

## HEARING OFFICER'S REPORT

**TO:** The Honorable Shawn M. Garvin  
Cabinet Secretary, Department of Natural Resources and Environmental Control

**FROM:** Theresa L. Newman  
Regulatory Specialist, Office of the Secretary  
Department of Natural Resources and Environmental Control

**RE:** Application of Andrew and Maureen Bolduc for a Subaqueous Lands Permit

**DATE:** August 28, 2024

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### **I. BACKGROUND AND PROCEDURAL HISTORY:**

A public hearing was held on Wednesday, April 15, 2020, at 6:00 p.m. through the WebEx platform utilized by the Department of Natural Resources and Environmental Control (“DNREC,” “Department”) pursuant to the State of Emergency declared by Governor Carney, dated March 13, 2020. The State of Emergency mandated all public meetings of executive branch public bodies governed by 29 *Del. C.* §§10001 et. seq. to be conducted electronically, either by means of telephone conference call or video-conference call, to prevent unnecessary public gatherings due to the public threat of COVID-19. The virtual hearing was conducted to receive comments on the application submitted by Coastal and Estuarine Research Inc., on behalf of Andrew and Maureen Bolduc for a Subaqueous Lands Permit (“Applicant, Bolduc”) to conduct mechanical maintenance dredging located at 32408 Holly Terrace Road, Holly Ridge Terrace, Ocean View, Sussex County, Delaware (Tax Map Parcel #1-34-9.00- 186.00) and to transport the dredged material via water-tight dump trucks to a confined disposal area located northeast of the intersection of Irons Lane and Old Mill Road at Tax Parcel# 134-7.00-187.00, Dagsboro, DE (“Application”).

On March 5, 2018, the Department's Division of Water, Wetlands and Waterways Section ("WWS") received the Application proposing to conduct 110± cubic yards of mechanical maintenance dredging to a depth of -4 feet mean lower water ("MLW") at the center of the lagoon. The applicant proposes to conduct dredging to remove accumulated sediments, aiming to restore the original depth and to improve navigation. All dredging will take place in private subaqueous lands owned by the Applicant, located at 32408 Holly Terrace Road in Ocean View, Delaware and will be conducted from the applicants' uplands by a long-reach excavator. The Applicant proposes to transport the dredge material, approximately 5 miles from the property to a confined disposal area located northeast of the intersection of Irons Lane and Old Mill Road at Tax Parcel# 134-7.00-187.00, Dagsboro, DE. It should be noted that the disposal location has been previously approved for disposal of dredging material.

The WWS conducted an initial review of the Application and issued a 20-day public notice of the Application in the New Journal and Delaware State News from April 4, 2018, through April 24, 2018. To that, the Department received one written comment in objection addressing concerns of the proposed project. The commenter, a property owner adjacent from the Applicant, expressed concerns regarding property line discrepancies, noting that the property line measures up the bulkhead located to the east of the proposed project, rather than the centerline of the lagoon. They also expressed concerns about potential damage to their existing bulkheads, located to the south of the Applicant's proposed project, due to dredging. Lastly, they addressed concern of potential damage to roadways by the dump trucks used to dispose of the dredging material.

It should be noted that during the notice period, the Department's Division of Fish and Wildlife reviewed the proposed project for potential harm to any species of concern in the area of the proposed project. It was found to be no concern with any species in the dredging location area documented, however the Department's Division of Fish and Wildlife did recommend time-of-year restrictions to protect eastern tiger salamander located at the disposal site, to be incorporated as a special condition of the permit. In addition, the Department's Groundwater Protection Branch conducted a review of the proposed project for any concerns between the dredged material at the disposal site and then potential to impact groundwater. They measured

the conductivity, pH, and dissolved oxygen in two locations at the disposal site. It was determined that there was no groundwater contamination.

During the initial review process, the Department conducted an on-site inspection which included a field reconnaissance to assess water depths. It was determined that White Creek, the connecting waterbody to the unnamed lagoon where the project is proposed, has a controlling water depth of 4 feet below mean low water. According to Section 4 of the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), dredging projects may not be deeper than the existing controlling depth of the connecting waterway. The unnamed lagoon was found to have depths ranging from -3 feet MLW within the unnamed lagoon, becoming even more shallow towards the project site. As a result, the Department required the Applicant to limit maintenance dredging to -3 feet MLW, in compliance with the Regulation.

Additionally, the Department reviewed the permitting history of the site. Under Statewide Activity Approval No. SA-199/09, the permit authorized a 4-foot wide by 25-foot-long dock. The onsite inspection revealed that there was a 4-foot-wide by 26-foot-long dock with additional 5-foot-long steps. In accordance with 7 *Del.C.* §7205, the Secretary may issue an after-the-fact authorization provided the activity is consistent with the purposes and provisions of the *Subaqueous Lands Act*. The Department advised the Applicant that the existing structure was not in compliance and would need to request an after-the-fact authorization.

As a result of the Department's review and the concerns addressed by the commenter, the Applicant submitted a revised Application. The revised Application included (1) the inclusion of a request to authorize a dock extension through the after the fact permit approval process; (2) the location of the area to be dredged modifying it from the lagoon centerline to the bulkhead located 10 feet away the Applicant's property lines to the east and south, (3) modifying the mechanically maintenance dredge area to 153± cubic yards to a depth of 3 feet below mean low water; and (4) a letter of no objection from the property owner to the north.

The Applicant's request to authorize an after the fact permit, detailed a dock extension of 4-foot-wide by 1-foot-long dock with additional 5-foot-long steps to bring the existing dock into compliance. The Applicant also resubmitted an updated property survey that detailed that the Applicant's property line measures up their bulkhead rather than the centerline of the lagoon. The location of the area to be dredged was modified as well expanding it from the centerline of the lagoon to 10 feet away from the bulkheads located to the east and south of the property lines. It should be noted that the northern property line of the project was defined as a shared property line of a separate adjacent landowner who submitted a letter of no objection to dredging and was included in the revised Application. As a result of modifying the area to be dredged, the Applicant revised the measurement of the dredging from 110± cubic yards to 153± cubic yards. Lastly, for compliance with the Regulation, the Applicant modified the dredging depth from 4-feet to 3-feet, below MLW.

Subsequent to receiving the revised Application, the Department communicated with the adjacent property owner in objection with the project to discuss the revisions submitted by the Applicant. During the time, the Department received an email dated November 7, 2019, from the adjacent property owner, formally withdrawing their approval of the dredging project. In response to the objections made and the Applicant not being able to come to a satisfactory resolution with the adjacent property owner, the Department issued a public notice of the hearing. The public notice was advertised in the News Journal and Delaware State News on March 18, 2020.

On April 15, 2020, the public hearing was held by the Department. There was one member of the public in attendance for the virtual hearing, along with the Applicant and Department staff. There was no comment received during the virtual hearing. Proper notice of the hearing was provided as required by law.

## **II. SUMMARY OF THE PUBLIC HEARING RECORD:**

The public hearing record (“Record”) consists of the following documents: (1) a verbatim transcript; (2) nine documents introduced by responsible Department staff at the public hearing held on April 15, 2020, and marked by this Hearing Officer accordingly as "Department Exhibits 1-9"; (3) one document submitted by the Applicant’s Consultant, Evelyn Maurmeyer with Coastal and Estuarine Research Inc., and marked as "Applicant Exhibit 1"; and (4) Technical Response Memorandum from Julie Molina, Environmental Scientist, Division of Water, dated June 25, 2024 and received by this Hearing Officer on July 22, 2024. The Department's person primarily responsible for reviewing this Subaqueous Lands Permit application, Mrs. Molina, developed the Record with the relevant documents in the Department's files.

Following opening remarks from Mrs. Molina on behalf of the Department (and the introduction of the Department's exhibits to be entered into the Record), Mrs. Maurmeyer provided an overview of the proposed project and introduced a document that was marked into the record, accordingly. At the conclusion of the virtual public hearing, the Record remained open for 15 days, through April 30, 2020, and the Department received 3 written comments during that time.

Subsequent to the close of the Record , this Hearing Officer, Theresa Smith, requested a Technical Response Memorandum (“TRM”) from the WWS technical experts in the Department’s Division of Water to: (1) address the concerns associated with this pending Application, as set forth in the public comment received by the Department; (2) provide a formal regulatory review of the Applicant’s proposed project; and (3) offer the Division of Water’s conclusions and recommendations with regard to the Mr. and Mrs. Bolduc’s pending Application for the benefit of the Record generated in this matter.

The Department’s TRM, dated June 25, 2024, and received by this Hearing Officer, on July 12, 2024, acknowledges the comments received prior to the virtual public hearing as well as the comments in support, thereafter the public comment period ended. As such, the details of all comments received will be discussed in further detail below.

I find that the Division of Water's TRM offers a detailed regulatory review of all aspects of the Applicant's proposed Subaqueous Lands Permit, identifies all of the concerns raised regarding the proposed project, and responds to them in a balanced manner, accurately reflecting the information contained in the Record. Thus, the aforementioned TRM is attached hereto as Appendix "A" and expressly incorporated herein as such.

### **III. RECOMMENDED FINDINGS AND CONCLUSIONS:**

Currently pending before the Department is the revised application for a Subaqueous Land Permit, submitted by Andrew and Maureen Bolduc (1) to authorize an after-the-fact dock extension, measuring 4-foot-wide by 1-foot-long with a 4-foot-wide by 5-foot-long set of access steps, (2) to conduct 153± cubic yards of mechanical maintenance dredging to a depth of 3 feet below MLW at an unnamed lagoon adjacent to White Creek, located at 32408 Holly Terrace Road, Holly Ridge Terrace, Ocean View, Sussex County, Delaware (Tax Map Parcel #1-34-9.00- 186.00), and (3) to transport the dredged material via water-tight dump trucks, approximately 5 miles to a confined disposal area located northeast of the intersection of Irons Lane and Old Mill Road at Tax Parcel# 134-7.00-187.00, Dagsboro, DE. I find that the Applicant's proposed project is subject to various state and federal regulatory requirements, including, but not limited to, Delaware's *Subaqueous Lands Act (7 Del.C. Ch.72)*, 7 DE Admin. Code 7504 - *Regulations Governing the Use of Subaqueous Lands*, and as provided for under Delaware law in 7 *Del.C. Ch.60*.

I further find the Department's TRM provides a detailed response to the comments received regarding the Application. The Department received 1 comment in objection that addressed a few concerns and received 3 comments in support of the proposed project. It should be noted that after the hearing, the commenter who initially objected to the proposed project did submit one of the written comments in support, stating that they were in full agreement with the revised proposed project.

As previously mentioned, the comment received in objection expressed concerns regarding property line discrepancies with the consideration of the proposed bulkheads, concerns of possible collapse of adjacent neighbor's bulkhead, and concern that the dump trucks hauling away the dredged material would cause damage to the roadway. The Department detailed the revisions made by the Applicant that meet state and federal regulatory requirements. In response to the comments, the revised Application included an updated property survey, detailing that the Applicant's property line is to their bulkhead rather than the lagoon centerline. In addition, the Applicant also modified the proposed dredging area to 10 feet from the adjacent property lines located to the east and south, to alleviate the concern of protentional collapse of bulkheads owned by adjacent property owners. It should be noted commenter's concern of the bulkhead was acknowledged in their most recent email of support that agrees with the 10-foot setback to the property lines to protect the bulkheads from collapsing.

The Department also addressed the concern of possible damage to roadways by dump trucks hauling away the dredged material. While the roadways fall outside of the Department's scope of authority, it is the responsibility of the service provider to maintain licensing, bonding, insurance and any other requirements to provide such service, that would cover any damage to the roadway due to hauling of the material.

In reviewing the applicable statutes and regulations, as well as weighing public benefits of this project against potential detriments, I find that the aforementioned project complies with all applicable federal and state laws and regulations. Should this Application be approved, the draft Subaqueous Lands Permit, attached hereto as Appendix B, shall be issued by the Department and is reflective of the revised Application submitted and would include all necessary requirements intended to protect public health and the environment. 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 Andrew and Maureen Bolduc.

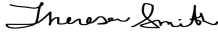
In conclusion, I recommend that the Subaqueous Lands Permit necessary for the proposed activities as set forth in the Application submitted by Andrew and Maureen Bolduc, consistent with the Record developed in this matter, be issued by the Department in the customary form, and with appropriate conditions.

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

1. The Department has jurisdiction under Delaware's *Subaqueous Lands Act* (7 Del.C. Ch.72) and 7 DE Admin. Code 7504 - *Regulations Governing the Use of Subaqueous Lands* and all other relevant statutory authority, to make a final determination of the Application after holding a public hearing, considering the public comments, and reviewing all information contained in the Record generated in this matter;
2. The Department provided proper public notice of the Application submitted by Andrew and Maureen Bolduc. and of the public hearing held on April 15, 2020, and held said hearing to consider all public comment that may be offered on the Application, in a manner required by the law and regulations;
3. The Department has carefully considered the factors required to be weighed in issuing the permit required by this Application, and finds that the Record supports approval of the Application, and the issuance of the Subaqueous Lands Permit associated with the same;
4. The Department shall issue the Subaqueous Lands Permit to the Applicant, Andrew and Maureen Bolduc to :1) authorize an after-the-fact dock extension, measuring 4-foot-wide by 1-foot-long with a 4-foot-wide by 5-foot-long set of access steps, (2) conduct 153± cubic yards of mechanical maintenance dredging to a depth of 3 feet below MLW at the inner end of an artificial lagoon adjacent to White Creek at 32408 Holly Terrace Road, Holly Ridge Terrace, Ocean View, Sussex County, Delaware (Tax Map Parcel #1-34-9.00- 186.00), and (3) transport the dredged material via water-tight dump trucks, approximately 5 miles to a confined disposal area located northeast of the intersection of Irons Lane and Old Mill Road at Tax Parcel# 134-7.00-187.00, Dagsboro, DE. Furthermore, said permit shall include all conditions as set forth in the Department's draft permit, 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.

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Theresa L. Smith  
Hearing Officer

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Attachments/Appendices:

Appendix A: Technical Response Memorandum (06/25/2024)

Appendix B: Draft Subaqueous Lands Permit