

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

THE PHILADELPHIA REGIONAL PORT
AUTHORITY, *Appellants*,

v.

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

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: Appeal No. 2021-08
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GREENWICH TERMINALS LLC, *et al. Appellants*,

v.

DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL,
Appellee.

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: Appeal No. 2021-09
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WALTER F. CURRAN, *Appellant*,

v.

DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL,
Appellee.

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: Appeal No. 2021-10
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DECISION AND ORDER UPON REMAND

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PREAMBLE

The Environmental Appeals Board (the “Board”) issued a Final Decision and Order on May 10, 2024. After appeal by the Port Operators (defined herein) and Mr. Walter F. Curran (“Curran”), the Delaware Superior Court issued a Memorandum Opinion and Order directing the Board to clarify the standard of review it applied and provide a “written evaluation of the evidence and reasoning for its rulings” with respect to applicable regulations 4.6, 4.7, 4.11, and 3.1.3.¹

Appellant PhilaPort did not appeal to the Superior Court. As such, the issues specifically raised by PhilaPort concerning applicable regulation 4.8, and ruled upon in the Board’s May 10, 2024 Final Decision and Order are repeated herein, but not changed.²

As set forth below, the appeals are rejected 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.”³ The Secretary’s corresponding Order is hereby affirmed.⁴

1 *Greenwich Terminals, et. al. v. DNREC, et. al.*, 2025 WL 1098975 (Del. Super., April 14, 2025) (the “Remand Opinion”).

2 The Remand Opinion upheld the Board’s order consolidating these appeals (the “Appeals” or the “Consolidated Appeals”). 2025 WL 1098975 at *14-15.

3 7 *Del. C.* §6008(b).

4 DNREC made a motion for a directed verdict during oral argument. The motion was mooted by the Board’s ruling.

INTRODUCTION

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 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.⁵ 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")⁶: Wali

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

6 The Delaware General Assembly has declared the following purpose and policy for its creation of Diamond State:

- (1) That the continued economic viability of the Port of Wilmington and its related facilities, and improvements to these facilities and to the commerce involving these facilities, benefits the entire State;
- (2) That it is in the best interest of the State to create a corporate entity which shall assume, by agreement, operation of the Port of Wilmington and its related facilities and to assume certain obligations of the City of Wilmington;

Rushdan (argued) and William Burton (argued);⁷

- 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
- Walter Curran (“Curran”): Michelle M. Skjoldal, David A. Rockman (argued).⁸

(3) That, in that regard, the General Assembly shall, in its discretion, appropriate an amount to fund the initial capital and operating responsibilities of such corporation and shall consider the future appropriations as appropriate

(4) That this Corporation is intended to have all power and authority necessary to be exercised in accordance with the form of governance expressed herein, to operate the Port of Wilmington and related facilities so as to maintain and expand the business of these facilities.

29 *Del. C.* §8780.

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

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

I. THE SECRETARY'S ORDER AND BASIS OF APPEALS

On September 30, 2021, DNREC, by and through its Secretary, issued an Order, Number 2021-W-0034 (the “Secretary’s Order”), permitting Diamond State, a public corporation with duties that include management of the Port of Wilmington, 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 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.”⁹

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

⁹ This argument was abandoned by Appellants. None of them addressed it at oral argument. Nevertheless, the Board addresses the argument briefly, *infra*.

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 Appellants' motions for summary judgment.
- 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.¹⁰

¹⁰ 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).

III. EVIDENCE IN THE RECORD BEFORE THE BOARD

A. Summary of the Secretary's Order and Supporting Documents

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.¹¹

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. Edgemoor 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 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.

¹¹ The Secretary's Order incorporates the Recommendation of the Hearing Officer assigned and, in turn, the Technical Response Memorandum ("TRM"), which responded to technical matters raised during the public comment period.

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.¹²

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 environmental, recreational, and navigational concerns.

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;”
- Section III.3 – addressing concerns related to the subject that the “proposed dredging activities will impact water quality;”

12 The Hearing Officer found the TRM to be “comprehensive” in this regard. This Board agrees with that conclusion.

- 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 Secretary’s Order also cites extensive public comment in favor of the Project.¹³

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

13 See, e.g., 7 Del. Admin Code §7504-4.6.1-4.6.2 (requiring consideration of the relative value to the State and the public of the project); 7 Del. Admin Code §7504-Purposes.

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].

B. Summary of Other Evidence Before the Board

The Board has been liberal throughout these Consolidated Appeals regarding the application of its evidentiary rules.¹⁴ 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."¹⁵ All

14 See December 12, 2022 Board Order.

15 7 *Del. Admin. Code* §105-5.4.

evidence having probative value may be accepted. The statutory language grants to the Board broad discretionary power regarding the record it is to consider.¹⁶

Ultimately, the Board, in this case, permitted Appellants and Appellees to supplement the record for the purpose of considering these consolidated appeals. Rather than rely on live witnesses, the parties chose to submit briefs, oral argument, demonstrative PowerPoint presentations, and witness affidavits and/or declarations in support or in defense of the Appeals.

On February 13, 2024, counsel for each of the Appellants and Appellees presented their oral arguments to the members of the Board.

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 these Appeals, in addition to considering the chronology, the Board considered:

- Voluminous written briefs submitted by every party to the Appeals;
- Oral argument from every party including demonstrative PowerPoint presentations submitted by each party to the Appeals; and
- Witness affidavits and declarations, as follow:

¹⁶ *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).

○ *John G. Cargill*

- Presented on behalf of DNREC. He works as a hydrologist for the Division of Watershed Stewardship within DNREC.
- His declaration provides a description and timeline of DNREC's environmental analyses in related to the Project.

○ *Steven M. Smailor*

- Presented on behalf of DNREC. He is the director of the Division of Water within DNREC.
- He provides testimony about how the permitting process works, generally. He also provides a timeline of specific events relevant to the timeline in this planning process.

○ *Laura Mensch*

- Presented on behalf of DNREC. She worked as principal planner with Delaware Coastal Programs within DNREC's Division of Climate, Coastal and Energy during the relevant times.
- She provides a timeline of events relevant to the permit. She provides specific testimony related to DNREC's coordination of permitting activities with other agencies at the federal and local level. She provides detail on coordination with Federal authorities when planning and permitting projects such as the one at issue.

○ *David Small*

- Presented on behalf of Diamond State. He works for Verdantas LLC ("Verdantas") (f/k/a Duffield Associates ("Duffield")) providing consulting services related to engineering, planning, environmental, etc. He was formerly Secretary of DNREC.

- He provides testimony regarding how the permitting process typically works and provides a list of materials that are required to be submitted with a subaqueous land permit application.
- He provides testimony about the difference between a new construction application and one for maintenance dredging.

○ *Brian J. Devine*

- Presented on behalf Diamond State. He is a consultant with Verdantas (f/k/a Duffield).
- He provides testimony about navigation in the Delaware River channel.
- He provides testimony about market changes in the shipping industry and Delaware's plans to participate in the changing seascape.
- He testifies about events specific to the application process for this project.

○ *Peter J. Innskeep*

- Presented on behalf of the Port Operators. He is employed as manager of operations for the appellant.
- He provides testimony regarding potential operational impacts of river delays and traffic on upriver port operations.

○ *David Whene*

- Presented on behalf of the Port Operators. He is employed as manager of operations for the appellant.
- He provides testimony regarding potential operational impacts of river delays and traffic on upriver port operations.

○ *Craig Jones*

- Presented on behalf of Port Operators and Curran. He is employed as an environmental consultant.
- He provides expert testimony regarding the removal of the shoaling fans from the project design and the resulting need for maintenance dredging.

○ *Jerzy J. Kichner*

- Presented on behalf of Port Operators. He is a retired Coast Guard Captain.
- He offers expert testimony on the navigational impacts of the project on boat traffic in the Delaware River and the potential shortcomings of the Full Mission Ship Simulation for Edgemoor Navigation Feasibility Study (“MITGAS”) to address those issues.

○ *Walter Curran*

- Mr. Curran testifies on behalf of his own appeal.
- He testifies regarding his uses of the Delaware River for recreational purposes and testifies that the project will have impacts on his enjoyment of recreational fishing and environmental quality.

○ *Damian V. Preziosi*

- Presented on behalf of Curran. He offers expert testimony on environmental risk assessment.
- His testimony concludes that Diamond State’s environmental assessments, approved by DNREC are flawed. He criticizes appellees for considering too small an area in assessing impact and not sufficiently providing for mitigation.

- *Theodore D. Tomasi*
 - Presented on behalf of Curran. He offers expert testimony on the sufficiency of the mitigation plan contemplated by Diamond State.
 - He focuses on providing an analytical framework by which to assess environmental impacts and create offsetting mitigation plans.
- *Charles Harman*
 - Presented on behalf of Philadelphia Port.
 - He provides testimony that MITGAS is incomplete regarding navigation in the Delaware River, in particular because of the ship-turning basin necessary to accommodate the project.

IV. THE STANDARD OF REVIEW

The Board was created by the Delaware General Assembly in 1973.¹⁷ The Board operates under the Environmental Appeals Board Regulations.¹⁸

The Board is a quasi-judicial review board that exists to hear appeals of decisions of the Secretary.¹⁹ The Board conducts public hearing for all appeals.²⁰ Deliberations of the Board may be conducted in executive session.²¹ The Board may affirm, reverse, or remand with instructions any appeal of a case decision of the Secretary.²²

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*,²³ the burden in the appeal rests upon Appellants to show the Secretary's decision is not supported by the

17 7 *Del. C.* §6007.

18 7 *Del. Admin. Code* §105.

19 7 *Del. C.* §6007(b).

20 *Id.* at §6008(a).

21 *Id.*

22 *Id.* at §6008(b).

23 250 A.3d 94, at 115 (Del. 2021).

evidence before this Board. The record before the Board consists of the entire record before the Secretary and any other “competent evidence” the parties produce during appeal.²⁴

The controlling statute provides a “clear instruction that the Board must defer to the Secretary’s decision unless the record before the Board – which can include evidence not before the Secretary – does not support that decision.”²⁵ “[T]he Board *must not overturn the Secretary’s decision unless the evidence before the Board does not support that decision.*”²⁶

The Supreme Court’s subsequent decision in *Delmarsh* holds that 7 Del. C. §6008(b) is a clear instruction that the Board must defer to the Secretary’s decision unless the record before the Board, which might include evidence not previously before the Secretary does not support the Secretary’s decision.²⁷

24 *Id.*

25 *Id.*

26 *Id.* (emphasis added).

27 *Delmarsh LLC v. EAB*, 277 A.3d 281, *292 (Del. 2022) (citing *Delaware Solid Waste Authority v. DNREC*). Absent an abuse of discretion, the agency decision must be affirmed. *Id.* citing *Public Water Supply Company v. DiPasquale*, 735 A.2d 381 (Del. 1999).

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following oral argument, the Board entered executive session as permitted by 7 Del. C. §6008(a) to deliberate and to receive legal advice.

After deliberation and careful review of the parties' respective arguments and evidence, the Board, because of the reasons that follow, 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 (as articulated in detail below) that 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.

It is the Board's conclusion that the evidence in the record before the Board supports the Secretary's Order. The Board finds from the evidence presented that Appellants have failed to carry their burden to demonstrate that the Secretary's decision is not supported by the evidence in the record before the Board. As such, the Board does not find that evidence submitted by the Appellants merits overturning the Secretary's Order.

A. Findings of Fact Generally Applicable to All Issues Presented

The Board makes the following findings of fact which are applicable to all aspects of the Consolidated Appeals.

1. The Economic Opportunities for the State of Delaware Created by the Project are Substantial and Not Challenged in the Record.

The Project's projected economic benefits for the State are established by the evidence before the Board and are not rebutted by any evidence presented by the Appellants.

Beginning in 2016, the Panama Canal began a project of expansion to enable a new class and size of ship to pass through it.²⁸ The larger ships -- called "New Panamax" -- are one and a half times the size of the previous class and can carry twice the cargo.²⁹ Currently, Delaware has no shipping cargo port facility capable of hosting the New Panamax class of ships due to limitations of the berthing depths at current facilities.³⁰ To take advantage of the economic opportunities presented by increased trade via New Panamax ships, Diamond State needed, on behalf of the citizens of Delaware and as required by its charter established by the Delaware General Assembly, to devise a plan to expand the Port of Wilmington's accessibility.³¹ Initial consideration was given to the possibility of expansion at the

28 The Affidavit of Brian J. Devine, Professional Engineer. (Devine Aff. ¶18). Mr. Devine provided engineering consulting services to Diamond State through his employment with Duffield Associates, which later became part of Verdantas LLC.

29 *Id.*

30 *Id.* at ¶¶20-21.

31 *Id.* at ¶¶19, 22.

Port of Wilmington’s existing facilities at the mouth of the Christina River, but that was deemed economically unfeasible due to the disruptions it would have caused with ongoing operations and because of environmental impacts that would have resulted should that area have been developed for the Project’s ultimate goals.³²

Diamond State developed a “Strategic Master Plan” to consider alternatives and scenarios to address the need for expansion of cargo port facilities in the State of Delaware.³³ In 2016, Diamond State held an “open house,” attended by over 100 individuals, during which Diamond State presented the various scenarios it was considering for port expansion, including economic and environmental impacts of the alternatives.³⁴ The open house generated 14 public comments which Diamond State incorporated into its evaluation process.³⁵

Ultimately, Diamond State selected the Edgemoor site as the best alternative.³⁶ The Board finds that the key factors supporting the selection of Edgemoor location were: it would reuse an existing, dilapidated industrial site; it

32 *Id.* at ¶¶23-26. This consideration included the impact to wetlands that would have been potentially destroyed from such an endeavor.

33 *Id.* at ¶¶27-32.

34 *Id.* at ¶¶33-36.

35 *Id.* at ¶¶37-38.

36 *Id.* at ¶¶39-40.

would avoid impact on wetlands that would have occurred at other potential locations; it would allow creation of a facility capable of accepting the New Panamax class ships; and the construction would result in removal of polluted sediment in the area from the site's previous use.³⁷ The Project was projected to create directly or indirectly 3,000 Delaware jobs.³⁸ The United States Army Corps of Engineers generated an economic model indicating benefits in the 10's of millions of dollars for the local Delaware economy and benefits in the 100's of millions of dollars for the national economy.³⁹

2. DNREC's Permitting Process, By and Through the Secretary, Followed Usual Protocols and Provided Extra Opportunity for Public Comment, Including from Appellants.

The process employed by DNREC to evaluate the subaqueous lands permit submitted by Diamond State followed the applicable code and regulations and provided for greater than usual opportunity for public comment, given the scope of the Project.

As a general matter, DNREC evaluates permit applications by engaging with subject-matter experts to assess whether the application meets requirements

³⁷ *Id.* at ¶39.

³⁸ *Id.* at ¶87.

³⁹ *Id.* at ¶89.

established by federal and state law.⁴⁰ DNREC, as an agency, does not advocate for outcomes, rather the Secretary makes a final decision based on the accumulation of evidence drawn from subject-matter experts, information submitted by the applicant, comments from the public, and other information useful for rendering a decision.⁴¹ DNREC uses standard forms for permit applications including any appendices necessary for the particular type of permit sought.⁴² After submission of a permit application, DNREC will assess whether the application is administratively complete and publishes public notice of the application.⁴³ DNREC may then hold a public information session or hearing and gather public comment.⁴⁴ Those public comments are reviewed by subject-matter experts to generate a technical response memorandum for the Hearing Officer to incorporate into that Hearing Officer's

40 Affidavit of David Small ("Small Aff." at ¶8). Mr. Small provided consulting services to Diamond State through his employment with Duffield Associates, which later became part of Verdantas LLC. Prior to his employment with Duffield, Mr. Small spent nearly 3 decades with DNREC, including as Secretary from 2014-2017 and as such provides valuable insight on DNREC's standard operating procedures as well as the process employed in this Project. (*See* Small Aff. ¶6).

41 *Id.* at ¶9.

42 *Id.* at ¶¶11-15 (describing the permitting process, generally, and the specific requirements for applications for a subaqueous land permit, specifically).

43 *Id.* at ¶11.

44 *Id.*

Report to the Secretary.⁴⁵ The Secretary then makes a final decision regarding the permit application.⁴⁶

DNREC began its evaluation of Diamond State's application for a subaqueous lands permit in March 2020 and the application was deemed administratively complete as of June 20, 2020.⁴⁷ DNREC gave notice (on August 23, 2020) and held a public hearing on the Project application on September 29, 2020.⁴⁸ The initial period of public comment was from August 23, 2020 through November 1, 2020, a total of 70 days, 50 days more than required.⁴⁹ The public comment period was then extended for an additional 31 days through December 1, 2020.⁵⁰

Notably, each of the Appellants participated in the public comment period. Appellants, the Port Operators, submitted a letter from counsel objecting to three aspects of the Project as then-proposed: the unprecedented use of shoaling fans to

45 *Id.*

46 *Id.*

47 Declaration of Steven M. Smailer, Director of DNREC's Division of Water ("Smailer Decl.") at ¶¶16-18. Mr. Smailer also provided testimony concerning DNREC's standard application process for projects corroborating Mr. Small's testimony on the subject. (Smailer Decl. at ¶¶5-14).

48 *Id.* at ¶¶19-21.

49 *Id.* at ¶22.

50 *Id.* at ¶23.

maintain construction dredging; the potential impact on navigation in the Delaware River; and the potential impact on aquatic life.⁵¹ The letter submitted on behalf of the Port Operators included a Memorandum from Craig Jones, Ph.D., Director Marine Science and Engineering at Integral Consulting.⁵² Dr. Jones' report was critical of the proposed use of shoaling fans in connection with the Project.⁵³

51 Oral Argument Tr. at 167:16-21. All public comments and submission made during the public comment period are archived on DNREC's website memorializing the September 29, 2020 public hearing. Available at <https://dnrec.delaware.gov/events/joint-public-hearing-diamond-state-port-corporation/>

The comments submitted by Port Operators was in the evidence before the Secretary and in the record before the Board on Appeal. Available at <https://documents.dnrec.delaware.gov/Admin/Documents/dnrec-hearings/2020-P-MULTI-0024/comments/Greenwich-Terminals-and-Gloucester-Terminals.pdf>

52 Dr. Jones submitted an Affidavit in the Appeals which was called upon for its testimony by Appellants, the Port Operators and Mr. Curran.

53 Indeed, DNREC shared a concern regarding the proposed use of shoaling fans because of their potential effect upon the aquatic life in the area and required additional data on the subject. Declaration of Laura Mensch, former principal planner within DNREC's Division of Climate, Coastal, and Energy's Costal Management Program. (Mensch Decl. at ¶¶37-41; *see also* Smailer Decl. at ¶¶57-63). In March 2021, Diamond State requested to remove shoaling fans as part of the project. (Mensch Decl. at ¶42; Smailer Decl. at ¶64). While the removal of shoaling fans from the project alleviated certain environmental concerns, the decision regarding the shoaling fans remains relevant to other issues raised in these Appeals, as discussed in more detail below.

The Port Operators' public comment also included a report from retired U.S. Coast Guard Captain Jerzy Kichner, P.E., KSEAS Consulting.⁵⁴ Captain Kichner's report raised concerns over potential effects of the Project on Delaware River navigation.

Finally, the Port Operators' public comment included a memorandum from Damian V. Preziosi, Principal Ecologist at Integral Consulting.⁵⁵ Mr. Preziosi's memorandum raised concerns about the potential environmental impacts of the Project and lack of adequate mediation of those impacts.

Appellant PhilaPort also submitted public comment.⁵⁶ PhilaPort also stated its objections to various aspects of the Project, including the use of shoaling fans, environmental impact and remediation, and navigation concerns.

54 Captain Kichner submitted an Affidavit in the Appeals which was called upon for its testimony by Appellants, the Port Operators.

55 Mr. Preziosi submitted an Affidavit in the Appeals which was called upon for its testimony by Appellant Curran.

56 As with the comments from Port Operators, PhilaPort's submission was in the evidence before the Secretary and part of the Record in these Appeals to the Board. *See* Letter from Andrew Levine, Esq., available at <https://documents.dnrec.delaware.gov/Admin/Documents/dnrec-hearings/2020-P-MULTI-0024/comments/Levine-Revised-PhilaPort.pdf>

Appellant Curran also submitted a letter objecting to the Project. His stated concerns relate to environmental and navigation concerns as well as the need for future dredging operations to maintain the Project site.⁵⁷

As is its normal procedure, DNREC prepared the TRM for the purpose of addressing concerns raised during public comment.⁵⁸ The TRM was submitted to the Hearing Officer to assist the Hearing Officer's preparation of her Report to the Secretary regarding the advisability of the Project.⁵⁹ For those issues outside of DNREC's ordinary departmental scope, the TRM relied on input from those agencies with the necessary expertise.⁶⁰ For example, DNREC relied on the Delaware Department of Transportation with respect to issues related to over land traffic patterns and on the United States Coast Guard concerning Delaware River navigation.⁶¹

57 Mr. Curran's letter was in evidence before the Secretary and in the record on Appeal to the Board. Available at: <https://documents.dnrec.delaware.gov/Admin/Documents/dnrec-hearings/2020-P-MULTI-0024/comments/W-Curran.pdf>

58 Mensch Decl. at ¶28.

59 *Id.*

60 *Id.*

61 *Id.*

For these reasons the Board finds that DNREC's process in evaluating the Project permit request met or exceeded the requirements set forth by code and regulation.

3. The Permit Challenged in these Appeals was Part of a Coordinated Permitting Effort Across Multiple Federal and State Agencies.

With respect to the Project, DNREC's permitting scope is limited to the subaqueous lands involved in the application. As is typical, a Project like the one proposed by Diamond State requires multiple permits from federal and state agencies on a parallel track.⁶² The failure of one permit will not automatically doom all the remaining permits. Where, as here, multiple permitting assessments are required, DNREC coordinates with the applicant and other relevant agencies throughout the process, particularly when issues deviate from DNREC's departmental bailiwick, which here was limited to the application of the subaqueous lands act.⁶³

62 Small Aff. at ¶31.

63 *Id.* at ¶32-34.

In the case of the Port of Wilmington, DNREC engaged with and coordinated with several of the Divisions of subject-matter expertise under its own umbrella and with multiple federal and state agencies outside of DNREC, including:⁶⁴

- The United States Army Corps of Engineers;
- The Delaware River Basin Commission;
- The United States Environmental Protection Agency;
- The National Oceanic and Atmospheric Administration;
- The United States Coast Guard;
- The National Marine Fisheries Service;
- The United States Fish and Wildlife Service;
- The National Park Service; and
- The Delaware Department of Transportation.

When an application involves many agencies at a federal level, a lead agency is designated to coordinate with the other federal and state agencies involved.⁶⁵ Here, the United States Army Corps of Engineers was the designated lead federal agency.⁶⁶

64 Mensch Decl. at ¶¶18-25, 30-36; Smailer Decl. at ¶¶26-32; Declaration of John G. Cargill, IV, hydrologist within the DNREC Division of Watershed Stewardship (“Cargill Decl.”) at ¶¶34-45.

65 Smailer Decl. at ¶29.

66 *Id.* In the Remand Opinion, 2025 WL 1098975, at *18, the Superior Court notes that the United States District Court for the District of Delaware vacated the

With respect to those questions raised by the subaqueous lands permit, DNREC has fulfilled its responsibilities to the public as required by code and regulation. For questions beyond the scope of the subaqueous lands permit DNREC deferred to the responsible agencies.

4. Each Appellant is a Business Competitor, or Affiliated with a Business Competitor, of the Port of Wilmington.

The evidence before the Board establishes that each of the Appellants has an economic interest in opposing the Project.

Appellant PhilaPort is an agency of the Commonwealth of Pennsylvania and is an up-river competitor of the Port of Wilmington which is also engaged in a multi-billion-dollar expansion project.⁶⁷ PhilaPort is operated by Holt Logistics Company (“Holt”).⁶⁸ Holt also runs the operations of Appellants, the Port Operators, which

United States Army Corps of Engineers permit to allow the Project to move forward. *Citing Greenwich Terminals LLC v. US Army Corps of Engineers*, 2004 WL 4595590 (D. Del. Oct 28, 2024). That opinion, issued after the Board’s original decision in these Appeals supports the notion that the Project is subject to multiple federal and state permitting actions. It further demonstrates that different agencies, at the federal and state level, have different areas of expertise. That is why such applications, such as this Project, require a coordinated effort. No single agency has all the expertise or answers for a Project of this scale, nor should any single agency be expected to have such expertise. Diamond State will need to obtain all relevant permits to the satisfaction of the agencies involved and the tribunals with jurisdiction for review.

67 February 13, 2024 Oral Argument Transcript at 142:20-143:14.

68 *Id.* at 143:15-20.

are also up-river competitors of the Port of Wilmington.⁶⁹ In addition, individual Appellant Curran testified that he was an executive and operations director for Holt and the Holt-managed Port Operators from 1989 – 2011.⁷⁰

The Board finds that the Appellants and those of experts retained to support their arguments in these Consolidated Appeals were biased or prejudiced by their own business interests.⁷¹ Those biases, prejudices, and interests are given weight in the Board’s consideration of the evidence in the record before it. Ultimately, upon review of the entire record, the Secretary’s decision is supported by the evidence before the Board. The testimony and evidence advanced by Appellants does not alter the decision of the Board.

69 *Id.* at 143:15-23.

70 Affidavit of Walter F. Curran (“Curran Aff.”) at ¶5f-h. Mr. Curran testified by affidavit in support of his appeal.

71 A finder of fact, such as the Board in this matter “must assess the credibility of each witness and determine the weight given to the testimony.” *Buck v. Viking Holding Management Co LLC*, 2024 WL 4352368, *7 (Del. Super. Sept. 30, 2024) (quoting *Williams v. Bay City, Inc.*, 2009 WL 1886089, at *7 (Del. Super. July 29, 2024)). Among the factors the finder of fact may consider are “the witnesses’ biases, prejudices, or interests” and “all circumstances that according to evidence, could affect the credibility of the testimony.” *Id.* (quoting *Zenith Energy Terminals Joliet Hldgs LLC v. CenterPoint Props. TR.*, 2024 WL 3570165, at *3 (Del. Super 29, 2024)).

B. 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 establishes the purpose of the law:

Subaqueous lands within the boundaries of Delaware constitute an important resource of the State and require protection against uses or changes which may impair the public interest in the use of tidal or nontidal waters. *The purposes of this chapter are to empower the Secretary to deal with or to dispose of interest in public subaqueous lands and to place reasonable limits on the use and development of private subaqueous lands, in order to protect the public interest by employing orderly procedures for granting interests in public subaqueous land and for issuing permits for uses of or changes in private subaqueous lands.* To this end, this chapter empowers the Secretary to adopt rules and regulations to effectuate the purposes of the chapter, to apply to the courts for aid in enforcing this statute and the rules and regulations adopted pursuant hereto, and to convey interests in subaqueous lands belonging to the State.⁷²

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.⁷³

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,

72 7 Del. C. §7201 (emphasis added).

73 *Id.*

permit or grant desired, showing the location of the area and containing specifications for any proposed construction.”⁷⁴ 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.⁷⁵

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.”⁷⁶ These regulations are set forth at *7 Del. Admin. Code* §7504, Regulations Governing the Use of Subaqueous Lands.

These Appeals 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 depends on the

74 *Id.* at §7207(a).

75 *Id.* at §7207(d)(1-3).

76 *Id.* at §7212.

nature of the application and is subject to review and analysis by DNREC's subject-matter experts.⁷⁷

Those subsections containing the imperative language “shall” must be followed for the Secretary’s Order to be validly issued. Other subsections require the Secretary to weigh the benefits and value to Delaware and the people of Delaware against the factors that weigh against the project.

The Board finds that DNREC by and through its Secretary has met each of the regulatory requirements for assessing an application for a subaqueous lands permit. Each of the requirements are discussed individually next.

C. Findings of Fact and Conclusions of Law Specific to Each Regulation Subsection

Next, the Board makes findings of fact and conclusions of law specific to the various Regulations invoked by Appellants as having been incorrectly applied.

⁷⁷ Courts will generally give deference “to an administrative body’s interpretation of its own rules unless that interpretation is clearly erroneous.” *Garrison v. Red Clay Consol. School Dist.*, 3 A.3d 264, 268 (Del. 2010) *citing State Farm Mut. Auto. Ins. Co. v. Mundorf*, 659 A.2d 215, 220 (Del. 1995).

1. The Application of Regulation Subsection 4.6

Subsection 4.6 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. (emphasis added).
- 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.

These are far from the only factors DNREC is directed to consider in the public interest. No challenge is raised other than to the subsections discussed herein. For example, Subsections 4.6.1, 4.6.2, and 4.6.8 require that consideration be given to the value and benefits of the Project to the public and to the State. Here the evidence is that the economic benefits to State and public are potentially very significant.⁷⁸ Subsections 4.6.5 and 4.6.9 require consideration be given to whether the Project could be accomplished any other way or in a way that is not water

78 Devine Aff. at ¶¶85-89 (testifying about the projected economic benefits to the State if the Diamond State expands port operations to allow for New Panamax ships).

dependent. Here the evidence is that expansion of the Port of Wilmington is the only way to achieve the goal of attracting New Panamax cargo ships to Delaware's shores.⁷⁹

The term “**Public Interest**” is defined to mean:

demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would exceed all demonstrable environmental, social, and economic costs of the proposed action. In determining the public interest in a request for the use, sale, lease, or transfer of interest in subaqueous lands, [DNREC] shall consider the ultimate project purpose to be served by said use, sale, permit, lease, or transfer of lands or materials.

§7 *Del. Admin. Code* §7504-1.0.

The Secretary's Order indicates that the action was made under 7 *Del. C.*, Chapter 72, which “empower[s] the Secretary to deal with or dispose of interest in public subaqueous lands...to protect the public interest by employing orderly procedures for granting interests in public subaqueous lands.”⁸⁰ The Board finds that the Secretary employed orderly procedures for the granting of public subaqueous lands by: holding the public comment period far longer than is ordinary.⁸¹ Then,

79 Devine Aff. at ¶¶18-26 (testifying that Delaware currently lacks the opportunity for New Panamax ships to dock at existing port facilities, leaving the State at a competitive disadvantage to the neighboring states).

80 7 *Del. C.* §6201.

81 Secretary Order at 3-4. Of the approximately 200 comments received some supported the Project and some opposed.

as a result of the public comments received, the Hearing Officer requested subject matter experts at DNREC to do further analysis and present recommendations.⁸² The Secretary's Order notes that the Project includes a mitigation plan inuring to the public's benefit requiring Diamond State to fund expansion of recreational facilities at nearby Fox Point State Park and to establish a eDNA fisheries monitoring program to be administered by DNREC to monitor species present in the waters immediately affected by the Project and then to be expanded to other rivers, creeks, and ponds.⁸³ With respect to matters outside DNREC's purview, the Secretary noted that independent confirmations concerning the Project's impact were obtained, including, for example from DelDOT and the United States Coast Guard.⁸⁴

The Board finds that the Secretary considered each of the required topics as demonstrated on the face of the Secretary's Order, which incorporates the hearing officer's report and the TRM. The Board finds further that the evidence relied upon by the Secretary is corroborated by evidence introduced to the Board by Appellees. As discussed in further detail in the following sections, the Board finds that testimony provided to the Board by David Small and Brian Devine on behalf of Diamond State and Laura Mensch, Steven Smailier and John Cargill on behalf of

82 *Id.* at 4.

83 *Id.* at 5-7.

84 *Id.* at 8.

DNREC confirms the conclusions made by the Hearing Officer and adopted by the Secretary that the Project is the culmination of a multi-year, multi-agency effort. During that multi-year, multi-agency effort, DNREC considered factors related to the “potential effect on the public with respect to commerce, navigation, recreation, aesthetic enjoyment, natural resources, and other uses of the subaqueous lands” as required by 7 *Del. Admin. Code* §7504-4.6.

The evidence before the Board is that the subaqueous lands in question are adjacent to a defunct industrial site with limited current public use, if any. As such the concern about navigation within the existing subaqueous lands area is minimal. With respect to the Project’s overall impact on Delaware River navigation, the Board finds that DNREC reasonably relied upon the approval of the United States Army Corps of Engineers, the River Pilots Association, the United States Coast Guard, and Wilmington Tug – all agencies or organizations with responsibility to maintain the navigability of the main channel.

With respect to consideration of recreation, aesthetic enjoyment, natural resources, and other uses, the Board finds the evidence is convincing that redevelopment of the Edgemoor site will have a net positive effect on the environment and that impact on recreation and aesthetic enjoyment is minimal given the location and current state of the site. The evidence also demonstrates that, to the

extent recreation or natural resources are impaired, a mitigation program has been designed to offset any losses.

Appellants offer testimony that suggests that the Secretary and DNREC could have taken a different approach in considering those factors required to be considered when issuing a subaqueous lands use permit. However, the regulatory language at issue does not require the Secretary to employ the methodologies or come to the conclusions urged by Appellants.

a. Navigation

i. Findings of Fact Regarding the Secretary's Consideration of the Public Interest Regarding Navigation

DNREC's authority over navigational issues is limited to the public interest in the subaqueous lands effected by the construction permit.⁸⁵ The actual responsibility for maintaining the navigability of the main shipping channel and proposed turning basin in the Delaware River (which are each beyond the

⁸⁵ "Subaqueous lands" are defined to mean "submerged lands and tidelands." 7 *Del. C.* §7202(g-i). The Secretary's jurisdiction is "over any project involving ungranted subaqueous lands owned by the State." *Id.* at §7203(a). The Subaqueous Lands Permit allowed by the Secretary's Order, and subject to these Appeals pertains to the loss of just 5.5 acres of public subaqueous lands. Permit at 1. *See also* Mensch Decl. at ¶¶43-44; Smailer Decl. at ¶66 (discussing the scope of the DNREC's responsibility for navigation in permitting relating to the use of subaqueous lands).

subaqueous lands subject to the permit) falls to the United States Army Corps of Engineers.⁸⁶

In addition to the process for obtaining a subaqueous lands permit from DNREC, Diamond State also applied to the Army Corps of Engineers for permits related to dredging in the navigation channel and the suitability of the “turning basin” in which ships entering and exiting the proposed Edgemoor site, would temporarily block the flow of Delaware River traffic.⁸⁷

In connection with that parallel application, Diamond State commissioned the “Full Mission Ship Simulation for Edgemoor Navigation Feasibility Study” dated August 22-24, 2018 conducted by the Maritime Institute of Technology and Graduate Studies (the “MITAGS” report).⁸⁸ The Army Corps of Engineers reviewed the modelling employed in the MITAGS report and made recommendations to improve the model.⁸⁹ The modelling in the MITAGS report also included input from the Pilot’s Association for the Bay and River Delaware based on the expertise and

86 Smailer Decl. at ¶28; Devine Aff. at ¶10. Army Corps of Engineers guidance indicates that “[w]here traffic conditions permit, the turning basin should use the navigation channel as part of the basin area.” USACE Engineering Manual 1110-2-1613, Section 9-2.c.2.

87 Devine Aff. at ¶¶44-48.

88 *Id.* at ¶44.

89 *Id.* at ¶45.

experience of the pilots.⁹⁰ DNREC regulations do not require creation of a navigation study like MITAGS and do not contain any standards for evaluating or assessing such a study because these fall within the purview of the Army Corps of Engineers.⁹¹

With respect to navigational safety and operations on the Delaware River, responsibility falls to several agencies, including the United States Coast Guard, the Pilots Association for the Bay and River Delaware, and Wilmington Tug, Inc.⁹² Traffic in the Delaware River is carefully timed and coordinated by the professional river pilots who board large cargo vessels to guide them to their destinations.⁹³

DNREC conferred with these partner agencies to address concerns related to the public interest expressed during public comment that the Project's impact on navigation and safety had not been sufficiently addressed.⁹⁴ In particular, two issues raised during public comment about potential flaws in MITAGS (concerning emergency procedures and safety within the main navigation channel) were the

90 *Id.* at ¶¶46-47.

91 *Id.* at ¶48.

92 Mensch Decl. at ¶¶45-46; Smailer Decl. at ¶67.

93 Devine Aff. at ¶¶12-17.

94 Mensch Decl. at ¶¶47, 52-53; Smailer Decl. at ¶¶67-72.

subject of additional follow-up inquiries by DNREC prior to issuing the permit.⁹⁵ DNREC conferred with Lt. Commander Andrew Cooke of the United States Coast Guard who confirmed that the Project did not pose a risk to navigational safety.⁹⁶ Duffield also provided DNREC with additional navigation information upon DNREC's request.⁹⁷ Duffield provided DNREC with additional information from Mr. David Cuff, President of the River Pilot's Association of Bay and River Delaware, who corroborated that MITAGS represented typical navigation scenarios in the Delaware River and from Mr. Christopher Rowland, President of Wilmington Tug, Inc., who confirmed that MITAGS was consistent with his experience and expectations.⁹⁸

The Hearing Officer's Report explicitly addressed criticisms of MITAGS raised during the public comment period, including by Appellants:

The Application includes a report by the Maritime Institute of Technology and Graduate Studies ("MITAGS") that assesses typical expected navigational scenarios and, as the TRM notes, concludes that

95 Mensch Decl. at ¶48; Smailer Decl. at ¶¶68-69.

96 Mesnch Decl. at ¶¶25, 49, 51-52.

97 Mensch Decl. at ¶50. Duffield's memorandum in response dated March 1, 2021 estimated that the main navigation channel would typically be impeded by a turning vessel for approximately 10-15 minutes.

98 Smailer Decl. at ¶70. MITAGS acknowledges that any decision regarding conditions for navigation facing any unusual circumstances, for example, related to weather or traffic falls upon the ship's captain and the local river pilot assigned to the mission within the Delaware River and Bay. MITAGS at 2.

“[t]he simulation results indicated the proposed Edgemoor Terminal would have minimal impact on ships as they transit the existing navigation channel.” The Department received public comments that alleged that the proposed turning basin would negatively impact navigation of vessels on the main channel and that there would be impacts to shipping that may occur in non-typical emergency scenarios (i.e., ships losing power while turning). These concerns were passed on to the Applicant to be addressed.

In response, the Applicant’s consultant, Duffield Associates, provided additional information to DNREC on March 4, 2021. This additional information included a letter from David K. Cuff, President of The Pilots’ Association for the Bay & River Delaware (“Pilots’ Association”) to Mr. Eugene Bailey, Executive Director of the DSPC. The Pilots’ Association reviewed the Navigation Feasibility Study for the Port of Wilmington Edgemoor Expansion project produced by the MITAGS and concurred with the above-cited statement in the MITAGS report that the proposed Edgemoor Terminal would have minimal impacts on ships traveling on the existing navigation channel. Additionally, DNREC coordinated with Lieutenant Commander Andrew Cooke, USCG Sector Delaware Bay, to receive input from the 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. The TRM concludes that the Applicant’s proposed plans meet all appropriate setback and siting criteria pursuant to the Regulations Governing the Use of Subaqueous Lands, 7 DE Admin Code 7504, Section 4.9.

Additionally, the input that was received from the Pilots’ Association for the Bay & River Delaware and the USCG have also adequately addressed the expressed navigational concerns pursuant to the Regulations Governing the Use of Subaqueous Lands, 7 DE Admin Code 7504, Section 4.8.4.⁹⁹

99 Hearing Officer Report at 18.

With respect to navigation within the subaqueous lands in question, the subaqueous lands construction permit, as issued, includes 17 special conditions imposed by DNREC, which include to minimize impacts on navigation during dredging and construction within the subaqueous lands.¹⁰⁰ With respect to the navigation in the main channel, the Secretary's Order and Hearing Officer's report refer to DNREC having obtained independent verification from those agencies responsible for navigation in the main channel.¹⁰¹ Further, the Subaqueous Lands Permit specifically requires that any work on the Project is "subject to the terms and conditions of all appropriate [United States Army Corps of Engineers] authorization."¹⁰²

The Board finds the evidence confirms that the Secretary reasonably gave consideration to the public interest in navigation both over the subaqueous lands within the Secretary's jurisdiction and the impact of the Project on waters outside the Secretary's jurisdiction by relying on the information provided by, among others, the United States Coast Guard, the United States Army Corps of Engineers, the River Pilots Association of Bay and River Delaware, and Wilmington Tug, Inc.

100 Subaqueous Lands Permit at 2-3.

101 Secretary's Order at 8; Hearing Officer Report at 18; TRM at Comment 12.

102 Subaqueous Lands Permit at 3.

ii. The Board's Assessment of Evidence Presented by Appellants to the Contrary

Appellants, the Port Operators, call upon the testimony of Captain Jerzy J. Kichner to challenge the adequacy of DNREC's consideration of the public interest regarding navigation in connection with the Project.¹⁰³ Captain Kichner submitted a report to DNREC in connection with the public comment period raising similar concerns regarding the Project. Captain Kichner's testimony is consistent with his initial report, namely that the Project contemplates a turning basin that will interfere with navigation in the Delaware River and that MITAGS did not adequately assess emergency situations. Captain Kichner's testimony is well-received by the Board, however, as discussed below, it does not outweigh the quality of the testimony and the record submitted by the Appellees. Moreover, Captain Kichner's testimony is not specific to the subaqueous lands that are covered by the permit. Rather the testimony is focused on the main navigation channel, which, while certainly affected by the Project as a whole, is beyond the scope of DNREC's authority.

Appellants, the Port Operators, submit the testimony of two operations managers at facilities managed by Holt Industries up-river of the Port of Wilmington, in direct competition to the Port of Wilmington, and the expansion plans proposed

103 Affidavit of Captain Jerzy J. Kichner, U.S.G.C. (Ret.) in Support of Port Operators' Appeal of Secretary Order No. 2021-W/CCE-0026.

by Diamond State.¹⁰⁴ Both Mr. Inskeep and Mr. Whene provide limited testimony on behalf of their employers regarding the possibility of navigational delays should the Project be permitted.¹⁰⁵ The testimony of these witnesses, warning of dire consequences for Delaware River traffic should the Project be allowed to move forward is not given weight in the Board's consideration of these Appeals. While Messrs. Inskeep and Whene are undoubtedly experienced and knowledgeable regarding shipping on the Delaware River, the Board finds that their positions as employees of the Appellants undermines the value of their respective testimony.

b. Recreation, Aesthetic Enjoyment, Natural Resources, and Other Uses of the Subaqueous Lands

The second prong of Regulation 4.6.3 requires the Secretary to consider the recreation, aesthetic enjoyment, natural resources and other uses of subaqueous lands. The Secretary's decision is supported by this requirement and the Board finds that the decision is supported by substantial evidence on this point.

104 See Affidavit of Peter J. Inskeep, Manager of Operations for Gloucester Marine Terminal and Paulsboro Marine Terminal in Support of Port Operators' Appeal of Secretary Order No. 2021-W/CCE-0026 and Affidavit of David N. Whene, President and Manager of Greenwich Terminals LLC, Operator of the Packer Avenue Marine Terminal at the Port of Philadelphia in Support of Port Operators' Appeal of Secretary Order No. 2021-W/CCE-0026.

105 *Id.*

**i. Findings of Fact Regarding the Secretary's
Consideration of Recreation, Aesthetic Enjoyment,
Natural Resources, and Other Uses of the
Subaqueous Lands**

Regulation Subsection 4.6 and 4.7 include several overlapping “considerations” related to environmental factors required for the DNREC permitting process. Whether addressed in this section or the next, the Board finds that DNREC’s consideration of the various factors related to the environment, including environmental quality, recreation, fishing, and enjoyment were all and each thoroughly vetted by DNREC over more than a half decade. In reaching this finding, the Board relies on the TRM, upon which the Hearing Officer relied, and the corroborating testimony provided by Laura Mensch, Steven Smailer, and John Cargill in their declarations.

In addition to the TRM, Duffield Associates, the consulting firm engaged by Diamond State (now known as Verdantas) prepared an Environmental Assessment Technical Document dated March 2020 and revised April 2022.¹⁰⁶ That document includes important factors that DNREC was required to consider. It concludes that “recreational uses of the [P]roject site are limited, and the current water quality of the portion of the Delaware River does not support fish and water ingestion.”¹⁰⁷

106 Exhibit C to Diamond State’s Answering Briefs for Oral Argument.

107 Environmental Technical Assessment Document at 63.

Further, the document indicates that recreational boating will face minimal impact as a result of the Project.¹⁰⁸ The Environmental Assessment Technical Document prepared by Duffield indicates that the Project is not expected to have any direct or indirect impacts on the species in the area, including herring, alewife, and striped bass.¹⁰⁹ The assessment document found that the Project does not present adverse recreational impact upon the public interest.¹¹⁰

The Board found Mr. Devine's testimony on behalf of Diamond State is compelling in this regard.¹¹¹ He states that the only impairment to subaqueous lands affected by the Project is within areas not practicably accessible for public recreation.¹¹² There are a total of 5.5 acres of subaqueous lands impacted by the Project, none of which are accessible from the shoreline.¹¹³ However, that access is

108 *Id.* at 144.

109 *Id.* at 175.

110 *Id.* at 177.

111 *See* Devine Aff. at ¶¶105-107.

112 Devine Aff. at ¶¶105-106.

113 *Id.* at ¶106.

extremely limited as a result of the presence of the “Cherry Island Reach of the Delaware River.”¹¹⁴

The Hearing Officer’s Report, incorporated by the Secretary’s Order, made the following statement, explicitly addressing the “consideration” of recreational impacts created by the Project. The Hearing Officer stated:¹¹⁵

The location of this project on the Delaware River is a 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.

Additionally, DNREC requires a soft start on all pile driving activities. 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 be conducted during dredging activities associated with the construction of the port to ensure that the activity is not adversely impacting sensitive species.

114 The Cherry Island area is a heavily industrialized with little opportunity for recreation within the vicinity. Mr. Preziosi insists that more than 5.5 acres of total area will be affected by the Project. Affidavit of Damian V. Preziosi at ¶18. That may be with respect to the entire Project and all the Federal and State agencies involved. However, only 5.5 acres of subaqueous lands are included in the permit issued by DNREC. Preziosi Aff. at ¶¶45-59.

115 Hearing Officer’s Report at 16.

The TRM notes that, if granting a permit will result in loss of a substantial resource to the public, then DNREC has the authority to require a permittee to take measures which will offset or mitigate the loss (7 Del.C. §7205, and the Regulations Governing the Use of Subaqueous Lands, 7 DE Admin. Code 7504, subsection 3.4). As noted previously, DNREC has required the Applicant to mitigate for the loss of 5.5 acres of subaqueous lands associated with the proposed project, and the details of DSPC's State of Delaware Compensatory Mitigation Plan will be addressed in greater detail further herein. The Department considers the proposed compensatory mitigation package to be adequate mitigation, pursuant to the Regulations Governing the Use of Subaqueous Lands, 7 DE Admin. Code 7504, Sections 4.7.1.4 and 4.7.4.

The TRM upon which the Hearing Officer, and subsequently the Secretary relied was prepared by, among others, Laura Mensch, Steven Smailer, and John Cargill.¹¹⁶ Mr. Cargill testified before the Board by declaration. His testimony confirmed the conclusions made in the Secretary's Order were based upon analysis provided by DNREC's subject matter experts.¹¹⁷

The Board finds the testimony from DNREC's subject-matter experts to be compelling in this respect and agrees with the Hearing Officer's conclusion, which was subsequently adopted by the Secretary's Order.

116 TRM at 1, Comment 9; Subaqueous Lands Permit at 2.

117 Cargill Decl. at ¶¶52, 54.

ii. The Board's Assessment of Evidence Presented by Appellants to the Contrary

Mr. Curran testifies that he regularly enjoys recreation and enjoyment of the Delaware River and Bay but gives little in the way of specific testimony about the Edgemoor site and his “use” thereof.¹¹⁸ The Board finds that it would be irrational for DNREC to halt the Project based on the “public interest” meant to be considered by this subsection based upon Mr. Curran’s vague testimony regarding his sole recreational use. Mr. Curran lives in Ocean View, Sussex County.¹¹⁹ He provides no testimony specific to the subaqueous lands that are in question based on this Project or the Appeals.

In addition, his claims of fishing in the area are undermined, in the Board’s determination, by the environmental assessments cited by Appellants and which are obvious considering the industrial uses (both previous and current) of the Edgemoor site and surrounding areas. Simply stated, the Board finds Mr. Curran’s claims that he fishes in the area not credible and affords it no weight.

118 Curran Aff. at ¶¶15-42.

119 Curran Aff. at ¶3. Mr. Curran claims to use the “River” all the way from Philadelphia to Lewes, Delaware. *Id.* at ¶15. Of Course, by the time one reaches Lewes, the “River” has become bay and then ocean.

c. The Board's Conclusion of Law Regarding the Application of Regulation Subsection 4.6

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 incorporated the Hearing Officer's Report, which is clear on its face as having considered navigational factors by conferring and coordinating with the appropriate agencies responsible for navigation on the Delaware River (*e.g.*, Delaware River Pilots and the United States Coast Guard).

While Captain Kichner is clearly an expert on the subject-matter of navigation along the entire Delaware River, DNREC reasonably gave greater weight to the input from the Army Corps of Engineers, the United States Coast Guard, the Pilot's Association of the Bay and River Delaware, and Wilmington Tug, Inc. As such, the Board cannot hold, based on the record before it, that DNREC failed to consider the “potential effect on the public with respect to ... navigation.”

DNREC's responsibility here is with respect to subaqueous lands, not the entire Delaware River. To suggest that DNREC would be expected to re-do or override the work of these agencies that are responsible, in fact, for the maintenance and safe navigational operations upon the Delaware River is unwarranted by

Appellants. Appellants read these subsections as requiring something beyond the scope of DNREC’s legal scope and subject-matter expertise.

Regarding subsections 4.6.4 and 4.6.6, the Project includes a 3-phase mitigation plan, which is discussed in detail below and which includes the opportunity for enhanced recreational opportunities at nearby Fox Point State Park, in addition to other environmental benefits.

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.

a. Recreation

i. Findings of Fact Regarding the Secretary's Consideration of the Effects of the Project on Recreational Fishing

This factor and evidence adduced to the contrary by Appellants is discussed above. The Board finds no evidence in the record before it that the concerns about recreational fishing have any basis in fact beyond those advanced by Appellants and those affiliated with the business interests of the Appellants against the Port of Wilmington and its operations.

b. Other Possible Environmental Impacts

DNREC, by and through its Secretary's Order, considered myriad environmental issues. None are meaningfully contradicted by evidence submitted to the Board by Appellants.

i. Findings of Fact Regarding the Secretary's Consideration of the Effects of the Project on the Aquatic Habitat, Water, and Air Quality

Appellee, DNREC, submitted declarations from the individuals involved in DNREC's consideration of these issues.

Steven M. Smailer, Director of DNREC's Division of Water, provided testimony regarding DNREC's consideration of the environmental impact of the project and the plans to mitigate those impacts.¹²⁰ John G. Cargill, a hydrologist

¹²⁰ Smailer Decl. ¶¶33-56.

within DNREC's Division of Watershed Stewardship also provided testimony on the subject of environmental impact and mitigation.¹²¹

Beginning in 2016, Duffield requested and received authorization to conduct sample analyses of sediment and surface water at the site.¹²² Draft sampling analyses provided in 2018 prompted comments from DNREC and a recommendation by DNREC to Duffield to conduct more robust sampling and analyses.¹²³ Additional and expanded testing occurred during 2019 and 2020.¹²⁴ Through 2021, DNREC, Duffield, the U.S. Army Corps of Engineers, the Delaware River Basin Commission, and the Environmental Protection Agency worked together to draft and finalize a plan for monitoring construction dredging and disposition of dredged materials.¹²⁵

121 Cargill Decl. ¶¶8-57.

122 Smailer Decl. at ¶¶34-35; Cargill Decl. at ¶¶9-11.

123 Smailer Decl. at ¶¶36-39; Cargill Decl. at ¶¶12-14.

124 Smailer Decl. at ¶¶40-41; Cargill Decl. at ¶¶15-29.

125 Smailer Decl. at ¶¶42-50; Cargill Decl. at ¶¶30-50. The dredging required for construction is expected to have a beneficial impact by removing contaminated sediment, leading to a "healthier, more diverse benthic community." Environmental Assessment Technical Document at 79.

The initial permit application submitted by Diamond State included an unprecedented use of “shoaling fans” to assist with the maintenance of the dredged subaqueous lands.

Shoaling fans were removed from the project, primarily because DNREC was concerned about the environmental impact of their inclusion.¹²⁶ This concern was raised by Appellants during public comment and was specifically addressed by DNREC in the permitting process. Having achieved their goal, Appellants moved the goalposts to challenge the hypothetical concerns created by the alternative plan.

Regarding the originally proposed shoaling fans, the Hearing Officer’s Report states, and the Board finds the same to be supported by the evidence before it:¹²⁷

DSPC’s original WSLs Application and Certification for the Port of Wilmington Expansion Project submitted to DNREC on March 16 and 18, 2020 included the installation and operation of SedCon Technologies, Inc.’s Turbo System anti-sedimentation devices (“shoaling fans”) to minimize the need for maintenance dredging. DNREC’s Division of Fish and Wildlife - Fisheries Section (“DFW Fisheries”) reviewed the proposed project activities, including the use of shoaling fans. On December 14, 2020, DFW Fisheries provided comments on the project in relation to the proposed use of shoaling fans as an anti-sedimentation technique.

The DFW Fisheries commented that the installation and operation of the shoaling fans would increase fish mortality and degrade ecosystem function and aquatic habitat in the project area. Shoaling fans would have adverse impacts on fish directly through impingement and entrainment, and indirectly through increased

126 Mensch Decl. at ¶¶37-42.

127 Hearing Officer Report at 9-10.

sedimentation and potential resuspension of contaminants. Adult fishes impinged on the shoaling fans may also be killed. Fan intakes would entrain pelagic fish eggs and larvae.

In addition to the entrainment and impingement impacts, DFW Fisheries noted that spawning runs could be altered by the noise produced by the fan blades. All these concerns were passed on to the Applicant to be addressed. In response to the above concerns that shoaling fans may pose a risk to aquatic life and water quality, DSPC modified the scope of the project activities to remove the use of shoaling fans. On July 1, 2021, the consultant for the Applicant, Duffield Associates, submitted a revision to the project plans that reflects the removal of the shoaling fans from the project design. The removal of the shoaling fans from the Application, coupled with the Applicant's proposed compensatory mitigation package, (described in greater detail further herein), address the significant portions of concern the Department had regarding the potential impacts to aquatic resources in regard to Delaware's Regulations Governing the Use of Subaqueous Lands, 7 DE Admin. Code 7504, specifically, Sections 4.7.1.2, 4.7.1.3, 4.7.1.4, and 4.7.4.

The Board finds this aspect of the Hearing Officer's Report is supported by the evidence before the Board. Testimony before the Board from DNREC's subject-matter experts confirms that public comment regarding the installation of shoaling fans was instrumental in discussions between DNREC and Diamond State in altering the project to remove an environmentally questionable aspect of the Project.¹²⁸

128 Smailer Decl. at ¶¶57-65; Mensch Decl. at ¶¶37-42; Cargill Decl. at ¶27.

The Board also agrees with the conclusion in the Hearing Officer's Report addressing the concern that dredging could have a negative impact upon water quality:¹²⁹

The Department's TRM acknowledges that dredging activities have the potential to increase turbidity in the river around the cutterhead, causing sediment particles and associated contaminants to become suspended in the river water, and thus impact water quality. However, the impacts are expected to be limited in extent, and will be monitored during the entire course of dredging activities to ensure impacts do not extend beyond regulatory boundaries.

Per an approved monitoring plan, turbidity/total suspended solids, among other physical parameters, will be measured regularly behind the cutterhead, and at background locations upstream and downstream of the dredging activities. Water quality samples and sediment samples will be collected regularly to evaluate water/sediment chemistry and to compare results to modeled predictions. Those samples will be analyzed for pH, hardness, organic carbon content, inorganic compounds (metals), pesticides, polycyclic aromatic hydrocarbons ("PAHs"), dioxins and furans and PCBs. While previous studies indicate that most (approximately 98%) of the dredged sediments will be captured and retained in Confined Disposal Facilities ("CDFs"), a small amount may be released back into the water through elutriate discharge.

Per the approved monitoring plan, DSPC will be required to conduct monitoring of the CDF influent and effluent. During active dredging, dredge slurry (influent) will be sampled regularly and will be allowed to separate into water and sediment. Sediment and water samples will be analyzed for organic carbon content, inorganic compounds (metals), pesticides, PAHs, dioxins and furans and PCBs. Effluent water samples will be collected at the same frequency as influent samples and will be analyzed for the same chemical

129 Hearing Officer Report at 10-11. Similarly, the Duffield's March 1, 2001 Memorandum on Page 3 confirmed that the Project was unlikely to affect the quality of the water in the area.

parameters. When influent and effluent data is combined with measurements of flow rate, a mass balance calculation can be done to determine the overall retention of contaminants in the CDF.

If any data collected during the course of active dredging and active discharge from the CDF are outside of applicable Delaware River Basin Commission and DNREC water quality criteria, then corrective actions will be implemented to address non-compliant conditions. The TRM states that the proposed monitoring and responsive corrective actions address the significant portions of concern DNREC had regarding the potential impacts to water quality in regard to the Regulations Governing the Use of Subaqueous Lands, 7 DE Admin. Code 7504, Sections 4.7.1.1.

The Board finds this conclusion, adopted by the Secretary's Order, is supported by the evidence before the Board. Testimony before the Board from DNREC's subject-matter experts confirms that dredging's impact upon water quality was considered and incorporated into the TRM upon which the Hearing Officer relied.¹³⁰

The Board also finds that the Hearing Officer's Report regarding the effect of the Project on air emissions is supported by the evidence in the record before the Board.¹³¹

The DCMP coordinated with the Department's Division of Air Quality ("DAQ") for input on air quality concerns related to the

130 TRM at Comment Sections 3-5. Smailer Decl. at ¶¶34-50; Cargill Decl., *passim*.

131 Hearing Officer's Report at 11-12. "DCMP" is the Delaware Coastal Management Program. Also, in the evidence before the Secretary and the Board was detail regarding potential noise pollution from the Project. Duffield Environmental Technical Assessment at 146, 180.

proposed activities included in this project. DAQ supports efforts that preserve public health and safety and promote smart growth. Activities associated with the proposed project must comply with all Delaware Air Quality Regulations (Division of Air Quality, 7 DE Admin. Code 1100) to not exceed air quality emission thresholds.

To reduce emissions associated with the construction phase of the project, DAQ recommends that retrofitted on-road and non-road diesel engines be used. Existing DAQ Regulations require the use of dust suppressants and measures to prevent transport of dust offsite from material stockpile, material movement, and use of unpaved roads and the use of covers on trucks that transport material to and from a site to prevent visible emissions (Particulate Emissions from Construction and Materials Handling, 7 DE Admin. Code 1106).

Additionally, Delaware Air Quality Regulations require a conformity determination for each pollutant where the total of direct and indirect emissions would equal or exceed any of the de minimis levels (Conformity of General Federal Actions to the State Implementation Plans, 7 DE Admin. Code 1135). Delaware Air Quality Regulations also restrict idling time for trucks and buses having a gross vehicle weight of over 8,500 pounds to no more than three minutes (Excessive Idling of Heavy-Duty Vehicles, 7 DE Admin. Code 1145).

Compliance with the above referenced Air Quality Regulations and the incorporation of the DAQ recommendations address the concern the Department had regarding the potential impacts to water quality in regard to Regulations Governing the Use of Subaqueous Lands, 7 DE Admin. Code 7504, Sections 4.7.1.5.

Again, the Board finds that the Hearing Officer's conclusion, upon which the Secretary relied is supported by the evidence in the record before the Board. The TRM cites that DNREC's Division of Air Quality provided subject-matter expertise in this regard.¹³²

132 TRM at Comment Section 4.

The Board also finds that the Secretary's Order appropriately considered the concerns stated by citizens concerned with environmental justice and that the Hearing Officer's findings are supported by the evidence before the Board. The Hearing Officer explicitly addressed the concept of environmental justice raised by concerned stakeholders.¹³³

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.

The Department's TRM notes that, as required under Delaware's Regulations Governing Hazardous Waste (7 DE Admin. Code 1302) and the Resource Conservation and Recovery Act (RCRA), a site Risk Assessment ("RA") was conducted which analyzed contaminant data from the upland (former DuPont/Chemours) property for potential risk to human health and the environment using appropriate guidelines and parameters. The RA considered all routes of potential exposure and determined that no unacceptable risk was posed to human health or the environment from contaminants at the site as long as the impacted media remains buried in place (thereby removing the potential pathway of exposure).

Based upon the RCRA Facility Investigation ("RFI") in conjunction with the RA, and in consideration of the site's future use, the presumptive site remedy of capping, construction management, groundwater monitoring and an environmental covenant, proposed in the Statement of Basis ("SB") and enforced by the conditions of the RCRA permit, issued April 29, 2021, work together to assure ongoing protection of both human health and the environment.

133 Hearing Officer Report at 12-13.

Furthermore, DNREC is requiring that the Applicant mitigate for potential negative impacts related to the proposed project, including the loss of 5.5 acres of subaqueous habitat. The DSPC, as a condition of the issuance of the WSLS Permit and DCMP Certification concurrence, must complete the State of Delaware Compensatory Mitigation Plan, which includes habitat and recreational enhancements that will benefit the residents of communities adjacent to the proposed project site. Some of these enhancements will occur at FPSP. FPSP, located on Lighthouse Road in Wilmington, Delaware, is in close proximity to the proposed project site. Communities located near the proposed project site have easy access to FPSP, therefore improvements to this park will also provide enhancements to the communities around the Edgemoor site. Additional information detailing the specific components of the State of Delaware Compensatory Mitigation Plan for the Applicant's proposed project will be discussed in detail further herein.

The presumptive remedy and enforcement of the RCRA requirements address the significant portions of concern the Department had regarding the potential impacts to water quality in regard to the Regulations Governing the Use of Subaqueous Lands, 7 DE Admin. Code 7504, Sections 4.7.1.6. Additionally, the proposed compensatory mitigation package, described in greater detail further herein, is considered adequate mitigation pursuant to the Regulations Governing the Use of Subaqueous Lands, 7 DE Admin. Code 7504, Sections 4.7.1.4 and 4.7.4.

The Board finds as a matter of fact that the Hearing Officer's conclusion, and thus the Secretary's Order, is supported by the record before the Board. The TRM cites the recovery of toxic subaqueous lands and the 3-part mitigation plan as offsetting any potential harm that could be caused by the Project.¹³⁴ These mitigation

134 TRM at Comment Section 5.

factors, applicable to those in the environmental justice community, are confirmed by the testimony before the Board from Steven Smailer and John Cargill.¹³⁵

The Board also finds that the Hearing Officer's Report, adopted by the Secretary's Order, included consideration of pollutants associated with the project, which is supported by the testimony before the Board from Steven Smailer and John Cargill:¹³⁶

As noted above, the portion of the Applicant's proposed project that fell under the permitting authority of the Department's DWHS-RS was previously approved with the execution of DNREC Secretary's Order No. 2021-WH-0014 and the issuance by DNREC of a RCRA CAP Renewal Permit to the DSPC (Effective Date: April 29, 2021). The Department's DWHS Corrective Action Section ("CAS") has been managing/overseeing the environmental cleanup of the upland portion of the former DuPont/Chemours Edgemoor site, where the new port will be constructed, in accordance with the federal RCRA program.

Critical to long term protection and improvement of human and ecological health from contaminants in the sediment will be proper management of the dredged material and associated CDF elutriate generated during dredging for port construction. A Monitoring Plan for Construction Dredging and Dredged Slurry has been developed by DSPC and approved by DNREC and USACE. The TRM concludes that the RCRA remedial actions, detailed sediment characterization, removal of the contaminated sediments during the dredging, associated risk assessment, and proposed monitoring and responsive corrective actions address the significant portions of concern DNREC had regarding the potential contaminated sediment transport in regard to the Regulations Governing the Use of Subaqueous Lands, 7 DE Admin. Code 7504, Sections 4.7.1.1, 4.7.1.6 and 4.7.2.

135 Smailer Decl. at ¶¶51-56; Cargill Decl. at ¶¶31-57.

136 Hearing Officer Report at 17.

* * *

A hydrogeologic site investigation is needed As noted above, a comprehensive hydrogeologic site investigation was performed as part of the sitewide RCRA Facility Investigation (“RFI”). The TRM states that the Department’s RCRA remedial actions, the detailed site characterization, sediment characterization, removal of the contaminated sediments during the dredging, associated risk assessment, and proposed monitoring and responsive corrective actions address the significant portions of concern DNREC had regarding the cumulative and secondary effects on the aquatic ecosystem, natural surface and groundwater hydrology in regard to the Regulations Governing the Use of Subaqueous Lands, 7 DE Admin Code 7504, Section 4.7.3.

The Board finds as a matter of fact that the testimony provided by the DNREC subject-matter experts regarding pollutants potentially involved in the Project supports the findings of the Hearing Officer, upon which the Secretary relied. The TRM discusses the consideration DNREC made regarding pollutants.¹³⁷ The TRM is corroborated by the Testimony of Steven Smailer and John Cargill.¹³⁸

In summation, the evidence in the record before the Board demonstrates that the subject-matter experts in several Divisions within DNREC were engaged in the multi-year process to assess the various benefits and concerns regarding the Project. The Secretary’s Order relies on the Hearing Officer’s Report in this regard. The Hearing Officer’s Report is based upon the work of the individual experts employed by the State of Delaware to assess potential environmental and recreational impacts

137 TRM at Comment Section 10.

138 Smailer Decl. at ¶¶34-50; Cargill Decl. at ¶13.

upon the State when subaqueous lands are developed. The Board finds, as a matter of fact, that the Secretary's Order was based upon substantial evidence and is supported by the evidentiary record now before the Board.

ii. The Board's Assessment of Evidence Presented by Appellants to the Contrary

The Board finds that Appellants' testimony is unconvincing about the supposed shortcomings of DNREC's assessment of environmental impacts of the Project. Mr. Curran calls upon the testimony of Mr. Damian V. Preziosi in support of his claims that the evaluation of environmental impact of the Project was not "considered" by DNREC.¹³⁹ Mr. Preziosi testifies that DNREC did not consider the habitat of Atlantic sturgeon that may be affected by the Project.¹⁴⁰ That testimony is belied by the record before the Board, which is replete with evidence of consideration of that very topic.

Mr. Curran also submits the testimony of Theodore D. Tomasi, Ph.D.¹⁴¹ Dr. Tomasi's Affidavit concludes that "DNREC failed to undertake any meaningful evaluation of the impacts and harm to recreation, fishing, boating and enjoyment of

139 Affidavit of Damial V. Preziosi.

140 Preziosi Aff. at ¶¶19-36.

141 Affidavit of Theodore D. Tomasi, Ph.D.

River [sic] that will result from the [Project].”¹⁴² Dr. Tomasi goes on to conclude that “DNREC failed to impose sufficient mitigation to address the harms caused to recreation, fishing, boating and enjoyment of the River.”¹⁴³ He testifies that DNREC should have approached the question of mitigation differently, including by considering an area stretching from the C&D Canal all the way to the Schuykill River.¹⁴⁴ He goes on to testify as to how he would have designed a mitigation plan based on the Project.¹⁴⁵

Dr. Tomasi is clearly a qualified expert in this area, however, the Board found that it was reasonable for the Appellees to rely on their own subject-matter experts who came to different conclusions, each of which are supported by their testimony and the evidence before the Board.

c. The Three-part Mitigation Plan

The Secretary’s Order is explicit regarding the three-phase mitigation plan contemplated to be imposed alongside the Project as a requirement by DNREC.¹⁴⁶

142 Tomasi Aff. at ¶11.

143 *Id.*

144 *Id.* at ¶¶32-44.

145 *Id.* at ¶¶45-69.

146 Secretary Order at 8-9.

ii. Findings of Fact Regarding the Mitigation Plan

For projects that involve the conversion of subaqueous lands to uplands, DNREC requires a plan for mitigating the effect of that process.¹⁴⁷ In early 2021, DNREC rejected Diamond State's initial plan for mitigation for failing to sufficiently address mitigation.¹⁴⁸ As a result of DNREC's initial rejection, several meetings ensued resulting in an expanded mitigation process based upon the economic model DNREC has applied in other subaqueous lands mitigation assessments.¹⁴⁹

The Board finds that the Mitigation Plan provides an adequate combination of direct in-kind replacement of lost habitat by:

- the creation of new intertidal wetland habitat in the immediate area of the project;¹⁵⁰
- the creation of the Environmental DNA monitoring program for the statewide fisheries program to be funded by Diamond State and administered by DNREC's subject-matter experts;¹⁵¹ and

147 Smailer Decl. at ¶51.

148 Smailer Decl. at ¶¶52-53.

149 *Id.* at ¶¶54-56.

150 Cargill Decl. at ¶¶54-55.

151 *Id.* at ¶¶52, 54.

- the reconnection of the impacted local community to the Delaware River by means of enhancements to Fox Point State Park.¹⁵²

In reaching this finding of fact, the Board relies on the following: the Secretary's Order (based upon the Hearing Officer's Report and the TRM) and the testimony proffered by Appellees. Namely, the testimony of Steven Smailer,¹⁵³ John Cargill,¹⁵⁴ and Brian Devine.¹⁵⁵

For Phase One of the Mitigation Plan, Diamond State will construct approximately one acre of intertidal wetland along the Delaware River at the north end of Fox Point State Park as an "in-kind" component of habitat replacement to partially compensate for what is being lost through the proposed construction of the port.¹⁵⁶ Diamond State shall be financially responsible for all aspects of the project.¹⁵⁷ This will include obtaining any necessary authorizations, construction of

152 *Id.* at ¶¶54-55.

153 Smailer Decl. at ¶¶51-56.

154 Cargill Decl. at ¶¶8-57.

155 Devine Aff. at ¶¶90-104.

156 Secretary Order at 7.

157 *Id.*

the wetland, and three (3) years of monitoring, maintenance and reporting to ensure that the wetland habitat creation is a success.¹⁵⁸

In Phase Two of the Mitigation Plan, to provide additional compensatory mitigation, the Diamond State will provide funding to establish the Environmental DNA (“eDNA”) Fisheries Monitoring Program under the operation and management of DNREC.¹⁵⁹ 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.¹⁶⁰ Additionally, DNREC will expand the eDNA monitoring to other rivers, creeks and ponds in Delaware to monitor endangered species, invasive species, and other species of interest. The data collected will help DNREC to evaluate and understand potential impacts of the proposed project on both resident and transient fish species that utilize the Delaware River and will help to supplement traditional data collection methods used by DNREC fisheries managers in other water bodies throughout the State of Delaware.

Phase Three of the Mitigation Plan provides for increased public access at Fox Point State Park to the natural resources of the Delaware River.¹⁶¹ Diamond State

158 *Id.* at 7-8.

159 *Id.*

160 *Id.*

161 *Id.* at 8.

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.¹⁶² Additional enhancements under consideration include roadway and lighting improvements, restroom repairs, and other amenities aimed at increasing public access to the natural resources of Fox Point State Park and the Delaware River.¹⁶³

Diamond State initially resisted DNREC's insistence on the environmental mitigation plans provided, but ultimately accepted the requirements imposed upon the Project.¹⁶⁴ The final mitigation plan was submitted on September 24, 2021.¹⁶⁵

iii. The Board's Assessment of Evidence Presented by Appellants to the Contrary

Appellants insist that the mitigation plans upon which DNREC insisted do not satisfy the regulation's requirements, despite the regulation including no specific manner of providing for mitigation. The Board finds that argument is not supported by the record before it.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Affidavit of Brian J. Devine at ¶¶90-104.

¹⁶⁵ *Id.* at ¶56.

The Board does not find Mr. Preziosi's testimony persuasive. First, Mr. Preziosi testifies that the compensatory mitigation plan is "grossly insufficient" and does not "meet compensatory mitigation requirements."¹⁶⁶ His testimony provides no basis in law for his conclusions. Instead, Mr. Preziosi's testimony consists of what DNREC "might have done" but does not indicate why what DNREC extracted from Diamond State regarding mitigation does not appropriately balance the public interest against the net benefits of the Project. Mr. Preziosi also testifies that the mitigation plan should have accounted for future maintenance dredging,¹⁶⁷ but that activity is not part of the application subject to the Secretary's Order. Maintenance dredging, and any required mitigation will be addressed by future applications.¹⁶⁸ Mr. Preziosi also testifies that the mitigation plan should have been species-to-species specific.¹⁶⁹ The Board finds as a matter of fact that the regulations require no such thing.

166 Preziosi Aff. at ¶¶45-59.

167 *Id.* at ¶61.

168 Small Aff. at ¶¶39-40; Devine Aff. at ¶¶43, 108-114.

169 Preziosi Aff. at ¶60.

d. The Board's Conclusions of Law Regarding the Application of Regulation Subsection 4.7

The Board finds and 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 and recreational factors. These issues 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. Issues of environmental concern explicitly considered by DNREC included noise pollution, cloudy water, and the sturgeon population.

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 the Board, with its own judgment or judgment of expert witnesses proffered by Appellants.

3. The Application of Regulation Subsection 4.8¹⁷⁰

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.¹⁷¹

170 This aspect of the Board's May 10, 2024 Final Order was not appealed. The Section is unchanged. In addition, for the purpose of this Order Upon Remand, the testimony of Mr. Charles Harman, submitted on behalf of Appellant PhilaPort concerning the effect of the turning basin is not given weight by the Board in its decision on these Appeals because PhilaPort has not appealed. *See* Affidavit of Charles Harman.

171 7 *Del. Admin. Code* §7504-1.0. 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:¹⁷²

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.¹⁷³

4. The Application of Regulation Subsection 4.11

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.

172 7 *Del. Admin. Code* §7504-2.3.3.1.4

173 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.

a. The Removal of Shoaling Fans from the Project Design and Potential Requirements for Future Maintenance Dredging

In connection with the Project, the initial construction will involve dredging the subaqueous lands subject to the permit issued by DNREC pursuant to the Secretary's Order. At one point, Diamond State had proposed to include a system of underwater shoaling fans to help reduce the need for future maintenance dredging. That part of the plan was abandoned, and Appellants argue that the Secretary's Order did not properly account for the need for future maintenance dredging. The dredging relevant to the DNREC permitting process is limited to the subaqueous lands in question.

i. Findings of Fact Regarding the Need for Future Dredging Operations

New construction dredging (like that allowed by the Secretary's Order) and maintenance dredging permits are distinct applications and require the submission of different information by a permit applicant.¹⁷⁴ Applications for initial construction permits requires broad amounts of environmental sampling and analysis.¹⁷⁵ An applicant may be asked if maintenance dredging will be required and whether and how such dredging can be minimized, but the application does not

¹⁷⁴ Small Aff. at ¶¶35-37.

¹⁷⁵ *Id.* at ¶38.

require it.¹⁷⁶ An application for maintenance dredging is far narrower because the area in question will have already been dredged in the construction process.¹⁷⁷

In designing the Project, Diamond State commissioned an assessment of regarding the amount of maintenance dredging anticipated to maintain the Edgemoor site.¹⁷⁸ The amount, estimated at 500,000 cubic yards per year is in line with what is required annually at the existing Port of Wilmington and the Delaware City refinery.¹⁷⁹ It is anticipated that such dredging would take 17 days per year.¹⁸⁰ Maintenance dredging will not affect recreational access to the River nor will it impact the navigational channel because it is limited to the berthing area.¹⁸¹

However, the amount of maintenance dredging anticipated did not take the proposed shoaling fan system into account because the efficacy of the shoaling fan proposal to reduce the need for maintenance dredging could not be guaranteed.¹⁸²

176 *Id.* at ¶¶40-41.

177 *Id.* at ¶39.

178 Devine Aff. at ¶108.

179 *Id.* at ¶109-110.

180 *Id.* at ¶111. Because the amount of maintenance dredging is variable year to year based on natural factors, Diamond State used a conservatively high estimate. *Id.* at ¶¶113-114, 120.

181 *Id.* at ¶112.

182 *Id.* at ¶116.

The inclusion of shoaling fans at a scale never before tested garnered public opposition, including from the Appellants during public comment.¹⁸³ DNREC also raised concerns about the potential impact, environmentally, of installing such shoaling fans at depth.¹⁸⁴ Diamond State found itself with a conundrum regarding the inclusion of shoaling fans in the project leading to their removal from the application.¹⁸⁵ It could not confirm their efficacy or determine the environmental impact without completion of the construction dredging, but the construction dredging could not proceed without a permit.¹⁸⁶

ii. The Board's Assessment of Evidence Presented by Appellants to the Contrary

Mr. Curran calls upon the expert testimony of Dr. Craig Jones in his objection to the consideration of dredging issues raised by the Project.¹⁸⁷ Dr. Jones believes that the need for maintenance dredging will exceed Diamond State's predictions.¹⁸⁸ Dr. Jones speculates about the nature of future maintenance dredging operations

183 *Id.* at ¶117.

184 *Id.* at ¶118. *See also* Mensch Decl. at ¶¶37-42; Smailer Decl. at ¶¶57-65.

185 Devine Aff. at ¶119.

186 *Id.*

187 Affidavit of Craig Jones, Ph.D.

188 *Id.* at ¶¶5-12.

required to be conducted by the Army Corps of Engineers in the main navigation channel of the Delaware River.¹⁸⁹

Mr. Preziosi testifies that the annual maintenance dredging contemplated by this project is unusual for the area.¹⁹⁰ In that regard, Mr. Preziosi's testimony is directly at odds with Mr. Devine regarding similar industrial sites on the Delaware River. In this regard, the Board finds the testimony of Mr. Devine to be more persuasive. Mr. Devine is a licensed Professional Engineer in the State of Delaware and has experience specific to subaqueous lands permitting related to the Delaware River.¹⁹¹

b. The Board's Conclusion of Law Regarding the Application of Regulation Subsection 4.11

Subsection 4.11 pertains to permits involving dredging operations. Here, the Project anticipates the need for future maintenance dredging. Indeed, even when the Project anticipated the use of shoaling fans, maintenance dredging was anticipated and accounted for. However, the Secretary's Order pertains to the construction permit application, not to future maintenance dredging operations, which will require future permitting action by DNREC and partner agencies at the federal and

189 *Id.* at ¶¶19-37.

190 Preziosi Aff. at ¶¶8-14.

191 Devine Aff. at ¶¶4-5.

state levels. Such permit applications will be subject to similar assessments regarding impact on factors such navigation in the effected subaqueous lands, the environment, and recreation. Any such permit issued will include such mitigation as deemed necessary by DNREC based on the scope of the work proposed. At this stage, the Board finds that the Secretary would be premature to opine regarding future dredging.

The evidence adduced by Appellant Curran from Dr. Jones does not compel a conclusion by this Board otherwise. Dr. Jones is clearly well-qualified, although he has not cited any work he previously has performed relevant to the Delaware River.¹⁹² On the other hand, the testimony from Mr. Devine is more persuasive to the Board.

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.¹⁹³ However, the evidence also demonstrates that maintenance dredging around the future wharf site will have no effect on navigation in the main channel. It appears to the Board that Appellants have, again, conflated DNREC's permitting

192 Jones Aff. at ¶1.

193 It is established by testimony from the witnesses presented by Appellees that this type of change to the permit application is typical. Smaller Decl. at ¶65.

responsibilities related to the subaqueous lands with the responsibility of other agencies to maintain the main navigation channel. The Board finds that there is no evidence 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.¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶

194 Oct. 21, 2022 Board Order at 16.

195 *Id.*

196 *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.¹⁹⁷

The Board finds Mr. Small’s testimony to be convincing and not challenged in the record before the Board. Namely, Mr. Small testifies that applications are not necessarily approved in the form in which the application is submitted.¹⁹⁸ DNREC’s process is fluid by design to foster modifications based upon feedback during the permitting process.¹⁹⁹ Because of that, the permitting process may include modifications, such as the removal of shoaling fans in this Project, to address DNREC concerns based upon public comment.²⁰⁰ DNREC’s actions with respect to Diamond State’s application in this case have been consistent with DNREC’s historic actions regarding application amendments.²⁰¹

197 The Board’s position is supported by testimony of DNREC’s witnesses regarding the ordinary procedures regarding the manner in which DNREC considers and accepts revisions to subaqueous lands permits.

198 Small Aff. at ¶19.

199 *Id.* at ¶20.

200 *Id.* at ¶21.

201 *Id.* at ¶¶22-26.

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 before the Board. 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 14th day of July, 2025.

/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: July 14, 2025 /s/ Robert Mulrooney (e-singed pursuant to 6 Del. C. § 12A-107)
Robert Mulrooney, Board Member

Date: July 14, 2025 /s/ Michael Horsey (e-singed pursuant to 6 Del. C. § 12A-107)
Michael Horsey, Board Member

Date: July 14, 2025 /s/ Deborah Wicks (e-singed pursuant to 6 Del. C. § 12A-107)
Deborah Wicks, Board Member