

Delaware Community Benefits Agreement Coalition (DCBAC)
19 Lambsons Lane
Wilmington, DE 19720

October 18, 2021

VIA EMAIL (Julia.hass@delaware.gov) AND OVERNIGHT DELIVERY
Environmental Appeals Board 89 Kings Highway Dover, DE 19901
Attn: Administrative Assistant to the Environmental Appeals Board

Pursuant to 7 Del.C. Ch. and amendments thereto, the Delaware Community Benefits Agreement Coalition (DCBAC) and the individual appellants identified herein (collectively, “Appellants”) submit this written statement of appeal. DCBAC (<https://www.delcbac.org/about>) is a community coalition representing members, civic associations and residents of Delaware, who are concerned, both individually and collectively, about the subaqueous and other impacts of the port expansion, as many of our members live next to or near the port.

The individual appellants include:

- Marie Reed, 1111 D St. Wilmington, DE 19801
- Karen Cheeseman, 31 South Pennewell Drive., Wilmington, DE 19809
- Simeon Hahn, 501 Lennox Rd, Wilmington, DE 19809
- Jeffrey Richardson, 700 West 21st, Wilmington, DE 19802
- Dr. Mujahid Nyahuma, 1509 West Lehigh Avenue, Philadelphia PA 19132

Secretary’s Order No.: 2021-W/CCE-0026 RE: Diamond State Port Corporation (“DSPC”) Wetlands and Subaqueous Lands Section (“WSLS”) Permit Application for a Subaqueous Lands Permit from the Division of Water and Federal Consistency Certification from the Division of Climate, Coastal and Energy’s Delaware Coastal Management Program (“DCMP”) for the DSPC’s proposal to construct a new container port on the Delaware River at DSPC’s Edgemoor property, located at 4600 Hay Road, New Castle County, Delaware Date of Issuance: September 30, 2021 Effective Date: September 30, 2021

Statement of Appeal

Interest Which Has Been Substantially Effected

The public trust doctrine employed by the State of Delaware establishes that tidal waters and certain other navigable waterways, along with the tidal lands underlying those waters, are held in trust by the states for the benefit, use, and enjoyment of the public. The interests of DCBAC have been significantly impacted by the above order. The DCBAC is composed of organizations and citizens who live and in close proximity to the project, as well as organizations and citizens seeking

conservation and restoration of subaqueous resources, and are impacted under the order by the permitted losses of wetlands and “waters” (subaqueous lands) and lack of appropriate mitigation for lost ecosystem services (environmental, social, and economical) under this order. These services include, but are not limited to habitat quality, water quality, climate resilience, recreational use, and social/spiritual connections to the Delaware River. This area of the Delaware River has also experienced cumulative impacts from decades of dredging, filling, pollution, and restrictions of access and resource use by environmental justice communities in the area and citizens of the State.

Statement that the Decision is improper:

DNREC’s decision is improper in that it did not fully evaluate the impacts from all regulated activities associated with the permit application, specifically (1) permanently destroying via dredging highly biologically productive shallow water habitats to less productive deep (45’) subtidal habitats and (2) negatively impacting existing shoreline ecosystem functions, including but not limited to critical intertidal functions, by constructing a 2600 foot long wharf structure and “bulkheading” and additional 3200 feet, resulting in over a mile of “hardened” shoreline. These actions will significantly impact the ecosystem services of the existing shorelines. Under the Delaware Subaqueous Lands Act and regulations the DNREC Wetlands and Subaqueous Lands Section provides permitting services for activities in Delaware’s wetlands, bays, rivers, streams, lakes, ponds and other waterways that might require a permit under state law. These activities include marina construction and operation, and construction of docks and piers, shoreline stabilization projects, dredging, filling, bridge or culvert construction, utility crossings of streams, and other projects that could affect Delaware’s waters and wetlands.

Allegation that the Decision is Improper:

The subaqueous lands permit application did not identify impacts to wetlands but identified 5.5 acres of fill on subaqueous lands. DNREC’s review agreed with the identified 5.5 acres of fill on subaqueous lands. Public comments on the impacts from dredging shallow waters and hardened shoreline stabilization measures were provided to DNREC.

DNREC did not fully address all regulated activities and impacts from dredging and shoreline stabilization components of the project. According to the DNREC website (<https://dnrec.alpha.delaware.gov/public-notices/notice-of-joint-public-hearing-diamond-state-port-corporation/>) “this project will include the construction of an approximately 2,600 foot long wharf structure, dredging of 3.3 million cubic yards of river sediments, excavating the berth and access channel to a depth of -45 feet mean lower low water, bulkheading 3,200 linear feet of shoreline, and occupying approximately 5.5 acres of subaqueous lands.” Current shallow water subaqueous habitats and associated services (ex. habitat and biological production) will be significantly impacted by the dramatic increase in depth to 45’. “Hard” shoreline stabilization measures, (i.e. bulkheads), will also cause significant impacts and decreases in the function of subaqueous lands.

DNREC identified that “A major aspect of the proposed project is that compensatory mitigation is required of the Applicant for the filling of 5.5 acres of subaqueous lands of the State of Delaware related to the construction activities associated with the proposed project.”

The permit identified a three-phase mitigation project:

“For Phase One of the Mitigation Plan, DSPC will construct approximately one (1) acre of intertidal wetland along the Delaware River at the north end of FPSP as an “in-kind” component of habitat replacement to partially compensate for what is being lost through the proposed construction of the port. DSPC shall be responsible for all aspects of the project. This will include obtaining any necessary authorizations, construction of the wetland, and three (3) years of monitoring, maintenance and reporting to ensure that the wetland habitat creation is a success. In Phase Two of the Mitigation Plan, to provide additional compensatory mitigation, the DSPC will provide funding to establish the Environmental DNA (“eDNA”) Fisheries Monitoring Program under the operation and management of DNREC. The first project administered through that program will focus on monitoring around the proposed project area and the surrounding Christina River watershed before, during and after dredging. Phase Three of the Mitigation Plan provides for increased public access at FPSP (Fox Point State Park) to the natural resources of the Delaware River. The DSPC will consult with DNREC to produce landscape designs for an improved walking trail around the newly created intertidal wetland, a viewing/observation platform that will facilitate associated education opportunities, and substantial vegetation removal to restore the view of the Delaware River along the length of the park. Additional enhancements under consideration include roadway and lighting improvements, restroom repairs, and other amenities aimed at increasing public access to the natural resources of FPSP and the Delaware River.”

"In addition to the State-required compensatory mitigation that includes the habitat and recreational enhancements at FPSP, DSPC is also proposing a habitat improvement project at Brandywine Creek State Park on Adams Dam Road in Wilmington, Delaware as part of their federal compensatory mitigation requirements. As currently proposed, this habitat improvement project consists of the construction of a rock-ramp fish passage structure at Dam #2 on Brandywine Creek, which has the intended purpose of allowing American shad, hickory shad, and other anadromous fish species to migrate further upstream to spawn. This will result in increased opportunities for recreational angling along the banks of the Brandywine between Dam #2 and Dam #4. The proposed federal mitigation at Brandywine Dam #2 is in addition to the mitigation DNREC requires to meet the state’s permitting criteria. "

DNREC via the Order has not completely evaluated all impacts to subaqueous lands and the review and mitigation plan are incomplete. In addition, the mitigation plan (for filling of 5.5 acres of subaqueous lands) does not demonstrate that these impacts will be fully mitigated; there is no analysis or scaling of the impacts to the proposed mitigation. The proposed DSPC habitat improvement project is not included in the permit and thus may be not enforceable.

Specific allegation relative to Environmental Justice

The DCBAC also asserts that the decision was improper in that there was no engagement with impacted public on the impacts and potential mitigation projects with the identified Environmental Justice communities in the area.

The Hearing Officer's report (<https://documents.dnrec.delaware.gov/Admin/Documents/dnrec-hearings/2020-P-MULTI-0024/Hearing-Officers-Report-DSPC-Wetlands-Fed-Cert-20200929.pdf>) included a summary and response to public comments. These were somewhat arbitrarily grouped into 12 issues. DNREC labeled them as comments in support of the project and comments opposed to the project.

Issue 5 (categorized as in opposition to the project) is: **“The proposed project represents a threat to public health, especially in Environmental Justice communities.** DNREC has placed great importance on understanding and addressing Environmental Justice concerns raised by communities in the vicinity of the proposed project site. As such, special consideration was taken to incorporate mitigation requirements that would result in improvements to the local environment and increase recreational opportunities for the residents of neighboring communities.”

DCBAC has stated that we are not against development, unless the development process excludes significant community participation and engagement and does not protect the health and stability/continuity of Environmental Justice communities and the environment. DNREC has not conducted significant engagement with the community, which does not support that DNREC placed great importance on understanding environmental justice concerns. Furthermore, DNREC arbitrarily considered and decided for the community what mitigation requirements would result in improvements to the local community.