


HEARING OFFICER'S REPORT

TO: The Honorable Shawn M. Garvin
Cabinet Secretary, Department 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: Application of Delmarva Power & Light for a Subaqueous Lands Lease (SL-413/19) for the Delmarva Power White Creek Utility Crossing Project, to wit: to install a sixteen-inch diameter by 564-foot long 25kV electric distribution line by directional bore at a minimum depth of 20 feet below the mudline of White Creek in Ocean View, Sussex County, Delaware.

DATE: February 20, 2020

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Tuesday, October 1, 2019, at 6:00 p.m. at the South Coastal Library, 43 Kent Avenue, Bethany Beach, Delaware, by the Department of Natural Resources and Environmental Control ("DNREC" or "Department") to receive comment on the Subaqueous Lands Lease application of Delmarva Power & Light ("Applicant") to install and occupy a sixteen-inch diameter by 564-foot long 25kV electric power distribution feeder by horizontal direction drill ("HDD") 20 feet beneath the mudline of White Creek in Ocean View, Sussex County, Delaware ("Application"). The proposed HDD bore pits will occur in the upland areas, outside of the Department's jurisdiction, adjacent to the terminus of Daisey Avenue and Peaceful Lane in Ocean View, Delaware.

The proposed project necessitates the Applicant to obtain from the Department a Subaqueous Lands Lease (SL-213/19). The Applicant's proposed project is subject to the requirements of Delaware's *Subaqueous Lands Act* (7 Del.C. Chapter 72) and the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504).

After having been deemed administratively complete, the Application was placed on public notice by the Department on June 26, 2019. During the public notice period, the Department's Division of Water, Wetlands and Subaqueous Lands Section ("WSLS"), received four written comments. One commenter, Mr. Gordon Wood, claimed that the proposed project lacked exact site plans, and that the community should have the opportunity to understand the material and economic impacts associated with the project.

Based on the public comments received as noted above, the Department determined that a public hearing was necessary. The announcement for a public hearing notice was placed on a twenty-day public notice on August 21, 2019. Thereafter, the Department received two additional letters voicing concerns about future dredging impacts to White Creek in Ocean View, Delaware.

Mr. Wood was provided with a copy of the Application and the plans associated with the utility crossing of White Creek. It was also explained to Mr. Wood that the Department only has jurisdiction beneath White Creek, and that the bore pits and the remainder of the project were not within the Department's jurisdiction. It should also be noted that, in order to address concerns raised by the public during the public notice period, the Applicant slightly modified the project site plans to avoid an existing docking facility. The revised plans increased the amount of pipeline in subaqueous lands by 82 linear feet.

Accordingly, the Department held its public hearing concerning this matter, as noticed, on October 1, 2019, which was attended by Department staff, representatives of the Applicant and Sovereign Consulting, Inc., and numerous individuals from the public. At the time of the hearing, the revised project site plans were fully vetted to the public. The hearing record was kept open for receipt of public comment through October 4, 2019. 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) five documents introduced by responsible Department staff at the public hearing, and marked accordingly by this Hearing Officer as “DNREC Exhibits 1-5”; (3) documentation introduced by representatives of the Applicant at the time of the hearing, and marked accordingly as “Applicant Exhibit 1”; (4) correspondence dated September 8, 2019 from Mr. Wood, requesting a continuance of the public hearing scheduled for October 1, 2019; (5) statement from Mr. Wood given orally at the time of the hearing, marked by this Hearing Officer at that time as “Wood Exhibit 1”; (6) additional statement from Mr. Wood, also given at the public hearing, and marked at that time as “Wood Exhibit 2”; (7) comment from David Rudolph received via e-mail, dated October 4, 2019; and (8) Technical Response Memorandum (“TRM”) from Patty Murray, Program Manager, WSLs, dated January 21, 2020.

The Department’s persons primarily responsible for reviewing this application, Ms. Murray and Tyler Brown, Section Manager, WSLs, developed the record with the relevant documents in the Department’s files.

At the request of this Hearing Officer, the technical experts in the Department’s WSLs prepared the above referenced TRM to (1) specifically address the concerns associated with this Application, as set forth in the public comments received by the Department; (2) provide a regulatory review of this proposed project; and (3) offer conclusions and recommendations with regard to the proposed project for the benefit of the Record generated in this matter. The TRM provides a discussion of the comments received by the Department regarding matters specifically associated with the Application currently pending before the Secretary at this time. This TRM does not address, however, those comments that pertain to matters outside the permitting authority of the Department, nor is it responsive to any comments not specifically related to the pending Application, which was the subject matter of the public hearing held by the Department on October 1, 2019.

I find that the WSLs's TRM offers a proper review of all aspects of the Applicant's proposed project, addresses those concerns germane to the subject matter of the October 1, 2019 public hearing, and responds to them in a balanced manner, accurately reflecting the information contained in the formal hearing record. Thus, the aforementioned TRM, with its attachments, is attached hereto as Appendix "A" and expressly incorporated herein as such.

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

This Application is for a Subaqueous Lands Lease to allow Delmarva Power & Light to install and occupy a sixteen-inch diameter by 564 foot-long 25kV electric power distribution feeder by HDD 20 feet beneath the mudline of White Creek in Ocean View, Sussex County, Delaware. The proposed HDD bore pits will occur in the upland areas, outside of the Department's jurisdiction, adjacent to the terminus of Daisey Avenue and Peaceful Lane in Ocean View, Delaware. Preliminarily, I find that the proposed project will require the Applicant to obtain a Subaqueous Lands Lease (SL-213/19). I further find that the Applicant's proposed project is subject to the requirements of Delaware's *Subaqueous Lands Act* (7 Del.C. Chapter 72) and *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504).

In reviewing the applicable statutes and regulations, the Department's experts in the Division of Water have concluded that the Applicant's proposed project, as described in detail in the Application, and as set forth herein above, complies with the Department's regulations administered by the WSLs. The jurisdiction of the Department is limited to the mean high-water line from bank to bank on White Creek. As stated previously, the proposed HDD bore pits are not within DNREC's jurisdiction. Should this Application be approved, the Subaqueous Lands Lease that would be issued by the Department would be reflective of the Application submitted and would include special conditions intended to protect public health and the environment.

In its TRM, the WSLs notes that no portion of the proposed project within the Department's jurisdiction will affect navigation, recreation, aesthetic enjoyment, natural resources, or other uses of subaqueous lands. The entire utility line within the Department's jurisdiction will not be visible, nor will it have any effect on the use or resources associated with the subaqueous lands of White Creek.

In further response to the concerns received by the Department, the WSLs coordinated with the Department's Shoreline and Waterway Management Section ("SWMS") about the potential impacts to future dredging projects within White Creek. As set forth in the aforementioned TRM, it is the opinion of the Department's experts in the SWMS that the proposed installation of the Applicant's powerline in the upstream portion of White Creek should have no impact on any future dredging work the Department may conduct in the waterway.

The Department's TRM expressly notes that all proposed activities within private or public subaqueous lands, channelward of the mean high-water line, require a Subaqueous Lands Permit and/or Lease from the State of Delaware. When determining if an applicant should perform activities on such lands, the WSLs considers the potential effect on the public, and the extent to which the public will benefit or suffer detriment from the project. In the present case, the installation of a utility line below the bed of White Creek should have no effect on the public's use of this natural resource, as the utility line will be a minimum of 20 feet below the mudline of the navigable waterbody. Additionally, the utility line should not affect the inherent right of any property owner to wharf out with a docking facility. All parcels adjacent to the project already have docking facilities, and the proposed project will have no effect on the existing facilities. The Department has required the Applicant to submit an as-built plan, with the utilization of a Tru Tracker system, to delineate the exact location of the utility line. Should an adjacent property owner decide to alter their docking facility, the Applicant will be required to visually mark the location of the utility line. The TRM states that this would be a highly unlikely scenario, as the current alignment as set forth in the Application is a safe distance from existing structures. Nevertheless, the burden would be on the Applicant to physically mark the utility line, should the Department have concerns with future alteration of any adjacent docking facilities.

I find and conclude that the Applicant has adequately demonstrated its compliance with all requirements of the statutes and regulations, as noted herein, and that the record supports approval of the Application submitted by Delmarva Power & Light. In conclusion, I recommend that the Subaqueous Lands Lease, as required for this proposed project, consistent with the record developed in this matter, be issued by the Department in the customary form, and with appropriate conditions.

Further, I recommend the Secretary adopt the following findings and conclusions:

1. The Department has jurisdiction under 7 *Del. C.* §§6003, 6004, 6006(4), Delaware's *Subaqueous Lands Act* (7 *Del.C.* Ch. 72), the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), and all other relevant statutory authority, to make a final determination on the Application after holding a public hearing, and considering all information contained in the Record generated in this matter;
2. The Department provided proper public notice of the Application of Delmarva Power & Light, and of the public hearing held on October 1, 2019, and held said hearing in a manner required by the law and regulations;
3. The Department has carefully considered the factors required to be weighed in issuing all permits required by the Applicant's proposed project, and finds that the Record supports approval of the Application and the issuance of the Subaqueous Lands Lease associated with same;
4. The Department shall issue Subaqueous Lands Lease (SL-213/19). Furthermore, the Lease shall include all special conditions as is necessary to ensure that Delaware's environment and public health will be protected from harm;
5. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and

6. The Department shall serve and publish its Order on its internet site and shall provide legal notice of the Order in the same manner that the Department provided legal notice of the Application.



LISA A. VEST
Public Hearing Officer

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Attachments:

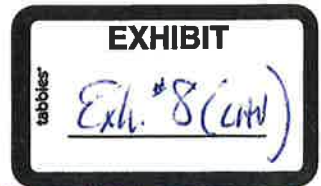
Appendix A: WSLS TRM (01/28/2020)

APPENDIX “A”



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL
DIVISION OF WATER
RICHARDSON & ROBBINS BUILDING
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

WETLANDS &
SUBAQUEOUS LANDS



PHONE
(302) 739-9943

Technical Response Memorandum

To: Lisa A. Vest, Hearing Officer

Through: Virgil Holmes, Director, Division of Water *1/28/2020*
Tyler Brown, Section Manager, Wetlands and Subaqueous Lands Section *TB 1-28-20*

From: Patty Murray Program Manager, Wetlands and Subaqueous Lands Section *PM 1/28/20*

Date: January 21, 2020

Subject: Delmarva Power White Creek Utility Crossing Project, Subaqueous Lands Lease Application

INTRODUCTION

On March 25, 2019, the Wetlands and Subaqueous Lands Section (WSLS), Division of Water, Department of Natural Resources and Environmental Control received an application from Sovereign Consulting Inc. submitted on behalf of Delmarva Power & Light located in White Creek in Sussex County, Delaware. The proposed project is subject to the requirements of the Subaqueous Lands Act (7 Del C., Chapter 72) and the Regulations Governing the Use of Subaqueous Lands. The proposed project is to install and occupy a 16 inch in diameter by 564 foot long 25kV electric power distribution feeder, by horizontal direction drill (HDD) 20 feet beneath the mudline of White Creek in Ocean View Sussex County DE. The proposed HDD bore pits will occur in the upland areas, outside of the Departments jurisdiction, adjacent to the terminus of Daisey Avenue and Peaceful Lane.

The project was placed on a 20 day public notice on June 26, 2019. During the public notice period, the WSLS received four written comments, three were against the project from Gordon Wood, Gail Payne, and John McAleer. Mr. Wood's objection claimed that the proposed project lacked exact site plans, and that the community should have the opportunity to understand the material and economic impacts associated with the project. There was one comment from DNREC's Division Fish & Wildlife recommending time of year restrictions from March 1st to September 30th to protect Summer Flounder, Horseshoe Crab, and American Eel. A frac-out plan was also recommended.

Based on the objections to the project WSLs determined that it was necessary to hold a public hearing. The announcement for a public hearing was placed on a 20 day public notice on August 21, 2019. After advertisement of the public hearing, there were two more letters submitted with concerns about any future dredging impacts to White Creek.

Mr. Wood was provided with the application and the plans associated with the utility crossing of White Creek. It was explained that the Department only has jurisdiction beneath White Creek, and that the bore pits and the remainder of the project were not within the Department's jurisdiction. In an attempt to address concerns raised during the public notice Delmarva Power slightly modified the project site plans to avoid an existing docking facility; although, the limit of disturbance as submitting on March 25, 2019 remained the same. The revised plans increased the amount of pipeline in subaqueous lands by 82 linear feet.

The public hearing was held on October 1, 2019. The public hearing was attended by WSLs staff, representatives of Delmarva Power and Sovereign Consulting, Inc., and individuals from the public. The hearing began with DNREC WSLs representative Patty Murray giving a presentation which described the background of the project from the initial application to the slightly modified revised plans. Jim Smith of Delmarva Power also gave a presentation where he discussed the project as a whole which exceeds the Department's jurisdiction and the reason for the location changes because of the concerns and objections they received during the public comment period.

There were five people who spoke during the public comment time at the hearing. Most of the questions were for Delmarva Power and exceeded the Department's jurisdiction.

Following the conclusion of the public hearing, the official record was kept open until October 4th at 4:30 p.m. in consideration of the revised plans.

This Technical Response Memorandum (TRM) presents the Wetlands and Subaqueous Lands Section's findings regarding the above-referenced permit application, the public comments received during the public notice period, and the testimonies given during the public hearing.

REGULATORY REVIEW - SUBAQUEOUS LANDS

The following review evaluates the proposed project with respect to the requirements of the Subaqueous Lands Act 7 Del. C., Chapter 72 and the Regulations Governing the Use of Subaqueous Lands (Regulations) adopted in accordance with the statute. The Regulations provide the criteria for evaluating projects that are proposed to be constructed in public or private subaqueous lands. The burden is on the applicant to prove to the Department that the requirements of these Regulations have been met; and if the granting of any permit will result in loss to the public of a substantial resource, that the loss has been offset or mitigated. The Department's regulatory evaluation and the public comments received are addressed according to the pertinent sections of the Regulations as follows.

Section 4.0 Criteria of Permits, Leases and Letters of Authorization - Evaluation Considerations. Each application shall be reviewed based on the consideration of the performance specifications, standards and other criteria listed in this section for the type of activity proposed.

The most relevant portions of Section 4.0 for the proposed project are discussed below. These include Section 4.6 - Public Use Impact, Section 4.7 - Environmental Considerations and Section

Section 4.6 Public Use Impact - The Department shall consider the public interest in any proposed activity which might affect the use of subaqueous lands.

All proposed activities within private/public subaqueous lands, channelward of the mean high water line, require a Subaqueous Lands Permit/Lease from the State of Delaware. When determining if an applicant should perform activities on these lands, the Wetlands and Subaqueous Lands Section considers the potential effect on the public and the extent to which the public will benefit or suffer detriment from the project. In this circumstance the installation of a utility line below the bed of White Creek should have no effect on the public's use of the resource. The utility line will be a minimum of 20 feet below the mudline of the navigable waterbody. Additionally, the utility line shouldn't affect the inherent right of any property owner to wharf out with a docking facility. All parcels adjacent to the project already have docking facilities and the project will have no effect on the existing facilities. In the event that one of the adjacent parcels decides to alter their existing docking facility, the Department has required DP&L to submit an as-built with the utilization of a Tru Tracker system to delineate the exact location of the utility line. If an adjacent property owner decides to alter their docking facility DP&L will be required to visually mark the location of the utility line. This is a highly unlikely situation since the current alignment is a safe distance from existing structures. The burden will be on DP&L to physically mark the utility line in the event that the Department has concerns with the future alteration of any adjacent docking facilities.

4.6.3 - The potential effect on the public with respect to commerce, navigation, recreation, aesthetic enjoyment, natural resources, and other uses of the subaqueous lands.

No portion of the project within the Departments jurisdiction will effect navigation, recreation, esthetic enjoyment, natural resources, and other uses of the subaqueous lands. The entire utility line within the Departments jurisdiction will be un-visible and will have no effect on the use or resources associated with the subaqueous lands of White Creek. The WSLS coordinated with the Shoreline and Waterway Management Section about the potential impacts to future dredging projects within White Creek. The area has been dredged previously and could potentially be dredged in the future. Chuck Williams of the Departments Shoreline and Waterway Management Section provided these comments after the hearing; "The proposed installation of the DP&L powerline in the upstream portion of White Creek should have no impact on any future dredging work the Department may conduct in the waterway. It is our understanding the line will be installed 20 feet below the bottom of the creek. Future dredging of the channel in the creek will be to a depth of 4.0 feet below Mean Lower Low Water (MLLW). With the proposed

1.0 foot of over dredging that will be requested (depth of 5.0 feet below MLLW), the power line will be deep enough that it will not impact dredging and the subsequent use of the channel by the boating public. Please contact me if need any additional information or have any questions concerning this matter."

Section 4.7 Environmental Considerations

4.7.1.1 Any impairment of water quality, either temporary or permanent which may reasonably be expected to cause violation of the State Surface Water Quality Standards. This impairment may include violation of criteria or degradation of existing uses.

To ensure the protection of sensitive aquatic species in the area, a review by the DNREC Fisheries Section recommended the following: "Sampling conducted by our Division's fisheries staff revealed that White Creek supports a large number of juvenile migratory fish and is thus considered an important nursery area in the Inland Bays. Several species of particular commercial and recreational importance utilize the creek and could be impacted by this project. A primary species of concern for this project is Summer Flounder (*Paralichthys dentatus*) which utilize the creek as a nursery area. We recommend that no in-water work occur from March 1st to September 30th to allow time for young of the year to grow large enough to be less vulnerable to habitat-altering activities and then migrate out of the system. This window should minimize the number of young of the year flounder impacted by project activities.

White Creek is utilized by large numbers of American Eel so no in-stream work from March 1st to June 30th to allow upstream passage of elvers (young eels).

Intertidal zones of the Inland Bays generally support spawning Horseshoe Crabs time-of-year-restriction (TOYR) from April 15th to August 30th to minimize the impact to Horseshoe Crabs.

The DNREC WSLS has placed these TOYR's within the permit as a special condition to protect environmental resources in the event that HDD activities could affect the species listed above. Since there is no exposure to subaqueous lands no additional resources or water quality should be affected.

CONCLUSIONS

The WSLS finds that the activity described in the application for the Subaqueous Lands Lease complies with the Regulations administered by the WSLS. Jurisdiction is limited to the mean high water line from bank to bank on White Creek. Again, the bore pits are not within the Department's jurisdiction.

Additionally, the dredging issues raised during the hearing have been addressed by the Departments technical expert as it relates to dredging. Chuck Williams of the Shoreline and Waterway Management Section provided the comments above to explain the Departments position on the effects of future dredging operations in this area.

Lastly, the location of the cable will be well defined using the Tru Tracker system. As stated above the applicant will be required to submit an as-built of the utility line and physically delineate the line in the event that the Department or an adjacent property owner is concerned about any future project in subaqueous lands.

In the event the Secretary determines that this project should be approved, included are draft authorizations with appropriate conditions for consideration.

Revised



Legend

16" Diameter Bore Location



NAD 1983 UTM Zone 18N

870

Feet



50 West Welsh Pool Road, Suite 6
Exton, Pennsylvania 19341
(610) 524-8124 (610) 524-8129

OCT - 1 2019

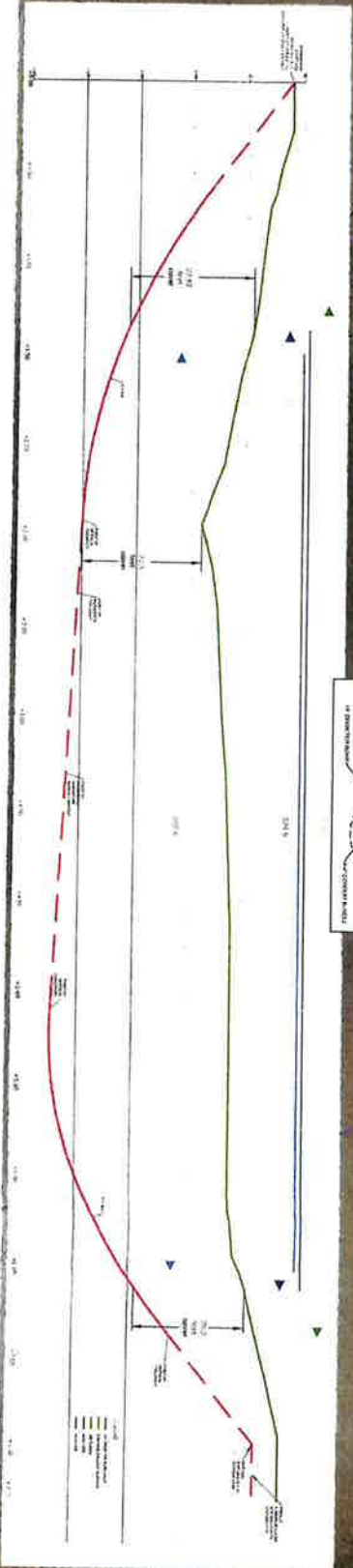
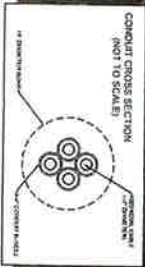
Figure 4 - DE Wetland Tile Exhibit
Tile DNR042

Delmarva Power & Light
Whites Creek Utility Distribution Crossing
Sussex County, Delaware

Date: 3/08/2019

OCT - 1 2019

W.S.L.S.
APPROVED PLANS
PERMIT#
DATE
(SEE PERMIT CONDITIONS)



134-12-00-2008.00



Wetland impacts on this sheet are regulated by both USACE and DNREC

W.S.L.S.
APPROVED PLANS
PERMIT#
DATE
(SEE PERMIT CONDITIONS)

Temporary Impacts on this Sheet	
	Wetlands (SF)
Boring	675.49
Matting	0.00

2007 Tidal Wetlands Boundary Downloaded From Firstmap@DE and Digitized by Sovereign Consulting Inc.

NAD 1983 UTM Zone 18N



Legend

- 16" Diameter Bore Location
- Delineated Wetlands
- Head of Tide Wetlands 2007



Delmarva Power & Light

Whites Creek Utility Distribution Crossing
Sussex County, Delaware

50 West Welsh Pool Road Suite 6
Exton, PA 19341
P: 610-524-8124

Date: 3/08/2019 Impact Exhibit