



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

OFFICE OF THE  
SECRETARY

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DOVER, DELAWARE 19901

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**Secretary's Order No. 2015-W-0045**

**Re: APPLICATION OF HERHOLDT PROPERTIES, LLC FOR A SUBAQUEOUS  
LANDS ACT PERMIT TO IMPROVE A ROAD CROSSING FOR AN UNNAMED  
TRIBUTARY OF CHURCH BRANCH ADJACENT TO 10200 BENSON ROAD,  
LINCOLN, SUSSEX COUNTY**

**Date of Issuance: December 30, 2015**

**Effective Date: December 30, 2015**

Pursuant to *7 Del. C. Chap. 60*, and the *Subaqueous Lands Act* ("SLA"), *7 Del. C. Chap. 72.*, the Department's Regulations issued under the SLA at *7 DE Admin. Code 7405*, ("SLA Regulations") and other relevant authority, the Secretary of the Department of Natural Resources and Environmental Control ("Department") issues this Order following a public hearing on a SLA permit application.

**Background and Procedural History**

This Order considers the record on Herholdt Properties LLC's ("Applicant") November 25, 2014 application ("Application") for a SLA permit to upgrade an existing road crossing culvert ("Project"). The Project would be in private subaqueous lands over an unnamed tributary ("Stream") of Church Creek adjacent to 10200 Benson Road, Lincoln, Sussex County. Applicant will use the upgraded roadway crossing to access the proposed 99 lot residential subdivision of 'Canaan Woods,' as approved by Sussex County's Planning and Zoning Commission on January 14, 2009 contingent upon "Condition D" which required Applicant to obtain approval from Delmarva Power & Light Company ("DP&L") to proceed with the Project because DP&L holds an easement on the roadway to access its transmission lines.

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The Department's Division of Water, Wetlands and Subaqueous Lands Section ("WSLS") published public notices of the Application, which opened a public comment period. WSLS timely received written public comments, including requests for a public hearing. Consequently, on April 2, 2015, the Department held a public hearing at the Milford Public Library before the Department's presiding hearing officer, Robert P. Haynes. Twelve persons from the public attended the public hearing, along with representatives of WSLS and the Applicant. The public comment period closed at the end of the public hearing.

On October 25, 2015, the Applicant notified the Department that Sussex County's Planning and Zoning Commission revised its planning approval by removing Condition 'D,' which had required that the Applicant obtain approval from DP&L to use its 150' wide transmission line right-of-way. DP&L uses the existing roadway crossing to access its transmission line, and, therefore, DP&L could also use the Project's improved, replacement roadway crossing.

On November 17, 2015, WSLS provided Mr. Haynes with its Technical Response Memorandum ("TRM"), which recommended issuance of a SLA permit based upon WSLS' draft permit.

Mr. Haynes prepared the attached Hearing Officer's Report ("Report"). The Report reviews the procedural history, establishes the record, discusses the public comments, and makes recommended findings that support issuance of WSLS's draft SLA permit.

### **Findings of Fact**

The Department adopts the Report to the extent it is consistent with this Order. The Report finds that the SLA permit should be issued because the Application satisfies the SLA regulatory requirements based upon the proposed use of private subaqueous lands for a roadway crossing, as approved by Sussex County's Planning and Zoning Commission. In addition, the Project will

replace an existing culvert that does not meet Sussex County's engineering standards with a new culvert that meets the County's standards and will reduce the flooding that already occurs on the roadway.

The issuance of the SLA permit for the Project will allow the Stream's flow to return to its natural state that existed before the roadway crossing's construction. The TRM also stated that the use of subaqueous lands cannot be avoided because there are no alternatives to achieve Applicant's primary purpose. The Department's experts determined that the Project will meet the SLA's regulatory requirements, and will correct the existing culvert's problems that adversely impact the Stream's natural environment, as explained by WSLs' TRM:

The current culvert pipe is undersized and acting as a dam preventing the passage of benthic organisms and fauna; although, approximately 5,752 sq.ft. of fill material will permanently impact aquatic vegetation within subaqueous lands and 404 wetlands. The proposed road crossing will impact minimal subaqueous lands and promote the natural flow of water while improving benthic and fauna passage.

The public comments were primarily from nearby landowners who oppose the Project because it will allow for the development of the 99 house Canaan Woods. The public comments also objected to the Project because it will restore the Stream to its natural flow which will eliminate the upstream flooding, including the artificially created pond that the public comments claim should be retained as an attraction for wildlife. However, the Department's experts and the record as a whole support the permit's issuance because it will restore the Stream's natural flow and reduce the risk of upstream flooding caused by an inadequately sized culvert.

As noted in the public comments, prior to this Application the Department submitted comments in 2008 through a "PLUS" letter to Sussex County's Planning and Zoning Commission that expressed its environmental concerns with the proposed Canaan Woods development. Sussex

County considered these concerns in its planning approval and in response the Canaan Woods' developer agreed to establish a 30' wide conservation easement maintaining a natural buffer zone along the Stream<sup>1</sup> to mitigate the environmental impact of the development. This easement will also provide the Benson Road property owners with more distance from the proposed houses in Canaan Woods. The Department finds this conservation easement as a reasonable effort to mitigate the environmental impact and to accommodate the public concerns.

The Department further finds that the use of 5,752 square feet of subaqueous lands will not adversely impact the properties along Benson Road. The public comments that object to the Project because it will be one regulatory step towards construction of Canaan Woods are not relevant to the Department's SLA decision because such objections to the Canaan Woods development are outside of the Department's SLA jurisdiction, which only reviews the proposed use of 5,752 square feet of private subaqueous lands.

Pursuant to the SLA regulations, the Department may consider the degree to which the project incorporates sound engineering principles when evaluating an application. The Project is based upon Sussex County's engineering requirements<sup>2</sup> for the Stream's roadway crossing, which requires a culvert that can carry the Stream's flow at 113 cubic feet per second ("cfs"). The existing crossing is a single lane, unpaved roadway that uses a 25" diameter metal culvert pipe with a capacity of 10.96 cfs, which does not meet Sussex County's design standards. The Project will replace the existing crossing with a two lane, paved roadway that will use two 38" high, 60" wide, and 56' long elliptically shaped reinforced concrete pipes capable of carrying 113 cfs and meeting Sussex County's requirements.

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<sup>1</sup> The conservation easement also will be along Church Branch.

<sup>2</sup> Sussex County's requirement is based upon a culvert capable of carrying the Stream's flows during a ten year storm event, or 5.3 inches of rainfall in twenty-four hours on the culvert's 738.45 acre watershed.

The record supports finding that the existing culvert pipe is inadequate to carry the Stream's flow during moderate, or two year, storm events, and this means that the culvert causes the Stream to periodically flood the roadway and the upstream areas. This flooding could impair DP&L's access to its transmission line. The record supports finding that the periodic flooding has created a pond and has harmed trees and other vegetation. The record also supports a finding that the existing roadway crossing blocks the Stream's natural flow downstream, which also harms the natural vegetation. Thus, the Department finds that the Project will restore the Stream's flow to its natural levels prior to the existing roadway crossing's construction.

The Department finds that the SLA permit should be issued despite the public comments in opposition. The Project will allow the Stream to flow unimpeded and return the upstream and downstream areas to a condition that existed prior to when the roadway crossing was built. In sum, overall the Department finds that restoring the Stream to its natural flow is preferable to the existing roadway crossing that has caused flooding and ponding.

### **Conclusions and Reasons**

The WSLs, as detailed in the TRM, finds that the Project is an appropriate use of private subaqueous lands under the SLA and the SLA Regulations. The Report also recommends approval of the Project and issuance of an SLA Permit based upon the overall record, which includes opinions of experts on the proposed roadway crossing's benefit to the environment. The Report and Order also consider the opposition from nearby residents, who seek to maintain the current conditions with an artificially created pond and who oppose the Project insofar as it will be used by the proposed Canaan Woods development, however, Sussex County regulates the development of Canaan Woods, and the Department's only current role is to review the Applicant's SLA permit application to use private subaqueous lands. Indeed, a portion of the Project's proposed use of

subaqueous lands already is used by the existing roadway crossing. The Department supports issuance of the SLA Permit for the Project as beneficial to the environment compared to the existing roadway crossing. Accordingly, the Secretary hereby adopts WSLS' recommendations and the Report's recommendations, which are to issue the subaqueous permit based upon WSLS's draft permit.

In sum, the following conclusions are entered as an Order:

1. The Department has jurisdiction pursuant to *7 Del. C. Section 6006* and *7 Del. C. Chap. 72* to make a determination on the Applicant's subaqueous lands permit application;
2. The Department provided adequate public notice of the Application and of the public hearing, and held the public hearing in a manner required by *7 Del. C. Sections 6003, 6004, and 6006*, and the SLA Regulations;
3. The Department considered all timely and relevant public comments in making this determination and this Order and attached Report establishes the record, makes findings of fact and reasons in support of this final agency action;
4. WSLS shall issue a permit approving the Project's use of private subaqueous lands based upon the WSLS' draft permit;

5. The permit's conditions and terms will protect the environment from the activity in the subaqueous lands, consistent with the intent of the SLA, and will allow the Applicant to provide vehicular access to Canaan Woods and to DP&L to access its transmission line right-of-way; and
6. The Department shall publish this Order on its web site and provide such notice of it in a manner required by the law and the Department's regulations.

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

David S. Small  
Secretary

## HEARING OFFICER'S REPORT

TO: The Honorable David S. Small  
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 HERHOLDT PROPERTIES, LLC FOR A SUBAQUEOUS  
LANDS ACT PERMIT TO IMPROVE A ROAD CROSSING FOR AN UNNAMED  
TRIBUTARY OF CHURCH BRANCH ADJACENT TO 10200 BENSON ROAD,  
LINCOLN, SUSSEX COUNTY**

DATE: November 23, 2015

### I. PROCEDURAL HISTORY

On November 25, 2014, Herholdt Properties, LLC ("Applicant") submitted an application ("Application") to the Department of Natural Resources and Environmental Control's ("Department") Division of Water, Wetlands and Subaqueous Lands Section ("WSLS"). Applicant seeks a permit pursuant to the *Subaqueous Lands Act* ("SLA"), 7 Del. C. Chap, 72, and the Department's *Regulations Governing the Use of Subaqueous Lands*, 7 DE Admin. Code 7504 ("SLA Regulations") to improve an existing roadway crossing ("Project") using 5,752 square feet, or 0.076 acre, of private subaqueous lands. The Project would carry an unnamed tributary ("Stream") of Church Branch under a proposed upgraded roadway located on Sussex County tax parcel 2-30-14 Parcel 69 ("Site"), which is adjacent to 10200 Benson Road, Lincoln, Sussex County.

On December 31, 2014, WSLS published public notices of the Application. WSLS timely received public comments, including requests for a public hearing. WSLS published public notices of a public hearing to be held April 2, 2015 at the Milford Public Library, 11 Southeast St, Milford, Sussex County. This notice also re-opened the public comment period for

written comments. I presided over the public hearing, which was attended by approximately twelve persons from the public and representatives from WSLs' and the Applicant.

Following the hearing, I requested technical assistance from WSLs, which provided the attached Technical Response Memorandum ("TRM") along with a draft of SLA permit consistent with WSLs' recommendation to approve the Project. On October 20, 2015, the Applicant submitted Sussex County's revised planning approval.

I consider the record, as established below, complete for the Department's final decision based upon my recommendation to approve the Project consistent with WSLs' recommendation.

## **II. SUMMARY OF THE RECORD AND FINDINGS OF FACT**

This Report establishes the following record: 1) the 58 page verbatim transcript of the public hearing, as summarized below; 2) the documents introduced as exhibits at the hearing, as identified below, and 3) this Report, including the documents cited herein and the attached TRM and draft SLA permit.

### **A. Summary of the Public Hearing Record**

At the public hearing, WSLs' environmental scientist Tyler Brown provided the following exhibits:<sup>1</sup>

DNREC Ex. 1-Applicant's November 28, 2014 application;  
DNREC Ex. 2-the Department's public notices of the application;  
DNREC Ex. 3- written public comments from Patsy Newmon,  
Mike Callaway, Deena Ellers Falini, Sylvia Smith, Kenneth  
and Francis Bass, and Greg and Cindy Manlove, Gary and  
Linda Evans and Linda Pearson; and

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<sup>1</sup>The Department has no burden of proof to develop the record at the hearing, but provides relevant documents to assist the public in making their public comments. The Department is neutral on the merits of the Project until after the public hearing.

DNREC Ex. 4-the Department's public notices of the public hearing.

Following Mr. Brown's presentation, the Applicant's counsel, Elio Battista, Jr., Esquire, of the law firm Parkowski, Guerke and Swayze, P.C., made a presentation on the Application's details. He noted that the Applicant received United States Army Corps of Engineers ("COE") permit for use of COE regulated wetlands, and that the Applicant had agreed to mitigate the wetlands impact by creating a conservation easement. He concluded by stating that the Application satisfied the applicable SLA Regulations, and that the Project met all the requirements for a SLA permit.

Mr. Battista introduced the following documents as exhibits:

- Applicant Ex. 1-the prepared statement of Jim McCulley, IV, a Delaware registered professional wetlands scientist with the consulting firm of Watershed Eco, LLC;
- Applicant Ex. 2- Mr. McCulley's resume;
- Applicant Ex. 3-the prepared statement of John Murray and James H. Lober, P.E., with Kercher Engineering, Inc.;
- Applicant Ex 4-Mr. Lober's resume;
- Applicant Ex 5-the declaration of covenants, conditions and restrictions for Canaan Woods;
- Applicant Ex. 6-the August 8, 2014 COE permit;
- Applicant Ex 7-the August 8, 2014 COE jurisdictional determination on wetlands;
- Applicant Ex. 8- a November 2, 2006 approved record plan map for the proposed Canaan Woods residential subdivision, which required the Project to gain vehicular access to Benson Road.

Mr. McCulley's prepared statement, Applicant's Ex. 1, set forth his expert review of the Project. He described how the Project would improve the existing culvert, which he said constrained the flow of the Stream's water. He noted that beaver dam activity also impeded the Stream's flow. He stated that the existing culvert caused an upstream impoundment, which caused trees and other vegetation to die. He stated that the existing culvert's blockage of the

Stream's natural flow also had caused the area downstream to dry out from its otherwise natural state, and that this change had harmed the natural vegetation. He indicated that his opinion that the existing culvert was built between 1968 and 1992. He concluded that the Project's proposed culvert would return the stream's upstream and downstream areas to their natural states prior to the existing culvert's construction.

Applicant's expert professional engineer, Mr. Murray, provided his engineering expertise on the existing and the proposed culverts. He said that the existing culvert is a 24 inch diameter metal pipe that appears to be damaged. He also described the beaver activity that contributes to the Stream's blockage. He calculated that the existing culvert receives water flow from a 738.45 acre watershed. Using a computer model, he calculated the Stream's flows during storm events. He estimated the Stream's flow was 44.04 cubic feet per second ("cfs") flow during a moderate two year storm event; i.e., 3.4 inches of rainfall over twenty four hours. He stated that the existing culvert's 24" diameter could only carry 10.96 cfs of the Stream's flow, which he said means that 30.07 cfs would flood over the existing roadway and that the culvert would also cause upstream flooding.

He stated that the Project would meet Sussex County's engineering standards, which require one foot clearance above the Stream's water flow during a 10 year storm event, or 5.3 inches of rainfall over a twenty four hour period. He stated that the Project's two 38" high by 60" wide elliptical reinforced concrete pipes and roadway elevation would allow 113.50 cfs of water flow, which meets Sussex County's requirements.

Finally, he stated that the proposed Canaan Woods development would not adversely impact the Stream's flow. He said that Canaan Woods would not add any additional water to the

watershed, and that the development's stormwater management system would improve water flow by managing stormwater flows during storm events.

The first public speakers were Frances and Ken Bass, who live along Benson Road near the Site. Mrs. Bass asked the Applicant whether Canaan Woods would have a 'good neighbor' policy, which she described as a policy to keep the neighbors informed about governmental approvals. She also was concerned with the impact to wetlands and water flows.

Mr. Battista answered her question about public notices by stating that the developer and the Department had provided all required public notices for all governmental approvals. He also addressed the issue of water flow by stating that the Project would allow the Stream's water flow to return to its natural stream prior to when the existing culvert.

Mrs. Bass also inquired about the ownership of the Site. Mr. Battista answered that Canaan Woods' developer contracted with the Applicant to acquire the Site.

The second public speakers were Linda and Gary Evans, who also live on Benson Road near the Site. They asked about the Project's proposed culvert and whether it would have grates to keep children and animals out. Mr. Battista responded by saying that Sussex County would make that determination, and that the Applicant would comply with Sussex County's decision. Ms. Evans asked whether the Department would be waiting for DP&L's approval for the work within DP&L's easement. Mr. Brown answered that the Department would like to see DP&L's approval.

Mr. Evans commented that the beavers had been removed by wildlife control officers five years ago. He also asked whether the Department's concerns, as expressed in the 2008 "PLUS" letter commenting on the proposed subdivision, would be considered for the Project.

The third public speaker was Jeffrey Falini, a property owner adjacent to the Site and downstream from the existing culvert. His concern was that the Project would cause the pond to be drained, which he opposed because he considered the pond to benefit the environment because it attracts wildlife. He also was concerned that the Project would cause more water to flow on to his property and thereby harm it.

The fourth public speaker was Michael Calloway, who lives upstream and adjacent to the Site. He was concerned with the Project drying up the existing pond, which he said was used by wildlife.

The fifth public speaker was Patsy Newnon, who also commented about wildlife using the pond. She also complained about the poor condition of Benson Road, which would be used more by Canaan Woods' residents.

The sixth public speaker was Mr. Hess, who claimed the Project would harm wildlife and noted that endangered species were located nearby.

Mr. and Mrs. Evans provided written comments including documents identified as Evans Exhibits 1 through 7, which were copies of documents prepared for Sussex County's planning review process.

#### B. The Application and Background.

The Project proposes to replace the existing, deteriorated culvert's 24" diameter metal pipe with two 38" high by 60" wide elliptically shaped reinforced concrete pipes. The Project also would replace the existing unpaved single lane roadway with a two lane 30' wide paved roadway that meets Sussex County's standards. The Project would place 174 cubic yards of fill on subaqueous lands, and would use 5,752 square feet of private subaqueous lands. The

existing culvert uses an unknown amount of subaqueous lands because WSLs has not found any Department SLA approval of the existing use of subaqueous lands.

Applicant seeks to improve the existing road crossing in order to provide vehicular access to 'Canaan Woods,' a proposed 99 unit single family residential housing development on 166.14 acres that Sussex County's Planning and Zoning Commission conditionally approved on January 14, 2009. On October 25, 2015, the Applicant notified the Department that the Sussex County revised its approval to remove condition D, which had required DP&L's agreement to access its transmission line right-of way.

DP&L's easement is based upon an April 22, 1974 Right-of-Way Agreement, which granted DP&L the right to use a 150' wide area for its high voltage transmission line that crosses Benson Road and runs along Canaan Woods' north boundary.

The Stream flows south to north parallel to Benson Road and it forms the eastern boundary of Canaan Woods. The Project provides the only reasonable road crossing over the Stream in order to allow Canaan Woods access to Benson Road and the upgraded roadway also would be used by DP&L to access its transmission line right-of-way.

The record also contains the August 8, 2014, COE jurisdictional wetlands determination and nationwide permit. The COE approval for filling of the designated wetlands includes the negotiated condition requiring Applicant to place a 30' wide conservation easements along the subdivision's boundaries with the Stream and Church's Branch.

The record includes the recommendation by WSLs' experts that the Project should be approved subject to reasonable permit conditions after a thorough review of the applicable SLA Regulations.

### III. DISCUSSION OF FINDINGS OF FACT AND REASONS

I find that the Project meets the requirements of the SLA and the Department's SLA Regulations because the Project is an appropriate use of subaqueous lands. I find that the public comments do not support any permit denial, or the addition of permit conditions other than WSLs recommends in its draft permit.

The Project will provide a reasonable use of subaqueous lands for a roadway crossing of the Stream. DP&L and Canaan Woods would use the roadway crossing. The Applicant determined that a bridge was too costly to construct over private subaqueous lands, and WSLs' experts agree that a bridge is not needed. The Project will use 5,752 square feet of private subaqueous lands, and this impact will result in a return of the Stream's flow without the obstruction caused by the existing culvert.

The record supports finding that the existing culvert's is inadequate to carry the Stream's flows during moderate storm events. Consequently, the existing crossing causes periodical flooding of upstream areas and the roadway, and this flooding adversely impacts trees and other vegetation. The flooding has created a pond upstream of the culvert, which some public comments consider to be a benefit to the environment because the pond attracts wildlife. I find that the artificially created pond is not a benefit when weighed against the natural Stream conditions as stated in the TRM, which should also attract wildlife. The Project will allow wildlife in the area to access the Stream restored to its natural state, unlike the artificially created pond and blockage of the Stream's natural flow. Thus, I find that the Project should be approved to allow the Stream to return to its natural state prior to the existing culvert, which, in turn, will restore the vegetation upstream and downstream to its natural state.

WSLS's TRM points out that the road crossing cannot be avoided and that the subaqueous lands currently are used by the existing culvert, albeit without any regulatory approval. Given the location of Canaan Woods and the two streams along its boundaries, there is no reasonable alternative to the Project in order to gain access to Canaan Woods from Benson Road. Thus, the SLA Regulations are satisfied with the proposed use of private subaqueous lands.

The WSLS's TRM also notes that the single entrance to Canaan Woods lessens the environmental impact on subaqueous lands than if the Applicant had proposed two entrances with two Stream crossings. The Project's mitigation environmental impacts from the filling of CO regulated wetlands will occur from the Applicant's agreement to the conservation easement that will preserve 30' of land extending from the two waterways that form Canaan Woods' boundaries. This easement will provide a significant environmental benefit by protecting the surface waters from the risk of harm from pollution and will provide an aesthetic benefit to property owners along Benson Road across the Stream from Canaan Woods.

The Project also will remove an inadequately sized culvert that has impaired the Stream's natural flow. The Stream's natural flow is obstructed and even moderate rainfall events cause flooding of the existing unpaved roadway that DP&L uses to maintain its transmission line. The flooding also kills trees and other vegetation upstream. The existing culvert also harms downstream vegetation that is deprived of the natural water flow.

The problems caused by the existing roadway crossing should be remedied, even if Canaan Woods is not built. The roadway's flooding during even moderate storm event increases the risk that DP&L's may not be able to access its transmission line. Thus, the Project should be

approved to reduce this risk, and also to restore the Stream to its natural flow, including the end to periodic upstream flooding.

The public comments oppose an improved the road crossing because it would be used by Canaan Woods. The homeowners along Benson Road have the Stream in their backyards. Canaan Woods would develop the current undeveloped area on the other side of the Stream from the Benson Road homes. The change from this development is not subject to the Department's review in a SLA permit application for the roadway crossing of the Stream. Sussex County's Planning and Zoning Commission already approved Canaan Woods' development, subject to satisfying the conditions needed before final approval. Sussex County's planning approval included the Project as the road access over the Stream from Benson Road. Indeed, any road access to Canaan Woods from Benson Road must cross the Stream. Thus, the Department should not deny the Project because of Canaan Woods' overall environmental impact on over 166 acres. Instead, the Department's SLA review is limited to the private subaqueous lands to be used, and the associated impact on the Stream that will restore its natural flow and reduce flooding.

Another reason in support of the Project is that WSLS' records do not have any indication of a permit for the existing road crossing culvert. The issuance of the permit for the improved roadway crossing will resolve this issue of no permit, and bring the crossing into compliance with the SLA and SLA Regulations.

#### **IV. CONCLUSIONS**

I recommend the following conclusions be entered:

1. The Department has jurisdiction pursuant to *7 Del. C. Section 6006* and *7 Del. C. Chap. 72* to make a determination on the Applicant's subaqueous lands permit application;

2. The Department provided adequate public notice of the Application and of the public hearing, and held the public hearing in a manner required by 7 Del. C. Sections 6003, 6004, and 6006, and the SLA Regulations;

3. The Department considered all timely and relevant public comments in making this determination and this Order and attached Report establishes the record, makes findings of fact and reasons in support of this final agency action;

4. WSLs shall issue a permit approving the Project's use of private subaqueous lands based upon the WSLs' draft permit;

5. The permit's conditions and terms will protect the environment from the activity in the subaqueous lands, consistent with the intent of the SLA, and will allow the Applicant to provide needed vehicular access to Canaan Woods and for use by DP&L to access its transmission line right-of-way; and

6. The Department shall publish this Order on its web site and provide such notice of it in a manner required by the law and the Department's regulations.

  
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Robert P. Haynes  
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 P. Haynes, Esq., Senior Hearing Officer

Through: Virgil Holmes, Director, Division of Water  
Steven M. Smailer, Section Manager, Wetlands and Subaqueous Lands Section

From: Tyler Brown, Environmental Scientist, Wetlands and Subaqueous Lands Section

Date: November 17, 2015

Subject: Herholdt Properties Subaqueous Lands Permit Application

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**INTRODUCTION**

The Wetlands and Subaqueous Lands Section (WSLS), Division of Water, Department of Natural Resources and Environmental Control received an application from Watershed Eco submitted on behalf of Herholdt Properties to replace and upgrade a road crossing with culvert pipes and associated fill on private subaqueous lands in a tributary of Church Branch adjacent to 10200 Benson Road, Lincoln, Sussex County, Delaware. The proposed project is subject to the requirements of the Subaqueous Lands Act (7 Del C., Chapter 72) and Regulations Governing the Use of Subaqueous Lands.

This Technical Response Memorandum (TRM) presents the Wetlands and Subaqueous Lands Section's (WSLS) findings regarding the above-referenced permit application and its expert recommendation that the SLA permit be issued.

The TRM also addresses comments presented at the public hearing held on April 2, 2015. The project was placed on 20 day public notice on December 31, 2014. During the public notice period the WSLs received 8 letters of objection to the project. The objections mainly targeted the proposed development and its negative impacts; although, additional concerns were questioned including Delmarva Power and Electric right-of-way approval, wildlife degradation, pollution, and public safety. The letters requested that the WSLs both deny the project and hold a public hearing.

The public hearing was held on April 2, 2015. Prior to and during the hearing, the WSLs received 8 letters objecting to the construction of the culvert pipes; the majority of the letters were from residents adjacent to the proposed development on Benson Road. The letters stated that the development would alter their way of living, cause roadway issues, pollute the stream, affect wildlife, and prohibit access to Delmarva Power's electric lines.

The applicant, Herholdt Properties, proposes to replace a failed road crossing culvert by installing a road crossing consisting of two 38 inch tall by 60 inch wide elliptical concrete pipes that are 56 linear feet each, and entails 5,752 square feet of fill within Subaqueous Lands to access the development Cannon Woods. During the public hearing James C. McCulley, IV of Watershed Eco LLC, John Murray of Kercher Engineering Inc., and Elio Battista, Jr of the firm of Parkowski, Guerke, and Swayze presented the proposed design on behalf of Herholdt Properties. During the presentation they explained the importance of the design and how the design would improve water flow to a more natural state. They explained how the existing culvert pipe and road has failed, which acts like a dam, and the addition of the proposed culvert pipes would restore the stream to a more natural state.

### **REGULATORY REVIEW- SUBAQUEOUS LANDS**

The following review evaluates the proposed project with respect to the requirements of the Subaqueous Lands Act (7 Del. C., Chapter 72 (Chapter 72)) and the Regulations Governing the Use of Subaqueous Lands (Regulations) adopted in accordance with the statute. The Regulations provide the criteria for evaluating projects that are proposed to be constructed in public or private subaqueous lands. The burden is on the applicant to satisfy the Department that the requirements of these Regulations have been met; and if the granting of the permits, lease or approval will result in loss to the public of a substantial resource or that the loss has been offset or mitigated. The public comments received prior to, and at the hearing, as well as the Department's regulatory evaluation, are addressed according to the pertinent sections of the Regulations as follows.

### **Section 4.0 Criteria of Permits, Leases and Letters of Authorization**

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

### **Section 4.6 Public Use Impacts**

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

#### **4.6.5 Avoidance.**

**The extent of which the applicant's primary objectives and purposes can be realized without the use of such lands.** The use of subaqueous land cannot be avoided. Subaqueous lands currently are being used for a Delmarva Power road crossing for access for its transmission line right-of-way. The Department's files have no record of any approval of the existing culvert's use of subaqueous lands. The culvert's current condition fails to adequately carry the stream's water flows to meet current requirements and it should be upgraded. The proposed replacement would allow usage by the proposed residential development and is the only possible access to the property without access through neighboring properties.

Complete avoidance would result in limited access to the property, and would not support traffic or safety requirements for the proposed development, Cannon Woods. If the current culvert is not upgraded and repaired, which may result in failure of the crossing, access will be limited on the west side of the stream.

**4.6.6 Minimization****The extent to which the applicant's primary purpose and objectives can be realized by alternatives, i.e. minimize the scope or extent of an activity or project and its adverse impact.** Herholdt Properties proposes to install one entrance for the 99 lot community; the addition of the appropriately sized culverts submerged in the stream bottom would restore the stream to a more natural state minimizing environmental impacts.

### **Section 4.7 Environmental Considerations**

**4.7.1.1 Any impairment of water quality, either temporary or permanent which may reasonably be expected to cause violation of the State Surface Water Quality Standards. This impairment may include violation of criteria or degradation of existing uses.** The proposed structure is expected to have minimal adverse impacts to water quality. The road crossing construction will have temporary impacts during construction but shall be quickly stabilized upon completion. The stream is proposed to be temporarily diverted during the

installation of the culverts and road crossing to prevent erosion and sediment plumes downstream.

**4.7.1.3 Any harm to aquatic or tidal vegetation, benthic organisms or other flora and fauna and their habitats. 4.7.1.4 Any loss of aquatic habitat.** The current culvert pipe is undersized and acting as a dam preventing the passage of benthic organisms and other fauna; although, approximately 5,752 square feet of fill material will permanently impact aquatic vegetation within subaqueous lands and 404 wetlands. The proposed road crossing will impact minimal subaqueous lands and promote the natural flow of water while improving fauna passage.

**4.7.1.2 Any effect on shellfishing, finfishing, or other recreational activities, and existing or designated water uses.** The primary purpose of the road crossing is to access the subdivision Cannon Woods and the Delmarva Power electric lines; and minimal recreational activities take place on the stream, which should be restored to its natural state.

#### **Section 4.7.5 Other Considerations**

**4.7.5.2 The degree to which the project incorporates sound engineering principles and appropriate materials of construction.** The proposed road crossing was designed by Kercher Engineering, Inc. According to Kercher Engineering the proposed culvert pipes will adequately handle a ten-year storm event and will be designed to the Sussex County Engineering Department standards and specifications.

**4.7.5.3 The degree to which the proposed project fits in with the surrounding structures, facilities and uses of the subaqueous lands and uplands.** Throughout Sussex County the Wetlands and Subaqueous Lands Section has approved several similar road crossings to access private properties and communities when there are no other alternatives for upland access.

#### **Section 4.8 Requirements for all Structures**

**4.8.4 Structures shall not interfere with navigation, public, or other rights.** This structure meets the requirements stated in the regulations. The structure does not interfere with the public or other rights in regards to the use of the adjacent properties or the tributary of Church Branch.

#### **CONCLUSION**

The WSLs finds that the activity described in the application for Wetlands and Subaqueous Lands Permits by Herholdt Properties, including installation of culvert pipes and a road crossing complies with the Regulations administered by the WSLs. The applicant has applied for only one road crossing to serve the entire community which the WSLs views as a positive aspect of the project in that it minimizes other impacts. The Applicant has addressed the public's concerns pertaining to water flow, water quality, and environmental impacts. Additionally, the structure dimensions are consistent with the applicable regulations. Applicant has proposed mitigation by

maintaining a natural buffer zone of at least 30 feet around all subaqueous lands and waters of the U.S. It is the WSL's opinion, that the project satisfies the regulatory requirements of the SLA and the SLA Regulations.

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

WETLANDS & SUBAQUEOUS  
LANDS SECTION



TELEPHONE (302) 739-9943  
FACSIMILE (302) 739-6304

STATE OF DELAWARE  
DEPARTMENT OF NATURAL RESOURCES &  
ENVIRONMENTAL CONTROL  
DIVISION OF WATER  
89 KINGS HIGHWAY  
DOVER, DELAWARE 19901

Subaqueous Lands Permit No.: SP-406/14  
Date of Issuance:  
Construction Expiration Date:  
Tax Parcel No.: 230-14.00-69.00

Herholdt Properties, LLC  
8406 N. Union Church Road  
Milford, DE 19963

Watershed Eco LLC.  
Attn: James McCulley  
158 Coopers Drive  
Newark, DE 19702

**SUBAQUEOUS LANDS PERMIT  
GRANTED TO HERHOLDT PROPERTIES, LLC TO INSTALL A ROAD CROSSING WITH  
(2) 56 LINEAR FOOT, 38 BY 60 INCH ELLIPTICAL REINFORCED CONCRETE PIPES  
CONSISTING OF 174 CUBIC YARDS OF FILL IMPACTING 5,752 SQUARE FEET OF  
SUBAQUEOUS LANDS IN A TRIBUTARY OF CHURCH BRANCH ADJACENT TO  
10200 BENSON ROAD, LINCOLN, SUSSEX COUNTY, DE.**

Pursuant to the provisions of 7 Del. C., §7205, and the Department's Regulations Governing the Use of Subaqueous Lands, permission is hereby granted on this \_\_\_\_\_ day of \_\_\_\_\_ A.D. 2015 to perform the above referenced project in accordance with the approved plans for this Permit (5 Sheets), as approved by Secretary Order No. 2015-W-0045 issued December 30, 2015; and the application dated November 19, 2014, and received by this Division on November 25, 2014.

WHEREAS, pursuant to the provisions of 7 Del. C., §7203, the Secretary of the Department of Natural Resources and Environmental Control through his duly authorized representative finds that it is not contrary to the public interest if this project is approved subject to the terms and conditions herein set forth.

This Permit is issued subject to the following conditions:

*Delaware's good nature depends on you!*

## GENERAL CONDITIONS

1. This Permit is granted for the purpose of installation of a new road crossing, as stated in the Permit application. Any other use without prior written approval shall constitute reason for this Permit being revoked.
2. The permittee and contractor shall at all times comply with all applicable laws and regulations of the Department of Natural Resources and Environmental Control.
3. The activities authorized herein shall be undertaken in accordance with the permit conditions, the final stamped and approved plans, and with the information provided in the permit application.
4. A copy of this Permit and the stamped approved plans shall be available on-site during all phases of construction activity.
5. The conditions contained herein shall be incorporated into any and all construction contracts associated with the construction authorized herein. The permittee and contractor are responsible to ensure that the workers executing the activities authorized by this Permit have full knowledge of, and abide by, the terms and conditions of this Permit.
6. The permittee shall protect and hold the State of Delaware harmless from any loss, cost or damage resulting from the activities authorized herein.
7. The issuance of this Permit does not constitute approval for any activities that may be required by any other local, state or federal government agency.
8. The issuance of this Permit does not imply approval of any other part, phase, or portion of any overall project the permittee may be contemplating.
9. This Permit authorizes only the activities described herein. Modifications to the project may require a supplemental approval from this office prior to the initiation of construction. A determination of the need for a supplemental approval will be made by this office pursuant to the permittee submitting written notification and revised plans indicating project changes. Failure to contact the Department prior to executing changes to the project shall constitute reason for this Permit being revoked.
10. Representatives of the Department of Natural Resources and Environmental Control shall be allowed to access the property to inspect all work during any phase of the construction and may conduct pre and post-construction inspections, collect any samples or conduct any tests that are deemed necessary.
11. The activities authorized herein shall be conducted so as not to violate the State of Delaware's Surface Water Quality Standards, as amended October 11, 2014.

IN WITNESS WHEREOF, I, Steven M. Smailer, Section Manager, the duly authorized representative of David S. Small, Secretary of the Department of Natural Resources and Environmental Control, have hereunto set my hand this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

---

By Steven M. Smailer, Section Manager  
the duly authorized representative of the  
Secretary of the Department of Natural Resources  
and Environmental Control



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Tyler Brown, Program Manager  
Wetlands and Subaqueous Lands Section



**W.S.L.S.**  
**APPROVED PLANS**  
**PERMIT # SP-406/14**  
**DATE 12-30-15 TLB**  
**(SEE PERMIT CONDITIONS)**

W02.97.101

IMPACT AREA



BY A PROFESSIONAL ENGINEER  
 REGISTERED IN THE STATE OF DELAWARE  
 DATE 12/30/15

BY A PROFESSIONAL ENGINEER  
 REGISTERED IN THE STATE OF DELAWARE  
 DATE 12/30/15

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BY A PROFESSIONAL ENGINEER  
 REGISTERED IN THE STATE OF DELAWARE  
 DATE 12/30/15

SUSSEX COUNTY ROAD #216  
 (aka. Green Road - Local Road)

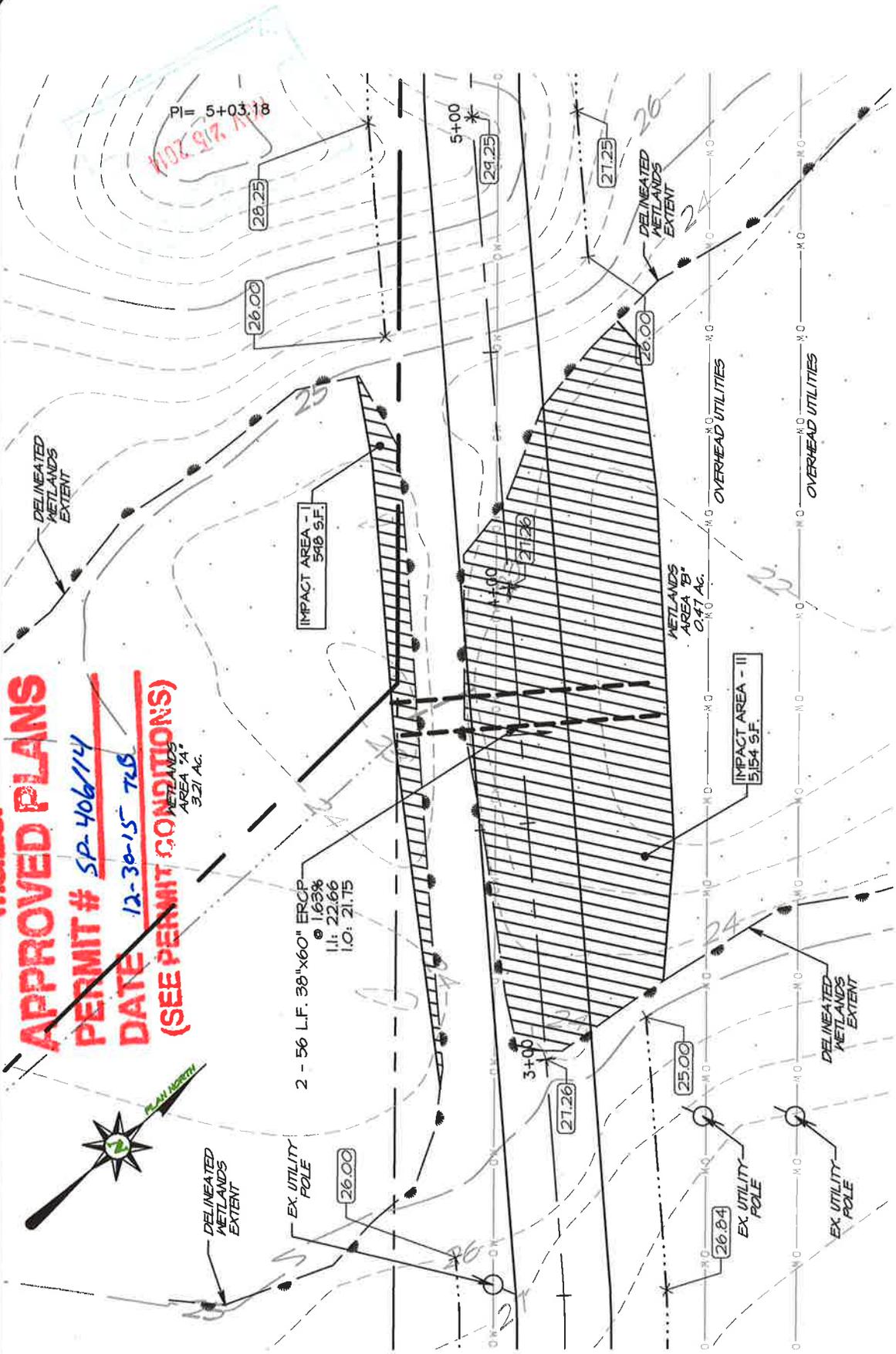
APP BY: A.S.K. DES BY: J.O.M. DRN BY: J.O.M.	SCALE IN FEET (1" = 600') 600' 300' 0' 600'
APPLICANT: CH3, LLC 18495 HERITAGE LANE MILFORD, DE 19963 Phone: (302) 398-8012 Fax: (302) 398-9025	PARCEL INFORMATION:  T.P.: 2-30-14, PARCEL 69 GROSS AREA: 166.14 Acres
SITE PLAN <b>CANAAN WOODS</b>  CEDAR CREEK HUNDRED - SUSSEX COUNTY - DELAWARE  <b>KERCHER ENGINEERING, INC.</b> ENGINEERS - PLANNERS - SURVEYORS 413 E. MARKET STREET - GEORGETOWN - DE 19947 302.854.9062 Voice 302.854.9064 Fax	
JOB No:	06-0407EG
PLAN DATE:	October 23, 2014
SHEET	2 of 4

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W.S.L.S.

**APPROVED PLANS**  
**PERMIT # SP-406/14**  
**DATE 12-30-15 T.S.**  
**(SEE PERMIT CONDITIONS)**

PI = 5+03.18  
10/27/2014



APP BY: A.S.K. DES BY: J.O.M. DRN BY: J.O.M.	<p>SCALE IN FEET (1" = 30')</p>	<p>ONLY THOSE PLANS INCORPORATING THE RAISED PROFESSIONAL SEAL SHOULD BE CONSIDERED OFFICIAL AND RELIED UPON BY THE USER. THIS PLAN IS PREPARED SPECIFICALLY FOR THE CLIENT AND PROJECT DESIGNATED HEREON. ANY MODIFICATION, REVISION, DUPLICATION OR USE WITHOUT THE CONSENT OF KERCHER ENGINEERING, INC. IS PROHIBITED BY LAW.</p> <p>© COPYRIGHT 2008 KERCHER ENGINEERING, INC. ALL RIGHTS RESERVED.</p>
<p>APPLICANT: CH3, LLC 16495 HERITAGE LANE MILFORD, DE 19963 Phone: (302) 398-8012 Fax: (302) 398-9025</p>	<p>PARCEL INFORMATION: T.P.: 2-30-14, PARCEL 69 GROSS AREA: 166.14 Acres</p>	
<p>WETLAND IMPACT AREA <b>CANAAN WOODS</b></p> <p>CEDAR CREEK HUNDRED - SUSSEX COUNTY - DELAWARE</p>	<p><b>KERCHER ENGINEERING, INC.</b> ENGINEERS - PLANNERS - SURVEYORS 413 E. MARKET STREET - GEORGETOWN - DE 19947 302.854.9062 Voice 302.854.9064 Fax</p>	<p><b>KEI</b></p>
JOB No:	06-0407EG	
PLAN DATE:	October 23, 2014	
SHEET	3 of 4	



