



STATE OF DELAWARE

**DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL**

DIVISION OF WATER

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Technical Response Memorandum

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Section

Date: October 1, 2022

Subject: Carlo and Teresita Businelli Subaqueous Lands Lease Application

INTRODUCTION

The Wetlands and Waterways Section (WWS), Division of Water, Department of Natural Resources and Environmental Control received an application from Carlo and Teresita Businelli to extend an existing boat docking facility in Herring Creek at 23962 Sundance Lane, Lewes, Sussex County, Delaware. The proposed project is subject to the requirements of the Subaqueous Lands Act (7 Del C., Chapter 72) and the Regulations Governing the Use of Subaqueous Lands (7 DE Admin. Code 7504).

This Technical Response Memorandum (TRM) presents the Wetlands and Waterways Section's (WWS) findings regarding the above-referenced lease application. The TRM also addresses comments presented prior to and during the public hearing held on February 10, 2022. The project was placed on 20 day public notice on September 15, 2021 where one letter of objection was received from Matthew Eisenmann, requesting a public hearing. The objections stated the following concerns: due to the uncertainty in the approval of the Eisenmann's present application, they object to the Businelli's proposed modifications in the event they should further reduce the Eisenmann's ability to extend their dock to reach adequate water. The Public Hearing was public noticed for 20 days beginning January 19, 2022. During the public hearing open record, the WWS received 1 oral comment in objection, from an adjacent property owner. The objections stated the

following concerns: the applicant ignored the October 5, 2020 imagery provided by DNREC WWS representing proportional property lines extended further complicating the location of structure in the cove, there is inconsistency in the objections of adjacent waterfront property owners depending on the applicant, specifically relevant to view, environmental impacts, and blocking use of the water by others which were all brought up for Lot #48 but not brought up for Lot #47.

The applicants, Mr. and Mrs. Businelli propose to install a 6 foot wide by 20 foot long dock extension, a 6 foot wide by 12 foot long kayak dock with launch, and to relocate an existing PWC lift to the proposed dock extension.

This application, along with two other applications currently being processed in the same vicinity of Herring Creek, called into question adequate water depths for mooring and or navigating at mean low water in the general area. The Department, not confident in the limited water depths observations provided with these applications, being questioned in public comment, contracted for a bathymetric surveying of either side of Herring Creek, encompassing all three proposed project sites. All three of the applicable Technical Response Memorandums and subsequent public process steps have been delayed due to the time required to schedule, conduct, and evaluate the survey. The WWS acknowledges the prolonged processing time of the three applications and public hearing affiliated with the bathymetric survey and the subsequent review and evaluation, however, that information was deemed necessary to adequately evaluate the proposed structures and communicated concerns. The Businelli's were asked to provide an image of their proposed structure represented on the bathymetry survey results, provided to them (Figure 1).

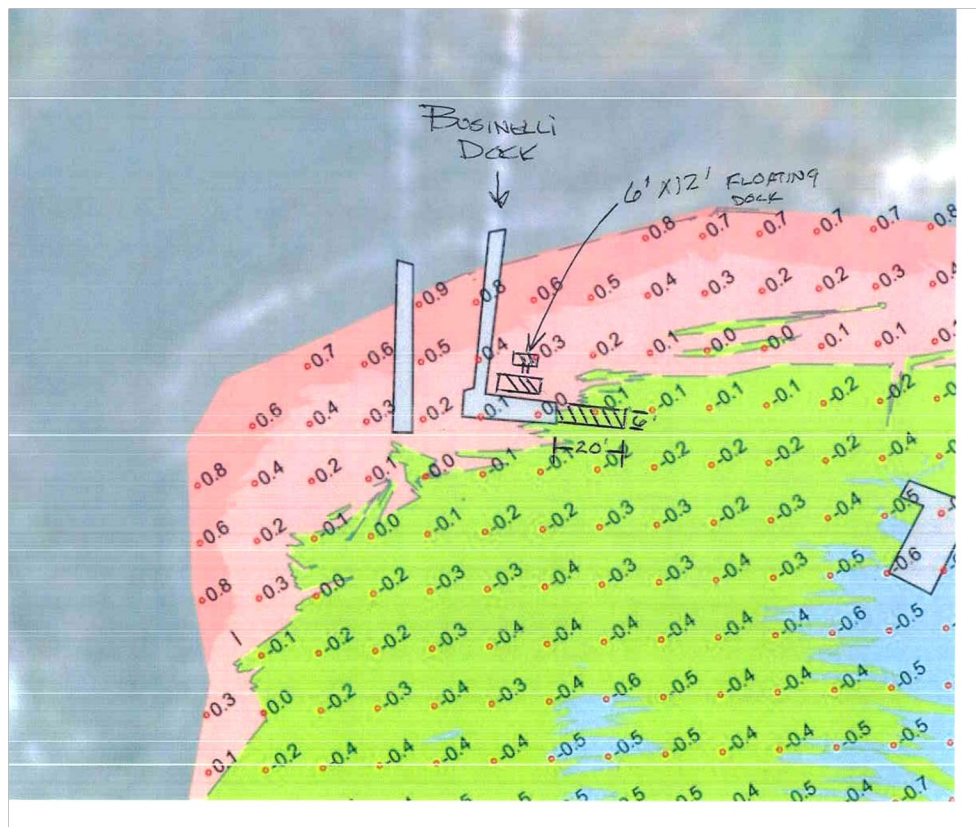


Figure 1. A representation of the Businelli's proposed dock extension and installation of a kayak launch at 23962 Sundance Lane, Lewes, Delaware overlaid on the DNREC-Acquired bathymetric survey in MLWL for the 20-year tidal epoch, illustrated by the Businelli's consultant, Rob Whitford. The current boatlift has 0.0 to -0.1 feet of water at MLW, and the proposed mooring location has -0.1 to -0.2 feet of water at MLW.

Summary/Discussion

Prior to the public hearing, the WWS held a Microsoft Teams call, with the applicant and the adjacent landowners prior to the neighbor's public hearing to discuss equitable apportionment to obtain adequate water for all parties. In this call, WWS provided an illustrated interpretation of the legal opinion from the State of Delaware Department of Justice to DNREC dated June 9, 2006 referencing Riparian Boundaries on Navigable Rivers and Across Accretions (2006 DOJ Opinion). This illustration (Figure 2) shows equitable apportionment of property lines extended, with the intention of all parties involved having an opportunity to reach adequate water depths, should they want to. The existing structures at Lots 47 and 48 reside outside of their respective lots' equitable apportionment and both intend to expand their piers. This is the shallower end of the cove with the shortest existing structures. In the call, the WWS encouraged all parties to evaluate compromising options and subsequently propose a compromising alternative if one could be agreed upon. It was acknowledged that the existing structures are not built ideally and so the option is to pursue a better way to move forward.

During the public hearing, the consultant for Mr. and Mrs. Businelli, Rob Whitford of Precision Marine Construction, presented a document drafted by former WWS staff illustrating property lines extended for the cove, projecting each property line linearly channelward, with no consideration for water depths within the cove, or properties to the east and west whose linear property lines extended in the same fashion would intersect. This document was entered into the record as the applicant's Exhibit 1.

REGULATORY REVIEW- SUBAQUEOUS LANDS

The following review evaluates the proposed project with respect to the requirements of the Subaqueous Lands Act (7 Del. C., Chapter 72 (Chapter 72)) and the Regulations Governing the Use of Subaqueous Lands (7 DE Admin. Code 7504) (Regulations) adopted in accordance with the statute. The Regulations provide the criteria for evaluating projects that are proposed to be constructed in public or private subaqueous lands. The burden is on the applicant to satisfy the Department that the requirements of these Regulations have been met; and if the granting of the permits, lease or approval will result in loss to the public of a substantial resource, that the loss has been offset or mitigated. The public comments received prior to, and at the hearing, as well as the Department's regulatory evaluation, are addressed according to the pertinent sections of the Regulations as follows.

Section 4.0 Criteria of Permits, Leases and Letters of Authorization

Section 4.0 of the Regulations requires that the application be evaluated based on the consideration of specific performance specifications, standards and other criteria, including Section 4.6 - Public Use Impacts, Section 4.7 - Environmental Considerations, Section 4.8 Requirements for all

Structures and Section 4.9 – Boat Docking Facilities. It also states that an application may be denied if the activity could cause harm to the environment, either singly or in combination with other activities or existing conditions, which cannot be mitigated sufficiently.

The WWS concludes that public use impacts will be minimal since the structure will be placed within the most shallow area of the cove, not extending into any deeper water than the existing structures (Figure 3). The proposed design does meet the requirements for all boat docking structures and does not exceed 250 linear feet in length.

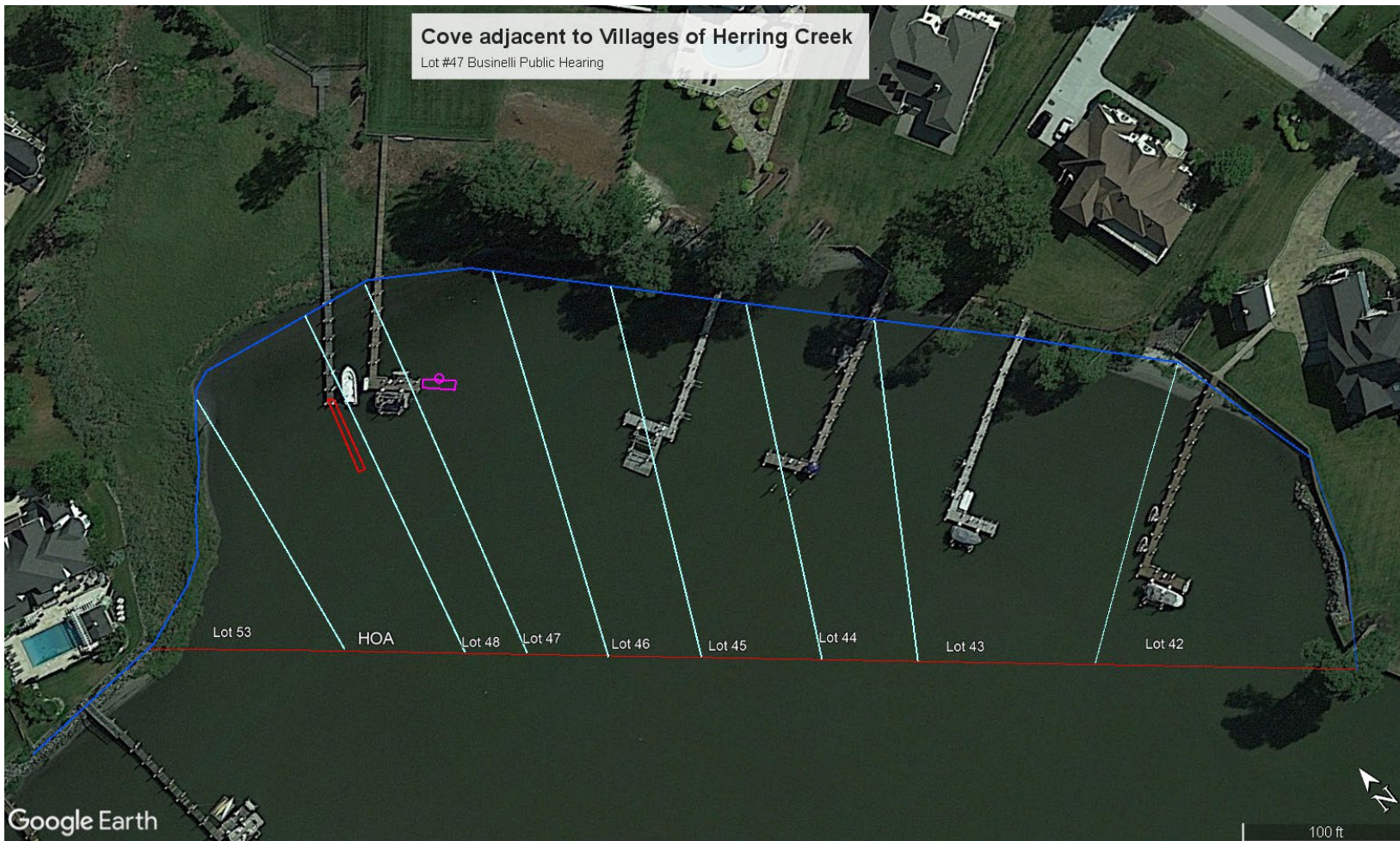


Figure 2. A visual interpretation of the legal opinion from the State of Delaware Department of Justice to DNREC dated June 9, 2006 referencing Riparian Boundaries on Navigable Rivers and Across Accretions as it applies to the cove in question on Herring Creek adjacent to the Villages of Herring Creek. The approximate location of Lot #48's proposed structure is visible in red, positioned within the equitable apportionment for the Village of Herring Creek HOA's community parcel; running parallel to the property line extended for Lot #48. The Businelli's proposed structure is visible in pink within the equitable apportionment for their respective parcel. Their existing structure is visible, primarily already occupying the equitable apportionment for Lot #48.

Section 4.6 Public Use Impacts

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

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

The proposed structure will be placed within State waters of Herring Creek and requires a Subaqueous Lands Lease from the State of Delaware. Under Section 4.9 Boat Docking Facilities, paragraph 4.9.2.5 states: In no case shall a structure extend more than 20 percent of the width of the waterbody, nor shall it extend seaward more than 250 feet, except under exceptional circumstances necessary to provide access for needed commerce. In tidal natural features 20 percent is measured from the mean low water mark of one side of the waterbody to the mean low water mark of the other. The proposed structure is proposed to extend approximately 74 feet channelward of the mean high water mark and is far from exceeding 20 percent of the width of the waterbody. The WWS had a bathymetric survey of the entire respective cove conducted. Following the survey, it was requested that the applicant provide a portrayal of the proposed structures as they would exist on the survey imagery (Figure 1). As proposed, the applicant would gain 1.2 inches in water depth at mean low water for mooring. Shallower depths are present between the end of the proposed pier and the shoreline which already limits recreational uses in the area. Specific concern was raised by the adjacent neighbor to the northwest, that an allowed extension at lot #47 but potentially not at lot #48 would not allow both parcel owners to access their properties from the water at mean low water. Additionally, Lot #46 does not yet have a structure. Should the owner of Lot #46 wish to pursue a structure (application has since been received following this hearing) the current proposed configuration would extend toward Lot #46 but would not substantially increase available water at mean low water. Using the 2006 DOJ Opinion, the WWS confirmed the existing structures do not lie within the equitable apportionment relative to each parcel. Recognizing that the structures are not arranged ideally to allow all waterfront parcels access to adequate water depths, any future work should take into consideration access to adequate water by all parties (Figure 3).

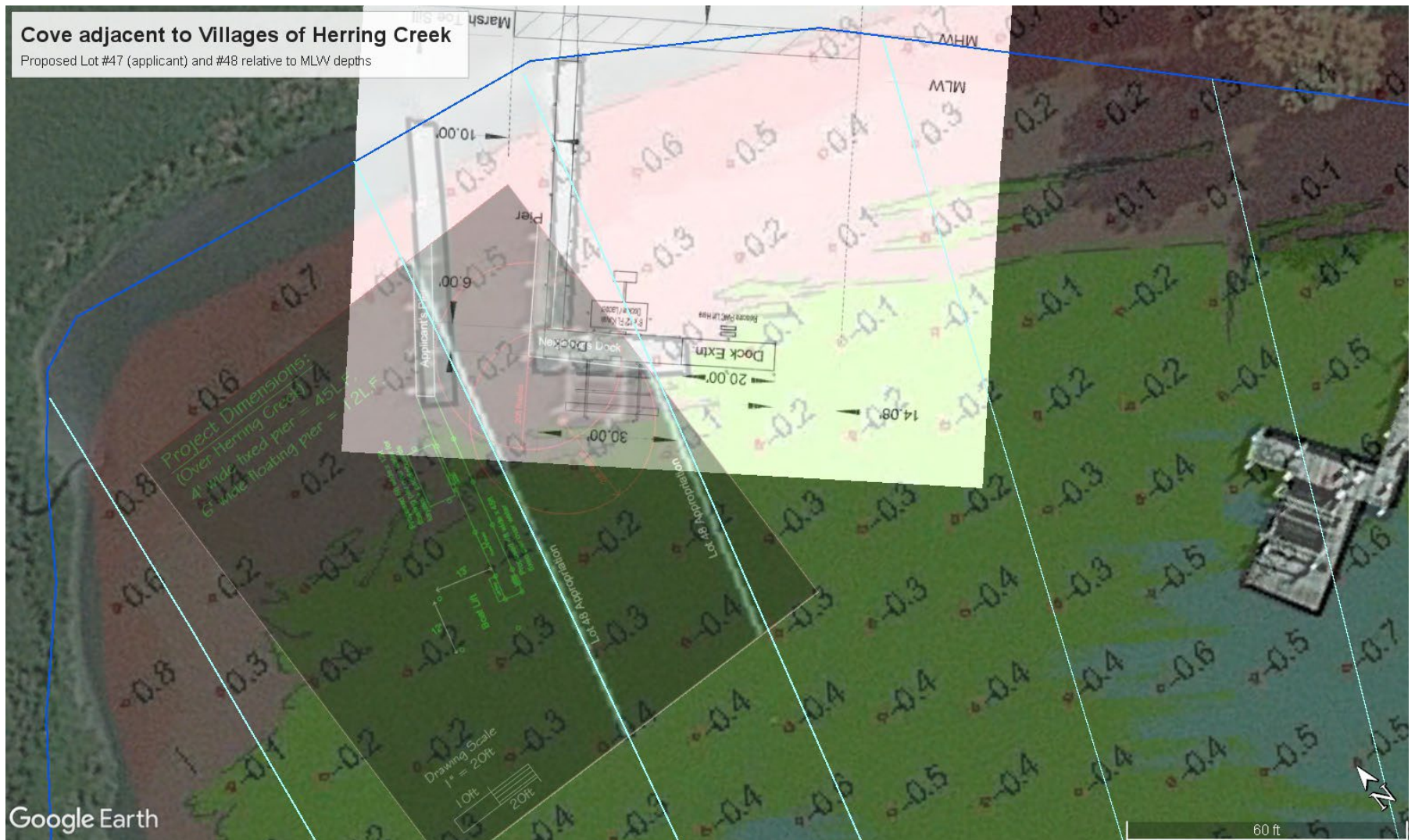


Figure 3. An illustration of the proposed structures for Lot #47 and Lot #48, with the DNREC-Acquired bathymetric survey in relation to the equitable apportionment of water access for each waterfront parcel owner.

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

The proposed structure will permanently occupy 563 square feet (0.42%) channelward of mean low water of the 3.07 acres of Subaqueous Lands within this cove adjacent to Villages of Herring Creek on Herring Creek. Open water of similar depths to the area of the proposed structure will remain unoccupied and available for recreational activities such as kayaking, paddle boarding, fishing, and crabbing.

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

The applicant seeks a dock extension “for mooring a boat when the boat lift is unavailable”. The applicant owns 73.44 feet of waterfront property and does have the right to wharf and access the water from their riparian property boundary. The current structure allows access to the current boatlift from a single direction. The proposed added dock extension does not change that the current boatlift is only accessible from one direction.

4.6.6 Minimization - The extent to which the applicant's primary purpose and objectives can be realized by alternatives, i.e. minimize the scope or extent of an activity or project and its adverse impact.

As mentioned before, the applicant seeks a dock extension “for mooring a boat when the boat lift is unavailable”. The applicant has proposed an orientation of the dock extension to increase their access to their vessel but does not take into consideration available water in the proposed location, or that the proposed structure will occupy their equitable apportionment of property lines extended when their existing structure occupies almost all the adjacent neighbor’s equitable apportionment already. Additionally, a reconfiguration of the proposed structure, in a channelward fashion, would not only achieve their goal of a mooring space when their lift is inaccessible, it would also allow for increased water depths for mooring and navigating, as well as allow opportunity to relocate the existing lift, adding usability. It should also be mentioned, a linear reconfiguration would also allow for more space between the applicant’s structure and any future structure proposed by the owners of Lot #46 to the southeast of the applicant.

Section 4.7 Environmental Considerations

4.7.1.1 Any impairment of water quality, either temporary or permanent which may reasonably be expected to cause violation of the State Surface Water Quality Standards. This impairment may include violation of criteria or degradation of existing uses.

The proposed structure is expected to have minimal adverse impacts to water quality. The facility will primarily be used to berth one motorized vessel and launch kayaks and one PWC and does not include any refueling, maintenance, or convenience facilities which could be sources of potential contaminants. The leaking of contaminants, such as, gas and oil, into the waterway from the vessel alone is expected to be no different than if the applicant were to simply moor their vessel in the same space. The treated lumber used for the facility can leach contaminants; however, this is mostly during the first few months after installation and can be considered minimal.

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

The primary use of this cove is for adjacent property owners to gain access to Herring Creek and for the general public's use. A secondary use would be crabbing and fishing. The proposed structure would allow the applicant to use the cove for these same reasons (Figure 1).

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

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

Section 4.7.5 Other Considerations

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

In terms of encroachment, the structures associated with Lot #47 owned by the Businellis, encroaches on Lot #48 owned by the Eisenmanns, as currently oriented. While the proposed extension does not encroach on Lot #46 to the southeast's equitable apportionment, the proposed extension does cause the Businellis' structure to occupy two separate parcels' equitable apportionment (Figure 3).

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

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

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

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

Section 4.8 Requirements for all Structures

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

This structure meets the requirements stated in the regulations for proper navigation. The applicant currently can only access their lift from one direction. This will remain the case. There is currently 28 feet available to maneuver a 22 foot vessel onto the existing boatlift, from the west. This

structure will not interfere with public use any more than the other five structures within the cove do. This proposed structure does interfere with equitable apportionment as it will not only occupy the applicant's equitable apportionment but does not decrease the amount of equitable apportionment for Lot #48 that it currently occupies.

Section 4.9 Boat Docking Facilities

4.9.2 Proximity of existing structures

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

The proposed structure's length would not significantly increase water depth available at mean low water, per the DNREC-Acquired bathymetric survey and therefore it cannot be ruled out that the applicant would request the need for dredging in the future. As designed, the proposed structures do not impact aquatic vegetation or wetlands.

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

The proposed structure's orientation does not significantly increase water depth available at mean low water, thus not eliminating the potential need for dredging in the future, which could be avoided by reconfiguring the proposed dock extension (Figure 1).

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

The proposed structure maintains the 10 foot property setbacks to the east. The existing structure resides within the equitable apportionment of the neighbor to the west; per the illustrated representation of the legal opinion from the 2006 DOJ Opinion.

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

The proposed structure's length would not significantly increase water depth available at mean low water, for the draft of the proposed vessel to be berthed, not eliminating the potential need for dredging in the future.

CONCLUSION

The WWS finds that the activity described in the application for the Subaqueous Lands Lease by Carlo and Teresita Bussinelli, including installation of a dock extension and a kayak launch, and the relocation of a PWC lift, complies with Statute and Regulations administered by the WWS. Additionally, the structure dimensions are consistent with the applicable regulations, but are not consistent with the guidance documents, and the nearby structures. The WWS finds that the proposed structure will not prevent the potential for future need to dredge the proposed mooring area(s). However, after reviewing the associated surveys, plot plan, deeds, and after evaluating the 2006 DOJ Opinion as well as the DNREC-acquired bathymetry survey of the respective cove, the WWS's opinion is that the proposed dock extension should be denied for the following reasons::

the dock is not within the equitable apportionment for their parcel for the purpose of obtaining adequate water depths, nor does it achieve significant increased mean low water depths, or increase the usability of the existing boat lift. The proposed increase in square footage occupying public subaqueous lands would not result in significant gain in water depth or increase the usability of the existing boat lift. A reconfiguration to allow more direct access to increased mean low water depths, as well as the relocation of the existing boatlift for increased usability, would be a more adequate use of the public resource as well as being mutually beneficial to the navigational interactions between both adjacent neighbors' current and future water access.