

Before Chairman Clifton H. Hubbard, Jr., Robert S. Ehrlich, Robert I. Samuel, Ray K. Woodward and Joan Donoho, comprising a quorum of the Environmental Appeals Board. Joelle P. Hitch, Deputy Attorney General for the Environmental Appeals Board.

The Environmental Appeals Board (hereinafter the "Board") scheduled a hearing on the above captioned appeal for March 9, 1999. Both the Appellants, Kurt S. Seglem and J. Richard Jones, ("Appellants") and Appellee, Department of Natural Resources and Environmental Control, ("DNREC") appeared and presented evidence in the form of testimony and exhibits to the Board. The following is the Order of the Environmental Appeals Board. ("EAB").

STATEMENT OF THE CASE

By letter dated, December 4, 1998, the Appellants appealed the decision of the Secretary to deny their application to construct a shared wetland walkway and dock to access the Holland Glade gut. Appellants assert their interests have been substantially affected in that they are prevented from exercising their riparian rights. They allege the decision to deny the permits is improper as it was exercised in a discriminatory manner, their application meets the requirements of the Wetlands Act of 1973 and the Subaqueous Lands Act, the decision unlawfully interferes with the exercise of their riparian rights, and the decision constitutes a "taking" of property without just compensation.

The position of DNREC is that the Glade is a limited resource for which the State has to balance interests and draw lines to protect against negative environmental impacts. DNREC asserts the State holds the bed of navigable waters in trust for all the people under the Public Trust Doctrine, as set forth in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) and *Illinois Control R. Co. v. Illinois*, 146 U.S. 387 (1892). The DNREC asserts this doctrine applies to Delaware as a result of *New Jersey v. Delaware*, 291 U.S. 361 (1934) and *Bickel v. Polk*, 5 De. 325 (1951). Also, pursuant to Chapters 66 and 72 of the Delaware Code, DNREC is given the responsibility of protecting this resource. DNREC asserts the resource has reached its limit and a line must be drawn

to prevent against the cumulative impacts of these projects from damaging the resource.

SUMMARY OF THE EVIDENCE

The evidence in this matter consists of the June 10, 1998 Joint Application of Kurt S. Seglem and J. Richard Jones, a letter dated November 17, 1998 from Laura M. Herr and William F. Moyer of DNREC denying the application with an attached memorandum detailing the reasons for the denial and the December 4, 1998 letter of appeal filed by Jeremy W. Homer, Esq. on behalf of the Appellants. In addition to the items in the chronology, the following testimony and exhibits were presented to the Board.

Mr. Kurt S. Seglem testified that he lives at 40 Glade Circle East, Rehoboth Beach Delaware in his full-time residence. The Glade community in which he lives, consists of approximately 55-57 lots initially set up for development in the late 1980s. Some of the properties front the Holland Glade which is a meandering waterway off of the Lewes Canal. Mr. Seglem owns lot 46, which he purchased from Mr. Dan McConnell. In 1997, Mr. McConnell filed an application with DNREC to build a walkway and dock. Mr. Seglem testified the McConnell application called for a 3 by 190 foot walkway and a 4 by 10 foot dock. The McConnell application was denied by DNREC by letter dated July 3, 1997.(Exhibit S-1) Mr. Seglem purchased the lot from Mr. McConnell on July 2, 1997, however was unaware of the denial of the permit until after the 20 day time for appeal had run.

Mr. Seglem proceeded to file an appeal despite having missed the deadline (Exhibit S-2) and then withdrew the appeal of the McConnell application. Mr. Seglem was aware some paired applications had been approved following the use of a matrix scoring system by DNREC to assess the applications however, Mr. Seglem did not have a neighbor at the time with whom he could submit a joint application. In approximately June of 1998, he decided to join with Mr. Jones and

submit a joint application with the help of Dr. Maurmeyer.

Mr. Seglem and Mr. Jones filed a joint application for a 3 by 210 foot walkway and a 5 by 35 foot dock. The structure was larger than that of McConnell because the location was different in order to share the dock with Mr. Jones and they wanted to accommodate two boats. Mr. Seglem testified that he believed the application of 1998 met the matrix test used in 1997 for granting the permits of other home owners in the Glade. Shortly after submitting the application Mr. Seglum heard mention of an agreement between DNREC and the Glade ownership which would have "cut [him] out of the docks and walkways". (Transcript p.26 L. 18) Mr. Seglem was unaware of any deed restrictions when he purchased his property from Mr. McConnell. Mr. Seglem testified that at the time he filed his application, he was unaware of any settlement negotiations between DNREC and other landowners in the Glade. The Appellants' application was subsequently denied in late November of 1998.

Mr. Jones testified that he lives at 38 Glade Circle East, in Rehoboth in his full-time residence. He was likewise unaware of any negotiations between DNREC and various property owners at the Glade for docks when he filed the joint application. Mr. Jones testified he had considered filing his own application however, he does not presently own a boat and had placed no time frame on filing such an application.

Mr. James T. Chaconas, Environmental Scientist, for DNREC testified he evaluated the applications submitted to DNREC and drafted the memorandum to the file regarding the disposition or denial of the applications. He was the primary person responsible for the processing of the applications at DNREC. He was also involved with other Glade applications filed in 1997.

Mr. Chaconas testified there were some individual walkways and docks at the Glade for

which permits were granted before 1997. There were also discussions between DNREC and people at the Glade concerning building a marina at the Glade. This was discussed as an alternative to building a series of wetland walkways and docks. The preference by DNREC at that time was for a marina to act as a central access facility of some sort.

Mr. Chaconas testified that in 1997 there were a number of applications filed in mass for walkways and docks at the Glade. He believes there was some agreement between DNREC and the developer regarding the docks and walkways however, he was not sure of the particulars. Mr. Chaconas testified he spoke with Dr. Evelyn Maurmeyer by telephone in 1998 after receiving the Seglem/Jones application. Mr. Chaconas made some notations regarding the conversation stating "There are only a certain number of permits were (sic) planned to be issued for the Glade. It was agreed to by The Glade people and our legal office." (Transcript p. 44 L. 16) (Exhibit Ch-1) Mr. Chaconas testified that this comment referred to the cumulative impact assessment used to evaluate the 30-31 applications received in 1996.

The goal of the cumulative impact assessment was to reduce environmental impacts from all of the structures by 50 percent. Mr. Chaconas testified the Glade people who were part of this agreement were the original 30-31 applicants. This would have included Mr. McConnell but not the Seglums or Jones. The agreement was essentially verbal and nothing was set forth in a written document except for his memorandum that was distributed with the first set of permits and denials. Mr. Chaconas testified that a certain number of people would be able to get the walkways and docks and the remainder would not as a result of the cumulative impact. Mr. Chaconas testified that DNREC was not going to entertain any further applications for walkways or docks except under very unusual circumstances. They would continue to evaluate applications as submitted and if the

circumstances weighed heavily in the applicants favor DNREC would issue a permit, however the goal of 50 percent had been met.

Mr. Chaconas testified DNREC did not give any sort of general notice to other residents of the Glade front as they believed most, if not all, of the Glade front owners interested in walkways and docks were part of the agreement. Mr. Chaconas testified he was unaware if any other conversations occurred between DNREC and the land owners who were not part of the agreement.

Mr. Chaconas testified that DNREC has issued dock permits numbering in the thousands. Mr. Chaconas testified the application of McConnell had a matrix score in 1997 of 135. The applicants at the time whose scores were less than 125 were approved under the cumulative impact assessment. Mr. Chaconas further testified that prior to 1997 some permits were issued that scored above 125. Mr. Chaconas testified that the 50 percent figure was used by DNREC as a result of looking at the number of potential waterfront owners who may be trying to access the marsh. DNREC concluded 41 waterfront owners would potentially want to access the marsh. They evaluated the potential impacts to the marsh based on the wetlands regulations criteria. Mr. Chaconas testified DNREC concluded the Glade marsh was a very highly functioning wetland system and they were concerned the marsh would be irreparably negatively impacted by 41 wetland walkways and docks. They attempted to minimize the impacts by developing a cumulative impact assessment methodology, the goal being to minimize the impacts by 50 percent.

Mr. Chaconas testified the 50 percent goal was what the Glade could tolerate. DNREC is presently doing assessments of the Glade with funding received as a result of settlements on other permits requested in the Glade. Following this research, there may be another dock or permit allowed in the future if it is determined the Glade would continue as a viable resource. Mr.

Chaconas testified that despite the 50 percent limit permits were granted to a Johnson and Westgate since they both had scores of 125 and the DNREC did not want to choose between them. Instead, DNREC chose to be flexible and granted the permits. In addition, DNREC had made a mistake in its calculations and the issuance of these permits caused it to go beyond the 50 percent limit.

Mr. Chaconas testified that following the issuance of the 2 additional permits past the 50 percent limit, they again granted permits for seven more families. Mr. Chaconas testified he did not know all the details regarding that decision, however, he was aware that all the applicants had made considerable mitigative measures to minimize impacts to the resource. Mr. Chaconas testified a matrix analysis was not performed in making the decision to issue docks and walkways to the seven additional families. Mr. Chaconas testified Section 3.01 Evaluation Considerations of the Regulations governing the issuance of docks provided language regarding cumulative impacts.(Exhibit Ch-4) He stated this was not the only provision which led to the denial of the permits.

Mr. Chaconas testified mitigation is where one offsets the environmental impacts of an activity such as building a dock or pier in a wetland or in a waterway. Mitigation can take the form of minimizing the size of the structure, avoiding building the structure, and compensating or creating new wetlands elsewhere. He was unaware of a requirement to mitigate prior to the granting of the original permit requests in 1996. He stated the mitigation regarding the 1997 issuance of permits to approximately 30 people was the reduction in size of the structures. He further testified the settlement regarding those individuals was reached in November of 1998.

Mr. Chaconas testified regarding an Application/Permit Routing form (Exhibit Ch-5) containing a notation from Laura Herr of a conversation with Evelyn Maurmeyer. It was explained

to Dr. Maurmeyer, that the likelihood of a denial on the application of Seglem/Jones was high. Mr. Chaconas testified there was no intentional delay on behalf of DNREC to cause the denial of the application to be issued after the settlement agreement in November 1998. Mr. Chaconas explained that he was not part of all of the settlement negotiations and although there was a high likelihood of the Seglum/Jones permit being denied in July due to cumulative impacts, it was treated as a separate matter from the settlement agreement which occurred in November regarding additional permits.

Mr. Chaconas testified the memorandum he issued in November 1998 to Seglem/Jones denying their permit request (Exhibit Ch-7) contained language very similar to the memorandum issued by him in 1997 (Exhibit Ch-2) denying Mr. McConnell's application. Mr. Chaconas testified that despite the similarities in some of the language, the processing of the application and issuance of the memorandum took some time because he went through quite a bit of evaluation, reviewed the regulations and the laws. Additionally, 1998 was the busiest year DNREC has ever had in processing applications and this particular application came in during their busiest season, Spring. Mr. Chaconas testified this application was processed more quickly than any others received by the office.

Mr. Chaconas testified there are about three or four families that have applied for permits that have no access to the Glade, there are those that were denied, and there are people that have not applied. Mr. Chaconas further testified that Mr. Jones property is along a tributary ditch system and not considered the Glade gut. Although Mr. Jones property is not part of the Glade, it is technically a wetland according to the State Wetlands Act. Mr. Chaconas testified that this is significant because it would increase the number of waterfront owners from 41 to 42 and would set a precedent that anybody who lives along one of the mosquito ditches can declare riparian ownership and apply

for a dock or pier.

Mr. Chaconas testified the Subaqueous Lands Act regulation refers to the 7.5 minute USGS map series as the basis for jurisdiction. In reviewing the map (Exhibit Ch-9), Mr. Chaconas testified Mr. Jones' property is a jurisdictional wetland and a jurisdictional waterway, however, although Mr. Seglem submitted a joint application with Mr. Jones, it did not meet the cumulative impact assessment goal. Mr. Chaconas testified in reference to his 1998 memorandum, that the "placement of permanent berthing structures, docks, on the Gut will eventually result in pressure to dredge the gut to maintain boat access and provide impetus to illegally prop wash the Gut resulting in significant damage to State lands." (Transcript p.112 L. 2) Mr. Chaconas testified this was one of the justifications for the denial of the permit.

Mr. Chaconas testified that even though the property to the center line of the Holland Glade is owned by the Division of Parks and Recreation and they will not permit any dredging to occur on their property, the more people that use this waterway, the more pressure will be placed on DNREC to do dredging. Mr. Chaconas testified that the Seglem/Jones permit by itself would cause a relatively minor impact, however the increase in the turbidity of the water from boating will decrease the amount of sunlight available to photo-synthetic micro-organisms resulting in stress that may decrease their abundance and ultimately result in their elimination from the watershed. Mr. Chaconas testified he is concerned the micro-organisms may be eliminated and the benthic population would be adversely affected as a result of increased boating. Lastly, Mr. Chaconas testified that his conversation with Ms. Maurmeyer was an effort by DNREC to provide some notice to the Appellants that DNREC had reached a critical point in the allowance of permits at the Glade community.

Laura Herr, Program manager with the DNREC Wetlands Section and Mr. Chaconas' Supervisor at DNREC testified that the settlement agreement, with the seven families, was reached in concept in January of 1998. It took time to administratively process the agreement as they had to wait for the design, final design drawings, and processing through the legal office. Ms. Herr testified that DNREC was aware prior to the application of Seglem/Jones that the settlement was agreed to regarding the seven families. Ms. Herr testified the settlement was agreed to based on some attractive features the settlement proposal offered. The settlement included funding for research to study pre and post construction impacts. The settlement also included a proposal to modify the operations and maintenance plan governing how the structures are used, what they can look like, restrictions on boating access, use and maintenance of the structures. The settlement proposals reduced the impacts of the structures as originally presented by more than 100 percent. There was a reduction from five or six large walkways to two and fewer docks with a reduced square footage of wetland impact by more than 100 percent. In light of these proposals, and with the knowledge of the uncertainty of the appeals process, the DNREC concluded it was better to accept the proposal with the limited impacts.

Ms. Herr testified that DNREC normally does not require mitigation. They expect the applicant to consider the impact and propose mitigation as part of their application so they can consider it as a whole. Ms. Herr testified that although they knew the resource had maxed out, there is always a possibility that an application comes in with a feature that they had not recognized before, another structure might come out, or the use of a structure could change. There are many possibilities which is why they analyze the applications as they come in one by one and see if there is still potential for additional approvals. In the case of the Seglem/Jones application, DNREC had

drawn a line and it would be a very high bar for them to overcome. Ms. Herr testified the language in the two memoranda is the same because they came to the same conclusion.

Ms. Herr testified she visited the Glade at least 20 times, the first being in the fall of 1993 and most recently in October or November of 1998. Ms. Herr described the Glade as a dwindling type of marsh resource and deserving of the highest level of protection. Ms. Herr described the wetlands and subaqueous lands permitting process. She testified DNREC is not required by statute to provide notice to neighbors of a proposed activity, however in the application process they request applicants provide DNREC with addresses of adjacent property owners so they can get some local information and ask for comments from those they feel are most affected by a project.

Ms. Herr described the matrix in more detail and explained it is not a test. A particular score does not mean you pass and get a permit. The matrix was a one-time analysis DNREC used for the 15 applications received in a relatively undeveloped resource. The analysis was performed and DNREC drew a line where they thought reasonable. DNREC believed it was dealing with only 41 Glade front lots and sought to reduce the impacts of all the proposed and existing structures by 50 percent. They had also hoped to cluster permit approvals to keep them in one area and leave expanses of wetlands free from structures entirely. Ms. Herr also testified that DNREC did not substitute the Department's statutory and regulatory obligations with the matrix, it was just one factor.

Ms. Herr testified that at some point the DNREC decided it was no longer appropriate to use the matrix in evaluating applications for structures in the Glade. The matrix was not used in considering the settlement proposals as they believed it not relevant. The DNREC likewise felt the matrix was not relevant to the Seglem/Jones application. The matrix was developed as a one-time

analysis to determine what level of impact the ecosystem could handle and any subsequent application would be beyond that level of acceptable impact. Ms. Herr testified the settlement proposals contained an extensive level of impact reduction. The DNREC weighed that against the uncertainty of the appeals process and considered the included funding for studying the Glade.

Dr. Evelyn Maurmeyer, a PhD in Coastal Geology and an environmental consultant with the firm Coastal & Estuarine Research in Lewes, Delaware testified on behalf of the Appellants.

Dr. Maurmeyer testified that Mr. Seglem contacted her in August of 1997 following his purchase of the property from Mr. McConnell and then again in April of 1998 regarding a project to build a walkway. The project called for a structure 210 feet long, 3 feet wide and 2 feet high over the wetland surface. It would lead to a dock 5 feet wide by 35 feet long to accommodate two vessels. Dr. Maurmeyer testified the dimensions are in compliance with the Wetlands and Subaqueous Lands Section of DNREC.

Dr. Maurmeyer testified regarding some pictures she had taken of the Seglem/Jones property. (Exhibits M-2-4) She testified in the past five years, she has been involved in 25-30 applications each year to DNREC, of which 5-10 contained walkways and docks. Dr. Maurmeyer testified the Seglem/Jones application was not unusual and the Glade is a typical salt marsh environment. She testified, the entire opposite shore however, is owned by the State therefore there is probably a very low likelihood of any docking facilities being built on the opposite shore. The environmental impact would be typical of that in other projects she has worked on.

Dr. Maurmeyer testified that she defines mitigation as compensation for unavoidable environmental impacts and cites the creation of a new wetland as an example. She testified, the Corps of Engineers typically requires mitigation for projects with significant environmental impacts,

however does not require mitigation for residential docks. She testified that in none of the previous projects she has worked on has DNREC required mitigation. Dr. Maurmeyer testified the Holland Glade has been in existence for over three thousand years and is a very valuable, though not fragile, resource. The plants are fairly hardy except to repeated foot traffic.

Dr. Maurmeyer testified regarding the similarities in the 1997 memorandum denying the McConnell permit and the 1998 memorandum denying the Seglem/Jones permit. Dr. Maurmeyer agreed the salt marsh is important and valuable however, disagreed that the impacts of recreation boating or walkways for private use would significantly damage the environment. She testified there is no published scientific information that this resource is at its environmental carrying capacity. Dr. Maurmeyer testified the environmental impacts of walkways include short-term localized impacts from construction, the loss of wetlands through the installation of pilings, and in most cases there is a natural re-colonization and recovery of the vegetation.

In examining a photograph of a structure similar to that which is being proposed, (Exhibit 5) Dr. Maurmeyer testified there is virtually no detectable difference from the surrounding wetland grasses to those grasses beneath the marsh surface. Dr. Maurmeyer testified that boating leads to increased turbidity, fuel, oil spills and increased debris. Dr. Maurmeyer testified she saw no scientific basis for drawing a line at 50 percent and she saw no threat in one more single shared walkway or dock. She also saw no significant difference in adding three more docks or walkways, as the studies by the University of Delaware show no substantial evidence that a carrying capacity problem exists in the inland bays as a whole. She testified that recreational boating is minor in comparison to the other environmental problems facing the bays.

Upon cross-examination, Dr. Maurmeyer testified that at the time of the McConnell

application, in 1997, none of the structures in the Glade were permitted, however in reviewing the property of Seglem/Jones prior to submitting the application, in 1998, there were structures built at the Glade. The environmental impacts of the Seglem/Jones structure would be greater than that proposed by McConnell and unavoidable impacts, such as the net loss of marsh surface area, would result from the pilings. Also, the shading effect would cause a reduction in the amount of sunlight that reaches the marsh surface. This would be the effect of any project utilizing pilings and was the effect of the structures built between the time of the McConnell application and the Appellants.

Dr. Maurmeyer further testified that by introducing a structure or the presence of human beings it may cause animals utilizing the marsh to relocate and would impede the migration of larger mammals. It would also cause the birds to "voluntarily relocate" and there is scientific evidence that CCA treated pilings may have damaging affects on marine organisms.

William F. Moyer, Section Manager of Wetlands and Subaqueous Lands Section of the Division of Water Resources testified on behalf of DNREC. Mr. Moyer testified regarding the history of the Subaqueous Lands Act and the regulations promulgated under that Act. Mr. Moyer testified he has visited the Glade six to eight times since 1985. In 1985, there were no roads, houses, or streets. Upon a recent visit he observed that the subdivision was almost half completed with houses, roads, streets, and yards. He testified DNREC was unaware of walkways and docks being proposed until 1993 when DNREC received three applications. Mr. Moyer testified that initially 20 piers were proposed with 44 boats to be docked in the Glade. DNREC suggested to the representative of the Glade developer, Ed Launay, the use of a central facility at the mouth of the Glade. Mr. Moyer testified the Glade developer desired a shared pier concept instead. He testified a meeting was held in January of 1995 with the waterfront owners of the Glade for the purpose of

determining which of the property owners were interested in having a boat, sharing a pier, wanted a single pier, or no pier at all. Following the meeting several letters were exchanged between DNREC and the Glade. The DNREC decided 16 piers, no more than 16 boardwalks across the wetlands and no more than 24 docks for boats should be constructed. They decided to do a batch of applications and a cumulative impact analysis. In an effort to show good faith, the three applications pending with DNREC were approved. Mr. Moyer testified that he believed the developer had agreed to deed restrictions for the unsold lots so there would be no further walkways on those lots.

Mr. Moyer testified that the applications submitted would be reviewed on a case by case basis. Mr. Moyer discussed the terms of the settlements entered into regarding some of the original applications that were denied and testified that some appeals were still pending before the Board. Mr. Moyer testified the matrix was developed with the intention of only 50 percent of the applications being approved. As a result of the settlement negotiations, some additional permits were granted. Mr. Moyer testified that the matrix was a reasonable approach and did not want to wait for science to make the resource management decisions. Based on his 25 years of experience, DNREC does not just rely on science but bases decisions on what it sees happening in different parts of the inland bays area.

Mr. Moyer testified regarding DNREC's concern that allowing Mr. Jones to join with Mr. Seglem, aside from the environmental impacts, would lead to other property owners who were not waterfront owners applying for permits to access Glade front lots. When DNREC originally considered the impacts of walkways and piers in these wetlands, they believed they were dealing with 41 lots. If they entertain Mr. Jones application, there are 11 or 12 more people along the little

tributary that could request access across Seglum's lot to get to the Glade.

Mr. Moyer testified that he believes people have riparian rights to get to water, however not at the expense of the environment. Mr. Moyer testified that letters were sent out by DNREC to all the Glade front property owners explaining DNREC's concerns regarding the environmental impacts on the Glade. Mr. Moyer testified that Seglem/Jones are the only applicants required to do some form of environmental mitigation. Mr. Moyer explained that their mitigation would be for the impacts resulting in the loss of wetlands.

Mr. Moyer testified that approximately 16 Glade front lots do not presently have access to the Glade. There is nothing preventing any of them from applying for permits. There is likewise nothing to prohibit those that presently share a walkway or dock from applying for a walkway or dock on their own property. The DNREC anticipates more applications from Glade front property owners for docks. In developing the matrix, DNREC did not consider any other property owners than those that fronted the Glade.

FINDINGS OF FACT

The Board makes the following findings of fact:

1. Mr. Jones property is waterfront property, however not Glade front property.
2. The matrix test was a reasonable means by which DNREC measured and attempted to minimize the impacts of all the proposed and existing structures in the Glade by 50 percent.
3. The 50 percent limit was reasonable based on the observations of the DNREC officials and their combined experience, despite the limited scientific research on this particular waterway.
4. The acceptance by DNREC of the settlement agreement concerning the seven additional families was reasonable.

5. Mr. Chaconas did not intentionally delay the Seglem/Jones application until after the settlement agreement with the seven families was finalized.

6. DNREC's concern that by allowing Mr. Jones to join with Mr. Seglem other property owners who were not Glade front owners would apply for permits to access the Glade was reasonable.

7. The environmental mitigation required of Seglem/Jones for the walkway and dock application was reasonable due to the loss of wetlands and projected environmental impact.

8. The projected environmental impact and loss of wetlands resulting from the Seglem/Jones walkway and dock is significant and the effect of such in a cumulative affect analysis is reasonable.

CONCLUSIONS OF LAW

Pursuant to 7 *Del.C.* § 6602, the "public policy of this State [is] to preserve and protect the productive public and private wetlands and to prevent their despoliation and destruction consistent with the historic right of private ownership of lands". Pursuant to 7 *Del.C.* § 7201, the "[s]ubaqueous lands within the boundaries of Delaware constitute an important resource of the State and require protection against uses or changes which may impair the public interest in the use of tidal or navigable waters." Any person whose interest is substantially affected by the action of the Secretary or the Department may appeal to the Environmental Appeals Board pursuant to 7 *Del.C.* §§ 7210 and 6008. "The burden of proof is upon the appellant to show that the Secretary's decision is not supported by the evidence on the record before the Board." 7 *Del.C.* § 6008 (b) Under circumstances where the initial full adversarial hearing is before the Board, the Board must be allowed to receive additional evidence and there is less apparent need for explicit deference to the Secretary's expertise. *Tulou v. Raytheon Service Company and the Environmental Appeals Board*,

Del. Super., 659 A.2d 796, 805 (1995).

The Wetlands Act, 7 *Del.C.* § 6604(b), provides that the Secretary shall consider several factors prior to the issuance of any permit. Those factors include environmental impact; aesthetic effect; number and type of public and private supporting facilities required and the impact of such facilities on all factors in this subsection; effect on neighboring land uses; state, county and municipal comprehensive plans for development; and economic effect. The Board is satisfied that the Secretary made substantial efforts to examine all of these factors in deciding whether or not to grant the permit application of Seglem/Jones. The evidence is clear that the Glade waterway is of significant value to both the residents of the Glade and the citizens of the State of Delaware. Mr. Chaconas testified the Glade marsh is a "very highly functioning wetland system"(Transcript at p. 59) Mr. Chaconas, Ms. Herr, and Mr. Moyer all testified regarding their concern that the marsh would be irreparably negatively impacted by too many walkways and docks. Dr. Maurmeyer further testified that there are unavoidable impacts such as the net loss of marsh surface area, the shading effect, and the relocation of animals and birds. She further testified regarding scientific evidence that CCA treated pilings may have damaging affects on marine organisms.

It is clear both parties agree that some damage to the wetlands occurs and the birds and animals that inhabit the area are negatively affected as a result of the construction of walkways and docks. The Board is satisfied that this damage is of a sufficient amount that caution and protective measures must be taken by DNREC.

The Secretary in recognizing the value of this body of water and the need to protect it, developed the matrix analysis by which they could measure the impact of the proposed structures on the Glade and minimize that impact by fifty (50) percent. Although they can offer no scientific

support for choosing fifty (50) percent as their target, the Board does find this to be a reasonable figure based on the collective visual observations and experience of the DNREC officials in monitoring this and other wetland areas.

DNREC has taken the initiative to step in prior to being able to document the "loss or despoliation that will adversely affect, if not entirely eliminate, the value of such wetlands as sources of nutrients to finfish, crustacea and shellfish . . .; destroy such wetlands as habitats for plants and animals. . .and eliminate or substantially reduce marine commerce, recreation and aesthetic enjoyment . . ."7 *Del.C.* §6602. The testimony reflected that as a result of the studies presently undertaken, there may be the ability to grant additional permits in the future, however the Secretary believes at present future development will place this wetland at risk. The Board believes it reasonable for DNREC to set its limits based on observed damage and projected damage which would result from the grant of additional permits instead of granting permits to all riparian owners in the hope that the damage can be corrected at a later date. The purpose of the Wetlands Act is to "preserve and protect" the wetlands, not to repair and rebuild them, assuming they can be repaired and rebuilt.

The Subaqueous Lands Act, 7 *Del.C.* § 7205(a) requires, "[n]o person shall deposit material upon or remove or extract materials from, or construct, modify, repair or reconstruct, or occupy any structure or facility, upon submerged lands or tidelands without first having obtained a permit, lease or letter of approval from the Department." The Regulation Governing the Use of Subaqueous Lands 1992, section 3 provides that "[a]n application may be denied if the activity could cause harm to the environment, either singly or in combination with other activities or existing conditions, which cannot be mitigated sufficiently." (Emphasis added) The Secretary developed its matrix analysis in

an effort to fairly evaluate the initial cluster of applications that were submitted to the Department for walkways and docks.

The Board has determined the matrix was a fair and reasonable approach to resolving how and to whom permits should be issued. The Board has further determined that although the Secretary was under no legal obligation to provide "notice" to the residents of the Glade regarding the applications, the Secretary undertook efforts collectively to discuss the issue through the Glade representative. The representative in turn, sent flyers out to the residents of the Glade, and there were apparently several discussions between the Secretary and the Glade's representative regarding a marina as a possible solution. In addition, the Secretary sent out a letter detailing the concerns over the environmental impacts to the Glade front property owners.

DNREC appears to have made a good faith effort to include all of the interested parties in the discussions regarding the limited resources at the Glade. There was testimony that the developer had agreed to place deed restrictions on some of the properties setting forth the limited availability of walkways and docks to the residents of the Glade. Apparently, to Mr. Seglem's and Mr. Jones' detriment, this was not done.

In the *City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004*, Del. Supr., 607 A.2d 1163 (1992), the Court held that riparian rights are property rights and among those rights is the right to have free access to navigable waters. It is also well settled however, that "the State possesses the power to regulate or restrict private riparian property rights for public purposes without the payment of compensation". *Id* at 1168. The restriction of such however, cannot be arbitrarily undertaken by the Secretary.

The Secretary in developing the matrix analysis attempted not to arbitrarily grant or deny

permits and the Board believes they were successful. Despite the one additional permit that was accidentally granted, the Secretary handled the initial batch of applications in a fair and non-discriminatory manner. The seven homeowners involved in the settlement were granted permits as a result of substantial efforts on their part to mitigate the damage to the Glade and were successful in mitigating over one hundred percent. The Secretary exercised reasonable judgment in resolving the permit dispute through the settlement process instead of risking substantially more damage as a result of the appeal process.

The Seglem/Jones application was not processed through the matrix analysis as this process was no longer relevant. The structures within the Glade had reached the limit set by DNREC to ensure the continuing stability of this environment. As previously stated, the Regulation Governing the Use of Subaqueous Lands 1992 permits denial of an application based on harm to the environment either singularly or in combination with other conditions. The Secretary had previously determined that the Glade had reached maximum capacity to protect against loss or despoliation and therefore, any future permit requests would be beyond the capacity of the Glade to withstand without risk to the environment.

The testimony was that the Seglem/Jones application went through the usual evaluation process, which explains the length of time it took to process the application. Ms. Herr testified the statutory and regulatory criteria were not substituted for the matrix in considering the previous applications and therefore, although the Seglem/Jones joint application may have fallen within the matrix range for approval, assuming it were even part of that analysis, the Appellants were not treated differently or discriminated against by their application being denied. The Glade had reached its safe limit by the Department's estimation prior to the filing of the Seglem/Jones application and

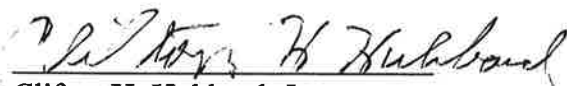
without considerable mitigation by Mr. Seglem and Mr. Jones, the likelihood of their permit application being denied was high. This information was conveyed to them through Dr. Maurmeyer.

Based on the evidence presented the Board is satisfied that the decision to deny the joint application submitted by Seglem/Jones was not made in an arbitrary and capricious manner. The Board is further satisfied that the Seglem/Jones permit application was not treated in a discriminatory manner by its denial. The Board believes the denial to have been reasonable. Based on the holding in *Bailey v. Philadelphia, Wilmington and Baltimore Railroad Co.*, Del. Ct. Err. & App., 4 Harr. 389 (1846) and *City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004*, Del. Supr., 607 A.2d 1163, (1992), although the Appellants private riparian property rights were regulated and/or restricted by DNREC, they are not entitled to compensation.

The Board hereby AFFIRMS the decision of the Secretary and dismisses the appeal.

IT IS SO ORDERED.

The following Board members concur in this decision.


Clifton H. Hubbard, Jr.
Chairman


Date

Environmental Appeals Board
Appeal No. 98-06

Robert S. Erlich
Robert S. Erlich,
EAB Board Member

April 12, 1999
Date

Environmental Appeals Board
Appeal No. 98-06

Joan H. Donoho
Joan Donoho
EAB Board Member

4/14/99
Date

Environmental Appeals Board
Appeal No. 98-06

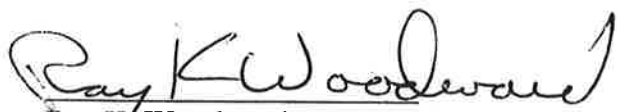
A handwritten signature in black ink, appearing to read "Robert I. Samuel". The signature is written in a cursive, somewhat stylized font. It is positioned above a horizontal line.

Robert I. Samuel
EAB Board Member

03/11/1999
Date

Environmental Appeals Board
Appeal No. 98-06

The following Board members dissented with this decision.


Ray K. Woodward
EAB Board Member

4/15/99
Date