

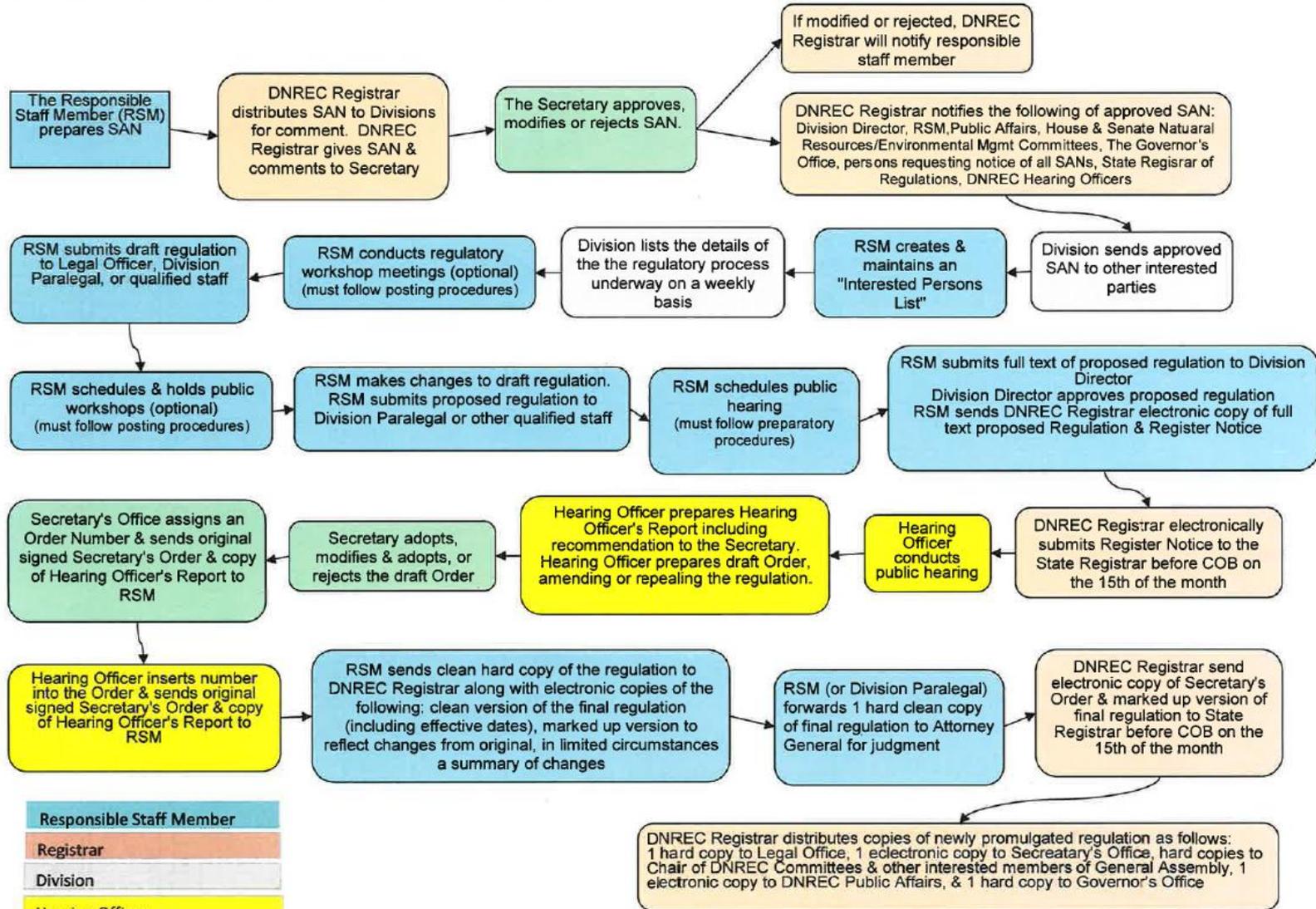
Regulatory Advisory Committee

June 6, 2014

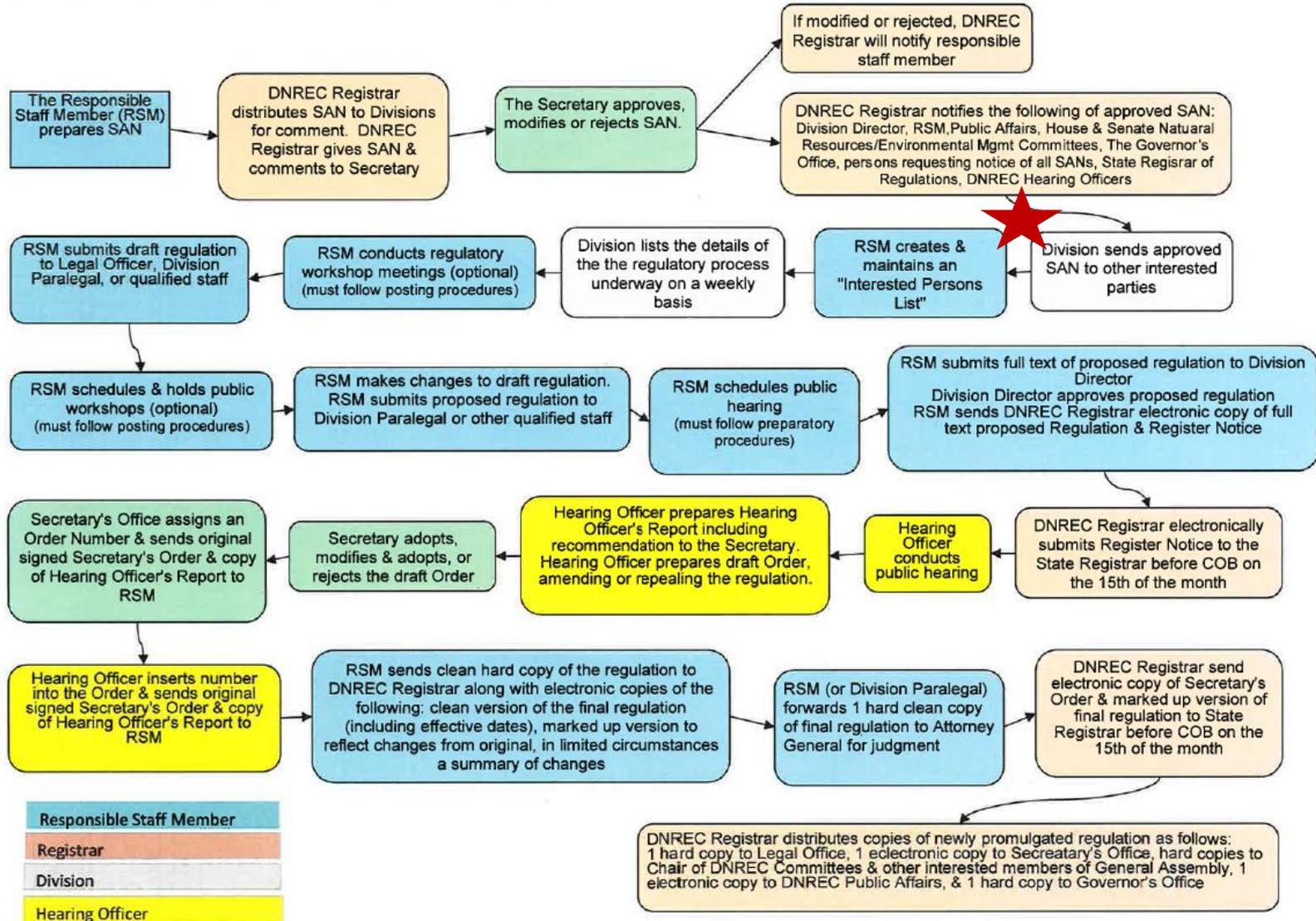
Regulation Development Process

- The Administrative Procedures Act sets forth a process for adoption of regulations that includes public hearings and the opportunity to submit written comments, before final regulations are formally adopted. On the **front end** of this mandated process, DNREC has created the Regulatory Advisory Committee to review the existing regulations and draft revisions, with the intent of including all **stakeholders** in the first stage of this process.

DNREC Regulation Development Process



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Current Regulations Governing Beach Protection and the Use of Beaches

Section 1

- Definitions – which are important when interpreting the sections of the regulations

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- “ Building Line -Along beaches extending from the Delaware/Maryland line to the tip of Cape Henlopen - 100 feet landward of the **adjusted** seawardmost 10-foot elevation contour above NGVD;”
- **adjusted** is referring to the fact that it is a straight line drawn between points that are measured 100 feet landward, every 500 feet, along the 10’ NGVD elevation contour

Section 2 – Administrative Principles

- **2.1 Purpose of Regulations**
- **2.2 Approval Requirement** – no construction without approval
- **2.3 Department Exemption** – Department held to same rules except for erosion control duties
- **2.4 Extensions for Letter of Approval or Permits**
- **2.5 Construction Setback Lines** – Prior Approvals
- **2.6 Maintenance, Repairs and Emergency Action** – allows for maintenance and repair work at or above the lowest living floor, for repairs not caused by wave action, flooding or erosion and for work related to protection of persons in the event of extreme emergency

Section 2 – Administrative Principles

- **2.7 Restoration or Reconstruction After Destruction** - requires permit or letter of approval
- **2.8 Siting Requirements for Construction and Reconstruction of Structures** – new construction must be landward of Building Line or as far landward as possible
- **2.9 Other Requirements and Approvals** – no exemptions from obtaining other permits or approvals required by Federal, State or local jurisdictions
- **2.10 General Permit Considerations** – geology, geomorphology, meteorology and hydraulics shall be taken into consideration during application process

Section 2 – Administrative Principles

- **2.11 Sole Jurisdiction** - all structures, devices and facilities for the enhancement, preservation or protection of beaches shall be under the sole jurisdiction of the Department.
- **2.12 Building Line Format** – must be mapped, shown as series of straight lines connected together at points whose locations are identified by reference to the Delaware State Plane Coordinate System. Points are 500 feet apart.
- **2.13 Building Line Re-established** – when beaches have changed Secretary can have Building Line re-established with new topography following public hearing
- **2.14 Re-establishment Effects on Lot Status** – refers to lots becoming seaward of the Building Line from re-establishment, must follow requirements of Section 4.0
- **2.15 Savings Clause** – if any provision is held invalid, the rest of the regulations are still effective

Section 3 – Prohibited Activities

- **3.1 Construction Seaward of the Building Line** – no construction seaward unless 1 of 4 exceptions exist:
 - There is no way to get structure landward of building line
 - Building cannot be redesigned to allow for all construction to be landward of building line
 - A cantilevered deck may be constructed with a new dwelling as long as it does not extend further seaward than immediately adjacent neighbor
 - Structure must be seaward of Building Line to fulfill its intended purpose, i. e. pipelines, piers, docks, wharf, boat ramp, etc.

Section 3 – Prohibited Activities

- If property is created seaward of Building Line after August 13, 1981 due to subdivision of a larger parcel, construction upon said parcel is prohibited
- If proposed construction meets the exceptions, a permit is required.
- **3.2 Modification or Expansion of Structures Seaward of the Building Line**
 - Approval is required
 - Modification or expansion is prohibited unless:
 - The intended purpose of the structure, or portion thereof, that is to be modified or expanded must be achieved
 - The expansion or modification is a cantilevered deck

Section 3 – Prohibited Activities

- **3.3 Other Activities:**

- Operation of motorized vehicles or machines on, over or across primary dune on State-owned beach except in crossings
- Pedestrian traffic on, over or across primary dune on State-owned beach except in crossings
- 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
- The damaging, destruction or removal of any trees, shrubbery, beach grass or other vegetation ground on State-owned or maintained beach, seaward of Building Line

Section 4 - Activities Requiring a Permit or Letter of Approval from the Division

- **4.1 General Rule** – we cannot issue approval for prohibited activities
- **4.2 Permit Application; Fee - \$150**
- **4.3 Construction of Beach Erosion Control or Shore Protection Structures or Facilities Seaward of the Building Line** – everything requires a permit, except sand fence, planting and fertilization of dune vegetation
- **4.4 Construction of Pipeline or Harbor Works Seaward of the Building Line** – requires a permit

Section 4 - Activities Requiring a Permit or Letter of Approval from the Division

- **4.5 Construction of a Structure Seaward of the Building Line; Permits; Exception for Beach Access Structures**
 - Permit required for construct of structures seaward of the Building Line
 - Before issuing permit written documentation that proposed structure will be constructed in accordance with requirements must be provided, i.e. completed application and plans
 - Dune crossovers can be approved through Letter of Approval

Section 4 - Activities Requiring a Permit or Letter of Approval from the Division

- **4.6 Other Activities Seaward of the Building Line** – Permits are required for the alteration, digging, mining, moving, removal or deposition of any substantial amount of beach or other materials, or the significant removal of vegetation
- **4.7 Mitigating Measures** – conditions requiring beach nourishment, dune construction and/or dune maintenance to balance effects of proposed activity
- **4.8 Construction Activities Landward of the Building Line and Within the Beach Area**
 - The alteration, digging, mining, moving, removal or deposition of any substantial amount of beach or other materials landward of the Building Line and within the beach area requires a Letter of Approval
 - Division can require applicant to apply for Permit if proposed project has a substantial effect on beach enhancement, preservation and protection

Section 5 – Procedures for Processing Permit Applications

- **5.1 The Division** – issues or denies permits based on compliance with Act and Regulations
- **5.2 Notice**
 - 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. Receive comments for 15 calendar days after.
 - Notice adjacent property-owners and wait 20 calendar days before rendering a decision

Section 5 – Procedures for Processing Permit Applications

- **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** Division shall take into consideration
 - Comments received
 - 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
 - The feasibility of alternative protection from storm damage that may be available
 - The historical average rate of shoreline change for the general area nearby and including the parcel of real property

Section 5 – Procedures for Processing Permit Applications

- The design modifications which may mitigate the impact of the proposed
- 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** The Division shall also weigh 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 by considering the factors:
 - The purposes and provisions of the Act and the Regulations
 - 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

Section 5 – Procedures for Processing Permit Applications

- The protection of the State, the public and any adjacent landowners from actual and potential financial and property loss
- The actual and potential financial or personal losses to the owner of the structure or portion thereof
- 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
- Any design alternatives or amendments to the original designs submitted to the Division by the owner of the proposed structure or portion thereof
- Any other factor the Division determines to be relevant

Section 5 – Procedures for Processing Permit Applications

- **5.3.3** Division may do the following in enforcing the Regulations:
 - Make on-site inspections
 - Communicate with anyone regarding the Regulations or the Act
 - Undertake formal or informal investigations
- **5.3.4** Division may require special permit conditions and/or require modification of proposed structures or activities
- **5.4 Decision** – Division shall make a decision and give written notice of the decision to applicant and adjacent property owners

Section 6 – Appeal From the Division’s Decision

- **6.1 Activity Pending Appeal** – applicant shall not commence permitting activity until appeal period has expired or if appealed, the appeal process has been exhausted
- **6.2 Procedures**
 - Any person aggrieved by any decision of the Division may appeal to the Secretary – and if deemed meritorious a public hearing may be held on such appeal
 - Hearing must be advertised 20 calendar days prior
 - Appellant may represent self or have counsel. Secretary may preside or designate someone to preside
 - A transcript of the hearing shall be prepared. Secretary shall enter an order including reasons for his/her decision.

Section 7 – Appeal From the Secretary’s Decision

- **7.1 Appeal Procedure** – Any person aggrieved by the final order of the Secretary may appeal within 30 calendar days to the Superior Court

Section 8 – Cease and Desist Orders, Violations and Penalties

- **8.1 Cease and Desist Orders** – Secretary shall have power to issue a cease and desist order. Order shall expire after 30 days, upon withdrawal or when superseded by an injunction
- **8.2 Violations and Penalties** – fines between \$100 and \$5,000 or imprisonment for less than 2 years, plus reimbursement to State for expenditures to correct violation
- **8.3 Jurisdiction** - Justices of the Peace shall have original jurisdiction to hear and determine violations under this Section

Section 9- Procedures for Adoption of Changes to the Regulations

- **9.1 Hearing** – hearing shall be advertised in Statewide newspaper and notice sent to “interested persons”
- **9.2 Decision** - Following the public hearing, the Secretary may adopt, with or without modifications, the proposed changes to the Regulations



Questions Since the Last Meeting



What does Delaware law require of government departments when regulations are written to implement legislation?

- This is answered with the first three slides of the presentation.

Your slide references the 1981 Regulations, noting they were revised at that time. The reference to 1983 simply states they are the current regulations. Were they revised in 1983 as well?

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Yes.

Changes found in 1983 Regulations vs. 1981 Regulations

- The following terms were defined:
 - Beach Preservation
 - Beach Protection
 - Dune Zone
 - Expansion
 - Lowest Living Floor
 - Maintenance
 - Modification
 - Parcel of Real Property
 - Regulation
 - Repair

Changes found in 1983 Regulations vs. 1981 Regulations

- “Design Storm” was removed from definitions
- 2.1 language was added regarding activities permitted prior to current regulation
- 2.4.2 language was added about how to request an extension
- 2.6 breaks down Maintenance, Repairs and Emergency Action
- 3.1 added the exception for structures that “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.”
- 3.1 added allowance of cantilevered decks with new dwellings
- 3.2 added allowance of cantilevered decks onto existing dwellings

Changes found in 1983 Regulations vs. 1981 Regulations

- 4.2 added fee for Permits
- 5.3 added 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; and 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 added more criteria for Division to consider during permit review

“OUR CHARGE ” -To Mitigate Beach Erosion and Minimize Storm Damage” Are those actual words in the 1972 law? If so, what is the actual language around ‘minimize damage’? What is the legislative history in the use of the specific language?

- No. However, the current Beach Preservation Act does state that our purpose is **“to provide storm protection for persons and property”** and the definition of "Regulated area" is the specific area within the defined beach that the Department is directed to regulate construction to preserve dunes and **to reduce property damage.**
- **“to provide storm protection for persons and property”** is first found in July 17, 1984 Amendment to Beach Preservation Act

*The 1984 Law defined the power “...to enhance, preserve and protect private beaches to include the **prevention and repair of damage from erosion in an emergency**” Are those specific words in the Law. If so, where can they be found easily? If not, what specific words are used and what is the legislative history behind them?*

The specific language is:

- 6803 Authority to enhance, preserve and protect beaches.

(a) Authority to enhance, preserve, and protect public and private beaches within the State is vested solely in the Department, except as pertains to archaeological resources on beaches, which are regulated by the Department of State, Division of Historical and Cultural Affairs pursuant to Chapter 53 of this title.

(b) The Department shall prevent and repair damages from erosion of public beaches. To this end, the Department shall, when it deems necessary, provide, construct, reconstruct and maintain groins, jetties, banks, dikes, dunes, bulkheads, seawalls, breakwaters and other facilities or make any other repairs or take any other measures along or upon any public beach or shoreline area in this State. All structures, devices and facilities existing now or in the future which are devoted to the enhancement, preservation and protection of beaches shall be under the sole jurisdiction, management and control of the Department.

- 6804 Privately owned beaches.

The authority of the Department to prevent and repair damages from erosion shall extend to privately owned beaches whenever, in the judgment of the Governor, a dangerous condition constituting an emergency exists in a location specified by the Governor. Before taking any action with respect to a privately owned beach, the Department shall, whenever practicable, give reasonable notice to the owner thereof that a condition of potential emergency must be corrected, and wait a reasonable period of time for the owner to correct the matter. If the owner does not correct the matter, the Department shall do so. The owner shall be liable for all expenses incurred by the Department in correcting a condition of potential emergency.

- "Emergency" means any unusual incident resulting from natural or unnatural causes 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.



Link to current Beach Preservation Act:

<http://delcode.delaware.gov/title7/c068/index.shtml>



Will we be using the draft of '06 changes as a starting point or will we be starting from scratch?

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- Neither, nor.

Does New Jersey have the equivalent of a DNREC line and height restrictions governing new construction along the ocean?

- A permit is required to construct any structure on a beach or dune or within a certain distance of the coast. This distance depends on the structure's size and use. A single family residential home must be at least 150 feet from the mean high water line of any tidal waters or the landward limit of a beach or dune, whichever is most landward. The distance for commercial developments depends on the amount of necessary parking spaces.
- This is statewide. There might be more localized rules and regulations that differ and may be more restrictive.



Does New Jersey have recent building standards for ocean construction? Are they similar to ours?

- Yes, they have building standards and are held to the National Flood Insurance Regulations if the local municipality is part of the NFIP.
- Their building standards are not the same.



The presentation said that ‘most’ of the damage from Hurricane Sandy was caused to the older and non-pile homes. Were any of the newer homes on pilings built in accordance with these standards and above their equivalent to our flood plain height requirements damaged in Sandy? If so, what do we know about the circumstances of that damage?

Hurricane Sandy

- \$65 Billion in damages and economic losses
- 159 fatalities
- 8.5 million customers lost power
- 650,000 homes damaged or destroyed
- 13 States with major disaster declarations
- Most damaged or destroyed homes were from 30 + year old outdated flood maps and were non-pile elevated buildings along the coast

(taken from May 14, 2014 Presentation)

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- We do not have that information readily available.

Am I correct that the National Flood Insurance Program does not cover damage caused below the flood plain heights?

- That is not correct. While flood damage coverage is limited below the lowest floor of elevated buildings there is still available coverage for portions of a building below BFE. Foundations, utilities are among the types of items for which coverage is available even if they are below BFE.



Discussion