footprint.

**3.6 3.7 Other Prohibited Activities:**

**3.3-4 3.7.1 The following activities are prohibited:**

**3.3-4.4 3.7.1.1** The operation of any motorized vehicle or machine on, over or across the primary dune on any State-owned or maintained beach except at those locations specified by the Department for such use (see current State Parks Rules and Regulations for additional rules);

**3.7.1.2** Transportation or storage of any type of boat across or on the primary dune on any State-owned or maintained beach except at locations approved or permitted by the Department;

**3.3-4.2 3.7.1.3** Pedestrian traffic on, over or across the primary dune on any State-owned or maintained beach except at those locations specified by the Department for such use;

**3.3-4.3 3.7.1.4** The alteration, moving or removal of any facility, improvement or structure installed or maintained by the Department for enhancement, preservation or protection of any beach; and

**3.3-4.4 3.7.1.5** The damaging, destruction or removal of any trees, shrubbery, beach grass or other vegetation growing on any State-owned or maintained beach seaward of the Building Line.

**3.8 Temporary Structures:**

**3.8.1** The placement of seasonal or otherwise temporary structures seaward of the Building Line and seaward of the dune on the dry beach may be allowed for a period of up to a year or such lesser period as specified with a Letter of Approval from the Department. It must be demonstrated by the applicant that the design and deployment of the temporary structure can be done so that the structure can be easily removed or otherwise relocated landward of the Building Line in a short time frame. Temporary structures must be removed from the site during the time frame established in the letter of approval and in the case of the threat of a coastal storm.

**3.8.1.1** If the temporary structures, such as, but not limited to, tents, wedding alters, chairs or tables, are being placed on the beach for an event that will last

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only 72 hours or less, the requirement to obtain a letter of approval is waived. However, the provisions of subsection 3.7.1.5 of this regulation still apply.

**4.0 Activities Requiring a Permit or Letter of Approval:**

- 4.1 General Rule:
  - 4.1.1 No permit shall be issued for any activity prohibited by any provision of the Regulations. Procedures for processing applications are set forth in Section 5.0 of the Regulations.
- 4.2 Permit Application; Fee:
  - 4.2.1 Any person applying for a permit pursuant to the provisions of Section 4.0 of the Regulations must apply to the Division on an application form provided by the Division. Any person submitting a permit application form to the Division pursuant to the provisions of Section 4.0 of the Regulations shall at the same time submit an application fee of \$150-00 for each permit application.
- 4.3 Construction of Beach Erosion Control or Shore Protection Structures or Facilities Seaward of the Building Line:
  - 4.3.1 No person shall commence or conduct, without a permit therefor from the Division, construction of any structure or facility on any beach seaward of the Building Line, the primary function of which is beach erosion control or shore protection including, but not limited to, groins, jetties, seawalls, revetments, dikes, bulkheads, and beach nourishment; except that ordinary dune maintenance, as determined by the Division, including the proper installation of sand fence and the planting and fertilization of stabilizing vegetation, shall not require a permit.
- 4.4 Construction of Pipelines or Harbor Works Seaward of the Building Line:
  - 4.4.1 No person shall commence or conduct without a permit therefor from the Division, construction seaward of the Building Line, or any pipeline, dock, pier, wharf, ramp or other harbor work.
- 4.5 Construction of a Structure Seaward of the Building Line; Permits; Exception for Beach Access Structures:
  - 4.5.1 Except as provided pursuant to the provisions of Sections-subsections 4.3, 4.4, or 4.5.3 of the Regulations, before any person commences the construction of any structure, or portion thereof, that would be located seaward of the Building Line, said person must have been issued a permit for the construction by the Division.
  - 4.5.2 Before any permit is issued by the Division pursuant to Section subsection 4.5.1 of the Regulations for the construction of any structure, or portion thereof, seaward of the Building Line, the person applying for the permit must provide the Division with written documentation that the proposed structure, or portion thereof, will be constructed in accordance with Division requirements relating to location and design criteria, which are intended to prevent or minimize any damage to the beach, and also all the provisions of the Act and the Regulations.
  - 4.5.3 A person is not required to follow the requirements of Section subsections 4.5.1 or 4.5.2 of the Regulations if a person intends to construct a structure, or portion

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thereof, that is going to be used only for the purpose of providing pedestrian access to and from the berm and foreshore across the dune zone. However, before any person commences the construction for such a beach access structure, or any portion thereof, that would be located seaward of the Building Line, said person must have been issued a letter of approval for the construction by the Division. A person may receive said letter of approval after applying to the Division on an application form that shall be made available by the Division. The Division shall process said application form pursuant to the procedures set forth in the provisions of Section subsection 4.8 of the Regulations.

4.5.3.1 For the purposes of best protection of the dunes, and to meet the needs of larger beach communities, pedestrian dune crossovers may be constructed to certain widths. The total number of residences that are served by each crossover will be determined by the Division by dividing the number of possible single family dwellings within a subdivision on non-ocean front or bay front lots by the number of community pedestrian dune crossovers within that subdivision.

4.5.3.1.1 Crossovers serving one or two single family residences shall not be wider than four feet

4.5.3.1.2 Community crossovers that serve anywhere between three to nine single family residences shall not be wider than five feet.

4.5.3.1.3 Community crossovers that serve 10 or more single family residences shall not be wider than six feet.

4.5.3.1.4 Crossovers serving persons with special needs will be evaluated on a case by case basis

4.6 Other Activities Seaward of the Building Line:

4.6.1 No person shall commence or conduct any of the following activities on any beach without a permit therefor from the Division: the alteration, digging, mining, moving, removal or deposition of any substantial amount of beach or other materials, or the significant removal of vegetation on any beach seaward of the Building Line which may affect enhancement, preservation or protection of beaches.

4.7 Mitigating Measures:

4.7.1 In rendering its decision on requests for permits and letters of approval pursuant to these Regulations, the Division shall make a determination regarding the potential adverse effects of the proposed structure or activity. If, in the opinion of the Division the potential for damage to the beach seaward of the Building Line is increased as a result of the proposed structure or activity, the Division may require the applicant to take mitigating measures (including, but not limited to beach nourishment, dune construction, and/or dune maintenance) to reduce such damage potential. When the Division requires such mitigating measures,

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the applicant, ~~his~~their successors, heirs and assigns, shall be required to maintain these measures for the life of the structure or activity. Failure to comply with the mitigating measures prescribed by the Division shall be cause for removal of the structure or termination of the activity and restoration of the beach, as nearly as possible, to its original condition at the expense of those persons owning the structure or conducting the activity, or for the Division to take the necessary actions to bring the owner into compliance and to place a lien on such property for all reasonable costs and expenses incurred by the Division, whichever action the Division deems most appropriate.

4.8 Construction Activities Landward of the Building Line and Within the Beach Regulated Area:

4.8.1 No person shall commence or conduct construction of any structure or the alteration, digging, mining, moving, removal or disposition of any substantial amount of beach or other materials landward of the Building Line and within the beach area without a letter of approval from the Division. To obtain the written approval, the applicant shall furnish to the Division a completed application on forms available from the Division.

4.8.2 Upon receipt of an application for approval, the Division shall consider the effect of the proposed project on beach enhancement, preservation and protection. The Division may undertake any investigation or activity it deems necessary to carry out the purposes of this Act. If the Division determines such a project may have a substantial effect on beach enhancement, preservation and protection, the applicant shall be directed to follow the procedures for obtaining a permit applicable under Section 4.0 of the Regulations. The Division shall make a decision on the application that may include terms and conditions which it determines will best implement the purposes of the Act and these Regulations. The Division shall give written notice with reasons for the decision to the applicant.

5.0 **Procedures for Processing Permit Applications**

5.1 The Division:

5.1.1 Applications shall be considered and permits issued or denied by the Division in accordance with the purposes and intent of the Act and these Regulations.

5.2 Notice:

5.2.1 Upon receipt of a permit application in proper form, the Division shall advertise in a daily newspaper of state-wide circulation and in a newspaper of general circulation in the county in which the activity is proposed:

5.2.1.1 That the application has been received.

5.2.1.2 A brief description of the nature of the application; and

5.2.1.3 That comments will be received for 15 calendar days by the Division regarding the application.

5.2.2 The Division shall also mail notice of the above to all adjacent property-owners as listed in the permit application, and make the application available for public inspection at the Dover office of the Division. A decision shall not be rendered on

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any permit application until at least 20 calendar days after notice has been published and mailed to adjacent property owners, and the application has been made available for public inspection, in accordance with this Section.

- 5.3 Specific Information to be Examined by the Division; Investigatory Authority of the Division and Its Agents; Authority of Division to Require Special Conditions or Modifications:
- 5.3.1 In addition to the general categories of information that are provided for pursuant to Section subsection 2.8 of the Regulations whenever the Division is deciding to issue a Permit pursuant to the Regulations, the Division shall take into consideration any relevant information relating to the following:
- 5.3.1.1 Any comments received by the Division;
- 5.3.1.2 The effect of the proposed construction on shoreline recession, beach erosion, flooding, and potential damage to the parcel of real property that is the subject of the permit application, and potential damage to any other parcel of real property, public lands, or personal property;
- 5.3.1.3 The feasibility of alternative protection from storm damage that may be available;
- 5.3.1.4 The historical average rate of shoreline change for the general area nearby and including the parcel of real property that is the subject of the permit application;
- 5.3.1.5 The design modifications which may mitigate the impact of the proposed construction on the part of the beach that is located seaward of the Building Line (see Section subsection 5.3.2 (b) below for further information); and
- 5.3.1.6 Any other factors or information that the Division determines to be relevant to the subject matter of the permit and carrying out the purposes and intent of the Regulations and the Act.
- 5.3.2 In determining if the Division shall require that the dimensions or location of a proposed structure, or portion thereof, or other design aspects are to be modified or redesigned pursuant to the provisions of Section subsection 3.1.1.2 of the Regulations, the Division, in addition to what is required in Sections subsections 2.8 and 5.3.1, shall balance the actual and potential hardships or benefits that may be experienced by the person owning the structure or portion thereof against the actual and potential hardships or benefits that the State, the public and adjacent landowners may experience. The Division while carrying out the balancing test may take into consideration the following factors:
- 5.3.2.1 The purposes and provisions of the Act and the Regulations;
- 5.3.2.2 The likelihood and amount of actual, or potential for, expenditures of federal and state revenues for maintaining, repairing or restoring the parcel of real property prior to construction, after construction and after any natural disaster (e.g. storm);
- 5.3.2.3 The protection of the State, the public and any adjacent landowners from actual and potential financial and property loss;

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- 5.3.2.4 The actual and potential financial or personal losses to the owner of the structure or portion thereof;
- 5.3.2.5 The feasibility of any modification or redesign required by the Division, keep in mind any increased or decreased costs, in achieving the purpose and function of the structure or portion thereof as originally planned;
- 5.3.2.6 Any design alternatives or amendments to the original designs submitted to the Division by the owner of the proposed structure or portion thereof; and
- 5.3.2.7 Any other factor the Division determines to be relevant.
- 5.3.3 The Division or Department, and any agents thereof, may do any of the following acts while attempting to carry out the purposes and intent of the Regulations and the Act, or while processing an application for a permit or request for a letter of approval:
  - 5.3.3.1 Make on-site inspections of any type of structure, or portion thereof, or any real property regulated by the provisions of the Regulations or the Act.
  - 5.3.3.2 Communicate with any party to discuss any matter relating to the Regulations or the Act.
  - 5.3.3.3 Undertake formal or informal investigations or activities as are necessary to carry out the propose and intent of the Regulations and the Act
- 5.3.4 In addition to the provisions of ~~Section~~ subsection 4.7 of this regulation, the Division may establish special permit conditions, and ~~or~~ require modification of any proposed structure or activity in order to (1) prevent increased erosion damage to the parcel of real property in issue, nearby parcels or real property, or public lands, and ~~or~~ (2) reduce public expenditures for beach protection.
- 5.4 Decision:
  - 5.4.1 The Division shall make a decision on the application which it determines will best implement the purposes of the Act and these Regulations. The Division shall give written notice with reasons to the applicant, to adjacent property owners as listed in the permit application and to other persons who have requested that they be notified of the decision on that application.
- 6.0 **Appeal From the Division's Decision**
  - 6.1 Activity Pending Appeal:
    - 6.1.1 The applicant shall not commence any activity regulated under Section 4.0 of the Regulations until such time as a final determination has been rendered on the matter and the appeal period has expired without an appeal having been taken, or, if appealed, the appeal process has been exhausted.
  - 6.2 Procedures:
    - 6.2.1 Any person or persons, jointly or severally, or any taxpayer, or any officer, department, board or bureau of the state, aggrieved by any decision of the Division, may appeal to the Secretary by giving written notice of appeal to the Secretary, and to the applicant if other than the appellant. Such notice shall be by certified or registered mail within ~~twenty~~ (20) calendar days of the Division's

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decision, and shall specify: (1) the interest of the appellant; (2) the basis of the appeal; and (3) the specific law(s), regulation(s) or other legal authority(ies) alleged to have been violated by the Division's decision. A public hearing may be held on any such appeal, upon request, whenever the Secretary deems the hearing request meritorious. A request for a public hearing shall be deemed meritorious when the appeal is not frivolous and the notice of appeal exhibits a reasonable familiarity with the Division's decision. The public hearing shall be conducted as follows:

6.2.1.1 For any hearing on an application, notification shall be served upon the applicant as summonses are served or by registered or certified mail not less than ~~twenty~~(20) calendar days before the time of said hearing. Notice shall also be published in a newspaper of general circulation in the county in which the activity is proposed and in a daily newspaper of general circulation throughout the State not less than ~~twenty~~(20) calendar days before the time of said hearing.

6.2.1.2 The appellant may appear personally or be represented by counsel at the hearing and produce any competent evidence in ~~his~~their behalf. The Secretary or ~~his~~ the Secretary's authorized designee may administer oaths, examine witnesses, and issue, in the name of the Department, notices of hearings or subpoenas requiring the testimony of witnesses and production of books, records or other documents relevant to any matter involved in such hearing.

6.2.1.3 A verbatim transcript of testimony at the hearing shall be prepared and shall, along with the exhibits and other documents introduced by the Secretary or other parties, constitute the record. The Secretary or ~~his~~ the Secretary's authorized designee shall make findings of fact based on the record. The Secretary shall then enter an order that will best further the purposes of the Act and these Regulations, and the order shall include reasons. The Secretary shall promptly give written notice of the order to parties who participated in the hearing.

**7.0 Appeal From the Secretary's Decision:**

**7.1 Appeal Procedure:**

7.1.1 Any person or persons, jointly or severally, or any taxpayer, or other officer, department, board or bureau of the State, aggrieved by a final order of the Secretary may, within ~~thirty~~(30) calendar days, appeal to the Superior Court as provided in 7 Del.C. §6803(g).

**8.0 Cease and Desist Orders, Violations and Penalties**

**8.1 Cease and Desist Orders:**

8.1.1 The Secretary shall have the power to issue a cease and desist order to any person who violates any provision of the Act or Regulations. Any such cease and desist order shall expire (1) after ~~thirty~~(30) days from the date of its issuance, or (2) upon withdrawal of said order by the Secretary, or (3) when the order is superseded by an injunction, whichever occurs first.

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8.2 Violations and Penalties

8.2.1 ~~Any person who violates any provision of the Act, or Regulations, or violates a cease and desist order of the Secretary, shall be fined not less than \$100 nor more than \$5,000 or imprisoned for not more than two (2) years, or both, and, in addition, shall reimburse the Department for its reasonable expenditures in remedying damage created. Whoever, without authority from the Department, alters, moves or carries away any substantial amount of beach material (including, but not limited to, sand or pebbles), or alters, damages or destroys any groin, jetty, bank, dike, dune, bulkhead, seawall, breakwater or any other facility, improvement or structure installed or maintained by the Department for the enhancement, preservation or protection of the beach, shall be liable for a civil penalty imposed by the Court of Common Pleas of not less than \$200 nor more than \$5,000 for each completed violation. If the violation has been completed and there is a substantial likelihood that it will recur or if it is a continuing violation, the Department may also seek a permanent or preliminary injunction or temporary restraining order in the Court of Chancery.~~

8.2.2 Any coastal structure erected, or excavation created, in violation of these regulations is hereby declared to be a public nuisance, and such structure shall be forthwith removed or such excavation refilled after written notice by the Department directing such removal or filling. In the event the structure is not removed or the excavation refilled as directed within a reasonable time, the Department may remove such structure or fill such excavation at its own expense. The person who erected the structure or created the excavation declared to be a public nuisance shall be liable for all expenses incurred by the Department in removing the structure or filling the excavation. The Secretary shall submit a detailed billing for the costs involved in abating the public nuisance to the person responsible. In the event that said billing is not paid by the person responsible within 30 days, the Department may file suit in the appropriate court seeking to compel payment.

8.2.3 Any person who:

8.2.3.1 Violates any condition or limitation in a permit issued pursuant to this chapter;

8.2.3.2 Engages in any activity prohibited by this chapter; or

8.2.3.3 Violates any regulation duly promulgated according to this chapter. Shall upon conviction be fined not less than \$200 nor more than \$5,000, or imprisoned for not more than 2 years, or both, and in addition shall reimburse the Department for its reasonable expenditures in remedying damage created.

8.2.4 For the purposes of subsection © of this Section, each and every day that a permit condition or limitation is violated, an activity engaged in which is prohibited by this chapter or a regulation violated is deemed a separate offense.

8.2.5 Any expenses or civil penalties collected by the Department under this Section are hereby appropriated to the Department to carry out the purposes of this chapter.

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8.3 Jurisdiction:

8.3.1 Justices of the Peace shall have original jurisdiction to hear and determine violations under this Section.

9.0 **Procedures for Adoption of Changes to the Regulations**

9.1 Hearing:

9.1.1 The Secretary, or his the Secretary's authorized designee, shall hold a public hearing on any changes to the Regulations that he shall propose for adoption. For a hearing on the proposed changes to the Regulations, notification shall be published in a newspaper of general circulation in each county of the State and in a daily newspaper of general circulation throughout the State. Such notification shall include (1) a brief description of the proposed changes to the Regulations, (2) the time and place of the hearing, and (3) the time and place where copies of the proposed changes may be examined and/or obtained. Such notice shall also be sent to any person who has requested notification from the Department by providing their name and mailing address.

9.2 Decision

9.2.1 Following the public hearing, the Secretary may adopt, with or without modifications, the proposed changes to the Regulations. This adoption shall be a final order for purposes of Section 7.0 of the Regulations.

