



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL**

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OFFICE OF THE
SECRETARY

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Secretary's Order No.: 2023-W-0019

RE: Permit Application of Lawton Family Marina to construct a new multi-slip marina and to authorize a boat ramp in Herring Creek, located northwest of the terminus of Sisters Lane, Millsboro, Sussex County, Delaware, thus necessitating Applicant to obtain a Marina Permit, an Operations and Maintenance Plan, and a Subaqueous Lands Lease

Date of Issuance: July 31, 2023

Effective Date: July 31, 2023

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC"), pursuant to 7 *Del.C.* §§6003, 6004, 6006, Delaware's *Subaqueous Lands Act* (7 *Del.C.* Ch. 72), the *Marina Regulations* (7 DE Admin. Code 7501), the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), and all other relevant statutory authority, the Department issues this Order, approving the application of the Lawton Family Marina ("Lawton Family" or "Applicant") for (1) a Marina Permit; (2) an Operations and Maintenance Plan; and (3) a Subaqueous Lands Lease to construct a new multi-slip marina and to authorize a boat ramp in Herring Creek, located northwest of the terminus of Sisters Lane, Millsboro, Sussex County, Delaware ("Application," "proposed project"). The proposed project is subject to the requirements of Delaware's *Subaqueous Lands Act* (7 *Del.C.* Ch. 72), the *Marina Regulations* (7 DE Admin. Code 7501) and the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504).

It should be noted that the Applicant's proposed project has been modified multiple times since the original plans were received by the Department back in 2019. This Order provides a summary of the interactions that have taken place between the Department and the Applicant over the course of the permitting process, the modifications that have been made to the originally proposed project, and the permit authorizations that will now be issued by the Department regarding the *revised* proposal.

Background, Procedural History and Findings of Fact

On December 30, 2019, the Department's Division of Water, Wetlands and Waterways Section ("WWS"), received the above-referenced Application, submitted on behalf of the Lawton Family by Coastal and Estuarine Research, Inc. (the Applicant's consultant), to construct a new 10-slip docking facility, located in Millsboro, Delaware, as noted above (Tax Parcel No. 2-34-18.00-51.06). Accordingly, the Application was advertised for a 20-day public notice period from February 19, 2020, through March 10, 2020. During that time period, the WWS received five written comments in opposition to the proposed project, expressing concerns including, but not limited to, what was perceived as the "excessive need" for a 10-slip marina to serve the purposes of a family, questioning the on-site management of the marina (since there is no housing on the property), and the "play area" of Herring Creek now being restricted as a no-wake zone. A public hearing was also requested to be held, based on these concerns.

During the Department's initial review of the Application, WWS's project scientist, Julia R. Molina, noted deficiencies therein. On February 12, 2020, Ms. Molina emailed the Applicant's consultant from Coastal and Estuarine Research, Inc., Evelyn Maurmeyer, and conveyed a list of required items needed to process the Application.

Following the end of the public notice period, on March 21, 2020, the public comments received by the Department were also forwarded to Ms. Maurmeyer with the request that the Applicant address public concerns expressed in the comments. Ms. Molina further advised Ms. Maurmeyer at that time that a public hearing had been requested but would not be scheduled until the requested information was received from the Applicant.

On November 5, 2020, the Department received the requested updates from Ms. Maurmeyer. The updates provided the WWS with an Operations and Maintenance Plan (“O&M Plan”) for the management of the marina, a description of the use of the marina as being utilized by nearby non-waterfront parcels, the addition of the existing boat ramp to the Application, identification of the site location of the marina on the parcel, clarification of the proposed dimensions, and submission of boat registrations to provide justification on the number of slips. Also included in the updates was a letter from counsel for the Applicant, describing the ownership of the parcel, and a notarized letter authorizing Joe Ribinsky to represent all the owners of record for the docking facility application process. It should be noted that the WWS typically processes applications in the name of the subject property owner. Due to the parcel in the present matter having multiple titleholders, the WWS decided to process the Application under the name of “Lawton Family Marina, c/o Joe Ribinsky.”

Following the Department’s review of the submitted materials and further discussion with the Applicant’s consultant, additional clarifications were submitted to the WWS by Ms. Maurmeyer on December 30, 2020. Details on the residents and parcels the marina would serve were provided, including the proposal of a “de-facto” community that included twelve (12) parcels with the aforementioned waterfront parcel remaining open space. Based on the lack of detailed bathymetry submitted by the Applicant, the WWS questioned whether the innermost slips had adequate water depths for the mooring of vessels. A pier from uplands going out to an access dock oriented parallel to the shoreline with finger piers on the channelward side of the dock was suggested, but the Applicant declined that reconfiguration.

The Applicant had concerns that the Department’s suggested reconfiguration of the proposed marina noted above would block access to the boat ramp. Furthermore, the vessels would be moored against the tidal ebb and flow currents, which could result in potential damage to the vessels and structure at times of high waves and strong currents. Given the concerns of both the Department and the public concerning this proposed project, the Department determined that it was in the public’s best interest to hold a public hearing at that time.

The Department published Legal Notice in both the *Delaware State News* and the *News Journal* on February 3, 2021, announcing a 20-day public notice period during which the Department was accepting comment regarding this matter, and that a virtual public hearing would be held on the proposed project on February 24, 2021. Notice of the public hearing was also placed on the State of Delaware Public Meeting Calendar on February 5, 2021. Subsequently, the Department received one written comment submitted in objection to the proposed project. The objector again expressed concerns including, but not limited to, navigational safety, light pollution, and the allocation of slips to non-family members.

At the time of the public hearing on February 24, 2021, the Applicant proposed to construct and operate a new 10-slip minor marina, consisting of a 4 foot wide by 120 foot long pier, six (6) 2 foot wide by 24 foot long finger piers, two (2) boat lifts with 4 associated pilings each and 16 free-standing mooring pilings, and to authorize a 16 foot wide by 10 foot long concrete boat ramp in Herring Creek, located northwest of the terminus of Sisters Lane, Millsboro, Sussex County, Delaware (“original proposed project”). The public hearing was attended by Department staff, the Applicant’s representatives and members of the public. Proper notice of the hearing was provided as required by law.

Following the Department’s presentation given at the public hearing of February 24, 2021, the Applicant’s consultant, Ms. Maurmeyer, offered a presentation on behalf of the Applicant. During that presentation, the following clarifications were made for the benefit of the hearing record being generated in this matter:

- The term “marina” applied to this proposal due to DNREC’s marina definition of a boat docking facility that allows mooring of five or more vessels;
- The marina would not be operated as a commercial facility;
- There are no amenities that a commercial marina would typically provide, such as fueling facilities or vessel maintenance facilities;

- The use of the marina would be the extended family of the heirs of Catherine Lawton, as well as one close family friend. All proposed marina users live within walking distance of the proposed structure and are identified as being associated with the aforementioned twelve (12) parcels;
- Other nearby docking facilities have similar channelward encroachment as the proposed project;
- The marina would not result in a no-wake zone nor limit the recreational use of the waterbody. Taking into account the width of the waterbody where the proposed docking facility is planned, and given that boats must maintain no wakes within 100 feet of structure, approximately 400 to 900 feet of width remains where vessels could pass at cruising speeds; and
- Herring Creek is public subaqueous lands, available for use by the public, and so the Applicant has the same right as others to utilize the waterway.

Following the Applicant's presentation, the hearing proceeded to accept live public comment regarding the proposed project. Concerns raised at that time by several commenters included the issue of the widest and deepest section of Herring Creek, where people typically pull tubes, wakeboard, jet-ski and waterski, would be limited to a no-wake zone with this proposed project. Another commenter contested the Applicant's estimation of 400 to 900 feet of usable waterbody width for vessels, noting that, due to existing water depths (and since the channel is located along the southern stretch of Herring Creek), there is actually only 180 feet of usable width, and that the proposed docking facility would limit that width further.

Additionally, several commenters expressed concerns at the hearing regarding the proposed on-site management of the marina (since the property is vacant), and were unsure as to whom potential complaints would be reported, since there are multiple families involved, since there have been previous complaints in that area regarding noise, the use of profanity traveling across the waterway, etc. Still other commenters questioned the ambiguity of the use of the marina being for family verses for community use.

Following the public hearing held in this matter, the WWS conducted a field reconnaissance in consideration of the marina being properly sited, in accordance with adequate water depths and without the need for future dredging. Further discussions regarding the proposed marina ensued between the Applicant and the Department's experts in the WWS thereafter. As a result, the Applicant's proposed project was *revised*, and requisite updates to the Draft O&M Plan were provided to the Department. The interactions between the Department and the Applicant's consultant following the public hearing of February 24, 2021, are discussed in greater detail below.

Subsequently, and at the request of Hearing Officer Lisa A. Vest, the Division of Water's experts in the WWS provided a Technical Response Memorandum ("TRM"), for the benefit of the hearing record generated in this matter. The Department's TRM provided not only responses to the comments received in this matter but also offered an extensive chronology of the interactions between the Department and the Applicant concerning the original proposed project that occurred subsequent to the public hearing. The Department's TRM, dated May 9, 2023, and received from the WWS by Hearing Officer Vest on May 26, 2023, is discussed in greater detail below.

Thereafter, Hearing Officer Vest prepared her Hearing Officer's Report ("Report"), dated June 22, 2023. The Report expressly incorporated therein as Appendix "A" an electronic file provided by the WWS on May 26, 2023, named "Lawton Family Marina – Millsboro Subaq-Compiled Portfolio." This file contained numerous documents associated with this permitting matter, including, but not limited to, the aforementioned TRM, the Draft Marina Permit, Draft O&M Plan, and the Draft Subaqueous Lands Lease. Ms. Vest's Report set forth the procedural history, summarized and established the record of information ("Record") relied on in the Report, and provided findings of fact, reasons, and conclusions that recommend the approval of the present Application currently pending before the Department, subject to the conditions set forth in the Draft permit authorizations contained in Appendix "A."

The Report, along with its Appendix, is incorporated herein by reference. The Report also addressed the public comments received in this matter and concluded that the same did not warrant the Department's denial of the pending Application, nor the delay of the decision regarding this pending permitting matter to receive any additional information.

Reasons and Conclusions

Currently before the Department is the pending Application for the proposed Lawton Family Marina, located in Herring Creek and northwest of the terminus of Sister's Lane, Millsboro, Sussex County, Delaware. As noted previously, the Applicant's proposed project has been modified multiple times since the original plans were received by the Department back in 2019, both prior to and subsequent to the public hearing of February 24, 2021. I find that the Applicant is required to obtain a Marina Permit, an approved O&M Plan, and a Subaqueous Lands Lease for the proposed project, for the reasons noted above. I further find that the Applicant's proposed project is subject to various state and federal regulatory requirements, including, but not limited to, the requirements of Delaware's *Subaqueous Lands Act* (7 Del.C. Ch. 72), the *Marina Regulations* (7 DE Admin. Code 7501) and the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), and as provided for under 7 Del.C. Ch. 60.

As noted in the Department's TRM, subsequent to the public hearing of February 24, 2021, the WWS determined that the ownership documentation and analysis provided by counsel for the Applicant was valid. Additional discussions regarding the "de-facto" community proposed by the Applicant then ensued. In response to providing the requested justification for the number of slips proposed for the marina, the Applicant advised the Department that the proposed project would serve multiple parcels nearby who have shared ownership of the waterfront parcel. It should be noted that, of the twelve (12) parcels listed in the proposed project, four of the parcels were listed for sale, and one of those four was owned by a non-family member.

The WWS determined that, if the Applicant wanted to propose this marina for “de-facto” community use, then prior to DNREC issuance of the requisite permits, the Applicant must attain a planned residential community approval and the marina be declared a common element through Sussex County Planning and Zoning. Otherwise, it would be inappropriate for non-waterfront properties to have docking facility rights, per Section 4.9.6 of the *Regulations Governing the Use of Subaqueous Lands*, which states that “[m]inimum frontage adjacent to subaqueous lands for a docking facility for any parcel will be forty (40) feet.” This determination was also made in consideration of development pressure and the cumulative impacts of allowing “de-facto” community use for proposed new marina facilities in a finite receiving waterbody.

Additionally, as previously noted above, the WWS conducted a field reconnaissance in consideration of the marina being properly sited, in accordance with adequate water depths and without the need for future dredging. On September 13, 2021, WWS staff traveled to the proposed marina site during a typical low tide via boat and the course of the vessel was navigated several times along the shoreline. Physical measurements of water depths were taken at the site as well as their location using a Global Positioning Unit (“GPS”) capable of submeter accuracy. As a result of the field reconnaissance noted above, the WWS determined that the nearshore waterway was indeed a shallow site, with water depths ranging slightly over one foot at mean low water in some of the proposed slip areas. On September 15, 2021, the WWS sent a letter requesting further information in order to continue this review and render a recommendation for the Record as to approval or denial of this Application.

On December 30, 2021, Ms. Maurmeyer provided an update to the information requested. This update included revising the classification of the marina to a recreational private marina, to be operated for the exclusive use of the waterfront property owners of Tax Parcel No. 2-34-18.00-51.06. Additionally, the O&M Plan was updated to memorialize the marina classification to limit the use of the marina to the owners of the waterfront parcel, including action the harbormaster would take for any marina users that violated provisions of the Plan, as well as revising several other details as stipulated in the WWS’s letter referenced above.

The TRM notes that, although the Department had requested detailed bathymetry to be submitted by the Applicant, it was not provided. This Application, along with two other permit applications currently pending before the Department in the same vicinity of Herring Creek, called into question adequate water depths for mooring and/or navigating at mean low water in the area in general. The WWS was not confident in the limited water depth observations provided within these applications, and therefore contracted for a bathymetric survey encompassing all three proposed project sites located on either side of Herring Creek. The TRM provided to Hearing Officer Vest in the current matter was significantly delayed due to the time required to schedule, conduct, and evaluate the survey. While the WWS acknowledges the prolonged processing time associated with the bathymetric survey and the subsequent review and evaluation, such information was deemed necessary to adequately evaluate the proposed structures and address the public concerns received by the Department in this matter.

On June 10, 2022, the WWS provided the survey results to the Applicant, and requested that the location of the docking facility be superimposed over the bathymetry in order to evaluate for adequate water depths. In consideration of slips attaining deeper water depths, the Applicant updated the docking facility site to be relocated 75 feet east of the boat ramp. The final submission of updates provided to WWS on March 31, 2023, eliminated the two innermost slips due to inadequate water depths and revised the O&M Plan to incorporate the modification to eight proposed slips (as opposed to the ten slips originally requested).

The Department's TRM provides a thorough review of the *revised* proposed project in light of the applicable statutes and regulations associated with the Application and the concerns voiced in the public comments received in this matter. The regulations provide the criteria for evaluating projects that are proposed to be constructed in public or private subaqueous lands. Further, the burden is on the Applicant to prove to the Department that the requirements of the statutes and regulations have been met, and if the granting of any permit, lease or approval will result in loss to the public of a substantial resource, or that the loss has been offset or mitigated.

The following section of this Order summarizes the concerns raised in the public comments received in this matter, and the Department's response to the same, in light of the review of the *revised* proposed project with respect to the requirements of the *Regulations Governing the Use of Subaqueous Lands* ("SL Regulations"), adopted in accordance with 7 Del.C. Ch. 72, the *Subaqueous Lands Act*. The TRM also notes various conditions added to the Department's draft authorizations, pursuant to that review.

Section 4.6, *Public Use Impact*, of the *SL Regulations* state that the Department shall consider the public interest in any proposed activity which might affect the use of subaqueous lands. Specifically, Section 4.6.3 demands consideration of the potential effect on the public with respect to commerce, navigation, recreation, aesthetic enjoyment, natural resources, and other uses of the subaqueous lands. The subaqueous lands located adjacent to the subject property are open for public use. The primary uses are private waterfront property owners and the general public participating in boating, watersports, fishing and crabbing. When evaluating the *revised* proposed project for navigational concerns, Section 4.9.2.5 of the *SL Regulations* states in relevant part, "[i]n no case shall a structure extend more than 20 percent of the width of the waterbody." The Department does not anticipate that there will be any significant adverse impacts on navigation with the addition of eight more vessels.

Although Herring Creek has not specifically been designated as a recreational use area, multiple members of the public commented that the *revised* project area is located adjacent to the widest and deepest section of Herring Creek where the public typically enjoys recreational activities. Concerns were raised that this "play area" would be limited to a no-wake zone. Since there are varying accounts of the recreational use width, the WWS reviewed existing August 2020 bathymetry of the State channel conducted by DNREC's Division of Watershed Stewardship staff. Based on that review, the TRM states that the proposed marina would create a permanent disruption of approximately 50 feet being limited to a no-wake zone. As a result, this leaves approximately 190 feet of usable width for recreational adjacent to the *revised* proposed project area.

With regard to the Department's review of the *revised* proposed project in light of Section 4.7, *Environmental Considerations*, the TRM notes that an evaluation of water quality and scientific data was submitted by the consultant as part of the Siting and Design Study of the marina. The construction activity and structures associated with the marina will have treated lumber that can leach contaminants. However, the leaching occurs mostly during the first few months after installation, and the Department considers that to be minimal. Additionally, the proposed marina has minimized potential sources of contamination by not providing fueling facilities and by not allowing major vessel maintenance work to be done on the grounds of the marina.

During the review process for this matter, pursuant to Section 4.7.1.2 of the *SL Regulations*, the WWS reached out to Michael Bott, Environmental Scientist with the Department's Watershed Stewardship, Shellfish Program, for potential impacts to the shellfish classification area. Herring Creek is classified as a prohibited shellfish harvest area. Downstream of the project area, the waterway opens up to being seasonally approved for shellfish harvesting.

The Department's Shellfish Program incorporates marinas with ten or more slips into the analysis of the shellfish classification system through the evaluation of the volume of water required for the dilution of the theoretical waste discharge from a wet slip to the shellfish growing area standard, based on available hydrographic data. Since the Applicant reduced the initial number of slips from ten to eight, the *revised* proposed project no longer meets the criteria for being included in the shellfish classification assessment. However, Herring Creek is approaching the carry capacity threshold and the prohibited classification area is nearing being expanded into the seasonally restricted area. Accordingly, the Draft Marina Permit includes a special condition with the following warning for any future application to expand this marina:

NOTE, impacts to the public's ability to harvest and consume shellfish is a consideration when reviewing new or expanded marina applications and Herring Creek has been deemed nearing the carrying capacity threshold.

Section 4.7.1.3 of the *SL Regulations* requires a review of the *revised* proposed project in the light of any harm to aquatic or tidal vegetation, benthic organism or other flora and fauna and their habitats. The TRM states that the proposed docking facility will cause some shading and additional wake but should allow for the growth of aquatic vegetation and the continued use of the area by benthic organisms. Further, the waterbody is currently used by the general public for water access along with a multitude of private docks, and the WWS believes that the addition of an eight-slip marina facility should not have a significant adverse impact on the environment.

The Department's Division of Fish and Wildlife ("DFW"), Species Conservation and Research Program, determined that a time of year restriction ("TOYR") for pile driving is appropriate to protect anadromous species including American Eel, American Shad, Striped Bass, and River Herring, as well as the estuary dependent species, Summer Flounder. The TOYR for anadromous species is March 1st through June 30th. The TOYR for Summer Flounder is March 15th through September 30th. Thus, the DFW requested that a TOYR from March 1st through September 30th be observed for pile driving activities to protect the fish species listed above. Additionally, breeding marsh birds such as state-endangered Black Rail (*Laterallus jamaicensis*) may be adjacent to the project site. Construction at this site could cause disturbance to marsh or colonial nesting birds in the adjacent march. To minimize impacts to these species during the breeding season, it was recommended that work be avoided from April 1st through July 31st. Cumulatively, the TOYR on construction activities from March 1st through September 30th was incorporated as a special condition in the Department's draft authorizations as well.

With regard to the *revised* proposed project's compliance with Section 4.9, *Boat Docking Facilities*, the TRM notes that the Applicant owns approximately 1,400 linear feet of waterfront property, with the marina being sited centrally on the western 700-foot portion of the waterfrontage. The siting of the boat docking facility on this portion of waterfrontage allows for access via uplands. Aquatic habitat, such as wetlands, have been avoided with the marina being sited at this location. Additionally, the siting of the marina docking facility structures has been designed with the consideration of minimal impacts.

In addition to the above regulatory review, the Applicant's *revised* proposed project was also reviewed by the WWS in light of the *Marina Regulations* (7 DE Admin. Code 7501). The TRM details this regulatory evaluation as well. This Order now reviews the public concerns addressed by the WWS in light of the pertinent sections of the *Marina Regulations*.

Section 11.0, *Requirements for Siting and Designing New Marinas*, of the Department's *Marina Regulations* describes the requirements, restrictions, and limitation criteria for new marina development. The Siting and Design Study ("S&D Study"), with associated documentation, was submitted by the Applicant as part of the marina application requirements and speaks to those concerns. Permitting requirements for the S&D Study for new minor marinas (25 slips and less) are modified in order to reduce environmental impacts by encouraging consolidation of vessel docking facilities.

The Applicant's consultant explored environmental siting considerations as required. Specifically, historic water quality data representative of on-site conditions was obtained from the Delaware Environmental Monitoring and Analysis Center ("DEMAC"), which is located in Guinea Creek at Banks Road, approximately two miles from the proposed project site area. Based on data collected between 2000 and 2018, dissolved oxygen ("DO") concentrations generally were above 5.0 mg/L throughout the year, and had peak concentrations as high as 12.47 mg/L. Since the healthy DO standard for the Inland Bays is a minimum of 4.0 mg/L, the project site can be expected to meet this criterion. The water quality data also included information regarding fecal coliform concentrations, but the project area is already designated as prohibited shellfish harvesting waters. Additionally, State-regulated wetlands and submerged aquatic vegetation are not present at the project site. As noted previously, pursuant to recommendations from DNREC's DFW, TOYRs for species of concern have been incorporated into the Department's draft authorizations. Thus, upon the Department's evaluation of environmental considerations, the *revised* proposed project is anticipated to have relatively minimal and short-term impacts to the environment.

Pursuant to Section 11.4 of the *Marina Regulations*, the Applicant's S&D Study also explored planning and design siting considerations. The TRM notes that the *revised* proposed eight-slip marina would be an "open marina" located in Herring Creek. There would be no man-made or natural barriers to restrict the exchange of water between Herring Creek and the waters within the marina. The upland site in an undeveloped vacant lot has a small, screened house on the parcel that would serve as an informal marina office and gathering location for marina users.

Due to the parcel being largely undisturbed, there is no current Sediment and Stormwater Management Plan in place. Included in the Draft Marina Permit is a requirement to attain Sediment and Stormwater Management approval from the appropriate State Department or delegated State Agency for any regulated land-disturbing activities. Additionally, the undeveloped parcel can accommodate parking on the uplands. The Applicant further addressed the daily operations of the proposed marina by submitting an O&M Plan, as previously noted, to the Department for approval.

With regard to compliance with Section 11.4.4, *Navigation and Access Channels*, of the *Marina Regulations*, the TRM notes that the proposed project was originally designed to moor ten vessels with no dredging proposed. Based on the aforementioned Department bathymetry, the marina was sited in a very shallow site. The Applicant subsequently relocated the marina 75 feet east of the existing boat ramp in order to attain deeper water depths, however, even with that relocation, there was still inadequate water depth at the originally proposed innermost slips (slips 9 and 10). Thus, the Applicant eliminated proposed slips 9 and 10, and requested to retain the remaining eight slips. The depths within the remaining eight slips range from -1.1 feet to -1.4 feet at mean low water. As noted above, the Applicant had previously declined a reconfiguration of the marina due to concerns with vessels moored against the tidal ebb and flow currents that could result in potential damage to the vessels and structure during times of high waves and strong currents. Due to the slips averaging less than the standard water depth of -1.5 foot mean low water for the mooring of vessels, the Department's draft authorizations include a special condition that prohibits future dredging for the marina. Additionally, the O&M Plan details that slips will be managed by mooring larger vessels within the designated outer slips and mooring smaller vessels in the designated inner slips.

Section 14.0, *Marina Operation and Maintenance ("O&M") Plan*, of the *Marina Regulations* speaks specifically to the requirements for obtaining a Marina O&M Plan. The requirements apply to all marinas in the State of Delaware, whether existing, under construction, or proposed. As noted above, a Draft O&M Plan was submitted to the Department as part of the Application. The O&M Plan addressed compliance with statutory requirements by including information on the marina layout, the disposal of waste material, emergency operations, rules and regulations for marina users, among other items. Regarding the disposal of vessel sewage waste, the O&M Plan stipulates that access to a pumpout facility will be located at Indian River Marina in Bethany Beach, Delaware, and Canalfront Park Marina in Lewes, Delaware.

There are no fueling facilities provided or major vessel maintenance allowed on the marina premises. In the event of a spill, the O&M Plan outlines the boater responsibilities and reporting requirements. This includes the use of the spill containment kits and containment booms located in a dock box on the marina premises. Pending associated subaqueous and marina authorizations for the construction activity, the O&M Plan will be authorized for approval and must be re-submitted for periodic re-approval every four years.

The Department received several concerns from the public regarding the overall operation of the marina. Due to the changing use of the marina during the permitting process, one commenter questioned the ambiguity of the use of the marina being for family verses for community use. The finalized O&M Plan identifies that the marina would be classified as a recreational private marina for the exclusive use of the waterfront property owners. Another commenter expressed concern for the on-site management of the marina since the property is vacant and there are multiple property owners involved. In response, the finalized O&M Plan identifies a Harbormaster, whose obligations include ensuring the marina users comply with all aspects of the O&M Plan and to take appropriate action to deal with marina users who violate any provision of the Plan. Further, the finalized O&M Plan specifically states that violators would first receive a verbal warning, followed by a written warning. Repeated violations would result in forfeiture of the slip for one season. Any future potential complaints would be directly relayed to the Harbormaster to mediate and, if appropriate, to the WWS to ascertain whether any regulatory violations have occurred.

In reviewing the applicable statutes and regulations, as well as weighing public benefits of this project against potential detriments, the Department's experts in the Division of Water have concluded that the pending Application complies with all applicable federal and state laws and regulations. I find that the Division of Water's TRM offers a thorough review of all aspects of the Applicant's pending Application, addresses those concerns germane to the subject matter of the aforementioned public hearing held by the Department in this matter, and responds to them in a balanced manner, accurately reflecting the information contained in the Record.

I further find that the Record developed in this matter reflects that the Department's experts in the WWS have concluded that the construction of the marina docking facility as described in the Application for the Marina Permit, the O&M Plan, and the Subaqueous Lands Lease by the Applicant, and then subsequently *revised* to address the expressed concerns of both the public and the Department, complies with all statutes and regulations that govern permitting actions such as the proposed Lawton Family Marina.

The State of Delaware is charged with upholding the Public Trust Doctrine, which has been used historically in protecting the public's rights to fishing, commerce, navigation, recreation and even preservation as an appropriate public use. With regard to the revisions that have been made to the originally proposed project, the Record reflects that the Applicant has practiced minimization by revising the original project to now propose an eight-slip marina (rather than a large docking facility that would have provided a slip for each of the individual property owners).

Additionally, as previously noted, the proposed marina would create a permanent disruption of approximately 50 feet being limited to a no-wake zone within the "play area" of Herring Creek. Taking into account the no-wake zone, approximately 190 feet of usable width for recreational activities adjacent to the project area would remain. The siting of the marina docking facility was designed with the consideration of attaining adequate depths within the slip mooring areas.

While weighing and balancing the use of public subaqueous lands for all, the WWS recognizes that a permanent disruption of the recreational water use area of Herring Creek adjacent to the project area would occur. However, since adjacent docking facilities on the neighboring parcels exist 681 feet west of the proposed marina and 255 feet east of the proposed marina, a broad area remains undisturbed for recreational use activities. Further, the remaining 190 feet of usable width adjacent to the project area is adequate to participate in recreational activities.

Lastly, the TRM notes that the proposed marina has minimized potential sources of contamination by not providing fueling facilities, and by not allowing major vessel maintenance work to be done on the grounds of the marina. The final O&M Plan for the marina provides rules and regulations for boat tenants and identifies the appropriate action that would occur in the case of non-compliance to the O&M Plan. Also included are emergency procedures and the safety precautions implemented during hurricanes and severe weather events.

The Record developed in this matter indicates that the Applicant has adequately demonstrated its compliance with all requirements of the statutes and regulations as noted herein, and that the Record supports approval of the *revised* proposed project known as the Lawton Family Marina, as submitted by the Applicant to the Department's Division of Water, WWS, in this matter. Accordingly, this Order approves all permits and authorizations required for the Applicant's *revised* proposed marina project, namely, the issuance of a Marina Permit, a finalized O&M Plan, and a Subaqueous Lands Lease, and directs that the same be issued by the Department in this customary form, with the appropriate conditions as set forth herein, consistent with the Record developed in this matter.

Further, the Department concludes and specifically directs the following:

1. The Department has jurisdiction, as provided for under 7 *Del.C.* Ch. 60, Delaware's *Subaqueous Lands Act* (7 *Del.C.* Ch. 72), the *Marina Regulations* (7 DE Admin. Code 7501) and the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), and all other relevant statutory authority, to make a final determination on the aforementioned pending Application after holding a public hearing, considering the public comments, and all information contained in the Record generated in this matter;
2. The Department provided proper public notice of the aforementioned Application submitted by Lawton Family Marina, and of the public hearing held on February 24, 2021, and held the hearing to consider any public comments that may be offered on the Application, in a manner required by the law and regulations;
3. The Department considered all timely and relevant public comments in the Record, as established in the Department's TRM of May 9, 2023, and all of the associated relevant documents included in the Department's electronic file named "Lawton Family Marina – Millsboro Subaq-Compiled Portfolio." The electronic file, provided by WWS on May 26, 2023, and expressly incorporated into the Record generated in this matter in its entirety, includes, but is not limited to, the TRM, Draft Subaqueous Lands Lease, Draft Marina Permit, and Draft O&M Plan;
4. The Department has carefully considered the factors required to be weighed in issuing all permits and authorizations required by the aforementioned Application, and finds that the Record supports approval of the same;
5. The Department shall issue the following authorizations to the Applicant in this matter: (1) a Subaqueous Lands Lease; (2) a Marina Permit; and (3) the finalized O&M Plan to the Lawton Family Marina, for the construction of a new multi-slip marina and to authorize a boat ramp in Herring Creek, located northwest of the terminus of Sisters Lane, Millsboro, Sussex County, Delaware, herein referred to as the Lawton Family Marina;

6. Said permit authorizations to be issued by the Department shall contain the appropriate conditions as set forth herein, consistent with the draft permit authorizations prepared by the Department's WWS, and consistent with the Record developed in this matter;
7. The Department adopts the Report and its Appendix as further support for this decision;
8. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and
9. The Department shall serve and publish its Order on its internet site.



Shawn M. Garvin
Secretary

