



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

89 KINGS HIGHWAY
DOVER, DELAWARE 19901

Secretary's Order No. 2009-W-0024

Office of the
Secretary

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**Re: APPLICATION OF THE DIVISION OF SOIL AND WATER
CONSERVATION FOR A WETLANDS PERMIT AND WATER
CERTIFICATION FOR CHANNEL MAINTENANCE DREDGING NEAR
KITTS HUMMOCK, KENT COUNTY**

Date of Issuance: July 17, 2009

Effective Date: July 17, 2009

Under the authority granted the Secretary of the Department of Natural Resources and Environmental Control (“Department” or “DNREC”), the following findings, reasons and conclusions are entered as an Order of the Secretary. This Order considers the Department’s Division of Soil and Water Conservation’s (“Applicant”) application submitted to the Department’s Division of Water Resources’ (“DWR”) Wetlands and Subaqueous Land Section (“WSLS”) authorizing activities regulated by *The Wetlands Act, 7 Del. C. Chap. 66*, and for a Water Quality Certification required under *7 Del. C. Chap. 60* and *Section 401* of the federal Clean Water Act.¹ The application seeks to conduct maintenance dredging of an existing drainage ditch and sidecast the dredged material into adjacent wetlands and install rip rap (“Project”).

On May 6, 2009, the Department held a public hearing on the application, and the Department’s presiding Hearing Officer, Robert P. Haynes, prepared a Report of Recommendations, dated July 10, 2009 (“Report”) and attached hereto, which reviewed

¹ The Department administers this federal authority under a delegation from the United States Environmental Protection Agency (“EPA”) pursuant to the federal Water Pollution Control Act, cite.

the record developed at that time. Mr. Haynes recommends that the Project be approved subject to such reasonable conditions determined by WSLs as set forth in the permit. I adopt and incorporate the Report to the extent it is consistent with this Order.

Findings and Reasons

I find that the record, as identified by WSLs at the public hearing and supplemented by the Department's investigation, supports issuance of the permit to the Applicant. The record is supported by WSLs' expert review of the considerations required by the applicable Department laws and regulations, as set forth in WSLs' post-hearing memorandum to the presiding hearing officer and attached to the Report along with the proposed permit. The proposed permit I shall adopt is subject to such reasonable permit conditions that will protect the environment from an undue risk of harm.

The Project was the subject of public comments both supporting it and opposing the drainage work, but the opposition was largely based upon the inadequacy of the Project to address Kitts Hummock's overall flooding problem during high water events such as the Mother's Day 2008 storm. The Department is well aware of the overall problem and it is taking steps to provide some relief to the flooding problems within its limited means to undertake such remedial actions. Without question, this Project will provide some relief and represents one step forward to reducing the adverse impact from flooding and it being done based upon the approval of the property owners on which the Project is located. Thus, DSWC determined to move forward with the Project as an interim measure now and obtain the regulatory approvals on this Project while the Department continues to work on the overall problems with the continued cooperation of local residents and elected and other governmental officials.

Conclusion

In sum, I adopt and direct the following as the final order of the Department:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding under its state and delegated federal authority;
2. The Department provided adequate public notice of the application and the public hearing, and held the public hearing in a manner required by the law and its regulations;
3. The Department has considered all timely and relevant public comments and has gathered information based upon the experts' investigation, and their professional judgment and other information in the record, that includes, but is not limited to, the public hearing record, as part of its investigation to determine whether the application should be approved, denied or approved with conditions;
4. The Department approves the requested authority for the Project based upon the reasons and findings in the Report to the extent consistent with this Order and subject to the reasonable permit conditions set forth and supported by WSLs in the draft permit;
5. The Department shall provide notice of the determination made by this Order similar to the legal notices required of the applications and public hearing.

s/Collin P. O'Mara
Collin P. O'Mara
Secretary

HEARING OFFICER'S REPORT

TO: The Honorable Collin P. O'Mara
Secretary, Department of Natural Resources and Environmental Control

FROM: Robert P. Haynes, Esquire
Senior Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: Application of the Division of Soil and Water Conservation for a Wetlands Lands Permit and Water Quality Certification for Maintenance Dredging Project at Kitts Hummock, Kent County

DATE: July 10, 2009

I. BACKGROUND AND PROCEDURAL HISTORY

This Report makes recommendation to the Secretary of the Department of Natural Resources and Environmental Control's ("DNREC" or "Department") on the Department's Division of Soil and Water Conservation's ("DSWC") application for a wetlands permit from the Department's Division of Water Resources, Wetlands and Subaqueous Lands Section ("WSLS"). DSWC seeks to repair an existing drainage ditch¹ in state defined wetlands near Kitts Hummock, Kent County ("Project"). The Project proposes to: 1) restore the existing stone rip rap by installing 40 cubic yards on the existing footprint of rip rap; 2) dredging to a depth of 3' below the mean low water line along the 2,650' long and 3' wide ditch; 3) the removal by power equipment of 100 cubic yards of dredged materials and its placement onto 106,000 square feet in adjacent wetlands along the length of the ditch, which is located west of South Bay Road and south of Kitts Hummock Road. The purpose to the Project is to restore the existing drainage ditch's ability to remove periodic flood waters that adversely impacts the roadways and residential structures during high water events and to increase water circulation in the wetlands in order to enhance their viability as wetlands.

¹ The ditch initially was constructed as a mosquito control project as well as for flood control. If it is a mosquito control activity, then the Project would be exempt from the Department's wetlands permit process, but I make no recommendation on this issue absent a better record to support such a decision. 7 Del. C. §6606.

The Project was the subject of requests for a public hearing and the Department determined that the public interest warranted holding a public hearing, which was duly the subject of public notices and held on May 6, 2009 at the Department's Dover office. The Department developed a record at the public hearing based upon the relevant information in the Department files at that time. WSLs also further developed the record as part of its post-hearing investigation and recommendations based upon its expert technical judgment. WSLs recommend that the Applicant receive a permit that includes certain reasonable conditions to ensure that the Project will not pose an undue risk to the environment.

II. SUMMARY OF THE RECORD

The record contains a verbatim transcript of the public hearing and documents introduced as exhibits at the hearing. In addition, at my request, the Department's experts in WSLs prepared a memorandum to support their recommended position that a permit be issued subject to certain conditions.

At the public hearing, the Department placed into the record DNREC exhibits Nos. 1-8, which included DSWC's application, the written public comments received during the public comment periods, the public legal notices, and certain photographs. Several members of the public in their written and oral comments raised concerns with the possible adverse impact of the deposit of the dredged soil into the adjacent wetlands. Instead, the comments suggested that the dredged material be removed and deposited in an area not within any wetlands. Several members of the public spoke opposing the permit as too inadequate to remedy the overall flooding problems experienced by Kitts Hummock's residents. Many were in attendance at the public hearing to indicate, by raising their hands in response to one speaker's request, their support for the Project. Some speakers spoke about the problems with the periodic flooding, and

the prolonged adverse impact of the flooding that occurred as a result of the Mother's Day storm of 2008.

The Department's experts in WSLs conducted a thorough investigation of the public comments and the application, and provided me with documentation that supports issuance of a permit for the Project; however, the permit would be subject to certain conditions WSLs' experts have determined appropriate to protect the environment. I recommend that the record also include this Report as an exhibit and the documents WSLs' provided or identified to support its recommendation, if the Department determines in a final Order to issue the permit. The record development is consistent with the Secretary's authority to introduce such documents into the record as may be necessary to support a final decision.

III. FINDINGS AND REASONS

The application is subject to the Department's review under *The Wetlands Act, 7 Del. C. Chap. 66*, the Department's *Wetlands Regulations ("Regulations")*, *7 Admin. Code §§ 7500 et seq* and the Department's *Regulations Governing the Control of Water Pollution*, *7 Admin. Code §§7501 et seq*. I find, based upon the record developed by WSLs, that the Project is consistent with the law and the applicable *Regulations* if the permit contains certain reasonable conditions, as recommended in the draft permit prepared by experts in WSLs.

The permit was opposed by members of the public in written and oral comments. One comment expressed a concern with the expenditure of public funds on the Project. Other comments raised concerns with the possible adverse impacts from depositing dredged materials into the adjacent wetlands, particularly whether the deposit would cause unacceptable changes in elevations to increase some flooding problems and harm the wetlands.

The Department's legal considerations are set forth in the governing statutes, and are further interpreted in the Department's *Regulations*. I find that the public comment on the public

source of funds is not a valid concern, although the law requires the Department to consider economic impacts. The Department has considered the impact on continued flooding versus the temporary disruption to the wetlands as a result of the Project. On balance, the Department's expert determined that the economic benefits warrant the Project, and I agree with this assessment that the economic benefits of improved drainage during high water outweighs the limited disruption to the wetlands during the excavation.

The public comments on the proposed location for the excavated materials I find raise a valid environmental concern, but the Department's experts have determined that this concern on balance can be alleviated by WLSL' proposed conditions that will reduce the risk of undue harm to the wetlands. The deposit of the materials will be spread over a large area along the ditch and would follow the Open Water Marsh Management Project methodologies to minimize any adverse impacts, which would be temporary in duration and last one growing season. The vegetation present is *Phragmites australis*, which is invasive and harmful to wetlands. The Project will entail reseeding the disturbed area with native species in an effort to control the invasive species. Moreover, I find that the deposit or sidecast of soil will add natural sediment to a wetland area, but will not result in any long adverse impact. Indeed, the improved circulation as a result of the Project should improve the wetlands during normal water conditions. I recommend that the Project be authorized to be done with power equipment, either by hydraulic or another form of equipment that the Department determines is appropriate. The Project, if completed under such conditions, should not result in any undue risk of environmental harm. WLSL' experts recommend issuance of the permit with conditions that will address these environmental concerns, such as not allowing the work to be performed during bird nesting season that will end July 31. This condition was recommended by the Department's Division of Fish and Wildlife in its comments on the application, which is included in the record.

It should be noted that every wetlands permit will have some environmental impact and that is why a permit is required from the Department to ensure that any disruption of wetlands is performed with no undue risk of environmental harm. The Department is responsible to evaluate the possible impacts from the Project and to make a decision to issue a permit when warranted and with conditions that will protect the environment from any undue risk of harm. I find that the draft permit accomplishes the Department's goal of protecting the environment from any undue risk of harm.

The Department's experts recommend issuance of the permit consistent with the risk of environmental harm after carefully considering the *Regulations* and have proposed many permit conditions that provide the appropriate environment protection for the Project consistent with *Regulation 12*. The permit's conditions and ongoing monitoring by the Department's WSLs will ensure that the Project will not pose any undue risk of environmental harm. Moreover, the Department is the applicant and will ensure that an environmental harm is minimized consistent with the administration of its duty to protect the environment from such harm.

There were extensive written comments in support of the Project in form letters submitted by nearby residents. These comments show a degree of public support for the Project and that is important for the Department's consideration because these people will be the most impacted by the Project.

The public comments also raised an issue with the overall drainage of Kitts Hummock, particularly after the Mother's Day storm in 2008. The overall review is not the subject of the pending permit, which is limited to the one specific location. Nevertheless, the Department held a public meeting after the public hearing held for this Project to gain insight and offer possible remedies to the overall flooding problems experienced at Kitts Hummock, particularly during storms. The public meeting was not in the record but I recommend that the fact that it was held

be included in the record as an action the Department has taken towards understanding and responding to the overall flooding problem faced by residents of Kitts Hummock.

Based upon such consultations and relying on the technical expertise of the Department's personnel, I recommend that the Project should be permitted; however, the permit will include reasonable conditions that will ensure that the environment and the public are adequately protected from harm. The *Regulations* require certain findings and I find that the Project satisfies these findings. The Project will improve the water flows during storms and remove water to reduce the risk of environmental harm from flooding and risk the public health risk from flood waters. The Project is a reasonable and adequately supported solution, albeit part of a much larger solution, based upon reconstructing the existing ditch. The permit will allow maintenance work to commence once the bird nesting season concludes on July 31, 2009. In sum, I agree that the record shows that the Project will improve the drainage problems at Kitts Hummock and reduce the risk of environment problems from flooding during high water events.

IV. RECOMMENDED FINDINGS AND CONCLUSIONS

Based on the record developed, I find and conclude that the record supports approval of the permit for the repair of the ditch, as an interim but important measure, to improve drainage near Kitts Hummock. I recommend the Secretary adopt the following findings and conclusions:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
2. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
3. The Department held a public hearing in a manner required by the law and regulations;

4. The Department considered all timely and relevant public comments in making its determination, and followed the applicable laws and regulations in making its decision;

5. The Department shall issue DSWC a permit for the Project, as set forth in detail in the WSLs documents and the application; and

6. The Department shall publish a notice of this Order on its web site and shall notify each person the Department determines may be affected by this Order based upon their interest in this decision as determined by the Department.

s/Robert P. Haynes
Robert P. Haynes, Esquire
Senior Hearing Officer