



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

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Secretary's Order No. 2009-W-0048

**Re: APPLICATIONS OF PRIME HOOK BEACH ORGANIZATION, INC.
FOR A SUBAQUEOUS LANDS ACT PERMIT AND A COAST
CONSTRUCTION PERMIT FOR BEACH SCRAPING AT PRIME HOOK
BEACH, SUSSEX COUNTY**

Date of Issuance: January 13, 2010

Effective Date: January 13, 2010

Under the authority granted the Secretary of the Department of Natural Resources and Environmental Control (Department), the following findings, reasons and conclusions are entered as a final Order on two permit applications, which Prime Hook Beach Property Owners Association (Applicant) submitted on behalf of its 104 members who own property along the Delaware Bay in the private community of Prime Hook Beach, Sussex County.

Background

This Order considers the record developed after a public hearing and the Hearing Officer's Report (Report) by Robert P. Haynes dated December 21, 2009 and attached hereto. The Report reviews the procedural background and recommends a record to support a recommended final decision to not grant a Subaqueous Lands Act (SLA) permit, and to grant a Beach Preservation Act (BPA) coastal construction permit. This recommendation was based in part upon the expert advice provided by the Department's Division of Water Resources, Wetlands and Subaqueous Lands Section (WSLS), and the

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Department's Division of Soil and Water Conservation's Shoreline and Waterways Management Section (SWMS). I adopt the Report and its recommendations, including the record developed.

Findings and Reasons

The SLA application seeks to remove by bulldozer approximately 20,500 cubic yards of sand in a 50' wide area of subaqueous lands along 7,400 feet of Prime Hook Beach. Applicant would move the sand landward up to 125 feet to the dry beach area in order to expand the beach area and restore sand dunes. The BPA coastal construction permit is needed for the scraping in the entire area.

The Report, based upon WSLS' expert advice on the environmental problems with the proposed beach scraping, and problems with Applicant's proof of ownership of the land, recommends denial. The Department finds that the Applicant has failed to adequately support the application for the SLA permit and that the Applicant may reasonably obtain sand from sources other than the subaqueous lands.

The Applicant's failure to adequately support the application is based on the Department's review of the deeds that Applicant provided to establish its members' ownership of the subaqueous lands. The Department's SLA regulations require the property deeds of all the property to be scraped, but Applicant was not able to prove in the deeds supplied that most of its members owned the subaqueous lands, which under Delaware law is subject to separate ownership from the non-subaqueous lands. The Report found that only a few of the deeds showed ownership to the Delaware Bay. Instead, most of the properties were based upon metes and bounds description to fixed points. Some of the deeds also only described a boundary to the high water mark, which

would not include any subaqueous lands. The Report indicates that the Applicant should present proof of ownership, and that the Department should not be required to research deeds to find the true ownership interest in the deeds that do not mention the Delaware Bay at all.

The Report further questions the signed approval by property owners as too vague and conditional approval of an abstract scraping with no informed knowledge of the Project shown in the approval. Consequently, procedurally the application should be revised and re-submitted once Applicant has obtained such proof to allow the public the opportunity to comment on an application that reflects all owners of the subaqueous lands that Applicant proposed to scrape. Thus, the Department finds that as a matter of fact and following Delaware law and the Department's SLA regulations that the Applicant failed to adequately support the SLA application.

The Reports also discussed the four environmental reasons supporting denial of the SLA application, as supported by WSLs' and SWMS's technical advice. These reasons are: 1) the Project will unduly harm the aquatic environment; 2) the Project would adversely impact other beach areas not scraped, 3) the Project likely could harm Prime Hook Beach by increasing beach erosion during storms; and 4) the Project's harm to the environment can be avoided because a reasonable alternative exists in acquiring sand from other sources. As a general comment, WSLs indicates that no SLA permit has ever been issued to beach scrape in the past to the Applicant. Moreover, WSLs has never issued a SLA permit for beach scraping to anyone for any other location in Delaware.¹

¹ The hearing record indicates that beach scraping, possibly in subaqueous lands, was conducted three times in the past, which if conducted without a SLA permit would violate the SLA and Department regulations.

WSLS's and SWMS' expert technical analysis indicates that scraping in the subaqueous lands causes undue environmental problems, which cannot be adequately mitigated by any permit conditions. At Prime Hook Beach, the Department experts found that the beach scraping could harm a known colony of marine worms in an area of 134 square meters. This benthic organism constructs cement like living reefs, which help to stabilize the beach and provide an aquatic habitat and a source of food for fish and shorebirds. The proposed beach scraping would cause massive disruption to all living things in the 20,500 cubic yards of sand removed from the subaqueous lands. The Department is empowered to protect the environment from such harm, which the Department determines is not justified to achieve the purpose of restoring the beach and sand dunes when there is another alternative available.

The second environmental reason for the denial is that the Department experts indicated that removing sand from subaqueous lands would disrupt the natural movement of sand along the Delaware coast, which at Prime Hook Beach moves sand southward along the coast towards Broadkill Beach. The removal of 20,500 cubic yards of sand from the subaqueous lands will mean that Broadkill Beach will likely not receive as much sand as it otherwise would. What one public comment described as a "big hole" created in subaqueous lands will be eventually filled naturally. The Department's experts have cited numerous studies that show that beach scraping subaqueous lands deprives other parts of the Delaware Bay of a portion of the sand that is removed. The Department is responsible for preserving all Delaware beaches.

The third environmental reason supporting the denial is that the Department does not support the proposed beach scraping because it may be contrary to its intended

purpose, namely, to preserving the beach at Prime Hook Beach. The record supports the reasonable conclusion that removal of the 20,500 cubic yards of sand from the subaqueous lands could adversely impact the offshore sand bars, which are an important natural barrier to protect Prime Hook Beach from erosion during storms. The sand bars, the beach area and the sand dunes all are needed to protect Prime Hook Beach from erosion from storms. The removal of sand from the subaqueous lands would alter the natural protection if it causes the sand bars to washes ashore to fill in the hole created by the removal of sand in the subaqueous lands. The Department's experts noted the adverse consequences to Ocean City, Maryland's beach when beach scraping in the subaqueous lands was done there. Similarly, SWMS' experts do not recommend beach scraping in the subaqueous lands, and cited the studies that show that the sand moves north to south, so that removing sand from the subaqueous lands would reduce the amount of sand transported south to replenish Broadkill Beach. SWMS is currently reviewing a study of Delaware Bay's beaches, and none of its recommendations include any scraping of subaqueous lands. In sum, beach scraping of subaqueous lands is not an acceptable method to restore the beach absent better proof than shown in these applications.

The fourth environmental reason supporting the denial is that Department's experts determined that an alternative to scraping the subaqueous lands existed, which the Applicant acknowledged, but rejected as more expensive. The Department supports the Applicant's decision to add sand to and restoring the sand dunes. Moreover, the sand should be added as quickly as possible, but the real issue is the source of the sand supply. The SLA regulations require the Department to consider alternatives. The Department's experts investigated options and determined that an alternative reasonably was available

to the Applicant to obtain sand from other sources than from the subaqueous lands, albeit probably at more cost than taking the "free" sand from the subaqueous lands even if they owned the land. The experts determined that 20,500 cubic yards of sand could be purchased locally at a cost of approximately \$15 per cubic yard for a total cost of \$307,500 for 20,500 cubic yards. This cost could be recovered from Applicant's members, and represents to the Department a reasonable alternative in the record and the alternative worth pursuing even if the cost is higher because it will provide long-term protection to the beach by adding sand, as opposed to merely shifting sand from one location to another on the same beach. The Department finds that adding sand is a reasonable alternative as a long-term investment to protect the value of its members' waterfront properties, which the Department recognizes have considerable value. The other source of sand is from offshore sources, and Prime Hook Beach can apply to be included in any public beach replenishment from offshore sand sources similar to Sea Colony's participation. *See Secretary's Order No. 2007-W-0006 (February 22, 2007).*

SWMS provides certain permit conditions for a permit to scrape sand in an area outside of the subaqueous lands. The Report recommends adopting these conditions and issuance of a permit conditioned upon using sand from other sources in which the SWMS' procedure is to require the identification of sources. The SWMS' proposed permit conditions provide the necessary and appropriate level of environmental protection and monitoring. The record indicates that Applicant may have unlawfully scraped sand from the subaqueous lands on several occasions in the past. Consequently, the Department will ensure that the source of the sand used is consistent with this Order and monitor the Applicant when it is conducting its activity under the BPA permit.

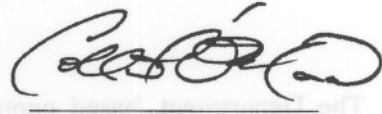
Applicant to its credit sought WSLS approval this time, but the Department may decide to investigate the past beach scrapings for the possible violations.

Conclusions

The Department, based upon the record and the findings and reasons set forth above and in the Report, concludes as follows:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding based on the record that supports not granting Applicant a SLA permit and granting Applicant a BPA permit subject to reasonable conditions;
2. The Department provided adequate public notice of the applications and the public hearing as required by the law and the Department regulations;
3. The Department held a public hearing in a manner required by the law and its regulations and has considered all timely and relevant public comments in making its determination;
4. The Department denies the requested SLA permit based upon the record that Applicant failed to provide adequate proof of ownership of the properties in the subaqueous lands and because of the undue environmental harm caused by scraping sand from the subaqueous lands, which harm cannot be remedied by any reasonable permit conditions and can be avoided by reasonable alternative of procuring sand from sources other than the subaqueous lands;
5. The Department shall grant the BPA permit for the construction required to move sand in the non-tidal area, subject to the reasonable permit conditions that SWMS has proposed, and be subject to SWMS' procedures for approving the sand used; and that

6. The Department shall publish this Order on its public web site and provide such other service and notice as required by law and Department regulation or otherwise determines necessary and appropriate.



Collin P. O'Mara
Secretary

HEARING OFFICER'S REPORT

TO: The Honorable Collin P. O'Mara
Secretary, Department of Natural Resources and Environmental Control

FROM: Robert P. Haynes, Esquire
Senior Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: APPLICATIONS OF PRIME HOOK BEACH ORGANIZATION, INC. FOR A
SUBAQUEOUS LANDS ACT PERMIT AND A COAST CONSTRUCTION PERMIT
FOR BEACH SCRAPING AT PRIME HOOK BEACH, SUSSEX COUNTY

DATE: December 21, 2009

I. PROCEDURAL HISTORY

This Report makes recommendations to the Secretary of the Department of Natural Resources and Environmental Control (Department) on Prime Hook Beach Organization, Inc's¹ (Applicant) September 4, 2008 Subaqueous Lands Act² (SLA) permit application submitted to the Department's Division of Water Resources (DWR), Wetlands and Subaqueous Lands Section (WSLS), and a September 22, 2008 Beach Preservation Act³ coast construction permit submitted to the Department's Division of Soil and Water Conservation (DSWC), Shoreline and Waterway Management Section (SWMS). The applications seek permission to mechanically scrape by bulldozer 20,500 cubic yards of sand from a 7,400' x 50' area in the subaqueous lands and grading the sand approximately 60' landward of the high water line to restore the dry beach and widen its beach's dunes (Project). The Department handled the applications under its joint permit process procedure.

¹ Applicant is a property owner association representing approximately 104 owners at Prime Hook Beach (some times named Shorts Beach) along the Delaware Bay.

² 7 Del. C. Chap. 72.

³ 7 Del. C. Chap. 68. The Applicant currently has a permit to scrape in the non-tidal beach areas that remains in effect until April 2010.

On September 17, 2008, the Department published public notice of the SLA application. On September 28, 2008, the Department published notice of the BPA application. The Department received requests for a public hearing from property owners in Broadkill Beach, Sussex County, which is the community immediately to the south of Prime Hook Beach. The comments indicated that the SLA application was deficient because no deeds were attached to the application.

On October 15, 2008 and October 28, 2008, WSLs and SWMS respectively sent Applicant letters indicating the need to provide deeds for the properties to be scraped. In a November 19, 2008 letter, Applicant provided the deeds purporting to establish ownership of all the land to be scraped.

On May 6, 2009, the Department published notice of a combined public hearing, which I presided over on June 3, 2009 in Dover. In a June 5, 2009 letter, Applicant provided me the two Delaware court cases claiming to support Applicant's position that the deeds conveyed an interest to the Delaware Bay, and that under Delaware law such an interest would include the subaqueous lands.

Following the public hearing, I requested the technical assistance from WSLs and SWMS. On August 18, 2009, SWMS provided its Technical Response Memorandum (TRM), which is attached hereto as Appendix A. On November 4, 2009, WSLs provided its TRM, which also is attached hereto as Appendix A. WSLs also provided a cost estimate to purchase sand. The Department also received from its consultant the December 2009 Report on the Delaware Bay beaches, which I reviewed. I determined that the record was complete to support a recommended decision to deny the SLA application and grant Applicant partial relief with a BPA permit.

II. SUMMARY OF THE RECOMMENDED RECORD

I recommend that the Department's record contain the following: 1) the 70 page verbatim transcript of the June 3, 2009 public hearing; 2) the exhibits introduced at the hearing, as identified in the transcript; 3) all timely submitted documents from the public or Applicant received during the extended public comment period; 4) the December 2009 Final Report⁴ entitled "Management Plan for the Delaware Bay Beaches," prepared by the Department's consultants; 5) the deeds provided by the Applicant's November 19, 2008 letter; 6) all the documents referred to in the procedural history recited above, and 6) this Report and the attached TRMs prepared by experts in WSLs and SWMS.

At the public hearing, the Department's representatives, Laura Herr, Program Manager of WSLs, and Jim Chaconas, an Environmental Scientist in WSLs, spoke about the SLA permit application process. Mr. Chaconas identified the following relevant documents from WSLs' files: Applicant's SLA permit application (DWR Ex. 1); the public notice of the application (DWR Ex. 2); the notice of the public hearing (DWR Ex. 3); miscellaneous correspondence sent and received between September 15, 2008 and January 5, 2009, including requests for evidence of ownership of land and subdivision plans (DWR Ex. 4); the Prime Hook Beach subdivision plans (DWR Ex 5); the Department's regulations issued under the SLA (DWR Ex. 6); the approximately 54 written public comments that supported the SLA application (DWR 7A); the 4 written public comments opposing the SLA application (DWR Ex. 7B); the assignment of the hearing officer (DWR Ex. 8); the retention of a court reporter (DWR Ex. 9); miscellaneous

⁴ This Study, prepared by consultants, was not formally released to the public when this Report was prepared, but drafts had circulated. This Report should be released in the near future, but it nevertheless includes useful information and was relied upon in preparing this Report.

meeting notes, emails and the other relevant public comments and correspondence prior to the public hearing (DWR Ex. 10); and written comments from the Department's Fish and Wildlife Division's Natural Heritage Program, which expressed concern for the horseshoe crab spawning and requested restrictions to not allow scraping from April 15-July 31 and the beach profile. This comment also discussed the shorebirds and beach nesting birds and the location as adjacent to the Prime Hook National Wildlife Refuge, which the comments indicate has beach nesting birds, such as the federally protected piping plover. (DWR Ex. 11).

Jennifer Wheatley, an Environmental Scientist in SWMS, discussed the beach scraping application and indentified the following documents from SWMS' files: the BPA (DSWC Ex. 1); the Department's BPA regulations (DSWC Ex. 2); Applicant's permit application (DSWC Ex. 3); the forms signed by property owners approving the scraping on their property (DSWC Ex. 4); the Department's receipt of the application fee (DSWC Ex. 5); the Department's public notice of the application (DSWC Ex. 6); the public comments received (DSWC Ex. 7); the miscellaneous correspondence with the Applicant (DSWC Ex. 8); the summary of the deeds Applicant provided (DSWC Ex. 9); the Department's public notice of the hearing (DSWC Ex. 10); the public comments received after the public hearing notice (DSWC Ex. 11); the plats of Prime Hook Beach's subdivisions (DSWC Ex. 12); and the aerial photos of Prime Hook Beach (DSWC Ex. 13).

John Chirtea spoke on behalf of the Applicant. He developed from audience participation that about 25-30 people of the 30-35 people who attended the hearing supported the applications. He recounted how Prime Hook Beach has experienced two major storms in recent years with Ernesto in 2006 and the Mother's Day storm in 2008, which he stated did a substantial amount of damage to Prime Hook Beach. He indicated that the Applicant has scraped the beach in the past,

and that he was informed by Department officials that a SLA permit was required before such scraping could occur again. He indicated that the applications were filed with the Department and the United States Army's Corps of Engineers using an environmental consultant well-known in Delaware. He indicated that the applications included 11 profiles of the beach, and also included soil samples. He estimated that the storms took away 10 to 15 feet of the beach, and that the applications would rebuild the sand dunes to protect the houses, would restore the beach area for recreational use, and would protect the Prime Hook National Wildlife Area from salt water intrusion from Prime Hook Beach. He indicated that beach scraping was last done in 1998, which he said has provided protection for ten years.

Sam Burke presented comments opposing the Project on behalf of 5 individual property owners and Back Bay Cove's subdivision property owners association, which consists of 42 property owners and the community at the north end of Broadkill Beach. He noted that his letter to Secretary Hughes indicated defects in the application based upon no deeds attached to the application. He also claimed that the deeds that Applicant subsequently provided did not establish ownership of the subaqueous lands that would be scraped. He discussed the issue of land ownership at length, and whether the deeds included ownership of land to the low water line. He prepared an exhibit, which was introduced as Burke Ex. 1, to describe the ownership issue. He indicated that scraping a hole 7,342 feet long by 125 feet wide and 2 feet deep to move 20,500 cubic yards, or almost 25 acres of land, would create a big hole that will fill up with sand. He discussed that the sand to fill the hole would come from the natural movement of sand, which he said at Prime Hook Beach, moved south. This would mean, he claimed, that the scraped hole would be filled by sand that otherwise would be naturally transported south to Broadkill Beach, thereby starving Broadkill Beach of its natural source of replenishment. He

highlighted several studies that were critical of the effectiveness of beach scraping, which he claimed concluded that beach scraping was not a long-term solution to beach erosion. He indicated that 10% of the sand may blow away when scraping is done. He indicated his support for beach replenishment at Prime Hook Beach by other means such as bringing in sand from offshore sources. He commented that the beach scraping is equivalent to stealing sand from a beach they do not own and taking it away from Broadkill Beach. He also mentioned his discussion with the consultant the Department retained to study the Delaware Bay beaches.

Carolyn McKowan spoke in opposition to the Project and how the application does not mention the impact on Broadkill Beach. She commented that the answer is not to take sand away from the beach, but to bring sand to the beach from another source. She said the beach constantly changes and that removing sand will be a band aid on a jugular cut. She cited page S5 of the application that indicates in item 11(b) that the area scraped will “be naturally replenished from the existing near shore sand bars by the waves and littoral currents.” She indicated that the littoral currents benefit Broadkill Beach, and that removing sand from the Prime Hook Beach area would hurt the natural replenishment of Broadkill Beach.

Ron Shoope spoke of his concern as a Broadkill Beach property owner for 40 years. He recalled asking DNREC for assistance in beach replenishment of its private beach and DNREC’s advice was to become a public beach and be included in the public beach replenishment from offshore sources. Broadkill Beach he said became a public beach so it could participate in public funded beach replenishment from off shore sources. He mentioned the DNREC Winter 2007 publication “Coastal Connection.” and quoted the Department’s article that “[b]y scraping the sand from the beach to build dunes, you are actually depleting the sand that needs to stay in the area for protective reasons.” He also cited a New Jersey study, which found that beach scraping

is a zero sum game because any sand scraped from the beach will be replaced by sand from the offshore sand bars. Sand bars, he stated the study indicated, are the most important first line of defense to prevent beach erosion. He also cited a study that concluded that beach scraping is ineffective at providing beach protection and that scraping sand at one place will result in the loss of sand at another place.

Charles Darling spoke in favor of the applications based upon his ownership of property at the boundary of Prime Hook Beach and Broadkill Beach. He also suggested that the beach be replenished by trucking in loads of sand and that the sand proposed to be scraped could be replaced by 1,110 truckloads of sand. He indicated that beach scraping had occurred in 1985, 1992 and 1998. He cited a Florida study that stated that beach scraping is a short-term solution to assist in dune recovery and protection from seasonal high tides and minor storms. He commented on his observed movement of a sand bar north. He urged the need to study the littoral drift of sand along the Delaware Bay.

Anne Darling spoke in support of the applications and indicated that their property has benefited by the natural movement of sand and their beach area the past 12 years has increased in size by approximately 25 feet. Consequently, she was not as concerned about the potential loss of sand.

Carmine Campanelli asked about the land ownership issues. Ms. Herr responded that the deeds are important to determine whether land ownership extends to the Delaware Bay, as opposed to specific fixed metes and bounds description of real property, and that deeds that are tied to the Delaware Bay can either gain or lose land area due to beach erosion or accretion.

Ron Goodwin also spoke as a property owner about the land ownership issue and that Delaware is a low tide state meaning that ownership is based upon the Delaware River or Delaware Bay as a natural monument means ownership to the low tide line.

The written comments generally supported the Project as needed to protect the Prime Hook Beach community. Ron and Chris Shoop's comment set forth the history of Applicant's BPA permits, beginning with an April 14, 1994 BPA permit (BP1935), but he claimed Applicant began scraping on February 12, 1994. He also indicated that Applicant has a current BPA permit issued April 11, 2002 and that a special condition prohibits scraping on lots 1, 2, 3, 11, 103, 104 and 105. He indicated that the Department extended this permit to April 11, 2010. He also noted that the WSLS application requires written permission from private subaqueous lands owners and that the application did not have signed signatures from all owners of subaqueous lands. He discussed the connection between the sand bar, beach, and sand dune as one system that would be adversely impacted if sand is removed from the subaqueous lands as it could hurt the sand bars, which he cited studies that indicated that sand bars are the most important first line of defense against storm waves. Finally, he questioned the Applicant monitoring the scraping as equivalent to 'the fox guarding the hen house.'

The Department's meeting notes in DWR Ex. 10 show the Applicant commenced contact with the Department shortly after the Mother's Day storm on May 12, 2008, and participated in the Department's joint permit processing meeting process. These notes include a June 19, 2008 memo from Applicant that indicated that beach scraping was done from the low water line in 1998. The memo also discusses that the existing permit to scrape is limited to the high water line and that this does not provide enough sand for protection. The memo indicates that only about 5,700 feet is involved in the request, and that the subaqueous lands tidal area is about 75 feet

between the low and high water lines. This memo also indicated that there is about 60 feet between the high water line and the scarp of the existing dunes. The use of sand from other sources was considered, but Applicant rejected this alternative as “far greater” than the scraping method.

The WSLs TRM sets forth the expert advice that under the SLA Regulations the application should be denied because of the potential for undue environment harm from the proposed scraping. The TRM discusses the public comments and notes that WSLs has never approved beach scraping for any location in Delaware. The TRM indicates that bulldozer movement from the landward side of the beach was done to restore the beach after the 2008 Mother’s Day storm to protect the fresh water in Prime Hook National Wildlife Refuge. The TRM also cites studies that are critical of beach scraping and show that it can harm the very beach it is intended to protect, and cites the example of beach scraping that Ocean City, Maryland, which have more severe erosion when a storm hit the beach after beach scraping than would have occurred without the beach scraping. The TRM refers to the known presence of marine worm colonies at Prime Hook Beach that would be harmed by the proposed scraping and notes that these colonies have an important role in protecting beaches from erosion by creating natural reefs. The TRM also discusses the adverse impact on the natural flow of sand along the beach and that scraping would disrupt this flow to the detriment of Broadkill Beach. The TRM indicates that an alternative to scraping the subaqueous lands exists in the procurement of sand from other sources and trucking it to Prime Hook Beach to restore the dry beach and its sand dune. WSLs in a supplement email to me informed be that the Department’s experts found a cost of \$15 a cubic yard for such sand,

The SWMS TRM reviews the deeds the Applicant provided and indicates that many do not support any ownership of subaqueous lands. The TRM also disputes the Applicant's assertion that past scraping was successful and notes that the timing of major storms is more important to measure the success of beach scraping. On the purpose to protect Prime Hook National Wildlife Refuge from saltwater intrusion, the TRM indicates that the source of this intrusion is from culverts and not from Prime Hook Beach, but indicates that more sand from other sources would provide the Refuge more protection from storm and saltwater intrusion if the Prime Hook Beach to the north is breached by such storms. The TRM also provide suggested permit condition should the Department decide to issue a permit and these conditions include no activity on lots 1, 2, 3, 101, 103, and 104, and 105 without written permission, and that Department must be notified in advance before any scraping of the non-subaqueous beach, that the sand dunes will be planted with certain suitable vegetation, and that no scraping of the subaqueous lands could occur unless the Department determines that there is enough sand present. The TRM concludes that the preferred method of combating chronic erosion is the addition of sand to the system, such as the residents of the north end of Prime Hook Beach did in 2007 that was instrumental in reducing the damage from storms.

III. RECOMMENDED FINDINGS AND DISCUSSION

I find that the Project's beach scraping would entail removing an estimated 20,697 cubic yards of beach sand landward from the subaqueous lands. The sand would be removed along a approximately 7,400 feet of beach along the Delaware Bay in the private community of Prime Hook Beach, which includes the plotted beachfront subdivisions known as Bay Shore Drive Estates, Thomas J. Jones, Joseph D. Shorts (4 additions) and Clifton Shores. The scraping would be done by bulldozer, which would be used to move the sand from tidelands, beginning

gradually at a minimum depth 20' landward from the low water line and gradually increasing in depth approximately 50' landward to the high water line and the maximum 2' depth. The sand taken from the subaqueous lands would be graded to restore the dry beach and sand dunes in an area approximately 100' landward of the high water line. Thus, the scraping would remove a volume of sand with an area approximately 7,400' long by 50' wide with a maximum depth up to 2 feet. The total surface area to be scraped is approximately 25 acres.

The stated purpose of the Project is to obtain sand to widen the recreational beach, to protect the houses from flooding, and assist in preventing saltwater intrusion into the United States Fish & Wildlife Service's Prime Hook National Wildlife Refuge located to the north of the Project⁵. I find that additional sand at Prime Hook Beach would further these purposes, which are purposes, which I find are consistent with the Department's statutory responsibilities under the BPA.

I find and conclude that the scraping of the subaqueous lands is activity regulated under the Subaqueous Lands Act (SLA), and the federal Clean Water Act⁶ because 20,500 cubic yards of sand would "remove or extract material from submerged or tidelands..." 7 Del. C. §7205. I find and conclude that the scraping in both the tidal and non-tidal beach area is construction activity regulated by the BPA. The BPA application is for the construction in the defined "beach," and the BPA requires a permit "to alter, dig, mine, move, remove, or deposit any substantial amount of beach or other materials, or cause the significant removal of vegetation, on any beach seaward of the building line which may affect the enhancement, preservation or

⁵ The Friends of Prime Hook Wildlife support the Project.

⁶ Section 5.1 of the Department's *Regulations Governing the Control of Water Pollution*, 7 DE Admin. Code 7201, which the Department administers under the federal *Water Pollution Control Act* (Clean Water Act), 33 U.S.C §§1251 *et seq.*

protection of beaches.” Based upon the record developed, I recommend that the SLA permit not be granted. I recommend approval of a BPA for construction outside of the subaqueous lands and based upon a condition that Applicant obtains sand from sources other than from the proposed area, namely, from subaqueous lands.

The first reason I recommend denial of a SLA permit is that the Applicant failed to demonstrate its ownership of all the tideland properties that it proposes to scrape. Applicant provided the Department in a November 19, 2008 cover letter with deeds. First, this submission was after the public notice of the application. Consequently, I find that the application was not complete when public notice was published because the SLA regulations require deeds as proof of ownership to be produced with the application. Nevertheless, the Department’s provided public notice of the public hearing cured this defect because the public had an opportunity then to comment of an application that had the deeds purporting to prove ownership.

My, SWMS’s review of the deeds, and the review by one public commenter raises a question whether the deeds show that Applicant’s members do own all the land to be scraped. Based upon my research, I agree that Delaware follows the minority rule that the area between the low water line and the high water line of tidal water is capable of private ownership. Delaware law interprets a deed to a boundary such as to “Delaware Bay” or “to the river” or “along the river” or following courses along waterway is deemed riparian, and, consistent with the maxim that a deed must be construed to transfer all the grantor has, such a grant will be deemed to include the tidelands, **unless it is specifically excluded**. See *State Ex Rel. Buckson v. Pennsylvania Railroad Co.* 228 A.2d 587 (1967) Del. Super. at 594.244 A. 2d 80 (1968).

My review of the deeds is consistent with SWMS’s review, which found numerous deeds that referenced only a metes and bounds description based upon fixed monuments. This type of

description is not consistent with a grant to the riparian waters of the Delaware Bay, which I agree with Applicant would allow ownership of the tidelands. Some deeds refer to the high water mark or line, but only for the fixed survey point and not as the moving boundary subject to erosion and accretion. The fact that *Buckson* establishes Delaware as a state that recognizes ownership to the low water mark, and the deeds do not grant to the low water mark, leaves the possibility not shown in this record who owns the subaqueous lands. The case that Applicant provided that cites *Buckson* for standing for the legal conclusion that ownership to the high water line also means ownership to the low water mark I find is dicta and not controlling. If the subaqueous is capable of private ownership, as *Buckson* holds, then it is possible for a grantor to have retained the subaqueous lands when a grantor conveying real property to the “high water mark” if this was the intent of the grantor. The Department should not be put in the position of ruling on land ownership. Thus, Applicant will need to provide better proof than what was provided, and there are deeds that, on their face, do not support the Applicant’s position.

It is not the Department’s burden to conduct title research at the Sussex County Courthouse to determine ownership of the area between the high water line and the low water line. For example, the deeds for the Clifton Shores subdivision do not on their face indicate such ownership. The only deeds that clearly on their face show such riparian ownership are the deeds for lots 1 and part of lot 2, 11, 61, 64, 97, and 107 in the Short subdivision. There is a grant of ownership to 8 lots in the Thomas T. Jones subdivision, but this grant is unclear based upon the documents provided. Applying this law to the Applicant’s support as provided in the record, I find that Applicant has failed meet its burden to support its application, but proof of ownership of all the subaqueous lands it intends to scrape.

The Department's *Regulations Governing the Use of Subaqueous Lands* (SLA Regulations) place the burden on an applicant to demonstrate that ownership of the lands to be used. *7 DE Admin. Code 2.2.2.3*. I find that the Applicant did not provide the certified copy of all the deeds to the properties to be scraped with the application as required by the SLS regulations, but only after this defect was pointed out by the Department in WSL's October 15, 2008 letter and SWMS' October 28, 2008 letter. *7 DE Admin. Code 3.1.2.3*. The Applicant provided the deeds, but they do not support ownership of all the properties to be scraped to the low water line.

The WSMS' investigation confirmed that Applicant's proof as shown in the deeds did not own all the subaqueous lands to be scraped. Jennifer Wheatley's examination of the deeds, as set forth in DSWC's TRM, shows that 53 of Applicant's members' deeds refer to the high water mark. Moreover, 2 deeds refer to the "dune," 1 refers to the "beach" and 1 refers to "original water line." Ms. Wheatley noted correctly that Delaware is a "low water state," which means that a reference to a natural tidal water boundary includes the tidal areas. For example, "dune" could not be a riparian boundary. Her review finds that the deeds only support a possible claim of ownership to the low water line for 29 of the 86 properties based upon their reference to the Delaware Bay. My review found that many of the 29 were not clear, but also could be interpreted as not conveying to the water because they were based upon two fixed monument along the Delaware Bay, and did not run to the Delaware Bay as Delaware law requires. Moreover, the fact that so few deeds include the proper reference to the Delaware Bay, whereas the majority go to the "high water line" and/or are based upon fixed metes and bounds description. The use of a fixed metes and bounds description and survey to delineate the lots raises a question that I cannot answer on this record, whether the grantor intended to convey

lands to the Delaware Bay. The best forum to decide this issue is in Delaware courts in and not before this agency. Nevertheless, proof of ownership of the subaqueous lands is required and I find it was not provided. Thus, I recommend a finding that as a matter of fact and law, the Applicant has failed to show that its application is complete and in compliance with the Department's regulations to the extent it seeks to scrape beach areas not shown by clear proof of ownership in the record of all the subaqueous lands.

I also recommend a finding that the application for any SLA permit be denied based upon the reasons provided by the experts in WSLS and SWMS in their TRMs. These documents raised environmental concerns that could not be mitigated by any reasonable permit conditions. The environmental concern may be summarized by one member of the public's comment, when he noted that the removal of sand will create a big hole approximately 2 feet deep, 125 feet wide and 7,342 foot long. The Department's experts agree that the mechanical scraping by a bulldozer to create this hole and move 20,500 of subaqueous lands onto the dry beach would harm aquatic life and the environment, including the known presence of a colony of marine worms that build natural reefs that are important to protect beach from erosion.

The Department experts also raised concerns with the disruption to the natural flow of sand along the beach, which at Prime Hook Beach flows south and naturally replenishes Broadkill Beach. The concern of Broadkill Beach property owners as expressed in the record the Department's experts consider to be valid because the removal of 20,500 cubic yards of sand from the subaqueous lands will mean that much sand will not be available to replenish Broadkill Beach.

This disruption of the natural flow of sand also could harm Prime Hook Beach because the removal of 20,500 cubic yards of sand from the subaqueous lands, as the Department's

experts note, it may expose the beach to more waves during storms, particularly if the sand that fills in the big hole comes from offshore sand bars. The record shows that the sand bars, beach and sand dunes are interrelated system. The removal of sand from the subaqueous lands could cause the sand that will fill in the big hole to be taken from the offshore sand bars. As a result, during storms the reduced sand bar barrier would expose Prime Hook Beach to more damage than if the subaqueous lands had not been scrapped. The Department's experts point to the Ocean City, Maryland that experienced more erosion following beach scraping.

The last reason to support denying the SLA application is that the Department experts found that an acceptable alternative existed, albeit at more cost. This alternative is to acquire sand from other sources and truck it to Prime Hook Beach so that sand truly will be added and not moved around. The Department determined that sand could be purchased for approximately \$15 a cubic yard, which means a total procurement cost of approximately \$300,000. This represents a good investment by Applicant to make on behalf of its 104 beachfront owning members and also would benefit the non-beachfront owning members who enjoy the beach and also would benefit from protection from flooding. Thus, this method would provide a long-term solution by adding sand to the beach, as opposed to moving the existing sand around and this method can be done with no harm to subaqueous land and its aquatic life.

I also recommend a finding that the application for a beach construction permit should be granted only if it does not remove sand or otherwise adversely impact the sand in subaqueous lands. This recommendation is made based upon the documents in the record and the information provided to me by the Department's experts, as reflected in this Report. I recommend this Report be included in the record if its recommendations are adopted. The recommended record also supports that a permit should be issued to allow the reconstruction of

sand dunes from the existing sand in the non-tidal areas with sand from other sources. The Applicant currently has a permit that authorizes such reconstruction. I recommend that the Department issue a permit based upon the permit conditions that SWMS has proposed and that additional sand may be provided from other sources approved by the Department in writing.

IV. RECOMMENDED CONCLUSIONS

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

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding based on the record that supports not granting Applicant a SLA permit and granting Applicant a BPA permit subject to reasonable conditions;
2. The Department provided adequate public notice of the applications and the public hearing as required by the law and the Department regulations;
3. The Department held a public hearing in a manner required by the law and its regulations and has considered all timely and relevant public comments in making its determination;
4. The Department denies the requested SLA permit based upon the record that Applicant failed to provide adequate proof of ownership of the properties in the subaqueous lands and because of the undue environmental harm caused by scraping sand from the subaqueous lands, which harm cannot be remedied by any reasonable permit conditions and can be avoided by reasonable alternative of procuring sand from sources other than the subaqueous lands;
5. The Department shall grant the requested BPA permit for the construction required to move sand in the non-tidal area subject to the reasonable permit conditions that

SWMS proposes, and that sand must be provided from another source other than from subaqueous lands and be subject to SWMS' procedures for such sand; and that

6. The Department shall publish this Order on its public web site and provide such other service and notice as required by law and Department regulation or otherwise determines necessary and appropriate.

IV. RECOMMENDED CONCLUSIONS

s/Robert P. Haynes
Robert P. Haynes, Esquire
Senior Hearing Officer