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DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL  
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DOVER, DELAWARE 19901

Office of the  
Secretary

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**Secretary's Order No. 2017-W-0022**

**Re: Reconsideration of an Application for a Subaqueous Lands Act Lease, a Marina Permit, and a Water Quality Certification for the Waters Run Community Marina on Dirickson Creek near Frankford, Sussex County**

**Date of Issuance: August 30, 2017**

**Effective Date: August 30, 2017**

**BACKGROUND AND PROCEDURAL HISTORY**

Pursuant to 7 Del. C. §§6003, 6004(b) and 6006(4), the *Subaqueous Lands Act* ("SLA"), 7 Del. C. Chap. 72, and other relevant authority, the Secretary of the Department of Natural Resources and Environmental Control ("Department") issues this Order on reconsideration of WRDG, LLC's ("Applicant")<sup>1</sup> October 16, 2014, application ("Application").

The Application seeks to operate a small marina for the Waters Run Community Marina ("Project"), which would be located along Dirickson Creek near Frankford, Sussex County.<sup>2</sup> The Project proposes to use public subaqueous lands for a community pier and dock slips for twelve boats, and for a community canoe/kayak ramp. In addition, the Applicant would install equipment, signage and facilities to operate a small marina.

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<sup>1</sup> The Applicant changed ownership as set forth in a January 19, 2017, letter from Mary R. Schrider-Fox, Esquire, counsel for NPN Building II, LLC ("NPN"), who indicated that NPN purchased at a Sheriff's sale the Project's land and obtained the Project. The Department recognizes and accepts this transfer to NPN as the Project's legal entity that assumes the record developed on the Application.

<sup>2</sup> The Project is part of the Waters Run community's common areas within Sussex County tax parcel 5-33-12.00-20.00. The Project's area is east of Old Mill Bridge Road (County Road 381).

On November 5, 2013, the Department's Division of Water, Wetlands and Subaqueous Lands Section ("WSLS") approved the Application subject to numerous terms and conditions. On March 18, 2015, the Environmental Appeals Board ("EAB") approved a settlement that remanded the November 5, 2013, decision to the Department "for further consideration and a public hearing before the Secretary's Hearing Officer."

Pursuant to the remand, the Department provided proper public notice of an April 28, 2015, public hearing at the Indian River Marina, 39415 Inlet Road, Rehoboth Beach, Sussex County. The Department's presiding hearing officer, Robert P. Haynes, Esquire, received public comments in support of and in opposition to the Project. Approximately thirty persons attended the public hearing.

Following the public hearing, Mr. Haynes requested the technical assistance from the WSLS, which prepared a Technical Response Memorandum ("TRM"). The TRM provided WSLS' analysis of the public comments, and recommended approval of the Application based upon revised terms and conditions that clarified that Sussex County planning approval was required of the Project.

The Department determined, given the opposition to the Project, that the Record should contain clarification of Sussex County's planning approval. Unfortunately, WRDG experienced financial problems and was unable to provide any Sussex County planning approval. In 2016, the Applicant's new owner, NPN, provided Sussex County's July 3, 2017 planning approval of the Project.

Mr. Haynes prepared the attached Hearing Officer's Report ("Report"), which sets forth the complete procedural history, establishes the Record, proposes findings of fact, and recommends conclusions and reasons in support of the Department's re-issuance of the permit for

a small marina, a SLA lease, and a water quality certification. The Report reviews the public comments, including the public comments in support of the Project from lot owners in the Waters Run development who wanted the promised community amenity. The Report summarized the public comments in opposition, which were made by nearby land owners and boaters who claimed that the Project: 1) would unduly reduce public access to Dirickson Creek; 2) would disturb the environment by adding too many boats; and 2) should first receive Sussex County's planning approval. In addition, the Report addressed an issue raised by the Applicant's proposed sale of boats slips.

### **FINDINGS OF FACT**

The Department finds that the Report accurately reflects the procedural history, establishes the Record that supports this final decision, proposes findings of fact, and recommends conclusions and reasons to support this final decision.

The Department finds that the Record supports approving the November 5, 2013, as supplemented by the information in the Record and the WSLs proposed revised permit and lease terms and conditions. The Department's consideration of the Record after a public hearing satisfies the EAB's requirements in its remand.

The Application seeks to use public subaqueous lands for a small marina for the Waters Run Community. The small marina will have 12 boat slips and the Application meets the regulatory requirements for a small marina under the Department's *Marina Regulations, 7 DE Admin. Code 7501*, the *Regulations Governing the Control of Water Pollution, 7 DE Admin. Code 7501* for the water quality certification, and the *Regulations Governing Subaqueous Lands, 7 DE Admin. Code 7504* for the use of public subaqueous lands.

The Department finds that the Project would be a water-based amenity for the Waters Run community, which Sussex County approved as a fifty-six lot residential community.

Sussex County's original approval included as Condition P the following:

The Community may be served by a crabbing/fishing pier, if permitted by the appropriate regulatory agency, to be located on the east side of Old Mill Bridge Road. There shall be no individual, co-shared, or community piers, boats ramps, or docking facilities of either temporary or permanent nature on the community boundary that is west of Old Bridge Road.

The Department finds that the plans submitted for Sussex County planning approval and in the original Application depicted a pier and dock structure with twelve boat slips. The Department received public comments that questioned the Sussex County planning approval, although the Department's prior permit approval included a permit condition that required the Applicant obtain planning approval for the Project.

Upon reconsideration, the Department requested that the Applicant obtain from Sussex County clarification of the original planning approval and if such approval included the twelve boat slips. The Department finds that the new owner sought and obtained Sussex County's Planning and Zoning Commission July 3, 2017, approval of a revised "Condition P," which allows docking for twelve boats. The Department finds that this amendment clarifies and resolves the issue of whether Sussex County approved the Project.

The Department finds that proposed use of subaqueous lands is to operate the Waters Run Community Marina, which would be a private marina with twelve boat slips available for use by the residents and guests of the Waters Run development.

The Department finds that the Applicant submitted proper designs and specifications for the Project, which would construct in public subaqueous lands the following: 1) a 5' wide by 110' long pier, 2) a 5' wide by 88' long dock, 3) four 4' wide by 11' long finger piers, 4) 20

mooring pilings, and 5) a 10' wide by 20' long canoe/kayak launching ramp using quarry stone secured within a plastic geocell grid. In addition, the Department finds that the Project meets the requirements for the signage, equipment and facilities for operating a small marina.

The Applicant assumed ownership of the unsold lots within Waters Run and the community common area, which includes the Project.

The Department finds that the Project will provide the Waters Run community with the amenity of a small marina, which the Marina Regulations recognize is preferable to the alternative of individual boat docking facilities, which currently would not be allowed to be built for Waters Run's waterfront lots. The Waters Run Community Marina would not have a boat storage area, a parking area except for golf carts, and short-term for trailers, a maintenance facility, a fueling facility, or restroom facilities. The Waters Run community members using the Project would walk or ride golf carts across Old Bridge Road and then on to a gravel road. The Project would have a small 10' x 10' structure connected to a gazebo for storage of the marina's equipment and materials, including portable pump out equipment, fire protection equipment, and spill kit, life ring, and other similar equipment. This structure also would display the Department's required necessary signage and contain the required small marina documents.

The Department finds that the Application included an acceptable proposed small marina Operation & Maintenance Plan, which was based upon the Department approved plan. This Plan will govern the Waters Run Community Marina's daily operations.

The Project is one of several amenities that the Applicant proposed for the Waters Run community. The Record includes public comments from several lot owners in support of the Project. At the public hearing, the Applicant described its proposed allocation of the boats slips, which indicated the possible sale of some boat slips. The Department finds that any sale of boats

slips is prohibited by the Marina Regulations, and would be contrary the Department's lease of the use public subaqueous lands.

Upon reconsideration, the Department finds that the Report fully addresses the procedural issue raised in the appeal to the EAB on whether a meritorious objection or request should trigger the Department's decision to hold a public hearing. The Department agrees with the WSLs and the Report that the Department should interpret the SLA regulations, the SLA, and the Department's Chapter 60 authority to decide to hold a public hearing upon a meritorious request. A meritorious objection without a request for a public hearing may support the Department's decision to hold a public hearing, but a meritorious objection does not provide any right to demand that the Department hold a public hearing.

The Department agrees with the public comments that the SLA provides support for holding hearings on a meritorious objection, and this Order provides the Department's clarification and interpretation of the SLA. A meritorious objection also should request a public hearing in order to claim any right to have the Department hold a public hearing. This interpretation is consistent with the common sense interpretation, and the overall Department authority to hold public hearings upon request under Chapter 60 and a full reading of the SLA provisions on holding public hearings. The public hearing that the Department held on this matter moots the issue, but this Order provides this interpretation for future matters. The Department finds that the WSLs' October 16, 2014, permit decision was proper because at that time the Department had no pending request for a public hearing. Upon reconsideration, the Department finds no legal defect in the WSLs' procedures that resulted in its October 16, 2014 permit decision, but upon remand and reconsideration approves the issuance of a revised permit

and lease to clarify the approval based upon the Record developed from the public hearing procedure.

The reconsideration includes all public comments received and finds that the Department should issue a new permit and lease based upon the WSLs' recommended changes. Thus, the Department finds that it has satisfied the remand for a reconsideration, albeit with a decision that supports the same result as in the October 16, 2014 permit decision, as superseded by the permit, water quality certification, and lease of public subaqueous lands that this Order authorizes.

### **CONCLUSIONS AND REASONS**

The above findings support the conclusion that WSLs properly issued the Applicant the authority in its October 16, 2014 decision. The remand to follow the Department's public hearing process did not result in any change to that decision other than to issue new permit and a subaqueous lands lease to reflect WSLs' changes. The Department determined that the Sussex County Planning Commissions review and approval of the Project based upon the new owner should precede any Department decision on the Project. The Sussex County Planning Commission approved the Project and satisfied one of the issues raised by the public comments.

The WSLs' TRM provides the reasons in support of this decision upon reconsideration. Moreover, the Department concludes that the Report fully discusses the issues raised by the Project's opponents and adopts the Report's reasons. The Department agrees with the Report, which concluded that the public comments do not support any denial of the SLA authority that the Applicant requested or any changes to the proposed Project. The Report discusses the public comments and concludes that they do not provide any reason to deny the Application or to impose any other permit conditions other than those the WSLs included in its draft permit.

Some of the public comments opposed a marina permit because of concerns with increased usage of Dirickson Creek. First, the Department concludes that the addition of 12 boat slips is well supported and consistent with the SLA and the Marina Regulations. Second, the Department concludes that it should not impose greater restrictions on the type of boats to use the boat slips, such as non-motorized boats, or require other changes to the Application. The Department concludes that the Waters Run Community Marina will not interfere with the allowed public use area reserved by the Department's SLA regulations, which is based upon preserving 60% of the width of Dirickson Creek for public use. The Department will regulate boating on Dirickson Creek under its authority over the regulation of boating and enforcement of safe boating operation. The Project meets all the Department's SLA requirements for a small marina and, accordingly, the Department concludes that WSLs should issue a marina permit, a water quality certification and execute a subaqueous lands lease for the Waters Run Community Marina.

The Report also considered the public comments that claim that the Department failed to have sufficient evidence of Sussex County's planning approval of the Project. As noted above, the Department determined to wait until the new owner obtained Sussex County's planning approval expressly for a marina. The prior planning approval was not expressly of a marina, although the plans showed a pier and dockage for twelve boats, which the Department relied upon for its prior approval. The Department considers that Record, as supplemented by Sussex County's recent approval, satisfies any confusion or doubt about Sussex County's action.

In sum, the Department, after consideration of the Record developed during the public hearing process, reaffirms the WSLs' October 16, 2014 decision. The WSLs shall issue a new permit, water quality certification and the Applicant and the Department will enter into a

subaqueous lands lease consistent with this Order based upon the draft documents in the Record.

The Department hereby enters the following ordering conclusions:

1. The Department has jurisdiction under its state and delegated federal authority pursuant to *7 Del. C. Section 6006* and *7 Del. C. Chap. 72* to make a determination on the Application for a subaqueous lands permit, a water quality certification, and the lease of public subaqueous lands;
2. The Department provided adequate public notice of the Application and the public hearing be held on it pursuant to an EAB settlement of an appeal "for further consideration and a public hearing before the Secretary's Hearing Officer";
3. The April 28, 2015 public hearing satisfied this remand for a public hearing, which was held pursuant to *Sections 6003, 6004, and 6006 of Title 7*;
4. The Department considered all timely and relevant public comments in making this determination. This Order and the attached Report establishes the Record to support this final decision upon reconsideration of the October 16, 2014 permit decision;
5. The WSLS shall issue Applicant a Marina Permit and Water Quality Certification based upon the WSLS' draft permit, and the Secretary and the Applicant shall execute a lease of public subaqueous lands based upon the WSLS' draft lease;
6. The Marina Permit shall include WSLS's proposed reasonable and well-supported conditions to protect the environment from the risk of harm; and

7. The Department shall publish this Order on its website and provide such notice of it in a manner required by the law and the Department's Regulations.



Shawn M. Garvin  
Secretary

## HEARING OFFICER'S REPORT

TO: The Honorable Shawn M. Garvin  
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: **Reconsideration of an Application for a Subaqueous Lands Act Lease, a Marina Permit, and a Water Quality Certification for the Waters Run Community Marina on Dirickson Creek Near Frankford, Sussex County**

DATE: August 23, 2017

### I. PROCEDURAL HISTORY

This Report is submitted to the Secretary of the Department of Natural Resources and Environmental Control ("Department") on reconsideration of a November 3, 2014 Application ("Application") for the Waters Run Community Marina<sup>1</sup> ("Project") within the Waters Run planned residential community along Dirickson Creek in an unincorporated area of Sussex County near Frankford. The Project seeks a subaqueous lands lease, a marina permit and a water quality certification for a community crabbing/fishing pier, dock slips for twelve boats, and a canoe/kayak launching ramp.

The Department's Division of Water, Wetlands and Subaqueous Lands Section ("WSLS") properly provided public notice of the Application, by publication of legal notices in two newspapers. The WSLS received comments opposing the Project from Murray Oltman and David Hartig. In addition, Mr. Oltman requested a public hearing.

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<sup>1</sup> WRDG, LLC ("WRDG") was the original Applicant and the original real estate developer of Waters Run, a planned fifty-six lot residential community. In a January 19, 2017 letter, counsel for NPN Building II, LLC ("NPN") informed the Department that NPN owns the Project and will develop the remaining unimproved lots in Waters Run. This Order will refer both WRDG and NPN as the Applicant unless otherwise noted.

The Applicant attempted to satisfy the concerns raised by Mr. Hartig and Mr. Oltman and the WSLs participated in the extensive settlement negotiations that lasted over several months until October 7, 2014, when Mr. Oltman notified the WSLs that he had accepted Applicant's settlement offer and that he withdrew his request for a public hearing.

The WSLs reviewed the Project, and approved it without holding a public hearing in an October 16, 2014, decision that issued Applicant Marina Permit MP-353/13, Water Quality Certification WQ-358/13 and Subaqueous Lands Lease SL-354/13. The WSLs approvals reflected the Applicant's settlement with Mr. Oltman.

WSLS informed Mr. Hartig of the decision on the Project, and Mr. Hartig appealed the Department's final decision to the Environmental Appeals Board ("EAB"). On March 18, 2015, the EAB approved a settlement between the Department and Mr. Hartig. The settlement dismissal of Mr. Hartig's appeal without prejudice to his "filing a subsequent appeal on the same permit application." The EAB approved settlement also directed "a Remand of this matter for further consideration and a public hearing before the Secretary's Hearing Officer." The Applicant did not participate in the appeal.

On April 1, 2015, the WSLs published in two newspapers public notice of an April 28, 2015 public hearing. I presided over the public hearing at the Indian River Marina, 39415 Inlet Road, Rehoboth Beach, Sussex County and approximately thirty persons attended.

Following the public hearing, the Applicant experienced difficulties and the Department suspended its reconsideration of the Application until early 2017 when the new owner notified the Department that it had purchased the Project. Following the Sussex County's approval of the twelve boat slips, the WSLs provided the attached revised Technical Response Memorandum

("TRM"), which recommends that the Department approve the Project and issue the revised marina permit, a water quality certification, and the subaqueous lands lease.

## II. SUMMARY OF THE RECORD

This Report establishes the Record, which includes: 1) the verbatim transcript of the public hearing, 2) the documents introduced as exhibits at the public hearing; and 3) this Report, including the documents cited herein and in the attached WSLs TRM.

At the public hearing WSLs' representatives were Environmental Scientist Tyler Brown and WSLs Program Manager Scott Figurski. The WSLs provided the following documents, which I marked as DNREC exhibits:<sup>2</sup>

- DNREC Ex. 1 – The Application received by WSLs on November 5, 2013;
- DNREC Ex. 2 - Public notice of the Application as published in *The News Journal* and *The Delaware State News* on November 20, 2013;
- DNREC Ex. 3 - Written comments from the following persons:
  - Jon Fallick, received November 5, 2013, in support of the Application;
  - Kiki Hargrove, received November 5, 2013, in support of the Application;
  - John Kline, received November 5, 2013, in support of the Application;
  - Catherine Hughes, received November 5, 2013, in support of the Application;
  - David Hartig, received December 10, 2015, in opposition to the Application;
  - Murray Oltman, received December 8, 2013, in opposition to the Application and his request for a public hearing;
  - Rodney Smith, received December 9, 2013, in opposition to the Application;
  - Catherine Hughes, received April 22, 2015, in support of the Application;
  - Anna von Lindenberg, received March 30, 2015, in opposition to the Application;

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<sup>2</sup> The Department provides documents at its public hearings in order to assist the public in making their comments, but the Department has no legal obligation to develop the record at the public hearing.

Jeffrey Mumford, received April 17, 2015, in opposition to the Application;  
David and Deborah Vicino, received April 17, 2015, in opposition to the Application;  
Robert Remo, undated, in opposition to the Application; and  
David Hartig, received April 20, 2015, in opposition to the Application.

DNREC Ex. 4 – Public notice of the Application and the public hearing as published April 1, 2015 in *The News Journal* and *Delaware State News*.

Following the WSLs' presentation, Applicant's consultant, Mr. Edward Launay of Environmental Resources, Inc., made a presentation and provided for the Record the following documents, which were marked as the following exhibits: summarized below:

- Waters Run Ex. 1- unsigned Declaration of Condominium for Waters Run Marina;
- Waters Run Ex. 2- Plan for the Project;
- Waters Run Ex.3-Waters Run Community Marina Operations & Maintenance Plan;
- Waters Run Ex. 4-October 18, 2007 letter from Sussex County Planning and Zoning Commission indicating approval of Waters Run subdivision's preliminary record plan approval with conditions;
- Waters Run Ex. 5- December 14, 2010 letter from the State of Delaware Historic and Cultural Affairs Office accepting the results of Dr. Otter's study and that there were no historical or cultural affairs issues;
- Waters Run Ex. 6 - September 1, 2010 Letter from the U.S. Fish and Wildlife Service indicating that there would be no impact on federally listed habitats or critical habitats or species;
- Waters Run Ex. 7- September 7, 2010 Letter from the Delaware Department of Natural Resources Natural Heritage and Endangered Species Program;
- Waters Run Ex. 8- Natural Heritage Program Site Visit Report;
- Waters Run Ex. 9-February 18, 2011 Letter from the Corps of Engineers certifying the location of waters of the United States on the Project's plan;
- Waters Run Ex. 10 – Applicant's March 13, 2014 letter to Scott Figurski proposing to address the concerns raised at the meeting;
- Waters Run Ex. 11- Applicant's March 13, 2014 letter to Murray Oltman on changes to the Project's details to address his concerns;
- Waters Run Ex. 12 - E-mail from Tyler Brown to Mr. Launay, Mr. Oltman, Mr. Remo, State Representative Gray, and Mr. Hartig providing the results of the water depth survey;
- Waters Run Ex. 13 - E-mail confirming the time and place for the August 21, 2014 meeting with Mr. Hartig and Mr. Oltman;

- Waters Run Ex. 14 - Mr. Oltman's e-mail to Mr. Launay, Tyler Brown, and others on remaining concerns;
- Waters Run Ex. 15 - Mr. Launay's August 29, 2014 Letter to Tyler Brown;
- Waters Run Ex. 16 - DNREC Fish and Wildlife's September 8, 2014 letter to Tyler Brown indicating in a review of their database they have no records of any state rare or federally listed plants or animals or natural communities at the Project's site;
- Waters Run Ex.17 - Tyler Brown's September 29, 2014 email to Mr. Launay summarizing agreement on Mr. Oltman's request for a public hearings;
- Waters Run Ex.18 - Mr Oltman's October 8, 2014 e-mail that withdrew his request for a public hearing;
- Waters Run Ex.19 - Vince Robertson's, Esq., counsel for Sussex County Planning and Zoning Commission, September 11, 2014 letter to Mr. Launay indicating that the Applicant should present to the Planning Commission DNREC's approval before the Planning Commission deliberate in regard to the appropriateness of the Project;
- Waters Run Ex. 20 - Applicant's agreement to Special Conditions of Delaware Department of Natural Resources and Environmental Control, Subaqueous Lands/Marina Permit;
- Waters Run Ex. 21 - Chart used in the hearing presentation;
- Waters Run Ex. 22 - Chart with 8.5" by 11" drawings used in the hearing presentation;
- Waters Run Ex. 23 - Mr. Launay's July 22, 2014 letter to Shane Abbott, Assistant Director of Sussex County Department of Planning and Zoning providing information on the Waters Run Community Marina.

Mr. Launay described the Project as a community pier for crabbing, fishing and for the overnight docking of twelve vessels. He indicated that the Department's policy is that marinas are preferred over the alternative of individual piers. He described the proposed 10' x 20' launch ramp for kayaks and canoes, and a gazebo with an attached shed to store the portable pump out equipment, a life ring, a fire extinguisher station, and an emergency spill kit, which are requirement equipment pursuant to the proposed Operations and Maintenance Plan ("O&M Plan").

He indicated that the project required a Department subaqueous lands lease and a marina permit. He stated that Dirickson Creek was 850'-900' wide at the Project, and that there were at

thirteen nearby piers, which ranged in length between 50' to 92'. He said the closest pier to the Project is on the north side of Dirickson Creek and is 84' long. He said the closest pier on the south side of Dirickson Creek is 64' long. The closest piers to the Project on the south side of Dirickson Creek are approximately 300' and 480' east of the Project. He stated his belief that the pier 480' from the Project was Mr. Hartig's.

The first public speaker was Murray Oltman, who said he lives across Dirickson Creek from the Project's site. He recounted his settlement discussions with the Applicant, which resulted in changes to the Project's spill kit, the pump out, the plans for traffic and parking, and the other changes to the Project's design and aesthetics. He discussed his concern with the two condominium documents he was provided. One was for the Waters Run community and the other was for the Waters Run marina. He noted that Sussex County initially only approved plans for Waters Run that included a fishing and crabbing pier. He stated that County approval of a marina would still be needed. He ended by stating that the developer had been very cooperative with the changes made during the informal settlement process.

The second public speaker was David Hartig, who said he lives in Magnolia Shores, a residential community on the south side of Dirickson Creek east of the Project. He opposes the Project's size. He stated that the Applicant does not have the option to construct individual piers along Dirickson Creek west of the bridge. He stated his concern with public safety and the safety of his family from the Project's increased boat traffic on Dirickson Creek. He mentioned that a jet ski hit a pier that was only 50' long. He stated that the Project's proposed 110' long pier would interfere with water-skiers who use of that part of Dirickson Creek, which he said is a good spot for water skiing. He said the Project would increase boat traffic in the area, which would harm the water quality and would increase noise levels. He questioned the depth

measurements and said that under certain tide and wind conditions the water levels were lower than shown by the Applicant's measurements. He cited the Department's decision to deny Swan Cove's application for a marina also supports denial of the Project because it lacks Sussex County's planning approval. He provided for the Record the following documents, which were marked as exhibits:

- Hartig Ex. 1-a marked up documents from Mandrin Homes, LLC's 2006 submission to Sussex County Planning Commission;
- Hartig Ex. 2-a marked up copy of Secretary's Order No. 2007-W-0006 issued March 15, 2007 on Swann Cove, LLC's application for a marina permit;
- Hartig Ex.3-Mr. Hartig's April 17, 2014 email on the public notice's language;
- Hartig Ex. 4-a marked up Sussex County zoning map;
- Hartig Ex. 5-google earth photos of area;
- Hartig Ex. 6- google earth photos of area;
- Hartig Ex. 7-a marked up excerpts of the Department's approval of Mr Hartig's application for a pier and boat dock;
- Hartig Ex. 8-Delaware Center of Inland Bay's April 2014 Survey for Love Creek;
- Hartig Ex. 9- a marked up copy of Waters Run's architectural guidelines;
- Hartig Ex. 10-photo of farmhouse across the road from the Project; and
- Hartig Ex. 11-photos of stormwater runoff from Waters Run.

Mr. Hartig discussed the need to supplement the Department public notices by posting signs at the Project's location.

The third public speaker was Marvin Long, who was concerned with water quality from the use of motorboats and from the Project's development of the grass area next to Dirickson Creek.

The fourth public speaker was Anna von Lindenberg, who was concerned with pollution entering the Inland Bays. She opposed adding any dockage on Dirickson Creek for use by motorboats because more boats would cause waves that would erode the shoreline.

The fifth public speaker was Fred Stewart, who only wanted to note that there are piers west side of the bridge.

The six public speaker was Debbie Vicino, who asked about the liability for the marina and about boat trailers. Mr. Launay responded by stating that the homeowners association would be responsible for liability, and that boat trailers could only be parked at the Project for a certain length of time.

The seventh public speaker was George Wright, who asked about the use of the boat ramp. Mr. Launay answered by stating that there would be no boat ramp and that there would be no area for backing a trailer down to launch a boat. Instead, Applicant proposed keeping the grass area and having an area to launch kayaks and canoes. Mr. Launay went on to describe that two of the proposed twelve boat slips would be reserved for use by all of the fifty-six owners within the Waters Run community and that the remaining ten boat slips would be sold as condominiums to owners of Waters Run.

The eighth public speaker was Mohammed Akhter, who lives in The Refuge. He agreed with the comments about preventing pollution and protecting wildlife, and he added the need to protect from noise pollution. He supported a boat launch area, but he opposed a marina.

Mr. Long spoke again and asked about getting copies of the exhibits. I informed him that the documents were public information and could be obtained via a Freedom of Information Act request.

An unidentified speaker asked about press coverage and the public notice. I indicated that the Department had not issued any press release. I said the Department published the required legal public notices and offered an email subscription service for public notices.

The Record includes the Application, which set forth the plans and specification to build the Project using 1,130 square feet of public subaqueous lands. The Project's water construction would include: 1) a 5' wide by 110' long community pier for crabbing, fishing, and to access the

12 boat slips; 2) a 5' wide by 88' long dock at the end of the pier, 3) four 4' wide by 11' long finger piers, 4) twenty mooring pilings, and 5) a 10' wide by 20' long canoe/kayak launching ramp using quarry stone secured within a plastic geocell grid.

The Project would only be available for use by the owners within the Waters Run community, which is a fifty six lot approved and substantially constructed residential subdivision located west on the west side of Old Mill Bridge Road from the Project. The Project's upland facilities would be on undeveloped land east of Old Mill Bridge Road that the Applicant owns as identified as Sussex County tax parcel 5-23-12.00.20.00.

The Applicant changed ownership as set forth in a January 19, 2017, letter from Mary R. Schrider-Fox, Esquire, counsel for NPN Building II, LLC ("NPN"), who indicated that NPN purchased at a Sheriff's sale the Project's land and obtained the Project. The Department recognizes and accepts this transfer to NPN as the Project's legal entity that assumes the record developed on the Application.

The Applicant provided Sussex County's Planning and Zoning Commission's approval of a twelve-boat slip in its July 3, 2017 amendment to Condition P in its prior approval of the Waters Run plans.

The Record also includes the WSLS TRM, as revised to reflect the Sussex County planning approval of the twelve boat slips. The TRM reviews the applicable SLA considerations and the Marina Regulations. The WSLS TRM recommends approving the Project's marina permit, water quality certification and a lease of subaqueous lands.

### **III. FINDINGS OF FACT**

I recommend that the Department issue an Order finding that the Record supports approval of the Project, subject to the reasonable permit conditions in the WSLS prepared draft

marina permit, the draft water quality certification, and the draft subaqueous lands lease. The Department will exercise ongoing supervision of the Project pursuant to the Department's Marina Regulations at *7 DE Admin. Code 7501*.

I find that the WSLs properly reviewed the Project following the withdrawal of the public hearing request and approved it without holding a public hearing based upon changes agreed to in a settlement between the Applicant and Mr. Oltman.

I find that the WSLs draft permit requires Sussex County's approval of a marina under its land use approval authority as a condition to the permit, which will ensure that the Department and Sussex County decisions are consistent.

Based upon the procedural history and the remand for a public hearing to reconsider the October 16, 2014 decision, I find that the Department properly held the April 28, 2015 public hearing to reconsider its prior decision pursuant to the EAB approved settlement of Mr. Hartig's appeal at EAB Docket No 2014-08. The holding of the public hearing satisfied Mr. Hartig's appeal of the October 16, 2014 decision, which the EAB did not vacate.

I find that the public hearing and the record developed on remand is consistent with the prior approval except that the Department determined to require Sussex County's planning approval of the twelve boat slips. The Applicant provided Sussex County's July 3, 2017 planning approval of the twelve boat slips as an amendment to its prior planning approval and this approval is consistent with the Project. As set forth below, I find that the consideration of the public comments in the Record, including those submitted prior to the October 16, 2014 decision, do not support any change in the Department's decision. I find that the Department should issue new permit, lease and a water quality certification to clarify the authority and reflect the reconsideration process.

#### **IV. DISCUSSION OF REASONS AND CONCLUSIONS**

The Department agreed to reconsider its October 16, 2014 decision and to hold a public hearing as part of its reconsideration. The Record includes all the public comments received both during the initial public comment period prior to the October 16, 2014 decision, and the public comments received during the public hearing's public comment period.

The public comments raised the following issues: 1) whether the SLA requires that Mr. Hartig's comment opposing the Project must be considered as a meritorious request for a public hearing even though he did not request a public hearing; 2) whether the Project will adversely impact Dirickson Creek from increased boats using it, the reduces area for public use, noise and the risk of water pollution, and 3) whether Sussex County had approved the Project as part of its planning review. In addition, the Applicant raised an issue at the public hearing in describing how the boat slips would be sold.

David Hartig raised the SLA procedural issue by claiming that he was entitled to a public hearing based upon his comments opposing the Project even though he did not request a public hearing. The WSLS received public comments from Murray Oltman that both opposed the Project and requested a public hearing.

The Department does not dispute that Mr. Oltman comment and request would have triggered a public hearing if he had not withdrawn his request pursuant to a settlement. Mr. Hartig, although he participated in the settlement negotiations, did not agree to any settlement. Nevertheless, he claimed that the Department should still have held a public hearing even after Mr. Oltman withdrew his hearing request.

Mr. Hartig claims that the Department should have held a public hearing based upon his comment submitted in opposition to the Project. He relies on the SLA language that cites a

“meritorious objection.” The WSLs disagree with his interpretation. Based upon my analysis, I conclude that the WSLs interpretation is correct and that the October 16, 2014 decision was properly made without a public hearing.

Mr. Hartig’s reading of the SLA is flawed because it ignores the SLA’s public notice language, which states that “[a] statement that a public hearing may be **requested** by any interested person who offers a meritorious objection to the application.” 7 Del. 7207 (Emphasis added). This language is similar to other Department public hearings on permit applications when the Department “receives a **meritorious request for a hearing**....” 7 Del. C. Section 6004(b) (Emphasis added.). Mr. Hartig’s interpretation would require the Department to assume that all persons who submit meritorious objections also want a public hearing held. The overall reading of the SLA does not support that interpretation because the SLA includes the request for a public hearing requirement that also is in the Department’s other statutes, and most notably Chapter 60 that specifically applies to the Department’s public hearing process under all its statutes.

Mr. Hartig’s interpretation also is contrary to the SLA that defines “[a] **public hearing request shall be deemed meritorious if it exhibits a familiarity with the application and provides a reasoned statement of the action’s probable impact.**” Section 7208(a) (3) (Emphasis added.). This language is similar (except for the use of “permit’s” for “action’s”) in all other Department hearing requests, which states that a “meritorious” request should exhibit “a familiarity with the application and a reasoned statement of the permit’s probable impact.” Section 6004(b). Thus, both Section 7208(a) (3) and Section 6004(b) require 1) a request for a public hearing and 2) that the request be “meritorious,” which means that the request sets forth “a familiarity with the application and provides a reasoned statement of the .... probable impact.”

Further support for the WSLs interpretation that a SLA public hearing must be requested in found in the Department's Marina Regulations, which are issued pursuant to the SLA. The Regulations states that a public hearing on a marina permit application will be held "[i]f a **meritorious request for a public hearing is received....**" Section 4.3.2.5.1 of 7 *DE Admin. Code 7501*. This Regulation is the Department's interpretation that the SLA's language and requires Mr. Hartig to have requested a public hearing in order to have any claim to a public hearing be held on his comments.

Finally, the *Administrative Procedures Act, 29 Del. C. 10101 et seq.*, which applies to all administrative agencies that issue permits or licenses, also supports the WSLs interpretation that Mr Hartig had to make a timely request for a public hearing. This provision states that a public hearing may be held on licensing/permitting applications, such as a SLA permit application, "in the discretion of the agency unless **timely requested** by a party....." *29 Del. C. §10131(a)* (Emphasis added). Mr. Hartig did not request a public hearing within the time period for the initial public comments and hearing requests, which ended on December 10, 2013. Instead, he relied on Murray Oltman's request. When Mr. Oltman subsequently withdrew his hearing request, Mr. Hartig could no longer timely request a public hearing.

Based upon the above analysis, the WSLs October 16, 2014 decision was proper and the Department did not have to hold a public hearing on Mr. Hartig's comments because the comments did not include a request for a public hearing.

Turning to the other issues raised in the public comments, the first issue entails whether adding twelve boats will adversely impact Dirickson Creek's environment and public safety. The WSLs TRM fully reviewed the Project's impact on Dirickson Creek, which is modest in terms of its physical footprint that will use only 1,131 square feet of subaqueous lands based

upon the facilities to be constructed. The Project does not include any dredging, although some public comments questioned the water depth at the mooring areas. The WSLs experts consider that the pier will allow the boat docking at a sufficient water depth for the proposed boats.

The public comments also complained that the pier was too long and interfered with public use of Dirickson Creek. The WSLs' TRM addresses this concern as follows:

Under Section 4.9 Boat Docking Facilities, paragraph 4.9.2.5 states: In no case shall a structure extend more than 20 percent of the width of the waterbody, nor shall it extend seaward more than 250 feet, except under exceptional circumstances necessary to provide access for needed commerce. In tidal natural features 20 percent is measured from the mean low water mark of one side of the waterbody to the mean low water mark of the other. The proposed structure will only extend 110 feet channelward of the mean high water mark and is far from exceeding 20 percent of the width of the waterbody. Navigation issues will be minimal since the structure is proposed to be installed in a cove at the terminus of the navigable portion of Dirickson Creek. Based on the bathymetry provided the proposed distance channelward of the mean high water appears appropriate to meet the navigational needs of the 12 slips.

Dirickson Creek is publically owned and it is open for public use. The primary users are property owners adjacent to Dirickson Creek and the general public participating in boating, watersports, fishing, crabbing, and kayaking. **Dirickson Creek is already a publically used waterbody; therefore, it's not anticipated that there will be any significant adverse effects on navigation with the addition of 12 more boats.** (Emphasis added).

I find that the above fully analysis addresses the public comments. The Project's addition of boats using Dirickson Creek should be allowed to use the public area of Dirickson Creek, which admittedly will have less public area to use as a result of the Project. Dirickson Creek with the Project will still have sufficient space available for public use based upon Regulation 7401, which allows private use of a waterway by piers that extend channelward up to 40% of the

width of a waterway, which assumes two piers on opposite sides of a waterway that each extend channelward 20% of a waterway's width. The Project provides ample available public space based upon the Project's 110' long pier, or well less than 20% of the width of Dirickson Creek at the Project's location. The WSLs calculated the width of Dirickson Creek to be at least 600' based upon the closest possible opposite shoreline, but this distance did not reflect the Project's pier that would go channelward perpendicular from the shoreline. WSLs also measured via mapping measurement a width of 925' based upon the pier's placement perpendicular to the shoreline. Thus, the public comments do not warrant any denial of the Project or any reduction in the length of the pier because it would unduly interfere with the Dirickson Creek's public area.

The public comments that raised concerns with the impact from any unsafe operation of boats and the risk of boats hitting the Project's pier. This concern does not support any change to the WSLs draft permit as it applies to all piers. This concern is addressed by safe operation of boats, which is regulated by Department boating regulations and their enforcement.

The final issue raised by the public comments claims that Sussex County has not approved the Project under its planning approval authority. The Department on reconsideration determined to require Sussex County's planning approval of the twelve boat slips, and the Applicant provided Sussex County's July 3, 2017 planning approval.

The prior planning approval was based on March 26, 2007 subdivision plans that showed only the Project's community pier for crabbing and fishing and not explicitly mentioned any boat slips, although the plans show a pier and dock with twelve boat mooring spaces. Section 7.0 of the Marina Regulation 7501 allows the Department to determine what planning and zoning approval is sufficient to move forward when considering a marina application.

The public comments also cite the Department's decision to deny the marina permit application sought by the Swan's Cove community, which is also located along Dirickson Creek. Secretary' Order No. 2007-W-0006 Issued March 15, 2007. In this decision the Department relied on the Sussex County planning decision denying the request for planning approval for a marina. The Sussex County planning approval satisfies this issue.

The issue that the Applicant raised at the public hearing entails the proposed sale of boat slips. The sale of boat slips involving public subaqueous lands is prohibited by Section 2.6.6 of the Marina Regulations. The Marina Permit that the WSLs prepared reflects this prohibition in Condition 16 by stating that there is no transfer of property ownership. Thus, the Applicant is on notice of this prohibition.

Based on the Record, I recommend that the Department approve the following conclusions:

1. The Department has jurisdiction under its state and delegated federal authority pursuant to *7 Del. C. Section 6006* and *7 Del. C. Chap. 72* to make a determination on the Project to use public subaqueous lands to construct and operate a small twelve boat slip marina permit and a water quality certification;
2. The Department provided adequate public notice of the Application and the public hearing to be held on it, which was held pursuant to an EAB settlement of an appeal "for further consideration and a public hearing before the Secretary's Hearing Officer;"
3. The April 28, 2015 public hearing satisfied this remand for a public hearing, which was held pursuant to *Sections 6003, 6004, and 6006 of Title 7*;

4. The Department considered all timely and relevant public comments in making this determination. This Order and the attached Report establishes the Record to support this final decision upon reconsideration of the October 16, 2014 permit decision;
5. The WSLs shall issue Applicant a Marina Permit and Water Quality Certification based upon the WSLs' draft permit, and the Secretary and the Applicant shall execute a lease of public subaqueous lands based upon the WSLs' draft lease;
6. The Marina Permit shall include WSLs's proposed reasonable and well-supported conditions to protect the environment from the risk of harm; and
7. The Department shall publish this Order on its web site and provide such notice of it in a manner required by the law and the Department's Regulations.



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Robert P. Haynes, Esquire  
Senior Hearing Officer





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

WETLANDS & SUBAQUEOUS  
LANDS SECTION

TELEPHONE (302) 739-9943  
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Technical Response Memorandum

To: Robert Haynes, Hearing Officer

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

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

Date: June 1, 2016 and revised on August 23, 2017

Subject: WRDG, LLC Wetlands and Subaqueous Lands Permit Application

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**INTRODUCTION**

The Wetlands and Subaqueous Lands Section (WSLS), Division of Water, Department of Natural Resources and Environmental Control received an application from Environmental Resources, Inc. Submitted on behalf of the WRDG, LLC. to construct a community kayak launching facility, a community pier/dock, and includes a 12 slip minor marina in Dirickson Creek on the Southeast side of Old Mill Bridge on Old Mill Bridge Road, Frankford, Sussex County, Delaware. The proposed project is subject to the requirements of the Subaqueous Lands Act (7 Del C., Chapter 72) and Regulations Governing the Use of Subaqueous Lands, (7 Del C., Chapter 60) and the Marina Regulations, and Section 401 of the Federal Clean Water Act.

This Technical Response Memorandum (TRM) presents the Wetlands and Subaqueous Lands Section's (WSLS) findings regarding the above-referenced permit application.

The TRM also addresses comments presented at the public hearing held on April 28, 2015. The project was placed on 20-day public notice on November 20, 2013. During this public notice period the WSLs received four (4) letters of objection to the project, with one specific letter from Murray Oltman requesting a public hearing. The objections stated that the bathymetry of the Dirickson Creek at the project site was inaccurately portrayed on the plans contained in the application; the comments further stated that the structure extends too far into the Creek thereby impeding navigation, would cause harm to Dirickson Creek and the Assawoman Bay, set precedence for future development, and the marina doesn't coincide with the approved Sussex County Plans.. The applicant addressed Mr. Oltman's concerns and he therefore withdrew his request for a public hearing. Guidance from Delaware's Department of Justice still encouraged WSLs to hold the public hearing. The Department issued a decision, which David Hartig appealed to the Environmental Appeals Board. A settlement of the appeal remanded the application back to the Department for holding a public hearing on reconsideration

The public hearing was held on April 28, 2015. Prior to and during the hearing, the WSLs received four (4) letters in favor of the project and all were from the residents of Waters Run. The letters expressed their excitement for the ability to recreationally boat in Delaware waters, and the letters also stated that the proposed structure is one structure that would serve the entire community.

The applicant, WRDG LLC., proposes to install a 5 foot wide by 110 foot long community pier, a 5 foot wide by 88 foot long community dock, (four) 4 foot wide by 11 foot long finger piers, 20 mooring pilings to berth up to 12 boats, and to install a 10 foot wide by 20 foot long kayak launching ramp using quarry stone secured within a plastic geocell grid. During the public hearing Environmental Resources, Inc. presented the application and explained how the application meets all regulatory requirements and reduces the amount of structure over subaqueous lands by constructing one facility for 56 single-family homes.

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

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

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

Section 4.1 of the Regulations requires that the application be evaluated based on the consideration of specific performance specifications, standards and other criteria, including Section 4.6 - Public Use Impacts, Section 4.7 - Environmental Considerations, Section 4.8 Requirements for all Structures and Section 4.9 – Boat Docking Facilities. It also states that an application may be denied if the activity could cause harm to the environment, either singly or in combination with other activities or existing conditions, which cannot be mitigated sufficiently.

The Wetlands and Subaqueous Lands Section concludes that minimal public use impacts will be avoided and that the proposed structure is designed to meet the requirements for all boat docking structures. The applicant has designed the structure to extend into the waterbody at the shortest length possible to adequately berth 12 vessels and provide recreational crabbing and fishing to the community. Lastly, the draft Operations and Maintenance plan submitted with the application addresses any potential harm to the environment and corrective action to take during an emergency.

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

Under this section the Department must consider, among other things, the potential effect on the public and the extent to which the public would benefit or suffer detriment from the project. Additionally, the Department must consider the degree to which the applicant's primary purpose could be realized by alternatives that would minimize or avoid impacts. The public use impacts most relevant to the proposed project are discussed in Sections 4.6.3 and 4.6.5, below.

#### **4.6.3 Navigation - The potential effect on the public with respect to commerce, navigation, recreation, aesthetic enjoyment, natural resources, and other uses of the subaqueous lands.**

The proposed facility will be placed within State waters of Dirickson Creek, and requires a lease from the State of Delaware. Under Section 4.9 Boat Docking Facilities, paragraph 4.9.2.5 states: In no case shall a structure extend more than 20 percent of the width of the waterbody, nor shall it extend seaward more than 250 feet, except under exceptional circumstances necessary to provide access for needed commerce. In tidal natural features 20 percent is measured from the mean low water mark of one side of the waterbody to the mean low water mark of the other. The proposed structure will only extend 110 feet channelward of the mean high water mark and is far from exceeding 20 percent of the width of the waterbody. Navigation issues will be minimal since the structure is proposed to be installed in a cove at the terminus of the navigable portion of Dirickson Creek. Based on the bathymetry provided, the proposed distance channelward of the mean high water appears appropriate to meet the navigational needs of the 12 slips.

Dirickson Creek is publically owned and it is open for public use. The primary users are property owners adjacent to Dirickson Creek and the general public participating in boating, watersports, fishing, crabbing, and kayaking contrary to the public comments in opposition.. Dirickson Creek is already a publically used waterbody; therefore, it's not anticipated that there will be any signifigant adverse effects on navigation with the addition of 12 more boats.

**4.6.5 Avoidance - The extent to which the applicant's primary objectives and purposes can be realized without the use of such lands (avoidance).**

The community has waterfront access on the West side of Old Mill Bridge Road and potentially had the ability to install 11 individual structures and 1 community structure; although, the community created a buffer zone eliminating water access to individual owners. A condition was added within the Sussex County approved plans eliminating any water access on the West side of Old Mill Bridge.

However, without the proposed launching structure and docking facility, residents could moor their vessels in Dirickson Creek and wade to the shoreline or wade their kayaks to adequate water from the shoreline. This type of activity typically results in damage to the bank, including erosion and sediment loss at the launch area; therefore, the proposed marina reduces the potential for erosion from individuals launching vessels from the bank and wading to their moorings. Waters Run Residents would also have to transport their motorized vessels before and after each use to a public boat ramp with the closest being Assawoman Wildlife Refuge or Holts Landing.

**4.6.6 Minimization - The extent to which the applicant's primary purpose and objectives can be realized by alternatives, i.e. minimize the scope or extent of an activity or project and its adverse impact.**

Waters Run is a community which consists of 56 single family homes. They are applying for one structure to serve the community, thus minimizing the potential impact on the adjacent subaqueous lands from multiple structures.

**Section 4.7 Environmental Considerations**

**4.7.1.1 Any impairment of water quality, either temporary or permanent which may reasonably be expected to cause violation of the State Surface Water Quality Standards. This impairment may include violation of criteria or degradation of existing uses.** The proposed structures are expected to have minimal adverse impacts to water quality. The facility will primarily be used as a minor marina consisting of 12 slips and does not include any refueling, maintenance, or convenience facilities which could be sources of potential contaminants. The leaking of contaminants, such as, gas and oil, into the waterway from the 12 berthed vessels themselves is expected to be minimal due to the marina rules and the implementation of the operations and maintenance plan. In the case of an accidental spill an emergency spill kit will be onsite. The treated lumber used for the facilities can leach contaminants; however, this is mostly during the first few months after installation and can be considered minimal.

**4.7.1.3 Any harm to aquatic or tidal vegetation, benthic organisms or other flora and fauna and their habitats. 4.7.1.4 Any loss of aquatic habitat.** The dock will cause some shading, but should allow for the growth of aquatic vegetation and the continued use of the area by benthic organisms. The waterbody is currently used by the general public and the addition of 12 boats should not have a significant adverse impact.

**4.7.1.2 Any effect on shellfishing, finfishing, or other recreational activities, and existing or designated water uses.** The primary use of Dirickson Creek is for adjacent property owners to gain access to the Assawoman Bay and watersports activities for the general public. A secondary use would be crabbing and fishing. The proposed structure would allow the residents of the Waters Run to use Dirickson Creek for these same reasons and would not impede others from gaining access to, or using, Dirickson Creek.

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

**4.7.5.2 The degree to which the project incorporates sound engineering principles and appropriate materials of construction.** The structure is proposed to use CCA treated lumber and will be constructed to typical standards by a local marine contractor, as is common for the majority of the structures in the vicinity.

**4.7.5.3 The degree to which the proposed project fits in with the surrounding structures, facilities and uses of the subaqueous lands and uplands.** There are multiple docks located both east and west of the project location. All of the docks observed were fixed and the approximate average size is 5 feet wide by 20 feet long; although, most structures are for individual lots or community crabbing and fishing piers. A large lagoon system which includes several berthed motorized vessels is approximately 2 miles downstream of the Waters Run community. The use of the docks varies from berthing motorized vessels, crabbing and fishing access, and for launching and retrieving small vessels.

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

**4.8.4 Structures shall not interfere with navigation, public, or other rights.** This structure meets the requirements stated in the regulations for proper navigation (see 4.6.3 above). The structure does not interfere with the public or other rights in regards to the use of the adjacent properties or Dirickson Creek.

### **REGULATORY REVIEW – MARINA REGULATIONS**

The following review evaluates the proposed project with respect to the requirements of the Marina Regulations. The Regulations provide the criteria for evaluating projects that are proposed to be constructed in subaqueous lands. The burden is on the applicant to satisfy the Department that the requirements of these Regulations have been met; and if the granting of the permit will result in loss to the public of a substantial resource, that the loss has been offset or mitigated. The public comments received prior to, and at the hearing, as well as the Department's regulatory evaluation, are addressed according to the pertinent sections of the Regulations as follows.

#### **Section 6.0 Subaqueous Lands Requirements - All new marinas or marina alterations must comply with subaqueous lands requirements as described in 7 Del.C., Ch. 72 and the 7504 Regulations Governing the Use of Subaqueous Lands.**

A review of the Subaqueous Lands requirements, as stated above, found that all portions of the project are consistent with the Subaqueous Lands Act (7 Del C., Chapter 72) and Regulations Governing the Use of Subaqueous Lands.

**Section 7.0 Consistency with Zoning Plans - The applicant shall provide evidence of zoning approval for proposed marina projects. The Department may defer consideration of an application if it determines that substantive questions regarding the zoning status for the proposed project actions are raised in a zoning appeal.**

During the review process of the proposed marina, attention was focused on the Sussex County Final Site Plan. This plan only references a “crabbing/fishing pier”. The Conditions are as follows by Waters Run Conditions of Approval section P, “the community may be served by a crabbing/fishing pier, if permitted by the appropriate regulatory agency, to be located on the east side of Old Mill Bridge Road”. “There shall be no individual, co-shared, or community piers, boat ramps or docking facilities of either a temporary or permanent nature on the community boundary that is west of Old Mill Bridge Road”. The WSLs recognized that the conditions of the Site Plan didn’t include any specific reference to a “marina”; although, the conditions didn’t prohibit the mooring of boats and the County-approved plans showed finger piers and mooring pilings consistent with those provided in the Marina application. Subsequently, the WSLs asked Edward Launay, Waters Run’s Consultant, to provide documentation of Planning and Zoning’s interpretation of the Site Plan in reference to marina construction. Edward Launay then contacted Shane Abbott of Planning and Zoning, according to Mr. Launay, a verbal response was generated that stated the County would need copies of DNREC and the Army Corps of Engineers permits along with an application for a county building permit and no other action would be needed. Since the WSLs needed documentation in writing, a request was made by Mr. Launay for the County to draft a document stating their opinion on the matter. On September 4, 2014 the Assistant County Attorney, Vincent Robertson, drafted a letter with Planning and Zoning’s official response. The response stated that the applicant would have to first obtain approval from DNREC, and then present the DNREC-approved plans to Planning and Zoning Commission for their consideration as an “Old Business” item. Mr. Robertson claimed that Planning and Zoning would then determine if an amendment to the original plans would be needed. In response to the letter, the WSLs felt that enough justification was provided from the county to move forward with the project. After discussing with council it was determined that the WSLs should receive documentation from the County approving the minor marina before a recommendation was made before the Secretary. On July 6, 2017 the WSLs received notification that the Sussex County Planning & Zoning Commission approved the request to amend the conditions of approval for Waters Run (2005-60) approving the 12 slop marina.

**10.0 Bonding**

**10.1 Requirement. Applicants may be required to obtain a secured bond, or other surety acceptable to the Department, including an irrevocable letter of credit or money in escrow, that shall be sufficient to hire an independent contractor to complete any conditions imposed, or to effect any limitations, or to restore the project area to its original condition in the event of a failure by the applicant to comply with the conditions or limitations of the marina construction permit. Bonds may be required for compensation projects, see Section 11.3.10.**

**10.2 Amount. Bonds shall be posted in an amount equal to 115 percent of the estimated cost of the activity.** On October 26, 2015 WSLs was contacted by Daniel Daly, a Special Investigator with the Department of Justice Fraud and Consumer Protection Unit, inquiring about the pending marina permit for the Waters Run Community. During this discussion the WSLs was notified that the applicant WRDG, LLC is in the middle of a fraud investigation and

litigation. The applicant is currently being investigated for multiple issues; although, WRDG, LLC received payments for the reservation of multiple boat slips before the issuance of a Marina Permit and Subaqueous Lands Lease. WSLs received the application in November of 2013 and the applicant granted several slip reservations in July of 2013, several months before the receipt of a marina application. At this time Dan Daly inquired about setting a requirement for a bond before the issuance of any permits. On December 9, 2015 WSLs held a meeting with Department of Justice attorneys to discuss the project and the requirements for setting a bond. After deliberations WSLs decided to implement a special condition within the drafted marina permit requiring a bond to protect the residents of Waters Run and to eliminate a partially built, unsound, structure over public subaqueous lands. Upon further review it was determined that Section 13.5 of the Marina Regulations doesn't allow the Department to require bonding for small marinas, eliminating the possibility for a bonding requirement.

#### **11.0 Requirements for Siting and Designing New Marinas**

The requirements for a siting and design study for minor marinas, marinas with less than 25 vessels, are relaxed in comparison to major marinas. The requirements for a minor marina siting and design study were achieved through the completed application and included documents.

#### **14.0 Marina Operation and Maintenance (O&M) Plan**

A complete O&M plan was submitted as part of the marina application, pending permit approval, the O&M plan will be certified and must be re-submitted and re-approved every four years.

### **CONCLUSION**

The WSLs finds that the activity described in the application for the Subaqueous Lands Lease and Marina Permit by WRDG LLC, Waters Run, including installation of a community structure, 12-slip marina, and kayak ramp complies with the Regulations administered by the WSLs. The applicant has applied for one structure to serve the entire community which the WSLs views as a positive aspect of the project, the developer designed the waterfront community to only allow water access from one location. Single family homes are designed to be landlocked, preventing the construction of individual boat docking facilities. The applicant addressed some of the public's concerns before the public hearing by amending their bylaws, eliminating parking on the east side of Old Mill Bridge Road, and eliminating the launching of trailered vessels. Additionally, the structure dimensions are consistent with the applicable regulations and guidance documents and have been designed to minimize encroachment into navigable waters.

Lastly, on March 2, 2017 the WSLs received notification that NPN Building, II, LLC purchased the undeveloped lots and common areas of Waters Run through a sheriff's sale held on November 15, 2016. The new owner, NPN Building, II, LLC requested that the record and application for the proposed marina be transferred and processed under NPN Building, II, LLC. The Department received from the Applicant that Sussex County had amended its planning approval to reflect the twelve boat slips.

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



Subaqueous Lands Lease No.: SL-354/13  
Associated Permits: MP-355/13  
Water Quality Certification: WQ-358/13  
Date of Issuance:  
Construction Expiration Date:  
Tax Parcel No.: 5-33-12.00-20.00

NPN Building II, LLC  
C/O Ross A. Byington  
6726 Curran Street, 2<sup>nd</sup> Floor  
McLean, VA 22101

#### **SUBAQUEOUS LANDS LEASE**

**GRANTED TO NPN BUILDING II, LLC TO CONSTRUCT AND INSTALL THE FOLLOWING STRUCTURES IN DIRICKSON CREEK ACROSS FROM WATERS RUN ENTRANCE ON OLD MILL BRIDGE ROAD, FRANKFORD, SUSSEX COUNTY, DELAWARE:**

**To Construct and Install:**

- A 5 foot wide by 110 foot long pier
- A 5 foot wide by 88 foot long dock
- Four (4) 4 foot wide by 11 foot long finger piers
- Twenty (20) stand-alone mooring pilings
- A 10 foot wide by 8 foot long kayak launch consisting of plastic geo-grid and quarry stone

Pursuant to the provisions of 7 Del. C. §7205, and the Department's Regulations Governing the Use of Subaqueous Lands, permission is hereby granted on this \_\_\_\_\_ day of \_\_\_\_\_ A.D. 2017, to construct the above-referenced project in accordance with the approved plans for this Lease (4 Sheets) as approved on **January 6, 2015** and the application dated October 10, 2013 and received by this Department on November 5, 2013, with subsequent information received on October 6, 2014, March 2, 2017, and on July 6, 2017.

WHEREAS, the State of Delaware is the owner of ungranted subaqueous lands lying beneath the waters of Dirickson Creek; and

WHEREAS, NPN Building II, LLC., owner of certain lands adjoining Dirickson Creek has applied for permission to install a pier, dock, (4) finger piers, (20) mooring pilings, and a kayak ramp; and

WHEREAS, pursuant to the provisions of 7 Del. C. §7203, the Secretary of the Department of Natural Resources and Environmental Control through his duly authorized representative finds that it is not contrary to the public interest if this project is approved subject to the terms and conditions herein set forth. This approval is in accordance with the plans and application submitted to the Department of Natural Resources and Environmental Control, a copy of which is attached hereto and made a part hereof.

This Lease shall be continued for a period of twenty (20) years or so long as the conditions attached to the Lease are adhered to, whichever is the shorter in time. Upon the expiration of the twenty-year term, this Lease shall expire and become null and void, unless prior thereto the lessee shall have applied for and received a renewal of this Lease. A renewal may be denied if the State determines that the Lease is no longer in the public interest.

THIS Lease is issued subject to the following conditions:

#### **SPECIAL CONDITIONS**

1. A copy of this lease, the approved Operations and Maintenance Plan, and the associated Marina Permit (MP-355/13) shall be supplied to all slip holders for review.
2. This Lease shall not be considered valid until it has been duly recorded in the office for the Recorder of Deeds in and for the appropriate County, and a copy of the recorded Lease is returned to, and has been received by, the Department.
3. The authorized area of structure over public subaqueous lands is 1,156 square feet represented by a 5 foot wide by 102 foot long portion of the pier, a 5 foot wide by 88 foot long dock, (4) four foot wide by 11 foot long finger piers, 20 mooring pilings, and a 10 foot wide by 1 foot long boat ramp/kayak launch constructed channelward of the mean low water line.
4. The structures authorized herein shall be constructed so as not to impair water access to the adjoining property and shall be located a minimum of ten (10) feet from the channelward extension of the boundary of adjacent properties unless prior written permission has been obtained from the adjacent property owner(s) and such permission was included in the permit application.
5. No portion of any structure shall be constructed using creosote treated lumber.

6. No portion of the structures authorized by this Lease shall exceed the dimensions for that structure identified on Page One of this Lease.
7. Erosion and sediment control measures shall be implemented in accordance with the specifications and criteria in the current Delaware Erosion and Sediment Control Handbook, so as to minimize entry and dispersal of sediment and other contaminants in surface waters.
8. The Contractors Completion Report shall be filled out and returned **within 10 days** of completion of the authorized work.
9. Parking shall be prohibited on the East side of Old Mill Bridge Road; access shall be limited to emergency response vehicles and golf carts or similar vehicles.
10. The marina slips shall only be occupied by current residents of the Waters Run Community and residents of the two adjacent parcels (533-12.00-20.06 and 533-12.00-20.07) north of the Waters Run entrance per the subdivision agreement.
11. Facility users shall abide by all terms and conditions of the HOA and Marina Covenants (According to the revised and current edition presented to the WSLs).

#### **GENERAL CONDITIONS**

1. This Lease is granted for the purpose of constructing a 12 slip marina and community access for crabbing and fishing, as stated in the lease application. Any other use without prior approval shall constitute reason for this Lease being revoked.
2. The pier, dock, (4) finger piers, (20) mooring pilings, and a boat ramp/kayak launch authorized by this Lease are subject to the terms and conditions of the appropriate Department of the Army Permit.
3. The lessee and contractor shall at all times comply with all applicable laws and regulations of the Department of Natural Resources and Environmental Control.
4. The activities authorized herein shall be undertaken in accordance with the Lease conditions, the final stamped and approved plans, and with the information provided in the lease application.
5. A copy of this Lease and the stamped approved plans shall be available on-site during all phases of construction activity.

6. The conditions contained herein shall be incorporated into any and all construction contracts associated with the construction authorized herein. The lessee and contractor are responsible to ensure that the workers executing the activities authorized by this Lease have full knowledge of, and abide by, the terms and conditions of this Lease.
7. The lessee shall protect and save the State of Delaware harmless from any loss, cost or damage resulting from the activities authorized herein.
8. ~~The issuance of this Lease does not constitute approval for any activities that may be required by any other local, state or federal government agency.~~
9. The issuance of this Lease does not imply approval of any other part, phase, or portion of any overall project the lessee may be contemplating.
10. This Lease authorizes only the activities described herein. Modifications to the project may require a supplemental approval from this office prior to the initiation of construction. A determination of the need for a supplemental approval will be made by this office pursuant to the lessee submitting written notification and revised plans indicating project changes. Failure to contact the Department prior to executing changes to the project shall constitute reason for this Lease being revoked.
11. Representatives of the Department of Natural Resources and Environmental Control shall be allowed to access the property to inspect all work during any phase of the construction and may conduct pre and post-construction inspections, collect any samples or conduct any tests that are deemed necessary.
12. The activities authorized herein shall be conducted so as not to violate the State of Delaware's Surface Water Quality Standards, as amended June 11, 2011.
13. All construction materials, waste or debris associated with this activity shall be properly disposed of and contained at all times to prevent its entry into waters or wetlands. Construction materials shall not be stockpiled in subaqueous lands or wetlands.
14. Disturbance of subaqueous lands or wetlands adjacent to the authorized structures or activities is prohibited. Disturbance of subaqueous lands or wetlands in the path of construction activity shall be minimized. Any temporarily impacted subaqueous lands or wetlands shall be returned to pre-disturbance elevations and conditions.
15. The lessee and contractor shall employ measures during construction to prevent spills of fuels, lubricants or other hazardous substances. In the event of a spill, the lessee and contractor shall make

every effort to stop the leak and contain the spill, and shall immediately contact the Hazardous Spill Response Team (HAZMAT) at 1-800-662-8802 and this office at (302) 739-9943. The lessee and contractor are responsible to comply with all directives to contain and clean up the spilled material(s) as stipulated by the HAZMAT team, and to restore the site as may be required by this office.

16. None of the activities authorized herein shall occur after the construction expiration date identified on Page 1 of this Lease. The lessee may file one construction expiration date extension request of up to one (1) year if necessary to complete the authorized work. Such requests must be received by the Department at least thirty (30) days prior to the construction expiration date.
17. The lessee shall notify the Wetlands and Subaqueous Lands Section prior to the commencement of the work authorized by this Lease.
18. The lessee shall maintain all authorized structures and activities in a good and safe condition.
19. Any actions, operations or installations which are found by the Department to be contrary to the public interest may constitute reason for the discontinuance and/or removal of said action, operation or installation. Removal and restoration shall be at the expense of the lessee and/or upland property owner within thirty (30) days of receipt of written notice of revocation and demand for removal.
20. This Lease is personal and may not be transferred without the prior written consent of the Department. Prior to the transfer of the adjacent upland property, the lessee shall obtain the written consent of the Department to transfer the Lease to the new upland property owner. Failure to obtain such written consent may result in the revocation of this Lease and the removal of all structures authorized by this Lease at the expense of the lessee.
21. Failure to comply with any of the terms or conditions of this Lease and any associated authorizations may result in enforcement action which could include the revocation of this Lease and subsequent restoration of the site to preconstruction conditions.

NPN Building II, LLC.  
SL-354/13  
Page 6 of 6

IN WITNESS WHEREOF, I, Ross A. Byington, the duly authorized representative of NPN Building II, LLC, have caused this instrument to be executed on this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

\_\_\_\_\_  
Ross A. Byington  
NPN Building II, LLC. (Lessee)

(Notary Seal)

\_\_\_\_\_  
Notary

IN WITNESS WHEREOF, I, Shawn M. Garvin, Secretary of the Department of Natural Resources and Environmental Control, have hereunto set my hand this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

\_\_\_\_\_  
Shawn M. Garvin, Secretary  
Department of Natural Resources and Environmental  
Control



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

WETLANDS & SUBAQUEOUS  
LANDS SECTION

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

NPN Building II, LLC  
C/O Ross A. Byington  
6726 Curran Street, 2<sup>nd</sup> Floor  
McLean, VA 22101

Marina Permit Number: MP-355/13  
Water Quality Certification Number: WQ-358/13  
Associated Lease: SL-354/13  
Effective Date:  
MP Expiration Date:  
Tax Parcel No.:5-33-12.00-20.00

**MARINA PERMIT AND  
WATER QUALITY CERTIFICATION**

**GRANTED TO:**

**NPN Building II, LLC**

**TO CONSTRUCT AND INSTALL:**

**A 5 foot wide by 110 foot long pier  
A 5 foot wide by 88 foot long dock  
Four (4) 4 foot wide by 11 foot long finger piers  
Twenty (20) stand-alone mooring pilings  
A ten foot wide by 8 foot long kayak launch consisting of plastic geo-grid and quarry stone**

**LOCATED:**

**In Dirickson Creek  
Across from the Waters Run Community Entrance  
On Old Mill Bridge Road, Frankford, Sussex County, Delaware**

Pursuant to the provisions of 7 Del. C., Chapter 60, Environmental Control, Chapter 72, the Subaqueous Lands Act, and the "Delaware Marina Regulations" and "Regulations Governing the Use of Subaqueous Lands" permission is hereby granted on this \_\_\_\_\_ day of \_\_\_\_\_ A.D. 2017, to construct and operate the above-referenced marina in accordance with the approved plans (4 sheets) as approved on **March 3, 2017**, and the application dated October 10, 2013 and received by the Department on November 5, 2013, and with subsequent information received on October 6, 2014, March 2, 2017, and on July 6, 2017 as requested and required by the Department.

WHEREAS, NPN Building II, LLC, owner(s) of certain adjoining lands to Dirickson Creek, has applied for permission to utilize and install the indicated structures for private use; and;

WHEREAS, pursuant to the provisions of 7 Del. C., Chapters 60, Environmental Control, Chapter 72, the Subaqueous Lands Act, Chapter 66, the Wetlands Act, and the “Delaware Marina Regulations” and “Regulations Governing the Use of Subaqueous Lands”, the Secretary of the Department of Natural Resources and Environmental Control through his duly authorized representative finds that it is not contrary to the public interest if this project is approved subject to the terms and conditions herein set forth.

NOW THEREFORE, this Permit is issued subject to the attached Subaqueous Permit General Conditions and the following Management Requirements and Special Conditions:

The work shall be completed in accordance with the documents identified below, and any limitations, requirements and other conditions set forth in this document.

**The marina shall be constructed and operated in accordance with the following documents:**

1. The permit application dated October 10, 2013 and received November 5, 2013, with subsequent information received October 6, 2014, March 2, 2017, and on July 6, 2017 as requested and required by the Department.
2. The applicable Department of the Army Individual Permit.
3. The approved plans for this Permit (4 Sheets), approved on **January 6, 2015**.
4. The draft Operations and Maintenance plan titled “Marina Operation & Maintenance Plan,” dated October 2013.

**A. SPECIAL CONDITIONS**

1. The permittee is responsible for ensuring that the contractor and/or workers executing the activities authorized by this Permit have full knowledge of the terms and conditions of this Permit. The permittee, contractor and/or workers executing the activities authorized by this Permit shall be responsible to ensure that all construction is in agreement with, and construction activities are conducted in accordance with, the documents identified on Page 2 of this Permit. Failure to construct in accordance with these documents, as approved by the Department, constitutes a violation of this Permit and may result in permit revocation and/or subject the permittee and/or contractor to fines and penalties as provided in 7 Del. C., §6005 and/or §7214. In addition, the permittee and/or contractor shall be held responsible for performing any modifications necessary to bring the non-compliance issue into compliance with the plans and specifications approved by the Department.
2. Parking shall be prohibited on the East side of Old Mill Bridge Road; access shall be limited to emergency response vehicles and golf carts or similar vehicles.

3. The marina slips shall only be occupied by current residents of the Waters Run Community and residents of the two adjacent parcels (533-12.00-20.06 and 533-12.00-20.07) north of the Waters Run entrance per the subdivision agreement.
4. Facility users shall abide by all terms and conditions of the HOA and Marina Covenants (According to the revised and current edition presented to the WSLs).
5. The conditions contained herein shall be included in the construction contract and other ancillary documents associated with earth disturbance and any other activities directly or indirectly associated with this project.
6. All construction activities shall be conducted in such a manner as to prevent the discharge of pollutants into the surface or ground waters of the State so that the "State of Delaware - Surface Water Quality Standards," as amended October 11, 2014, are not violated, and to minimize disturbance of the land, air and water environments.
7. Erosion and sediment control measures shall be implemented in accordance with the specification and criteria in the current Delaware Erosion and Sediment Control Handbook, so as to minimize entry and dispersal of sediment and other contaminants in surface waters.
8. **The permittee must ensure that the Contractor's Post-Construction Completion Report is completed and returned to the Wetlands and Subaqueous Lands Section within 10 days of the completion of the project. Failure to submit this form may result in enforcement action.**
9. All construction activities associated with this Permit must be completed on or before the expiration date of this Permit. This Permit for the proposed construction shall expire if the project has not been completed within three (3) years from the issuance of this Permit. The permittee may file a permit extension request if the facility cannot be completed within the three (3) year time frame. Such requests must be received by the Department at least thirty (30) days prior to the construction completion deadline and must justify the need for the extension and identify a new target date for completion.
10. A copy of this Permit and all of the documents identified on Page 2 of this Permit must be available on-site during all phases of construction activity.
11. Any actions, operations, or installations which are considered by the Department to be contrary to the best interests of the public shall constitute reason for the discontinuance and/or removal of said action, operation or installation.
12. This Permit does not imply approval of any other part, phase, or portion of any overall project the permittee may be contemplating.
13. This Permit does not cover the structural stability of the project units.

## **B. MANAGEMENT REQUIREMENTS**

### 1. Lease Restriction

**All work performed in association with this project shall be completed in accordance with Subaqueous Lands Lease No. SL-354/13. This Permit shall be null and void if the associated Lease has not been duly recorded in the office for the Recorder of Deeds in and for the appropriate County and a copy of the recorded Lease is returned to, and has been received by, the Department.**

All structures constructed channelward of the mean low water are constructed on lands leased from the State of Delaware. The leased portions of this marina include the docking area, consisting of a 5 foot wide by 102 foot long pier, a 5 foot wide by 83 foot long dock, (4) four foot wide by 11 foot long finger piers, 20 mooring pilings, and a 10 foot wide by 1 foot long boat ramp/kayak launch constructed channelward of the mean low water line. The leased portion of these structures includes approximately 1,131 square feet on public subaqueous land.

### 2. Changes of Permit Terms or Conditions

A report must be submitted to the Department describing any anticipated marina facility changes or expansions that would require modification of the terms and conditions of this Permit. The Department must approve changes prior to implementation.

### 3. Pre-Construction Notification

The permittee shall notify the Wetlands and Subaqueous Lands Section at least ten (10) days prior to the date work will be commenced.

### 4. Noncompliance Notification

In the case of noncompliance with State regulations and Permit conditions, the permittee shall report to the Department:

Orally **within twenty-four (24) hours** from the time the permittee became aware of any noncompliance which may endanger public health or the environment at (302) 739-9943 during normal working hours, or (800) 662-8802 after normal working hours, and

In writing, as soon as possible, and within five (5) days of the date the permittee knows or should know of any noncompliance, unless this period is extended by the Department. This written notification shall contain:

- i. A description of the condition of noncompliance and its cause, and
- ii. The period of noncompliance, including exact dates and times, or if not yet corrected, the anticipated time the noncompliance is expected to continue and the steps being taken to reduce, eliminate and prevent recurrence of the non-complying condition.

## 5. Facilities Operation

The permittee and contractor shall at all times maintain in good working order, and operate as efficiently as possible, all systems and equipment used for construction activities or to achieve compliance with the terms and conditions of this Permit. The facility shall be operated in accordance with the Marina's Operations and Maintenance Plan.

## 6. Adverse Impact

The permittee shall take all reasonable steps to minimize any adverse impact to the surface or ground waters of the State resulting from the activities regulated by this Permit. Additional or accelerated monitoring may be required if the potential for adverse impact is noted.

## 7. Pre-Operation Notification

The permittee shall notify the Department, in writing, **at least fifteen (15) working days prior** to the date that the marina becomes operational. The permittee shall not commence operation of the new marina sections until a pre-startup inspection has been conducted by Department personnel to verify that all construction has been performed in accordance with the documents identified on Page 2 of this Permit. Based upon the results of the pre-startup inspection, the Department will either:

- i. Grant written approval of the marina facility as constructed, so that marina operations can commence, or
- ii. Require the permittee to perform additional construction and modification of marina facilities to bring them into compliance with the plans and specifications presented in the permit application. The permittee must complete any additional work that may be required prior to seeking approval to commence operations.

## 8. Operations and Maintenance Plan

**Within six (6) months of the issuance of this Permit and before any operation of the marina, the permittee shall submit a final Operations & Maintenance Plan for Department review. Failure to submit the final Operations & Maintenance Plan within the six (6) month time frame may result in revocation of this Permit for the operation of the facility and may be cause for enforcement action pursuant to 7 Del. C., Chapter 60. This Permit does not constitute final approval of the draft Operations and Maintenance Plan for this facility.**

## 9. As-Built Plans

**Within ninety (90) days following the completion of construction, the permittee shall submit to the Department an “as-built” set of plans for the marina.**

## **10. Right of Entry**

The permittee shall allow the Secretary of the Department of Natural Resources and Environmental Control, or his authorized representatives, upon presentation of credentials, to:

- i. Enter upon the permittee’s premises for inspection of any construction activities, run-off control devices, monitoring methods or equipment required in this Permit, or other structures or facilities necessary for compliance with the terms and conditions of this Permit, or to sample any discharge of pollutants; and
- ii. Have access to any records required to be kept under the terms and conditions of this Permit, for inspection and/or copying.

## **11. Transferability**

This Permit is personal and may not be transferred without the prior written consent of the Department. Prior to the transfer of the adjacent upland property, the permittee shall obtain the written consent of the Department to transfer this Permit to the new upland property owner. Failure to obtain such written consent may result in the revocation of this Permit and the removal of all structures authorized by this Permit at the expense of the permittee.

This Permit may be transferable upon Department review and approval of the stated intentions, provided that a letter explaining the intention to transfer, accompanied by a copy of the Permit, is provided to the Department and signed by both the transferor and the transferee at least ten (10) days prior to the actual transfer. If marina operations have commenced, a new, updated Operations and Maintenance Plan must be submitted for Department review whenever the marina ownership or leasehold changes.

## **12. Information Requirements**

The permittee shall furnish to the Department within a reasonable time, any information requested, including copies of records, which may be used by the Secretary to determine compliance with this Permit or the Marina Regulations. Knowingly making any false statement or supplying false information may result in the imposition of criminal penalties as provided for in 7 Del. C., §6015.

## **13. Reporting a Discharge**

Any person who causes or contributes to the discharge of a pollutant into State waters, whether in excess of any conditions specified in this Permit or in the absence of a specific permit condition, shall report such an incident to the Department as required under 7 Del. C., §6028.

#### **14. Permit Modification, Suspension or Revocation**

This Permit may be modified, suspended or revoked in whole or in part during its term for cause including, but not limited to, the following:

- i. Violation of any terms or conditions of this Permit;
- ii. Obtaining this Permit by misrepresentation or failure to disclose fully all relevant facts, or if information and data provided by the applicant in good faith proves to be false;
- iii. Information that the permitted activity poses a threat to human health or welfare;
- iv. Failure by the permittee to obtain all other applicable Federal, State or local permits or approvals which may be required or failure to comply with such permits or approvals.

#### **15. Liability Clause**

Nothing in this Permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under any State law or regulation.

#### **16. Property Rights**

The issuance of this Permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

#### **17. Severability**

The provisions of this Permit are severable, and if any provision of this Permit, or the application of any provision of this Permit to any circumstances, is held invalid, the application of such provision to other circumstances, and the remainder of this Permit, shall not be affected thereby.

### **C. GENERAL CONDITIONS**

## **1. Purpose**

The project in subaqueous lands shall be for creation of a new marina to berth 12 vessels for a waterfront community. The facility will also be used by community residents for crabbing and fishing and canoe and kayak launching.

## **2. Vessel Sewage Discharge**

The marina shall provide convenient access to an approved, fully operable and well maintained pumpout facility to receive wastes from vessel holding tanks or portable marine toilets (portapotties).

The marina shall place signs, clearly visible to resident and transient vessels, to indicate the location and availability of the pumpout station and shall not preclude the use of the pumpout station by transient vessels. In addition, all restrooms shall also be clearly identified.

The O&M Plan shall include the following information regarding vessel sewage in the boater rules and regulations section:

- i. Any discharge, by any means, of untreated or inadequately treated vessel sewage into or upon the waters of any marina, boat docking facility or tidal waters of the State is prohibited;
- ii. All vessels while on waters of the State shall comply with 33 U.S.C. §1322, Marine Sanitation Devices, as amended February 4, 1987.

## **3. Vessel Maintenance**

This Permit does not authorize any major vessel maintenance or repair activities at the marina, whether by marina personnel, subcontractors or vessel owners. Only minor maintenance, such as washing, polishing and limited inboard painting is authorized. No pressure washing, bottom or hull scraping, sanding or painting, or major engine overhauls are authorized. All vessel maintenance must be managed to prevent discharge of pollutants into the environment. All materials used in maintenance and any wastes generated from maintenance activities must be stored, handled and disposed properly, and in compliance with Department regulations. Failure to properly handle vessel maintenance material or wastes may result in the revocation of this Permit.

## **4. Dimensions of Decking**

No portion of the decking on the piers and docks authorized by this Permit shall exceed the width dimensions for those structures identified on Page 1 and 2 of this Permit.

## **5. Signage**

Signage shall be placed at both the pump-out slip and the community pier stating that mooring at these locations is prohibited, with exception of the temporary mooring for sewage pump-out.

**6. Wetlands and Subaqueous Lands Disturbance Avoidance**

There shall be no movement of equipment within subaqueous lands and wetlands not specifically authorized by this Permit. Any areas disturbed pursuant to this authorization, other than the authorized permanent impact areas, shall be returned to pre-construction conditions/elevations and appropriately stabilized and/or vegetated.

Disturbance of wetlands adjacent to the permitted construction by burning, cutting, herbicide treatments, mechanical methods or any other method is prohibited.

There shall be no stockpiling of construction material in subaqueous lands or wetlands.

**7. Corps of Engineers Permit**

The work authorized by this Permit is subject to the terms and conditions of the applicable Department of the Army Individual Permit.

**8. Pile Driving**

In order to prevent increased sedimentation in the Dirickson Creek, all piles must be driven.

**9. County Approval**

On June 22, 2017 the Sussex County Planning Commission approved the request to amend Condition P of the conditions of approval for Waters Run (2005-60). Condition P states "The community may be served by a crabbing/fishing pier, if permitted by the appropriate regulatory agency, to be located on the east side of Old Mill Bridge Road. There shall be no individual, co-shared, or community piers, boat ramps or docking facilities of either a temporary or permanent nature on the community boundary that is west of Old Mill Bridge Road". The applicant shall receive County approval for any future improvements to the marina prior to submitting to the Wetlands and Subaqueous Lands Section.

IN WITNESS WHEREOF, I, Steven M. Smailer, Section Manager, the duly authorized representative of Shawn M. Garvin, Secretary, Department of Natural Resources and Environmental Control, have hereunto set my hand this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

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

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Tyler Brown, Environmental Program Manager  
Wetlands and Subaqueous Lands Section