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DIVISION OF WATER
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Technical Response Memorandum

To: Lisa A. Vest, Hearing Officer

Through: Steven M. Smailer, Director, Division of Water Date: 2023.05.25 20:55:18 -04'00'
Matthew R. Jones, Section Manager, Wetlands and Waterways Section

From: Julie R. Molina, Environmental Scientist, Wetlands and Waterways Section

Date: May 9, 2023

Subject: Lawton Family Marina c/o Joe Ribinsky, Marina Permit Application, Operations and Maintenance Plan Application and Subaqueous Lands Lease Application

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INTRODUCTION

On December 30, 2019, the Wetlands and Waterways Section (WWS), Division of Water, Department of Natural Resources and Environmental Control received an application from Coastal and Estuarine Research, Inc. submitted on behalf of Lawton Family Marina to construct a new 10 slip docking facility, located in Herring Creek and northwest of the terminus of Sister's Lane, Millsboro, Sussex County, Delaware (Tax Parcel no. 2-34-18.00-51.06). 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, and the Marina Regulations.

The project was advertised for a 20-day public notice period from February 19, 2020 to March 10, 2020. Upon conclusion of the public notice period, the WWS received five written comments in opposition to the project. The objectors expressed concern over what they perceived as the excessive need for a 10-slip marina to serve the purposes of a family, questioned the on-site management of the marina since there is no housing on the property, the "play area" of Herring Creek being now restricted as a no wake zone as well as detailing several other concerns. Furthermore, a public hearing was requested to be held based on these concerns.

During the initial review of the application, the project scientist, Julie R. Molina, noted deficiencies within the application. On February 12, 2020, Mrs. 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 were forwarded to Ms. Maurmeyer in order to address public concerns and/or provide a response. At that time, Mrs. Molina informed Ms. Maurmeyer that a public hearing was requested but would not be scheduled until the information previously requested was submitted. Ms. Maurmeyer stated that instead of sending the information separately, she would wait until all items were compiled to submit.

On November 5, 2020, Ms. Maurmeyer provided the initial updates to the application. The updates included supplying 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, submitting boat registrations to provide justification on the number of slips, etc. Also included was a letter from the applicant's Attorney's office describing the ownership of the parcel and a notarized letter authorizing Joe Ribinsky to represent all the owners for the docking facility application process. See Enclosure 1 to view the Attorney's letter and supporting documents. In summary, Catherine I. Lawton conveyed portions of the subject parcel to multiple family members. This resulted in the property being owned as follows: 5/8 owned by Barry and Catherine Dukes, Mark and Jacqueline Engle and Samuel Paynter; 1/8 owned by Joe Ribinsky III and Robert Ribinsky; 1/8 owned by Donald Mitchell and Theodore Mitchell; 1/8 owned by James Jr. and Catherine Travis. The WWS typically processes applications in the name of the subject property owner. Due to the parcel having multiple titleholders, the WWS decided to process the application under the name of Lawton Family Marina (the original matriarch of the family) c/o Joe Ribinsky.

Following review of the submitted materials and discussion with the consultant, on December 30, 2020, Ms. Maurmeyer submitted further clarifications to the application. Details on the residents and parcels the marina would serve were provided. A "de-facto" community was proposed that included twelve (12) parcels with the waterfront parcel (Tax Parcel no. 2-34-18.00-51.06) remaining open space. In addition, 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 the reconfiguration. The applicant had concerns that the 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 announcement for a public hearing was placed on a 20-day public notice period from February 3, 2021 to February 23, 2021. During advertisement of the public hearing, one written comment was submitted in objection to the project. The objector again expressed concern where they claimed that the only section in the entirety of Herring Creek where boaters can safely tow tubes, wake board or water ski, being potentially limited to a no wake zone. Additionally,

objections were raised concerning light pollution, the allotting of slips to non-family members, etc.

At the time of the public hearing, the applicant, Lawton Family Marina c/o Joe Ribinsky 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, DE (Tax Parcel no. 2-34-18.00-51.06).

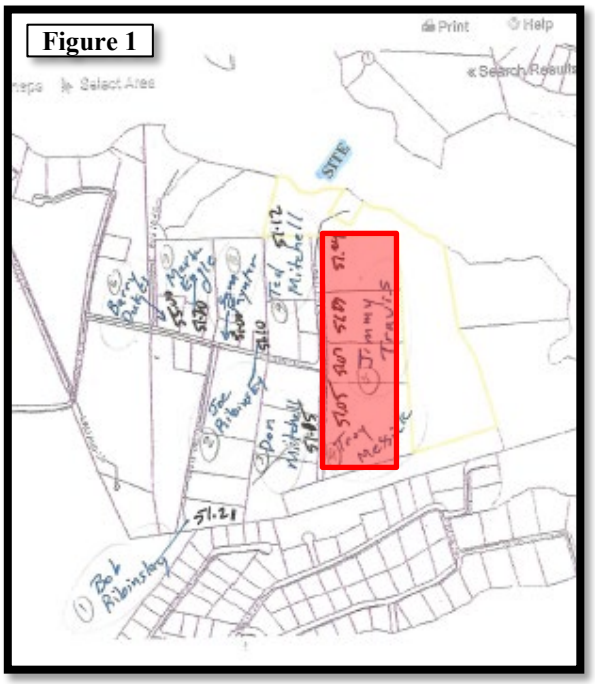
The public hearing was held on February 24, 2021. The public hearing was attended by WWS staff, the applicant's representatives, and individuals from the public. During the Public Hearing, the Hearing Officer, Lisa A. Vest, gave the introductory remarks on behalf of the Department. Subsequently, the project scientist, Julie R. Molina, gave a presentation on behalf of the Wetlands and Waterways Section. Mrs. Molina described the overview of the application as submitted for the marina. To conclude, Mrs. Molina presented the exhibits of the public records on behalf of the Department.

Subsequently, the applicant's consultant from Coastal and Estuarine Research, Inc., Evelyn Maurmeyer, gave a presentation. Ms. Maurmeyer clarified that the term for "marina" simply applied due to the docking facility meeting the DNREC marina definition of a boat docking facility that allows mooring of five or more vessels. This marina would not be operated as a commercial facility. There are no amenities that a commercial marina would typically provide such as fueling facilities or vessel maintenance facilities. She continued that the users of the marina would be the extended family of the heirs of Catherine Lawton as well as one close family friend. All of the proposed marina users live within walking distance of the proposed structure and are identified as being associated with twelve (12) parcels (referenced as Figure 1 below). Ms. Maurmeyer then pointed to other nearby docking facilities that had similar channelward encroachment as the proposed marina. She continued that the marina would not result in a no-wake zone nor limit the recreational use of the waterbody. A representative from Delaware Fish and Wildlife's Natural Resource Police informed her that boats have to maintain no wakes within 100 feet of structure. Taking into account, the width of the waterbody where the proposed docking facility is planned, that would leave approximately 400 to 900 feet of width where vessels could pass at cruising speeds. She concluded that Herring Creek is public subaqueous lands, available for use by the public, and that the applicant has the same right as others to utilize the waterway.

At that time, Ms. Vest opened the forum for public comment. Several commenters expressed concern over the widest and deepest section of Herring Creek where people typically pull tubes, wakeboard, jet-ski and waterski being limited to a no-wake zone. Another commenter contested Ms. Maurmeyer's estimation of 400 to 900 feet of usable waterbody width for vessels. He stated that due to existing water depths and since the channel is located along the southern stretch of Herring Creek, there actually is only 180 feet of usable width and that the docking facility would limit the width further. In addition, several commenters expressed concern for the on-site management of the marina since the property is vacant. They were unsure who to report any potential complaints to since there are multiple families involved. In the past, there have been complaints regarding noise, the use of profanity traveling across the waterway, etc. Several other

commenters questioned the ambiguity of the use of the marina being for family verses for community use. Ms. Vest closed the official record at the end of the public hearing proceedings.

Subsequent to the Public Hearing, the WWS sought internal legal guidance and interpretation of several factors. It was determined that, the ownership documentation and analysis provided by the applicant's attorney was indeed valid. WWS staff additionally discussed the "de-facto" community proposed by the applicant. During the processing of the application for this marina, justification was requested for the number of slips. The applicant indicated that the marina would serve multiple parcels nearby who have shared ownership of the waterfront parcel. However, of the twelve (12) parcels listed, four of the parcels (highlighted in red in Figure 1) were listed for sale and one of which was owned by a non-family member. The program determined that if the applicant wanted to propose this marina for "de-facto" community use, then prior to DNREC issuance, 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 <u>Regulations Governing the Use of Subaqueous Lands</u> which states "Minimum 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. Furthermore, 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. It was 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 the review and render a recommendation of approval or denial of the application (see Enclosure 2). On December 30, 2021, Ms. Maurmeyer provided an update to the information requested. This included revising the classification of the marina to a recreational private marina operated for the exclusive use of the waterfront property owners of tax parcel no. 2-34-18.00-51.06. In addition, the Operations and Maintenance Plan was updated to memorialize the marina classification which limited the use of the marina to the owners of the waterfront parcel, included

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 letter. The other updates provided included clarifying one of the waterfront parcel owners of Travers to Travis, providing an updated marina layout and acknowledging that vessels would not be moored at the most channelward end of the marina.

Although the Department had requested detailed bathymetry to be submitted, it was not provided. This application, along with two other applications currently being processed 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 (see Enclosure 3). All three of the applicable Technical Response Memorandums and subsequent public process steps have been delayed due to the time required to schedule, conduct, and evaluate the survey. The WWS acknowledges the prolonged processing time of the three applications and public hearings affiliated with the bathymetric survey and the subsequent review and evaluation, however, that information was deemed necessary to adequately evaluate the proposed structures and the communicated concerns.

On June 10, 2022, the WWS provided the survey results to the applicant and requested that the applicant superimpose the location of the docking facility 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 were provided on March 31, 2023, which 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.

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

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 (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, lease or approval will result in loss to the public of a substantial resource, or 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.

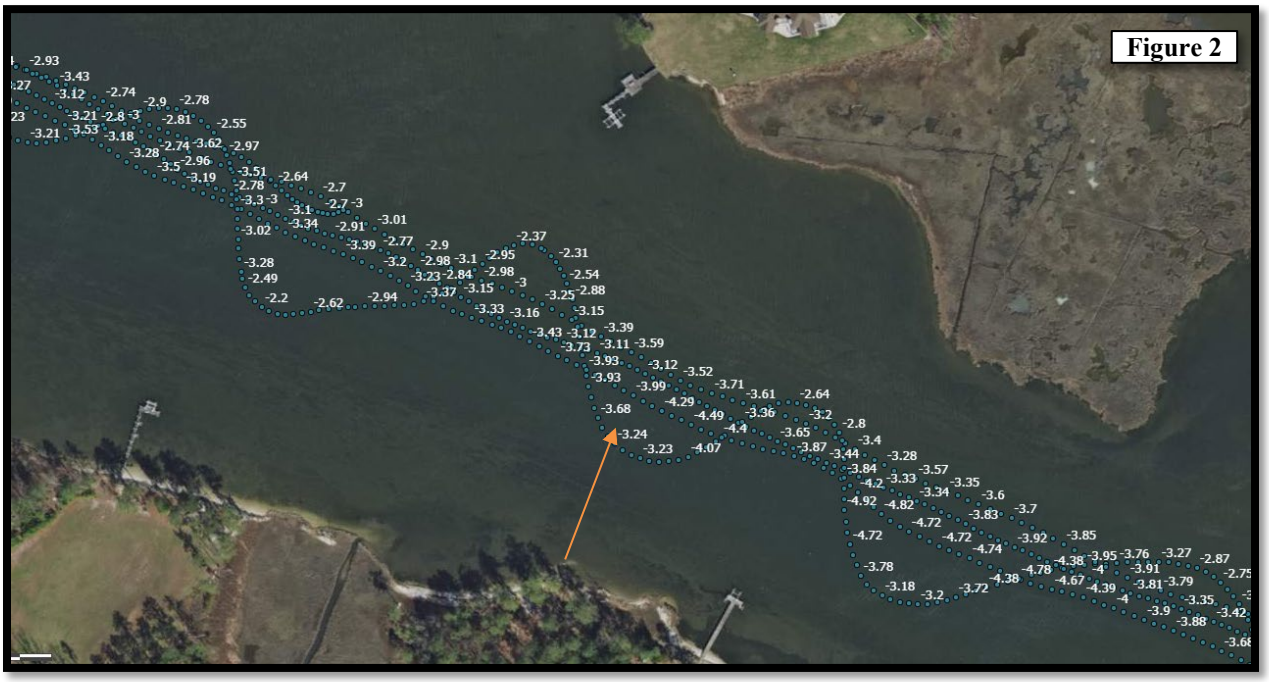
<u>Section 4.0 Criteria of Permits, Leases and Letters of Authorization</u> - Evaluation Considerations. Each application shall be reviewed based on the consideration of the performance specifications, standards and other criteria listed in this section for the type of activity proposed.
The most relevant portions of Section 4.0 for the proposed project are discussed below. This includes Section 4.6 - Public Use Impact, Section 4.7 - Environmental Considerations, and Section 4.9 - Boat Docking Facilities.

<u>Section 4.6 Public Use Impact</u> - The Department shall consider the public interest in any proposed activity which might affect the use of subaqueous lands.
The activity of constructing an eight-slip marina is proposed to be sited within the public subaqueous lands of Herring Creek. This activity within public subaqueous lands requires a Subaqueous Lands Lease from the State of Delaware. When determining if an applicant should occupy those public subaqueous lands, the Wetlands and Waterways Section considers the potential effect on the public and the extent to which the public would benefit or suffer detriment from the project. The public use impacts most relevant to the proposed project are discussed in Sections 4.6.3 and 4.6.6 below.

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.
The subaqueous lands located adjacent to the subject property are open for public use. The primary users are private waterfront property owners and the general public participating in boating, watersports, fishing, and crabbing. When evaluating for navigational concerns, the WWS references Section 4.9.2.5 of the <u>Regulations Governing the Use of Subaqueous Lands</u> which states, in relevant part; "In no case shall a structure extend more than 20 percent of the width of the waterbody." In tidal natural features, 20 percent is measured from the mean low water mark of one side of the waterbody to the mean low water mark of the other. The proposed channelward encroachment of 120 feet is within 20 percent of the width of the waterbody. In addition, the proposed marina is centrally located along the approximate 700 foot long western stretch of waterfrontage. Docking facilities on the neighboring parcels exist 681 feet west of the marina and 255 feet east of the marina. As a result, it is not anticipated 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 stated that the 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. The DNREC, Fish and Wildlife Natural Resource Police enforce Section 6.1.2 of the <u>Boating Regulations</u>, which states, in relevant part, "The speed of all vessels on the waters of this State shall be limited to a Slow-No-Wake speed within 100 feet of…docks." The applicant's consultant stated the no-wake zone would not impact boaters since there is an estimated 400 to 900 feet of usable waterbody width while a member of the public contested that there was only 180 feet of usable width based on existing water depths. Since there were such varying accounts of the recreational use width,

the Department reviewed existing August 2020 bathymetry of the State channel conducted by DNREC, Division of Watershed Stewardship staff (see Figure 2). Within the channel and central to the subject project area, the bathymetry consisted of depths ranging from -2.84 to -4.49 at mean low water. The meandering bathymetry collected weaving through the channel ranged from -2.31



to -4.92 at mean low water. Based on the extent of the bathymetry, at a minimum, currently there is 240 feet of usable width for recreational activities. The orange arrow in Figure 2, represents the proposed 120-foot channelward encroachment along with the standard 100-foot distance from a boat docking facility that must be designated a no-wake zone. This marina would create a permanent disruption of approximately 50 feet being limiting to a no-wake zone. As a result, this leaves approximately 190 feet of usable width for recreational activities adjacent to the project area.

4.6.6 - The extent to which the applicant's primary purpose and objectives can be realized by alternatives, i.e. minimize the scope or extent of an activity or project and its adverse impact.

The applicant's primary objective and purpose is to provide the multiple owners of the subject waterfront parcel boat docking access. The Public Trust Doctrine holds that lands under navigable waters are open to the public for commerce, navigation, fishing, and recreation. Therefore, as a waterfront property owner, the applicant has rights for a water access structure. As detailed above, the waterfront property ownership is divided into 1/8s which comprises eleven individuals in total. The applicant has practiced minimization by proposing an eight-slip marina rather than a larger docking facility that would provide a slip for each individual owner.

If the marina is not constructed, then the property owners would have to transport their motorized vessels before and after each use to a public boat ramp or moor their vessels at previously approved private marinas.

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.

An evaluation of water quality and scientific data was submitted by the consultant as part of the Siting and Design Study of the marina as discussed below in Section 11.3. The construction activity and structures associated with the marina will have treated lumber that can leach contaminants; however, this is mostly during the first few months after installation and can be considered minimal. In addition, 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. Additionally, as discussed in further detail in Section 14.2 below, an Operations and Maintenance (O&M) Plan for the marina was submitted by the consultant.

4.7.1.2 - Any effect on shellfishing, finfishing, or other recreational activities, and existing or designated water uses.

During the permit review process, the project scientist reached out to Mike Bott from DNREC, 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 Shellfish Program incorporates marinas 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 slips, the marina no longer meets the criteria for being included in their shellfish classification assessment. However, during discussion with Mike Bott, Herring Creek is approaching the carry capacity threshold and the prohibited classification area is nearing being expanded into the seasonally restricted area. The draft Marina Permit includes a special condition with the following warning for any future application to expand the 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."

4.7.1.3 - Any harm to aquatic or tidal vegetation, benthic organisms or other flora and fauna and their habitats.

The 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. The waterbody is currently used by the general public for water access along with a multitude of private docks; the addition of an eight-slip marina facility should not have a significant adverse impact on the environment.

The DNREC, Division of Fish and Wildlife, Species Conservation and Research Program, determined that a time of year restriction (TOYR) for pile driving work 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 and the TOYR for Summer Flounder is March 15th through September

30th. Therefore, the Delaware Division of Fish and Wildlife requested that a TOYR from March 1st through September 30th be observed for pile driving activities to protect the fish species listed above. In addition, 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 marsh. 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 time of year restrictions on construction activities from March 1st through September 30th was incorporated as a special condition in the draft authorizations.

Section 4.9 Boat Docking Facilities

4.9.2 - General Siting Considerations: Siting of boat docking facilities shall be evaluated on site specific conditions including, but not limited to, location of navigational channel, proximity of existing structures, aquatic habitats, and width and orientation of waterbody. The following criteria will be weighed and balanced when evaluating the siting of boat docking facilities.

The applicant owns approximately 1,400 linear feet of waterfront property. Although the subject property is one parcel, the waterfrontage itself is bisected into two portions. The proposed marina has been sited centrally on the western 700 foot portion of 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 proposed marina structure is located in an area where there is little proximity to existing structures. Existing docking facilities on the neighboring parcels exist 681 feet west of the proposed marina and 255 feet east of the proposed marina. Furthermore, the marina structure is proposed to be set back approximately 150 feet from the edge of the Herring Creek navigational channel. Therefore, the siting of the marina docking facility structures has been designed with the consideration of minimal impacts. Further considerations for siting of the boat docking facility are discussed in Section 11.4.4.1 below.

REGULATORY REVIEW – MARINA REGULATIONS

The following review evaluates the proposed project with respect to the requirements of the Marina Regulations. The Regulations provide the criteria for evaluating marinas that are proposed to be constructed in 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 a permit will result in loss to the public of a substantial resource, or 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 11.0 Requirements for Siting and Designing New Marinas - This section describes the requirements, restrictions, and limitation criteria for new marina development....New marina applications must include a Siting and Design Study that demonstrates how the proposed marina meets the criteria of this section.

The submitted Siting and Design (S&D) Study with associated documentation was submitted as part of the marina application requirements and speaks to both of those concerns. Permitting requirements for the Siting and Design Study for new minor marinas (25 slips and less) are

modified in order to reduce environmental impacts by encouraging consolidation of vessel docking facilities.

11.3 Environmental siting considerations

The S&D Study explored environmental siting considerations as required. The consultant submitted historic water quality data representative of on-site conditions obtained from the Delaware Environmental Monitoring and Analysis Center (DEMAC). The station (Station 308051) is located in Guinea Creek at Banks Road which is approximately two miles from the project site area. Based 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. In addition, State-regulated wetlands and submerged aquatic vegetation are not present at the marina site. As discussed above, a review from the DNREC, Division of Fish and Wildlife resulted in a recommendation for a time of year restriction for species of concern which was incorporated in the draft approvals. Upon an evaluation of environmental considerations, there would be relatively minimal and short-term impacts to the environment.

11.4 Planning and design requirements

The S&D Study also explored planning and design siting considerations as required. As discussed at length in Section 4.9.2 above, the applicant owns approximately 1,400 linear feet of waterfront property and has oriented the proposed marina centrally on the western portion of the waterfrontage. The 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 with a small, screened house on the parcel which 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 department or delegated agency for any regulated land-disturbing activities. In addition, the undeveloped parcel can accommodate parking on the uplands. The applicant further addressed the daily operations of the marina by submitting an Operations and Maintenance Plan for approval.

<u>11.4.4 Navigation and Access Channels</u>

11.4.4.1 Marinas shall only be located in areas which, in the determination of the Department, offer safe and convenient access to waters of navigable depth. Such locations tend to present maximum opportunities for flushing, with less danger of sedimentation than very shallow sites. Safe and convenient access will be determined on a case-by-case basis. Factors such as existing water depths, distance to existing channels and their depths, and tidal and wave action will be considered.

The marina was originally designed to moor ten vessels with no dredging proposed. Based on the Department bathymetry (see Enclosure 3), the local mean low water elevation occurs at 1.32 feet NAVD 88 which results in the marina being sited in a very shallow site. The marina was relocated 75 feet east of the existing boat ramp in order to attain deeper water depths. Even with this

relocation, the originally proposed innermost slips (slips 9 and 10) resulted in having -.50 feet at mean low water. Due to the inadequate water depths, these slips were eliminated, and the applicant requested to retain the remaining eight slips. Depths within the eight slips range from -1.1 feet to -1.4 feet at mean low water. As discussed above, during the initial review of the permit process, the applicant had declined a reconfiguration of the marina due to concerns with vessels moored against the tidal ebb and flow currents which could result in potential damage to the vessels and structure during times of high waves and strong currents. When evaluating for concerns of adequate water depths in relation to future dredging, the WWS references Section 11.4.2.2 of the Marina Regulations which states, in relevant part, "…Marinas shall not be permitted in areas that would require frequent maintenance dredging, resulting in harm to aquatic life and preventing the recolonization of benthic organisms." Due to the slips averaging less than the standard water depth of -1.5 foot mean low water for the mooring of vessels, the draft authorizations include a special condition that prohibits future dredging for the marina. In addition, the O&M 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

14.2 Marina operations and maintenance (O&M) plan. This section of the Regulations presents the requirements for obtaining a marina operations and maintenance (O&M) plan. It applies to all marinas in the State of Delaware, whether existing, under construction, or proposed.

A draft O&M plan was submitted as part of the marina 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 access to a pumpout facility is 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.

There were several concerns expressed by commenters on the operation of the marina. Due to the changing use of the marina during the permitting process, a 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. The 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 could be directly relayed to the Harbormaster or a WWS representative to mediate.

CONCLUSION

In reviewing the applicable statues, regulations, and weighing public benefits against detriments, the WWS finds that the construction of the marina docking facility as described in the application for the Marina Permit, Operations and Maintenance Plan, Subaqueous Lands Lease by Lawton Family Marina c/o Joe Ribinsky and revised to address the expressed concerns complies with the Regulations administered by the WWS.

The applicant has applied for a marina facility along their approximate 1,400 linear feet of waterfrontage in public subaqueous lands. The Public Trust Doctrine holds that lands under navigable waters are open to the public for commerce, navigation, fishing, and recreation. Through the Public Trust Doctrine, the applicant has rights for a water access structure. The applicant has practiced minimization by proposing an eight-slip marina rather than a larger docking facility that would provide a slip for each of the eleven individual owners.

Through agency consultation, the applicant worked to realize their purpose and objectives through alternatives. As described above, the applicant reduced the number of slips from ten to eight based on the limited depth detailed by the bathymetry. Depths within the remaining eight slips range from -1.1 feet to -1.4 feet at mean low water. Due to the slips averaging less than the standard water depth of -1.5 foot mean low water for the mooring of vessels and the applicant declining a reconfiguration, the draft authorizations include a special condition that prohibits future dredging for the marina.

As discussed in detail in Section 4.6.3 above, the marina would create a permanent disruption of approximately 50 feet being limiting 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 water depths within the slip mooring areas. 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 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. Additionally, the submitted Operations and Maintenance (O&M) Plan for the marina has rules and regulations for boat tenants as well as 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.

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