

ENVIRONMENTAL APPEALS BOARD

STATE OF DELAWARE

Simeon Hahn, Marie Reed, :
Karen Cheeseman, and :
Jeffrey Richardson, Appellants :
v. :
Department of Natural Resources : **No. 2021-W/CCE-0026**
And Environmental Control, :
Respondent :
v. :
Diamond State Port Corporation, :
Permittee :

Counsel of Record

Ken Kristl, Esq. for the Appellants.
Devera B. Scott, Esq. and Lucinda Cucuzzella, Esq. for Respondent
Wali W. Rushdan II, Esq. for Permittee

Introduction

The DNREC Secretary issued Order Number 2021-W/CCE-0026 on September 30, 2021. The Order dealt with a permit application submitted by the Diamond State Port Corporation (DSPC) to the DNREC Division of Water, Wetlands, and Subaqueous Lands (WSLS). DSPC sought a subaqueous lands permit and a federal consistency certification, necessitated by the DSPC proposal to construct a new container port on the Delaware River at 4600 Hay Road, Edgemoor, New Castle County, Delaware (“project”).

The DSPC property is the former location of the DuPont Edgemoor (Chemours) site, including a titanium dioxide pigment production facility. It lies along the Delaware River between Fox Point State Park (“FPSP”), upstream, and industrial facilities, including the existing Port of Wilmington, downstream. Dupont and later Chemours operated the titanium dioxide production facility through 2016. That facility was, historically, regulated under the Delaware Hazardous Waste Program throughout its operations. The plant and related structures were demolished before the sale of the property to the DSPC in February of 2017.

The proposed project is located adjacent to the federal navigation channel in the Delaware River, offshore of the DSPC parcel. The proposed project includes the construction of a pile-supported wharf (approximately 2,600 feet long), dredging the berth and access channel to a depth of 45 feet below mean lower low water, installing a bulkhead along 3,200 feet of shoreline, and occupying approximately 5.5 acres of subaqueous lands. DSPC also proposes to deepen portions of the Delaware River adjacent to the federal navigation channel to create a primary access channel to enable large container vessels to reach the site.

Most of the dredged materials (approximately 3.3 million cubic yards of river sediments and underlying soil) would be stored in existing confined disposal facilities operated by the U.S. Army Corps of Engineers, with a portion retained onsite to be used as fill material. The portion of the proposed project that fell under the permitting authority of the DNREC Division of Waste and Hazardous Substances, Remediation Section (“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). This specifically included the implementation of corrective measures and post-closure care that would be authorized under a Resource Conservation and Recovery Act (“RCRA”) Corrective Action Permit (“CAP”).

DNREC processed all of the permit applications received from DSPC together and held a public hearing regarding the proposed project on September 29, 2020. DNREC staff, representatives of DSPC, Duffield Associates (consultant for DSPC), Gulftainer, and over fifty members of the public virtually attended the public hearing, with three members of the public providing live comment on the pending permit applications at that time. Due to the high level of public interest, and in response to requests made by the public, the hearing record remained open for receipt of comment through December 1, 2020. DNREC received approximately 200 comments overall, voicing both support and opposition to the proposed project.

At the request of Hearing Officer Lisa A. Vest, the technical experts in the Department’s Division of Water, WSLs, and the Division of Climate, Coastal and Energy, through its Delaware Coastal Management Program, prepared a Technical Response Memorandum (“TRM”). The purpose of the TRM was [1] to address the concerns associated specifically with the WSLs and DCMP aspects of the proposed project; and [2] to offer conclusions and recommendations regarding those concerns for the benefit of the Record generated in this matter.

The Hearing Officer then prepared her Report, dated September 29, 2021, which expressly incorporated the TRM. The Report set forth the procedural history, summarized and established the record of information relied on in the Report, and provided findings of fact, reasons, and conclusions that recommended the Secretary approve the application. The Report also thoroughly addressed the public comments and indicated that they did not warrant the denial of the permit decision nor a delay in order to receive additional information.

In reviewing the applicable statutes and regulations, as well as weighing the public benefits of those aspects of the proposed project under the permitting authority of the WSLs and the DCMP against potential detriments, the Secretary relied on DNREC experts in the WSLs and the DCMP, who concluded that the DSPC application complied with all applicable federal and state laws and regulations. The WSLs Subaqueous Lands Permit and the DCMP Certification issued by DNREC were subject to extensive general and specific conditions, intended by the Secretary to ensure continued protection of public health and the environment.

History of the Appeal

A timely appeal of this Order was filed by five individuals who self-identified as the “Delaware Community Benefits Agreement Coalition” (DCBAC). The appellants argued that DNREC had failed to properly address impacts from the proposed dredging and shoreline stabilization. The appeal further argued that the project and mitigation efforts presented a risk to public health, and to those in nearby communities, creating an issue as to environmental justice.

The Board, ruling on DNREC’s motion, dismissed the DCBAC as an entity for lack of counsel, and found that the five individual appellants had failed to establish standing. The individual appellants appealed to the Delaware Superior Court, which issued an opinion affirming the Board as to one appellant, but reversing as to the other four. The case was remanded to the Board for proceedings consistent with the Court’s ruling.

DSPC was added as a necessary party to the EAB appeal, as the permittee. Mr. Kristl entered his appearance as counsel for the individual appellants in August of 2025.

The hearing in Case Number 2021-W/CCE-0026 took place on April 28, 2026 before the Chair, Dean Holden, and Board Members Deborah Wicks, Alia Smith, and Michael Horsey. The parties to the appeal are the Department of Natural Resources and Environmental Control (DNREC; Respondent), Diamond State Port Corporation (Permittee), and (Appellants) Marie Reed, Karen Cheeseman, Jeffrey Richardson, and Simeon Hahn. The parties entered into a stipulation to submit, in advance of the hearing, joint exhibits, witness proffers, individual party exhibits, witness declarations, and various procedural and evidentiary motions. The stipulation limited presentations at the hearing to argument on the legal and factual issues.

Decision of the Board

After review of the record, including the materials submitted by the parties as set forth below, and after hearing full argument by the parties, the Board (by a vote of 3-1) affirmed the Order of the Secretary dated September 30, 2021, issuing a subaqueous lands permit and federal consistency certification to the Permittee. The Board further denied the motion by DNREC to dismiss the appeal.

The Board notes that the permit challenged here was previously at issue in three appeals that were consolidated for purposes of a prior hearing before the Board.¹ The appellants argued that the Order approving the permit should not have been issued due to the failure of DNREC to adhere to the applicable regulations, and to properly consider the effects of the project on environment and recreational factors and on river navigation. The Board issued a comprehensive decision in the consolidated matters on July 14, 2025, affirming the Secretary and denying the appeals. The opinion supporting that determination is incorporated herein by reference.

¹ *Greenwich Terminals LLC v. DNREC*, No. 2021-09; *The Philadelphia Regional Port Authority v. DNREC*, No. 2021-08; and *Walter F. Curran v. DNREC*, No. 2021-10.

Issues Presented

On September 30, 2021, DNREC Secretary Garvin issued Order 2021-W/CCE-0026, granting a subaqueous lands permit and a federal consistency certificate to the U.S. Army Corps of Engineers, to Diamond State Port Corporation (DSPC), for a project to construct a new container port on the Delaware River in Edgemoor, New Castle County, Delaware, on the site of a former Dupont (Chemours) Company titanium dioxide plant.

The Appellants contest the issuance of the Subaqueous Lands Permit and the federal Consistency Certificate by the Secretary with respect to the Edgemoor container port. The Board must determine if the Secretary's Order issuing the permit and certification is supported by evidence in the record as to the nature of the impact of the project on subaqueous lands and the sufficiency and impact of mitigation plans. The Appellants have also raised the issue of whether the Secretary and DNREC sufficiently evaluated the impact of the project on environmental justice communities.

Exhibits

The **Appellants** submitted the declarations of **Simeon Hahn**, a retired NOAA employee offered as an expert in ecological assessment, **Jeffery Richardson** and **Pamela Salaam** regarding community impacts, and **Marissa McClenton** as to principles of environmental justice.

Appellants offered exhibits including:

- [1] a monograph from the Clean Air Coalition entitled “Diesel and Health in America: The Lingering Threat”;
- [2] a memorandum containing recommendations for the Southbridge Truck Bypass Study; and
- [3] an environmental assessment regarding a container terminal project in Portsmouth, Virginia.

DSPS submitted the declarations of **Eugene Young Jr.** and **Diego Lopez** regarding the Port expansion, **Brian Devine**, interim Director of DSPS, and **Jim Shanahan** of Brandywine River Restoration Trust regarding shad migration. DSPS will rely on documents in the record for the appeal, as well as environmental assessments conducted by various federal agencies in connection with the Delaware River Main Channel Deepening project, including:

- National Marine Fisheries Service Biological Opinion for Dredging Activities within the Philadelphia District dated November 1996;
- National Marine Fisheries Service Biological Opinion on the impacts of the Army Corps of Engineers proposed rock blasting on shortnose sturgeon dated January 2001;
- Supplemental Biological Assessment for Potential Impacts to the New York Bight Distinct Population Segment of Atlantic Sturgeon dated March 2011;

- National Marine Fisheries Service Biological Opinions for Deepening and Maintenance of the Delaware River Federal Navigation Channel (issued November 2017, December 2018, and November 2019);⁷
- Delaware River Main Stem and Channel Deepening Project Environmental Assessment dated April 2009;
- Draft Environmental Assessment for the Delaware Main River Deepening Channel Project dated June 2011;
- Final Environmental Assessment for the Delaware River Main Channel Deepening Project dated September 2011; and
- Final Environmental Assessment for the Delaware River Main Channel Deepening Project dated November 2013.

DSPS presented environmental assessments prepared in connection with its parallel federal permitting process, including:

- National Marine Fisheries Service Endangered Species Act Biological Opinion for the Edgemoor Container Port dated March 2022; and
- National Marine Fisheries Service Endangered Species Act Biological Opinion for the Edgemoor Container Port dated June 2023.

DSPS also referenced two federal grants obtained to help fund construction of the port facility, from the following federal agencies:

- United States Department of Transportation: Port Infrastructure Development Program (PIPD); and
- Environmental Protection Agency: Zero-Emission Technology Deployment Competition under the Clean Ports Program..

DSPS reserved the right to rely on documents presented to the Board in Consolidated Appeals 2021-08, 2021-09, and 2021-10; environmental impact assessments prepared subsequent to the Secretary's Order; and aerial photographs or video of the Project site and surrounding area. More specifically, DSPS directed the Board's attention to:

- Factual findings reflected in prior written orders of the Board;
- February 13, 2024 Public Hearing Transcript;
- Witness declarations, specifically the Declarations of Brian Devine, John G. Cargill, IV; Steven M. Smailer, David Small, and Laura Mensch; and
- Traffic Operational Analysis (TOA) for the Edgemoor Port Facility dated September 2023.

DNREC presented the amended declaration of **Steven Smailer**, Director of the Division of Water, and the declaration of **John G. Cargill IV**, a senior hydrologist in the Division of

Watershed Stewardship. With respect to exhibits, DNREC relied on materials in the public hearing record, as well as declarations and documents identified in the Chronology, namely:

- September 30, 2021 Secretary's Order No. 2021-W/CCE-0026 (Chronology Exhibit 1)
- September 30, 2021 Subaqueous Lands Permit & Associated Documents (Chronology Exhibits 2, 2a, 2b, 2c, 2d)
- September 30, 2021 Federal Consistency Certification (Chronology Exhibit 3)
- September 29, 2021 Hearing Officer's Report and Exhibits (Chronology Exhibit 4)
- September 29, 2020 Transcript of Public Hearing (Chronology Exhibit 5)

DNREC also made reference to regulations and statutory authority, including:

- 7 *Del.C.* ch. 60 (Environmental Control Act)
- 7 *Del.C.* ch. 72 (Subaqueous Lands)
- 7 *Del. Admin. C.* §7504 (Regulations Governing the Use of Subaqueous Lands)

Contentions of the Parties

The Appellants' first argument was that the Secretary failed to consider the effect of dredging on critical habitat. Counsel argued that the biological assessment with respect to the Atlantic Sturgeon under the federal Endangered Species Act (ESA), part of the environmental assessment technical document prepared by DNREC, was not completed until after the Secretary's Order granting the permit to DSPC. The Secretary thus lacked the formal analysis of the National Marine Fisheries Service with respect to endangered habitat under the ESA. The dredging of a biologically-productive section of the Delaware River is referenced in DNREC Regulations governing subaqueous lands. The declaration of Mr. Hahn questions whether the dredged area would continue to be biologically productive.

Appellants' second argument was that the proposed mitigation efforts were insufficient. According to the statute, the mitigation must be linked to the loss. In this case, compensatory mitigation was addressed to 5.5 acres of wetland impacted by dredged spoil and construction activities. The Appellants sought a remand in order for the Secretary to reconsider the effect of the dredging on the wetlands and the River bottom in the area of the project. The contention was that the proposed creation of a new wetland area north of Fox Point Park and other amenities did not adequately address the harm presented. A one-acre wetland is not sufficient to address the disturbance of 87 acres of River bottom, according to Appellants.

The third argument of the Appellants is that the Secretary failed to fully consider other factors, such as emissions, noise, odors, and hazardous chemicals, in awarding the permit. Criteria emissions would arise during three years of construction, and from vehicles using the new port facility. Counsel argued that compliance by the Permittee with various federal laws was insufficient to support the State permit, given the lack of federal regulation of noise and odor pollution from the facility during the construction phase and later operation.

The Permittee pointed out that the port facility would be built on a legacy contaminated site, formerly occupied by a Dupont (Chemours) Company titanium dioxide plant. After the closing of that facility, the contamination on site was remediated, and continues to be monitored. Swimming and fishing are prohibited on that portion of the River. The intent of the project is to revitalize a dormant site, and to enable the Port to remain competitive by accommodating cargo from deepwater container ships on the Delaware River, creating jobs and generating tax revenue.

For DSPC, the permit issued by the Secretary and at issue here was the culmination of an effort covering many years of research and planning, in an effort to comply with federal, state, and local laws regulating such development. The permit acknowledges the federal role and the need to integrate efforts to achieve compliance with environmental and land use regulations. DSPC recognizes its ongoing responsibility to comply with the general and specific conditions of the permit.

DSPC has, for more than a decade, reached out to the surrounding community with information about the port expansion. These efforts at community engagement generated significant feedback from individuals and organizations, that was incorporated into the site planning and efforts at compliance. The DNREC permitting process was likewise subject to extensive public input prior to the Secretary's decision. There is a considerable history of workshops, meetings, comments, and public hearings regarding the project. Environmental justice concerns were addressed by changing aspects of the plan to reduce emissions, noise, odor, and other impacts on the local community.

Counsel for DSPC emphasized that the Secretary properly looked at all aspects of the proposed development, including the economic benefits, such as new employment opportunities and increased tax revenue for government. This project would greatly expand the reach of the existing Port of Wilmington, by accommodating large container ships that cannot access the existing facility. Development of the dormant site would also enhance recreational activities through the offset and mitigation measures mandated by the permit. DSPC argued that the container port would be a net improvement for the surrounding community, as compared to the dormant remediated site and the former chemical plant.

According to the Permittee, one environmentally-beneficial aspect of dredging would be the removal of layers of sediment containing polychlorinated biphenyls, better known as PCB's – a known carcinogen. The removal and safe containment of this contaminated spoil will actually improve water quality and promote restoration of fishing on the River. In context, the site,

including the riverbed, has been heavily contaminated through past use and deposition. Development would not degrade the site or interfere with the ongoing remediation, and dredging would remove existing legacy contamination from the River.

The nature and extent of the emissions anticipated from the site would have far less impact than the previous industrial use. The emissions are within DNREC's regional budget for criteria pollutants. A facility with trucks, trains, cranes, and warehouses would generate considerably less emissions than a chemical plant or manufacturing facility. DSPC will receive a federal grant that will facilitate the use of electric cranes and trucks on-site, thus considerably reducing emissions of greenhouse gases.

Counsel for DNREC explained how DSPC had complied with numerous requirements for federal permits and with Delaware River Basin Commission requirements for the construction of the bulkhead and wharf. The Secretary considered these actions and findings in awarding the permit to DSPC with the general and special conditions attached.

In providing for offset and mitigation, the Secretary considered both the temporary disturbance of some 87 acres of River bottom, as well as the permanent impact on 5.5 acres of wetlands, in mandating the creation of a new wetland area. Routine maintenance dredging does not trigger additional mitigation or offset mandates. However, the Permittee is required to monitor fish populations, turbidity, and other factors during the dredging. DNREC relied on findings by its Division of Fish & Wildlife to establish conditions in the permit to protect fish populations.

With respect to emissions, DNREC's Division of Air Quality concluded that the project construction should not cause a deterioration of air quality or significantly contribute to continuation of marginal non-attainment of ozone national ambient air quality ("NAAQS") standards.

Counsel for DNREC emphasized how the Regulations require that the Secretary balance environmental impacts with economic and community benefits, in determining appropriate conditions, offsets, and mitigation efforts incorporated in the permit. The improvements to Fox Point State Park would directly address recreational concerns expressed by Appellants.

Standard of Review

The Board was created by the Delaware General Assembly in 1973 to act as a quasi-judicial body to hear appeals from certain actions by the DNREC Secretary. The Board operates under the Environmental Appeals Board Regulations. The Board may affirm, reverse, or remand with instructions any appeal of a case decision of the Secretary.

The controlling statute, 7 Del.C. §6008, 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.”² “[T]he Board must not overturn the Secretary’s decision unless the evidence before the Board does not support [the Secretary’s] decision.” *Id.*

The burden in the appeal rests upon Appellants to show the Secretary’s decision is not supported by the 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, including in this case the proffers and declarations of witnesses. The Board cannot reverse the Secretary’s decision unless it finds that the record fails to support the Secretary’s decision.³ Absent an abuse of discretion, the agency decision must be affirmed.⁴

The Delaware Subaqueous Land Act, Chapter 72 of Title 7 of the Delaware Code, applies to the development of subaqueous lands within the State of Delaware. The purpose of the law is broadly defined:

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. 7 *Del.C.* §7201.

The Chapter protects the public interest by creating procedures for issuing permits for uses of or changes in private subaqueous lands, and by allowing the Secretary to place reasonable limits on the use and development of such lands.

The statutory authority and the Regulations guided the Board in its deliberations.

Conclusion

A majority of the Board, by a vote of 3-1, Ms. Smith dissenting, after deliberations, determined that the Appellants failed to carry their burden, and that the award of the permit to DSPC should be sustained. The Secretary’s determination is supported by substantial evidence, as reflected in the Hearing Officer Report and the Technical Response Memo, and is free from legal error. The Board majority did not find any basis to reverse the Secretary’s decision on the facts or law, or to remand the matter for further findings.

² *Delaware Solid Waste Authority v. DNREC*, 250 A.3d 94, at 115 (Del. 2021).

³ *Delmarsh LLC v. EAB*, 277 A.3d 281, 292 (Del. 2022).

⁴ *Public Water Supply Company v. DiPasquale*, 735 A.2d 381 (Del. 1999).

Discussion

The Board is bound to consider the record as a whole, including the specific exhibits, proffers, and declarations relied on by each of the parties. Although by stipulation there was no live testimony, the Board did consider the submissions of the parties from witnesses, including experts. The Board also relied on the text and references of the Secretary's thorough decision itself, the Hearing Officer's Report, and the Technical Response Memo. The permit award was the product of a comprehensive investigation and review by DNREC. The award includes numerous general and special conditions binding the Permittee in the construction and operation of the proposed facility, and protecting the local environment.

Turning to the specific grounds argued by the Appellants, it is worth noting that the effect of dredging on critical habitat for the Atlantic Sturgeon was reviewed by the National Marine Fisheries Service under the ESA. The biological opinion relied on by the Secretary studied the effect of the project on the local section of critical habitat, both during the construction phase and periodic dredging to maintain the channel and pier depth, anticipated in the future. The conclusion was that the project could adversely affect the Atlantic Sturgeon, but was not likely to jeopardize its survival. Further, the project could adversely affect critical habitat, but was not likely to modify or destroy it.

The Edgemoor site happens to be within the range where the freshwater River merges with tidal waters from the Atlantic Ocean and the Delaware Bay, creating ideal salinity for the Atlantic Sturgeon. The ESA mandates robust protections for endangered species in critical habitat. A number of the special conditions imposed by the Secretary limit or constrain operations to protect and preserve that habitat. The Secretary was entitled to rely on the biological opinion and the federal agency findings in fashioning the permit conditions and constraints.

Where the granting of a subaqueous lands permit will result in the loss of a public resource, the permittee may be required to take measures to offset or mitigate the loss. *7 Del.C. §7205*. In this case, to effectuate this purpose, the Secretary attached some 27 general conditions and 17 special conditions, in granting the permit to DSPC. Included is a requirement that DSPC create a new wetland area north of the project site, adjacent to Fox Point Park. This and other measures to be taken to offset or mitigate the effects of dredging are reasonable efforts to limit harm to the environment, and to restore and protect habitat.

The Secretary properly relied on the project's demonstrated compliance with the federal Clean Air Act (CAA) and the Clean Water Act (CWA), as well as the National Environmental Protection Act (NEPA). There were references to approvals obtained from the U.S. Army Corps of Engineers. To the extent that such laws or approvals do not reach noise and odor pollution, it is worth noting that the site adjoins the Penn Central railroad right-of-way, and beyond that the I-

495 highway corridor creates a buffer that separates the facility from the nearest commercial and residential properties. It is reasonable to expect that odor and noise problems during construction and later operation of the facility will be confined to the site itself, at considerable distance from the Edgemoor community. For example, freight to be loaded and unloaded from ships will utilize existing rail spurs and a full existing interchange affording truck access to and from the Interstate highway.

The Board considered what, if anything, would be gained from the remand to the Secretary requested by the Appellants. The full record supporting the permit decision consists of over 7,000 pages of documents. The exhibits and proffers of the parties reflect a thorough and exhaustive review of all aspects of the project. The TRM and Hearing Officer Report thoroughly discuss the testimony presented and the agency response. It is difficult for the Board to see what would be gained by a remand, other than further delay in a process that has extended over several years already, to the prejudice of the Permittee. The Board is satisfied that the record is ample and sufficiently complete, and that the Secretary fully considered it. That effort is reflected in the numerous conditions attached to the permit, which will impact the construction and operation of the facility, far into the future. This case should stand or fall on the evidence and argument presented to the Board. A remand is not justified.

Ruling on the Motion to Dismiss the Appeal

DNREC moved to dismiss the appeal, arguing that decisions of the Secretary with regard to State-owned subaqueous lands are not subject to review under Delaware law. The Board unanimously denied the motion, and allowed the appeal to proceed to a ruling on the merits.

The Delaware Code provides that any person whose interest is substantially affected by *any* action of the Secretary taken pursuant to the Subaqueous Lands Act may appeal to this Board. 7 *Del.C.* §7210 (emphasis added). The cited statute contains an exception, barring an appeal of a decision by the Secretary to *deny* a permit on any matter involving state-owned subaqueous lands. Thus, where, as in this case, a permit has been *granted* by the Secretary, the right to appeal is unaffected by the statutory exception, regardless of State lands being involved.

The Code, §7210, further provides that appeals in Subaqueous Lands cases shall be governed by §6008 and §6009 of Title 7. Section 6008(a) affords a broad right of appeal to the Board on the part of any person substantially affected by any action of the Secretary, consistent with the equivalent provision of §7210 cited above. The Superior Court found that the remaining Appellants have standing in this case. Likewise, §6008(e) contains the exception – inapplicable here - providing that there shall be no appeal of a decision by the Secretary to *deny* a permit on any matter involving state-owned land, including subaqueous lands, unless that denial was discriminatory.

There was no holding to the contrary in the *Worldwide Salvage* case⁵. The Secretary never acted on the permit application from Worldwide Salvage, another company having been awarded the salvage rights. This was tantamount to a permit denial, and the Court dismissed the Worldwide Salvage appeal on that basis. The basis of the appeal was the failure of the Secretary to award the permit to Worldwide Salvage, which amounts to a denial. Thus the holding in *Worldwide Salvage* can be distinguished. This case does not involve a disgruntled developer competing with DSPC to develop the Edgemoor property who was not granted a permit. Rather, it involves concerned citizens contesting the award of the permit.

Under both Chapter 72 and Chapter 60 of Title 7, the General Assembly has granted a broad right of appeal to this Board. The exception under §7210 is narrow, in that an appeal is barred only where [1] a permit was denied, *and* [2] State-owned subaqueous lands were involved. Similarly, the exception to the broad appeal right of §6008 is narrow, pertaining only to [1] denial of a permit on [2] State-owned lands. Under either statute, both of the criteria must be satisfied, before an appeal is barred.

In this case, it is uncontested that the subaqueous lands permit was *granted* to the Diamond State Port Corporation. That ends the inquiry under either statute. The appeal is not barred. While the Delaware River includes subaqueous lands under State control, that fact would only come into play if the permit had been *denied*. If this permit had been *denied* to DSPC, appeal to this Board would have been barred.

These statutes are not ambiguous. The intent of the General Assembly could not be more clear. A party *denied* a subaqueous lands permit on State land cannot appeal to the Board, unless there is a claim of discrimination. Whereas, where such a permit has been *granted*, as in this case, the broad statutory right of appeal applies. If, as DNREC argues, the General Assembly wanted to bar *all* appeals in cases involving State lands, it would not have linked that clause to the denial of a permit. Rather, it would have hitched the State lands limitation to the first sentence of §7210 and §6008. Counsel for DSPC suggested several plausible ways of doing so. But the legislature did not enact any such language. The statutes have been amended several times, without amendment to bar all appeals involving State lands.

It is worth noting that the *denial* of a subaqueous lands permit has no environmental consequences, whereas the *granting* of a permit, as here, will result in some impact to the environment, as the exhibits reflect. The legislature has provided for an appeal in the present context, such as that filed by the individual appellants in this case, who raise serious concerns about the impact on their community of this development project. It is well within the prerogative of the General Assembly to allow for an appeal as a check on the Secretary's authority in some instances, but not others.

⁵ *Worldwide Salvage, Inc. v. Environmental Appeals Board*, 1986 WL 3650 (Chandler, J. Jan. 30, 1986)

Counsel pointed out this issue is presently before the Superior Court and pending argument in a related case, *Greenwich Terminals v. DNREC*.⁶ That case is an appeal from the ruling of this Board dated July 14, 2025, cited above. The eventual ruling on the appeal in that case could well differ from the result reached here. However, this Board cannot await the decision in another case. The parties are entitled to a ruling at this time. The Board unanimously finds that the appeal taken in this case, from the *granting* of a subaqueous lands permit and a federal consistency finding, is not barred by the statutes or prior case law. The Board is persuaded that the General Assembly intended for community residents such as Appellants here to have a right to appeal the granting of an environmental permit affecting their community.⁷

For the reasons set forth above and in the record, the Motion to Dismiss the Appeal is DENIED.

For the reasons set forth above and in the record, the appeal is denied, and the decision of the Secretary is sustained.

IT IS SO ORDERED this 26th day of May, 2026

Date: May 19, 2026
/s/ Dean Holden
Dean Holden, Chairperson
Environmental Appeals Board

The following two Board members, who, with Chairperson Holden constitute a quorum of the Board, concur in this Decision and Final Order:

Date: May 19, 2026
/s/ Michael Horsey
Michael Horsey, Board Member

Date: May 19, 2026
/s/ Deborah Wicks
Deborah Wicks, Board Member

The following Board member dissented from the denial of the appeal and the affirmance of the Secretary's decision:

⁶ See *Greenwich Terminals, LLC v. DNREC*, 2025 WL 1098975 (Miller, J. April 14, 2025).

⁷ A number of procedural motions filed by the parties were resolved prior to the hearing, as reflected in the Stipulation and the hearing record.

Date: May 26, 2026
/s/ Alia Smith
Alia Smith, Board Member