

Secretary's Order No.: **2011-W-0048**

RE: Wetlands and Subaqueous Lands Section Application of Sea Colony Recreational Association, Inc. to amend its existing Subaqueous Lands Lease to periodically replenish (over a ten-year period) 2,350 linear feet of beach by hydraulically dredging approximately 150,000 cubic yards of sand from an offshore borrow site to coincide with the Federal Beach Replenishment Project along the Atlantic Coast, at Sea Colony in Bethany Beach, Sussex County, Delaware; AND Coastal Construction Permit Application of Sea Colony Recreational Association to mechanically scrape sand from the beach to rebuild the dune in front of Sea Colony

Date of Issuance: December 15, 2011

Effective Date: December 15, 2011

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control under 29 Del. C. §§8001 *et seq.*, the following findings and conclusions are entered as an Order of the Secretary:

The Applicant, Sea Colony Recreation Association, Inc., seeks to amend its existing Subaqueous Lands Lease to periodically replenish, over a ten-year period, 2,350 linear feet of beach by hydraulically dredging approximately 150,000 cubic yards of sand from an offshore borrow site to coincide with the Federal Beach Replenishment Project along the Atlantic Coast, at Sea Colony in Bethany Beach, Sussex County, Delaware. Additionally, the Applicant is also seeking a Coastal Construction Permit to mechanically scrape sand from the beach to rebuild the dune in front of Sea Colony in Bethany Beach. The proposed dredging project is subject to the requirements of the Subaqueous Lands Act (7 Del.C., Chapter 72) and Delaware's *Regulations Governing the Use of Subaqueous Lands*, while the proposed action to mechanically scrape sand from the beach to rebuild the Applicant's dune is subject to the requirements of Delaware's *Regulations Governing Beach Protection and the Use of Beaches*, as well as Delaware's Beach Preservation Act of 1972. The purpose of this project is to provide increased

protection to property and structures from coastal storm damage and additional recreational beach areas through maintenance of a replenishment project conducted in 2007. Due to the dynamic geomorphology of the coast and movement of sand, the project will also supplement maintenance of the Federal replenishment project in Bethany Beach and South Bethany Beach currently being conducted by the U.S. Army Corps of Engineers.

Sea Colony is a private beach community, as is the beach of its neighbor located immediately to the south, the private community of Middlesex. South of Middlesex is the town of South Bethany Beach, which maintains a public beach. Located north of Sea Colony is Bethany Beach, which is also a town whose beach is open to the citizens of Delaware.

As noted above, the Department reviews all subaqueous lands applications (and proposed projects set forth within such applications) in the light of the requirements of the Delaware Subaqueous Lands Act and the *Regulations Governing the Use of Subaqueous Lands*. These Regulations provide the criteria for evaluation of proposed projects to be constructed in public or private subaqueous lands. Such criteria include, but are not limited to, environmental impacts, public use impacts, and administrative principals associated with the ownership of said subaqueous lands. Furthermore, upon the granting of a subaqueous lands lease, such lease may, if determined necessary by the Secretary, include certain conditions to address comments and concerns expressed by the public regarding the effect of a proposed project upon the surrounding community. Additionally, Sea Colony's Coastal Construction Permit Application (which involves the mechanical scraping of sand from the beach to rebuild the dune in front of Sea Colony) is

reviewed in the light of the requirements of the Delaware Beach Preservation Act of 1972 and the *Regulations Governing Beach Protection and the Use of Beaches*, which provide the criteria for evaluation of projects such as this.

In the present matter, there were two major areas of concern expressed by the public at the time of the public hearing held by the Department on September 21, 2011, to wit: (1) whether the State of Delaware would be receiving appropriate monetary compensation for the placement of public sand resources on the private lands of Sea Colony; and (2) whether, once public sand is placed on private property, the public should have rights of access to the nourished beach area. As a result of these concerns voiced by the public at the time of the aforementioned hearing, the Hearing Officer, Lisa A. Vest, held the record open until October 15, 2011, to facilitate the inclusion of a Technical Response Memorandum (“TRM”) from the Department’s Wetlands and Subaqueous Lands Section of the Division of Water. That memorandum, dated October 13, 2011, is expressly incorporated herein to this Order.

The Department’s TRM of October 13, 2011 reviews and summarizes the two major areas of concerns as noted above, and relies upon a quantitative analysis of relative benefits regarding this project, as set forth by the U.S. Army Corps of Engineers (the same of which was attached to the aforementioned TRM). The Army Corps analyzed the proposed private Sea Colony project, as well as the adjacent public replenishment project, in the light of potential benefit(s) derived from (1) filling at Bethany Beach only; (2) filling at Sea Colony only; and (3) filling at both Bethany Beach and Sea Colony. As noted in the Department’s TRM, the analysis determined that a concurrent construction of the private Sea Colony project *with* the public Bethany Beach project “...provides

mutual benefits that cannot be realized through separate project implementation.” Thus, the impact of allowing the Applicant to proceed with the proposed project of beach replenishment for its community presents minimal adverse environmental impacts to the existing shoreline of Sea Colony, and, in fact, provides a benefit to not only the Applicant’s private community, but to the public communities adjacent to Sea Colony as well.

With regard to the assertion made at the time of the public hearing that the Sea Colony waterside property line runs to a fixed point, and then along the local *high* water line (and not the low water line), the Department *confirmed* this point in its TRM of October 13, 2011. Given this, the intertidal zone between the high and low tide lines is considered to be fully public subaqueous lands, and, as such, the public is guaranteed access within this area. Thus, the verification of this point by the Department’s Division of Water should address the voiced concerns of assuring public access to the nourished beach area subsequent to the placement of public sand on private property. In addition, the nature of the nourishment project will cause these public lands to also receive sand, thus increasing the area available to public access. In order to ensure that the public is fully aware of their right of access across this intertidal zone (and to prevent any future confusion with regard to which area(s) the public is entitled to access), the Applicant shall be required to mark the location of the private property boundary as a condition of its lease in this matter.

There is, however, still the public concern over the State of Delaware not receiving appropriate monetary compensation for the placement of public sand resources on the private lands of the Applicant, Sea Colony. While it is certainly rational that the

Department charge this Applicant a fee for all materials being placed on public subaqueous lands (located channelward of mean high water), it is consistent with that logic that such a fee should be *reasonable*. Fees which are set too high by the Department in such matters will discourage private beach communities from participating in future nourishment projects, again, to the detriment of not only the private communities themselves, but to significant detriment of the public beach fill projects as well. I agree with the Department's suggestion (as set forth in its aforementioned TRM) that the Applicant's fee should be reduced in this matter, in full consideration of the public benefits to be afforded by the expenditure of private monies by the Sea Colony community to nourish this section of the beach.

The Department must also review this application in the light of Section 2.0 of the Department's *Subaqueous Lands Regulations* (Administrative Principles). Section 2.2.2.3 of said Regulations recognizes the applicability of the Public Trust Doctrine to all navigable waters. The Public Trust Doctrine provides that title to tidal and navigable freshwaters, the lands beneath, and the living resources inhabiting said waters within a State, is a special title, held by the State, in trust for the public's benefit. Such title establishes the public's right to use and enjoy these trusted waters, lands and resources.

In reviewing Sea Colony's application in this matter, it must be determined whether granting public access to the private property area landward of the mean high tide line (that is, to an area that will be nourished with public sand) could act as a disincentive for other private communities to participate in beach nourishment activities through contribution of private funds to the effort. After careful review of the record generated in this matter, I believe this to be the case. Requiring public access on private

property in this case could have a chilling effect on future projects where private owners are seeking to nourish their properties due to potential liability and other issues. In addition, I do not believe that such a requirement is needed given the public benefit that will accrue from this project, including the amount of area seaward of the Sea Colony property that is already open to the public and that will be enhanced by additional sand from the project.

Noting the aforementioned quantitative analysis of relative benefits conducted by the U.S. Army Corps in this matter once again, there are mutual benefits, or, a greater end result, that result from the implementation of joint projects (i.e., private construction efforts initiated concurrent with public construction efforts) which cannot be realized through separate project implementation. Similarly, given the thrown movement of sand along Delaware's ocean coastline, it is likely that the federal project would need to compensate for the amount of sand proposed for the Sea Colony project, should the Applicant opt to not seek to renourish its beach. Those costs would be borne by U.S. taxpayers. Given this, I believe the Department's granting of Sea Colony's subaqueous lands lease in this matter will actually result in an incentive for other private communities to take advantage of such joint opportunities in the future, as much more can be realized as an end result to such projects by working concurrently with Federal efforts than by attempting to implement projects separately.

As noted above, a duly noticed public hearing was held on September 21, 2011, at the Modern Maturity Center in Dover, Delaware. Representatives from the Department and the Applicant, Sea Colony Recreation Association, Inc., were in attendance at this hearing, and all made presentations to develop the record. Members of the public also

attended said hearing, and comments were received by the Department at that time. Subsequent to that public hearing, Hearing Officer Lisa A. Vest requested the Wetlands and Subaqueous Lands Section of the Department's Division of Water provide her with a Technical Response Memorandum (TRM) to formally address the public comments and concerns raised in this matter. The requested TRM, dated October 13, 2011, was provided to Hearing Officer Vest and was incorporated into the public hearing record generated in this matter.

Based on the record developed in this matter, and the technical expertise of the Department's personnel who assisted in this application, the record supports approval of Sea Colony Recreation Association, Inc.'s Application for a Subaqueous Lands Lease, as consistent with the requirements of the Delaware Subaqueous Lands Act, and the *Regulations Governing the Use of Subaqueous Lands*. I find that the issuance of the aforementioned Subaqueous Lands Lease (along with the permit condition stated above) will allow this Applicant to periodically replenish, over a ten-year period, 2,350 linear feet of beach by hydraulically dredging approximately 150,000 cubic yards of sand from an offshore borrow site to coincide with the Federal Beach Replenishment Project along the Atlantic Coast, at Sea Colony in Bethany Beach, Sussex County, Delaware, as proposed in its application. Additionally, I believe the record supports approval of Sea Colony Recreation Association, Inc.'s Application for a Coastal Construction Permit Application, which will permit the Applicant to mechanically scrape sand from the beach to rebuild the dune in front of the Sea Colony community, as consistent with the requirements of the Delaware Beach Preservation Act, and the *Regulations Governing Beach Protection and the Use of Beaches*.

The granting of Sea Colony's aforementioned permits currently pending with the Department will provide increased protection to its property and structures from coastal storm damage and additional recreational beach areas through maintenance of a replenishment project conducted in 2007, and will also supplement maintenance of the Federal replenishment project in Bethany Beach currently being conducted by the U.S. Army Corps of Engineers. The proposed project has nominal environmental impacts, is suitable for the area, and (as previously stated) has met the aforementioned regulatory criteria for such projects.

Accordingly, I direct that the necessary permits (with condition) be issued to the Applicant, and enter the following findings and conclusions:

1. The Department has jurisdiction under its statutory authority to issue both a WSLs Subaqueous Lands Lease and a Coastal Construction Permit to the Applicant, subject to reasonable permit conditions deemed appropriate and consistent by the Department in this matter;
2. The Department provided adequate and lawful public notice of the aforementioned Application of Sea Colony Recreation Association, Inc., and of the public hearing held on September 25, 2011, and held said hearing to consider public comment on the application, in a manner required by the law and regulations;
3. The proposed project poses minimal adverse environmental impacts to the existing shoreline of Sea Colony, or to its beach community neighbors to either the north or south of the proposed project site;

4. The placement of sand at Sea Colony concurrently with the public Bethany Beach project provides mutual benefits that cannot be realized through separate project implementation;
5. The Sea Colony waterside property boundary runs to a fixed point, and then along the local high water line (not the low water line). As such, the intertidal zone between the high and low tide lines is considered to be fully public subaqueous lands, and public access within this area is guaranteed;
6. The permits approved by this Order will allow this Applicant to: (1) periodically replenish, over a ten-year period, 2,350 linear feet of beach by hydraulically dredging approximately 150,000 cubic yards of sand from an offshore borrow site to coincide with the Federal Beach Replenishment Project along the Atlantic Coast, at Sea Colony in Bethany Beach, Sussex County, Delaware, as proposed in its application; and to (2) mechanically scrape sand from the beach to rebuild the dune in front of the Sea Colony community;
7. The proposed project at Sea Colony will contribute to the stability of the Bethany Beach project, and will contribute sand to the littoral system in general;
8. The Applicant shall bear all costs associated with the transport and placement of sand on their property;
9. The Department has considered the factors required to be weighed in issuing such permits, and finds that the proposed use is both appropriate and

reasonable at the proposed location, and that it should be permitted, with conditions, as set forth above;

10. The Department shall issue said permits to the Applicant, Sea Colony Recreation Association, Inc., and said permits shall include all conditions consistent with the final Order and any other reasonable conditions that the Department includes in such permits, to ensure that Delaware's environment will be protected from harm, consistent with the aforementioned existing Delaware regulations governing such matters, to wit: that the Applicant shall be required to mark the location of the private property boundary at Sea Colony, so that the public is fully aware of their right of access across the intertidal zone;
11. The Department, in its discretion, and pursuant to 7 Del.C. §6003(h), shall reduce the annual fee for all material placed on public subaqueous lands (channelward of mean high water) as part of the project, due to the public benefits that accrue from the project. However, the Applicant shall be required to reimburse the Department for its time in processing and overseeing the application and permits;
12. The Department has carefully considered all the statutory factors to be considered in making a decision on these permit applications, and those required to be considered under existing Delaware regulations regarding such

matters, to wit, the requirements of the Subaqueous Lands Act (7 Del.C., Chapter 72), the Beach Preservation Act of 1972, Delaware's *Regulations Governing the Use of Subaqueous Lands*, and Delaware's *Regulations Governing Beach Protection and the Use of Beaches*;

13. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary;
14. The Department shall serve and publish its Order on all affected persons in a manner consistent with the service and publication of Secretary's Orders; and
15. This proposed project will enable the Applicant to replenish Sea Colony's private beachfront initially, and lead to an enhancement and stabilization of the public beach shorelines surrounding the Applicant's location in the near future, while simultaneously allowing the Department to balance the protection of Delaware's natural resources with the right of a landowner to enjoy and use his own property, in furtherance of the purposes of 7 Del. C., Ch. 60.

/s/ Collin P. O'Mara

Collin P. O'Mara
Secretary