

Secretary's Order No.: **2008-W-0044**

RE: Wetlands and Subaqueous Lands Section Permit Applications of Keith Properties, LLC, to construct a community deck, personal dock and boat lift in Fenwick Shoals, Fenwick Island, Delaware

Date of Issuance: September 15, 2008

Effective Date: September 15, 2008

I. Background:

On Thursday, March 6, 2008, the Department of Natural Resources and Environmental Control held a public hearing at the Town Hall on Coastal Highway, Fenwick Island, Delaware, in order to receive comments and solicit the views of interested parties in regards to the proposal of the Applicant, Keith Properties, to construct both a community structure and a private structure in the Fenwick Shoals development located off of Fenwick Shoal Boulevard, Fenwick Island, Delaware. Of note is the fact that the construction plans for each of these proposed projects changed significantly in both size and location from the time the Applicant initially filed his permit application with the Department to the time of the public hearing. As a result, a great deal of time was spent at the hearing itself by Department personnel clarifying with the Applicant the exact dimensions of the proposed structures, as well as identifying, with specificity, the proposed location of said structures within the Fenwick Shoals development.

The original permit applications filed with the Department by Keith Properties, LLC, proposed the construction of a 16 foot by 16 foot

community deck, with a 3 foot by 12 foot gangway, to a 4 foot by 3 foot floating dock between Lots 22 and 23, in a tidal drainage ditch that connects with a lagoon adjacent to Roy Creek. The Applicant's initial proposal also included plans for a 6 foot by 90 foot private dock and boat lift in a lagoon adjacent to Roy Creek, lying along Lots 26, 27, and 28, Fenwick Shoal Boulevard, Fenwick Island, Delaware. On the evening of the hearing, however, the Applicant had modified those construction plans, and was at that time proposing (1) a minimized community structure with a 5 foot by 12 foot platform, of which 1 foot by 12 foot would rest over the channel; and (2) a modified 6 foot by 90 foot private structure, of which only 1 foot by 90 foot would rest over publically regulated subaqueous lands, and 2 foot by 90 foot would rest channel-ward at the mean high water mark. The private structure was minimized overall with regard to its impact to the wetlands, in that only 20% of its structure would rest over subaqueous lands. Additionally, the walkway would not be over DNREC regulated wetlands, but instead would be constructed over uplands owned by Keith Properties and by Stiles Adkins. The walkway portion would cross over a couple of portions of federally regulated 404 wetlands, and the wetlands walkway would be permitted by the Department, if approved, in conjunction with a permit under Army Corp SPGP #20 by the Army Corps of Engineers, which would ultimately grant the Applicant access to get to their structure.

In support of the applications for the aforementioned community and private structures, the Applicant avers that all construction plans are compliant with the applicable Wetlands and Subaqueous Lands Section Docking Facilities Guidance Document (circa July 2005), specifically, Chapter VI, *Critical Dimensions & Requirements for the Structures*. Moreover, the Applicant, through Mr. Kelly Pierson of Envirotech, Inc. (consultant firm retained by the Applicant, hereinafter referred to herein as “Envirotech”), further contends that all necessary supporting documentation, including, but not limited to, the acquisition of an easement to locate the structures as proposed, was procured by the Applicant in this matter. This hearing was conducted pursuant to 7 Del C., Ch. 66; DNREC Wetlands Regulations, rev. 11/03/94; DNREC Subaqueous Lands Regulations, rev. 09/02/92; 7 Del.C., Ch. 72; the Subaqueous Lands Act, 7 Del.C., Chapter 72; and 7 Del.C., Chapter 60. Proper notice of the hearing was provided, as required by law.

After the hearing, the Hearing Officer performed an evaluation of the evidence entered into the record in this matter. Thereafter, the Hearing Officer prepared her report and recommendation in the form of a Hearing Officer’s Report to the Secretary dated September 3, 2008, and that Report, with its exhibits attached thereto, is expressly incorporated herein by reference.

II. Findings and Conclusions:

1. Proper notice of the hearing was provided as required by law.

2. Throughout the course of this procedural matter, the Applicant failed to provide the requested documentation showing the limitations of the properties owned by Adkins Realty, despite the fact that the burden of providing such documentation rests solely on the Applicant in such DNREC permit application matters;
3. Throughout the course of this procedural, the Applicant failed to provide requested written agreement(s) between Andrew Adkins and/or Adkins Realty and the Applicant regarding the use of the common ground and lagoon separating the properties, despite the fact that the burden of providing such documentation rests solely on the Applicant in such DNREC permit application matters;
4. Throughout the course of this procedural, the Applicant failed to provide revised drawings for the community dock as presented at the public hearing, and for mean low water depths in the ditch connecting to the common lagoon shared with the Keen-Wik Association, despite the fact that the burden of providing such documentation rests solely with the Applicant in such DNREC permit application matters;
5. The Department has been unquestionably patient with the Applicant by allowing this matter to remain open for approximately six (6) months subsequent to the date of the

public hearing, so that said documentation could be gathered and provided for the Department's review. At this juncture, however, the Department has no recourse other than to declare the Applicant's permit applications as they now sit as **denied**.

6. Should Keith Properties, LLC, wish to pursue its plans in the future for a community dock and/or a private dock as set forth in the public hearing of March 6, 2008, new application(s) and notice(s) (thus affording the public the opportunity to provide comment to the Department regarding same) would have to be filed by this Applicant for future consideration by the Department. Such application(s) should address the concerns expressed by both the Department and members of the Fenwick Shoals community during the course of this procedural matter.

III. Order:

In view of the above findings, it is hereby ordered that the Wetlands and Subaqueous Lands Section Permit Applications of Keith Properties, LLC, to construct a community deck, personal dock and boat lift in Fenwick Shoals, Fenwick Island, Delaware are **denied**.

IV. Reasons:

The record does not warrant, nor has the Applicant, Keith Properties, LLC, reasonably justified to the Department, its requests for the WSLs permits noted above. Moreover, a review of these requests in light of the State of Delaware's Regulations concerning Wetlands and Subaqueous Lands, specifically, with regard to the Applicant's burden to provide all requisite documentation in support of such applications to the Department as requested, makes the granting of the Applicant's requests currently before the Department unfeasible at this time.

Should Keith Properties, LLC wish to pursue these projects in the future, new applications would have to be filed with the Department, and the matter would be re-noticed for public review and comment at that time. Of course, the Department remains ready to assist such Applicants with the overall permitting process for such matters, in furtherance of the policy and purposes of 7 Del. C., Ch. 60.

/s/ John A. Hughes
John A. Hughes
Secretary

Ahear/KEITH BROS.Ord.

HEARING OFFICER'S REPORT

REGARDING: Wetlands and Subaqueous Lands Section Permit
Applications
of Keith Properties, LLC, to construct a community deck, personal dock
and boat lift in Fenwick Shoals, Fenwick Island, Delaware

Lisa A. Vest
Hearing Officer

September 3, 2008

1. Background Findings:

On Thursday, March 6, 2008, the Department of Natural Resources and Environmental Control held a public hearing at the Town Hall on Coastal highway, Fenwick Island, Delaware, in order to receive comments and solicit the views of interested parties in regards to the

proposal of the Applicant, Keith Properties, to construct both a community structure and a private structure in the Fenwick Shoals development located off of Fenwick Shoal Boulevard, Fenwick Island, Delaware. Of note is the fact that the construction plans for each of these proposed projects changed significantly in both size and location from the time the Applicant initially filed his permit application with the Department to the time of the public hearing. As a result, a great deal of time was spent at the hearing itself by Department personnel clarifying with the Applicant the exact dimensions of the proposed structures, as well as identifying, with specificity, the proposed location of said structures within the Fenwick Shoals development.

The original permit applications filed with the Department by Keith Properties, LLC, proposed the construction of a 16 foot by 16 foot community deck, with a 3 foot by 12 foot gangway, to a 4 foot by 3 foot floating dock between Lots 22 and 23, in a tidal drainage ditch that connects with a lagoon adjacent to Roy Creek. The Applicant's initial proposal also included plans for a 6 foot by 90 foot private dock and boat lift in a lagoon adjacent to Roy Creek, lying along Lots 26, 27, and 28, Fenwick Shoal Boulevard, Fenwick Island, Delaware. On the evening of the hearing, however, the Applicant had modified those construction plans, and was at that time proposing (1) a minimized community structure with a 5 foot by 12 foot platform, of which 1 foot by 12 foot would rest over the channel; and (2) a modified 6 foot by 90 foot private

structure, of which only 1 foot by 90 foot would rest over publically regulated subaqueous lands, and 2 foot by 90 foot would rest channelward at the mean high water mark. The private structure was minimized overall with regard to its impact to the wetlands, in that only 20% of its structure would rest over subaqueous lands. Additionally, the walkway would not be over DNREC regulated wetlands, but instead would be constructed over uplands owned by Keith Properties and by Stiles Adkins. The walkway portion would cross over a couple of portions of federally regulated 404 wetlands, and the wetlands walkway would be permitted by the Department, if approved, in conjunction with a permit under Army Corp SPGP #20 by the Army Corps of Engineers, which would ultimately grant the Applicant access to get to their structure.

In support of the applications for the aforementioned community and private structures, the Applicant avers that all construction plans are compliant with the applicable Wetlands and Subaqueous Lands Section Docking Facilities Guidance Document (circa July 2005), specifically, Chapter VI, *Critical Dimensions & Requirements for the Structures*. Moreover, the Applicant, through Mr. Kelly Pierson of Envirotech, Inc. (consultant firm retained by the Applicant, hereinafter referred to herein as “Envirotech”), further contends that all necessary supporting documentation, including, but not limited to, the acquisition of an easement to locate the structures as proposed, was procured by the Applicant in this matter. Further discussion of the Applicant’s

proposals, along with the documentation found in the public hearing record of this matter, is detailed herein.

Public comment regarding the Applicant's proposed structures at Fenwick Shoals was received by the Department, not only at the time of the public hearing, but during both the pre-hearing and post-hearing phases of this matter as well. These public concerns, along with the Department's responses to the same, will all be addressed in greater detail below. Proper notice of the hearing was provided, as required by law.

II. Summary of Record:

In order to ensure an accurate preservation of the record developed in this case, the following is an itemized listing of all materials entered into the record at the time of the hearing:

A. Department's Exhibits:

The Department entered the following exhibits into the record at the public hearing of March 6, 2008:

- Exhibit #1: Keith Properties' applications for both the proposed community structure and private structure as described above ;
- Exhibit #2: Public Notice of said applications dated August 29, 2007, which listed both structures separately;

- Exhibit #3: Public comments received to the Department's initial notice;
- Exhibit #4: Copies of Statutes and Regulations relevant to this hearing matter (i.e., 7 Del C., Ch. 66; DNREC Wetlands Regulations, rev. 11/03/94; DNREC Subaqueous Lands Regulations, rev. 09/02/92; and 7 Del.C., Ch. 72);
- Exhibit #5: Correspondence from the Applicant to DNREC;
- Exhibit #6: Additional miscellaneous correspondence received by the Department;
- Exhibit #7: Notice of the Public Hearing;
- Exhibit #8: Assignment of the Hearing Officer for the Keith Properties, LCC Public Hearing of March 6, 2008;
- Exhibit #9: Photographs of the site, wetlands maps, topography maps, and other various photos of the Fenwick Shoals site;
- Exhibit #10: Existing permits issued by DNREC to Applicant;
- Exhibit #11: Subdivision plan of Fenwick Shoals;

- Exhibit #12: 404 Wetlands delineation done by Envirotech of the wetlands area at the Fenwick Shoals site;
- Exhibit #13: Copies of the declarations and covenants for Fenwick Shoals;
- Exhibit #14: Department's request for the court reporter for said hearing.

B. Applicant's Exhibits:

Mr. Kelly Pierson of Envirotech made a detailed presentation at the public hearing on behalf of the Applicant with regard to Keith Properties' pending applications for the proposed structures at Fenwick Shoals. In support thereof, Envirotech entered two additional exhibits into the formal hearing record at the time of this hearing: a set of construction plans detailing the proposed structures (entered into the record as Exhibit #15; and a spiral-bound summary of the Applicant's proposals (modified from the original applications, entered into the record as Exhibit #16). For the sake of brevity, as well as to aid the Secretary in his review, a copy of Exhibit #16 as entered by Envirotech on behalf of the Applicant at the public hearing is physically attached to this Hearing Officer's Report as Attachment "A", and is expressly incorporated into this report as well.

C. Applicant's Presentation/Discussion:

The Applicant's proposals were discussed in detail at the time of the public hearing by Kelly Pierson of Envirotech. As a result, the discussion and subsequent public comments and/or concerns may be broken down into four major categories: (1) compliance of the structures with current Department regulations and policy; (2) navigability issues; (3) minimizing impacts to the wetlands and subaqueous lands; and (4) the need for easement(s) to be procured by the Applicant from the owners of the adjacent property at Fenwick Shoals.

At the hearing, Mr. Pierson stated that the proposed structures are in compliance with the Department's previously approved structures in cases such as this, and therefore meet the criteria contained with DNREC's Wetland regulations and WSLs Docking Facilities Guidance Document. The modified proposed private structure, according to Envirotech, would be less than or equal to the 20% of the water body, which again would make the structure compliant with current DNREC regulations¹. Moreover, the proposed structure has been minimized to the most minimal length to support the mooring of Mr. Keith's vessels, being four boats totaling 72 linear feet, with five feet in between, which totals 90 linear feet. Additionally, the Applicant opted to propose the

¹ See Section 3.03(B)(5) of the State of Delaware, DNREC, Div. of Water Resources *Regulations Gov. the Use of Subaqueous Lands*, as amended 09/02/92, to wit: "...[i]n no case shall a structure extend more than 20% of the width of the waterbody..."

private boatlift construction at an area which would cause the most minimal impact to wetlands. Envirotech further stated that the proposed plans were in compliance with DNREC Wetlands policies and regulations that individuals with the same boat mooring needs and site-specific characteristics could be entitled.

With regard to concerns expressed about the navigability issues in Fenwick Shoals, Envirotech noted that the Applicant had applied for an easement to shift the location of the proposed private structure to an area that would pose less concern. Additionally, the construction design of the private structure had been minimized from its original plan by placing the majority of the structure over uplands, and both the square footage of the structure and the width of the structure (channel-ward) were reduced from what was originally designed in the initial applications submitted to the Department in this matter. The community structure, Envirotech noted, would be solely within the agricultural channel, as opposed to being constructed out on the main channel, so there should be no additional concerns of navigability there, either.

In turning to the minimization of wetlands and subaqueous lands impacts, Envirotech noted that the Applicant had an easement to move the dock to a wider portion of the lagoon, as opposed to the location which was originally proposed in the initial

applications submitted to the Department in this matter. With the change in location of the proposed structure, the majority of the structure would be over uplands, and the revised plans now request only the minimal structure length. Moreover, the design of the community structure had been minimized to reduce effects as to drainage and navigation.

In closing, Envirotech wished to go on the record at the hearing with regard to the fact that all proposed structures are in accordance to the declaration of restrictions, conditions, covenants, agreements, easements, reservations and charges for Fenwick Shoals, as executed on February 27, 2004, specifically, Article III, Sections E and F of said document. Moreover, Mr. Pierson reiterated that the Applicant is in compliance with DNREC regulations and guidelines, and that the impacts to wetlands and subaqueous lands had been significantly reduced and minimized in this project.

As noted previously, at the conclusion of the Applicant's presentation at this hearing, the Department then began a lengthy question and answer session with the Applicant, on the record, as to each and every change that had been made from the original application on file with the Department. The following bullet points are a summary of what the Applicant stated as fact, on the record, in response to the pointed questions asked of them by

Department personnel at the public hearing with regard to their proposed construction plans for these structures at Fenwick Shoals:

- The community structure was modified to a 5 x 12 ft. fixed structure, and the 16 x 16 foot deck as originally proposed had been completely eliminated;
- The water depths in the agricultural ditch were “probably 6 inches”;
- The Applicant was applying for a kayak and/or canoe-type launch, and would not object if the Department conditioned its permit in that manner;
- With regard to plans for storage of said kayaks and/or canoes, the Applicant indicated that they would be taken out of the water and stored in a shed-like structure on site;
- The Applicant indicated that the tidal range was approximately two foot, and that it was understood that the Applicant would have to make sure that the decking elevation would be constructed to ensure that the structure remained usable and not ultimately result in a “floater dock” sitting on the bottom for extended periods of time;

- The motivation for eliminating the gang plank and the floater was (1) obstruction of the ditch; and (2) minimizing the shaving of the channel;
- The draft of the vessels that was provided in the application was 24 inches for each of the Applicant's four vessels, which would mean that the boats would be sitting on the bottom at low tide. The Department stated that knowledge of the water depths needed to be obtained by the Department to determine the feasibility of the dock use, particularly with the application for a boatlift;
- The waterway width where the Applicant proposed to construct the boatlift is 65 feet. The lift itself is 12 feet wide, plus the one-foot cantilever. Thus, the Applicant is right at the aforementioned DNREC regulatory width limit of 20% for such structures as noted above;
- In response to being asked by the Department to elaborate on the "easement agreement" that Mr. Keith entered into with Stiles Adkins, the Applicant indicated that Mr. Keith asked permission from Mr.

Stiles to allow him to construct docks behind the Keith house, and (according to Mr. Keith) Mr. Stiles agreed to the same.

- Envirotech further stated that the reasoning/desire to locate the docks behind the Applicant's house is that the channels are wider in that area versus behind Lots 26-28, so it would be (1) less of an encroachment issue; (2) less of a structure over wetlands; (3) the majority of the structure would be over uplands; and (4) it would again address the issues of minimization of impacts and navigable issues;
- With regard to the portions of land that are delineated as federal 404 wetlands, the Applicant is willing to construct per Department's recommendations of one-inch gapping in the boards;
- The Department indicated that they would need further clarification for the record of whether the Sussex County Zoning Ordinance would consider the proposed wetlands walkway a "disturbance" if falling within the 50-foot buffer zone as established by the

Sussex County government (the Applicant believed that it would not be considered so);

- The Applicant confirmed that the new proposed location for the community structure was moved out closer to the mouth of the ditch where it empties, and that it believed that location to be on their property, adjacent to the Adkins property, but in no way on the Adkins property.

D. Public Comments/Discussion:

Once the Department's questions posed to the Applicant were concluded, the hearing floor was then opened to those members of the public who wished to voice concern for this proposed project. These concerns shall now be addressed below:

1. Ben Waide, President, Keen-Wik Association:

A letter from Mr. Waide dated September 17, 2007 was read into the hearing record by Department personnel at the time of the hearing. This letter indicated that, while it was not believed that the applications made by Keith Properties were in violation of any existing homeowners association agreement(s) between Keen-Wik Association, various homeowners, and/or the Keith brothers themselves, there were still some concerns with certain aspects of the applications, to wit: (1) the homeowners' association, along with homeowners along the lagoon, are very concerned with the

length of the proposed dock, and requests the permitted length to be reduced to 25 feet (which is generally the size of other docks in that community); (2) they also request that the boatlift be a cantilevered forklift-type lift that does not require the use of standalone pilings in the lagoon, which may restrict navigation; (3) they further request that DNREC investigate the feasibility of locating a floating dock in the ditch, and the availability for it to be effectively used by boaters. Additionally, there are concerns that such a floating dock and the use of a shallow ditch by boaters will interfere with the silk fences and weed-eaters that have been installed to restrict silt intrusion into the lagoon. Mr. Waide requested that DNREC fully address these concerns with their investigations and communicate the recommendations for this project prior to any approval of the application.

2. Scott Chandler/Jack Spann:

Both Mr. Chandler and Mr. Spann offered suggestions with regard to the construction of a lift as desired by the Applicant. Mr. Chandler's device would, in essence, simply be four poles submerged with winches at the top with cable coming down and connecting to a structure that is in the water. Along those same lines, Mr. Spann also suggested a design for a cantilever lift that has only two poles in the water that would be against the bulkhead, and do not intrude or protrude out. When not in use,

the “forklift” part would always be below the water and would not present any problems.

3. Andrew Adkins/Adkins Incorporated:

Andrew Adkins, present at the public hearing and representing Adkins Incorporated at that time, offered comments for the record with regard to the property adjacent to the proposed construction sites as set forth by Envirotech in this matter. Mr. Adkins requested that all of the property at issue in this matter be surveyed to prove that the Applicant is entitled to actually reach the water. Mr. Adkins stated for the record that, in most of Adkins Incorporated developments, whenever lagoons are dug, they are not dug directly on their property line against the other person’s property line. Rather, they always strike a line 10-20 feet on their property and then dig the lagoon, which then renders their neighbor *not waterfront*. Furthermore, Sussex County maps online clearly indicate that Adkins Incorporated owns all the property on the far side of the lagoon, all of the property that comes up around it, and even the property in front of the tax ditch. Mr. Adkins further stated that they have not given any express easements, rights, variances, or anything of that nature to anyone in this matter, nor have they sold anything or agreed to anything with anyone involved in this matter. Moreover, even if through a survey someone found a way to access the water, Adkins Incorporated

owns the subaqueous lands in the development, so people would still have to obtain permission from Adkins to put the pilings in the water.

In light of the above, Mr. Adkins stated that, until such time as the parties could clarify through a property survey where and how Mr. Stiles actually gets to the water, it would be his contention that, while Stiles may have a covenant, he still does not access the water.

a. Additional/Miscellaneous Public
Comments/Concerns:

The following are some additional miscellaneous concerns raised verbally at the time of the hearing:

- i. Enforcement of no motorized vessels at the community dock;
- ii. The length of the proposed dock being too long and, in general, disproportionate, given the size of the other docks in the community;
- iii. Navigability of the waters, again, given the proposed size of the dock;
- iv. Safety issues due to boats having to swing around a 90 foot structure while simultaneously yielding for other vessels coming and going in the channel;

- v. Concerns that the low water mark is possibly less than the six inches stated by the Applicant during their presentation;
- vi. Concerns that the width of the lagoon is possibly less than the 60-65 foot width as stated by the Applicant during their presentation;
- vii. Concerns in general that the measurements and property lines as stated by the Applicant should be double-checked to ensure accuracy.

As a result of the fact that numerous questions raised at the hearing could not be answered or verified to the Department's satisfaction, the Hearing Officer made the decision to keep the record open for 30 days subsequent to the date of the hearing, so that there would be time for the Department to not only receive additional comment, but more importantly to fully investigate and verify the scientific data as set forth by the Applicant at the time of the hearing. Furthermore, the Hearing Officer gave allowances for the record to potentially remain open even longer, should additional clarifications and/or documentation be needed by the Department from the Applicant in order to make an informed decision regarding these pending permit applications.

E. Post-Hearing Documentation:

Subsequent to the conclusion of the hearing on March 6, 2008, numerous additional documents were received by this Hearing Officer, including, but certainly not limited to, letters and/or emails from concerned citizens about the impacts of this proposed construction, some of which contained color photographs depicting the levels of the low tide at the site of the proposed construction. One such piece of correspondence was from Edward J. Brady (dated March 14, 2008), and the same is attached hereto as Attachment "B" and is expressly incorporated into this Hearing Officer's Report. Mr. Brady raised many valid concerns with regard to this proposed project that were not addressed by the Applicant at the time of the hearing, including, but not limited to, the following: (1) how the construction equipment would gain access to the work area (i.e., via the wetlands, or the lagoon); (2) how such access would be obtained without damaging wetlands; (3) what requirements (if any) would the Department place on the Applicant to not block off the lagoon during construction (as the lagoon is the only access the residents have to Roy Creek); and (4) whether DNREC would require the Applicant to remove dredged waste material from the area. These concerns were forwarded to Envirotech for review and response by Chuck McNally of DNREC's Division of Water Resources, and Mr. Pierson responded to the same on behalf of the Applicant with his correspondence directed

back to Mr. McNally dated May 9, 2008. Envirotech's response is attached hereto as Attachment "C", and is expressly incorporated into this Hearing Officer's Report as well.

Although Envirotech did respond to concerns raised by citizens such as Mr. Brady (as requested by Mr. McNally of the Department), the fact still remained that the Applicant never produced any surveys and/or documentation which definitively proved that they, in fact, had obtained any kind of easements, variances, or any such agreement(s) from any of the parties involved in this matter which would verify their legal rights to actually reach the water. Mr. McNally again communicated with Mr. Pierson via email on May 21, 2008, reminding him at that time that the Department still needed additional documentation from the Applicant in order to support their pending permit applications in this matter.

On June 25, 2008, the Department once again wrote to Kelly Pierson at Envirotech to specifically set forth what was needed from the Applicant in order to further the pending applications filed by Keith Properties in this matter. In that letter, the following items were listed as outstanding and owing to the Department from the Applicant at that time:

1. The survey (allegedly) being done by Simpler Surveying showing the limitations of the properties owned by Adkins Realty, and a written agreement between Andrew Adkins and Keith Brothers for the use of the common ground and lagoon separating the properties;

2. Revised drawings for the community dock (as set forth by Envirotech at the public hearing) and for mean low water depths in the ditch connecting to the common lagoon shared with Keen-Wik. The Applicant was further advised that these plans should include maintenance dredging of the mouth of the ditch where it connects to the lagoon. Upon receipt of this, the Department stated it would re-notice this part of the application, and proceed with making a final determination with regard to the community dock permit application only;

3. A request to withdraw the personal dock application (as originally proposed at the public hearing) and to re-apply with revised plans for the dock at the newly proposed location of the wider section of the lagoon, as determined by the Department's May 1, 2008 field measurements. The Applicant was further advised that the revised application from Keith Properties, LLC should also address all the concerns presented at the hearing, as

well as the subsequent comments submitted in Mr. Edward Brady's letter of March 18, 2008;

4. That revised application, once received, would then be placed on Public Notice by the Department for 20 days.

The June 25, 2008 letter addressed to Mr. Pierson at Envirotech from Mr. McNally is attached hereto as Attachment "D", and is expressly incorporated into this Hearing Officer's Report at this time.

III. Findings

Envirotech, Inc., on behalf of the Applicant, gave a detailed presentation with regard to Keith Properties LLC's proposals at Fenwick Shoals on March 6, 2008, for the benefit of both the Department and those members of the public in attendance at the time of this public hearing. As a result of the many questions that arose at the hearing about these proposed projects (and as a result of the Department's need to further investigate both the data and the statements made by the Applicant with regard to the same), the Hearing Officer allowed the record to remain open to facilitate the procurement of additional documentation in this matter. There was also, as noted previously, the need for the Applicant to verify to the Department their claims that legal rights had been obtained by Keith Properties, LLC, to actually be able to access the water, by providing DNREC with such documents as deeds,

variances, easements, etc. that had possibly been executed between the parties involved in this matter.

Despite answering some of the questions raised at the hearing by both the Department and concerned citizens, the fact remains that there were several items which were requested from the Applicant during the post-hearing process. These items were specifically set forth by Mr. McNally in his letter to Mr. Pierson dated June 25, 2008 (see Attachment “D”). Unfortunately, the Applicant never responded to the Department’s requests for these items, and as of the date of this Hearing Officer’s Report, the Applicant has failed to produce the same.

IV. Conclusions and Recommendations:

In matters such as this, it is the responsibility of the Applicant to provide any and all requested documentation to the Department to support his or her permit applications.² In the present case, Keith Properties, LLC, applied for WSLs permits to construct both a community structure and a private structure in Fenwick Shoals, located in Fenwick Island, Delaware. The proposed projects, however, were significantly modified from the original plans, and so the Department requested revised drawings to coincide with the design changes discussed at the public hearing. Additionally, the Department had requested that it be provided copies of any and all legal documents which verified that the Applicant actually had legal rights to access the water at the proposed construction sites, due to the fact that verbal testimony at the public hearing on March 6, 2008 indicated that

² See Section 2.03 of the State of Delaware, DNREC, Div. of Water Resources *Regulations Gov. the Use of Subaqueous Lands*, as amended 09/02/92, to wit: “*The burden shall be on the Applicant to satisfy the Department that the requirements of these Regulations have been met...*”

the Applicant did not, in fact, have such rights in hand. To date, none of that information has been provided to the Department by the Applicant.

The Department has, during all phases of this hearing matter, attempted to communicate and work with the Applicant in order to achieve a mutually agreeable resolution to the Applicant's requests for these permits. Nevertheless, at some point the Department must make a decision based on the information contained within the public record, and this Hearing Officer does not believe it is reasonable to extend any additional time to the Applicant to provide the Department the aforementioned information as previously requested.

Based on the public record developed in the course of this hearing, it is my opinion that the record does not warrant, nor has the Applicant reasonably justified, the pending requests for WSLs permit applications for the proposed community and private structure projects at Fenwick Shoals, Fenwick Island, Delaware. For the reasons stated above, I hereby recommend that the requests of the Applicant as listed above be *denied*.

I also recommend that the following findings be made with regard to this matter:

1. Proper notice of the hearing was provided, as required by law.
2. Throughout the course of this procedural matter, the Applicant failed to provide the requested documentation showing the limitations of the properties owned by Adkins Realty, despite the fact that the burden of providing such documentation rests solely on the Applicant in such permit application matters;

3. Throughout the course of this procedural, the Applicant failed to provide requested written agreement(s) between Andrew Adkins and/or Adkins Realty and the Applicant regarding the use of the common ground and lagoon separating the properties, despite the fact that the burden of providing such documentation rests solely on the Applicant in such permit application matters;
4. Throughout the course of this procedural, the Applicant failed to provide revised drawings for the community dock as presented at the public hearing, and for mean low water depths in the ditch connecting to the common lagoon shared with the Keen-Wik Association, despite the fact that the burden of providing such documentation rests solely with the Applicant in such matters;
5. The Department has been unquestionably patient with the Applicant by allowing this matter to remain open for approximately six (6) months subsequent to the date of the public hearing, so that said documentation could be gathered and provided for the Department's review. At this juncture, however, the Department has no recourse other than to declare the Applicant's permit applications as they now sit as ***denied***.

6. Should Keith Properties, LLC, wish to pursue its plans in the future for a community dock and/or a private dock as set forth in the public hearing of March 6, 2008, new application(s) and notice(s) (thus affording the public the opportunity to provide comment to the Department regarding same) would have to be filed by this Applicant for future consideration by the Department. Such application(s) should address the concerns expressed by both the Department and members of the Fenwick Shoals community during the course of this procedural matter.

In addition, I recommend issuing the attached Secretary's Order to effectuate this purpose, and adopting the Hearing Officer's findings and conclusions as expressed hereinabove.

 /s/ Lisa A. Vest .
LISA A. VEST,
Public Hearing Officer

Ahear/KEITH PROPERTIES LLC