



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

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OFFICE OF THE
SECRETARY

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Secretary's Order No.: 2019-W-0045

RE: Permit Application of Sargio Corporation to conduct mechanical maintenance dredging of approximately 3,500 cubic yards of sediment from Bay Vista Marina, and to dispose such sediment material on an adjacent upland lot located in Rehoboth Beach, Sussex County, Delaware, thus necessitating Applicant to obtain a Subaqueous Lands Permit and Water Quality Certification.

Date of Issuance: December 4, 2019

Effective Date: December 4, 2019

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC"), pursuant to 7 *Del.C.* §§6003, 6004(b), 6006(4), Delaware's *Subaqueous Lands Act* (7 *Del.C.* Chapter 72), and all other relevant statutory authority, the Department issues this Order, approving a Subaqueous Lands Permit and Water Quality Certification to allow Sargio Corporation ("Applicant") to conduct mechanical maintenance dredging of approximately 3,500 cubic yards of sediment from Bay Vista Marina, to a depth of four (4) feet below the Mean Low Water ("MLW") in the marina basin, and to a depth of six (6) feet below MLW in the marina access channel. Bay Vista Marina is adjacent to the Lewes and Rehoboth Canal, near the east terminus of Basin Street, Rehoboth Beach, Sussex County, Delaware.

The dredged material from Bay Vista Marina will then be disposed of via excavator and water-tight dump trucks at an adjacent upland parcel (owned by the Applicant) located near the east terminus of First Street, Rehoboth Beach, Sussex County, Delaware.

The Applicant's proposed project, as set forth above, is subject to the requirements of Delaware's *Subaqueous Lands Act* (7 Del.C. Chapter 72), the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), the *Regulations Governing the Control of Water Pollution* (7 DE Admin. Code 7201), Section 401 of the federal *Clean Water Act*, 33 U.S.C. 1341, and 7 Del.C. Chapter 60.

Background and Findings of Fact

On August 20, 2018, the Department's Division of Water, Wetlands and Subaqueous Lands Section ("WSLS"), received a permit application from Coastal and Estuarine Research, Inc., submitted on behalf of Sargio Corporation, seeking permission to conduct the above described dredging activity at Bay Vista Marina. Accordingly, the permit application was then advertised for a 20-day public notice period, beginning on September 19, 2018. During that time, the WSLS received several written comments in favor of the proposed project, and one comment from Henry Shaubach, who voiced opposition to the project. Mr. Shaubach claimed that the proposed project lacked (1) engineered site plans; (2) sediment and stormwater management plans; and (3) the testing of water and dredge spoils for pollutants. Additionally, Mr. Shaubach expressed concerns regarding previous land use changes in the area, which he alleged had increased water ponding near the end of First Street in Rehoboth Beach, Delaware.

Due to the fact that only one comment had been received in opposition to the proposed project, the Department's WSLs staff met with Mr. Shaubach on October 3, 2018, to see whether his concerns regarding this proposed dredging project could be successfully addressed without the need for a public hearing. At that time, the Department advised Mr. and Mrs. Shaubach that the WSLs does not have jurisdiction over previous land use changes at the end of his street, nor could WSLs or the Department control the drainage issues associated with the same. Additionally, WSLs staff explained to the Shaubach family that the Applicant's proposed project is a typical dredging project that routinely occurs in southern Delaware, and that, due to the lack of heavy industry in the area, the Department does not typically require such applicants to submit documentation verifying that the dredging materials are not toxic. Since Mr. Shaubach's concerns about this proposed project continued to persist, an on-site meeting at Bay Vista Marina was then scheduled between the Applicant and the Shaubach family to take place on October 25, 2018.

It should be noted that, prior to the October 25, 2018 meeting between the Applicant and Mr. Shaubach, Hydrologist Amber Bataille from the Department's Division of Water (Groundwater Protection Branch) also conducted a review of the Applicant's proposed project. Ms. Bataille's review determined that a public groundwater withdrawal well was located near the project area. The review further revealed that part of the Applicant's proposed dredge disposal area was located within a Wellhead Protection Area. The Applicant was informed of this review and its findings and, as a result, the westernmost proposed dredge spoil cell of the proposed project was abandoned by Sargio Corporation, per WSLs requirements.

On October 25, 2018, members of the Shaubach family, owners of the Sargio Corporation, Evelyn Maurmeyer (Applicant's environmental consultant), and George Appel (Applicant's contractor) met and walked the proposed boundaries of the dredge disposal site as Mr. Shaubach expressed his concerns about the proximity of the site to his property. At that time, boundary flags were placed to identify the mutually agreed upon limits of the dredge disposal site, and marked with GPS points (to 50 centimeters' accuracy) to ensure such boundary data was accurately recorded. Those boundary points were later surveyed by Triangle Surveyors, and were confirmed to match up with the Department's WSLS data. In addition to the disposal area being mapped, the Applicant agreed at that time to obtain an approved Sussex Conservation District Erosion and Stormwater ("E&S") Management Plan, along with a chemical analysis of the dredge sediments (compiled from five random grab samples throughout the marina basin) to confirm that no contaminants of public health concern are present.

In addition to the above accommodations, the Applicant further agreed to remove some of the road gravel that Mr. Shaubach believed contributed to the flooding of his property, and to install a swale, if needed, to remove water. It should also be noted, however, that Mr. Shaubach was informed by Department staff that DNREC could not enforce the agreement between the parties with regard to above matters, as the same were outside of the Department's WSLS jurisdiction.

On October 25, 2018, per the agreement noted above, the Applicant removed the gravel fill from the road surface, and brought the area back to its original elevation (which was subsequently confirmed in the field by WSLs Environmental Scientist George Geatz). During this time, Mr. Shaubach expressed concern that the excavation equipment had cut a coaxial cable line, which was confirmed. Comcast was contacted to resolve that issue.

The Applicant's approved Sussex County E&S Management Plan, along with the analytical laboratory results of the dredge sediments, were both received by the Department on January 3, 2019. The data received from Envirocorp Labs (specifically, the chemical analyses of the dredge sediment provided by Seewald Laboratories, Inc.) did not indicate the presence of any harmful pollutants in significant quantities. Additional review of this data from DNREC Hydrologist John Cargill provided further confirmation of this finding.

On January 8, 2019, the Department emailed Mr. Shaubach, at his request, two maps of the final dredge disposal location, the approved Sussex Conservation District E&S Management Plan, and the laboratory chemical analysis of the lagoon sediment, and gave him until January 14, 2019 to review these documents. When contacted at that time by WSLs staff (Mr. Geatz and Tyler Brown, Program Manager), Mr. Shaubach advised that he was still unsatisfied with the items provided, and requested additional documentation. At that time, Mr. Shaubach was informed by Mr. Geatz and Mr. Brown that the Sargio Corporation had "...gone above and beyond what they had been asked to do, and had modified the project based off his concerns." Mr. Shaubach was given until January 18, 2019 to determine whether he wished to move forward with a public hearing.

On January 18, 2019, Mr. Shaubach contacted the WSLs staff and advised that he had visited the proposed dredge disposal site the day before, and now believed that the flagging denoting the boundary of the site had been altered and moved closer to his property boundaries. Mr. Shaubach then requested to move forward with a public hearing, as previously requested.

Based upon Mr. Shaubach's continued objections to this proposed project, the Department's WSLs staff determined that it was necessary to schedule a public hearing concerning this matter. Accordingly, notice for the public hearing was published by the Department on February 20, 2019. Upon this matter being noticed for a public hearing, numerous letters voicing support for this proposed project were once again received by the Department. The only objector to this pending permit application remained Mr. Shaubach, who at this point had retained the services of David Hutt, Esquire, to further represent his interests in this matter.

The Department held the public hearing concerning this pending permit application on March 14, 2019. The hearing was attended by the Department's WSLs staff, representatives of the Applicant (owner John Candeloro, Evelyn Maurmeyer of Coastal and Estuarine Research, Inc., and Applicant's counsel, Hal Dukes, Esquire), and individuals from the public, including, but not limited to, Henry Shaubach and his attorney, David Hutt. Proper notice of the hearing was provided as required by law.

Subsequent to the aforementioned public hearing noted above, at the request of Hearing Officer Bethany Fiske, the technical experts in the Department's Division of Water prepared a Technical Response Memorandum ("TRM") to (1) specifically address concerns voiced by Mr. Shaubach with regard to the proposed dredging activity; (2) provide a formal regulatory review of the Applicant's project; and (3) offer the Division of Water's conclusions and recommendations with regard to this pending Application for the benefit of the hearing record generated in this matter.

Subsequent to the Department's TRM having been received for inclusion into the hearing record, Hearing Officer Lisa A. Vest prepared her Hearing Officer's Report ("Report"), dated October 18, 2019, which expressly incorporated said TRM therein. Ms. Vest's Report set forth the procedural history, summarized and established the record of information ("Record") relied on in the Report, and provided findings of fact, reasons, and conclusions that recommend the Department approve this permit Application, subject to the conditions set forth in the draft Subaqueous Lands Permit SP-368/18 and Water Quality Certification WQ-368/18, which will allow the Applicant to proceed with the proposed dredging activity, as set forth in the Application referenced above.

The Report also addressed the public comments received in this matter, and concluded that the same did not warrant the Department's denying this pending Application, or delaying the permit decision to receive any further additional information.

Reasons and Conclusions

The Applicant seeks permission to conduct mechanical maintenance dredging activity at Bay Vista Marina, specifically, to dredge 3,500 cubic yards of sediment, and to dispose the dredged material on an adjacent upland parcel located near the east terminus of First Street, Rehoboth Beach, Sussex County, Delaware. Preliminarily, I find that the proposed project will require the Applicant to obtain a Subaqueous Lands Permit and Water Quality Certification from the Department's WSLs. I further find that the Applicant's proposed project is subject to the federal and state statutory and regulatory requirements previously referenced herein.

The Record reflects that, at the time of public hearing on March 14, 2019, eleven members of the public spoke in favor of the proposed dredging of Bay Vista Marina. All of those comments came from slip holders who were unable to ingress and egress at the majority of the tidal cycle. Additional comments received from the public included that the silted-in marina presented a safety hazard for the community. A local realtor also offered a statement that the access to a viable marina was a major enhancer of property values in the area.

The Record also reflects that, over the course of several months subsequent to the Department having placed this permit application on public notice, meetings were held between the Applicant and Mr. Shaubach, during which time numerous concerns surrounding this dredging project were addressed. Mr. Shaubach believes the previous installation of the spoil disposal site backed water onto his property, however, it is the opinion of the Department's WSLs staff that there is little evidence to support this claim.

According to the Department's TRM, the area of concern is all low relief coastal plain material, and, due to the location of the property (at the end of First Street in Rehoboth Beach, nearest to the marina and wetlands), it can be assumed that water naturally drained in this direction before the installation of a berm. Furthermore, in this instance, drainage issues are not within the jurisdiction of the Department, as the Applicant has already received an approved Sussex Conservation District E&S Management Plan. Nevertheless, the Applicant has agreed to install a drainage swale near the new disposal site. As noted previously, DNREC cannot mandate such an agreement in this matter, as the same is beyond the jurisdiction of the Department.

With regard to the sediment contamination concerns voiced by Mr. Shaubach's attorney, Mr. Hutt, at the time of the aforementioned public hearing, the Record reflects that the chemical analyses of the dredge sediment did not identify significant levels of any pollutant known to contaminate wells or to pose a significant human health hazard. Additionally, the Department's TRM notes there is a very low likelihood of any well water contamination (including the introduction of salts) to Mr. Shaubach's well, as the general groundwater flow pattern from the disposal site does not intersect his property. Furthermore, as noted previously, the Applicant has already gone through the process of obtaining an approved Sussex County Conservation District E&S Management Plan, an action that is typically done only after an applicant has received the necessary permits for such a project.

The Department notes in its TRM that tracking the dredged material offsite would require at least three hundred and fifty (350) water-tight dump trucks, costing additional tens of thousands of dollars. This option would significantly increase the cost of this dredging project, and, ultimately, would not allow it to occur. Storing the material on-site, in a cell that has been previously used for spoil material, is the most environmentally conscious and financially feasible way to accomplish this dredging project, as it will (1) allow minimal transport of the material along roadways; (2) allow the material to dewater nearest to the source; and (3) generally minimize potential environmental impacts. The Record further reflects that the Applicant has stated the funding for this dredging event will “far exceed” the amount that the marina brings in on a yearly basis, and that the cost for this proposed project has already become a burden.

In order to address the concerns voiced by the Shaubach family, the Department’s WSLs has included numerous special conditions in the draft Subaqueous Lands Permit and Water Quality Certification, including, but not limited to, the following:

Due to dredge disposal site concerns addressed during the public process, the DNREC WSLs Department shall be contacted 48 hours prior to the commencement of the dredging and prior to site preparation at the disposal location.

The above special condition will allow the Department’s scientists to verify the boundary locations of the dredge containment area, and to ensure that approved construction plans have been adhered to prior to the commencement of any and all dredging activities associated with this project.

The State of Delaware is charged with upholding the Public Trust Doctrine, which has been used historically in protecting the public's rights to fishing, commerce, navigation, recreation and even preservation as an appropriate public use. The Department recognizes that there are concerns associated with this project, as voiced by Mr. Shaubach, but those concerns have been balanced. As set forth in the Department's TRM, there is agreement that the Bay Vista Marina has become silted in, and needs to be dredged. In reviewing the applicable statutes and regulations, as well as weighing public benefits of this project against potential detriments, the Department's experts in the Division of Water have concluded that the aforementioned proposed mechanical maintenance dredging and sediment disposal activity, as described in the permit application of Sargio Corporation, complies with the applicable Regulations administered by the WSLS.

The Record developed in this matter indicates that the Department's experts have considered all statutes and regulations that govern projects such as the Applicant's proposed project, and have recommended issuance of all permits necessary for completion of the same. I find and conclude that the Applicant has adequately demonstrated its compliance with all requirements of the statutes and regulations as noted herein, and that the Record supports approval of the permit application submitted by Sargio Corporation.

In conclusion, I recommend that all permits required for this proposed project, consistent with the Record developed in this matter, be issued by the Department in the customary form, and with appropriate conditions.

Further, the Department concludes and directs the following:

1. The Department has jurisdiction under 7 *Del. C.* §§6003, 6004, 6006(4), 7 *Del. C.* Chapter 72, and all other relevant statutory authority, to make a final determination on the Applicant's permit application, after holding a public hearing and considering the public comments and all information contained in the Record generated in this matter;
2. The Department provided proper public notices of the permit application of Sargio Corporation, and of the public hearing held on March 14, 2019, and held said hearing in a manner required by the law and regulations;
3. The Department considered all timely and relevant public comments in the Record, as established in the Report, prior to issuing this Order as its final decision;
4. The Department has carefully considered the factors required to be weighed in issuing all permits and leases required by the Applicant's proposed dredging project, and finds that the Record supports approval of the same, based upon the terms and conditions in the draft documents prepared by the WSLs, and the issuance of all required permits associated with same;
5. The Department shall issue to the Applicant Subaqueous Lands Permit SP-368/18 and Water Quality Certification WQ-368/18, which shall include all special conditions to ensure that Delaware's environment and public health will be protected from harm;
6. The Department adopts the Report and its attachments as further support for this decision;
7. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and

8. The Department shall serve and publish its Order on its internet site, and shall provide legal notice of the Order in the same manner that the Department provided legal notice of the Application.



Shawn M. Garvin
Secretary

