



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

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OFFICE OF THE  
SECRETARY

**Secretary's Order No. 2013-W-0047**

**Re: REQUEST OF EVERETT T. CONAWAY AND JESSE FREDERICK  
CONAWAY TO CORRECT DEPARTMENT WETLANDS MAP #419 FOR  
PROPERTY NEAR BETHEL, SUSSEX COUNTY**

**Date of Issuance: May 19, 2015**

**Effective Date: May 19, 2015**

**Background**

This Order of the Secretary of the Department of Natural Resources and Environmental Control (Department) considers the record developed on a proposed map correction for Wetlands Map #419 (Map 419). The Department's Division of Water, Wetlands and Subaqueous Lands Section (WSLS) investigated the claim that Map 419 should be corrected and prepared the proposed revision.

Everett T. and Jesse Frederick Conaway own property (Property) adjacent to the Nanticoke River at Nathaniel's Landing off of Woodland Ferry Road near Bethel, Sussex County. The Conaway hired a consultant to determine federal and state wetlands on their Property and the consultant determined that approximately 2 acres of the Property that are now designated as wetlands on Map 419 should no longer be designated as wetlands. Accordingly the consultant sought a proposed map correction to WSLS so that WSLS may investigate the correction under the map correction procedure in the *Wetlands Act, 7 Del Code Chap 66*.

WSLS conducted site visits and otherwise investigated the Property and concluded that Map 419 should be corrected. The Department provided public notice of the WSLS' proposed

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map correction to Map 419. In response to the public notice, WSLS received a request for a public hearing from Roy Whitaker, a neighbor of the Property. The Department held the public hearing and the presiding hearing officer prepared the attached Report, which recommends approval of WSLS' recommended map change correction of Map 419.

### **Findings and Reasons**

The Department adopts the Report to the extent it is consistent with this Order. The Department finds that WSLS' proposed correction to Map 419 is well supported by the record based upon the WSLS thorough review of the Property and the determination of the wetlands on it consistent with the definition of state regulated wetlands in the *Wetlands Act, 7 Del. C. Chap. 66*. The records includes that WSLS' experts conducted several on site surveys and reviewed the maps in order to ensure that the corrected map would be an accurate determination of both the local mean high water, which was established at 1.6 feet above mean sea level, and the area two feet above the local high water to an elevation of 3.6 feet. The record contains the topographic map showing the elevation of 3.6 feet above local mean high water and that this area is different from the current area shown as wetlands on Map 419. Consequently, a correction to Map 419 is required as part of the Department's administration of the Wetlands Act and the duty to maintain accurate maps of state regulated wetlands.

The determination of state regulated wetlands is based upon the surveys of the local high water and the 2 feet elevation above it. WSLS administers the Wetlands maps and periodically considers requests for Wetlands map corrections. WSLS first determines if the request is valid and the existing map is inaccurate and should be changed. The record shows that WSLS conducted several on-site inspections of the Property and required several map revisions before recommending the final map to replace Map 419.

The challenge to the proposed correction was based upon a claim that there was insufficient notice of the proposed change. WSLs followed the WSLA procedure for the map correction, which provided public notice that Map 419 could be changed for a correction. The public had public notice and the opportunity to participate in the public hearing on the Map 419 correction. WSLs and Department have little agency discretion to determine the wetlands insofar as the Wetlands Act defines “wetlands” as the area from the local high water to the 2 foot elevation above the local high water. The Report reviewed the history of wetlands maps and found that the Department had provided itself with discretion to depart from actual measurement on when wetlands had been unlawfully filled in. The Report rejected the claim on lack of notice or an opportunity to participate in the map change process for Map 419. The Report found that any revisions to the maps as part of the process did not significantly change the subject of the change, namely, that a correction to Map 419 for the Property was being considered. The public had ample opportunity to participate at the public hearing to provide information for WSLs’ investigation and determination of an accurate map of the wetlands for the Property. The Department is responsible for mapping all state regulated wetlands and this initially was done without the benefit of more precise measurements of all areas. Consequently, the Wetlands Act provides for a map correction procedure and WSLs followed this procedure.

Mr. Whitaker’s opposition to the map correction does not dispute the technical support for the change or contest the mapping of the elevation mapping. Indeed, the technical support for the elevation determination is difficult to contest given the definition of wetlands that limits the Department’s discretion to determine wetlands. The Department considers the map correction to be a task that can be done without a hearing if none is requested because the determination is an exercise of technical measurement skills that the Wetlands Act entrusts to the

Department, including the verification of survey performed by others. Map 419 was shown to be incorrect and once this was established there is a responsibility to correct Map 419, which WSLs has done in its recommended change.

The claim by Mr. Whitaker's counsel that his ability to participate in the public hearing process was harmed by WSLs' not providing sufficient information in response to a Freedom of Information Act (FOIA) request is rejected because the Department's FOIA's process has measures to follow to seek relief for any claim that information was not provided. The Department's response to the FOIA is a separate procedure from the map change procedure. Consequently, any lack of information provided pursuant to a FOIA request does not affect the record on the map change and the lawfulness of the map correction given the limited facts to be determined, namely, the elevation distances on a map above the local tidal high water line.

The Department may consider changes to its map correction procedures in the future to update for the changes in law that have occurred since the Wetlands Act was enacted. For example, the law and regulations require providing the map change to the Secretary of State, but the Department of State no longer maintains this information on map changes. Instead, the Delaware Registrar of Regulations maintains the wetlands map change documents finalized by this Department. Thus, the map correction should be adopted as it is a technical determination of the local high tidal water and the 2 feet above it on the adjacent land, as shown on the Map #419 attached hereto, which is amply supported by the technical information in the record from WSLs's survey and that from the property owner's consultants.

### **Conclusions**

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

- 1) The Department has jurisdiction under its statutory authority to make a determination in this proceeding based on the record;
- 2) The Report is adopted and its finding that the record supports granting the map correction to Map 419;
- 3) The Department provided adequate public notice of the proposed map change and the public hearing, as required by the law and the Department regulations;
- 4) The Department held a public hearing and has considered all timely and relevant public comments in making its determination; 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.

A handwritten signature in black ink, appearing to read 'David S. Small', written over a horizontal line.

David S. Small  
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: **REQUEST OF EVERETT T. CONAWAY AND JESSE FREDERICK CONAWAY  
TO CORRECT DEPARTMENT WETLANDS MAP #419 FOR PROPERTY  
NEAR BETHEL, SUSSEX COUNTY**

DATE: October 11, 2013

### I. PROCEDURAL HISTORY

On January 11, 2008, Everett T. Conaway and Jesse Frederick Conaway (Conaway) submitted via their consultant<sup>1</sup> a request that sought a correction from the Department of Natural Resources and Environmental Control and Environmental Control's (Department) Division of Water, Wetlands and Subaqueous Lands Section (WSLS) to the Department's wetlands map #419 (Map 419)<sup>2</sup> insofar as Map 419 designated portions of the Conaway's property near Bethel, Sussex County as wetlands under the Wetlands Act, *7 Del. Code Chap. 66*. The Conaway's January 11, 2008 letter provided WSLS with a map of the elevation and other information for WSLS to determine that Map 419 should be corrected to reflect the proper elevation of 2 feet above local high water, which was determined to be 1.6 feet.

On March 7, 2008, WSLS staff and Dr. Maurmeyer toured the Conaway property.

On December 3, 2010, WSLS staff toured the site with Dr. Maurmeyer and Don McCoy of Davis, Bowen and Friedel, Inc, (DBF) which had prepared the map correction. An agreement

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<sup>1</sup> Evelyn M. Maurmeyer, Ph.D, of Coastal & Estuarine Research, Inc.

<sup>2</sup> Under Section 6607(b) of the Act the Department is to prepare an inventory of all wetlands and suitable maps, after holding a public hearing pursuant to Section 6609.

was reached to submit information that showed the 3.6 foot elevation contour based upon DBF's determination of the foot local high water at 1.6 feet. The requested information was submitted to WSLs and on May 11, 2011, the Department published public notice of the proposed correction request.

WSLS received a request for a public hearing from Kenneth Kristl, Esquire, counsel for Roy Whitaker, an adjacent property owner of the Conaway's property.

In a June 22, 2011 letter, Jim Chaconas, Environmental Scientist in WSLs, explained to Mr. Kristl the Department's wetlands map change criteria to satisfy the request for a public hearing, and required that Mr. Whitaker to reaffirm the request for a public hearing if WSLs' explanation was not satisfactory. In a July 14, 2011 letter, Mr. Kristl reaffirmed his client's request for a public hearing.

In an August 29, 2011 letter, Mr. Chaconas wrote to Mr. Kristl informing him that the Department would hold a public hearing on October 11, 2011 at the Department's Dover office. In addition, the Department had published public notice of the hearing. The Department had published a public notice of the public hearing.

The Department held a public hearing on October 11, 2011.

In a February 3, 2012 cover letter, Mr. Woodward of DBF submitted a drawing of the revised proposed wetlands line in response to Mr. Chaconas' request for a revision.

On November 29, 2012, Mr. Chaconas submitted the attached technical response memorandum that recommends that the Department correct Map 419 based upon the map submitted February 3, 2012 that had been requested by WSLs.

## II. SUMMARY OF THE RECORD<sup>3</sup>

The Department's recommended record contains the following: 1) the verbatim transcript of the public hearing; 2) the documents identified in the procedural history above, 3) the documents introduced as exhibits at the hearing; and 3) this Report, including the post-hearing memorandum prepared by Mr. Chaconas attached hereto and other documents cited in this Report.

At the public hearing, Mr. Chaconas provided the following documents from the Department files in order that these documents could assist the public in the presentation of comments on the application: Conaway's letter and supporting information dated January 8, 2008 (Ex. 1); public notice of the wetlands map correction (Ex. 2); public notice of the public hearing (Ex. 3); correspondence on the request (Ex. 4); the Department's Wetlands Regulation (Ex 5); the Wetlands Act (Act) (Ex. 6); the October 11, 2011 memo assigning a hearing officer (Ex. 7); the August 30, 2011 memo assigning a court reporter (Ex. 8); the written comments on behalf of Roy Whitaker by his counsel Kenneth Kristl, Esquire, consisting of a letter dated May, 31, 2011, a letter dated July 20, 2011, and a letter dated October 11, 2011 (Ex. 9); and photographs of the area subject to the correction request (Ex. 10); and Conaway's revised map dated October 7, 2011 as received by WSLs on October 10, 2011 (Ex. 11).

Dr. Maurmeyer made a presentation that explained the background and the field investigation. She also discussed the 2007 survey and DBF's mapping. Chuck Woodward of DBF also spoke and explained the use of GPS and the North American Vertical Datum (NAVD)

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<sup>3</sup> The record reflects the information considered relevant for this Report and a final decision based upon it should the Secretary adopt this Report. The record includes information developed during the public hearing process and the post-hearing investigation.

88, which he indicated was the current datum used by Sussex County. He explained that the survey showed that areas within Map 419 that had an elevation of 2 feet above the local mean high water should be 3.6 feet above the local mean high water. His firm prepared a proposed correction to Map 419 that would reflect the proper wetlands areas and 2 feet above local mean high water based upon the survey.

Mr. Roy Whitaker spoke and asked questions about Ex. 11 to find out the differences from the map originally submitted to the Department in Ex. 1. Dr. Maurmeyer replied that the revised map was the result of the Department's site investigation, which in Ex. 11 shows the proposed state regulated wetlands line at 3.6 feet above the local mean high water.

Mr. Chaconas prepared the attached memorandum that sets forth WSL's recommendation to make the correction based upon the February 2012 map and also upon his field investigation and expertise.

I consider the record, as reviewed above, sufficient to support a final decision that the Department's Wetlands map #419 should be corrected as recommended by Mr. Chaconas' attached memorandum.

### **III. RECOMMENDED FINDINGS AND DISCUSSION**

Section 6607(e) of the *Wetlands Act, 7 Del. C. Chap. 66 (Act)* and Section 17 of the Department's *Wetlands Regulations, 7 DE Admin. 7502* provides a process whereby the Department may correct wetlands maps that may need revising as a result of changes since the wetlands maps were approved by the Department. The Department first determined the inventory and mapping of wetlands in Order No 76-WE-2 issued December 23, 1976 and revised the mapping in Order No. 81-WE-e on November 1, 1981 and in Secretary's Order No 92-0053 on September 2, 1992. In 1993 the Wetlands Act was amended to allow map corrections to be

made on specific areas, and since then WSLs has acted upon numerous map corrections requested by property owners. Secretary's Order No. 92-0053 recognized that "wetlands are not a static resource but may undergo changes over time (i.e. wetlands becoming uplands, wetlands eroding away, uplands becoming wetlands, wetlands being created naturally, etc.) it was determined that the regulatory wetlands map be completely revised and proposed for adoption by the Department." Wetlands are defined in the Wetlands Act based upon the area from the local high water and an elevation of 2 feet above the local high water and the Department has interpreted this to allow a difference only when wetlands were unlawfully filled in the past. There is no evidence of any illegal filling of wetlands present in the Conaway's property that is subject to this request. The correction procedure to the Wetlands Maps is fairly straightforward process once the local high water and 2 feet elevation above the local high water is determined on a water and the process is undertaken by the Department as part of its responsibility to ensure accurate mapping of wetlands, which are subject to change as noted above. The correction process was added to the Wetlands Act to avoid the delay and cost for undertaking periodic state-wide mapping of wetlands.

The Conaway's property that is the subject of the request is part of their larger parcels that total approximately 183 acres along the Nanticoke River in the Nathaniel's Landings area to the east of Woodland Ferry Road near the Woodland Ferry crossing of the Nanticoke River in an unincorporated area of Sussex County. The Conaway's' property is located on Map 419 and contains wetlands shown on Map 419.

The Conaways retained Dr. Maurmeyer for determining Belfast Farm's potential for development of the property know as Belfast Farms and to assess the presence of federal and state regulated wetlands. Dr. Maurmeyer conducted surveys, which showed that that Map 419

should be corrected to remove approximately 2 acres of wetlands in an area along an unnamed tributary of the Nanticoke on the northern side of Belfast Farms. Dr. Maurmeyer discussed with WSLs staff, and the result was the Conaway's request to correct Map 419.

Dr. Maurmeyer's survey determined that Map 419 incorrectly designated 94,243 square feet, or 2.16 acres of the Conaway's property as "Tidal Forest Swamp," which is a wetlands designation and subject to the Act's regulation of wetlands. Dr. Maurmeyer's survey showed that the incorrectly designated Tidal Forest Swamp was more than 2 feet above the local mean high water line and that it should have been designed on Map 419 as "Other" for a non wetlands designation. Consequently, the Conaways seek relief from the Department by having the Department correct Map 419's error.

WSLS staff investigated the claimed error on Map 419's classification of the wetlands and concluded that the relief was meritorious and set the matter for a public notice as a Department correction. This action was taken based upon Mr. Chaconas and others in WSLs conducting an on-site evaluation, which confirmed that Map 419 should be corrected.

The public notice resulted in the request for a public hearing by counsel for Mr. Whitaker, an adjacent property owner of the Conaway's property. Mr. Whitaker opposed the correction to Map 419 and inquired about the technical support and documentation for the change. The Department considered various map revisions in an effort to arrive at the most accurate depiction of the 2 foot elevation above mean sea level for the area. Under the Act, the designation of "wetlands" is based upon Section 6603(h)'s definition. "Wetlands" are defined as "lands above the mean low water elevation...subject to tidal action in the State ...whose surface is at or below an elevation of 2 feet above local mean high water..." The only other criteria is the lands ability to grow one of numerous plant species and that the lands are not

currently used for agricultural purposes containing 400 acres or more of contiguous nontidal swamp, bog, muck or marsh exclusive of narrow stream valleys where fresh water stands most, if not all, or the time due to high water table, which contribute significantly to ground water recharge, and which would require intensive artificial drainage using equipment such as pumping stations, drain fields or ditches for the production of agricultural crops.” This definition is subject to very little debate if it is based upon the land’s elevation above local high water.

The position taken in opposition to change to Map 419 is based upon the changes to the proposed revision that occurred following the initial public notice. It is undisputed that there were several changes to Map 419 following the initial public notice. Nevertheless, these changes are properly within the initial public notice and is part of the Department’s investigation of the claimed error. I find that those changes were proper in order to determine the most accurate map of the wetlands based upon the survey. The map changes were proper because the initial notice put the public on notice of the possibility of changes to Map 419 for the Property. Indeed, the fact that there is a public hearing and public comment process requires that the Department has the authority to change Map 419 from what was in the initial notice or otherwise the whole public notice and hearing process would be a meaningless exercise. The nature and scope of the changes for a map correction should reasonably relate to the initial notice and I find that the final revision does reasonably relate to the Property in the initial notice. If the final revision was on a property located far from the Property, then I would find that such a revision would trigger a new public notice.

Mr. Chaconas has described the changes at the hearing and in his technical response memorandum the reasons for each change in the map. I agree with his assessment that the changes are not substantial to warrant any new public notice or to hold another public hearing.

Indeed, I find that the Department has limited discretion to designating wetlands. In this case the changes were from the measurement of the 2 foot elevation above the local mean high water of the tidal waters. There is no room for any mischief so long as the measurement of the elevation is accurate, but then it is not that easy to measure elevations in all the Property. The revisions that occurred showed the differences in elevation and these differences highlight the only real area of controversy. I find that WSLs vigorously surveyed the Property to determine the proper elevation based upon 2 foot elevation above local mean high water.

There is another issue that I raise and that is the Act's requirement of notification of the Secretary of State. This was done before the creation of the Delaware Registrar of Regulations and the public notice published in the Delaware Register of Regulations. Thus, should the Department adopt the map change recommended herein, then such notice should go for publication in the Delaware Register of Regulations.

This Report recommends approval the WSLs recommended change to Map 419 as consistent with the procedures outlined for a map change to correct an error on the 2 foot elevation as currently now shown on Map 419.

#### **IV. CONCLUSION**

Based on the record set forth in this Report, I recommend that the Department approve the attached draft order.

  
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Robert P. Haynes, Esquire  
Senior Hearing Officer



STATE OF DELAWARE  
DEPARTMENT OF NATURAL RESOURCES &  
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WETLANDS & SUBAQUEOUS  
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**Technical Response Memorandum**

To: Robert Haynes

Through: Virgil Holmes  
Kathy Stiller

From: Jim Chaconas

Date: November 29, 2012

Re: MC-016/08: Map Change Request to DNREC Wetlands Map DNR #419 at Nathaniel's Landing near Bethel, Sussex County, Delaware (Tax Map Parcels 2-32-4.00, parcels 6.00 & 6.05)

The Wetlands and Subaqueous Lands Section (WSLS) has reviewed the request, submitted by Evelyn Maurmeyer of Coastal and Estuarine Research, Inc.(CER) to change the above regulatory maps to re-designate a portion of the parcel currently mapped as marsh (M) and tidal forested swamp (F) to uplands (O). The wetland areas shown on the map correspond to a small unnamed west flowing tributary to the Nanticoke River. This Technical Response Memorandum (TRM) summarizes the results of the WSLS review.

7 Del. Code, Chapter 66, §6607(e) allows the Department to make changes to the State of Delaware Wetland Maps used to determine jurisdictional wetland boundaries "if an on-site evaluation by the Department establishes that an error exists in a wetland map that has been adopted by the Department." Additionally, the statute requires the Department to document the results of the on-site evaluation, in writing, and give public notice of any correction to the map. Two site evaluations were conducted on the property, the first on March 7, 2008 by the author, Melanie Tymes and Scott Figurski of this office and Dr. Evelyn Maurmeyer of CER, the consultant for the property owner, Jesse Frederick Conaway.

Dr. Maurmeyer had identified potential errors in the State wetland line and proposed changing the State wetland line so that it would correspond to the wetlands line delineated by her according to the U.S. Army Corps of Engineers (COE) definition of a wetland. Dr. Maurmeyer had also submitted a copy of the COE wetland line superimposed on a plan showing the property and contour elevations, prepared by Davis, Bowen and Friedel, Inc (DBF). The COE definition

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Jesse Frederick Conaway  
TRM for MC-016/08  
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WSLS recommends that the Department make the appropriate notations in its mapping files to indicate these changes in designation based on the observed field characteristics and the areas' surface elevations relative to 2 feet above the local mean high water elevation in accordance with the State Wetlands Act (7 Del.C., Chapter 66). While these corrections were prompted by Dr. Maurmeyer's request, her request merely caused the Department to review its existing map for accuracy. The scientific evidence established conclusively that the changes were warranted.