



SPONSOR: Rep. Cathcart & Sen. Simpson
Reps. Buckworth, Fallon, Lavelle,
Lofink, Reynolds, Valihura, Wagner,
Gilligan, Houghton, Keeley, Viola &
Sens. McBride, Amick, Sorenson,
Connor

HOUSE OF REPRESENTATIVES

141st GENERAL ASSEMBLY

HOUSE SUBSTITUTE NO. 1

FOR

HOUSE BILL NO. 340

AN ACT TO AMEND CHAPTER 66, TITLE 7 OF THE DELAWARE CODE RELATING TO THE PROTECTION
OF WETLANDS.

1 WHEREAS, freshwater wetlands are among the State's most valuable natural resources because they reduce
2 flood damage to homes, businesses, and cropland, reduce nutrients and sediment loads and protect critical habitats for
3 plant and animal species; and

4 WHEREAS, the State of Delaware enacted the Wetlands Act in 1973 for the express purpose of protecting all
5 tidal wetlands of the State and those non-tidal or freshwater wetlands containing 400 acres or more of contiguous non-
6 tidal swamp, bog, muck or marsh; and

7 WHEREAS, the federal government administers a regulatory program pursuant to the Clean Water Act for
8 protecting wetlands in Delaware; and

9 WHEREAS, on January 9, 2001, the U.S. Supreme Court ruled the federal government had exceeded its
10 statutory authority resulting in the removal of protection of isolated freshwater wetlands that provide habitat for unique
11 and state or globally rare plant and animal species; and

12 WHEREAS, protection of these isolated wetlands will be consistent with the current public policy of this State to
13 preserve and protect the productive public and private wetlands and to prevent their despoliation and destruction
14 consistent with the historic right of private ownership of lands.

15 NOW, THEREFORE:

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

17 Section 1. Amend § 6602, Title 7 of the Delaware Code by inserting at the end of existing paragraph:

18 "The freshwater wetlands of Delaware are indispensable and fragile natural resources. In their
19 natural state, freshwater wetlands serve humans and nature. They provide habitat for fish, wildlife, and
20 vegetation; water-quality maintenance and pollution control; flood control; shoreline stabilization;
21 sediment and erosion control; groundwater recharge and discharge; food chain support; open space; and
22 opportunities for natural resource education, scientific study, and recreation.

23 It is the policy of this State that activities which do not depend upon water or wetland areas to
24 fulfill the basic purpose of the activity be located outside of wetlands or undertaken so as to avoid, to
25 the extent practicable, adversely affecting the natural functions that wetlands provide; to allow
26 freshwater wetland alterations only where such activities do not adversely impact wetlands values and
27 functions and are not contrary to the public interest, and all practicable measures have been applied to
28 avoid or minimize those adverse impacts; to provide for compensation for adverse wetland impacts in
29 the form of freshwater wetland restoration, creation, or enhancement to offset further losses; and to
30 coordinate protection of wetlands with existing statutes, ordinances, or related state and federal
31 regulatory programs.

32 It is the intent of the General Assembly that freshwater wetlands in the State of Delaware shall
33 be subject to regulation by only one level of government. Further, as a result of a Supreme Court
34 decision, some of Delaware's ecologically important wetlands no longer receive any federal protection.
35 It is the intent of the General Assembly that the ecological function and value of these isolated
36 freshwater wetlands be protected."

37 Section 2. Amend § 6603(h), Title 7 of the Delaware Code by deleting the word "and" found between "(T.
38 latifolia)" and the phrase "those lands not" and inserting in lieu thereof ";".

39 Section 3. Amend § 6603(h), Title 7 of the Delaware Code by deleting the period "." at the end of the sentence
40 and inserting in lieu thereof the following:

41 "; and nonfederal isolated wetlands as designated by the Secretary."

42 Section 4. Amend § 6603, Title 7 of the Delaware Code by inserting new paragraphs to read as follows:

"(i) 'Best management practices' means conservation practices or systems of practices and management measures adopted by the Secretary that minimize adverse impacts to the chemical, physical, and biological characteristics and functions of freshwater wetlands.

(j) 'Nonfederal isolated wetlands' means an area that:

- a. is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal conditions does support, a prevalence of vegetation or aquatic life typically adapted for life in saturated soil conditions; and
- b. cannot or will not be regulated by the U.S. Army Corps of Engineers. Nonfederal, isolated wetlands, provided they meet the requirements of this Subsection, may be classified by the Secretary into two major types based on their ecological functions and value:

1. Class 1 nonfederal isolated wetlands are those that either alone or in combination with other nearby ecologically significant lands represent unique ecological communities providing exceptional wetland functions and values necessary to support habitat for federally or state listed endangered plant and animal species, and which have unique geologic and hydrologic characteristics. Wetland types most commonly found in this class include, but are not limited to, Delmarva bays, dune swale wetlands, Atlantic white cedar swamps, and bald cypress swamps.

2. Class 2 nonfederal isolated wetlands are those that provide wetland functions, provide diverse habitat for many species and in some cases, support rare and unique species. Class 2 is characterized by vegetation type as forested, shrubby or herbaceous/emergent, and by hydrology being either temporarily or seasonally saturated, semi-permanent or intermittently flooded.

(k) 'Practicable' means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

(l) 'Wetland conservation buffer' means such acreage including uplands that, based upon a determination by the Department and designated in accordance with procedures of this Chapter, is of significant importance to protecting the functions of a Class 1 wetland with which it is associated."

(m) 'Minor drainage' means activities performed by, or with the assistance of, the Department of Natural Resources and Environmental Control, the Conservation Districts, or their agents involving excavation and discharge of dredged or fill material in Class 2 wetlands and/or wetland conservation buffers incidental to connecting upland drainage facilities to receiving waters, adequate to effect the removal of excess soil moisture from upland agricultural croplands; performed in accordance with Best Management practices adopted by the Delaware Department of Natural Resources and Environmental Control.

Section 5. Amend § 6606, Title 7 of the Delaware Code by inserting at the end of existing paragraph:

"Additionally, for those nonfederal isolated wetlands and associated wetland conservation buffers designated by the Secretary, the following uses and activities are considered *de minimis* or temporary non-adverse impacts and shall be exempt from the provisions of this Chapter unless expressly provided otherwise in this Chapter:

1. Outdoor recreation activities which result in insignificant freshwater wetland impacts including, but not limited to, hunting, wildlife nesting structures, fishing, trapping, bird-watching, hiking, primitive camping, and dog training.
2. Continued activities related to the production of agricultural products as part of an established, ongoing farming operation involving: plowing, tilling, planting, cultivation, and harvesting: non-structural dependent livestock production; and the repair or maintenance of established, serviceable drainage and water storage systems. Tillable lands included in a State or federally approved conservation or set-aside program or otherwise determined to be 'farmed wetlands' by the USDA Natural Resources Conservation Service shall retain the agricultural exemptions contained herein until they are no longer part of an established, ongoing farming operation.
3. Prior converted croplands as determined by the USDA Natural Resources Conservation Service as wetlands which were both manipulated (drained or otherwise physically altered to remove excess water from the land) and cropped before December 23, 1985, to the extent that they no longer exhibit important wetlands values. Such lands are not subject to the jurisdiction of this Chapter unless production of agricultural products is abandoned and wetland characteristics become re-established. An area will be considered abandoned if for

five consecutive years there has been no cropping, management, or maintenance activities related to agricultural production.

4. Silvicultural activities in Class 2 wetlands and wetland conservation buffers performed in accordance with silvicultural Best Management Practices adopted by the Delaware Department of Agriculture involving harvesting of forest products; reforestation practices including, but not limited to, bedding and planting; cultivation; the construction, repair, or maintenance of permanent and temporary logging roads; provided the activity is performed in accordance with a forestry management plan approved by the Forestry Administrator of the State Department of Agriculture, and the activity does not remove the area from the jurisdiction of this Chapter (exclusive of logging roads).

5. Educational or scientific research activities and devices which result in insignificant impacts to nonfederal isolated wetlands to include nature trails not involving the placement of structures or fill material.

6. Repair or maintenance of grassed highway rights-of-way or roadside ditches, repair or maintenance of established or authorized underground and above ground utilities and rights-of-way.

The Secretary may, with the assistance of advisory groups representing affected interests, exempt from the provisions of this Chapter by regulation other activities resulting in no more than minimal impacts when considered individually or cumulatively."

Section 6. Amend § 6607(d), Title 7 of the Delaware Code by deleting the period "." at the end of paragraph (3) and inserting in lieu thereof a semicolon ";".

Section 7. Amend § 6607(d), Title 7 of the Delaware Code by renumbering paragraph (4) as paragraph (6) and inserting new paragraphs as follows:

"(4) Designating up to 35,000 acres of nonfederal isolated wetlands into their appropriate class. For Class 1 nonfederal isolated wetlands, the Secretary shall delineate wetlands conservation buffers around this specific wetland type to guide activities that may adversely impact wetlands functions and values.

(5) Setting forth procedures for the purposes of delineating the boundaries of nonfederal isolated wetlands classes and conservation buffers, consistent with the definitions set forth in this Chapter. For wetland boundaries permitted by this Chapter, the Secretary shall consider the procedures contained in the wetland delineation manual published by the U.S. Army Corps of Engineers. (1987 edition).

Section 8. Amend § 6607(e), Title 7 of the Delaware Code by inserting at the end of existing paragraph:

125 "Upon designation, any modifications to the delineation of Class 1 wetlands and associated
126 wetland conservation buffers may only be made after a public hearing and approval of the Secretary.
127 Until maps are adopted, the determination by the Secretary of nonfederal isolated wetlands subject to
128 the provisions of this Chapter shall be made on a case-by-case basis."

129 Section 9. Amend Chapter 66, Title 7 of the Delaware Code by adding a new section designated as § 6621,
130 which new section shall read as follows:

131 "§ 6621. Best Management Practices.

132 The Secretary shall, with the assistance of advisory groups representing affected interests,
133 develop and adopt by regulation Best Management Practices for certain activities in wetlands
134 consistent with the purposes and intent of this Chapter to include those activities authorized
135 pursuant to this Chapter."

136 Further Amend Chapter 66, Title 7 of the Delaware Code by adding a new Section designated as §
137 6622, which new Section shall read as follows:

138 "§ 6622. Coordination with Federal, State, Local, and Other Programs.

139 In implementing this Chapter, the Secretary shall coordinate the State wetlands program with any federal, State and local
140 programs relevant to the protection, development, or management of wetlands. The Secretary shall attempt to minimize
141 or eliminate any duplication and overlap of the State program set forth in this Chapter with other federal and State
142 wetlands or other resource protection and management programs to include but not limited to: development of
143 coordinated permit application and processing procedures; educational and technical assistance; and incentive programs,
144 with financial or other incentives for private landowners, to encourage conservation of wetlands and associated
145 conservation buffers within their ownership, including but not limited to, the consideration of conservation easement
146 programs, tax relief programs, cost sharing for enhancement and restoration, and encouragement of compatible uses."

SYNOPSIS

The federal government administers a regulatory program pursuant to the Clean Water Act for protecting wetlands in Delaware. On January 9, 2001, the U.S. Supreme Court ruled the federal government had exceeded its statutory authority over isolated freshwater wetlands. As a result of this Supreme Court decision, some of Delaware's ecologically important wetlands no longer receive any federal protection. This Act is intended to address the recent decision by giving the Department of Natural Resources and Environmental Control the authority to designate and protect Delaware's isolated freshwater wetlands as ecologically and socio-economically important wetlands that may no longer be under the jurisdiction of the federal government. The Secretary of the Department is required to adopt maps designating the location of up to 30,000 acres of nonfederal isolated wetlands, and procedures for delineating these isolated freshwater wetlands. Nonfederal isolated wetlands may be classified by the Secretary into two major types based on their ecological function and value. Class 1 represents unique ecological communities providing exceptional wetland functions and values. Class 2 being generally forested, shrubby or herbaceous/emergent isolated wetlands, not qualifying as Class 1, and providing integral wetland functions, diverse habitat for many species or, in some cases, support rare and unique species.