



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL
RICHARDSON & ROBBINS BUILDING
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OFFICE OF THE
SECRETARY

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September 30, 2021

Mr. Eugene R. Bailey
Executive Director
Diamond State Port
Corporation 820 N. French
Street, 4th Floor Wilmington,
DE 19801

RE: Delaware Coastal Management Program — Federal Consistency Certification for Port of Wilmington Edgemoor (FC 2020.0043)

Dear Mr. Bailey: *E. Bailey*

The Delaware Department of Natural Resources and Environmental Control (DNREC), and the Delaware Coastal Management Program (DCMP), has completed its review of the above referenced project. This letter is in response to the federal consistency certification dated and received on March 18, 2020, submitted by you on behalf of Diamond State Port Corporation (DSPC). The review period was extended to six months on June 10, 2020. Additionally, the DCMP and DSPC entered a stay agreement for a period of six months, from August 3, 2020 to February 3, 2021, bringing the end of the review period to March 18, 2021. The DCMP and DSPC entered a second stay agreement for a period of one year, from February 26, 2021 to February 26, 2022, bringing the end of the review period to March 18, 2022.

PROPOSED ACTION

DSPC proposes to construct a new shipping container port facility on the Delaware River at DSPC's Edgemoor property, 4600 Hay Road, Edgemoor, New Castle County, DE 19809, Tax Parcel ID 0615300006 and 0615300003. This project would include the removal of existing in-water structures; the construction of an approximately 2,600-foot-long, pile-supported concrete wharf structure; new hydraulic dredging to remove approximately 3.3 million cubic yards of river sediments and underlying soil; excavating the berth and access channel to a depth of -45 feet mean low water; and bulkheading 3,200 linear feet of shoreline. Dredged materials would be stored at the Wilmington Harbor North and/or Wilmington Harbor South confined disposal facilities (CDFs) and a portion of the dredged materials would be used as fill. The use of shoaling fans, proposed in the original application materials, was removed from the scope of the proposed activities after consultation with the applicant.

FEDERAL CONSISTENCY WITH STATE COASTAL MANAGEMENT PROGRAMS

Pursuant to the Coastal Zone Management Act (CZMA) of 1972, as amended, any applicant for a required federal license or permit to conduct an activity, in or outside of the coastal zone, that can have reasonably foreseeable effects on any land or water use or natural resource of the coastal zone of that state, shall provide a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. The National Oceanic and Atmospheric Administration (NOAA) is required to review and approve a proposed state management program for it to become effective. Under the CZMA implementing regulations, Federal Consistency with Approved Coastal Management Programs (15 CFR 930), subpart D, state agencies are directed to develop a list of federal licenses or permit activities to be included as part of the management program, with the federal licenses or permit activities described in terms of the specific licenses or permits involved. Any applicant for a federal license or permit selected for review by a state agency should obtain the views and assistance of the state agency regarding the means for ensuring that the proposed activity will be conducted in a manner consistent with the management program.

During the period when the state agency is reviewing the consistency certification, the applicant and the state agency should attempt, if necessary, to agree upon conditions, which, if met by the applicant, would permit state agency concurrence.

PUBLIC PARTICIPATION

In accordance with 15 CFR §930.61, the public was invited to participate in the review of the Port of Wilmington Edgemoor expansion project. On August 23, 2020, DNREC published a joint public notice in the Delaware State News, The Wilmington News Journal, and the DNREC public notices list service that included the federal consistency certification received from DSPC and notice of a joint public hearing to be held by DNREC on September 29, 2020. The public comment period was originally scheduled to close on November 1, 2020, which represents a 71-day comment period. On October 30, 2020, at the request of members of the public, DNREC extended the public comment period to December 1, 2020, which represents a 101-day comment period.

During the public comment period DNREC received 196 comments, three of which were submitted live during the September 29, 2020 public hearing, 193 of which were submitted in writing before or after the public hearing.

DNREC received comments of opposition and support. Comments opposing the proposed structure included the following topics of concern: homeland security, impacts of the proposed shoaling fans, community engagement and transparency, public health/environmental justice, violation of House Joint Resolution Ten (HJR-10), fishing/crabbing, natural resources, air quality, navigational concerns, and water quality. Comments in favor of the proposed project noted the benefit to Delaware from building a port of call for larger container ships, job creation and economic development, and the cleanup and redevelopment of a currently inactive parcel.

At the request of the Hearing Officer, DNREC generated a Technical Response Memorandum (TRM) to address comments and questions submitted to DNREC during the project's public comment period, from August 23, 2020 to December 1, 2020 (see DNREC Public Hearing Docket #2020-P-Multi-0024).

FEDERAL CONSISTENCY ANALYSIS

The DCMP coordinates the review of consistency certifications with agencies administering the enforceable and advisory policies of the program. The following agencies participated in this review:

DNREC, Division of Air Quality (DAQ)
DNREC, Division of Fish and Wildlife (DFW)
DNREC, Division of Waste and Hazardous Substances (DWHS)
DNREC, Division of Water (DW)
DNREC, Division of Watershed Stewardship (DWS)
Department of Transportation (DelDOT)
Department of State, State Historic Preservation Office (SHPO)

The location of this project on the Delaware River is known habitat of the Atlantic sturgeon (*Acipenser oxyrinchus*) and shortnose sturgeon (*Acipenser brevirostrum*), two species that are listed as endangered under the Endangered Species Act (ESA). In order to minimize impacts to sturgeon and other commercially and recreationally valuable species during their spawning periods, DNREC requires that no in-water work occurs from March 15th through June 30th. This time-of-year restriction will be observed for all in-water work including, but not limited to, pile driving, construction, installation of temporary bulkhead wall and sheet pile walls, and all dredging including maintenance dredging. In addition, DNREC requires a soft start on all pile driving activities. (7 DE Admin. Code 2201, subsections 5.11.2.1, 5.11.3.2)

Cherry Island Flats is an important fish habitat and one of the major striped bass spawning areas of the Delaware River. Due to the proximity of the project to Cherry Island flats, DNREC also requires in-situ turbidity monitoring of the flats during dredging activities associated with the construction of the port to ensure that the activity is not adversely impacting sensitive species. (7 DE Admin. Code 2201, subsections 5.11.2.1, 5.11.3.2)

To ensure long term protection of human and ecological health from contaminants in the sediment, DSPC is required to properly manage the dredged material and associated CDF elutriate generated during dredging for port construction. As such, DNREC required that DSPC generate a monitoring plan for construction dredging and dredged slurry. On August 18, 2021, DNREC received a final monitoring plan from DSPC; this plan was reviewed and approved by both DNREC and the U.S. Army Corps of Engineers (USACE). (7 DE Admin. Code 2201, subsections 5.3.1.4, 5.3.1.17)

Mitigation is required by the State of Delaware for the loss of 5.5 acres of subaqueous lands. DNREC requires that the applicant implement the DNREC-approved mitigation plan which includes the creation of approximately one acre of intertidal wetland at the north end of Fox Point State Park (FPSP), an expanded environmental DNA (eDNA) monitoring program in the Delaware River and other strategic locations within the basin before, during, and after dredging/construction activities, and a FPSP enhancement plan involving landscaping and other upland improvements. (7 DE Admin. Code 2201, subsection 5.4.18)

In addition to the state-required compensatory mitigation, DSPC is also proposing additional mitigation measures as part of their federal compensatory mitigation requirements. These additional mitigation measures will include habitat improvement that will benefit American shad, hickory shad, and other anadromous fish species. The proposed federal mitigation is in addition to the mitigation DNREC requires to meet the state's permitting criteria. (7 DE Admin. Code 2201, subsection 5.4.18)

Please be advised that coordination with the NOAA National Marine Fisheries Service (NMFS) should be considered for protection of endangered species. (7 DE Admin. Code 2201, subsection 5.11.3.2)

Additionally, the DCMP received input from United States Coast Guard (USCG) on the navigational components of this proposed project. On September 17, 2021, USCG Sector Delaware Bay stated that it does not see this project posing a risk to safe navigation. (7 DE Admin. Code 2201, subsection 5.4.22.3)

The proposed activity is to be implemented in a manner consistent with the enforceable policies of the DCMP under 7 DE Admin. Code 2201, Section 5.0 including but not limited to: Coastal Waters Management, Subaqueous Lands and Coastal Strip management, Port of Wilmington, Historic and Cultural Areas, Living Resources, Transportation Facilities, Air Quality Management, and Pollution Prevention (7 DE Admin. Code 2201, subsections 5.3.1.4, 5.3.1.17, 5.4.18, 5.4.22.3, 5.8.1.1, 5.8.1.3, 5.8.1.4, 5.10.1.4, 5.11.2.1, 5.11.3.2, 5.19.1.1, 5.19.2.6, 5.20.2, 5.20.2.2, 5.20.2.6, 5.20.2.8, 5.20.2.9, 5.20.2.12, 5.24.1.1).

CONDITIONAL CONCURRENCE

Based on its review, the DCMP conditionally concurs that the Port of Wilmington Edgemoor as proposed above is consistent with Delaware's enforceable policies.

To protect living resources of the state, DFW recommended a specific time of year restriction for all in-water work including, but not limited to, pile driving, construction, installation of temporary bulkhead wall and sheet pile walls, and all dredging, including maintenance dredging, as well as requiring a soft start on all pile driving activities. DFW also requires in-situ turbidity monitoring of Cherry Island Flats during dredging activities associated with the construction of the port to ensure that the activity is not adversely impacting sensitive species. DW Wetlands and Subaqueous Lands Section (WSLS) requires mitigation for the loss of subaqueous lands. Additionally, the DWS Watershed Assessment & Management Section and the DWHS Remediation Section conducted a review of the sediment analysis. On August 18, 2021, the applicant submitted a final monitoring plan for construction, dredging and dredged slurry as a condition of this concurrence.

As such, to be consistent with the DCMP's enforceable policies, the following conditions must be satisfied as they relate to the Coastal Waters Management, Subaqueous Lands and Coastal Strip Management, and Living Resources policies (7 DE Admin. Code 2201, subsections 5.3.1.17, 5.4.18, 5.11.2.1, and 5.11.3.2):

1. A time-of-year restriction from March 15th to June 30th for all in-water work including, but not limited to, pile driving, construction, installation of temporary bulkhead wall and sheet pile walls, and all dredging including maintenance dredging;
2. A soft start on all pile driving activities;
3. The initiation and implementation of the DNREC-approved monitoring plan for construction, dredging and dredged slurry, and in-situ turbidity monitoring of Cherry Island Flats, as described above;
4. The initiation and implementation of the DNREC-approved mitigation package to mitigate the loss of 5.5 acres of subaqueous lands, as described above; and
5. Submittal of the construction plans for the federally-required mitigation for review and approval prior to construction.

Failure to comply with 15 CFR §930.4 as it relates to the conditions above will result in this conditional concurrence being deemed an objection. Under this scenario, the applicant is advised that pursuant to 15 CFR part 930, subpart H, and within 30 days from receipt of this letter, a request may be submitted to the Secretary of Commerce to override this objection. In order to grant an override request, the Secretary of Commerce must find that the activity is consistent with the objectives or purposes of the CZMA or is necessary in the interest of national security. A copy of the request and supporting information must be sent to the DCMP and the federal permitting or licensing agency. The Secretary of Commerce may collect fees for administering and processing your request.

Pursuant to 15 CFR 930.66, DSPC shall notify the DCMP of any proposed modifications to activities after receiving a decision from the DCMP. Modifications will be subject to supplemental federal consistency review if effects to any coastal use or resource will be substantially different than originally described.

Please be advised that this federal consistency review does not negate the need for any other authorizations that may be required.

Thank you for the opportunity to review and respond to the Port of Wilmington Edgemoor federal consistency certification. If you have any questions, please contact me or Laura Mensch of my staff at (302) 739-9283.

Sincerely,



Shawn M. Garvin
Secretary

cc: Todd Schaible, USACE