



SPONSOR: Sen. Hansen & Sen. Paradee & Sen. Townsend &
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Sen. Sokola

DELAWARE STATE SENATE
150th GENERAL ASSEMBLY

SENATE BILL NO. 233

AN ACT TO AMEND TITLE 7 OF THE DELAWARE CODE RELATING TO THE PROTECTION OF WETLANDS.

1 WHEREAS, it is commonly known that healthy nontidal wetlands reduce, store, and filter stormwater runoff and
2 can help remove harmful bacteria and pollutants, thereby protecting sources of Delaware's water supply; and

3 WHEREAS, it is also commonly known that nontidal wetlands provide flood storage capacity thereby protecting
4 public and private property from flooding and the resultant financial and personal impacts associated therewith; and

5 WHEREAS, that while the State has acted to protect tidal wetlands, it has not taken equally vigorous action to
6 protect the State's nontidal wetlands relying instead on federal regulations enforced by the United States Army Corps of
7 Engineers pursuant to the Clean Water Act; and

8 WHEREAS, the U.S. Environmental Protection Agency ("EPA") has proposed a dramatic reduction in protections
9 under the Clean Water Act, leaving nontidal wetlands in Delaware without adequate federal or State protection; and

10 WHEREAS, the EPA proposed rule reducing these protections will become final on June 22, 2020, stripping
11 protections from thousands of acres in Delaware; and

12 WHEREAS, it is important that the State promptly modify its existing wetlands permit program to add necessary
13 protections for nontidal wetlands, as Delaware is the only state in the mid-Atlantic region without state-level protections,
14 and thus is especially vulnerable to the changes proposed at the federal level; and

15 WHEREAS, protection of nontidal wetlands will be consistent with the current policy of this State to preserve and
16 protect the productive public and private wetlands to prevent their loss and impairment and consistent with the historic right
17 of private ownership of lands;

18 NOW, THEREFORE:

19 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

20 Section 1. Amend Chapter 66, Title 7 of the Delaware Code by making deletions as shown by strike through and
21 insertions as shown by underline as follows:

22 § 6601. Short title

23 This chapter shall be known and may be cited as "The Wetlands Act."

§ 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. It is hereby determined that the transitional areas between terrestrial and aquatic ecosystems of Delaware, and the wetlands in or about such areas of Delaware, are the most critical areas for the present and future quality of life in the State and that the preservation of tidal and nontidal wetlands is crucial to the protection of the natural environment.~~ 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.

§ 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 of tidal wetlands" 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) "Tidal 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*), Wedgeon 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*), Sea Blite (*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 oliganthos*), Orach (*Atriplex patula* var. *hastata*), March Elder (*Iva frutescens* var. *oraria*), Gounsel Bush (*Baccharis halmifolia*), Bladder Wrack (*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.

(i) "Nontidal wetlands" means an area in the State that exhibits or contains one or more of the following characteristics:

1) Hydrophytic vegetation. Macrophytic plant life growing in water, soil, or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content;

2) Hydric soils. Soils that are saturated, flooded, or ponded long enough during the growing season (March 1 through October 30), to develop anaerobic conditions in the upper part;

3) Wetland hydrology. Permanent or periodic inundation, or soil saturation to the surface, at least seasonally. Further, nontidal wetlands include without limitation marshes, swamps, bottomland forest, bogs, wet meadows, and the shallow margins and headwaters of water bodies and water courses. Nontidal wetlands are

typically but not necessarily adjacent to or in proximity to nontidal waters of the state, including without limitation lakes, rivers, streams (including intermittent and ephemeral streams), drainage ditches, tax ditches, creeks, mudflats, sandflats, sloughs, ponds and impoundments, natural or manmade, containing natural levels of salinity of 5 parts per thousand or less.

(j) "Wetlands" means all tidal and nontidal wetlands in the state, and the terms "tidal" and "nontidal" are not necessarily mutually exclusive. All wetlands will be determined using the U.S. Army Corps of Engineers Wetlands Delineation Manual dated January 1987, and any regional supplemental guidance pertaining to local conditions.

(k) "Preexisting use of nontidal wetlands" 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 June 22, 2020 or any temporary or seasonal use in active use for 10 consecutive weeks within the last 12 months previous to June 22, 2020.

§ 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 and nontidal 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 and nontidal 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.

§ 6605. Preexisting use

Any expansion or extension of a preexisting use of tidal wetlands and any expansion or extension of a preexisting use of nontidal wetlands 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.

§6606. Exemptions

Any of the following activities are exempt from permit requirements for tidal wetlands: 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. Any of the following activities are exempt from permit requirements for nontidal wetlands: Normal activities established prior to June 22, 2020 required for the farming and production of food crops, such as plowing, seeding, cultivating and harvesting, provided that such activity is part of an established and on-going operation for the farming and production of food crops, and an operation ceases to be established when the area on which it was conducted has been converted to another use or has lain fallow or idle for 3 years except as part of a conventional, crop rotation cycle.

§ 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.~~ 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, pursuant to a site-based wetland delineation conducted using the U.S. Army Corps of Engineers Wetland Delineation Manual (1987). After such designation, the 2-foot elevation above local mean high water specified in § 6603 of this title

144 ~~shall not apply to any land outside the designated area.~~ Periodic updates to State wetland maps will follow procedures
145 outlined in this section.

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

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

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

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

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

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

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

170 §6608. Permit applications

171 (a) Any person desiring to obtain a permit required by §6604 of this title shall submit an application in such form
172 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~~ request 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.

§ 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 his 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~~ subpoenas 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~~ subpoenas 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.

§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~~ receipt of the Secretary's decision, or publication of the decision including, without limitation, online publication on the Department's website, whichever is soonest.

§6611. Repealed

§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.

§ 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.

§ 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.

§ 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.

§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.

§6617. Penalties

(a) Any person who intentionally or knowingly violates any rule, regulation, order, permit condition or provision of this chapter shall be fined not less than \$500 or more than \$10,000 for each offense. Continuance of any activity prohibited by this chapter during any part of a day shall constitute a separate offense. Any person found guilty of violating any cease and desist order of the Secretary shall be fined for each offense, starting from the date of receipt of the order. The Superior Court shall have jurisdiction of offenses under this subsection.

(b) Any person who violates any rule, regulation, order, permit condition or provision of this chapter shall be fined not less than \$50 or more than \$500 for each violation. Each day of violation shall be considered as a separate violation. The Justices of the Peace Courts shall have jurisdiction of offenses under this subsection.

(c) Any person who violates a provision of this chapter, any condition or limitation in a permit rule, regulation or order shall be liable for a civil penalty of not less than \$1,000 nor more than \$10,000 for each ~~completed~~ day of violation. The Superior Court shall have jurisdiction of offenses under this subsection.

(d) In addition to any penalties imposed under this section or injunctive relief under §6615 of this title, a person who effects or permits any activity in wetlands in violation of this chapter may be liable to the State for the cost of restoration of the affected wetland to its condition prior to such violation insofar as that is technically feasible. The

Attorney General of the State, upon complaint of the Secretary, shall institute a civil action to recover such damages, or may request such cost of restoration to be imposed in the Chancery Court injunctive action or Superior Court civil action.

§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.

§ 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.

§ 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.

SYNOPSIS

This Bill institutes a State nontidal wetlands program and leaves intact the current State tidal wetlands program under Chapter 66 of Title 7. Prior to these amendments, the only regulatory protection of the State's nontidal wetlands was through the U.S. Army Corps of Engineers and the federal Clean Water Act ("CWA"). Nontidal (freshwater) wetlands are valuable resources that contribute to the quality of life for all Delawareans and deserve a local program of protection. The State nontidal wetlands program will be, more efficient and more responsive than the federal program. The State nontidal wetlands program will cover gaps in federal jurisdiction under the CWA and mitigate the uncertainty surrounding the limits to federal jurisdiction. The bill also makes technical revisions and conforms certain language to language in 7 Del. C. Ch. 60, for consistency.

Author: Senator Hansen