



STATE OF DELAWARE  
**DEPARTMENT OF NATURAL RESOURCES AND  
ENVIRONMENTAL CONTROL**

RICHARDSON & ROBBINS BUILDING  
89 KINGS HIGHWAY  
DOVER, DELAWARE 19901

OFFICE OF THE  
SECRETARY

PHONE  
(302) 739-9000

**Secretary's Order No.: 2021-W/CCE-0026**

**RE: Diamond State Port Corporation (“DSPC”) Wetlands and Subaqueous Lands Section (“WSLS”) Permit Application for a Subaqueous Lands Permit from the Division of Water and Federal Consistency Certification from the Division of Climate, Coastal and Energy’s Delaware Coastal Management Program (“DCMP”) for the DSPC’s proposal to construct a new container port on the Delaware River at DSPC’s Edgemoor property, located at 4600 Hay Road, New Castle County, Delaware**

**Date of Issuance: September 30, 2021**

**Effective Date: September 30, 2021**

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control (“Department” or “DNREC”), pursuant to 7 *Del.C.* §§6003, 6004, 6006, *The Subaqueous Lands Act* (7 *Del.C.* Ch. 72), *The Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), *Federal Consistency with Approved Coastal Management Programs* (15 CFR Part 930), *Delaware Coastal Management Program Federal Consistency Policies and Procedures* (7 DE Admin. Code 2201), and all other relevant statutory authority, the Department issues this Order, approving the Division of Water, Wetlands and Subaqueous Lands Section (“WSLS”) Permit Application for a Subaqueous Lands Permit, and the Federal Consistency Certification from the Division of Climate, Coastal and Energy’s Delaware Coastal Management Program (“DCMP”) with respect to the United States Army Corps of Engineers (“USACE”) authorizations also required in this matter, of Diamond State Port Corporation (“DSPC” or “Applicant”).

The above referenced WSLs Permit Application for a Subaqueous Lands Permit (“Application”) and the DCMP Federal Consistency Certification (“Certification”) are currently pending before the Department at this time, necessitated by the Applicant’s proposal to construct a new container port on the Delaware River at DSPC’s Edgemoor property, located at 4600 Hay Road, Edgemoor, New Castle County, Delaware (“proposed project”).

### **Background, Procedural History and Findings of Fact**

The Applicant’s property (tax parcels: 0615300006 and 0615300003) is the former location of the DuPont Edgemoor (Chemours) site, and its associated titanium dioxide pigment production facility. It lies along the Delaware River between Fox Point State Park (“FPSP”), to the north, and industrial facilities to the south. The site operated as a titanium dioxide production facility through 2016, and has, historically, been regulated under the Delaware Hazardous Waste Program throughout its operations. That facility was demolished before the sale of the property to the DSPC in February of 2017. The proposed project is located adjacent to and north of the federal navigation channel, in the southern portion of Reach B of the Delaware River, at the intersection of the Cherry Island and Bellevue Ranges, and is offshore of the Applicant’s property, as described above.

The Applicant’s proposed project includes building 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. The Applicant also proposes to deepen portions of the Delaware River adjacent to the federal navigation channel to create a primary access channel that would serve the proposed berth construction at the site.

The majority of the dredged materials (approximately 3.3 million cubic yards of river sediments and underlying soil) will be stored in existing USACE-owned confined disposal facilities, with a portion retained onsite to be used as fill material. It should be noted that the use of shoaling fans (as proposed by DSPC in the original Application) was removed from the scope of the proposed activities after consultation with the Applicant.

It should also be noted that the portion of the Applicant's proposed project that fell under the permitting authority of the Department's Division of Waste and Hazardous Substances, Remediation Section ("DWHS-RS"), specifically, 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"), 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 processed all the above permit applications received from DSPC together regarding this proposed project, and held the public hearing on September 29, 2020, to assure both efficiency and transparency, and to make sure the public was afforded the ability to provide meaningful comment on the proposed project in its entirety, as noted above. With the RCRA CAP Renewal Permit having already been issued to DSPC, this Order concerns only the DSPC's WSLs Application for a Subaqueous Lands Permit and DCMP Certification that remains pending before the Department at this time.

The statutory and regulatory authority for the Department's review of the matters contained herein is established and provided for under 7 *Del.C.* Chapter 60, as well as *The Subaqueous Lands Act* (7 *Del.C.* Chapter 72), *The Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), *Federal Consistency with Approved Coastal Management Programs* (15 CFR Part 930), and *Delaware Coastal Management Program Federal Consistency Policies and Procedures* (7 DE Admin. Code 2201).

Given the level of public interest on the Applicant's proposed activities regarding this proposed project, the Department made the decision to issue a Joint Public Notice on August 23, 2020, advising the public of the requisite permit applications and DCMP Certification submission received from DSPC, and of a joint virtual public hearing to be held by DNREC, as referenced above. Thereafter, the Department held its public hearing on September 29, 2020.

Department staff, representatives of DSPC, Duffield Associates (consultant for the Applicant), Gulftainer, and over fifty members of the public virtually attended the September 29, 2020 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 for the Department to extend the public comment period, the hearing record (“Record”) remained open for receipt of comment through December 1, 2020. It should be noted that comments were received from the public not only at the time of the public hearing, but also during both the pre- and post-hearing phases of this permitting matter. Proper notice of the hearing was provided as required by law.

The Record generated in this matter indicates that numerous members of the public offered comments regarding the aforementioned permit applications, both at the time of the public hearing on September 29, 2020 and during the time periods when the Record remained open to receive public comment (both prior to and subsequent to the hearing). The Department 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, DCMP, prepared a Technical Response Memorandum (“TRM”) to (1) address the concerns associated specifically with the WSLS and DCMP aspects of the proposed project, as voiced in the public comments received by the Department; and (2) offer conclusions and recommendations with regard to those concerns for the benefit of the Record generated in this matter. The TRM, dated September 29, 2021, provided a summary of only those comments received that fell within the scope of the aforementioned WSLS and DCMP portions of the Applicant’s proposed project, and offered detailed responses to the same.

Subsequent to the receipt of the Department's TRM referenced above, Hearing Officer Vest prepared her Hearing Officer's Report ("Report"), dated September 29, 2021, which expressly incorporated said documentation therein. Ms. Vest's Report set forth the procedural history, summarized and established the record of information ("Record") relied on in the Report, and provided findings of fact, reasons, and conclusions that recommend the Department approve the DSPC's pending WSLS Application and DCMP Certification, subject to the conditions set forth in the finalized Subaqueous Lands Draft Permit, as prepared by the WSLS, and as contained in the finalized DCMP Certification. The Report, including attachments, is expressly incorporated herein by reference. The Report also thoroughly addressed the public comments received in this matter and concluded that the same did not warrant the Department's denial of DSPC's pending WSLS Application and DCMP Certification, nor the delay of the permit decision to receive any additional information.

### **Reasons and Conclusions**

Currently pending before the Department is the WSLS Application submitted by DSPC, as well as the DCMP Certification with respect to the USACE authorizations also required for the project. I find that the Applicant is required to obtain both a WSLS Subaqueous Lands Permit and the DCMP for the proposed project, as noted above.

I further find that the specific aspects of the proposed project that fall under the permitting authority of the WSLS and DCMP are subject to various state and federal regulatory requirements as set forth above, including, but not limited to, *7 Del.C.* Chapters 60 and 72, with additional regulatory authority provided under the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), the *Federal Consistency with Approved Coastal Management Programs* (15 CFR Part 930), and the *Delaware Coastal Management Program Federal Consistency Policies and Procedures* (7 DE Admin. Code 2201).

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 Department's experts in the WSLs and the DCMP have concluded that DSPC's pending WSLs Application and DCMP Certification complies with all applicable federal and state laws and regulations. The WSLs Subaqueous Lands Permit and the DCMP Certification to be issued by the Department will be reflective of the submissions by DSPC and will be appropriately conditioned to ensure continued protection of public health and the environment.

The Department's TRM acknowledges the comments received from the public concerning the Applicant's proposed project, and thoroughly responds to the same therein. While many comments voiced support of the DSPC's proposed project, other comments voiced concerns related to certain aspects of the project that fall under the permitting authority of the WSLs and the DCMP. Specifically, the TRM noted twelve (12) areas of concern, as voiced by the public, that were contained within the comments received by the Department in this matter. All comments were posted on the Department's hearing web page dedicated to this matter as they were received. Additionally, the Department's extensive responses to the comments received in this matter are set forth in detail in the TRM, which was expressly incorporated into the Record by Hearing Officer Vest, and attached to her Report as Attachment "A." Thus, the public may review all the public comments contained in the Record, as well as the Department's responses to the concerns voiced therein, by reviewing the hearing web page and the TRM, should they wish to do so.

A major aspect of the proposed project is that compensatory mitigation is required of the Applicant for the filling of 5.5 acres of subaqueous lands of the State of Delaware related to the construction activities associated with the proposed project. In his memorandum dated September 26, 2021, John Cargill, Hydrologist IV for the Department's Division of Watershed Stewardship, Watershed Assessment and Management Section, set forth the components of the State Compensatory Mitigation Plan for DSPC ("Mitigation Plan") for inclusion into the Record developed in this matter.

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, statewide fisheries' benefits by the incorporation of the Environmental DNA monitoring program and reconnects the impacted local community to the Delaware River by means of enhancements to FPSP.

For Phase One of the Mitigation Plan, DSPC will construct approximately one (1) acre of intertidal wetland along the Delaware River at the north end of FPSP as an "in-kind" component of habitat replacement to partially compensate for what is being lost through the proposed construction of the port. DSPC shall be responsible for all aspects of the project. This will include obtaining any necessary authorizations, construction of the wetland, and three (3) years of monitoring, maintenance and reporting to ensure that the wetland habitat creation is a success.

In Phase Two of the Mitigation Plan, to provide additional compensatory mitigation, the DSPC will provide funding to establish the Environmental DNA ("eDNA") Fisheries Monitoring Program under the operation and management of DNREC. 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.

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 FPSP to the natural resources of the Delaware River. The DSPC 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. Additional enhancements under consideration include roadway and lighting improvements, restroom repairs, and other amenities aimed at increasing public access to the natural resources of FPSP and the Delaware River.

For the benefit of the Record, the aforementioned memorandum authored by Mr. Cargill, dated September 26, 2021, which summarized the Mitigation Plan for DSPC, was expressly incorporated into the Record by Hearing Officer Vest, and attached to her Report as Attachment “D.”

The Department’s experts in the WSLs and the DCMP have addressed all public comments and concerns specifically related to the proposed project and the Application currently pending before the Department, as provided in the public notice and public hearing process. Furthermore, the WSLs and the DCMP have thoroughly considered all public concerns in the finalized WSLs draft permit and DCMP Certification that will be issued to DSPC in this matter.

The Record developed in this matter indicates that the Department’s experts in the WSLs and the DCMP have conducted a comprehensive review of the information provided by the Applicant, considered all statutes and regulations that govern projects such as the Applicant’s above proposed activities, reviewed the Mitigation Plan as submitted to DNREC by the DSPC, and determined that the Record provides adequate justification and detail to support the proposed project. Additionally, as noted in the TRM, DNREC obtained independent confirmation from external agencies (e.g., DelDOT and USCG) where needed to thoroughly evaluate the public’s concerns in areas beyond the Department’s standard regulatory purview. As a result of this comprehensive review of the Record developed in this matter, the Department’s experts have recommended issuance of the WSLs Subaqueous Lands Permit and the DCMP Certification.



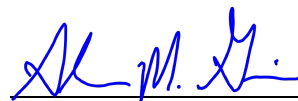
I find and conclude that the Applicant has adequately demonstrated compliance with all requirements of the statutes and regulations, has submitted the requisite Compensatory Mitigation Plan required for the filling of 5.5 acres of subaqueous lands of the State of Delaware related to the proposed construction associated with this project, and is continuing to work with the Department to assure that all commitments and ongoing compliance requirements are met. I further find that the Record supports approval of the WSLs Application and DCMP Certification, as submitted by DSPC in this matter. Moreover, I find and conclude that the Record supports the recommendations of the Department's experts in the WSLs and DCMP, as set forth in the TRM of September 29, 2021, including, but not limited to, the recommendation concerning the issuance of the WSLs Subaqueous Lands Permit and the DCMP Certification for the Applicant, for the reasons noted above.

Accordingly, this Order approves the issuance of the WSLs Subaqueous Lands Permit and the DCMP Certification for the DSPC, consistent with the Record developed in this matter, and with appropriate conditions.

Further, the Department concludes and specifically directs the following:

1. The Department has jurisdiction under 7 *Del.C.* Chapters 60 and 72, with additional authority under the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), the *Federal Consistency with Approved Coastal Management Programs* (15 CFR Part 930), the *Delaware Coastal Management Program Federal Consistency Policies and Procedures* (7 DE Admin. Code 2201), and all other relevant statutory authority, to make a final determination on the Application after holding a public hearing, considering the public comments, and all information contained in the Record generated in this matter;
2. The Department provided proper public notice of the WSLs Application and the DCMP Certification submitted by DSPC, and of the public hearing held on September 29, 2020, and held said hearing to consider any public comments that may be offered on the same, in a manner required by the law and regulations;

3. The Department considered all timely and relevant public comments in the Record, as established in the TRM dated September 29, 2021, provided by the Department's WSLs and DCMP, as well as the supplemental documentation provided in Mr. Cargill's memorandum summarizing the Mitigation Plan for DSPC, dated September 26, 2021, both of which have been expressly incorporated into the Record generated in this matter and attached to the Hearing Officer's Report as Attachments "A" and "D," respectively;
4. The Department has carefully considered the factors required to be weighed in issuing the aforementioned WSLs Permit and the DCMP Certification, as necessitated by the Applicant's proposed project, and finds that the Record supports approval of the same;
5. The Department shall issue to DSPC Subaqueous Lands Permit No. SP-101/20 and DCMP – Federal Consistency Certification for Port of Wilmington Edgemoor No. FC 2020.0043, consistent with the Record developed in this matter. Furthermore, the aforementioned WSLs Permit and DCMP Certification shall include all conditions necessary to ensure that Delaware's environment and public health will be protected from harm;
6. The Department adopts the Report and its attachments as further support for this decision;
7. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and
8. The Department shall serve and publish its Order on its internet site.



Shawn M. Garvin  
Secretary