



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-WH-0014

RE: Diamond State Port Corporation (“DSPC”) Resource Conservation and Recovery Act (“RCRA”) Corrective Action Permit (“CAP”) Renewal for the DSPC Edge Moor property, located at 4600 Hay Road, New Castle County, Delaware

Date of Issuance: April 29, 2021

Effective Date: April 29, 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, 7 *Del.C.* Ch. 63, Delaware’s *Regulations Governing Hazardous Waste* (“DRGHW”), as set forth in 7 DE Admin. Code 1302, and all other relevant statutory authority, the Department’s Division of Waste and Hazardous Substances, Remediation Section (“DWHS-RS”), issues this Order, approving the Resource Conservation and Recovery Act (“RCRA”) Corrective Action Permit (“CAP”) Renewal Request (“Application”) of Diamond State Port Corporation (“DSPC” or “Applicant”). The RCRA mandates the preparation of a new CAP to regulate the ongoing RCRA Facility Investigation and Corrective Measures Implementation measures, per the DWHS-RS’ finalized Statement of Basis (“SB”), which provides the justification for the remedy selection, and the eventual site closure at DSPC’s Edge Moor property located at 4600 Hay Road, in New Castle County, Delaware.

The DSPC site located in Edge Moor is at the former location of the Chemours titanium dioxide production facility. The site includes two parcels totaling 115 acres (Tax Parcel ID Nos. 0615300006 and 0615300003). A 112-acre parcel lies along the Delaware River between Fox Point State Park to the north, and industrial facilities to the south. A 3-acre parcel is across Hay Road at the former facility main entrance. The site operated as a titanium dioxide production facility through 2016. That facility was demolished before the sale of the property to the DSPC in February of 2017.

The DSPC has proposed to construct a new container port on the Delaware River at the aforementioned Edge Moor property (“proposed project”), which was the subject of a virtual joint public hearing held by the Department on September 29, 2020 (the details of which are set forth below). The proposed project includes building a pile-supported wharf (about 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 majority of the dredged materials (approximately 3.3 million cubic yards of river sediments and underlying soil) will be stored in existing Army Corps of Engineer-owned confined disposal facilities, with a portion retained onsite to be used as fill material. Additionally, the Applicant proposes that the site will be redeveloped under the RCRA CAP Renewal into an intermodal shipping container offloading and storage facility.

The proposed project, if ultimately approved by the Department in its entirety, would not only require a RCRA CAP Renewal from the DWHS-RS to regulate all RCRA related activities at the Edge Moor site (which is the subject of this Order), but also an additional permit from the Department’s Division of Water, Wetlands and Subaqueous Lands Section (“WSLS”), and a Federal Consistency Certification from the Department’s Division of Climate, Coastal and Energy’s Delaware Coastal Management Program (“DCMP”).

The Department processed all of the above permit applications received from DSPC together regarding this proposed project and held the aforementioned virtual joint 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.

The Department's experts in the DWHS-RS have made a preliminary determination to issue the RCRA CAP Renewal to the DSPC for the implementation of corrective measures and post-closure care at the Edge Moor site, as noted above. The remaining permit applications required for DSPC's proposed project currently remain under review by the Department's experts in the Division of Water and the DCMP and are not yet in the posture to make a final determination on those matters. Thus, this Order concerns only that portion of the proposed project that falls under the permitting authority of the DWHS-RS, specifically, those activities that would be authorized under a RCRA CAP Renewal. Furthermore, the issuance of the RCRA CAP Renewal at this time should not be construed as the Department's approval of DSPC's proposed project in its entirety, as the need for corrective measures and post-closure care of the Edge Moor site exists independent of the aforementioned proposed project and is essential to ensure continued protection of public health and the environment at that location.

Background, Procedural History and Findings of Fact

To serve as background on the DSPC site, the aforementioned property is the former location of the DuPont Edge Moor (Chemours) site, and its associated titanium dioxide pigment production facility. The site has been regulated under the Delaware Hazardous Waste Program throughout its operations. In August of 2002, DuPont completed the neutralization and stabilization of four (4) surface impoundments at the plant in accordance with a Consent Order. These impoundments were later capped for closure and are regulated under a Post-Closure Permit with a Post-Closure Care Plan that provides for ongoing cap maintenance, environmental monitoring and financial assurance.

In March of 2006, DNREC issued to DuPont a Corrective Action Permit (No. HW-03A16) for the facility that provided for the completion of a RCRA Facility Investigation. The investigation work plan identified 30 Solid Waste Management Units (“SWMUs”) across the site, referred to as areas of environmental concern. A site investigation was completed in these areas to determine environmental impacts. Additionally, a facility Human Health and Ecological Risk Assessment was completed that determined the environmental impacts identified in the site investigation posed no significant threat to human health or the environment and did not require active remediation.

The site was sold by Chemours to the DSCP on February 27, 2017. The plant was demolished by Chemours prior to the sale, and all applicable permits were transferred to the DSCP. The DSCP is currently seeking renewal of the RCRA CAP and maintaining the remedy for the closed impoundments. The DSCP has also retained a contractor to operate a proposed container facility onsite.

The operations proposed in the Application that fall under the permitting authority of the DWHS-RS are subject to various state and federal regulatory requirements, including, but not limited to, the United States Environmental Protection Agency’s (“EPA”) Corrective Action Program under the *Solid Waste Disposal Act*, as amended by the *Resource Conservation and Recovery Act* (“RCRA”) of 1976, and the *Hazardous and Solid Waste Amendments* (“HSWA”) of 1984, 42 U.S.C. §§6901, et seq. (“Corrective Action Program”). The Corrective Action Program is designed to ensure that certain facilities subject to RCRA have investigated and cleaned up any releases of hazardous waste and hazardous constituents that have occurred at their property. The State of Delaware is authorized for the Corrective Action Program under Section 3006 of the RCRA. Thus, primary authority in Delaware for the Corrective Action Program is provided under 7 *Del.C.* Chapters 60 and 63, with additional authority provided under Delaware’s *Regulations Governing Hazardous Waste* (“DRGHW”), as set forth in 7 DE Admin. Code 1302.

Given the level of public interest on the Applicant's proposed activities with regard to this proposed project, the Department made the decision to issue a Joint Public Notice on August 23, 2020, advising the public of the permit applications and Federal Consistency 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 (on behalf of 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 DWHS-RS prepared a Technical Response Memorandum ("TRM") to (1) address the concerns associated specifically with the DWHS-RS' RCRA CAP Renewal aspect of the proposed project, as set forth in the public comments received by the Department; and (2) offer conclusions and recommendations with regard to the same for the benefit of the Record generated in this matter.

The aforementioned TRM, dated March 17, 2021, as provided by the Department's experts in the DWHS-RS, provided a summary of only those comments received that fell within the narrow scope of the aforementioned RCRA CAP Renewal, and offered responses to the same. It does not, however, address those comments that pertain to matters outside the permitting authority of the DWHS-RS, nor is it responsive to any comments not specifically related to the RCRA CAP Renewal Application of DSPC.

Subsequent to the receipt of the Department's TRM referenced above, Hearing Officer Vest prepared her Hearing Officer's Report ("Report"), dated April 28, 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 RCRA CAP Renewal Application, subject to the conditions set forth in the finalized RCRA CAP Renewal prepared by the DWHS-RS, and as contained in the finalized SB that provides the justification for the remedy selection. The Report is incorporated herein by reference. The Report also addressed the public comments received in this matter and concluded that the same did not warrant the Department's denial of DSPC's pending RCRA CAP Renewal Application, nor the delay of the permit decision to receive any additional information.

Reasons and Conclusions

The RCRA CAP Renewal Application submitted by DSPC allows for the implementation of corrective measures and post-closure care at the site and will replace a prior RCRA CAP that expired under the previous property owner. I find that the Applicant is required to obtain a RCRA CAP Renewal, as noted above. I further find that the specific aspects of the proposed project under the permitting authority of the DWHS-RS are subject to various state and federal regulatory requirements, including, but certainly not limited to, 7 *Del.C.* Chapters 60 and 63, with additional authority provided under the DRGHW, as set forth in 7 DE Admin. Code 1302.

In reviewing the applicable statutes and regulations, as well as weighing public benefits of those aspects of the proposed project under the permitting authority of the DWHS-RS against potential detriments, the Department's experts in the DWHS-RS have concluded that DSPC's pending Application complies with all applicable federal and state laws and regulations. The RCRA CAP Renewal to be issued by the Department would be reflective of the Application submitted by DSPC and would allow for the implementation of corrective measures and post-closure care at the site, as noted above, to ensure continued protection of public health and the environment.

In its TRM, the Department acknowledges the public concerns related specifically to the narrow scope of the proposed project that fall under the permitting authority of the DWHS-RS. Additional comments received in this matter that fall under the permitting authority of the Department's Division of Water, WSLs, and the Division of Climate, Coastal and Energy, DCMP, will be addressed in future TRM(s) once those permit reviews have been completed by the Department.

In the present case, the Department's TRM from the DWHS-RS acknowledges the following concerns voiced by the public in this matter: (1) the proposed project represents a threat to public health, especially in Environmental Justice communities; (2) there are concerns regarding sediment and contaminants at the site, such as Polychlorinated Biphenyls ("PCBs"); and (3) there is a need for a hydrogeologic site investigation.

In response to the concerns that the proposed project represents a threat to public health, the TRM notes that a site Risk Assessment ("RA") was conducted, as required under RCRA and the DRGHW, to analyze contaminant data for potential risk to human health and the ecosystem using the latest accepted 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 contaminated media remains in place.

Based upon the RCRA Facility Investigation (“RFI”) in conjunction with the RA and in consideration of the site’s potential future reuse, the Department notes that the presumptive site remedy of capping, construction management, groundwater monitoring and an environmental covenant, as proposed in the finalized SB and enforced by the conditions of the finalized RCRA CAP Renewal, allow for the ongoing protection of both human health and the environment.

Additionally, the community’s concerns of Environmental Justice issues surrounding this proposed project are significant. The Department believes in the importance of equitable, responsible, development and growth that protects communities from negative health and environmental impacts. DNREC will collaborate with partners and address environmental issues and concerns through robust community engagement, ensuring inclusivity and transparency. Regardless of the proposed site use, protection of human health, safety, and the environment will be ensured. If a different use of the site is proposed in the future, additional RA and remedial actions may be required.

With regard to concerns about the site containing sediment and contaminants such as PCBs, the Department’s experts in the DWHS-RS state that, from an engineering control and best management practice perspective, past facility operations did not likely exacerbate river sediment issues. Facility operations provided control of stormwater through grading, sedimentation ponds and eventual drainage. A wastewater treatment plant controlled operational wastewater. Process sludges were dried and landfilled at a downriver location where they were eventually capped and are currently regulated and monitored under a solid waste permit.

Although PCBs were a byproduct of facility production and were detected at several soil sampling locations, they were not identified as a major site contaminant and were determined to pose no unacceptable risk in the RA. The Department’s TRM notes that the preliminary construction plans, the finalized SB’s proposed remedy and the finalized RCRA CAP Renewal all provide for the minimization of sediment impacts due to engineering controls and best management practices, all of which will be enforced through the RCRA CAR Renewal.

Lastly, in response to the comments received that stated that a hydrogeological site investigation is needed, the aforementioned TRM notes that a comprehensive hydrogeologic site investigation was performed as part of the sitewide RFI. The RFI identified twenty-nine (29) SWMUs across the site that were areas where environmental impacts from facility operations were known to have or potentially could have occurred.

A thorough investigation in two phases was conducted that involved (1) the installation of numerous soil borings to characterize subsurface soil impacts; (2) the installation of three lines of monitoring wells to characterize site groundwater; (3) the completion of pump tests to determine hydraulic conductivity and connectivity across the site; and (4) the collection of numerous media samples for laboratory analysis for contaminants of concern (“COCs”). The TRM notes that, in general, the results of the RFI indicated low levels of COCs in shallow subsurface soils and perched groundwater consistent with the industrial site activities.

The hydrogeologic site investigation and associated RAs indicated that the levels of contaminants posed little threat to site groundwater. The site is underlain by a thick section of Potomac Formation clay that acts as a local aquitard, restricting downward flow of groundwater. Additionally, shallow groundwater underlying the site is primarily perched atop this clay and confined to intermittent sandy zones that are lenticular (lens shaped) and hydraulically disconnected from each other and the Delaware River. The presumptive remedy and site construction will be limited to shallow depths and not impact the clay aquitard.

The Department’s experts in the DWHS-RS have addressed all public comments and concerns specifically related to the proposed RCRA CAP Renewal, as provided in the public notice and public hearing process. Furthermore, the DWHS-RS has thoroughly considered all public concerns in the finalized Draft Permit’s proposed presumptive remedy that will be enforced through the Permit and subsequent environmental covenant.

The Record developed in this matter indicates that the Department's DWHS-RS experts have considered all statutes and regulations that govern projects such as the Applicant's above proposed activities and have recommended approval of the RCRA CAP Renewal necessary for the same. I find and conclude that the Applicant has adequately demonstrated compliance with all requirements of the statutes and regulations 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 RCRA CAP Renewal Application 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 DWHS-RS, as set forth in the TRM of March 17, 2021, including, but not limited to, the recommendation concerning the issuance of the RCRA CAP Renewal for the Applicant, for the reasons noted above.

Accordingly, this Order approves the issuance of the RCRA CAP Renewal 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 63, with additional authority under the DRGHW, as set forth in *7 DE Admin. Code 1302*, 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 Application 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 Application, 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 provided by the Department's DWHS-RS, which has now been expressly incorporated into the Record generated in this matter;
4. The Department has carefully considered the factors required to be weighed in issuing the permit required by the Application, and finds that the Record supports approval of the same;
5. The Department shall issue to DSPC the RCRA CAP Renewal, consistent with the Record developed in this matter. Furthermore, said permit shall include all conditions as set forth in the DWHS-RS' finalized RCRA CAP Renewal for DSPC, 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