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States' Wetlands Permitting Statutes:

Delaware



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7 Del. Code §§ 6601 – 6620

Current through ch. 254 of the 152nd General Assembly (2023-2024).

7 Del. Code § 6601. Short title.

This chapter shall be known and may be cited as “The Wetlands Act.”

7 Del. Code § 6602. Purpose.

It is declared that much of the wetlands of this State have been lost or despoiled by unregulated dredging, dumping, filling and like activities and that the remaining wetlands of this State are in jeopardy of being lost or despoiled by these and other activities; that such loss or despoliation will adversely affect, if not entirely eliminate, the value of such wetlands as sources of nutrients to finfish, crustacea and shellfish of significant economic value; that such loss or despoliation will destroy such wetlands as habitats for plants and animals of significant economic and ecological value and will eliminate or substantially reduce marine commerce, recreation and aesthetic enjoyment; that such loss or despoliation will, in most cases, disturb the natural ability of wetlands to reduce flood damage and adversely affect the public health and welfare; that such loss or despoliation will substantially reduce the capacity of such wetlands to absorb silt and will thus result in the increased silting of channels and harbor areas to the detriment of free navigation. It is hereby determined that the coastal areas of Delaware are the most critical areas for the present and future quality of life in the State and that the preservation of the coastal wetlands is crucial to the protection of the natural environment of these coastal areas. Therefore, it is declared to be the public policy of this State to preserve and protect the productive public and private wetlands and to prevent their despoliation and destruction consistent with the historic right of private ownership of lands.

7 Del. Code § 6603. Definitions.

- (a) “Activity” means any dredging, draining, filling, bulkheading, construction of any kind, including but not limited to, construction of a pier, jetty, breakwater, boat ramp, or mining, drilling or excavation.
- (b) “Authorized activity” includes any activity allowed after receipt of a permit from the Department.
- (c) “Board” means the Environmental Appeals Board.



(d) “Department” means the Department of Natural Resources and Environmental Control.

(e) “Person” means any individual, group of individuals, contractor, supplier, installer, user, owner, partnership, firm, company, corporation, association, joint stock company, trust, estate, political subdivision, administrative agency, public or quasi-public corporation or body, or any other legal entity, or its legal representative, agent or assignee.

(f) “Preexisting use” means any use of land, or water, or subaqueous lands, or of a structure or any combination of these which was lawfully in existence prior to and in active use on July 17, 1973, or any temporary or seasonal use in active use for 10 consecutive weeks within the last 12 months previous to July 17, 1973.

(g) “Secretary” means the Secretary of the Department of Natural Resources and Environmental Control.

(h) “Wetlands” shall mean those lands above the mean low water elevation including any bank, marsh, swamp, meadow, flat or other low land subject to tidal action in the State along the Delaware Bay and Delaware River, Indian River Bay, Rehoboth Bay, Little and Big Assawoman Bays, the coastal inland waterways, or along any inlet, estuary or tributary waterway or any portion thereof, including those areas which are now or in this century have been connected to tidal waters, whose surface is at or below an elevation of 2 feet above local mean high water, and upon which may grow or is capable of growing any but not necessarily all of the following plants:

Eelgrass (*Zostera marina*), Widgeon Grass (*Ruppia maritima*), Sago Pondweed (*Potamogeton pectinatus*), Saltmarsh Cordgrass (*Spartina alterniflora*), Saltmarsh Grass (*Spartina cynosuroides*), Saltmarsh Hay (*Spartina patens*), Spike Grass (*Distichlis spicata*), Black Grass (*Juncus gerardii*), Switch Grass (*Panicum virgatum*), Three Square Rush (*Scirpus americanus*), Sea Lavender (*Limonium carolinianum*), Seaside Goldenrod (*Solidago sempervirens*), Seablite (*Suaeda maritima*), Sea Blite (*Suaeda linearis*), Perennial Glasswort (*Salicornia virginica*), Dwarf Glasswort (*Salicornia bigelovii*), Samphire (*Salicornia europaea*), Marsh Aster (*Aster tenuifolius*), Saltmarsh Fleabane (*Pluchea purpurascens* var. *succulenta*), Mock Bishop's Weed (*Ptilimnium capillaceum*), Seaside Plantain (*Plantago oliganthus*), Orach (*Atriplex patula* var. *hastata*), Marsh Elder (*Iva frutescens* var. *oraria*), Groundsel Bush (*Baccharis halimifolia*), Bladderwrack (*Fucus vesiculosus*), Swamp Rose Mallow, Seaside Hollyhock or March Mallow (*Hibiscus palustris*), Torrey Rush (*Scirpus torreyi*), Narrow-leaved Cattail (*Typha angustifolia*), and Broad-leaved Cattail (*T. latifolia*) and those lands not currently used for agricultural purposes containing 400 acres or more of



contiguous nontidal swamp, bog, muck or marsh exclusive of narrow stream valleys where fresh water stands most, if not all, of the time due to high water table, which contribute significantly to ground water recharge, and which would require intensive artificial drainage using equipment such as pumping stations, drain fields or ditches for the production of agricultural crops.

7 Del. Code § 6604. Permit required.

(a) Any activity in the wetlands requires a permit from the Department except the activity or activities exempted by this chapter and no permit may be granted unless the county or municipality having jurisdiction has first approved the activity in question by zoning procedures provided by law.

(b) The Secretary shall consider the following factors prior to issuance of any permit:

(1) Environmental impact, including but not limited to, likely destruction of wetlands and flora and fauna; impact of the site preparation on tidal ebb and flow and the otherwise normal drainage of the area in question, especially as it relates to flood control; impact of the site preparation and proposed activity on land erosion; effect of site preparation and proposed activity on the quality and quantity of tidal waters, surface, ground and subsurface water resources and other resources;

(2) Aesthetic effect, such as the impact on scenic beauty of the surrounding area;

(3) The number and type of public and private supporting facilities required and the impact of such facilities on all factors listed in this subsection;

(4) Effect on neighboring land uses, including but not limited to, public access to tidal waters, recreational areas and effect on adjacent residential and agricultural areas;

(5) State, county and municipal comprehensive plans for the development and/or conservation of their areas of jurisdiction;

(6) Economic effect, including the number of jobs created and the income which will be generated by the wages and salaries of the jobs in relation to the amount of land required, and the amount of tax revenues potentially accruing to the state, county and local governments.



(c) The Secretary may require a bond in an amount and with surety and conditions sufficient to secure compliance with the conditions and limitations, if any, set forth in the permit. The particular amount and the particular conditions of the bond required shall be consistent with and in furtherance of the purposes of this chapter. The Secretary shall state for the record, the basis for the bonding requirements imposed with each permit granted. In the event of a breach of any condition of any such bond, the Attorney General may institute an action in Superior Court upon such bond and prosecute the same to judgment and execution.

7 Del. Code § 6605. Preexisting use.

Any expansion or extension of a preexisting use requires a permit and no permit may be granted under this chapter unless the county or municipality having jurisdiction has first approved the use in question by zoning procedures provided by law.

7 Del. Code § 6606. Exemptions.

Any of the following activities are exempt from permit requirements:

Mosquito control activities authorized by the Department; construction of directional aids to navigation; duck blinds; foot bridges; the placing of boundary stakes; wildlife nesting structures; grazing of domestic animals; haying; hunting; fishing and trapping.

7 Del. Code § 6607. Procedures; regulations; application fees.

(a) The Secretary shall administer this chapter.

(b) The Secretary shall inventory, as promptly as he or she is able, all wetlands within the State and prepare suitable maps. Such maps shall be filed with the Secretary of State and made available for public inspection at the offices of the Department. On completion of a wetlands boundary map for an area, the Secretary shall propose that wetlands within the area be designated as such in accordance with the map. Wetlands designation on the maps shall be conclusive for the purpose of this chapter upon adoption by the Secretary, subject to the outcome of any appeals taken under this section, and subsection (e) of this section. After such designation, the 2-foot elevation above local mean high water specified in § 6603 of this title shall not apply to any land outside the designated area.

(c) The Secretary shall adopt a wetlands designation or any other regulation only after holding a public hearing in accordance with § 6609 of this title.



(d) The Secretary shall, in furtherance of the purpose of this chapter, adopt regulations:

(1) Setting forth procedures, including provision for fees, which shall govern the processing of permit applications and the conduct of hearings;

(2) Elaborating standards consistent with § 6604 of this title by which each permit application will be reviewed and acted upon;

(3) Controlling or prohibiting activities on lands designated or proposed for designation as wetlands, which regulations may vary from area to area according to the ecological value of the subject wetlands and the threat to the health and welfare of the people of this State which their alteration would pose.

(4) Any fees collected under this chapter are hereby appropriated to the Department to carry out the purposes of this chapter. The Secretary shall report through the annual budget process the receipt, proposed use and disbursement of these funds.

(e) If an on-site evaluation by the Department establishes that an error exists in a wetlands map that has been adopted by the Department, the wetlands map containing the error may be corrected by the Department after the Department documents, in writing, the results of the on-site evaluation, and the Department gives the public notice of any proposed correction. For purposes of this subsection, the term “public notice” shall consist of having notice of the proposed correction, the name of the property owner, location of the property in issue and a description of the error, published in a daily newspaper of general circulation throughout the State and a newspaper of general circulation in the county in which the activity is proposed. Such notice shall be published at least 20 days in advance of any correction to a map by the Department. If the Department determines that it has received a meritorious objection to any proposed correction set forth in a public notice, the Department shall hold a public hearing in accordance with the procedures set forth in § 6609 of this title. Any Department correction made to an adopted wetlands map shall be filed with the Secretary of State and made available for public inspection at the offices of the Department.

(f) The Secretary may waive any provision of the regulations adopted pursuant to this chapter when warranted under the following circumstances:

(1) Life-threatening emergencies.



(2) Actions required for public safety for which sufficient time is not available to follow the regulations.

(3) When imminent or catastrophic damage or loss of major infrastructure is likely if all provisions of the regulations are adhered to.

(4) Where the authority of the Department under this chapter overlaps with another statute, including but not limited to shellfish grounds (Chapter 19 of this title), beach preservation (Chapter 68 of this title) or subaqueous lands (Chapter 72 of this title) 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 this chapter.

(g) The Secretary may issue an after-the-fact permit, letter of authorization or waiver in those cases where an activity has occurred without first obtaining the required permit, letter of authorization or waiver. The determination of whether or not to issue an after-the-fact permit, letter of authorization or waiver shall be consistent with the purposes and provisions of this chapter. The applicant receiving the after-the-fact permit, letter of authorization, or waiver will be responsible for paying any associated processing fee and the Secretary may assess a penalty in accordance with § 6005 of this title.

7 Del. Code § 6608. Permit applications.

(a) Any person desiring to obtain a permit required by § 6604 of this title shall submit an application in such form and accompanied by such plans, specifications and other information as required by applicable regulations.

(b) Upon receipt of an application in proper form, the Secretary shall advertise in a daily newspaper of statewide circulation and in a newspaper of general circulation in the county in which the activity is proposed:

(1) The fact that the application has been received; and

(2) A brief description of the nature of the application.

The Secretary may hold a public hearing with respect to any application if it is deemed to be in the best public interest. The Secretary shall hold a public hearing if he or she receives a written meritorious objection within 20 days of



advertisement. A public hearing request shall be deemed meritorious if it exhibits a familiarity with the application and a reasoned statement of the permit's probable impact.

7 Del. Code § 6609. Public hearings.

Any public hearing held by the Secretary or the Board concerning a regulation, permit application or alleged violation or appeal shall be conducted as follows:

(1) Notification shall be served upon the applicant, alleged violator, or appellant as summonses are served by registered or certified mail not less than 20 days before the time of said hearing. Not less than 20 days' notice shall also be published in a daily newspaper of general circulation throughout the State and a newspaper of general circulation in the county in which the activity is proposed. Such notice shall also be sent by mail simultaneously to persons who have listed their names and addresses with the Secretary to be notified. Such notice shall also be sent by mail simultaneously to all adjoining property owners. Notice shall outline the area concerned, activity involved, and the location where the application for a permit or other pertinent material is available for inspection.

(2) The permit applicant, alleged violator, or appellant may appear personally or by counsel at the hearing and produce any competent evidence in his or her behalf. The Secretary or the Secretary's duly authorized designee or the Board or its duly authorized designee may administer oaths, examine witnesses and issue, in the name of the Department or the Board, notices of hearings or subpoenae requiring the testimony of witnesses and the production of books, records or other documents relevant to any matter involved in such a hearing; and subpoenae shall also be issued at the request of the applicant or alleged violator. In case of contumacy or refusal to obey a notice of hearing or subpoena under this section, the Superior Court in the county in which the hearing is held shall have jurisdiction, upon application of the Secretary or the Chairperson of the Board, to issue an order requiring such person to appear and testify or produce evidence as the case may require.

(3) A verbatim transcript of testimony at the hearing shall be prepared and shall, along with the exhibits and other documents introduced by the Secretary or other party, constitute the record.

The Secretary or the Secretary's duly authorized designee or the Board or its duly authorized designee shall make findings of fact based on the record. The Secretary or the Board shall then enter such order as will best further the purpose of this chapter, and shall state reasons. The Secretary or the Board shall promptly give written notice to the persons affected by such order.



7 Del. Code § 6610. Appeal to Board.

Any person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board within 20 days after the Secretary has announced the decision.

7 Del. Code § 6612. Appeal from Board's decision.

(a) Any person or persons, jointly or severally affected by any decision or nondecision of the Board, or any taxpayer, or any officer, department, board or bureau of the State, may appeal to the Superior Court in and for the county in which the use in question is wholly or principally located by filing a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Any such appeal shall be perfected within 30 days of the decision of the Board.

(b) The Court may affirm, reverse or modify the Board's decision. The Board's findings of fact shall not be set aside unless the Court determines that the record contains no substantial evidence that would reasonably support the findings. If the Court finds that additional evidence should be taken, the Court may remand the cause to the Board for completion of the record.

7 Del. Code § 6613. Taking without just compensation.

If the Superior Court finds that the action appealed from constitutes a taking without just compensation, it shall invalidate the order and grant appropriate relief, unless the Secretary at this stage, consents to the reversal or modification of his or her decision. However, the Secretary may, through negotiation or condemnation proceedings under Chapter 61 of Title 10, acquire the fee simple or any lesser interest, including but not limited to, a perpetual negative easement or other interest which assures that the affected land shall not thereafter be altered, dredged, dumped upon, filled or otherwise altered subject to any reasonable reservations to the landowner as the Secretary may have stipulated to prior to assessment of damages. A decision of the Superior Court that the action appealed from constitutes a taking without just compensation shall not become effective for 2 years of the date of decision and shall not become effective at all if within that period the Secretary has initiated action to acquire fee simple or any lesser interest in the wetlands in question. A finding of the Superior Court that the denial of a permit or the restrictions imposed by a granted permit constitutes a taking without just compensation shall not affect any land other than that of the petitioning landowner. If the Secretary has not initiated action to acquire fee simple or any lesser interest in the wetlands in question within 2 years from the date of a final court ruling, the permit must be granted as applied.

7 Del. Code § 6614. Cease and desist orders.



The Secretary shall have the power to issue an order to any person violating any rule, regulation or order or permit condition or provision of this chapter to cease and desist from such violation. Any cease and desist order issued pursuant to this section shall expire (1) after 30 days of its issuance, or (2) upon withdrawal of said order by the Secretary, or (3) when the order is suspended by an injunction, whichever occurs first.

7 Del. Code § 6615. Injunction.

Action for injunctive relief may be brought by the Secretary to prevent a violation of this chapter or a permit condition. The Court of Chancery may, at its discretion, require bond in the appropriate amount.

7 Del. Code § 6616. Right of entry.

The Secretary or the Secretary's duly authorized designee, in regulating any activity over which he or she has jurisdiction pursuant to this chapter, may enter, at reasonable times, upon any private or public property for the purpose of determining whether a violation exists of a statute or regulation enforceable by him or her, upon giving written notice, and after presenting official identification to the owner, occupant, custodian or agent of said property.

7 Del. Code § 6617. Penalties.

(a) Whoever violates this chapter or any rule or regulation duly promulgated thereunder, or any condition of a permit issued pursuant to § 6604 of this title, or any order of the Secretary, shall be subject to enforcement in accordance with § 6005 or § 6013, or both, of this title.

7 Del. Code § 6618. Inconsistent laws superseded; all other laws unimpaired.

All laws or ordinances inconsistent with any provision of this chapter are hereby superseded to the extent of the inconsistency; provided, that present and future zoning powers of all counties and municipalities, to the extent that said powers are not inconsistent with this chapter, shall not hereby be impaired; and provided, that a permit granted under this chapter shall not authorize an activity in contravention of county or municipal zoning regulations.

7 Del. Code § 6619. Liberal construction.

This chapter, being necessary for the welfare of the State and its inhabitants, shall be liberally construed in order to preserve the wetlands of the State.

7 Del. Code § 6620. Federal aid; other funds.



The Department may cooperate with and receive moneys from the federal government, state or local government or any industry or other source. Such moneys received are appropriated and made available for the study and preservation of the wetlands.

