



STATE OF DELAWARE

**DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL**

DIVISION OF WATER

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Technical Response Memorandum

To: Theresa Newman, Hearing Officer

Through: Steven M. Smailer, Director, Division of Water
Matthew R. Jones, Section Manager, Wetlands and Waterways Section *mrg*

From: Rebecca Bobola, Environmental Program Manager, Wetlands and Waterways
Section

Date: October 1, 2021

Subject: Matthew D. Eisenmann and Colleen K. Eisenmann Subaqueous Lands Lease
Application

INTRODUCTION

The Wetlands and Waterways Section (WWS), Division of Water, Department of Natural Resources and Environmental Control received an application from Matthew D. Eisenmann and Colleen K. Eisenmann to extend an existing boat docking facility in Herring Creek at 344 Skyler Drive, Lot 48, Lewes, Sussex County, Delaware. The proposed project is subject to the requirements of the Subaqueous Lands Act (7 Del C., Chapter 72) and the Regulations Governing the Use of Subaqueous Lands (7 DE Admin. Code 7504).

This Technical Response Memorandum (TRM) presents the Wetlands and Waterways Section's (WWS) findings regarding the above-referenced lease application. The TRM also addresses comments presented prior to and during the public hearing held on May 19, 2021. The project was placed on 20 day public notice on May 13, 2020. During the public notice period the WWS received 3 letters of objection from Rita Lysik, Carlo and Teresita Businelli, and Al Lara. Bill Tarry also provided imagery to accompany Al Lara's comments. The objections stated the following concerns: conflicts with the existing easement agreement, the proposed structures encroach on one or both adjacent properties, the proposed extension could harm the adjacent wetlands or wildlife within the cove, and conflicts to community and or private interest. During the public hearing open record, the WWS received 8 letters of objection (two were repeat comment

providers) from Jean McCullough, Tushar and Susan Patel, John and Linda Ecklund, Villages of Herring Creek HOA Board, and Carlo and Teresita Businelli. The WWS also received 5 letters of support from Douglas Ellis, Kaitlin Eisenmann, Quinton Eisenmann, Jason Falcone, and Evelyn Maurmeyer. The objections stated the following concerns: the proposed structures encroach on one or both adjacent properties, the proposed extension could harm the adjacent wetlands or wildlife within the cove, and conflicts to community and or private interest, decreased property values, questionable representation of property lines extended, lack of consideration of some neighboring properties, potential harm to aesthetics, concerns for safety and navigation, concern for completeness of the application, and concern for the proposed extension to violate conditions of the original lease. Comments in favor of the proposed structure noted the extension for the purpose of obtaining navigable water is reasonable, the extension will not negatively impact the cove or the aesthetic of the view, the addition of a floating structure similar to neighbors' will make paddle boarding safer at low water, the extension would make use of the vessel at mean low water possible, and an extension is necessary for adequate water, access to water should be considered for all waterfront homeowners, the extension is still shorter than nearby structures, the Eisenmanns have offered several resolutions, the Eisenmanns have revised to minimize impacts to the greatest extent feasible, the application complies with DNREC regulation and WWS guidelines for dimensions, setbacks, justification of need, and navigable water depths, and the proposed extension avoids dredging, which is discouraged.

The applicants, Mr. and Mrs. Eisenmann originally proposed to install a 4 foot wide by 10 foot long pier extension, a 3 foot wide by 10 foot long gangway, and a 6 foot wide by 25 foot long floating dock. Before and during the public hearing Mr. Eisenmann presented the alternative application and plans which propose to install a 4 foot wide by 45 foot long fixed pier extension, a 6 foot wide by 12 foot long floating platform, and a 4 piling boatlift. The alternative application maintains the opportunity for additional water access for either adjacent neighbor, achieves mooring at increased water depths at mean low water, prevents the proposed floating kayak platform from resting on bottom at mean low water, and is comparable in linear footage of other piers in the same cove.

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 general area. The Department, not confident in the limited water depths provided with these applications, being questioned in public comment, contracted for the bathymetric surveying of either side of Herring Creek, encompassing all three proposed project sites. 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 communicated concerns.

Summary/Discussion

Prior to the public hearing, the WWS held two Microsoft Teams calls, one with the applicant and one with both adjacent landowners who had provided comment in objection. In these calls, WWS

provided an illustrated interpretation of the legal opinion from the State of Delaware Department of Justice to DNREC dated June 9, 2006 referencing Riparian Boundaries on Navigable Rivers and Across Accretions (2006 DOJ Opinion). This illustration (Figure 1) shows equitable apportionment of property lines extended, with the intention of all parties involved having an opportunity to reach adequate water depths, should they want to. The existing structures at Lots 47 and 48 reside outside of their respective lots' equitable apportionment and both intend to, either immediately or in the future, expand their piers for the purpose of increased water depth. This is the shallower end of the cove with the shortest existing structures. In both calls, the WWS encouraged all parties to evaluate compromising options and subsequently propose a compromising alternative if one could be agreed upon. It was acknowledged that the existing structures are not built ideally and so the option is to pursue a better way to move forward.

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 (7 DE Admin. Code 7504) (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 satisfy the Department that the requirements of these Regulations have been met; and if the granting of the permits, lease or approval will result in loss to the public of a substantial resource, that the loss has been offset or mitigated. The public comments received prior to, and at the hearing, as well as the Department's regulatory evaluation, are addressed according to the pertinent sections of the Regulations as follows.

Section 3.0 Procedures for Application

Comment was provided that the deed was not included in the application packet. It is common practice within WWS to not provide the deed to the public during public comment when the application is requested. The same comment provider said the Buildable Lot survey was not as detailed as the survey plot plan would be. Subsequently, a survey plot plan was provided on August 4, 2020 showing the same specifics as the Buildable Lot survey.

Section 4.0 Criteria of Permits, Leases and Letters of Authorization

Section 4.0 of the Regulations requires that the application be evaluated based on the consideration of specific performance specifications, standards, and other criteria, including Section 4.6 - Public Use Impacts, Section 4.7 - Environmental Considerations, Section 4.8 Requirements for all Structures and Section 4.9 – Boat Docking Facilities. It also states that an application may be denied if the activity could cause harm to the environment, either singly or in combination with other activities or existing conditions, which cannot be mitigated sufficiently.

The WWS concludes that public use impacts will be minimal since the structure will be placed within the shallowest area of the cove as close to the line of equitable apportionment for Lot 48 as feasible and only to the extent channelward to obtain adequate water depth (Figure 1). The proposed design does meet the requirements for all boat docking structures and does not exceed 250 linear feet in length.

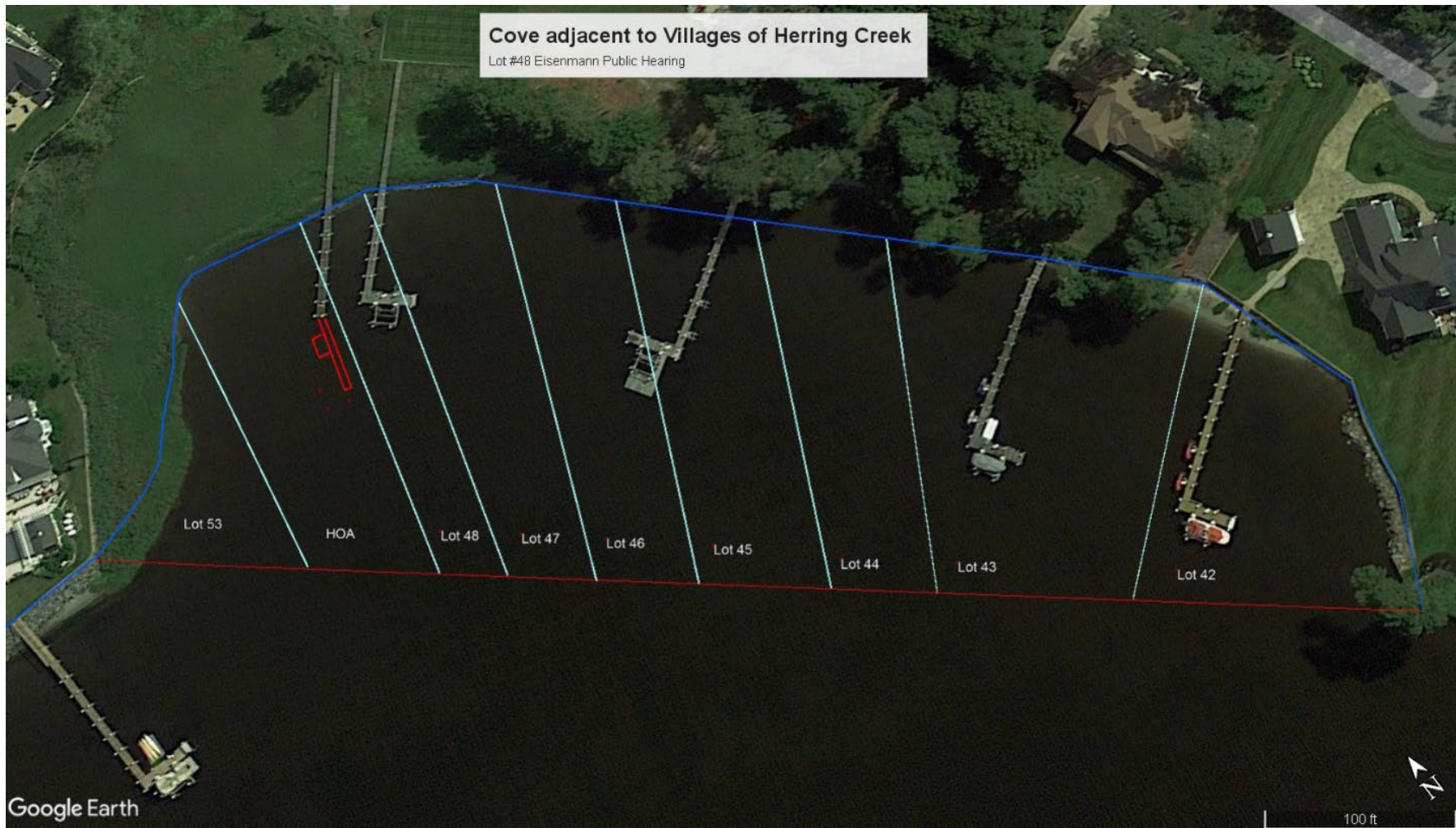


Figure 1. A visual interpretation of the legal opinion from the State of Delaware Department of Justice to DNREC dated June 9, 2006 referencing Riparian Boundaries on Navigable Rivers and Across Accretions as it applies to the cove in question on Herring Creek adjacent to the Villages of Herring Creek. The approximate location of the proposed structure is visible in red, positioned within the equitable apportionment for the Village of Herring Creek HOA's community parcel; running parallel to the property line extended for Lot #48, primarily already occupied by the residents of Lot #47.

Section 4.6 Public Use Impacts

Under this section the Department must consider, among other things, the potential effect on the public and the extent to which the public would benefit or suffer detriment from the project. Additionally, the Department must consider the degree to which the applicant's primary purpose could be realized by alternatives that would minimize or avoid impacts. The public use impacts most relevant to the proposed project are discussed in Sections 4.6.3, 4.6.4, 4.6.5 and 4.6.6, below.

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

The proposed structure will be placed within State waters of Herring Creek and requires a Subaqueous Lands Lease from the State of Delaware. Under Section 4.9 Boat Docking Facilities, paragraph 4.9.2.5 states: In no case shall a structure extend more than 20 percent of the width of the waterbody, nor shall it extend seaward more than 250 feet, except under exceptional circumstances necessary to provide access for needed commerce. 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 structure is proposed to extend approximately 115 feet channelward of the mean high water mark and is far from exceeding 20 percent of the width of the waterbody. The length of the structure is justified due to the shallow water depths. The WWS had a bathymetric survey of the entire respective cove conducted. Following the survey, it was requested that the applicant provide a portrayal of the proposed structures as they would exist on the survey imagery. As proposed, the applicant would gain 6 inches in water depth at mean low water for mooring. Shallower depths are present between the end of the proposed pier and the shoreline which already limits recreational uses in the area. Specific concern was expressed regarding a negative impact to navigation for both the HOA's future plans for a community pier as well as navigation by the neighbor at Lot #47. The proposed structure would leave 45 feet between the most encroaching piling and the north property line extended of the HOA parcel. Accounting for setbacks, that leaves a width of 15 feet to accommodate a pier or platform or a combination there of. The proposed structure also leaves approximately 195 linear feet of unobstructed space from the shoreline to the "mouth of cove" in the HOA's equitable apportionment of property lines extended. For the navigation by the neighbor at Lot #47, the neighbor would be able to access their existing boatlift from the south only. It is not uncommon for boatlifts to only be accessible by a single direction. The neighbor at Lot #47 provided comments that there would be an increased likelihood of accidents. Per Delaware Boater's Handbook, there are regulations for speed in proximity to docks and structure that operators must abide by. The owner of Lot #53, who has an existing structure outside of the cove in question, provided comments that she could be limited to the direction in which she could access her boatlift. There is approximately 193 feet from the east end of this resident's dock and the most west piling of the proposed structures at Lot #48. The owner of Lot #53 additionally mentioned her water rights and property rights were not taken into consideration. Per Subaqueous Regulations, one boat docking facility is allowed per residential lot, which she already has on another portion of her property not impacted by this portion of cove. The owner of Lot #51 provided comments that their aesthetic enjoyment and benefit from the third floor of their river view purpose built home would be negatively impacted by the extension of the Eisenmann's pier at Lot #48. While the proposed extension at Lot #48 would be in view, there are 7 total structures

currently in view, including the existing structures at Lot #48. Additionally, Lot #46 does not yet have a structure. It would be inconsistent to say that the owner of Lot #46 would not be allowed to exercise their property rights to access the water to protect the water view of the property owners of Lot #51 when there are 7 existing structures within view. The parcel owners of Lot #44 within the same cove were permitted to construct a pier within water view of Lot #51 during 2021 but no public comment was received in objection to the added structure in view at that time. Additionally, directly between Lot #51 and Lot #48, Villages of Herring Creek Home Owners Association communicated in their public comment, their intentions of constructing a community pier directly in view of Lot #51's water view. Concerns were raised about impacts to natural resources but our evaluation indicated those impacts were de minimus and were typical of any such activities including the existing structures. Using the criteria established by the 2006 DOJ Opinion, the WWS confirmed the existing structures do not lie within the equitable apportionment relative to each parcel. Recognizing that the structures are not arranged ideally to allow all waterfront parcels access to adequate water depths, any future work should take into consideration access to adequate water by all parties (Figure 2).

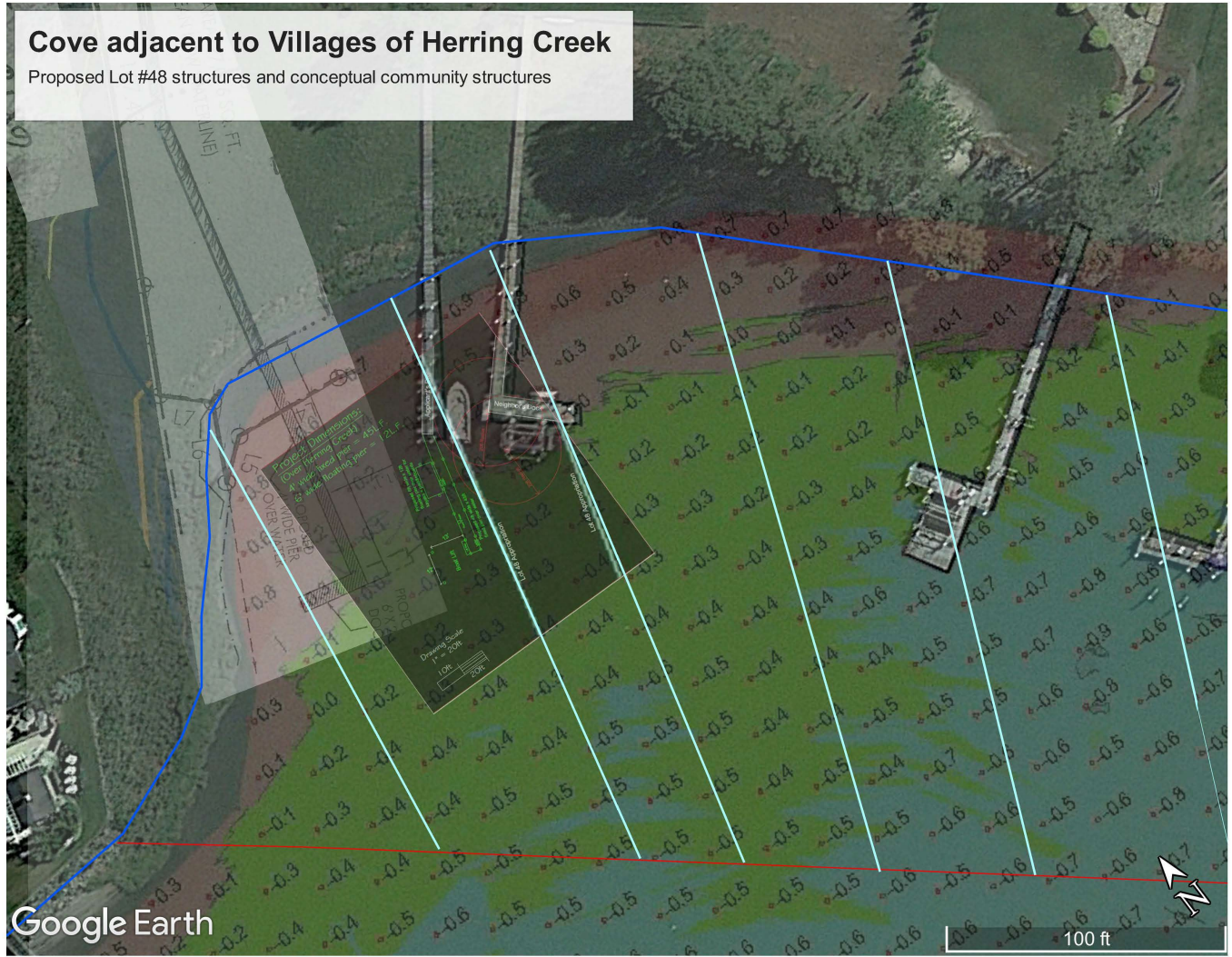


Figure 2. An illustration of the proposed structures for Lot #48 and the conceptual community pier provided by the Villages of Herring Creek HOA, with the DNREC-Acquired bathymetric survey in relation to the equitable apportionment of water access for each waterfront parcel owner.

4.6.4 Disruption of Public Use – The extent to which any disruption of the public use of such lands is temporary or permanent.

The proposed structure will permanently occupy 486 square feet (0.36%) channelward of mean low water of the 3.07 acres of Subaqueous Lands within this cove adjacent to Villages of Herring Creek on Herring Creek. Concern has been expressed in public comment regarding permanent inability to navigate the cove in question following the construction of the proposed structure. Open water of similar depths to the area of the proposed structure will remain unoccupied and available for recreational activities such as kayaking, paddle boarding, fishing, and crabbing.

4.6.5 Avoidance – The extent to which the applicant’s primary objectives and purposes can be realized without the use of such lands (avoidance).

The applicant owns 45.56 feet of waterfront property; this is the only area where the applicant can construct a facility on their riparian property boundary. The applicant does have the right to wharf and access the water from their riparian property boundary.

4.6.6 Minimization – 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 has considered, and acted on, reconfiguring the orientation of the proposed structure to reduce impacts to the HOA’s available space for future water access and to maintain the opportunity for the opposite adjacent neighbor to utilize their boat lift from at least one direction, in an attempt to minimize impacts and to address both adjacent property owners’ concerns. Further minimization would create an impact that would not achieve the applicant’s goal. Further structure reduction would not allow the applicant to berth a vessel due to shallow waters.

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.

The proposed structure is expected to have minimal adverse impacts to water quality. The facility will primarily be used to berth one motorized vessel and launch kayaks and paddleboards and does not include any refueling, maintenance, or convenience facilities which could be sources of potential contaminants. The leaking of contaminants, such as, gas and oil, into the waterway from the vessel alone is expected to be no different than if the applicant were to simply moor their vessel in the same space. The treated lumber used for the facility can leach contaminants; however, this is mostly during the first few months after installation and can be considered minimal. Concern was expressed regarding impacts to wildlife within the cove with the use of a motorized vessel within the shallow waters of the cove. The proposed structure is designed in length to provide adequate water depth for the draft of the vessel to be moored at the proposed structure, thus addressing this concern.

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

The primary use of this cove is for adjacent property owners to gain access to Herring Creek and for the general public's use. A secondary use would be crabbing and fishing. The proposed structure would allow the applicant to use the cove for these same reasons and would not impede others from gaining access to, or using, the cove (Figure 1).

4.7.1.3 Any harm to aquatic or tidal vegetation, benthic organisms or other flora and fauna and their habitats. 4.7.1.4 Any loss of aquatic habitat.

The dock will cause some shading but should allow for the growth of aquatic vegetation and the continued use of the area by benthic organisms. The cove in question is currently used by the general public and currently contains six docking structures; the extension of one structure and addition of one motorized vessel should not have a significant adverse impact in this regard.

Section 4.7.5 Other Considerations

4.7.5.1 The degree to which the project represents an encroachment on or otherwise interferes with public lands, waterways or surrounding private interests.

The owners of Lot # 47 provided comment stating the proposed structures will decrease their personal property value as well as eliminate the Villages of Herring Creek HOA's water access. As seen in (Figure 2.) water access remains for both adjacent parcels.

4.7.5.2 The degree to which the project incorporates sound engineering principles and appropriate materials of construction.

The structure is proposed to use CCA treated lumber and will be constructed to typical standards by a local marine contractor, as is common for the majority of the structures in the vicinity.

4.7.5.3 The degree to which the proposed project fits in with the surrounding structures, facilities and uses of the subaqueous lands and uplands.

There are multiple docks located both east and west of the project location. Structures in the area range from 25 feet long to 250 feet long. The use of the docks varies from berthing motorized vessels and launching non-motorized vessels for residential use to launching non-motorized vessels. The existing structures within the cove are of similar linear footage and obtain similar mean low water depths, or greater, than the applicant is proposing.

Section 4.8 Requirements for all Structures

4.8.4 Structures shall not interfere with navigation, public, or other rights.

This structure meets the requirements stated in the regulations for proper navigation. The adjacent neighbors claim that the ability to navigate effectively will be eliminated by the proposed structure which is the basis for their opposition. The neighbor currently can only access their lift from one direction. This will remain the case. There is currently 28 feet available to maneuver a 22 foot

vessel onto the existing boatlift. The neighbor suggests there will be increased likelihood of accidents, which falls on the ability of the operator given the adequate space available and the requirements to operate at safe speeds, without a wake. This structure will not interfere with public use any more than the other five structures within the cove do. As mentioned by the applicant and commenters, it is very shallow and should not be utilized at unsafe speeds to begin with. Additionally, wakes should not be made within 50 feet of structure according to DE boating laws.

Section 4.9 Boat Docking Facilities

4.9.2 Proximity of existing structures

4.9.2.2 Structures should be constructed to avoid dredging or filling, with minimal impact on aquatic vegetation and wetlands, and without dead-end or poorly flushed lagoons.

The proposed structure's length would obtain adequate water depth at mean low water, for the draft of the proposed vessel to be berthed, avoiding the need for dredging. As designed, the proposed structures do not impact aquatic vegetation or wetlands. Adjacent neighbors provided comment stating the existing structure is constructed to the maximum extent possible. This information was sought from the original contractor rather than the Wetlands and Waterways Section, the regulatory authority for such matters. The original authorization does not contain special conditions limiting the future modification and or expansion of the pier. The original authorization does specify the structure is for the purpose of mooring a vessel.

4.9.2.7 Docks and piers should extend out from the shoreline far enough so as to eliminate need for dredging and filling and provide sufficient height to allow light to penetrate to vegetation underneath and alongside.

The proposed structure's length would obtain adequate water depth at mean low water, for the draft of the proposed vessel to be berthed, avoiding the need for dredging.

4.9.2.10 – All convenience structures should be set back a minimum of ten (10) feet from adjacent property lines.

The proposed structure adequately complies with the equitable apportionment for water access consistent with the 2006 DOJ Opinion.

4.9.2.13 Dredging to obtain navigable water depths in conjunction with private residential boat docking facilities should be avoided.

The proposed structure's length would obtain adequate water depth at mean low water, for the draft of the proposed vessel to be berthed, avoiding the need for dredging.

CONCLUSION

The WWS finds that the activity described in the application for the Subaqueous Lands Lease by Matthew D. Eisenmann and Colleen K. Eisenmann, including installation of a fixed pier, a floating platform, and a boatlift with four associated pilings, complies with Statute and Regulations administered by the WWS. Additionally, the structure dimensions are consistent with the applicable regulations, guidance documents, and the nearby structures. The WWS finds that the structure will not substantially affect the navigational uses of the public or the adjacent neighbors.

After reviewing the bathymetric survey conducted by Plitko, plot plan, deeds, and after evaluating the 2006 DOJ Opinion, the WWS's opinion is that the proposed construction of Matthew D. Eisenmann and Colleen K. Eisenmann's dock is within the equitable apportionment for adequate water depths as feasibly possible given the surrounding existing structures. While any new structure could be considered to reduce public access, the rights of the riparian landowner to access their lands from the water must also be considered.

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