

SUMMARY BASIS FOR DECISION

Patuxent Owner LP
Name of Applicant

22-NT-3282/202261946
Application Number

Paula Stonesifer
Project Manager

June 30, 2023
Date of Decision

The Environment Article, Annotated Code of Maryland and the Code of Maryland Regulations establish criteria for the Maryland Department of the Environment (Department or MDE) to consider when evaluating projects that propose to change the course, current or cross section of a nontidal stream or other body of water or to impact a nontidal wetland. If the criteria are satisfied, the Department may issue a permit for the proposed activity. The Department may deny a permit for a waterway construction activity that it believes is inadequate, wasteful, dangerous, impracticable or detrimental to the best public interest. The Department may not issue a nontidal wetland permit for a regulated activity unless it finds that the applicant has demonstrated that a regulated activity, which is not water-dependent, has no practicable alternative, will minimize alteration or impairment of the nontidal wetlands, and will not cause or contribute to a degradation of ground or surface waters.

In the case of the proposed construction of a driveway, stormwater outfall, parking spaces and a new residential building, the question for the Department to address is whether or not the proposed project impacts are acceptable under the regulations as they pertain to such construction activities. The project will permanently impact 1,841 square feet of forested nontidal wetland and 8,069 square feet of 25-foot nontidal wetland buffer.

PUBLIC NOTICE

Adjoining property owners, local government officials and other interested persons must be notified of proposed impacts to nontidal wetlands and waterways. In addition, an opportunity to comment and request a public informational hearing must be provided via a local newspaper. The public notice on this application was published in *Howard County Times* on March 23, 2023.

One request for an informational hearing was received and a virtual public informational hearing was held on May 8, 2023. That request, along with the transcript of the hearing and all written comments the Department received are saved in the file. Certain questions and concerns related to topics that lie outside of the Nontidal Wetlands Division's (Division) regulatory authority were received. Those comments, which will not be discussed at length herein but are included in the file, include stormwater management and forest conservation. Both of those are regulated by Howard County.

The following topics are addressed herein, as noted:

1. Lack of information posted online – discussed below
2. Public outreach efforts- discussed below
3. A 30-day extension request- discussed below
4. Waiver of Maryland regulations- discussed in Project Purpose and Need
5. Loss of nontidal wetlands- discussed in Avoidance and Minimization
6. Stormwater management and flooding issues- discussed in Water Quality
7. Wildlife concerns- discussed in Endangered Species
8. Mitigation and mitigation banking- discussed in Mitigation

A concern was expressed regarding the plans made available for public review. The information posted to the Department’s website in advance of the hearing (a project description, proposed impacts and a plan identifying the location and extent of said impacts) constituted the same information the Department was reviewing. The type of and/or specific documents the commentor stated should have been made available were either unrelated to the Division’s authority in this matter, and/or were not generated as a result of any meeting in which the Department participated. There were several public outreach meetings associated with the project beyond the scope of the Department’s nontidal wetland authority, including:

- Hickory Ridge Village Board presentation- 9/29/2020
- Pre-Submission Community Meeting #1 - 11/5/2020 – including mailings to the County required radius and signage posted on-site
- Hickory Ridge Village Board presentation - 2/25/22
- County Council vote - 4/4/22 - CR2 9- approved necessary waiver and PILOT for project
- Pre-submission Community Meeting #2 at the Hawthorne Center - 12/1/22
- Hickory Ridge Village Board - 2/27/23

The Department received a request for a 30-day extension of the public comment period on the premise that it had not provided documents related to the aforementioned meetings, and plans associated with the County’s review. As the Department had shared information pertinent to its review of proposed nontidal wetland impacts, a 30-day extension was not granted.

PROJECT PURPOSE AND NEED

In order for the Department to authorize impacts to nontidal wetlands and their regulated buffers, regulated activities must be determined to be necessary and unavoidable to meet the basic project purpose. It is also important to note that the orderly development and use of land is regulated through planning and zoning controls implemented by the local government. In this particular instance, Howard County makes the decision about appropriate land use of the property. The project purpose is to construct a residential building with associated parking, roads, and utilities (*Joint Federal/State Application for the Alteration of any Floodplain, Waterway, Tidal or Nontidal Wetland in Maryland*, (Application) Section 2d). This residential building is designed to help address housing needs of adults with disabilities through a supportive community for people of all ages, abilities and incomes. (Cover Letter dated November 16, 2022, Haley Kelly, WSSI).

A public comment was received, saying that the applicant had requested a waiver of Maryland regulations. The project was reviewed in accordance with the Nontidal Wetland statute and regulations and no waiver was requested, nor is there a provision in said statute and regulations to grant waivers for the impacts proposed.

ALTERNATIVES ANALYSIS

For projects that are not water-dependent, the applicant must conduct an alternatives analysis to demonstrate that the project has no practicable alternative. The factors to be considered are whether the project purpose can be accomplished using one or more alternative sites in the general area; a reduction in the size, scope, configuration or density would result in less impact; the applicant made a good faith effort to accommodate the site constraints that caused the alternative sites to be rejected; and that the regulated activity is necessary for the project to meet a demonstrated public need.

The applicant looked at three alternative building sites within the proposed project vicinity. The first site did not contain any regulated resources but was very steep. The grading operations required for the site made it economically infeasible and therefore was not chosen. The second site did not contain any regulated resources but was believed to contain historic resources. This site was also determined to be too small to accommodate the project, having limited access and lack of sidewalks, therefore this site was not chosen. The third site did not contain any regulated resources but was located far away from any amenities such as shopping centers, public transportation and limited access to sidewalks, thus this site was not chosen. The selected building site while having impacts to nontidal wetlands, accomplished the goals of the project: a walkable community for disabled individuals, access to shopping, public transportation, and sidewalks (Cover Letter dated November 16, 2022, Haley Kelly, WSSI). Through the review process, which included a site visit, the Department determined that additional consideration of alternative sites was not warranted.

AVOIDANCE AND MINIMIZATION

If the alternative site analysis is accepted, the applicant must demonstrate that adverse impacts to nontidal wetlands, their regulated buffers, and the 100-year frequency floodplain are necessary and unavoidable.

Development on the subject parcel is in large part guided by the location of the proposed access road and further defined by Howard County's subdivision regulations. The site is located at the intersection of Freetown Road and Cedar Lane. The road classification of Freetown Road (a Major Collector) is a lower classification than Cedar Lane (Minor Arterial). Howard County Subdivision Regulations state, "Where a proposed subdivision involves frontage on an Arterial Road, or a residential subdivision fronts a Major Collector, the street layout shall provide vehicular access to the subdivision by a lower classification public road" (letter dated January 18, 2023, from GLW). In this case, that would be Freetown Road. Furthermore, the lower classification road equates to a lower design speed for Freetown Road. A lower design speed results in a safer driveway entrance concerning turning movements and sight distance. A driveway can be incorporated along Freetown

Road complying with the required driveway separation while at the same time lining up with the existing driveway across the street at the Hickory Ridge Village Center.

An Alternative Access Evaluation was performed and summarized in a letter from the Traffic Group, Inc, dated April 26, 2022. Traffic counts were taken along the two possible access points with Freetown Road having only a quarter of the volume as did Cedar Lane (5300 vehicles/day versus 20,000 vehicles/day). Crash data was retrieved over a 4-year period and only one-seventh of the crashes (3 versus 21) were reported along Freetown Road in the stretch where the driveway entrance is proposed. Additionally, the queuing from a traffic signal on Cedar Lane at Owen Brown Road would adversely impact turning movements out of an entrance off of Cedar Lane. In conclusion, the report highly recommended that for traffic safety purposes, access to the site should be provided along Freetown Road. Access to Cedar Lane, the alternative, would create unnecessary safety risks for the future residents, visitors, and passing motorists (Letter dated January 18, 2023, from GLW).

It is not possible to completely avoid the wetland, given its location near the County preferred Freetown Road access. The proposed driveway has been designed to bend as sharply as possible to the west to avoid the larger, lower portion of the wetland (Cover Letter dated November 16, 2022, Haley Kelly, WSSI). Through the process, which included a site visit, the Department determined that the project satisfied the regulatory requirement to avoid and/or minimize impacts to regulated resources.

WATER QUALITY

Erosion and sediment control measures and stormwater management practices are designed to prevent the degradation of ground and surface water quality. Sediment pollution is addressed under Maryland's Erosion and Sediment Control Act. The law mandates local Soil Conservation Districts to review and approve erosion and sediment control plans developed in accordance with State standards. The Department's programmatic responsibilities are limited to promulgating regulations, and developing standards, ordinances and other criteria necessary to administer an erosion and sediment control program, including program oversight and delegation of enforcement authority to local governments. As a result, the Howard Soil Conservation District is responsible for the review and approval of an erosion and sediment control plan for the proposed project.

Stormwater discharges are addressed under Maryland's Stormwater Management Act. The law requires counties and municipalities to "adopt ordinances necessary to implement a stormwater management program." The Department's programmatic responsibilities are limited to promulgating regulations defining the minimum features of a stormwater ordinance and program oversight. The Department also reviews the stormwater management program of the counties and municipalities and their field implementation and requires corrective action where a program is found deficient. For most projects, compliance with the County-issued stormwater management approval ensures that the project will not degrade water quality, but for projects affecting Tier II waters, the Department will require a separate anti-degradation analysis. In this particular case, however, the Howard County Department of Planning and Zoning is responsible for the review and approval of the project's stormwater management plan.

During the application review process, the Department verifies that appropriate best management practices are incorporated into the sediment and erosion control plans and the stormwater management plans to protect the State's water resources. To ensure that these practices are contained in the project's final design plans, the applicant will submit approved sediment and erosion control plans and stormwater management plans to the Department prior to the commencement of construction activities authorized by the Permit.

As noted above, Howard County is the approving authority regarding stormwater management design and approval associated with this project. Though the site does not contain streams or 100-year nontidal floodplain, several public comments/concerns were expressed, particularly as it relates to flooding. For that reason, we are including the following information which does not relate to the Department's nontidal wetland authority, but which would be of general interest:

The project will provide 100-year floodflow management as Howard County has determined that downstream flooding exists. Management will be provided via an underground chamber system. Stormwater management for the project will be provided via two bioretention facilities, one Filterra, and porous pavement. The required Environmental Site Design volume (ESDv) was determined to be approximately 10,000 cubic feet. The total provided ESDv is approximately 11,000 cubic feet (Cover Letter dated November 16, 2022, Haley Kelly, WSSI).

ENDANGERED SPECIES

Once the application is received, it goes through a screening process. This screening process uses Geographical Information System (GIS) to determine the proposed site location and whether or not there are designated resources in the area such as rare, threatened or endangered species. If there are resources identified, the Division sends copies of the proposed plan to the appropriate agencies to review and send comments. No rare, threatened or endangered species were identified by the GIS screening process.

A comment was received from the public relative to wildlife habitat in general and box turtles specifically. As described above, the project was screened using data provided by the Department of Natural Resources (DNR) and the site is not within areas identified as requiring further coordination with DNR. Further, comments regarding retention of forest land are the province of the County who has responsibility for implementation of the Forest Conservation Act.

HISTORIC PRESERVATION

The application was also screened using GIS for historical and archeological resources. No historical or archeological resources were identified by the GIS process.

MITIGATION

Mitigation is only a consideration in a permit decision after steps have been taken to avoid and minimize impacts to nontidal wetlands and their regulated buffers, and nontidal waterways, including the 100-year nontidal floodplain. The total proposed permanent nontidal wetland impacts include 1,841 square feet of forested nontidal wetland. Mitigation will be required at a 2:1 mitigation-to-impact ratio, resulting in a mitigation requirement of 3,682 square feet of forested nontidal wetland. As stated in the Credit Sale Statement dated June 16, 2023, mitigation was satisfied through the purchase of 3,682 square feet of forested nontidal wetland credits from the Patuxent Mitigation Bank. The proposed impacts are located within the approved Primary Service Area of the Patuxent Mitigation Bank and will offset functions lost due to the wetland impacts. As noted in Kelly Neff's email dated June 16, 2023, the Mitigation and Technical Assistance Section determined that the mitigation is acceptable.

Code of Maryland Regulation (COMAR) 26.23.04 requires mitigation for permanent nontidal wetland losses except those that are exempt in 26.23.04.02(A). This project proposes to impact 1,841 square feet of forested nontidal wetland within the watershed of an unnamed tributary to the Little Patuxent River, designated as a Use IV waterway. Since the wetland impacts are proposed within a Use IV waterway, mitigation is required by State regulations. Additionally, the 2008 U.S. Army Corps of Engineers and U.S. Environmental Protection Agency's "Compensatory Mitigation for Losses of Aquatic Resources" (2008 Federal Mitigation Rule) §332.3(b)(2) specifies the first order of mitigation preference as being a mitigation bank having available credits when impacts are within the service area of the mitigation bank, in this case Patuxent Mitigation Bank. Patuxent Mitigation Bank, where the mitigation is proposed, went through the bank review process following requirements in the 2008 Federal Mitigation Rule and COMAR 26.23.04.06, and was reviewed and approved by the Interagency Review Team (IRT), composed of representatives from Maryland Department of the Environment, Maryland Department of Natural Resources, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, and National Marine Fisheries Service. As part of the Mitigation Banking Instrument approved on September 30, 2021, the bank sponsor discussed how the bank would provide functional uplift and replace wetland functions and acreage from impacts occurring within the service area. COMAR 26.23.04.03(J) requires that mitigation projects meet certain project standards to ensure that the mitigation site is successfully completed. The Patuxent Mitigation Bank will be required to meet the performance standards approved by the IRT in the Mitigation Banking Instrument. These performance standards include many requirements related to hydrology, soils, vegetative cover, species richness, invasive plant species, tree density, tree height and tree canopy to ensure the mitigation bank develops into a successful wetland system. After the active monitoring period for the mitigation bank concludes and the mitigation bank meets the performance standards, the North American Land Trust will monitor and maintain the mitigation bank in perpetuity to ensure the mitigation goals continue to be met.