

**In the Matter Of:**

ENVIRONMENTAL APPEALS BOARD

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Delmarsh v. DNREC Hearing

August 11, 2020

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BEFORE THE ENVIRONMENTAL APPEALS  
BOARD OF THE STATE OF DELAWARE

DELMARSH, LLC )  
 )  
Appellant, )  
 )  
v. ) EAB Appeal No. 2020-03  
 )  
DEPARTMENT OF )  
NATURAL RESOURCES )  
AND ENVIRONMENTAL )  
CONTROL, )  
 )  
Appellee. )

TUESDAY, AUGUST 11, 2020  
9:00 A.M.

TRANSCRIPT OF  
HEARING HELD VIA REMOTE WEB CONFERENCING  
BEFORE THE ENVIRONMENTAL APPEALS BOARD

MEMBERS PRESENT:

- DEAN E. HOLDEN, CHAIRPERSON
- FRANCES RIDDLE, MEMBER
- MICHAEL A. HORSEY, MEMBER
- RANDALL HORNE, MEMBER
- GUY MARCOZZI, MEMBER
- ROBERT MULROONEY, MEMBER
  
- KEVIN MALONEY, ESQ.  
DEPUTY ATTORNEY GENERAL  
DELAWARE DEPARTMENT OF JUSTICE  
COUNSEL TO THE BOARD
  
- SASCHA MOHAMMED, ADMINISTRATIVE ASSISTANT

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APPEARANCES:

RICHARD L. ABBOTT, ESQ.  
ABBOTT LAW FIRM LLC  
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Hockessin, Delaware 19707  
For Appellant DelMarsh, LLC,

KAYLI H. SPIALTER, ESQ.  
STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
Carvel Office Building, 5th Floor  
820 N. French Street  
Wilmington, Delaware 19801  
for Appellee Department of Natural  
Resources and Environmental Control

-- -- -- --



1                   CHAIRPERSON HOLDEN: Good  
2 morning, everybody. Thank you very much for  
3 the patience. It's taken us a little bit  
4 here to work through the kinks. We will  
5 jump right in.

6                   So the purpose of today's  
7 hearing is the consideration of Appeal  
8 2020-03 filed by Delmarsh, LLC, which we'll  
9 refer to as "Delmarsh." Delmarsh appealed a  
10 January 30, 2020 decision by the Delaware  
11 Department of Natural Resources and  
12 Environmental Control, which we'll refer to  
13 as "DNREC." Delmar contends the decision  
14 was improper.

15                   Subsequently, Delmarsh filed a  
16 motion in limine requesting certain evidence  
17 and testimony proposed to be presented by  
18 DNREC not be admitted. DNREC has provided a  
19 response to the motion in limine.

20                   I'll now introduce the Board  
21 members and a few other individuals:

22                   Mr. Mulrooney; Ms. Riddle;  
23 Mr. Marcozzi; Mr. Horsey; Mr. Horne; and  
24 myself, Dean Holden, Board Chairperson, make

1 up the Environmental Appeals Board.

2 Sascha Mohammed is the  
3 administrative assistant to the Board.

4 Mr. Kevin Maloney is the Board's  
5 DAG.

6 Representatives from Delmarsh:  
7 We have counsel, Mr. Richard Abbott,  
8 present, as is Mr. Jeffrey Liberto.

9 And Ms. Kayli Spialter is online  
10 representing DNREC.

11 This hearing is being held  
12 remotely via Webex video conferencing. With  
13 that being said, I ask participating  
14 individuals to mute your microphone unless  
15 you're actively speaking. If you are having  
16 video conferencing issues, you could let us  
17 know via the chat function. Ms. Mohammed is  
18 also at her office desk. The phone number  
19 is 302-739-9295. Also, please turn off any  
20 phone ring tones or set them to silent if  
21 you have them with you.

22 We will conclude the hearing no  
23 later than 4:30 p.m. We may take a  
24 midmorning break, lunch break and possibly



1 other breaks should the hearing run into the  
2 afternoon. The Board may deliberate at any  
3 time and will do so in executive session, as  
4 permitted by 7 Del Code, Section 6008(a).

5 Notice of today's hearing was  
6 posted on the State of Delaware Secretary of  
7 State's Public Meeting Calendar and at the  
8 Richards & Robbins Building, 89 Kings  
9 Highway, in Dover. In addition, public  
10 notice of this hearing was published in the  
11 News Journal and the Delaware State News.

12 The Board is a quasi-judicial  
13 body created by the General Assembly to hear  
14 appeals of decisions of the secretary. The  
15 manner in which the Board fulfills its  
16 duties and responsibilities, including  
17 conducting hearings, is established and  
18 governed by the Delaware Code, Board's  
19 regulations and case law. The Board is  
20 required to issue a written decision within  
21 90 days of the conclusion of this matter.  
22 Pursuant to 7 Del Code 6009(a), any person  
23 or persons aggrieved by any decision of the  
24 Board may appeal to the Superior Court



1 within 30 days of receipt of the written  
2 opinion.

3 As we indicated earlier,  
4 Delmarsh has filed a motion in limine, with  
5 a subsequent response by DNREC. I will ask  
6 the appellant to begin addressing the motion  
7 in limine.

8 MR. ABBOTT: Thank you,  
9 Mr. Chairman.

10 Mr. Chairman, members of the  
11 Board. My name is Richard Abbott. I'm  
12 counsel to Delmarsh. And I'll introduce  
13 Mr. Liberto and Mr. McCulley. They've  
14 effectively been introduced, but they'll be  
15 introduced later when they testify.

16 As to the motion in limine, as  
17 the Board chair requested I'll address that  
18 in order.

19 First, the primary focus of the  
20 motion is a 1926 aerial photograph, and  
21 we're seeking to exclude any evidence and  
22 testimony regarding that photograph for  
23 three reasons.

24 The first reason is: Under



1 Delaware Rule of Evidence Rule 901,  
2 authentication is required to admit  
3 evidence. When you have a photograph, in  
4 particular, you have to be able to establish  
5 a sufficient degree of accuracy as to what  
6 the photograph is supposed to depict, and  
7 that's why you need that sponsoring witness,  
8 in order to establish the details of when  
9 the photograph was taken, how it was taken,  
10 et cetera, et cetera. None of those  
11 elements are present here because we have a  
12 photograph that's taken from a website. I  
13 gather DNREC is alleging it's a state  
14 website. I can't tell that with certainty.  
15 But we don't know who took it, when they  
16 took it, how they took it, and it's an  
17 extremely important issue because that's the  
18 underpinning of the entire DNREC decision.

19 So the Delaware Supreme Court  
20 has said that the proponent of a particular  
21 photograph has to show that there is -- by  
22 reasonable probability that there's no  
23 possibility of misidentification or  
24 adulteration of the photograph, meaning that





1 it accurately depicts what it purports to  
2 show. So that's not present because we  
3 don't know who took the 1926 photo. We  
4 don't know any of the details of it, and I'm  
5 not even sure what Delaware imagery is. So  
6 that's first issue.

7 The second issue is with respect  
8 to the issue of legal irrelevance under  
9 Delaware Rule of Evidence Rule 403. We  
10 submit that the probative value is  
11 substantially outweighed by the danger of  
12 unfair prejudice and confusion because we  
13 have lay witnesses, not expert aerial  
14 photograph interpreters, who DNREC could  
15 have retained and could have gotten the read  
16 on. And in fact, DNREC is alleging that a  
17 dark area on a 1926 aerial photograph is  
18 somehow evidence of a tidal connection.  
19 That's the central issue in the case, tidal  
20 connection.

21 So a dark area. And how do you  
22 determine what that is? Is it a shadow? Is  
23 it a drainage ditch that's not connected to  
24 tidal waters? It's not discernible, and



1           therefore, it's too speculative and  
2           conjectural and would lead to undue  
3           prejudice to my client.

4                         Thirdly, Delaware Rules of  
5           Evidence 701 and 702 require under these  
6           circumstances that an expert witness be  
7           presented who is an aerial photograph  
8           interpreter. They do exist, as I present in  
9           the motion. It's a recognized professional  
10          field. And DNREC could have had an  
11          interpreter take a look at the photograph  
12          and discern in their opinion, if they could  
13          opine, whether the dark area that they're  
14          relying upon constitutes a connection to  
15          tidal waters.

16                        So Rule 702 requires knowledge,  
17          skill, experience, training, education, any  
18          of those or a combination of those. The  
19          DNREC employees, contrary to the DNREC  
20          contention, are not experts in the aerial  
21          photograph interpretation field, and merely  
22          because they've reviewed aerial photographs  
23          in the past does not make them experts. You  
24          can't act as if you're a medical doctor on

1 numerous occasions and then claim that that  
2 experience allows you to give a medical  
3 opinion, for example. And that's  
4 essentially what they're contending.

5 The other points that DNREC  
6 makes, again, they allege that the Delaware  
7 aerial imagery is a public self-  
8 authenticating document. I haven't seen any  
9 proof of that. That's just a contention  
10 without any backup information. The only  
11 specifics regarding the 1926 photograph that  
12 was submitted by DNREC was an indication  
13 that this was a United States Department of  
14 Agriculture photograph. It doesn't say why  
15 it was taken. It doesn't give any of the  
16 details like the information exists for the  
17 1937 aerial photographs and the 1950s aerial  
18 photographs. If you look at that document  
19 DNREC attached, there's a lot of detail  
20 regarding the other aerial photographs.  
21 There's nothing other than an indication  
22 "1926 USDA." So we don't think that is  
23 sufficient indicia of reliability to allow  
24 the photograph to be admitted.



1                   They allege that you don't need  
2                   an expert to interpret a photo. Well, the  
3                   proof is in the pudding. You've seen the  
4                   photo. I attached it to my motion in  
5                   limine. And what's on that photo is  
6                   anybody's guess. And that's what it boils  
7                   down to. This is mere guesswork and  
8                   surmising by DNREC, and it's just not  
9                   reliable information that the Board should  
10                  allow to be admitted for consideration.

11                  So the last point DNREC made was  
12                  that even if the 1926 aerial photo is  
13                  inadmissible, that doesn't cause a problem  
14                  to their site summary or their decision.  
15                  Well, I would suggest that because the site  
16                  summary is founded on the 1926 photograph,  
17                  if the 1926 photograph doesn't come in,  
18                  neither does any reference to it. And  
19                  further, in the actual decision, it refers  
20                  to the site summary. So, again, once the  
21                  photograph is out, then all matters that  
22                  rely or refer to that photograph, Delmarsh  
23                  would submit, should not be admitted. Thank  
24                  you.



1 CHAIRPERSON HOLDEN: Thank you,  
2 Mr. Abbott.

3 Is the Board comfortable to hear  
4 from Ms. Spialter before we address any  
5 questions?

6 Ms. Spialter.

7 MS. SPIALTER: Good morning,  
8 members of the Board, Chair Holden. I am  
9 Kayli Spialter, here on behalf of DNREC, and  
10 I will be presenting both our case in chief  
11 as well as responding to appellant's motion  
12 in limine.

13 As you heard from Mr. Abbott,  
14 his primary focus of the motion in limine is  
15 to exclude a 1926 aerial photograph which  
16 was first produced in response to  
17 appellant's request for production and  
18 subpoena by providing a URL, a website  
19 address, the beginning of which is  
20 <http://firstmap.gis.Delaware.gov>.

21 Following Mr. Abbott's concerns  
22 regarding knowing exactly what portion of  
23 this website we were going to be presenting,  
24 I took a screen shot for him and forwarded



1 that, which has been included in our joint  
2 exhibits. However, it is my intention to  
3 produce the website itself, to produce the  
4 entirety of ArcGIS and the map as produced  
5 by that website. Accordingly, as Mr. Abbott  
6 mentioned, that makes the exhibit  
7 self-authenticating. It is well established  
8 by the Delaware and Federal Rules of  
9 Evidence Rule 902 paragraph (5) a  
10 "publication purporting to be issued by a  
11 public authority" is self-authenticating.  
12 And courts have repeatedly held that a web  
13 page maintained on a government website is a  
14 publication purporting to be issued by a  
15 public authority under said rule.  
16 Accordingly, it appears on a government  
17 website, it is self-authenticating. It is  
18 authentic. It is uncontrovertible. It's  
19 not a matter of discretion. It is.

20 Moving on.

21 Appellant argues that the  
22 photograph is inadmissible because it would  
23 be unduly prejudicial. First of all, that  
24 standard falls under Delaware Rules of



1 Evidence 403 and it has been held to be an  
2 extraordinary measure used sparingly because  
3 it is the role of the fact-finder to weigh  
4 the evidence, and in order to do so, the  
5 fact-finder must see all of the evidence.  
6 It is only in a situation where the  
7 prejudicial value -- where the unfair  
8 prejudice is substantially outweighing the  
9 probative value.

10 One of the benefits of appearing  
11 before the Board is that you are all  
12 professionals. You all have experience  
13 within the field. You all understand  
14 DNREC's professionals and their experience  
15 in the field. To suggest that the Board  
16 would be unfairly prejudiced against the  
17 appellant by imagery appearing on a  
18 government website, quite frankly sounds  
19 absurd.

20 As Mr. Abbott stated, this  
21 photograph, the historical lay of the land,  
22 is a crucial element of the regulatory  
23 definition of "wetlands." I would submit  
24 that even if the map had handwritten notes



1 on it -- which it does not, it is simply a  
2 photograph -- the Board in its expertise is  
3 sufficiently experienced and sufficiently  
4 capable of judging the probative value of  
5 the evidence that it should not be  
6 inadmissible due to any potential prejudice.  
7 It is of central relevance to this case to  
8 determine what the lay of the land was at  
9 various points in history. Accordingly, the  
10 probative value of this evidence is  
11 extremely high. I would argue that there is  
12 no prejudicial value, certainly not unfair  
13 prejudice that outweighs that probative  
14 value.

15 Now, Mr. Abbott has also argued  
16 that the map cannot be -- that the  
17 reliability of the map is questionable  
18 because of the lack of background on it.  
19 Now, as previously stated, it's self-  
20 authenticating by appearing on a government  
21 website. However, I can understand that  
22 even so, there is a difference between  
23 believing that the photograph is what it  
24 purports to be and the validity of the





1 contents of the exhibit, which more or less  
2 sounds like a hearsay objection.

3 So first, I would like to remind  
4 the Board that under Delaware Rule of  
5 Evidence 803 paragraph (16) which provides  
6 statements appearing in a document that is  
7 at least 20-years old are admissible once  
8 the document is authenticated.

9 Further, again, I intend to  
10 produce that exhibit using the ArcGIS  
11 software, which will allow you to see at  
12 every magnification level exactly where the  
13 photograph comes from, how it works into the  
14 greater scope of the Delaware lay of the  
15 land, as well as the software itself. I am  
16 more than happy to address any questions at  
17 that point.

18 As Mr. Abbott mentioned,  
19 included with my response to the motion in  
20 limine, I also included a document which  
21 provides background information on the  
22 Delaware aerial imagery. It demonstrates  
23 where and how these photographs came to be,  
24 who owns them and who is responsible for



1       their upkeep. The 1926 photographs were  
2       initially commissioned by the USDA  
3       Agriculture Stabilization & Conservation  
4       Service. While, no, we do not have the  
5       specific photographer's name, being this  
6       document is close to a hundred-years old and  
7       has been part of the public domain for  
8       decades, I believe any argument as to its  
9       relevance or reliability can be judged based  
10      on viewing the photographs themselves.

11               With regard to appellant's  
12      argument that an expert witness is required  
13      to interpret these photographs, well, there  
14      may very well be the field of expert aerial  
15      photography, that does not in any way limit  
16      the ability for more general expert opinion  
17      and certainly doesn't limit lay witness  
18      testimony. We will demonstrate that DNREC's  
19      employees, our witnesses, experienced and  
20      educated in the field of aerial photography  
21      analyzation for the purposes of determining  
22      wetlands, determining water bodies, as was  
23      done in this case.

24                               Delaware Rules of Evidence 702



1 requires that the witness being proffered as  
2 an expert has scientific, technical or other  
3 special ed. knowledge by virtue of their  
4 education or experience. You'll hear from  
5 Tyler Brown that he analyzes photography of  
6 this sort with every single map application,  
7 whether it's a wetlands change such as this  
8 one or a permit to authorize a subaqueous  
9 permit for docking purposes, et cetera. It  
10 is going to be clear to the Board that  
11 Mr. Brown has the experience necessary to  
12 provide an expert opinion regarding what the  
13 imagery shows. And to whatever extent the  
14 Board may feel that Mr. Brown and  
15 Mr. Goetze's experience is insufficient for  
16 an expert testimony regarding the imagery,  
17 any lay witness may testify and offer an  
18 opinion rationally based on their  
19 perception. Accordingly, DNREC's witnesses  
20 will also be able to testify as to what it  
21 is that they observe on the maps, how that  
22 relates to what they observed on site and  
23 provide an opinion based on their perception  
24 of the evidence.



1                   Accordingly, I do not believe  
2                   that there is any argument to exclude this  
3                   photography from the record, and it is of  
4                   utmost importance to the definition for  
5                   "wetlands" to determine what the topography  
6                   of the land has looked like through history.

7                   To the extent that the Board  
8                   were to grant appellant's motion in limine,  
9                   that is still insufficient grounds to also  
10                  exclude the on-site investigation summary as  
11                  well as the decision which forms the basis  
12                  for this appeal. Appellant provides  
13                  absolutely no authority for such an extreme  
14                  position that a single piece of evidence  
15                  eliminates an entire opinion. In fact, it's  
16                  well established that evidence can be  
17                  submitted for one purpose but not for  
18                  another -- for example, hearsay objections.  
19                  So even if the Board were to grant the  
20                  motion in limine and exclude the 1926 aerial  
21                  photography, the rest of the analyses and  
22                  the decision itself would have to be  
23                  admissible; otherwise, we literally would  
24                  have no reason to be here. I honestly don't



1 understand how this hearing would work if  
2 the document which is being appealed is  
3 excluded from evidence. I would love to  
4 hear some explanation of that.

5 But regardless, the documents  
6 themselves contain significantly more  
7 information than one photograph or opinions  
8 based on that one photograph. And  
9 accordingly, even if the photograph is  
10 excluded, the remainder of the documents  
11 should be admissible.

12 Thank you.

13 CHAIRPERSON HOLDEN: Thank you,  
14 Ms. Spialter.

15 Questions from the Board?

16 So without specific questions  
17 from the Board, we've got a motion in limine  
18 and a response, we can hear a motion to go  
19 to executive session for discussion. We can  
20 hear a motion on the motion in limine.

21 UNIDENTIFIED SPEAKER: I'll  
22 motion to go to executive session.

23 CHAIRPERSON HOLDEN: There is a  
24 motion to go to executive session.

1 Can I get a second?

2 Mr. Horsey is indicating a  
3 second.

4 MR. HORSEY: Second.

5 CHAIRPERSON HOLDEN: All in  
6 favor?

7 Aye.

8 MS. RIDDLE: Aye.

9 MR. HORSEY: Aye.

10 MR. HORNE: Aye.

11 MR. MARCOZZI: Aye.

12 MR. MULROONEY: Aye.

13 CHAIRPERSON HOLDEN: Any  
14 opposed?

15 Okay. So the Board members here  
16 will then need to log off of the meeting,  
17 and we'll reconnect here, right. So keep  
18 your fingers crossed that our reconnection  
19 works well. We've been through this once.

20 We'll travel over to the  
21 executive session, the information that  
22 Sascha provided yesterday afternoon,  
23 reconnect there.

24 And for the other folks here on



1 Webex, we hope to be back shortly with full  
2 communication. Thank you.

3 CHAIRPERSON HOLDEN: We're back  
4 in public session. In a moment here we'll  
5 see if the Board has a motion. I want to  
6 ensure that the Board member who has a  
7 motion that they state who they are. I  
8 don't know the court reporter gets to see  
9 exactly who is speaking, and if we end up  
10 doing a vote, we'll do a roll call vote so  
11 that information is on the record.

12 So with that, is there a motion  
13 from the Board?

14 MR. HORNE: This is Randy. I  
15 make a motion to deny the submitted motion  
16 in limine.

17 CHAIRPERSON HOLDEN: All right.  
18 We have a motion from Mr. Horne.

19 Is there a second?

20 Mr. Horsey, I see your lips  
21 moving, but your mic, looks like it's muted.

22 MR. HORSEY: This is Mike  
23 Horsey. I second.

24 CHAIRPERSON HOLDEN: All right.



1 We have a motion to deny the motion in  
2 limine and a second from Mr. Horsey. I'm  
3 going to do a roll call vote.

4 Ms. Riddle.

5 MS. RIDDLE: Aye.

6 CHAIRPERSON HOLDEN:

7 Mr. Mulrooney.

8 MR. MULROONEY: In favor.

9 CHAIRPERSON HOLDEN:

10 Mr. Marcozzi.

11 MR. MARCOZZI: In favor.

12 CHAIRPERSON HOLDEN: Mr. Horne.

13 MR. HORNE: In favor.

14 CHAIRPERSON HOLDEN: Mr. Horsey.

15 MR. HORSEY: In favor.

16 CHAIRPERSON HOLDEN: This is  
17 Dean Holden. I vote in favor of the motion  
18 as well.

19 So it's a unanimous decision to  
20 deny the motion in limine.

21 With that, we'll move into the  
22 appellant's arguments for the appeal.

23 Mr. Abbott.

24 MR. ABBOTT: Thank you,





1 Mr. Chair. Are we proceeding with opening  
2 statements at this point, or...

3 CHAIRPERSON HOLDEN: Yes,  
4 please.

5 MR. ABBOTT: Very good. The  
6 case or this appeal boils down to the  
7 definition of the term "wetlands" that is  
8 contained in the Wetlands Act.  
9 Specifically, it's Title 7, Section 6603  
10 (h), which defines the term "wetlands." It  
11 includes three criteria that have to be  
12 satisfied in order for land to qualify as  
13 wetlands. And I'm going to summarize them  
14 while using a single word for each one.

15 So one criteria deals with  
16 elevation. A second criteria deals with  
17 plants. And a third criteria deals with  
18 tidal. T-I-D-A-L. This appeal does not  
19 involve elevation or plant criteria. It  
20 does not involve elevation or plant  
21 criteria. They're not before you. The only  
22 criteria that is relevant regarding the  
23 definition of "wetlands" is the tidal  
24 criteria.



1 Further, the tidal criteria is  
2 broken down into two possible items. One is  
3 that the land could currently be subject to  
4 tidal action. That's not at issue because  
5 it's undisputed that the lands are not  
6 currently subject to tidal action. So the  
7 other component of the tidal criteria is  
8 what is at issue here, and that particular  
9 component of the tidal criteria requires  
10 three things:

11 One, "Areas." So, again, the  
12 first element is areas.

13 The second component of it is  
14 that you have "in this century." There is a  
15 term, "in this century."

16 And the third component is  
17 "connected to tidal waters."

18 All combined, it reads: Areas  
19 within this century were connected to tidal  
20 waters.

21 But all three of those  
22 components of this particular tidal criteria  
23 are required to be shown, or else, there is  
24 an error on the maps, and the lands should

1 be removed.

2 "This century," as I've set  
3 forth in the memorandum of law that I  
4 submitted, we contend plainly means the 21st  
5 Century. This century. We're in the 21st  
6 Century. If the General Assembly had meant  
7 it to mean the 20th Century, they could have  
8 said "the 20th Century." They also could  
9 have said something like "from 1900  
10 forward." In any event, instead, they chose  
11 the term "this century." And today, this  
12 century is the 21st Century. And as I noted  
13 a moment ago, it is undisputed that there is  
14 no tidal connection in this century. So,  
15 therefore, we think that this century issue  
16 would be dispositive.

17 But also, we can address DNREC's  
18 argument. They contend that the term "in  
19 this century" is ambiguous. And as we've  
20 presented in our memorandum of law, if it is  
21 ambiguous, the interpretation which is most  
22 favorable to the landowner should be  
23 applied. It's, effectively, private  
24 property rights, the free use of land. So



1 just like a zoning decision is decided in  
2 favor of the landowner in case of ambiguity,  
3 we submit that any ambiguity found by the  
4 Board should likewise be resolved in favor  
5 of Delmarsh.

6 The areas, and connected to  
7 tidal waters. The six lots are not areas  
8 that were connected to tidal waters in any  
9 century. The only item that DNREC presents  
10 is a 1926 aerial photograph, which we just  
11 dealt with the motion in limine on. It's  
12 not reliable. When you look at it, I think  
13 you'll agree no one can really tell what the  
14 ground conditions are that are depicted on  
15 that photo. Again, there has to be proof of  
16 connection. And merely showing dark areas  
17 along a particular roadbed does not in and  
18 of itself establish that there is a  
19 connection. And as we'll present in the  
20 evidence, you'll hear DNREC has no idea if  
21 that's just a drainage ditch and it was  
22 receiving storm water runoff. It's not  
23 necessarily connected to the ditch.

24 The other thing you'll hear and



1 see in the exhibits, the Joint Hearing  
2 Exhibits, are that there was a ditch that  
3 ran from the St. Jones River. It went  
4 underneath the area that we believe is now  
5 Flack Avenue and then it connected into the  
6 tidal marsh that is currently located on the  
7 west side of Flack Avenue. That's the only  
8 ditch. That's the only objective evidence  
9 that exists to show any ditch. That ditch  
10 runs next to lot 26. My client's lots are  
11 22 through 25, 32 and parcel D. Not lot 26.  
12 DNREC, I think you'll probably see here has  
13 confused lot 26, which is a relatively large  
14 lot owned by a gentleman name of Charles  
15 Shore for 70 years now. And that's not my  
16 client's property. Even if the aerial photo  
17 were to show a sliver of a dark area and the  
18 Board were to find that that constituted a  
19 tidal connection, the "areas" term is key  
20 because it's only those areas that are part  
21 of that connection. Therefore, this sliver  
22 of dark area that DNREC, you'll hear, relies  
23 upon to theorize that there is a tidal  
24 connection is the only area that would have



1 a tidal connection, not the other 95 plus  
2 percent of lots 22 through 25 and lots 32  
3 and parcel D. In fact, lot 32 and parcel D  
4 don't front on Flack Avenue. So they  
5 clearly have no influence whatsoever based  
6 on this dark area that DNREC contends  
7 constitutes a tidal connection.

8 We will show you evidence that  
9 DNREC's speculating; they're participating  
10 in pure conjecture. And although you've  
11 allowed the evidence in, as the courts  
12 typically do, the next question is: What  
13 weight should be accorded to that evidence?  
14 And we would submit that little to no weight  
15 should be accorded to it because it's  
16 anybody's guess what a nearly 100-year-old  
17 photo shows on the ground. It shows you  
18 from the air. That dark area could be  
19 plants. That dark area could be a shadow.  
20 That dark area could be any number of  
21 things. And without an expert aerial photo  
22 interpreter, there is no one that can give  
23 an opinion as to what that dark area  
24 actually shows.



1           Last, but not least, DNREC also  
2           hypothesizes that there is a culvert. I  
3           don't know whether they're arguing that it  
4           used to exist or that it currently exists,  
5           but I can assure you, there's no culvert  
6           running under Flack Avenue today that  
7           connects the marsh to any lands and let  
8           alone my client's lots 22 through 25, 32 and  
9           the parcel D.

10           Now, I trust that each of you  
11           has the joint exhibit binder that was  
12           submitted to Ms. Mohammed. I would  
13           encourage you to look to orient yourselves.  
14           You probably already have tab 6 in that  
15           exhibit binder because that is the Charles  
16           Shore subdivision plan. We would submit to  
17           you that this is some of the best evidence  
18           of the circumstances that existed at the  
19           property, at least we see here in 1950. It  
20           was prepared by surveyor Charles Brown in  
21           October.

22           CHAIRPERSON HOLDEN: Mr. Abbott,  
23           let's give folks just a second to get there.  
24           I know this is a challenge for some folks.



1                   So you're referencing the  
2                   chronology; is that correct?

3                   MR. ABBOTT: No, I'm referencing  
4                   the joint hearing exhibits.

5                   CHAIRPERSON HOLDEN: Okay. A  
6                   joint hearing exhibit document. Does  
7                   everybody on the Board have that in front of  
8                   them?

9                   Okay. I understand. Okay.  
10                  Very good. Okay.

11                  MR. ABBOT: Everybody should  
12                  have a hard copy because I submitted nine  
13                  hard copies.

14                  MR. HORNE: Could I ask that we  
15                  reference a page number in that exhibit?

16                  CHAIRPERSON HOLDEN: Mr. Abbott,  
17                  does it show you which page number in that  
18                  exhibit? Not everybody, when they open that  
19                  PDF, has the tabs visible.

20                  MR. ABBOTT: Oh. I don't know  
21                  what page number it would be. I know it's  
22                  Exhibit 6.

23                  CHAIRPERSON HOLDEN: Let me see  
24                  if I can get there real quick.





1 MR. ABBOTT: It's a survey plan  
2 that shows numerous lots. The background is  
3 black, and the lots are overlaid in white.

4 CHAIRPERSON HOLDEN: Okay. I'll  
5 get there in just one second, I can give a  
6 page number. It looks like it's page 72.

7 MR. ABBOTT: Sure. It's going  
8 to be somewhat cumbersome because we'll be  
9 referring to exhibits numbers throughout the  
10 testimony, but perhaps we'll just take a  
11 moment and figure out what the page number  
12 may be.

13 In any event, what this shows  
14 you is that parcels are, as you're aware, in  
15 Bowers Beach. Technically Town of Bowers,  
16 but colloquially referred to as "Bowers  
17 Beach." This is the Shore subdivision plan  
18 from 1950 I mentioned. You'll see over, all  
19 the way over on the left side, in the upper  
20 side it says, parcel D, 2.1 acres, and then  
21 it shows you all the lot numbers going from  
22 left to right starting with lands of Charles  
23 Frank. Then you'll note next to that is a  
24 somewhat meandering line that has the word



1 "DITCH," D-I-T-C-H, next to it. And that  
2 meandering line runs adjacent to lot No. 26  
3 and the lands of Charles Frank. Then you'll  
4 see it then appears to run underneath a  
5 road, a 30-foot-wide right-of-way and then  
6 it continues on beyond that right-of-way,  
7 which now is known as Flack Avenue, and that  
8 ends in an area which is now a tidal marsh.

9 So I just wanted to go over this  
10 particular document so you could all orient  
11 yourselves to the location of the property  
12 and visualize what we're talking about  
13 because lots 22, 23, 24, and 25 are at  
14 issue, as well as lot 32, which sits right  
15 above lot 22, and then, of course, the  
16 larger parcel that's delineated as parcel D,  
17 as in David. And parcel D runs along the  
18 St. Jones River and also has some frontage  
19 on the Delaware Bay. Lot 32 has frontage on  
20 the Delaware Bay, and lots 22 through 25 are  
21 all inland and don't abut any tidal water.

22 So you'll hear testimony about  
23 all these various matters from both  
24 Mr. Liberto, our expert, Mr. McCulley. I



1 suspect you'll also hear some DNREC  
2 witnesses, but at the end of the day, they  
3 simply have no proof. And the emperor has  
4 no clothes. There is no evidence of a  
5 credible nature to establish that in any  
6 century there has ever been a tidal  
7 connection with the six lots.

8 I'll refer to them at certain  
9 times as "the six lots." And by that I mean  
10 lots 22 through 25, 32 and parcel D.

11 That's all I have now. I can  
12 continue with our evidence, or is it time  
13 for Ms. Spialter to do her opening?

14 CHAIRPERSON HOLDEN: So first  
15 let me ask: Has the Board navigated  
16 themselves there to page 72, to that plot  
17 plan, which is black background with white  
18 lines? I see some nods. Yeah. Okay. Very  
19 good.

20 Is it more comfortable to move  
21 to Ms. Spialter's opening argument?

22 Okay. Ms. Spialter.

23 MR. SPIALTER: Thank you,  
24 Chair Holden.

1           As you've heard from appellants,  
2           this case revolves around a wetlands map  
3           designation, the regulatory definition of  
4           "wetlands" and the fact that there is really  
5           only one element of the definition that is  
6           at issue here. That is "those areas which  
7           are now or in this century have been  
8           connected to tidal waters."

9           As an initial point, DNREC does  
10          not agree with appellant's assertion that  
11          there is no tidal action at this point.  
12          However, we will discuss that when we  
13          present our evidence as necessary. We  
14          believe that the evidence will show, based  
15          on the on-site investigation performed by  
16          DNREC employees following the application,  
17          as well as the application itself, and  
18          information requested by DNREC employees in  
19          attempting to evaluate the application, that  
20          based on the record before the Secretary --  
21          which is the standard before the  
22          Environmental Appeals Board -- based on the  
23          record before the Secretary, the evidence  
24          supports the finding that the lands in

1 question were or are -- were in this century  
2 or are tidally connected to tidal waters.  
3 There are absolutely definitions here that  
4 come into play, definitions of "tidal  
5 waters," definitions of "in this century,"  
6 definitions of "connected to." It is the  
7 responsibility of DNREC staff in their role,  
8 in their job descriptions to, as the  
9 determiners of these questions determining  
10 these applications, to interpret that  
11 regulation.

12 It's important to note at this  
13 point that substantial weight is granted to  
14 agency's construction of its own rules. The  
15 regulations in question here are DNREC's  
16 rules. Agency's construction will only be  
17 reversed if it is clearly wrong. It may not  
18 be the only definition. It may not even be  
19 the best definition. As long as it is not  
20 clearly wrong, the agency's interpretation  
21 stands.

22 We will show that there is  
23 ambiguity in the regulation and that DNREC  
24 interpreted it according to the rules of



1 statutory interpretation to find that "in  
2 this century" properly means the 20th  
3 Century or at least a rolling 100-year  
4 period from the date of analysis.

5 Accordingly, the 1926 aerial photography as  
6 well as current storm activity, soil makeup,  
7 and other clear geological markers on the  
8 property demonstrate that it is connected to  
9 tidal waters.

10 You may heard appellants try to  
11 offer evidence that was not before the  
12 Secretary, despite multiple requests for  
13 additional information. To whatever extent  
14 that information may refute the findings of  
15 DNREC employees, of the Secretary, that's  
16 irrelevant because the standard before the  
17 Board is whether the evidence before the  
18 Secretary is sufficient to uphold the  
19 decision. And we believe that it will show  
20 that it absolutely is still wetlands and  
21 that the spirit of the regulations and  
22 statute should be protected by maintaining  
23 that wetlands designation. Thank you.

24 CHAIRPERSON HOLDEN: Thank you,



1 Ms. Spialter.

2 Any questions at the moment from  
3 the Board?

4 Do you want to move into witness  
5 testimony?

6 All right. Mr. Abbott.

7 MR. ABBOTT: Thank you,  
8 Mr. Chairman. I would like to first have  
9 Jeff Liberto testify. I can't call him to  
10 the stand because we don't have a.

11 So if may proceed with  
12 Mr. Liberto. Are you on, Mr. Liberto?

13 MR. LIBERTO: Yes. Can you hear  
14 me?

15 MR. ABBOTT: Yes.

16 CHAIRMAN HOLDEN: Do we have  
17 Ms. Reeder do introductions for Mr. Liberto?

18 THE COURT REPORTER: This is  
19 Ms. Reeder, the court reporter. Just wanted  
20 to remind counsel the court reporter  
21 generally asks for a stipulation by counsel  
22 that you agree to the court reporter  
23 remotely swearing in all witnesses.

24 MR. ABBOTT: Agreed here.



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MS. SPIALTER: Agreed.

THE WITNESS: Agreed.

-- -- -- --

JEFFREY LIBERTO,

the witness herein, having first  
been duly sworn on oath, was  
examined and testified as follows:

DIRECT EXAMINATION

BY MR. ABBOTT:

Q. Mr. Liberto, how old are you?

A. I'm 55.

Q. Where do you reside?

A. I live at 74 Cabin Court, in  
Magnolia, Delaware.

Q. How are you employed?

A. I'm currently not employed right  
now.

Q. Okay. Do you own Delmarsh, LLC?

A. Yes.

Q. And we don't need to have all the  
members of the Board go through this, but  
I'm going to refer you -- you have the hard  
copy of the joint hearing exhibits in front  
of you; correct?





1 A. Yes.

2 Q. Just for the record, I wanted to  
3 establish that Exhibit 7 and 8 are the deeds  
4 for the six lots; is that correct?

5 A. Yes, that is correct.

6 Q. And Exhibits 9 and 10 are the Kent  
7 County tax parcel printouts for the six  
8 lots?

9 A. Yes.

10 Q. Now, there's only two deeds, but  
11 there's six lots. Could you explain that to  
12 the Board, please?

13 A. Well, in the original 1950s  
14 subdivision, they were all plotted and  
15 recorded, and in my deed itself, it  
16 individually lists each lot.

17 Q. Okay. So the deeds actually  
18 reference the various lots that combine to  
19 constitute the six lots?

20 A. Yes. They're actually individually  
21 noted: 22, 23, 24, 25, 32 and, of course,  
22 the residual, D.

23 Q. Now, one of those deeds also  
24 includes lots 20 and 21?



1           A.     Yes.

2           Q.     Okay.  Now, you've subsequently  
3 conveyed those two lots to the someone else?

4           A.     That is correct.

5           Q.     And lots 20 and 21 are not the  
6 subject of this appeal here?

7           A.     That's correct.

8           Q.     All right.  Can you, please, tell  
9 the Board about your first involvement with  
10 the six lots?

11          A.     Probably 1999, somewhere around that  
12 area, Jeff Beiser, who is a friend of the  
13 family's and so forth, purchased this  
14 property.  I think it was May of '89.  
15 Anyways, he was looking to develop it.  I  
16 had interest in it and so forth.  So we  
17 decided to do a joint venture partnership,  
18 which I financially obligated myself and  
19 joined up with Jack as partners on it.

20          Q.     All right.  And then subsequent to  
21 that, you ultimately became the sole owner  
22 of the six lots through Delmarsh?

23          A.     Yeah.  Originally, we had Del-Homes,  
24 and because of -- long story short.  Jack's



1 wife passed of cancer. Another partner that  
2 we had, Bill Zaccardell, passed of cancer.  
3 Jack was at an age and so forth, a point in  
4 his life he just was done, did not want to  
5 be bothered with anything, so we conveyed it  
6 to the new company, Delmarsh, from  
7 Del-Homes.

8 Q. All right. Now, I want to refer you  
9 to Exhibit 6 that we discussed or I  
10 discussed in the opening which the Board  
11 chair indicated, I believe was at page 72.  
12 So the Board might want to refer to that so  
13 they can follow along with your testimony.

14 All right. So Mr. Liberto, are  
15 you at Exhibit 6?

16 A. Yes, I'm looking at the Charles  
17 Shore subdivision.

18 Q. Okay. And the road that shows "to  
19 St. Jones River" on the lower left-hand  
20 corner.

21 A. Yes.

22 Q. Is that Flack Avenue?

23 A. Yes.

24 Q. All right. And it appears that it's

1 laid out at 30 feet wide. It appears to be  
2 30 and a --

3 A. Wait I need my...

4 Q. All right.

5 A. Yes, it is 30 feet wide. Yes.

6 Q. Again zeroing in on that lower  
7 left-hand corner on Exhibit 6, there is a  
8 meandering area that comes in or meandering  
9 line that comes in from the St. Jones River  
10 that has the word "DITCH," all caps,  
11 D-I-T-C-H. Do you see that?

12 A. Yes, I do.

13 Q. Now, are you familiar with that  
14 ditch that was around at least apparently in  
15 1950?

16 A. I've never personally seen the  
17 ditch. Charles Shore, his son, Ray Shore,  
18 told me about it when he was a kid and so  
19 forth, but I personally have never seen it.

20 Q. And so it appears that it runs  
21 underneath Flack Avenue and into the marsh  
22 on the west side of Flack Avenue. Is  
23 that --

24 A. That's what it appears.



1 Q. All right. And is that consistent  
2 with the information that you received  
3 regarding the location of that ditch?

4 A. Yes. From what Ray was telling me,  
5 I'll say.

6 Q. And Ray is Ray Shore?

7 A. Yes. Charles Shore's son, the  
8 original developer of this subdivision.

9 Q. Now, again, zeroing in on that lower  
10 left-hand corner, there is a relatively  
11 large lot, No. 26. Do you see that?

12 A. Yes.

13 Q. Do you know who the owner of that is  
14 currently?

15 A. That's Charles Shore. That's the  
16 original developer.

17 Q. And was there any analysis done when  
18 representatives of DNREC visited the site on  
19 lot 26 based on your observation?

20 A. You're asking if DNREC did any soil  
21 borings or anything like that on lot 26; is  
22 that correct?

23 Q. Correct.

24 A. Yes, they did. Mm-hmm.



1 Q. Were you present when they were  
2 taking these soil borings from lot 26?

3 A. Yes. My daughter Isabella and  
4 myself were both there.

5 Q. Did you advise the DNREC  
6 representatives that that was not your  
7 property?

8 A. Honestly, I told them and showed  
9 them where the boundaries were surveyed, but  
10 I don't understand everything that they do.  
11 So they took borings wherever -- on the  
12 different -- they took it on this particular  
13 property. They took some on my property.  
14 They took some on the southern properties  
15 that abut to me on the south side.

16 Q. Back to Exhibit 6, the Shore  
17 subdivision plan. Is there anything on  
18 there that shows any connection between the  
19 ditch running to the St. Jones River and  
20 your six lots?

21 A. No. No, I even asked Ray about  
22 that, and he said there never was.

23 Q. Okay. Now, again, looking at that  
24 Shore subdivision plan, there is a area that



1 says "Lands of Charles Frank" to the north  
2 of the ditch?

3 A. Yes.

4 Q. Is the house built on that "lands of  
5 Charles Frank"?

6 A. Well, there's two houses. There is  
7 one house there, and then there is another  
8 house immediately to the north of it.

9 Q. So it's those two parcels that the  
10 houses are on?

11 A. It used to be Larry and Joe, but  
12 they sold it to the State of Delaware, so  
13 the State of Delaware currently owns that.

14 Q. Do you know approximately when the  
15 State purchased those two houses from Larry  
16 and Joe?

17 A. I think, I think it was August,  
18 September of 2018. '18 or '19, somewhere.  
19 I think it was '18.

20 Q. Have you previously received  
21 approval from DNREC to remove any portion of  
22 the six lots from the state wetlands maps?

23 A. Yes.

24 Q. All right. And would that be



1 reflected in tab 4 of the joint hearing  
2 exhibits?

3 A. That's some of it, yes. That's the  
4 latest one.

5 Q. For purposes of the Board, it's  
6 approximately six pages before page 72. And  
7 while the Board members are hopefully  
8 finding this, let me just identify it a  
9 little more specifically.

10 At Exhibit 4, the first page is  
11 dated April 22, 2013, and it's a letter from  
12 DNREC. Is that what you're looking at,  
13 hopefully?

14 A. Yeah, April 22, 2013. I have the  
15 letter, correct.

16 Q. And it's regarding "Change to DNREC  
17 wetlands map No. DNR 1083."

18 A. Yes.

19 CHAIRPERSON HOLDEN: It shows as  
20 page 66 in our PDF document.

21 Q. Okay. Excellent. I got it right,  
22 six pages prior.

23 Now, if you could go to the next  
24 page, which, for the Board, would be page





1           67. Do you see at the very top, the first  
2           sentence, says "The WSLs does approve the  
3           map change request as described in this  
4           letter and depicted on the approved plans"?

5           A.     Yes, I see that.

6           Q.     All right. And did Mr. McCulley, it  
7           seems -- did Mr. McCulley work with you on  
8           this map amendment?

9           A.     Yes, he did.

10          Q.     At the time, it was approved by a  
11          gentleman by the name of Virgil Holmes,  
12          Section Manager, Wetlands and Subaqueous  
13          Lands Section; correct?

14          A.     Correct.

15          Q.     All right. At page, for Board  
16          purposes -- the last page of Exhibit 4 for  
17          Mr. Liberto, and for the Board, it would be  
18          page 68. Can you tell me what that is?

19          A.     That's the plot plan showing the  
20          additional uplands areas, areas of the  
21          uplands that were added to.

22          Q.     All right. Now, I'd like you to  
23          turn -- sorry. Find my spot here.

24                     And then you applied for the



1 wetland map amendment that is on appeal here  
2 in June of 2019; correct?

3 A. Correct.

4 Q. And that's at Exhibit 1?

5 A. Yes.

6 Q. We don't need to proceed through  
7 everything on Exhibit 1, but I did want to,  
8 for purposes of orienting the Board, go  
9 through a few maps that are at the end of  
10 your Exhibit 1, which would be page 15  
11 through 18. For the Board, it should be  
12 pages 15 through 18.

13 So in other words, Mr. Liberto,  
14 it would be the last four pages of Exhibit  
15 1.

16 A. Okay.

17 Q. So I have what appears to be a tax  
18 map that has some handwritten tax parcel  
19 numbers and other indications on it.

20 A. Yes.

21 Q. Okay. So that tax map, could you  
22 explain who put the tax parcel numbers on  
23 that tax map?

24 A. Well, this is from Kent County's



1 website, their mapping website. So I  
2 printed it out and I handwrote the parcel  
3 numbers that were addressed to each of those  
4 properties.

5 Q. So the six lots are the areas of  
6 land that are indicated as "Delmarsh"?

7 A. Correct, 0300 and 0200.

8 Q. Now, above the -- and above your  
9 parcels, the Delmarsh's parcel, you have  
10 "Shore." That's the Shore parcel lot 26?

11 A. Yeah. Lot 26, parcel 0100.

12 Q. Above that, you have two tax parcel  
13 numbers. Could you tell me what those are?

14 A. That's where the two homes were. So  
15 0200 currently has a home and 0100 currently  
16 has a home.

17 Q. And those are the lands the state  
18 bought in about 2018?

19 A. Correct.

20 Q. All right. If you could turn to the  
21 next page. I'm sorry. Scroll forward two  
22 pages, if you could, please.

23 A. Yes.

24 Q. And that appears to be a aerial



1 photograph with the tax parcel lines  
2 overlaid on top of it?

3 A. That's correct.

4 Q. Could you tell the Board where you  
5 obtained this?

6 A. This is from the same Kent County  
7 website. Just click on the aerial photos.

8 Q. Okay. So it appears that your  
9 parcel -- well, the parcels that you can see  
10 mostly appear to have a white base to them.

11 A. Yes. That's all wash and sand.

12 Q. Okay. And so that's lots 22 through  
13 25, 32 and parcel D?

14 A. That's correct.

15 Q. Okay. And I'm not sure if it's  
16 visible to the Board members, but -- and I'm  
17 also familiar with the octagonal house along  
18 Flack Avenue. Do you see that? There is an  
19 octagonal-shaped roof?

20 A. Yes.

21 Q. And your properties are located one  
22 parcel away from that; correct?

23 A. Well, actually, it would be the  
24 octagonal house. Yes, you can see



1 the -- pretty much where the white is, there  
2 is a property line there, a black line.  
3 That is the southern edge of my property.

4 Q. So the octagonal house, that's on  
5 lot 20; correct?

6 A. That's correct.

7 Q. So then there's lot 21 that's not  
8 part of this appeal next to that; right?

9 A. Correct.

10 Q. And then beyond that would be lots  
11 22 through 25?

12 A. That's correct.

13 Q. All right. Could you turn to the  
14 next page of Exhibit 1, which I believe  
15 should be page 18 for the Board.

16 A. Yes.

17 Q. Can you tell us what that shows?

18 A. I took a drone up and pointed it to  
19 the north so I can show all my property.  
20 And you'll see the tire tracks and so forth  
21 where I just had cleaned up the lot.

22 Q. All right. There appears to be a  
23 road. Is that a road I'm seeing with cars  
24 parked on it?



1 A. Yes. That's Flack Avenue.

2 Q. Flack Avenue. Okay. And at the end  
3 of Flack Avenue, I see not real well, but I  
4 see what appears to be two houses.

5 A. Yes, that's two houses. I have the  
6 original photo. I don't know how to submit  
7 it. Maybe Jim has it.

8 Q. You mean you have a better version  
9 of this same photograph?

10 A. Yes. He should have it in our  
11 files. I don't know if Jim can -- if he's  
12 hearing me, or...

13 Q. Well, we can always have him address  
14 that during his testimony.

15 A. It's just easier to see rather than  
16 this black and white. That's all.

17 Q. Okay. Now what I'd like you to do  
18 is to turn to Joint Hearing Exhibit 11,  
19 which for the Board's benefit, I'm not sure  
20 what page number it would be, but it is the  
21 very last page of our exhibits.

22 A. Yes.

23 Q. I'm waiting, Mr. Liberto, for Board  
24 members to have an opportunity to scroll



1 forward to that.

2 CHAIRPERSON HOLDEN: So the last  
3 page of that PDF document for us is "Bowers  
4 Beach Map Changes-Map 2," page 89.

5 MR. ABBOTT: That is precisely  
6 what I'm looking for. Thank you,  
7 Mr. Chairman.

8 MR. HORNE: That's with the red  
9 shading on it?

10 MR. ABBOTT: Correct.

11 BY MR. ABBOTT:

12 Q. Mr. Liberto, do you have "Bowers  
13 Beach Map Changes-Map 2" with the red  
14 shading on certain areas?

15 A. Yes.

16 Q. Could you tell the Board members  
17 what that document is?

18 A. It basically shows the areas that  
19 have been taken off of the state's map and  
20 reclassified as "uplands."

21 Q. Now, towards the top of the page,  
22 there is a boundary, I call it a bread-  
23 slice shaped area of land. Do you see that?

24 A. Yes.



1 Q. It has a "M" in the middle of it?

2 A. Yes.

3 Q. It appears to the right. And above  
4 the capital "M," there is a pork-chop-shaped  
5 red area.

6 A. Yes.

7 Q. And so that area would be the area  
8 that was removed by DNREC from the wetlands  
9 map in years past from a portion of your six  
10 lots; correct?

11 A. Yes. Back to the plot that we were  
12 previously viewing. That shows the line  
13 itself that was...

14 Q. I direct your attention to the lower  
15 right-hand corner of this document entitled  
16 "Legend." Do you see that?

17 A. Yes.

18 Q. Above the legend is a square area  
19 that is shaded in red. There's a faint  
20 capital "M" beneath the red. Do you see  
21 that?

22 A. Yes.

23 Q. All right. So are there houses  
24 built on that area that used to be





1 designated as state wetlands?

2 A. Yes. There's homes all over it.

3 Q. Okay. And do some of the homes  
4 front and take access from Flack Avenue?

5 A. Actually, they're on Bayshore and  
6 Flack, both.

7 Q. Okay.

8 A. The lots are split in half between  
9 Bayshore and Flack.

10 Q. All right. Then moving further  
11 upwards on the page, there is another large  
12 area colored in red, almost a perfect  
13 rectangle, relatively rectangular shape,  
14 and it has a capital "M" below the red  
15 shading. Do you see that?

16 A. Yes.

17 Q. Are there houses that used to be  
18 designated as state wetlands?

19 A. Yes. I actually owned a lot of  
20 those lots in there, and I worked with  
21 Mr. McCulley on that and so forth, so...

22 Q. What lots -- can you just share with  
23 the Board what lot numbers you've previously  
24 been involved with building homes on that



1 are in this middle of the page red area?

2 A. I did lots 17A, 17B, 18A, 18B.

3 Q. All right. And are there houses  
4 fronting on Bayshore that are in that red  
5 area?

6 A. Yeah.

7 Q. And are there houses that front on  
8 Flack Avenue that are in that red area?

9 A. Yeah. There are several on both  
10 streets.

11 Q. So it appears DNREC has removed  
12 what, what would you guess, dozens of lots,  
13 of state wetlands?

14 A. Fourteen, 15. Oh, yeah. Dozens at  
15 least.

16 Q. At least dozens of houses have been  
17 built on houses previously designated as  
18 state wetlands?

19 A. Yes.

20 Q. And during the course of DNREC's  
21 review of map changes regarding those dozens  
22 of lots, did they ever allege that a 1926  
23 aerial photograph prevented them from  
24 removing any of those lands from the map?

1           A.     I never heard of it.  And I used to  
2 work with other developers that were  
3 developing beside me, and it never came up  
4 then either.

5           Q.     All right.  Based on your 21 years  
6 of familiarity with the six lots, have they  
7 ever been connected to tidal waters?

8           A.     No.  And I thoroughly went through  
9 that with Mr. Shore.

10          Q.     Now, is there a drainage swale along  
11 Flack Avenue on the east side abutting lots  
12 22 through 25?

13          A.     Yes.

14          Q.     And is that drainage swale in the  
15 30-foot wide Flack Avenue right-of-way?

16          A.     I would think so.

17          Q.     And what does that drainage swale do  
18 as a practical matter?

19          A.     Just from normal rain and so forth,  
20 it accumulates.

21          Q.     So rain water that runs off of Flack  
22 Avenue?

23          A.     Yeah, from the sky, and from the  
24 road itself and so forth.  I mean, a lot of



1 times, it's totally dry, everything is  
2 totally dry for weeks. After you get a  
3 rain, depending on how much rain you get, it  
4 depends on if there is any water that  
5 accumulates in that swale.

6 Q. Does any water come into your  
7 property from Bayshore? Street runoff?

8 A. Oh, yes. Mm-hmm. The town has been  
9 working on, supposedly, a solution because  
10 all the homes around there, it needs some  
11 type of storm water management.

12 Q. Now, you mentioned -- we talked  
13 earlier about how you were present during  
14 one of the site visits conducted by DNREC.

15 A. Yes.

16 Q. DNREC indicates they made two site  
17 visits. So you were only there for one of  
18 them.

19 A. No, I was there at both.

20 Q. Okay.

21 A. One, my daughter was there, and the  
22 other, Jim McCulley was with me.

23 Q. Okay. Now, did you have any  
24 discussions with Tyler Brown of DNREC during



1 either of those site visits?

2 A. Yes.

3 Q. And did he ever comment to you  
4 regarding his opinion of the prior map  
5 amendment in 2013?

6 A. Yes. As a matter of fact, Jim  
7 McCulley had the conversation with him about  
8 the amendment and so forth.

9 Q. And that's -- we talked earlier  
10 about the April 22, 2013 letter from  
11 Mr. Brown's predecessor?

12 A. Correct. Yes.

13 Q. And for the Board's benefit, that  
14 was at page 66 and 67.

15 So what did Mr. Brown say about  
16 the map amendment approved by his  
17 predecessor?

18 A. Well, the conversation was that the  
19 wash-in, the sand and so forth, the  
20 elevation of everything, the majority of my  
21 lot is of -- or higher than what we had  
22 already removed from the wetlands, and so if  
23 we made application and so forth, would he  
24 support it, and he said, Mr. Brown, said



1 that he would not support it. We said,  
2 Well, then we had it before. And he said,  
3 Well, I wouldn't have done that, so...

4 MR. ABBOTT: Okay. Thank you.  
5 I don't have any further questions for  
6 Mr. Liberto.

7 THE WITNESS: Thank you.

8 CHAIRPERSON HOLDEN:  
9 Ms. Spialter.

10 MS. SPIALTER: Thank you.

11 CROSS-EXAMINATION

12 BY MS. SPIALTER:

13 Q. Mr. Liberto, I'd just like to ask  
14 you a couple of questions about the history  
15 of the site and your observations of the  
16 site.

17 A. Sure.

18 Q. So first of all, have you ever  
19 observed the tide from the back bay flood  
20 across Flack Avenue?

21 A. I have not.

22 Q. Have you ever seen the bay breach  
23 the dunes to flood the area?

24 A. I think back in 2016, there was a



1 big storm that -- I think it was Sandy Hook.  
2 Not Sandy Hook. But one of those major  
3 storms that tore up all New Jersey and  
4 everywhere else.

5 Q. I believe that Mr. Abbott asked you  
6 about water inundation on the properties.  
7 Have you ever seen standing water on the  
8 properties in question?

9 A. Yes.

10 Q. Have you ever had to take action,  
11 remedial action to have that water removed?

12 A. I tried to pump it off the property  
13 and so forth, if that's what you're asking.  
14 There is no storm water management from the  
15 town, so, therefore, it lies on the  
16 surrounding homes and my property, both.

17 Q. Due to the whether storm activity or  
18 tidal activity, have you ever seen the dunes  
19 be breached?

20 A. Yes. From storm, yes.

21 Q. And have you ever taken action to  
22 have that dune repaired in any way?

23 A. I tried to, but the amount of  
24 permits and the process and everything else



1 was very lengthy. But I worked with DNREC,  
2 Jennifer Luoma, and I spoke with Mike from  
3 Omni Corp., Mike Yost. And they had a dune  
4 replenishment going on at the time, so they  
5 said to -- it would be easier just to let  
6 them go forward with their permit process  
7 because they were replenishing the dunes and  
8 the beaches all across Bowers.

9 Q. Okay. Thank you very much.

10 Talk a little bit about the  
11 history that you had because you obviously  
12 have been through map changes before, as  
13 evidenced by the exhibits we've already  
14 looked at.

15 A. Mm-hmm.

16 Q. Can you -- have you ever previously  
17 applied to have these properties' wetlands  
18 designation removed?

19 A. This is the first time for these,  
20 all of these six lots.

21 Q. Is there any reason that you did not  
22 apply previously to have these lots removed?

23 A. Busy. Busy with life.

24 Q. Have you ever discussed having these





1 properties' wetlands designation removed  
2 with a DNREC employee at any time before  
3 this application?

4 A. Beforehand, I'm -- as far as --  
5 you're talking about what I already had  
6 removed from the dunes?

7 Q. No. I'm sorry. The areas that are  
8 part of this appeal, that were part of this  
9 application.

10 A. Okay.

11 Q. Have you ever discussed having the  
12 wetlands designation removed with any DNREC  
13 employee before having applied?

14 A. I probably have discussed it with  
15 Jennifer at some point.

16 Jim McCulley handles all of  
17 the -- anything like that, I have Jim  
18 McCulley handle.

19 Q. Specifically, when you applied for  
20 the map changes in 2013 that are evidenced  
21 on Exhibit 11 from the joint exhibits, is  
22 there a reason that you did not include the  
23 rest of your property in that application?

24 A. Back then -- there used to be a



1 gentleman by the name of Chuck McNally, and  
2 a long story short, there was some rift  
3 between my partner, Jack Beiser, and him,  
4 and for whatever reason, it was as long as  
5 he's alive, Jack Beiser is never going to  
6 see the approval of those lots. So, but...  
7 that's why nothing ever, for whatever  
8 reason, got done.

9 Q. So you did in fact have a  
10 conversation before with a DNREC employee  
11 regarding the properties in question here?

12 A. That's I had with Jack.

13 Q. And --

14 A. That's what was supposedly said by  
15 Chuck McNally and so forth.

16 Q. Were you ever given any explanation  
17 as to why these properties would never be  
18 approved to have the wetlands designation  
19 removed?

20 A. I had a kind of off-the-record  
21 discussion with Chuck at one point, and  
22 supposedly Jack did something out on a golf  
23 course that was totally against what he was  
24 supposed to do. And again, I don't know all



1 the particulars other than that's between  
2 the big boys.

3 Q. Prior to applying to have the  
4 wetlands designation removed here, did you  
5 have any reason to believe that the  
6 application would be denied?

7 A. I'll say this. There's never been a  
8 reason why the application should have been  
9 denied on any of it.

10 MS. SPIALTER: Thank you. No  
11 further questions.

12 CHAIRPERSON HOLDEN: Questions  
13 from the Board for Mr. Liberto?

14 Mr. Horsey.

15 EXAMINATION

16 BY MR. HORSEY:

17 Q. Mr. Liberto, do you know -- you  
18 talked about the state bought those two  
19 houses. Do you know why they bought them?

20 A. From what I understand, they said to  
21 protect red knots and horseshoe crabs. So  
22 supposedly, they paid -- I don't know this  
23 for a fact, but supposedly they paid two  
24 million dollars for it and because nobody

1 bought the homes, they're going to demolish  
2 the homes.

3 Q. So the houses now are not being  
4 lived in?

5 A. That's correct. That I know for a  
6 fact.

7 CHAIRPERSON HOLDEN: Any other  
8 questions from the Board?

9 All right. Thank you,  
10 Mr. Liberto.

11 (Witness excused.)

12 CHAIRPERSON HOLDEN: Mr. Abbott,  
13 do you have any other witnesses you wish to  
14 call?

15 MR. ABBOTT: Yes, I do. I ask  
16 that I be allowed to question James  
17 McCulley.

18 Mr. McCulley, are you there?

19 MR. McCULLEY: I am here. Can  
20 you hear me?

21 MR. ABBOTT: Excellent. Then I  
22 will proceed.

23 CHAIRPERSON HOLDEN: Could we  
24 have Ms. Reeder virtually swear him in?



1                   JAMES C. McCULLEY, IV,  
2                   the witness herein, having first  
3                   been duly sworn on oath, was  
4                   examined and testified as follows:

5                   DIRECT EXAMINATION

6                   BY MR. ABBOTT:

7                   Q.       Mr. McCulley, good morning.

8                   A.       Good morning.

9                   Q.       Could you, please, share with the  
10                  Board your educational background?

11                  A.       I have a B.A. from Rutgers in  
12                  biology, an M.S. from Rutgers in biology, 32  
13                  credits towards my Ph.D. from Ohio State  
14                  University in plant pathology, and numerous  
15                  continuing education credits in wetlands  
16                  science over the past 32 years.

17                  Q.       So that 32 years is the tenure of  
18                  your career in this field?

19                  A.       Yes, that is correct.

20                  Q.       All right. And so you have been a  
21                  full-time environmental scientist in that 32  
22                  years?

23                  A.       Yes. I started -- in 1987, I was a  
24                  biologist with the Corps of Engineers, the



1 Philadelphia District. After that, I went  
2 to KCI Technologies as the head of their  
3 wetlands group until 1990 when I started my  
4 own company, and currently still own my own  
5 company. Changed names from JCM  
6 Environmental to Watershed Eco in 2011.

7 Q. All right. Now, I see you have the  
8 professional wetlands scientist designation;  
9 is that correct?

10 A. Correct. Actually, senior  
11 professional wetlands scientist.

12 Q. Okay.

13 A. The benefits of getting older.

14 Q. And could you just briefly share  
15 with the Board what's involved in obtaining  
16 that designation?

17 A. Essentially, you have to have  
18 experience in wetlands science. There is a  
19 continuing education requirement. There is  
20 recertification every five years that deals  
21 with your education, your experience, and  
22 other criteria in order to get recertified  
23 and then the Board votes on your  
24 recertification every five years based on

1 what you submit.

2 Q. Have you previously been recognized  
3 as a expert witness in environmental matters  
4 in testifying at court?

5 A. Yes. Numerous times.

6 Q. And how about recognition as an  
7 expert in the environmental field before  
8 state agencies or boards?

9 A. I've testified at EPA headquarters  
10 several times. I've testified recently at  
11 the White House with regards to the new  
12 Trump wetland rule changes. And I've  
13 testified several times at corps  
14 headquarters, as well, Corps of Engineers.

15 Q. Are you familiar with lots 22  
16 through 25, 32 and parcel D shown on the  
17 Shore subdivision plan?

18 A. Yes.

19 Q. Let's, if you could refer to Exhibit  
20 6 in the exhibit binder. Which, again, for  
21 benefit of Board members is page 72 on your  
22 PDF.

23 A. Got it.

24 Q. All right. Some Board members may



1 be scrolling to page 72. So while they're  
2 doing that, could you just explain to us  
3 what your first involvement was with those  
4 six lots?

5 A. I believe it was around 2006 that I  
6 was initially hired to do the wetlands  
7 delineation and permitting for these lots  
8 and also other lots in the area. As  
9 Mr. Liberto said, he owned some other lots  
10 that I worked on as well. There were some  
11 other builders and developers that I worked  
12 for in this area around that same time.

13 Q. So was some of that wetlands work  
14 with the United States Army Corps of  
15 Engineers and federal jurisdictional  
16 wetlands?

17 A. Yeah, both DNREC and the Corps of  
18 Engineers.

19 Q. So did you have any involvement with  
20 the lots in this area of Bowers Beach prior  
21 to 2006?

22 A. No. No, I did not.

23 Q. And Mr. -- you were here, obviously,  
24 were here when Mr. Liberto was testifying;





1 correct?

2 A. Yes, I was.

3 Q. You're familiar with the 2013 map  
4 amendment that was approved by DNREC for a  
5 portion of the six lots; correct?

6 A. Correct. Yeah. I worked on that.

7 Q. And we went through with Mr. Liberto  
8 the map amendments that have taken place to  
9 numerous residential building lots on Flack  
10 Avenue and Bayshore. Are you familiar with  
11 that?

12 A. Yes. I worked on some of those, and  
13 some of those were worked on by Mike Green,  
14 who was Environmental Consulting Services.  
15 Yes, I'm familiar with those just based on  
16 the permitting that I have done up and down  
17 Bowers.

18 Q. Now, circling back to the 2013 map  
19 amendments that DNREC approved for a portion  
20 of the six lots. Did you have any  
21 conversation with Tyler Brown of DNREC  
22 regarding that map amendment?

23 A. When those map amendments were done,  
24 Tyler was not there.



1                   But, yes, Mr. Liberto described  
2                   when we were talking about the sand that had  
3                   washed in more recently on the site and  
4                   pointing it out to Tyler when we were on the  
5                   site as to the previous map changes were  
6                   based on sand washing in and additional sand  
7                   has washed in and so we felt at the very  
8                   minimum that a map change should be done to  
9                   account for the new sand that has washed in.  
10                  And Tyler said he would not have approved  
11                  the previous map change, the 2013 map change  
12                  just because the sand washed in.

13                Q.       But that changed the elevation,  
14                didn't it?

15                A.       Yes.

16                Q.       So Mr. Brown said despite that fact,  
17                he wouldn't have approved it?

18                A.       Yes.

19                Q.       All right. Are you familiar with  
20                the topographic survey at binder Exhibit 3?

21                A.       Yes.

22                Q.       And I'm not going to ask you a lot  
23                of questions about it. I don't know what  
24                page number that would work out to be for



1 the Board members.

2 Exhibit 3 is a topographic  
3 survey for Delmarsh, LLC by Miller & Lewis.  
4 And it's probably --

5 CHAIRPERSON HOLDEN: Looks like  
6 it's page 64. It has a colorized location  
7 map up in the top left-hand corner. Is that  
8 correct?

9 MR. ABBOTT: That is it. Thank  
10 you, Mr. Chairman.

11 BY MR. ABBOTT:

12 Q. All right. So Mr. McCulley, are you  
13 looking at that first -- at that page, tab  
14 3, Exhibit 3?

15 A. I am.

16 Q. Okay.

17 A. Yes.

18 Q. On the left-hand side of that map  
19 towards the bottom, there is a rectangular  
20 area with the word "House" inside of it. Do  
21 you see that?

22 A. Yes, I do.

23 Q. And that is one of the two houses  
24 Mr. Liberto testified had been sold to the



1 state?

2 A. That's correct.

3 Q. All right. Now, moving to the right  
4 of that house, there's a wedge-shaped parcel  
5 of land. That's lot 26, I believe.

6 A. Right.

7 Q. All right. Then continuing to move  
8 right, the next four lots, would be lots 22  
9 through 25?

10 A. Yes, correct.

11 Q. All right. And moving further to  
12 the right, there is a octagonal shape with  
13 the word "House" inside of it. Do you see  
14 that?

15 A. Yes.

16 Q. Are you familiar with what that is?

17 A. Yes. The octagonal house was built  
18 a few years ago.

19 Q. And I think that was on lot 20?

20 A. Correct. Yes.

21 Q. So there are houses all up and down  
22 Flack Avenue and Bayshore; correct?

23 A. Yes. Both -- on both sides of  
24 Mr. Liberto's property and then all up and



1 down Bayshore and Flack, there's numerous  
2 lots.

3 Q. Okay. And I want you to go back.  
4 Let's go back to Exhibit 6, which is the  
5 Shore subdivision plan. And, again, for the  
6 Board, page 72.

7 Now, in the lower left corner,  
8 Mr. McCulley, do you see the squiggly line  
9 running from the St. Jones River in towards  
10 the marsh and Flack Avenue?

11 A. Yes.

12 Q. All right. It says "Ditch." Do you  
13 have any familiarity with what that's  
14 referring to?

15 A. Just from this map; but there is no  
16 ditch that is present out in the field  
17 anymore. Hasn't been since I've been  
18 involved with the site. But it appears from  
19 this old survey that it was a connection  
20 between the marsh that's west of Flack  
21 Avenue and the St. Jones River.

22 Q. Okay. And in your work in the  
23 environmental field, is this document  
24 something that you would look to for



1 purposes of putting together evidence of  
2 past circumstances on the ground?

3 A. Yeah. I think any history that you  
4 could dig up is important to know what's  
5 going on on the site today --

6 Q. Okay.

7 A. -- trying to figure out, you know...

8 Q. Do you have any knowledge of  
9 historical background regarding the ditch?

10 A. No. Only what's on this plan. This  
11 is the only place that I've seen it appear.

12 Q. Okay. Now, you've prepared -- we're  
13 going to go at this point to Exhibit 2 in  
14 the exhibit binder, which should be page,  
15 begin at page 19 for purposes of the Board.

16 Are you at tab 2, Mr. McCulley?

17 A. Yep, I'm there.

18 Q. This is your wetlands report  
19 prepared for Delmarsh; correct?

20 A. That's correct.

21 Q. And it was prepared for purposes of  
22 the application to have the six lots  
23 removed, or the rest of the six lots removed  
24 from the state wetlands map; correct?

1           A.     Correct.

2           Q.     All right.  Now, can you describe in  
3 a summary fashion your next page, which I  
4 believe should be page 20, for the purposes  
5 of the Board?  It's the second page of your  
6 report.

7           A.     That Section A of the report is the  
8 general location of the property and just a  
9 general description of the property.

10          Q.     Okay.  And Section B is next.  Could  
11 you tell me what that involves?  It's a  
12 number of pages.

13          A.     Yes.  That's the history of the site  
14 mainly based on the aerial topography of  
15 mapped soils, the National Wetland Inventory  
16 Map, and the Statewide Wetland Mapping  
17 Project Map.

18                   The aerial photos that I  
19 describe in the report in -- show a history  
20 of disturbance on or near the subject  
21 property.  You can see dirt roads on the  
22 site since 2002.

23                   And then the soils mapping that  
24 was done in the 1950s depicts on the site



1 what are mapped as "tidal soils," and those  
2 tidal soils are also mapped on the rest of  
3 Bowers Beach, where these other houses have  
4 been built, and other areas that were  
5 previously mapped as tidal wetlands and then  
6 taken off the map.

7 And the National Wetland  
8 Inventory Map shows the majority of the site  
9 as non-wetlands, and also the Statewide  
10 Wetland Mapping Project Map, which is Figure  
11 8, shows the site as non-wetlands.

12 Again, I think the last map in  
13 that section is the State Wetlands Map, DNR  
14 183, that we've been talking about, which  
15 depicts the "M," for marsh, on that, what  
16 you called the bread slice. And we saw on  
17 the, on another exhibit that some of that  
18 area has been removed from state tidal  
19 mapping, the red areas.

20 Q. All right. So the last map you just  
21 referred to, in the middle of the page, it  
22 has a heading "B.2"; correct?

23 A. Yes, that's correct.

24 Q. Figure 9. Okay.



1 A. Mm-hmm.

2 Q. For purposes of the Board, I believe  
3 it's page 25.

4 CHAIRPERSON HOLDEN: I believe  
5 that's actually 29 in our PDF exhibit.

6 Q. Sorry, I must have miscounted. All  
7 right. So Bates 29. Looking at Figure 9,  
8 Mr. McCulley.

9 A. Yes.

10 Q. I see the bread-slice area with the  
11 "M" in it. Now, what does "M" stand for?

12 A. Stands for marsh. It's a  
13 designation of state tidal wetlands, marsh,  
14 marsh designation.

15 Q. Is it actually a marsh?

16 A. No, it's not.

17 Q. Okay. Now, to the right of the  
18 bread-slice area is a large area directly  
19 abutting the waterway with a capital "B."  
20 What is capital "B"?

21 A. That's beach. That's a designation  
22 on the State Tidal Wetland Maps for beach.

23 Q. So beach is not wetlands, is it?

24 A. So, yes, it's not wetlands, it's



1 beach. Then the area, the blank area  
2 between the "B" and the "M" has no  
3 designation, so that would mean it's  
4 uplands, not wetlands.

5 Q. Okay. So some of the area between  
6 the B and the M would be parts of parcel D  
7 and lot 32?

8 A. Correct.

9 Q. All right. Now, your heading "B.2"  
10 says, "No tidal connection." Can you tell  
11 me what that references?

12 A. Correct. Well, if you refer back to  
13 the topo plan, you can see that -- so this  
14 upland we just talked between "B" and "M" is  
15 the dune. And if you look at the topo, that  
16 dune is at elevation approximately 6 to 7.  
17 It ranges within that range.

18 And Flack Avenue to the west, if  
19 you look at that topo plan, ranges in  
20 elevation around 4. And the state, when  
21 they did their dune restoration, determined  
22 that the mean high tide line was elevation  
23 2.3. So there is really no way for the tide  
24 to get to the site on a regular basis,



1 unless it breaches either the dunes or it  
2 goes over Flack Avenue.

3 So Flack Avenue is relatively  
4 thick. So the tide elevation would have to  
5 come up around 4 to get over Flack Avenue  
6 from the west side and get onto the site or  
7 would have to get up around 6 or 7 or push  
8 the dunes out of the way, breach those dunes  
9 from the Delaware Bay side to get onto the  
10 "M" portion of the site, the bread-slice  
11 portion of the site.

12 Q. What you're saying is that at high  
13 tide, the waterway adjacent to the area  
14 marked "B" does not get high enough to go  
15 over the dunes that are not designated as  
16 "M" or "B"; is that correct?

17 A. Correct. Or over Flack Avenue on a  
18 regular tidal basis. So 2.3 would be mean  
19 high tide. It would have to get much higher  
20 than that to actually get onto the portion  
21 of the site that's marked with the "M."

22 Q. Now, you mentioned the term "tide."  
23 Is that what a layman would understand high  
24 tide, low tide based on tidal charts?



1           A.     Yeah.  So the mean high tide would  
2           just be the average of the high tides in the  
3           area.

4           Q.     Okay.  But in terms of the word  
5           "tide," we're talking about something that  
6           changes throughout the course of every day?

7           A.     Correct.

8           Q.     So there was a question asked of  
9           Mr. Liberto about whether the dunes had ever  
10          been breached by a storm.  Do you recall  
11          that?

12          A.     Yes, yes.

13          Q.     Would that storm constitute a tide?

14          A.     Well, under an extreme high tide or  
15          a storm tide, there is evidence that sand  
16          does get washed onto the site.  It has on  
17          several occasions, probably two or three  
18          that I'm aware of since I've been working on  
19          the site, and that would be since 2006.  So,  
20          you know, at some point, either the tide got  
21          high enough to push the sand onto the site  
22          or high enough to push the sand and get onto  
23          the site.  I've never seen the tidal water  
24          there.  I've only seen the sand there.



1 Q. Okay. But generally, the term  
2 "tide" means the changing water elevation  
3 during the course of each day?

4 A. Yes.

5 Q. Now, you indicate in your report  
6 that the site previously had phragmites  
7 growing on it?

8 A. Yes.

9 Q. Could you tell the Board what  
10 phragmites is?

11 A. Phragmites is the exotic invasive  
12 plant that came from Asia that has pretty  
13 much taken over a lot of areas that are wet  
14 or near wetlands, and it just gets out of  
15 control, crowds out everything else. And so  
16 it's kind of on the state hit list. And the  
17 state does have a program to control phrag,  
18 although there is not enough funding to  
19 control all the phrag in the state. There  
20 are certain areas that are treated for phrag  
21 by the state.

22 Q. So the DNREC actually has a  
23 phragmites elimination program?

24 A. Yes.



1 Q. Were phragmites eliminated on the  
2 six lots?

3 A. Yes. Mr. Liberto has been spraying  
4 the site to get rid of the phragmites. He's  
5 pretty much eliminated it. Unfortunately,  
6 it hasn't been eliminated from the parcels  
7 adjacent to him. So there's been some spot  
8 treatment that's been necessary every year  
9 just to keep the little bit of phrag that  
10 keeps encroaching, to keep that out.

11 Q. Ultimately, what was your opinion  
12 regarding any tidal connection between the  
13 six lots and any body of water?

14 A. So my conclusion was that the areas  
15 that are on the east side of the dunes that  
16 are adjacent to the Delaware Bay do  
17 regularly get flooded with tidal action, and  
18 that's been determined by the state to be  
19 mean high tidal elevation of 2.3.

20 The area that's off-site, that's  
21 west of Flack Avenue, appears to be acting  
22 as tidal marsh and gets flooded on a regular  
23 basis. But the area that's marked as "M,"  
24 the bread-slice area that's kind of

1 insulated by Flack Avenue and the dune on  
2 the other side, is not subject to regular  
3 tidal flooding. In fact, I've never seen  
4 any tidal action on that site since 2006.

5 Q. All right. Are any of the six lots  
6 designated as federal jurisdictional  
7 wetlands?

8 A. Yes. So, you know, as has been  
9 mentioned before, there are portions of the  
10 site that are wet that are -- and as  
11 Mr. Liberto said, there is a lot of runoff  
12 that comes to these sites. Unfortunately,  
13 it's a problem in Bowers.

14 But, yes, we have had numerous  
15 discussions with the Corps of Engineers.  
16 There are portions of this site that are not  
17 covered with sand sufficiently to make them  
18 non-wetlands that are classified as federal  
19 jurisdictional wetlands.

20 Q. But federal jurisdictional wetlands  
21 can be designated based solely on, for  
22 example, soil type; correct?

23 A. It's the soil, the vegetation and  
24 the hydrology. They don't necessarily have

1 to be tidal. They would be freshwater,  
2 Section 404, non-tidal wetlands.

3 Q. So federal wetlands is a totally  
4 different criteria than the state wetlands;  
5 is that right?

6 A. Yes, yes.

7 Q. Under federal law, can the six lots  
8 be filled, raised, anything like that by  
9 right?

10 A. No fill material can be placed in  
11 the areas that have been designated federal  
12 wetlands, unless we get a permit to do that.

13 Q. Based on your experience, what type  
14 of permit could possibly be obtained from  
15 the United States Army Corps of Engineers  
16 for the six lots?

17 A. There's potential for a small amount  
18 of impact under a nationwide permit, but  
19 more likely, it would be an individual  
20 permit. And in all likelihood, it would be  
21 denied. There's other areas along here,  
22 other lots that were built on where people  
23 wanted to fill, and instead, the corps  
24 required the houses to be put up on pilings





1 to avoid collection of fill and dredge  
2 material on the site.

3 Q. So let's take, by way of example,  
4 Lots 22 through 25 fronting on Flack Avenue.  
5 Could a permit be obtained to put a gravel  
6 driveway in?

7 A. Possibly put a driveway to access  
8 the upland portions where the sand has  
9 washed in and the Corps of Engineers has  
10 determined that it's not wetlands, then they  
11 likely would issue a permit to access those  
12 upland areas of the site.

13 Q. And what if the houses were built on  
14 pilings, would there be a permit that would  
15 issue for that?

16 A. That would be approved by the Corps  
17 of Engineering. So they would be able to do  
18 that.

19 Q. Do you know if that was done with  
20 lot 20, the octagonal house?

21 A. That's correct, yes.

22 Q. Is it built on pilings?

23 A. Yes, it is. All the houses out here  
24 are built on pilings.



1 Q. Does the octagonal house on lot 20  
2 have a gravel driveway from Flack Avenue?

3 A. Yes.

4 Q. All right. Now, you've been here  
5 while there's been a decision made on the  
6 1926 aerial photo. So I had some questions  
7 I wanted to ask you about that.

8 A. Okay.

9 Q. Not specifically. Just generally  
10 about that photo and aerial photos  
11 typically.

12 A. Okay.

13 Q. As an environmental scientist, do  
14 you ever rely upon aerial photographs in  
15 performing your analysis?

16 A. Yes, all the time.

17 Q. Do you hire an expert aerial  
18 photograph interpreter to assist you in  
19 determining what the ground conditions are  
20 as depicted on the photo?

21 A. Not usually, but occasionally I do.  
22 If there's a situation where the aerial  
23 photo, the determination of whatever is  
24 shown on that photo would be crucial to the



1 opinion that's going to be rendered or the  
2 sole basis of the opinion that's going to be  
3 rendered, I do have a few expert aerial  
4 photography interpreters that I deal with.

5 Q. Are they in our region, the Delaware  
6 region?

7 A. Yes. Typically, in most cases, I  
8 use Joseph Arsenault, who is in New Jersey.  
9 I've used him on multiple occasions through  
10 the last 32 years. I've also in the past  
11 used Vincent Attardi, who is in West  
12 Virginia, who I also know who's a aerial  
13 photo interpreter expert. Used him a  
14 handful of times over the years. There was  
15 also an expert at DNREC, Larry Palmato. I  
16 don't even know if he's still there. I  
17 haven't talked to him in a long time. But I  
18 dealt with him in the past, also.

19 Q. All right. Have you looked at the  
20 1926 aerial photo that DNREC relied upon in  
21 this instance?

22 A. Yes, I have.

23 Q. Can you give an opinion on what is  
24 depicted on it?

1           A.     I can give my opinion.  I mean, I  
2     can see certain features and I can talk  
3     about what I think they might be, but I  
4     would not want to make a definitive decision  
5     on the question you're asking, tidal  
6     connection to the subject property.  That's  
7     crucial in this case.

8           Q.     Right.  Could you explain to the  
9     Board why you don't feel you would be able  
10    to do that?

11          A.     I just don't think there is enough  
12    information, and it's outside of my area of  
13    expertise.

14                   Typically, you know, it could be  
15    a swale, could be a ditch, could be a  
16    shadow.  Photography and aviation were not  
17    very advanced in 1926.  I'm not sure how the  
18    photo was taken.

19                   But nowadays, from since the  
20    '50s, most aerial photography is taken as  
21    stereo photography, which are photographed  
22    in a particular way so you can actually look  
23    at the ground elevations, you can get a feel  
24    for the topo with a special viewer, and you



1 can determine what these elevations look  
2 like.

3 So that dark area, I mean, I  
4 have no idea if it's the roadside swale on  
5 Flack Avenue that exists there today or if  
6 it was something else. Topography could  
7 help us, but obviously, that's not  
8 available.

9 I'd just like to say the way  
10 that I typically interpret aerial  
11 photography is you look at the current  
12 signatures. So you would look at that dark  
13 signature and you would say, okay, that dark  
14 signature appears in this area, so let's see  
15 what's in that area. '26 was a long time  
16 ago, but in that area right now, it's a  
17 swale along Flack Avenue.

18 Flack Avenue is around elevation  
19 4. That swale is around elevation 3, I  
20 think you can look at the topo, somewhere in  
21 there, and the mean high tide is 2.3. So in  
22 my mind -- again, I said I wouldn't make a  
23 determination based on that photo because  
24 it's so crucial to this case, but in my



1 mind, I would think that most likely that  
2 dark area is the swale that continues to  
3 exist along Flack Avenue at this point.

4 MR. ABBOTT: Thank you. I don't  
5 have any further questions for this witness,  
6 Mr. Chair.

7 MS. SPIALTER: Chair Holden, we  
8 can't hear you.

9 CHAIRPERSON HOLDEN: How about  
10 now?

11 MS. SPIALTER: Got it.

12 CHAIRPERSON HOLDEN: Okay. Too  
13 many buttons.

14 Ms. Spialter, do you have  
15 questions for the witness?

16 MS. SPIALTER: Yes, I do. Thank  
17 you, Chair Holden.

18 CROSS-EXAMINATION

19 BY MS. SPIALTER:

20 Q. Mr. McCulley, I'd like to start,  
21 since this is where we ended, I would like  
22 to start asking you a few questions about  
23 that topographic survey, which is Exhibit 3  
24 in the joint exhibits.



1 A. Okay.

2 Q. First of all, can you just explain  
3 what any one of these markers indicates just  
4 to make sure that everyone is clear about  
5 what each of these Xs and numbers mean?

6 A. Yes. The little X with a number  
7 next to it, and that number is the spot  
8 elevation. That would be the elevation that  
9 the surveyor determined was the ground  
10 elevation at that X.

11 Q. Okay. Thank you.

12 And there are two dotted blue  
13 lines towards the top of the map. Do you  
14 see those two dotted blue lines?

15 A. Yes.

16 Q. Okay. So the first one reads:  
17 "Approximate Mean Low Water Line." The  
18 lower one reads: "Approximate High Water  
19 Line." Do you see that?

20 A. Yeah.

21 Q. In your experience as an expert, is  
22 it accurate to say that topography moves  
23 generally in a gradual format? So for  
24 example, if you see a pattern of one feet,



1 two feet, three feet, that you would not  
2 assume there would be major deviations from  
3 that. You wouldn't see four feet between  
4 one and two, for example. Is that accurate?

5 A. Correct.

6 Q. If we look at the dotted blue line  
7 where it says, "Approximate Mean High Water  
8 Line." Let's actually look where those  
9 words are to sort of reference it to make  
10 sure we're all looking at the same spot.  
11 Just to the left and slightly below those  
12 words there is an "X" with the number  
13 "3.99." Do you see that?

14 A. Yes.

15 Q. Okay. Just to the left of that, on  
16 the other side of the dotted blue line is  
17 another X that says "3.73." Do you see  
18 that?

19 A. Right. Yes.

20 Q. Okay. So now that we've oriented  
21 ourselves a little bit, would you agree,  
22 generally speaking, that the Xs, the  
23 elevations on the water side of that mean  
24 water line, are generally in the 3.5 to 3.7



1 range?

2 A. Yes. The problem is, the surveyor  
3 who put the approximate mean high water line  
4 on here used the debris that had washed up  
5 during a storm and didn't know that DNREC  
6 had determined that the mean high tide line  
7 was actually 2.3.

8 Q. So we'll get back to that  
9 determination and where that determination  
10 by DNREC came from.

11 But just looking at this survey,  
12 do you acknowledge that the mean high tide,  
13 the mean high water line appears to fall  
14 somewhere in the 3.5 to 4 range on this  
15 topographical map?

16 A. What the surveyor has incorrectly  
17 designated as the approximate mean high  
18 water line is shown at that elevation, yes.

19 Q. What exactly are you basing the  
20 interpretation that that is not the  
21 approximate mean high water line? If you  
22 call part of this survey invalid, why is an  
23 of the rest of it valid?

24 A. Well, the surveyor did not realize



1 that DNREC had done a survey called the  
2 North Bowers Breach Survey when the dune was  
3 breached. The date of the survey was  
4 February 15, 2007, where they determined  
5 that the mean high water was 2.3 feet.  
6 Elevation 2.3.

7 Q. Okay. If you're looking at any  
8 given topographical map, whether it's the  
9 one in front of us or any other topographic  
10 map, how is zero determined?

11 A. It depends. It could be the map can  
12 be done with the relative elevation where  
13 they would just select a zero and then base  
14 everything on that or it could be done based  
15 on some kind of data. And the survey that  
16 was done by DNREC is on the Delaware State  
17 Plane 83, and I believe this one is notated  
18 as also being on the Delaware State one, but  
19 it doesn't give you...

20 Q. Can you specify where on this  
21 topographical survey it explains what datum  
22 was used, what map was used?

23 A. If you look all the way on the right  
24 side under "Plan Data," if you go about

1 halfway down the page, it says --

2 If you go halfway down the page  
3 on the right-hand side where it says "Plan  
4 Data," you'll see tax parcel number and age  
5 and address. Title "Bearing Reference  
6 System." That's where it references the  
7 "Delaware State Plane System."

8 Q. In your expert opinion, does the  
9 Delaware State Plane System include a  
10 vertical datum standard?

11 A. Yes.

12 Q. And what vertical datum standard is  
13 that?

14 A. I know it as the Delaware State  
15 Plane System.

16 Q. If that wasn't clear, I'll back up  
17 slightly. Are you familiar with the  
18 national vertical datums NABD88, NABD83, for  
19 example?

20 A. Yes.

21 Q. Do you know what vertical datum the  
22 Delaware State Plane System was done in?  
23 Was it done in one of those? Was it its own  
24 system? Are you aware?

1           A.     I believe it's 83, based on the  
2           DNREC map that was provided.  It's  
3           referenced as the Delaware State Plane  
4           NAD83.

5           Q.     Okay.  So your understanding is that  
6           it was done on the NAD83 vertical datum.  
7           But is there anything on this survey that  
8           identifies the vertical datum specifically?

9           A.     No.

10          Q.     Thank you.

11                     And if you have two elevations  
12           that were done on different vertical datum,  
13           can they be compared?

14          A.     Yes.  There would have to be a  
15           factor that you would either add or  
16           subtract.

17          Q.     And does this map have that factor?  
18           If we did know what the vertical -- I'm  
19           sorry.  Let me back up.

20                     Does this survey include that an  
21           additional or a subtracted quantifier  
22           necessary to compare it to other datum?

23          A.     No, it does not.  But the spot  
24           elevations match the spot elevations taken



1 by DNREC in 2017 on their map.

2 Q. So I'm going to turn now to your  
3 study, which is Exhibit 2 in our joint  
4 exhibits. I, unfortunately, don't have page  
5 numbers, So I'm going to reference the pages  
6 based on the images that are on them to make  
7 it a little bit easier for everyone.

8 A. Okay.

9 Q. I think I'm about eight pages in.  
10 I'm on the page that includes Figure 10.  
11 We'll get everyone a minute to get there.

12 Are you ready, Mr. McCulley?

13 A. Yes.

14 Q. Wonderful. So at the very top, we  
15 see that you prepared, in this thing that  
16 you prepared, "The State of Delaware 2017  
17 has determined that the mean high tide is at  
18 elevation 2.3 feet."

19 A. Correct.

20 Q. What vertical datum was that  
21 prepared on?

22 A. NAD83.

23 Q. How do you know that?

24 A. It's on the map that was prepared by



1 DNREC. The North Bowers Breach Survey,  
2 which lists the blue line as the mean high  
3 water line.

4 Q. Was that map included anywhere  
5 either as an exhibit in this case or in your  
6 study?

7 A. I don't think it's in the exhibit  
8 book. I'm not sure if it was submitted or  
9 not.

10 Q. To the best of your knowledge, was  
11 that map ever requested by DNREC?

12 A. I don't know.

13 Q. Okay. To the best of your  
14 knowledge, was that map ever provided to  
15 DNREC?

16 A. DNREC. well, DNREC -- it's DNREC's  
17 map. I assume DNREC has it.

18 Q. Specifically, in the context of your  
19 report -- we understand that this is  
20 something that you believe was prepared by  
21 DNREC -- but specifically in relation to  
22 this report, was it ever -- did you ever  
23 provide this map to DNREC as saying, yes,  
24 this in front of you is the map I used?



1           A.     No. I believe I just referenced the  
2 elevation that was determined on the page  
3 that you just referenced.

4           Q.     Okay. Great.

5                     We'll move down to the next  
6 paragraph where you reference a survey done  
7 by Miller & Lewis in 2019 to determine the  
8 mean high tide to be 2.5 feet.

9           A.     Yes.

10          Q.     Do you know what vertical datum that  
11 study was done through?

12          A.     It's the same one that we're looking  
13 at, the Delaware State Plane System. I  
14 don't know what the NPD year was.

15          Q.     So are you saying that the  
16 topographic survey done in 2019 is Exhibit  
17 3, that topographical map we've been talking  
18 about?

19          A.     Yes. The surveyor actually  
20 corrected it. When I discussed with the  
21 surveyor how they came up with the  
22 approximately mean high water line, they  
23 said that they had just located the debris  
24 that had washed up. Then we talked about



1 the Delaware -- the 2.3 elevation, and then  
2 they adjusted their mean high tide to 2.5.  
3 Unfortunately, you have the wrong version.  
4 You have the older version of the map they  
5 have not included in the binder.

6 Q. To the best of your knowledge, was  
7 the updated map requested by DNREC?

8 A. I don't know.

9 Q. To the best of your knowledge, was  
10 it ever provided to DNREC?

11 A. I don't know.

12 Q. When we talk about a mean high tide  
13 of any elevation, obviously, that is in a  
14 single spot. We can see on these maps that  
15 there are differences of certainly half a  
16 foot, perhaps a full foot, over a  
17 relatively -- over one parcel. How do you  
18 know where that -- where that determines  
19 mean high tide point is?

20 A. You mean what elevation would mean  
21 high tide be?

22 Q. Well, specifically, so -- we say --  
23 sorry.

24 You say in that second paragraph





1           that Miller & Lewis determined the mean high  
2           tide to be at 2.5 feet.  What specific point  
3           is that on this survey?  Is it at the far  
4           west extreme, the far north extreme?

5           A.       Well, the elevation 2.5 would go  
6           over the entire site.  It's not just one  
7           location.

8           Q.       Okay.  All right.  I believe those  
9           are the questions I have related to the  
10          survey itself.

11                       I'd like to ask you a few  
12          questions sort of about your opinions in  
13          your professional experience of wetlands and  
14          tidal action more generally.

15                      In your professional opinion,  
16          does the Delaware definition of "tidal  
17          wetlands" require regular ebb and flow?

18          A.       I think that's part of the  
19          definition, yes.

20          Q.       Okay.  Are there are any specific  
21          areas in the state that you would  
22          professionally determine to be wetlands but  
23          do not have regular ebb and flow?

24          A.       Yes.



1 Q. So please correct me if I'm wrong,  
2 but it sounds like those two answers  
3 contradicted one another. Do wetlands  
4 require regular ebb and flow or do they not?

5 A. Are we talking state tidal wetlands  
6 or are we talking wetlands? State tidal  
7 wetlands.

8 Q. Yes, tidal wetlands.

9 A. They do not, but they require to  
10 have a connection to tidal waters.

11 Q. In your professional opinion, what  
12 does "connection" mean? What is required  
13 scientifically?

14 A. Well, for example, if the mean high  
15 tide elevation is 2.3 and I dig a hole in my  
16 yard at 2.3 and it's miles away, it's at the  
17 right elevation, but it's not connected to  
18 tidal waters; there's no tidal waters  
19 anywhere nearby.

20 So to me, the dune and Flack  
21 Avenue, they completely surround the area,  
22 the interior area of the site, don't allow  
23 any tidal water to get there, unless it  
24 reaches an elevation of around 4 to go over



1 Flack Avenue or an elevation of around 6 or  
2 7 to go over the dune.

3 Q. In your professional opinion, how  
4 frequently would a tidal event over 4 happen  
5 in an area like this, with this elevation  
6 and this mean high tide, as you see it at  
7 2.5 or 2.3?

8 A. Well, I've been on the site many,  
9 many times and I haven't seen the tide come  
10 from the west side of Flack Avenue and  
11 breach over Flack Avenue onto the site.

12 Q. Have you ever been on site following  
13 an extreme rain event or storm event?

14 A. Not directly right after. Maybe a  
15 few days after.

16 Q. Based on the elevations at the site  
17 and your experience and your professional  
18 opinion, do you believe that the ditch, when  
19 it existed, as evidenced on the map in  
20 Exhibit 6 that we discussed, do you believe  
21 that that ditch would have caused tidal  
22 action on the subject property?

23 A. Well, the subject property is higher  
24 than the 2.3 elevation. So assuming that

1 the mean high tide was still 2.3 back in  
2 1926, there would not be regular tidal  
3 flooding even if that ditch was flooded.  
4 But, yes, a storm event, yes, potentially  
5 that ditch could have flooded just the same  
6 as the marsh that's on the other side of  
7 Flack.

8 Q. Thank you.

9 You say that you've been on the  
10 site several times; correct?

11 A. Many, many times, yes.

12 Q. And in your professional opinion, is  
13 wetlands vegetation -- is evidence of  
14 wetlands vegetation on the site?

15 A. On portions of the site, yes.

16 Q. Have you done any soil borings or  
17 reviewed soil borings done by anyone else?

18 A. Yes.

19 Q. And the soils that you found, are  
20 those the type associated with tidal  
21 wetlands?

22 A. They're associated with wetlands in  
23 general.

24 Q. Are there soils that are



1 specifically associated with tidal wetlands  
2 versus non-tidal wetlands?

3 A. They're not the real mucky organic  
4 soils that you typically see in a tidal  
5 marsh on this site. These are more  
6 mineral-based with some organic. And as I  
7 mentioned before, there's some large areas  
8 that are covered with sand from the sand  
9 that's periodically washed in from the  
10 dunes.

11 Q. That raises a question. I would  
12 like to go back for a second. You just said  
13 that sand is regularly washed in due to  
14 tidal action, storm action, what have you;  
15 correct?

16 A. Well, not regularly, but probably  
17 two or three times since 2006, yes.

18 Q. Okay. And that would raise the  
19 elevation of the site; correct?

20 A. In portions where the sand washes  
21 in, yes.

22 Q. So in your professional opinion, is  
23 it more likely that the site was a lower  
24 elevation or a higher elevation in the 1950s



1 when this site plan was first prepared and  
2 when we know that the ditch was present?

3 A. Well, there are some areas that are  
4 currently higher than they were in the '50s.  
5 There are some areas that are higher than  
6 they were five years ago.

7 Q. So in your professional opinion,  
8 would it be accurate to say that it is more  
9 likely that flooding may have occurred, that  
10 tidal action may have occurred due to the  
11 ditch in the 1950s than it is now?

12 A. That would just be pure conjecture.  
13 I have no idea.

14 Q. Okay. Just two final questions.

15 I believe we talked a whole lot  
16 about the site, what's present there, what  
17 tidal action looks like. In your  
18 professional opinion, what does the term  
19 "connection to tidal water" require? Like  
20 sort of at a minimum, how would you define  
21 that?

22 A. I would define that as, that any  
23 water that's on that portion of the site has  
24 the opportunity to get to that tidal



1 connection at any particular time, but  
2 there's not an impediment or blockage to  
3 that tidal water.

4 Q. Sorry. I correct myself. I have  
5 more than one question. I am almost done.

6 Are you familiar with the  
7 regulatory definition of "wetlands" in  
8 Delaware?

9 A. Yes.

10 Q. Okay. And the elevation requirement  
11 in that regulation is within -- is less  
12 than 2 feet above mean high tide; is that  
13 correct?

14 A. Correct, yes.

15 Q. Okay. And based on any measure that  
16 you have provided, would you agree that all  
17 of Flack Avenue that is adjacent to the  
18 property in question is less than two feet  
19 above mean high tide?

20 A. Flack Avenue? I'd have to look at  
21 the elevations, but it averages around 4,  
22 but I know that it gets a little bit higher.  
23 Let me just look at that plan before I  
24 answer.



1                   Yeah. So if you look in front  
2 of the octagonal house, the elevation of  
3 Flack, 4.5, and then it's around 4 in front  
4 of Mr. Liberto's lots.

5           Q.     Okay. So --

6           A.     If it is high tide, then 4.3 would  
7 be two feet above.

8           Q.     So, again, just for clarification's  
9 sake. Based on what you just said, would  
10 you agree that the portion of Flack Avenue  
11 in front of Mr. Liberto's property is less  
12 than two feet above mean high tide?

13          A.     Yes, just barely.

14          Q.     In your professional opinion, based  
15 on your expertise, do you know why 2 feet  
16 was selected as the regulatory boundary?

17          A.     It is my understanding that because  
18 2.3 would be like the mean high tide, that  
19 there would be higher tides that could flood  
20 that area at certain times. But in this  
21 case, there is impediments to that. That's  
22 why I believe in my professional opinion  
23 that this area should not be mapped as state  
24 tidal wetlands.





1 Q. You discussed impediments. What  
2 would be on the impediments be on the  
3 western side where Flack Avenue is?

4 A. Flack Avenue.

5 Q. So you believe that Flack Avenue  
6 itself is the impediment to the tidal  
7 action; is that correct?

8 A. Yes, that's correct.

9 Q. Do you acknowledge that if the tide  
10 were to come 2 feet over mean high tide that  
11 it would flood Flack Avenue?

12 A. Yes, but it can continually move  
13 that way. It would have to flood all the  
14 way up to elevation 4 and then it would  
15 spill over Flack Avenue.

16 MS. SPIALTER: Okay. Thank you  
17 very much. No further questions.

18 THE WITNESS: Thank you.

19 CHAIRPERSON HOLDEN: Thank you,  
20 Ms. Spialter.

21 Questions from the Board?

22 Mr. Horsey.

23

24 EXAMINATION



1 BY MR. HORSEY:

2 Q. Mr. McCulley, you're saying that the  
3 water has got to go over Flack or got to go  
4 over the dune; correct?

5 A. Correct.

6 Q. All the pictures that you've got in  
7 your report, looks like there is a lot of  
8 sand there. You're saying that if the water  
9 elevation comes up on the dune or comes up  
10 on Flack to an elevation that is even to  
11 what is in those lots, you're saying water  
12 won't come up from the bottom of it?

13 A. No. We haven't seen that. We  
14 haven't seen that. If you look at the lots,  
15 they, roughly, average around 3.5 to 4. So  
16 we haven't seen -- we haven't seen tidal  
17 action -- if it hasn't flooded over Flack,  
18 we haven't seen it come up through the  
19 ground.

20 Q. If it's at elevation 3.5 in the bay  
21 and you're saying that sand, there is not  
22 enough soil borings to know if it was  
23 straight sand there to where the water would  
24 come up from the subsurface?



1           A.       We have never seen that happen.

2                   MR. HORSEY:   That's all I have.

3                   CHAIRPERSON HOLDEN:   Other  
4 questions from the Board?

5                   MR. HORNE:   A quick question.

6                   EXAMINATION

7 BY MR. HORNE:

8           Q.       We danced around the question was  
9 somebody is an expert in reading aerial  
10 photography.  Are you aware, is there -- in  
11 order to call yourself an expert in that, is  
12 there some sort of certification?  Is there  
13 an organization that one belongs to or is it  
14 just experience?

15           A.       I believe it's experience.  I'm not  
16 familiar with an organization or  
17 designation.

18                   CHAIRPERSON HOLDEN:   Thank you,  
19 Mr. Horne.

20                   Other questions from the Board?

21                   EXAMINATION

22 BY CHAIRPERSON HOLDEN:

23           Q.       Mr. McCulley, Dean Holden here.  I'm  
24 curious if you could offer some commentary



1 on the -- how a large storm event surge and  
2 how a large rain event inundation, meaning  
3 standing water caused by a big red event,  
4 differs from tidal water flow as it relates  
5 to tidal wetlands. Right. I mean, they all  
6 cause visible water on land surface, right,  
7 or on soil. But how do they differ?

8 A. Well, the tidal action regularly  
9 falls -- rises and falls twice a day. So  
10 there's changes in the water elevation as  
11 the tide goes up and down.

12 Q. To be clear. There has been some  
13 discussion over storm surges. I'm familiar  
14 in the press of a big storm where a storm  
15 may come over the Rehoboth boardwalk, per  
16 say, right?

17 A. Right.

18 Q. To me, not being an expert, to me  
19 that's a different situation than the ebb  
20 and flow, as you talked about. Are there  
21 other situations where a storm surge from a  
22 large storm event that happens on a  
23 frequency of years creates the basis for  
24 calling a footprint tidal wetland or a

1 wetland?

2 A. Not a tidal wetland. We're talking  
3 about two different things. We did  
4 acknowledge this is Section 404 wetlands.  
5 In some areas, it's wet enough to be  
6 considered wetlands mainly from the fact  
7 that the drainage has been blocked off and  
8 all the drainage from Flack Avenue from  
9 Bayshore comes down and sits on this site.  
10 So when it rains, this site gets wet. Now,  
11 it does infiltrate and it does go away after  
12 a couple days, so it doesn't sit there  
13 forever. But it doesn't rise and fall with  
14 the tide.

15 Q. Is there a reason that -- there's  
16 been a lot of discussion about this 1926  
17 photo. Is there a reason to focus on the  
18 94-year-old photo when there seems to be a  
19 large amount of other evidence available to  
20 make determinations?

21 A. I think the whole reason for the '26  
22 photo is the phrase "in this century" and  
23 what that means. We argued that "in this  
24 century" means in this century that we're



1 in. And I guess DNREC argued it was the  
2 previous century and that photo is in the  
3 previous century and it shows that ditch  
4 existing. That ditch doesn't appear on any  
5 other aerial photos after that, although it  
6 does appear on the 1950 survey which we  
7 pointed out. The best reference we have of  
8 that ditch is 1950.

9 CHAIRPERSON HOLDEN: Thank you.  
10 No other questions.

11 A. Whether "in this century" means in  
12 the 20th Century or the 21st Century.

13 CHAIRPERSON HOLDEN: Thank you.  
14 Any other questions by the Board  
15 members?

16 All right. Thank you,  
17 Mr. McCulley.

18 THE WITNESS: Thank you.  
19 (Witness excused.)

20 CHAIRPERSON HOLDEN: I see we're  
21 almost at 12:30 here. Is it acceptable to  
22 everybody to take about a 30-minute break  
23 and come back here at 1:00 o'clock and then  
24 we will proceed?



1                   Okay. Very good. So we will  
2 reconvene here in just over 30 minutes and  
3 try to get going right promptly at  
4 1:00 o'clock. Thank you very much.

5                   MS. SPIALTER: Thank you,  
6 everyone.

7                   (Luncheon recess taken.)

8                   CHAIRPERSON HOLDEN: I think we  
9 have everybody back. We had just finished  
10 with Mr. McCulley before our brief lunch  
11 break there.

12                  Mr. Abbott, do you have any  
13 additional witnesses or topics to discuss?

14                  MR. ABBOTT: No. I just wanted  
15 to go through the formality of requesting  
16 the admission into evidence of the 11-  
17 exhibit joint exhibit binder. I think it's  
18 stipulated to just because it's a joint  
19 binder. But I just want to make sure that  
20 it's deemed part of the record and in  
21 evidence.

22                  CHAIRPERSON HOLDEN:  
23 Ms. Spialter, you're of the same  
24 understanding, that those are all

1 satisfactory exhibits for the record?

2 MS. SPIALTER: Yes. I agree.

3 MR. ABBOTT: In that case,  
4 Mr. Chairman, we don't have any further  
5 evidence.

6 CHAIRPERSON HOLDEN: All right.  
7 Ms. Spialter.

8 MS. SPIALTER: All right. Thank  
9 you, Mr. Chairman.

10 We will begin by calling Tyler  
11 Brown as our first witness.

12 TYLER BROWN,  
13 the witness herein, having first  
14 been duly sworn on oath, was  
15 examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MS. SPIALTER:

18 Q. All right. Tyler, can you state  
19 your name for the record?

20 A. Tyler Brown.

21 Q. What is your place of employment?

22 A. Delaware Department of Natural  
23 Resources. I am environmental program  
24 manager in the drainage program now, but up





1           until a couple months ago, I was program  
2           manager, too, in the wetlands-subaqueous  
3           lands section.

4           Q.       What was your involvement with the  
5           map change request application that is the  
6           subject of this hearing?

7           A.       So I was the manager that executed  
8           the document.

9           Q.       What does "executed the document"  
10          mean?

11          A.       Signed the document, the denial of  
12          the map change.

13          Q.       Were you involved in the site  
14          evaluation?

15          A.       Yes.

16          Q.       Can you tell me a little bit about  
17          what happened when you went out to the site?

18          A.       Sure. So I guess to start, we  
19          always evaluate aerial photography, get an  
20          idea of the site, check out the surrounding  
21          areas, which involves looking at a lot of  
22          aerials from different years, the existing  
23          conditions of the State Wetlands Map, any  
24          previous activities that have taken place.



1           Then we go on site and actually  
2           verify according to the documents that were  
3           provide associated with JD in this case. We  
4           did take a couple borings on site, tried to  
5           evaluate the vegetation that was sprayed and  
6           essentially eradicated with the use of  
7           herbicide. And that's, for the most part,  
8           it. Tried to verify what was submitted as  
9           part of the report as well.

10          Q.     Can you identify the documents that  
11          were submitted as part of the application  
12          through looking at -- these are part of the  
13          chronology.

14                 If the Board does not have them  
15          in front of the Board, I'm going to put them  
16          up here. I'm going to share my screen in  
17          just a moment so everybody can see what  
18          we're talking about, if I have the right to  
19          do so.

20                 Sascha, can you give me the  
21          right to share my screen?

22                 MS. MOHAMMED: I'm on it.

23                 MS. SPIALTER: Thank you. Thank  
24          you. Perfect. Wonderful. All right.



1                   So everybody should be able to  
2                   see my screen at this point. Is that  
3                   correct?

4                   CHAIRPERSON HOLDEN: Yes.

5                   MS. SPIALTER: All right.

6                   Fantastic. Thank you, all.

7                   So these are the chronology  
8                   exhibits, some of which were not included in  
9                   the joint exhibits because of the motion in  
10                  limine, but by regulation, the chronology is  
11                  part of the record. So if you need me to  
12                  move for their admission, please let me  
13                  know, but my understanding is that they're  
14                  automatically included.

15                  BY MS. SPIALTER:

16                  Q.       So Tyler, can you explain what  
17                  Exhibit 1 is here?

18                  A.       That is a topographic survey that  
19                  was provided by the applicant.

20                  Q.       Is that the topographic survey that  
21                  we were looking at earlier, which is Exhibit  
22                  3 in the joint --

23                  A.       Yes.

24                  Q.       And Exhibit 2, what is that?



1           A.       That is a cover letter for the  
2 application for a map change.

3           Q.       And so the rest of the document, I'm  
4 just going to scroll through quickly, is  
5 that in fact the application as you remember  
6 it?

7           A.       Correct.

8           Q.       Is that the same application as  
9 Exhibit 1 in the joint exhibit binder?

10          A.       Yes.

11          Q.       Okay. Moving on to Exhibit 3. What  
12 is Exhibit 3?

13          A.       Looks like the report prepared by  
14 Jim McCulley.

15          Q.       And is that the same as Exhibit 2 in  
16 the joint exhibit binder in front of you?

17          A.       Yes.

18          Q.       Can you describe when and how this  
19 report was provided to you?

20          A.       So it was provided as part of the  
21 original application that was submitted to  
22 us.

23          Q.       So you received both at the same  
24 time?



1           A.     Correct.

2           Q.     Moving on to the next exhibit,  
3 Exhibit 4. Can you identify what Exhibit 4  
4 is?

5           A.     Sure. That is a description of what  
6 George put together based on what we saw on  
7 site, characteristics of the vegetation,  
8 characteristics of the soil and  
9 characteristics -- or the description of the  
10 aerial photography and what we observed on  
11 site.

12          Q.     Quickly. Who is George?

13          A.     George Geatz is an environmental  
14 scientist for the wetlands and subaqueous  
15 lands section, who is also a professional  
16 wetlands scientist and a professional soils  
17 scientist.

18          Q.     Let's talk a little bit about what  
19 was included in this summary. So first of  
20 all, it talks about two on-site  
21 investigations done August 13th and  
22 September 18th of 2019. Were you on site  
23 both of those days?

24          A.     Yes, I believe so.



1 Q. And is an investigation of the sort  
2 always done as part of a map change?

3 A. Yes.

4 Q. The second paragraph you talk about  
5 what you visually observed while walking  
6 around the site. Can you describe what the  
7 site looked like?

8 A. Sure. So, for the most part, the  
9 entire property that's owned by Mr. Liberto  
10 had been sprayed and mowed with herbicide.  
11 So on these two specific site visits, we  
12 were trying to identify the vegetation, but,  
13 of course, it was, you know, it was sprayed  
14 with herbicide and was dead, for the most  
15 part, but we could verify some of the  
16 vegetation that was there right on the  
17 border and by just trying to look at the  
18 stems which was -- the majority was  
19 phragmites, but also there was a little bit  
20 of spartina alterniflora.

21 Q. You discussed seeing spartina on the  
22 adjacent property. Can you describe what  
23 you saw?

24 A. Yes. So there was a, from what I



1 remember, there was a little bit of water  
2 present, but there was very lush, healthy  
3 spartina alterniflora, which is typically in  
4 a salt marsh, and I would say super healthy.  
5 It was probably 5 or 6-feet tall.

6 Q. When you say "salt marsh," is that  
7 tidal marsh?

8 A. Tidal marsh, yes.

9 Q. Thank you.

10 And when you are on site, what  
11 is it that you are going on site to see, to  
12 record?

13 A. So one of the things we did is --  
14 you know, because there was previous map  
15 changes done in the area, we were trying to  
16 figure out exactly -- we georeferenced an  
17 existing wetlands map and put them on a GPS  
18 unit. We were trying to physically see  
19 where the existing state-regulated wetland  
20 line is. So we kind of -- well, we did lay  
21 that out.

22 So we put all the information we  
23 had of the existing map, georeferenced it  
24 and upload it to a GPS unit where we could



1 physically mark out the existing state-  
2 regulated wetlands on and compare that to  
3 the existing landscape and the survey that  
4 we had received and also compare it to the  
5 vegetation and we could take a look at the  
6 soils in comparison as well.

7 Q. On site, did you perform any soil  
8 analysis?

9 A. Yes. I mean, so that's not  
10 necessarily part of the role, but just out  
11 of curiosity and trying to get an idea where  
12 sand overwash was or was not, we did -- you  
13 know, George did evaluate soils on site.

14 Q. And how did you do that?

15 A. With a soil auger.

16 Q. Moving on. You discussed and also  
17 in your report in the summary it discusses  
18 the aerial photography. Can you describe  
19 what aerial photography you looked at?

20 A. Sure. So we look at a series of  
21 aerial photography. We see whatever is the  
22 oldest present all the way up to the most  
23 current. And that goes for every single  
24 application, which is over, approximately





1 over 500 a year. We, for every application,  
2 whether it's a repair, replace of a bulkhead  
3 or large scale map change, we review aerial  
4 photography to get an understanding of  
5 what's present on site.

6 Q. When you say that you review aerial  
7 photography, is that done electronically or  
8 hard copy? What means do you use?

9 A. Electronically.

10 Q. Using what software?

11 A. GIS.

12 Q. I'm going to back up very quickly.  
13 I got a little bit ahead of myself. We  
14 talked about your position. Can you  
15 describe what your job responsibilities were  
16 in the wetlands division department?

17 A. Sure. So I was a section manager  
18 that oversaw all applications that were  
19 submitted to the wetlands -- or to the  
20 section, and if it wasn't in public  
21 subaqueous plans, I had signing authority  
22 for each decision that was made in the  
23 section as well as oversaw any enforcement  
24 action.

1 Q. What types of applications -- you  
2 said you had signing authority. What type  
3 of permits and other actions came across  
4 your desk on a regular basis?

5 A. Subaqueous land permits by just a  
6 typical wetlands jurisdiction, was the  
7 determination knee-high determinations,  
8 subaqueous lands, lease applications, water  
9 quality certifications, wetland permits for  
10 wetland impacts, and review of water quality  
11 certifications, and also mitigation  
12 associated with wetland impacts.

13 Q. What is your educational background?

14 A. So I have a bachelor of science in  
15 agriculture with a minor in plant science,  
16 and I have approximately ten years'  
17 experience in the environmental field.  
18 Seven, a little over seven years' experience  
19 specifically in the wetlands and subaqueous  
20 land section, which included a lot of  
21 courses, classes hosted by the Army Corps of  
22 Engineers associated with plant  
23 identification, soils training, soil  
24 delineation training.



1 Q. Do you have any certifications?

2 A. I'm a nutrient management consultant  
3 and a certified pesticide applicator. I do  
4 not hold a professional wetlands science or  
5 professional soils science, mainly because I  
6 moved up in the section so quick to  
7 management that it didn't benefit me to go  
8 through that process.

9 Q. Understandable.

10 Okay. Going back to the aerial  
11 photography. Is aerial photography  
12 something that you review regularly in your  
13 job?

14 A. Absolutely.

15 Q. How often?

16 A. Every day.

17 Q. So you described using aerial  
18 photography from GIS?

19 A. Mm-hmm.

20 Q. I am going to now share GIS. So as  
21 everyone can see, this is an active website.  
22 Is the ArcGIS, as written on the screen,  
23 software, is this the software that you used  
24 in the course of business to review aerial



1 photography?

2 A. Yes.

3 Q. Can you tell me what we're looking  
4 at here?

5 A. So we're looking at the dirt road  
6 that runs south-north towards St. Jones  
7 River, Flack Avenue. Obviously, the area  
8 has changed a lot. The beach is eroded, and  
9 the dunes was all the way back on  
10 Mr. Liberto's main -- several series of  
11 lots.

12 Q. Specifically when was this  
13 photograph taken?

14 A. This was taken in 1926.

15 Q. How do you know that?

16 A. It's there on the Delaware website.

17 Q. Where my cursor is currently  
18 highlighting, does this accurately represent  
19 the database of the 1926 aerial photography?

20 A. Yes.

21 Q. How do you know what area this map  
22 is? What's it showing?

23 A. Well, there's a whole other series  
24 of identifiers that we can use. There's



1 other layers. The state named roads that we  
2 would follow. We can put Kent County  
3 parcels, overlay that, and easily figure out  
4 where we're at.

5 Q. Can you --

6 A. And also knowledge of the area.

7 Q. Sorry. Specifically, have you used  
8 this map before?

9 A. Absolutely.

10 Q. I am going to zoom in on the subject  
11 area. As you can see, the quality continues  
12 to increase to the maximum resolution. Is  
13 this image accurately showing the properties  
14 in question in this application?

15 A. Yes. The properties in question  
16 are -- would be the southeast of the ditch  
17 near where the cursor is.

18 Q. So roughly, --

19 A. Right there.

20 Q. -- this area here?

21 A. Yeah. Just maybe a little farther  
22 south. Right in that area.

23 Q. Okay. When you look at this image,  
24 what do you -- in your professional opinion,



1 what is it that you see?

2 A. I see a small feature coming off of  
3 the St. Jones River that leads into wetlands  
4 areas, similar to any other ditch that runs  
5 throughout other marshes throughout the  
6 state.

7 Q. So this is a common geological  
8 feature that you've seen in your experience?

9 A. Yes. I think if you zoom out, you  
10 will see them all over the frame of the  
11 wetlands to the west, yes.

12 Q. Are the ditches natural or manmade,  
13 generally?

14 A. Some are natural, some are manmade  
15 through fish and wildlife mosquito control.

16 Q. Is that generally what they're used  
17 for?

18 A. It all depends. Some are natural  
19 that are just the current features of -- you  
20 know, pushes water through up to flood  
21 marshes. Some were manmade created for  
22 mosquito control purposes.

23 Q. When they exist naturally, the  
24 purpose -- their function ecologically is to

1 feed tidal water into the marshes?

2 A. Correct. Yes. Absolutely.

3 Q. I'd like to -- I'd like to look at  
4 the plan, which is Exhibit 6 in the joint  
5 exhibit binder, that we discussed  
6 significantly during the appellant's case in  
7 chief. Have you seen this image before?

8 A. Yes.

9 Q. What does this graphic demonstrate?

10 A. Looks like a 1950 plat of the area  
11 in question and more.

12 Q. Do you see in the lower left-hand  
13 corner the word "Ditch"?

14 A. Yes.

15 Q. To the best of your professional  
16 knowledge, would you identify that ditch to  
17 be in the same location as the darkened area  
18 that you call "the ditch" in this 1926  
19 photograph?

20 A. Yes, I'd agree.

21 Q. And within your professional  
22 opinion, and the course of normal business,  
23 would you regularly reference documents like  
24 this in order to determine the historical



1 lay of the land?

2 A. Yeah. Sure. I mean, any historic  
3 information we have, the more, the better to  
4 make a determination.

5 Q. Let's go back to the on-site summary  
6 that we were discussing a few minutes ago.  
7 You discussed doing some soil borings and  
8 then in this paragraph here discussed the  
9 types of soils were present. Can you tell  
10 us a little bit more about what soils you  
11 found in the area?

12 A. Sure. As referenced in Jim's  
13 report, transquaking and Mispillion soils  
14 were referenced in the wet soil survey,  
15 which typically are a indicator of a tidal  
16 salt marsh. While doing the soil borings,  
17 yes, those are very organic soil, dark,  
18 very, very dark, mucky soil which you  
19 typically see in a tidal marsh. I would say  
20 that this area was a little bit dryer, you  
21 know, but it's typical of a higher, higher  
22 tidal marsh. It also had a strong sulfur  
23 smell, which is also typically the smell in  
24 a completely saturated tidal environment.





1 Q. Were there any elements of a tidal  
2 marsh that were missing when you were  
3 evaluating the site?

4 A. I wouldn't -- no. I mean, when you  
5 look at our definition -- when comparing to  
6 the state regulated wetlands definition, no.

7 Q. Let's talk about the information  
8 that was provided as part of the  
9 application.

10 A. Sure.

11 Q. We looked at the application itself,  
12 which is Exhibit 1 in the joint exhibit  
13 binder, and the report by Mr. McCulley,  
14 which is Exhibit 2 in the exhibit binder.  
15 Was any other information provided by the  
16 appellants as part of this application?

17 A. Not that I remember. I know on  
18 several occasions we requested additional  
19 information that was referenced in the  
20 report itself, and we were told it was  
21 ancient history and it was never provided.  
22 So it made our evaluation a little difficult  
23 as well.

24 Q. Do you recall specifically what



1 items were requested?

2 A. I can reference two things. One  
3 thing is the information on survey data.  
4 Because the survey itself was kind of  
5 conflicting to the report, so we asked for  
6 clarification, which we were told was  
7 ancient history and didn't matter to this  
8 determination.

9 And also Jim's report references  
10 a hydrological study that was done by KCI, I  
11 believe, and which -- the report referenced  
12 it, so we wanted to see that information.  
13 That should obviously help us make a  
14 determination. And we were also told that  
15 was ancient history and didn't matter as  
16 part of this evaluation.

17 Q. You referenced just now a  
18 discrepancy in the topological survey. Can  
19 you provide more detail on what that  
20 discrepancy was?

21 A. Yeah. Very similar to what we just  
22 went over with Jim. It was very confusing  
23 about the layout of the blue dashed line on  
24 the survey showing approximate mean high.



1 Q. For the Board, we're looking at  
2 Joint Exhibit 3, which is that topological  
3 survey which we discussed with Mr. McCulley.

4 A. So we were requesting the blue line,  
5 how that was determined, what the deal with  
6 that was, and also the fact that there was  
7 no note on -- was this done in -- we asked  
8 the question was this done in NABD88 and  
9 NABD83 and also went back -- the fact that  
10 it didn't necessarily note on the survey.  
11 The survey, it wasn't even signed. And we  
12 referenced -- just to make sure I covered  
13 it -- referenced back to the report about  
14 the two State of Delaware elevations versus  
15 what Miller & Lewis put together, and then  
16 also the third, kind of oddball with the  
17 blue line. Yes. We just asked for  
18 clarification on that.

19 Q. To some extent, I asked Mr. McCulley  
20 some of these questions, but I'd like your  
21 opinion on them as well. You've discussed a  
22 few different vertical datums. Can you  
23 explain what NABD88, for example, is, how  
24 it's used?



1           A.     A lot of times, it -- it can be  
2           used a lot. A lot of times it's used in  
3           marine environments to get an idea of the  
4           elevation. Usually it's pulled from the  
5           closest tide gauge and references that to  
6           that mean high elevation, sets a benchmark,  
7           and, you know -- let's just pretend in this  
8           case, you know, based off of the datum from  
9           a tide gauge in Bowers Beach, mean high was  
10          an elevation of 2. Then that could be  
11          referenced on this map. And if there is a  
12          totally different datum used, it would list  
13          what the difference was.

14          Q.     On the survey that is in front of  
15          you, as it exists in front of you, is there  
16          any indication what vertical datum was used?

17          A.     No, other than it says "Delaware  
18          State Plane." But that was part of the  
19          questions we had asked about what was used  
20          and how that was determined.

21          Q.     Are you familiar with the Delaware  
22          State Plane System?

23          A.     Yes.

24          Q.     Does that include a vertical datum



1 as a standard?

2 A. It's a datum. I don't believe it's  
3 vertical.

4 Q. So it would be what kind of datum,  
5 then?

6 A. Honestly, I'm not a hundred percent  
7 sure on that.

8 Q. Okay.

9 A. Working in this section, we always  
10 deal with NABD88 and NABD83. I think the  
11 state plane system is just a actual location  
12 of having to do with the vertical datum.

13 Q. So it would be more along the lines  
14 of a GPS --

15 A. It should be --

16 Q. Would the Delaware State Plane  
17 System be more along the lines of a GPS or  
18 longitude and latitude sort of system?

19 A. I believe so.

20 Q. Thank you.

21 Looking at the survey in front  
22 of you. Where it says "approximate mean  
23 high water line," in your professional  
24 opinion, can you approximate what height is



1 demonstrated by that line?

2 A. I would say somewhere around 3.8.

3 Q. And that 3.8 as compared to the 2.3  
4 and 2.5 numbers provided in the report, is  
5 there any way to compare those numbers  
6 without reference to a vertical datum?

7 A. No, not without more information.

8 Q. Did you request additional  
9 information?

10 A. Yes.

11 Q. Was any additional information ever  
12 provided?

13 A. No.

14 Q. So moving on. The last exhibit in  
15 the chronology is Exhibit 5. Can you  
16 identify Exhibit 5, please?

17 A. So that is the letter that we sent  
18 out with the information about the map  
19 change request.

20 Q. When you say information about, was  
21 this the decision?

22 A. This is the decision that we felt  
23 that the property as is is correctly mapped.

24 Q. What was that decision based on?



1           A.       It was based upon the language in  
2 the wetlands law criteria.

3                   MR. MARCOZZI:   Which exhibit is  
4 that, please?

5                   MS. SPIALTER:   It is Exhibit 5  
6 in the chronology.  It is not part of the  
7 joint exhibits because -- due to the motion  
8 in limine and Mr. Abbott's request to  
9 exclude it.

10                   MR. MARCOZZI:   Thank you.

11 BY MS. SPIALTER:

12           Q.       As referenced in this letter, the  
13 three criteria for state regulated wetlands  
14 are the elevation?

15           A.       Mm-hmm.

16           Q.       The vegetation?

17           A.       Yes.

18           Q.       And the criteria that the areas must  
19 be now or in this century connected to tidal  
20 waters?

21           A.       That's correct, yes.

22           Q.       In your professional opinion, were  
23 all three criteria met here?

24           A.       Yes.



1 Q. It's been discussed that the  
2 criteria, "those areas which are now or in  
3 this century have been connected to tidal  
4 waters," can be interpreted in many ways.  
5 Can you explain how you interpreted that?

6 A. So I did raise the question to  
7 counsel about it. And I was interpreting  
8 it. And as counsel advised as when the  
9 law -- "this century" is when the law was  
10 written.

11 Q. How do you define "connected to  
12 tidal waters"?

13 A. Any form or feature that's directly  
14 connecting to a feature, and which in this  
15 case, it clearly depicts a ditch-like  
16 feature running from the St. Jones River  
17 adjacent to Mr. Liberto's property, which I  
18 think is pretty obvious from viewing the  
19 aerial photography that during high tide  
20 events would -- if that elevation would be  
21 within 2 feet above mean high, it would be  
22 directly connected to that, to the feature.

23 Q. If we look at -- if we look at map  
24 6, again, which is the plan, I think this





1       lays out all of the features that we need to  
2       have this discussion.

3               Obviously, I think we're all in  
4       agreement that geography does not care about  
5       manmade zoning boundaries. Is that correct?

6       A.     Yes.

7       Q.     How far, therefore, would you  
8       define -- if we assume that the ditch is a  
9       tidal waterway, how far would the area  
10      connected to that ditch extend? How would  
11      you define that professionally?

12      A.     It's try -- in this case, it's  
13      trying to observe, you know, the aerial  
14      photography, but also it's based off the  
15      indicators of elevation. There's -- I mean,  
16      this is a fairly flat area, even if in the  
17      surveys today, that goes onto the -- a  
18      little bit of the survey actually goes onto  
19      the property where the ditch runs. It's all  
20      relatively flat area. So, you know, less  
21      elevation change, that's more area that the  
22      water is going to spread.

23      Q.     So in your professional opinion, if  
24      I'm understanding you correctly, you



1 interpret "connected to tidal waters"  
2 meaning areas of a like elevation?

3 A. Well, correct. I mean, you know,  
4 tidal wetlands, just because they're tidal  
5 wetlands does not mean they get the daily  
6 ebb and flow every day. So they do not --  
7 it's not like mean high water, that's the  
8 break line, that's no longer a tidal  
9 wetlands. I mean, in that case, there would  
10 be very little tidal wetlands in the state.  
11 There's thousands of acres of tidal wetlands  
12 that only get -- you know, they only get  
13 tidal waters on them during above average  
14 high tides or storm events.

15 Q. Can you explain how professionally  
16 you would determine where the end of the  
17 tidal wetlands was?

18 A. In this case --

19 Q. More generally.

20 A. So what I would say is, oddly  
21 enough, that 2 foot above local mean high is  
22 a very good indication. I've done hundreds  
23 and hundreds of JDs in this section.

24 Q. What's a JD?



1           A.     I'm sorry. A jurisdictional  
2 determination, a state wetlands  
3 jurisdictional determination. And even  
4 though these maps were created in 1988 based  
5 off of that elevation, it's pretty amazing  
6 how -- you know, we've dealt with some sea  
7 level rises and some erosion issues, but  
8 it's pretty amazing how that 2-foot  
9 elevation, and -- is a lot of times spot-on  
10 to change of more of a tidal wetlands  
11 environment to, up to a more freshwater  
12 marsh environment.

13          Q.     And so if you'll turn to Exhibit 3,  
14 which is the topographic survey. Is any  
15 portion of the property subject to this  
16 application above, more than 2 feet above  
17 the mean high water line?

18          A.     Well, according to all three of the  
19 numbers that are kind of associated with  
20 this survey, I don't think there is anywhere  
21 on the property, other than the dune system,  
22 that would be -- that would be more than  
23 2 feet above local mean high.

24          Q.     Okay. Based on the elevations on



1 this site, as presented in that topographic  
2 survey, in your professional opinion, would  
3 the ditch, as seen from the aerial  
4 photography and the other drawings, cause  
5 tidal action on the property?

6 A. Yes.

7 Q. And is that your basis for  
8 determining that, under the regulations, the  
9 properties are properly designated "tidal  
10 wetlands"?

11 A. Yes. And that's the -- to add  
12 additional information -- that's exactly  
13 where we stopped. We never went into any  
14 detail to see if there's was any form of  
15 influence underneath the road or culvert  
16 systems or anything like that. Apparently  
17 that information has already been documented  
18 and obtained and was mentioned in the report  
19 but was never provided to us.

20 I would even say that there is  
21 one area, I would say that that culvert is  
22 likely still there because I was walking and  
23 found a hole where I sunk up to nearly my  
24 waist, which would indicate that there is



1 something going on there. I'm not going to  
2 say that there's full-blown active  
3 functioning culvert there, but there is  
4 something there.

5 Q. You talked briefly about what level  
6 of tidal activity in your professional  
7 opinion is required to be deemed wetlands  
8 under Delaware's law. So let's return to  
9 that.

10 First, do you believe that tidal  
11 wetlands require regular ebb and flow?

12 A. Some do, some don't. Low marsh  
13 does. High marsh does not.

14 Q. Is there some frequency of tidal  
15 activity that is required?

16 A. Yeah. There's a series of, and  
17 most -- in Delaware, you have your low marsh  
18 and then it kind of slowly sets up so you  
19 have your spartina alterniflora, your low  
20 marsh, spartina patens, which references hay  
21 grass, would be the next level, and then it  
22 usually steps up to a more shrub-like or  
23 high tide bush. That goes off the elevation  
24 and the frequency of flooding, essentially.

1 Q. Under the regulations that we've  
2 been discussing, are all three of those  
3 areas wetlands under the regulations?

4 A. Correct, at that elevation, which  
5 would throw all three of those wetland  
6 plants into that category, yes.

7 Q. Would areas that see tidal action  
8 only during storm events, in your  
9 professional opinion, meet the definition of  
10 "connected to tidal action"?

11 A. Yes, yes. Now, I'm not saying like  
12 one -- you know, a major storm like Sandy,  
13 but, yes, there's typical -- there's several  
14 high tide events a year, whether it's a  
15 spring tide that would affect those, yes.

16 MS. SPIALTER: I have no further  
17 questions.

18 CHAIRPERSON HOLDEN: Thank you,  
19 Ms. Spialter.

20 Mr. Abbott and Ms. Spialter, if  
21 you don't need to, you can stop sharing the  
22 screen unless you feel it would be of  
23 benefit to --

24 MS. SPIALTER: Yeah. That's



1 fine.

2 CHAIRPERSON HOLDEN: Very good.

3 MR. ABBOTT: Mr. Chairman, if I  
4 could, I may ask Mr. Brown some questions  
5 about those documents.

6 CHAIRPERSON HOLDEN: Okay.

7 MR. ABBOTT: It could be helpful  
8 if they're on there. We've got them also in  
9 the chronology.

10 MS. SPIALTER: I'm glad to put  
11 them up on my own screen if that would be  
12 easier for you, Mr. Abbott.

13 MR. ABBOTT: Yeah, that would be  
14 great. I think it's helpful for the Board  
15 as well.

16 CHAIRPERSON HOLDEN: Mr. Abbott,  
17 would you like to continue?

18 MR. ABBOTT: Thank you,  
19 Mr. Chairman, yes.

20 CROSS-EXAMINATION

21 BY MR. ABBOTT:

22 Q. Mr. Brown, for starters, you  
23 received the application for wetland map  
24 amendment on July 1, 2019; correct?



1 A. Yes.

2 Q. Okay. You did not render an  
3 decision on that map application, however,  
4 until seven months later on January 30,  
5 2020; right?

6 A. Yes.

7 Q. And the central underpinning for  
8 your decision was the 1926 aerial photo;  
9 correct?

10 A. Not solely, but the majority, yes.

11 Q. All right. That 1926 aerial photo  
12 was available on July 1, 2019; correct?

13 A. Yes. So to elaborate, we did  
14 entertain looking at other ideas and wanted  
15 to make sure we were making the correct  
16 decision and made sure we were coordinating  
17 with counsel.

18 Q. When did you first look at the 1926  
19 aerial?

20 A. Likely within a few weeks of the  
21 application being submitted.

22 Q. Do you recall on numerous occasions  
23 I followed up with you by email to request  
24 the status of the outcome of the





1 application?

2 MS. SPIALTER: I would like to  
3 object. What is the relevancy of this line  
4 of questioning?

5 MR. ABBOTT: It has to do with  
6 his making up excuses for his preordained  
7 conclusion to deny the application.

8 CHAIRPERSON HOLDEN: Mr. Abbott,  
9 if you could get to the questions you'd like  
10 to address.

11 MR. ABBOTT: Certainly.

12 BY MR. ABBOTT:

13 Q. So, again, Mr. Brown, on numerous  
14 occasions, I sent you emails regarding the  
15 status of your decision on the application.  
16 Correct?

17 A. That is correct.

18 Q. And you failed to respond to some of  
19 those emails at all; isn't that right?

20 A. That's possible. I would say we  
21 also requested a lot of information that was  
22 never returned as well.

23 Q. We'll get to that story.

24 A. All right.



1 Q. Eventually you got your lawyer to  
2 respond for you, instead; correct?

3 A. I'm sorry, can you say that again?

4 Q. Eventually you had your lawyer  
5 respond to me on your behalf; correct?

6 MS. SPIALTER: Again, objection.  
7 Relevancy. The statute is what the statute  
8 is. None of this is relevant to the  
9 determination.

10 MR. ABBOTT: It goes to the  
11 made-up excuses, which are exactly what  
12 we've heard here today and even a new set of  
13 concocted excuses.

14 MS. SPIALTER: There is no  
15 motive element to this determination. You  
16 can either prove or disprove that the record  
17 before the Secretary was insufficient to  
18 support his conclusion and the decision in  
19 this case. That is it.

20 MR. ABBOTT: And the reason it  
21 took so long is because they were trying to  
22 come up with an excuse to say no.

23 MS. SPIALTER: Irrelevant,  
24 whether there was an excuse or wasn't.



1 Prove it or don't.

2 CHAIRPERSON HOLDEN: Mr. Abbott,  
3 I do agree that Mr. Brown has offered  
4 reasons for his decision. If you could get  
5 to addressing those and your questions  
6 regarding their appropriateness.

7 BY MR. ABBOTT:

8 Q. Mr. Brown, do you recall when I sent  
9 you an electronic version of the elevation  
10 survey that you asked for in an email in  
11 July 19, 2019?

12 A. I am not going to say for sure, but  
13 I trust that. And I think that's the survey  
14 that we have; right?

15 Q. Do you have any emails that you can  
16 show the Board that confirmed that you  
17 requested anything else other than the  
18 elevation survey that I provided to you?

19 A. Yes.

20 Q. Okay. What --

21 MS. SPIALTER: If you would like  
22 us to produce those, I am more than happy to  
23 do so.

24



1 BY MR. ABBOTT:

2 Q. I've gone through my emails,  
3 Mr. Brown, and I find no other requests from  
4 you to me. Are you saying you requested  
5 information from someone else other than me?

6 A. No. I believe it came from George  
7 Goetz, which was copied with myself, you,  
8 possibly Mr. Liberto and Jim McCulley.

9 Q. Okay.

10 A. If you'd like those dates, I could  
11 probably give them to you in one second.

12 Q. So Mr. Geatz would know?

13 A. I mean, I know because I was copied  
14 in the application -- I mean, the email.

15 Q. Why don't you tell me what the email  
16 said?

17 A. Sorry. I have to dig through my  
18 phone.

19 MS. SPIALTER: I can very easily  
20 produce one such email conversation if that  
21 would be beneficial to the Board.

22 THE WITNESS: Okay. You have  
23 it. Mine is not working

24 MR. ABBOTT: So I would like to



1 know more about it at this stage because  
2 there's an allegation that an email was sent  
3 to me requesting something and I didn't  
4 ensure that it was provided, which it is  
5 highly improbable.

6 THE WITNESS: No, you responded.

7 MS. SPIALTER: I can absolutely  
8 show it to you, and at that point, we can  
9 determine whether or not it is being entered  
10 into evidence.

11 BY MR. ABBOTT:

12 Q. Mr. Brown, you indicated that I did  
13 respond to your email?

14 A. Yes.

15 MS. SPIALTER: But not with the  
16 information provided. That is what he said.  
17 Sorry. Not with the information requested.

18 Q. The information you wanted was an  
19 elevation survey, which I provided to you as  
20 an email attachment; isn't that correct?

21 A. Yeah, but there was questions about  
22 the elevation, and it was told that -- I  
23 think the exact words -- "that was ancient  
24 history."



1 Q. Do you have an email to that effect?

2 MS. SPIALTER: I believe it's on  
3 your screen.

4 MR. ABBOTT: I can't read it.

5 THE WITNESS: "George, I believe  
6 all the reports and reference that you  
7 mentioned are outdated and no longer  
8 relevant."

9 BY MR. ABBOTT:

10 Q. Okay. So that seems like a fair  
11 response. It's not that we didn't provide  
12 it to you, we didn't find it to be relevant  
13 to the issue before you.

14 A. That goes back to the survey that  
15 gives no details of what exactly we're  
16 looking at.

17 Q. Well, the question that was  
18 presented in the application for map  
19 approval was whether or not there was a  
20 tidal connection of areas within this  
21 century; correct?

22 A. So we evaluated all three factors of  
23 the law, not just one. We don't ignore two  
24 out of the three.



1 Q. What do elevations have to do with  
2 the tidal connection question?

3 A. I mean, everything. The law, it has  
4 to have all three. So elevation survey, you  
5 had -- you provided a survey that was  
6 misleading, that had three different  
7 references. We just didn't -- we were just  
8 asking for clarification, which is a typical  
9 process in any form of application submitted  
10 to the wetlands and subaqueous land section,  
11 which I am sure Jim has dealt with us on  
12 several occasions where we request  
13 clarification or additional information.

14 Q. But ultimately, the issue that we  
15 raised was that there was no tidal  
16 connection; isn't that correct?

17 A. That's what was inferred and  
18 referenced in the report, yes.

19 Q. All right. Your decision, again --  
20 you said earlier your decision, I think you  
21 said was primarily based on the 1926 aerial  
22 photo. Am I using the correct terminology?

23 A. So that was a big question about the  
24 connection, yes.



1 Q. Okay. Other than the 1926 aerial  
2 photo, the only thing I read in your site  
3 summary that you based your decision as to  
4 tidal connection on is the last sentence in  
5 the fourth paragraph which reads:

6 "Additionally, a culvert located  
7 on the northern end of the property appears  
8 to connect the site with the vast area of  
9 tidal spartina marsh found on the opposite  
10 end of Flack Avenue." Correct?

11 A. Yeah. That's what it says.

12 Q. But that was the only other reason,  
13 other than the 1926 aerial, for your  
14 decision; right?

15 A. Yes. We decided not to evaluate any  
16 further.

17 Q. Okay. And I believe in direct  
18 testimony you testified that actually you  
19 don't know whether there was a culvert, do  
20 you?

21 A. Well, the survey depicts that there  
22 was. Beneath the road? Are you speaking  
23 beneath the road on the 1950 survey?

24 Q. You're talking about the culvert,





1       you're talking about a connection that goes  
2       out to the marsh out to the St. Jones River  
3       on the 1950 survey?

4           A.     I think this property would have --  
5       it would not matter about the culvert going  
6       beneath the road because there is a direct  
7       connection from St. Jones River to where --  
8       to the point where it met Flack Avenue.  
9       Whether or not it had a culvert going  
10      underneath the road doesn't affect anything  
11      on the west side of Flack Avenue.

12          Q.     Right now we're referring to the  
13      1950 Charles Shore subdivision plan.  
14      Correct?

15          A.     Okay.

16          Q.     That shows a ditch adjacent to lot  
17      26; right?

18          A.     Yes.

19          Q.     It does not show a ditch that's even  
20      adjacent to any of the six lots, does it?

21          A.     What's your definition of  
22      "adjacent"? To me, that is adjacent, and  
23      that's typical of a wetland feature is that  
24      there is a feature that runs through and



1 feeds hundreds and tens of acres.

2 Q. "Adjacent" means directly abutting.

3 A. So it's -- yes, there is a ditch  
4 directly abutting lot 25.

5 Q. On the 1950 Shore subdivision plan?

6 A. Yes. There is a ditch on lot 26  
7 that is directly abutting lot 25.

8 Q. Oh, okay. So if you're next door to  
9 an adjacent parcel, then that means that you  
10 have a connection; that's what your position  
11 is?

12 A. That's how tidal wetlands work, yes.

13 Q. Where is that in the definition of  
14 "wetlands"?

15 A. That's just wetlands science that  
16 wetlands don't -- again, wetlands don't have  
17 to be -- to have direct mean high water  
18 touching them on every event.

19 Q. So "connected" means you could be  
20 one, two lots away in your opinion?

21 A. Absolutely, yes.

22 Q. Okay. Do you have any source that  
23 defines the word "connected" that says it  
24 can be disconnected to still be connected?



1           A.     I guess that -- no. I guess I don't  
2 quite understand that. But no.

3           Q.     Well, going back to the 1950 Shore  
4 subdivision plan. There is no pipe or  
5 culvert that goes to lots 22 through 25  
6 directly, is there?

7           A.     There is no culvert, not according  
8 to this survey.

9           Q.     And you have no other evidence that  
10 there was ever any culvert other than the  
11 one that's potentially shown on the 1950  
12 Shore subdivision plan; correct?

13          A.     I don't, but there's reference of  
14 culverts and hydrological studies that was  
15 in the report submitted to us that I haven't  
16 seen, either.

17          Q.     Okay. So you don't know because you  
18 have no personal knowledge; right?

19          A.     I don't know about the series of  
20 culverts along the road. I had no intention  
21 to evaluate based on the information we had  
22 for the project.

23          Q.     In fact, you don't know whether  
24 there was any culvert running under Flack



1 Avenue other than the one shown on the 1950  
2 Shore subdivision plan, do you?

3 A. No, I don't.

4 Q. Now, you previously advised my  
5 client and Mr. McCulley that you would have  
6 denied the 2013 amendment to the wetlands  
7 map that your predecessor approved; right?

8 A. So I'm not going to say I did or did  
9 not. I honestly do not know. I do trust  
10 Jim professionally, so I would say he's  
11 probably not lying. But I would say number  
12 one rule in my book is you don't make a  
13 decision before you thoroughly evaluated  
14 everything. So I never -- I very rarely in  
15 the field would I burst something like that  
16 out. So I do respect Jim and I would trust  
17 that maybe I did say that, but I don't  
18 recall.

19 Q. You are no longer the head of the  
20 Delaware wetlands and subaqueous land  
21 section; correct?

22 A. Correct. I just took another  
23 position a couple months ago.

24 Q. Did you review Mr. McCulley's



1 reports?

2 A. Yes.

3 Q. Did you find any content of his  
4 report that you found to be inaccurate?

5 A. I think we've -- not off the top of  
6 my head. I think we covered the whole issue  
7 associated with the topographic survey and  
8 the numbers that were included in the  
9 report --

10 Q. What about --

11 A. -- and the elevations in the report  
12 and -- what's that?

13 Q. What about the DNREC survey of 2.3  
14 mean high water mark that Mr. McCulley  
15 talked about, are you familiar with that?

16 A. No. That's something I had asked  
17 questions about but didn't necessarily get a  
18 response as to -- I mean, I think shoreline  
19 water assessments is a totally different  
20 division, and they do surveys all the time.  
21 And I have no idea when they completed that  
22 survey or what time. They may have done it  
23 four times in the last ten years in that  
24 area. So I don't know what was being



1 referenced.

2 Q. You read Mr. McCulley's report that  
3 said DNREC had a survey that found mean high  
4 tide to be 2.3 elevation; right?

5 A. Yes.

6 Q. And so did you check with your  
7 colleagues at DNREC to see if that was  
8 correct?

9 A. No. I checked with the applicant.  
10 Usually it's the burden on the applicant to  
11 coordinate with us.

12 Q. Okay. But couldn't you have sent an  
13 email to your colleagues at your same  
14 agency?

15 A. Yes. I probably could, but it  
16 probably could have been just as easy that  
17 we received a response from the applicant.

18 Q. And when did you ask for that from  
19 the applicant?

20 A. I'll tell you in one second.

21 MS. SPIALTER: I'm going to pull  
22 up the email that you were just looking at.

23 A. So that looks like an August 21st,  
24 2019.



1 BY MR. ABBOTT:

2 Q. Okay. Where does it say please  
3 provide us with the DNREC report that  
4 Mr. McCulley relies upon?

5 A. There are several -- the last  
6 sentence of this email says, "There are  
7 several different numbers floating around  
8 here in reference to elevations of mean high  
9 tide line that are causing confusion. What  
10 is the actual elevation associated with the  
11 mean high tide line on the Miller & Lewis  
12 survey?"

13 Q. Okay. And what was my response?

14 A. "Jim McCulley confirmed that this  
15 references prior information, complications  
16 that are merely the background for purposes  
17 not on point of the current situation. As  
18 to your comment about a site visit where we  
19 will map out the state regulated wetlands  
20 that are on the property, I assume that you  
21 are referring to a portion of the  
22 undersigned" -- or I can't -- is this --

23 MS. SPIALTER: "Undesignated."

24 A. -- "undesignated two-acre lot that



1 lies on bayside of the dunes. Non-tidal  
2 action occurs landward on the side of the  
3 dunes. The survey, my client advises that  
4 he proposed location based on guesstimates  
5 for the high tide. So you can disregard  
6 that and go to more accurate information Jim  
7 used from the state, which I mean DNREC."

8 Q. Okay. Now, I think you alluded  
9 before to the fact that Mr. McCulley is a  
10 recognized environmental expert in Delaware.

11 A. Absolutely.

12 Q. I think you also testified that you  
13 did not have the NWS certification?

14 A. I'm not sure what NWS is.

15 Q. Or PWS, professional wetlands  
16 scientist designation.

17 A. I do not.

18 Q. So you're aware Mr. McCulley  
19 concluded there was no basis to designate  
20 any of the six lots as state wetlands?

21 A. I think that's what his conclusion  
22 said, yes.

23 Q. And would you agree that there's  
24 been no tidal connection with the six lots





1 in the 21st Century?

2 A. The fact that the information of the  
3 elevation I would assume that water overtops  
4 Flack Avenue several times as year. Yes, I  
5 would say there is tidal influence.

6 Q. What several times a year?

7 A. Storm events, certain storm events.  
8 Spring high tides.

9 Q. So your belief is that a storm event  
10 is a tidal event?

11 A. So there's a series of tidal  
12 epidemics. I mean, there's several series  
13 of large spring tide which are associated  
14 with a moon phase that happen every year.  
15 So I wouldn't necessarily it's a hurricane  
16 event or anything like that, but, yes, some  
17 storm events and some of your typical spring  
18 tide events. In fact, I've observed the  
19 site with water on it and tons of stranded  
20 horseshoe crabs.

21 Q. And you're talking about on lot 26?

22 A. On 26? Let me make sure. I'm  
23 talking on Mr. Liberto's lots, whatever they  
24 are. I'm sorry. Hold on one second.



1                   No, not on lot 26. It would be  
2 I observed them on lot 26, 25, 24.

3           Q.     Are you aware that you took soil  
4 borings on lot 26?

5           A.     No, I'm not. I believe the first  
6 site visit, that's very possible. I think  
7 the first site visit, there were no property  
8 boundaries. But I believe on the second  
9 site visit, Mr. Liberto clearly had  
10 everything marked.

11          Q.     Okay. And so it's your position  
12 that tidal connection can be established  
13 pursuant to a few-time-a-year event?

14          A.     Yes, definitely.

15          Q.     And where does it say that in the  
16 statute?

17          A.     References 2 feet above mean high  
18 water. So that would be several times a  
19 year.

20          Q.     That's the elevation component?

21          A.     Yeah, which correlates to flooding  
22 events.

23          Q.     No, I'm not asking about the  
24 elevation component. I'm asking you about



1 the tidal criteria. Tidal criteria requires  
2 that it be connected to tidal waters in this  
3 century; correct?

4 A. Yes.

5 Q. Okay. And the tides of the Delaware  
6 River and the St. Jones River in that  
7 vicinity, occur two high tides per day and  
8 two low tides per day; correct?

9 A. Yes.

10 Q. Okay. Going back to the Charles  
11 Shore subdivision plan. Oh. You already  
12 covered that.

13 You visited the site on two  
14 occasions; correct?

15 A. Yes. Well, formally, yes. I think  
16 I met with Mr. Liberto on another occasion  
17 prior to submitting an application.

18 Q. And when you visited the site, there  
19 was no evident tidal activity on the six  
20 lots; correct?

21 A. I believe I visit the site  
22 originally on a spring tide and the  
23 entire -- most of the lot was flooded. Mr.  
24 -- and we actually received a phone call



1 Mr. Liberto was actively pumping water off  
2 the site.

3 Q. You mean the time that there was a  
4 storm event and storm water runoff went onto  
5 his lots?

6 A. I'm not sure.

7 MS. SPIALTER: Objection.  
8 That's a conclusion well beyond what you can  
9 make as an attorney.

10 CHAIRPERSON HOLDEN: The burden  
11 is to prove that the record in front of the  
12 Secretary doesn't support the decision. So  
13 I would ask you to focus in that arena  
14 versus arguing about email language.

15 MR. ABBOTT: No, no. I hear  
16 you. Thank you, Mr. Chairman. No. My  
17 point, I think it's made based on  
18 Mr. Brown's answer, is he's not sure where  
19 the water came from. It might have been  
20 from a storm.

21 BY MR. ABBOTT:

22 Q. All right. Now, DNREC purchased the  
23 land at the end of Flack Avenue; correct,  
24 Mr. Brown?



1 A. I guess.

2 Q. You're not aware of that?

3 A. Other than what you guys are  
4 speaking of here and the fact that I saw it  
5 on a tax parcel, but I don't know the  
6 specifics of a purchase.

7 Q. Okay. The lots those two houses  
8 were located on abuts the St. Jones River;  
9 correct?

10 A. Yes.

11 Q. Is the St. Jones River tidal?

12 A. Yes.

13 Q. Were those two lots on the State  
14 Wetlands Map at any time?

15 A. I don't believe they were.

16 Q. Do you have any email communications  
17 with George Goetz regarding your work on the  
18 Delmarsh application?

19 A. There should be, yes. Whatever I  
20 was copied in or responded to.

21 Q. Why didn't you produce those emails  
22 in response to a subpoena?

23 A. I assume we gave everything. Right?

24 MS. SPIALTER: You have the



1 answers to your subpoenas. The witness did  
2 not answer that subpoena. I did.

3 BY MR. ABBOTT:

4 Q. Mr. Brown, you're not aware that  
5 your -- that DNREC declined to produce  
6 emails between you and Mr. Geatz?

7 A. Well, there's a series of emails  
8 where I'm copied on. I don't think there is  
9 any specific email between me and George  
10 about the project. Our offices are right  
11 next door. If we're going to talk, we talk.

12 Q. Okay. You would agree with me that  
13 the 1926 aerial photo does not show water  
14 across the entirety of the six lots;  
15 correct?

16 A. Can you bring that up, the '26  
17 aerial?

18 MS. SPIALTER: Sure.

19 A. No, it does not. It looks like that  
20 would be a low tide photo. And there is  
21 water in the ditch feature itself and  
22 in the St. Jones and on the Delaware Bay.

23 Q. How can you tell it's low tide or  
24 high tide?



1 A. I see a wrack line on the beach.

2 Q. That could be a shadow, couldn't it?

3 A. I don't think so.

4 Q. All right. Now, there is a ditch  
5 that comes in from the St. Jones River, it  
6 appears on this aerial; correct?

7 A. There's a ditch that comes -- I'm  
8 sorry. Can you repeat that?

9 Q. There is ditch that comes in from  
10 the St. Jones River that's shown on this  
11 aerial?

12 A. Correct.

13 Q. And that ditch seems to be  
14 consistent with the ditch shown on the Shore  
15 subdivision plan; correct?

16 A. Yes. I think, yeah, I've already  
17 agreed to that, yes.

18 Q. What's the elevation of that ditch?

19 A. What is the elevation of that ditch?

20 Q. Yes.

21 A. That ditch is below mean low water.

22 Q. Well, how do you know if --

23 A. 'Cause there's water present in the  
24 future.



1 Q. Was it manmade?

2 A. I don't know that answer.

3 Q. How deep was it?

4 A. I don't know that answer.

5 Q. What type of plane was used to take  
6 this aerial photo?

7 MS. SPIALTER: Objection.  
8 Relevance.

9 MR. ABBOTT: I want to know how  
10 much he knows about the background of the  
11 photo. It's very relevant to determine how  
12 it was taken, et cetera.

13 CHAIRPERSON HOLDEN: Mr. Abbott,  
14 again, the task here was the decision of the  
15 Secretary or the decision of DNREC valid or  
16 improper based on the record in front of  
17 them?

18 MR. ABBOTT: Understood,  
19 Mr. Chairman. And this photo is central to  
20 their decision. So I just want to know what  
21 Mr. Brown knows about the photo.

22 THE WITNESS: It looks like a  
23 similar type of landscape to what's on the  
24 east and west side of Flack Avenue, and I





1 think, as all we know, the west side of  
2 Flack Avenue is an active wetland that can't  
3 even be close to being denied.

4 BY MR. ABBOTT:

5 Q. Okay. So that ditch that's on this  
6 aerial probably went underneath Flack Avenue  
7 and connected to the marsh; correct?

8 A. Yes. It also looks like it runs to  
9 the south along Flack Avenue as well. Small  
10 feature carries that way.

11 Q. Well, it looks like if that's true,  
12 then there's multiple lots numbered below  
13 lot 22 that would be connected in your  
14 opinion; correct?

15 A. Yes. I would say that's a true  
16 statement.

17 Q. So let's say lot 20 that a house was  
18 built on. That would have been connected.  
19 State wetlands; right?

20 A. I -- yes. Yes, I think it is.

21 Q. But DNREC removed lot 20 from the  
22 State Wetlands Map, didn't it?

23 A. I believe it did, yes.

24 Q. And the 1926 aerial photos were



1 available when that happened, weren't they?

2 MS. SPIALTER: Objection.

3 Relevance.

4 MR. ABBOTT: This is the central  
5 exhibit. This is the complete foundation  
6 for DNREC's entire decision.

7 MS. SPIALTER: Yes, but you're  
8 not asking about the map. You're asking  
9 about prior decisions that were not made by  
10 the witness sitting in front of you.

11 MR. ABBOTT: They're made by  
12 DNREC. DNREC is the defendant.

13 MS. SPIALTER: And DNREC has the  
14 right to make decisions individually based  
15 on the evidence presented in front of it.  
16 The decision made here was based on the  
17 record before the Secretary. What was made  
18 in other cases is irrelevant because we do  
19 not know what was before the Secretary in  
20 those cases.

21 MR. ABBOTT: It directly attacks  
22 Mr. Brown's interpretation of this photo.

23 CHAIRPERSON HOLDEN: Mr. Abbott,  
24 I'm going to ask you if you can succinctly



1 address the questions you've got here for  
2 the witness, and shortly, I'm going to ask  
3 for an opportunity for Board members to ask  
4 questions of the witness and we can circle  
5 back to you then if you have got additional  
6 questions.

7 BY MR. ABBOTT:

8 Q. Mr. Brown, do you know anything  
9 about the background of this photograph?

10 A. Can you elaborate?

11 Q. Do you know anything about how it  
12 was taken and by whom, when, under what  
13 weather conditions, et cetera?

14 A. Well, I mean, you can -- obviously,  
15 it wasn't a terrible -- wasn't rough weather  
16 conditions or wasn't windy weather  
17 conditions because the plane is flying and  
18 taking a photo. It's not a extremely high  
19 event. That's obvious just looking at the  
20 water features.

21 Do I know who took the aerial  
22 photograph or who was in the plane? No, I  
23 do not. All I know is it is saved on a  
24 state website and it's part of our everyday



1 life of analyzing 1926, 1951, 1960 aerials.

2 Q. So how wide is the area that is dark  
3 on this photo in front of lots 22 through  
4 25?

5 A. I could probably use a measuring  
6 tool, if I knew exactly the area you're  
7 talking about. I can give you an idea.

8 Q. Well, you're saying that there's a  
9 dark area that runs along the Flack Avenue  
10 in front of lots 22 through 25; correct?

11 A. So are you asking from where the,  
12 let's say, where we think the culvert is or  
13 where the culvert is referenced in the 1950  
14 survey, how far is it running south along  
15 Flack; is that what you're asking?

16 Q. No. I am asking you how -- I am  
17 asking you: It is your position, your  
18 interpretation that there is a ditch that  
19 runs parallel to Flack Avenue that is a dark  
20 area on the photo; correct?

21 A. Yes.

22 Q. All right. And it is your  
23 contention that it runs along lots 22  
24 through 25? Correct?



1           A.     Yeah.  Sure.  Are we sharing the  
2     screen right now?  I can measure it out  
3     exactly.

4           Q.     No.  Let's take it one at a time.  
5     Is it your position, your interpretation  
6     that there's a dark area that you think  
7     connects to the St. Jones River along lots  
8     22 through 25?

9           A.     Yes.

10          Q.     Okay.

11          A.     There's a feature there.

12          Q.     How wide is Flack Avenue as shown on  
13     this aerial photo?

14          A.     Around 20 feet.

15          Q.     Okay.

16                   MR. HORSEY:  Mr. Holden?

17                   CHAIRPERSON HOLDEN:  Mr. Horsey.

18                   MR. HORSEY:  Does the witness  
19     mind taking and tracing where he's saying,  
20     that they're all talking about that ditch  
21     being?  I just want to make sure I  
22     understand what the two of them are saying  
23     and they're not talking past one another.  
24     Please.



1                   CHAIRPERSON HOLDEN: Mr. Brown,  
2                   can you use maybe the measure tool to trace  
3                   the alignment of the features you're talking  
4                   about?

5                   Thank you.

6                   Mr. Brown, a question for you.  
7                   Do you require the applicant to confirm the  
8                   name of the pilot -- in the application from  
9                   the applicant, does the department question  
10                  the pilot, the weather, the type of airplane  
11                  utilized in the several different aerial  
12                  photos submitted as part of the application?

13                  THE WITNESS: Absolutely not.

14                  CHAIRPERSON HOLDEN: Mr. Abbott,  
15                  is your professional wetland expert prepared  
16                  to testify with that information?

17                  MR. ABBOTT: I think he's  
18                  already testified that you need an expert  
19                  aerial photograph interpreter, but --

20                  CHAIRPERSON HOLDEN: To  
21                  determine the name of the pilot or the type  
22                  of airplane?

23                  MR. ABBOTT: No. That goes more  
24                  to the weight that can be given because of



1 the questions about the accuracy of what  
2 it's showing.

3 Mr. Chairman, I think Mr. Brown  
4 had just answered that he is estimating the  
5 width of Flack Avenue at that time to be 20  
6 feet, approximate. Is that right,  
7 Mr. Brown?

8 CHAIRPERSON HOLDEN: Mr. Abbott,  
9 I certainly understand. What I ask of you  
10 is to get back to the thrust of the  
11 rationale for the decision based upon the  
12 record in front of the department with the  
13 decision. It seems to me, personally, that  
14 you're tracing down the elevation and  
15 weather and type of airplane and other  
16 information, obviously not a pertinent  
17 piece, that you have related either expert  
18 photo reviewers would offer comment upon nor  
19 did your applicant provide the information  
20 when paying a public wetlands scientist to  
21 provide information to the department. And  
22 so it does not seem to be in line with the  
23 thrust of your charge here.

24 Mr. Horsey.



1 MR. HORSEY: This is for  
2 Mr. Abbott. When Mr. Brown just traced that  
3 area of the ditch, do you concur that you're  
4 talking about the same area?

5 MR. ABBOTT: That's what I  
6 assumed he was referring to as the supposed  
7 connection.

8 MR. HORSEY: Okay.

9 MR. ABBOTT: So further to this  
10 photograph.

11 And Mr. Chairman, this  
12 photograph is their entire case, so --

13 CHAIRPERSON HOLDEN: Mr. Abbott,  
14 Dean Holden, again. Your public wetlands  
15 scientist testified that the ditch that  
16 seemed apparent in the '26 photo and also  
17 seemed apparent in the 1950 subdivision plat  
18 seemed to exist in both. So I heard your  
19 expert witness testify the presence of, and  
20 I've heard you say because it's not since  
21 2000 in existence, it doesn't matter, right,  
22 we've heard that as well. We've heard both  
23 your witness and Mr. Brown testify to the  
24 likely presence of this feature.



1 MR. ABBOTT: No. Mr. McCulley  
2 testified that he cannot say what that dark  
3 area is that runs parallel to Flack Avenue.  
4 It could very well simply be a drainage  
5 ditch that receives storm water runoff. So  
6 he does not agree with Mr. Brown in that  
7 respect.

8 And if I could ask Mr. Brown the  
9 next question I intended to ask about the  
10 area adjacent to the approximate 20-foot  
11 Flack Avenue, I think we can establish that  
12 that area probably isn't even on lots 22  
13 through 25.

14 MS. SPIALTER: Again, objection.  
15 Relevance. That is not what they based  
16 their opinion on.

17 MR. ABBOTT: Well, then I'll  
18 have to ask Mr. Brown because apparently I'm  
19 not understanding what his decision and his  
20 site summary state.

21 CROSS-EXAMINATION, cont'd

22 BY MR. ABBOTT:

23 Q. So Mr. Brown, you just drew on this  
24 aerial photo a blue line that came down



1 Flack Avenue; correct?

2 A. Yes.

3 Q. And in your site summary, that was  
4 the primary basis for your conclusion that  
5 you believe the six lots were state  
6 wetlands; correct?

7 A. I wouldn't say it was primary. That  
8 was a reference to that there was tidal  
9 connection --

10 Q. Okay.

11 A. -- in the 20th Century.

12 Q. Okay. So you just stated a moment  
13 ago that you estimate Flack Avenue to be  
14 20-feet wide up. And do you recall the  
15 Shore subdivision plan shows that Flack  
16 Avenue is 30-feet wide in terms of its  
17 right-of-way?

18 A. Yeah.

19 Q. Okay. So the dark area that is on  
20 this aerial that you believe constitutes a  
21 connection to tidal waters could be part of  
22 the Flack Avenue right-of-way?

23 A. I wouldn't -- in my professional  
24 opinion, no.



1 Q. Well, 20 feet is not 30 feet, is it?

2 A. No, it's not, but there's also --  
3 we're talking about several years in  
4 between, and you said the road wasn't -- how  
5 do you know the road wasn't widened? And I  
6 was giving an estimate with my shaky hand  
7 here trying to quickly label that out for  
8 the Board.

9 Q. You claimed that this aerial is on  
10 some Delaware website?

11 A. Yes.

12 Q. And how do we know the Delaware  
13 website is a reliable source?

14 MS. SPIALTER: Objection. Not  
15 for the witness. That's a legal question,  
16 not a factual question.

17 Q. Mr. Brown, what I'd like to know is  
18 who does this site.

19 A. It's saved on First Map, and I  
20 believe my counsel already addressed that.

21 MS. SPIALTER: It's part of the  
22 Delaware Public Archives, as I provided to  
23 counsel and the Board in response to your  
24 motion in limine.

1 BY MR. ABBOTT:

2 Q. I believe, Mr. Brown, you testified  
3 that it's your opinion that "connected to  
4 tidal waters" includes areas of like  
5 elevation.

6 A. Yes. Of like elevation? If I said  
7 that, I may have misspoken. But like I  
8 said, from the hundreds of state wetland JDs  
9 that I've completed in my seven-year tenure  
10 within the wetlands and subaqueous section,  
11 it's pretty amazing how that 2-foot  
12 elevation is the break and the change  
13 between a salt marsh and a transition to a  
14 404 freshwater marsh or uplands.

15 Q. So your decision is based on the  
16 theory that the six lots could be flooded by  
17 a major storm; right?

18 A. No. It was based on the three  
19 criteria of the state law.

20 Q. Because I'd like you to shoe me  
21 where in your site summary you based your  
22 conclusion on a few-time-a-year storm surge.

23 A. Are you talking about the elevation?  
24 Is that -- I mean I think you --



1 Q. I thought you testified that the six  
2 lots had a tidal connection because there  
3 could be a storm surge that inundates them  
4 with water.

5 A. Yeah. I mean, I think even though  
6 you have a lot of conflicting information in  
7 your survey, yes, I would stand by that  
8 statement.

9 Q. Where is that theory referenced in  
10 your Delmar, LLC on-site investigation  
11 summary?

12 A. I'm not sure that it specifically  
13 is, but, I mean, it's just a matter of fact.

14 Q. Where is it referenced in your  
15 January 30, 2020 decision?

16 A. Pull it up.

17 MS. SPIALTER: Mm-hmm.

18 A. I mean, it references the definition  
19 and that we feel that it meets the intent of  
20 the definitions. I mean, it's saying it  
21 meets all three criteria of the law.

22 Q. Where in your decision do you  
23 mention your storm surge theory of connected  
24 to tidal waters?



1           A.     I don't have a storm surge theory.  
2           I have a theory that it's -- the entire lot  
3           is less than 2 foot above mean high water.

4           Q.     That's the elevation criteria.  I'm  
5           talking about the connected to tidal waters  
6           criteria.

7           A.     Well, it's the same difference.  
8           It's a fact of the matter that on several  
9           events a year high marsh floods during  
10          spring tide events.

11          Q.     So then the entire area along Flack  
12          Avenue, all those houses should be  
13          designated as state wetlands and the houses  
14          torn down?

15          A.     No means did I say that.  There is a  
16          lot of areas that are built which would meet  
17          the definition of state wetlands that were  
18          done prior to the law and regs.  There is a  
19          lot of grandfathered area in the state.

20          Q.     So at the end of the day, your  
21          decision is based on the possibility that  
22          the six lots could theoretically be  
23          inundated with water based on a  
24          few-time-a-year event?

1           A.     No.  It's based on the three  
2           criteria of the law.

3           Q.     Well, as to the "connected to tidal  
4           waters" criteria, your testimony was that  
5           you think it's connected -- it was connected  
6           to tidal waters because it could -- all six  
7           lots could be completely inundated if the  
8           marsh tops over Flack Avenue.  Correct?

9           A.     Well, it was that the ditch has, is  
10          directly adjacent to the property and, yes,  
11          it provides a source of tidal water to the  
12          area in the 1926 aerial.  That is my  
13          professional opinion, yes.

14          Q.     But in the 1926 aerial, the only  
15          areas that you believe are connected to  
16          tidal waters is that dark area that runs  
17          parallel to Flack Avenue; correct?

18          A.     No.  That would be water, not  
19          wetlands.

20          Q.     Your theory is that the dark area  
21          that runs parallel to Flack Avenue is  
22          connected to tidal waters; correct?

23          A.     Yes.

24                   MR. ABBOTT:  Thank you.



1                   No further questions, Mr. Chair.

2                   MS. SPIALTER: May I ask for one  
3 question on redirect?

4                   CHAIRPERSON HOLDEN:

5 Ms. Spialter.

6                   REDIRECT EXAMINATION

7 BY MS. SPIALTER:

8           Q.       The definitions states "connected to  
9 tidal waters"; is that accurate?

10           A.       Yes.

11           Q.       Can you in your professional opinion  
12 define "connected" specifically, to the best  
13 of your ability?

14           A.       So it all correlates together. The  
15 "connected" goes back to the elevation which  
16 references that's most likely your storm  
17 event or your spring tide event. So they  
18 are going to inundate the marsh and act as a  
19 functional salt marsh.

20           Q.       In your professional opinion, does  
21 "connected" have anything to do with zoning  
22 lots, divisions, boundaries, artificially  
23 created by man or anything similar?

24           A.       Absolutely not. If that was the





1 case, there would be very few state wetlands  
2 in the state.

3 MS. SPIALTER: No further  
4 questions.

5 CHAIRPERSON HOLDEN: Questions  
6 from the Board for Mr. Brown?

7 EXAMINATION

8 BY MR. MARCOZZI:

9 Q. This is Guy. Tyler, I understand  
10 that you feel that the site is inundated  
11 with flood waters on a regular basis. Can  
12 you just elaborate on that, the evidence  
13 that you have and the frequency at which you  
14 think that that area is inundated with the  
15 flood waters?

16 A. So is that according to the old  
17 aerial photography or current conditions?

18 Q. Let's just start with the current  
19 conditions.

20 A. So I would say, yes, we didn't go  
21 into a thorough, in-depth study and put  
22 piezometers down and all that stuff and do a  
23 full-blown hydrological study, which  
24 apparently was already done, but we didn't



1 receive that information, again.

2 Just according to the elevation  
3 and the height, most of the lot is well  
4 below the 2 feet about mean high. The road  
5 is at a low elevation. So I would say it's  
6 not a frequent basis, but I would say  
7 several times a year, it does in my  
8 professional opinion.

9 Q. Do you think you get back waters  
10 from the inland side or is it a flooding all  
11 coming from St. Jones River and Delaware  
12 Bay?

13 A. The current conditions, I would say  
14 it's coming from the back side of the marsh  
15 across the road, unless there's a crazy  
16 storm event and it blows through the dune  
17 like it has on a couple of occasions.

18 MR. MARCOZZI: Thank you.

19 CHAIRPERSON HOLDEN: Mr. Horsey.

20 EXAMINATION

21 BY MR. HORSEY:

22 Q. I want to ask Mr. Brown the same  
23 question that I asked Mr. McCulley. I wrote  
24 down numbers this time before I asked Mr.



1 McCulley. I looked at the high tide lines  
2 and we can say that the high tide lines are  
3 either 2.3 or 3.8. Looks like 3.8 on that  
4 Miller & Lewis, Miller drawing, but  
5 everybody is saying that the state says it's  
6 2.3. When I look at that site out there, I  
7 look at elevations from 3.5 to 3.0. I get  
8 it that the sand dune is anywhere from 5 to  
9 just shy of 8. So the question I got and  
10 this is what I asked Mr. McCulley: Is it  
11 possible your flooding can come from  
12 subsurface if the high tide mark is right  
13 and it's a 3.8, the tide comes in at 3.8,  
14 but your surface out on this site is 3, is  
15 the water coming from subsurface? You  
16 augered holes. You said you augered holes.  
17 Is that soil pervious enough to let water  
18 come in when the tide comes in?

19 A. So it's very possible. I think the  
20 only real way is to actually install  
21 piezometers and monitor the tide events.  
22 It's something we considered, but we just  
23 didn't feel necessary considering the  
24 evidence that we had.

1 Q. And the spartina that you were  
2 talking about, switching gears just a little  
3 bit, does that grow anywhere else?

4 A. So it's typically in some form of  
5 salt or brackish environment. Usually it is  
6 in inner tidal zone. But I can give an  
7 example.

8 Ted Harvey Little Creek  
9 Impoundments on Fish and Wildlife property.  
10 They do hold that, and basically, you know,  
11 they let water in and out of that structure,  
12 but it's a brackish environment. So it will  
13 grow in salt and brackish environments.

14 MR. HORSEY: That's all I have.

15 CHAIRPERSON HOLDEN:

16 Mr. Mulrooney.

17 MR. MULROONEY: I have a couple.

18 EXAMINATION

19 BY MR. MULROONEY:

20 Q. Mr. Brown, did you look into the  
21 rationale behind the 2013 decision to make  
22 changes to the tidal wetlands map? It seems  
23 that the area that had considered is  
24 essentially the same area. So the



1 conditions you're talking about in terms of  
2 being subject to tidal waters, I would think  
3 that would have had applied to that area as  
4 well. So could you talk a little bit about  
5 that in terms of whether you had looked into  
6 the 2013 decision?

7 A. Yeah, sure. I did look into it. So  
8 it looks like to me it was solely based off  
9 the fact that everything was above that  
10 2 feet above mean high elevation. In fact,  
11 if you actually look at Bowers Beach -- it's  
12 labeled "Bowers Beach Map Changes Map 2,"  
13 which I think it's Exhibit 11, that  
14 actually, if you look, it looks like a small  
15 portion that's labeled. So there's two --  
16 there's two legend -- a legend at the  
17 bottom. There's a "Wetlands Removed" and a  
18 "Wetlands Added." It actually looks like an  
19 area was actually added to the state-  
20 regulated wetlands map, oddly enough, as  
21 well. Or retained or added.

22 Q. So that area was generally above the  
23 2 feet, then, you're saying?

24 A. Yes.

1 MR. MULROONEY: Thank you.

2 MR. HORNE: This is Randy. I  
3 have a couple questions.

4 CHAIRPERSON HOLDEN: Go ahead.

5 BY MR. HORNE:

6 Q. If wetlands are defined by the local  
7 mean high tide elevation, why would you  
8 then -- not you personally, but why would  
9 someone use a spring high tide or a storm  
10 surge to define tidal connectivity? It  
11 seems like you're using two different  
12 standards within the same butt -- butt  
13 process.

14 A. Right. So going back to the  
15 definition of "state regulated wetlands."  
16 One of the criteria, if it's at an elevation  
17 at mean high water or 2 foot above, there's  
18 that zone which is typical of growing -- you  
19 know, salt marsh, being in a salt marsh  
20 environment.

21 Q. Okay. I'm not sure that answers,  
22 but that's all right.

23 And with respect to all the  
24 contradictions on mean high tide, did you



1           happen to look at what the NOAA mean high  
2           tide was or a local tide gauge?

3           A.       We did not. I think in order to do  
4           that, we would have to go through a full  
5           blown survey ourselves and actually, you  
6           know, verify everything. No. The short  
7           answer is no.

8           Q.       Why would you not trust NOAA data if  
9           it was a local gauge? I can understand if  
10          it was a remote gauge. But it's a local  
11          gauge. I would think you would trust  
12          the NOAA data.

13          A.       And I would agree to that, but it  
14          also has to be correlated and referenced to  
15          how the elevations were taken on that  
16          property.

17          Q.       Oh, I understand that. I understand  
18          that.

19          A.       Yeah.

20          Q.       Which brings up another question.  
21          You've made some statements with respect to  
22          the elevations and you were talking about  
23          this 2 foot above and you're basing it on  
24          that -- your comments on that survey, but



1           you've also said you don't know what that  
2           survey is based on. Because you say it  
3           references the Delaware State Plane and you  
4           don't think that constitutes a vertical  
5           relation datum. So, therefore, how can you  
6           comment?

7           A.       So, again, the burden is on the  
8           applicant to provide some of this data, and  
9           even if --

10          Q.       I understand that. I understand  
11          that. But you made the statement.

12          A.       Right. Well, I don't want to seem  
13          misleading or not, but all -- either of the  
14          three of the elevations, we're still in the  
15          same situation where all or the majority of  
16          the property, even if you take one of the  
17          three elevations that they have referenced  
18          is at that below 2 feet above mean high.

19                   MR. HORNE: That's it.

20                   CHAIRPERSON HOLDEN: Thank you,  
21          Mr. Horne.

22                   Ms. Riddle, any questions?

23                   MS. RIDDLE: Yes.

24                   I do have just one. Again, a



1 clarification question.

2 EXAMINATION

3 BY MS. RIDDLE:

4 Q. If you go back to the 1926 map,  
5 there is the area that comes from St. Jones  
6 River. And then there is that apparent gray  
7 area that continues parallel to Flack  
8 Avenue. In the 1950 map, I don't see the  
9 parallel stretch on Flack Avenue. Would  
10 your decision have changed if that part of  
11 the ditch or the gray area in the '26 map  
12 were not there and it were just the  
13 connection to the St. Jones to Flack  
14 Avenue -- and then put the culvert into the  
15 marsh?

16 A. I'm sorry. I didn't quite catch the  
17 last couple, the last sentence or so about  
18 the culvert.

19 Q. Yeah. If that gray area in the 1926  
20 map, which is the one that goes straight  
21 down Flack Avenue -- 1950 map --

22 THE COURT REPORTER: I'm sorry.  
23 You're keep cutting out, part of your  
24 sentence. I'm not sure what the issue is.



1 Some of your words are being lost.

2 CHAIRPERSON HOLDEN: We're  
3 getting most of it. Just give it a try one  
4 more time, please.

5 BY MS. RIDDLE:

6 Q. Okay. Let me -- I can't adjust my  
7 volume up any more. It's to the maximum.

8 But my question basically is  
9 your decision based on connection to tidal  
10 area, does that hinge on not only the part  
11 of the ditch that goes through St. Jones to  
12 Flack Avenue but also from Flack Avenue --  
13 directly -- the properties in question?

14 A. I lost a little bit again, but I  
15 think I have enough to get what you're  
16 saying. Basically, just -- sorry. Let's  
17 say, for example, that feature wasn't  
18 present, that -- yeah, if it just went  
19 straight keep going. So what you're saying,  
20 if that's all the feature depicted and if it  
21 didn't head kind of to the southeast there,  
22 is that what you're asking, if that doesn't  
23 exist?

24 Q. Exactly.



1           A.       I think that would have no bearing  
2           on the decision.  It's just additional  
3           proof, in my mind, that there's additional  
4           feature heading down south or down Flack  
5           Avenue.

6                       MS. RIDDLE:  Okay.  Thank you.

7                       CHAIRPERSON HOLDEN:  Ms. Riddle,  
8           any other questions?

9                       MS. RIDDLE:  No.  That's it.

10                      EXAMINATION

11           BY CHAIRPERSON HOLDEN:

12           Q.       Question for you, and it relates a  
13           little bit to what I believe the appellant's  
14           argument is relative to "this century" and  
15           whether "this century" means from the year  
16           2000 forward.  Has the department  
17           historically put their blinders on for  
18           permit submission post 2000 to any  
19           preexisting condition previous to the year  
20           2000?

21           A.       I would say I'm not a hundred  
22           percent sure on that.  I've asked the  
23           question.  Unfortunately, the section has  
24           had a lot of turnover.  But I would assume



1 from what I've seen on some of these others,  
2 that, yes, that has been overlooked adjacent  
3 to this particular property.

4 Q. Sorry. I didn't necessarily mean to  
5 ask about this property. I'm more  
6 referencing within the definition of "state  
7 wetlands," that if it had been tidally  
8 connected some time previous this century.  
9 Right. So what's the lookback period for  
10 any permit submission? Does it -- now that  
11 we're in the 21st Century, are you not  
12 allowed to look past the year 2000?

13 A. So -- and this is -- you know, this  
14 project did take longer than what we  
15 anticipated and it mainly went back to -- in  
16 my opinion here is seven years is the first  
17 time really come across a situation like  
18 this.

19 Q. Right.

20 A. I think it's kind of unique. I've  
21 authorized, I've completed map changes  
22 myself, but it's never been in an area, that  
23 I can recall, that we thought could have  
24 tidal connection historically. It was all



1 an err in the map where it may have been 5  
2 or 6 feet that were mis-mapped in the  
3 uplands or something of that nature.

4 So in my opinion, anyway. I  
5 can't think of any site, any relative to  
6 this. It would compare to -- I can give you  
7 a good example. I could reference Ted  
8 Harvey and Little Creek Impoundments again.  
9 Those sites were historic -- historically  
10 salt marshes, and they were altered by man  
11 as a waterfowl refuge and habitat. They  
12 were mapped as state wetlands, I think off  
13 the premise that it was in the 20th Century.

14 Q. Let me interconnect the question.  
15 The Watershed Eco's wetlands report provides  
16 a number of maps using aerials that predate  
17 the year 2000. Are their inclusion viewed  
18 as valid to the department or does the  
19 department only review aerial -- allow  
20 submission of documents, aerial photos post  
21 the year 2000?

22 A. We review everything. Again, the  
23 more information, we have the better, so  
24 it's -- yes, it most certainly would. There

1 are other aerials that show where the breach  
2 had blown through and there is water  
3 standing on the property. That's things we  
4 looked at in general anyway, also.

5 MR. HOLDEN: Thank you. Any  
6 other questions from the Board?

7 MR. MARCOZZI: Dean, either this  
8 is for you or for Tyler.

9 CHAIRPERSON HOLDEN:  
10 Mr. Marcozzi, thank you. Just identifying  
11 who you are for the record.

12 EXAMINATION

13 BY MR. MARCOZZI:

14 Q. If this ditch connects, then that's  
15 one criteria. And the century thing is part  
16 of that. And then the other key point, I  
17 guess, would be if the information alone is  
18 sufficient to create the connectivity. It  
19 seems to me that those are the principal  
20 issues. Am I getting that correctly?

21 CHAIRPERSON HOLDEN: I think  
22 that's really a question for Mr. Brown.

23 THE WITNESS: Yeah, I would  
24 agree. Yes.



1 MR. MARCOZZI: Okay. So I know  
2 you guys do a lot, you know, and you bring  
3 us a lot of background, but at the end of  
4 the day, it always comes down to a couple  
5 key things we need to decide. I just want  
6 to make sure the Board had those issues  
7 clearly defined.

8 CHAIRPERSON HOLDEN: Thank you,  
9 Mr. Marcozzi.

10 Any other questions from the  
11 Board for Mr. Brown?

12 Thank you, Mr. Brown.

13 (Witness excused.)

14 CHAIRPERSON HOLDEN:  
15 Ms. Spialter, any other witnesses?

16 MS. SPIALTER: No. I had listed  
17 potentially other witnesses, but at this  
18 point, I believe that Mr. Brown has  
19 testified as to everything I need to  
20 introduce into the record. So with that, I  
21 will rest.

22 CHAIRPERSON HOLDEN: Very good.  
23 I think, Mr. Abbott, closing  
24 argument for you.



1 MR. ABBOTT: Yes, Mr. Chairman.  
2 As I indicated at the beginning, the issues  
3 are, number one, "areas." That's the first  
4 key term. The second key term in the  
5 statute is "connected to tidal waters." And  
6 the third key term or phrase is "in this  
7 century." So, again, have to be areas that  
8 are connected to tidal waters in this  
9 century.

10 Taking those in reverse order.  
11 "In this century," as we've pointed out, the  
12 clear and plain meaning of the language when  
13 someone tells you this century is the 21st  
14 Century because that is the Century that we  
15 currently live in.

16 In terms of the theory that it  
17 could be the 20th Century, as I stated  
18 before, if that is what the General Assembly  
19 intended, then that's what they would have  
20 said. All they had to do was say "20th  
21 Century" or they could have said "1900  
22 forward." There's other ways to say it as  
23 well, but they could have put a specific  
24 date -- instead, they said "this century."



1 "This century" clearly means the 21st  
2 Century. And there is no evidence that's  
3 been presented in the record that there was  
4 any connection to tidal waters in the 21st  
5 Century for any of these six lots.

6 Next. We have the "connected to  
7 tidal waters" issue. "Connected" means  
8 joined or linked. That's in my memorandum  
9 of law. I gave you the dictionary  
10 definition. And so there has to be a direct  
11 connection.

12 What DNREC has presented for the  
13 first time, by the way, because it's not in  
14 its decision and it's not in the site  
15 summary that its decision was based on, but  
16 suddenly, DNREC came up with a new theory  
17 for purposes of this hearing that  
18 "connected" means adjacent or nearby or even  
19 areas that could have a storm surge or, this  
20 new term, "spring tide" a few times a year.  
21 So that's not a connection. It's not joined  
22 or linked. It's occasionally inundated by a  
23 major, unusual event.

24 So also when you look at the



1 1926 aerial photograph, the only thing that  
2 that photograph shows, according to  
3 Mr. Brown, is a supposed ditch running  
4 parallel to Flack Avenue, which he theorizes  
5 is connected to the ditch that runs to the  
6 St. Jones River that's shown on the 1950  
7 Shore subdivision plan. Even assuming  
8 that's true, that is the only area that he  
9 has shown any evidence could have been  
10 connected to the tidal waters. So only that  
11 dark area on the 1926 photograph qualifies  
12 under the specific unambiguous definition of  
13 the language in Title 7 Section 6603(h)  
14 definition of "wetlands."

15 The other point that the Board  
16 should keep in mind is that there is no  
17 accurate way to determine if that supposed  
18 ditch along Flack Avenue in the 1926 aerial  
19 photo is in fact a swale that receives storm  
20 water runoff similar to the swale that's  
21 there today that receives storm water  
22 runoff. That wouldn't seem to have changed.  
23 Why would that change in 94 years? Flack  
24 Avenue was there then, Flack Avenue is there



1 now, and it is quite common for there to be  
2 storm water runoff swales adjacent to  
3 roadways. So there is no plausible evidence  
4 that can show with any reasonable degree of  
5 certainty that there was any connection of  
6 any of these six lots to tidal waters.

7 In addition, I pointed out the  
8 width issue. Flack Avenue is laid out at  
9 30-foot wide. Mr. Brown conceded that in  
10 the 1926 aerial, it was, at most, 20-foot  
11 wide. So that dark area that he believes is  
12 a ditch connected to the St. Jones River  
13 could just as easily be in the right-of-way.  
14 We don't know how wide it is. It may only  
15 be 10-foot wide. So that tells us that  
16 there may be a portion of Flack Avenue that  
17 qualifies under Mr. Brown's theory as state  
18 wetlands. But that's not proof that any of  
19 the lots 22 through 25 are wetlands. In  
20 addition, the aerial photo showed zero  
21 connection -- I repeat, zero connection with  
22 lot 32 and parcel D. Again, this is just  
23 Mr. Brown's what we call hearings or  
24 litigation construct arguments that he's



1 just created recently for this hearing that  
2 he's now going to argue, well, "connected"  
3 means adjacent. "Connected" could mean  
4 elevation criteria. "Connected" could mean  
5 the few-time-a-year storm surge or spring  
6 tide. That's not what a connection is. And  
7 I think we all know that. I think everybody  
8 understands what connected is. It's not  
9 periodic and it's not tidal. "Tidal" means  
10 the ebbs and flows, as was referred to  
11 earlier, that occur on a daily basis.  
12 That's tidal.

13 Because taken to its logical  
14 conclusion, Mr. Brown could map virtually  
15 the entire state of Delaware on the state  
16 wetlands map because, theoretically, there  
17 could be a flood. There's a flood in  
18 Newport, Delaware. There's a flood in -- at  
19 the beach. There is a flood in the Dewey  
20 Beach, for example. Does that mean that  
21 Dewey Beach is now all state wetlands  
22 because there was a storm event that caused  
23 water to surge and flood? No. A flood and  
24 a storm surge are not a tidal connection.



1 And I think that's -- you don't have to be  
2 an expert to understand that simple  
3 proposition.

4 The other thing that was  
5 attempted in this hearing today is to the  
6 confuse the different criteria to qualify as  
7 wetlands. There is an elevation criteria.  
8 We're not arguing that. That is irrelevant  
9 today. None of that elevation discussion  
10 has anything to do with what's before this  
11 Board. Instead, what's before this Board is  
12 areas connected to tidal waters in this  
13 century. Elevation is not at issue. That's  
14 a red herring that's been put forth by  
15 Mr. Brown to come up with a new theory for  
16 why his decision says what it says.

17 Finally, I'll point you to the  
18 decision itself. The decision itself  
19 actually contains no explanatory basis for  
20 its conclusion. It's what we lawyers call a  
21 conclusory statement. He has a conclusion,  
22 and the conclusion says -- I'm going to  
23 paraphrase -- we evaluated the map change.  
24 We evaluated the site, reviewed supporting



1 documentation. Upon reviewing the  
2 supporting documentation and conducting an  
3 on-site evaluation, and then it lists the  
4 property parcel numbers, it has been  
5 determined that no error exists in the  
6 Delaware wetland map DNR 183. This property  
7 has been found to meet the definition of  
8 "wetlands." Therefore, the area will remain  
9 as state wetlands.

10 That provides absolutely no  
11 basis for the conclusion.

12 So we know that this storm  
13 surge/spring tide theory that's just  
14 recently been put forth and the adjacent  
15 equals connected theory is new because not  
16 only is it not mentioned in the decision,  
17 it's not even mentioned in the Delmarsh, LLC  
18 on-site investigation summary.

19 So the third paragraph of that  
20 particular document that Mr. Brown testified  
21 Mr. Geatz prepared starts out by talking  
22 about the 1926 aerial photo. It mentions  
23 that legal advice has told them that this  
24 century is the 20th Century. It then says,



1 "The St. Jones River being tidal in this  
2 area and having a clear tidal connection to  
3 the sites in 1926, we consider this  
4 criterion of a wetland to be fulfilled."

5 So that's it. There's nothing  
6 about storm surges. There's nothing about  
7 spring tides. There's nothing about  
8 anything other than that aerial showing what  
9 he theorizes is a connection. And then it  
10 says, "Additionally, a culvert" -- and then  
11 it talks about this culvert appears to  
12 connect.

13 Well, Mr. Brown has conceded in  
14 this hearing under oath that he doesn't know  
15 of any culvert. He can't find any culvert.  
16 In fact, he's conceded that the only culvert  
17 that could have existed is the one shown  
18 running underneath Flack Avenue on the 1950  
19 Shore subdivision plan. So that just  
20 doesn't establish any tidal connection at  
21 all.

22 And, again, as a matter of law,  
23 the new storm surge/spring tide story that  
24 he's trying to throw out at the Board for

1 justification for the first time here today  
2 just doesn't comport with the statute. The  
3 statute: Again, "areas"; "connected to  
4 tidal waters"; "in this century." That is  
5 it. And he didn't provide you with any  
6 evidence whatsoever that that existed, and  
7 his only theory that predated this hearing  
8 here today was the dark area on the 1926  
9 aerial photograph running next to Flack  
10 Avenue, which for the reasons I've already  
11 cited is not reliable, it's not discernible,  
12 and they have not provided you anything but  
13 his guess, his surmise, his speculation and  
14 his conjecture. And that simply cannot the  
15 carry the day.

16 This is an important issue.  
17 DNREC wants to prohibit my client from  
18 building on six building lots that have been  
19 approved since 1950. And it's too late, the  
20 cow is out of the barn, and DNREC has  
21 already conceded through all of the wetland  
22 map amendments all up and down Flack Avenue  
23 and Bayshore Drive that if you don't show  
24 that your lands are inundated with water,





1 tidal water, then you're not going to be on  
2 the map. There is no such proof here. And  
3 these lots should likewise be removed in  
4 their entirety from the map. And we would  
5 respectfully request that the Board reverse  
6 DNREC's decision so that the maps will be  
7 amended in accordance with the law.

8 Thank you.

9 CHAIRPERSON HOLDEN: Thank you,  
10 Mr. Abbott.

11 Ms. Spialter.

12 MS. SPIALTER: Thank you, Chair  
13 Holden.

14 Today you've heard a lot of  
15 different definitions of what one very  
16 simple sentence in the regulations means.  
17 However, the legal standard is clear. On  
18 appeal to the Board, the appellant bears the  
19 burden of proving that the Secretary's  
20 decision is not supported by the evidence on  
21 the record before the Board.

22 Further, substantial weight and  
23 deference is accorded to the construction of  
24 a regulation enacted by an agency which is



1 also charged with its enforcement. The  
2 agency's interpretations need not be the  
3 only possible reading or even the best one  
4 to prevail. The administrative agency's  
5 interpretations will not be reversed unless  
6 it is clearly wrong.

7 So we return to the regulation  
8 in question that we keep analyzing. The  
9 regulation states in pertinent part, because  
10 we've all agreed that while there are three  
11 criteria, only one is in question here.

12 Section 5 provides definitions,  
13 and one of the parts of the definition of  
14 "wetlands" is "areas which are now or in  
15 this century have been connected to tidal  
16 waters."

17 The simple fact that DNREC and  
18 appellant have offered two competing  
19 definitions makes it clear that there is  
20 ambiguity. Accordingly, DNREC is afforded  
21 deference, unless DNREC's definition is  
22 clearly wrong.

23 So as Mr. Abbott did, I'm also  
24 going to walk through the three portions of



1 this definition, make it clear what DNREC's  
2 definition is, what its interpretation is  
3 and how it was applied here.

4 First we have "areas." Area is  
5 not defined. As you heard from Mr. Brown,  
6 the ecology does not care for the manmade  
7 lines like zoning ordinances, roads, lot  
8 divisions or any other manmade boundary.  
9 Accordingly, "area" was defined by DNREC to  
10 be a cohesive area, a cohesive lot of land  
11 with similar characteristics.

12 We then move on to "which are  
13 now or in this century." "In this century"  
14 is also clearly ambiguous. It could mean  
15 the 20th Century. It could mean the 21st  
16 Century. It could also mean a 100-year  
17 period, going back 100 years from when the  
18 regulation was promulgated. It could mean a  
19 hundred years from today.

20 In a case where a regulation or  
21 a statute is ambiguous, we try to discern  
22 legislative intent. And other elements of  
23 the wetlands statute make it clear that the  
24 purpose of Chapter 66, which is the wetlands

1 chapter of Title 7, was to preserve the  
2 wetlands of the state. For example, if you  
3 look at Section 6602 of Title 7, it reads:  
4 "It is declared that much of the wetlands of  
5 this state have been lost or despoiled by  
6 unregulated dredging, dumping, filling and  
7 like activities and that the remaining  
8 wetlands of the state are in jeopardy." It  
9 continues to discuss the ways in which the  
10 wetlands are in danger. And then it goes on  
11 at the very end to say: "It is hereby  
12 determined that the coastal areas of  
13 Delaware are the most critical for the  
14 presence and future quality of life in the  
15 state and that the preservation of the  
16 coastal wetlands is crucial to the  
17 protection of the natural environment of  
18 these coastal areas. Therefore, it is  
19 declared to be the public policy of this  
20 state to preserve and protect the productive  
21 public and private wetlands and to prevent  
22 their despoliation and destruction  
23 consistent with the historic right of  
24 private ownership of land."



1           To have a statute with a stated  
2           purpose of conservation in the future, to  
3           arbitrarily determine that at the turn of  
4           one random day, all of a sudden a hundred  
5           years of history mean nothing is literally  
6           an absurd reading and, therefore, cannot be  
7           correct. Therefore, DNREC believes that  
8           DNREC has interpreted the regulation statute  
9           to have "in this century" mean either the  
10          20th Century or perhaps a hundred years from  
11          when the regulation was first promulgated.  
12          And either way, we are still talking about  
13          well before 1926.

14                 Lastly, we have to talk about  
15          "connected." Appellant would have you  
16          believe that the term "connected" requires a  
17          strict dictionary definition of alongside or  
18          adjacent or touching. But, again the  
19          dictionary definition has to be applied in  
20          context. And in the context of wetlands  
21          "connected" means hydrologically connected,  
22          ecologically connected.

23                 And when Mr. Abbott tries to  
24          conflate the issue by saying that we were

1 conflating the three elements of the  
2 wetlands definition, that ignores the fact  
3 that "connected" by its very nature in this  
4 regulation and by its very nature in terms  
5 of the definition of "wetlands" implies all  
6 three of the criteria, because that is how  
7 we determine connection. We determine  
8 connection by looking at the elevation, by  
9 looking at the soils, by looking at the  
10 vegetation. Everything about the site made  
11 it clear that from the preexisting ditch,  
12 the connection to the St. Jones River,  
13 through and beyond the applicant's property  
14 is connected in all of the scientific ways  
15 that matter and are, therefore, clearly  
16 tidal wetlands.

17 You've heard the evidence to  
18 back each of these elements. You've heard  
19 the evidence regarding the soils on site  
20 that are associated with brackish and salty  
21 areas. You heard the testimony regarding  
22 the vegetation that is associated with  
23 brackish and salty areas. You've heard the  
24 testimony regarding Mr. Brown's experience



1 in the field where generally areas up to  
2 2 feet above mean high tide carry the same  
3 ecological markers and the same scientific  
4 delineation of wetlands.

5 DNREC went out to the site,  
6 analyzed it, evaluated it, looked at the  
7 historical information available and  
8 repeatedly asked for clarification about  
9 information that seemed to be misleading or  
10 inconclusive.

11 Presented as an exhibit in front  
12 of you today is a survey that suggests the  
13 mean high water line is a foot and a half  
14 higher than that put forth by the expert, by  
15 appellant's expert. At no point, not even  
16 before this Board, was the applicant able to  
17 produce what they claim to be the corrected  
18 survey.

19 Accordingly, it's clear, and  
20 incontrovertible that based on the evidence  
21 before the Secretary, and before the Board,  
22 that by the definitions in the regulations,  
23 all six of the lots in the question are  
24 tidal wetlands, and therefore, this case



1 should be ruled in DNREC's favor. And the  
2 map change denial should be upheld.

3 CHAIRPERSON HOLDEN: Thank you,  
4 Ms. Spialter.

5 With that, is there a motion for  
6 the Board to go into executive session.

7 MR. HORNE: This is Randy. I  
8 make a motion we move to executive session  
9 for discussion.

10 MR. MULROONEY: Second.

11 CHAIRPERSON HOLDEN: Thank you,  
12 Mr. Horne.

13 Mr. Mulrooney, was that a  
14 second?

15 MR. MULROONEY: That's a second.

16 CHAIRPERSON HOLDEN: All right.  
17 So we're going to move over to executive  
18 session here.

19 Does Ms. Mohammed have contact  
20 info for Mr. Abbott and Mr. Spialter so we  
21 can get back to you? It's 3:00 o'clock now.  
22 We certainly will endeavor come back before  
23 4:30 and let you know otherwise. Okay.  
24 Very good.





1 With that, Board members will  
2 log off here and we'll get back to you.

3 Thank you.

4 (Executive session held off the  
5 record.)

6 CHAIRPERSON HOLDEN: I think we  
7 have everybody back. I see Mr. Abbott,  
8 Ms. Spialter as well. Very nice.

9 Is there a motion from the  
10 Board?

11 MR. HORSEY: Mr. Chairman.

12 CHAIRPERSON HOLDEN: Mr. Horsey.

13 MR. HORSEY: I make a motion to  
14 affirm the Secretary's decision.

15 CHAIRPERSON HOLDEN: There is a  
16 motion. Is there a second?

17 MR. HORNE: Randy Horne. I  
18 second the motion.

19 CHAIRPERSON HOLDEN: Mr. Horne,  
20 I see a second.

21 Any discussion on the motion?

22 All right. I'm going to do a  
23 roll call vote.

24 Ms. Riddle.



1 MS. RIDDLE: In favor.

2 CHAIRPERSON HOLDEN: All right.

3 Mr. Horsey.

4 MR. HORSEY: In favor.

5 CHAIRPERSON HOLDEN: Mr. Horne.

6 MR. HORNE: In favor.

7 CHAIRPERSON HOLDEN: Mr.

8 Mulrooney.

9 MR. MULROONEY: In favor.

10 CHAIRPERSON HOLDEN:

11 Mr. Marcozzi.

12 MR. MARCOZZI: In favor.

13 CHAIRPERSON HOLDEN: Dean

14 Holden. Vote in favor of the motion.

15 So the motion passes

16 unanimately.

17 I thank everybody for working

18 through the technical glitches here of a

19 Webex video conference today. It's taken a

20 little bit of patience. I appreciate that.

21 We'll get the decision out here

22 within 90 days.

23 Ms. Reeder, appreciate your help

24 here as well. With that, our hearing is



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concluded.

(Hearing concluded 3:44 p.m.)



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I N D E X

APPELLANT'S EVIDENCE

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State of Delaware )  
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New Castle County )

CERTIFICATE OF REPORTER

I, Lucinda M. Reeder, Registered  
Diplomate Reporter, Certified Real-time  
Reporter and Notary Public, do hereby  
certify that the foregoing record is a true  
and accurate transcript of my stenographic  
notes taken on August 11, 2020, in the  
above-captioned matter.

IN WITNESS WHEREOF, I have hereunto  
set my hand and seal this 20th day of August  
2020 at Wilmington, Delaware.



Lucinda M. Reeder, RDR, CRR



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