

HEARING OFFICER'S REPORT

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

FROM: Lisa A. Vest
Regulatory Specialist, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: Application of Lawton Family Marina for (1) a Marina Permit; (2) an Operations and Maintenance Plan, and (3) a Subaqueous Lands Lease to construct a new multi-slip marina and to authorize a boat ramp in Herring Creek, located northwest of the terminus of Sisters Lane, Millsboro, Sussex County, Delaware. (Hearing Docket No. 2021-P-W-0001)

DATE: June 22, 2023

I. BACKGROUND AND PROCEDURAL HISTORY:

A virtual public hearing was held on Wednesday, February 24, 2021, at 6:00 p.m. via the State of Delaware Cisco WebEx Meeting Platform by the Department of Natural Resources and Environmental Control (“DNREC” or “Department”) to receive comment on the application of the Lawton Family Marina, c/o Joe Ribinsky (“Lawton Family” or “Applicant”) for (1) a Marina Permit; (2) an Operations and Maintenance Plan; and (3) a Subaqueous Lands Lease to construct a new multi-slip marina and to authorize a boat ramp in Herring Creek, located northwest of the terminus of Sisters Lane, Millsboro, Sussex County, Delaware (“Application,” “proposed project”). It should be noted that the Applicant’s proposed project has been modified multiple times since the original plans were received by the Department back in 2019. This Hearing Officer’s Report (“Report”) will provide a summary of the interactions that have taken place between the Department and the Applicant regarding this matter, the modifications that have been made to the originally proposed project, and the proposed approved Draft authorizations that are now pending before the Department regarding this proposal.

The proposed project is subject to the requirements of Delaware’s *Subaqueous Lands Act* (7 Del.C. Ch. 72), the *Marina Regulations* (7 DE Admin. Code 7501) and the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504).

On December 30, 2019, the Department's Division of Water, Wetlands and Waterways Section ("WWS"), received the initial Application submitted on behalf of the Lawton Family by Coastal and Estuarine Research, Inc. (the Applicant's consultant), to construct a new 10-slip docking facility, located in Millsboro, Delaware, as noted above (Tax Parcel No. 2-34-18.00-51.06). Accordingly, the Application was advertised for a 20-day public notice period from February 19, 2020, through March 10, 2020. During that time period, the WWS received five written comments in opposition to the proposed project, expressing concerns including, but not limited to, what was perceived as the "excessive need" for a 10-slip marina to serve the purposes of a family, questioning the on-site management of the marina (since there is no housing on the property), and the "play area" of Herring Creek now being restricted as a no-wake zone. A public hearing was also requested to be held, based on these concerns.

During the Department's initial review of the Application, WWS's project scientist, Julia R. Molina, noted deficiencies therein. On February 12, 2020, Ms. Molina emailed the Applicant's consultant from Coastal and Estuarine Research, Inc., Evelyn Maurmeyer, and conveyed a list of required items needed to process the Application. Following the end of the public notice period, on March 21, 2020, the public comments received by the Department were also forwarded to Ms. Maurmeyer with the request that the Applicant address public concerns expressed in the comments. Ms. Molina further advised Ms. Maurmeyer at that time that a public hearing had been requested but would not be scheduled until the requested information was received from the Applicant.

On November 5, 2020, the Department received the requested updates from Ms. Maurmeyer. The updates included an Operations and Maintenance Plan for the management of the marina, describing the use of the marina as being utilized by nearby non-waterfront parcels, adding the existing boat ramp to the Application, identifying the site location of the marina on the parcel, clarifying proposed dimensions, and submitting boat registrations to provide justification on the number of slips. Also included in these updates was a letter from counsel for the Applicant, describing the ownership of the parcel, and a notarized letter authorizing Joe Ribinsky to represent all the owners of record for the docking facility application process.

It should be noted that the WWS typically processes applications in the name of the subject property owner. Due to the parcel in the present matter having multiple titleholders, the WWS decided to process the Application under the name of “Lawton Family Marina, c/o Joe Ribinsky.”

Following review of the submitted materials and further discussion with the Applicant’s consultant, additional clarifications were submitted to the Department by Ms. Maurmeyer on December 30, 2020. Specifically, details on the residents and parcels the marina would serve were provided, including the proposal of a “de-facto” community that included twelve (12) parcels with the aforementioned waterfront parcel remaining open space. Based on the lack of detailed bathymetry submitted, the Department questioned whether the innermost slips had adequate water depths for the mooring of vessels. A pier from uplands going out to an access dock oriented parallel to the shoreline with finger piers on the channelward side of the dock was suggested, but the Applicant declined that reconfiguration. The Applicant had concerns that the suggested reconfiguration would block access to the boat ramp and stated that the vessels would be moored against the tidal ebb and flow currents, which could result in potential damage to the vessels and structure at times of high waves and strong currents.

The Department moved forward at that point with publication of a Legal Notice in both the *Delaware State News* and the *News Journal* on February 3, 2021, advising the public of the above-described proposed project, and of a 20-day public notice period during which the Department was accepting comment regarding this matter. The Legal Notice also announced that a virtual public hearing would be held to consider comments on the proposed project on February 24, 2021. Notice of the public hearing was also placed on the State of Delaware Public Meeting Calendar on February 5, 2021. During advertisement of the public hearing, the Department received one written comment submitted in objection to the proposed project. The objector again expressed concerns including, but not limited to, navigational safety, light pollution, and the allocation of slips to non-family members.

At the time of the public hearing on February 24, 2021, the Applicant proposed to construct and operate a new 10-slip minor marina, consisting of a 4 foot wide by 120 foot long pier, six (6) 2 foot wide by 24 foot long finger piers, two (2) boat lifts with 4 associated pilings each and 16 free-standing mooring pilings, and to authorize a 16 foot wide by 10 foot long concrete boat ramp in Herring Creek, located northwest of the terminus of Sisters Lane, Millsboro, Sussex County, Delaware (“original proposed project”). The public hearing was attended by Department staff, the Applicant’s representatives and members of the public.

Following the public hearing, the Department entered into significant discussions with the Applicant concerning the above-described original proposed project. At the request of this Hearing Officer, the Division of Water’s experts in the WWS provided a Technical Response Memorandum (“TRM”), for the benefit of the hearing record (“Record”) generated in this matter. The Department’s TRM provided not only responses to the comments received in this matter but offered an extensive chronology of the interactions between the Department and the Applicant concerning the original proposed project that occurred subsequent to the public hearing. The Department’s TRM, dated May 9, 2023, and received by this Hearing Officer on May 26, 2023, is discussed in greater detail below. It should be noted that proper notice of the hearing was provided as required by law.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The Record consists of the following documents:

(1) The official verbatim Transcript of Proceedings from Wilcox & Fetzer, Ltd., generated from the virtual public hearing of February 24, 2021;

(2) Six (6) exhibits identified as the Department’s Exhibits regarding the Application as referenced above, introduced by responsible Department staff at the aforementioned hearing, and marked accordingly as “Dept. Exh. 1-6”;

(3) Copy of the Applicant’s presentation offered at the public hearing, marked accordingly by this Hearing Officer as “Applicant’s Exhibit 1,” identified as such on the hearing web page dedicated to this matter under the “Applicant’s Exhibits” section;

(4) Copies of the public comments received by the Department regarding the Application as referenced above, as identified on the hearing web page dedicated to this matter under the “Public Comments” section; and

(5) Technical Response Memorandum (“TRM”) prepared by the Department’s Division of Water, WWS, dated May 9, 2023. The Department’s TRM was provided to this Hearing Officer by WWS on May 26, 2023, as an electronic file named “Lawton Family Marina – Millsboro Subaq-Compiled Portfolio.” The electronic file includes, but is not limited to, the associated Draft Subaqueous Lands Lease, Draft Marina Permit, and Draft Operations & Maintenance Plan, should the Secretary approve this pending permitting matter.

The Department’s person in the Division of Water primarily responsible for reviewing this Application, Julie R. Molina, Environmental Scientist, developed the Record with the relevant documents in the Department’s files.

Subsequent to the Department’s presentation given at the public hearing of February 24, 2021, the Applicant’s consultant, Ms. Maurmeyer, offered a presentation on behalf of the Applicant. During that presentation, the following clarifications were made for the benefit of the Record being generated in this matter:

1. The term “marina” applied to this proposal due to DNREC’s marina definition of a boat docking facility that allows mooring of five or more vessels;
2. The marina would not be operated as a commercial facility;
3. There are no amenities that a commercial marina would typically provide, such as fueling facilities or vessel maintenance facilities;

4. The use of the marina would be the extended family of the heirs of Catherine Lawton, as well as one close family friend. All proposed marina users live within walking distance of the proposed structure and are identified as being associated with the aforementioned twelve (12) parcels;
5. Other nearby docking facilities have similar channelward encroachment as the proposed project;
6. The marina would not result in a no-wake zone nor limit the recreational use of the waterbody. Taking into account the width of the waterbody where the proposed docking facility is planned, and given that boats must maintain no wakes within 100 feet of structure, approximately 400 to 900 feet of width remains where vessels could pass at cruising speeds; and
7. Herring Creek is public subaqueous lands, available for use by the public, and so the Applicant has the same right as others to utilize the waterway.

Following the Applicant's presentation, this Hearing Officer then opened the hearing for receipt of live public comment. Several members of the public offered comment at the time of the hearing. Concerns raised at that time by several commenters included the issue of the widest and deepest section of Herring Creek, where people typically pull tubes, wakeboard, jet-ski and waterski, would be limited to a no-wake zone with this proposed project. Another commenter contested the Applicant's estimation of 400 to 900 feet of usable waterbody width for vessels, noting that, due to existing water depths (and since the channel is located along the southern stretch of Herring Creek), there is actually only 180 feet of usable width, and that the proposed docking facility would limit that width further. Additionally, several commenters expressed concern for the onsite management of the marina (since the property is vacant), and were unsure as to whom potential complaints would be reported, since there are multiple families involved, since there have been previous complaints in that area regarding noise, the use of profanity traveling across the waterway, etc. Still other commenters questioned the ambiguity of the use of the marina being for family verses for community use.

As set forth previously herein, the Record generated in this matter reflects that the Department's WWS provided a TRM to (1) specifically address the concerns associated with the Application, as set forth in the public comments received by the Department; and (2) offer conclusions and recommendations regarding this pending permitting matter for the benefit of the Record. The TRM provides a detailed chronology of the interactions between the Department and the Applicant in this matter, both during the pre- and post-hearing phases of the permitting process, a thorough evaluation of the Applicant's proposed project in light of the requirements of the applicable statutes and regulations, a summary of the public comments received by the Department in this matter and detailed responses to the same.

I find that the aforementioned TRM, as provided by the Department's experts in the Division of Water, addresses the areas of concern voiced by the public comments received by the Department in this permitting matter, and provides responses to those comments in a balanced manner, accurately reflecting the information contained in the Record. Accordingly, the Department's TRM, dated May 9, 2023, as contained within the Department's electronic file, along with other relevant documents in the Record, provided to this Hearing Officer as "Lawton Family Marina-Millsboro Subaq-Compiled Portfolio" on May 26, 2023, is attached hereto for the Secretary's review as Appendix "A," and is hereby expressly incorporated herein.

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

Currently pending before the Department is the above-described Application for the proposed Lawton Family Marina, located in Herring Creek and northwest of the terminus of Sister's Lane, Millsboro, Sussex County, Delaware. As noted previously, the Applicant's proposed project has been modified multiple times since the original plans were received by the Department back in 2019, both prior to and subsequent to the public hearing of February 24, 2021. I find that the Applicant is required to obtain a Marina Permit, an approved Operations and Maintenance Plan, and a Subaqueous Lands Lease for the proposed project, for the reasons noted above.

I further find that above-described Application is subject to various state and federal regulatory requirements, including, but not limited to, the requirements of Delaware's *Subaqueous Lands Act* (7 Del.C. Ch. 72), the *Marina Regulations* (7 DE Admin. Code 7501) and the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), and as provided for under 7 Del.C. Ch. 60.

The TRM notes that, subsequent to the public hearing of February 24, 2021, the WWS determined that the ownership documentation and analysis provided by counsel for the Applicant was valid. Additional discussions regarding the “de-facto” community proposed by the Applicant then ensued. In response to requesting justification for the number of slips proposed for the marina, the Applicant advised the Department that the proposed project would serve multiple parcels nearby who have shared ownership of the waterfront parcel. However, of the twelve (12) parcels listed, four of the parcels were listed for sale, and one of those four was owned by a non-family member. The WWS determined that, if the Applicant wanted to propose this marina for “de-facto” community use, then prior to DNREC issuance of the requisite permits, the Applicant must attain a planned residential community approval and the marina be declared a common element through Sussex County Planning and Zoning. Otherwise, it would be inappropriate for non-waterfront properties to have docking facility rights, per Section 4.9.6 of the *Regulations Governing the Use of Subaqueous Lands*, which states that “[m]inimum frontage adjacent to subaqueous lands for a docking facility for any parcel will be forty (40) feet.” This determination was also made in consideration of development pressure and the cumulative impacts of allowing “de-facto” community use for proposed new marina facilities in a finite receiving waterbody.

Additionally, subsequent to the public hearing held in this matter, the WWS conducted a field reconnaissance in consideration of the marina being properly sited, in accordance with adequate water depths and without the need for future dredging. On September 13, 2021, WWS staff traveled to the proposed marina site during a typical low tide via boat and the course of the vessel was navigated several times along the shoreline. Physical measurements of water depths were taken at the site as well as their location using a Global Positioning Unit (“GPS”) capable of submeter accuracy.

As a result of the field reconnaissance noted above, the WWS determined that the nearshore waterway was indeed a shallow site, with water depths ranging slightly over one foot at mean low water in some of the proposed slip areas. On September 15, 2021, the WWS sent a letter requesting further information in order to continue this review and render a recommendation for the Record as to approval or denial of this Application. On December 30, 2021, Ms. Maurmeyer provided an update to the information requested. This update included revising the classification of the marina to a recreational private marina, to be operated for the exclusive use of the waterfront property owners of Tax Parcel No. 2-34-18.00-51.06. Additionally, the Operations and Maintenance Plan was updated to memorialize the marina classification to limit the use of the marina to the owners of the waterfront parcel, including action the harbormaster would take for any marina users that violated provisions of the Plan, as well as revising several other details as stipulated in the WWS's letter referenced above.

The TRM further notes that, although the Department had requested detailed bathymetry to be submitted by the Applicant, it was not provided. This Application, along with two other applications currently pending before the Department in the same vicinity of Herring Creek, called into question adequate water depths for mooring and/or navigating at mean low water in the area in general. The Department was not confident in the limited water depth observations provided within these applications, and therefore contracted for a bathymetric survey encompassing all three proposed project sites located on either side of Herring Creek. The TRM provided to this Hearing Officer in the current matter was significantly delayed, according to WWS, due to the time required to schedule, conduct, and evaluate the survey. While the WWS acknowledges the prolonged processing time associated with the bathymetric survey and the subsequent review and evaluation, the TRM states that such information was deemed necessary to adequately evaluate the proposed structures and the public concerns raised in the comments received by the Department in this matter.

On June 10, 2022, the WWS provided the survey results to the Applicant, and requested that the location of the docking facility be superimposed over the bathymetry in order to evaluate for adequate water depths.

In consideration of slips attaining deeper water depths, the Applicant updated the docking facility site to be relocated 75 feet east of the boat ramp. The final submission of updates provided to WWS on March 31, 2023, eliminated the two innermost slips due to inadequate water depths and revised the Operations and Maintenance Plan to incorporate the modification to eight proposed slips (as opposed to the ten slips originally requested).

The Department's TRM provides a thorough review of the *revised* proposed project in light of the applicable statutes and regulations associated with the Application and the concerns voiced in the public comments received in this matter. The regulations provide the criteria for evaluating projects that are proposed to be constructed in public or private subaqueous lands. Further, the burden is on the Applicant to prove to the Department that the requirements of the statutes and regulations have been met, and if the granting of any permit, lease or approval will result in loss to the public of a substantial resource, or that the loss has been offset or mitigated.

The following section of this Report summarizes the concerns raised in the public comments received in this matter, and the Department's response to the same, in light of the review of the *revised* proposed project with respect to the requirements of the *Regulations Governing the Use of Subaqueous Lands* ("*SL Regulations*"), adopted in accordance with 7 *Del.C. Ch. 72, the Subaqueous Lands Act*. The TRM also notes various conditions added to the Department's draft authorizations, pursuant to that review.

Section 4.6, *Public Use Impact*, of the *SL Regulations* states that the Department shall consider the public interest in any proposed activity which might affect the use of subaqueous lands. Specifically, Section 4.6.3 demands consideration of the potential effect on the public with respect to commerce, navigation, recreation, aesthetic enjoyment, natural resources, and other uses of the subaqueous lands. The subaqueous lands located adjacent to the subject property are open for public use. The primary uses are private waterfront property owners and the general public participating in boating, watersports, fishing and crabbing.

When evaluating the *revised* proposed project for navigational concerns, Section 4.9.2.5 of the *SL Regulations* states in relevant part, “[i]n no case shall a structure extend more than 20 percent of the width of the waterbody.” The Department does not anticipate that there will be any significant adverse impacts on navigation with the addition of eight more vessels.

Although Herring Creek has not specifically been designated as a recreational use area, multiple members of the public noted in their comments that the proposed project area is located adjacent to the widest and deepest section of Herring Creek where the public typically enjoys recreational activities. Several objectors raised concern that this “play area” would be limited to a no-wake zone. Since there are varying accounts of the recreational use width, the Department reviewed existing August 2020 bathymetry of the State channel conducted by DNREC’s Division of Watershed Stewardship staff. Based on that review, the TRM states that the proposed marina would create a permanent disruption of approximately 50 feet being limited to a no-wake zone. As a result, this leaves approximately 190 feet of usable width for recreational adjacent to the *revised* project area.

With regard to the Department’s review of the *revised* proposed project in light of Section 4.7, *Environmental Considerations*, the TRM notes that an evaluation of water quality and scientific data was submitted by the consultant as part of the Siting and Design Study of the marina. The construction activity and structures associated with the marina will have treated lumber that can leach contaminants. However, the leaching occurs mostly during the first few months after installation, and the Department considers that to be minimal. Additionally, the proposed marina has minimized potential sources of contamination by not providing fueling facilities and by not allowing major vessel maintenance work to be done on the grounds of the marina.

During the review process for this matter, pursuant to Section 4.7.1.2, the WWS reached out to Michael Bott, Environmental Scientist with the Department’s Watershed Stewardship, Shellfish Program, for potential impacts to the shellfish classification area. Herring Creek is classified as a prohibited shellfish harvest area and downstream of the project area, the waterway opens up to being seasonally approved for shellfish harvesting.

The Department's Shellfish Program incorporates marina with ten or more slips into the analysis of the shellfish classification system through the evaluation of the volume of water required for the dilution of the theoretical waste discharge from a wet slip to the shellfish growing area standard, based on available hydrographic data. Since the Applicant reduced the initial number of slips from ten to eight, the *revised* proposed project no longer meets the criteria for being included in the shellfish classification assessment. However, Herring Creek is approaching the carry capacity threshold and the prohibited classification area is nearing being expanded into the seasonally restricted area. Accordingly, the Draft Marina Permit includes a special condition with the following warning for any future application to expand this marina:

NOTE, impacts to the public's ability to harvest and consume shellfish is a consideration when reviewing new or expanded marina applications and Herring Creek has been deemed nearing the carrying capacity threshold.

Section 4.7.1.3 of the *SL Regulations* requires a review of the *revised* proposed project in the light of any harm to aquatic or tidal vegetation, benthic organism or other flora and fauna and their habitats. The TRM notes that the proposed docking facility will cause some shading and additional wake but should allow for the growth of aquatic vegetation and the continued use of the area by benthic organisms. Further, the waterbody is currently used by the general public for water access along with a multitude of private docks, and the Department believes that the addition of an eight-slip marina facility should not have a significant adverse impact on the environment.

The Department's Division of Fish and Wildlife ("DFW"), Species Conservation and Research Program, determined that a time of year restriction ("TOYR") for pile driving is appropriate to protect anadromous species including American Eel, American Shad, Striped Bass, and River Herring, as well as the estuary dependent species, Summer Flounder. The TOYR for anadromous species is March 1st through June 30th. The TOYR for Summer Flounder is March 15th through September 30th. Thus, the DFW requested that a TOYR from March 1st through September 30th be observed for pile driving activities to protect the fish species listed above.

Additionally, breeding marsh birds such as state-endangered Black Rail (*Laterallus jamaicensis*) may be adjacent to the project site. Construction at this site could cause disturbance to marsh or colonial nesting birds in the adjacent march. To minimize impacts to these species during the breeding season, it was recommended that work be avoided from April 1st through July 31st. Cumulatively, the TOYR on construction activities from March 1st through September 30th was incorporated as a special condition in the Department’s draft authorizations as well.

With regard to the *revised* proposed project’s compliance with Section 4.9, *Boat Docking Facilities*, the TRM notes that the Applicant owns approximately 1,400 linear feet of waterfront property, with the marina being sited centrally on the western 700-foot portion of the waterfrontage. The siting of the boat docking facility on this portion of waterfrontage allows for access via uplands. Aquatic habitat, such as wetlands, have been avoided with the marina being sited at this location. Additionally, the siting of the marina docking facility structures has been designed with the consideration of minimal impacts.

In addition to the above review, the Applicant’s *revised* proposed project was also reviewed by the WWS in light of the *Marina Regulations* (7 DE Admin. Code 7501). The TRM details this regulatory evaluation as well, and the following section of this Report notes the public comments addressed by the WWS according to the pertinent sections of the *Marina Regulations*.

Section 11.0, *Requirements for Siting and Designing New Marinas*, of the Department’s *Marina Regulations* describes the requirements, restrictions, and limitation criteria for new marina development. The Siting and Design Study (“S&D Study”), with associated documentation, was submitted by the Applicant as part of the marina application requirements and speaks to those concerns. Permitting requirements for the S&D Study for new minor marinas (25 slips and less) are modified in order to reduce environmental impacts by encouraging consolidation of vessel docking facilities.

The Applicant's consultant explored environmental siting considerations as required. Specifically, historic water quality data representative of on-site conditions was obtained from the Delaware Environmental Monitoring and Analysis Center ("DEMAC"), which is located in Guinea Creek at Banks Road, approximately two miles from the proposed project site area. Bases on data collected between 2000 and 2018, dissolved oxygen ("DO") concentrations generally were above 5.0 mg/L throughout the year, and had peak concentrations as high as 12.47 mg/L. Since the healthy DO standard for the Inland Bays is a minimum of 4.0 mg/L, the project site can be expected to meet this criterion. The water quality data also included information regarding fecal coliform concentrations, but the project area is already designated as prohibited shellfish harvesting waters. Additionally, State-regulated wetlands and submerged aquatic vegetation are not present at the project site. As noted previously, pursuant to recommendations from DNREC's DFW, TOYRs for species of concern have been incorporated into the Department's draft authorizations. Thus, upon the Department's evaluation of environmental considerations, the *revised* proposed project is anticipated to have relatively minimal and short-term impacts to the environment.

Pursuant to Section 11.4 of the *Marina Regulations*, the Applicant's S&D Study also explored planning and design siting considerations. The TRM notes that the *revised* proposed eight-slip marina would be an "open marina" located in Herring Creek. There would be no man-made or natural barriers to restrict the exchange of water between Herring Creek and the waters within the marina. The upland site in an undeveloped vacant lot has a small, screened house on the parcel that would serve as an informal marina office and gathering location for marina users.

Due to the parcel being largely undisturbed, there is no current Sediment and Stormwater Management Plan in place. Included in the Draft Marina Permit is a requirement to attain Sediment and Stormwater Management approval from the appropriate State Department or delegated State Agency for any regulated land-disturbing activities. Additionally, the undeveloped parcel can accommodate parking on the uplands. The Applicant further addressed the daily operations of the proposed marina by submitting an Operations and Maintenance Plan, as previously noted, to the Department for approval.

With regard to compliance with Section 11.4.4, *Navigation and Access Channels*, of the *Marina Regulations*, the TRM notes that the proposed project was originally designed to moor ten vessels with no dredging proposed. Based on the aforementioned Department bathymetry, the marina was sited in a very shallow site. The Applicant subsequently relocated the marina 75 feet east of the existing boat ramp in order to attain deeper water depths, however, even with that relocation, there was still inadequate water depth at the originally proposed innermost slips (slips 9 and 10). Thus, the Applicant eliminated proposed slips 9 and 10, and requested to retain the remaining eight slips. The depths within the remaining eight slips range from -1.1 feet to -1.4 feet at mean low water.

As noted above, the Applicant had previously declined a reconfiguration of the marina due to concerns with vessels moored against the tidal ebb and flow currents that could result in potential damage to the vessels and structure during times of high waves and strong currents. Due to the slips averaging less than the standard water depth of -1.5 foot mean low water for the mooring of vessels, the Department's draft authorizations include a special condition that prohibits future dredging for the marina. Additionally, the Operations and Maintenance Plan details that slips will be managed by mooring larger vessels within the designated outer slips and mooring smaller vessels in the designated inner slips.

Section 14.0, *Marina Operation and Maintenance ("O&M") Plan*, of the *Marina Regulations* speaks specifically to the requirements for obtaining a Marina O&M Plan. The requirements apply to all marinas in the State of Delaware, whether existing, under construction, or proposed. As noted above, a Draft O&M Plan was submitted to the Department as part of the Application. The O&M Plan addressed compliance to statutory requirements by including information on the marina layout, the disposal of waste material, emergency operations, rules and regulations for marina users, among other items.

Regarding the disposal of vessel sewage waste, the O&M Plan stipulates that there will be access to a pumpout facility located at Indian River Marina in Bethany Beach, Delaware, and Canalfront Park Marina in Lewes, Delaware. There are no fueling facilities provided or major vessel maintenance allowed on the marina premises. In the event of a spill, the O&M Plan outlines the boater responsibilities and reporting requirements. This includes the use of the spill containment kits and containment booms located in a dock box on the marina premises. Pending associated subaqueous and marina authorizations for the construction activity, the O&M Plan will be authorized for approval and must be re-submitted for periodic re-approval every four years.

The Department received several concerns from the public regarding the overall operation of the marina. Due to the changing use of the marina during the permitting process, one commenter questioned the ambiguity of the use of the marina being for family verses for community use. The final O&M Plan identifies that the marina would be classified as a recreational private marina for the exclusive use of the waterfront property owners. Another commenter expressed concern for the on-site management of the marina since the property is vacant and there are multiple property owners involved. In response, the final O&M Plan identifies a Harbormaster, whose obligations include ensuring the marina users comply with all aspects of the O&M Plan and to take appropriate action to deal with marina users who violate any provision of the Plan. The O&M Plan specifically states that violators would first receive a verbal warning, followed by a written warning. Repeated violations would result in forfeiture of the slip for one season. Any future potential complaints would be directly relayed to the Harbormaster to mediate and, if appropriate, to the WWS to ascertain whether any regulatory violations have occurred..

I find that the Division of Water's TRM offers a thorough review of all aspects of the Applicant's pending Application, addresses those concerns germane to the subject matter of the aforementioned public hearing held by the Department in this matter, and responds to them in a balanced manner, accurately reflecting the information contained in the Record.

I further find that the Record developed in this matter reflects that the Department's experts in the WWS have concluded that the construction of the marina docking facility as described in the Application for the Marina Permit, the O&M Plan, and the Subaqueous Lands Lease by the Applicant, and then subsequently *revised* to address the expressed public concerns, complies with all statutes and regulations that govern permitting actions such as the proposed Lawton Family Marina.

As set forth in the TRM, the Applicant has applied for a marina facility along their approximate 1,400 linear feet of waterfrontage in public subaqueous lands. The State of Delaware is charged with upholding the Public Trust Doctrine, which has been used historically in protecting the public's rights to fishing, commerce, navigation, recreation and even preservation as an appropriate public use. The TRM holds that the Applicant has practiced minimization by revising the original project to now propose an eight-slip marina (rather than a large docking facility that would have provided a slip for each of the individual property owners).

Additionally, as previously noted, the proposed marina would create a permanent disruption of approximately 50 feet being limited to a no-wake zone within the "play area" of Herring Creek. Taking into account the no-wake zone, approximately 190 feet of usable width for recreational activities adjacent to the project area would remain. The siting of the marina docking facility was designed with the consideration of attaining adequate depths within the slip mooring areas. The TRM further notes that, while weighing and balancing the use of public subaqueous lands for all, the WWS recognizes that a permanent disruption of the recreational water use area of Herring Creek adjacent to the project area would occur. However, since adjacent docking facilities on the neighboring parcels exist 681 feet west of the proposed marina and 255 feet east of the proposed marina, a broad area remains undisturbed for recreational use activities. Further, the remaining 190 feet of usable width adjacent to the project area is adequate to participate in recreational activities.

The TRM further notes that the proposed marina has minimized potential sources of contamination by not providing fueling facilities, and by not allowing major vessel maintenance work to be done on the grounds of the marina. The final O&M Plan for the marina provides rules and regulations for boat tenants and identifies the appropriate action that would occur in the case of non-compliance to the O&M Plan. Also included are emergency procedures and the safety precautions implemented during hurricanes and severe weather events.

I find and conclude that the Record supports approval of the *revised* proposed project known as the Lawton Family Marina, as submitted by the Applicant to the Department's Division of Water, WWS, in this matter. Upon approval, the permit authorizations to be issued by the Department would be reflective of the *revised* Application and Plan submitted by the Applicant, consistent with the draft permit authorizations prepared by the Department's experts in the Division of Water, with appropriate conditions, to ensure continued protection of public health and the environment, and reflective of the Record developed in this matter.

Accordingly, this Report recommends the issuance of a Marina Permit, a Operations and Maintenance Plan, and a Subaqueous Lands Lease to construct a new multi-slip marina and to authorize a boat ramp in Herring Creek, located northwest of the terminus of Sisters Lane, Millsboro, Sussex County, Delaware, herein referred to as the Lawton Family Marina, with the appropriate conditions as set forth herein, consistent with the draft permit authorizations prepared by the Department's WWS, and consistent with the Record developed in this matter.

Further, the Department concludes and specifically directs the following:

1. The Department has jurisdiction, as provided for under 7 *Del.C.* Ch. 60, Delaware's *Subaqueous Lands Act* (7 *Del.C.* Ch. 72), the *Marina Regulations* (7 DE Admin. Code 7501) and 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 aforementioned pending Application after holding a public hearing, considering the public comments, and all information contained in the Record generated in this matter;

2. The Department provided proper public notice of the aforementioned Application submitted by Lawton Family Marina, and of the public hearing held on February 24, 2021, and held the hearing to consider any public comments that may be offered on the Application, in a manner required by the law and regulations;
3. The Department considered all timely and relevant public comments in the Record, as established in the Department's TRM of May 9, 2023, and all of the associated relevant documents included in the Department's electronic file named "Lawton Family Marina – Millsboro Subaq-Compiled Portfolio." The electronic file, now expressly incorporated into the Record generated in this matter in its entirety, includes, but is not limited to, the TRM, Draft Subaqueous Lands Lease, Draft Marina Permit, and Draft Operations & Maintenance Plan;
4. The Department has carefully considered the factors required to be weighed in issuing all permits and authorizations required by the aforementioned Application, and finds that the Record supports approval of the same;
5. The Department shall issue the following authorizations to the Applicant in this matter: (1) a Subaqueous Lands Lease; (2) a Marina Permit; and (3) the associated Operations and Maintenance Plan to the Lawton Family Marina, for the construction of a new multi-slip marina and to authorize a boat ramp in Herring Creek, located northwest of the terminus of Sisters Lane, Millsboro, Sussex County, Delaware, herein referred to as the Lawton Family Marina, with the appropriate conditions as set forth herein, consistent with the draft permit authorizations prepared by the Department's WWS, and consistent with the Record developed in this matter;
6. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and

7. The Department shall serve and publish its Order on its internet site.

/s/Lisa A. Vest
LISA A. VEST
Regulatory Specialist