Wetland Definition Subcommittee

Report-Out to the Wetlands Regulatory Advisory Committee

RAC meeting: Wednesday, October 7, 2026 **Submitted:** October 5, 2026
Submitted by: Jim McCulley (Subcommittee Chair) and Ann Burruss, on behalf of the subcommittee

This report presents the subcommittee's consensus recommendations, the options it puts forward for RAC decision, and its questions for the RAC, DNREC, and DOJ. Proposed regulatory language appears in shaded boxes in bold italics. Each recommendation and option includes a short note on what it would mean from a regulatory perspective.

1. Definition of a Wetland

1.1 Core Definition — Consensus

Adopt the federal regulatory definition of "wetlands" codified by the U.S. Army Corps of Engineers and EPA at 33 C.F.R. § 328.3(c)(1) and 40 C.F.R. § 230.3. (The 1987 Manual quotes this definition but is not its source.)

> **Recommended text:** ***Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.***

What this means: Delaware's definition of a wetland would be word-for-word the same as the federal Section 404 definition.

1.2 Tidal and Nontidal Wetlands Included — Consensus, with Options

The definition should state clearly that it fully encompasses the areas defined as "tidal wetlands" and "nontidal wetlands" (see Section 2). Whether an area is a wetland is decided by the same test everywhere; the tidal/nontidal label is a separate classification. The subcommittee asks the RAC to choose whether the definition's list of examples should name tidal wetlands:

- **Option 1.2A —** Add "tidal swamps" and "tidal marshes" to the list.

> **Text under 1.2A:** ***Wetlands generally include swamps, marshes, tidal swamps, tidal marshes, bogs, and similar areas.***

What this means: Makes the inclusion of tidal wetlands explicit in the definition itself. The state text would differ slightly from the federal text, but the list is illustrative and would not change what qualifies as a wetland.

- **Option 1.2B —** No additional language.

What this means: Keeps the definition word-for-word with the federal definition. Tidal wetlands are still covered because the definition states that it encompasses them.

1.3 Delineation Method — Consensus, with Options

> **Recommended text:** ***Wetlands shall be identified and delineated in accordance with the U.S. Army Corps of Engineers Wetlands Delineation Manual (Technical Report Y-87-1, January 1987) and the official regional supplements to that manual applicable to Delaware.***

Background. The 1987 Manual is the technical guidance the Corps and EPA use to decide whether an area is a wetland and where its boundary lies, and has been the standard method for federal Section 404 delineations since the early 1990s. It applies a three-parameter test: under normal circumstances, a wetland has hydrophytic vegetation, hydric soils, and wetland hydrology. The Corps' regional supplements update the Manual's field indicators and procedures for regional conditions, and control where they differ from the Manual. Two apply in Delaware: the Atlantic and Gulf Coastal Plain Region supplement (Version 2.0, ERDC/EL TR-10-20, November 2010), covering most of the state, and the Eastern Mountains and Piedmont Region supplement (Version 2.0, ERDC/EL TR-12-9, April 2012), covering the Piedmont in northern New Castle County. All three documents are available on the Corps Regulatory Program delineation page.

What this means: Consultants and the Corps already use these documents for every federal delineation in Delaware, so one field delineation would serve both state and federal permitting.

The subcommittee asks the RAC to choose what happens if the Manual or the supplements are replaced or updated in a major way (excluding routine revisions to the indicator lists for hydrology, plant species, and hydric soils):

- **Option 1.3A —** Regulations stipulate that delineation shall follow the replaced or updated manual/supplements.

What this means: State delineations would stay in step with federal delineations automatically. The trade-off is that a federal change could expand or shrink the area Delaware regulates without a state rulemaking or public process.

- **Option 1.3B —** Regulations stipulate that the definition and delineation method will be reconsidered by a multi-stakeholder deliberative body (e.g., a reconvened RAC) before any replacement or major update is adopted in Delaware.

  What this means: Delaware would keep control over any change in what it regulates. Until the state acts, the state and Corps boundaries could differ, but only on sites where both agencies take jurisdiction and the federal change actually moves the line.

- **Questions for DNREC / DOJ:** (a) Can the RAC stipulate Option 1.3B? If not, what statutory authority does the RAC have, or what other avenues are available? (b) For Option 1.3A, may Delaware regulations adopt future federal manuals and supplements by reference, or only the versions in effect when the regulation is adopted?

2. Tidal Wetlands and Nontidal Wetlands

2.1 Classification — Proposal and Contingent Consensus

Proposal to the RAC and the Exceptional Value Wetlands Subcommittee: Define all wetlands subject to the ebb and flow of tidal waters as Exceptional Value Wetlands. If the RAC accepts this proposal, the subcommittee recommends by consensus:

> **Recommended text:** ***Tidal wetlands are all wetlands at or below the mean high water line. Nontidal wetlands are all wetlands above the mean high water line.***

How the subcommittee reached this proposal. The subcommittee balanced two goals. The first is protecting tidally influenced wetlands: classifying all tidal wetlands as Exceptional Value gives them the highest level of protection, and wetlands above mean high water, including high marsh that floods only on higher tides, remain regulated wetlands under the Section 1 definition. The second is regulatory alignment: Section 1 aligns the wetland definition and delineation method with Section 404, and the mean high water boundary aligns the tidal/nontidal split with the shoreward limit of federal Section 10 (Rivers and Harbors Act) jurisdiction and with Delaware's subaqueous lands program. One shared boundary supports coordinated state–federal (one-stop) permitting.

What this means: Tidal wetlands at or below mean high water would carry Exceptional Value status and be permitted under the tidal provisions; wetlands above it would be permitted under the nontidal provisions. This replaces the pre-SB9 approach, which defined tidal wetlands up to 2 feet above local mean high water; wetlands in that band would be classified as nontidal but would remain regulated. If the RAC does not accept the proposal, the subcommittee will deliberate further and return with options.

2.2 Mean High Water — Suggestion (not yet deliberated by the full subcommittee)

Delaware's Subaqueous Lands Regulations (7 DE Admin. Code 7504) define "mean high water" by physical shoreline evidence (where the action of the water leaves a distinct mark by erosion, loss of terrestrial vegetation, or similar characteristics). The federal Section 10 line is set by the tidal datum. Unless the definitions match, the state and federal tidal boundaries will not align. The subcommittee chair and co-author suggest adopting the federal definition at 33 C.F.R. § 329.12(a)(2):

> **Suggested text:** ***The mean high water line is the line on the shore reached by the plane of the mean (average) high water. Where precise determination of the line is necessary, it shall be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the apparent shoreline, may be used only where an estimate of the line is sufficient.***

What this means: State and federal tidal lines would be the same line. Where a precise boundary is needed, applicants would survey to a NOAA tidal datum or, where no nearby tide station exists, a site-specific tidal study.

Questions for the RAC

- Does the RAC accept the proposal to classify all tidal wetlands as Exceptional Value Wetlands, with mean high water as the line between tidal and nontidal wetlands?
- Does the RAC agree with adopting the federal mean high water definition? If so, should the subcommittee further deliberate how the line will be determined in practice (e.g., tidal datum source, site-specific tidal studies, survey standards)?