

STATE OF DELAWARE

DEPARTMENT OF NATURAL RESOURCES  
AND  
ENVIRONMENTAL CONTROL

REGULATIONS  
GOVERNING THE USE OF SUBAQUEOUS LANDS  
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STATE OF DELAWARE  
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

REGULATIONS GOVERNING THE USE OF SUBAQUEOUS LANDS

FOREWORD

AUTHORITY

These regulations governing the use of subaqueous lands are promulgated in accordance with the provisions of 7 Del. C. §7212.

PURPOSES

Subaqueous lands within the boundaries of Delaware constitute an important resource of the State and require protection against uses or changes which may impair the public interest in the use of tidal or navigable waters. The purposes of this chapter are to empower the Secretary to deal with or to dispose of interest in public subaqueous lands, and to place reasonable limits on the use and development of private subaqueous lands, in order to protect the public interest by employing orderly procedures for granting interests in public subaqueous land, and for issuing permits for uses of or changes in private subaqueous lands. To this end, 7 Del. C. §7212 empowers the Secretary to adopt rules and regulations to effectuate the purposes of the chapter, to apply to the courts for aid in enforcing this statute and the rules and regulations adopted pursuant thereto, and to convey interests in subaqueous lands belonging to the State.

DEFINITIONS

The following words or phrase shall have the following definitions unless the context clearly indicates otherwise.

(1) "Activity" includes, but is not limited to, any human induced action, such as dredging, draining, filling, grading, bulkheading, mining, drilling, extraction of materials or excavation or construction of any kind, including, but not limited to, construction of a boat ramp or slip, breakwater, residences, bridge, bulkhead, culvert, dam, derrick, dock, groin, jetty, lagoon, gabion, rip-rap, launching facility, marina, mooring facility, pier, seawall, walkway or wharf.

(2) "Anchoring" means the holding of a vessel solely by means of an anchor which is dropped to underwater lands and which is carried aboard the vessel.

(3) "Anchorage/Moorage" means a designated and permitted area reserved for the anchoring or mooring of vessels.

(4) "Approved upland residential unit(s)" means the residential units given final

approval by a local government zoning agency for one parcel of land riparian to the adjacent or affected waterbody.

(5) "Boat docking facility" means a place where a vessel or vessels may be secured to a fixed or floating structure, or moorage or mooring onto the shoreline or shoreline structure (including marginal docks), either temporarily or indefinitely.

(6) "Commercial" means any activity undertaken for profit, for which a fee will be charged, directly or indirectly, or which results in the generation of revenue.

(7) "Commercial Project" means any boat docking facility or anchorage, other than a single-boat pier, dock or anchorage intended to serve a single family dwelling.

(8) "Convenience Structure" means any structure which provides access to a watercourse, including but not limited to, a boat ramp or slip, derrick, dock, dolphin, piling, launching facility, marina, mooring facility, pier, walkway or wharf; whether permanent or temporary, floating or fixed.

(9) "Critical Habitat" includes areas classified by the Department and serving an essential role in the maintenance of sensitive species. Areas may include unique aquatic or terrestrial ecosystems that support rare endangered or threatened plants and animals. Rare, endangered or threatened species are defined by both state and/or federal listings.

(10) "Cumulative Impacts" means the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges or activities. Although the impact of a particular discharge or activity may be a minor change in itself, the cumulative effect may impair the water resources and interfere with the productivity, water quality, or public use of existing aquatic ecosystems.

(11) "Department" means the Department of Natural Resources and Environmental Control.

(12) "Dredging" means the removal or displacement, by artificial activities, of mud, soil, sand, gravel, shells or other material from subaqueous lands.

(13) "Facility" means all related land, structures, services, appurtenances and improvements associated with an activity regulated under 7 Del. C. Chapter 72.

(14) "Filled Lands" includes tidelands and submerged lands reclaimed artificially through raising such lands above the highest probable elevation of the tides to form dry land by placement of a fill or deposit of earth, rock, sand or other solid materials.

(15) "Filling" means depositing materials from any source onto tidelands, submerged lands, wetlands or upland, whether for the purpose of creating new uplands or for any other purpose,

including the disposal of dredged materials.

(16) "Floating Platform" means any floating structure which has no means of propulsion or is not designed as a boating vessel.

(17) "Governor" means the Governor of the State of Delaware.

(18) "Lease" means an agreement for exclusive possession of lands for a determinate period.

(19) "Marginal dock" means a fixed or floating structure placed immediately contiguous and parallel to or including an established seawall, bulkhead, or revetment, used for the purpose of berthing vessels either temporarily or indefinitely.

(20) "Marina" means a boat docking facility, as defined in the Department's Marina Regulations.

(21) "Mean high water" or "mean high tide" (a tidal datum) means the point on a bank, tide flat, beach or shore, up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation (non-aquatic), physical markings or characteristics, known vegetation lines, and may be further identified by tidal gauge data, or any other suitable means delineating the mean height reached by a rising tide.

(22) "Mean low water" or "mean low tide" (a tidal datum) means the average lowest point on a bank, tide flat, beach or shore, found during normal tide conditions. This may be determined by physical or biological characteristics, interpolation from mean high water based on knowledge of tidal range for an area or tide gauge information, if corrected to account for local conditions.

(23) "Mooring" means the holding of a vessel by means of a mooring buoy or similar device which is fastened to a stationary underwater device that is not carried aboard the vessel as regular equipment.

(24) "Navigable water" means a river, stream, lake, bay, inlet, or other waterway capable of having been or being used for transport of useful commerce, including waterways which become navigable as the result of alteration such as dredging. "Transport of useful commerce" shall include the transportation of goods or persons by water including, but not limited to, recreational transport, such as canoeing, rafting, sailing, tubing, water-skiing, motor boating or windsurfing.

(25) "Ordinary high water line" means for nontidal waters, the line where the presence and action of the water are so continuous in all ordinary years so as to mark upon the soil of the bed, or character distinct from that of the banks, with respect to vegetation, as well as with respect to the nature of the soil itself.

(26) "Person" means any individual, minor, partnership, corporation, joint venture, estate, trust, syndicate, fiduciary, firm and other association and combination whether public or private, including quasi-public corporations, political subdivisions, and governmental agencies, instrumentalities, and other entities.

(27) "Pier" means a structure in, on, or over subaqueous lands which is used by the public primarily

for fishing, crabbing, swimming, or viewing. A pier shall not include vessel berthing use unless specifically designated as such.

(28) "Preemptive area" means the area of public subaqueous lands from which the traditional public uses have been, or would be, excluded to any extent by an activity, structure, or vessel.

(29) "Private subaqueous lands" means any subaqueous lands which are not public subaqueous lands.

(30) "Public interest" means demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would exceed all demonstrable environmental, social, and economic costs of the proposed action. In determining the public interest in a request for use, sale, lease, or transfer of interest in subaqueous lands, the Department shall consider the ultimate project and purpose to be served by said use, sale, permit, lease, or transfer of lands or materials.

(31) "Public subaqueous lands" means those subaqueous lands owned by the State of Delaware, including subaqueous lands which were altered or created from non-subaqueous lands by excavation or other means or through loss by natural processes or acts of God.

(32) "Resident vessel" means a live-aboard vessel docked or moored at an anchorage, marina, or other boat docking facility for a period exceeding a total of two consecutive weeks in a single year.

(33) "Riparian habitat" means a habitat that is strongly influenced by water and which occurs in, or adjacent to, a waterbody (i.e. rivers, streams, ponds, lakes, bays, ocean, wetlands, etc.).

(34) "Secondary Effects" are effects on an aquatic ecosystem that are associated with a discharge or activity, but do not directly result from the discharge or activity.

(35) "Secretary" means the Secretary of the Department of Natural Resources and Environmental Control.

(36) "Shoreline Erosion Control Structure or Measure" means any activity or structure which provides for stabilization of the shore or bank of a watercourse including, but not limited to, a bulkhead, breakwater, gabion, groin, jetty, rip-rap revetments, seawall, vegetation, and/or grading of banks.

(37) "State" means the State of Delaware.

(38) "Structure" includes, but is not limited to, any boat ramp, slip, building, breakwater, bridge, bulkhead, culvert, dam, derrick, dock, gabion, groin, jetty, residence, launching facility, marina, mooring facility, pier, seawall, walkway, or wharf.

(39) "Subaqueous lands" means submerged lands and tidelands.

(40) "Submerged lands" means land lying below the line of mean low tide in the beds of all tidal waters within the boundaries of the State, together with the beds (channelward of ordinary high water in non-tidal waters) of navigable rivers, streams, lakes, bays, inlets, ponds, or other waterways within the boundaries of the State.

(41) "Tidal waters" means any waters affected by tide.

(42) "Tidelands" means lands lying between the line of mean high water and the line of mean low

water.

(43) "Vessel" means and includes every description of watercraft, boat, houseboat, or other contrivance capable of navigating the waters of the State.

(44) "Water-dependent activity" means an activity which can only be conducted on, in, over, or adjacent to water, and where the use of the water or subaqueous lands is a primary and integral part of the activity or use.

(45) "Wetlands" means those lands defined as "Wetlands" in 7 Del. C. Chapter 66.

## SECTION 1. ADMINISTRATIVE PRINCIPLES

### 1.01 Jurisdiction

These Regulations are adopted pursuant to 7 Del. C. §7212.

### 1.02 Scope of Regulations.

#### A. Applicability

1. The extent of jurisdictional authority over public or private subaqueous lands includes any activity in a navigable stream or waterbody, which have a hydrologic connection to natural waterbodies.

2. These Regulations shall apply to all activities upon or affecting public and private subaqueous lands within the State of Delaware.

3. These Regulations shall apply to all applications received on or after the effective date of these Regulations. Applications submitted before the effective date of these Regulations shall be governed by the regulations titled "Regulations Governing the Use of Public Subaqueous Lands," adopted July 14, 1969 and revised July 30, 1985.

4. These Regulations shall not alter any right or obligation arising from any lease, easement, license, grant or other legally binding agreement from or between the State of Delaware and any person which is in effect prior to the effective date of these Regulations.

5. To the extent that any activity is commenced prior to the effective date of these Regulations, any previous regulation or law which applied to such activity prior to the effective date of these Regulations shall remain in force.

6. Any expansion, modification, renewal, repair, or rebuilding of any structure affecting subaqueous lands, which occurs after the effective date of these Regulations, shall be subject to these Regulations.

7. Any change or modification of a permitted or grandfathered activity affecting subaqueous lands, which occurs after the effective date of these Regulations, shall be subject to these Regulations.

## B. Subaqueous Lands

1. The areas where these Regulations apply are shown on the U.S. Geological Survey 7.5 Minutes Series (Topographic) Quadrangle Charts for the various quadrangles making up the State of Delaware. Such jurisdiction shall be presumed correct subject to written rebutment by the public or the Department based on a determination made in the field, using established criteria and procedures adopted by the Department in accordance with the Regulations. These criteria shall be developed using biological and physical indicators which include, but are not limited to, the presence of a defined channel, banks, aquatic fauna and flora, and other field indicators of instream habitat.

2. Final determination of the location of mean high water shall be determined in the field by the Department, using biological and physical indicators. Where the bank or shore at any particular site is of such character that it is impossible or difficult to ascertain where the point of mean high water is, recourse may be had to other places on the bank or shore of the same stream, lake, etc. to determine whether a given stage of water is above or below the mean high water mark. Similarly, the ordinary high water mark along the banks of a navigable bay, lake, pond, river, stream, or other waterway shall be taken as the boundary between the subaqueous lands and the non-subaqueous lands.

3. These Regulations acknowledge the applicability of the Public Trust Doctrine to all navigable waters. Any applicant asserting private ownership of subaqueous lands must demonstrate said ownership.

### 1.03 Activities on Private Subaqueous Lands: Types of Projects Requiring a Permit.03 Activities on Private Subaqueous Lands: Types of Projects Requiring a Permit

A. Owners of private subaqueous lands shall obtain a permit from the Department, pursuant to this regulation, before undertaking any activity on such lands which, as determined by the Department, may contribute to the pollution of public waters, have an adverse impact or destroy aquatic habitats, infringe upon the rights of the public use of the waterway or the public, infringe upon the rights of other private owners, or make connection with public subaqueous lands, including but not limited to, the activities specified in subsection C of this section.

B. No person shall deposit material upon, remove, or extract materials from, or construct, modify, repair, reconstruct, except as specified in subsection 1.08(B) any structure or facility upon or over private subaqueous lands without first having obtained a permit or letter of authorization from the Department.

## C. Permits or Letters of Authorization

The following types of activities in, on, over, or under private subaqueous lands require a permit or letter of authorization from the Department:

1. Construction of a convenience structure or boat docking facility.
2. Construction of a shoreline erosion control structure or measure.
3. Dredging, filling, excavating, or extracting of materials.
4. Excavation, creation, or alteration of any channel, lagoon, turning basin, pond, embayment, or other navigable waterway on private subaqueous lands which will make connection with public subaqueous lands.
5. Dredging of existing channels, ditches, dockages, lagoons, and other navigable waterways to maintain or restore the approved depth and width (letter of authorization).

6. Excavation of land which makes connection to subaqueous lands.
7. The laying of any pipeline, electric transmission line, telephone line, or any other utility structure in, on, over, or under the beds of private subaqueous lands.
8. Installation of temporary or permanent mooring buoys or private marker buoys.
9. Establishment of an anchorage for the use of a mooring for more than two (2) boats or for appurtenant onshore services.
10. Anchoring or mooring a floating platform over private subaqueous lands for a period of twenty-four (24) consecutive hours or more.
11. Anchoring or mooring any vessel or platform over private subaqueous lands for a revenue generating purpose.
12. Repair and replacement of existing serviceable structures over private subaqueous lands (letter of authorization), except no permit or letter is required for repairs or structural replacements which are above the mean low tide and which do not increase any dimensions or change the use of the structure.

1.04 Use of Public Subaqueous Lands: Types of Projects Requiring Approval.04 Use of Public Subaqueous Lands: Types of Projects Requiring Approval

A. The Secretary may convey a fee simple title or any lesser interest for a commercial or noncommercial project. Once public subaqueous lands become private subaqueous lands, they are subject to regulation as private subaqueous lands pursuant to these Regulations.

B. The following types of activities on public subaqueous lands require a lease, permit, or letter of authorization from the Department:

1. Construction or use of any structure on, in, under, or over public subaqueous lands, including but not limited to, any convenience structures, shoreline erosion control structure or measure, or boat docking facility.
2. Dredging, filling, excavating, or extracting of materials.
3. Continuous anchoring or mooring of a commercial vessel used in a commercial activity on or over public subaqueous lands for thirty (30) or more consecutive calendar days or for thirty (30) or more calendar days during any consecutive three (3) months.
4. The laying of any pipeline, electric transmission line, or telephone line in, on, over, or under the beds of public subaqueous lands.
5. Installation of temporary or permanent mooring buoys or private marker buoys.
6. Establishment of an anchorage for mooring more than two (2) boats or which serves as a permanent place for resident vessels.
7. Anchoring or mooring a floating platform over public subaqueous lands and for a period of

twenty-four (24) consecutive hours or more.

8. Maintenance dredging of existing or new channels, ditches, dockages, lagoon and other waterways to maintain or restore the approach depth and width (letter of authorization).

9. Anchoring or mooring any vessel or platform over public subaqueous lands for revenue generating purposes.

10. Repair and replacement of existing serviceable structures over private subaqueous lands (letter of authorization), except no permit or letter is required for repairs or structural replacements which are above the mean low tide and which do not increase any dimensions or change the use of the structure.

11. New dredging activities of channels, ditches, dockages or other waterways.

#### 1.05 Statewide Activity Approvals.

The Department may adopt statewide activity approvals for certain specified activities with limiting dimensions and criteria which are considered to have minimal impacts on subaqueous lands, water quality, habitats, etc. The qualification of a project for a statewide activity approval may require no review or will invoke an abbreviated review process for a decision by the Department.

#### 1.06 Prohibitions.

Certain types of projects are deemed inappropriate for consideration and shall not be considered or approved for private or public subaqueous lands under these Regulations:

##### A. Houseboats

No non-motorized vessel or floating platform whose function or use is primarily that of a residence shall be authorized under these Regulations to moor, anchor, dock over or otherwise occupy subaqueous lands.

##### B. Gazebos

No gazebos shall be constructed on a dock, pier, wharf, or other convenience or shoreline erosion control structure which otherwise utilize subaqueous lands, whether the structure is enclosed or open.

##### C. Overwater Structures

Restaurants, decks, residences, or appurtenances that extend over subaqueous lands, but which are not dependent upon water access for their primary purpose, shall not be authorized by these Regulations.

##### D. Mooring Buoys

Installation of mooring buoys or private marker buoys, which unduly impedes or preempts public access to subaqueous lands or interfere with navigation, shall not be permitted.

##### E. Convenience Structures

No convenience structure shall be constructed or used in a manner which creates a safety or navigation hazard, public nuisance, or unduly restricts public use or access to subaqueous lands. Such structures shall be relocated or removed by the person who installed, replaced or owns the structure.

F. Dockminiums

No real property consisting of a pier, dock, boat slip or anchorage over public subaqueous lands shall be declared as a unit in a common interest community. The section shall not prohibit classification of such structures as common amenities of a condominium or planned community.

G. Developments

1. In residential developments in which the development allows individual boat docks, the combined number of individual boat docks and centralized slips (such as in a marina) shall not exceed the total number of waterfront lots in the development. This subsection shall not apply to an application for an individual boat dock at a waterfront lot filed by the individual if an individual has purchased such lot prior to the effective date of these Regulations. In residential developments in which the development prohibits individual boat docks, the number of centralized slips shall be limited only by any applicable requirements of the State of Delaware Marina Regulations.

2. The construction of boat launching ramps may be authorized within residential developments for the use of any resident within the development regardless of whether or not residents with waterfront property have, or may apply for, individual boat docks.

3. No resident of a development which prohibits individual boat docks shall permanently beach, moor, or anchor any vessel at any location in the development other than the development's approved marina.

4. No individual boat dock application shall be accepted prior to the legal subdivision and sale of individual lots on, or adjacent to, the proposed structure.

1.07 Other Projects.07 Other Projects

No other project which may potentially impact the public interest in the use of tidal or navigable waters, contribute to water pollution, infringe upon the rights of the public, infringe on the rights of private owners, or make connection with public subaqueous lands, shall be undertaken on public or private subaqueous lands unless approval has been obtained from the Department.

1.08 Exemptions.08 Exemptions

A. Anchoring

A waterfront property owner, other than one within a development which provides a marina or anchorage for residents' use, may anchor or moor, not more than two (2) personally owned vessels in the waters adjacent to and within the perpendicular seaward extension of the property boundaries of the waterfront property, provided that the preemptive mooring area does not extend more than ten percent of the width of the waterbody at high tide, is not in a navigational channel, and does not pose a navigational hazard.

B. Written Notification of Exempted Repairs and Replacements

Repairs or structural replacements which are above the mean low tide and which do not increase any dimensions or change the use of the structure are exempt from the permit or letter of authorization requirements contained herein. The user shall notify the Department in writing in advance of utilization of the exemption. For purposes of this subsection, the notice shall include the location of the structure, a description of the use of the structure,

and provide its dimensions.

C. Shellfishing

The use of shellfish grounds for shellfishing and the authorized use, deployment, and marking of fishing equipment and gear, is regulated under the authority of 7 Del. C. Chapters 9, 11, 18, 19, 21, 23, 24, 25 and 27.

D. Drainage Ditches

Artificially created channels excavated from non-subaqueous lands and designed according to reasonable drainage standards do not require approval under these Regulations.

1.09 Waivers.09 Waivers

A. The Department may waive any provision of these regulations when warranted under the following circumstances:

1. Life-threatening emergencies.
2. Actions are required for public safety for which sufficient time is not available to follow the Regulations.

3. Where the authority of the Department under 7 Del. C. Chapter 72 overlaps with another statute, including but not limited to Shellfish Grounds, 7 Del. C. Chapter 19; Beach Preservation, 7 Del. C. Chapter 68; or Wetlands, 7 Del. C. Chapter 66, provided that the following criteria are met:

- a. If, in the opinion of the Secretary, equal environmental impact review and regulation of the activity would be provided by either statute; and
- b. Waiver of these regulations would not be contrary to the purposes of 7 Del. C. Chapter 72.

B. For facilities or activities which require a permit pursuant to the Department Marina Regulations, the Department will waive the provisions of Sections 3.01.B and 3.01.C of these Regulations.

C. The failure of the Department to enforce any of the provisions of these Regulations, however, shall not constitute a waiver by the Department of any such provisions.

1.10 Revocation.10 Revocation

The Secretary may revoke any lease or permit for failure to comply with these Regulations or the terms and conditions of the lease or permit. The Secretary may, upon expiration or cancellation of a lease, direct the lessee to remove all structures and equipment from the leased area within 180 days. If the lessee fails to remove the structures and equipment thereon within the 180 day period, the Department shall, at its option and after 10 days from receipt of written notice by certified mail to the lessee, have the structures and equipment removed at the expense of the lessee.

1.11 Penalties.11 Penalties

Violations of these regulations shall be punishable in accordance with 7 Del. C. §7214.

1.12 Other Regulatory Agencies.12 Other Regulatory Agencies

Compliance with these Regulations does not relieve any person from complying with the laws, rules, regulations, and requirements imposed on the same lands, uses, structures, facilities or other appurtenances by local, State and Federal government agencies or other divisions within the Department.

1.13 Public Information.13 Public Information

All material submitted in connection with any application shall be deemed public records subject to disclosure subject to 29 Del. C. Chapter 100 unless designated by the applicant and accepted by the Department as covered by one or more of the exceptions enumerated in 29 Del. C. §10002(d).

1.14 Severability.14 Severability

If any part of these Regulations or the application of any part thereof are held invalid or unconstitutional, the application of such part to other persons or circumstances, and the remainder of these Regulations, shall not be affected thereby and shall be deemed valid and effective.

1.15 Appeals.15 Appeals

Any person whose interest is substantially affected by any action of the Secretary taken pursuant to these Regulations may appeal to the Environmental Appeals Board as per 7 Del. C., §7210. There shall be no appeal of a decision by the Secretary to deny a permit on any matter involving State-owned subaqueous lands.

1.16 Effective Date of These Regulations.16 Effective Date of These Regulations

These Regulations shall take effect upon final adoption.

## SECTION 2. PROCEDURES FOR APPLICATION

### 2.01 General

#### A. Requirements for Every Application

A person seeking a lease or permit shall submit to the Secretary a written request, using the appropriate forms available from the Department, stating in detail the type of grant, lease or permit desired, showing the location of the area and containing specifications for any proposed activity.

The application for every type of activity shall provide the information requested in the appropriate application form. No application shall be considered complete or acted upon until the application is deemed complete by the Department. Providing false or inaccurate information shall be grounds for denial or revocation of a permit or lease and shall be grounds for a civil or criminal penalty.

#### B. Required Attachments to the Application

The applicant shall attach the following to the application:

1. A map showing the location and boundaries of the proposed project in relation to the adjoining property and to the nearest existing street or road intersection, and the specific location of all proposed activities.

2. A neat, scaled drawing of the proposed activities on 8-1/2" x 11" paper which shows: i) that the design conforms to generally accepted engineering principles, ii) accurate dimensions of the proposed activity (e.g., cubic yards of dredging or fill, square feet of dock, pier, jetty, or preemptive area, linear feet of bulkheading, utilities, etc.), iii) all existing structures, iv) exact location of property corners and property lines, wetlands and aquatic habitats. If the design does not conform to generally accepted engineering principles, the Secretary may require that the design be prepared, signed, and sealed by a professional engineer registered in the State of Delaware.

3. A certified copy of the deed and survey plot plan (to indicate property lines and corners) to the land, and written permission from the owner if other than the applicant for the project. The Department may request such additional information as will enable it to determine ownership of or authority to use the property.

4. Evidence of zoning approval for the project. The Department may defer consideration of the application if it determines that substantive questions regarding the validity of the County's or municipality's actions are raised in an appeal of that action.

5. The application fee and any deposit required.

6. Performance bond as required.

7. Additional information as required by the Department.

#### C. Current Application

The applicant shall maintain the application in a current state and notify the Department immediately of any changes in the information provided.

2.02 Additional Information.02 Additional Information

The Department may request such additional information as will enable it to consider the application properly. The Department may require the applicant to provide an environmental assessment if it determines that the proposed activity may have a substantial adverse effect on the environment. Any requested additional information not provided to the Department within a reasonable time may be grounds to declare the permit incomplete or deny the permit.

The Department may request of any State agency a report or recommendation concerning any application before it which affects that agency or for which that agency has particular information or expertise. The Department may consider the report in ruling on the application.

2.03 Burden on Applicant.03 Burden on Applicant

The burden shall be on the applicant to satisfy the Department that the requirements of these Regulations have been met; and if the granting of the permits, lease or approval will result in loss to the public of a substantial resource, that the loss has been offset or mitigated.

SECTION 3. CRITERIA OF PERMITS, LEASES, AND LETTERS OF AUTHORIZATION  
3. CRITERIA OF PERMITS, LEASES, AND LETTERS OF AUTHORIZATION

3.01 Evaluation Considerations.01 Evaluation Considerations

Each application shall be reviewed based on the consideration of the performance specifications, standards and other criteria listed in this section for the type of activity proposed.

An application may be denied if the activity could cause harm to the environment, either singly or in combination with other activities or existing conditions, which cannot be mitigated sufficiently.

For shoreline erosion control structures or measures and for water-dependent activities, each activity shall be reviewed on basis of need for the type of structure proposed.

For repair and replacement projects of serviceable structures, serviceability must be proven to the satisfaction of the Department. A serviceable structure includes existing structures which are intact and functioning for the original intended design purpose. For structures which are no longer intact due to a specific and catastrophic water event or activity, camera-dated photographs or aerial photography must clearly indicate the serviceability of said structure (as defined by the criteria above) within six (6) months prior to the date of application.

With regard to an evaluation of the overall public benefits from the proposed activity or structure, the following criteria may be used to determine whether or not to issue a permit, easement, lease, fee simple interest, or other instrument, with or without mitigating measures and conditions.

A. Public Use Impact

The Department shall consider the public interest in any proposed activity which might affect the use of subaqueous lands. These considerations include, but are not limited to, the following:

1. The value to the State or the public in retaining any interest in subaqueous lands which the applicant seeks to acquire, including the potential economic value of the interest.
2. The value to the State or the public in conveying any interest in subaqueous lands which the applicant seeks to acquire.
3. The potential effect on the public with respect to commerce, navigation, recreation, aesthetic enjoyment, natural resources, and other uses of the subaqueous lands.
4. The extent to which any disruption of the public use of such lands is temporary or permanent.
5. The extent to which the applicant's primary objectives and purposes can be realized without the use of such lands (avoidance).
6. The extent to which the applicant's primary purpose and objectives can be realized by alternatives, i.e. minimize the scope or extent of an activity or project and its adverse impact.
7. Given the inability for avoidance or alternatives, the extent to which the applicant can employ

mitigation measures to offset any losses incurred by the public.

8. The extent to which the public at large would benefit from the activity or project and the extent to which it would suffer detriment.

9. The extent to which the primary purpose of a project is water-dependent.

B. Environmental Considerations

1. The Department shall consider the impact on the environment, including but not limited to, the following:

a. Any impairment of water quality, either temporary or permanent, which may reasonably be expected to cause violation of the State Surface Water Quality Standards. This impairment may include violation of criteria or degradation of existing uses.

b. Any effect on shellfishing, finfishing, or other recreational activities, and existing or designated water uses.

c. Any harm to aquatic or tidal vegetation, benthic organisms or other flora and fauna and their habitats.

d. Any loss of natural aquatic habitat.

e. Any impairment of air quality, either temporarily or permanently, including noise, odors, and hazardous chemicals.

f. The extent to which the proposed project may adversely impact natural surface and groundwater hydrology and sediment transport functions.

2. For major commercial activities, or for other activities which may have a substantial environmental impact, the Department may require an environmental impact assessment. In all cases, a general assessment of potential impacts listed in Section 3.01.B(1) must be provided by the applicant.

3. The Department shall consider whether the activity under review could have the potential to cause any adverse environmental impacts, taken in conjunction with the existing situation and with other activities under construction or review. To assess the cumulative and secondary impacts, the Department may require the applicant to provide the following information:

a. Determination of cumulative effects on the aquatic ecosystem, natural surface and groundwater hydrology.

b. Determination of secondary effects on the aquatic ecosystem, natural surface and groundwater hydrology.

4. The Department shall consider whether any significant impacts or potential harm could be offset or mitigated by appropriate actions or changes to the proposed activity by the applicant. If so, the required mitigating measures may be included as conditions of the permit or lease.

### C. Other Considerations

The Department shall also consider the following to determine whether to approve the application:

1. The degree to which the project represents an encroachment on or otherwise interferes with public lands, waterways or surrounding private interests.
2. The degree to which the project incorporates sound engineering principles and appropriate materials of construction.
3. The degree to which the proposed project fits in with the surrounding structures, facilities, and uses of the subaqueous lands and uplands.
4. Whether the proposed activity complies with the State of Delaware's Surface Water Quality Standards both during construction and during subsequent operation or maintenance.
5. The degree to which the proposed project may adversely affect shellfish beds or finfish activity in the area.

#### 3.02 Requirements for all Structures.02 Requirements for all Structures

A. Structures shall be constructed in a manner that allows for continued growth and nourishment of aquatic and wetland vegetation under or near the structure wherever possible, and allows for adequate water circulation and water quality to support plants and animals.

B. Structures shall be constructed, installed, and used in a manner that minimizes pollution or the causing of harm to aquatic and tidal plants, fish and wildlife.

C. Structures shall utilize the best available materials and technologies and shall be constructed in a manner that will prevent or minimize leaching or runoff of harmful chemicals or other substances which may cause water pollution or harm to aquatic plants and wildlife.

D. Structures shall not interfere with navigation, public, or other rights.

#### 3.03 Boating Docking Facilities.03 Boating Docking Facilities

A. All new and existing marinas must comply with the requirements of the Department Marina Regulations.

B. General Siting Considerations: Siting of boat docking facilities shall be evaluated on site-specific conditions including, but not limited to, location of navigational channel, proximity of existing structures, aquatic habitats, and width and orientation of waterbody. The following criteria will be weighed and balanced when evaluating the siting of boat docking facilities.

1. Structures should be sheltered or protected from storm-driven currents, waves, and ice in an area with low or moderate normal currents and littoral drift.

2. Structures should be constructed to avoid dredging or filling, with minimal impact on aquatic vegetation and wetlands, and without dead-end or poorly flushed lagoons.

3. Structures should be located away from critical habitats, historic, or archaeological areas.
4. Structures should be located away from hazardous facilities or designated recreational swimming areas.
5. Where adequate depths exist for water-dependent structures, no dock, mooring, piling, or other structure or mooring area shall extend channelward more than 10 percent of the width of the waterbody at that location (from mean low water). In no case shall a structure extend more than 20 percent of the width of the waterbody, nor shall it extend seaward more than 250 feet, except under exceptional circumstances necessary to provide access for needed commerce.
6. Docks, mooring, pilings, or other structures should be located a minimum of ten (10) feet from a navigation channel.
7. Docks and piers should extend out from the shoreline far enough so as to eliminate need for dredging and filling, and provide sufficient height to allow light to penetrate to vegetation underneath and alongside.
8. Slips, lagoons, basins, and access channels should be no deeper than the parent waterbody (i.e. no sill), and the depth should slope upward toward the landward extent from the parent waterbody. Exception may be allowed only by individual review of the potential environmental impacts and approval granted by the Secretary of the Department.
9. Berms and grasslands should be made a part of the boat docking facility design wherever feasible and possible, particularly for buffer zones between the facility and any wetlands. As much of the land surface as possible should be vegetated or covered with porous materials to decrease stormwater runoff.
10. All convenience structures shall be set back a minimum of ten (10) feet from adjacent property lines. Exceptions may be allowed only if a written letter of no objection is obtained from the adjacent property owner, and the Department is satisfied that no navigation hazard or other adverse environmental impact may result.
11. New docking facilities should not extend beyond existing structures in the immediate vicinity unless absolutely necessary to obtain navigable water depths for a water-dependent activity.
12. Docking facilities should extend out from the shoreline no further than to a depth necessary for docking a boat capable of navigating the waterway.
13. Dredging to obtain navigable water depths in conjunction with private residential boat docking facilities should be avoided.

C. Structures shall not be constructed using creosote treated lumber.

D. For subdivided, recorded parcels of real property, applications for construction of a boat docking and/or launching facility must satisfy the minimum area requirements of a lot for residential construction, to include applicable setback and utility construction requirements (based on county, state and municipal standards), prior to consideration for approval for a subaqueous lands lease/permit. Community or common area parcels within an approved subdivision must satisfy the requirements defined by the Marina Regulations for a marina, based on the maximum number of potential users within the subdivision.

E. Properties which were legally subdivided and recorded prior to the adoption of Subaqueous Lands law

(July 14, 1969) are exempted from the minimum size requirements for a docking facility as specified by Subsection 3.03D of these Regulations. All structures exempted by this condition must satisfy all other siting, design, and review criteria of these Regulations.

F. Minimum frontage adjacent to subaqueous lands for a docking facility for any parcel will be forty (40) feet. Any proposed structure must satisfy all setback requirements as defined by state, federal or county regulation or guidelines.

G. Applications for the construction of a boat docking/launching facility within a recorded easement/right-of-way, linking non-waterfront properties to the shoreline, must be submitted with a written letter of no objection by the owner of the property containing said conveyance. Location and siting of the structure must satisfy all setback and frontage requirements, as defined by the Department. Applications will not be accepted for private/community structures within approved public easements or right-of-ways.

### 3.04 Installation and Use of Shoreline Erosion Control Measures.

#### A. Requirements

1. Structural shoreline erosion control measures shall not be permitted in those areas where minimal demonstrable erosion is evident, as determined by the Department.

2. Efforts shall be made to utilize shoreline erosion control methods that best provide for the conservation of aquatic nearshore habitat, maintain water quality, and avoid other adverse environmental effects. These include, but are not limited to, vegetation, revetments, and gabions. Structural erosion control measures may be allowed where it can be shown, through a review of site conditions and generally accepted engineering standards, that nonstructural measures would be ineffective in controlling erosion. When engineering feasibility and effectiveness considerations are equal, the shoreline erosion control method utilized shall be the one with the least adverse environmental impact.

3. Nonstructural measures are preferred for shoreline stabilization work in:

a. Low wave energy areas where no significant shoreline erosion occurs or wetlands occur. In this case, the allowable activity or measure should be limited to, the introduction or management of suitable vegetation.

b. Eroding areas where combinations of structural/nonstructural measures would be a practicable and effective method of erosion control. In this case, the allowable activities include:

(1) The properly designed and constructed regrading and contouring of the shoreline followed by planting and management of suitable vegetative stabilizing cover.

(2) A combination of low profile stone groins and suitable vegetative stabilizing cover.

(3) Properly designed and constructed low-profile rip-rap revetments, marsh-toe sills, or other non-vertical structures which may be used in conjunction with vegetative stabilizing cover.

4. Vertical-walled structures shall be allowed only where a non-vertical structure, designed to equal

standards, would be ineffective to control erosion, where deleterious environmental effects associated with the construction of vertical structures would be less than the impacts on the adjacent environment during construction of a non-vertical structure, where functionally, no practical alternatives exist for certain water-dependent facilities or activities, or where generally accepted engineering practices would preclude the use of non-vertical walled structures.

5. All structural shoreline erosion control measures shall be designed to conform to generally accepted engineering principles. If the designed measure does not conform to accepted engineering principles, the Department may require a design to be prepared, signed, and sealed by a professional engineer registered in Delaware.

6. Structural erosion control measures shall address and satisfy the following elements:

- a. Protection of aquatic biota, wetlands, and nearshore shallow water habitat.
- b. Protection of water quality, flushing, and naturally occurring littoral drift and flow.
- c. For vertical walls, protection against "toe scour" by adequately designed toe depth and, in high energy environments, rip-rap at the toe of the structure for existing tidal and wave conditions.
- d. Adequate flow and circulation necessary to support the functional value of adjacent wetlands or aquatic habitat.
- e. Materials and methods of construction shall be sufficient to withstand the stresses to which they will be subjected, from wind, waves, tides, currents, ice, and debris.
- f. Avoidance or minimization of increased erosion of adjacent or downdrift shorelines.

#### B. Additional Requirements

1. Erosion control measures shall be installed and used only for the purposes of shoreline stabilization; any structure which serves or could serve to increase the property of an applicant shall be regulated by the provisions of Section 3.05 below.

2. Bulkheads must be aligned, where possible, with any adjacent bulkheads and shall be designed to prevent the possibility of trapping floating debris or impairing water circulation.

3. Each shoreline erosion control structure shall be designed to the extent possible to minimize adverse environmental impacts. If the Department determines that the granting of a permit for a shoreline erosion control structure will result in loss to the public of a substantial resource, the permittee may be required to take measures which will offset or mitigate the loss.

4. No permanent structure (building, house, patio, porch, deck, or other such structure) shall be constructed on a bulkhead or any portion of the anchoring system or any adjacent area that would interfere with future repair and/or replacement of the bulkhead.

3.05 Activities Involving Dredging, Filling, Excavating or Extracting Materials.05 Activities Involving Dredging, Filling, Excavating or Extracting Materials

A. Objectives

Projects shall be designed to meet the following objectives:

1. Conform to the pertinent objectives, classification system, environmental considerations, and criteria of the "Inland Bays Dredging Study, Volumes I and II," dated April 1986, as adopted by the Department on July 18, 1986.
2. Maintain the navigability of channels.
3. Maintain or improve the environmental quality of the State's water resources, subaqueous lands and wetlands.

B. General Evaluation Consideration

The Department shall consider the following additional factors in reviewing a dredging, filling, excavating, or extracting application:

1. Any environmental impacts at and surrounding the dredging site(s).
2. Any environmental effects of the disposal of the dredged materials at and surrounding the disposal or fill site(s), before or after mitigation, during and following the disposal of fill activities and particularly impacts on water quality as described below in Paragraph C.
3. Any economic and noneconomic benefits of the project compared to the costs of the project, both direct and secondary.
4. Consistency of the project with regional growth and local land use plans.

C. Water Quality on Dredging Projects

The applicant may be required to submit information to the Department to facilitate its evaluation of water quality impacts, as may be required to ensure compliance with State Surface Water Quality Standards.

The following concerns for protecting water quality shall be specifically considered by the Department in evaluating applications for dredging projects:

1. All dredging is to be conducted in a manner consistent with sound conservation and water pollution control practices. Spoil and fill areas are to be properly diked to contain the dredged material and prevent its entrance into any surface water. Specific requirements for spoils retention may be specified by the Department in the approval, permit or license.
2. All material excavated shall be transported, deposited, confined, and graded to drain within the disposal areas approved by the Department. Any material that is deposited elsewhere than in approved areas shall be removed by the applicant and deposited where directed at the applicant's expense, and any required mitigation shall also be at the applicant's expense.

3. Materials excavated by hydraulic dredge shall be transported by pipeline directly to the approved disposal area. All pipelines shall be kept in good condition at all times and any leaks or breaks shall be immediately repaired.

4. Materials excavated and not deposited directly into an approved disposal area shall be placed in scows or other vessels and transported to either an approved enclosed basin, dumped, and then rehandled by hydraulic dredge to an approved disposal area, or to a mooring where scows or other vessels shall be unloaded by pumping directly to an approved disposal area.

5. When scows or other vessels are unloading without dumping, they shall have their contents pumped directly into an approved disposal area by a means sufficient to preclude any loss of material into the body of water.

6. In approved disposal areas, the applicant may construct any temporary structures or use any means necessary to control the dredge effluent, except borrowing from the outer slopes of existing embankments and/or hydraulic placing of perimeter embankments. For bermed disposal sites, a minimum freeboard of two (2) feet, measured vertically from the retained materials and water to the top of the adjacent confining embankment, shall be maintained at all times.

7. The applicant shall not obstruct drainage or tidal flushing on existent wetlands or upland areas adjacent thereto. The applicant shall leave free, clear, and unobstructed outfalls of sewers, drainage ditches, and other similar structures affected by the disposal operations. The dredged materials shall be distributed within the disposal area in a reasonably uniform manner to permit full drainage without ponding during and after fill operations.

8. The dredging operation must be suspended if water quality conditions deteriorate in the vicinity of dredging or the spoil disposal site. Minimum water quality standards may be included as an element of the permit and shall be monitored by the applicant. Violation of these conditions shall be cause for immediate suspension of activity and notification of the Department. Dredging shall not be resumed until water quality conditions have improved and the Department has authorized the resumption.

#### D. Prohibited Dredging Project

The following types of dredging projects are prohibited.

1. Dredging of biologically productive areas, such as nursery areas, shellfish beds, and submerged aquatic vegetation, if such dredging will have a significant or lasting impact on the biological productivity of the area.

2. Dredging of new dead-end lagoons, new basins and new channels, which have a length to width ratio greater than 3:1 and for which the applicant cannot prove, by clear and convincing evidence, that such dredging would not violate State Surface Water Quality Standards. This subsection shall not apply to marina projects governed by the Marina Regulations.

3. Dredging channels, lagoons, or canals deeper than the existing controlling depth of the connecting or controlling waterway, unless otherwise approved under Subsection 3.03B(8) of these Regulations.

4. Dredging channels, cleaning marinas, or other subaqueous areas by using propeller wash from boats.

E. Removal of Public Subaqueous Lands

No person shall remove any material from public subaqueous lands without Department approval and receipt by the Department of full payment of the fee for the amount of material estimated to be removed. The Department reserves the right to determine the amount of material to be removed in dredging and/or filling projects.

3.06 Creation of Lands.06 Creation of Lands

A. Creation

No person shall fill, reclaim, or alter public subaqueous lands without the Department approval and receipt by the Department of full payment of a lease fee for the estimated area of land created or affected. The land created shall remain State property and may be leased to the applicant under terms and conditions to be set by the Department, unless otherwise conveyed as noted below in paragraph B. Lease fees may be waived for shoreline erosion control projects which have demonstrated water quality or habitat benefits associated with their use.

B. Sale of Created Lands

The Secretary may convey a fee simple title or any other interest in public lands created by filling, reclamation, or alteration of public subaqueous lands, in whole or in part, in lieu of leasing said lands pursuant to the provisions of Paragraph A above, as a precondition of granting a permit for such project. The sale price shall be determined by the Department on the basis of the fair market value after filling, reclamation, or alteration.

C. Secretary Approval of the Sale or Lease of Created Lands

The Secretary reserves the right to deny any application for the lease or sale of created lands pursuant to Paragraphs A and B above if he deems such lease or sale not to be in the public interest.

3.07 Installation and Use of Pipeline and Other Conduits.07 Installation and Use of Pipeline and Other Conduits

A. Types of Projects: No person shall install or use a pipeline or other conduit, on or in subaqueous lands, without a lease or permit from the Department. Approval of the Department is required for pipeline including, but not limited to:

1. Telephone lines.
2. Lines for the transmission of electricity.
3. Pipelines for the transport of any liquid or gas.
4. Any other type of conduits or utility.

B. Construction and Materials

The construction methods and materials for pipelines and other conduits shall, at a minimum, be in accordance with the applicable state and federal regulations governing the installation and operation of pipelines, and shall conform to generally accepted engineering practices for said activities.

## SECTION 4. FEES. FEES

### 4.01 Application Fees.01 Application Fees

Every application, except those from a state or federal government agency or political subdivision of the State of Delaware, shall be accompanied by the nonrefundable application fee established by the General Assembly. This fee shall cover the costs of handling and evaluating the application, and other expenses of administering the subaqueous lands program.

### 4.02 Lease Fees.02 Lease Fees

Lease fees shall be established by the General Assembly for all commercial and non-commercial projects over public subaqueous lands.

The lease and fee requirements of these Regulations shall be applicable to all activities and structures, including previously leased lands, where no fee was required.

Lease fees shall apply to any lease that has expired until such time as the structure is removed pursuant to a denial or revocation, or until such time as a new lease has been issued.

### 4.03 Hearing Fees.03 Hearing Fees

#### A. Costs

The costs of public hearings, as described below, shall be charged to the applicant. These costs may include the costs of publication of the notice of the hearing, charge for the hearing room, if any, costs for recording, transcription, and copying the proceedings, and other costs directly related to the hearing. No charge will be made for the salaries and expenses of the public officials involved in the hearing.

#### B. Deposit

The Secretary may require a deposit in addition to the application fee at the time of application, or at any other time, to ensure payment of the applicable fees.