

# **EXHIBIT J**

July 5, 2006

RES#0014-0001

Ms Sarah Cooksey  
DNREC-Coastal Management Program  
89 Kings Highway  
Dover, DE 19901

RE: Swains Wharf Marina (FC 05.083)  
Response to March 23, 2006 letter and May 4, 2006 email

Dear Ms Cooksey:

I am responding to your March request for additional information regarding shorebird use of the projects site, an observation of oysters, and a question regarding water depths.

#### **CMP Policies for Nongame and Endangered Species and Policies for Marinas**

We conducted a visual survey of shorebirds using the project site and beach areas directly across Mispillion River and Cedar Creek on 6 different days between May 17 and May 27, 2006. Both weekday and weekend days were chosen along with varying tide heights to obtain a broader perspective of the activities of the red knot (*Calidrus canutus*) and apparent impacts by boats. Six beach segments were monitored at one half (½) hour intervals to determine species utilization and presence (Figure 1). All surveys were conducted from Swain's Wharf Marina site using a 20-60x spotting scope in order to minimize disturbance from survey personnel moving about. We recorded boat traffic and relative speed (no wake and obviously above no wake) and any apparent response by birds to boat passage, noise, or wake.

The survey data of bird usage is provided as Table 1. Most of the species moved freely between the stations with a preference to the sandy beaches on Mispillion River when compared to the shell fragmented beaches of the project site. A total of ten shorebird species were observed; ruddy turnstone (*Arenaria interpres*), long-billed dowitcher (*Limnodromus scolopaceus*), greater yellow legs (*Totanus melanoleucus*), willet (*Catoptrophorus semipalmatus*), semipalmated sandpiper (*Charadrius pusilla*), red knot (*Calidrus canutus*), dunlin (*Erolina alpina*), American oystercatcher (*Haematopus palliatus*), black-bellied plover (*Squatarola squatarola*), and black-necked stilt (*Himantopus mexicanus*). Ruddy turnstone was the most commonly observed species on the project site beaches and all other beaches. Long-billed dowitcher was the next most common species observed during the first half of the survey period, although semipalmated sandpiper replaced dowitcher as the second most common species during the second half of the survey period. Birds used the Mispillion River 1 and Cedar Creek 1 sites in far greater numbers than other sites.

Red knot used the Mispillion River 1 beach on the project site, although sparingly. The maximum

number recorded was 40 individuals and most use occurred around low tide. Little to no feeding was observed by the species at this location. The main use appeared to be as a loafing site. The On-site location on Cedar Creek only had one red knot recorded over all six days of surveys, despite fairly good use by other species when the beach was exposed. Most red knot use occurred at Mispillion River 2, across the river from the project site, followed by Cedar Creek 1, which was partially on Cedar Creek and partially on Mispillion River.

Use of the north beach, Mispillion 1, on the site by horseshoe crabs was minimal. Due to the coarse nature of the beach, mostly oyster shells and rocks, few crabs even attempted to nest in this section and any nest divots were not discernable. The On-site beach was being used by horseshoe crabs, but divots were largely indiscernible. Whether this is a result of wave wash, nesting activity obscuring already laid nests, or the stony nature of the sediments was not apparent. Many crabs are currently trapped on this beach above the concrete and under the erosion control fabric.

A total of 257 boats were observed during the survey, with 72 boats (28%) appearing to cause a reaction by birds. Twenty-eight boats (11% of the total) were up to plane to some extent (above "no-wake" speed) as they passed the site. Nineteen (68%) of these 28 boats caused a reaction. The remaining 229 (89%) were traveling at, or close to "no-wake" speed, and caused 53 reactions (23% of total).

Speeding boats resulted in nearly three times as many reactions (68% vs. 23%) as boats at "no-wake" speed. Reactions were typically in response to the boat induced wake striking the shoreline than the presence of the boat itself. Shorebirds such as the semipalmated sandpiper were more susceptible to a reaction due to their size and waters edge shoreline utilization. Shorebirds such as ruddy turnstones and red knot were more tolerant to boat disturbance due to their general position higher up from the water's edge. When there was an influx of boats the shorebirds tended to move higher up the beach to avoid the disturbances.

The docks adjacent to the site on the west were being used by commercial fisherman which would dock and unload their catch or load up bait before going out. This was similar to activity expected to occur in the marina when operating. This activity occurred 200-250 feet from the Mispillion River 1 location on the project site. Despite the sometimes high level of noise, none of the shorebirds showed any discernable response to this disturbance.

The presence of the marina and docked boats along Cedar Creek and Mispillion River should result in more boats observing a "no-wake" speed until they are past the marina and in the Mispillion River channel.

Delaware boating regulations require "The speed of all vessels on the waters of this State shall be limited to a Slow-No-Wake speed when within 100 feet of:

- . Any shoreline where "Slow-No-Wake" signs have been erected by the Department;

- . Floats;
- . Docks;
- . Launching ramps;
- . Marked swimming areas;
- . Swimmers; or
- . Anchored, moored, or drifting vessels.”

Boats traveling within the navigation channel of Cedar Creek will be within or near 100 feet from boats moored in the marina. A greater presence of people in the marina ready to report violators, especially of any wake that damages their boat will serve as a deterrent to speeding.

#### **CMP Policies Specific for Subaqueous Lands and Coastal Strip Management (#20)**

The March 23, 2006 letter raised a question regarding the shallow water depths recorded by the USACOE during a March, 2005 bathymetry survey in the area of the proposed ramp and adjacent larger boat slips. We gathered additional soundings in this area on June 13, 2006 using the Corps benchmark and matched the Corps findings fairly closely for most similar points. We were able to determine the relation of the USACOE Philadelphia District Mean Lower Low Water (MLLW) benchmark to other datums using datum information on maps provided by the Corps. The Corps MLLW is -1.07 feet below MLLW as reported by the National Ocean Survey and used in the predicted tide tables. As an example, if the Corps survey shows a depth of 1 foot at MLLW the navigation charts for that same location would show a depth of 2 feet MLLW. We have redesigned the piers to insure boats will have sufficient water under them at low tide.

We reviewed the site for other suitable ramp locations and determined the proposed location is still the best in regards to traffic flow within the parking lot, minimizing disruptions to navigation by ramp users and overall marina design. The relatively shallow depths mean the ramp will not be usable during low water, but that is acceptable to the applicant.

#### **CMP Policies Specific for Fish and Wildlife (#1) and Policies Specific to Marinas (#5)**

Your letter reported finding viable oyster beds in the area of the proposed boat ramp. We reviewed this area from the shore at low tide during the bird surveys and again on June 13, 2006

Ms Sarah Cooksey  
DNREC-Coastal Management Program  
Swains Wharf Marina (FC 05.083)  
July 5, 2006

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with a boat during low tide. The oysters we found consisted of small clumps attached to relatively small concrete blocks and similar debris or were loose on the river bottom. Many of the attached closed shells were easy to loosen from the clumps. Many shells were recently dead.. Given the water movement demonstrated in the area by the number of large oyster shells, stones, pieces of concrete and other heavy debris that are thrown onto the adjacent uplands and are gradually filling the tide marsh on the west side of the uplands, we feel most, if not all, of the observed oysters have originated at other locations, probably further out in deeper water. The west edge of the deposited shells has progressed almost a foot in places into the *Spartina alterniflora* marsh since I conducted the wetland delineation several year ago. The large number of recently dead shells indicates this location may be extremely stressful for oysters. The indicated level of water movement would make it difficult for oyster beds to establish or survive for any substantial length of time.

While negative impacts, such as you cite in your letter, have been documented for some marinas, those negative impacts are typically a result of poor flushing of the marina waters. This site, at the confluence of two tidal rivers and in close proximity to Delaware Bay, will have excellent flushing. As a result, dissolved oxygen levels will remain at the ambient levels of the adjacent waterways. Shellfish and other benthic organisms currently occupying the sediments adjacent to the marina are already experiencing periodic sediment resuspension and resettling to a degree beyond what boats at the marina will cause. The marina has been designed to minimize boat operations in shallow water. Lack of fueling facilities will minimize petroleum inputs to marina waters. Boaters following the marina O & E manual will have oil absorbent "sponges" in their bilge to minimize oil contaminated water from being pumped into marina waters.

If you have any questions, please call or email me at [dhardin@restorationes.com](mailto:dhardin@restorationes.com).

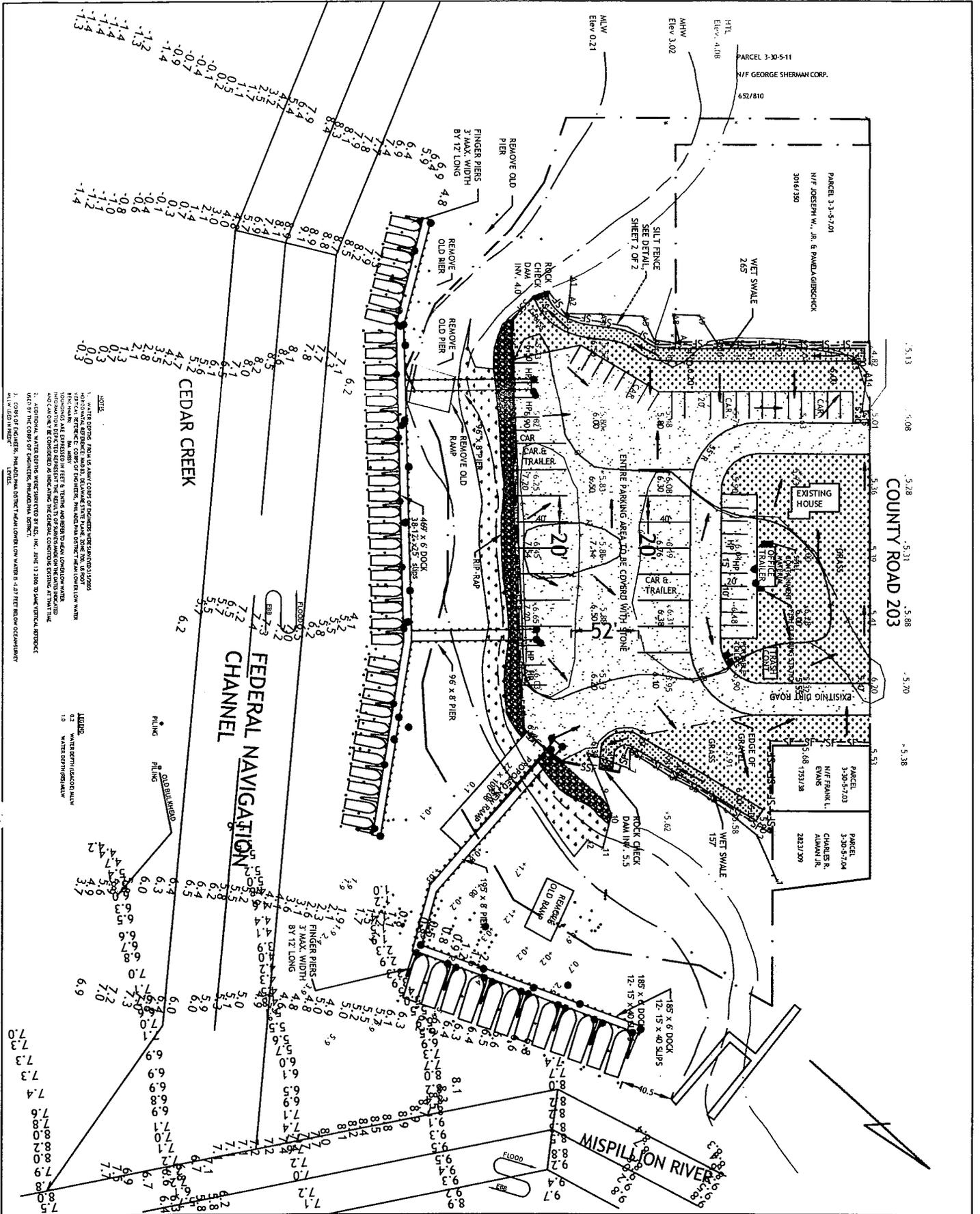
Sincerely,



David L. Hardin

projects\0014-0001 Swain Marina\July 2006 response to CMP

cc: Jim. Chaconas  
Kevin Faust

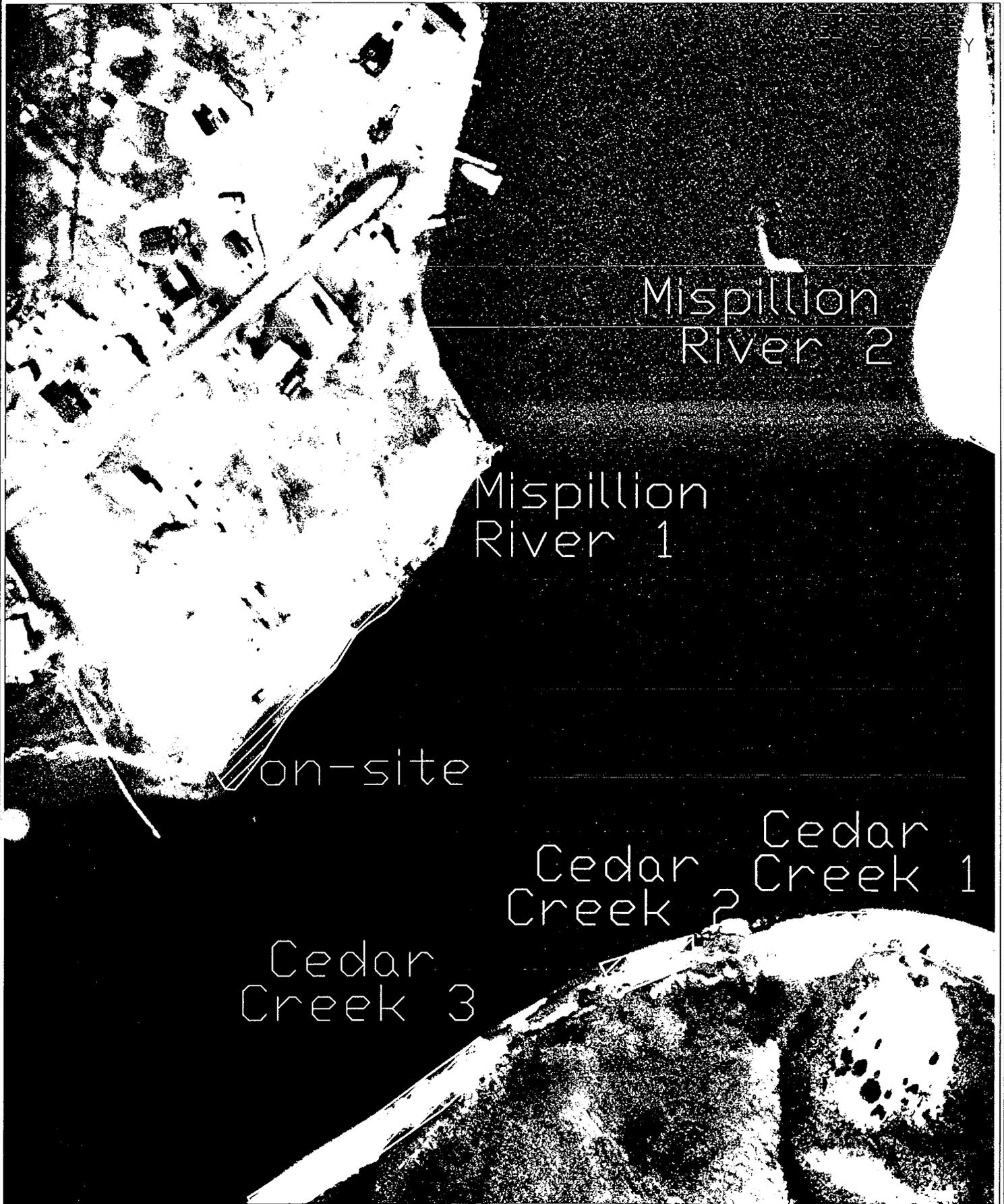


Date: JUNE 7, 2005  
 Scale: 1" = 100'  
 Proj.No.: 408B001  
 Drawing No.: **FIGURE 5**

**PROPOSED MARINA REVISION – BATHYMETRY**  
 SWAIN MARINA, TAX MAP 3–30–5–10  
 SLAUGHTERS BEACH, SUSSEX COUNTY, DELAWARE

**RES RESTORATION ECOLOGICAL SERVICES, INC.**

311 N. AURORA ST  
 EASTON, MD 21601  
 PHONE 410-820-7465



**LEGEND:**

- OBSERVATION STATIONS

FIGURE 10F1

SWAINS MARINA  
OBSERVATION STATIONS  
FIGURE 1

**RES** RESTORATION ECOLOGICAL SERVICES, INC.  
311 N. ALBREA ST  
EASTON, MD 21601  
PHONE 410-820-7445

**TABLE 1. SHOREBIRD OBSERVATIONS IN THE VICINITY OF SWAINS WHARF MARINA**

DATE: MAY 17, 2006

12:53PM HIGH TIDE

7:04PM LOW TIDE

LOCATION: MISPELLION RIVER 1

SPECIES:

	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM	3:30PM	4:00PM	4:30PM	5:00PM	5:30PM	6:00PM
RUDDY TURNSTONE	70	60	20	20	12	105	50	80	100	90	160	150
LONG-BILLED DOWITCHER	50	30	40	60	3	32	30	10	25	20	20	0
GREATER YELLOW LEGS	1	0	0	0	0	0	0	0	0	0	0	0
WILLET	10	0	0	0	0	0	0	0	0	0	0	0
SEMIPALMATED SANDPIPER	0	0	0	0	0	0	0	2	0	0	3	0
RED KNOT	0	0	0	0	0	0	0	0	25	10	6	0

LOCATION: MISPELLION RIVER 2

SPECIES:

	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM	3:30PM	4:00PM	4:30PM	5:00PM	5:30PM	6:00PM
RUDDY TURNSTONE	0	0	0	0	40	0	0	0	30	60	15	230
LONG-BILLED DOWITCHER	0	0	0	0	0	0	0	0	10	20	0	100
RED KNOT	0	0	0	0	0	0	0	0	0	24	0	60

LOCATION: CEDAR CREEK 1

SPECIES:

	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM	3:30PM	4:00PM	4:30PM	5:00PM	5:30PM	6:00PM
RUDDY TURNSTONE	30	30	0	60	40	100	50	120	40	160	200	300
LONG-BILLED DOWITCHER	30	0	0	0	0	0	30	20	0	50	40	40
SEMIPALMATED SANDPIPER	0	0	0	0	0	0	0	0	0	20	0	0
RED KNOT	0	0	0	0	0	0	0	0	0	7	0	20

**TABLE 1. SHOREBIRD OBSERVATIONS IN THE VICINITY OF SWAINS WHARF MARINA (continued)**

DATE: MAY 17, 2006 (CONTINUED)

12:53PM HIGH TIDE

7:04PM LOW TIDE

LOCATION: CEDAR CREEK 2

SPECIES:

	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM	3:30PM	4:00PM	4:30PM	5:00PM	5:30PM	6:00PM
RUDDY TURNSTONE	10	0	15	10	0	0	10	0	0	0	0	0
LONG-BILLED DOWITCHER	30	0	20	30	0	0	20	2	0	0	0	0
WILLET	0	0	0	2	0	2	0	0	0	0	0	0
SEMIPALMATED SANDPIPER	0	0	2	0	0	0	20	0	0	0	0	0

LOCATION: CEDAR CREEK 3

SPECIES:

	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM	3:30PM	4:00PM	4:30PM	5:00PM	5:30PM	6:00PM
RUDDY TURNSTONE	45	10	0	6	10	20	30	20	12	60	180	250
LONG-BILLED DOWITCHER	0	0	30	3	10	70	10	30	0	30	50	100
WILLET	0	0	0	2	5	0	10	0	0	0	0	6
SEMIPALMATED SANDPIPER	0	0	0	0	10	2	0	0	0	10	0	0

LOCATION: ON-SITE

SPECIES:

	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM	3:30PM	4:00PM	4:30PM	5:00PM	5:30PM	6:00PM
RUDDY TURNSTONE	5	0	0	0	0	7	12	6	18	5	16	60
LONG-BILLED DOWITCHER	3	0	0	0	0	3	9	0	2	0	0	0
WILLET	0	0	0	2	0	2	0	0	0	0	1	0
SEMIPALMATED SANDPIPER	0	0	0	0	0	1	1	1	0	0	2	1



**TABLE 1. SHOREBIRD OBSERVATIONS IN THE VICINITY OF SWAINS WHARF MARINA (continued)**

**DATE: MAY 19, 2006 (CONTINUED)**

9:05AM LOW TIDE

2:49PM HIGH TIDE

LOCATION: CEDAR CREEK 2

SPECIES:

	9:00AM	9:30AM	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM
RUDDY TURNSTONE	10	15	30	5	0	30	8	15	20	10	75	17	40
LONG-BILLED DOWITCHER	30	60	20	20	35	60	30	15	20	15	0	9	10
WILLET	0	2	0	0	0	0	0	0	0	0	0	0	0
SEMPALMATED SANDPIPER	0	0	0	0	0	0	13	20	0	0	0	0	0
RED KNOT	0	0	0	0	0	0	0	0	0	2	0	0	0

LOCATION: CEDAR CREEK 3

SPECIES:

	9:00AM	9:30AM	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM
RUDDY TURNSTONE	42	10	15	75	60	20	10	40	0	0	0	0	20
LONG-BILLED DOWITCHER	13	10	30	75	110	20	70	60	0	0	0	0	70
SEMPALMATED SANDPIPER	9	0	2	0	0	0	0	15	0	0	0	0	5

LOCATION: ON-SITE

SPECIES:

	9:00AM	9:30AM	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM
RUDDY TURNSTONE	47	11	11	12	40	3	2	17	17	16	48	1	0
LONG-BILLED DOWITCHER	17	3	6	3	30	1	0	0	3	7	2	2	0
WILLET	0	0	0	0	0	0	0	0	0	0	0	1	0
SEMPALMATED SANDPIPER	0	0	0	0	0	2	0	2	0	0	0	0	0



**TABLE 1. SHOREBIRD OBSERVATIONS IN THE VICINITY OF SWAINS WHARF MARINA (continued)**

**DATE: MAY 20, 2006 (CONTINUED)**

10:03AM LOW TIDE

3:53PM HIGH TIDE

LOCATION: CEDAR CREEK 2

SPECIES:

	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM
RUDDY TURNSTONE	1	0	17	0	0	0	0	0	0	0	0
LONG-BILLED DOWITCHER	7	0	0	4	0	0	0	7	0	0	0

LOCATION: CEDAR CREEK 3

SPECIES:

	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM
RUDDY TURNSTONE	0	65	30	70	110	15	1	31	0	7	13
LONG-BILLED DOWITCHER	0	7	30	35	30	60	0	19	0	1	7
WILLET	0	0	0	0	0	0	1	0	0	0	0
SEMIPALMATED SANDPIPER	0	0	0	20	12	0	0	0	0	0	2

LOCATION: ON-SITE

SPECIES:

	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM
RUDDY TURNSTONE	13	3	0	70	2	2	7	13	13	0	11
LONG-BILLED DOWITCHER	0	2	0	35	1	0	0	6	3	0	0
WILLET	2	0	0	0	1	0	0	0	0	1	0
SEMIPALMATED SANDPIPER	0	1	0	20	2	0	0	2	0	0	1

**TABLE 1. SHOREBIRD OBSERVATIONS IN THE VICINITY OF SWAINS WHARF MARINA**

**DATE: MAY 24, 2006**

7:15AM HIGH TIDE

1:38PM LOW TIDE

LOCATION: MISPELLION RIVER 1

SPECIES:

	9:00AM	9:30AM	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM
RUDDY TURNSTONE	1	13	42	50	6	18	18	30	0	0	17	4	0
LONG-BILLED DOWITCHER	13	1	6	20	1	0	2	0	0	0	0	0	2
WILLET	0	0	0	0	0	3	0	0	0	0	1	1	2
SEMPALMATED SANDPIPER	0	0	0	10	4	2	2	0	0	0	0	0	0
RED KNOT	6	0	2	10	0	0	0	5	0	0	0	0	0
DUNLIN	0	0	0	0	0	0	5	0	0	0	0	0	0
AMERICAN OYSTERCATCHER	0	0	0	0	0	0	0	2	2	0	0	0	0
BLACK-BELLIED PLOVER	0	0	0	0	0	10	0	0	0	5	0	0	0

LOCATION: MISPELLION RIVER 2

SPECIES:

	9:00AM	9:30AM	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM
RUDDY TURNSTONE	0	0	130	130	110	100	80	200	300	200	100	200	200
LONG-BILLED DOWITCHER	0	0	50	100	0	30	40	0	0	0	0	0	0
WILLET	0	2	0	20	30	0	0	0	0	0	0	0	30
SEMPALMATED SANDPIPER	0	0	0	20	15	210	150	300	300	0	0	0	175
RED KNOT	0	0	50	40	80	110	45	100	150	70	140	200	140
DUNLIN	0	0	0	0	60	0	20	0	0	180	0	0	0
BLACK-BELLIED PLOVER	0	0	0	0	0	10	0	0	0	5	0	0	0

LOCATION: CEDAR CREEK 1

SPECIES:

	9:00AM	9:30AM	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM
RUDDY TURNSTONE	45	0*	0*	0*	0*	0*	0*	0*	0*	0*	40	45	40
LONG-BILLED DOWITCHER	50	0*	0*	0*	0*	0*	0*	0*	0*	0*	0	0	0
WILLET	0	0*	0*	0*	0*	0*	0*	0*	0*	0*	0	0	0
SANDPIPERS	0	0*	0*	0*	0*	0*	0*	0*	0*	0*	75	90	40
RED KNOT	20	0*	0*	0*	0*	0*	0*	0*	0*	0*	0	0	20
BLACK-BELLIED PLOVER	0	0*	0*	0*	0*	0*	0*	0*	0*	0*	0	0	10

\* NOTE: BIRD BANDING BEING CONDUCTED

**TABLE 1. SHOREBIRD OBSERVATIONS IN THE VICINITY OF SWAINS WHARF MARINA (continued)**

**DATE: MAY 24, 2006 CONTINUED)**

7:15AM HIGH TIDE

1:38PM LOW TIDE

LOCATION: CEDAR CREEK 2

SPECIES:

	9:00AM	9:30AM	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM
RUDDY TURNSTONE	30	7	30	0	2	0	0	0	0	0	0	0	0
LONG-BILLED DOWITCHER	30	0	2	0	0	0	0	0	0	0	0	0	0
WILLET	0	0	0	0	0	0	4	0	0	2	0	1	0
RED KNOT	15	4	0	0	0	0	0	0	0	0	0	0	0
DUNLIN	0	0	0	0	4	0	0	0	0	0	0	0	0

LOCATION: CEDAR CREEK 3

SPECIES:

	9:00AM	9:30AM	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM
RUDDY TURNSTONE	40	120	30	40	20	70	7	2	3	22	0	11	8
LONG-BILLED DOWITCHER	15	60	30	10	0	25	0	1	0	0	0	0	0
WILLET	1	0	0	20	0	0	0	0	0	0	0	0	0
SEMIPALMATED SANDPIPER	12	5	30	5	40	30	0	1	30	10	15	0	0
RED KNOT	5	10	0	20	10	5	0	0	0	0	0	0	0
DUNLIN	0	0	0	0	35	0	0	0	0	5	0	0	0
BLACK-BELLIED PLOVER	0	0	2	0	0	0	0	0	0	0	0	0	0

LOCATION: ON-SITE

SPECIES:

	9:00AM	9:30AM	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM
RUDDY TURNSTONE	60	20	35	25	1	0	0	1	2	1	1	0	0
LONG-BILLED DOWITCHER	10	0	0	0	0	0	0	0	0	0	0	0	0
WILLET	0	10	15	1	1	1	1	1	0	0	0	0	0
SEMIPALMATED SANDPIPER	0	15	20	30	8	2	0	1	0	0	0	0	0



**TABLE 1. SHOREBIRD OBSERVATIONS IN THE VICINITY OF SWAINS WHARF MARINA (continued)**

**DATE: MAY 26, 2006 (CONTINUED)**

9:01AM HIGH TIDE

3:13PM LOW TIDE

LOCATION: CEDAR CREEK 2

SPECIES:

9:00AM	9:30AM	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM
10	0	20									
0	3	5									
6	15	30									
2	0	0									
2	0	0									

RUDDY TURNSTONE  
 LONG-BILLED DOWITCHER  
 WILLET  
 SEMIPALMATED SANDPIPER  
 BLACK-NECKED STILT

LOCATION: CEDAR CREEK 3

SPECIES:

9:00AM	9:30AM	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM
50	10	2									
0	5	0									
60	0	0									

RUDDY TURNSTONE  
 LONG-BILLED DOWITCHER  
 RED KNOT

LOCATION: ON-SITE

SPECIES:

9:00AM	9:30AM	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM
11	0	7									
1	0	1									
0	0	1									
0	0	1									

RUDDY TURNSTONE  
 WILLET  
 SEMIPALMATED SANDPIPER  
 RED KNOT



**TABLE 1. SHOREBIRD OBSERVATIONS IN THE VICINITY OF SWAINS WHARF MARINA (continued)**

DATE: MAY 27, 2006 (CONTINUED)

9:51AM HIGH TIDE

4:00PM LOW TIDE

LOCATION: CEDAR CREEK 2

SPECIES:

	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM
RUDDY TURNSTONE	5	20	10	20	10	120	10	20	15	0	5
LONG-BILLED DOWITCHER	10	0	0	5	10	0	2	0	5	1	0
WILLET	0	0	0	0	0	30	0	5	5	0	0
SEMIPALMATED SANDPIPER	20	20	10	20	0	40	20	0	0	0	5
RED KNOT	10	20	20	5	10	0	0	0	0	1	0

LOCATION: CEDAR CREEK 3

SPECIES:

	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM
RUDDY TURNSTONE	0	10	0	50	30	15	30	40	40	15	15
LONG-BILLED DOWITCHER	0	0	0	10	0	0	0	0	0	0	0
WILLET	0	0	0	70	0	0	0	3	0	15	0
SEMIPALMATED SANDPIPER	0	20	30	60	100	30	30	0	0	0	0
RED KNOT	0	5	0	30	10	0	0	10	0	0	0

LOCATION: ON-SITE

\*NOTE: 2 FISHERMAN ON BEACH

SPECIES:

	10:00AM	10:30AM	11:00AM	11:30AM	12:00PM	12:30PM	1:00PM	1:30PM	2:00PM	2:30PM	3:00PM
RUDDY TURNSTONE	0	7	0*	0*	1	0	0	0	0	0	0
WILLET	0	1	0*	0*	0	0	0	0	0	0	0
SEMIPALMATED SANDPIPER	0	0	0*	0*	10	15	35	15	10	0	0

# EXHIBIT K



STATE OF DELAWARE  
DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL  
DIVISION OF SOIL AND WATER CONSERVATION

89 KINGS HIGHWAY  
DOVER, DELAWARE 19901

DELAWARE COASTAL  
MANAGEMENT PROGRAM

TELEPHONE: (302) 739-9283  
FAX: (302) 739-2048

September 29, 2006

David Hardin  
Environmental Resources, Inc  
One Plaza East, Suite 500  
100 East Main Street  
Salisbury, Maryland 21801-4981

**RE: Federal Consistency Hold Condition  
Swains Wharf Marina (FC 05.083)**

Dear Mr. Harden:

In a letter to you dated June 30, 2006, you agreed to place the Swain's Marina project on hold to allow the applicant more time to provide necessary information to complete the review of this project.

This is a reminder that a term of the hold agreement is that the necessary information must be provided within ninety days, or by October 16, 2006. If the information cannot be provided within the agreed upon time frame, the applicant will be required to provide written notification to the DCMP which will include justification for the additional time and a date upon which the applicant will be able to provide the information. The DCMP will agree to any reasonable requests for extended time periods.

If you have questions, please contact either myself or Bonnie Willis of my staff at (302) 739-9283.

Sincerely,

Sarah W. Gocksey, Administrator  
Delaware Coastal Management Program

cc: File 05.038  
Kevin Faust - USACE  
Jim Chaconas - DNREC/DWR

# EXHIBIT L



311 N. Aurora St.  
Easton, MD 21601  
Phone/Fax 410-820-7465

October 14, 2006

VIA FAX

RES#0014-0001

Ms Sarah Cooksey  
DNREC-Coastal Management Program  
89 Kings Highway  
Dover, DE 19901

RE: Swains Wharf Marina (FC 05.083)  
Response to September 29, 2006 letter

Dear Ms Cooksey:

I have received your reminder letter that a response to the comments requested in June are due by October 16, 2006. At the August 11, 2006 meeting a number of additional items were presented to us by the Wetlands and Subaqueous Lands Section. You asked that we provide copies of our response to those items also. One of the items was to include the mean low water and mean high water contours along the opposite bank of the Cedar Creek. We had requested a surveyor obtain that information and to date he has not done the work. I have recently made arrangements to borrow some surveying equipment from my former company and obtain the elevation data ourselves, but the earliest we can get the equipment and do the field work this coming week. While I think I can have all the information out by the end of October, our schedule has been changing daily with weather and other project demands. Therefore, I am requesting a 30 day extension until November 16, 2006 to make sure I can provide all the information at one time.

I would also like to request you change my address to that on this letterhead. This is the second letter from your office I have been delayed in receiving since my former company needed to forward it to me.

If you have any questions, please call or email me at [dhardin@restorationes.com](mailto:dhardin@restorationes.com).

Sincerely,

A handwritten signature in cursive script that reads 'David L. Hardin'.

David L. Hardin

# **EXHIBIT M**



311 N. Aurora St.  
Easton, MD 21601  
Phone/Fax 410-820-7465

November 14, 2006

RES#0014-00001

Ms Sarah W. Cooksey  
Delaware DNREC- Coastal Management Program  
Division of Soil and Water Conservation  
89 Kings Highway  
Dover, DE 19901

Mr. James T. Chaconas  
Delaware DNREC- Division of Water Resources  
Wetlands & Subaqueous Lands Section  
89 Kings Highway  
Dover, DE 19901

RE: Marina permit application- Swain's Wharf Marina  
Misipillion River and Cedar Creek  
Sussex County, DE

Dear Ms Cooksey and Mr Chaconas:

At our August 11, 2006 meeting, we were given a list of nine additional items that needed to be addressed by the applicant. I am providing a response to those items in the order they are on the sheet provided (copy attached). Since this list included topics also requested by the Coastal Management Program, I am sending this letter as a response to both agencies.

1. Flood zone with velocity hazard. I have talked to the Groundwater Protection Branch and was told that permits for permanent holding tanks have been discontinued. However, since the site was the location of an existing marina and an existing grandfathered septic system exists, a permanent holding tank could be obtained by first being denied approval for an on-site disposal system (through submitting a soil evaluation) and then applying for a variance. The holding tank would be considered an improvement on existing conditions. A letter from Jim Cassidy of the Groundwater Protection Branch outlining the process is attached. In the meantime, it was our understanding from the meeting that portable toilets with a holding tank such as used at the Bowers Beach boat ramp will be acceptable for the initial season or two of operation. These portable toilets would have an attached holding tank for marine wastes such as used by DNREC at the Bowers Beach boat ramp. A copy of a proposed service with A-1 Hauling is attached.

2. Vessel sewage pumpout. The applicant will obtain a portable pumpout unit such as shown on the attached sheets, with plans to convert to an installed system once demand indicates it is needed and a permanent holding tank is installed.

3. Compliance with FEMA regulations. I have reviewed both FEMA and Sussex County regulations regarding flood hazards. The County regulations take the minimum FEMA requirements and add somewhat to them. Essentially any construction within the wave hazard zone requires the bottom of the lowest horizontal structural member of a V zone building be elevated 1 foot or more above the base flood elevation. Other requirements are certain building practices be followed including adequate anchoring of structures. These items have to be adhered to in order to obtain the required certificates for insurance and occupancy. The most recent map available from FEMA is FIRM 10005C0055J, revised 1/6/2005, which shows the property as being Zone VE (EL 11). Therefore, the bottom of the lowest horizontal structural member would need to be at EL 12. There is some discrepancy between the FIRM and the current online county map. The county online map only shows the northern edge of the site, which is tide marsh, as VE. The remainder of the site is AE. The elevation for AE is EL 9. I have assumed the most current map to follow is the above referenced FEMA map. There is nothing about the site that would prevent the applicant from meeting FEMA and County requirements. All permanent structures such as offices, caretakers house and bathrooms would need to be constructed on pilings and comply with the required building materials and practices.

4. Mean high and mean low water. We have obtained elevation/sounding data along the opposite shore of Cedar Creek and determined a mean low water line for that shore. A mean high water line was not practicable as the opposite shore becomes tidal marsh dominated by smooth cordgrass behind a narrow beach area. Elevations in the marsh were below the mean high water elevation. Using the MLW information we have added an additional line on the plans showing a distance 20% of the channel width from the project shoreline (MLW line). Additionally, I have converted all water depths and tidal elevations to the same datum used by the Corps of Engineers for the channel surveys since the majority of the data was based on this datum. This is the Philadelphia Corps of Engineers mean lower low water (MLLW) datum. Following the Corps format, all of these elevations are shown as feet below this MLLW datum. Bottom elevations below the datum are positive numbers and elevations above the datum are negative numbers. The upland site elevations are still based on the NGVD 1988 datum. The Corps MLLW datum is 2.92 feet below the NGVD 88 datum.

5. Location of wastewater handling facilities. The location of wastewater handling facilities is shown on the revised plans.

6. Proximity of navigation channel in Mispillion River. As shown on the site plan, the federally maintained navigation channel in the Mispillion River is 25 feet from the nearest proposed outside piling. As of the last known survey in March, 2005, there was more than adequate water depth for navigation throughout the channel and even north of the channel.

7. State regulated wetlands. The only state regulated wetlands on the property are located on the south side of the site between the adjacent Gierschick property and Cedar Creek. This wetland is

Ms Sarah W. Cooksey  
Mr. James T. Chaconas  
Wetlands & Subaqueous Lands Section  
Marina permit application- Swain's Wharf Marina  
November 14, 2006

Page 3

dominated by short form *Spartina alterniflora*. The mapped boundary has been added to the revised plans.

8. Correct location of Auman and Evans properties. I have reviewed property plats and deeds for the Swain property, Evans and Auman properties. The Auman plat is the same that was submitted to DNREC with his pier permit application. While there are some discrepancies in the plats, they vary by a few feet, not the magnitude shown on the county tax maps. The location of these two properties match the descriptions in the deeds. The boundaries of the Swain property were established via a court order in 1974. We believe the approved survey of the property locations is shown on the site plan. In our experience, the property boundaries shown on tax maps are frequently inaccurate. The current tax map scales the road frontage of the Swain property between the Evans and Guierschick properties as about 342 feet, even though the map notation, the survey plat and deed description all put the length at 308.45 feet. The outline of the Auman property does not even match the plat submitted with the permit application or the deed description. Although the property boundaries differ from that shown on the current Sussex County tax maps, the property survey is the legal representation of the property boundaries.

9. Water supply. There is currently an existing well on the property which would be sufficient for the limited amount of water initially needed. Once the permanent holding tank is approved, the applicant will provide upgraded bathroom facilities with sinks and the well will be replaced. The existing well is located north of the present house structure and was installed prior to well permits being required. An above ground well head was not found, but an approximate location is shown on the plans, based on the owners description.

If you have any questions, please call at 410-820-7465.

Sincerely,



David L. Hardin

projects\0014-0001\state permit\response to list of additional information 10\_9\_06

cc: Kevin Faust, USACE  
Walt Swain



STATE OF DELAWARE  
DEPARTMENT OF NATURAL RESOURCES  
& ENVIRONMENTAL CONTROL  
DIVISION OF WATER RESOURCES  
422 N. DUPONT HIGHWAY, SUITE 1  
GEORGETOWN, DELAWARE 19947

TELEPHONE: (302) 856-4561  
FAX No.: (302) 856-5088

October 30, 2006

Mr. Dave Hardin  
Restoration Ecological Services  
311 Aurora Street  
Easton, MD 21601

RE: Holding Tank Procedures for Swain's Warf Marina  
Sussex County Tax Map # 3-30-5-10

Dear Mr. Hardin

I am writing as a follow up to our telephone conversation discussing the possibility of installing a holding tank as a means on wastewater disposal for the proposed marina. As this is an existing facility, even if in disrepair, the possibility of installing a permanent holding tank is a distinct possibility. The procedures are as follows.

- 1) Have a site evaluation performed by a licensed Class D Soil Scientist. The soil scientist will determine the system type to be installed on the property. (Be sure to let the soil scientist know of the flooding potential of the property.)
- 2) Submit the site evaluation to the Department for review and approval.
- 3) After approval, the site evaluation should go to a Class C Design Engineer.
- 4) Upon approval of the permit application, contact a Class E contractor for installation.

These are the basic steps in the process. As there are sometimes exceptions to the rules, if you run into any problems along your way, please don't hesitate to contact me at (302) 856-4561

Sincerely,

A handwritten signature in black ink, appearing to read "James Cassidy".

James Cassidy  
Program Manager I  
Ground Water Discharges Section

*Delaware's good nature depends on you!*



1009 River Road • New Castle, DE 19720 • (302) 322-1074

VIA FAX TRANSMISSION

September 21, 2006

Mr. Pete Russo  
Swain's Wharf Marina

RE: Sanitation

Dear Pete:

It was a pleasure speaking with you regarding your upcoming project at Swain's Wharf Marina in Slaughter Beach, Delaware.

A-1 Sanitation Service will provide you with portable restroom units for use by patrons of the marina. They will be serviced once a week, however, we suggest during the busy summer season, the service be increased to twice a week.

It is my understanding that you will have a CVA dump station installed on the premises. A-1 Sanitation Service will be happy to provide you with a Holding Tank Maintenance Agreement. A-1 Sanitation Service will be responsible for pumping the contents of and disposing of same while the dumpstation is in use. Our technicians are on call 24 hours a day. Once you have determined what size tank will be installed, we will prepare the Holding Tank Maintenance Agreement for your signature.

If you need additional information, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Steve Smiertka', written over a horizontal line.

Steven A. Smiertka  
Vice President

Toll Free 1-888-322-1074 • Fax (302) 326-0360

• Portable-Toilets • Restroom Trailers • Septic Tank and Grease Trap Service • Temporary Holding Tanks and Water Systems • Storage Containers



## PUMP OUT CADDY

### 25 Gallon Waste Collection Cart For Holding Tank Pump Outs

#### Performance Features

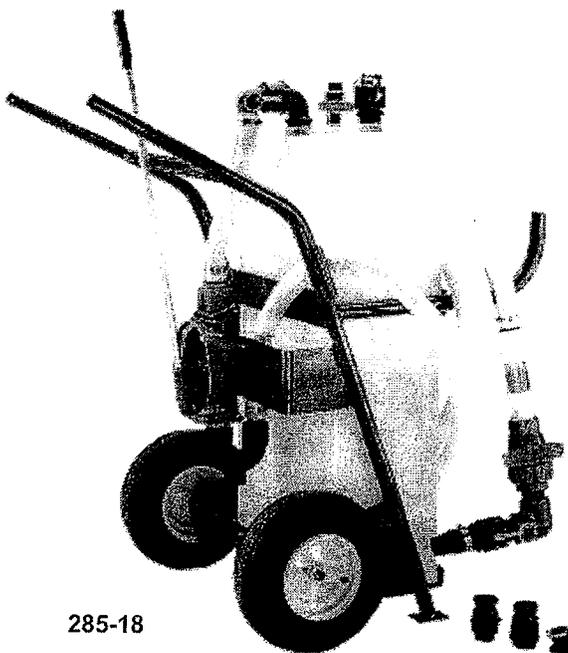
- Manual Pump For Secure Self Service Operations
- Easy Fill & Off Load Operation
- Pump Out Rates To 15 GPM
- Self Priming Suction from Heights Up To 15 ft (7.6m)
- Easily Moved Around On Wide 12" Pneumatic Tires

#### Design Features

- Easy To Use-Low Maintenance
- Integral Hose Rack
- Vertical Mount Diaphragm Pump
- Welded Aluminum Cart With Stainless Axle & Pneumatic Tires
- All Materials Rated For Marine Use
- Stock 25 Gallon Poly Tank
- Quick Clamp Plumbing & Hose Assemblies

Edson's Manual Diaphragm Pump Out Caddy is a convenient, easy to use waste collection system that is shipped complete. Designed for small collection jobs, the cart with manual 18 gallon per minute pump and 25 gallon tank makes short work of emptying boat holding tanks. It is especially safe for self service facilities and a very economical tool for emptying tanks of boats being pulled for service or storage.

The pump out caddy uses the Edson unique plumbing and hose assemblies that allows for the tank to be safely emptied by the pump while virtually eliminating the chance of accidental spillage. The pump and hose assemblies are available as separate items for those who want to use them with their own tanks and carts, trailers or boats.



285-18

### Edson Manual Pump Out Caddy

**PUMP PERFORMANCE:** Static Head - Suction 18 ft / 5.48m , Discharge - 18 ft / 5.48m ● Dry Suction Lift -15 ft / 4.57m ● Max Volume - 18 GPM / 68.1 LPM at 5 ft Suction Lift and 0 Discharge at 46 Strokes per Min. w/ 1.5" Hose

**PUMP CONSTRUCTION:** Anodized Aluminum Pump ● Nitrile Valves Diaphragm and ● Stainless Steel Hardware ● Vertical Mount, Lever Action

**PUMP OUT HOSE ASSEMBLY:** 1 1/2" Polyflex Hose ● 90° Ball Valve ● Sight Glass/Check Valve ● Quick Clamp Adapter ● Complete Set of Deck Adapters ● 25 ft Length

**COLLECTION TANK:** 25 Gal. Rotational Molded High Density Polyethylene, Waste Tank ● FNPT Through Tank Fittings, One 1/2", One 1 1/2" and One 2" Through Tank Fitting ● 4" Access Port With Threaded Cap

**CART:** Welded Aluminum ● 12" Pneumatic Tires ● Baked On Polyurethane Coating ● 2 Wheel Cart Design

#### ORDERING INFORMATION

DESCRIPTION <i>See Price List For Other Models</i>	WEIGHT (Lbs/Kgs)	ORDER NO.
Pump Out Caddy	40 / 18	285-18

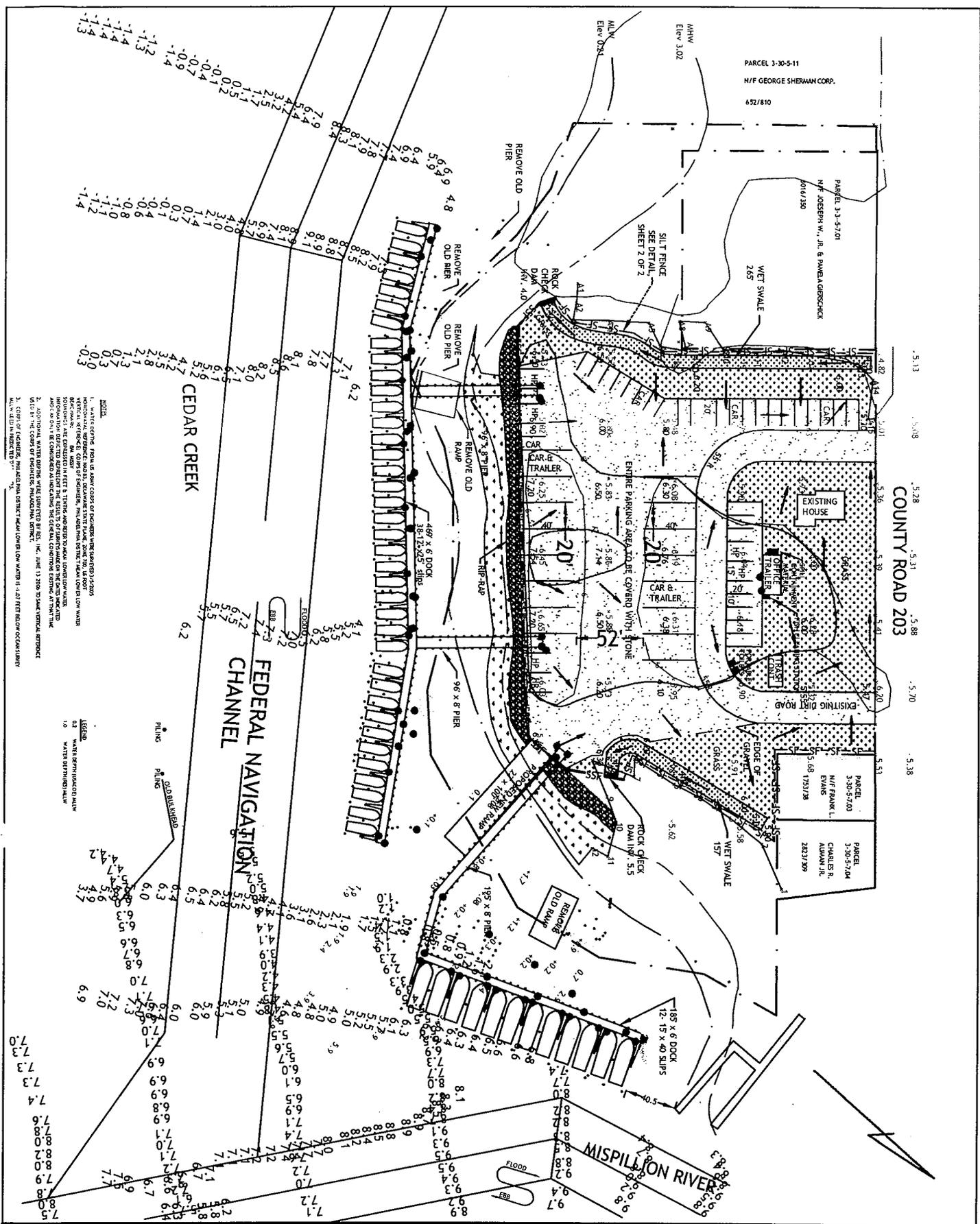
[www.edsonpumpout.com](http://www.edsonpumpout.com)



146 Duchaine Blvd., New Bedford, MA 02745-1292 Tel. 888-351-7782 Fax 508-995-5021

**INTERNATIONAL**

E-Mail [pumpout@edsonintl.com](mailto:pumpout@edsonintl.com)



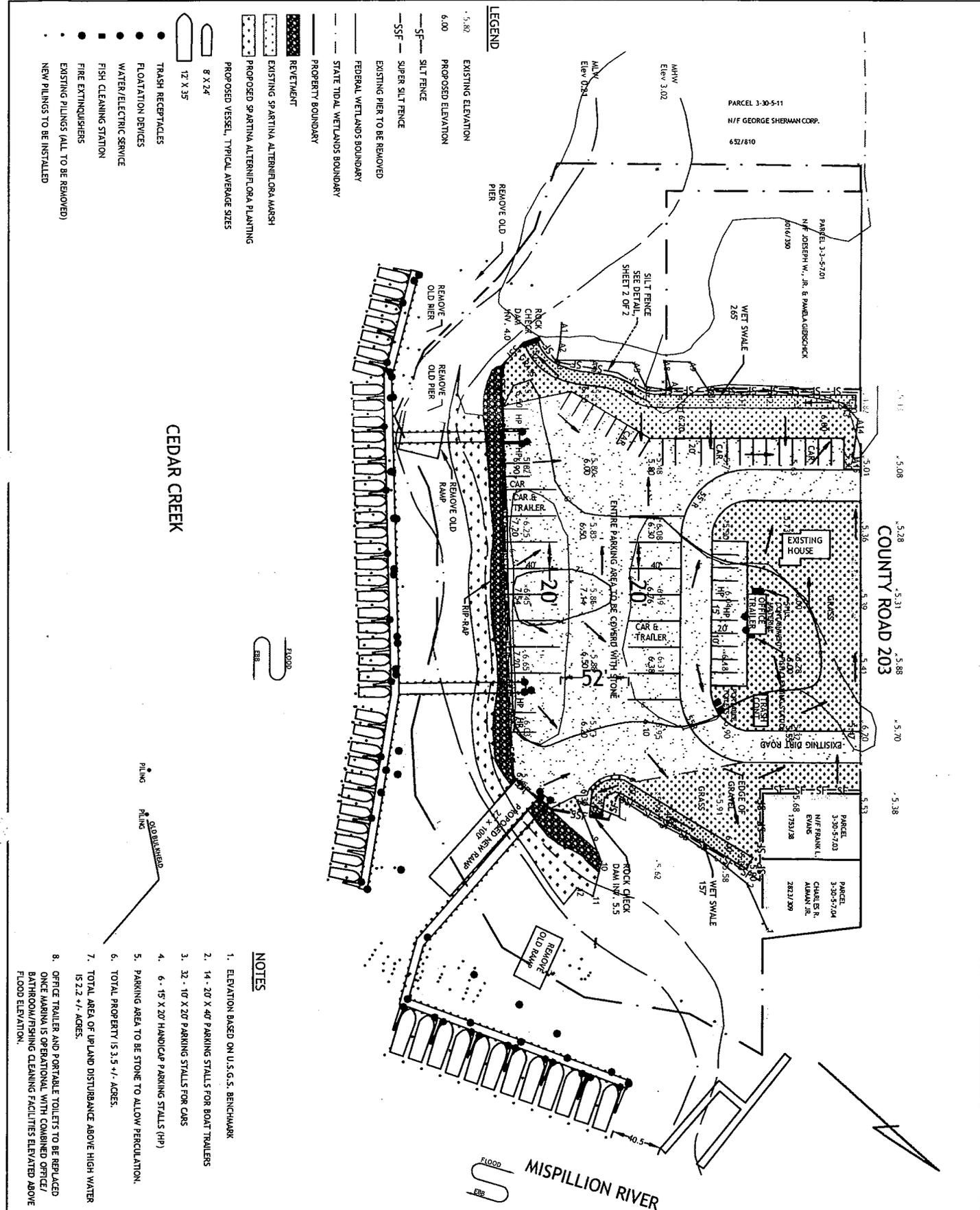
Date: JUNE 7, 2005  
 Scale: 1" = 100'  
 Proj.No.: 408B001  
 Drawing No.: FIGURE 5

PROPOSED MARINA REVISION - BATHYMETRY  
 SWAIN MARINA, TAX MAP 3-30-5-10  
 SLAUGHTERS BEACH, SUSSEX COUNTY, DELAWARE

**RES** RESTORATION  
 ECOLOGICAL  
 SERVICES, INC.

811 N. AURORA ST  
 EASTON, MD 21601  
 PHONE 410-820-7465

- NOTES:**
1. WATER DEPTHS FROM US NAVY CHARTS OF DELAWARE WERE ADJUSTED 1.2000 FEET TO CORRELATE WITH THE BATHYMETRY DATA FROM THIS PROJECT.
  2. ADDITIONAL WATER DEPTHS WERE OBTAINED BY RES, INC. JUNE 13, 2005 TO MAKE VERTICAL REFERENCE TO THE CHARTS OF DELAWARE, PAULSONS, SERIES 11.
  3. COAST OF DELAWARE, THE DELAWARE DISTRICT (NAD 83) LOW WATER IS 1.27 FEET BELOW OCCULT LUNAR TIDE.
- LEGEND:**
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Date: JUNE 7, 2006  
 Scale: 1" = 100'  
 Proj.No.: 0014-0001  
 Drawing No.: FIGURE 1

PROPOSED MARINA REVISION  
 SWAIN MARINA, TAX MAP 3-30-5-10  
 SLAUGHTERS BEACH, SUSSEX COUNTY, DELAWARE

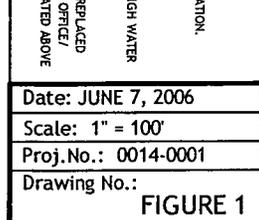
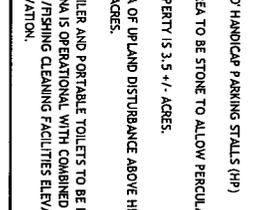
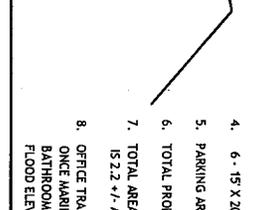
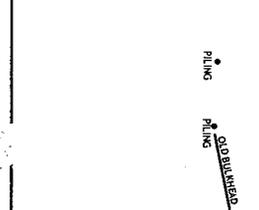
**RES RESTORATION ECOLOGICAL SERVICES, INC.**  
 311 N. AURORA ST  
 EASTON, MD 21601  
 PHONE 410-820-7465

- TRASH RECEPTACLES
- FLOTATION DEVICES
- WATER/ELECTRIC SERVICE
- FISH CLEANING STATION
- FIRE EXTINGUISHERS
- EXISTING PILING (ALL TO BE REMOVED)
- NEW PILING TO BE INSTALLED

- LEGEND**
- 5.80 EXISTING ELEVATION
  - 6.00 PROPOSED ELEVATION
  - SF SILT FENCE
  - SSF SUPER SILT FENCE
  - - - - EXISTING PIER TO BE REMOVED
  - - - - FEDERAL WETLANDS BOUNDARY
  - - - - STATE TIDAL WETLANDS BOUNDARY
  - - - - PROPERTY BOUNDARY
  - - - - REVETMENT
  - - - - EXISTING SPARTINA ALTERNIFLORA MARSH
  - - - - PROPOSED SPARTINA ALTERNIFLORA PLANTING
  - - - - PROPOSED VESSEL, TYPICAL AVERAGE SIZES
  - - - - 8' X 24'
  - - - - 12' X 35'

- NOTES**
1. ELEVATION BASED ON U.S.G.S. BENCHMARK
  2. 14 - 20' X 40' PARKING STALLS FOR BOAT TRAILERS
  3. 32 - 10' X 20' PARKING STALLS FOR CARS
  4. 6 - 15' X 20' HANDICAP PARKING STALLS (HP)
  5. PARKING AREA TO BE STONE TO ALLOW PERCOLATION.
  6. TOTAL PROPERTY IS 3.5 +/- ACRES.
  7. TOTAL AREA OF UPLAND DISTURBANCE ABOVE HIGH WATER IS 2.2 +/- ACRES.
  8. OFFICE TRAILER AND PORTABLE TOILETS TO BE REPLACED ONCE MARINA IS OPERATIONAL WITH COMBINED OFFICE/BATHROOM/FISHING CLEANING FACILITIES ELEVATED ABOVE FLOOD ELEVATION.

**CEDAR CREEK**



# **EXHIBIT N**

**PRICKETT, JONES & ELLIOTT**

A PROFESSIONAL ASSOCIATION

11 NORTH STATE STREET

DOVER, DELAWARE 19901

TEL: (302) 674-3841

FAX: (302) 674-5864

<http://www.prickett.com>

WAYNE N. ELLIOTT  
GARY F. TRAYNOR  
JOHN W. PARADEE  
D. BENJAMIN SNYDER\*  
GLENN C. MANDALAS\*

WILMINGTON OFFICE  
1310 KING STREET, P.O. 1328  
WILMINGTON, DE 19899  
TEL: (302) 888-6500  
FAX: (302) 658-8111

\* ALSO ADMITTED IN PA

Writer's E-Mail Address: [JWParadee@prickett.com](mailto:JWParadee@prickett.com)

July 16, 2007

Sarah W. Cooksey  
Administrator, Delaware Coastal Programs  
Department of Natural Resources and Environmental Control  
5 E. Reed Street, Suite 201  
Dover, Delaware 19901

**RE: Swain's Wharf Marina**

Dear Ms. Cooksey:

Please be advised that I represent Mr. Walt Swain, d/b/a Stooge, Incorporated, the applicant for a Consistency Determination from your office with regard to the above-referenced marina project.

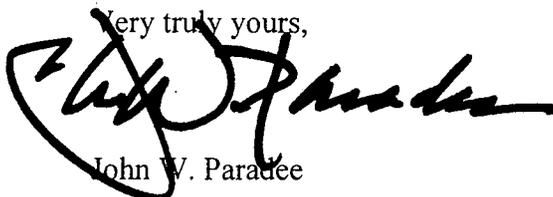
My client's application was filed in April of 2005, more than two (2) years ago. A notice of my client's application was published in The Delaware State News on February 5, 2006, almost eighteen (18) months ago. And finally, my client provided your office with supplemental information (as requested) in November of 2006, more than one hundred eighty (180) days ago.

Under the circumstances, your office has had more than ample time to review and process my client's application. Is there some reason why the Department is dragging its feet with this application?

My client's application deserves to be reviewed and approved in a timely fashion. At your earliest opportunity, please advise me of the status of your review of my client's application, as well as an explanation why the application has not yet been approved. If I do not hear from you within ten (10) days, then my client will be forced to consider legal action.

Thank you for your prompt attention. I look forward to hearing from you soon.

Very truly yours,



John W. Paradee

cc: Walt Swain  
Pete Russo  
David Hardin, P.E.

# EXHIBIT O

**PRICKETT, JONES & ELLIOTT**

A PROFESSIONAL ASSOCIATION

**11 NORTH STATE STREET  
DOVER, DELAWARE 19901**

**TEL: (302) 674-3841**

**FAX: (302) 674-5864**

**<http://www.prickett.com>**

WAYNE N. ELLIOTT  
GARY F. TRAYNOR  
JOHN W. PARADEE  
D. BENJAMIN SNYDER\*  
GLENN C. MANDALAS\*

WILMINGTON OFFICE  
1310 KING STREET, P.O. 1328  
WILMINGTON, DE 19899  
TEL: (302) 888-6500  
FAX: (302) 658-8111

\* ALSO ADMITTED IN PA

Writer's E-Mail Address: [JWParadee@prickett.com](mailto:JWParadee@prickett.com)

August 20, 2007

Sarah W. Cooksey  
Administrator, Delaware Coastal Programs  
Department of Natural Resources and Environmental Control  
5 E. Reed Street, Suite 201  
Dover, Delaware 19901

**RE: Swain's Wharf Marina**

Dear Ms. Cooksey:

Please respond to my July 16, 2007 letter (copy enclosed) within ten (10) days, or I will be forced to file appropriate legal action to protect my client's interests.

Thank you for your prompt attention. I look forward to hearing from you soon.

Very truly yours,



John W. Paradee

JWP/lwr  
Enclosure

cc: Walt Swain  
Pete Russo  
David Hardin, P.E. ✓

**PRICKETT, JONES & ELLIOTT**

A PROFESSIONAL ASSOCIATION

11 NORTH STATE STREET

DOVER, DELAWARE 19901

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WAYNE N. ELLIOTT  
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D. BENJAMIN SNYDER\*  
GLENN C. MANDALAS\*

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TEL: (302) 888-6500  
FAX: (302) 658-8111

\*ALSO ADMITTED IN PA

Writer's E-Mail Address: [JWParadee@prickett.com](mailto:JWParadee@prickett.com)

July 16, 2007

Sarah W. Cooksey  
Administrator, Delaware Coastal Programs  
Department of Natural Resources and Environmental Control  
5 E. Reed Street, Suite 201  
Dover, Delaware 19901

**RE: Swain's Wharf Marina**

Dear Ms. Cooksey:

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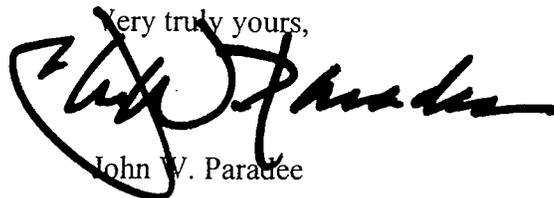
My client's application was filed in April of 2005, more than two (2) years ago. A notice of my client's application was published in The Delaware State News on February 5, 2006, almost eighteen (18) months ago. And finally, my client provided your office with supplemental information (as requested) in November of 2006, more than one hundred eighty (180) days ago.

Under the circumstances, your office has had more than ample time to review and process my client's application. Is there some reason why the Department is dragging its feet with this application?

My client's application deserves to be reviewed and approved in a timely fashion. At your earliest opportunity, please advise me of the status of your review of my client's application, as well as an explanation why the application has not yet been approved. If I do not hear from you within ten (10) days, then my client will be forced to consider legal action.

Thank you for your prompt attention. I look forward to hearing from you soon.

Very truly yours,



John W. Paradee

cc: Walt Swain  
Pete Russo  
David Hardin, P.E.

# **EXHIBIT P**



STATE OF DELAWARE  
DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL  
DIVISION OF SOIL AND WATER CONSERVATION

89 KINGS HIGHWAY  
DOVER, DELAWARE 19901

DELAWARE COASTAL  
MANAGEMENT PROGRAM

August 30, 2007 - 4 2007  
TELEPHONE: (302) 739-9283  
FAX: (302) 739-2048

John W. Paradee  
Prickett, Jones & Elliott  
11 North State Street  
Dover, Delaware 19901

**RE: Swain's Wharf Marina (FC 05.083)**

Dear Mr. Paradee,

The Delaware Coastal Management Program (DCMP) has received your inquiry into the status of the federal consistency application submitted by your client, Mr. Walt Swain, for Swain's Wharf Marina. We appreciate your client's eagerness to conclude the review process but due to the many factors (see below) that surrounded this project, its review has taken longer than usual. I assure you that this is due to the complex nature of the situation and is well within the federal guidelines. As I indicated in my phone message to you on July 19, 2007 in response to your letter dated July 16<sup>th</sup>, there are many major issues surrounding this project that need to be taken into consideration.

This project is located on a federal waterway and requires a federal Army Corps of Engineers permit prior to the commencement of activity. Because of this Mr. Swain's project also requires a federal consistency determination from DCMP. As part of this review process, the applicant must provide an assessment of the probable coastal zone effects of the proposed project on any land or water use or natural resource of the coastal zone to the relevant enforceable policies of the DCMP. Pursuant to National Oceanic & Atmospheric Administration regulations (15 CFR 930), the Delaware Coastal Management Program has up to 180 days to review the information provided by the applicant to ensure it is consistent with the DCMP's enforceable policies. If the review requires time beyond the 180 days, the State agency and applicant may mutually agree to suspend the consistency time clock (HOLD) extending the review period until all matters can be resolved. Such an agreement must be formalized in writing and signed by both parties. Particular to this project, as not all matters were resolved at the 180-day point, a "Hold" agreement was set forth in a letter, signed and returned to this office by Dave Harden, the applicant's consultant who is authorized to act on Mr. Swain's behalf. Mr. Hardin was provided a signed original copy to keep for his files if you would like to reference it. This project was placed on HOLD on July 13, 2006.

In addition, because the original project application was incomplete when it was received in April 2005, it could not be placed on public notice until mid-January 2006.

During that time period, we worked with Mr. Swain's consultant to collect the additional information requested. Even though some information upon which to make a determination was not available, the project was deemed to have enough information to begin a review.

Most of the issues surrounding this project have been addressed. However a very significant natural resource issue, the impact to the migratory shorebird population that is dependant on the area as a foraging and roosting location, has not yet been resolved. The issue is currently in front of the U.S. Fish and Wildlife Service Shorebird Technical Committee and we are waiting for their response, after which time a final decision regarding this matter can be reached.

Sincerely,



Sarah W. Cooksey, Administrator  
Delaware Coastal Programs

Cc: John A. Hughes, Secretary  
Robert S. Baldwin, Director  
Patrick J. Emory, Director  
Kevin C. Donnelly, Director

# EXHIBIT Q

**PRICKETT, JONES & ELLIOTT**

A PROFESSIONAL ASSOCIATION

11 NORTH STATE STREET  
DOVER, DELAWARE 19901

TEL: (302) 674-3841

FAX: (302) 674-5864

<http://www.prickett.com>

WAYNE N. ELLIOTT  
GARY F. TRAYNOR  
JOHN W. PARADEE  
D. BENJAMIN SNYDER\*  
GLENN C. MANDALAS\*

WILMINGTON OFFICE  
1310 KING STREET, P.O. 1328  
WILMINGTON, DE 19899  
TEL: (302) 888-6500  
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\* ALSO ADMITTED IN PA

Writer's E-Mail Address: [JWParadee@prickett.com](mailto:JWParadee@prickett.com)

October 5, 2007

The Honorable John Hughes  
Secretary, Department of Natural Resources and Environmental Control  
Richardson & Robbins Building  
89 Kings Highway  
Dover, Delaware 19901

**RE: Swain's Wharf Marina**

Dear Secretary Hughes:

I represent Mr. Walt Swain, d/b/a Stooze, Incorporated, the applicant for a determination of Coastal Zone consistency from the State of Delaware Department of Natural Resources and Environmental Control (the "Department") in connection with the above-referenced marina project.

My client's application was filed in April of 2005, over two and a half years ago. A notice of my client's application was published in The Delaware State News on February 5, 2006, over twenty (20) months ago. And finally, my client provided the Department with supplemental information (as requested) in November of 2006, almost a year ago.

Under the circumstances, the Department has had more than ample time to review and process my client's application. Regrettably, the Department has been dragging its feet and making numerous excuses for its unreasonable delay in the processing of this application. Sarah W. Cooksey of the Office for Delaware Coastal Programs has attempted to justify the Department's refusal to act upon my client's application on the basis that (1) the project was placed on hold on July 13, 2006, and (2) the Office for Delaware Coastal Programs is awaiting input from the U.S. Fish and Wildlife Service Shorebird Technical Committee. What Ms. Cooksey has failed to acknowledge, however, is that the applicant agreed to no more than a six (6) month "hold" extension from November 16, 2006 (the date by which the applicant submitted additional information requested by Ms. Cooksey), an extension which has long since run, and further, the Department's review and consideration of any application for a determination of Coastal Zone consistency does not depend and is not contingent upon any input from the U.S. Fish and Wildlife Service. With all due respect, I submit that the Office of Delaware Coastal Programs is intentionally stalling for time, hoping that either the U.S. Fish and Wildlife Service will designate the redknot shorebird as a threatened species, so that the Mispillion watershed can be declared a protected area, or worse, that my client will simply give up on pursuit of its application. In any event, there should be no question whatsoever that, based upon all of the voluminous documentation and information my client has submitted in support of its application

(particularly so in contrast to what the Department has required from other, similarly-situated applicants), and in accordance with all currently-applicable and governing standards, my client is entitled to the immediate issuance of a positive Coastal Zone consistency determination.

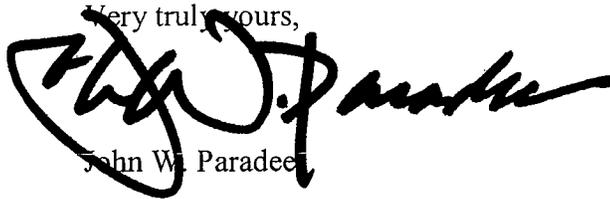
In my experience, you have always been a fair, reasonable, and prudent person who does not tolerate bureaucratic red tape or inexcusable delay. In this instance, I am reaching out to you because I believe your intervention is not only warranted, but indeed necessary, in order to compel the Office of Delaware Coastal Programs to stop stalling and perform its job in a fair and timely fashion. I would prefer not to file legal action to force the Department to carry out its statutory duties -- but if I must, then of course I will.

In closing, I respectfully request that you review this matter as soon as possible and direct the Office of Delaware Coastal Programs to issue a consistency determination for my client's application within the next thirty (30) days. Otherwise, if no action is taken by November 5, 2007, then I will be forced to file legal action to compel the Department to perform its legal obligations.

Thank you for your time, attention, and courtesy in this matter. I look forward to hearing from you shortly.

With apologies for having to trouble you with such matters, I remain...

Very truly yours,

A handwritten signature in black ink, appearing to read "John W. Paradee". The signature is stylized and cursive, with a large initial "J" and "P".

John W. Paradee

JWP/lwr

cc: Walt Swain  
Pete Russo  
David Hardin, P.E. ✓  
Sarah W. Cooksey (DNREC, Office of Delaware Coastal Programs)

# EXHIBIT R



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

DELAWARE COASTAL  
MANAGEMENT PROGRAM

TELEPHONE: (302) 739-9283  
FAX: (302) 739-2048

January 3, 2008

Jan 7 2008

David Hardin  
Restoration Ecological Services, Inc.  
311 N. Aurora Street  
Easton, MD 21601

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED  
7007 1490 0003 3233 8169

**RE: Objection to Federal Consistency Determination - Objection  
Swain's Wharf Marina (FC 05.083)**

Dear Mr. Hardin:

The Delaware Coastal Management Program (DCMP) has received and reviewed your consistency determination for the above referenced project. Based upon our review and pursuant to National Oceanic & Atmospheric Administration regulations (15 CFR 930), the DCMP objects to your consistency determination for the proposed Swain's Wharf Marina, a 50-slip marina in the Mispillion Harbor at the confluence of Cedar Creek and the Mispillion River, on County Road 203, Milford, Sussex County, Delaware.

The DCMP has found this project to be inconsistent with the following approved coastal management policies:

- 5.A.3. CMP Policies Specific to Marinas: State of Delaware Marina Regulations, Section 1 (B)(5)(a), Section II(D)(8)
- 5.A.3. CMP Policies for Coastal Waters Management: 7 Delaware Code 6001(a)(4) and State of Delaware Surface Water Quality Standards, Section 1.1
- 5.A.4. CMP Policies for Subaqueous Lands and Coastal Strip Management: State of Delaware Regulations Governing the Use of Subaqueous Lands, Section 1.04(B)(1)(2) and 3.01(A)(1)(3)
- 5.C.3. CMP Policies for Nongame and Endangered Species: 7 Delaware Code 201(1)(2)

**Project Description and Background**

Walter Swain proposes to construct a 50-slip marina at the confluence of Cedar Creek and Mispillion River, on County Road 203 in Milford, Sussex County, Delaware. This location was formerly the site of a 26 slip marina owned by Ms. Dot Bennett. Storms destroyed much

of the marina and attendant features in 1992. The proposed project would remove remaining pilings and boat ramp remnants, construct 38 slips for smaller boats, 12 slips for larger boats, and reconstruct the boat ramp in front of the property. This project would also include infrastructure improvements including parking areas, an office and a wastewater handling system.

The Department of Natural Resources and Environmental Control's Wetlands and Subaqueous Lands (WSLS) Section received a subaqueous land lease application regarding the proposed project in April, 2005. A request for Coastal Zone Federal Consistency concurrence for this project was received by the DCMP on April 26, 2005. The project was reviewed by DCMP staff and deemed incomplete. Information required to complete the application was requested from the applicant on May 25, 2005. The additional information was received by the DCMP on January 12, 2006. The project was placed on public notice by the DCMP for a period of 30 days on February 5, 2006.

Additional information about the project was requested from the applicant in letters dated March 23, 2006 and June 30, 2006. The project time clock was stopped with written agreement from the applicant on July 13, 2006 to allow additional time for the applicant to provide and for the DCMP to review new information and to allow for internal coordination within DNREC and the U.S. Fish and Wildlife Service's Migratory Shorebird Technical Committee (SBTC) regarding resource issues. Responses including the additional information requested from the applicant were received on July 14, 2006 and November 16, 2006, respectively. Comments requested from the SBTC were received on September 25, 2007.

### **Policy Inconsistencies**

#### **5.A.3. CMP Policies Specific to Marinas: State of Delaware Marina Regulations, Section 1 (B)(5)(a), Section II(D)(8)**

The State of Delaware Marina Regulations, implemented through the WSLS state that "No person shall construct, install, modify, rehabilitate, or replace a marina unless such person has a valid permit issued by the DNREC pursuant to the State of Delaware Marina Regulations." It is our understanding that a Subaqueous Lands Lease will not be issued for the proposed project.

Section II(D)(8) of the State of Delaware Marina Regulations indicate that marinas shall not be permitted at sites that are recognized by the DNREC as "Critical Habitat." The project site is within an area which migratory and breeding shorebirds depend upon and is therefore recognized by the DNREC as critical habitat area. According to the DNREC Natural Heritage Program, the Red Knot (*Calidris canutus*) is currently listed on the State of Delaware's Rare Species of Conservation Concern List as a species that is "very rare within the State... (and) is susceptible to becoming extirpated." The subspecies of concern with respect to this project, *Calidris canutus rufa*, which is globally ranked as "critically impaired", was also named as a candidate for Endangered Species Act protection by the USFWS, a process that began in

2004. The following State listed rare species also occur within Mispillion Harbor: Ruddy Turnstone (*Arenaria interpres*), Sanderling (*Calidris alba*), Dunlin (*Calidris alpina*), Semipalmated Sandpiper (*Calidris pusilla*). The following State-listed rare species are known to breed or have historical bred in the Mispillion Harbor: Black Skimmer (*Rynchops niger*), Osprey (*Pandion haliaetus*) and American Oystercatcher (*Haematopus palliatus*).

The applicant, Walter Swain, does not have the required State approvals for construction and operation of the proposed 50-slip marina, and the proposed project location is within a recognized critical habitat, therefore this project is inconsistent with DCMP approved policies.

### **5.A.3. CMP Policies for Coastal Waters Management: 7 Delaware Code 6001(a)(4) and State of Delaware Surface Water Quality Standards, Section 1.1**

7 Delaware Code 6001(a)(4) states that "the coastal water resources of the State shall be protected and conserved to assure continued availability for public recreational purposes and for the conservation of aquatic life and wildlife." State of Delaware Surface Water Quality Standards, section 1.1 states "It is the intent of the Department (DNREC) to maintain within its jurisdiction surface waters of the State of satisfactory quality consistent with public health and public recreation purposes, the propagation and protection of fish and aquatic life, and other beneficial uses of the water." The majority of the lands surrounding the proposed project site are owned by the State of Delaware and private conservation organizations. These lands are protected from development and/or are used for wildlife management, conservation and education, particularly education regarding spawning horseshoe crabs and migratory shorebirds, both of which heavily utilize these waters.

Pollutants from marinas including decreased levels of dissolved oxygen and elevated levels of metals and petroleum hydrocarbons, which may enter the water through discharges from boats, spills or other sources, can result in toxicity in the water column, both lethal and sublethal (EPA 1993). Conventional boat engines release up to 30 percent of their fuel directly into the water and air as pollution (Schmidt et al. 2004). In addition to pollution resulting from engine use and minor to major leaks and spills, the construction of this facility would result in the placement of over 350 chromated copper arsenate (CCA) treated pilings supporting the dock and pier structures. Significant concentrations of chromium, copper and arsenic leachate have been seen in aquatic organisms, particularly those in the vicinity of the treated lumber structures (Sanger and Holland 2002; Weis et al. 1993). Heavy metal contamination of the aquatic environment can have detrimental effects on the food chain, including the complete absence of organisms in severe cases (Wang 2002). The negative effects of the contamination from the use of CCA treated pilings plus the increased and concentrated number of boats and the pollution associated with their operation in this harbor could be detrimental to the survivability of horseshoe crab eggs deposited in the harbor. This, in turn, would have a direct negative affect on the horseshoe crab population and the migratory shorebirds, as horseshoe crab eggs are their primary food source. Therefore, the construction of the proposed marina would negatively affect the wildlife utilizing the water resources in this area, thereby making this project inconsistent with DCMP enforceable policies.

**5.A.4 CMP Policies for Subaqueous Lands and Coastal Strip Management: State of Delaware Regulations Governing the Use of Subaqueous Lands, Section 1.04(B)(1)(2) and 3.01(A)(1)(3) and (C)(1)**

State of Delaware Regulations Governing the Use of Subaqueous Lands, Section 1.04(B)(1)(2) states that "The following types of activities on public subaqueous lands require a lease, permit, or letter of authorization from the DNREC: a) Construction or use of any structure on, in, under, or over public subaqueous lands, including but not limited to, any convenience structures, shoreline erosion control structure or measure, or boat docking facility, and b) dredging, filling excavating or extracting of materials." As stated above, the applicants do not have the required State permits and/or lease for construction and operation of the proposed 50-slip marina.

State of Delaware Regulations Governing the Use of Subaqueous Lands, Section 3.01(A)(1)(3) states that "The DNREC shall consider the public interest in any proposed activity which might affect the use of subaqueous lands. These considerations include, but are not limited to, the following: 1) the value to the State or the public in retaining any interest in subaqueous lands which the applicant seeks to acquire, including the potential economic value of the interest,... and 3) the potential effect on the public with respect to commerce, navigation, recreation, aesthetic enjoyment, natural resources, and other uses of the subaqueous lands." Also, Section 3.01(C)(1) states that "The DNREC shall consider the following to determine whether to approve an application: 1) the degree to which the project represents an encroachment on or otherwise interferes with public lands, waterways, or surrounding private interests."

The proposed construction and operation of a marina would require the use of public subaqueous lands which are held in trust by the State for the benefit of all of its citizens. Many Delawareans and visitors to the State arrive each May to observe and enjoy the spring migration of shorebirds in Delaware. There is also a growing recognition of the important role habitats along the Delaware Bay play for the fall migration that occurs from early July through September.

For decades, the State and conservation organizations including The Nature Conservancy, Delaware Wildlands, The Conservation Fund and others have invested large sums of public and private money into protecting the Mispillion Harbor and surrounding areas for ecological conservation and wildlife management purposes. The conservation of this natural resource is in the best public interest. The prosperity of this area's natural environment, including the wildlife it supports, is a reflection of Delaware's quality of life and the annual migration of shorebirds is an event that brings tourists to the region which in turn helps our State's economy. Studies estimate the economic value of the spring migration to the region, based on the contribution of recreational birders, is between \$6.8 – 15.9 million annually (USFWS 2003). This economic activity is a sustainable use of the resource, but depends upon the protection of key habitat used by the migratory shorebirds. In recent years, the State of Delaware has worked in cooperation with the Conservation Fund and the DuPont Company to

acquire and permanently protect the area surrounding the proposed marina and to restore the Mispillion Visitor Center for the benefit of the general public. These preserved areas are now a cornerstone for environmental conservation, education on the importance of spawning horseshoe crabs and migratory shorebirds and ecotourism in the Delmarva Region. The use of public subaqueous lands and the disturbance to the wildlife in the surrounding area due to the construction and day-to-day operation of the proposed marina are inconsistent with the public interest in the areas and therefore, inconsistent with DCMP approved policies.

**5.C.3. CMP Policies for Living Resources: 7 Delaware Code 201 (1) and (2), DNREC Wetlands Regulations Section 7.02 (A) and (B)**

7 Delaware Code 201 (1) and (2) states that "it is in the best interest of the State to preserve and enhance the diversity and abundance of nongame fish and wildlife, and to protect the habitat and natural areas harboring rare and vanishing species of fish, wildlife, plants and areas of unusual scientific significance or having unusual importance to the survival of Delaware's native fish, wildlife and plants in the natural environment" and that "rare and endangered species are a public trust in need of active, protective management, and that it is in the broad public interest to preserve and enhance such species."

As stated above, numerous State species of concern are found or breed within the Mispillion Harbor. In addition, this area is known to have the highest concentration of foraging shorebirds and spawning horseshoe crabs in the Delaware Bay. Many species of shorebirds rely solely upon the eggs of the horseshoe crab as their food source during their brief migratory stopover in the Delaware Bay. The resources of the Delaware Bay are crucially important to these birds as they migrate to their breeding grounds in the Arctic each year. From 2001 to 2006, the Mispillion Harbor has held the highest concentration of eggs from spawning horseshoe crabs on the western side of Delaware Bay, primarily due to area being protected from on-shore wave action (R. Weber, pers. comm.). Onshore wave action can negatively affect horseshoe crab egg concentrations by decreasing or inhibiting spawning (Shuster, 1982) and by washing away the eggs that have been previously deposited (Nordstrom, et al. 2006; Smith et. al., 2002). Because of the abundance of eggs and other unique shoreline characteristics, this small area provides habitat to large numbers of shorebirds, including over one half of the hemispheric population of Red Knot (*Calidris canutus*), during the migratory stopover (Baker, et al, 1998).

In addition, Mispillion Harbor supports fall migratory shorebirds, though not to the extent observed in spring. This area can be particularly important in the fall for Ruddy Turnstone, Sanderling, Semipalmated Sandpipers, Western Sandpipers, Semipalmated Plovers, and Black-bellied Plovers and may also be an important nursery for juvenile terns (K. Kalasz, pers. comm.). This return migration usually begins in mid-July and continues through late summer and fall.

The construction and operation of the proposed 50-slip marina at this location would result in direct loss of roosting habitat for many of these important species and would introduce significant human disturbance to this area. Human disturbance has been demonstrated to

force shorebirds to: 1) shift to feeding areas with fewer numbers of humans (Burger and Gochfeld 1991), 2) entirely abandon an area (Smit and Visser 1993, Pfister et al. 1992), or 3) increase vigilance, movement, or escape flights (flushing). Disturbance can therefore reduce feeding time and increase energy requirements at a time when migrant birds need fuel for migration (Lafferty 2001, Davidson and Rothwell 1993, Hockin et al. 1992). The Delaware Bay Shorebird-Horseshoe Crab Assessment Report Biological Assessment drafted by the Shorebird Technical Committee (USFWS 2003), a committee formed at the request of the Atlantic States Marine Fisheries Commission by the U.S. Fish and Wildlife Service, addresses human disturbance to shorebirds, concluding that "repeated disturbances along [Delaware Bay] beaches likely reduces shorebird feeding efficiency thereby increasing energy expenditure and reducing energy intake." The recommendations stemming from this report were used by the DNREC to support horseshoe crab harvest restrictions in part to increase eggs available to shorebirds. Additionally, in a memo dated September 25, 2007 regarding the impacts of the construction of the proposed project, stated that the opinion of the Shorebird Technical Committee was that "best option for conservation of the shorebirds would be permit denial"(Kalasz, 2007).

Numerous published studies have noted negative human disturbance effects on shorebirds caused by: 1) walking and jogging (Burger 1981), 2) windsurfing and hunting (Madsen 1998), 3) dog-walking, bird-watching, and shellfishing (Goss-Custard and Verboven 1993), 4) automobiles, boats and all-terrain vehicles (Rodgers and Smith 1997), 5) personal watercraft and outboard-powered boats (Rodgers and Schwikert 2002), and 6) aircraft (Koolhaas et al. 1993).

The chronic disturbance of foraging and roosting shorebirds can disrupt their behavior and cause them to use the energy they are trying to store for migration in an escape flight, thus affecting their energy balance and potentially their survival (West et al. 2002, Gill et al. 2001, Lafferty 2001, Harrington and Drilling 1996, Davidson and Rothwell 1993, Helmers 1992, Hockin et al. 1992).

Due to its location within the premier shorebird foraging area in the Delaware Bay and lack of alternative high quality foraging areas, the primary and secondary impacts of the construction and operation of a marina facility at this location in the Mispillion Harbor have a high likelihood of significant deleterious impacts to hemispheric populations of migratory shorebirds.

Based on the impacts to protected wildlife and habitats and public interest, there is no viable commercial alternative for this project.

### **Appeal Process**

Pursuant to 15 CFR part 930, subpart H, and within 30 days from receipt of this letter, you may request that the Secretary of Commerce override this objection. In order to grant an override request, the Secretary must find that the activity is consistent with the objectives or purposes of the Coastal Management Act, or is necessary in the interest of national security. A

copy of the request and supporting information must be sent to the Delaware Coastal Management Program and the federal permitting or licensing agency. The Secretary may collect fees from you for administering and processing your request.

If you have any questions regarding this determination please do not hesitate to contact me at (302) 739-9283.

Sincerely,



Sarah W. Cooksey, Administrator  
Delaware Coastal Management Program

SWC/bwa

References attached

cc: File 05.083

John Hughes – DNREC/Secretary  
Laura Herr – DNREC/DWR  
James Chaconas – DNREC/DWR  
Kevin Maloney – DOJ/DAG  
David Ormond – DOJ/DAG  
Frank Cianfrani – USACE/Philadelphia  
Kevin Faust – USACE/Dover  
David Kennedy – OCRM/Director  
David Kaiser – NOAA/NOS  
G. Walter Swain – Applicant  
✓ John W. Paradee – Prickett, Jones & Elliott

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