



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

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Secretary's Order No. 2013-W-0012

Re: APPLICATION OF MARK AND SHERRY HUGHES FOR AUTHORITY UNDER THE SUBAQUEOUS LANDS ACT AND THE WETLANDS ACT TO BUILD A WALKWAY AND BOAT DOCK AT 4 COVE LANE, LONG NECK, SUSSEX COUNTY

Date of Issuance: April 24, 2013

Effective Date: April 24, 2013

Background

This Order considers Mark and Sherri Hughes' (Applicants) application submitted to the Division of Water, Wetlands and Subaqueous Lands Section (WSLS). Applicants seek approval to construct a walkway over wetlands and a private boat dock for their single family residence, which is in the High View subdivision at 4 Cove Lane, Long Neck, Sussex County. The Department's regulatory authority is under the Subaqueous Lands Act, *7 Del. C. Chap. 72* (SLA), and the Department's SLA Regulations, *7 DE Admin. 7504*, and the Wetlands Act, *7 Del. C. Chap. 66* and the Department's Wetlands Regulations, *7 DE Admin 7502*.

The Department received meritorious requests for a public hearing, which was held on May 10, 2012. WSLS prepared for the presiding hearing officer its recommendation, which was to deny the application. The presiding hearing officer granted Applicants the opportunity to reply to WSLS analysis, and Applicants provided a response. The presiding hearing officer in the attached Report also recommended denial of the application.

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Findings and Reasons

The Department adopts the Report to the extent it is consistent with this Order and determines that the proposed walkway and boat dock should not be built because of the environmental harm that such construction and use would cause to Steels Cove in Indian River Bay.

The Report relies on WSLS' review of the application. WSLS' analysis determined that the proposed pier would not reach open water. The analysis has determined that boat launching and mooring facilities were nearby that Applicants could use. WSLS also indicated the harm to the environment from the construction and use as a boat dock. The Department finds that WSLS analysis is correct.

Applicants contested WSLS' determination that the proposed pier would not reach open water. In response to Applicants' criticisms, WSLS conducted a field inspection that confirmed the prior determination that the proposed pier would not reach open water. The pier, as proposed, would not be long enough to reach open water to allow for its intended use as a boat dock. The application was flawed from the beginning. WSLS' analysis finds that no remedy to the fundamental problem would be acceptable given the environmental harm from the proposed pier, which is a harm that would increase if the pier was longer or dredging occurred.

This decision to deny application is consistent with the Department's decision in the permit issued to allow the High View Homeowners Association (Association) to construct the community pier near the Applicants' property. The Department's condition required the Association to amend its legal documents to prevent any private boat docks in the subdivision. The Association owns the common areas in the High View subdivision and the common areas

include the waterfront land. The Association did not change the legal documents and now supports the Applicants' effort to construct a private boat dock.

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 that supports denying Applicants the requested SLA and WA authority to construct a walkway and boat dock;
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 and has considered all timely and relevant public comments in making its determination; 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.



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 MARK AND SHERRY HUGHES FOR AUTHORITY UNDER
THE SUBAQUEOUS LANDS ACT AND WETLANDS ACT TO BUILD A BOAT
DOCK AND WALKWAY AT 4 COVE LANE, LONG NECK , SUSSEX COUNTY

DATE: April 17, 2013

I. PROCEDURAL HISTORY

This Report for the Secretary of the Department of Natural Resources and Environmental Control (Department) reviews a record on an application submitted to the Department's Division of Water, Wetlands and Subaqueous Lands Section (WSLS) by Mark and Sherry Hughes (Applicants). Applicants seek to construct a walkway over wetlands and a dock for their personal use at their house at 4 Cove Lane, Long Neck, Sussex County.

The Department published public notice of the application on November 23, 2011 DNREC Ex. 2. The Department received written comments in support and in opposition and a request for a public hearing. DNREC Ex. 7. WSLS published public notice of a public hearing on April 11, 2012. DNREC Ex. 3. The Department held the public hearing on May 10, 2012 at the Department's offices at 901 Pilottown Road, Lewes, Sussex County. The public comment period closed at the conclusion of the hearing. I requested the technical assistance of experts in WSLS. WSLS' expert, Jim Chaconas, prepared the attached technical response memorandum (TRM), which concludes that the Department should not grant the requested authority. I granted the Applicants the opportunity to reply to the TRM, and Applicants provided a reply (Hughes Ex 1). WSLS conducted an on-site investigation on December 4, 2012 and provided the attached

December 11, 2012 email that did not change the TRM. I consider the record, as reviewed below, complete for a final decision.

II. SUMMARY OF THE RECORD

The Department's record contains the following: 1) the verbatim transcript of the public hearing; 2) the documents identified and introduced at the hearing; and 3) this Report, including the post-hearing documents referenced in this Report, including WSLs' TRMs and Applicant's response to the first TRM. The following is a summary of the record.

At the public hearing, WSLs' representative, Jim Chaconas, Environmental Scientist, provided the following documents¹ from the Department files: Applicant's permit application received (Ex. 1); the public notice of the application (Ex. 2); the public notices of the public hearing (Ex. 3); the correspondence sent to the Applicants (Ex. 4); Subaqueous Lands Act (SLA) and Department SLA regulations (Ex 5); the Wetlands Act and Department Wetlands regulations (Ex 6); the comments received in response to the public notice; (Ex. 7); the WSLs memo assigning a hearing officer (Ex 8); and the WSLs memo scheduling a court reporter (Ex. 9).

The Applicants attended the hearing along with their counsel, Michael Morton, Esquire. Mr. Morton spoke on the applicable wetlands maps WE320/11 and SL319/11 and that the proposed project has attempted to minimize the overall footprint. In addition, he indicated that it was designed to be environmentally friendly based upon the proposed use of 'Flow Thru Decking' that is designed to increase the light that reaches the vegetation. He also mentioned the mitigation that would occur with the plantings under the proposed pier and the proposed

¹ 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.

eradication of Phragmites as an invasive non-native species and planting of native species. He also indicated that the person who did the fieldwork was subpoenaed and would indicate that the application complied with the Department regulations and guidance documents. He introduced Applicants Exhibit 1 as the brochure on the decking and Applicants Exhibit 2 as the High View Homeowners Association (HVHOA) bylaw amendment.

The first member of the public to speak was Vincent O'Sullivan, who indicated he was president of the HVHOA. He said that 85% of the members of HVHOA supported the application and an amendment to the bylaws that indicates approval of the proposed dock. Mr. O'Sullivan responded to questions asked by Mr. Chaconas concerning the HVHOA and the developer of High View subdivision, Bryce Lingo. Finally, Mr. O' Sullivan indicated that the prior president signed off on the bylaw amendment but did not sign it because he did not want his other board member to know.

Mark Capriotti spoke in support and indicated that his mom has owned property at 2 Cove Lane for over 12 years. His mom was told by Mr. Lingo that there was no problem with putting docks in for the waterfront properties. He indicated that the proposed dock would not harm the environment, but would improve the environment by removing the invasive vegetation.

Jonathan Staehle spoke as the contractor who would build the structure and described the decking that would be used, which would be made from polypropylene.

Mr. Hughes spoke and indicated he has owned the property at 4 Cove Lane for 7.5 years and purchased another waterfront lot next to it and one behind it for more privacy.

The WSLS prepared two technical response memorandums (TRM). The first was provided to Applicants. In response, Applicants requested the opportunity to respond, which was allowed and Applicant's response disputed the finding that the pier would be in wetlands and

criticized the lack of any field survey. WSLS in response conducted a field survey and prepared a second TRM that confirmed first TRM's conclusions. WSLS recommended no approval based upon the adverse impact to the environment, and that the structure as proposed would not reach water that would support the boating purpose for the dock.

III. DISCUSSION OF FINDINGS AND REASONS

Applicants seek authority under Subaqueous Lands Act² (SLA) for the construction in public subaqueous lands and the use of a term of years for a 131'x 6' pier, two 12' x 3' finger piers, 58 pilings, and a 36'x 6' boat dock. Applicants also seek authority under the Wetlands Act (WA)³ to build and use a 36' walkway over state wetlands in order to reach the proposed pier. Applicants propose to use the pier for mooring their pontoon boat, a flat bottom jon boat, and a personal watercraft. The Applicants claim that water depth at the proposed boat dock is 1.5' a mean low water.

I find, based upon WSLS' comprehensive and thorough investigation, that pier would be in wetlands and could not be used without destroying the wetlands. The record shows that Applicants are the owners of a property improved by a single family residence at 4 Cove Lane, Long Neck, Sussex County, but the property line does not extend to the water, which is Steels Cove located on the south shore of Long Neck. Instead, HVHOA owns the property along Applicant's property as the waterfront property is part of the subdivision's common areas, which were granted to HVHOA. While the record shows support for Applicants from the HVHOA, it also has opposition from HVHOA members. Based upon the use of land for a considerable

² 7 Del. C. Chap. 72.

³ 7 Del. C. Chap. 66.

period of time if the public subaqueous land lease is issued, I do not recommend any authority absent a grant of permission that is better than in the current record.

WSLS also indicated that HVHOA obtained its permit to construct the community pier, which was constructed near Applicants' property. The issuance of the original authority to construct was conditioned upon HVHO not allowing any private docks in the subdivision. I find that this condition supports denial because the community pier was built based upon the HVHOA accepting this condition. The HVHOA should have known that no private docks should be built in the subdivision consistent with the original grant of the authority for the community pier.

WSLS' investigation of the application and its recommended denial also is based upon the harm to the environment, as determined by the analysis of the WSLs Regulations. WSLs's recommendation also is based upon the flaws in the application, which WSLs determined from its mapping and site visit would result in the proposed dock not reaching any navigable water. Instead, the plans have the proposed dock being built in wetlands, which would preclude any boating use absent destruction of the wetlands by dredging. Second, WSLA finds that the approval of the community pier and the nearby location of boat launching and marina facilities supports that Applicants have available alternatives to a private boat dock and walkway that would damage the environment. WSLs determined that the proposed use of the pier for boating was unlikely even if dredging were to occur because of the low water conditions present in Steels Cove.

The present application represents a case where the Applicants were not encouraged that an application would be successful, but instead were informed by WSLs in several informal meetings that obtaining the authority would be very difficult. Nevertheless, Applicants submitted

an application that WSLs determined was not factually correct and would, if approved, destroy wetlands and otherwise was inconsistent with the WSLs and WLA regulations. I agree with WSLs' analysis. The application also is flawed by Applicant's not owning the land that will be used or otherwise having a legally recognizable interest to use the land for the duration of a subaqueous lands lease. In addition, the proposed use as a boat dock cannot occur without undue damage to the wetlands and there are suitable nearby boat dock and boat launching facilities to use as an alternative to a private dock.

IV. CONCLUSIONS

I recommend that the Department deny the application and provide a draft order consistent with this recommendation.

Robert P. Haynes, Esquire
Senior Hearing Officer



WETLANDS & SUBAQUEOUS
LANDS SECTION

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Technical Response Memorandum

To: Robert Haynes, Hearing Officer

Through: Kathy Stiller *MS 8/23/12*
Virgil R. Holmes *VH 8/23/12*

From: Jim Chaconas *JC 8/23/12*



Date: August 23, 2012

Subject: Permit application submitted by Mark and Sherry Hughes for a wetland walkway, pier and a dock in Steel's Cove at 4 Cove View, Highview Subdivision, Long Neck, Sussex County, Delaware

Introduction

In response to your request, this Technical Response Memorandum (TRM) presents the Wetlands and Subaqueous Lands Section's (WSLS) investigation regarding the above-referenced permit application. The TRM also summarizes comments presented at the public hearing held on May 10, 2012. The WSLS, Division of Water, Department of Natural Resources and Environmental Control (Department) has received an application from Mark and Sherry Hughes to construct a walkway across State-regulated wetlands and a pier, a dock with a boat lift and finger piers that would be built over State-regulated wetlands and Subaqueous Lands in and along lands adjacent to Steel's Cove at 4 Cove View, Highview Subdivision, Long Neck, Sussex County, Delaware. An aerial view showing the site location is attached (See Attachment 1). The structures would cross wetlands owned by the Highview Homeowners Association, Inc. (HOA) to gain access to Steel's Cove. Because the wetlands are owned by the HOA, the applicant is not a true riparian landowner and has limited riparian rights as recognized under common law. As stated in the permit application, the purpose of constructing the structures is to provide mooring of the applicants' boats in Steel's Coves.

The proposed 3 foot by 38 foot walkway would cross vegetated tidal marsh wetlands. The walkway would connect to a 4 foot by 131 foot pier that would be built over a narrow unvegetated gut flanked on each side by low marsh wetlands. An L shaped dock and two finger piers and a boat lift attached to it would be constructed at the end of the pier. As proposed, one

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of the finger piers would end near the terminus of the gut. Most of the dock, the other finger pier and the boat lift would be constructed over vegetated wetlands (See Attachment 2). All of the area where the proposed construction would take place is mapped as marsh wetlands (M) or tidal mudflats (in some cases vegetated) (T) on the State of Delaware Wetlands Map No. DNR057 (Shown on Attachment 3). For purposes of this application the sections of the structures over vegetated wetlands are subject to jurisdiction under the Wetlands Act of 1973 (7 Del. C., Chapter 66) and the sections of structure over the unvegetated gut and unvegetated tidal mudflat are subject to the requirements of the Subaqueous Lands Act (7 Del C., Chapter 72).

The plan submitted by the applicants (see Attachment 4) shows the proposed dock, boat lift and finger piers extending beyond vegetated State regulated wetlands into open water within Steel's Cove. DNREC's review of aerial photography mapping tools including Arcview-ArcMap and Google Earth (see Attachment 2) shows that the plan submitted by the applicant does not accurately represent the current conditions and the extent of wetlands in Steel's Cove. Based on DNREC's measurements, the area of wetlands and mudflat is more extensive and the proposed structure would need to extend much further into Steel's Cove before the proposed dock, boat lift and finger pier would extend beyond State regulated wetlands. The aerial photography shown on Attachment 2 is available on Arcview, ArcMap and shows conditions in 2007. The extent of the wetlands shown on this attachment can also be confirmed on Google Earth from their aerial photography dated July, 2010.

The plan submitted by the applicants indicates that the water depth in Steel's Cove ranges from 1 foot to 3.8 feet (see Attachment 4). The water depth ranges do not indicate the tide stage (e.g. mean low water, mean high water) that these water depth ranges represent. On-site observations by DNREC staff made recently and at the time of the application and permitting of the community crabbing pier indicate that the water depths are much shallower. In addition a survey conducted by LandDesign, Inc. in February, 1996 shows the mean sea level elevations measured in the area of the proposed structures are no more than 1 foot and less than a foot over the majority of the area at this location. According to a spokesperson at LandDesign these elevations were surveyed using a fixed reference and the 1927 vertical datum. This very shallow water depth was an important factor in the Department deciding not to allow boats to moor at the community pier permitted in 1996 .

The plan submitted by the applicant indicates an "existing channel" is located in close proximity to the proposed structure (see Attachment 4). The characterization of an "existing channel" improperly implies that this area is somehow maintained for navigation or provides access to a channel maintained for navigation. This area has no discernible channel that would allow reliable navigation at low tide and is in fact separated from the more navigable portion of Steel's Cove by a sandy shoal that is clearly visible on aerial photography (Attachment 1). The nearest channel that provides reliable navigation is located more than 800 feet (past the sandbar) from the proposed structure.

The section of Steel's Cove in front of the HOA is comprised of a very shallow embayment, largely separated from the rest of the Cove (which adjoins Indian River Bay), by a sand bar located 800 plus feet from the lots fronting on the Cove. The area within this embayment consists of vegetated marsh wetlands and very shallow water and or mudflat. The State-regulated wetlands at this location are undisturbed and comprise part of an extensive salt marsh system on this part of Steel's Cove. The dominant marsh vegetation is indicative of a high quality marsh and consists primarily of smooth cord grass (*Spartina alterniflora*) and to a lesser extent salt hay (*Spartina patens*).

The HOA currently maintains a large pier connected to a crabbing pier for the use of the residents of the Highview community. The HOA pier was permitted in 1996 by the original developer, Bryce Lingo, and at that time, the WSLs indicated its concerns for use of boats and the placement of individual wetland walkways, docks or piers in the community by placing restrictions in the Subaqueous Lands Lease issued to Bryce Lingo for the pier. The restrictions precluded docking of boats at the pier and also stated that no future walkways, docks, or piers shall be constructed in this community (then named Burrwood). Further, in a letter to the WSLs from the agent of the developer, the developer agreed to place into the Burrwood Covenants and Conditions language preventing any of the lots in the development from having individual walkways through the wetlands to the water and that the community pier would not be used for mooring motorized vessels. The current HOA bylaws allow for construction of piers, docks or walkways across wetlands provided authorizations are obtained from DNREC and from the HOA Board of Directors. DNREC was not involved in the preparation of these bylaws and does not recognize the presence of these bylaws as having altered in any way the original agreement that prevented any of the lots in the development from having individual walkways through the wetlands to the water.

The application, submitted by Mark and Sherry Hughes, was received by the WSLs on October 18, 2011. Following receipt of additional information requested by the Department, the application was deemed complete on November 18, 2011 and placed on public notice from November 23 through December 12, 2011. Six responses to the notice were received. Three stated that there were no objections or were otherwise favorable toward the project. One of the commenters in favor of the project stated that it would be an asset to the community. The other three responses expressed concerns or objected to the project. The concerns and reasons for objecting to the project included the following: the structure would be built on community owned property; it would be very large; the Cove is very shallow and dredging might be required; and the issuance of a permit would lead to the construction of more structures. A public hearing was also requested by one of the persons objecting to the project. The public comments also indicated that dredging would possibly be sought for access to the proposed private dock and that the motorized vessels would disturb the current environment of Steel's Cove.

The public hearing was initially scheduled for April 26, 2012 and then, at the applicant's request, rescheduled for May 10, 2012. The hearing was attended by the applicant, his attorney, consultant and contractor. Also in attendance were the President of the HOA and another officer of the HOA. The applicant's attorney gave a short presentation stating that in addition to minimizing the size of the structure, the applicant would use Flow Thru Decking for the structures surface. This type of decking is designed to be more environmentally friendly by allowing more light penetration to the ground and vegetation it's built over. Additionally, he stated that the applicant would have wetland vegetation planted under the pier section where no wetland vegetation is currently growing. He also stated that as part of the project, Phragmites would be eradicated and replaced with native plants.

The applicant's attorney also stated that the HOA bylaws allowing the HOA to approve docks and walkways had been approved. The HOA President confirmed this and stated he would provide a copy of the document signing off on the bylaws. This document was provided to the WSLs shortly after the hearing. Additionally, the other HOA officer spoke in favor of the project and stated that it is his understanding that anybody on the waterfront should be able to construct a pier. The applicant's contractor also provided some background as to how the structure would be built.

There were no persons at the hearing who opposed the project, but the written comments in opposition were included in the record. One additional comment was received during the period the project was on notice advertising the public hearing. That comment expressed concerns about the shallowness of the Cove, stating that there is not enough water to navigate a vessel at this location. Additionally, concern was expressed that the water is too shallow to accommodate a barge for constructing the piers and dock and that track equipment would have to be used causing significant damage to the wetlands in the Cove.

Department Review

The Department's concerns focus largely on the cumulative environmental impacts related to marsh fragmentation, habitat displacement and degradation, and degradation of water quality from the multiple structures, as discussed in more detail below and particularly in Sections 12.2.1 and 12.2.2.

The cumulative impacts for this application were assessed with the following goals in mind:

- Limiting structures in Delaware's marshes in such a way that large portions of unbroken marsh will remain undisturbed in order to preserve important habitat;

- Reducing the overall impacts of projects by anticipating the potential impacts expected if additional marsh front property owners were to apply for individual wetland walkways and docks.

Cumulatively, these structures would have a negative, long term, environmental impact on the remaining wetlands in this area. Moreover, the WSLs is concerned about the potential undesirable precedent that would be set for the building of other lengthy walkway structures across other unbroken expanses of tidal marsh wherever they are located.

In developing these findings, the WSLs has placed a premium on protecting the remaining unbroken expanses of marsh that are still devoid of structures. During the past decade the Department has seen a marked increase in the number of wetland walkway permit applications and inquiries due to increasing development pressure. Consequently, the Department's concerns about the negative cumulative environmental impacts of placing a growing number of wetland walkways across Delaware's marshes have been heightened. With this in mind, the Department has reviewed the cumulative impacts of these structures with increased scrutiny.

The public comments in opposition also indicate that some in the Highland community also want to preserve the natural environment of Steel's Cove from use by boats or the construction of piers and docks.

The Department completed a review of the permit application in accordance with the current laws, regulations and guidance.

State Wetlands Act Requirements

Tidal wetlands such as those adjacent to Steel's Cove are protected under The Wetlands Act of 1973 (Title 7 Del. Code, Chapter 66). The purpose of the Wetlands Act as stated in Section 6602 is as follows:

“It is declared that much of the wetlands of this State have been lost or despoiled by unregulated dredging, dumping, filling and like activities and that the remaining wetlands of this State are in jeopardy of being lost or despoiled by these and other activities; that such loss or despoliation will adversely affect, if not entirely eliminate, the value of such wetlands as sources of nutrients to finfish, crustacea and shellfish of significant economic value; that such loss or despoliation will destroy such wetlands as habitats for plants and animals of significant economic and ecological value and will eliminate or substantially reduce marine commerce, recreation and aesthetic enjoyment; that such loss or despoliation will, in most cases, disturb the natural ability of wetlands to reduce flood damage and adversely affect the public health and welfare; that such loss or despoliation will substantially reduce the capacity of such wetlands to absorb silt and will thus result

in the increased silting of channels and harbor areas to the detriment of free navigation. It is hereby determined that the coastal areas of Delaware are the most critical areas for the present and future quality of life in the State and that the preservation of the coastal wetlands is crucial to the protection of the natural environment of these coastal areas. Therefore, it is declared to be the public policy of this State to preserve and protect the productive public and private wetlands and to prevent their despoliation and destruction consistent with the historic right of private ownership of lands.”

The State of Delaware adopted the Wetlands Regulations pursuant to the authority granted by Section 6607 of the Wetlands Act. The Regulations require, in Section 12 - “Standards for Permits”, that the Secretary consider the overall effect of the proposed activity including the environmental effect (Section 12.2). The following is an evaluation of the overall effects of the proposed activity in accordance with Section 12 of the Wetlands Regulations.

12.2.1 Value of Tidal Ebb and Flow

Salt marshes have a high vegetative productivity, which acts as an energy source to many marine organisms. The proposed structure will shade approximately 332 square feet of tidal wetlands. Vegetation under wetland walkways weakens and is less productive, or may die, because of the shading effects from the walkway. In a 1984 U.S. Army Corps of Engineers review ⁽¹⁾ of a report entitled “The Effects of Docks on Salt Marsh Vegetation” (Kearney, et. al., 1983), ⁽²⁾ the Corps noted that walkways over wetlands reduce plant height and density of plants growing under the walkway. The report evaluated impacts on vegetation from structures ranging from 2 feet to 5 feet in height over the marsh. The height of the walkway proposed in the application will be 2.5 feet above the marsh surface. Reduced marsh plant production results in less organic matter produced to support zooplankton and other primary consumers and decomposers and, consequently, reduces overall food chain productivity. Because the biological productivity of marsh plants forms the base of the marine food chain, even relatively minor adverse impacts to this vegetation are magnified in importance as you move up the food chain. It should also be noted that observations of other wetland walkways by the WSLs have found that shading from the walkways has removed or reduced the amount of marsh vegetation growing under and adjacent to the walkways, consequently reducing marsh productivity and causing soil erosion in the marsh.

It should be noted that the applicants are proposing to use a more environmentally friendly decking material for this project that allows greater light penetration through the decking, thus reducing shading impacts to the vegetation beneath the decking. Recent research conducted by the Skidaway Institute of Oceanography has shown that the use of these alternative products does not significantly negate the effects of shading ⁽³⁾ Consequently, while the applicants’ efforts to reduce the impacts of the proposed structure on the marsh are often recommended, recent research shows the products do not perform as well as expected.

12.2.2 Habitat Value

The salt marsh provides shelter and food to many different insect, bird, fish and benthic species. The salt marsh acts as a nursery for many juvenile fish and shellfish. The vegetation produced in the salt marsh is important to the entire estuary as an energy source. In addition to the impact on production levels, discussed above, the proposed project will impact the marsh in the following ways:

1. The increased human presence on the marsh will disrupt the normal breeding and feeding cycles of many bird and animal species. A recent study entitled “The Effect of Long Piers on Birds Using Tidal Wetlands in Worcester County, Maryland” (Alison E. Banning, 2007)⁽⁴⁾ found that populations of obligate marsh birds (i.e. those bird species which are most dependent on marshes because they nest there exclusively and feed off aquatic insects and crustaceans) are reduced when long piers or walkways are present. Obligate marsh birds investigated as part of this study include American Bittern, Clapper Rail, Seaside Sparrow, Swamp Sparrow, Virginia Rail and Willet. The study recommended that the presence of long piers in marshes should be reduced and that, because of the sensitivity of obligate marsh birds to long piers or walkways, “large, contiguous marsh areas” (such as the marsh at this location) should be preserved. Additionally, the study noted that between 1998 and 2004, 32,400 acres of salt marshes, nationwide, were lost because of conversion to open water and human development.
2. The dissection of the marsh by the walkway will result in a habitat that is far less conducive to species of birds and animals dependent on large expanses of unbroken marsh. Therefore, the adverse impact of the wetland walkway and the pier on the marsh was considered to be much greater than just the footprint of the structure.
3. The introduction of a walkway across the marsh will increase the ease of access to the marsh by a number of predators, including fox, raccoon and domestic cats, which prey on nesting populations of birds and small mammal species.
4. The construction of a walkway crossing the marsh would effectively segment the marsh into smaller components weakening the integrity of the existing marsh. The disturbance of the marsh could encourage common reed (*Phragmites australis*) to grow into the unaffected *Spartina* marsh, displacing the existing robust *Spartina* community. Common reed is considered a noxious weed with little food value to wildlife. Common reed is a concern because it has displaced *Spartina*-dominated salt marshes such as this one, in many locations in Delaware.

12.3 Aesthetic Effect

The salt marsh in Steel's Cove contains high quality vegetation comprised of high quality plant species including smooth cord grass (*Spartina alterniflora*), and salt hay (*Spartina patens*). The proposed project would bisect an uninterrupted swath of over 1,000 feet in length of tidal wetlands in front of the Highview Subdivision. This marsh supports a variety of animals, including birds, benthic organisms and fish. Impacts to this marsh on wetland vegetation and animal breeding and foraging, would reduce the aesthetic value of the wetland because the potential to observe wildlife in the natural wetland environment at this site would be compromised.

Because of their aesthetic appeal, the salt marshes still remaining in Delaware play a significant role in attracting the millions of tourists who visit the Delaware eastern shore each year. The attractiveness of the unspoiled marshes also contributes to the desirability of the Inland Bays area for economic development. Preservation of the existing marsh system will help provide the high quality, visually pleasing natural landscape that attracts tourists to the Inland Bays area. Additionally, research conducted by the National Park Service has shown that preservation of large open space areas next to housing developments increases the values of homes in those developments. Preserving this large portion of wetlands along Steel's Cove will allow other residents in the area to enjoy the view of natural, undisturbed landscapes.

The impacts on fisheries and water quality will also have a direct impact on the citizens of Delaware. The protection of the marsh will provide cleaner water and healthier fisheries. This is important to the citizens of the State in many ways - aesthetically and economically.

12.4 Impact of Supporting Facilities

The construction of the walkway could result in the construction or addition of numerous appurtenances. For example, electric lights (permanent and portable) would adversely affect certain wildlife.

12.5 Effects on Neighboring Land Uses

The placement of a walkway in this portion of the marsh could provide impetus for other landowners along this part of Steel's Cove to construct walkways and other water access structures in the wetlands adjacent to the Cove.

The proposed structure will set an undesirable precedent, by permitting a long, private wetland walkway and pier across an unbroken expanse of tidal marsh. The consequence of permitting this walkway, piers, dock and boat lift could provide the impetus for the construction of additional lengthy structures in the marsh by individual lot owners in the Highview Subdivision.

The construction of additional walkways in this part of the marsh along Steel's Cove could have very undesirable cumulative impacts. Cumulative impacts are defined as "the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges or activities. Although the impact of a particular discharge or activity may be a minor change in itself, the cumulative effect may impair the water resources and interfere with the productivity, water quality, or public use of existing aquatic ecosystems."

12.6 Comprehensive Plans

The importance of protecting Delaware's Tidal Wetlands is emphasized in the Comprehensive Conservation and Management Plan for Delaware's Tidal Wetlands (CCMP)⁽⁵⁾. In evaluating this permit application and reaching a decision, the WSLS considered the CCMP's objective to "better protect, conserve, restore or enhance tidal wetlands values and functions, done in a manner which maximizes their environmental roles and is responsive to human needs."

The proposed structure is located in the Indian River watershed. This section of the Indian River watershed is listed in the State of Delaware's Surface Water Quality Standards⁽⁶⁾ as waters of exceptional recreational or ecological significance (ERES). Section 11.5 of the State's Water Quality Standards, the Criteria for ERES Waters, states:

"Designated ERES waters shall be accorded a level of protection and monitoring in excess of that provided most other waters of the State. These waters are recognized as special natural assets of the State, and must be protected and enhanced for the benefit of present and future generations of Delawareans."

Due to the ERES waters designation for this section of the Indian River watershed, the WSLS has striven to limit new construction in the waterway and adjacent wetlands. Permitting the proposed structure would not meet the intent of the State's Surface Water Quality Standards with regard to the high level of protection ERES waters should be accorded. Because Steel's Cove is in an area which has been left relatively untouched by pier and dock construction, it is imperative that these subaqueous lands be afforded even greater protection from development.

12.7 Economic Impact

The economic impacts, both short and long term can be broken out as follows:

1. The proposed project will provide work for a local marine contractor.
2. Revenues generated for government by these structures will likely be negligible.

3. The value of the wetland with respect to food chain supply and habitat value will be diminished as previously discussed. However, this impact is not easily quantified and a dollar amount is difficult to calculate.
4. The walkway, piers and dock will likely increase the value of the home for which it is built.
5. The value to the public of wetlands areas in the vicinity of the project could be diminished by the reduction in value for bird watching and other educational outdoor activities.
6. Wetlands are natural filters that process and eliminate pollutants generated by urban and agricultural sources. The walkway will partially displace and decrease the natural function of the wetlands to improve water quality. This loss of marsh would lead to a reduction in water quality. The economic cost of this impact is difficult to quantify.
7. Wetlands are important habitats for fish nurseries and feeding areas. The walkway will have adverse effects on these functions. The economic cost of this impact is also difficult to quantify.

12.8 Project Design that Eliminates or Substantially Lessens Damage to the Wetlands

The stated purpose for the wetlands walkway in the application is to access piers and a dock for the mooring of the applicants' boats in Steel's Cove. The piers and dock would provide berthing for recreational watercraft. The applicants could avoid all impacts to regulated wetlands by launching their boats and jet ski at Massey's Landing boat ramp which is less than one mile from the Highview neighborhood. The use of the public facility would eliminate negative environmental impacts from constructing and maintaining a walkway, piers and dock at the proposed project site and substantially reduce negative cumulative impacts to the marsh and Cove.

State Subaqueous Lands Act Requirements

Structures located in public subaqueous lands are subject to the Subaqueous Lands Act (Title 7, Del. Code, Chapter 72) and the Regulations Governing the Use of Subaqueous Lands (Subaqueous Regulations). Section 3 of the Subaqueous Regulations requires that the application be evaluated based on its impacts on public use and environmental considerations.

Public Use Impacts

Sections of the proposed piers, dock and finger piers are to be constructed in public subaqueous lands which are lands owned by the state of Delaware and held in public trust for its citizens. The pier and dock would extend into Steel's Cove. Additionally, the project would encroach on a large expanse (approximately 1200 feet) of uninterrupted shoreline. The proposed project requests that 460 square feet of public subaqueous lands be put into private use for the pier and dock structures, as well as additional preemptive use of public lands for the berthing areas, including a boat lift.

The use of public subaqueous lands for the construction of the pier and dock has aesthetic impacts similar to those described in Section 12.3 in the Wetlands Review, in that the construction of the structure may impact wildlife breeding and foraging habitat and diminish the diversity and beauty of the area.

The construction of the piers and dock will have the same commercial impacts, as described in Section 12.7 of the Wetlands Review. Briefly, the project would provide work for a marine contractor. The structures will likely increase the applicant's property value. Conversely, work will be provided for local merchants if the applicants launch their boats at a nearby launch facility. This alternative would also eliminate the anticipated impacts to water quality, food chain production, habitat value, and aesthetic value.

The applicants could alternatively avoid constructing on public lands by launching their boats and jet ski at Massey's Landing boat ramp. The use of the public facility would eliminate negative environmental impacts from constructing and maintaining a walkway, piers, dock and boat lift at the proposed project site and substantially reduce negative cumulative impacts to the marsh and Cove.

Environmental Impacts

The section of Steel's Cove where the proposed structures would be built is very shallow. A survey provided to the WSLs by the surveying firm, LandDesign, Inc, shows the mean sea level elevations measured in the area of the proposed structures are 1 foot or less over the majority of the area. Additionally, all of Steel's Cove between where the structures would be placed and the sand bar 600 feet away is mapped as tidal marsh wetland or tidal mudflat indicating any open waters in this area are very shallow. Staff from the WSLs have accompanied the applicants' consultant in a john-boat through this section of Steel's Cove during a high tide event for the purpose of conducting measurements near the project area. Water depths measured in the area approximately within 200 feet from the marsh wetlands, where the structure will be located were approximately 1 foot. It should also be noted that during the course of navigating across the Cove, the boat bottomed out several times.

Because of the shallowness of this section of Steel's Cove, virtually any type of motor boat activity will involve grinding boat propellers into or very close to the Cove bottom seriously disrupting any aquatic life in the path of the boat. Sediments would also be resuspended, further degrading water quality.

Comments received by the WSLs from the Department's Natural Heritage Program concerning this project, identified Steel's Cove as a likely prime settlement area for larval and juvenile summer flounder (*Paralichthys dentatus*). Larval and juvenile summer flounder are very dependent on shallow water habitats such as exist at Steel's Cove. Moreover, they are most abundant from January 1 through August 30, which includes the time of year when most boating activity would occur. The introduction of motor boat mooring facilities into the Cove would introduce greater motor boat activity into this part of Steel's Cove. Consequently, the grinding of motor boat propellers into or close to the Cove bottom, in combination with resuspending sediments into the Cove's waters would result in deleterious impacts on the nursery habitat of this fisheries resource.

This section of Steel's Cove is not under consideration for dredging by the Department. Any dredging activity by using propeller wash from boats is prohibited by the Subaqueous Lands Regulations.

Cumulative Impacts Analysis

Section 3.01 of the Subaqueous Lands Regulations, Evaluation Considerations, 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." Cumulative impact assessment has been an important component of this permit decision analysis. Cumulative impact is defined as "the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges or activities. Although the impact of a particular discharge or activity may be a minor change in itself, the cumulative effect may impair the water resources and interfere with the productivity, water quality, or public use of existing aquatic ecosystems."

The introduction of the proposed wetland walkway, piers, and dock would have undesirable environmental impact on the adjacent tidal marsh. Approval of these structures would likely result in the construction of several more walkways/piers and docks across this uninterrupted expanse of marsh. As stated above, Steel's Cove is a very shallow embayment and the negative environmental impacts of navigating motorized boats through the shallow water would be magnified by additional users. In addition, allowing the construction of these structures in an otherwise uninterrupted tidal marsh would be inconsistent with previous WSLs and Environmental Appeals Board decisions.

Importantly, water access is available to the applicant at the nearby Massey's Landing boat ramp. The use of a public facility would eliminate negative environmental impacts from constructing and maintaining a walkway, piers, dock and boat lift at the proposed project site and eliminate the associated impacts to the marsh and Cove. Additionally, secondary environmental impacts from boating activity that cumulatively degrade the aquatic environment such as boat wake erosion, fuel in the water, and other boating related impacts would be avoided.

Cumulative impacts were also discussed previously in Section 12.5 of the Wetlands review.

Project Alternatives

The Subaqueous Regulations require the Department to consider "the extent to which the applicant's primary objectives and purposes can be realized without the use of such lands" [public subaqueous lands]. The stated purpose for the project is to get access across tidal wetlands to piers and a dock that would provide berthing for the applicant's recreational watercraft. The applicant could avoid all impacts to regulated wetlands and subaqueous lands from the proposed walkway, piers and dock by using a local launch facility such as Massey's Landing Boat Ramp. Project alternatives were also discussed previously in Section 12.8 of the Wetlands review and in the Public Use Impacts Section, above.

The "WSLS Docking Facilities Guidance Document" (As amended July, 2005) (Guidance Document) provides guidance to assist WSLS staff with making consistent decisions pertaining to the permitting of structures over State-regulated wetlands and subaqueous lands, such as walkways, piers and docks. The applicant's proposed wetland walkway meets the dimension criteria identified in the guidance document. However, the Guidance Document stresses in its opening paragraphs that it "is not intended to expressly prohibit larger structures, **or indicate definite approval of structures which meet the guidance criteria**, but rather, to indicate which applications can be processed more quickly with a higher likelihood of approval, and which will require additional justification or more difficulty in gaining approval. In addition to a review of structure size, the Guidance Document also requires that the wetland type and condition be assessed as part of the overall permit application review. In this case, it is the location of the walkway, the condition of the wetlands, and the lack of water depth to provide reliable navigation which causes the greatest concern. The wetland to be crossed is a high quality *Spartina* wetland and is part of a dwindling habitat type - large uninterrupted expanses of high quality tidal wetlands. The WSLS is committed to preserving large unspoiled expanses of wetlands such as those located on, and to the west of this site. Consequently, construction of the wetland walkway, piers, dock and boat lift at this location, over a large undeveloped expanse of wetlands, has been judged to create an unacceptable level of impact.

Summary of Conclusions

The applicants has applied for Wetlands and Subaqueous Lands authorizations to construct a wetland walkway, pier, dock, finger piers and a boat lift to moor boats in a very shallow embayment containing undeveloped tidal marsh wetlands. As was the case in 1996, when the Department issued a permit for a community crabbing pier in this cove, the Department finds that the Cove is very shallow and not conducive to boat traffic. Consequently, the introduction of facilities designed to accommodate regular boat traffic would be environmentally unsound and not serve the public interest. Moreover, the Department does not plan to dredge this section of Steel's Cove. Attempted boating activity in this part of the Cove could create pressure to dredge the Cove.

Comments received by the WSLs from the Department's Natural Heritage Program concerning this project, identified Steel's Cove as a likely prime settlement area for larval and juvenile summer flounder (*Paralichthys dentatus*) which would be present during most of the boating season. The introduction of motor boat mooring facilities, and the consequent increase in motor boat traffic, into the shallow waters of the Cove would result in deleterious impacts on the nursery habitat of this fisheries resource.

Additionally, the applicants propose to construct a wetland walkway connected to a lengthy pier with a dock, finger piers and boat lift that would encroach on over 1,000 linear feet of mostly uninterrupted shoreline and tidal wetlands paralleling the shoreline of the Highview Subdivision. In addition to the adverse environmental and public use impacts to wetlands and subaqueous lands outlined above, the proposed project would set an undesirable precedent by allowing a long wetland walkway to cross an otherwise large, contiguous, unbroken expanse of tidal wetlands. Over the past decade, the Department has focused its wetland regulatory protection efforts on wetland areas like the one at this project site, in part, because they are still devoid of any structures and represent a dwindling resource and habitat type. Several past decisions designed to protect tidal wetlands and issued by the WSLs such as ones at The Glade at Holland Glade, Broadkill Beach on Deep Hole Creek and Point Farm at Pepper Creek have been supported by the Delaware Environmental Appeals Board.

The wetlands that the applicant proposes to cross to gain access to Steel's Cove are owned by the HOA. Therefore, the applicant is not a true riparian landowner and has more limited riparian rights as recognized under common law.

The proposed project would place the dock, one of the finger piers and the boat lift in and over State-regulated vegetated marsh wetlands. The Department has never issued a permit to construct a dock or mooring facility in vegetated wetlands. This review assumes that the applicants intended to project the proposed pier, dock, finger piers and boat lift past the vegetated wetlands and further into Steel's Cove. Assuming that is the case, much of the discussion

presented in this TRM would still apply although additional review would be warranted for any changes to the project design applied for.

Alternatively, water access including a launch facility is available to the applicant at the Massey's Landing boat ramp. The use of a public facility would eliminate negative environmental impacts from constructing and maintaining a walkway, piers and dock at the proposed project site and reduce associated negative impacts to the marsh and Cove.

After thorough review of this application, I recommend denial of the Wetlands Permit and Subaqueous Lands Lease for all of the above stated reasons.

LITERATURE CITED

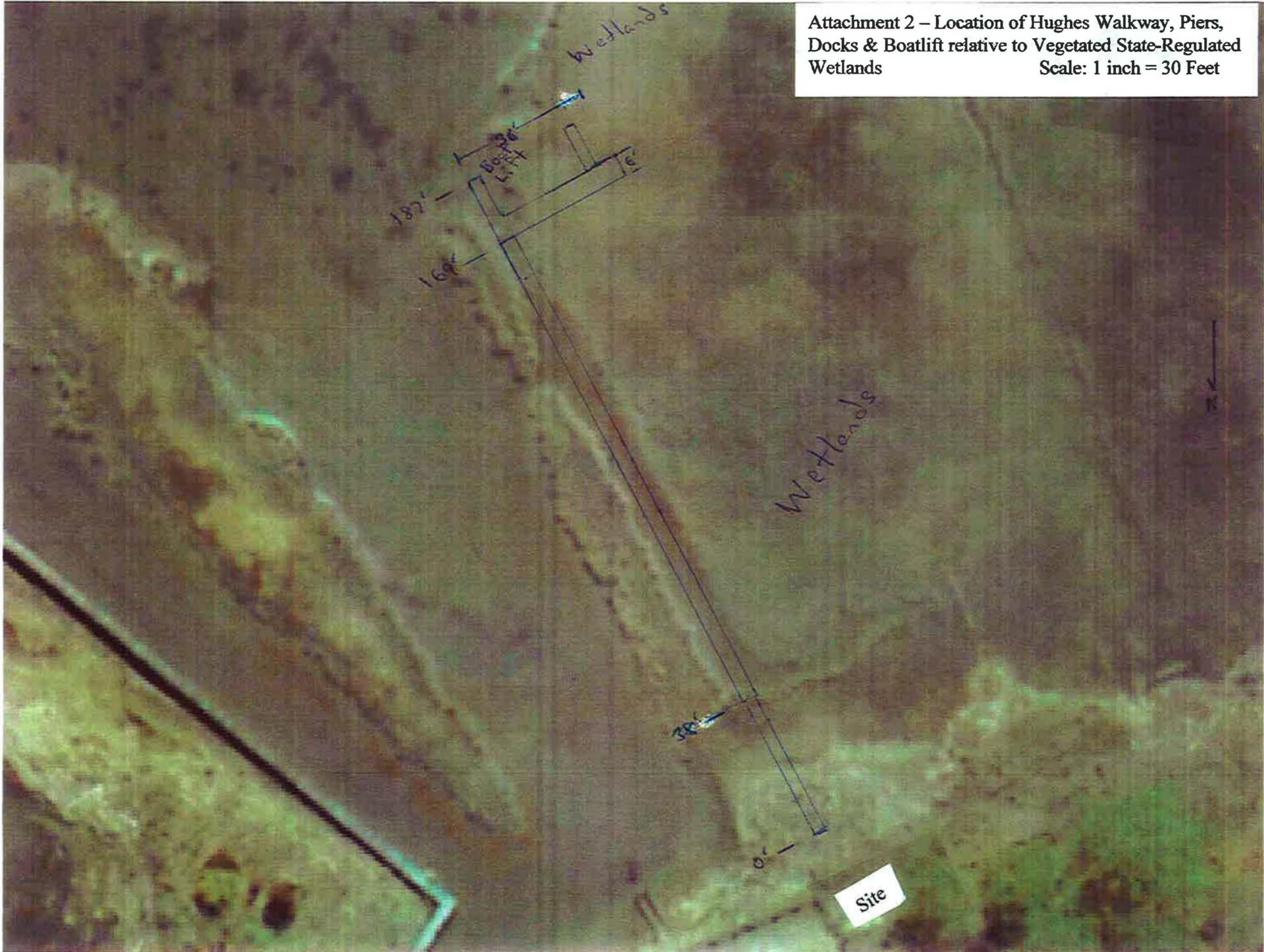
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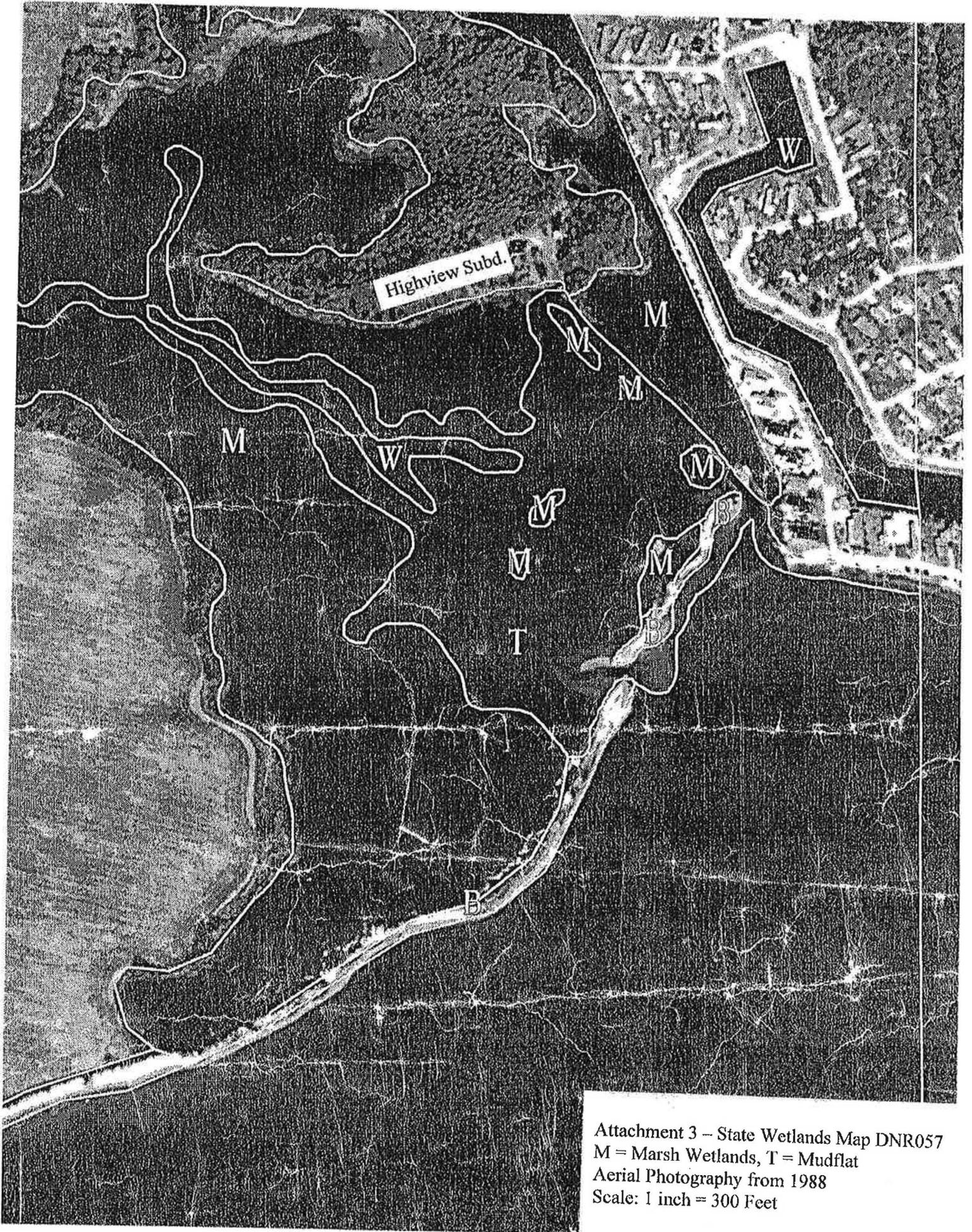
Attachment 1 – Aerial view of Hughes Project, Highview Subdivision and Steel's Cove
Green Line indicates approximate location of wetlands

1 inch = 30'

Attachment 2 – Location of Hughes Walkway, Piers, Docks & Boatlift relative to Vegetated State-Regulated Wetlands
Scale: 1 inch = 30 Feet

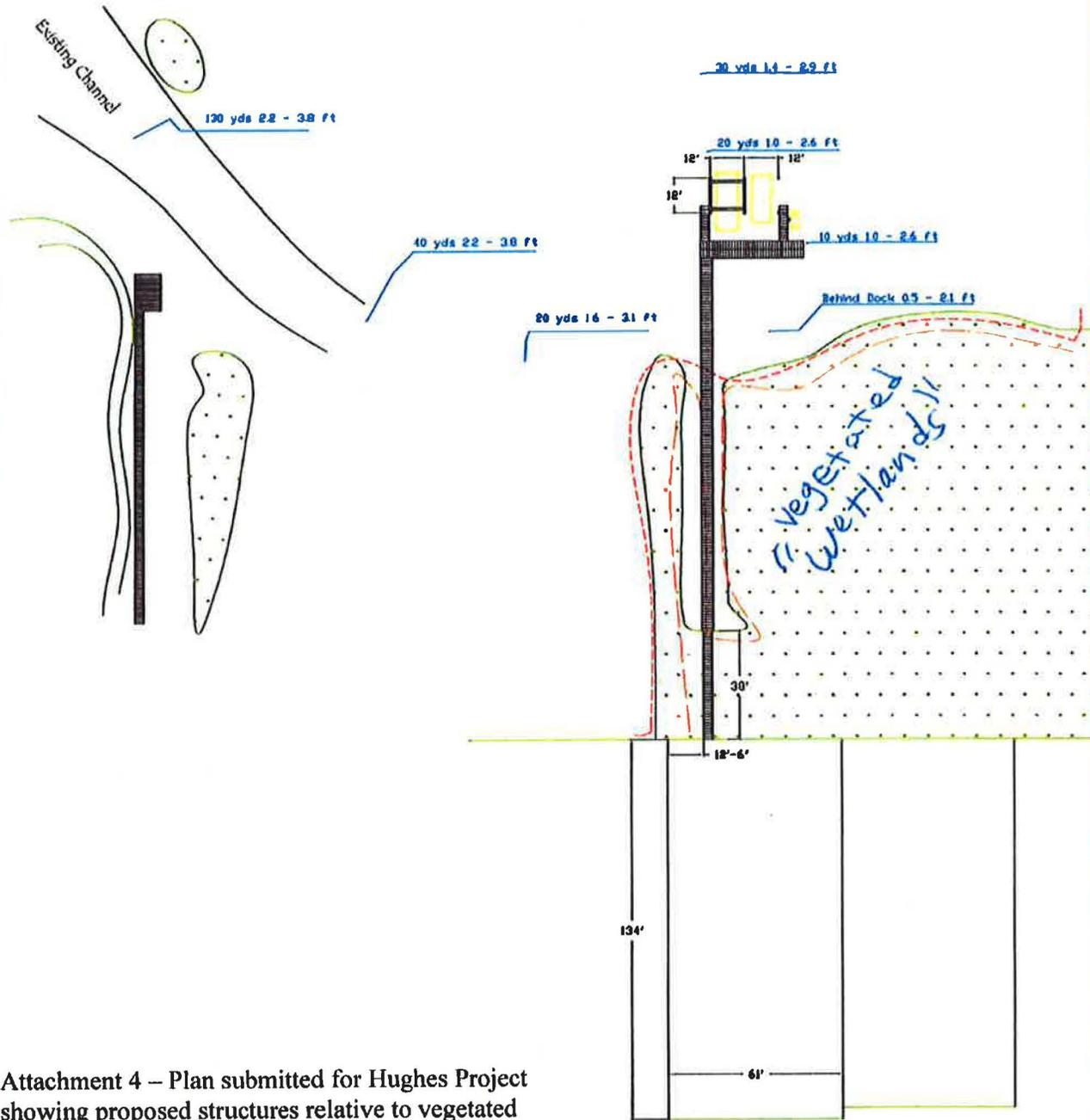


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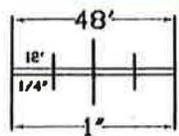


Attachment 3 – State Wetlands Map DNR057
M = Marsh Wetlands, T = Mudflat
Aerial Photography from 1988
Scale: 1 inch = 300 Feet

Steele's Cove



Attachment 4 – Plan submitted for Hughes Project showing proposed structures relative to vegetated wetlands



MLW -----
 MIHW - - - -

	Frankford, DC 19945		3'x38' Wetlands Walkway 4'x131' Pier w/ 6'x36' Dock	
	DATE	SHEET of	SCALE 1" = 48'	APPROVED BY

Haynes, Robert P (DNREC)

From: Chaconas James T. (DNREC)
Sent: Tuesday, December 11, 2012 3:58 PM
To: Haynes Robert P (DNREC)
Subject: Hughes Permit Application

Bob – We went out to the Mark Hughes site at Steele’s Cove last Tues. Dec. 4 to check the measurements of the proposed structures. The measurements verified that as proposed, the dock and one of the finger piers will be over tidal wetlands. The measurements basically coincided with the measurements taken from the aerial photographs. The proposed wetland walkway is also a little short and would not completely traverse the wetlands before reaching the tidal gut proposed for the pier.

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