

RESOLUTION FOR THE MINUTES

A RESOLUTION for the Minutes concerning Docket D-2020-003 CP-1, issued to the Diamond State Port Corporation for the Port of Wilmington Edgemoor Expansion.

WHEREAS, on November 1, 2020, in accordance with Section 3.8 of the Compact, Diamond State Port Corporation (“DSPC”) applied to the Commission (also herein, “DRBC”) for approval of dredging and deep-water berth construction activities for its Port of Wilmington Edgemoor Expansion project, (the “Project”); and

WHEREAS, on March 9, 2022, following a duly noticed public comment period and public hearing, the Commission issued Docket D-2020-003 CP-1 (the “Docket”) approving the proposed activities subject to conditions intended to ensure the Project does not substantially impair or conflict with the Commission’s Comprehensive Plan; and

WHEREAS, as is typical for dredging and in-water construction projects, the Docket included no expiration date; and

WHEREAS, the Docket nevertheless was subject to Section 401.41(a) of the *Rules of Practice and Procedure* (the “RPP”) then in effect, which provided in relevant part that “[a]pproval by the Commission under these regulations shall expire three years from the date of Commission action unless prior thereto the sponsor has expended substantial funds (in relation to the cost of the project) in reliance upon such approval,” 18 C.F.R. § 401.41(a) (“unamended Section 401.41(a)”); and

WHEREAS, echoing unamended Section 401.41(a), Condition 10 of the Docket (“Condition 10”) likewise provided that the Commission’s approval “shall expire three years from the approval date . . . unless prior thereto the docket holder has commenced operation of the subject Project or has expended substantial funds (in relation to the cost of the Project) in reliance upon this docket approval”; and

WHEREAS, by Resolution No. 2024-06 on June 5, 2024, the Commission amended Section 401.41(a), effective July 22, 2024, altering the conditions under which a docket may be automatically terminated and the criteria and procedure by which automatic termination may be avoided; and

WHEREAS, by letter dated December 3, 2024, DSPC asserted that because it had expended substantial funds in relation to the cost of the Project within the three-year timeframe established by unamended Section 401.41(a) and Condition 10, it was not subject to the amended version of the rule, and its Docket approval would remain active past March 9, 2025, without the need for an extension; and

WHEREAS, specifically, DSPC asserted that it: (a) paid the sum of \$16,730,000 on June 6, 2023, for “costs associated with the design and construction of approximately 3.1 million cubic

yards of replacement capacity at the Site 15G Dredged Material Placement Facility”; and (b) paid an additional \$4,320,000 on the same date “in engineering and other costs related to development of the . . . dredged material placement capacity” required for the Project, for a total of \$21,050,000; and

WHEREAS, DSPC further avers that these expenditures were “related to” the Project because they were required by agreements “in support of dredging activities approved through consideration of the Docket” and that they constitute substantial funds in relation to the estimated total Project cost of \$400,000,000; and

WHEREAS, by letter dated December 6, 2024, DRBC staff asked DSPC to (a) “confirm that the anticipated project cost remains as stated in Section A.5 of the Docket or provide an adjusted project cost estimate”; and (b) “confirm that the project as described in Section A of the Docket has not changed or provide specific details of any changes;” and

WHEREAS, by letter dated March 17, 2025, DSPC provided the requested confirmations, averring that the Project remains “substantially similar” to that described in Docket Section A and that the Project costs, now estimated at \$415,000,000, “remain substantially consistent with those described in Section A;” and

WHEREAS, DSPC further asserts that within three years of the Docket approval date, the United States, the State of Delaware and port operator and developer Enstructure Wilmington Holdings LLC (“Enstructure”) made additional substantial expenditures and financial commitments in partial reliance on the Docket approval, as follows:

- award by the United States Department of Transportation of \$50 million and expenditure of “significant resources working with DSPC to effectuate the grant” (DSPC letter of December 3, 2024);
- award by the United States Environmental Protection Agency of “a Clean Port grant . . . that commits an additional \$68.9 million for the upland portion of the Project” (DSPC letter of March 17, 2025);
- expenditure of “\$195,000,000 by . . . way of a transfer from the State of Delaware¹ to the DSPC, in furtherance of a binding Joint Development Agreement with Enstructure Wilmington Holdings LLC (‘Enstructure’), the current operator of the Port of Wilmington and developer and future operator of the Project” (DSPC letter of March 17, 2025);
- expenditure of “significant resources in advancing the design and procurement of equipment for the terminal” by Enstructure (DSPC letter of March 17, 2025);
- expenditure by the State of Delaware of “an additional \$3,000,000 in furtherance of binding agreements related to the mitigation plan required by the [Delaware]

¹ DSPC is a state-owned entity created to “operate the Port of Wilmington and related facilities so as to maintain and expand the business of these facilities.” 29 Del. C. Ch. 87, § 8780. (Footnote not in cited source.)

Department of Natural Resources and Environmental Control” (DSPC letter of March 17, 2025);

- “additional significant costs incurred by DSPC and Enstructure to advance the Project, including expenses for retaining engineering, legal, and other expertise” (DSPC letter of March 17, 2025);
- expenditure of “significant funds” by the Corps (DSPC letter of March 17, 2025); and

WHEREAS, construction of the Project cannot commence unless and until the United States Army Corps of Engineers (the “Corps”) issues a new authorization under its Section 408 program, 33 C.F.R. § 408, and a new Department of the Army permit under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act (collectively, the “Corps approvals”), both of which were issued in 2022 but vacated in October 2024 by the United States District Court for the Eastern District of Pennsylvania; and

WHEREAS, it is not known at this time whether modifications to the Project may be required before the Corps approvals can be reissued and, if so, whether such modifications might be material to the Commission’s determination in accordance with Section 3.8 of the Delaware River Basin Compact that the Project does not substantially impair or conflict with the Commission’s Comprehensive Plan;

NOW THEREFORE, BE IT RESOLVED by the Delaware River Basin Commission:

1. The Commission incorporates the WHEREAS Clauses above as though fully set forth herein.
2. On the basis of averments by Diamond State Port Corporation, the Commission hereby finds that:
 - a. In reliance on the Commission’s Docket approval and within three years of the Docket approval date, DSPC expended substantial funds in relation to the cost of the Project.
 - b. The Project and Project cost remain substantially similar to those set forth in Section A of the Docket approval.
 - c. DSPC thus satisfied both unamended Section 401.41(a) and Condition 10 of the Docket, and its Docket approval continues in effect.
3. If the Project as approved by the Commission changes materially from that described in the Docket, either as a condition of reissuance of the Corps approvals or for any other reason, amendment of the Docket may be required. Accordingly:
 - a. DSPC shall promptly notify the Commission if the Corps approvals are reissued without any material changes to the project as approved by the Docket.

- b. DSPC shall copy the Commission's Project Review Manager on any submissions that have been or are hereafter made to the Corps for purposes of reissuance of the Corps approvals where material changes in the location or plans for the Commission-approved activities are proposed in the submissions.
 - c. Until notified by the Executive Director or the Commission that no further reporting is necessary, DSPC is directed to report to the Commission annually in May (or by such earlier date with reasonable notice to DSPC as the Executive Director may specify) whether any material changes to the Project as approved in the Docket, other than those identified in accordance with paragraph 3.b. hereof, have occurred over the previous year, and if so, to describe such changes.
4. If and as required by the Executive Director or the Commission in response to information supplied by DSPC in accordance with paragraph 3.b. or 3.c. hereof, DSPC shall apply to the Commission for amendment of the Docket within such time as the Executive Director or the Commission may prescribe.

BY THE COMMISSION

ADOPTED: June 11, 2025