

**Secretary's Order No.: 2011-W-0002**

**RE: Wetlands and Subaqueous Lands Section Permit Application  
(MP-186/09) from Lighthouse View Condominium Association  
of Owners, LLC, for a proposed 24-slip marina in Lighthouse Cove, a tributary to  
the Assawoman Bay at Beacon Drive, Fenwick Island, Sussex County, Delaware**

**Date of Issuance: January 14, 2011**

**Effective Date: January 14, 2011**

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control under 29 Del. C. §§8001 *et seq.*, the following findings and conclusions are entered as an Order of the Secretary:

The Applicant, Lighthouse View Condominium Association of Owners, LLC, seeks a Wetlands and Subaqueous Lands Section (“WSLS”) Lease and Marina Permit to construct a 24-slip marina consisting of twelve (12) 4 by 20 foot finger piers and 26 freestanding pilings in Lighthouse Cove, Little Assawoman Bay, at Beacon Drive, Fenwick Island, Sussex County, Delaware. The proposed project is subject to the requirements of the Subaqueous Lands Act (7 Del.C., Chapter 72), Delaware’s *Regulations Governing the Use of Subaqueous Lands*, and *Delaware Marine Regulations* (7 Del.C., Chapters 60, 66 and 72). The Applicant has applied for said permit to provide water access and boat docking facilities for its community.

As noted above, the Department reviews all WSLS permit applications (and proposed projects set forth within such applications) in the light of the requirements of the Delaware Subaqueous Lands Act, Delaware’s *Marine Regulations*, and the *Regulations Governing the Use of Subaqueous Lands*. These Regulations provide the criteria for evaluation of proposed projects to be constructed in public or private subaqueous lands. Such criteria include, but are not limited to, environmental impacts,

public use impacts, and administrative principals associated with the ownership of said subaqueous lands. Furthermore, upon the granting of an application for a WSLS permit, such permit may, if determined necessary by the Secretary, include certain conditions to address comments and concerns expressed by the public regarding the effect of a proposed project upon the surrounding community.

In the present matter, the Applicant's proposed project is not a public or commercial marina. The Applicant has stated that there will be no fueling station, no dredging, no filling of wetlands (or any kind of wetland disturbance), nor any habitat loss as a result of the projected project. Furthermore, the Applicant maintains that the structures involved in this project will be constructed, installed and utilized in a manner that minimizes the pollution and causing of harm to the aquatic and tidal plants, fish and wildlife. As a result of the Department's review of this application, DNREC finds the Applicant's statements regarding the potential environmental impacts associated with this project to be valid. Additionally, DNREC's Natural Heritage and Endangered Species Program reviewed the site in light of the proposed project, and found no current records of State-rare or federally listed plants, animals, or natural communities at this project site. Thus, I believe the construction and operation of this proposed project will have minimal environmental impacts to the site area and surrounding lands.

With regard to the public use impacts of this project, the same is proposed in a waterway that is primarily used as an access point to the Assawoman Bay for fishing, recreation and enjoyment of the natural resources. Historically, the waterway had been channelized, filled and bulkheaded, leaving it unsuitable for other uses. Questions were raised at the public hearing concerning potential impacts of this project on local

navigation, and so the Department conducted a thorough review of this application in the light of those concerns. The Wetlands and Subaqueous Lands Section of the Department's Division of Water Resources has determined that the construction and operation of the proposed facility will not diminish the use of this waterway for navigation, or alter or disrupt the current uses of these public subaqueous lands.

In addition to the above public use impact considerations, Section 4.9 of the Department's Subaqueous Lands Regulations (Boat Docking Facilities) establishes the criteria for evaluating the siting of proposed boat docking facilities. Specifically, Section 4.9.2.12 states that docking facilities should extend out from the shoreline no farther than to a depth necessary for docking a boat capable of navigating the waterway. The facilities may also not extend more than twenty (20) percent of width of the waterway, or be located closer than 10 feet to the navigation channel. The Applicant's proposed structures have been determined to meet these regulatory standards. However, in light of the public comment received from the community regarding the effect of the proposed marina on safe navigation, the Department recommends inclusion of a permit condition in this matter, to wit: that no portion of any vessel berthed at the marina shall extend channelward beyond the farthest channelward extension of the finger pier associated with its assigned slip.

The most contentious aspect of the public hearing held in this matter required the Department to review this application in the light of Section 2.0 of the Department's Subaqueous Lands Regulations (Administrative Principles). Section 2.2.2.3 of said Regulations recognizes the applicability of the Public Trust Doctrine to all navigable waters. The Public Trust Doctrine provides that title to tidal and navigable freshwaters,

the lands beneath, and the living resources inhabiting said waters within a State is a special title, held by the State, in trust for the public's benefit. Such title establishes the public's right to use and enjoy these trusted waters, lands and resources. Any applicant asserting private ownership of subaqueous lands must demonstrate said ownership.

In the present matter, the Applicant asserts that the subaqueous lands at issue are public lands entrusted to the State of Delaware. In support of that assertion, the Applicant provided to the Department a survey depicting the area of privately owned underwater land, as well as the Chain of Title to said property beginning in 1957, which pre-dates construction of the bulkheads, filling of underwater lands and wetlands, the dredging of underwater lands and excavation of wetlands on the south and west portions of Lighthouse Cove. This assertion was challenged during the public hearing process regarding this application by John Sergovic, representing Lighthouse Cove Investors, LLC, who alleges that all the private lagoons surrounding Tax Parcel 134-23-3.02 were created by, and are therefore the property of, Lighthouse Cove Investors (Balsamo, et al.). Mr. Sergovic further asserts that construction by the Applicant on these private underwater lands would require the formal consent of Lighthouse Cove Investors, which has refused such consent.

As a result of the aforementioned challenge made by Mr. Sergovic on behalf of Lighthouse Cove Investors, the Department performed an exhaustive research and review of the lands in question in this matter. Based upon that review, the Department has determined that said research supports the Applicant's assertion that the area of underwater lands where the proposed project is situated consists wholly of public subaqueous lands. While the Department affirms and agrees that there is, indeed, a

privately owned, manmade lagoon retained by Lighthouse Cove Investors, LLC, it does not agree that the Applicant's proposed structures are located on, or within ten (10) feet of, these privately owned subaqueous lands.

The Department notes that a natural waterway which is altered by activities such as filling, channelizing, or bulkheading is not considered to be a private lagoon due to such modification. Moreover, the natural waterway in question can be clearly identified as a natural waterway on State Highway maps, USGS topographic maps, aerial photos, historic tax maps, prior permit applications, and site photographs taken prior to the excavation and filling of the subaqueous lands and wetlands. Thus, it is the Department's position, after careful and thorough review of this application and the challenges made by Lighthouse Cove Investors, LLC, that the subaqueous lands upon which the Applicant proposes to construct marina slips is, in fact, State of Delaware public subaqueous land, and is not privately owned by Lighthouse Cove Investors, LLC.

A duly noticed public hearing was held on April 22, 2010, at the Fenwick Island Town Hall in Fenwick Island, Delaware. Representatives from the Department, the Applicant, and Lighthouse Cove Investors, LLC were in attendance at this hearing, and all made presentations to develop the record. Members of the public also attended said hearing, and comments were received by the Department at that time. Subsequent to that public hearing, Hearing Officer Lisa A. Vest requested the Wetlands and Subaqueous Lands Section of the Department's Division of Water Resources provide her with a Technical Response Memorandum (TRM) to formally address the public comments and

concerns raised in this matter. The requested TRM, dated August 12, 2010 was provided to Hearing Officer Vest, incorporated into the public hearing record generated in this matter, and addressed thoroughly in the Hearing Officer's report dated December 17, 2010 ("Report"). That Report, which is appended hereto and incorporated herein, recommended issuance of this Marina Permit and Subaqueous Lands Lease, subject to the standard and reasonable conditions in a WSLS permit that are included to protect Delaware's precious environment.

I find and conclude that the record developed in this matter supports approval of issuing the Applicant a WSLS Marina Permit and Subaqueous Lands Lease, as recommended in the aforementioned Report. Based on the record, and the technical expertise of the Department's personnel who assisted in this application, the record supports approval of Lighthouse View Condominium Association of Owners, Inc.'s Application for a WSLS Marina Permit and Subaqueous Lands Lease, as consistent with the requirements of the Delaware Subaqueous Lands Act, Delaware's *Marine Regulations*, and the *Regulations Governing the Use of Subaqueous Lands*

I find that the issuance of the aforementioned Marina Permit and Subaqueous Lands Lease, along with the permit condition stated above, will allow this Applicant to construct and operate a 24-slip marina consisting of twelve 4 by 20 foot finger piers and 26 freestanding pilings in Lighthouse Cove, Little Assawoman Bay, at Beacon Drive, Fenwick Island, Sussex County, Delaware, as proposed in its application. The granting of this Marina Permit and Subaqueous Lands Lease will enable the Applicant to provide water access and boat docking facilities for its community.

This Department recognizes the rights of riparian landowners to make reasonable use of an adjoining waterbody, specifically, the right to wharf out to a point of navigability, and the right to erect structures such as docks, piers, and boat lifts. I agree with the Department's assessment that the record developed in this matter does not establish a credible claim of ownership of the underwater land in the project area that would alter those rights. The design of the proposed project has fewer impacts than any alternatives, nominal environmental impacts, is suitable for the area, has been minimized, and has met the regulatory criteria for such projects as set forth in Delaware's *Regulations Governing the Use of Subaqueous Lands* and the *Delaware Marina Regulations*.

Accordingly, I direct that a conditional permit be issued to the Applicant, and enter the following findings and conclusions:

1. The Department has jurisdiction under its statutory authority to issue a Marina Permit and Subaqueous Lands Lease Permit to the Applicant, subject to reasonable permit conditions deemed appropriate and consistent by the Department in this matter;
2. The Department provided adequate and lawful public notice of the aforementioned Application of Lighthouse View Condominium Association of Owners, Inc., and of the public hearing held on April 22, 2010, and held said hearing to consider public comment on the application, in a manner required by the law and regulations;
3. The permit approved by this Order will allow this Applicant to construct and operate a 24-slip marina consisting of twelve 4 by 20 foot finger piers and 26

freestanding pilings in Lighthouse Cove, Little Assawoman Bay, at Beacon Drive, Fenwick Island, Sussex County, Delaware, as proposed in its application. The granting of this Marina Permit and Subaqueous Lands Lease will enable the Applicant to provide water access and boat docking facilities for its community;

4. The Department has considered the factors required to be weighed in issuing such permits, and finds that the proposed use is both appropriate and reasonable at the proposed location, and that it should be permitted, with conditions, as set forth above;
5. The Department shall issue a permit to the Applicant, Lighthouse View Condominium Association of Owners, Inc., and said permit shall include all conditions consistent with the final Order and any other reasonable conditions that the Department includes in such permits, to ensure that Delaware's environment will be protected from harm, consistent with the aforementioned existing Delaware regulations governing such matters, to wit: that no portion of any vessel berthed at the marina shall extend channelward beyond the farthest channelward extension of the finger pier associated with its assigned slip;
6. The aforementioned permit condition requirement as set forth above shall also be incorporated into the Lighthouse View Condominium Association of Owners, Inc.'s required Operations and Maintenance Plan, in order for said Plan to receive Departmental approval;

7. The Department has carefully considered all the statutory factors to be considered in making a decision on this permit application, and those required to be considered under existing Delaware regulations regarding such matters, to wit, the requirements of the Subaqueous Lands Act (7 Del.C., Chapter 72), Delaware's *Regulations Governing the Use of Subaqueous Lands*, and *Delaware Marina Regulations* (7 Del.C., Chapters 60, 66 and 72);
8. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary;
9. The Department shall serve and publish its Order on all affected persons in a manner consistent with the service and publication of Secretary's Orders; and
10. This proposed project will enable the Applicant to provide water access and boat docking facilities for its community, while simultaneously allowing the Department to balance the protection of Delaware's natural resources with the right of a landowner to enjoy and use his own property, in furtherance of the purposes of 7 Del. C., Ch. 60.

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

## HEARING OFFICER'S REPORT

RE: Wetlands and Subaqueous Lands Section Permit Application (MP-186/09) from Lighthouse View Condominium Association of Owners, LLC, for a proposed 24-slip marina in Lighthouse Cove, a tributary to the Assawoman Bay at Beacon Drive, Fenwick Island, Sussex County, Delaware

Lisa A. Vest  
Hearing Officer

December 17, 2010

### **I. Background Findings:**

A public hearing was held on Thursday, April 22, 2010, at 6:00 p.m. at the Fenwick Town Hall, 800 Coastal Highway, Fenwick Island, Delaware, in order for the Department to receive public comment concerning a Wetlands and Subaqueous Lands Section (“WSLS”) Lease and Marina Permit from Lighthouse View Condominium Association of Owners, LLC (hereinafter referred to as “Applicant”). The Applicant seeks to construct a 24-slip marina consisting of twelve 4 by 20 foot finger piers and 26 freestanding pilings in Lighthouse Cove, Little Assawoman Bay, at Beacon Drive, Fenwick Island, Sussex County, Delaware. The proposed project is subject to the requirements of the Subaqueous Lands Act (7 Del.C., Chapter 72), Delaware’s *Regulations Governing the Use of Subaqueous Lands*, and *Delaware Marina Regulations* (7 Del.C., Chapters 60, 66 and 72).

The Department has the authority to issue WSLS Leases and Marina Permits, pursuant to 7 Del.C., Chapters 60, 66, 72, and reviews all such permit applications (and proposed projects set forth within such applications) in the light of the aforementioned requirements of the Delaware Subaqueous Lands Act, Delaware’s *Marina Regulations*,

and the *Regulations Governing the Use of Subaqueous Lands*. These Regulations provide the criteria for evaluation of proposed projects to be constructed in public or private subaqueous lands. Such criteria include, but are not limited to, environmental impacts, public use impacts, and administrative principals associated with the ownership of said subaqueous lands. Furthermore, upon the granting of an application for a WSLs permit, such permit may, if determined necessary by the Secretary, include certain conditions to address comments and concerns expressed by the public regarding the effect of a proposed project upon the surrounding community.

This project was placed on the standard 20-day public notice beginning on July 15, 2009. During the public notice period, the Department received twenty-four (24) letters of objection to the project, two of which formally requested a public hearing. Subsequently, the Department held a public hearing in Fenwick Island, Delaware, on April 22, 2010, in response to the comments received, and to address concerns expressed by individuals potentially affected by the project. Public comment was also received by the Department at the time of the hearing itself, all of which will be addressed below. Proper notice of the hearing was provided as required by law.

## **II. Summary of Record:**

### **A. Department Presentation:**

At the time of the hearing on April 22, 2010, Melanie Tymes, Environmental Scientist with DNREC's Wetlands and Subaqueous Lands Section (WSLS), and Laura Herr, Section Manager for WSLs, represented the Department with regard to this pending permit application matter. Introductory remarks from Ms. Herr were made at the beginning of this hearing, to ensure that the public fully understood (1) the Department's

neutrality at that time with regard to the Applicant's pending permit application; and (2) the importance of the Department receiving public input concerning the same. Following those introductory remarks by Ms. Herr, Ms. Tymes introduced eleven (11) exhibits to be submitted into the formal hearing record regarding this permitting hearing. Included within those Departmental exhibits was a copy of the Applicant's formal application and plans submitted to DNREC, copies of the legal notices regarding the holding of this public hearing, copies of the Delaware Regulations governing Marinas, Subaqueous Lands, and the applicable sections of the Delaware Code, photographs of the proposed location of this proposed project, and copies of the public comment that had been received by the Department to date in this matter<sup>1</sup>.

**B. Applicant Presentation:**

Subsequent to the Department having entered its exhibits into the record, Stephanie Hansen, Esquire, counsel for the Applicant, offered a very thorough presentation for the record in support of the Applicant's pending permit application, which included, but was not limited to, four witnesses to offer testimony regarding the proposed marina project. First, Ms. Hansen offered a brief description of the proposed project and, specifically, where the proposed structure would be located. The Applicant also provided to this Hearing Officer at that time an Exhibit Booklet, comprised of seven (7) exhibits concerning this proposed project, which included, but was not limited to, the Applicant's pending application with the Department (marked at the time of the hearing as "Applicant 1 - 7"). The Applicant's exhibits were formally entered into the record at

---

<sup>1</sup> Prior to the public hearing held on April 22, 2010, the Department received four (4) letters of support for the project, as well as thirteen (13) letters that had (1) no merit; (2) expressed no objection; or (3) came after the close of the public comment period.

the time of the hearing, and the same are expressly incorporated into this Hearing Officer's report.

Ms. Hansen then clarified the specifics of the Applicant's proposed project for the record, stating that the proposed project is not a public or commercial marina, and will have no new buildings except for perhaps a small storage shed for equipment. There will be no fueling station on the premises, no dredging involved, no filling of wetlands or any kind of wetland disturbance, and no habitat loss as a result of project.

Ms. Hansen then provided a bit of history associated with the desire to construct marina slips in this area, stating that the initial proposals for this project were made in 1986, but those proposals were not successful. Additional attempts were again made back in 2001 and 2004, but those attempts were also unsuccessful. One of the main reasons for these previously unsuccessful attempts, according to Ms. Hansen, was that there was an adjacent landowner that claimed the affected lands were not public subaqueous lands, but were instead private subaqueous lands, and therefore it was not within the State's authority to issue such a permit. Ms. Hansen then noted that the State of Delaware adheres to the Public Trust Doctrine, which asserts that the State owns all the land beneath navigable waters. In the present case, the Applicant asserts that, while there is no quarrel that the lagoon at that location is navigable, there is a presumption that the State owns the land, unless someone provides documentation to the contrary.

At that point, Ms. Hansen called upon the Applicant's surveyor, Greg Simpler, of Simpler Surveying, to provide additional information concerning ownership of the affected lands. Mr. Simpler was the creator of the exhibits entered into the record on behalf of the Applicant at the time of the hearing. These exhibits, which indicated the

property division lines of the areas in question, were based upon the previous surveys that had established said property division lines, as well as the formal deeds of record which date back at least 100 years. In creating this documentation, Mr. Simpler utilized his own measurements with regard to the common property line between Lighthouse Cove and Lighthouse View, and also mapped out all of the bulkhead, the riprap, and the lagoon widths in the Town of Fenwick Island which are east of the subject site for the proposed 24 marina slips. After having performed all of the retracement surveys, Mr. Simpler then reviewed all documents presented to the Applicant by the aforementioned adjacent landowner (i.e., Lighthouse Cove Investors, LLC, represented by John Sergovic, Esquire), and concluded that there was no substantial evidence that there is any private subaqueous lands east of the bulkhead.

In support of his conclusion, Mr. Simpler explained that, as a riparian owner, the property line does not stay in one place all the time, due to various acts of nature such as erosion or avulsion. When an artificial structure is built, and documentation of the original boundary line is in place, then a surveyor can take that documentation and lay that boundary line back on the face of the earth and possibly discern between private and public subaqueous lands. According to Mr. Simpler, in the absence of any sort of artificial structure or documentation having been placed, a landowner cannot reclaim eroded land, by definition of erosion itself. Based upon his review of the documentation provided by Mr. Sergovic in this matter, Mr. Simpler states that there is nothing in the title or deed chain that permitted a surveyor to do anything except utilize the meanderings of the bay to determine the property lines in this matter, as there was no indication in any of the deeds provided that any private subaqueous rights were ever reserved by any

landowner(s). Thus, it is Greg Simpler's professional opinion that the owner of the subaqueous land over which the Applicant wishes to construct its proposed project is, in fact, the State of Delaware, and that the same are public subaqueous lands.

Mr. Simpler then described how he performed the surveys as requested, on behalf of the Applicant in this matter. According to those surveys, there is sufficient depth for the type of vessels that would potentially utilize the proposed marina. Additional DNREC requirements for this project, such as all structures (i.e., pilings and piers) being 10 feet from the adjacent property, the water frontage of the property meeting 40 feet, all structures being 10 feet from any navigation channel, and no greater than a 20 percent encroachment into the waterway, were also confirmed as having been met by the Applicant, according to the survey documentation provided by Mr. Simpler.

Continuing on with the Applicant's presentation at the hearing, Ms. Hansen then called upon Jonathan Staley of Sussex Marine Construction to discuss the specific construction parameters of the piers and pilings for this proposed project. Mr. Staley designed the plan for the marina that was submitted for this permit application. He confirmed that the proposed plan includes 12 finger piers, or 24 slips. Each finger pier is 4x20 feet wide, with the exception of the northern-most pier, which is 4x18½ feet wide. There will be 26 mooring pilings (two more than the number of slips), and the distance from pier-to-pier is 25 feet. Each slip is 12 feet, 6 inches. All materials of construction are salt-treated lumber and pilings, and galvanized hardware. There will no creosote-treated lumber utilized for this marina. While routinely there are six pilings per pier, Mr. Staley notes that, for this project, he reduced the design to four pilings per pier to reduce the impact on the environment.

Mr. Staley stated that it is his professional opinion that the structures involved in this project will be constructed, installed, and utilized in a manner that minimizes the pollution and causing of harm to the aquatic and tidal plants, fish and wildlife. Mr. Staley further stated that the structures involved in this project will be constructed in a manner that will prevent and/or minimize leaching, or runoff, of harmful chemicals or other substances that may cause water pollution. Lastly, he verified that the proposed piers are designed to extend out from the bulkhead far enough so as to eliminate the need for dredging and filling.

Ms. Hansen then called upon Evelyn Maurmeyer to discuss specific environmental impact issues associated with this proposed project. Ms. Maurmeyer is an environmental consultant with Coastal and Estuarine Research in Lewes, Delaware, and is the person that prepared the application on behalf of the Applicant in this matter. Ms. Maurmeyer confirmed that she has been preparing permit applications such as this one for various applicants for approximately 30 years (since 1981). With regard to the water quality in the lagoon and surrounding vicinity, Ms. Maurmeyer cited her three data sources researched for this project<sup>2</sup>, and stated that, while dissolved oxygen requirements and phosphorous requirements are met, the nitrogen requirements are not met. It is her opinion, however, that none of the elements associated with the proposed project would impact nitrogen.

Ms. Maurmeyer believes that there will not be a significant cumulative impact to the environment as a result of this project moving forward. In support of that opinion, she noted that, in 2008, there were a total of 56,669 boats registered in the State of

---

<sup>2</sup> Ms. Maurmeyer cited her sources as the Inland Bay Systems Monitoring Program, the State of Delaware Watershed Assessment Report 2008, and a scientific study of Little Assawoman Bay that was conducted by students and faculty at the University of Delaware.

Delaware. Of those vessels, a Delaware boating survey found that only 8 percent boated in Assawoman Bay, and 11 percent boated in the lower Inland Bays, for a total of approximately 19 percent of vessels boating in one of these water bodies. Thus, she does not believe that the 24 boats to be moored in this facility will be a major impact to existing boating uses in the Bay area.

Continuing on with her testimony on behalf of the Applicant in this matter, Ms. Maurmeyer stated that the proposed project will not cause any violation of State of Delaware Surface Water Quality Standards (during either the construction or operation phase), due to the requirements that are set forth in the Applicant's mandatory Operations and Maintenance Plan, nor does she believe that the structures involved in this application will significantly restrict the water flow within the marine basin. When asked about the status of any stagnant water that is presently in the location of the proposed marina, Ms. Maurmeyer noted that the existing lagoon is a dead-end lagoon, so there is limited flushing; however, she does not believe the proposed structures will impede tidal flushing. She further noted that the structures will be sheltered, or protected, from storm-driven waves, currents, and/or ice, due to the fact that it is a low-energy environment. There will not be an impact on aquatic vegetation, as there is no documented submerged aquatic vegetation at the site. Additionally, there will be no wetland impacts associated with this application, as there are no wetlands present at the actual project site.

Moving on to activities associated with this waterbody, Ms. Maurmeyer stated that the designated water uses for Assawoman Bay in general are as follows: primary contact (such as swimming) is partially supported; secondary contact (such as boating) is fully supported. She does not believe that this application will have any effect on those

uses, as the proposed project is not located in a designated recreational swimming area. Ms. Maurmeyer then cited a letter which she sent to Debbie Lee Rouse, Environmental Scientist, Shellfish and Recreational Waters Program of the (then) Watershed Assessment Section of DNREC. Ms. Rouse reviewed the project description, and, in a reply letter dated June 1, 2009, advised that the Department had reviewed the project as proposed, and that her Program "...would not consider the proposed project to be problematic relating to an increased or unacceptable risk to shellfish-growing areas. The project site is classified as an area where shellfish harvesting is prohibited."

With regard to air quality, noise, odors, and other reasonable concerns regarding the proposed project, it is Ms. Maurmeyer's opinion that there will be no impairment of air quality, no toilet facilities, no hazardous materials stored at the marina, and no fueling station on site. Lastly, when asked how storm water runoff would be addressed on the property, Ms. Maurmeyer replied that the storm water infiltrates into the permeable ground, with the parking facilities on the western side of the units. The area between the eastern side of the units and the bulkhead and the lagoon consist of gravel and permeable materials into which storm water can infiltrate, rather than run off into the lagoon.

Lastly, Ms. Hansen called upon Skip Gegline, President of the Lighthouse View Condominium Association, to discuss vessel documentation for the vessels owned by the residents of Lighthouse View. Mr. Gegline was the person who gathered that information on behalf of the Applicant, and advised those in attendance at the public hearing that evening that, as of that time, there were 23 residents at the 24 units of their community (one being vacant). At that time, there were 15 vessels owned by those residents, with 12 of those vessels being motorized boats, and the remaining 3 being

personal watercraft, or jet-skis. There were 11 owners who have submitted letters of intent for the record, and one owner who, as of that time, had not submitted a formal response.

With regard to the Operations and Maintenance Plan (“Plan”) for the proposed marina, Mr. Gegline advised that the major components of this Plan, as required, are marina layout information, seasonal wet storage reduction, pump-out compliance, storm water management, storage and handling materials and ways, emergency operation plans, and general rules and regulations for boaters utilizing the facility. The Plan incorporates what is known as the Clean Marina Program elements, and offers guidelines and best practices that can be incorporated into such an operation and maintenance plan. Mr. Gegline further offered that, should this permit application be granted by DNREC, the Applicant would wish to take the Clean Marina Pledge.

Turning the focus toward wastewater issues, Mr. Gegline stated that sanitary waste will be handled directly by the residents of the community, with the rule for residents being that each owner would be responsible for carrying that material back to their own unit for disposal (including porta-potty waste from the vessels). General trash would, again, be the owner’s personal responsibility, under a “bag and carry” rule. Additionally, there will be no fish-cleaning station at the proposed site for the boat slips. Any fish waste that might be brought in on a boat would, again, be carefully bagged and disposed of properly back at the resident’s unit, or in the community dumpster.

With regard to maintenance or repair work being allowed on the boats at the marina, Mr. Gegline advised that boaters would be limited to very small tasks that can be accomplished on the boat itself, such as polishing. There is no engine haul, no bottom

scraping, and no other major work that would be allowed as the boat sits in the water in the lagoon. Additionally, since there will be no fueling facilities at the site, the boaters will have to go to nearby commercial marinas or fueling stations to get their fuel for their vessels. Mr. Gegline also confirmed that there would be spill-containment equipment kept at the marina, which would include booms, absorbent pads which come in a barrel-sized container, and the Applicant is prepared to make that purchase and have that available on site. In order to store that, and perhaps other materials that would be used to equip the marina (such as life safety equipment, lifelines, etc.), the Applicant would purchase and install a fairly small-sized storage shed on site on their property, which would be 10 feet from any adjacent property, as required.

Ms. Hansen then asked Mr. Gegline to comment as to noise control provisions at the proposed marina. There is a section in the proposed marina's draft Rules and Regulations that recommends quiet time from 10:00 p.m. to 8:00 a.m., which includes human noise as well as motor noise. There are also very specific restrictions proposed with regard to loud music and general behavior at the marina as well, and to enforce such restrictions, the Applicant has proposed the designation of one member as a Harbor Master, who would be responsible for documentation of violations of the Rules and Regulations, taking it to the association council, and prescribing fines for such violations. For the first offense, the violator would be given a warning. After that, second violations carry a \$50.00 fine, third violations carry a \$100.00 fine, and fourth offenses (all within one year) carry a \$200 fine and loss of marina privileges.

Lastly, with regard to overall safety concerns, Mr. Gegline advised that the association is very interested in establishing safety features that the community believes

are necessary and helpful for boat safety and human safety. Currently, there is one “no wake” sign posted, but the Applicant is willing to post additional signs so that anyone entering or leaving the lagoon would know what the rules of the road are for that area. Additionally, the association is willing to limit the vessel size of the boats in the slips toward the narrowest end of the lagoon to be no greater than the size of the mooring on that pier, again, taking into consideration the DNREC requirement of no greater than a 20 percent encroachment into the waterway. With those last comments, Ms. Hansen concluded the Applicant’s presentation at the public hearing.

**C. Public Comment:**

Following the Applicant’s thorough presentation, the public hearing was then opened up to comment from members of the public. For brevity’s sake, the public concerns offered by those who spoke at the hearing will be discussed herein one by one, rather than discussing each and every comment raised by each person who spoke, as many of the comments from citizens in attendance that evening were similar.

Charles Wright started the evening by telling those in attendance at the hearing that he had been a resident of Fenwick Island for over 30 years, and while he heard everything that the Applicant stated with regard to minimizing impact, he believed that this proposed project would result in a big impact to the community’s habitat in several ways. First of all, there are six to eight species of birds in the location of the proposed project, which, according to Mr. Wright, take up residence in both the spring and fall seasons. Mr. Wright is concerned that the marina would disturb that occurrence. Additionally, despite the Applicant promising to enforce rules and regulations with regard to noise arising from use of the marina, Mr. Wright is convinced that the noise

level for the community will be elevated as a result of this project, and there will be nothing the Applicant can do to enforce the same. Mr. Wright further voiced concern for traffic that will be generated as a result of additional people coming and going in the community when utilizing the proposed facility. In summation, Mr. Wright stated that he was adamantly opposed to this project, and asked that the Department deny the pending permit application for this matter.

Immediately following Mr. Wright, Kevin Derbyshire offered his comments in support of this permit application for the record at the public hearing. Mr. Derbyshire stated that he and his wife had recently purchased a home, and that even before that purchase, he had been visiting the area in Fenwick Island all of his life. He noted that he has relatives in the area, and that the owners he has met are "...very accountable, responsible people...", and that he believed that residents will ensure that the proposed rules and regulations will be followed. Moreover, Mr. Derbyshire stated that part of the reason for his property purchase was to have safe access to the waterway. He believed that the Applicant had laid out its plan in a very professional manner, and it was his hope that the Department would grant the pending application.

Numerous other comments were received at the time of the public hearing, which fell in line with either the concerns voiced by Mr. Wright, or the support voiced by Mr. Derbyshire. Additional concerns were voiced by attendees such as Robert Logan, who cited potential navigation issues for boaters arising from the design of the piers as set forth in the Applicant's plan and possible discharges from accidental gasoline spills, which would affect the wetlands in the area. Still other concerns included increased water pollution, parking and street congestion in the location of the project, and potential

safety issues for children who occupy and use non-motorized vessels coming in and out of the lagoon areas.

Equally voiced at the hearing, however, were the approving comments offered by numerous property owners in the area, who encouraged the Department to grant the Applicant's permit application. Many who supported the Applicant's proposed project noted that they did not believe some of the opposing comments should be given much creditability. Laura Hettinger, for example, noted that her and her husband were residents of Lighthouse View, and, like other residents of that community, took "extreme pride in the area and the development", and were hoping to have the benefit of the same privileges and water rights as everyone else in the surrounding area already enjoys. Ms. Hettinger further opined that, as boaters who have traversed all of the canals and waterways in the area, her and her husband believe that the concerns previously voiced with regard to traffic and navigation are essentially unfounded, and that certain issues such the ones previously noted about navigating the proposed piers are simply part of the boating experience. Her and her husband purchased their property because of the wildlife and beauty of nature existent at that location, and cannot imagine anyone in that development wanting to do anything to harm the same.

Subsequent comments by attendees such as William McCloud (who also supported the Applicant's proposed project) also suggested that concerns previously voiced about boat traffic and wetlands/wildlife impact as a result of this marina may not be as stated. Mr. McCloud and his wife (who also offered comment in support for this project) are full-time residents of Lighthouse View, and "...see everything that's going on at Lighthouse View and on the waterways". According to Mr. McCloud, he estimates

that he sees a boat pass by his property “...every 10 minutes or so....even in the summer....so there is not a lot of heavy traffic right there at the tip...” As to the concerns voiced about the wetlands and wildlife impact, he notes that his wife is “quite passionate” about the same, and that just the week before this hearing, they attempted to take care of some eggs that had been laid on the pebbles in their development by some American Oyster Catchers. They are quite conservative in taking care of the property, and have the intent to eventually purchase a boat, so they are in support of the Applicant’s project for that community.

Yet another supporter of this project, Andrea Watt, noted that she was born and raised in Delaware, and spent all of her summers at the beaches in the area. As her and her husband were looking for a family retreat, they convinced her parents (also 40-year Delaware residents) to come to Fenwick Island, as they were drawn to the beautiful, quiet bays and access to the water. Despite their wonderful experience as property owners in the area, however, they are missing the experience of being able to have a boat at their property. They have a boat, which must be housed in Rehoboth at the present time, but during the summer Rehoboth is an hour drive away from their property due to the traffic. They have been unable to use their boat because they don’t have a place to store it, or even have access to the water. Ms. Watt believes that their community has shown commitment to protecting the environment by putting the aforementioned rules and regulations in place within the pending application. Moreover, she noted DNREC’s mission, as found on the Department’s website, is to ensure that Delaware (in her own words) “...is a state where people can embrace enjoyment of the environment in their daily lives”, and that her family would like to “...embrace the environment, and enjoy the

water as part of our daily experience here”. Ms. Watts further states that she does not think that enjoyment should be only for those who have lived in Fenwick Island all their lives, but rather should be extended to both new and old residents of the area.

Of particular note was the comment made by Robert Cooper, who lives at 38999 Lighthouse Cove Lane. While it is Mr. Cooper’s opinion that his quality of life will be affected most negatively by the 12 piers proposed in the Applicant’s project (as well as the noise, water traffic and pollution arising from this proposed marina), he wanted to offer suggestions for possible restrictions to be placed on this application, should the Department decide to grant the same. First, Mr. Cooper suggested that the number of slips be limited from 24 to 12, so that there would be one slip for every unit. Secondly, he recommended that construction of the piers should be limited to the winter season, from November to March. Third, that the vessel should not exceed the end of the piers in length. And, lastly, that the Department mandate a permit restriction that the docks only be used by the actual unit owners, and not renters of the units within the community.

In addition to his public comments, Mr. Cooper submitted written testimony for the Department’s consideration, which included historical pictures that illustrate how the lagoon has frozen in the wintertime, and how, when that occurs, the actual pilings have lifted up out of the ground. It is Mr. Cooper’s concern that, given the potential for the piers to lift from the ground, this marina could cause damage to his property. This documentation was marked as “Cooper Exhibit 1”, and entered into the public hearing record by this Hearing Officer for review at that time.

Ms. Martha Keller also offered comment for the record at the time of the public hearing, and voiced her concerns with safety, water pollution, and most specifically, the

area's potable drinking water. While Ms. Keller complimented both the Applicant's presentation and those in attendance that had offered comment before her, she had some concerns regarding Ms. Maurmeyer's research conducted on behalf of the Applicant in this matter. Ms. Keller cited what she termed as "substantial research" performed by Ms. Judy Denver which indicates that, when pilings are laid for the piers in projects such as these, the "...actual shading of that area interferes with the natural ecology" of the location. Ms. Keller further noted that this issue has not been considered in the past, and it has subsequently been discovered that this action damages the ecology. With regard to safety concerns, Ms. Keller stated that not only must rules be made, but that the first infraction must be listed as a warning, and the second infraction is an actual penalty fee, with the fee amount listed in writing. According to Ms. Keller, the Courts will not uphold such fines unless the definitive fees are stated as such. Lastly, with regard to potable water concerns, she noted that all residents must have unpolluted aquifers, because they are dependent upon them for water supply. The wetlands collect the water, which percolates through the earth and then comes down into the aquifers. If the aquifers become polluted, then the potable water is polluted, and everyone is negatively affected.

Toward the conclusion of the public hearing, John Sergovic, Esquire, offered comment on behalf of his client, Lighthouse Cove investors. Mr. Sergovic contends that the Applicant is attempting to utilize his client's private property with regard to the location of the proposed marina project, and brought with him to this public hearing two individuals, Charles Adams (of Adams Surveying in Georgetown, Delaware) and Mr. Howard Abbott (who contends that the lands in question are private subaqueous lands owned by the Abbott family) in support of such contention. In his presentation at the

public hearing, Mr. Sergovic had both Mr. Adams and Mr. Abbott identify various portions of the lands in question, and offer their opinions as to ownership of the property at issue. At the conclusion of the hearing, Mr. Sergovic offered a summary of the position taken by his clients in this matter with respect to their objections to the Applicant's permit application, which was as follows: (1) his client created the lagoon on the property in question; (2) since his client created the lagoon, it is private subaqueous lands; (3) private subaqueous lands cannot be utilized without the property owner's permission; and (4) if the Department wants to utilize said lands, Mr. Sergovic will file a reverse condemnation action on behalf of his client in this matter.

In further support of this position, Mr. Sergovic offered two sets of documents: (1) a booklet of 11 exhibits, including, but not limited to, a series of maps and deeds depicting the various property conveyances between different owners of the lands in question in this matter (marked and entered into the hearing record by this Hearing Officer as "Sergovic Number 1"); and (2) a copy of the Appellate Opening Brief in the matter of *Abbott v. Gray*, previous litigation which concerns ownership of the property in question (marked and entered into the hearing record by this Hearing Officer as "Sergovic Number 2").

Subsequent to the close of the record with regard to public comment, the Department's WSLS of the Division of Water Resources reviewed this permit application in the light of (1) the requirements of the State of Delaware Subaqueous Lands Act, Delaware's *Marine Regulations*, and the *Regulations Governing the Use of Subaqueous Lands*; (2) the exhibits entered into the formal hearing record in this matter, as noted above; and (3) the public comments that were received by the Department in this matter,

and provided this Hearing Officer with a detailed and comprehensive Technical Response Memorandum (TRM), which addressed all issues raised by the public comment received by the Department with regard to this pending permit application. The TRM, dated August 12, 2010, has been formally incorporated into the public hearing record generated in this matter, and will now be discussed in detail herein.

As noted previously, the aforementioned Regulations provide the criteria for evaluation of proposed projects to be constructed in public or private subaqueous lands. Such criteria include, but are not limited to, environmental impacts, public use impacts, and administrative principals associated with the ownership of said subaqueous lands. Furthermore, upon the granting of an application for a WSLS permit, such permit may, if determined necessary by the Secretary, include certain conditions to address comments and concerns expressed by the public regarding the effect of a proposed project upon the surrounding community.

In the present matter, the Applicant's proposed project is not a public or commercial marina. The Applicant has stated that there will be no fueling station, no dredging, no filling of wetlands (or any kind of wetland disturbance), nor any habitat loss as a result of the projected project. Furthermore, the Applicant maintains that the structures involved in this project will be constructed, installed and utilized in a manner that minimizes the pollution and causing of harm to the aquatic and tidal plants, fish and wildlife. As a result of the Department's review of this application, WSLS finds the Applicant's statements regarding the potential environmental impacts associated with this project to be valid. Additionally, DNREC's Natural Heritage and Endangered Species Program reviewed the site in light of the proposed project, and found no current records

of State-rare or federally listed plants, animals, or natural communities at this project site. Thus, the Department believes the construction and operation of this proposed project will have minimal environmental impacts to the site area and surrounding lands.

With regard to the public use impacts of this project, the marina is proposed in a waterway that is primarily used as an access point to the Assawoman Bay for fishing, recreation and enjoyment of the natural resources. Historically, the waterway had been channelized, filled and bulkheaded, leaving it unsuitable for other uses. Questions were raised at the public hearing concerning potential impacts of this project on local navigation. The Department conducted a thorough review of this application in the light of those concerns, and WSLs has determined that the construction and operation of the proposed facility will not diminish the use of this waterway for navigation, or alter or disrupt the current uses of these public subaqueous lands.

In addition to the above public use impact considerations, Section 4.9 of the Department's Subaqueous Lands Regulations (Boat Docking Facilities) establishes the criteria for evaluating the siting of proposed boat docking facilities. Specifically, Section 4.9.2.12 states that docking facilities should extend out from the shoreline no farther than to a depth necessary for docking a boat capable of navigating the waterway. The facilities may also not extend more than twenty (20) percent of width of the waterway, or be located closer than 10 feet to the navigation channel. The Applicant's proposed structures have been determined to meet these regulatory standards. However, in light of the public comment received from the community regarding the effect of the proposed marina on safe navigation, the Department recommends inclusion of a permit condition in this matter, to wit: that no portion of any vessel berthed at the marina shall extend

channelward beyond the farthest channelward extension of the finger pier associated with its assigned slip.

The most contentious aspect of the public hearing held in this matter required the Department to review this application in the light of Section 2.0 of the Department's Subaqueous Lands Regulations (Administrative Principles). Section 2.2.2.3 of said Regulations recognizes the applicability of the Public Trust Doctrine to all navigable waters. The Public Trust Doctrine provides that title to tidal and navigable freshwaters, the lands beneath, and the living resources inhabiting said waters within a State is a special title, held by the State, in trust for the public's benefit. Such title establishes the public's right to use and enjoy these trusted waters, lands and resources. Any applicant asserting private ownership of subaqueous lands must demonstrate said ownership.

In the present matter, the Applicant asserts that the subaqueous lands at issue are public lands entrusted to the State of Delaware. In support of that assertion, the Applicant provided to the Department a survey depicting the area of privately owned underwater land, as well as the Chain of Title to said property beginning in 1957, which pre-dates construction of the bulkheads, filling of underwater lands and wetlands, the dredging of underwater lands and excavation of wetlands on the south and west portions of Lighthouse Cove. This assertion was challenged during the public hearing process regarding this application by John Sergovic, representing Lighthouse Cove Investors, LLC, who alleged that all the private lagoons surrounding Tax Parcel 134-23-3.02 were created by, and are therefore the property of, Lighthouse Cove Investors (Balsamo, et al.). Mr. Sergovic further asserted that construction by the Applicant on these private

underwater lands would require the formal consent of Lighthouse Cove Investors, which has refused such consent.

As a result of the aforementioned challenge made by Mr. Sergovic on behalf of Lighthouse Cove Investors, the Department performed an exhaustive research and review of the lands in question in this matter. Based upon that review, the Department has determined that said research supports the Applicant's assertion that the area of underwater lands where the proposed project is situated consists wholly of public subaqueous lands. While the Department affirms and agrees that there is, indeed, a privately owned, manmade lagoon retained by Lighthouse Cove Investors, LLC, it does not agree that the Applicant's proposed structures are located on, or within ten (10) feet of, these privately owned subaqueous lands.

The Department notes that a natural waterway which is altered by activities such as filling, channelizing, or bulkheading is not considered to be a private lagoon due to such modification. Moreover, the natural waterway in question can be clearly identified as a natural waterway on State Highway maps, USGS topographic maps, aerial photos, historic tax maps, prior permit applications, and site photographs taken prior to the excavation and filling of the subaqueous lands and wetlands. Thus, it is the Department's position, after careful and thorough review of this application and the challenges made by Lighthouse Cove Investors, LLC, that the subaqueous lands upon which the Applicant proposes to construct marina slips is, in fact, State of Delaware public subaqueous land, and is not privately owned by Lighthouse Cove Investors, LLC.

### **III. Conclusions and Recommendations:**

Based on the record developed in the course of this hearing, it is my opinion that the record does warrant, and the Applicant has reasonably justified, the pending request for a WSLS Marina Permit and a Subaqueous Lands Lease, with certain permit conditions, to provide water access rights and boat docking facilities for the community of Lighthouse View Condominium Association of Owners, Inc., located in Fenwick Island, Sussex County, Delaware. As noted in the Department's aforementioned TRM, the project has nominal environmental impacts and is designed in a suitable manner for the proposed location. The Department recognizes the rights of riparian landowners to make reasonable use of the adjoining waterbody, specifically, the right of such landowners to wharf out to a point of navigability, and the right to erect structures such as docks, piers, and boat lifts. Moreover, it is the belief of the Department that no information was received in this matter that established a credible claim of ownership of the underwater land in the project area that would alter that right.

For the reasons stated above, I hereby recommend that the Applicant's pending request for a WSLS Marina Permit and a Subaqueous Lands Lease to provide water access rights and boat docking facilities for the community of Lighthouse View Condominium Association of Owners, Inc., located in Fenwick Island, Sussex County, Delaware, be ***granted***, with inclusion of the following *permit condition* to address comments and concerns expressed by the public regarding the effect of the proposed marina on safe navigation, to wit: that no portion of any vessel berthed at the marina shall extend channelward beyond the farthest channelward extension of the finger pier associated with its assigned slip, as set forth both herein this present Report and in the

Department's TRM of August 12, 2010. I also recommend that the following findings be made with regard to this matter:

1. Proper notice of the hearing was provided, as required by law.
2. The Department has jurisdiction under its statutory authority to issue a Marina Permit and Subaqueous Lands Lease Permit to the Applicant, subject to reasonable permit conditions deemed appropriate and consistent by the Department in this matter;
3. The Department provided adequate and lawful public notice of the aforementioned Application of Lighthouse View Condominium Association of Owners, Inc., and of the public hearing held on April 22, 2010, and held said hearing to consider public comment on the application, in a manner required by the law and regulations;
4. The permit approved by this Order will allow this Applicant to construct and operate a 24-slip marina consisting of twelve 4 by 20 foot finger piers and 26 freestanding pilings in Lighthouse Cove, Little Assawoman Bay, at Beacon Drive, Fenwick Island, Sussex County, Delaware, as proposed in its application. The granting of this Marina Permit and Subaqueous Lands Lease will enable the Applicant to provide water access and boat docking facilities for its community;
5. The Department has considered the factors required to be weighed in issuing such permits, and finds that the proposed use is both appropriate and reasonable at the proposed location, and that it should be permitted, with conditions, as set forth above;

6. The Department shall issue a permit to the Applicant, Lighthouse View Condominium Association of Owners, Inc., and said permit shall include all conditions consistent with the final Order and any other reasonable conditions that the Department includes in such permits, to ensure that Delaware's environment will be protected from harm, consistent with the aforementioned existing Delaware regulations governing such matters, to wit: that no portion of any vessel berthed at the marina shall extend channelward beyond the farthest channelward extension of the finger pier associated with its assigned slip;
7. The aforementioned permit condition requirement as set forth above shall also be incorporated into the Lighthouse View Condominium Association of Owners, Inc.'s required Operations and Maintenance Plan, in order for said Plan to receive Departmental approval;
8. The Department has carefully considered all the statutory factors to be considered in making a decision on this permit application, and those required to be considered under existing Delaware regulations regarding such matters, to wit, the requirements of the Subaqueous Lands Act (7 Del.C., Chapter 72), Delaware's *Regulations Governing the Use of Subaqueous Lands*, and *Delaware Marina Regulations* (7 Del.C., Chapters 60, 66 and 72);
9. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary; and

10. The Department shall serve and publish its Order on all affected persons in a manner consistent with the service and publication of Secretary's Orders.

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

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