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**DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL**
DIVISION OF WATER
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**WETLANDS &
SUBAQUEOUS LANDS**

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Technical Response Memorandum

To: Lisa A. Vest, Hearing Officer

Through: Virgil Holmes, Director, Division of Water ^{VH}
VH (Jul 31, 2020 15:41 EDT)
Steven M. Smailer, Environmental Program Administrator, Division of Water *MS*

From: Julie R. Molina, Environmental Scientist, Wetlands and Subaqueous Lands Section *JRM*

Date: July 24, 2020

Subject: Christopher At the Townes At Bayshore Village, LLC, Marina Permit Application, Operations and Maintenance Plan Application, Subaqueous Lands Lease Application, Subaqueous Lands Permit Application, and Water Quality Certification Application

INTRODUCTION

On October 29, 2019, the Wetlands and Subaqueous Lands Section (WSLS), Division of Water, Department of Natural Resources and Environmental Control received an application from Environmental Resources, Inc. submitted on behalf of Lighthouse Cove Investors, LLC to construct a new 18 slip community marina docking facility and to conduct maintenance dredging southeast of Lighthouse Cove Lane and in two Unnamed Private Lagoons, located at the terminus of Lighthouse Cove Lane, Fenwick Island, 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, the Marina Regulations and (7 Del C., Chapter 60) and the Department's Regulations Governing the Control of Water Pollution and Section 401 of the Clean Water Act.

During the initial review of the application, the applicant informed the WSLS of the near imminent transfer of the property. The final transfer of the property to Christopher At the Townes

At Bayshore Village, LLC was executed on December 6, 2019 and received by the Department on December 17, 2019. Prior to placing the project on public notice, discussions on the recent permitting history between Lighthouse Cove Investors, LLC and the subject property were made with the current property owner.

In reviewing the recent history, an application under Lighthouse Cove Investors, LLC was submitted on April 4, 2019 for the development of a marina on the above referenced property. At that time, several public comments in opposition to the project were received. The applicant considered the public hearing process an undue hardship in regard to the delayed commencement of construction of the community development and subsequently withdrew the application (Marine Permit; Operations & Maintenance Plan; Subaqueous Lands Lease; Subaqueous Lands Permit; Water Quality Certification – 157/19) on July 24, 2019. In order to facilitate the construction of the residential community development, Lighthouse Cove Investors, LLC applied for and was issued a Letter of Authorization (LA-279/19) on October 3, 2019 to replace/repair the bulkhead within the same footprint as the existing structure. This current marina application has been modified from the original April 2019 submittal by reducing the number of proposed slips from 22 to 18. However, since several comments in objection to the project were previously received, the WSLs determined that it was in the public's best interest to hold a public hearing and Christopher At the Townes At Bayshore Village, LLC agreed to directly advertise for a public hearing.

The announcement for a public hearing was placed on a 20-day public notice period on January 22, 2020. After advertisement of the public hearing, there were a total of five written comments in objection to the project. The objectors to the project expressed navigational concerns with regards to the narrowness of the waterbody in combination with the increased boat traffic congestion and the impact to the Town of Fenwick Island community. Additionally, objections were raised on the need to constantly dredge to maintain navigable water depths. Other objections included concerns with pollution of the waterbody and the effect on local flora and fauna.

The applicant, Christopher At the Townes At Bayshore Village, LLC proposes to construct and operate a new 18 slip minor marina by installing a 16 inch wide by 700 foot long portion of boardwalk, two (2) 6 foot wide by 24 foot long docks and five (5) boat lifts with four associated pilings each and to mechanically maintenance dredge 180± cubic yards to a depth of 3.5 feet below Mean Low Water (MLW) in portions of public subaqueous lands and two unnamed private lagoons southeast of Lighthouse Cove, located at the terminus of Lighthouse Cove Lane. They also are proposing to dispose of the dredged material on-site via sealed dump truck to a 22 foot wide by 110 foot long super silt fenced enclosed area to be dewatered, graded and capped with topsoil to be incorporated within a landscaped berm located east of Lighthouse Cove Lane at 38.452209, -75.057211, Fenwick Island, Sussex County, Delaware.

The public hearing was held on February 20, 2020. The public hearing was attended by WSLs staff, the applicant's representatives and individuals from the public. During the Public Hearing, the Hearing Officer, , gave the introductory remarks on behalf of the Department. Subsequently, the project scientist, Julie R. Molina, gave a presentation on behalf of the Wetlands and Subaqueous Lands Section. Mrs. Molina explained the recent permitting history of the site as

well as an overview of the application for the marina. To conclude, Mrs. Molina presented the exhibits of the public records on behalf of the Department.

Subsequently, the applicant's consultant from Environmental Resources, Inc., Edward M. Launay gave a presentation. Mr. Launay pointed out that the Letter of Authorization (LA-279/19) issued by the Department was a minimization in channelward encroachment from the original April 2019 application. The application had originally requested to repair the bulkhead by stepping-out in front of the existing bulkhead to construct a new bulkhead. However, the Letter of Authorization allowed for the replacement of the bulkhead within the exact footprint of the existing structure. Mr. Launay also stated the project is largely located on the applicant's private subaqueous lands (east and west lagoons) with only six moorings located in public subaqueous lands along the northern property boundary. Mr. Launay described the boardwalk as a minor encroachment since it would not exceed the face of the bulkhead pilings in subaqueous lands. In addition, slip widths were reduced in the west lagoon to provide a wider buffer from the adjacent property. Mr. Launay expressed the applicant's position that the proposed layout and design of the marina would have no impact to existing navigational channels or lagoons since boats have historically moored along the bulkhead. He then pointed to other nearby lagoon systems as narrow as 28 feet wide and commonly to about 50 feet wide. For comparison in those locations, he stated that there are boatlifts and other structures that would be more of an impediment to navigation than the minor channelward encroachment of the boardwalk. He concluded by providing an aerial with lagoon widths and site photos as exhibits on behalf of the applicant.

At that time, Ms. Vest opened the forum for public comment. Several commenters expressed concern for the northern limits of the project site as a navigational and safety hazard. The northern bend was described as a dangerous corner from a visibility standpoint for those utilizing kayaks, standup paddle boards and other non-motorized watercraft. Representatives from the Town Council of Fenwick Island also raised concern for the six mooring berths on the north side of the subject property. Their position was that the mooring of six vessels along the 200 foot long northern face of the bulkhead would be too congested. Additionally, concerns were voiced on the impacts to the approximately 40 properties within the incorporated limits of the Town of Fenwick Island located east of the project site. Other comments centered on water quality concerns and the frequency of dredging. In addition, several questions were presented by the public. Although Ms. Vest did not allow for the public hearing to include a question and answer session, she requested all questions to be addressed through the Department's Technical Response Memorandum. Listed below are the questions posed relating only to the submitted application within the purview of the WSLS.

Q: "There were no dimensions in the project documents of the waterway passage after the finished build-out of the project."

A: This question was in reference to the northern limit of the project in public subaqueous lands. The only structure proposed over public subaqueous lands is the 16 inch wide by 200 foot long portion of the boardwalk to be constructed as part of a cap over the bulkhead pilings. There are no stand-alone mooring pilings proposed at this location. The width of the waterbody varies along the northern bulkhead due to a 90 degree bend in the canal. At the narrowest pinch point, across the waterbody on tax parcel no. 1-34-23.20-27.04, a boat lift was previously authorized (SL-203/19). After accounting for that boat lift and the 16 inch wide boardwalk on the

applicant's property, the narrowest distance for waterway passage would be approximately 44 foot wide. This determination is made regarding the footprint of structures in subaqueous lands.

Q: "What happens if it doesn't get approved? Do they still have the right to tie up there?"

A: The Marina Regulations applies to any commercial, public, recreational, or private marina that is on or adjacent to the water and contains five or more slips. Therefore, even if no structures were constructed, a Marina Permit authorization is required if the property owner(s) moored five or more vessels along the bulkhead. If the project were to be denied, the applicant could still moor four vessels along the entirety of the waterfront property, including the contested northern boundary.

Q: "Do we know how often they are going to dredge?"

A: The applicant has applied to remove a total of 180 cubic yards of material from select areas determined to have accumulated sediments based on the submitted bathymetric survey. Of the total, 52 cubic yards of material are proposed to be removed from public subaqueous lands while the remaining material to be dredged is located at the dead-end of the east and west lagoons. Adequate water depths currently exist without the need for substantial dredging. On a long-term basis, additional maintenance dredging could be requested based on need while still adhering to all applicable regulations. This includes not dredging deeper than the controlling water depth of the waterbody nor deeper than the parent waterbody. An estimation of the frequency of future maintenance dredging requests is minimal based on the current site conditions and the small volume currently being requested.

Ms. Vest closed the official record at the end of the public hearing proceedings.

After the Public Hearing, the WSLs conducted a field survey in consideration of concerns raised during the hearing with regards to potential navigational and safety hazards with vessels moored along the northern limits of the project site. On June 24, 2020, WSLs staff laid out buoys offset approximately twelve feet along the north side of the subject property. Physical measurements were taken at the site as well as the location of the buoys collected using a Global Positioning Unit (GPS) capable of submeter accuracy. The course of a vessel was then navigated toward entering and exiting the canal system several times while being cognizant of the buoys acting as vessels. Upon entry to the lagoon, visibility was acceptable when taking a wide turn, but visibility decreased when exiting due in-part to the sharp angle in the canal system as well as the afore-mentioned boat lift positioned on the corner on the opposite shoreline. Additionally, it was determined that with vessels moored along the 35 foot long pinch point of the canal, there would be a waterway passage of approximately 32 feet. Subsequent to this field reconnaissance, the WSLs contacted the applicant's consultant to relay public safety concerns on the mooring of vessels along the narrowest pinch point of the canal on the northern face of the project site and the field observations. In an effort to address the navigational concerns at the site, the applicant's consultant submitted revised plans on July 18, 2020. The revisions included a minimization of slip capacity dimensions which resulted in a re-organization of the slip mooring locations. Specifically, the mooring of six vessels along the 200 foot long northern face of the bulkhead was minimized to five vessels with a 42 foot wide no mooring zone located along the area of greatest concern (the pinch point).

This Technical Response Memorandum (TRM) presents the Wetlands and Subaqueous Lands Section's (WSLS) findings regarding the above-referenced permit application, the public comments received during the public notice period, the testimonies given during the public hearing, and the field observations.

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 (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 prove to the Department that the requirements of these 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 Department's regulatory evaluation and the public comments received are addressed according to the pertinent sections of the Regulations as follows.

Section 4.0 Criteria of Permits, Leases and Letters of Authorization - Evaluation Considerations. Each application shall be reviewed based on the consideration of the performance specifications, standards and other criteria listed in this section for the type of activity proposed.

The most relevant portions of Section 4.0 for the proposed project are discussed below. This includes Section 4.6 - Public Use Impact, Section 4.7 - Environmental Considerations, Section 4.9 - Boat Docking Facilities and Section 4.11 - Activities Involving Dredging, Filling, Excavating or Extracting Materials.

Section 4.6 Public Use Impact - The Department shall consider the public interest in any proposed activity which might affect the use of subaqueous lands.

The proposed activities are within public subaqueous lands on the northernly boundary of the site and within private subaqueous lands within the lagoons to the east and west of the subject property. The activities within public subaqueous lands require a Subaqueous Lands Lease from the State of Delaware. Although the underwater land of the unnamed lagoons is owned by the applicant, the proposed activities requires a Subaqueous Lands Permit from the State of Delaware. When determining if an applicant should occupy those public and private subaqueous lands, the Wetlands and Subaqueous Lands Section considers the potential effect on the public and the extent to which the public would benefit or suffer detriment from the project.

Furthermore, Section 2.3.1 of the Regulations Governing the Use of Subaqueous Lands, states: "Owners of private subaqueous lands shall obtain a permit from the Department, pursuant to this regulation, before undertaking any activity on such lands which, as determined by the Department, may contribute to the pollution of public waters, have an adverse impact or destroy aquatic habitats, infringe upon the rights of the public use of the waterway or the public, infringe upon the rights of other private owners, or make connection with public subaqueous lands." The public use impacts most relevant to the proposed project are discussed in Sections 4.6.3, 4.6.5, and 4.6.6 below.

4.6.3 - 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 users are private waterfront property owners, approximately 40 waterfront properties within the incorporated limits of the Town of Fenwick Island, a 24 slip community marina and the general public participating in boating, watersports, fishing, and crabbing. Multiple objectors to the project voiced concerns over the narrowness along the approximately 90 degree bend of the canal at the northern boundary of the project site. When evaluating navigational concerns, the WSLs references Section 4.9.2.5 of the Regulations Governing the Use of Subaqueous Lands which states, in relevant part; “In 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 of one side of the waterbody to the mean low water mark of the other. The proposed 16 inch wide boardwalk does not exceed the face of the bulkhead pilings and is within 20 percent of the width of the waterbody.

Since these public subaqueous lands are held in the State’s trust, the WSLs further takes into consideration navigation from a public safety viewpoint. The boat lift directly across the waterbody on tax parcel no. 1-34-23.20-27.04 and the 16 inch wide boardwalk on the applicant’s property are the narrowest pinch point location for waterway passage. Solely regarding the footprint of these structures, this would leave an approximate 44 foot width for waterway passage. However, with the addition of vessels moored along the 200 foot long northern limit of the project, the waterway width for vessel passage becomes reduced to 32 feet. Although a commenter suggested there is a minimum standard of a 60 foot wide width for waterway passage for good traffic flow, this is anecdotal and not a regulatory requirement. Additionally, during the Public Hearing, the applicant’s consultant presented an exhibit detailing other adjacent lagoons with waterway passage widths as narrow as 28 feet wide and commonly to about 50 feet wide. Although it could be argued that this waterway passage width is similar to others in the adjacent canals; the key difference at this location is that the orientation of the waterbody includes a sharp 90 degree bend of the canal which inherently reduces visibility and could be cause for a safety concern with the narrow condition of the canal.

As detailed above, after the Public Hearing, a survey was conducted by WSLs staff to assess public safety concerns on the mooring of vessels along the narrowest pinch point of the canal on the northern face of the project site. In an effort to address the navigational concerns at the site, the applicant’s consultant submitted revised plans. The revisions included reducing five (5) of the slip capacity dimensions from 12 foot wide by 24 foot long to 12 foot wide by 20 foot long which enabled a re-organization of the slip mooring locations. Specifically, the mooring of six vessels along the 200 foot long northern face of the bulkhead was reduced to five vessels with the inclusion of a 42 foot wide no-mooring zone along the pinch point of the waterbody.

The relocation of one slip mooring area to the edge of the west lagoon also touches on a concern raised by another commenter regarding navigation concerns with the congestion of too many slips along the northern side of the project site. The commenter stated that most 50 foot wide lots within the neighboring lagoon community moor one vessel and suggested one vessel per every 50 feet is needed. While the mooring of vessels do need to be designed appropriate to site limitations, the recommendation for one vessel every 50 feet does not align with the Regulations

Governing the Use of Subaqueous Lands, which allows up to four moorings of vessels on a waterfront property with 40 feet of frontage. There is a total of 200 linear feet along the northern limit of the project which is proposed to moor five vessels along with the 42 foot wide vessel exclusion zone. The newly proposed three (3) 12 foot wide by 20 foot long vessels to be moored along an 82 foot wide section of the bulkhead, includes two (2) 10 foot wide buffers between each berthing area and is bounded by the 42 foot wide vessel exclusion zone. This leaves 76 feet for the mooring of the two (2) remaining 12 foot wide by 24 foot long berthing areas which is also bounded by the 42 foot wide exclusion zone. The buffers outlined in the plans between vessel mooring locations are adequately designed and should not contribute to navigational concerns.

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

The applicant's primary objective and purpose is to provide the community an amenity in terms of boat slip availability and water access. In referencing the scope of the proposed project, 13 of the 18 vessels are to be moored along the 16 inch wide boardwalk over subaqueous lands. The five remaining slips are to be accessed via the boardwalk and two (2) 6 foot wide by 24 foot long docks to boat lifts. The applicant is practicing avoidance due to the proposed minimal footprint of docking facility structures in subaqueous lands to serve the community.

If the marina is not constructed, then the Townes at Bayshore Village community residents would have to transport their motorized vessels before and after each use to a public boat ramp or moor their vessels at previously approved private marinas.

4.6.6 - 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.

Sussex County has approved The Townes at Bayshore Village community to consist of an 18 unit townhome community. The applicant's primary objective is requesting 18 mooring slips to accommodate each townhome residence. This is a minimization from the withdrawn April 2019 application of 22 slips.

Through agency consultation, the applicant worked to realize their purpose and objectives through alternatives. As described above, minimization of channelward encroachment impacts was achieved through the issuance of the Letter of Authorization (LA-279/19) to repair the bulkhead through the replacement in its existing footprint rather than 18 inches in-front of the existing bulkhead. Additionally, accommodations were made to address concerns for the impairment of water access to the adjoining properties in the dead-end of the east and west lagoons. Slip locations were slightly shifted and slips widths were minimized to allow a buffer distance of 21 feet (when the existing structure was originally 16 feet) from the adjoining property in the east lagoon and remained 17.6 feet (when the proposed structure was originally 13 feet) from the adjoining property in the west lagoon. Additionally, as described in detail above, the applicant endeavored to address navigational safety concerns through a vessel exclusion zone. This was accomplished through a minimization of slip capacity dimensions and a re-organization of slip mooring locations while still meeting their purpose of providing 18 mooring locations.

Furthermore, the consolidation of vessel facilities into a marina is considered a minimization of possible activities in subaqueous lands and a reduction of overall environmental impacts when compared to the alternative of numerous individual structures along the available shoreline.

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.

An evaluation of water quality and scientific data was submitted by the consultant as part of the Siting and Design Study of the marina as discussed below in Section 11.3. The construction activity and structures associated with the marina will have treated lumber that can leach contaminants; however, this is mostly during the first few months after installation and can be considered minimal. In addition, the proposed marina has minimized potential sources of contamination by prohibiting fish cleaning at the docking facility and the discharge of fish waste into waters adjacent to the marina, by not providing fueling facilities, and by not allowing major vessel maintenance work to be done on the grounds of the marina. Additionally, as discussed in further detail in Section 14.2 below, an Operations and Maintenance (O&M) Plan for the marina was submitted by the consultant.

4.7.1.3 - Any harm to aquatic or tidal vegetation, benthic organisms or other flora and fauna and their habitats.

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; the addition of an 18 slip marina facility should not have a significant adverse impact on the environment.

According to the DNREC, Division of Fish and Wildlife, Species Conservation and Research Program, the species of concern known to utilize the Little Assawoman Bay for nursery habitat, migration corridors, and spawning habitat include Summer Flounder (*Paralichthys dentatus*), American Eel (*Anguilla rostrata*), and Horseshoe Crabs (*Limulus polyphemus*). However, due to the location of this project within the bay but near a dead-end canal, the DNREC, Division of Fish and Wildlife did not recommend a time of year restriction for construction for these species. Instead, to maintain water quality, a silt curtain was advised to be installed prior to the commencement of in-water work. This recommendation for the use of a turbidity curtain during in-water work is implemented as a special condition of the draft authorizations in order to reduce or eliminate impacts to the species of concern.

Section 4.9 Boat Docking Facilities

4.9.2 - General Siting Considerations: Siting of boat docking facilities shall be evaluated on site specific conditions including, but not limited to, location of navigational channel, proximity of existing structures, aquatic habitats, and width and orientation of waterbody. The following criteria will be weighed and balanced when evaluating the siting of boat docking facilities.

The applicant owns approximately 700 linear feet of waterfront property. The proposed marina has been designed so that a majority of the marina docking facility structures are sited within the

applicant's private subaqueous lands (east and west lagoons). These structures include the 16 inch wide by 500 foot long portion of boardwalk, two (2) 6 foot wide by 24 foot long docks and five (5) boat lifts with four associated pilings each. The only structural footprint within public subaqueous lands is the 16 inch wide by 200 foot long portion of boardwalk which will not encroach further than the face of the existing bulkhead pilings in subaqueous lands. The 90 degree bend in the orientation of the waterbody and the proximity to the boat lift on the opposite shoreline was discussed at length in Section 4.6.3 above. Therefore, the siting of the marina docking facility structures has been designed with the consideration of minimal impacts to subaqueous lands. Considerations for siting of the boat docking facility are discussed further in Sections 4.9.2.2 below.

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.

Based on historical aerials, the public subaqueous lands adjacent to the proposed marina facility were re-aligned and the lagoons were excavated out of uplands sometime between 1961 and 1968. This activity was conducted prior to the promulgation of the Regulations Governing the Use of Subaqueous Lands in 1969. Although, the excavation of new dead-end lagoons is highly discouraged, maintenance dredging of a previous man-made excavated lagoon feature is an allowable activity.

The marina has been designed to moor 13 vessels parallel to the bulkhead and have five vessels moored at the dead-end of the lagoon. Rather than requesting the entire slip berthing areas to be maintenance dredged, the applicant has practiced avoidance by requesting to dredge three separate areas along the bulkhead. The proposed maintenance dredging is located on one area along the northern section on public subaqueous lands and on portions located on private subaqueous lands at the dead-ends of the east and west lagoons. The applicant requesting to excavate 180± cubic yards of material from a total area of 5,785± square feet is considered a minor amount of volume to provide adequate water depths for vessel mooring.

Best management practices are typical conditions when authorizing a dredging activity in order to minimize impacts to the environment. In addition, as specified in the environmental siting considerations of the Siting & Design Study required by the Marina Regulations, there are no state-regulated wetlands on-site, no submerged aquatic vegetation on-site and the waterbody is mapped as being prohibited for shellfishing. If approved, the use of a turbidity curtain for the dredging activity would be implemented in order to protect species of concern. Upon an evaluation of environmental considerations, there would be relatively minimal and short-term impacts to the environment.

Section 4.11.3 Water Quality on Dredging Projects

4.11.3.1 - All dredging is to be conducted in a manner consistent with sound conservation and water pollution control practices. Spoil and fill areas are to be properly diked to contain the dredged material and prevent its entrance into any surface water. Specific requirements for spoils retention may be specified by the Department in the approval, permit or license.

The proposed maintenance dredging would be conducted by a mechanical excavator working from land. This activity is required to be implemented in accordance with sound water pollution control practices and DNREC's Surface Water Quality Standards in order to minimize impacts to the

environment. Additionally, the use a turbidity curtain would be required to protect species of concern. Disposal of the dredged material is proposed to be transported on-site via sealed dump truck to a 22 foot wide by 110 foot long super-silt fenced enclosed area to be dewatered, graded and eventually capped with topsoil to be incorporated within a landscaped berm. The DNREC Groundwater Protection Branch conducted a review of this disposal location and method and found no groundwater contamination concerns.

Section 4.11.4 Prohibited Dredging Project. The following types of dredging projects are prohibited.

4.11.4.3 Dredging channels, lagoons, or canals deeper than the existing controlling depth of the connecting or controlling waterway, unless otherwise approved under 4.9.2.8 of these Regulations.

The proposed maintenance dredging is to remove 180± cubic yards of material to a depth of 3.5 feet below mean low water in three separate locations along the bulkhead for a total area of 5,785± square feet. Based on the bathymetry submitted, the adjacent subaqueous lands vary between a -2 to -6 foot depth at mean low tide. The limits of dredging is proposed only in the areas necessary to align with the existing average of -3.5 feet deep at mean low water. The proposed depths meet the above requirements and are within the depths of the controlling waterway.

REGULATORY REVIEW – MARINA REGULATIONS

The following review evaluates the proposed project with respect to the requirements of the Marina Regulations. The Regulations provide the criteria for evaluating marinas that are proposed to be constructed in subaqueous lands. The burden is on the applicant to prove to the Department that the requirements of these Regulations have been met; and if the granting of a permit will result in loss to the public of a substantial resource, or that the loss has been offset or mitigated. The Department’s regulatory evaluation and the public comments received are addressed according to the pertinent sections of the Regulations as follows.

4.3.2.4 Public Notice

4.3.2.4.1 Advertise receipt of the application in two (2) newspapers of statewide circulation.

As required, the project and public hearing was advertised on January 22, 2020 in two newspapers of statewide circulation for a 20 day period. Additionally, as a courtesy, the WSLs also sends directs mailings of the project description to property owners within a 1,000 foot radius of the project. Although a comment was received regarding the timing of the public hearing during the winter when residents may not be home, the WSLs did comply with the statutory and regulatory requirements in advertising the project. Since the WSLs’s jurisdiction predominantly affects coastal communities, it would be an impractical workload burden to the Department to detain the permitting process on all coastal projects until the summer.

Section 11.0 Requirements for Siting and Designing New Marinas - This section describes the requirements, restrictions, and limitation criteria for new marina development....New marina applications must include a Siting and Design Study that demonstrates how the proposed marina meets the criteria of this section.

A commenter suggested that an environmental impacts study be completed as well as a study on the impacts to the adjacent community. The submitted Siting and Design (S&D) Study with associated documentation was submitted as part of the marina application requirements and speaks to both of those concerns. Permitting requirements for the Siting and Design Study for new minor marinas (25 slips and less) are modified in order to reduce environmental impacts by encouraging consolidation of vessel docking facilities.

11.3 Environmental siting considerations

The S&D Study explored environmental siting considerations as required. The consultant submitted historic water quality data representative of on-site conditions obtained from the Delaware Environmental Monitoring and Analysis Center (DEMAC). The station (Station 310011) is located at the State Rt. 54 Bridge and the Fenwick Ditch just 0.5 miles west of the 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 14.0 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. In addition, State-regulated wetlands and submerged aquatic vegetation are not present at the marina site. A review from the DNREC, Division of Fish and Wildlife found that the project would not impact any species of concern as long as a turbidity curtain was used during in-water construction activities. The requirement for the use of a turbidity curtain has been implemented as a special condition of the draft authorizations.

11.4 Planning and design requirements

The S&D Study also explored planning and design siting considerations as required. As discussed at length in Section 4.9.2 above, the structural footprint of the marina has been largely designed to remain on the applicant's private subaqueous lands (east and west lagoons). In addition, only five of the 18 moorings are sited to be located in public subaqueous lands. Furthermore, a minor amount of material (180± cubic yards) was requested to be dredged and only from specified areas within the marina in order to attain navigable depths. Based on the bathymetry submitted, adequate depths exist without the need for substantial dredging even on a long-term basis. The applicant addressed the daily operations of the marina by submitting an Operations and Maintenance Plan for approval.

11.4.5 Vessel Traffic and Navigation

11.4.5.1 - Marinas shall be designed to minimize adverse effects on the existing public and private use of waters of the State. This includes applications for mooring sites (permanent or temporary), speed or traffic reductions, or any other device, either physical or regulatory, that may cause the use of State waters to be restricted.

Many commenters voiced concerns on the impacts to the approximately 40 properties within the incorporated limits of the Town of Fenwick Island located east of the project site. While acknowledging it was not their position to oppose the impacts to the applicant's private subaqueous

lands; the concerns were focused on the vessels moored along public subaqueous lands. Vessel navigation was discussed at length in Section 4.6.3 above. Subsequent to the public hearing, the applicant submitted revised plans which included a 42 foot long vessel exclusion zone along with the re-location of one vessel from the northern bulkhead. The requirement for the vessel exclusion zone has been implemented as a special condition of the draft authorizations and within the draft Operations and Maintenance Plan.

Section 14.0 Marina Operation and Maintenance (O&M) Plan

14.2 Marina operations and maintenance (O&M) plan. This section of the Regulations presents the requirements for obtaining a marina operations and maintenance (O&M) plan. It applies to all marinas in the State of Delaware, whether existing, under construction, or proposed.

A draft O&M plan was submitted as part of the marina application. The O&M Plan addressed compliance to 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 convenient access to a pumpout facility has been contracted with Sharks Cove Marina located at 38931 Madison Ave, Fenwick Island, Selbyville, DE 19975. 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.

One commenter voiced concern on the language included in the O&M Plan stating, “The Townes At Bayshore Village Community Marina is for the exclusive use of The Townes At Bayshore Village residents *and their guests*”. The commenter believed this would open the use of the moorings to homeowners who rented their homes out during the summer months and felt that renters would be inconsiderate and contribute to noise and pollution. This application has been minimized from the withdrawn April 2019 application which had originally requested for 22 moorings for vessels. The current application now aligns the number of slips with the number of townhomes (18). It is within the homeowners’ best interest to not rent out slips to others outside of the community. However, if slips are to be rented out to those that are renting their townhomes, it would not be under the purview of the WSLs to manage slip availability. The O&M Plan states that the docking or launching of vessels will be only as directed and permitted by the slipholder or Harbormaster. In addition, the O&M Plan includes rules and regulations for *all* slip users to follow. This is detailed in the O&M Plan but includes rules to not allow disorderly conduct, no running on the docks, that the marina and its surroundings are a “no wake” zone, etc.

CONCLUSION

In reviewing the applicable statutes, regulations, and weighing public benefits against detriments, the WSLs finds that the construction of the marina docking facility and maintenance dredging as described in the application for the Marina Permit, Operations and Maintenance Plan, Subaqueous Lands Lease, Subaqueous Lands Permit and Water Quality Certification by Christopher At the Townes At Bayshore Village, LLC complies with the Regulations administered by the WSLs.

The applicant has applied for a marina facility largely located on the applicant's private subaqueous lands with only five moorings located in public subaqueous lands. The Public Trust Doctrine holds that lands under navigable waters are open to the public for commerce, navigation, fishing, and recreation. The mooring of vessels along the northern bulkhead in public subaqueous lands aligns with the rights and privileges granted through the Public Trust Doctrine.

Through agency consultation, the applicant worked to realize their purpose and objectives through alternatives. As described above, the applicant reduced the number of slips proposed to align with the number of townhomes. In addition, minimization of channelward encroachment impacts was achieved through the repair of the bulkhead through the replacement in its existing footprint rather than 18 inches in-front of the existing bulkhead. Furthermore, accommodations were made to address concerns for the impairment of water access to the adjoining properties in the dead-end of the east and west lagoons by increasing buffer distances. Additionally, as described in detail above, the applicant endeavored to address navigational safety concerns through a vessel exclusion zone.

In order to address the navigational and public safety concerns, the following special condition is included in the draft Marina Permit and draft Subaqueous Lands Lease: *“Permanent or transient berthing of vessels shall not be permitted within the 42 foot wide vessel exclusion zone, commencing 82 feet from the east corner of the north facing bulkhead, as labeled on the approved plans. Signage and a fence clearly marking the vessel exclusion zone shall be installed at the specified location. The Permittee is strictly responsible for the management of the vessel exclusion zone. Failure to maintain the vessel exclusion zone free of vessels, shall constitute reason for this Marina Permit and Subaqueous Lands Lease being revoked and removal of all structures authorized herein.”*

The proposed marina has minimized potential sources of contamination by providing convenient access to a sewage pumpout system, by not providing fueling facilities, and by not allowing major vessel maintenance work to be done on the grounds of the marina. Additionally, the submitted Operations and Maintenance (O&M) Plan for the marina has rules and regulations for boat tenants which contain best management practices and tips. This includes ways to control oil in the bilge, management of vessel sewage disposal, trash and recycling. Also included, are emergency procedures and the safety precautions implemented during hurricanes and severe weather events.

In the event the Secretary determines that this project should be approved, included are draft authorizations with appropriate conditions for consideration.






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Final Audit Report

2020-07-31

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