

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE**

THE PHILADELPHIA REGIONAL PORT :
AUTHORITY, *Appellants*, :

v. : Appeal No. 2021-08

DEPARTMENT OF NATURAL RESOURCES :
AND ENVIRONMENTAL CONTROL, *Appellee*. :

GREENWICH TERMINALS LLC, *et al. Appellants*, :

v. :
: Appeal No. 2021-09

DEPARTMENT OF NATURAL RESOURCES :
AND ENVIRONMENTAL CONTROL, :
Appellee. :

WALTER F. CURRAN, *Appellant*, :

v. : Appeal No. 2021-10

DEPARTMENT OF NATURAL RESOURCES :
AND ENVIRONMENTAL CONTROL, :
Appellee. :

DECISION AND FINAL ORDER

Pursuant to due and proper notice of the time and place of hearing served on all parties in interest, and to the public, the above-captioned appeals came before the Environmental Appeals Board (the “Board”) on February 13, 2024. The hearing was

convened in the Auditorium of the Richardson & Robbins Building, located at 89 Kings Highway, Dover, Delaware.

Members of the Board present and constituting a quorum were: Dean Holden (Chairperson); Michael Horsey; Robert Mulrooney; and Deborah Wicks.¹ Deputy Attorney General A. Zachary Naylor represented the Board joined by the Board's administrative liaison, Tanesha Perry.

The parties were represented by counsel as follows:

- Delaware Department of Natural Resources and Environmental Control (“DNREC”): Deputy Attorneys General Devera Scott (argued) and Jameson Tweedie (argued);
- Diamond State Port Corporation (“Diamond State”): Wali Rushdan (argued) and William Burton (argued);²
- Philadelphia Regional Port Authority (“PhilaPort”): Joelle Polesky and Andrew Levine (argued);
- Greenwich Terminals, LLC, Gloucester Terminals, LLC, and GMT Realty, LLC (“Port Operators”): Thaddeus Weaver; Stephen D. Daly (argued); Shoshana Schiller, Jill Kaplan; and

¹ Board members Randall Horne, Michael Houghton, and Guy Marcozzi were recused from considering the matter during various preliminary proceedings.

² Collectively, DNREC and Diamond State are referred to as “Appellees.”

- Walter Curran (“Curran”): Michelle M. Skjoldal, David A. Rockman (argued).³

As set forth herein, the appeals are denied by the Board. Appellants have not met their burden to show that the Secretary’s decision was “not supported by the record before the Board.” 7 *Del. C.* §6008(b). The Secretary’s corresponding Order is hereby affirmed.⁴

I. THE SECRETARY’S ORDER

On September 30, 2021, DNREC, by and through its Secretary, issued an order (the “Secretary’s Order”) permitting Diamond State to use and develop subaqueous lands in the State of Delaware in connection with its plan to construct a new container port along the Delaware River at its Edgemoor property (the “Project”).

Appellants argue that the Secretary’s Order approving the permit for the Project should not have been issued because DNREC and Diamond State did not adhere to the applicable regulations in two main respects:

- that DNREC did not follow several of the factors required to be considered when approving such a permit, including

³ PhilaPort, Port Operators and Curran are referred collectively to as “Appellants.”

⁴ DNREC made a motion for a directed verdict during oral argument. The motion is moot based upon this Decision and Order.

requirements related to considering the effects of the proposed Project on environment and recreational factors and on river navigation; and

- that DNREC and Diamond State violated a procedural requirement to maintain the permit application for the Project in “a current state.”⁵

Appellees argue that all controlling statutes and regulations were followed procedurally and substantively in connection with the permit in question.

II. PROCEDURAL HISTORY OF THESE APPEALS

The Board issued two Orders in response to preliminary motions in these consolidated appeals. The issues resolved by those Orders resulted in some narrowing of the appeals.

- The Board’s October 21, 2022 Order dismissed Curran’s Amended Statement of Appeal because its challenge to the Water Quality Certificate was not timely, dismissed the appeals of certain individuals who failed to establish standing to pursue an appeal, and denied appellant’s motion for summary judgment.

⁵ This argument was abandoned by Appellants. None of them addressed it at oral argument. Nevertheless, the Board addresses the argument, briefly, *infra*.

- The Board’s December 12, 2022 Order granted motions *in limine* to exclude testimony from the Secretary of DNREC or the Hearing Officer and to exclude testimony regarding the Water Quality Certificate. The Board denied all other motions *in limine* to exclude evidence in this appeal.⁶

III. EVIDENCE IN THE RECORD BEFORE THE BOARD

The Secretary’s Order sets forth the evidentiary record upon which the Secretary’s Order was based. The Board does not restate the Secretary’s Order in its entirety but draws upon the portions most relevant to the consideration of the issues raised in these consolidated appeals.⁷

The Secretary’s Order describes the property in question that will be rehabilitated by this Project. Most long-time Delawareans will know the property in question as DuPont’s former Edgemoor facility. It is located along the banks of the Delaware River between Fox Point State Park to the north and industrial operations to the south. The location has been historically operated under the

⁶ In addition, the Board on April 25, 2022, dismissed a business organization as an appellant in EAB Appeal 2021-07 because the entity was not represented by legal counsel, which is not permitted by Delaware law. *Tigani v. Director*, 2020 WL 5237278, *4 (Del. Super. Sept 2, 2020) citing *Transpolymer Indus., Inc. v. Chapel Main Corp.*, 1990 WL 168276 (Del. Sept. 18, 1990).

⁷ The Secretary’s Order, like this Decision and Order, incorporates the report of the hearing officer assigned and, in turn, the Technical Response Memorandum (“TRM”), which responded to technical matters raised during the public comment period.

Delaware Hazardous Waste Program. The operating facility that was previously located on the site was demolished in 2017, before Diamond State acquired it.

The Project will include the construction of a commercial wharf and the deepening of the Delaware River to accommodate the transit of the larger class of cargo ships that will, because of the Project, enjoy access to the expanded port facilities in the State of Delaware.

The Project represents the culmination of years of coordinated efforts between and amongst DNREC and various other State and federal stakeholder agencies, each of whom have specialized responsibilities within the purview of the Project.

A well-attended public hearing (including the representation of Appellants' interests) was held on September 29, 2020. Because of the scope of the Project and the level of public interest and scrutiny, DNREC held open the period for public comment beyond that normally required. Such was the level of public interest that the hearing officer invited the preparation of the TRM to assist with the consideration of the various public concerns.⁸

In all, 12 primary areas of public concern were expressly addressed by the hearing officer and the TRM. Of these 12, 9 considered matters related to

⁸ The hearing officer found the TRM to be "comprehensive" in this regard. This Board agrees with that conclusion.

environmental, recreational, and navigational concerns – each of which Appellants now argue were “not considered” by the Secretary.

The Secretary’s Order also cites extensive public comment in favor of the Project. *See, e.g., 7 Del. Admin Code §7504-4.6.1-4.6.2* (requiring consideration of the relative value to the State of the project); *7 Del. Admin Code §7504-Purposes*.

The Secretary’s Order goes on to discuss the 3-phase environmental mitigation plan to be created to address concerns related to such matters. DNREC has used the Project as leverage to: (1) reclaim a toxic waste site; (2) expand Fox Point State Park; and (3) improve the Environmental DNA Fisheries Monitoring Program.

The Secretary’s Order concludes as follows:

The [r]ecord developed in this matter indicates that [DNREC’s] experts ... have conducted a comprehensive review of the information provided by [Diamond State], considered all statutes and regulations that govern projects such as [Diamond State’s] above proposed activities, reviewed the [m]itigation [p]lan as submitted to DNREC by [Diamond State], and determined that the [r]ecord provides adequate justification and detail to support the proposed [P]roject. Additionally, as noted in the TRM, DNREC obtained independent confirmation from external agencies ... where needed to thoroughly evaluate the public’s concerns in areas beyond [DNREC’s] standard regulatory purview. As a result of this comprehensive review of the [r]ecord developed in this matter, [DNREC’s] experts have recommended issuance of the [permit to Diamond State].

The Board has been liberal throughout these consolidated appeals regarding the application of its evidentiary rules. *See* December 12, 2022 Board Order. *7 Del.*

Admin. Code §105-5.3 limits the opportunity for parties who were not accused violators or permit applicants from expanding the record. Yet, *7 Del. C.* §6008(b) and *7 Del. Admin. Code* §105-5.4 provide the Board may consider any “competent evidence” submitted by the parties during the appeal. “Strict rules of evidence do not apply to the Board.” *7 Del. Admin. Code* §105-5.4. All evidence having probative value may be accepted. The statutory language grants to the Board broad discretionary power regarding the record it is to consider. *Tulou v. Raytheon Serv. Co.*, 659 A.2d 796, 803 (Del. Super. Ct. 1995), *rev’d on other grounds by Delaware Solid Waste Authority v. DNREC*, 250 A.3d 94 (Del. 2021).

Ultimately, the Board, in this case, permitted Appellants to supplement the record for the purpose of considering these consolidated appeals. Rather than rely on live witnesses, the parties submitted briefs and witness affidavits in support of their appeals. On February 13, 2024, counsel for each of the Appellants and Appellees presented their oral arguments on their submissions to the eligible members of the Board.

Board concludes the record before the Secretary was complete, and nothing the Board has received from Appellants purporting to supplement the record before the Secretary supports Appellants’ proposition that the Secretary’s Order was unsupported by the evidence before him, nor does the evidence in the record before

the Board rebut any of the Secretary’s conclusions in any way that would prompt this Board to reverse or remand the Secretary’s Order.

IV. THE STANDARD OF REVIEW

The Board was created by the Delaware General Assembly in 1973. *7 Del. C. §6007*. It operates under the Environmental Appeals Board Regulations. *7 Del. Admin. Code §105*.

The Board is a quasi-judicial review board that exists to hear appeals of decisions of the Secretary. *7 Del. C. §6007(b)*. The Board conducts public hearing for all appeals. *Id.* at §6008(a). Deliberations of the Board may be conducted in executive session. *Id.* The Board may affirm, reverse, or remand with instructions any appeal of a case decision of the Secretary. *Id.* at §6008(b).

In 2021, the Delaware Supreme Court issued an *en banc* opinion setting forth this Board’s standard of review based upon the plain language of *7 Del. C. §6008*. Pursuant to *Delaware Solid Waste Authority v. DNREC*, the burden in the appeal rests upon Appellants to show the Secretary’s decision is not supported by the evidence before this Board. 250 A.3d 94, at 115 (Del. 2021). The record before the Board consists of the entire record before the Secretary and any other “competent evidence” the parties produce during appeal. *Id.*

The Board must defer to the Secretary's decision unless the record before the Board does not support that decision. *Id.*; *Delmarsh, LLC v. Environmental Appeals Board*, 277 A.3d 281 (Del. 2022).

Assuming DNREC followed its own regulations, the Board will give the processes used and conclusions reached by the Secretary deference and will not consider other possible interpretations of the matters before the Secretary. *See, e.g., Ramsey v. DNREC*, 1997 WL 358312, at *4 (Del. Super. Mar. 20, 1997) *aff'd* 700 A.2d 736 (Del. 1997).

It is not the job of this Board to reach its own substantive conclusions regarding the permit application or to substitute its judgment for that of the Secretary.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Prior to the February 13, 2024 hearing and in accordance with the Board's Regulations, DNREC provided the Board the chronology for each of the consolidated appeals consisting of the record before the Secretary. In deciding this appeal, in addition to considering the chronologies, the Board considered the written submissions of the Parties. These written submissions include briefs, witness affidavits, documentary exhibits, and the presentations made during oral arguments by the parties. The Board also considered the oral arguments presented by the parties at the February 13, 2024 hearing. Following oral argument, the Board entered

executive session as permitted by 7 Del. C. §6008(a) to receive legal advice and deliberate.

After deliberation and careful review of the parties' respective arguments and evidence, the Board, for the following reasons and by a vote of 4 to 0, affirms the Secretary's Order.

The Board concludes as a matter of law that the Project is governed by the Subaqueous Lands Act and related regulations. The Board finds as a matter of fact the Secretary thoroughly vetted the Project pursuant to the governing law as demonstrated by the record before the Secretary and the record as supplemented before the Board. As such, the Board declines to substitute its or Appellants' witnesses' alternate judgments for that of the Secretary's based on the record evidence.

On an appeal to the Board, Appellants bear the burden of proving that the Secretary's Order is not supported by the evidence on the record before the Board. When making factual determinations, the Board takes account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. *Delmarsh*, 277 A.3d at 287. Substantial weight is granted to an agency's construction of its own rules, such that the agency's construction will only be reversed if it is "clearly wrong." *See, Div. of Soc. Servs. v.*

Burns, 438 A.2d 1227, 1229 (Del. 1981). DNREC’s determination is not unreasonable nor is it clearly wrong.

The Board finds from the evidence presented that Appellant has failed to carry its burden to demonstrate the Secretary’s decision is not supported by the evidence on the record before the Board.

A. The Controlling Law Empowers DNREC’s Secretary to Protect the Public Interest

Title 7, Chapter 72 of the Delaware Code (the Subaqueous Land Act) applies to the development of subaqueous lands in the State of Delaware. The Chapter empowers the Secretary of DNREC to deal with or dispose of interests in public subaqueous lands and to place reasonable limits on the use and development of private subaqueous lands. *7 Del. C. §7201*. The Chapter protects the public interest by creating procedures for granting interests in public subaqueous lands and for issuing permits for uses of or changes in private subaqueous lands. *Id.*

When an applicant seeks a permit to engage in acts controlled by Chapter 72, its application must be filed with the Secretary “stating in detail the type of lease, permit or grant desired, showing the location of the area and containing specifications for any proposed construction.” *Id.* at §7207(a). Upon receipt of an application in “proper form,” the Secretary is required to give notice of its receipt, a description, and the opportunity for a public hearing. *Id.* at §7207(d)(1-3).

To guide review of applications under Title 7, Ch. 72, DNREC's Secretary has promulgated a set of regulations to "effectuate the policy and purposes of th[e] chapter." *Id.* at §7212. These regulations are set forth at 7 *Del. Admin. Code* §7504, Regulations Governing the Use of Subaqueous Lands.

This appeal concerns the application and interpretation of these regulations. Appellants' challenges to the Order focus on the Secretary's application of 7 *Del. Admin. Code* §7504-4.0 in several respects.

Regulation 4.0 includes sets of criteria that DNREC must consider when making decisions on subaqueous land permit applications.

Essentially, section 4.0 of the regulation provides DNREC with a series of non-exclusive operational checklists applicable in various permitting scenarios. How DNREC goes about fulfilling those checklist requirements will necessarily depend on the nature of the application. However, those subsections containing the imperative language "shall" must be followed for the Secretary's Order to be validly issued.

DNREC by and through its Secretary has met each of these requirements. They are discussed individually next.

1. The Application of Regulation Subsection 4.6

Subsection 4.6⁹ states that DNREC “shall consider the public interest” in proposed activities affecting subaqueous lands, including by the following provisions:

- 4.6.3 The potential effect on the public with respect to commerce, navigation, recreation, aesthetic enjoyment, natural resources, and other uses of the subaqueous lands.
- 4.6.4 The extent to which any disruption of the public land use of such lands is temporary or permanent.
- 4.6.6 The extent to which the applicant’s primary purpose and objectives can be realized by alternatives, *i.e.*, minimize the scope or extent of an activity or project and its adverse impact.

The subsection directs that the Secretary “shall consider” the listed factors. The Secretary considered each of the required topics as demonstrated by the Secretary’s Order, which incorporates the hearing officer’s report and the TRM.

For example, upon a review of the hearing officer’s report, the following sections directly address the necessary consideration given related to recreation, the environment, or navigation:

- Section III.2 – addressing concerns related to the subject that the “proposed shoaling fans pose a risk to aquatic life and water quality;”

⁹ These are far from the only factors DNREC is directed to consider. No challenge is raised other than to the subsections discussed herein.

- Section III.3 – addressing concerns related to the subject that the “proposed dredging activities will impact water quality;”
- Section III.4 - addressing concerns related to the subject that the “activities associated with the [P]roject will result in increased air emissions;”
- Section III.5 - addressing concerns related to the subject that the “proposed [P]roject represents a threat to public health, especially in Environmental Justice communities;”
- Section III.7 – addressing concerns related to the subject that the “proposed [P]roject is in violation of Delaware House Joint Resolution Ten;”
- Section III.9 – addressing concerns related to the subject that the “proposed [P]roject will result in a loss of recreational fishing and crabbing;”
- Section III.10 - addressing concerns related to the subject that there are “concerns regarding sediment and contaminants such as PCBs;”
- Section III.11 - addressing concerns related to the subject that “a hydrogeologic site investigation is needed;” and

- Section III.12 - addressing concerns related to the subject that “Incomplete/Insufficient navigational studies, particularly for emergency scenarios.”

The Board hastens to add that the Secretary considered, as he was required to do by the regulation, these factors within the scope of the “public interest” in the whole Project, which includes a massive economic opportunity for the people of Delaware.

Regarding subsection 4.6.3, the Secretary’s Order is clear on its face as having considered navigational factors by conferring and coordinating with the appropriate agencies responsible (*e.g.*, Delaware River Pilots and the United States Coast Guard). To suggest that DNREC would be expected to re-do or override the work of these agencies that are responsible, in fact, for the safe navigational operations upon the Delaware River is unwarranted by Appellants.

Regarding subsections 4.6.4 and 4.6.6, the Project includes a 3-phase environmental mitigation plan, demonstrating the Secretary’s careful adherence to the regulatory requirements.

2. The Application of Regulation Subsection 4.7

Subsection 4.7 dictates that DNREC “shall consider the impact on the environment,” including by the following provisions:

- 4.7.1.2 Any effect on shellfishing, finfishing, or other recreational activities, and existing or designated water uses.

- 4.7.1.3 Any harm to aquatic or tidal vegetation, benthic organisms or other flora and fauna and their habitats.
- 4.7.1.5 Any impairment of air quality, either temporarily or permanently, including noise, odors, and hazardous chemicals.
- 4.7.4 The Department shall consider whether any significant impacts or potential harm could be offset or mitigated by appropriate actions or changes to the proposed activity by the applicant. If so, the required mitigating measures may be included as conditions of the permit or lease.

The record before the Secretary indicates that the environmental factors identified by Appellants were indeed “considered” and accounted for as part of DNREC’s process.

DNREC and Diamond State considered each issue raised in the appeals regarding environmental factors, cited in section V.A.1, *supra*. They were extensively analyzed and thoroughly vetted by experts in the field and were subjected to countless public reviews and comments. The Project is the culmination of significant and exhaustive consideration, expert analysis, negotiations, discussions, meetings, public comments, and administrative critic and review that spanned over half a decade. The findings that serve the basis for the Secretary’s Order meet the minimal standard that “a reasonable mind might accept [such facts] as adequate to support [the] conclusion[s].” *Smolka v. DaimlerChrysler*, 2004 WL 3958064, at *2 (Del. Super. July 13, 2004) (citation omitted). As discussed

previously, the Project also includes a 3-phase environmental mitigation plan adopted because DNREC “considered” the required factors.

Although Appellants may believe a different result is warranted based on studies conducted by their own experts, this Board declines to replace the Secretary’s Order, which is well-supported by the evidentiary record, with its own judgment or judgment of expert witnesses proffered by Appellants.

3. The Application of Regulation Subsection 4.8

Appellant PhilaPort presses a challenge to the Secretary’s Order based upon the definition of the word “structure” as it is used in *7 Del. Admin. Code §7504-4.8*. Appellant PhilaPort suggests that DNREC did not follow subsection 4.8.4 (“structures shall not interfere with navigation, public or other rights”).

The argument advanced by PhilaPort, that the required turning basin (*i.e.*, the space in the open water that cargo ships entering and exiting the port will use to make turns) for the Edgemoor location is a “structure” has no reasonable basis in law or fact.

A “structure” is defined. *7 Del. Admin. Code §7504-1.0*.¹⁰

¹⁰ Pursuant to Regulation 1.0, the term structure “includes, but is not limited to, any boat ramp, slip, building, breakwater, bridge, bulkhead, culvert, dam, derrick, dock, gabion, groin, jetty, residence, launching facility, marina, mooring facility, pier, seawall, walkway, or wharf.” It does not include a “turning basin.”

A “turning basin” is included within a different category of non-structures. 7

Del. Admin. Code §7504-2.3.3.1.4:

Excavation, creation, or alteration of any channel, lagoon, turning basin, pond, embayment, or other navigable waterway on private subaqueous lands which will make connection with public subaqueous lands.

PhilaPort’s argument under regulation subsection 4.8 is rejected. A “turning basin” is not a “structure.” The Secretary would have no reason to consider this subsection in connection with the proposed turning basin.¹¹

4. The Application of Regulation Subsection 4.11

Further, Appellants argue that DNREC has not followed Subsection 4.11 pertaining to activities involving dredging, filing, excavating, or extracting materials. The subsection provides that “projects shall be designed to meet the following objectives:”

- 4.11.1.1 Conform to the pertinent objectives, classification system, environmental considerations, and criteria of the "Inland Bays Dredging Study, Volumes I and II," dated April 1986, as adopted by the Department on July 18, 1986.
- 4.11.1.2 Maintain the navigability of channels.
- 4.11.1.3 Maintain or improve the environmental quality of the State's water resources, subaqueous lands and wetlands.

¹¹ Nevertheless, the Secretary did give consideration even to this. The hearing officer’s report indicates specific consideration given to the factors contemplated by subsection 4.8.4.

Subsection 4.11 pertains to permits involving dredging operations. Here, the Project anticipates the need for future maintenance dredging. However, the Secretary's Order pertains to the construction Project, not to future maintenance dredging operations, which may require future permitting action by DNREC. At this stage, the Secretary would be premature to opine regarding dredging.

In any event, the evidentiary record demonstrates that concerns for navigability of the channel for through-traffic was a serious consideration for DNREC, which coordinated its consideration of the matter with the other relevant agencies. No evidence before the Board indicates that more or different procedures were required.

5. The Application of Regulation Subsection 3.1.3

In connection with Appellants' earlier motion for summary judgment, which was denied, the Board found as a matter of fact that Diamond State's removal of the shoaling fans from the Project was not substantial enough to require the permit process to restart. Oct. 21, 2022 Board Order at 16. The Board found instead that the rule of reason as well as a reading of the whole regulations led to the conclusion that some back and forth on the specifics of the Project is both normal and beneficial. *Id.* The Board further found that it has been the consistent practice of DNREC not to require resubmission of applications when the changes reduce the environmental impact of the Project as a whole. *Id. citing McFaul, Sr. v. Secretary of DNREC et.*

al., EAB Appeal No. 2003-01 (Oct. 3, 2003); *Lampner v. DNREC*, EAB Appeal No. 2018-02 (Oct. 2, 2019).

During oral argument, Appellants did not address their argument that under 7 *Del. C.* §7200-3.1.3 that the application was not properly maintained “in a current state.” The Board’s view of this issue remains unchanged.

VI. CONCLUSION

Upon consideration of the facts and law, the Board concluded that Appellants did not carry their burden to demonstrate that the Secretary’s Order is not supported by the evidence in the record. Upon returning from executive session, Board member Mulrooney so moved, which motion was seconded by Board member Horsey. The Board voted unanimously, and the motion carried.

IT IS SO ORDERED this 10th day of May, 2024.

/s/ Dean Holden (e-singed pursuant to 6 *Del. C.* §12A-107)
Dean Holden, Chairperson

The following 3 Board members concur in this Decision and Final Order:

Date: _____

Robert Mulrooney, Board Member

Date: May 10, 2024

/s/ Michael Horsey (e-singed pursuant to 6 *Del. C.* §12A-107)
Michael Horsey, Board Member

Date: May 4, 2024

/s/ Deborah D. Wicks (e-singed pursuant to 6 *Del. C.* §12A-107)
Deborah Wicks, Board Member

al., EAB Appeal No. 2003-01 (Oct. 3, 2003); *Lampner v. DNREC*, EAB Appeal No. 2018-02 (Oct. 2, 2019).

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VI. CONCLUSION

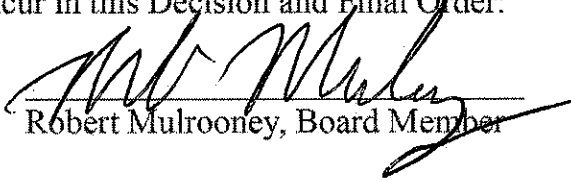
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IT IS SO ORDERED this ____ day of May, 2024.

Dean Holden, Chairperson

The following 3 Board members concur in this Decision and Final Order:

Date: 5/6/2024



Robert Mulrooney, Board Member

Date: _____

Michael Horsey, Board Member

Date: _____

Deborah Wicks, Board Member