

BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE

MARK AND SHERRY HUGHES,)	
)	
Appellants,)	
)	
v.)	
)	Appeal No. 2013-04
DEPARTMENT OF NATURAL)	
RESOURCES AND)	
ENVIRONMENTAL CONTROL,)	
)	
Appellee.)	

DECISION AND FINAL ORDER

Pursuant to due and proper notice of the time and place of the hearing served on all parties in interest, and to the public, the above-stated cause of action came before the Environmental Appeals Board (“Board”) on August 26, 2014, in the Auditorium of the Richardson and Robbins Building, located at 89 Kings Highway, Dover, Kent County, Delaware. The hearing was not completed at that time, and a second hearing was scheduled for October 21, 2014. However, due to the illness of a Board member, no quorum was available that day, and the hearing was rescheduled and heard on November 25, 2014.

Members of the Board present and constituting a quorum were Nancy J. Shevock (Chair), Sebastian LaRocca, Michael Horsey and Dean Holden. No Board members disqualified themselves or were otherwise disqualified. Deputy Attorney General Robert W. Willard represented the Board.

Appellants were represented by Michael Morton, Esquire. Deputy Attorney General Robert F. Phillips represented the appellee, Department of Natural Resources and Environmental Control (“DNREC”).

STATEMENT OF THE CASE AND PROCEEDINGS

Then DNREC Secretary Collin P. O’Mara issued an order dated April 24, 2013 (the “Secretary’s Order” or “Order”) which denied the appellants’ application to construct a walkway and private boat dock for their single family residence located at 4 Cove View, Long Neck, Sussex County, Delaware. The Secretary accepted a report from DNREC which relied upon a review conducted by Jim Chaconas of the Wetlands and Subaqueous Lands Section (“WSLS”). This review was a report authored by Mr. Chaconas entitled Technical Response Memorandum (“TRM”) which recommended denial of the application.

Appellants’ counsel sent a letter dated May 14, 2013 to the Board stating that they wished to appeal the Order and the basis of their appeal, and that letter serves as the statement of appeal. In that letter, counsel stated that the Order was improper for a variety of reasons, including the fact that the proposed dock project complied with DNREC regulations; that the Secretary applied an incorrect standard in denying the application; that actual measurements by an environmental scientist indicated that the mean water level is adequate for the project’s intended purposes, contrary to statements made in the TRM submitted by DNREC to the Secretary; that the project would result in access to navigable waterways, contrary to statements in the Order; that man-made structures already exist in the area; and that the project would eliminate phragmites, an invasive and non-native species in the area, while also benefitting the environment

because the appellants would plant additional native species of flora under the proposed dock and walkway.

SUMMARY OF EVIDENCE AND ARGUMENTS

In accordance with EAB Regulation 4.0, the Board was provided with the Chronology, consisting of the record below.

Appellants' Position and Evidence

Michael Morton said in an opening statement that the appellants began this process in November, 2011, three years ago. Appellants believe that Mr. Chaconas, a DNREC environmental scientist who worked on the application filed by appellants, made a decision that he would not approve the project before he actually investigated it, despite the fact that he visited the site with one of appellants' witnesses who took actual measurements in his presence which showed the depth of the water to be adequate for this project. During the hearing, Mr. Morton also argued that this project complies with DNREC regulations and its denial was not based on the regulations, and therefore the Secretary's Order was not proper. There are many docks where boats cannot be used when the water is low, so that cannot be a reason to deny this application.

Kelly James Pierson testified that he received a degree from the University of Delaware in plant and soil science and entomology with a concentration in wetland delineations and environmental impacts. After working for DNREC for several years, he began work in the private sector and then started his own company. He is now the president and senior environmental scientist of Back Creek Environmental. Mr. Pierson

began working with the appellants while employed by Envirotech, then began his own company and continued working with appellants.

At this point, DNREC stipulated that Mr. Pierson was an expert in environmental science.

In regard to the permit application filed by appellants, Mr. Pierson examined the overall environmental impacts of the project. The project intended to remove exotic, non-native vegetation such as phragmites. Mr. Pierson testified that a new type of preferred decking would be used on the project which would be environmentally sound. This decking would increase the light reaching the mudflat below the dock and help to create beneficial wetland vegetation.

Mr. Pierson testified that the application was in compliance with all DNREC regulations. The only issue was a discrepancy in the overall length of the dock in different areas in the plans versus the actual application itself, but this was the equivalent of a typographical error only. The application stated that the length of the dock would be 120 feet, when it actually was approximately 131 feet. There would be 1.5 feet of mean low water at the extent of the dock. To determine that depth, Mr. Pierson testified that he observed the site to see where the tide was down to its lowest extent. Mr. Pierson testified that he went into the area in a jon boat, a small aluminum boat, and took measurements. Mr. Pierson testified that another person with him took photographs showing the elevations which were presented in a prior proceeding in this matter.

Mr. Pierson testified that he also went by boat from Massey's Landing into Steel's Cove, where the proposed dock would be located, accompanied by Jim Chaconas of WSLs. They used what Mr. Pierson believed to be a 16 foot flat-bottom boat with a 25

to 35 horsepower motor on it, which Mr. Chaconas had from Water Resources. Although he saw no other boats access the area at that time, Mr. Pierson testified that the appellants said they had witnessed others accessing the area routinely.

Mr. Pierson testified that the reason he and Mr. Chaconas did this was because Mr. Chaconas had said there would not be navigable water in that area to reach the appellants' property. However, Mr. Pierson testified that on that day he and Mr. Chaconas were able to navigate into the area, in Mr. Chaconas's boat with Mr. Chaconas driving. Mr. Pierson testified that he then took measurements in Mr. Chaconas's presence.

Mr. Pierson did the application for appellants, using sources and methods generally recognized by DNREC, which he knew from his experience working at DNREC. Mr. Pierson testified that paragraph 5 of the original application, which he himself drafted, stated: "The purpose of the proposed project is to provide water access for the applicant for water-dependent activity, which is the mooring of a pontoon boat, a flat-bottom jon boat, and a wave runner. All the boats are designed and accustomed to shallow water depths."

Mr. Pierson testified that he also made additional recommendations for the application that were not technically required. For example, the application mentioned that the design of the decking would allow for light penetration to the wetlands.

In addition, Mr. Pierson testified that the application asked for the impact the project would have on tidal ebb and flow and he indicated there would be no effect. As to Habitat Value, Mr. Pierson stated in the application that there might be minimal effect, with potential benefits, as the project might provide shelter for furbearing animals, and

the walkway would allow perching of birds. Mr. Pierson testified that he could see no negative impact as far as aesthetic effects were concerned.

Mr. Pierson testified that there was another similar structure in existence in the area which was a community structure, which has definitely degraded over time. Mr. Pierson also testified that there would be no negative impacts on neighboring land uses and in fact the project would be beneficial because it would reduce erosion. Mr. Pierson further testified that he saw no negative environmental or economic impact, because non-native invasive vegetation would be removed and beneficial vegetation would be added to the area.

Mr. Pierson testified that there was an area at this site similar to a half-moon channel that had depths deeper than the surrounding areas, which is referred to as a “gut.” This gut provides navigation in and out of Steel’s Cove.

Mr. Pierson testified concerning Exhibit E, which was a reply which he helped to prepare to DNREC’s TRM. One section of the reply dealt with Habitat Value---Mitigation, Avoidance and Minimization of Impacts. In this section, Mr. Pierson said he was pointing out that this project was using environmentally friendly products that WSLs actually promotes. Few people use these materials because they are more expensive, but appellant Mr. Hughes wanted to use it to make the project more environmentally friendly. For example, the project used Thru Flow decking, which is more expensive than regular decking, and which allows about 70% light penetration through the actual decking itself. That provides soil stability and is especially good for small crustaceans and other kinds of plants and animals. As Mr. Pierson stated in this reply, appellant Mr. Hughes agreed to plant new vegetation over approximately 1,555 square feet in the existing mudflat under

the pier. Also, 720 square feet of phragmites would be eliminated. The TRM authored by Mr. Chaconas had said that this project could encourage phragmites to grow in the area. Mr. Pierson testified that this is not correct, as phragmites are already there and Mr. Hughes would eliminate them.

Mr. Pierson's response stated that there were not going to be any lights, water lines, or fish cleaning stations in the project and Mr. Pierson recommended that a restrictive covenant be added to the permit to ensure that none of these things could be added in the future.

Mr. Pierson testified that WSLS has a guidance document indicating that there should be no wetland walkways greater than 150 feet across vegetative wetlands. Mr. Pierson testified that the proposed walkway would extend only 36 to 38 feet across vegetative wetlands, while all other properties in the area have tidal marsh over 150 feet, so there could be no future structures in the area. Appellants' property is the only property in the area that could qualify for a dock like this according to the WSLS guidance document.

Mr. Pierson also testified that DNREC had issued permits to other applicants over the years whose projects had significant impacts to wetlands and subaqueous lands. In addition, Mr. Pierson testified that from his experience working for DNREC and thereafter, he believes certain individuals with DNREC have personal agendas about the type of projects they want to see approved, and will view those projects they do not like differently from what the regulations actually provide. Mr. Pierson testified that, based on his experience and training, the proposed project complies with DNREC regulations.

Mr. Pierson's response also dealt with projects that were denied by DNREC in the past which the TRM of Mr. Chaconas cited. Mr. Pierson's reply said these denied projects were not at all like the proposed project.

Mr. Pierson testified that at the present time, there is a degrading gut coming up close to Mr. Hughes's property and there is an invasive species of plant there. By the proposed project's use of alternative materials and eradication of phragmites and adding beneficial vegetation to the marsh underneath the proposed dock, the project would actually improve the overall habitat value of the area. Mr. Pierson also stated that there would be no negative impacts from this proposed project on other people that come in and out, as in navigation hazards.

Mr. Pierson testified that he believed the measurements used in the TRM of Mr. Chaconas were all interpretive because they were based on aerial photography, while Mr. Pierson made actual measurements at the site.

Mr. Pierson also testified that there was another survey done taking actual measurements by True North Land Surveying, in which he assisted by flagging the wetlands boundary.

On cross-examination, Mr. Pierson stated that the depth of the water found in the first picture of Exhibit K is a foot and a half, and the picture was taken at low tide about 45 yards from the end of the marsh. Mr. Pierson testified that in the last picture of Exhibit K, with "Mark Hughes Mooring Project" appearing at the top, the depth of the water there, at the tip of the marsh, was eight-tenths (8/10) of a foot.

Mr. Pierson testified on cross-examination that he was aware the appellants intended to moor a pontoon boat approximately 22 feet by 9 feet off of the proposed

dock. Mr. Pierson testified that this boat would draw between six inches and a foot of water approximately. He agreed that in the application for the permit, found at Exhibit A, there is an Appendix A, labeled “Boat Docking Facilities” and the application states that the pontoon boat would draw one foot of water. Mr. Pierson agreed that the propellers on the boat would extend below the hull, but that appellants only intended to utilize the dock during appropriate tides when the water was deep enough. In addition, Mr. Pierson testified that one can prop a motor up to run in shallow depth.

Mr. Pierson was asked on cross-examination if the appellants gave any thought to the ability of other residents in the area to build piers and docks and he said that they did consider that, but they knew the overall lengths of the marshes in their properties would exceed the length called for in DNREC guidance documents. .

Again on cross-examination, Mr. Pierson was asked if the community dock and pier which already exists in this area was located far over on one side of Steel’s Cove, and he agreed that it was. When asked if structures in such a position generally cause less environmental harm than a pier that goes straight through wetlands and subaqueous land, Mr. Pierson testified this was a case-specific issue. Here, the community structure does not allow any vegetation to grow and is shaded and causes a higher erosion problem than the appellants’ proposed project, because the appellants will have beneficial vegetation and light penetration decking.

Again on cross-examination, Mr. Pierson testified that as far as he could remember, a true riparian owner is someone who owns land to the edge of the water. Mr. Pierson believed that 36 to 38 feet of wetlands beyond the appellants’ property was owned by the Homeowners Association (HOA) of Highview Subdivision.

Mr. Pierson testified that the appellants' property is not a waterfront lot, but that in his experience working for DNREC and later in submitting applications, especially in the Pepper Creek area, where a homeowners association owned vegetative marsh, DNREC had allowed individual, non-community, structures to be built across the marsh to navigable waters.

On re-direct examination, Mr. Pierson testified that landowners in Pepper Creek were permitted to have structures that crossed over land owned by a homeowners association. DNREC in those cases never objected on a theory that these landowners were not riparian landowners.

Mr. Pierson testified that he participated in getting the HOA in this case to approve the appellants' project.

On further cross-examination, Mr. Pierson testified that at the time the Pepper Creek project he referred to was approved, there were other piers already in existence there, so that project did not involve the first pier going over homeowners association lands.

Eugene Vincent O'Sullivan testified for the appellants, stating that he is the president of the Highview Homeowners Association ("HOA"). DNREC stipulated to the fact that in May, 2012, a majority of homeowners belonging to the association approved an amendment to their restrictive covenants that would allow construction of piers and docks. He said that appellant Mr. Hughes had requested permission to install a dock over the wetlands area owned by the HOA. The request was reviewed and approved by the officers of the HOA and on April 29, 2011 three officers of the HOA signed a letter confirming the approval of the HOA for appellants to construct the dock.

Mr. O'Sullivan testified that the original developer of the area, Mr. Lingo, had established bylaws and later transferred the property to the HOA. Mr. O'Sullivan testified that the current officers at that time wished to modify the bylaws. All of the 39 property owners were sent the proposed modified bylaws and all but six approved the modifications and only two of those six were against the modifications.

Mr. O'Sullivan testified that he had a duck blind which he had built. He testified that DNREC at one point had alleged that this was actually a dock. Mr. O'Sullivan testified that the duck blind was discussed at one point with the Army Corps of Engineers and DNREC and both advised him that he could build a duck blind. Mr. O'Sullivan testified that Mr. Chaconas later reversed that and called the structure a dock. Nevertheless, Mr. O'Sullivan testified that the duck blind was built and is now used.

Bradley Absher testified that he is the president of True North Land Surveying. His company was retained to do a survey of the area around the proposed dock. This survey was done after the Secretary's Order had been issued. Mr. Absher testified that Exhibit J shows the company's boundary survey plan along with the boundary of appellants' property. The survey shows the beginning of the State vegetative wetlands line according to Back Creek Environmental, Mr. Pierson's company. Mr. Pierson assisted Mr. Absher in performing the survey. Mr. Absher testified that appellants' property boundary extends slightly past the federal wetlands line. Mr. Absher testified that his understanding was that the proposed dock was to go down the gut without encroaching into the vegetative wetlands. Mr. Absher testified that there was vegetation in the area between where the gut starts and the rear portion of appellants' property. Mr. Absher testified that in Exhibit J, the HOA owns the land between the north boundary of

appellants' property and the line showing the end of State vegetated wetlands, which is the gut.

Mr. Absher noted that he and Mr. Pierson disagreed about the length between appellants' property and the gut. Mr. Pierson believed the distance to be 38 feet, while Mr. Absher believed the distance to be 68 feet. Mr. Absher testified that part of the appellants' lot goes over federal wetlands but does not reach the State vegetative wetlands.

DNREC objected that the new survey showed the proposed dock as a structure that was longer than what had been presented to the Secretary in the original application. Mr. Morton responded that the testimony showed the dock is in exactly the same position as in the application, but there was a difference of opinion between Mr. Absher and Mr. Pierson as to how long the walkway would be to get back to the area where it started. The new survey simply shows actual on-ground measurements that were not done beforehand. The appellants did not realize this distance was even an issue until the Secretary's Order was issued.

On cross-examination, Mr. Absher testified the HOA owned the land from the end of appellants lot to the shoreline.

Jonathan Gregory Staehle testified that he is the owner of Sussex Marine Construction. Mr. Staehle was to be the contractor for construction of the proposed dock. Mr. Staehle said that he and his brother did the drawings contained in Exhibit A. Mr. Staehle also provided the pictures of Thru Flow decking found in Exhibit F to the appellants, who decided to use Thru Flow decking for the proposed dock. Mr. Staehle testified that he has used Thru Flow interlocking panels before on construction sites

approved by DNREC. It is substantially more expensive than using standard wood. The cost of 2-foot coverage of salt treated material is about \$14.00 while the cost of Thru Flow decking is about \$45.00. Mr. Staehle said some people are more environmentally conscious and therefore are willing to pay much more for the Thru Flow decking, which lasts significantly longer than wood and allows more light to reach underneath the dock.

On cross-examination, Mr. Staehle testified that he took no actual measurements of the water depths in the area. Rather, he relied on information provided to him by Mr. Pierson.

When this hearing continued on November 25, 2014, appellant Mark Hughes testified that he purchased this property about ten years ago, and that he owns three lots in the community. When he purchased the property, there was no deed restriction relating to the building of a dock or walkway.

Mr. Hughes reviewed Exhibit C, a Declaration of Covenants, Conditions and Restrictions applicable to the community of Highview, and testified that he was required to sign this when he purchased the property, and these restrictions explained what property owners could and could not do with their property. None of those restrictions prohibited the installation of a single family walkway or dock.

Mr. Hughes testified that his neighbor, Mr. Capriotti, had applied for a permit to build a dock, which application is currently being withheld, pending the result of this hearing.

Mr. Hughes testified that in order to clarify the procedure for a person in the community to get a dock, the covenants were redrafted about three years ago and approved by the community.

Mr. Hughes testified that DNREC asked him to obtain a letter from the community's Board approving his application. Mr. Hughes reviewed Exhibit G and testified that it was the letter dated April 29, 2011 from the Board permitting him to build his walkway and dock.

Mr. Hughes testified that after the application was filed, he met with a group of people, in a round table discussion, including Mr. Chaconas of DNREC, along with representatives of the Army Corps of Engineers, the Historic Commission and Kelly Pierson. At this meeting, no one objected to the proposed dock, including Mr. Chaconas.

Also, at a public hearing concerning the application held in Lewes, Delaware, Mr. Hughes testified that no one objected to his plans to build the dock. Mr. Hughes said he was disturbed prior to the start of this public meeting, because he saw the hearing officer, Mr. Haynes, drive up in the same car as Mr. Chaconas, and they were laughing. He felt the hearing officer should be impartial and believed it was inappropriate for him and Mr. Chaconas, who opposed the building of the dock, to arrive together.

Mr. Hughes testified that other than the above round table discussion and the public hearing in Lewes, Mr. Chaconas never met with Mr. Hughes or asked Mr. Hughes for any clarifications of his application. The only other time he saw Mr. Chaconas was when he saw Mr. Chaconas in an airboat with a large V-8 propeller in the area where Mr. Hughes intends to build his dock.

Mr. Hughes testified that he has now become aware of the fact that DNREC is now maintaining through Mr. Chaconas that there was some discussion about a decade ago about placing restrictions on the use of this cove area where the dock would be built.

But Mr. Hughes testified that he never saw or heard anything about that until he received the letter providing the final rejection of his application to build the dock.

Mr. Hughes testified that he intends to use a pontoon boat with a small motor that requires very little water to move about at the proposed dock. Mr. Hughes testified that he believed this boat could successfully be used there. Mr. Hughes testified that the pontoon sits out to the side and the motor sits in the middle. The motor does not hang below the boat except for the amount of water one sets it at to make the boat go forward. It can be set at a lower level and it has auto tilt to get the boat out to where the pilot of the boat wants it to be. The blades of the motor can be set to go no lower than the pontoon itself. Mr. Hughes testified that the pontoon itself only sits about two inches in the water. It definitely rides less than six inches into the water.

Mr. Hughes testified that an alternative dock which DNREC suggested he might use at Massey's Landing is not adequate. Mr. Hughes testified it is difficult to launch a boat with two people because of the strong current that runs there. Mr. Hughes testified that, while this alternative location is handicapped accessible for fishing, a handicapped person cannot climb over a railing and climb down into the boat. Mr. Hughes testified that his mother would not be able to climb into his boat if it were in Massey's Landing. Mr. Hughes testified that he has been familiar with this alternative area for many years and its shortcomings were partly why he wanted to build his proposed dock.

Mr. Hughes testified that his proposed project does not include lights, water lines, and fish cleaning stations or the like. Mr. Hughes testified that he has indicated to DNREC that he is willing to agree to a restrictive covenant to prevent any future installation of such things.

Mr. Hughes testified that he is willing to remove or eradicate phragmites from approximately 720 square feet of the area of the proposed dock. Mr. Hughes also intends to plant beneficial vegetation native to the area where the phragmites would hopefully be eliminated. These things are not required by DNREC regulations, but Mr. Hughes wanted to offer to do this. Mr. Hughes testified that his use of the more expensive Thru-Flow decking would help the beneficial vegetation to grow as it would allow more light to penetrate beneath the dock.

Mr. Hughes testified that his property is significantly different from the properties of his neighbors. In front of his house, Mr. Hughes testified there is a large unvegetated ditch that runs all the way out to open water which appeared to make it a perfect place for a walkway to the dock. None of the other lots in the area have that. The walkway would go through the ditch where nothing grows and nothing has grown since at least 1920, according to old photos of the area. The dock would be in the open water at the end of the ditch.

Mr. Hughes testified that over the last several years he has driven throughout the area and seen many docks installed. In addition, in the same area where the proposed dock would be, there is a much longer crabbing dock. No one from DNREC ever explained to Mr. Hughes why they thought his proposed dock was different from the crabbing dock.

Mr. Hughes reviewed Exhibit E containing a Docking Facilities Guidance Document, which said that the total length of a walkway over State regulated wetlands should not exceed 150 feet. Mr. Hughes testified that it was his understanding that the walkway for his proposed dock would not go over wetlands more than 150 feet.

When Mr. Hughes received the TRM submitted by DNREC in response to his application, he authorized a reply to it. Mr. Hughes testified that the TRM said there was not enough water in the area to launch a boat and that there were some important unbroken wetlands there, and he did not think the TRM made sense in saying that. Mr. Hughes testified that the distance mentioned in the TRM would have included Pot Nets Trailer Park, and there are hundreds of docks in Pot Nets. Mr. Hughes said there are no wetlands there because it is all excavated. There are no contiguous unbroken wetlands.

Mr. Hughes testified that he has seen an airboat travel through this area, as well as jet skis, flat boats, paddle boarders and a tow boat.

On cross-examination, Mr. Hughes testified that he understood some members of the community did file written objections to his application, although no one spoke against it at the public hearing. Those who objected were not waterfront homeowners.

Mr. Pierson was recalled to respond to an issue raised by a Board member concerning the disagreement between Mr. Pierson and Mr. Absher over the distance of the walkway, with Mr. Pierson believing it is about 38 feet, while Mr. Absher believes it is about 68 feet. Mr. Pierson testified that he believed it was 38 feet. Mr. Pierson testified that he measured the area a couple of different ways with tape and with laser rangefinders and every time he measured the area, it was between 36 and 38 feet. Regardless, Mr. Pierson testified that even if the distance were 68 feet, any impact would be minimal, and mitigated by Mr. Hughes removing the phragmites and planting beneficial vegetation.

Upon questioning by the Board, Mr. Pierson testified that DNREC did not request that the application be updated with corrective measurements, nor did DNREC identify potential discrepancies and ask for the application to be revised.

Mr. James Chaconas was called as a witness by the appellant and testified that he is an environmental scientist working for DNREC in the Wetlands and Subaqueous Lands Section (WSLS). Mr. Chaconas testified that his job is to evaluate permit applications for subaqueous lands projects, such as docks and piers.

Mr. Chaconas testified that he had worked with Mr. Pierson at DNREC and that Mr. Pierson also was an environmental scientist.

Mr. Chaconas testified that he had taken on-ground measurements of the Hughes project in December 2012. These measurements were taken after the public hearing concerning this project was held and after the TRM which he authored and after the reply to the TRM had been received. Mr. Chaconas testified that he took measurements using Google Earth, and also GIS which he considered to be accurate. Mr. Chaconas agreed that these measurements were taken after the reply to the TRM pointed out that he had not taken any on-ground measurements earlier.

Mr. Chaconas testified that Kelly Pierson brought the boat used when Mr. Chaconas and Mr. Pierson visited the area and Mr. Pierson also piloted the boat. During that visit, Mr. Chaconas said he took measurements with a surveyor's rod.

Mr. Chaconas testified that he later returned to the cove in an airboat in December 2012. Mr. Chaconas testified that he did not provide any notes or written documentation of that visit to the appellant, but did send an email to Mr. Haynes, the hearing officer, who had conducted the public hearing earlier, indicating that he had verified the measurements taken previously for preparation of the TRM he had prepared. Mr. Chaconas testified that he did not copy the appellant or the appellant's attorney on this email.

Mr. Chaconas testified that he did not recall whether he arrived at the public hearing with Mr. Haynes, the hearing officer, but said they do carpool to hearings quite often to save gas, and that they both work in the same building.

Mr. Chaconas testified about his statements in the TRM at page three, which states that in 1996, when the HOA pier was permitted by the original developer, Mr. Lingo, the WSLS indicated its concern for use of boats and the placement of individual walkways, docks and piers by placing restrictions in the Subaqueous Lands Lease issued to Mr. Lingo. The restrictions precluded docking of boats at the pier and also said that no future walkways, docks or piers could be constructed. The agent of the developer sent a letter to WSLS indicating that the developer agreed to place in the Covenants and Conditions for the community language preventing any of the lots from having individual walkways through the wetlands to the water and requiring that the community pier would not be used for mooring motorized vessels. Mr. Chaconas noted in the TRM that the current HOA bylaws allow for construction of piers, docks and walkways provided authorizations are received from the HOA Board of Directors and DNREC. The TRM went on to state that DNREC was not involved in the preparation of these bylaws and DNREC does not recognize the bylaws as having altered in any way the original agreement that prevented walkways through the wetlands to the water.

Mr. Chaconas testified that he never saw a deed containing such restrictions nor any bylaws containing such restrictions. Mr. Chaconas testified that the State still leases the right to have the community pier over the public subaqueous lands to the HOA. Mr. Chaconas testified that the current lease does not prohibit motorized vessels. Mr. Chaconas agreed that the TRM does not say that these restrictions no longer appear in the

lease. When asked if he had a responsibility to update the TRM if he discovered something is no longer as represented in the TRM, Mr. Chaconas testified that there is a responsibility to update, but that he was looking at the opposition which existed in 1996 and his evaluation came up with many of the same conclusions, and he did not update the TRM. Mr. Chaconas testified that although the agent for Mr. Longo had said in 1996 that restrictions would be placed in the Covenants and Conditions preventing the erection of walkways and docks and piers, that was apparently never done. Mr. Chaconas agreed that when he wrote the TRM, he knew that these restrictions had never been placed. Mr. Chaconas agreed that the TRM ends with his recommendation that this permit be denied relying in part on the statements made on this page three of the TRM, even though there was never an update correcting the information appearing there.

Mr. Chaconas testified that there is generally not a reply filed to a TRM by an applicant, but in this case the appellant did file a reply dated October 13, 2012. Mr. Chaconas testified that he did not file a response to this reply. Mr. Chaconas testified that he and the hearing officer, Mr. Haynes, probably discussed it, but he does not recall the discussion. Mr. Chaconas testified that Mr. Haynes did ask him to go out and verify the measurements and that is when he visited the site in the airboat which Mr. Hughes saw him in.

DNREC's Position and Evidence

Mr. Phillips said in his opening statement that the construction of the proposed dock in the location in the application simply does not make sense as the water is very shallow there. Mr. Phillips argued that the Secretary's Order is entitled to deference and should be upheld. DNREC would present evidence that the appellants are not riparian

landowners and therefore have no right to access to the water. DNREC has always wished to limit the number of docks in Steel's Cove. Appellants wish to moor a large boat at this dock. Given the boat's size and its propellers, there would be damage to the environment if this dock were permitted.

Nicholas E. Grez testified that he is a full time resident of the Highview Subdivision. Mr. Grez testified that he has boated in the area of the proposed dock, using paddleboats and kayaks. The water there is low, and he has never attempted to take a motorized boat into the area. Mr. Grez did not believe a boat could be used there because the water is too low. Mr. Grez had submitted a written comment to DNREC opposing this proposed dock.

On cross-examination, Mr. Grez was told of Mr. Pierson's testimony that he and Mr. Chaconas took a 16-18 foot jon boat with a motor all the way to the location of the proposed dock during low tide. Mr. Grez said he would assume that the jon boat was very light weight and the tiller was probably raised as high as possible. Mr. Grez agreed that his signature appeared on an approval of updated bylaws of the HOA that would allow for docks and piers such as the proposed to be constructed if approved by the State.

After completing his testimony after being called as a witness by the appellant, Mr. Chaconas was then called to testify by DNREC. Mr. Chaconas reviewed various documents not previously submitted or shared with the appellant. The appellant objected that the documents were letters and other items that were hearsay. The Board allowed the testimony indicating that it would decide the proper weight to provide this evidence. Mr. Chaconas testified that these materials included historic information from 1927 and 1996 indicating the depth of water in this area is very shallow. Also documents indicating that

Mr. Lingo had once agreed to place restrictions in the Covenants and Conditions for the community to prohibit walkways and piers. Mr. Chaconas testified that he learned during his investigation that these restrictions were never placed in the Covenants and Conditions, nor in any deeds to properties in the community. Mr. Chaconas testified that when he measured the area, the water was very shallow across the embayment which needed to be crossed to get to the little gut where one is able to get out of the area by boat. Mr. Chaconas said he was there at mid-tide and it was about one foot deep.

Mr. Chaconas testified that this area is environmentally rich for flounder and good for the fish which like to traverse the area. The wetlands produce organic matter which produces Phytoplankton, which feed the small fish which in turn feed the large fish. Mr. Chaconas testified that there is an uninterrupted expanse of wetlands that continues down past the neighborhoods onto the other side of the embayment. Mr. Chaconas said the concern about this permit is that there would be more human presence and shading from the dock and there could be cumulative impacts that are not good for the environment. Mr. Chaconas said that there are about eight lots in the area that could apply for permits like the appellant.

Mr. Chaconas testified that when he was in a boat with Mr. Pierson at this site, the boat bottomed out several times. Mr. Chaconas also testified that the pier at Massey's landing is handicapped accessible. Mr. Chaconas testified that since 2011, DNREC has issued about 1400 permits and denied only 13.

Mr. Chaconas testified that the wetlands in this cove meet the definition of productive wetlands under DNREC's Wetland Regulations at section 5. Mr. Chaconas

testified that they are wet marsh spartina alterniflora wetlands, which extend across the embayment uninterrupted.

Mr. Chaconas was asked to explain how the definition of “cumulative impacts” found in 7 Del. Admin. Code, Part 7500, section 1, applies to this section of Steel’s Cove. Mr. Chaconas testified that placing a single pier in the area would have an impact, but placing several piers in the area would have a greater impact on the environment. Mr. Chaconas testified that multiple structures would break the marsh up into smaller components, which makes it more open for invasive species to move in and also makes it more difficult for animals to continue living there. It could also reduce marsh production, which could affect fishing habitat, because fish rely on that marsh for production of food that they consume. Therefore, there could be a poor cumulative effect on the environment if several piers were placed there.

Mr. Chaconas testified that a neighbor of Mr. Hughes, Mr. Capriotti, has filed an application for a dock. However, DNREC has been holding off on reviewing that application at the request of the Capriottis pending the outcome of Mr. Hughes’ application.

Mr. Chaconas testified that, other than the Capriotti’s application, he does not know that others will request a pier if this application is approved and that it is just a possibility. Mr. Chaconas also testified that if this one dock were approved, future applications could be denied if their approval would adversely affect the environment. But Mr. Chaconas testified that future denial could be more difficult because a granting of this application could set a precedent that piers in this area are acceptable. Mr.

Chaconas testified that this area is very shallow and in the future people might ask for permission to dredge the area because of that.

Mr. Chaconas testified that there is no regulation that prohibits boats from this embayment area. Mr. Chaconas testified that a depth of 18 inches of water is considered the minimum depth to operate a motorboat. Mr. Chaconas testified that the draft on an airboat is 6 inches, so he had no issue with an airboat in the area. Mr. Chaconas testified that most permits issued for docks are in deeper water than is present here.

Board member Dean Holden noted that the application and the TRM appeared to differ on the issue of certain measurements concerning the exact location of the proposed dock and questioned why there was no discussion between the appellant and DNREC about this. Mr. Chaconas testified that the application would have been denied regardless of the accuracy of those measurements.

On cross-examination, Mr. Chaconas was asked about his testimony that the definition of “cumulative impacts” applies to this proposed project and his testimony that a single pier could have an impact on the environment, but the existence of several piers would have a cumulative bad effect on the environment. Mr. Chaconas was asked to review 7 Del. Admin. Code, Part 7500, section 4.2, which states “An application may be denied if the activity could cause harm to the environment, either singly or in combination with other activities or existing conditions, which cannot be mitigated sufficiently.” Mr. Chaconas agreed the section does not speak of potential or future activities. Mr. Chaconas testified that in reviewing this application, DNREC was looking at the impact of this single structure, but also looking at the potential for more impacts later from more structures. Mr. Chaconas testified that he knew there was some interest

by others in building additional structures and that he did take that into consideration in part in reviewing this application, even though he agreed that DNREC criteria does not give discretion to look at potential future applications to deny a current application.

Mr. Chaconas testified that while he had earlier testified that there was an uninterrupted stretch of wetlands across the embayment, he agreed there was a duck blind, the community pier, an old boathouse and moorings of concrete pilings in the embayment area.

Mr. Chaconas testified that the proposed walkway begins on Mr. Hughes's private property, then goes across property owned by HOA, which had approved the construction, and then goes to the gut, which is owned by the State. The wetlands are primarily on HOA property. Mr. Chaconas testified that the lease for the community pier no longer prohibits boats from using the pier. Mr. Chaconas testified that in the TRM, he had written about restrictions precluding boats docking at the community pier and that no walkways, docks or piers would be allowed in the future, and did not say that the restrictions no longer existed.

Mr. Chaconas testified that of all the applications considered over the last few years by DNREC, the vast majority of which were approved, he did not know how many were similar to the pending application. Mr. Chaconas agreed that at low tide, the gut is dry and animals might have access across it whether there is a walkway above or not, depending on the condition of the gut.

Mr. Chaconas testified that DNREC has a guidance document indicating that walkways should not extend beyond 150 feet over wetlands, and this application is in compliance with that measurement.

In closing argument, Mr. Morton said there is no standard on what constitutes navigable water. Yet DNREC cites this area as not being navigable as a basis for its decision to deny the application. One cannot look at potential future impacts to deny a current application. There are already several items in this cove, including a community pier, a boathouse, pilings sticking out of the water and a duck blind, so this application would not produce a first impact on the area.

Mr. Morton argued that the TRM never provided information which was known by Mr. Chaconas at the time. The appellant is willing to try to remove phragmites even though not required to do so. The appellant is also willing to plant good vegetation in the area even though not required to do so. The appellant is also willing to increase his own costs by using Thru Flow decking which may help vegetation to grow. All of the appellant's boats are designed for shallow water and are able to navigate in the cove. There are no regulations telling an applicant that a certain depth of water is required and the appellant testified that he is able to navigate in these waters.

This application satisfies the Wetlands Act requirements and the State Subaqueous Land Act requirements. It falls within the guidance language used by DNREC.

In closing argument, Mr. Phillips said DNREC contends that the water in this area is not deep enough to allow water dependent activity. The boathouse is no longer there, except for its foundation, the pilings show a dock was once there and is no longer. Since 1996, when DNREC approved the community pier, it has intended to restrict development of walkways and docks in this area. Mr. Phillips argued that the public

interest is in clean water and a good environment, and that granting this application for a dock and walkway where the water is so shallow would not be in the public interest.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to 7 Del. C. §6008, the burden of proof in this proceeding is on the appellant. In addition, the Secretary's decision is entitled to deference by the Board. Nevertheless, the Board votes, 3-1, to reverse the Secretary's Order and allow this dock to be constructed. A majority of the Board finds that this application should not have been denied by the Secretary. While it is clear that DNREC would like this area to remain pristine, a majority of the Board does not believe the evidence shows that the application should be denied under the law. While one could argue that this is not an ideal location for this dock, there was no proof that the law required a denial of the permit. A community pier already exists in the area. While the evidence showed that DNREC had hoped that restrictions on future piers in the area would be placed in the deeds on houses there, this was never done.

There was much discussion in the hearing of the depth of the water in the area of the proposed dock. DNREC argued that the water was too shallow and the application had to be denied. However, the testimony showed that boats have been in this water and in fact, Mr. Chaconas of DNREC had been in the area in a boat himself. While he may have believed the water was very shallow, the boat did appear to successfully navigate the area. The appellant also made it clear that he intended to use his boat only when the tide allowed.

There was a discrepancy in the testimony as to who brought the boat and who piloted the boat when Mr. Pierson and Mr. Chaconas went to the cove together. A

majority of the Board does not believe this fact has any bearing on its decision. The important fact is that the boat was able to navigate the waters, even if it did so with some degree of difficulty.

There was also testimony concerning whether Mr. Hughes was a true riparian landowner. Again, a majority of the Board does not believe that resolution of this issue would alter the Board's decision.

DNREC also seemed to fear that if the application were granted, many other applications would soon follow and perhaps would be difficult to deny if this application were granted. Apart from the pending application of Mr. Capriotti, it is not clear whether other applications for docks in this area will be filed. It appears that the appellant was willing to spend a large sum of money by being willing to purchase Thru Flow decking which will allow more sunlight through the pier and hopefully help beneficial plant life to exist there. The appellant also has stated that he is willing to remove phragmites from the area at his own cost, and all seemed to agree that phragmites were a bad type of vegetation. In any event, it appears to the Board's majority that DNREC should carefully examine any future applications and decide whether they should be granted or denied based upon the evidence presented at that time. The Board majority does not see why all such applications would have to be granted if the evidence calls for denials of one or more.

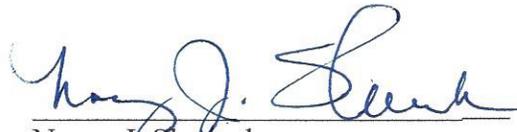
The evidence shows that DNREC never corresponded with the appellant about issues raised by the application. The TRM contained information which was misleading or inaccurate, but never was corrected. DNREC was well aware that deed restrictions prohibiting walkways and docks were never written, yet DNREC appeared to take the

position that a dock should not be permitted here, even though the application appears to comply with DNREC regulations.

No regulations were cited which indicated that this application did not comport with the law, except for Mr. Chaconas's testimony that the "cumulative impacts" section might apply if several more piers were later permitted to be in this area. However, as noted above, Mr. Chaconas agreed that under 7 Del. Admin. Code, part 7500, section 4.2, DNREC is permitted to consider only existing circumstances in reviewing an application, and not potential future circumstances. It appears to a majority of the Board that DNREC has simply decided that walkways or docks in this area would be harmful to the environment, but cannot cite laws or regulations or science supporting their position. Mr. Chaconas himself agreed that DNREC criteria does not give it discretion to look at potential future applications in order to deny a current application. DNREC cannot regulate the future. Its fear of potential future applications for docks cannot govern its consideration of a current application. Rather, each application must be considered on its own merits under the law and regulations.

The Chair of the Board dissents, believing that a grant of this application would cause damage to the wetlands in the area and that there could be a cumulative effect harming the environment if this application is granted. Furthermore, during deliberations, the Chair requested that the appeal be remanded back to the Secretary for further review. However, the majority of the Board did not agree.

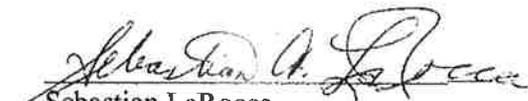
I dissent.



Nancy J. Shevock
Chairperson

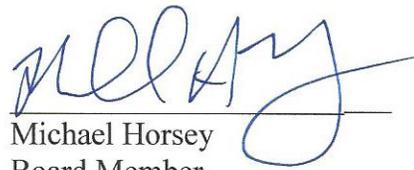
Date: February 13, 2015
Environmental Appeals Board
Appeal No. 2013-04 (Mark and Sherry Hughes)

The following Board members concur in this decision.


Sebastian LaRocca
Board Member

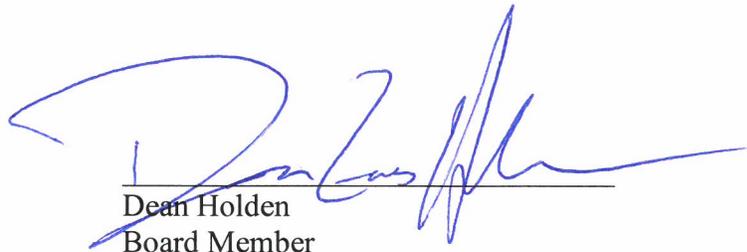
Date: 2/13/15
Environmental Appeals Board
Appeal No. 2013-04 (Mark and Sherry Hughes)

Date: 2/20/15


Michael Horsey
Board Member

Environmental Appeals Board
Appeal No. 2013-04 (Mark and Sherry Hughes)

Date: 2/18/2015
Environmental Appeals Board
Appeal No. 2013-04 (Mark and Sherry Hughes)



Dean Holden
Board Member