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ENVIRONMENTAL CONTROL**  
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**Technical Response Memorandum**

To: Lisa A. Vest, Hearing Officer

Through: Steven M. Smailer, Director, Division of Water *MS*  
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From: Julie R. Molina, Environmental Scientist, Wetlands and Waterways Section *JRM*

Date: September 25, 2023

Subject: Abby L. Pubusky and Thomas A. Taylor II, Wetlands Permit Application and Subaqueous Lands Lease Application

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**INTRODUCTION**

On December 31, 2018, 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 Abby L. Pubusky and Thomas A. Taylor II (“Applicant”) to construct a new wetland walkway and docking facility, located in Herring Creek at 23854 Brant Circle, The Cove, Lewes, Sussex County, Delaware (Tax Parcel no. 2-34-18.00-257.00). The proposed project is subject to the requirements of 7 Del. C. §6604, and the Department’s Wetlands Regulations and the Subaqueous Lands Act (7 Del C., Chapter 72) and the Regulations Governing the Use of Subaqueous Lands.

The subject property was originally authorized a docking facility through Subaqueous Lands Lease no. SL-0303/95. Subsequent authorizations and transfers took place across several authorizations (Subaqueous Lands Lease nos. SL-016/99 and SL-119/09) but a wetland walkway providing access to the docking facility was never proposed. Access to the existing docking facility would have required crossing over approximately 200 feet of State-regulated wetlands. In the absence of a wetland walkway, the current property owner would traverse the wetlands to and

from the docking facility via an ATV which resulted in severe rutting and loss of vegetation. Construction of a new wetland walkway to access the existing docking facility would be prohibitive since the WWS has established a 2005 WWS Docking Facilities Guidance Document which stipulates wetland walkways should not exceed 150 feet in length. The current property owner is proposing to remove the existing docking facility and select a new water access location where the construction of a wetland walkway would meet the limiting length requirement to a new docking facility.

The project was advertised for a 20-day public notice period from February 6, 2019 to February 26, 2019. Upon conclusion of the public notice period, the WWS received four written comments in opposition to the project. The objectors expressed concern over what they perceived as an excessively large docking facility, concern that the docking facility would hinder access in and out of the cove and conveyed that the State-regulated Wetlands on the property needed to be protected. Furthermore, a public hearing was requested to be held based on these concerns.

Since there were multiple objections raised during the public notice period, the applicant requested a site meeting with WWS staff. During the meeting held on April 11, 2019, the applicant and their consultant discussed alternate plans to address the commenters' concerns. The applicant proposed to re-design their docking facility and planned to submit an updated application.

On July 14, 2020, the applicant's consultant from Coastal and Estuarine Research, Inc., ("Consultant"), reached out to determine if the pending application was still active. The consultant informed WWS staff that the applicant had been occupied with family matters since the time of the April 2019 meeting but was now ready to move the application forward. Since the revised plans were to be largely modified from the original, the WWS allowed for the application to be processed through a second public notice period with direct mailings to those that previously commented.

On September 29, 2020, Ms. Maurmeyer provided the initial updates to the application. The project was advertised for a 20-day public notice period from October 28, 2020, to November 17, 2020. Upon conclusion of the public notice period, the WWS received two written comments in opposition to the project. Commenters were concerned over the wetlands that had been damaged by the ATV path and believed that the vegetation needed to grow back undisturbed. In addition, there was concern over what was described as a "mini marina" being proposed due to the size of the docking facility requested in comparison to the small cove. On November 20, 2020, the project scientist, forwarded the public comments to the Consultant to provide the opportunity for the applicant to respond and to address public concerns, or move forward with scheduling a public hearing. In addition, the WWS requested an update on the staking of the location of the proposed wetland walkway (since the submitted coordinates were inaccurate), proposed restoration of the rutted wetlands, vessel registration justifying the length of dock, and bathymetry.

WWS staff recommended that the applicant request a formal Jurisdictional Determination to clearly identify the proposed wetland walkway impacts to State-regulated Wetlands. On March 11, 2021, WWS staff conducted a Jurisdictional Determination (authorization no. JD-266/21) of the landward and channelward extent of State-regulated Wetlands on the subject property. Based on the Jurisdictional Determination, the applicant determined the final location of the proposed wetland walkway. The applicant identified the location of the proposed wetland walkway as being

71 feet west of the first-raised western piling associated with the existing pier. The Jurisdictional Determination indicated that the proposed location of the wetland walkway would not exceed 150 linear feet in accordance with current WWS guidelines.

The Consultant provided further application updates on July 2, 2021. This included a restoration plan for the impacted State-regulated Wetlands and revised plan and cross-section views of the proposed docking facility.

The legal advertisement for a public hearing was placed on a 20-day public notice period from July 7, 2021 to July 27, 2021. During advertisement of the public hearing, ten written comments in objection were received. In particular, two objectors raised concerns of an inadequate public notice announcement. Within the Wetland Regulations, it is a regulatory requirement to consider the effect of proposed wetland activities on neighboring lands. Neighboring land uses is defined in the Wetland Regulations as those uses on land within 1,000 feet of the proposed activity. Accordingly, the WWS utilized the information included in the December 31, 2018 application for direct notification of neighboring property owners within a 1,000 foot radius of the project and additionally directly mailed those who previously commented. Commenters pointed out that the address list utilized for direct notification of the project was inaccurate due to property ownership conveyance from the time of the original 2018 application. Since the address list was concluded to be outdated, the Department determined it would best address this concern through re-advertisement of the public notice of the public hearing utilizing an updated address list.

The announcement for a public hearing was re-advertised and placed on a 20-day public notice period from August 4, 2021 to August 24, 2021. During advertisement of the public hearing, one written comment was submitted in support to the project and five written comments were written in objection. The letter in support claimed that the newly proposed wetland walkway would provide a more environmentally sound way for the applicants to access the water. The objectors again expressed concern over what was perceived as an excessively large docking facility, concern that the docking facility would hinder navigability within the cove and conveyed that the proposed project would negatively impact the wildlife in the wetlands and the surrounding environment.

At the time of the public hearing, the applicant proposed to conduct wetland restoration and construct a 3 foot wide by 150 foot long wetland walkway, a 4 foot wide by 10 foot long fixed pier, a 3 foot wide by 10 foot long gangway, a 6 foot wide by 6 foot long floating platform, a 6 foot wide by 40 foot long floating dock and a 6 foot wide by 10 foot long floating jet ski platform in Herring Creek at 23854 Brant Circle, The Cove, Lewes, Sussex County, Delaware (Tax Parcel no. 2-34-18.00-257.00).

The public hearing was held on August 25, 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 gave the introductory remarks on behalf of the Department. Subsequently, the project scientist gave a presentation on behalf of the Wetlands and Waterways Section providing an overview of the application as submitted for the private residential wetland walkway to gain access to a docking facility and presented the exhibits of the public records on behalf of the Department.

The applicant's consultant from Coastal and Estuarine Research, Inc., Evelyn Maurmeyer, also gave a presentation. The Consultant described the history of the site. She stated that at the time that the original docking facility was constructed, there was no wetland walkway issued to access the dock. She further stated that during this period, WWS guidance allowed for up to a 300-foot-long wetland walkway. She pointed out that had the applicants requested for a wetland walkway at that time, they would have been approved. In 2005, the WWS guidelines were updated to allow 150-foot-long wetland walkways to a boat docking facility. The Consultant stated that the applicant had submitted many revisions and minimizations to the project throughout the permit process to design a structure that complies with all regulations and current guidelines. She further detailed that the proposed project complies with not exceeding 20 percent of the width of the waterbody and justified the length of the dock by the applicant having recently purchased another vessel. The Consultant concluded by requesting for the project to be approved for the enjoyment of the applicant's family.

At that time, the Hearing Officer opened the forum for public comment. The applicants themselves spoke about how they want their family to enjoy the use of the waterbody. They currently own a 25-foot-long pontoon and recently acquired an 18 foot long fishing boat. A member of the public spoke in support of the application stating that the Pubusky-Taylor family has done their due diligence in regard to permitting requirements. Another member of the public spoke in support of the project stating that since the applicants have a waterfront property, they should be able to access the water like all the other waterfront property owners. Additionally, another commenter pointed out that the new design would allow a more environmentally sound way of accessing their vessel. Another commenter expressed concern over the proposed docking facility being considerably larger and out of characteristic with other docking facilities within the cove. He stated that this design may impede others' ability to get in and out of the cove. The commenter requested that the current design be replaced with a reasonably sized dock. Another commenter spoke to the cove being utilized as an active kayak community and being concerned with the potential impacts to wildlife. The record was closed at the end of the public hearing proceedings.

Although the Department had requested detailed bathymetry to be submitted, it was not provided. Subsequent to the public hearing, the WWS conducted a field reconnaissance in consideration of adequate water depths since the docking facility was primarily designed to be floating. On September 13, 2021, WWS staff traveled to the proposed docking facility location 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 under one foot at mean low water.

In consideration of addressing Department concerns with the floating docking facility resting on the waterway bottom, the applicant provided updated plans revising the floating structure to a predominantly fixed docking facility. The one remaining floating structure proposed would be the floating drive-on PWC platform. The draft Subaqueous Lands Lease includes a special condition to reduce impacts to benthic macroinvertebrates through the installation of

stoppers or other devices to prevent the floating platform from resting on the waterway bottom. Additionally, the applicants' consultant had presented new information during the public hearing that the applicant had recently acquired an 18-foot-long vessel to justify the length of the proposed dock. After the public hearing, documentation of the August 2022 purchase of the vessel was provided. Moreover, in consideration of public concern over the size of the non-commercial docking facility, the applicants minimized their impact in subaqueous lands further. At the time of the public hearing, the modifications to the docking facility included a reduction of 47 square feet from the original submittal. Subsequent to the public hearing, final modifications from the original submittal resulted in a total reduction of 89 square feet of structure occupying subaqueous lands. On August 15, 2022, the applicant provided the final submission proposing to conduct wetland restoration and construct a 3 foot wide by 150 foot long wetland walkway, a 4 foot wide by 26 foot long fixed pier, a 5 foot wide by 40 foot long fixed dock, and a 6 foot wide by 10 foot long floating jet ski platform in Herring Creek at 23854 Brant Circle, The Cove, Lewes, Sussex County, Delaware (Tax Parcel no. 2-34-18.00-257.00).

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- WETLANDS**

The following review evaluates the proposed project with respect to the requirements of 7 Del. C. §6604, and the Department's Wetlands Regulations adopted in accordance with the statute. The Regulations provide the criteria for evaluating projects that are proposed to be constructed in wetlands. The historic right of privately owned land includes public regulation of such land to prevent harm to the public. The coastal areas of Delaware are the most critical areas for the present and future quality of life in the State and that the preservation of the coastal wetlands is crucial to the protection of the natural environment of these coastal areas. The Department's regulatory evaluation and the public comments received are addressed according to the pertinent sections of the Regulations as follows.

### **Section 7.0 Condition for Permits – No permit will be issued to:**

#### **7.1.4 Utilize wetlands for any activity unless it: Requires water access or water for the central purpose of the activity; and has no alternative on adjoining non-wetland property of the owner.**

Activities within wetlands requires a Wetlands Permit from the State of Delaware. When determining if an applicant should occupy those wetlands, the Wetlands and Waterways Section considers the utilization of wetlands for the purpose of the proposed activity. The subject property is located along a cove of Herring Creek and its shoreline is dominated by wetlands. The property does not contain any uplands directly abutting to the waterway. The proposed 3 foot wide by 150-foot-long elevated wetland walkway directly adjoins to the newly proposed docking facility which will provide water access as its central purpose. There is no alternative to gaining water access without crossing wetlands.

If the wetland walkway were not to be constructed, then the property owners would continue to access the current docking facility through existing means. Due to the soft marsh surface, the current property owners have accessed the existing docking facility via ATV which has resulted in a pathway of severe rutting and degradation to the wetland vegetation.

**Section 8.5.8 An Environmental Summary which includes an evaluation of the project in relation to the factors listed:**

The most relevant portions of Section 8.5.8 for the proposed project are discussed below.

**8.5.8.3 Alternatives to the proposed action which would reduce or avoid environmental damage.**

The proposed wetland walkway was designed to reduce environmental damage by siting the wetland walkway in an upstream location which does not exceed the 150-foot-long wetland walkway length as stipulated by the 2005 WWS Docking Facilities Guidance Document. Although the Consultant points to varying guideline changes that have occurred over the years, the property owners were able to meet their desired purpose of water access while reducing the area of impact to cross wetlands. In addition, the wetland walkway was proposed to be elevated 3 feet above the marsh surface and oriented to minimize shading impacts on wetland vegetation.

**8.5.8.4 All measures to be taken during and after the completion of the proposed project to reduce detrimental effects.**

After completion of the construction of the proposed wetland walkway and docking facility, the applicant proposes wetland restoration in acknowledgement of the degradation to the wetland vegetation that occurred from the ATV path. The wetland restoration would occur over a phased period. First, the applicant proposes to remove the existing docking facility and abandon the ATV path. Afterward, the existing ruts would be regraded to elevations that support wetland vegetation. Due to the seedbank available onsite, the existing marsh vegetation would be expected to naturally revegetate in the impacted areas. The site would then be monitored for two growing seasons to document revegetation. If natural re-colonization does not result in 85% coverage, then wetland seedlings are proposed to be planted to expedite revegetation.

**Section 12.0 Standards for Permits**

**12.2 Environmental Effect - Environmental Effect shall include consideration of the effect of site preparation and the proposed activity on the following wetlands values:**

The presence of the tidal wetlands allows for a natural protective system for absorption of storm wave energy, flood waters and heavy rainfall. Excluding the ATV pathway, the tidal wetlands onsite are predominately healthy and are dominated by smooth cordgrass (*Spartina alterniflora*) and salt hay (*Spartina patens*). Impacts during construction of the wetland walkway include temporary placement of matting in wetlands to support construction equipment utilized to vibrate in the walkway support pilings. All other work, to include construction of whalers, stringers and decking, will be completed by manual assembly and matting will be removed after construction completion. Due to the construction of the wetland walkway being a singular event, construction activities are deemed temporary impacts.

The proposed project will have minimal impact on tidal ebb and flow since the height of the elevated walkway will allow for tidal exchange. In addition, once the wetland walkway structure is in place, impacts to the habitat would be minimal since anthropogenic traffic would be directed

over the walkway instead of through the wetlands themselves. Furthermore, the DNREC, Division of Fish and Wildlife, Species Conservation and Research Program determined that there were no records of state-rare or federally listed plants, animals or natural communities at this project site.

## **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.

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

The most relevant portions of Section 4.0 for the proposed project are discussed below. This includes Section 4.6 - Public Use Impact, Section 4.7 - Environmental Considerations, and Section 4.9 - Boat Docking Facilities.

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

The activity of constructing a residential docking facility is proposed to be sited within the public subaqueous lands of a cove 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 Regulations Governing the Use of Subaqueous Lands 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 31 feet channelward of the mean low water line is within 20 percent of the width of the waterbody.

**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 have a private residential boat docking facility. 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 discussed above, the current location of the existing docking facility has resulted in wetland degradation access impacts. In order to avoid future adverse impacts to the wetlands, the applicants have proposed a docking facility in an alternate location which would meet the permitting guidelines for the construction of a wetland walkway.

Several comments in opposition were concerned with the design of the docking facility which was viewed as out of characteristic for the community and excessive for a non-commercial docking facility. Through agency consultation, the applicants worked to minimize the scope of the project within public subaqueous lands. From the time of the original submittal, there were many revisions which included modifying the docking facility from a floating structure to a predominately fixed structure, removing two boat lifts, reducing the dock length by 10 feet and interchanging the kayak launch with a floating jet-ski platform. These modifications resulted in a total reduction of 89 square feet of structure occupying subaqueous lands. In addition, the channelward encroachment was reduced from 40 feet to 31 feet to address impacts on navigational concerns.

**Section 4.7 Environmental Considerations**

**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 a residential docking facility should not have a significant adverse impact on the environment. Furthermore, the DNREC, Division of Fish and Wildlife, Species Conservation and Research Program determined that there were no records of state-rare or federally listed plants, animals or natural communities at the project site.

**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 applicants own approximately 308 linear feet of waterfront property. The siting of the boat docking facility on this portion of waterfrontage allows for access via a wetland walkway which was designed in consideration of minimal impact. Existing docking facilities on the neighboring parcels exist 145 feet west of the proposed docking facility and 190 feet east of the proposed docking facility. Therefore, the siting of the docking facility structures had been designed with consideration to proximity of existing structures.



## **CONCLUSION**

In reviewing the applicable statutes, regulations, and weighing public benefits against detriments, the WWS finds that the construction of the final proposed residential wetland walkway to access the docking facility as described above for the Wetlands Permit and Subaqueous Lands Lease by Abby L. Pubusky and Thomas A. Taylor II complies with the Regulations administered by the WWS.

The wetland walkway was designed with consideration of reducing environmental impacts by siting the wetland walkway in a location which is in accordance with current practices. In addition, the wetland restoration plan is incorporated as a special condition of the draft Wetlands Permit approval.

The Public Trust Doctrine holds that lands under navigable waters are open to the public for commerce, navigation, fishing, and recreation. In addition, the applicant has riparian rights for a water access structure. Through agency consultation, the applicants have worked to minimize the scope of the docking facility within public subaqueous lands. These modifications resulted in a total reduction of 89 square feet of structure occupying subaqueous lands. Furthermore, the channelward encroachment was reduced from 40 feet to 31 feet to address impacts on navigational concerns.

Therefore, the program recommends the approval of the applications for a wetland walkway and boat docking facilities.

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