



STATE OF DELAWARE  
DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL  
89 KINGS HIGHWAY  
DOVER, DELAWARE 19901

Office of the  
Secretary

Phone: (302) 739-9000  
Fax: (302) 739-6242

**Secretary's Order No.: 2018-P-0030**

**RE:            Approving Final New Regulations: 7 DE Admin. Code 109:  
                 *Regulations Governing the Guidelines to Evaluate Land Being  
                 Considered for Permanent Protection***

**Date of Issuance: May 15, 2018**

**Effective Date of the Amendment: June 11, 2018**

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, 7 *Del.C.* §7507A(b), 29 *Del.C.* §8003(7), and any other relevant statutory 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.

**Background, Procedural History and Findings of Fact**

This Order relates to proposed new Regulations, to wit: 7 DE Admin. Code 109: *Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection* (hereinafter referred to as "Open Space Regulations"). Title 7, Chapter 75 of the Delaware Code, known as the *Delaware Land Protection Act* ("LPA"), gives State agencies the ability to permanently protect land through the acquisition of a property in fee simple interest or through the acquisition of a conservation easement on a property. The Open Space Program,

established by the LPA, was created to fund these acquisitions. The associated Open Space Council, which consists of seven members appointed by the Governor, was created to advise the Cabinet Secretary of DNREC on all matters relating to the administration, implementation, and financing of the Open Space Program, pursuant to 7 *Del.C.* §7505.

The entities of the State that are eligible to purchase land through the Open Space Program are as follows: (1) the DNREC Division of Parks and Recreation; (2) the DNREC Division of Fish and Wildlife; (3) the Department of Agriculture; (4) the Delaware Forest Service; and (5) the Department of State Division of Historic and Cultural Affairs. All land transactions are voluntary, and are done to permanently protect land in the State of Delaware. To be eligible for permanent protection, an area of land must include or exhibit, in whole or in part, one or more of the criteria described in 7 *Del.C.* §7507A. Support staff of the Open Space Program evaluates a property based on a set of guidelines before presenting the same to the Open Space Council for consideration. These guidelines take into consideration the ecological value of a property, land use of the property and the surrounding properties, cultural and historic resources, water features, recreation, and descriptive evaluation.

The guidelines that staff uses for evaluation purposes were approved by the Open Space Council, as required by the LPA; however, the public expressed interest in having input as to how properties were evaluated as well. During the process of amending the LPA in 2016, legislators decided the best way to incorporate public comment was through notice and public hearing, pursuant to the Administrative Procedures Act (“APA”), pursuant to 29 *Del.C.* Chapter 101, Subchapter II.

In consultation with the Department of Justice, the Department crafted the proposed Open Space Regulations, which were developed to comply with the aforementioned APA requirement. As stated therein, the purpose of the proposed Regulations is to detail the *Guidelines to Evaluate Land Being Considered for Permanent Protection* that the State agencies, as defined in 7 Del.C. §7504(10), utilize to evaluate land(s) that have been offered for permanent protection, to ensure that such land(s) should be permanently protected, and that such permanent protection furthers the purposes of the Land Protection Act, pursuant to 7 Del.C. Ch. 75.

The Department has the statutory basis and legal authority to promulgate the proposed new Regulations, pursuant to 7 Del. C. §7507A(b) and 29 Del.C. §8003(7). The Department's Division of Parks and Recreation, Planning, Preservation and Development Section, commenced the regulatory development process with Start Action Notice #2017-01 (signed by then-DNREC Secretary David Small on February 7, 2017). The Department published its initial proposed Open Space Regulations in the March 1, 2017 *Delaware Register of Regulations*. It should be noted that the Department's initial proposed new Regulations incorporated the now formally named "*Guidelines to Evaluate Land Being Considered for Permanent Protection*" in Section 4.1. The aforementioned proposed new Regulations were then presented and thoroughly vetted by the Department at the public hearing on March 23, 2017. Members of the public attended the public hearing, and comment was received by the Department regarding this proposed regulatory promulgation.

Subsequent to the public hearing of March 23, 2017, responsible Department staff reviewed the comments that were received prior to the hearing record closing for comment on April 8, 2017. As a result of that review, the Department determined that several revisions should be made to the proposed Regulations, in order to provide additional clarity and a greater

understanding to the public with regard to how the Open Space Program evaluates land(s) that have been offered for permanent protection. Since these revisions were substantive in nature, and were made subsequent to the public hearing of March 23, 2017, the revised proposed Open Space Regulations were re-noticed and re-published in the *Delaware Register of Regulations* on August 1, 2017. Accordingly, the hearing record was re-opened for an additional thirty (30) days at that time in order to receive comment from the public.

The hearing record remained open for public comment through close of business on August 31, 2017. No additional comment was received by the Department concerning this proposed promulgation. It should be noted that all notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

Hearing Officer Vest prepared a Hearing Officer's Report dated April 25, 2018 ("Report"). The Report documents the proper completion of the required regulatory development process, establishes the record, and recommends the adoption of the revised proposed new Open Space Regulations as attached to the Report as Appendix "A."

### **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 revised proposed new Regulation, to wit: 7 DE Admin. Code 109: *Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection*, are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the revised proposed new Open Space Regulations be promulgated as final. I further find that the Department's experts in the Division of Parks and

Recreation in the Planning, Preservation and Development Section fully developed the record to support adoption of this revised proposed new 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 revised proposed new Regulations, to wit: 7 DE Admin. Code 109: *Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection*, pursuant to 7 Del. C. §7507A(b) and 29 Del.C. §8003(7);

2. The Department has jurisdiction under its statutory authority, pursuant to 7 Del. C. §7507A(b) and 29 Del.C. §8003(7), to issue an Order adopting these revised proposed new Regulations as final;

3. The Department provided adequate public notice of the initial proposed new Regulations and all proceedings in a manner required by the law and regulations, and provided the public with an adequate opportunity to comment on the same, including at the time of the public hearing held on March 23, 2017, and during the 15 days subsequent to the hearing (through April 8, 2017). Moreover, the Department provided the public an additional period of time in which to offer comment in this matter when the revised proposed Regulations were re-noticed and re-published in the *Register of Regulations* August 1 – 31, 2017, consistent with 29 Del.C. §10118(a), before making any final decision;

4. Promulgation of the revised proposed new Regulations will enable the Department to detail the *Guidelines to Evaluate Land Being Considered for Permanent Protection* that the State agencies, as defined in 7 Del.C. §7504(10), utilize to evaluate land(s) that have been offered for permanent protection, to ensure that such land(s) should be

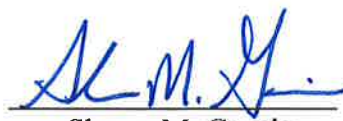
permanently protected, and that such permanent protection furthers the purposes of the Land Protection Act, pursuant to 7 *Del.C.* Ch. 75;

5. The Department has reviewed the revised proposed new Regulations in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104, and has selected Exemption “A” regarding same, as this proposed promulgation is not subject to Chapter 104, Title 29 of the Delaware Code, because it will not apply to small businesses or individuals at all;

6. The Department’s Hearing Officer’s Report, including its established record and the recommended revised proposed new Regulations as set forth in Appendix “A,” are hereby adopted to provide additional reasons and findings for this Order;

7. The Department’s initial proposed new Regulations, as initially published in the March 1, 2017 *Delaware Register of Regulations*, and then subsequently revised, re-noticed and re-published, and as set forth in Appendix “A” hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final revised new Regulations, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and

8. The Department shall submit this Order approving as final the revised proposed new Regulations as final new Regulations, to wit: 7 DE Admin. Code 109: *Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection*, 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.

  
Shawn M. Garvin  
Secretary

## MEMORANDUM

**TO:** The Honorable Shawn M. Garvin  
Cabinet Secretary, Dept. 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 New Regulation: 7 DE Admin. Code 109:**  
***Regulations Governing the Guidelines to Evaluate Land Being***  
***Considered for Permanent Protection***

**DATE:** April 25, 2018

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### **I. Background:**

A public hearing was held on Thursday, March 23, 2017, at 6:00 p.m. at the Department of Natural Resources and Environmental Control ("DNREC", "Department"), 89 Kings Highway, Dover, Delaware to receive comment on proposed new Regulations, to wit: 7 DE Admin. Code 109: *Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection* (hereinafter referred to as "Open Space Regulations"). Title 7, Chapter 75 of the Delaware Code, known as the *Delaware Land Protection Act* ("LPA"), gives State agencies the ability to permanently protect land through the acquisition of a property in fee simple interest or through the acquisition of a conservation easement on a property. The Open Space Program, established by the LPA, was created to fund these acquisitions. The associated Open Space Council, which consists of seven members appointed by the Governor, was created to advise the Cabinet Secretary of DNREC on all matters relating to the administration, implementation, and financing of the Open Space Program, pursuant to 7 Del.C. §7505.

The entities of the State that are eligible to purchase land through the Open Space Program are as follows: (1) the DNREC Division of Parks and Recreation; (2) the DNREC Division of Fish and Wildlife; (3) the Department of Agriculture; (4) the Delaware Forest Service; and (5) the Department of State Division of Historic and Cultural Affairs. All land transactions are voluntary, and are done to permanently protect land in the State of Delaware. To be eligible for permanent protection, an area of land must include or exhibit, in whole or in part, one or more of the criteria described in 7 *Del.C.* §7507A. Support staff of the Open Space Program evaluates a property based on a set of guidelines before presenting the same to the Open Space Council for consideration. These guidelines take into consideration the ecological value of a property, land use of the property and the surrounding properties, cultural and historic resources, water features, recreation, and descriptive evaluation.

The guidelines that staff uses for evaluation purposes were approved by the Open Space Council, as required by the LPA; however, the public expressed interest in having input as to how properties were evaluated as well. During the process of amending the LPA in 2016, legislators decided the best way to incorporate public comment was through notice and public hearing, pursuant to the Administrative Procedures Act (“APA”), pursuant to 29 *Del.C.* Chapter 101, Subchapter II.

In consultation with the Department of Justice, the Department crafted the proposed Open Space Regulations, which were developed to comply with the aforementioned APA requirement. As stated therein, the purpose of the proposed Regulations is to detail the *Guidelines to Evaluate Land Being Considered for Permanent Protection* that the State agencies, as defined in 7 *Del.C.* §7504(10), utilize to evaluate



land(s) that have been offered for permanent protection, to ensure that such land(s) should be permanently protected, and that such permanent protection furthers the purposes of the Land Protection Act, pursuant to 7 *Del.C.* Ch. 75.

The Department has the statutory basis and legal authority to promulgate the proposed new Regulations, pursuant to 7 *Del. C.* §7507A(b) and 29 *Del.C.* §8003(7). The Department's Division of Parks and Recreation, Planning, Preservation and Development Section, commenced the regulatory development process with Start Action Notice #2017-01 (signed by then-DNREC Secretary David Small on February 7, 2017). The Department published its initial proposed Open Space Regulations in the March 1, 2017 *Delaware Register of Regulations*. It should be noted that the Department's initial proposed new Regulations incorporated the now formally named "*Guidelines to Evaluate Land Being Considered for Permanent Protection*" in Section 4.1. The aforementioned proposed new Regulations were then presented and thoroughly vetted by the Department at the public hearing on March 23, 2017. Members of the public attended the public hearing, and comment was received by the Department regarding this proposed regulatory promulgation.

Subsequent to the public hearing of March 23, 2017, responsible Department staff reviewed the comments that were received prior to the hearing record closing for comment on April 8, 2017. As a result of that review, the Department determined that several *revisions* should be made to the proposed Regulations, in order to provide additional clarity and a greater understanding to the public with regard to how the Open Space Program evaluates land(s) that have been offered for permanent protection. Since these revisions were substantive in nature, and were made subsequent to the public

hearing of March 23, 2017, the *revised* proposed Open Space Regulations were re-noticed and re-published in the *Delaware Register of Regulations* on August 1, 2017. Accordingly, the hearing record was re-opened for an additional thirty (30) days at that time in order to receive comment from the public.

The hearing record remained open for public comment through close of business on August 31, 2017. No additional comment was received by the Department concerning this proposed promulgation. It should be noted that all 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 documents: (1) a verbatim transcript; (2) ten documents introduced by responsible Department staff at the public hearing held on March 23, 2017, and marked by this Hearing Officer accordingly as Department Exhibits 1-10; and (3) Technical Response Memorandum (TRM) provided to this Hearing Officer by Elena Stewart, Land Preservation Specialist with the Department's Division of Parks and Recreation, dated September 5, 2017. The Department's person primarily responsible for the drafting and overall promulgation of these proposed Regulations, Elena Stewart, developed the record with the relevant documents in the Department's files.

As stated previously, members of the public attended the aforementioned March 23, 2017 hearing. Pursuant to Delaware law, the record remained open for fifteen (15) additional days subsequent to the date of the public hearing for receipt of public comment. The hearing record formally closed with regard to public comment at close of

business on April 8, 2017. Subsequent revisions made to the Department's initial proposed Regulations (as a result of the comment received) were substantive in nature, thereby necessitating a re-noticing and re-publication in the *Register of Regulations* on August 1, 2017. Accordingly, the hearing record was re-opened for an additional thirty (30) days for the inclusion of any additional public comment that may be received by the Department, however, none was received.

At the request of this Hearing Officer, a Technical Response Memorandum ("TRM") was prepared by Department staff to serve as a comprehensive summary of the comment received in this matter. The Department's TRM not only provides a thorough discussion of the comment received in this matter, but also provides the Department's responses and recommendations concerning the same. Accordingly, the Department's *revised* proposed Open Space Regulations, along with the aforementioned TRM, are hereby expressly incorporated into the hearing record generated in this matter, and are attached hereto for the Secretary's review as Appendices "A" and "B", respectively.

It should be noted that no further re-noticing or re-publication of the Department's *revised* proposed Regulations is necessary in this matter, due to the fact that (1) all substantive changes were made prior to publication in the August 1, 2017 edition of the *Register of Regulations*; and (2) no further changes were made subsequent to that time.

### **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 its *revised* proposed new Regulation, to wit: 7 DE Admin. Code 109: *Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection*, as noted above.

Accordingly, I recommend promulgation of these *revised* new Regulations 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 *revised* proposed new Regulations, to wit: 7 DE Admin. Code 109: *Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection*, pursuant to 7 Del. C. §7507A(b) and 29 Del.C. §8003(7);
2. The Department has jurisdiction under its statutory authority, pursuant to 7 Del. C. §7507A(b) and 29 Del.C. §8003(7), to issue an Order adopting these *revised* proposed new Regulations as final;
3. The Department provided adequate public notice of the initial proposed new Regulations and all proceedings in a manner required by the law and regulations, and provided the public with an adequate opportunity to comment on the same, including at the time of the public hearing held on March 23, 2017, and during the 15 days subsequent to the hearing (through April 8, 2017). Moreover, the Department provided the public an additional period of time in which to offer comment in this matter when the *revised* proposed Regulations were re-noticed and re-published in the *Register of Regulations* August 1 – 31, 2017, consistent with 29 Del.C. §10118(a), before making any final decision;
4. Promulgation of the *revised* proposed new Regulations will enable the Department to detail the *Guidelines to Evaluate Land Being Considered for Permanent Protection* that the State agencies, as defined in 7 Del.C. §7504(10), utilize to evaluate land(s) that have been offered for permanent protection, to ensure that such land(s)

should be permanently protected, and that such permanent protection furthers the purposes of the Land Protection Act, pursuant to 7 *Del.C.* Ch. 75;

5. The Department has reviewed the *revised* proposed new Regulations in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104, and has selected Exemption “A” regarding same, as this proposed promulgation is not subject to Chapter 104, Title 29 of the Delaware Code, because it will not apply to small businesses or individuals at all;

6. The Department’s initial proposed new Regulations, as initially published in the March 1, 2017 *Delaware Register of Regulations*, and then subsequently *revised*, re-noticed and re-published, and as set forth in Appendix “A” hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final *revised* new Regulations, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and

7. The Department shall submit the *revised* proposed new Regulations as final new Regulations, to wit: 7 DE Admin. Code 109: *Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection*, 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.



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LISA A. VEST  
Public Hearing Officer

\\ahear\ OPEN SPACE New Regs.2018

Attachments/Appendix:

Appendix A: *Revised* proposed new Regulation  
Appendix B: TRM (9/5/17)

## **APPENDIX “A”**





regulation is available at:

**1301 Regulations Governing Solid Waste**

**OFFICE OF THE SECRETARY**

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

**REGISTER NOTICE**

**SAN#: 2017- 01**

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

**1. TITLE OF THE REGULATIONS:**

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

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

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

**3. POSSIBLE TERMS OF THE AGENCY ACTION:**

N/a

**4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:**

7 Del.C. Ch. 75

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

N/a

**6. NOTICE OF PUBLIC COMMENT:**

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

**7. PREPARED BY:**

Elena Stewart      [elena.stewart@state.de.us](mailto:elena.stewart@state.de.us)      302-739-9935

**\*Please Note: The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 Del.C. Ch. 104, is available at:**

**<http://regulations.delaware.gov/register/august2017/proposed/21 DE Reg 130RFA 08-01-17.pdf>**

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

**1.0 Purpose of the Regulations**

The purpose of the Regulations contained herein is to detail the Guidelines to Evaluate Land Being Considered for Permanent Protection that the State agencies, as defined in 7 Del.C. §7504(10), shall use to evaluate land(s) that have been offered for permanent protection to ensure that the land(s) should be permanently protected and that permanently protecting the land furthers the purposes of the Land Protection Act, 7 Del.C. Ch. 75.

## 2.0 Definitions

As used in these Regulations, the following terms shall have the meanings set forth here:

**"Act"** refers to the Land Protection Act (7 Del.C. Ch. 75).

**"Buffer"** refers to a vegetated area near a stream or other water feature which helps improve water quality by serving as protection from impacts of adjacent land use.

**"Cultural/ Historic Resources"** means those structures, improvements, sites or lands that are listed as significant in or eligible for listing in the National Register of Historic Places, either as individual listings or as contribution elements in listed or eligible historic districts (30 Del.C. §1803).

**"Early Successional Habitat or ESH"** refers to mixed stand of grasses and herbaceous flowering plants, old field habitat, pastureland, and shrubland.

**"ERES Waters"** refers to waterways or waterbodies having the designation requiring the highest level of protection for waters that are of "Exceptional Recreation or Ecological Significance" (ERES). These waterways are important habitats for a multitude of wildlife and are also popular recreation destinations.

**"Fisheries Access Area"** refers to an area where fish could be caught, such as a shoreline or pier or somewhere a boat could get access to the water for the purpose of fishing.

**"Fisheries Resource Protection Areas"** means critical nursery or spawning habitat for anadromous fish, bivalves, and shellfish.

**"Floodway"** means an area of land that impacts or is impacted by flooding.

**"Habitat of Conservation Concern (HCC)"** refers to habitats that are rare, have special significance in Delaware, are particularly sensitive to disturbance, and/or have a high diversity of rare plants.

**"Management Plan"** refers to a plan for the stewardship of land that would support the purposes of the Act.

**"Mean High Water (MHW)"** refers to the average of all the high water heights observed over a period of several years.

**"Nutrient Management Critical Priority Areas"** refers to areas established to help the Delaware Nutrient Management Commission decide where to focus their efforts with respect to their Nutrient Management Planning and Nutrient Relocation programs. The Delaware Nutrient Management Act (3 Del.C. Ch. 22) was enacted in June 1999 as part of an effort to address water quality concerns in Delaware.

**"One-Hundred-Year Floodplain"** refers to the area of inundation when the expected 100-year flood flow rate is mapped. A one-hundred-year flood is a flood event that has a 1% probability of occurring in any given year.

**"Open Space"** or **"open space land"** means any land the permanent protection of which will further any of the purposes listed in the Act.

**"Open Space Program"** means the conservation program created to carry out the purposes of the Act.

**"Permanent protection", "permanently protected", "permanently protect", or "preservation"** means the acquisition by purchase, gift, grant, bequest, devise, or otherwise of the fee or any lesser interest, development right, easement, covenant, or other contractual right in land in perpetuity necessary to achieve the purposes of the Act.

**"Proximity to Population Base"** refers to the Strategies for State Policies and Spending document, which is developed by the Office of State Planning Coordination and adopted by Executive Order. Levels 1-3 are the areas wherein State policies will support growth and economic development activities, with Levels 1 and 2 being the primary focus.

**"Regional Priorities"** means priorities that an organization has developed that could support the purposes of the Act.

**"Restoration"** means renewing degraded, damaged, or destroyed ecosystems and habitats in the environment by active intervention and action.

"S1 Species" refers to species classified as extremely rare with typically 5 or fewer occurrences statewide.

"S2 Species" refers to species classified as very rare with typically 6 to 20 occurrences statewide.

"S3 Species" refers to species classified as rare to uncommon with approximately 21 to 100 occurrences statewide.

"Sea Level Rise (SLR) Adaptation" means adaptations that allow for landward migration of a resource or loss of land due to sea level rise.

"Species of Greatest Conservation Need (SGCN)" refers to species identified according to a set of criteria provided in the Delaware Wildlife Action Plan. SGCN are species indicative of the overall diversity and health of the State's wildlife resources. Some may be rare or declining, may be vital components of certain habitats, and/or may have a significant portion of their population in Delaware.

"Stand-alone" means land that is not adjacent to properties that are already protected, or part of a greater management plan for an area that is already protected.

"State agency" means the Department of Natural Resources and Environmental Control (Division of Parks and Recreation or the Division of Fish and Wildlife), Department of State (Division of Historical and Cultural Affairs), or the Department of Agriculture (Delaware Forest Service) (7 Del.C. §7504(10)).

"State Registry of Natural Areas" means a list identifying all State-registered Natural Areas accompanied by a map on file at the Office of Nature Preserves.

"Statewide Comprehensive Outdoor Recreation Plan (SCORP)" refers to a planning and policy document that identifies needs in outdoor recreation throughout the State of Delaware.

"Utilities" means aboveground public utilities that serve more than one entity, such as electric transmission or distribution lines, fiber optic/cable lines, cell tower and/or solar panel array.

"Viewshed" means an area of particular scenic or historic value that is deemed worthy of preservation against development or other change.

"Watershed Impairment" refers to waters that do not meet the standards of Section 303(d) of the Clean Water Act (CWA). Section 305(b) of the CWA requires reporting of the conditions of the waters of the State. If monitoring reveals that a stream has high pollutant levels that prevent it from achieving all of its designated uses, it is considered impaired and will be placed on the 303(d) list. This information is organized by watershed, or the land area draining to a particular water body.

### **3.0 Open Space Criteria**

To be eligible for permanent protection, an area of land must include or exhibit, in whole or in part, one or more of the criteria set forth in 7 Del.C. §7507A(a).

### **4.0 Open Space Evaluation**

- 4.1 State agencies shall use the Guidelines to Evaluate Land Being Considered for Permanent Protection, last updated 12/7/16, to evaluate land(s) which a landowner has offered for permanent protection to ensure that permanently protecting the land furthers the purposes of the Act. The Guidelines can be found here:

**Guidelines to Evaluate Land Being Considered for Permanent Protection**

[http://regulations.delaware.gov/register/august2017/proposed/Guidelines to Evaluate Land.pdf](http://regulations.delaware.gov/register/august2017/proposed/Guidelines%20to%20Evaluate%20Land.pdf)

- 4.2 A representative of the Open Space Council or State agency may access the land being considered for permanent protection to perform onsite verification to gather information about the land only after the landowner executes the written permission form attached to the aforementioned guidelines granting the representative permission to enter upon the land.
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## **Guidelines to Evaluate Land Being Considered For Permanent Protection**

The State agencies<sup>1</sup> shall use these guidelines to evaluate lands which a landowner has offered for permanent protection to ensure that permanently protecting the land furthers the purposes of the Land Protection Act, 7 Del. C. Chapter 75.

<b>ECOLOGICAL VALUE</b>	<b>20 points</b>	<b>15 points</b>	<b>10 points</b>	<b>5 points</b>	<b>0 points</b>
<b>Plants</b>	Federally listed or candidate species, globally rare, or proposed state listed species documented on site or adjacent lands that may benefit from habitat protection	S1 species <sup>2</sup> documented on site or adjacent lands that may benefit from habitat protection	S2 species <sup>3</sup> documented on site or adjacent lands that may benefit from habitat protection	S3 species <sup>4</sup> documented on site or adjacent lands that may benefit from habitat protection	S1-S3 species not likely to benefit from habitat protection
<b>Animals</b>	Federally listed or candidate species, globally rare, state listed or proposed state listed species documented on site or adjacent lands that may benefit from habitat protection	S1 species documented on site or adjacent lands that may benefit from habitat protection	S2 species documented on site or adjacent lands that may benefit from habitat protection	At least 1 SGCN <sup>5</sup> likely to benefit from habitat protection	SGCN not likely to benefit from habitat protection
<b>Habitat of Conservation Concern (HCC)<sup>6</sup></b>	Protects an existing HCC documented on site	Protects a corridor connecting two HCCs	Protects land adjacent to an HCC (potential for expansion of HCC through restoration)	Potential for establishing an HCC (must be in close proximity to other HCCs)	No potential for establishing a HCC
<b>Fisheries Resource Protection Areas</b>	Protects critical nursery or spawning habitat for anadromous fish, bivalves, and shellfish	Adjacent to critical nursery or spawning habitat for anadromous fish, bivalves, and shellfish	Potential to protect and/or improve nursery or spawning habitat for anadromous fish, bivalves, and shellfish		

<sup>1</sup> 7 Del. C. § 7504 - The Department of Natural Resources and Environmental Control, Divisions of Parks and Recreation and Fish and Wildlife; the Delaware Department of Agriculture, Delaware Forest Service; and the Department of State, Division of Historic and Cultural Affairs

<sup>2</sup> S1 Species- Extremely rare with typically 5 or fewer occurrences statewide.

<sup>3</sup> S2 Species- Very rare with typically 6 to 20 occurrences statewide.

<sup>4</sup> S3 Species- Rare to uncommon with approximately 21 to 100 occurrences statewide.

<sup>5</sup> SGCN, or Species of Greatest Conservation Need, are identified according to a set of criteria provided in the *Delaware Wildlife Action Plan*. SGCN are species indicative of the overall diversity and health of the State's wildlife resources. Some may be rare or declining, may be vital components of certain habitats, and/or may have a significant portion of their population in Delaware.

<sup>6</sup> HCC, or Habitat of Conservation Concern, are habitats that are rare, have special significance in Delaware, are particularly sensitive to disturbance, and/or have a high diversity of rare plants. Because of these factors, they are known – or expected – to harbor SGCN, especially insects that are often dependent on specific host plants.

ECOLOGICAL VALUE	20 points	15 points	10 points	5 points	0 points
Forest/Non-Forested Wetland % Cover	76-100	51-75	26-50	10-25	<10
ESH <sup>7</sup> % Cover		76-100	51-75	26-50	
Total (115)					

LAND USE	20 points	15 points	10 points	0 points	-10 points
Proximity to Existing Preserved Lands	Inholding/ Adjacent to existing protected lands	Provides a corridor between existing protected lands	Potential connector or corridor between existing protected lands	Stand alone	
Development Pressure	Takes away the potential of developing >5 residences on site				Proposed/approved development on property being considered (not cost effective)
On-site Buildings			Property with no building	Property with 1 building	Property with >1 building
Size of Property	>200 acres	100 - 199 acres	25 - 99 acres	< 25 acres	
Use of Property	Primarily in a natural state (>50%)	Primarily agricultural lands (>50%)	Residential/commercial use (<25% land disturbance)	Residential/commercial use (>25% land disturbance)	Intense residential use, borrow pits, waste treatment facilities, spray irrigation, landfills etc.
Access		Access exists; no improvements necessary	Access exists but improvements necessary	Poor access	No access
Public Utilities <sup>8</sup>					Above ground utilities present
Sea Level Rise (SLR) Adaptation <sup>9</sup>	Provides for inland migration			Predicted to be under water based on current models	Currently under water at MHW <sup>10</sup>
Total (125)					

<sup>7</sup> ESH – Early Successional Habitat, including mixed stand of grasses and forbs, old field habitat, pastureland, and shrubland.

<sup>8</sup> Utilities – aboveground public utilities that serve more than one entity (e.g. electric transmission/distribution lines, fiber optic/cable lines, cell tower, solar panel array).

<sup>9</sup> DNREC Sea Level Rise Scenarios. Adaptations allow for landward migration of a resource or loss of land due to sea level rise.

<sup>10</sup> MHW = Mean High Water

CULTURAL/HISTORICAL RESOURCES	40 points	20 points	10 points
Cultural/Historical Resources <sup>11</sup>	Listed on National Register of Historic Places	Eligible for listing on National Register	Some cultural/historic interest
Threat to Cultural Resources	Immediate – approved subdivision	Potential – submitted subdivision	
Total (80)			

WATER FEATURES	25 points	15 points	5 points	0 points
Water Features Present	Unchannelized, buffered	Unchannelized, unbuffered	Channelized, buffered	Channelized, unbuffered
Waterway Frontage	>1000 linear feet	500-999 linear feet	250-499 linear feet	0-249 linear feet
Buffer Size	>200'	100-199'	50-100'	0-50'
Wetlands on Site	Freshwater	Other		
Water Quality Improvement Potential	Potential for wetland restoration	Potential to restore degraded streams	Potential for enhancement and/or buffering	
<a href="#">Nutrient Management Critical Priority Areas</a> <sup>12</sup>	Low	Medium		High
<a href="#">ERES Waters</a> <sup>13</sup>	Within ERES waters		Adjacent to ERES waters	Outside ERES waters
<a href="#">Watershed Impairment</a> <sup>14</sup>	0-50%	50-74%	75-99%	100%
Total (200)				

<sup>11</sup> Cultural/Historic resources means those structures, improvements, sites or lands that are listed as significant in or eligible for listing in the National Register of Historic Places, either as individual listings or as contribution elements in listed or eligible historic districts (30 Del. C. §1803).

<sup>12</sup> The Delaware Nutrient Management Act (3 Del. C. Ch.22) was enacted in June 1999 as part of an effort to address water quality concerns in Delaware. Nutrient management critical area priorities were established to help the Delaware Nutrient Management Commission decide where to focus their efforts with respect to their Nutrient Management Planning and Nutrient Relocation programs.

<sup>13</sup> The designation requiring the highest level of protection is for waters that are of "Exceptional Recreation or Ecological Significance" (ERES). These waterways are important habitats for a multitude of wildlife and are also popular recreation destinations.

<sup>14</sup> Section 305(b) of the Clean Water Act (CWA) requires reporting of the conditions of the waters of the State. Section 303(d) of the CWA requires listing of the impaired waters (waters that do not meet their standards). If monitoring reveals that a stream has high pollutant levels that prevent it from achieving all of its designated uses, it is considered impaired and will be placed on the 303(d) list. This information is organized by watershed, or the land area draining to a particular water body.

<b>RECREATION</b> (Must not adversely affect ecological resources to receive points)	<b>20 points</b>	<b>15 points</b>
Potential for High Priority Outdoor Recreation Needs as Defined in the SCORP <sup>15</sup> (see Recreation Use section below for specific uses)	3+	1-2
Recreational Uses (see Recreation Use section below for specific uses)	3+	1-2
Proximity to Population Base <sup>16</sup>	Level 1	Level 2
Within a Fisheries Access Area <sup>17</sup>	Yes	
<b>Total (80)</b>		

<b>RECREATIONAL USES</b> (Must not adversely affect ecological resources to receive points)	<b>Check All That Apply</b>
Hunting	
Fishing	
Wildlife viewing (unique species or habitat)	
Boating/kayak access (ramps and/or parking)	
Walking, jogging or bike paths/ATV, hiking, mountain biking or equestrian trails	
Sport courts	
Multi-purpose fields	
Water park/swimming pool	
Dog park/dog training areas	
Beach access	
Access to historic sites	
Disc golf courses	
Golf courses	
Playgrounds	
Picnic areas	
Camping areas	
Rollerblading, roller skating or roller hockey areas/skate parks	
<b>Total Number of Recreational Uses</b>	

<sup>15</sup> Statewide Comprehensive Outdoor Recreation Plan (SCORP) is a planning and policy document that identifies needs in outdoor recreation throughout the state of Delaware.

<sup>16</sup> [Strategies for State Policies and Spending](#) - Level 1 and Level 2 Areas of Investment.

<sup>17</sup> An area where fish could be caught, such as a shoreline or pier or somewhere a boat could get access to the water for the purpose of fishing.



Total Points For All Categories	Total Points
Ecological Value (        /115)	
Land Use (        /125)	
Cultural/Historical (        /80)	
Water Features (        /200)	
Recreation (        /80)	

## DESCRIPTIVE EVALUATION/PROJECT-SPECIFIC QUESTIONS

The following qualitative portion may be weighted more heavily than the quantitative portion depending on the specific property.

**Does the acquisition support state or regional preservation and restoration priorities or management plan goals?**

(e.g., Atlantic States Marine Fisheries Council's Interstate Fisheries Management Plans, Bayshore Initiative, Bird Conservation Region 30, Blackbird-Millington Corridor Plan, Captain John Smith Chesapeake National Historic Trail, Chesapeake Watershed Implementation Plan, , Delaware Forest Action Plan, Delaware Bayshore Initiative, Delaware Wildlife Action Plan, Forest Action Plan, Inland Bays Watershed Restoration Plan, Nanticoke Watershed Restoration Plan, North American Wetlands Conservation Act, Partners in Flight Priority Species, National Fish and Wildlife Foundation, SCORP, Wildlife Action Plan)

**List Regional Priorities and/or Management Plan Goals here:**

**Describe why the property is considered for preservation.** (e.g., critical wildlife habitat, water quality protection, recreational opportunities, cultural resource preservation)

**Are preservation/management goals best achieved through fee title or conservation easement, and why?**

**Is there a discount offered on the purchase price?** Please note all endowment and monitoring contributions are voluntary, but priority may be given to properties whose owners offer financial incentives, such as a discount or endowments, to the State.

**Are there opportunities to leverage non-Open Space Program funds? If so, identify the funding sources and percentages.**

**Describe any potential management challenges and/or costs.**

**Is there a near term plan for development?**

**For stand-alone sites, are the resources on the property significant enough to justify preservation?**

**Describe geological features of interest on site.**

<b>Will preserving this property protect a viewshed? If so, describe the viewshed?</b>
<b>Is this property on the State Registry of Natural Areas?</b>
<b>Is there public interest in acquiring the property?</b>
<b>Is the owner requesting provisions in the contract/easement that would reduce the property's primary conservation values or appropriate management?</b>
<b>Is the property a potential restoration site?</b>
<b>Does the property contain a floodway? Is it in the 100 year floodplain?</b>
<b>Other comments:</b>

## PROJECT SUMMARY

### GENERAL PROPERTY INFORMATION

Owner Contact Information:

Tax Parcel:

Acreage:

Uplands:

Wetlands:

Watershed:

Agency Contact:

Ranking Score:

### ACQUISITION DATA

Full Fair Market Purchase: \_\_\_\_\_ Bargain Sale: \_\_\_\_\_ Donation: \_\_\_\_\_

Leveraged Funds:

Endowment/Monitoring Contribution:

Contract Price:

Comments:

### APPRAISAL DATA

Appraiser:

Date of Appraisal:

Appraised Value:

Per Acre Value:

Uplands:

Wetlands:



## Landowner Permission to Access Land/Limitations on Use and Disclosure of Data

### Agreement

As required by 7 Del. Code § 7507B, a representative of the State agency may access land being considered for permanent protection only after the landowner executes a written permission form granting State agency representative permission to access the land. This form shall serve as that written permission.

Any data collected during this visit shall not be used for any of the following purposes:

- (1) To incorporate the data into a comprehensive plan; overlay zoning ordinance; guideline; specific or technically-based performance standard, design criterion, or mitigation requirement; or for any other restrictions on land use.
- (2) To deny, delay, or recommend the denial or delay of a permit or license.
- (3) To place any condition or restriction on a permit or license.
- (4) To charge additional fees on a permit or license.

Nothing shall prohibit the State agency representative from reporting to the proper authorities any information or data obtained about the property concerning a violation of any environmental, public health, or safety laws or regulations or information that is otherwise required to be reported.

Data collected under this section related to negotiations that do not result in the permanent protection of land are not public records and may not be disclosed under Chapter 100, Title 29.

**Name and agency of representative:** \_\_\_\_\_

**Signature:** \_\_\_\_\_

**Date:** \_\_\_\_\_

### Landowner Permission Form (Agency representative to retain)

This certifies that \_\_\_\_\_ (and \_\_\_\_\_ additional staff) is/are authorized  
Name of agency representative

to enter upon the property of \_\_\_\_\_ located at \_\_\_\_\_  
Landowner's full name Property address or description

for the purpose of examining the property for its suitability for permanent protection by the State of Delaware.

**Name of Landowner:** \_\_\_\_\_

**Signature:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Contact information:** \_\_\_\_\_



## **APPENDIX “B”**







State of Delaware  
Department of Natural Resources and Environmental Control  
**Division of Parks and Recreation**  
89 Kings Highway  
Dover, Delaware 19901

**To:** Lisa Vest, DNREC Hearing Officer

**Through:** Raymond Bivens, Director, Division of Parks and Recreation **REB**

**Through:** Matthew Chesser, Administrator, Planning, Preservation and Development **MC**

**Through:** **RWE** Robert Ehemann, Program Manager, Park Resource Office

**From:** Elena Stewart, Land Preservation Specialist

**Date:** September 5, 2017

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**Background**

Title 7, Chapter 75 of the Delaware Code, known as the Delaware Land Protection Act (LPA), recognizes the value in protecting open space in Delaware for the public benefit. In order to do that, the LPA gives State agencies the ability to permanently protect land through the acquisition of a property in fee simple interest or through the acquisition of a conservation easement on a property. The Open Space Program was created to fund these acquisitions and the associated Open Space Council was created to advise the Secretary of DNREC on all matters relating to the administration, implementation, and financing of the Open Space Program (7 Del. C. § 7505).

To be eligible for permanent protection, an area of land must include or exhibit, in whole or in part, 1 or more of the criteria described in 7 Del. C. § 7507A. Additionally, staff that supports the Open Space Program evaluates a property based on a set of guidelines before presenting a property to the Open Space Council for consideration.

The guidelines that staff uses were approved by the Open Space Council, as required by the LPA, but the public expressed interest in having input as to how properties were evaluated as well. During the process of amending the LPA in 2016, legislators decided the best way to incorporate public comment was through notice and public hearing pursuant to the Administrative Procedures Act (APA) pursuant to 29 Del. C. Chapter 101, Subchapter II.

In consultation with Deputy Attorney General William Kassab, the Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection were

developed to comply with the APA requirement. A Start Action Notice (SAN) was approved by then Cabinet Secretary David Small on February 7, 2017.

On March 1, 2017, the proposed Regulations Governing the Guidelines to Evaluate Land Being Considered for Permanent Protection were published in the Delaware Register of Regulations (Volume 20 – Issue 9). The Regulations incorporate the now formally named “Guidelines to Evaluate Land Being Considered for Permanent Protection” in Section 4.1.

A public hearing was noticed on February 26, 2017 in the Delaware News Journal and the Delaware State News. The public hearing was held on March 23, 2017 at 6pm in the Richardson and Robbins building in Dover. The record remained open until April 8, 2017. The Division received one written comment from Andrew T. Manus on March 27, 2017. Additionally, David Carter provided verbal comments at the hearing and those comments have been extracted from the transcription of the hearing.

The hearing record was re-opened on August 1, 2017 for a 30-day public comment period as a result of comments received in the public hearing. There has been some clarifying language inserted in the Regulations and associated Guidelines based upon those comments.

## **Discussion**

The following are comments were received in writing from Andrew T. Manus. Mr. Manus’ comments are unedited in their original format and Parks response is italicized:

### **Guidelines to Evaluate Land Being Considered for Permanent Protection** (scoring matrix)

RECREATION Unclear how points are assigned in this section.

*DNREC, Parks – The “Recreation” Section ties into the “Recreational Uses” Section. First, the suitability of the recreational uses are determined in the “Recreational Uses” Section, and then points are assigned in the “Recreation” based on the categories. This was clarified in the “Recreation” Section, which now directs the reader’s attention to the following section.*

### **PROJECT SUMMARY: ACQUISITION DATA**

Under item identified as **Endowment/Monitoring Contribution**: it should be noted that any such contribution is voluntary and not a requirement for purchase. If endowment/monitoring contributions are a requirement, it should be explicitly stated in the guidelines. In the past, some land owners and realtors have felt coerced in negotiations with the State acquiring open space properties to provide such a contribution to complete a deal.

*DNREC, Parks – All endowments and monitoring contributions are voluntary; however, priority may be given to properties whose owners offer either contributions or a bargain sale. The following language was added to reflect this - **Please note all***

***endowment and monitoring contributions are voluntary, but priority may be given to properties whose owners offer financial incentives, such as a discount or endowments, to the State.***

Comments received at the December 7, 2016 OSC meeting:

Porter Schutt, member of the Open Space Council, stated we should include language in the beginning of the quantitative portion of the Guidelines specifying that they may have more value than the quantitative portion.

*DNREC, Parks – Agreed. The following language was added - **The following qualitative portion may be weighted more heavily than the quantitative portion depending on the specific property.***

Lorraine Fleming, member of the Open Space Council, pointed out that the definition of “Permanent protection” refers back to the ‘purposes of this chapter’ and should read ‘purposes of the Act’.

*DNREC, Parks – Agreed. This was changed in the Regulations.*

Due to the fact that the above changes were made by the Department subsequent to the hearing record having closed for public comment, the decision was made to republish the revised proposed regulation (with said changes incorporated in the same) in the Delaware Register of Regulations, and to reopen the public comment period for an additional thirty (30) days, so as to provide complete transparency to the public with regard to this rule-making process.

Accordingly, the Department republished the revised proposed regulation in the Delaware Register of Regulations on August 1, 2017, and reopened the hearing record for public comment through close of business August 31, 2017. No additional comments were received.

### **Conclusion**

After reviewing the comments submitted, the Division of Parks and Recreation endorses the above responses and recommendations for the inclusion in the Hearing Officer’s Report.

