STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
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DOVER, DELAWARE 19901

OFFICE OF THE
SECRETARY

PHONE: (302) 739-9000
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Secretary's Order No. 2012-W-0015

Re: APPLICATION OF THE VILLAS OF BETHANY WEST FOR SUBAQUEOUS LANDS ACT AND WETLANDS ACT AUTHORITY TO BUILD A COMMUNITY BOAT DOCK FACILITY AND ACCESS WALKWAY IN BETHANY BEACH, SUSSEX COUNTY

Date of Issuance: May 30, 2012
Effective Date: May 30, 2012

Procedural History

This Order of the Secretary of the Department of Natural Resources and Environmental Control (Department) is entered after a February 9, 2012 public hearing held on the Villas of Bethany West's (Applicant) September 3, 2011 permit application. Applicant is a homeowners association that seeks on behalf of its members Wetlands Act[1] authority to construct a wooden walkway over state regulated wetlands, and Subaqueous Lands Act[2] authority to build a community boat dock facility on the Bethany Loop Canal (Canal) in Bethany Beach, Sussex County.

The Department's presiding hearing officer prepared the attached hearing officer's report (Report), which recommends issuance of the authority consistent with the permits drafted by the Department's experts in the Division of Water, Wetlands and Subaqueous Lands Section (WSLS). The Report is hereby adopted as further support for this decision to the extent it is consistent with this Order.

[1] *7 Del C. Chap 66* and the Department's Wetlands Regulations at *7 DE Admin. 7502*
[2] *7 Del. C. Chap. 72* (SLA) and the Department's SLA Regulations, *7 DE Admin 7504.*

Findings and Reasons

The Department finds that the record supports the issuance to the Applicant of the Wetlands Act authority to construct the wooden walkway and the Subaqueous Lands Act authority to construct a boat dock, subject to WSLS' recommended permit conditions. The authority is based upon Applicant's alternative plan as better for the environment and public safety than the original plan. The Applicant's proposed alternative plan addresses many of the public comments in opposition to the original plan because it reduces the channelward encroachment of the facility by reducing the length gangway, which will provide greater space in the Canal for others to use for boating. The Department finds the alternative plan is better for the environment and should be approved as consistent with the Wetlands Act and SLA and the Department's regulations promulgated under these laws.

The Department's experts in WSLS recommend after careful evaluation that the proposed dock's location is appropriate if limited to the Applicant's members use with no mooring and no use by motorized vessels. Applicant's 128 townhouses members have used a prior boat dock for many years until 2010 when it was removed. The Applicant's members have been hand carrying their boats across the wetlands to gain access to the Canal and this foot traffic has harmed the wetlands. The walkway will control this foot traffic and protect the wetlands more than the wider foot traffic than currently occurs. Applicant voluntarily removed the boat dock after a Department's investigation revealed that it had not been approved. The proposed new boat dock will be smaller than the old dock.

The Applicant also has agreed to remove a fallen tree on the shoreline opposite the proposed boat dock to increase navigable space and the Department agrees that such action is

appropriate. The Applicant also will enforce the permit conditions and install suitable signs to provide notice of the rules on restricted usage of the boat dock.

In sum, the approval based upon the alternative plan will allow the community water access for launching and retrieving small non-motorized vessels in a reasonable manner that will cause less environmental damage to the wetlands than if the community continues to walk across the wetlands in an uncontrolled manner in order to use the Canal. The proposed location on the Canal and its limited use by small mostly non-motorized vessels supports the SLA permit.

Finally, the Department's approval recognizes that Applicant had used a boat dock for many years without any public complaints about this use. The Applicant voluntarily removed the old boat dock structure without any Department enforcement action and has cooperated with the Department in the design and conditions that will result in the least environmental harm. The Department finds that the new dock will be far better for the environment and public safety than the old dock and the wetlands walkway in particular will reduce the harm to the wetlands from uncontrolled foot traffic to gain access to the Canal.

Conclusions

The Department, based upon the record and the findings and reasons set forth above, concludes as follows:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding based on the record;

2. The record supports granting Applicant the SLA and Wetlands Act authority to construct the walkway and bock dock facility based upon the alternative plan and subject a permit restrictions prepared by WSLS, including but not limited to restriction the boat docking facility's use to non-motorized vessels;

3. The Department provided adequate public notice of the application and the public hearing, as required by the law and the Department regulations;

4. The Department held a public hearing and has considered all timely and relevant public comments in making its determination;

5. The Department shall publish this Order on its public web site and provide such other service and notice as required by law and Department regulation or otherwise determines necessary and appropriate.

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 VILLAS OF BETHANY WEST FOR SUBAQUEOUS LANDS ACT AND WETLANDS ACT AUTHORITY TO BUILD A COMMUNITY BOAT LAUNCH AND ACCESS WALKWAY IN BETHANY BEACH , SUSSEX COUNTY

DATE: April 30, 2012

I. PROCEDURAL HISTORY

This Report provides the Secretary of the Department of Natural Resources and Environmental Control (Department) with recommendations on the Villas of Bethany West's (Applicant) September 3, 2010 permit application for authority to construct a walkway over wetlands and an associated community dock to be located on the Bethany Loop Canal (Canal) in the Town of Bethany Beach, Sussex County.

The Department's Division of Water, Wetlands and Subaqueous Lands Section (WSLS) provided public notice of the application. In response to the public notice, the Department received multiple requests for a public hearing. The Department granted the requests and provided public notice of the public hearing. I presided over the public hearing held February 9, 2012 at the Department's Indian River Marina offices, near Bethany Beach, Sussex County. The public comment period closed at the conclusion of the hearing. I requested the technical assistance of experts in WSLS, who provided in a March 13, 2012 memorandum attached hereto a detailed response to the public comments and a draft permit should the Secretary decide to issue a permit. I consider the record, as reviewed below, complete for a final decision.

II. SUMMARY OF THE RECORD[1]

The Department's record contains the following: 1) the verbatim 45 page transcript of the public hearing; 2) the documents identified and introduced at the hearing; and 3) this Report, including the information provided by WSLS attached hereto. The following is a summary of the record.

At the public hearing, WSLS' representatives, Virgil Holmes, Program Manager I, and Scott Figurski, Environmental Scientist, provided the following documents[2] from the Department files: Applicant's permit application received July 14, 2011 (DNREC Ex. 1); the January 18, 2012 public notice of the application (DNREC Ex. 2); the January 18, 2012 public notice of the public hearing (DNREC Ex. 3); the public comments received from the notice (DNREC Ex. 4); Department's SLA and Wetland Act regulations (DNREC Ex 5); comments from the public hearing notice (DNREC Ex 6); the memo assigning the presiding hearing officer (DNREC Ex. 7); the memo scheduling a court reporter (DNREC Ex. 8); and additional written public comments (DNREC Ex. 9).

The Applicant's representatives at the public hearing were Wes Allen, director of operations and senior environmental scientist for Environtech Environmental Consulting, Inc., and Allen Garnaas, a board member of Applicant. Mr. Allen made a Power Point presentation, which also was included in the record as Villas of Bethany Villas Ex. 1. In addition, Applicant

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[1] The public hearing record is one part of the Department's record, which includes the post-hearing investigation to determine the accuracy of information provided at the public hearing, including the application.

[2] The Department provides documents at the hearing solely to assist the public in making public comments. The Department may rely on other information identified in this Report or the Secretary's Order to support the Department's final decision.

introduced an alternate plan for the proposed dock and walkway in an attempt to satisfy some public concerns. Villas of Bethany West Ex. 2.

The Applicant's presentation provided a detailed overview of the plan based upon the alternative, which would construct a 4'x 60' wetlands walkway, a 8.5' foot gangplank extending from the shoreline 6.5' to allow access to a 6'x 15' floating dock. The presentation indicated that the dock would allow 51.5' from the dock to the opposing side of the Canal at high water. At low water the distance would be 48.5'. The wetlands walkway was proposed to control foot traffic from trampling the vegetation in the wetlands. The Applicant indicated that it would agree to limit the usage to non-motorized vessels and install signs to reflect the rules on usage. The presentation also included an overview of the nearby structures on subaqueous lands along the Canal.

Mr. Garnaas' presentation supported the application because a prior dock had been present since at least 1984. The Applicant's members considered a boat dock to be a recreational amenity to the community. He explained the importance of water access to the community. He indicated that the community would post a "no mooring" sign on the dock, and limit the dock's use to non-motorized boats, such as kayaks and canoes, owned by the community members and that no trailers would be allowed.

Richard Miller spoke of his concern with the application, but indicated that his concerns had been satisfied by informal discussions with the Department staff and the Applicant. His concern was the possible use of the dock by motorized vessels.

Pat Swed spoke of her concern with the use of the dock by motorized vessels and how she seeks a "no wake" sign installed to protect the banks of the canal from erosion from motorized vessels.

Deborah Colby spoke in support of the application as a member of the Village of Bethany West community, which she described as an environmentally conscious group of people as you can imagine. She explained the walkway would protect the wetlands from harm by a protected path to the water access rather than trampling shoreline grasses to reach the water for use.

Tom Rom spoke as an owner in the community and in support of the application.

Josias Cromwell spoke as a member of the community and in support of the application.

Eric Uff spoke as a property owner of the adjacent property on the other side of the same canal off of Bethany Loop Canal. He asked a question about the distances and was told by the Applicant that the old dock was 10 feet in length and that the new structure would be 25 feet. He was concerned with the foot traffic near the shoreline, particularly near a drainage ditch along the canal. He claimed that this foot traffic has caused harm to the natural edge of the canal and caused the canal to fill in to where it is now only a couple of inches deep when it had been 2 feet deep four years ago. He sought a fence or something to keep the foot traffic away from the shoreline.

Ms. Cromwell spoke to dispute that the drainage ditch was used by foot traffic.

Parker Hennion spoke about the use of the footpath as possibly occurring since the dock was removed in the past year.

Mr. Miller asked how many units were in the community and Applicant informed him that there were 128. He also asked about lease payments for use of the public subaqueous lands and the Department's Mr. Figurski answered that the lands were not public insofar as they were owned by the Town of Bethany. He also noted that the Department does not charge lease fees for non-commercial use of public subaqueous lands, and the proposed use would not be considered a commercial use, which would include business operations of a marina.

Phyllis Chapman spoke on the access to the proposed dock by non-community members and the Applicant indicated that access is controlled by registering the vessels with the Applicant. She was concerned about the increased boat usage of the Bethany Loop canal as a result of the dock.

Ms. Colby spoke again to voice her support for the application and its use as a resource for all members of the community and not a single dock serving only one property.

The WSLS prepared a memorandum that comprehensively responded to all the public comments and prepared a draft permit with conditions consistent with minimizing the environmental impact. WSLS' experts recommended approval based upon Applicant's alternative proposal and Applicant's voluntary offer of certain restrictions on use and community oversight of the permit conditions.

III. RECOMMENDED FINDINGS AND DISCUSSION

Applicant is the homeowners association for the Villas of Bethany West community, which has 32 buildings containing 128 townhouses in the Town of Bethany Beach, Sussex County. The community is located along the Canal, which is an artificially created waterway owned by the Town of Bethany Beach, which means its subaqueous lands are private and not public as defined by the SLA. Bethany Beach has granted rights to use the subaqueous lands to any who have the approval of the Department as required under the SLA.

The Canal is shallow and runs from the Assawoman Canal eastward towards the center of Bethany Beach, where there is a loop. The Canal's depth in its center at the proposed location is no more than 4'. The Canal is mostly used by non-motorized vessels to the east of the proposed location.

Applicant seeks permit authority under Subaqueous Lands Act[3] (SLA) and the Wetlands Act.[4] The SLA authority is needed for the proposed construction of two pilings for a floating boat dock on private subaqueous lands. The Wetlands Act authority is needed for the construction of the walkway over state owned wetlands.

The boat dock and walkway would be used exclusively by the Applicant's members. Applicant would require all boats using the boat dock to be registered with the Applicant. The boats would be stored at an existing nearby boat storage area. The boats would be carried by hand to and from the proposed dock and no trailers would be allowed except hand dollies. The proposed use would be limited to non-motorized vessels, such as canoes and kayaks, that would be hand carried to the dock and Applicant would install sufficient signs to notify the users of the dock on the restrictions for its use.

The Applicant previously used a boat dock structure since at least 1984. Applicant voluntarily removed the boat dock in 2010 at the request of the Department, which discovered the structure during an investigation. The structure was removed because the Department had no record that it had authorized any boat dock.

Applicant originally proposed to install a 4' wide by 60' long wooden walkway over the wetlands supported by 12 pilings, a 4' wide by 10' long wooden gangway from the walkway to the floating dock which would have been supported by 2 pilings in the subaqueous lands, and a 6' wide by 13' long floating dock. At the public hearing, Applicant presented an alternative plan in response to the public comments. This alternative would construct a 4' wide by 60' long

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[3] *7 Del. C. Chap. 72.*
[4] *7 Del. C. Chap. 66.*

wooden walkway supported by 8 pilings over the wetlands, a 4' wide by 8.5' gangway to the floating dock supported by 2 pilings in the subaqueous lands, and a 6' wide by 15' long floating dock. The mean low water at the dock area is between 24" to 30," which is sufficient for the proposed use by non-motorized vessels, but would not be suitable for most motorized vessels.

The Department investigated the dock's proposed location in the Canal to determine if there were suitable distances for dock. The application's original plan would extend 14' into the Canal, and the width of the Canal at the proposed location was 61' at mean low water, which provided 47' to the other side of the Canal. The alternative plan would extend the dock 12' into the Canal, which would allow 49' at mean low water to the other side of the Canal for use by other vessels. The presence of the fallen tree does not alter this calculation of the distance, but Applicant has agreed to remove the tree to further remove this from the calculations.

The Department's is concerned with whether the dock would allow the Canal to be used by others in a safe manner, particularly for boating, and the environmental concerns with building too large a structure. Section 4.8 of the SLA Regulations provides the requirements for all structures. The Department experts in WSLS determined that the alternative plan represents a dock and walkway consistent with the SLA and Wetlands Regulations. The impact on the wetlands is reduced by fewer pilings in the alternative. The subaqueous lands impact would be reduced by shortening the dock's extension into the Canal by 2'. I agree that the alternative is the better plan and that there is no other suitable option available given the lack of access to the private canal that is located next to the boat storage area. The Applicant has considerable frontage along the Canal, but the proposed location and other locations along the Canal would be essentially the same from the Department's assessment of the environmental impact.

I find that the WSLS' recommended permit is consistent with the applicable law and Regulations. Section 4.9 of the SLA Regulations provides general siting considerations for all boat docking facilities. This Section indicates that the Department is to evaluate based upon "**site specific conditions including, but not limited to, location or navigation channel, proximity of existing structures, aquatic habitats, and width and orientation of the waterbody**." The Department's experts considered Section 4.9's site specific factors in recommending approval of a permit. In addition, the Department has weighed and balanced the thirteen considerations set forth in Section 4.9. These considerations include the width of the waterbody and its limited use by motorized vessels.

As noted above, the Applicant will improve the Canal's use for other boats by removing a fallen tree that is located on the opposite bank of the Canal from the proposed dock location. This offer will improve the safety of the Canal by all boaters, and the Department will accept this offer and include it as a permit condition. The Applicant also has agreed to enforce the restrictions on use in its rules that apply to the community members and to provide suitable notice of the restrictions. This allows Applicant to act as an enforcement agent to police the use of the boat dock to ensure that the rules and regulations and permit conditions are followed.

The Department's experts also haves found that the distance considerations should not prevent the proposed dock, particularly when there is sufficient distance from the dock to the other side of the Canal. The Department's experts have considered the distance and the general nature of the Canal in recommending a permit based upon the alternative, and subject to reasonable conditions, including restricting the usage to non-motorized vessels. The site specific recommendation is based upon the Canal as a shallow water body, which supports limited use by motorized vessels. Even if the Canal was deeper, the Department considers that the restrictions

to only non-motorized vessels are justified to avoid undue harm to the environment from use of many motorized vessels in such a confined area based upon the standard distances for a boat docking facility. .

The Department's experts have recommended issuance of permit authority based upon Applicant's alternative dock in Villas of Bethany West Ex. 2. I adopt this recommendation, which is based upon the thorough technical response memorandum attached here that summarizes the public comments and applies the law and regulations to support the recommended permit. I agree that the proposed dock will reduce the harm to the wetlands that now may occur as Applicant's members walk their vessels through the wetlands to reach the Canal. I also agree that a single dock structure located to serve the entire community is better than multiple docking structures along the length of the Applicant's property that abuts the Loop Canal. The WSLS' recommended permit conditions also will protect the environment and satisfy some of the concerns raised by the public comments.

IV. CONCLUSIONS

Based on the record set forth in this Report, I recommend that the Department approve the following conclusions:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding based on the record, which provides adequate reasonable support for approval of the SLA authority;

2. The Department provided adequate public notice of the application and the public hearing as required by the law and the Department regulations;

3. The Department held a public hearing in a manner required by the law and its regulations and has considered all timely and relevant public comments in making its determination;

4. The Department grants the SLA permit authority for the construction of the dock in private subaqueous lands, and the Wetllands Act permit authority for constructing the walkway based upon the alternative design in the record in Villas of Bethany West Ex. 2; and that

5. The Department shall publish this Order on its public web site and provide such other service and notice as required by law and Department regulation or otherwise determines necessary and appropriate.

Robert P. Haynes, Esquire
Senior Hearing Officer

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WETLANDS & SUBAQUEOUS
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Technical Response Memorandum

To: Robert Haynes, Hearing Officer

Through: Kathy Stiller, Director, Division of Water RDH for 3-13-12
3/13/12 Laura Herr, Section Manager, Wetlands and Subaqueous Lands Section
3/12/12 Virgil Holmes, Program Manager I, Wetlands and Subaqueous Lands Section

From: Scott Figurski, Environmental Scientist, Wetlands and Subaqueous Lands Section

Date: March 13, 2012

Subject: Villas of Bethany West Wetlands and Subaqueous Lands Permit Application

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INTRODUCTION

The Wetlands and Subaqueous Lands Section (WSLS), Division of Water, Department of Natural Resources and Environmental Control received an application from Envirotech Environmental Consulting, Inc. Submitted on behalf of the Villas of Bethany West to construct a community wetland walkway, gangway and floating dock in the Bethany Loop Canal at the northeast end of Salt Pond Circle, Bethany Beach, Sussex County, Delaware. The proposed project is subject to the requirements of the Wetlands Act (7 Del. C. Chapter 66) and Wetlands Regulations and the Subaqueous Lands Act (7 Del C., Chapter 72) and Regulations Governing the Use of Subaqueous Lands.

This Technical Response Memorandum (TRM) presents the Wetlands and Subaqueous Lands Section's (WSLS) findings regarding the above-referenced permit application.

The TRM also addresses comments presented at the public hearing held on February 9, 2012. The project was placed on 20 day public notice on August 10, 2011. During the public notice period the WSLS received 16 letters of objection to the project. Most of the letters were a copy of an original letter with different signatures. The objections stated that the width of the Loop Canal at the project site was inaccurately portrayed on the plans contained in the application; the comments further stated that the structure projects too far into the Loop Canal and would impede navigation, especially if vessels were berthed at the structure. The comments also expressed concerns about the impact of the wetland walkway on the State-regulated wetlands. The letters requested that the WSLS either deny the project or hold a public hearing.

The public hearing was held on February 9, 2012. Prior to and during the hearing, the WSLS received 27 letters in favor of the project and all were from the residents of the Villas of Bethany West. The letters were a copy of an original with different signatures. The letters stated that an alternate plan which was presented to the WSLS on February 6, 2012 allows the structure to meet State criteria and would not impede navigation. The letters also stated that the proposed structure is one structure that would serve the entire community; the by-laws of the community would be amended to state that no berthing or mooring of vessels would take place and re-planting would be done to restore and enhance the wetlands after construction.

The applicant, the Villas of Bethany West, originally proposed to install a 4 foot wide by 60 foot long community wetland walkway, a 4 foot wide by 10 foot long gangway and a 6 foot wide by 15 foot long floating dock for the purpose of launching kayaks, canoes and hand-carried vessels. During the public hearing Envirotech Environmental Consulting, Inc. presented the alternative application and plans which propose to install a 4 foot wide by 60 foot long community wetland walkway, a 4 foot wide by 8.5 foot long gangway and a 6 foot wide by 15 foot long floating dock for the purpose of launching kayaks, canoes and hand-carried vessels. The alternative application reduces the length of the gangway by 1.5 feet, addresses the fact that no berthing or mooring will take place at the structure and proposes re-planting of impacted areas after construction. It was also stated during the presentation that signage would be installed stating the rules for proper use of the structures and that the by-laws of the community would be amended to state that no berthing or mooring of vessels would take place.

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 satisfy the Department that the requirements of these Regulations have been met; and if the granting of the permits, lease or approval will result in loss to the public of a substantial resource, that the loss has been offset or mitigated. The public comments received prior to, and at the hearing, as well as the Department's regulatory evaluation, are addressed according to the pertinent sections of the Regulations as follows.

Section 4.0 Criteria of Permits, Leases and Letters of Authorization
Section 4.0 of the Regulations requires that the application be evaluated based on the consideration of specific performance specifications, standards and other criteria, including Section 4.6 - Public Use Impacts, Section 4.7 - Environmental Considerations, Section 4.8 Requirements for all Structures and Section 4.9 – Boat Docking Facilities. It also states that an application may be denied if the activity could cause harm to the environment, either singly or in combination with other activities or existing conditions, which cannot be mitigated sufficiently.

Section 4.6 Public Use Impacts
Under this section the Department must consider, among other things, the potential effect on the public and the extent to which the public would benefit or suffer detriment from the project. Additionally, the Department must consider the degree to which the applicant's primary purpose could be realized by alternatives that would minimize or avoid impacts. The public use impacts most relevant to the proposed project are discussed in Sections 4.6.3 and 4.6.5, below.

4.6.3 Navigation. The proposed gangway and dock will be placed in the Bethany Loop Canal. The underwater land is owned by the Town of Bethany Beach; therefore, this area is classified as private subaqueous lands. The Town of Bethany Beach has submitted a letter to the WSLS which grants permission for the installation of structures over or in the Town's property as long as they meet State criteria. Under Section 4.9 Boat Docking Facilities, paragraph 4.9.2.5 states: *In no case shall a structure extend more than 20 percent of the width of the waterbody.* In tidal artificial lagoon systems 20 percent is measured from the mean high water mark of one side of the waterbody to the mean high water mark of the other. The Loop Canal is 64 feet wide at the proposed construction location, 20 percent of 64 feet equals 12.8 feet. The applicant has agreed to allow the structure to encroach channelward no farther than 12.5 feet which means the structure will meet the 20 percent requirement. The distance from the channelward edge of the structure to the mean low water line on the opposite side of the Loop Canal will be 48.5 feet. The Loop Canal narrows to the west of the project location and at one point is 36.5 feet wide at mean low water. The letters of objection stated that the width of the Loop Canal at the proposed construction site is 45 feet, but this is due to a fallen tree. The applicant has agreed to remove the tree. The 64 foot width shown on the application plans was verified by the WSLS to be accurate.

The Bethany Loop Canal is privately owned and it is open for public use. The primary users are property owners adjacent to the Loop Canal who use the waterway to gain access to the Assawoman Canal and Salt Pond. The Loop Canal is already being accessed by residents of the Villas of Bethany West who launch canoes and kayaks directly from the wetland shoreline. Therefore, the proposed project will not result in any increase in boat traffic. As a result, and considering that compliance with the 20% rule has been achieved as described above, it is not anticipated that there will be any adverse effects on navigation in the area.

4.6.5 Avoidance. There is a narrow, private lagoon located adjacent to the Villas of Bethany West property. The WSLS and the applicant's consultant explored the option of placing a smaller launch facility in the lagoon to avoid impacts to the adjacent wetlands from the proposed walkway. However, the underwater land of the lagoon is owned by Canal Conservation, Inc.

Upon speaking to a representative of the corporation, it was found that they would not grant permission for a launch facility to be placed in the lagoon, thus precluding this possible alternative.

However, without the proposed launching structure, residents must carry their vessels through State-regulated wetlands and launch them from the wetland shoreline. This activity results in damage to the wetlands, including erosion and sediment loss at the launch area. The proposed walkway and dock would reduce these impacts.

4.6.6 Minimization

The Villas of Bethany West is a community which consists of 32 buildings which contain 128 townhouses. They are applying for one structure to serve the community, thus minimizing the potential impact on the adjacent wetlands from multiple structures.

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. The proposed structures are expected to have minimal adverse impacts to water quality. The facility will primarily be used for the launch and retrieval of non-motorized vessels which will minimize the leaking of contaminants, such as, gas and oil into the waterway. Treated lumber does leach contaminants, mostly during the first few months after installation. The proposed gangway will be made out of aluminum and will not leach contaminants.

4.7.1.3 Any harm to aquatic or tidal vegetation, benthic organisms or other flora and fauna and their habitats. 4.7.1.4 Any loss of aquatic habitat. The residents currently access the water by launching and retrieving vessels from the edge of the Loop Canal. This activity is causing erosion on the bank and loss of tidal vegetation. The proposed gangway will be situated above the edge of the Loop Canal and will allow continued growth of the tidal vegetation. The proposed dock is a floating dock. The dock will cause some shading, but should allow for the growth of aquatic vegetation and the continued use of the area by benthic organisms.

4.7.1.2 Any effect on shellfishing, finfishing, or other recreational activities, and existing or designated water uses. The primary use of the Loop Canal is for adjacent property owners to gain access to the Assawoman Canal and Salt Pond. A secondary use would be recreational boating and paddling for exercise and aesthetic enjoyment. The proposed structure would allow the residents of the Villas of Bethany West to use the Loop Canal for these reasons and would not impede others from gaining access to, or using, the Loop Canal. The structure would not increase vessel traffic due to the fact that the residents of the Villas of Bethany West already utilize the Loop Canal.

Section 4.7.5 Other Considerations

4.7.5.2 The degree to which the project incorporates sound engineering principles and appropriate materials of construction. The proposed structure is a gangway and a floating dock which both have the ability to move with the tide. This is the most feasible design for a dock structure used for the purpose of launching and retrieving small vessels. The gangway does not require pilings for support and the floating dock requires only two pilings in order to be held in place. A fixed pier and dock would require additional pilings.

4.7.5.3 The degree to which the proposed project fits in with the surrounding structures, facilities and uses of the subaqueous lands and uplands. There are multiple docks located both east and west of the project location. All of the docks observed were fixed and the approximate average size is 5 feet wide by 20 feet long. The use of the docks varies from berthing motorized vessels to launching and retrieving small vessels.

Section 4.8 Requirements for all Structures

4.8.4 Structures shall not interfere with navigation, public, or other rights. This structure meets the requirements stated in the regulations for proper navigation. The structure does not interfere with the public or other rights in regards to the use of the adjacent properties or the Loop Canal.

REGULATORY REVIEW - WETLANDS

The following review evaluates the proposed project with respect to the requirements of the Wetlands Act (7 Del. C. Chapter 66), Wetlands Regulations (Regulations) adopted in accordance with the statute. The Regulations provide the criteria for evaluating projects that are proposed to be constructed in State-regulated wetlands. The burden is on the applicant to satisfy the Department that the requirements of these Regulations have been met; and if the granting of the permit will result in loss to the public of a substantial resource, that the loss has been offset or mitigated. The public comments received prior to, and at the hearing, as well as the Department's regulatory evaluation, are addressed according to the pertinent sections of the Regulations as follows.

Section 8.0 Procedures for Applications

8.5.8.1 The reasons that structures cannot feasibly be located on adjacent property of the owner other than wetlands. A review of the State-regulated map index, map number 24 revealed that the applicant does not own property that would allow the residents to gain access to the Loop Canal without crossing State-regulated wetlands.

8.5.8.3 Alternatives to the proposed action which would reduce or avoid environmental damage. There is a privately owned lagoon adjacent to the applicant's property which is owned by the Canal Conservation, Inc. Placing a launch structure in the lagoon would avoid the need to install a wetland walkway in State-regulated wetlands. The WSLS and the applicant's consultant explored the option of placing a launch facility in the lagoon. Canal Conservation, Inc. did not grant permission to install the facility.

The residents currently traverse the wetland surface in order to gain access to the Loop Canal resulting in damage to wetland vegetation, as well as, erosion and sediment loss at the launch area.

8.5.8.4 All measures to be taken during and after the completion of the proposed project to reduce detrimental effects. The structure has been designed with gaps between the decking boards to allow sunlight penetration to the marsh grasses below. The applicant's consultant has proposed the use of appropriate erosion and sediment control measures during construction. The consultant has also proposed re-planting all areas disturbed during construction.

12.0 <u>Standards for Permits</u>

12.2 Environmental Effect. Environmental effect shall include consideration of the effect of the site preparation and the proposed activity on the following wetland values:

12.2.1.1 Production Value: carrying organic matter to adjacent estuaries and coastal waters which serve as breeding areas for certain animal species (especially fish and shellfish). Although the proposed walkway will impact wetlands it is not expected to have a measurable impact on the transport of organic matter.

12.2.2.5 Presence of plants or animals known to be rare generally, or unique to the particular location. A review of the site by staff from the DNREC Division of Fish and Wildlife's Natural Heritage and Endangered Species Program determined that there is no rare or endangered plant or animal species at the project location.

<u>CONCLUSION</u>

The WSLS finds that the activity described in the application for Wetlands and Subaqueous Lands Permits by the Villas of Bethany West, including installation of a community wetland walkway, gangway and floating dock, complies with the Regulations administered by the WSLS. The applicant has applied for one structure to serve the entire community which the WSLS views as a positive aspect of the project. The community has addressed the public's concerns pertaining to vessel berthing and mooring by agreeing to provide signage and amending their bylaws to state that no berthing or mooring is permitted. Additionally, the structure dimensions are consistent with the applicable regulations and guidance documents and have been reduced to minimize encroachment into navigable waters. Mitigation has been proposed in the form of re-planting impacted areas after construction.

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