HEARING OFFICER'S REPORT

TO: The Honorable Shawn M. Garvin
Cabinet Secretary, Department of Natural Resources and Environmental Control

FROM: Theresa L. Smith
Regulatory Specialist, Office of the Secretary
Department of Natural Resources and Environmental Control

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

DATE: May 29, 2024

I. BACKGROUND AND PROCEDURAL HISTORY:

A virtual public hearing was held on Wednesday, January 12, 2022, at 6:00 p.m. via the State of Delaware Cisco WebEx Meeting Platform by the Department of Natural Resources and Environmental Control ("DNREC," "Department") to receive comments on the Subaqueous Lands Permit application submitted by Fort DuPont Redevelopment and Preservation Corporation ("Applicant," "FDRPC") to install a rip-rap shoreline along a portion of the southern bank of the Delaware City Branch Canal, at Fort DuPont, adjacent from 260 Old Elm Avenue, Delaware City, DE ("Application".) In accordance with 7 DE Admin. Code 7504 – *Regulations Governing the Use of Subaqueous Lands* ("Regulation") the proposed project is intended to stabilize the bank location and prevent continued erosion and possible slop failure along the branch canal channel.

On July 23, 2014, the Delaware Legislature enacted House Bill 310, creating the FDRPC to preserve and protect the recreational amenities of Fort DuPont and to make capital improvements to the 325-acre complex. The Delaware City Branch Canal runs along Fort

DuPont and overtime has deteriorated by erosion and is no longer serviceable. The erosion also threatens the stability of the adjacent lands and the sediments entering the branch channel that could obstruct boat traffic, such as leaning trees. In response to these concerns and as a part of the America's Water Infrastructure Act of 2018, the Delaware City Branch Canal is in the process of being transferred to FDRPC to make improvements of the area.

On August 24, 2021, the Department received the initial Application to install 2,000 linear feet of rip-rap shoreline stabilization along the Delaware City Branch Canal, between the DNREC boat ramp bulkhead and 9th Street Bridge. The stabilization will run on the shoreline adjacent to Cook Street, Crawford Lane, and Draper Street. The Applicant proposes to install 5,363 ± cubic yards of riprap on the bank to rebuild the former rip-rap armored slop and address the deteriorating area. The riprap will be placed on a geotextile fabric and is calculated to impact 0.82 ± acres along the Delaware City Branch Channel with no modifications to the existing slope, nor any backfill or dredging.

An initial review of the Application was completed by the Department's Division of Water, Wetlands and Waterways Section ("WWS") on October 5, 2021, to determine if the proposed structure is consistent with regulatory requirements. In accordance with 7 *Del. C* §7207 (d) the Department placed the Application on notice on October 13, 2021, through the News Journal and Delaware State News for 20 days.

To that, the Department received comment requesting a hearing, and it also addressed inconsistencies, incompletion, and opposition to the application. Accordingly, a hearing was

scheduled for January 12, 2022. Pursuant to 7 *Del. C* §7208 (b), the Department notified 28 adjoining property owners of the proposed project and the hearing, via U.S postal mail. All proper noticing requirements for the public hearing were met in accordance with 29 *Del. C* §10115.

On January 5, 2022, the Applicant resubmitted their application with corrections to the inconsistencies throughout the Application. The initial application was inconsistent to the information provided on page 4 and Appendix 1. The revised Application changed the type of application to a "new" project on page 4, rather than a "repair/ replacement of an existing structure, " and is consistent with the information provided on Appendix 1. In a letter submitted to the Department on January 12, 2022, the Applicant explained that the change to "new" is indicative of the regulatory definitions, as the proposed project's existing remnants are not serviceable. Moreover, while a "repair or replacement of an existing structure" requires photos, a "new" project does not. Therefore, the Application meets the regulatory requirements and is considered complete, in that aspect. Additionally, the Applicant adjusted the linear feet of rip-rap shoreline stabilization from 2,000 to 1,600 feet to ensure consistency within the application.

On January 12, 2022, the virtual public hearing was held by the Department and the revised Application was thoroughly vetted at the time of the public at the hearing. There were three (3) members of the public in attendance at the virtual hearing, along with a representative of the Applicant and Division of Water's staff. The record remained open through Thursday, January 27, 2022, and comment was received from the public. Subsequent to the record closing, this Hearing Officer requested a Technical Response Memorandum ("TRM") from the expert

staff of the Department's Division of Water, WWS that will be discussed in further detail below. Proper notice of the hearing was provided as required by law.

It should be noted, the Department received a previous application from the Applicant, and held a hearing on January 21, 2021, for the Subaqueous Lands Permit application to install approximately 2,000 linear feet of riprap along a portion of the southern bank of the Branch Channel with the intent to stabilize the bank and precent continued erosion and possible slope failure. Subsequent to the hearing, the Applicant withdrew the Application via a letter submitted to the Department, dated July 27, 2021. The Department published the withdrawal letter on the hearing webpage dedicated to that matter, leading to the closure of that hearing record.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The public hearing record ("Record") consists of the following documents: (1) a verbatim transcript; (8) eight documents introduced by responsible Department staff at the public hearing held on January 12, 2022, and marked by this Hearing Officer accordingly as "Department Exhibits 1-8"; (3) one(1) document submitted by the Applicant, and marked by this Hearing Officer as "Applicant's Exhibit 1"; (4) the TRM from Rebecca Bobola, Environmental Scientist, Division of Water; and (5) the draft Subaqueous Land Permit prepared by the Department's WWS regarding Fort Dupont's Subaqueous Lands Permit Application, as identified at the time of the public hearing as "Department's Exhibit 2" and posted as such on the hearing web page dedicated to this matter. The Draft Permit is expressly incorporated into this Report and attached hereto as Appendix "A". The Department's person primarily responsible for reviewing the

Application, Mrs. Bobola, developed the Record with the relevant documents in the Department's files.

Representing the Applicant at the hearing was Ralph Downard, Senior Project Manager with Duffield Associates, an authorized agent for the Applicant. Following the presentation from Mrs. Bobola, on behalf of the Department (and the introduction of the Department's exhibits to be entered into the Record). Mr. Downard, proceeded with a presentation on behalf of Applicant providing a brief introduction of the FDRPC and an overview of the project.

The Record closed with regard to public comment 15 days following the public hearing, on January 27, 2022. The Department received 4 comments regarding the matter. Subsequently, at the request of the Hearing Officer, the Department's WWS submitted into the Record a Technical Response Memorandum ("TRM") to: (1) address the concerns associated with this pending Application, as set forth in the public comment received by the Department; (2) provide a formal regulatory review of the Application; and (3) offer the Department's WWS conclusions and recommendations with regard the pending Application for the benefit of the Record generated in this matter.

The Department's TRM acknowledges the comments received from the public and thoroughly responds to the same. The comments addressed concerns of historic preservation, inconsistent information in the application and concerns on the impact on natural surface and groundwater hydrology, as well as sediment transport functions.

The Applicant attested that the Delaware Division of Historic and Cultural Affairs has been notified of the proposed project and a Phase I Archeological Evaluation has been completed. In addition, the U.S. Army Corps of Engineers archeologist is reviewing the Section 404 and 408 applications to ensure no historic artifacts are impacted without being properly documented. Furthermore, the Section 106 review process is required for federal projects, and is not required for state projects; hence, no discussion was included in this permit application. It should be noted that the Applicant currently has a pending Federal permit from the Army Corps of Engineers for a Nationwide Permit 13 & Section 408 - Federal Permit #NAP-2017-00678-85.

Additional comments/objections addressed administrative issues with the application such as: inadequate direct notification of public notice, omitted questions on the application, claims of the project being new to avoid additional documentation.

The Applicant provided a revised application to correct the inaccuracies and discrepancies of the initial application and submitted a letter on January 12, 2022, that provides an explanation of the revisions and responds to concerns of the public. As mentioned above, the Applicant revised the type of Subaqueous Lands Permit to a "new" project, on page 4, which is also consistent with information on Appendix 1, and meets the regulatory definition of a "new" project. Moreover, while a "repair or replacement of an existing structure" requires photos, a new project does not. Therefore, the Application meets the regulatory requirements and no does not require further documentation. Additionally, the Applicant adjusted the linear feet of rip-rap shoreline stabilization from 2,000 to 1,600 feet to ensure consistency within the application.

In the letter dated January 12, 2022, the Applicant also addresses the concern raised regarding the calculation of cubic yardage of the riprap being proposed, discrepancies between the basic application, appendices and plans and, the lack of a Sediment and Erosion Control Plan. The applicant explains that the slope is expressed with ± to account for natural variability of the shoreline. The total proposed cubic yardage of riprap stated in the application did not match the example formula the Department provides. The example formula assumes the base width of riprap is twice the width of the rip rap at the top of bank. The applicant proposes to apply an equally wide layer of riprap, top to bottom, with an anchor toe.

The public also addressed concerns about the project's potential impact on natural surface and groundwater hydrology, as well as sediment transport functions. The Applicant's proposal to utilize filter cloth behind the riprap revetment aims to mitigate sedimentation of the waterway. While this is not a part of the pending Application, the Department approved for the Sediment and Stormwater Plan in December of 2021, for the revetment and adjoining lands, which includes the removal of the leaning trees at the top of the bank regardless of permit approval because of the potential dangers posed.

Concerns were also raised about the aesthetics of the proposed project not being suitable for the historic area and a perceived lack of consideration for the site's historic value. The Department did consider alternatives stabilization methods, such as gabion baskets; however, they have a more industrial appearance and are typically used on areas with more severe erosion and steeper slopes. Moreover, the same type of riprap shoreline stabilization, as proposed, exists on the opposite side of the canal from the planned work area.

The Department conducted a thorough assessment of the proposed project's impact to the public. The implementation of riprap shoreline stabilization was found to have no adverse effect on the navigability of the canal, both during and after installation. Without this stabilization, sediment erosion into the water body would persist, leading to the shallowing of the Branch Canal and compromising shoreline integrity, potentially resulting in bank failure.

The Department also evaluated the impacts on shellfishing, finfishing, or other recreational activities, as well as existing or designated water uses. It was determined that there would be no disruption to the current uses of the Branch Canal following the installation of the proposed riprap shoreline stabilization. However, the Department did incorporate a special condition in the draft permit, as attached in Appendix "A", stipulating that the proposed project should not take place between March 1 through June 30 to protect anadromous fish species.

The TRM, attached herein as Appendix "B" offers a detailed regulatory review of all aspects of the Applicant's proposed Application, identifies all concerns raised by the public, and responds to them in a balanced manner, with accurately reflecting the information contained in the Record. This report, along with the Department's draft Subaqueous Lands Permit and TRM, attached as Appendix "A" and "B," respectively, are expressly incorporated herein.

In conclusion, I find that the proposed project to install 1,600 linear foot rip-rap revetment for shoreline stabilization, complies with Delaware's Subaqueous Lands Act (7 *Del.C.* Chapter 72) and *Regulations Governing the Use of Subaqueous Lands (*7 DE Admin. Code

7504). Furthermore, the proposed project does not substantially affect the navigational uses of the public or the adjacent neighbors and enables the Applicant to stabilize the area to prevent further erosion.

III. REASONS AND CONCLUSIONS:

Currently pending before the Department is the above-described Application for a Subaqueous Lands permit submitted by Fort DuPont Redevelopment and Preservation Corporation to install a rip-rap shoreline along a portion of the southern bank of the Delaware City Branch Canal, at Fort DuPont, adjacent from 260 Old Elm Avenue, Delaware City, DE. In accordance with the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504) the proposed project is intended to stabilize the bank location and prevent continued erosion and possible slop failure along the branch canal channel.

I find that the Applicant is required to obtain the requisite permit, for the reasons noted above described in the proposed project. I further find that FDRPC's proposed project is subject to various state and federal regulatory requirements, including but not limited to Delaware's *Subaqueous Lands Act* (7 *Del.C.* Chapter 72), *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504) and as provided for under 7 *Del.C.* Ch. 60.

Further, I recommend the Secretary adopt the following findings and conclusions:

1. The Department has jurisdiction under 7 *Del.C.* Ch. 72, 7 DE Admin. Code 7504 - *Regulations Governing the Use of Subaqueous Lands* and all other relevant statutory authority, to make a final determination of the Application after holding a public hearing, considering the public comments, and reviewing all information contained in the Record generated in this matter;

2. The Department provided proper public notice of the Application submitted by Fort DuPont Redevelopment and Preservation Corporation and of the public hearing held on January 12, 2022, and held said hearing to consider all public comments that may be offered on the Application, in a manner required by the law and regulations;

3. The Department has carefully considered the factors required to be weighed in issuing the permit required by this Application, and finds that the Record supports approval of the Application and the issuance of the Subaqueous Lands Permit and finds the Record supports approval of the same;

4. The Department shall issue the Subaqueous Lands Permit to the Applicant, Fort DuPont Redevelopment and Preservation Corporation, to authorize the installation of 1,600 linear feet of rip-rap shoreline along a portion of the southern bank of the Delaware City Branch Canal, between the DNREC boat ramp bulkhead and 9th Street Bridge at Fort DuPont, with the Record developed in this matter. Furthermore, said

permit shall include all conditions as set forth in the Department's Draft Permit, to ensure that Delaware's environment and public health will be protected from harm;

5. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and

6. The Department shall serve and publish its Order on its internet site and shall provide legal notice of the Order in the same manner that the Department provided legal notice of the Application.

Theresa Smith
Public Hearing Officer

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Attachments/Appendices

Appendix A: Draft Subaqueous Lands Permit

Appendix B: Technical Response Memorandum (10/06/2023)