



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

89 KINGS HIGHWAY
DOVER, DELAWARE 19901

PHONE: (302) 739-9000
FAX: (302) 739-6242

Secretary's Order No. 2016-S-0038

Re: Stanley Walcek's Application for a Federal Consistency Determination for the Mews of Bethany Development, Bethany Beach, Sussex County

Date of Issuance: September 1, 2016

Effective Date: September 1, 2016

PROCEDURAL HISTORY

The Secretary of the Department of Natural Resources and Environmental Control ("Department") issues this Order on Stanley Walcek's ("Applicant") Application ("Application") for a federal consistency determination pursuant to the Department's *Delaware Coastal Management Program Federal Consistency Policies and Procedures*, 7 DE Admin. Code 108 ("Regulation").

The Application was based upon Applicant's United States Army Corps of Engineers ("USACE") permit application¹ to fill 1.92 acres of federally regulated non-tidal wetlands ("Wetlands") in the Town of Bethany Beach, Sussex County.² The filling of the Wetlands would allow the Applicant to construct the proposed Mews of Bethany Beach development ("Project"), which is an unapproved subdivision. The Project would fill the Wetlands for the construction of six multi-family residential buildings, an access

¹ Under the Regulation, certain federal regulated activities triggers an application to the Department to determine if the federal regulated activity is consistent with the Regulation.

² The Project would be located between Garfield Parkway (SR 26) and the Bethany Loop Canal on four parcels totaling approximately 12.32 acres. Only 0.118 acres are uplands and these are located in the Garfield Parkway right of way.

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street from Garfield Parkway, sidewalks, parking spaces, stormwater management facilities and public utility facilities. The Applicant proposed to mitigate the destruction of the Wetlands by creating four acres of forested freshwater wetlands at a site located approximately four miles west of the Project in Ocean View, Sussex County.

The Department's Delaware Coastal Management Program ("DCMP") reviewed the Application under the Regulation. The DCMP properly provided public notice of the Application, and thereafter received approximately eighty public comments that opposed the Project. These comments are summarized as objecting to the Project because it would 1) increase flooding; 2) destroy wildlife habitat and kill or displace the wildlife; and 3) pollute the water. The public comments included opposition from the Town of Bethany Beach, which has not received the Project's plans for its municipal planning approval.

The DCMP coordinated with the Department's Division of Water, Wetlands and Subaqueous Lands Section ("WSLS"), which received an application for the Project's water quality certification ("WQC"). WSLS also received many public comments opposed to the Department issuing a WQC for the Project based upon similar concerns as stated in the comments on the DCMP Application.

On March 4, 2016, the Department held a consolidated public hearing on both the DCMP and the WQC applications. Approximately one hundred persons attended and thirteen persons spoke, with all but one of the commenters voicing opposition to the Project. The opposition was based on the grounds that the Project: 1) would cause more flooding in Bethany Beach; 2) would destroy wildlife habitat and ruin the natural

scenery; and 3) would increase water pollution. The Department did not receive any public comment that supported the Project³.

Mr. Haynes requested technical assistance from the Department's experts in the DCMP and the WSLs. The DCMP provided its Technical Response Memorandum ("TRM"), which recommended that the Department object to the Project because it was not consistent with the Regulation. The DCMP TRM cited the Regulation's provisions that establish policies to protect all wetlands as a valuable natural resource that should be protected as much as reasonably possible from destruction. The Regulation protects wetlands from destruction because they reduce the impact of storms and flooding of developed areas, provide unique and important habitat for animals, birds and other wildlife, and capture and filter pollutants that otherwise would harm water quality. The DCMP's TRM included a draft objection letter should the Department adopt its position in the final decision.

The WSLs' TRM provided its recommendation that the Department should not make a determination on the WQC at this time because the Applicant failed to provide sufficient information in response to the WSLs letter requesting supplemental information, particularly on the Project's stormwater management and the Applicant's mitigation that would offset the harm caused by destroying the Wetlands.

The attached Hearing Officer's Report ("Report") reviews the procedural history, establishes the Record, sets forth proposed findings of fact, and provides reasons and conclusions consistent with a recommendation that the Department should object to the Project. The Report cited the Record, the public comments that opposed the Project, and relied on the opinions of the Department's experts in the DCMP and the WSLs. The

³ One verbal public comment was generic and not directly relevant to the Project.

Report recommends adopting the positions set forth by the Department's experts in the DCMP and the WSLs in their respective TRMs. The Report also discusses the Project's lack of any local government approval from the Town of Bethany Beach, which it considers makes any Department review premature in this matter until the Town approves the Project and establishes with some degree of certainty the Project's footprint that will then allow the Department to determine the impact on the environment under the Regulation.

The Report recommends that the Department object to the Applicant's Project because it is not consistent with the Regulation based upon the conclusion that the Project will increase the risk of flooding, will destroy valuable and important habitat including habitat used by herons, eagles and osprey, and will result in additional pollutants entering Delaware waters, including waters determined to require special protection under the classification as Exceptional Recreational or Ecological Significance ("ERES").

In addition, the Report also considered the WQC Application and recommended that the Department adopt the position set forth in the WSLs TRM, which was that the Department should not make a determination on the WQC at this time because the Applicant failed to provide WSLs with requested information on stormwater management and the proposed mitigation of the water quality standards.

FINDINGS OF FACT

The Department finds that the Record supports objecting to the Application's federal consistency determination based upon the DCMP's draft objection letter attached to its TRM. The Department finds that its objection to the Application is the proper exercise of its delegated federal authority, as set forth in the Regulations. The DCMP's

TRM describes how the Project would not be consistent with several of the enforceable policies in the Regulations that are to protect wetlands, to prevent flooding, and to preserve natural coastal habitat: 5.1 Wetlands Management; 5.3 Coastal Waters Management; 5.11.2 Fish and Wildlife; and 5.11.3 Nongame and Endangered Species. The Department agrees with DCMP's TRM and its review of the individual policies.

The Department also agrees with the WSLs TRM and the Report, which both recommend the Department not make a determination on the WQC at this time. The Department relies on the WSLs TRM in this Record because it supports the objection. The WSLs TRM identifies the importance of the Wetlands as a natural resource for protecting and improving water quality, which the Department regulates by the WQC pursuant to a federal delegation under Section 401 of the Clean Water Act. Indeed, the United States Environmental Protection Agency ("EPA") submitted comments to the USACE on the Project that highlighted the scrutiny required before the USACE issues a permit. The EPA's comments highlight the importance of the Wetlands in improving water quality. The water quality protection functions are the reason why WSLs requires the information on the Project's stormwater management and the mitigation to determine the Project's actual water quality impacts. EPA also requested the USACE to require the Applicant to provide more information, particularly on alternatives as required by the federal regulations. EPA summarizes its comments as follows: "In light of these concerns, and in the absence of additional site specific information, EPA recommends denial of permit."

The Department finds the Applicant failed to support the Application with sufficient information on the stormwater management and the proposed mitigation plan.

The Department does not accept the Applicant's unsupported statement that the Project will not impact the water quality because this statement is contrary to the Department's determination that wetlands improve water quality and hence the destruction of wetlands will harm water quality absent the Applicant's support for proving that there will be no harm. This is essentially a question of whether the Applicant has met his burden of proof to convince the Department that it should concur in the Applicant's unsupported certification that the Project is consistent with the Regulation. The Department finds that the Applicant failed to meet his burden to support the Application, and hence the Department objects to the Applicant's federal consistency certification.

The Department agrees with the public comments, the DCMP TRM and the Report that the proposed destruction of the Wetlands will increase the risk of flooding as inconsistent with 5.1 Wetlands Management: "The DCMP finds that based on the documented flooding already occurring in the project vicinity, and given that the applicant has not proven that the flooding will not be exacerbated by the loss of 1.92 acres of forested wetland; the proposed development does not protect the public interest and is therefore not consistent with these policies." The destruction of the Wetlands will displace the water stored in the Wetlands. The Department has no information from the Applicant on where the displaced water will go and what impact the displacement will have on Delaware water in the adjacent wetlands and in the Bethany Loop Canal. Absent documentation and analysis, the Department finds that an objection is appropriate because the destruction of wetlands will add to flooding absent Applicant providing some reasonable support of how it will not. The Applicant provided no support for his

conclusion that Delaware's waters would not be impacted by the destruction of the Wetlands.

The Department considers the Town opposition very important regarding the flooding impact. As noted in the public comments, the Town's comprehensive plan indicates the concern with flooding and views wetlands as a method to reduce the risk of flooding. Thus, the Department objection is consistent with the Town's concerns about flooding included in its comprehensive plan.

The Project is in an area that has been designated as waters that are of exceptional recreation or ecological significance ("ERES"). ERES waters are provided special protection in the Regulation and the Department adopts the DCMP findings related to 5.3 Coastal Waters Management: "DCMP finds that based on the direct impacts to the forested wetland, and the documented scarcity of similar habitats with the ERES-designated watershed, the proposed development is not consistent with this policy."

The Department also finds the destruction of wildlife habitat supports the objection to the Project as set forth in the DCMP TRM based on Section 5.11.2.1 (Fish and Wildlife) and 5.11.3.2 (Nongame and Endangered Species). The Department's experts conducted site inspections and provided considerable support for the presence of vegetation suitable for supporting diverse wildlife. The public comments also provided photographs and statements on the presence of wildlife that live in the proposed Project area. The DCMP TRM states: "The DCMP finds that based on the documented importance of the habitat available at the site and the impact that would result from the construction of six (6) multi-family residential units with associated infrastructure within a forested wetland; the proposed project is not consistent with this [5.11.2.1 and 5.11.3.2]"

policy.” Therefore the Department finds that the wildlife in the Wetlands will be harmed by the destruction of the Wetlands.

The public comments indicate the presence of endangered species, but the Department’s experts did not find the presence of such species in their visits to the Project. Nevertheless, the Department finds that the DCMP’s TRM supports the objection to the Project even without finding any endangered species because of the special and unique role the Wetlands provide to the area.

In conclusion, the Department adopts the DCMP’s objection to the Application: “The DCMP reviews projects on a case by case basis and has determined that this project is incompatible with the site conditions and the natural environment at the project location and, therefore cannot be constructed in a manner consistent with DCMP’s approved coastal management policies.”

REASONS AND CONCLUSIONS

The Department concludes that the DCMP should issue an objection letter consistent with the draft objection letter because the Applicant failed to meet the burden to show that the Project is consistent with the Regulation. This conclusion is consistent with the position of the Department’s experts in the DCMP and the WSLs, as well as the many public comments, which provided extensive analysis.

The DCMP’s analysis supports the objection because the Project is inconsistent with four different sections of the Regulations as discussed in more detail in the previous section: Section 5.1 Wetlands Management, 5.3 Coastal Waters Management, 5.11.2 Fish and Wildlife, and 5.11.3 Nongame and Endangered Species. These inconsistencies support the objection to the federal consistency determination.

In addition, the Applicant failed to support the Application by not providing the Department's water quality experts with the information they requested on the Project's discharges into the ERES waters during storm events. The destruction of the Wetlands also would destroy valuable and important wildlife habitat. Therefore, the Department's experts concluded that the Applicant's filling of the Wetlands would be inconsistent with the Department's duty to protect the environment in general and to improve the water quality of ERES waters in particular.

Moreover, the Applicant's proposed mitigation location was insufficiently identified and with little detail on its design and operation. Indeed, even if the proposed mitigation site turns out to be viable it will take years before it effectively mitigates the loss of the mature trees in the Wetlands and the location is so far removed from the Project that it will not mitigate the local flooding that could be exacerbated by the Project. In sum, the Department finds that the Applicant made little attempt to comply with the Department's policies that protect and preserve wetlands and the water quality of the surface waters, particularly ERES waters such as would be impacted by the Project's runoff during storm events.

Finally, the CZMA requires that the Department consider alternatives for a project that is inconsistent with the Regulations, however, the Department determines that no alternative exists to overcome the objection to this Project. The Department previously provided the Applicant with an alternative when the Applicant sought to fill these Wetlands in a previous application in 1993. The Department's July 23, 1993 objection included the alternative to develop the upland area and minimize wetlands impacts and the Applicant utilized this alternative in building the Bethany Crossing West

development of 9 homes in 2002 which is adjacent to the current Project. Thus, the Applicant's current attempt to fill the Wetlands does not have an alternative because the Applicant previously used the only alternative that minimized the destruction of the Wetlands.

The Department's concludes and directs the following:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding pursuant to *7 DE Admin Code. 108* and other relevant authority following a public hearing;
2. The Department provided adequate public notice of the Application and the public hearing pursuant to *7 Del. C. §6004(b)*;
3. The Department considered all timely and relevant public comments in the Record, as established in the Report, prior to issuing this Order as a final decision;
4. The Record supports issuing the draft objection letter prepared by the DCMP based on the TRM and the Application's failure to meet the standards in the Regulation; and that
5. The Department shall publish this Order on its web page and shall provide notice of this Order to the persons who may be affected by this Order, as determined by the Department, and as required by law and Department regulations.



David S. Small
Secretary



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89 KINGS HIGHWAY
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PHONE: (302) 739-9000
FAX: (302) 739-6242

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: **Stanley Walcek's Applications for a Federal Consistency Determination and for a Water Quality Certification for the Proposed Mews of Bethany Development in Bethany Beach, Sussex County**

Date September 1, 2016

I. PROCEDURAL HISTORY

A. Application for a Federal Consistency Determination

In an Application dated September 15, 2015, Stanley Walcek ("Applicant")¹ applied with the United States Army Corps of Engineers ("USACE") for a permit to fill 1.92 acres of federally regulated non-tidal wetlands ("Wetlands") to construct the Mews of Bethany development ("Project") in the Town of Bethany Beach, Sussex County ("Town").

The filing of the USACE permit application is a federal activity that required the Applicant to apply to the Delaware Department of Natural Resources and Environmental

¹ The Application and all other communications with the Department were signed by the Applicant's authorized agent and consultant, Charles Miller, 1010 Environmental Consulting Services, Inc.

Control's ("Department") Delaware Coastal Management Program ("DCMP") for a federal consistency determination ("DCMP Application"). The DCMP reviews the DCMP Application's and determines if the Department should concur or object to the Applicant's certification that the Project is consistent with the Department's *Delaware Coastal Management Program Federal Consistency Policies and Procedures, 7 DE Admin. Code 108* ("DCMP Regulations"). The DCMP review is to occur in a six-month period unless extended by agreement between the Applicant and the DCMP to stay the review period.

In a letter dated November 15, 2015, the Applicant submitted his DCMP Application, which DCMP received on November 20, 2015. The DCMP Application did not contain the Applicant's proposed mitigation plan, which the Applicant provided in a November 15, 2015 letter to the USACE, which DCMP received on September 24, 2015. DCMP, in a November 24, 2015 email, notified the Applicant that DCMP's review had commenced to determine if the DCMP Application was consistent with the Regulations.²

On December 20, 2015, the DCMP published public notices of the DCMP Application in two newspapers, which described the Project and the Applicant's proposed mitigation for the destruction of the Wetlands by the proposed creation of four acres of forested wetlands at another location. The public notice provided the public with thirty days to submit public comments on the Project, but in a January 17, 2016 public notice, the DCMP extended the public comment period to February 4, 2016 because of the public interest and the Project's complexity.

² The Department's initial completeness review determines if the basic required information is provided, but this does not limit the Department from requiring additional information for its decision within the six month DCMP review period or finding that the Applicant failed to meet his burden of proof to support a concurrence with his federal consistency certification.

On March 2, 2016, the DCMP and the Applicant executed a written stay agreement whereby they agreed to extend the DCMP review period until July 18, 2016. On July 13, 2016, the DCMP and the Applicant signed another agreement that established a September 2, 2016 deadline for a Department decision on the DCMP Application.

B. Water Quality Certification Application

In a letter dated December 2, 2015, the Applicant applied with the Department's Division of Water, Wetlands and Subaqueous Lands Section ("WSLS") for the Project's water quality certification ("WQC"). The USACE Application also triggered the Applicant's WQC Application.

The WSLS's review of the WQC Application is pursuant to Section 401 of the federal *Clean Water Act*, 33 U.S.C. §1251 et seq. (1972), which EPA delegated to the Department and the WSLS administers the WQC's authority pursuant to Section 5.0 of the Department's *Regulations Governing the Control of Water Pollution*, 7 DE Admin. Code 7201.

On January 13, 2016, the WSLS had public notices of the WQC Application published in two newspapers with public comments due February 2, 2016. The WSLS received eighty-four public comments during the public comment period.

C. Consolidated Public Hearing on the DCMP and WQC Applications

The DCMP and the WSLS determined to hold a consolidated public hearing on the Applicant's DCMP and WQC applications. On February 12, 2016, the Department published in two newspapers public notices of a March 4, 2016 public hearing. This public notice also re-opened the public comment period.

I presided over the public hearing held at the South Coastal Library, 43 Kent Avenue, Bethany Beach. Approximately one hundred persons attended and thirteen persons presented public comments, and none of the comments supported the Project. The public comments objected to the Project's increasing flooding, harming the water quality and destroying important wildlife habitat. The public comment period closed at the conclusion of the public hearing.

D. Post-Hearing Analysis and Record Development to Support Final Decision

Following the public hearing, the DCMP considered the public comments and DCMP requested that the Department's Division of Fish and Wildlife, Species Research and Conservation Program ("SCRCP") supplement its February 10, 2016 site survey with another site survey on May 20, 2016. The SCRCP prepared site assessment memorandums dated March 3, 2016 and May 24, 2016.

WSLS's also considered the public comments determined that the Applicant should provide additional information, which the WSLS requested in a May 18, 2016 letter. This request sought an accurate list of the names and addresses of adjacent property owners. In addition, the WSLS requested specifics on the Project's stormwater management, which controls water flows during storm events in order to reduce water pollution and reduce the risk of flooding. The WSLS also requested details on the proposed mitigation, which is to offset the environmental harm that the Project would cause. In a June 30, 2016 letter, the Applicant provided a response to the WSLS information request.

The WSLS prepared the attached Technical Response Memorandums ("TRM") to assist me in my recommendations. The WSLS TRM set forth its expert position that the

Department determine that the Applicant still has not provided the requested details on the stormwater management or mitigation. Consequently, the WSLs recommends pursuant to Section 5.10.7 of the Water Quality Regulations that the Department determine that the WQC Application is inactive and require the Applicant to resubmit a new WQC Application if Applicant chooses to proceed.

The DCMP also prepared a TRM attached hereto, and this TRM recommended that the Department object to the Project based upon an objection letter attached to the DCMP TRM. The DCMP TRM recommended objection because it determined that the Project was not consistent with the DCMP Regulations' Sections 5.1 Wetlands Management, 5.3 Coastal Waters Management, 5.11.2 Fish and Wildlife, and 5.11.3 Nongame and Endangered Species. The DCMP TRM emphasized the Project's potential harm to Delaware waters from the Project. This harm is not quantified because the DCMP determined that the Applicant failed to meet his burden of proof to support with any scientific analysis or documentation of the amount of water that would be discharged and its quality. Instead, the Applicant relies on an unsupported statement that there would be no impact to Delaware water, which the DCMP disputes as contrary to the loss of the Wetland's flood storage capacity and water improvement function. The DCMP also cites the destruction of the Wetlands causing harm to wildlife that rely on the Wetlands for habitat. The DCMP recommended an objection based upon the individual inconsistencies with the DCMP policies in the Regulation, as cited in DCMP's TRM.

II. SUMMARY OF THE RECORD³

³ This summary does not determine any factual accuracy.

This Report establishes the following Record: 1) the verbatim transcript of the public hearing; and 2) the documents identified as exhibits herein or otherwise cited in this Report or are incorporated by reference.

At the March 4, 2016, public hearing, the Department's representatives present were: Steve Smailer, WSLs Program Manager II, Tyler Brown, WSLs Program Manager I, Mathew Jones, WSLs Environmental Scientist, Tricia Arndt, DCMP Planner IV, and Nicole Rodi, DCMP Planner.

The DCMP and the WSLs developed an administrative record to assist the public in making public comments. The DCMP provided the following documents from its extensive files on the DCMP Application⁴:

- DCMP Ex. 1-November 15, 2015 application;
- DCMP Ex. 2-December 20, 2015 public notices of the DCMP application;
- DCMP Ex. 3-January 17, 2016 public notices of the extended comment period for the DCMP application; and
- DCMP Ex. 4-written public comments received on the DCMP application.

Several of the public comments provided extensive reasons to support the Department's decision to object to the DCMP Application.

The WSLs provided the following documents for an administrative record on the WQC application:

- WSLS Ex. 1- permit application;
- WSLS Ex. 2-public notice of the permit application;
- WSLS Ex. 3-public notice of the public hearing;
- WSLS Ex. 4-written public comments on the WQC application.

The WSLs and DCMP received eighty-four public comments,⁵ many of them very extensive and detailed. The public comments may be summarized as raising the

⁴ DCMP's files contain documents from when the Applicant first tried to fill the Wetlands, which the DCMP objected to in a July 23, 19 letter. Given this history, I recommend that the Department include the entire DCMP file on the Applicant's attempts to fill wetlands on his Bethany Beach properties where the Project is located, which is classified as 99% federal or state wetlands.

following concerns with the proposed destruction of the Wetlands: 1) the increased risk of flooding; 2) the loss of habitat for wildlife in general and birds in particular; 3) the loss of natural scenery; and 4) the increased risk of water pollution. All the public comments opposed the Project. Many of the public comments to the DCMP and the WSLS were from the same commenter. The DCMP prepared a summary of the comments, which is included in the Record.

The Applicant's authorized agent and the consultant, Charlie Miller, attended the public hearing. He indicated that he was available to answer questions and that he had prepared the Project's poster boards on display at the public hearing.

The first public speaker was Diane Boyle Fogash, who spoke on behalf of the Bethany Beach Landowners Association ("BBLA"), which she said is a non-profit organization with 1,115 members reflecting 2,000 owners of property in the Town of Bethany Beach. She cited the BBLA's January 29, 2016 comment letter. She supplemented the BBLA comments by stating that the proposed mitigation was located four miles away and would not reduce the flooding or otherwise mitigate the loss of the Wetlands.

The second public speaker was Bruce Frye, who identified himself as a member of the Town Council of the Town. He mentioned that the Town was frequently flooded and that the loss of the Wetlands would increase the risk of flooding because the Wetlands act as a natural sponge to absorb and filter water. He indicated that the Town had voted unanimously to oppose the Project's proposed filling of the Wetlands. He commented on the BBLA opposition and that every email the Town Council has received has opposed the Project. He commented on the Town spending \$50,000 with the USACE

⁵ A list of the public comments is included with the WSLS Ex. 4 and the DCMP also provides a summary.

to study the Town's flooding issues. He concluded that the study found no good answer to reduce the flooding.

The third public speaker was Brian Nester, who commented on the flooding and explained his concern that the Department should preserve the Wetlands to reduce the risk of flooding. He commented that the Wetlands hold about 165,000 gallons of water in a storm that this amount of water will be displaced during storms to add to any flooding in the area. He also mentioned the impact on water quality and that the destruction of the Wetlands will hurt the water quality, which he said is already 40% higher than allowed by the Total Maximum Daily Loads. His third point in opposition to the Project was that the Wetlands support habitat used by American eagles and osprey, which he said were protected species. His fourth point was that the proposed mitigation site has a Sussex County conservation easement that may prevent any change in use to create the freshwater wetlands. Finally, he commented that the DCMP application failed to provide an adequate explanation on the flooding issue except to refer to the proposed mitigation site. Mr. Nester also provided extensive and detail public comments that addressed the following issues: flooding, impaired water quality conditions, wildlife habit, and an analysis of the DCMP Application that disputed the Applicant's federal consistency determination.

The fourth public speaker was Scott Talbot, who stated he was President of the Stewards Watch Homeowners Association, which includes 48 homes located near the Project. His comments used a map to show that any rain produces flooding and that filling the Wetlands will only add to the flooding. He cited Section 5.11 of the Regulations to support that the Project is inconsistent with the Regulations. He said the

entire area is saturated and the area cannot afford the loss of the Wetlands. He also commented on the presence of wildlife in the Project's area, including eagles, foxes, turtles and raccoons.

The fifth public speaker was David Clark, who stated that he lives in Bethany Crossing West directly to the west of the Project. He stated he is a professional engineer in Delaware with experience in land development. He said he reviewed the plans for the Project and based upon the drawing "Existing Conditions" that stormwater saturates the south side of the Project and overflows on to the Bethany Crossing West property. He stated that his written comments provided photographs of the flooding. He said that the Project would increase the flooding because of the additional stormwater runoff and the Project's impervious surfaces such as roads and sidewalks. He said the Project's stormwater flow will go to the west and impact his development. He said the Project's stormwater flow going to the north would affect the freshwater wetlands, then the tidal wetlands. He noted the stormwater's volume could impact these waters and that its contents could contain pollutants such as petroleum byproducts, herbicides, pesticides and fertilizer from the Project. He also requested a further site review in the spring and summer to observe the wildlife at that time as opposed to the observation in February. Finally, he indicated that the Department should require an archeological review before considering approving the Project.

The sixth public speaker was Jack Walsh, who spoke in opposition based upon the mitigation site being located four miles away that could not mitigate the loss of the Wetlands. He cited the 2008 mitigate rule to provide a functional assessment to determine if the proposed wetlands functions and services would replace the Wetlands'

functions and services in the same watershed and as close as possible. He commented on how he has observed flooding of 18 to 25 inches above normal. He said that he had to evacuate three times in the past twenty years.

The sixth public speaker was Matt Kirks, who commented on the flooding at his house on 6th Street and the Canal as well as a house he owns on Tingle. He had water two feet over his bulkhead this past season and two inches over the bulkhead during high tides. He said that filling the Wetlands would severely impact his properties.

The seventh public speaker was Robert Regan, who indicated he was President of the Bethany Pines Homeowners Association, which is on the south side of Route 26. He expressed his concern with the filling of the Wetlands would increase the flooding in the area.

The eighth public speaker was Robert Bailey, who spoke of the development over the years and how important the Wetlands is to maintaining habit for wildlife. He also expressed concern for flooding. He saw no possible mitigation that could offset the loss of the Wetlands and he wondered if the wildlife that use the Wetlands would be relocated to the new mitigation area.

The ninth public speaker was Chris Bason, who opposed the loss of the Wetlands, which he described as the last wetlands around. He commented that the Project was inconsistent with the Regulations and the Town's comprehensive plan, which seeks to preserve wetlands in order to reduce flooding. He also commented on the loss of the Wetlands would reduce the ability to reduce nitrogen and phosphorous discharges into the Indian River Bay and the Little Assawoman Bay, which are impaired because of high nitrogen and phosphorous levels. He further noted that these waters are classified as

Exceptional Recreational and Ecological Significance (“ERES”), which he stated affords them more regulatory protection from any pollution.

The tenth public speaker was Mr. Leeboyer, who stated that he counted 100 persons present. He requested a show of hands of those who supported the Project. The record indicated that no one raised any hands in response.

The eleventh public speaker was John Grandy, who commented that the loss of the Wetlands will adversely impact the other wetlands near the Bethany Beach Nature Center. He also questioned whether the proposed mitigation four miles away would actually mitigate the loss of the Wetlands.

Kathy Shorter was the twelfth public speaker, who said she was on the Town Council and her property was in the Villas and backed up to the Project. She commented that there currently was standing water on her property and that she is flooded during every nor’easter and that the last one she could not leave her property for two days. She commented that the Project would make the flooding worse.

Sheila Rose was the thirteenth public speaker. She said she was a chicken farmer from Roxanna. Her comments did not relate specifically to the Project. Instead, she expressed ‘her live and let live’ attitude and that folks would have to adjust to higher water.

The post hearing development of the Record includes the following several important documents: 1) the March 22, 2016 letter from the United States Environmental Protection Agency (“EPA”) ; 2) the WSLs TRM; 3) the DCMP TRM, and 4) the Town/USACE study of flooding dated September 2015.

The EPA comments strongly oppose any USACE approval of the permit to fill the Wetlands to build the Project. The comments set forth the EPA's position that the Wetlands are valuable forested wetlands and are an important part of the Delaware Inland Bay Watershed, which is one of 28 National Estuary Programs designated an 'estuary of national importance.' EPA cited excessive nutrient pollution and habitat loss as significant threats to the Inland Bays' water quality. EPA previously identified the Wetlands as "an aquatic resource of national importance because of the important functions they provide locally and to the larger watershed, the increasing threats to their long term viability, and that they are difficult resources to replace." The EPA comments went on to state that

forested wetlands are becoming more uncommon in the watershed making the functions and services they provide even more essential. They provide a suite of ecological functions which are not only necessary locally but also to maintaining the quality of the Inland Bays watershed, including providing habitat for wildlife, food chain production, flood storage, groundwater recharge, nutrient recycling, sediment transport, and organic matter input and processing.

Comment at 2.

The EPA was not able to ascertain the quantifiable impact on the loss of the Wetlands from the USACE public notice. Consequently, EPA recommended that the USACE require the Applicant to conduct a detailed baseline assessment of the Wetland's physical, chemical and biological functions in order to measure the impact of the loss of the Wetlands. The EPA indicated that such an assessment is supported by the Section 404 Guidelines at 40 CFR § 230.3(q). The EPA comments indicate that the Guidelines prohibit discharges into wetlands if there is a practicable alternative, or the least

environmentally damaging practicable alternative (“LEDPA”). The Guidelines requires the Applicant to determine less adverse impacts on the aquatic ecosystem and presumes that a LEDPA exists unless the Applicant demonstrates otherwise.

The EPA comments also addressed Section 404(b)(1)’s Guidelines, which requires consideration of secondary and cumulative impacts from the loss of the Wetlands. The EPA cited the development in the area, including by the Applicant, which already has caused changes to the environment from cumulative impacts.

The EPA comments questioned whether the proposed mitigation plan was feasible given the lack of any control over the property that is to be used, including no access to the property. The EPA comments did not consider the proposed mitigation to be a suitable replacement for the Wetlands. The EPA recommended that the USACE require a mitigation plan that includes all elements in the 2008 Mitigation Rule, including clearly defined site-specific success criteria, a detailed monitoring strategy, and a thorough adaptive management plan. The EPA emphasized that the cumulative effect of numerous piecemeal impacts locally to this type of unique wetlands the destruction of the Wetlands could detrimentally affect the local community and wildlife.

The WSLs TRM recommended that the Department did not have enough information from the Applicant to support approval of the WQC application at this time. The WSLs indicated that the Applicant failed to provide the requested details on: 1) the composition and amount of fill to be placed in the Wetlands, 2) the construction methods that would be used to limit the land disturbance; 3) the proposed stormwater management practices; and 4) the proposed creation of the new freshwater wetlands to mitigate the

loss of the Wetlands. The lack of this information caused the WSLs to recommend that the Department does not have sufficient information to issue the WQC at this time

The DCMP TRM set forth its analysis of the Project under the Regulation and its recommendation that the Project was not consistent with the following Department policies in the Regulation. 5.1 on Wetlands Management, 5.3 on Coastal Waters Management, 5.11.2 on Fish and Wildlife, and 5.11.3 on Nongame and Endangered Species. The policies and the DCMP's assessment are set forth below:

5.1 WETLANDS MANAGEMENT

5.1.1 The productive public and private wetlands in the state shall be preserved and protected to prevent their despoliation and destruction consistent with the historic right of private ownership of lands. [7 Del. C. §6602]

5.1.2 Activities in or adjacent to wetlands shall be conducted so as to minimize wetlands destruction or degradation, to preserve the natural and beneficial values of wetlands, and to protect the public interest therein. [7 Del. C. §§6602, 6603(a)(2), 6119, 4001]

The DCMP finds that based on the documented flooding already occurring in the project vicinity, and given that the applicant has not proven that the flooding will not be exacerbated by the loss of 1.92 acres of forested wetland; the proposed development does not protect the public interest and is therefore not consistent with these policies.

5.3 COASTAL WATERS MANAGEMENT

5.3.1.3 The coastal water resources of the state shall be protected and conserved to assure continued availability for public recreational purposes and for the conservation of aquatic life and wildlife. [7 Del. C. §6001(a)(4)]

5.3.1.4 It is the policy of the DNREC to maintain within its jurisdiction surface waters of the State of satisfactory quality consistent with public health and public recreation purposes, the propagation and protection of fish and aquatic life, and other beneficial uses of the water. [Delaware Surface Water Quality Standards, Section 1.1, amended July 11, 2004]

5.3.1.5 The designated uses applicable to the various stream basins represent the categories of beneficial use of waters of the state which must be maintained and protected through application of appropriate criteria. Such uses shall include public water supply; industrial water supply; primary contact recreation involving any water-based form of recreation, the

practice of which has a high probability for total body immersion or ingestion of water such as swimming and water skiing; secondary contact recreation involving a water-based form of recreation, the practice of which has a low probability for total body immersion or ingestion of water such as wading, boating and fishing; maintenance, protection and propagation of fish, shellfish, aquatic life and wildlife preservation; agricultural water supply; and waters of exceptional recreational or ecological significance (ERES waters). [Delaware Surface Water Quality Standards, Sections 2 and 3, amended July 11, 2004]

5.3.1.6 Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. Degradation of water quality in such a manner that results in reduced number, quality, or river or stream mileage of existing uses shall be prohibited. Degradation shall be defined for the purposes of this section as a statistically significant reduction, accounting for natural variations, in biological, chemical, or habitat quality as measured or predicted using appropriate assessment protocols. [Delaware Surface Water Quality Standards, Section 5.1, amended July 11, 2004]

5.3.1.7 Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that water quality shall be maintained and protected. In the case of ERES waters, existing quality shall be maintained or enhanced. Limited degradation may be allowed if the DNREC finds, after review, that allowing lower water quality would result in a substantial net environmental or public health benefit and does not impede existing uses in the area in which the waters are located while allowing for full protection of existing uses. [Delaware Surface Water Quality Standards, Sections 2 and 5.2, amended July 11, 2004]

5.3.1.8 Where high quality waters constitute an outstanding national resource, such as waters of national parks and wildlife refuges, existing quality shall be maintained and protected. [Delaware Surface Water Quality Standards, Section 5.3, amended July 11, 2004]

5.3.1.13 Designated exceptional recreational or ecological significance (ERES) waters shall be accorded a level of protection and monitoring in excess of that provided most other waters of the State. These waters are recognized as special natural assets of the State, and must be protected and enhanced for the benefit of present and future generations of Delawareans. [Delaware Surface Water Quality Standards, Section 5.6.1.1, amended July 11, 2004]

5.3.1.14 ERES waters shall be restored, to the maximum extent practicable, to their natural condition. To this end, the DNREC shall, through adoption of a pollution control strategy for each ERES stream basin, take appropriate action to cause the systematic control, reduction, or removal of existing pollution sources, and the diversion of new pollution sources, away from ERES waters. [Delaware Surface Water Quality Standards, Section 5.6.1.2, amended July 11, 2004]

The DCMP finds that based on the direct impacts to the forested wetland, and the documented scarcity of similar habitats within the ERES-designated watershed, the proposed development is not consistent with this policy.

5.3.1.31 After July 1, 1991, unless a particular activity is exempted by these regulations, a person may not disturb land without an approved sediment and stormwater management plan from the appropriate plan approval agency. [Delaware Sediment and Stormwater Regulations, Section 8(1), amended April 11, 2005]

Regarding the requirement for an approved sediment and stormwater plan, the DCMP echoes the concerns expressed by the WSLs in their technical response memorandum; that there is insufficient information to evaluate the proposal to determine if a sediment and stormwater plan could be approved by the appropriate approval agency, the Sussex Conservation District. The consultant, Charles Miller from Environmental Consulting Services, Inc., relayed that he had met with DNREC's Sediment and Stormwater Program and the Sussex Conservation District in 2011, but neither agency has a record of an active application nor an approved plan.

The WSLs noted inconsistencies in the stormwater management facilities depicted on the site plans accompanying the Water Quality Certification application and sought clarification and additional information regarding pre- and post-development discharge rates in a May 18, 2016 letter to the consultant. Information received by the WSLs subsequent to that request indicated that stormwater at the site discharges to the Bethany Loop Canal and that runoff volumes would be unchanged. This claim was unsubstantiated; details of the stormwater analysis were not provided to the WSLs and the site's ability to comply with DNREC's Sediment and Stormwater Regulations is uncertain at this time.

Numerous comments were received from Bethany Beach residents (see DCMP's excel file tracking the summary of comments) and from the Town Mayor and Council (letter dated January 20, 2016) detailing frequent flooding at the site and in the vicinity. In fact the site was flooded on the day of the February agency site visit, as were neighborhood streets adjacent to the Walcek property. The wetlands on site clearly offer flood storage capacity. Destruction of 1.92 acres of forested wetland, and adding impervious surface from the development and associated infrastructure would reduce this wetland function, possibly to the further detriment of the existing communities.

The DCMP is not making a determination that the project would not comply with the policy regarding sediment and stormwater approval; rather that the information to address this policy is insufficient at this time.

5.11.2 FISH AND WILDLIFE

5.11.2.1 All forms of protected wildlife shall be managed and protected from negative impacts. [7 Del. C. §102(a)]

5.11.3 NONGAME AND ENDANGERED SPECIES

5.11.3.2 Rare and endangered species are in need of active, protective management to preserve and enhance such species. The diversity and abundance of the native flora and fauna of Delaware, particularly those deemed rare or endangered, shall be preserved and enhanced through the protection of the habitat, natural areas, and areas of unusual scientific significance or having unusual importance to their survival. [7 Del. C. §201(1)(2)]

As stated previously, the DCMP has coordinated with the Delaware Division of Fish and Wildlife Species Conservation and Research Program and the U.S. EPA regarding the importance of the habitat at the site relative to the surrounding areas. Both state and federal agencies noted the significant loss of similar habitat and wetlands in the vicinity due to development and the increasing importance of the remaining forested wetland areas. The SCRCP provided an assessment of the diversity of habitat within the site, noting the importance of larger wetland complexes (especially within developed areas) in supporting a full array of wildlife species. The EPA referred to the site as an aquatic resource of national importance.

The DCMP finds that based on the documented importance of the habitat available at the site and the impact that would result from the construction of six (6) multi-family residential units with associated infrastructure within a forested wetland; the proposed project is not consistent with this policy.

The DCMP concluded as follows:

The DCMP reviews projects on a case by case basis and has determined that this project is incompatible with the site conditions and the natural environment at the project location and, therefore cannot be constructed in a manner consistent with DCMP's approved coastal management policies.

III. FINDINGS OF FACT

I find that the Record supports objecting to the Application's federal consistency determination based upon the DCMP's draft objection letter attached to its TRM. I also find that the Record does not support any decision on the WQC Application, but instead

that Department determine that the Applicant failed to provide requested information and that the WQC is inactive, which is the WSLs recommendation.

I agree with the DCMP that the Project is not consistent with the DCMP Regulation, and that the Department should object to the Applicant's federal consistency certification. The DCMP's TRM describes how the Project would not be consistent with several of the enforceable policies in the Regulations that are to protect wetlands, to prevent flooding, and to preserve natural coastal habitat. I agree with DCMP's TRM and its review of the individual policies.

I also find that the WSLs TRM supports the WSLs's recommended action to determine that the WQC Application is inactive, which requires the Applicant to submit a new WQC Application.

I find that the Applicant failed to support the DCMP Application with sufficient information on the stormwater management and the proposed mitigation plan. The Department's expert rejects reliance on the Applicant's unsupported statement that the Project will not impact Delaware waters because such a statement is contrary to the Department's determination that wetlands improve water quality and hence the destruction of wetlands will harm water quality. Thus, the Applicant failed to support for the DCMP Application by showing the stormwater management, and proving that it would not harm Delaware's waters. This is essentially a question of whether the Applicant has met his burden of proof to convince the Department that it should concur in the Applicant's certification that the Project is consistent with the Regulation. I recommend that the Department find that the Applicant failed to meet his burden to

support the Application, and hence the Department should object to the Applicant's federal consistency certification.

I find that the public comments and the DCMP TRM support the objection based upon assuming that the destruction of the Wetlands will increase the risk of flooding. The destruction of the Wetlands first will displace the water stored in the Wetlands. The Department has no information from the Applicant on where the displaced water will go and what impact the displacement will have on Delaware water in the adjacent wetlands and in the Bethany Loop Canal. Absent documentation and analysis, the Department finds that an objection is appropriate because the destruction of wetlands will add to flooding absent Applicant providing some reasonable support of how it will not. The Applicant provided no support for his conclusion that Delaware's waters would not be impacted by the destruction of the Wetlands.

I rely also on the Town's opposition based upon its concerns with the flooding. As noted in the public comments, the Town's comprehensive plan indicates the concern with flooding and views wetlands as a method to reduce the risk of flooding. Thus, the Department objection is consistent with the Town's plans.

I agree with the DCMP assessment that finds the destruction of wildlife habitat supports an objection to the Project. The Department's experts conducted site inspections and provided considerable support for the presence of vegetation suitable for supporting diverse and important wildlife. The public comments also provided photographs and statements on the presence of many wildlife in the Project. Thus, it is reasonable to object based upon the harm to the wildlife that use the Wetlands as their habitat.

The public comments indicate the presence of endangered species, but the Department's experts did not find the presence of such species in their visits to the Project. Nevertheless, the Department finds that the DCMP's TRM supports the objection to the Project even without finding any endangered species because of the special and unique role the Wetlands provide to the area.

IV. REASONS AND CONCLUSIONS

I conclude that the DCMP should issue an objection letter consistent with the draft objection letter because the Applicant failed to meet the burden to show that the Project is consistent with the Regulation and the DCMP analysis that the Project is inconsistent with multiple policies set forth in the DCMP Regulation. This conclusion is consistent with the position of the Department's experts in the DCMP and the WSLs, as well as the many public comments, which provided extensive analysis.

The DCMP's analysis supports the objection because the Project is inconsistent with four different sections of the Regulations as discussed in more detail in the previous section: Section 5.1 Wetlands Management, 5.3 Coastal Waters Management, 5.11.2 Fish and Wildlife, and 5.11.3 Nongame and Endangered Species. These inconsistencies support the objection to the federal consistency determination.

In addition, the Applicant failed to support the Application by not providing the Department's water quality experts with the information they requested on the Project's discharges into the ERES waters during storm events. The destruction of the Wetlands also would destroy valuable and important wildlife habitat. Therefore, the Department's experts concluded that the Applicant's filling of the Wetlands would be inconsistent with

the Department's duty to protect the environment in general and to improve the water quality of ERES waters in particular.

Moreover, the Applicant's proposed mitigation location was insufficiently identified and with little details on its design and operation. Indeed, it will take years before it effectively mitigates the loss of the mature trees in the Wetlands. In sum, I conclude find that the Applicant made little attempt to comply with the Department's policies that protect and preserve wetlands and the water quality of the surface waters, particularly ERES waters such as would be impacted by the Project's runoff during storm events.

Finally, I determine that no alternative exists to overcome the objection. The Department previously provided the Applicant with an alternative when the Applicant sought to fill these Wetlands, and the Department's July 23, 1993 objection included the alternative to develop the upland area and minimize wetlands impacts. Thus, the Applicant's latest attempt to fill the Wetlands does not have an alternative because the Applicant previously used the only alternative that minimized the destruction of the Wetlands.

The recommend the following ordering paragraphs if the Department adopts this Report's recommendations:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding pursuant to *7 DE Admin Code. 108* and other relevant authority following a public hearing;
2. The Department provided adequate public notice of the Application and the public hearing pursuant to *7 Del. C. §6004(b)*;

3. The Department considered all timely and relevant public comments in the Record, as established in the Report, prior to issuing this Order as a final decision;
4. The Record supports issuing the draft objection letter prepared by the DCMP based on the TRM;
5. The Record supports issuing the notice of decision to the Applicant that the WQC is inactive and that the Applicant must submit a new WQC Application to obtain a WQC for the Project; and that
5. The Department shall publish this Order on its web page and shall provide notice of this Order to the persons who may be affected by this Order, as determined by the Department, and as required by law and Department regulations.



Robert P. Haynes, Esq.
Senior Hearing Officer
Office of the Secretary

*Kara S. Coats
Deputy Secretary
on behalf of
Robert P. Haynes
Hearing Officer*



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL
 OFFICE OF THE SECRETARY

DELAWARE COASTAL
 MANAGEMENT PROGRAM

100 W. WATER STREET, SUITE 7B
 DOVER, DELAWARE 19904

Phone: (302) 739-9283
 Fax: (302) 739-2048

Technical Response Memorandum

To: Bob Haynes, Hearing Officer

From: Tricia Arndt, Delaware Coastal Management Program, Environmental Planner IV

Date: September 1, 2016

RE: Mews of Bethany, Federal Consistency Determination

Project Description:

Mr. Stanley Walcek proposes to construct six (6) multi-family residential units with associated infrastructure, on 4 tax parcels (1-34-13.19-62.00, 63, 64, and 65) totaling 12.32 acres. The development site is bound by Route 26 to the south and the Bethany Loop Canal to the north. The upland portion of the site is located along the right-of-way for Route 26. Site plans included with the application (dated 10/21/11) quantify the upland area at the site as ±0.118 acres (see insert below). The proposed development, the Mews of Bethany, would impact 1.92 acres of federally regulated non-tidal wetlands. The applicant proposes mitigation for these impacts within the same watershed, approximately 4 miles away on tax parcel 1-34-11.00-197.01, adjacent to Roxana Road in Ocean View, Delaware.

Area Information from 10/21/11 Plan Set Cover Sheet:

Existing Areas Table

DESCRIPTION	SQUARE FEET	ACRES
TOTAL SITE	± 536,458.82	± 12.32
FEDERAL WETLANDS	± 540,645	± 12.197
STATE WETLANDS	± 190,357	± 4.37
PHRAGMITES	± 242,258	± 5.56
AREA OF PHRAGMITES NOT TO BE FILLED	± 198,148	± 4.55
• DITCH	± 4,197	± 0.096
UPLANDS	± 5,162	± 0.118
FORESTED	± 289,340	± 6.85
FORESTED POST DEVELOPMENT	± 203,292	± 4.67 (62%)

* ± 230 cu yd. of fill required for both on-site ditches

Delaware's good nature depends on you!

Site characterization:

A site visit was conducted by federal and state resource agencies on February 10, 2016. The U.S. Army Corps of Engineers (USACE), the U.S. Environmental Protection Agency (EPA), DNREC's Coastal Management Program (DCMP), Wetlands and Subaqueous Lands Program (WSLS), and the Species Research and Conservation Program (SCRP) were joined by the applicant's consultant and evaluated both the development site and the mitigation site. A second follow-up site visit was conducted by the DCMP and the SCRCP on May 20, 2016 to assess potential habitat for breeding birds. The SCRCP provided an assessment of the flora and fauna subsequent to these evaluations in a letter dated March 3, 2016 and an email on May 24, 2016.

Portions of the site to be impacted are classified as forested wetland dominated by loblolly pine and red maple. Shrubs present include high bush blueberry and bayberry, as well as grasses, sedges and ferns. The forested wetland transitions to tidal marsh adjacent to the Bethany Loop Canal. Forested wetland blocks provide habitat to an array of plant and animal species. Active and remnant (non-active) nests of herons and egrets are present as well as numerous species of song birds.

The DCMP assessed recent and historical data on the site characteristics, relying both on the site visits and SCRCP biologists' opinions, and on interpretations of a series of aerial photographs provided by the SCRCP in a letter to the applicant's consultant dated January 19, 2012. The photo interpretations document changes in vegetation communities and increases in wetland acreage over time.

DCMP permitting role:

An individual permit for discharge of fill into federally regulated wetlands is required from the U.S. Army Corps of Engineers. The Delaware Coastal Programs reviews federal activities and activities requiring a federal license or permit for consistency with the state's coastal management policies pursuant to the federal Coastal Zone Management Act, Federal Consistency Regulations (15 CFR 930). The DCMP policy document including complete text of each policy referenced in this memo is available online: <http://www.dnrec.delaware.gov/coastal/Documents/Federal%20Consistency/2011DCMPPolicyDocument.pdf>

The DCMP's action is timely and complies with the Federal Consistency Regulations, 15 CFR 930.60. The CZMA six-month review period began on September 24, 2015 and was to end on March 24, 2016. Both parties agreed to a six-month stay of the project review period beginning on March 2, 2016, thus making the review deadline July 18, 2016. Prior to the July 18 deadline, both parties once again agreed to stay the review period; the DCMP must issue a decision on or before September 2, 2016. The signed agreements renegotiating the review timeline are included included in the project file.

Policy evaluation:

The DCMP evaluated the project for consistency with its federally approved coastal management policies. The following discussion details pertinent information gathered from state and federal natural resource experts and the public; and outlines DCMP's concerns about the project.

5.1 WETLANDS MANAGEMENT

5.1.1 The productive public and private wetlands in the state shall be preserved and protected to prevent their despoliation and destruction consistent with the historic right of private ownership of lands. [7 Del. C. §6602]

5.1.2 Activities in or adjacent to wetlands shall be conducted so as to minimize wetlands destruction or degradation, to preserve the natural and beneficial values of wetlands, and to protect the public interest therein. [7 Del. C. §§6602, 6603(a)(2), 6119, 4001]

The SCRCP was contacted in November 2011 by the applicant's consultant seeking species and habitat data necessary for permit applications. The SCRCP (at that time known as the Natural Heritage and Endangered Species Program) provided a response dated January 19, 2012. The reviewing biologist did not access the site but offered comments pertaining to the importance of forested wetlands and conducted an analysis of a time series of aerial images, from 1937 to 2007. The 2007 aerial photographs were the most recent images available at that time. Vegetation community interpretations were based on the images and multispectral analysis using color bands. The methods are detailed in the 2012 letter, as well as the caveats. It is important to note that the data was not field verified. The DCMP is citing this information to illustrate the trend over time, not specific wetland type and acreage. This analysis supports anecdotal evidence from the residents and Town Council regarding the increased flooding over time.

The SCRCP's assessment indicated that the wetland acreage has increased over time from approximately 3 acres in 1937 to over 12 acres in 2007 (see Table 1 below).

Table 1. Summary of Wetland Changes based on interpretation of aerial imagery.

Year of Aerial Photo	Approximate wetland acres present
1937	2.88
1954	4.47
1961	8.54
1997	13.35
2002	13.39
2007	*12.67

* The reduction in wetland acres between 2002 and 2007 is primarily due to development in the southwestern edge of the property that entailed wetland fill.

The applicant's assessment of these policies is brief. In response to policy 5.1.1 in the federal consistency submission, the applicant points to his right "to use, exclude others from using, irreversibly change, and sell which are all consistent with the historic right of private ownership". In response to policy 5.1.2, the

applicant asserts that “there are no activities in State of Delaware jurisdictional wetlands. Activities are minimized to 1.92 acres in Federal 404 jurisdictional wetlands.”

Proposed mitigation for wetland impacts are located approximately four (4) miles west of the site near Ocean View, Delaware. In a March 22, 2016 letter, the EPA questioned whether the mitigation site was viable based on potential access issues that may affect construction and monitoring at the site. The EPA also expressed concerns that the proposal may not be sufficient to offset the lost functions and values of the impacted wetlands, noting the scarcity and importance of the existing wetlands. Likewise, the WSLs technical response memorandum raises concerns that the mitigation proposal lacks sufficient detail to address public comments concerning the effectiveness of the site to replace wetland functions at the project site.

In 2015, the USACE coordinated with the Town of Bethany Beach to determine the feasibility of water control structures in the Loop Canal (which is adjacent to the project site) and the Assawoman Canal, in order to address flooding issues. This report, titled “**Pennsylvania Avenue, Town of Bethany Beach, Delaware Flood Risk Management Feasibility Study**”, was referenced in a comment letter from the Mayor of Bethany Beach and from attendees at the public hearing. The DCMP obtained the report from the USACE project manager via email after the hearing. The report notes the history of flooding within the Town which is attributed to a combination of rainfall and runoff, and water levels within the tidally influenced canals. The report states that “significant amounts of floodwater (2 to 3 feet) are present in the streets and surrounding building foundations for multiple days at a time” and that “flooding issues have become a chronic threat to public safety and a consistent source of economic damages”.

Wetlands provide multiple ecosystem services that directly benefit people, so much so that local, state and federal entities, in Delaware as well as nationally, have developed regulations to protect them (Mitsch and Gosselink 2000, Acreman and Holden 2013). The State of Delaware explicitly protects tidal wetlands, but that does not diminish the long understood importance of non-tidal wetlands (Daniels and Cumming 2008, Acreman and Holden 2013). A characteristic of non-tidal wetlands, particularly those in floodplains, is that they provide storage for floodwater which is slowly released back into the system (Acreman and Holden 2013, Mitsch and Gosselink 2000). The ability for these wetlands to continue to provide value to society diminishes when these wetlands are impacted to a point where they can no longer function (Mitsch and Gosselink 2000). Assessing the value of a wetland must take into consideration the amount of development around it and the amount of other continuous wetlands in the area that are also able to function at its current size (Mitsch and Gosselink 2000). In areas where wetlands have been regularly impacted and reduced in size and function, the larger wetlands in the area increase in their value, much like the wetlands that occur on Mr. Walcek’s property.

The DCMP finds that based on the documented flooding already occurring in the project vicinity, and given that the applicant has not proven that the flooding will not be exacerbated by the loss of 1.92 acres of forested wetland; the proposed development does not protect the public interest and is therefore not consistent with these policies.

5.3 COASTAL WATERS MANAGEMENT

5.3.1.3 The coastal water resources of the state shall be protected and conserved to assure continued availability for public recreational purposes and for the conservation of aquatic life and wildlife. [7 Del. C. §6001(a)(4)]

5.3.1.4 It is the policy of the DNREC to maintain within its jurisdiction surface waters of the State of satisfactory quality consistent with public health and public recreation purposes, the propagation and protection of fish and aquatic life, and other beneficial uses of the water. [Delaware Surface Water Quality Standards, Section 1.1, amended July 11, 2004]

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5.3.1.7 Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that water quality shall be maintained and protected. In the case of ERES waters, existing quality shall be maintained or enhanced. Limited degradation may be allowed if the DNREC finds, after review, that allowing lower water quality would result in a substantial net environmental or public health benefit and does not impede existing uses in the area in which the waters are located while allowing for full protection of existing uses. [Delaware Surface Water Quality Standards, Sections 2 and 5.2, amended July 11, 2004]

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State. These waters are recognized as special natural assets of the State, and must be protected and enhanced for the benefit of present and future generations of Delawareans. [Delaware Surface Water Quality Standards, Section 5.6.1.1, amended July 11, 2004]

5.3.1.14 ERES waters shall be restored, to the maximum extent practicable, to their natural condition. To this end, the DNREC shall, through adoption of a pollution control strategy for each ERES stream basin, take appropriate action to cause the systematic control, reduction, or removal of existing pollution sources, and the diversion of new pollution sources, away from ERES waters. [Delaware Surface Water Quality Standards, Section 5.6.1.2, amended July 11, 2004]

The project site is located in the Inland Bays watershed which is designated as Waters of Exceptional Recreational or Ecological Significance (ERES Waters). This designation is defined in the Water Quality Standards, which is the enforceable mechanism and basis for multiple policies in the Coastal Waters Management section.

In a March 22, 2016 letter in response to the U.S. Army Corps of Engineers public notice for the Mews of Bethany, the EPA identified the wetlands at the project site as “an aquatic resource of national importance because of the functions they provide locally and to the larger watershed, the increasing threats to their long term viability, and that they are difficult resources to replace.” Further, the EPA points out the importance of forested wetlands in maintaining water quality within the Inland Bays watershed and the significant values provided such as flood storage, groundwater recharge, nutrient cycling, and wildlife habitat. The EPA’s comment letter is provided with this memorandum.

The DCMP finds that based on the direct impacts to the forested wetland, and the documented scarcity of similar habitats within the ERES-designated watershed, the proposed development is not consistent with this policy.

5.3.1.31 After July 1, 1991, unless a particular activity is exempted by these regulations, a person may not disturb land without an approved sediment and stormwater management plan from the appropriate plan approval agency. [Delaware Sediment and Stormwater Regulations, Section 8(1), amended April 11, 2005]

Regarding the requirement for an approved sediment and stormwater plan, the DCMP echoes the concerns expressed by the WSLS in their technical response memorandum; that there is insufficient information to evaluate the proposal to determine if a sediment and stormwater plan could be approved by the appropriate approval agency, the Sussex Conservation District. The consultant, Charles Miller from Environmental Consulting Services, Inc., relayed that he had met with DNREC’s Sediment and Stormwater Program and the Sussex Conservation District in 2011, but neither agency has a record of an active application nor an approved plan.

The WSLS noted inconsistencies in the stormwater management facilities depicted on the site plans accompanying the Water Quality Certification application and sought clarification and additional information regarding pre- and post-development discharge rates in a May 18, 2016 letter to the consultant. Information received by the WSLS subsequent to that request indicated that stormwater at the site discharges to the Bethany Loop Canal and that runoff volumes would be unchanged. This claim was

unsubstantiated; details of the stormwater analysis were not provided to the WSLs and the site's ability to comply with DNREC's Sediment and Stormwater Regulations is uncertain at this time.

Numerous comments were received from Bethany Beach residents (see DCMP's excel file tracking the summary of comments) and from the Town Mayor and Council (letter dated January 20, 2016) detailing frequent flooding at the site and in the vicinity. In fact the site was flooded on the day of the February agency site visit, as were neighborhood streets adjacent to the Walcek property. The wetlands on site clearly offer flood storage capacity. Destruction of 1.92 acres of forested wetland, and adding impervious surface from the development and associated infrastructure would reduce this wetland function, possibly to the further detriment of the existing communities.

The DCMP is not making a determination that the project would not comply with the policy regarding sediment and stormwater approval; rather that the information to address this policy is insufficient at this time.

5.11.2 FISH AND WILDLIFE

5.11.2.1 All forms of protected wildlife shall be managed and protected from negative impacts. [7 Del. C. §102(a)]

5.11.3 NONGAME AND ENDANGERED SPECIES

5.11.3.2 Rare and endangered species are in need of active, protective management to preserve and enhance such species. The diversity and abundance of the native flora and fauna of Delaware, particularly those deemed rare or endangered, shall be preserved and enhanced through the protection of the habitat, natural areas, and areas of unusual scientific significance or having unusual importance to their survival. [7 Del. C. §201(1)(2)]

As stated previously, the DCMP has coordinated with the Delaware Division of Fish and Wildlife Species Conservation and Research Program and the U.S. EPA regarding the importance of the habitat at the site relative to the surrounding areas. Both state and federal agencies noted the significant loss of similar habitat and wetlands in the vicinity due to development and the increasing importance of the remaining forested wetland areas. The SCRCP provided an assessment of the diversity of habitat within the site, noting the importance of larger wetland complexes (especially within developed areas) in supporting a full array of wildlife species. The EPA referred to the site as an aquatic resource of national importance.

The DCMP finds that based on the documented importance of the habitat available at the site and the impact that would result from the construction of six (6) multi-family residential units with associated infrastructure within a forested wetland; the proposed project is not consistent with this policy.

5.25 COASTAL MANAGEMENT COORDINATION

5.25.1 State agencies shall provide an opportunity for one another, federal agencies, and other interested parties to review and comment on proposed actions which may be of more than local interest. [Delaware Executive Order No. 42, August 15, 1996]

5.25.2 State agencies responsible for implementation of the CMP shall coordinate their CMP implementation responsibilities with each other to the extent necessary to assure well informed and reasoned program decisions. [Delaware Executive Order No. 42, August 15, 1996]

5.25.3 All State agencies and local units of government shall consider, prior to any CMP decisions, the national interest in:

5.25.3.1 Planning for and locating facilities which are necessary to meet other than local requirements; and

5.25.3.2 Coastal resource conservation and preservation. [Delaware Executive Order No. 42, August 15, 1996]

The DCMP provided opportunity for interested public to review and comment on the proposed action. In accordance with the federal consistency regulations and program policy, the DCP issued a 30 day public notice on December 20, 2015 to solicit public comment on the proposed project. In response to this notice, multiple requests were received asking for the public notice timeframe to be extended. The DCP complied with this request and extended the comment period an additional 15 days. The revised public notice was published on January 17, 2016.

Approximately 80 written comments were received from individuals as well as responses from representatives from numerous civic and homeowners associations. All comments received stated opposition to the project. Comments could generally be categorized as concerns regarding loss of wildlife habitat; loss of flood storage capacity provided by the existing wetlands; potential for increased flooding to adjacent properties as a result of lost storage capacity; loss of the natural vista; and questioning the legitimacy and feasibility of the proposed mitigation. The DCMP compiled an excel spreadsheet to track individual and group comments, and summarized each respondent's concerns.

Further, a joint public hearing with the Wetlands and Subaqueous Lands Section was advertised on February 13, 2016 and held locally on March 5, 2016 at the Town of Bethany Beach Public Library. Approximately seventy (70) individuals attended. 13 spoke, no one was in support of the project.

Bethany Beach Mayor John Gordon provided a letter in response to the DCMP's public notice of the application. The letter dated January 20, 2016 stated that "on January 15, the Bethany Beach Town Council voted unanimously to oppose Stanley Walcek's proposal to permanently fill 1.92 acres of non-tidal forested wetland to facilitate his development of the property". The Mayor specified that the project is not in the Town's best interest.

The DCMP has been in close coordination with the USACE regarding the review of the proposed project. The USACE has expressed concerns regarding the inadequacies in the permit application, lack of specificity in the mitigation plans, incomplete biological assessment of the site, lack of a satisfactory

alternatives analysis, and insufficient avoidance and minimization of wetland impacts. These concerns have been provided in writing to the applicant and/or his consultant. The DCMP has been copied on most correspondence between the USACE and the applicant. These records are part of the federal consistency review file.

The EPA provided justification to the USACE for the denial of the federal permit on the basis that the project as proposed may not comply with Section 404(b)(1) Guidelines and may not be in the public interest. The DCMP notes that it is because of the federal permit requirement that a federal consistency review from this program is necessary. The DCMP echoes the EPA's concerns regarding the direct, secondary, and cumulative impacts from the project.

The policies pertaining to Coastal Management Coordination are directed towards state agencies and outlines agency responsibilities in implementing the approved coastal management program. The DCMP has consulted with numerous state and federal agencies for their expertise and has provided ample opportunity for public input.

Conclusion and Recommendation:

The DCMP coordinated with DNREC's Wetlands and Subaqueous Lands Section, DNREC's Species Conservation and Research Program, the U.S. Army Corps of Engineers (USACE), and the U.S. Environmental Protection Agency (USEPA) for expert opinions on potential impacts to state natural resources as a result of this project. As a result of the significant resource concerns discussed previously and the unprecedented level of opposition from the public and the Town of Bethany Beach Mayor and Council, the DCMP recommends that the project not be constructed as currently proposed.

The DCMP reviews projects on a case by case basis and has determined that this project is incompatible with the site conditions and the natural environment at the project location and, therefore cannot be constructed in a manner consistent with DCMP's approved coastal management policies.

The Federal Consistency Regulations and the DCMP's program document outline the process and requirements for activities that are denied Coastal Zone Management concurrence. The federal regulations (15 CFR 930.63) and the DCMP's program document (section 3.2.6.2) state that the state coastal management program can provide project alternatives to the applicant that would be consistent with the state's policies, **IF** such alternatives exist. The DCMP finds that the alternative that would be consistent with our coastal management policies has been utilized. In a letter dated July 23, 1993, the DCMP objected to the applicant's development proposal at the same site, and advised at that time that the alternative would be to utilize upland portions of the site and to minimize wetland impacts. At that time the site totaled 14.5 acres and the upland portion of the site was 1.307 acres. Mr. Walcek later subdivided and sold the southwest portion of the property, which contained the majority of the uplands at the site. The Bethany Crossings development stands there today.

A proposed consistency determination has been drafted in order to notify the applicant of the DCMP's objection to the project. The DCMP is statutorily obligated to notify the applicant of a decision on or before September 2, 2016.

Work cited:

Acreman, M., & Holden, J. (2013). How wetlands affect floods. *Wetlands*,33(5), 773-786.

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Daniels, A. E., & Cumming, G. S. (2008). Conversion or conservation? Understanding wetland change in northwest Costa Rica. *Ecological Applications*, 18(1), 49-63.

Mitsch, W.J., & Gosselink, J. G.(2000). The value of wetlands: importance of scale and landscape setting. *Ecological Economics* 35 (200) 25-33.



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL**
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

WETLANDS & SUBAQUEOUS
LANDS SECTION

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

Technical Response Memorandum

To: Robert Haynes, Hearing Officer

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

From: Matthew Jones, Environmental Scientist, Wetlands and Subaqueous Lands
Section

Date: August 10, 2016

Subject: Stanley J. Walcek, Water Quality Certification Application

INTRODUCTION

On December 7, 2015, the Wetlands and Subaqueous Lands Section (WSLS), Division of Water, Department of Natural Resources and Environmental Control received an application from Environmental Consulting Services, Inc. Submitted on behalf of Stanley J. Walcek to construct six multi-family residential housing units with associated infrastructure known as the "Mews of Bethany", impacting 1.92 acres of federally regulated non-tidal wetlands along Route 26 approximately 1,330 feet west of Route 1 in Bethany Beach, Sussex County, Delaware. With proposed mitigation on parcel 1-34-11.00-197.01, adjacent to Roxana Road approximately 1,000 feet South of Route 26, Ocean View, Sussex County, Delaware. The proposed project is subject to the requirements of the Regulations Governing the Control of Water Pollution, (7 Del C., Chapter 60) and Section 401 of the Federal Clean Water Act.

The project was placed on 20-day public notice on January 13, 2016. During this public notice period the WSLs received multiple letters of objection to the project, with many of those letters requesting a public hearing. The objections varied from the following: that the mitigation site lacked access or was not a feasible alternative or lacked detail, the proposed project would result in an increase in flood risk; the detrimental effect on adjacent wetlands, and that the application was incomplete. No written comments were received in support of the application.

This Technical Response Memorandum (TRM) presents the Wetlands and Subaqueous Lands Section's (WSLS) findings regarding the above-referenced permit application and the public comments received during the public notice period and those presented at the public hearing held on March 4, 2016.

SUMMARY

During the Public Hearing, Hearing Officer Robert P. Haynes presented the exhibits prepared by Environmental Consulting Services, Inc. as well as the public records from the Department. Following the presentation of the exhibits, Public Hearing that applicant's consultant, Environmental Consulting Services, Inc., were asked if they would like to make a presentation; in which they politely declined and offered to listen and answer questions pertaining to the project. Comments during the public hearing varied but the main concerns were similar to those expressed in the written comments received during the public notice period: insufficiencies/inadequacies of the proposed mitigation as presented, concerns regarding possible increasing in flooding, loss of and impact to wetlands habitat.

Following the public hearing held on March 4, 2016, The Wetlands and Subaqueous Lands Section (WSLS) attempted to finalize our review of the application for a Water Quality Certification for the proposed "Mews of Bethany" development. As part of our review, the WSLs staff identified additional information that was needed before the review could be completed. A certified letter dated May 18, 2016 was sent to Stanley J. Walcek and Environmental Consulting Services, Inc. specifically addressing items needed to reach a conclusion on the 401 Water Quality Certification. The applicant was given thirty (30) working days to provide us with the requested information. On July 5, 2016, Environmental Consulting Services, Inc. dropped off additional information in response to that request.

Specifically, the following information was requested and the associated response received:

Incomplete Adjacent Property Owner Information: This list of adjacent landowners provided with the application was found to be incomplete based on comments received during the public notice period and our subsequent re-review of the information submitted with the application. The owner contact information for tax parcels 1-34-13.19-61.01 and 1-34-13.19-62.01 (9 units) had not been included with the original application.

Response: The applicant's July 5, 2016 submittal contained a list providing the requested information.

Discussion: The Regulations Governing the Control of Water Pollution public notice requirements state:

5.11.2 Public notice shall be given by the following methods:

5.11.2.1 Publication in a daily newspaper of general circulation statewide and a newspaper of general distribution in the county(ies) in which the activity is proposed; or

5.11.2.2 Joint notice with the federal permitting agency or with other state agencies, when consistent with the procedures herein and practical to facilitate processing of the application; and

5.11.2.3 Selected mailings of a copy of the public notice of application to state, county, or municipal authorities and other parties known to be interested in the matter, including the applicant, any agency with jurisdiction over or interest in the activity or disposal site and the owners or residents of property who would be reasonably affected by the proposed activity, as identified in the application.

Of potential significance is the underlined portion of section 5.11.2.3. It is reasonable to assume that adjacent property owners “*would be reasonably affected by the proposed activity*” and should have been identified in the application in their entirety. The additional contact information submitted in response to this request is now complete, however these property owners would not have received the “Selected mailings of the public notice directly.”

Insufficient Detail Regarding Fill Materials:

Appendix H #3 Fill Source not specified. Please provide

Appendix H #6 Fill material type and composition not specified. Please provide.

Response: The applicant’s July 5, 2016 submittal stated “*Appendix H is for fill in Wetlands Subaqueous Lands. No fill in State Wetlands or Subaqueous Lands is requested in the permit.*” The location of three commercial borrow pit locations were provided as possible sources of the fill in addition to a statement regarding “*Non-structural fill also may be used from the agricultural fields of the Pierce-Hardy mitigation site in Clarksville.*” Appendix H was submitted identifying on #3 that the source of fill would be “Hauled in from upland sources.” The response to Item #6 regarding the type and composition percentage was provided as “*Unknown.*” Additionally the total volume of fill indicated in item #4 was presented as 0 cubic yards.

Discussion: The applicant’s statement that “*No fill in State Wetlands or Subaqueous Lands is requested in the permit.*” is irrelevant to the request for the additional information. The Water Quality Certification portion of the Regulations Governing the Control of Water Pollution state:

5.10.2 If the proposed activity involves the discharge of dredged or fill material, the application must contain the following additional information:

5.10.2.1 A description of the composition, source, and quantity of any material to be dredged or used as fill and a description of the area to be impacted, including the area of fill in acres. If the proposed activity involves dredge or fill at multiple sites, the applicant must identify the location for each site and specify the area to be dredged or filled at each location.

5.10.2.2 The method of dredging or filling and specific plans for disposal and control of dredge spoils.

The basis for the Water Quality Certification review is to evaluate whether the proposed federally permitted activity, in the case fill in federally-regulated wetlands, has the potential to impact water quality. A determination regarding the potential impact to water quality from this project cannot be made without the information requested regarding the fill composition and

without a reasonable estimate of the volume of fill material to be used. The applicant's lack of response in these regards and their apparent position that this information is not needed prohibits a final determination at this time with regards to water quality certification.

Insufficient Detail Regarding Site Plans: Erosion and Sediment Control Plan (Sheet 10) – specifies “Foundation [sic] type to be determined by others” Without knowing the foundation type and the associated fill materials, it is not possible for the WSLs to evaluate the anticipated disturbance for the proposed activity as it relates to both the extent and type of fill and the indicated limit of disturbance. Please provide these details.

Response: The applicant's July 5, 2016 submittal stated “*The foundation type is concrete footers with poured or block walls and concrete pads as depicted in the drawing (Sheet 10). Specification for the type of concrete is not available at this time. The construction materials and methods are similar to the developments to the east and west of the Mews Site.*” And additionally restates the possible sources of the fill material.

Discussion: The information provided does address the foundation type as state in our request. However, given the foundation type presented (concrete footers) the limited of disturbance presented on the submitted plans does not appears to be sufficient to encompass the area needed to dig the necessary trenches. The applicant did not provide any additional information/discussion regarding the limit of disturbance as it related to our concerns.

Inconsistent/Outdated Plans: The plans provided have inconsistencies regarding the proposed stormwater management facilities. The provided cover sheet (Sheet I) dated 7/10/2012 indicates a “Sediment Forebay Refer To Sheet 9” while Sheet 9 (Stormwater Management Plans), dated 10/05/2011, indicates no such feature. Please provide WSLs with the current sediment and stormwater plans as well as a completed WSLs Appendix P – Stormwater Management (enclosed).

Response: The applicant's July 5, 2016 submittal contained a narrative description of the originally proposed stormwater management and a series of changes to that concept. It also states “*The saturated soils provide little if any stormwater storage capacity. In its undeveloped state the stormwater falling on the site moves directly through the 12.32 acres to the Bethany Loop Canal.*” Furthermore, in the requested Appendix P item #7 regarding peak pre- and post-development discharge volumes, the information provided by the applicant indicates no differences in stormwater runoff volume from the existing forested wetland with 0 acres of impervious surfaces to the proposed development with substantial impervious surface.

Discussion: It is anticipated that most/all of the stormwater concerns would have to be addressed as part of a formal stormwater management plan submission for the development. Given the preliminary nature of the land plan, it does not appear that those plans have been finalized and are available at this time. However, the information that has been provided by the applicant regarding the pre- and post-development discharge volume appears inconsistent in that it is highly unlikely that the existing wooded wetlands would have the same runoff volume as the fully developed site, as proposed. Additionally this position was not supported by any analysis or calculations.

Insufficient Mitigation Analysis/Justification: Information provided with the application regarding the mitigation site appears to be preliminary. Additionally, no information was provided regarding an evaluation of alternatives, possible avoidance or minimization, or an analysis of the potential environmental impacts as they relate to the basis for the proposed mitigation/compensation. Please provide this information.

Response: The applicant's July 5, 2016 submittal stated "*The information regarding the mitigation which was provided to DNREC was preliminary because the USCOE had not decided on what it would accept as mitigation.*" Additionally the response states "*The evaluation of alternatives, possible avoidance or minimization was provided in the USCOE Permit Application which was provided to DNREC.*"

Discussion: The Regulations Governing the Control of Water Pollution mitigation/compensation requirements state:

5.10.1.7.3 Compensation - The Secretary shall require the applicant to provide for replacement of waters of the State lost due to the activity where they can neither be avoided nor minimized.

5.10.1.7.3.1 Methods of compensation shall include the creation of new waters or the restoration of previously impacted or degraded waters. Compensation may also include establishing compensation banks where waters are established in one location to compensate for losses in several locations.

5.10.1.7.3.2 The compensation of waters on site and within the same watershed is given preference over compensation off site and in a different watershed.

5.10.1.7.3.3 Compensation for waters shall provide functional replacement of acres impacted not to exceed a ratio of three times the area of impacted waters.

5.10.1.7.3.4 To the extent practicable, compensation will be implemented prior to the activity for which such compensation is required. In the event compensation banks have not been established, this provision shall not apply.

5.10.1.7.3.5 When waters are created or restored as part of any antidegradation requirements, the Secretary may require conservation easements or other similar means to protect such waters from adverse alterations in perpetuity.

5.10.1.7.3.6 All certifications requiring wetlands creation or restoration shall include monitoring, functional assessment, maintenance and reporting programs to document timely achievement of a fully functional ecological system.

It is the position of the WSLS that the statement by the applicant that the mitigation information provided was "...*preliminary because the USCOE had not decided on what it would accept as mitigation.*" indicates that there are still significant uncertainties in what is being proposed and what the Army Corp may eventually permit. These uncertainties should be more substantially resolved prior to the issuance of a water quality certification.

CONCLUSION

The WSLS finds that the activity described in the application for the 401 Water Quality Certification by Stanley J. Walcek, proposing to construct six multi-family residential housing units with associated infrastructure, impacting 1.92 acres of federally regulated non-tidal wetlands along Route 26 approximately 1,330 feet west of Route 1 in Bethany Beach, Sussex County, Delaware, with proposed mitigation on parcel 1-34-11.00-197.01, adjacent to Roxana Road approximately 1,000 feet South of Route 26, Ocean View, Sussex County, Delaware lacks

information required to complete our review at this time and to adequately address the concerns raised through the public comment/hearing process.

This conclusion is based on the following deficiencies:

- The stated uncertainty regarding the negotiations with the U.S. Army Corps of Engineers regarding the necessary mitigation: Not only do the submitted mitigation plans lack sufficient detail, it appears that there are still unresolved negotiations with the USCOE in this regard that could significantly affect the project as a whole. Therefore, issuing a Water Quality Certification at this time would be premature. Furthermore, the preliminary information provided is insufficient to adequately address the significant public comments regarding the mitigation site and the associated plans.
- The insufficient detail regarding the source, composition, and amount of fill being proposed: It is not possible to adequately assess the potential impacts to water quality without the requested information regarding the proposed fill. At a minimum, the volume and composition of the material would be needed to evaluate the extent of possible impacts as a result of this material entering the adjacent waters. The applicant's statement that this was not needed because there is no fill in State-regulated wetlands appears to ignore the fundamental basis for water certification regarding the fill.
- The incomplete listing of "reasonably affected" parties submitted with the application: While this information was eventually provided in the applicant's response to the additional information request, these ten (10) adjacent property owners were not afforded the same due process as the others in the area. Our records indicate that a number of the property owners in question were either in attendance at the public hearing or provided comments, however, there is no confirmation that all parties were sufficiently notified.
- The inconsistencies regarding the plans and the stormwater analysis: Additional information is still needed to resolve outstanding questions about the post-development runoff volumes and the limit of disturbance during construction.

Due to the remaining inconsistencies listed above The Wetlands and Subaqueous Lands Section cannot render an approval decision at this time. Therefore, pursuant to 7 DE Admin Code 7201 § 5.10.7 the application should be considered inactive and returned to the applicant. DNREC WLS would entertain a new application for Water Quality Certification, once the deficiencies and inconsistencies have been addressed and a provisional or draft permit has been issued by the USCOE indicating that the scope of the proposed development and the details of the mitigation site have been agreed upon.