



STATE OF DELAWARE  
**DEPARTMENT OF NATURAL RESOURCES AND  
ENVIRONMENTAL CONTROL**  
RICHARDSON & ROBBINS BUILDING  
89 KINGS HIGHWAY  
DOVER, DELAWARE 19901

OFFICE OF THE  
SECRETARY

PHONE  
(302) 739-9000

**Secretary's Order No.: 2023-W-0028**

**RE: Permit Applications of Abby L. Pubusky and Thomas A. Taylor, II for (1) a Subaqueous Lands Lease and (2) a Wetlands Permit to construct a new wetland walkway and docking facility located in Herring Creek, 23854 Brant Circle, The Cove, Lewes, Sussex County, Delaware**

**Date of Issuance: November 21, 2023**

**Effective Date: November 21, 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 *Wetlands Act* (7 *Del. C.* §6604), Delaware's *Subaqueous Lands Act* (7 *Del.C.* Ch. 72), *Wetlands Regulations* (7 DE Admin. Code 7502) and 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 applications of Abby L. Pubusky and Thomas A. Taylor, II ("Applicants") for (1) a Subaqueous Lands Lease and (2) a Wetlands Permit to construct a new wetland walkway and docking facility located in Herring Creek, 23854 Brant Circle, The Cove, Lewes, Sussex County, Delaware ("Applications," "proposed project"). It should be noted that the Applicants' proposed project has been modified since the original plans were received by the Department. This Order provides a summary of the interactions that have taken place between the Department and the Applicants 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 31, 2018, the Department's Division of Water, Wetlands and Waterways Section ("WWS"), received the Applications submitted on behalf of the Applicants by Coastal and Estuarine Research, Inc. ("Consultant"), to construct a new wetland walkway and docking facility, located in Herring Creek, Lewes, Delaware, as noted above (Tax Parcel No. 2-34-18.00-257.00). The subject property was originally authorized as a docking facility through Subaqueous Lands Lease No. SL-0303/95. Subsequent authorizations and transfers took place across several authorizations (Subaqueous Lands Lease Nos. SL-016/99 and SL-119/09) but a wetland walkway providing access to the docking facility was never proposed.

In the absence of a wetland walkway, the Applicants have traversed the wetlands to and from the docking facility via a standard All-Terrain Vehicle ("ATV"), resulting in severe rutting and loss of vegetation. Construction of a new wetland walkway to access the existing docking facility would be prohibitive pursuant to the 2005 WWS Docking Facilities Guidance Document that stipulates wetland walkways should not exceed 150 feet in length. The Applicants are proposing to remove the existing docking facility and select a new water access location where the construction of a wetland walkway would meet the limiting length requirement to a new docking facility.

Accordingly, the above-described Applications were advertised for a 20-day public notice period from February 6, 2019, through February 26, 2019. During that time period, the WWS received four written comments in opposition to the proposed project. The objectors expressed concerns over what they perceived as an excessively large docking facility, additional concerns that the docking facility would hinder access in and out of The Cove, and desires that the State-regulated Wetlands on the property must be protected. A public hearing was requested.

Due to the fact that multiple objections were raised by commenters during the public notice period noted above, the Applicants requested a site meeting with WWS staff. During that meeting held on April 11, 2019, the Applicants and their Consultant discussed alternate plans to address the commenters' concerns. The Applicants proposed to re-design their docking facility and planned to submit an updated application regarding the same to the Department at that time.

On July 14, 2020, the Applicants' Consultant reached out to determine whether the pending Applications were still active. The Consultant informed WWS that the Applicants had been occupied with family matters since the time of the April 2019 meeting noted above, but were now ready to move forward with the Applications.

On September 29, 2020, the Consultant provided the initial updates to the original Applications. The proposed project was then advertised for another 20-day public notice period from October 28, 2020, to November 17, 2020. Once again, the WWS received two written comments in opposition to the same. Concerns were voiced by the commenters over the wetlands that had been damaged by the ATV path and commenters believed that the vegetation needed to grow back undisturbed. In addition, there was concern over what was described as a "mini marina" being proposed due to the size of the docking facility requested in comparison to the small cove.

On November 20, 2020, the public comments were forwarded to the Consultant to provide the opportunity for the Applicants to respond and address concerns associated with the proposed project. Additionally, the WWS requested an update on the staking of the location of the proposed wetland walkway (since the submitted coordinates were inaccurate), proposed restoration of the rutted wetlands, vessel registration justifying the length of the dock, and bathymetry.

The Department's WWS staff also recommended that the Applicants request a formal Jurisdictional Determination to clearly identify the proposed wetland walkway impacts to State-regulated Wetlands. Subsequently, on March 11, 2021, WWS staff conducted a Jurisdictional Determination (authorization no. JD-266/21) of the landward and channel ward extent of State-regulated Wetlands on the subject property. Based on that Jurisdictional Determination, the Applicants determined the final location of the proposed wetland walkway as being 71 feet west of the first-raised western piling associated with the existing pier. The Jurisdictional Determination also indicated that the proposed location of the wetland walkway would not exceed 150 linear feet in accordance with current WWS guidelines.

Further updates to the original Applications were provided to the Department by the Consultant on July 2, 2021. This included a restoration plan for the impacted State-regulated Wetlands and revised plan and cross-section views of the proposed docking facility. Accordingly, a legal advertisement for a public hearing was placed on a 20-day public notice period from July 7, 2021, to July 27, 2021. During that time period, ten written comments in objection to the proposed project were received. In particular, two objectors raised concerns of an inadequate public notice announcement.

Within the *Wetland Regulations*, it is a regulatory requirement to consider the effect of proposed wetland activities on neighboring lands. The term "neighboring land uses" is defined in the *Wetland Regulations* as those uses on land within 1,000 feet of the proposed activity. The WWS utilized the information included in the original Applications for direct notification of neighboring property owners within a 1,000-foot radius of the proposed project and additionally directly mailed those who previously commented in this matter. Commenters pointed out the address list utilized for direct notification of the proposed project was inaccurate, due to property ownership conveyance from the time of the original 2018 application. Since the address list was concluded to be outdated, the Department determined it would best address this concern through re-advertisement of the legal notice of the public hearing using an updated address list.

The legal advertisement for the public hearing was immediately re-advertised by the Department and placed on a 20-day public notice period from August 4, 2021, to August 24, 2021. During that time, one written comment was submitted in support to the project, and five written comments were written in objection. The letter in support claimed that the newly proposed wetland walkway would provide a more environmentally sound way for the Applicants to access the water. Objectors expressed concerns over (1) what was perceived as an excessively large docking facility, (2) navigability issues within the cove due to the proposed docking facility, and (3) negative impacts to the wildlife within the wetlands and surrounding environment as a result of the proposed project.

At the time of the public hearing held on August 25, 2021, the Applicants proposed to conduct wetland restoration and construct a 3 foot wide by 150 feet long wetland walkway, a 4 foot wide by 10 foot long fixed pier, a 3 foot wide by 10 foot long gangway, a 6 foot wide by 6 foot long floating platform, a 6 foot wide by 40 foot long floating dock and a 6 foot wide by 10 foot long floating jet ski platform at the aforementioned property in Herring Creek, Lewes, Delaware. The public hearing was attended by WWS staff, the Applicants' representatives, and various individuals from the public. Following presentations by both the Department and the Applicants' Consultant, Hearing Officer Lisa A. Vest then received comment directly from the public at the time of the public hearing concerning this matter. Comments incorporated into the Hearing Record ("Record") at that time that voiced both support for and concerns over the Applicants' proposed project. Proper notice of the hearing was provided as required by law.

At the request of Hearing Officer Vest, the Division of Water's experts in the WWS provided a Technical Response Memorandum ("TRM"). 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 Applicants concerning the original proposed project that occurred subsequent to the public hearing. The Department's TRM, dated September 25, 2023, and received from the WWS by Hearing Officer Vest on November 7, 2023, is discussed in greater detail below.

Thereafter, Hearing Officer Vest prepared her Hearing Officer's Report ("Report"), dated November 10, 2023. The Report attached the Department's aforementioned TRM, the Department's Draft Subaqueous Lands Lease and the Draft Wetlands Permit, as Appendices "A" through "C," respectively. Ms. Vest's Report set forth the procedural history, summarized and established the Record relied on in the Report, and provided findings of fact, reasons, and conclusions that recommend the approval of the present Applications currently pending before the Department, subject to the conditions set forth in the Draft permit authorizations. The Report, along with its Appendices, 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 Applications, nor the delay of the decision regarding this pending permitting matter to receive any additional information.

### **Reasons and Conclusions**

Currently pending before the Department are the pending Applications for (1) a Subaqueous Lands Lease and (2) a Wetlands Permit to construct a new wetland walkway and docking facility located in Herring Creek at 23854 Brant Circle, The Cove, Lewes, Sussex County, Delaware. As noted previously, the proposed project has been modified since the original plans were received by the Department, both prior to and subsequent to the public hearing of August 25, 2021. I find that the Applicants are required to obtain a Subaqueous Lands Lease and a Wetlands Permit for the proposed project, for the reasons noted above.

I further find that above-described proposed project is subject to various state and federal regulatory requirements, including, but not limited to, the requirements of Delaware's *Wetlands Act* (7 Del. C. §6604), Delaware's *Subaqueous Lands Act* (7 Del.C. Ch. 72), *Wetlands Regulations* (7 DE Admin. Code 7502) and the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), and as provided for under 7 Del.C. Ch. 60.

It should be noted that, although the Department had requested detailed bathymetry to be submitted, it was not provided by the Applicants in this matter. Thus, subsequent to the public hearing held in this matter, the WWS conducted a field reconnaissance in consideration of adequate water depths since the docking facility was primarily designed to be floating. On September 13, 2021, WWS staff traveled to the proposed docking facility location 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.

The Department’s field reconnaissance determined that the nearshore waterway was indeed a shallow site, with water depths ranging slightly under one foot at mean low water. In consideration of addressing the Department’s concerns with the floating docking facility resting on the waterway bottom, the Applicants provided updated plans revising the floating structure to a predominantly fixed docking facility. The one remaining floating structure proposed would be the floating drive-on personal watercraft platform. The Department’s Draft Subaqueous Lands Lease includes a special condition to reduce impacts to benthic macroinvertebrates through the installation of stoppers or other devices to prevent the floating platform from resting on the waterway bottom.

In consideration of concern over the size of the non-commercial docking facility, the Applicants minimized their impact in subaqueous lands further. At the time of the public hearing, the modifications to the docking facility included a reduction of 47 square feet from the original submittal. Subsequent to the public hearing, final modifications from the original submittal resulted in a total reduction of 89 square feet of structure occupying subaqueous lands. On August 15, 2022, the Applicants provided the final *revised* submission to the Department, proposing to conduct wetland restoration and construct a 3 foot wide by 150 foot long wetland walkway, a 4 foot wide by 26 foot long fixed pier, a 5 foot wide by 40 foot long fixed dock, and a 6 foot wide by 10 foot long floating jet ski platform in Herring Creek at 23854 Brant Circle, The Cove, Lewes, Sussex County, Delaware.

The Department's TRM provides a thorough review of the *revised* proposed project in light of the applicable statutes and regulations associated with the Applications 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. It should be noted that the historic right of privately owned land includes public regulation of such land to prevent harm to the public. Further, the burden is on the Applicants 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, that such loss has been offset or mitigated.

The following section of this Report evaluates the *revised* proposed project with respect to the requirements of Delaware's *Wetlands Act* (7 Del. C. §6604) and the Department's *Wetlands Regulations* (7 DE Admin. Code 7502), adopted in accordance with the statute.

### **Regulatory Review - Wetlands**

Section 7.0 of the *Wetlands Regulations, Condition for Permits*, states that activities within wetlands require a Wetlands Permit from the State of Delaware. When determining if an Applicant should occupy those wetlands, the WWS considers the utilization of wetlands for the proposed activity. The subject property is located along a cove of Herring Creek and its shoreline is dominated by wetlands. The property does not contain any uplands directly abutting to the waterway. The proposed 3 foot wide by 150 foot long elevated wetland walkway directly adjoins to the newly proposed docking facility which will provide water access as its central purpose. There is no alternative to gaining water access without crossing wetlands. If the wetland walkway were not to be constructed, then the property owners would continue to access the current docking facility through existing means. Due to the soft marsh surface, the current property owners have accessed the existing docking facility via ATV, resulting in a pathway of severe rutting and degradation to the wetland vegetation.



The Department also evaluated the proposed project in light of *Wetlands Regulations* Section 8.5.8, *An Environmental Summary*, specifically, Section 8.5.8.3, which calls for an evaluation of “[a]lternatives to the proposed action which would reduce or avoid environmental damage.” The Department’s TRM notes that the Applicants’ proposed wetland walkway was designed to reduce environmental damage by siting the walkway in an upstream location that does not exceed the 150 foot long wetland walkway length, as stipulated by the 2005 WWS Docking Facilities Guidance Document. Although the Consultant points to varying guideline changes that have occurred over the years, the property owners were able to meet their desired purpose of water access, while reducing the area of impact to cross wetlands. Additionally, the wetland walkway was proposed to be elevated 3 feet above the marsh surface and oriented to minimize shading impacts on wetland vegetation.

Furthermore, Section 8.5.8.4 calls for an evaluation by the Department of “...[a]ll measures to be taken during and after the completion of the proposed project to reduce detrimental effects.” The TRM notes that, after completion of the construction of the proposed wetland walkway and docking facility, the Applicants propose wetland restoration in acknowledgement of the degradation to the wetland vegetation that occurred from the ATV path. The wetland restoration would occur over a phased period. First, the Applicants propose to remove the existing docking facility and abandon the ATV path. Afterward, the existing ruts would be regraded to elevations that support wetland vegetation. Due to the seedbank available online, the existing marsh vegetation would be expected to naturally revegetate in the impacted areas. The site would then be monitored for two growing seasons to document revegetation. If natural re-colonization does not result in 85% coverage, then wetland seedlings are proposed to be planted to expedite revegetation. It should also be noted that the wetland restoration plan has been incorporated as a special condition of the Department’s Draft Wetland Permit in this matter.

Section 12.0, *Standards for Permits*, specifically, Section 12.2, *Environmental Effect*, states that the Department shall “...include considerations of the effect of site preparation and the proposed activity on the following wetlands values.” The Department’s TRM notes that the presence of the tidal wetlands allows for a natural protective system for absorption of storm wave energy, flood waters and heavy rainfall.

Excluding the ATV pathway, the tidal wetlands onsite are predominately healthy and are dominated by smooth cordgrass (*Spartina alterniflora*) and salt hay (*Spartina patens*). Impacts during construction of the wetland walkway include temporary placement of matting in wetlands to support construction equipment utilized to vibrate in the walkway support pilings. All other work, to include construction of whalers, stringers and decking, will be completed by manual assembly and matting will be removed after construction completion. Due to the construction of the wetland walkway being a singular event, construction activities are deemed temporary impacts.

Additionally, the *revised* proposed project will have minimal impact on tidal ebb and flow since the height of the elevated walkway will allow for tidal exchange. Once the wetland walkway structure is in place, impacts to the habitat would be minimal since the anthropogenic traffic would be directed over the walkway instead of through the wetlands themselves. Furthermore, the Department's Division of Fish and Wildlife, Species Conservation and Research Program, has determined that there are no records of state-rare or federally listed plants, animals or natural communities at the proposed project site.

The following section of this Report evaluates the *revised* proposed project with respect to the requirements of Delaware's *Subaqueous Lands Act* (7 Del. C. Ch 72) and the Department's *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504, hereinafter referred to as "*Subaqueous Regulations*"), adopted in accordance with the statute.

### **Regulatory Review – Subaqueous Lands**

Section 4.6, *Public Use Impact*, of the aforementioned *Subaqueous Regulations* states 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 of the aforementioned subaqueous lands 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, the WWS references Section 4.9.2.5 of the *Subaqueous Regulations*, which states in relevant part, “[i]n no case shall a structure extend more than 20 percent of the width of the waterbody.” In tidal natural features, 20 percent is measured from the mean low water mark on one side of the waterbody to the mean low water mark of the other. The proposed channel ward encroachment of 31 feet channel ward of the mean low water line is within 20 percent of the width of the waterbody.

Section 4.6.6 of the *Subaqueous Regulations* demands evaluation of the *revised* proposed project to the extent to which the Applicants’ “...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.” The Applicants’ primary objective and purpose is to have a private residential boat docking facility. The TRM notes that the Public Trust Doctrine holds that lands under navigable waters are open to the public for commerce, navigation, fishing and recreation. Thus, as a waterfront property owner, the Applicants have rights for a water access structure.

As previously noted above, the current location of the existing docking facility has resulted in wetland degradation. In order to avoid future adverse impacts to the wetlands, Applicants have proposed a docking facility in an alternate location that meets the permitting guidelines for the construction of a wetland walkway. The Department’s TRM notes that several comments voiced concerns with the design of the docking facility, which was viewed as being non-characteristic for the community and excessive for a non-commercial docking facility. Through agency consultation, the Applicants worked to minimize the scope of the project within public subaqueous lands, including modifying the docking facility from a floating structure to a predominately fixed structure, removing two boat lifts, reducing the dock length by 10 feet, and interchanging the kayak launch with a floating jet ski platform. These modifications resulted in a total reduction of 89 square feet of structure occupying subaqueous lands. Additionally, the channel ward encroachment was reduced from 40 feet to 31 feet to address impacts on navigational concerns.

With regard to the Department's review of the *revised* proposed project in light of Section 4.7, *Environmental Considerations*, the TRM notes that the 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. The waterbody is currently used by the general public for water access along with a multitude of private docks. Thus, the addition of a residential docking facility should not have a significant adverse impact on the environment. Furthermore, as previously noted, the Department's Division of Fish and Wildlife, Species Conservation and Research Program, determined that there were no records or state-rare or federally listed plants, animals or natural communities at the project site.

Lastly, with regard to the *revised* proposed project's compliance with Section 4.9, *Boat Docking Facilities*, specifically, Section 4.9.2, *General Siting Considerations*, the TRM notes that the Applicants own approximately 308 linear feet of waterfront property. The siting of the boat docking facility on this portion of waterfrontage allows for access via a wetland walkway that was designed in consideration of minimal impact. Existing docking facilities on the neighboring parcels exist 145 feet west of the proposed docking facility and 190 feet east of the proposed docking facility. Therefore, the siting of the docking facility structures has been designed with consideration given to the proximity of existing structures.

I find that the Division of Water's TRM offers a thorough review of all aspects of the Applicants' pending Applications, 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 proposed residential wetland walkway to access the docking facility, as described above in both the Subaqueous Lands Lease and the Wetlands Permit submitted by the Applicants, and then subsequently *revised* to address the expressed public concerns, complies with all statutes and regulations that govern such permitting actions.

As noted previously, the Department's Draft Subaqueous Lands Lease includes a special condition to reduce impacts to benthic macroinvertebrates through the installation of stoppers or other devices to prevent the floating platform from resting on the waterway bottom. Also, the proposed wetland walkway has been designed with consideration given to reducing potential environmental impacts by siting the walkway in a location that is in accordance with current practices. Furthermore, the aforementioned wetland restoration plan has been incorporated as a special condition of the Draft Wetland Permit to be issued by the Department in this matter.

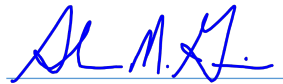
The State of Delaware is charged with upholding the Public Trust Doctrine, which has been used historically in protecting the public's rights to fishing, commerce, navigation, recreation and even preservation as an appropriate public use. Additionally, the Applicants have riparian rights for a water access structure. As noted above, through agency consultation, the Applicants have worked to minimize the scope of the docking facility within public subaqueous lands. The modifications to the docking facility have resulted in a total reduction of 89 square feet of structure occupying subaqueous lands. Furthermore, the channel ward encroachment was reduced from 40 feet to 31 feet to address impacts on navigational concerns voiced by members of the public in this matter. In light of the Applicants' revisions to the originally proposed project, the Department's experts in the WWS have recommended approval of the Applicants' permit applications for both a wetland walkway and boat docking facilities currently pending before the Department at this time. I concur with those recommendations.

The Record developed in this matter indicates that the Applicants have adequately demonstrated their compliance with all requirements of the statutes and regulations as noted herein, and that the Record supports approval of the Applicants' *revised* proposed project, as submitted to the Department's Division of Water, WWS, in this matter. Accordingly, this Order approves all permits and authorizations required for the Applicants' *revised* proposed project, namely, the issuance of a Subaqueous Lands Lease and a Wetlands Permit, 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 *Wetlands Act (7 Del. C. §6604)*, Delaware's *Subaqueous Lands Act (7 Del.C. Ch. 72)*, the Department's *Wetlands Regulations (7 DE Admin. Code 7502)*, 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 Applications 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 Applications submitted by the Applicants, and of the public hearing held on August 25, 2021, and held the hearing to consider any public comments that may be offered on the Applications, 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 dated September 25, 2023, and received by Hearing Officer Vest on November 7, 2023, and all associated relevant documents included in the Record generated in this matter, included, but not limited to, the TRM, the Draft Subaqueous Lands Lease, and the Draft Wetlands Permit, all attached to the Report as Appendices "A" through "C," respectively;
4. The Department has carefully considered the factors required to be weighed in issuing all permits and authorizations required by the aforementioned Applications, and finds that the Record supports approval of the same;
5. The Department shall issue the following permit authorizations to the Applicant in this matter: (1) a Subaqueous Lands Lease and (2) a Wetlands Permit, for the construction of a new wetland walkway and boat docking facility in Herring Creek, located at 23854 Brant Circle, The Cove, Lewes, Sussex County, Delaware;

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 Appendices 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