

ABBOTT CONSULTING SERVICES

2600 W. 7th Street, Apt. B6

Wilmington, DE 19805

(302) 605-4253

rich@richabbottlawfirm.com

February 17, 2025

VIA HAND DELIVERY

Delaware Environmental Appeals Board

89 Kings Highway

Dover, DE 19901

Attention: Administrative Assistant to Environmental Appeals Board

Re: Appeal of Secretary's Order No. 2025-W-0006

Application of Fort DuPont Redevelopment & Preservation Corporation

For a Subaqueous Lands Permit

Dear Chairman & Members of the Environmental Appeals Board:

I am agent for Appellants Maritime Investment Properties II LLC, Maritime Delaware LLC, and Timothy G. Konkus (the "Appellants"). Appellants hereby appeal the above Order (the "Order"), which is dated January 15, 2025 and was announced on January 29, 2025. *See* Order enclosed.

This letter shall constitute the Appellants' written Statement of Appeal pursuant to Section 2.0 in 7 Del. Admin. Code 105, the Environmental Appeals Board Regulations (the "EAB Regulations").

1. The Interest Substantially Affected

Section 2.1.1 of the EAB Regulations requires that the Appellants describe the interest which has been substantially affected. As a preliminary matter, the background regarding the Appellants is helpful.

Appellant Maritime Investment Properties II LLC ("MIP") is a Delaware limited liability company that owns, *inter alia*, certain parcels of land with improvements which are situated adjacent to the Delaware City Branch Canal (the "Branch Canal") and that compose the entire Delaware City, Delaware block bounded by 3rd Street, 4th Street, Franklin Street and Canal Street – a/k/a 300, 302, and 310 Canal Street and 311 Franklin Street (the "Canalside Block"). The Canalside Block is located directly across the Branch Canal from the proposed location of the rip rap revetment structure (the "Shoreline Structure") at issue in the Order. And MIP also owns real estate identified as 214 Canal

Street, which is situated proximate to the Shoreline Structure, as well as 605 Fifth Street, in Delaware City, Delaware.

Appellant Maritime Delaware LLC (“MD”) is a Delaware limited liability company that does business as Delaware City Marina. MD operates a marina business (the “Marina”) on, *inter alia*, the Canalside Block. The Marina includes docks that extend into the Branch Canal (the “Marina Docks”), which are a critical part of the business operations of MD. MD leases the Canalside Block and the Marina Docks from MIP, and the two entities have common ownership.

Appellant Timothy G. Konkus (“Konkus”) is a principal of MIP and MD. Konkus has closely followed the Subaqueous Lands Permit Application at issue in the Order, as well as a similar predecessor application that was withdrawn, and has engaged in public comment thereon. Konkus depends for his livelihood on the business operations and resultant income derived from MIP and MD.

The Appellants will all suffer from the same negative impacts that installation of the Shoreline Structure will effectuate (the “Negative Impacts”). The Negative Impacts include, but are not limited to:

- (1) Aesthetics – the Shoreline Structure will look unappealing and unnecessarily introduce an industrial-like appearance into the more natural look of the Branch Canal, which will harm the recreational pleasure of boaters and customers who patronize the Marina;
- (2) Sedimentation – the Shoreline Structure will cause increased sedimentation and siltation in the vicinity of the Marina Docks and the Canalside Block by virtue of its increase in turbidity and displacement in the Branch Canal;
- (3) Channel Reduction – the Shoreline Structure will also decrease the channel of the navigable portion of the Branch Canal by introducing rip rap and thereby limiting the area that boats may use.

The Appellants will lose business, revenue and the ability to expand operations in the future due to the Shoreline Structure. They themselves will also suffer from the negative appearance of the Shoreline Structure. The Appellants reserve the right to expand upon and further expound on the interests that will be substantially affected.

2. Allegation That The Order Is Improper

The Order is invalid and improper for the reasons and on the grounds which are more fully set forth hereinafter.

3. **Reasons Why The Order Is Improper**

The four (4) reasons that the Order is legally invalid are:

(1) No proof that Lisa Borin Ogden was duly authorized to act in the stead of the Secretary of the Delaware Department of Natural Resources and Environmental Control (“DNREC”) or that she was duly appointed as Secretary or Acting Secretary of DNREC as required by law, including the Subaqueous Lands Regulations, and Delaware Code Title 7, Sections 6003, 6004 and 6006(4), Title 29, Section 8002, and Title 7, Chapter 72;

(2) Lack of legally proper Public Notice and Advertisement of the Revised and Amended Applications for a Subaqueous Lands Permit allegedly approved to construct the Shoreline Structure (the “SL Permit”) sufficiently in advance of the January 12, 2022 Public Hearing, as required by Delaware Code Title 7, Section 7208(b) and the Delaware Administrative Procedures Act, Title 29, Chapter 101 of the Delaware Code;

(3) No Order, DNREC Memo, or Hearing Officer Report finding that: (a) more than “minimal demonstrable erosion” was evident as required by Section 4.10.1.1 of 7 Del. Admin. Code 7504, the Regulations Governing the Use of Subaqueous Lands (the “Subaqueous Lands Regulations”), (b) “a non-vertical structure, designed to equal standards, would be ineffective to control erosion” and related provisions in Section 4.10.1.4 of the Subaqueous Lands Regulations and (c) nonstructural measures outlined in Section 4.10.1.3 of the Subaqueous Lands Regulations were not viable to address any necessary shoreline stabilization; and

(4) The Applicant, the Fort DuPont Redevelopment and Preservation Corporation (the “FDRPC”), lacked Standing and Legal Authority to seek and obtain the SL Permit since the FDRPC was not the owner of the private subaqueous lands at issue in the Order, per Section 2.3.1 of the Subaqueous Lands Regulations.

The Appellants reserve the right to assert additional bases for Order invalidity in the future. The Environmental Appeals Board is respectfully requested to reverse the Order for all reasons presented by the Appellants in the appeal proceedings.

4. **Estimated Number of Witnesses & Time Involved in Presenting the Appeal**

The Appellants believe they will likely only present the testimony of Konkus at the hearing. Argument and introduction of testimony and exhibits is estimated to be 1 to 2 hours, depending on the extent of objections, argument and questions posed by others. Additional time will be needed to cross-examine any DNREC witnesses and present any rebuttal to the DNREC case.

Page 4

Enclosed please find a check in the amount of \$50 as the deposit for costs called for by Section 2.4 of the EAB Regulations.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Richard L. Abbott". The signature is fluid and cursive, with a large initial "R" and "A".

Richard L. Abbott, Esq.



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL**
RICHARDSON & ROBBINS BUILDING
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

OFFICE OF THE
SECRETARY

PHONE
(302) 739-9000

Secretary's Order No: 2025-W-0006

**RE: Application of Fort DuPont Redevelopment and Preservation Corporation
for a Subaqueous Lands Permit**

Date of Issuance: January 15, 2025

Effective Date: January 15, 2025

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department," "DNREC") pursuant to 7 *Del.C.* §§6003, 6004, 6006(4), Delaware's *Subaqueous Lands Act* (7 *Del.C.* Ch. 72), and all other relevant statutory authority, the Department issues this Order, approving the revised application submitted by the Fort DuPont Redevelopment and Preservation Corporation¹ ("Applicant," "FDRPC") for a Subaqueous Lands Permit to install a rip-rap shoreline along a portion of the southern bank of the Delaware City Branch Canal, at Fort DuPont, adjacent from 260 Old Elm Avenue, Delaware City, DE ("Application") in accordance with 7 DE Admin. Code 7504 – *Regulations Governing the Use of Subaqueous Lands* ("Regulation"). The following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced Subaqueous Lands Permit application proceeding.

¹ Pursuant to 7 *Del.C.* §4733(b)(2), the Secretary of the Department of Natural Resources and Environmental Control is a member of the Board of Directors of the Corporation.

Background, Procedural History and Findings of Fact

Pursuant to 7 *Del.C.* Ch. 60, the Department's Division of Water, Wetlands and Waterways Section ("WWS") received a Subaqueous Lands Permit application from the Fort DuPont Redevelopment and Preservation Corporation. The FDRPC was established by the Delaware Legislature through House Bill 310, signed into law on July 23, 2014. Its mission is to oversee the economic development of the Fort DuPont Complex near Delaware City, while preserving the historical and environmental integrity of the complex and its surrounding areas. The FDRPC is responsible for maintaining and protecting the recreational amenities at Fort DuPont and making capital improvements to the 325-acre complex.

The Delaware City Branch Canal, running along Fort DuPont, has deteriorated over time due to erosion and is no longer serviceable. This erosion threatens the stability of the adjacent lands and leads to sediments entering the branch channel, which could obstruct boat traffic with debris such as leaning trees. Under the *America's Water Infrastructure Act* of 2018, the FDRPC is responsible for overseeing the improvements to the Delaware City Branch Canal. To address these issues, the FDRPC submitted a Subaqueous Lands Permit application in 2020 to rebuild the former rip-rap armored slope and address the deteriorating area.

In accordance with 7 *Del. C* §7207(d), the Department issued a public notice of this application, through the News Journal and Delaware State News for a period of 20 days. Subsequently, the Department received a request for a public hearing and accordingly a virtual hearing was held on January 21, 2021. During the hearing process, it was realized that there was a need to revise the application and to correct discrepancies regarding the public notice outreach to adjacent neighbors in the proposed project area. Consequently, the Applicant submitted a letter, dated July 27, 2021, requesting to withdraw the permit application. That request was granted.

On August 24, 2021, the Department's WWS received a new Subaqueous Land Permit application submitted by the FDRPC that proposes to install 2,000 linear feet of rip-rap shoreline stabilization along the Delaware City Branch Canal, between the DNREC boat ramp bulkhead and 9th Street Bridge, adjacent to Cook Street, Crawford Lane, and Draper Street. The Applicant proposes to install 5,363± cubic yards of riprap on the bank to rebuild the former rip-rap armored slop. The riprap will be placed on a geotextile fabric and is estimated to impact 0.82± acres along the Delaware City Branch Channel without modifying the existing slope, backfill, or dredging.

In accordance with 7 *Del. C* §7207(d), the Department issued a public notice of the application on October 13, 2021, through the News Journal and Delaware State News for a period of 20 days. Subsequently, the Department received a request for a public hearing, along with responses highlighting inconsistencies, incomplete information, and opposition to the application. Accordingly, a hearing was scheduled for January 12, 2022. All proper noticing requirements for the public hearing were met in accordance with 29 *Del. C* §10115. In addition, pursuant to 7 *Del. C* §7208 (b), the Department notified 28 adjoining property owners of the proposed project and the hearing, via U.S postal mail.

On January 5, 2022, the Department received a revised application from the Applicant that addressed concerns raised by the public during the notice period. Following additional communication with the applicant, the Applicant, by letter dated January 12, 2022, clarified that according to the regulatory definitions, the project is considered a “new” undertaking since the existing remnants are not serviceable. Thus, on page 4, the Application was revised from a “repair or replacement of an existing structure” to a new project, further aligning with information throughout the Application.

Additionally, while a “repair or replacement of an existing structure” requires photos, a new project does not. Therefore, to address the public concern of an incomplete application, the Department’s WSS determined that the Application is complete and meets the regulatory requirements in that aspect. Additionally, the Applicant adjusted the linear feet of rip-rap shoreline stabilization from 2,000 to 1,600 feet to ensure consistency within the Application.

The virtual public hearing was held by the Department on January 12, 2022. The Department’s staff from the Division of Water, primarily responsible for reviewing this Application, developed the hearing record (“Record”) with the relevant documents in the Department’s files. During the virtual public hearing, the Applicant’s representative presented an overview of the project that was marked into the Record, along with the January 12, 2022, letter submitted by the Applicant. There were three (3) members of the public in attendance at the hearing. At the conclusion of the virtual public hearing, the Record remained open for 15 days and comment was received through January 27, 2022.

At the request of Hearing Officer Theresa Smith, the technical experts in the Division of Water prepared a Technical Response Memorandum (“TRM”) for the benefit of the Record generated in this matter. The Department’s TRM provided responses to the comments received in this matter. The Department’s TRM, dated September 14, 2023, is discussed in greater detail below.

Hearing Officer Smith prepared a Hearing Officer's Report dated May 29, 2024 ("Report"). Ms. Smith's Report set forth the procedural history, summarized and established the record of information ("Record") relied on in the Report, and provided findings of fact, reasons, and conclusions that recommend the Department approve this revised Application, subject to the conditions set forth in the revised draft permit. The Report, along with its Appendices, is incorporated herein by reference. The Report also addressed the public comments received in this matter and concluded that the same did not warrant the Department's denial of the pending Application. The Report concluded that the draft Subaqueous Lands Permit is protective of human health and the environment while being consistent with applicable federal and state laws and regulations.

Reasons and Conclusions

Currently pending before the Department is the proposed revised Application for a Subaqueous Lands Permit to install a rip-rap shoreline along a portion of the southern bank of the Delaware City Branch Canal, at Fort DuPont, adjacent from 260 Old Elm Avenue, Delaware City, DE.

The Department's TRM provides a thorough review of the revised proposed project in light of the applicable statutes and regulations associated with the Application and the concerns addressed in the public comment received in this matter. More specifically, the Department's technical experts addressed the concerns raised regarding the revision submitted by the Applicant, as well as the historical preservation and environmental impacts of the proposed project.

Concerns were raised about the inconsistencies in the information contained throughout the Application. The application was initially identified as a repair or replacement of an existing structure on page 4; however, it was also referred to as a "new" project on Appendix 1. Additionally, the measurement for shoreline stabilization with rip-rap was listed as 2,000 linear feet on page 4, and 1,600 linear feet on Appendix 1. To that end, the Applicant submitted a revised Application, changing the Application to a new project and listing 1,600 linear feet of rip-rap shoreline stabilization. The Applicant also submitted a letter of explanation as to the revisions made. The revised Application was fully vetted at the time of the virtual hearing, and the Applicant's letter was also included in the hearing record.

The public also raised concerns regarding the preservation of Fort Dupont. Specifically, they requested a Section 106 federal review to assess historical preservation. Delaware's Division of Historic and Cultural Affairs and the U.S. Army Corps of Engineers (USACE) are responsible for reviewing the impacts related to historical preservation. While a Section 106 review is not required for state projects, USACE archeologists have initiated a Section 106 review as part of their Section 404 and Section 408 permit applications to ensure that no historical artifacts are destroyed without proper documentation. Additionally, the Division of Historic and Cultural Affairs has completed a Phase 1 evaluation to further ensure the protection of historical artifacts.

The Department also received comment regarding the proposed project's impact on the environment, safety, and welfare of the public. The Division of Water conducted a review of these impacts and determined that the riprap shoreline stabilization would not adversely affect navigability of the canal during or after installation. Without this stabilization, sediment erosion into the water body would continue, leading to the shallowing of the Branch Canal and compromising shoreline integrity that may potentially result in bank failure. Furthermore, the Applicant is proposing to conduct the project without any dredging or backfilling, thus reducing negative impacts to the environment.

The Department also assessed the impacts on shellfishing, finfishing, or other recreational activities, as well as existing or designated water uses. It was determined that the installation of the proposed riprap shoreline stabilization would not disrupt to the current uses of the Branch Canal. However, to protect anadromous fish species, the Department included a special condition in the draft permit, prohibiting project activities from taking place between March 1 through June 30.

Based on the Record developed by the Department's experts and established by the Hearing Officer's Report, I find that the Applicant is required to obtain a Subaqueous Lands Permit for the proposed project, for the reasons noted above. I also find that the Record developed in this matter supports approval of the FDRPC's Application for a Subaqueous Lands Permit, consistent with 7 Del. C. Ch. 60, *Delaware's Subaqueous Lands Act* (7 Del.C. Ch. 72) and the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504). Therefore, I conclude that the recommendations of the Hearing Officer are hereby adopted, and I direct that a Subaqueous Lands Permit be issued to the Applicant to install a rip-rap shoreline along a portion of the southern bank of the Delaware City Branch Canal, at Fort DuPont, adjacent from 260 Old Elm Avenue, Delaware City, DE.

I further direct that the following reasons and conclusions are entered:

1. The Department has jurisdiction under 7 Del. C. Ch. 60, *Delaware's Subaqueous Lands Act* (7 Del.C. Ch. 72), the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), and all other relevant statutory authority, to make a final determination of the pending Application after holding a public hearing, considering the public comments, and reviewing all information contained in the Record generated in this matter;
2. The Department provided proper public notice of the revised Application submitted by Fort DuPont Redevelopment and Preservation Corporation and of the public hearing held on January 12, 2022. Further, the Department held said hearing to consider all public comment that may be offered on the revised Application, in a manner required by the law and regulations;
3. The Department has carefully considered the factors required to be weighed in issuing the Subaqueous Lands Permit required by this pending Application, and finds that the Record supports approval of the revised Application and the issuance of the Subaqueous Lands Permit associated with the same;
4. The Department shall issue the Subaqueous Lands Permit to the Applicant, Fort DuPont Redevelopment and Preservation Corporation, to install a rip-rap shoreline along a portion of the southern bank of the Delaware City Branch Canal, at Fort DuPont, adjacent from 260 Old Elm Avenue, Delaware City, DE, consistent with the Record developed in this matter. Furthermore, said permit shall include all conditions as set forth in the Department's draft permit, to ensure that Delaware's environment and public health will be protected from harm;
5. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and
6. The Department shall serve and publish its Order on its internet site.



Lisa Borin Ogden
Secretary