

**DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL**

THE PHILADELPHIA REGIONAL
PORT AUTHORITY,

Appellant,

v.

DEPARTMENT OF NATURAL
RESOURCES AND
ENVIRONMENTAL CONTROL,

Appellee.

NO.

On Appeal from Department of Natural
Resources and Environmental Control
Secretary Shawn M. Garvin's Order No.
2021-W/CCE-0026 and Permit No. SP-
101/20

Dated September 30, 2021

NOTICE AND STATEMENT OF APPEAL

To: Environmental Appeals Board
Attention: Administrative Assistant to the Environmental Appeals Board
89 Kings Highway
Dover, DE 19901

PLEASE TAKE NOTICE that the Philadelphia Regional Port Authority, doing business as PhilaPort ("PhilaPort" or "Appellant") through undersigned counsel hereby appeals from Secretary Shawn M. Garvin's Order No. 2021-W/CCE-0026 dated September 30, 2021, as well as from the issuance of Subaqueous Lands Permit No. SP-101/20, for the reasons set forth below:

1. On September 30, 2021, Secretary Shawn M. Garvin of the Delaware Department of Natural Resources and Environmental Control ("DNREC")

issued Secretary's Order No. 2021-W/CCE-0026 (the "Order") authorizing the issuance of Subaqueous Lands Permit No. SP-101/20 (the "Permit").

2. The Order specifies that the Permit "shall include all conditions necessary to ensure that Delaware's environment and public health will be protected from harm." Order at 10.

3. The Order incorporates the "Hearing Officer's Report" dated September 29, 2021 (the "Report").

4. Appellant is the Philadelphia Regional Port Authority, doing business as PhilaPort ("PhilaPort"), which owns and is responsible for several ports in Philadelphia directly upriver from the proposed Edgemoor Expansion ("Edgemoor" or "the Expansion"), which is the "new shipping container port facility" authorized in part by the Permit.

5. Through this appeal, PhilaPort asserts that DNREC issued the Permit without sufficiently addressing PhilaPort's concerns regarding the project's impact on the safety and free navigation of vessels entering and exiting PhilaPort's facilities. Specifically, the Expansion interferes with PhilaPort's navigation rights on the Delaware River in derogation of 7 *Del. C.* § 7504, Section 4.8.4.

6. The Permittee is Diamond State Port Corporation (“DSPC” or “Permittee”), a corporation registered in the State of Delaware. DSPC filed the original permit application for a Subaqueous Lands Permit and Federal Consistency Certification (the “Application”), which is the subject of the Order.

7. PhilaPort filed administrative comments, dated October 30, 2020 and amended on November 16, 2020 (the “Comments”), in response to the Application, which Comments are incorporated herein by reference, as if set forth in full.

8. PhilaPort, working with the federal government as the sole non-federal sponsor, is partially responsible for the deepening of the Delaware River’s Main Navigation Channel (the “MNC”). The deeper MNC allows the Delaware River to accommodate traffic from Post Panamax and larger vessels. All ships entering and exiting PhilaPort must traverse the MNC from Edgemoor to PhilaPort’s facilities upriver.

9. Edgemoor’s proposed expansion includes construction of a new port structure including a large Turning Basin. As its name suggests, the Turning Basin will allow vessels exiting Edgemoor to turn around, as necessary to reach the Delaware Bay and the Atlantic Ocean. Because there is no other means of exiting

the facility, the Turning Basin is an indispensable part of Edgemoor's proposed expansion.

10. However, because the Turning Basin projects into the entire width of the MNC vessels exiting Edgemoor will necessarily impede the in- and outbound river traffic entering and exiting PhilaPort. As explained more fully below, the costs and risks of this intrusion are not sufficiently accounted for in DNREC's Report, Order, or Permit.

11. DNREC's decisions with respect to navigation are based in principle part on Attachment 23 to Permittee's Application, the "Full Mission Ship Simulation for Edgemoor Navigation Feasibility Study," dated August 24, 2018 and prepared by The Maritime Institute of Technology and Graduate Studies (the "MITAGS Study").

12. Edgemoor submitted the MITAGS Study to DNREC to satisfy the regulatory requirements set forth in 7 *Del. C.* § 7504, including Section 4.0 *et seq.* Among those requirements, Section 4.8.4 contains an absolute prohibition on any structure—such as Edgemoor—that interferes with the free navigation of

Delaware's waterways.¹ 7 *Del. C.* § 7504, Section 4.8.4 (“Structures shall not interfere with navigation, public or other rights.”).

13. As the language of Section 4.8.4 reflects – and unlike other provisions of the Code – this prohibition is set forth in absolute terms, without opportunity for accommodation or mitigation.²

14. The Report erroneously concluded that the Application complies with Section 4.8.4 based upon three pieces of evidence: the MITAGS Study, a letter from the Pilot’s Association, and an informal consultation between DNREC and the United States Coast Guard (the “USCG”). See Report at Section 12. This reliance was also in error.

15. More specifically, the MITAGS Study cannot ensure that Edgemoor “shall not interfere with navigation” because:

- a. it confirms that a typical turning vessel at Edgemoor will occupy or encompass most if not all of the MNC during a turn;

¹ For purposes of this appeal, the “structure” may be the entire Edgemoor Expansion, which includes the Turning Basin as an integral component, or the Turning Basin itself, as specially constructed, engineered, and excavated structure within Edgemoor.

² It is notable that 7 *Del. C.* § 7504, Section 4.8 contains several requirements for all “structures”, as that term is very broadly defined at 7405, Section 1.0. Sections 4.8.1-4.8.3 specify requirements to “minimize pollution” and to use “best available materials” to minimize impacts. Significantly Section 4.8.4 contains no such mitigation language and is instead stated as an absolute prohibition, “shall not.”

- b. vessels heading in- or outbound will have to slow or stop to accommodate any vessel turning at Edgemoor.

16. This plainly constitutes an “interference with navigation.” 7 *Del. C.* § 7504, Section 4.8.4. As a result, both the Permit granted on September 30 and the Expansion itself contravene the absolute prohibition set forth in Section 4.8.4.

17. Further, even if DNREC were authorized to “permit” a project that fails to comply with Section 4.8.4—the absolute language suggests otherwise—the Permit issued fails to implement any of the safety qualifiers the MITAGS Study identified as essential to safe navigation. These include:

- a. a requirement that docking procedures at Edgemoor take place only with winds at or below 20 knots;
- b. a requirement that inbound vessels may dock at Edgemoor only at high tide;
- c. a significant redesign that deepens Edgemoor in an additional location.

18. The Report, Order, and Permit all fail to impose and/or incorporate necessary limitations on wind speed or tidal depth, and, as a result, fail to protect the free navigation and safety of existing river traffic within the MNC. The Department’s actions also contravene the analysis and conclusion of the MITAGS Study, itself, on which DNREC purports to rely.

19. The Report also attached a Pilot's Letter referencing putative alterations to the design of the Turning Basin structure, intended to address concerns articulated in the MITAGS Study. See MITAGS Study, at Section 5.1.2. Rather than simply remedying these concerns, however, the proposed change substantially modified the basin's existing design and thus constitutes a material modification of the original Application, which in turn should have triggered a new public comment and/or hearing process to at least consider the Turning Basin redesign.

20. Moreover, the Report, Order and Permit fail to specify whether these changes are a necessary precondition of DNREC's approval or alternatively, whether the Applicant *formally* modified its Application to incorporate these new design requirements.

21. Without further clarification, the Pilot's Letter merely suggests that the Turning Basin's impact on navigation could be lessened *if* there is a "deepening [of] the Southern portion of the area 'to provide' additional maneuvering space as inbound vessels turn in the turning basin." Letter, David K. Cuff, President, The Pilots' Association for the Bay and River Delaware to Eugene Bailey, Executive Director, Diamond State Port Corporation, undated (the "Pilot's Letter").

22. Absent express implementation of this recommendation, DNREC cannot assure PhilaPort (or any similarly situated parties) that the Expansion “shall not interfere with navigation,” as mandated by Section 4.8.4.

23. Put simply, by failing to address (let alone adopt) the MITAGS Study’s conditions for safe operation, the Report guaranteed the legal deficiency of the Permit issued.

24. As additional support, the Report references an undocumented interagency contact between DNREC and the United States Coast Guard. Little detail of that conversation is provided. The Report quotes the USCG Sector Delaware Bay—without specific attribution—as generically stating that it “does not see this project posing a risk to safe navigation.” The Department’s September 29, 2021 “Technical Response Memorandum” (the “TRM”) proves no additional insight on this summary, unsupported consultation. See TRM at Section 12.

25. Neither compliance with Section 4.0 *et seq* nor the policy rationale underlying Delaware’s public notice and comment procedures can be satisfied by a vague reference to undocumented conversations with unspecified individuals. In particular, the potential risks and costs implicated by the Turning Basin’s intrusion on the MNC are too serious to be set aside in this fashion.

26. Although the Report and TRM conclude that the MITAGS Study, Pilot's Letter and USCG consultation together confirm that the Expansion "shall not interfere with navigation[,]” none of the cited documents conclusively demonstrate (or even assert) that there will be no interference.

27. At best, the evidentiary record suggests that, under certain narrow conditions, any interference with navigation may be manageable. Because DNREC has declined to impose the kinds of restrictions necessary to ensure those conditions are typical, however, free navigation (and thus compliance with Section 4.8.4) cannot be guaranteed.

28. The Report also fails to address the central concern articulated by PhilaPort in the Comments, which specifically reference Edgemoor's potential interference with navigation during emergency procedures, like those necessitated by a ship losing steam during a turn.

29. The Report and DNREC cannot depend upon the MITAGS Study to resolve this legitimate concern because the MITAGS Study expressly declines to do so, noting that:

[b]erthing procedures, tug power required, and emergency procedures will be developed in future simulation studies.

MITAGS Study at 28. On information and belief, no additional studies with respect to emergency procedures were ever submitted by Applicant.

30. Nor do the Pilot's Letter or the USCG consultation satisfactorily address this issue; there is no evidence in the Report, the TRM, or anywhere else that either entity performed an independent evaluation of possible emergency scenarios.

31. As it stands, the Permit contains no conditions or requirements regarding emergent events. Should a vessel lose steam – an eminently foreseeable possibility – the Permit is silent regarding the DPSC's obligation to ensure that free navigation of the MNC remains uncompromised.

32. Given the risk posed by this kind of emergency, DNREC's failure to analyze, document, and redress PhilaPort's concerns marks a gaping hole in the administrative record – and, by extension, a fatal flaw in its decision to issue the Permit.

33. Finally, the Permit also fails to incorporate other critical restrictions associated with the MITAGS Study:

- a. the MITAGS Study only evaluates containerships up to 9,300 TEUs, the maximum size planned for Edgemoor (MITAGS at 5);

- b. the MNC accommodates vessels up to 14,000 TEUs (MITAGS at 5).

The Permit contains no provisions limiting Edgemoor traffic to ships no larger than the 9,300 TEUs, and thus fails to provide a critical, safe operating parameter on Edgemoor. Should Edgemoor seek to dock a vessel of a size greater than 9,300 TEUs it has provided no study or assurance of safe operations of vessels in the Turning Basin, and therefore in this region of the MNC.

34. PhilaPort estimates that three witnesses will likely be required, and further estimates one day for the hearing.

WHEREFORE, in consideration of the statements above, the Philadelphia Regional Port Authority, doing business as PhilaPort, respectfully requests that this Board invalidate the Permit and remand it to the DNREC in order to conduct the comprehensive navigational studies that will be necessary to demonstrate that vessels calling upon Edgemoor can turn safely within the Turning Basin without interfering with navigation on the Delaware River, and further that the operational constraints identified by the MITAGS Study have been integrated into the Permit.

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