

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

GREENWICH TERMINALS LLC,
GLOUCESTER TERMINALS LLC and
GMT REALTY, LLC,

Appellants,

v.

DEPARTMENT OF NATURAL
RESOURCES AND ENVIRONMENTAL
CONTROL AND DIAMOND STATE
PORT CORPORATION,

Appellees.

C.A. No. N25A-08-003 KMM

WALTER F. CURRAN,

Appellant,

v.

DEPARTMENT OF NATURAL
RESOURCES AND ENVIRONMENTAL
CONTROL AND DIAMOND STATE
PORT CORPORATION,

Appellees.

C.A. No. N25A-08-001 KMM

Date Submitted: June 1, 2026
Date Decided: September 23, 2026

MEMORANDUM OPINION AND ORDER

Upon Diamond State Port Corporation's Motion for Application of Judicial

*Notice: **Denied***

*Appeal from Environmental Appeals Board: **Affirmed***

Thaddeus J. Weaver, DILWORTH PAXSON LLP, Wilmington, DE, Shoshana (Suzanne Ilene) Schiller (argued), Jill Hyman Kaplan, Danielle N. Bagwell, MANKO GOLD KATCHER FOX LLP, Bala Cynwyd, PA, *Attorneys for Appellants Greenwich Terminals LLC, Gloucester Terminals LLC, and GMT Realty, LLC.*

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Miller, J.

I. INTRODUCTION

Diamond State Port Corporation (“Diamond State”) applied for a permit from the Department of Natural Resources and Environmental Control (“DNREC”) under the Subaqueous Lands Act (the “Act”) to expand the Port of Wilmington to the site of the former DuPont Edgemoor facility. Walter F. Curran (“Curran”) and Greenwich Terminals LLC, Gloucester Terminals LLC, and GMT Realty, LLC (collectively “Greenwich”) were among the objectors. Curran raised objections based on the project’s impact on recreational fishing in the area and lack of mitigation. Greenwich, which owns and operates ports north of the site, raised objections based on navigational and safety concerns, among others.

DNREC approved the permit and Greenwich and Curran appealed to the Environmental Appeals Board (the “Board”), which affirmed DNREC’s decision.

Greenwich and Curran appealed to this Court. In its April 14, 2025 Memorandum Opinion and Order (the “Remand Order”),¹ the Court found that the Board summarily rejected the objectors’ evidence without explanation. Because the Board did not make factual findings, provide an analysis of the evidence presented, or explain its reasoning, the Board’s decision was reversed and remanded.

¹ 2025 WL 1098975 (Del. Super. Apr. 14, 2025).

On remand, the Board issued an eighty-page Decision and Order Upon Remand (the “Remand Decision”).² Greenwich and Curran again appealed. The objectors argue that the Board committed legal error and its findings and rulings are not supported by substantial evidence.

The Court finds that the Board did not commit legal error, credibility determinations and weighing the evidence lies with the Board, and its rulings are supported by substantial evidence. Greenwich and Curran failed to carry their burden of proof and the Remand Decision is Affirmed.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The site and the parties*

DuPont’s former titanium dioxide production facility is on approximately 115 acres located along the Delaware River, just east of Wilmington and near the Port of Wilmington.³ The site has been plagued by toxic contamination for years.

Diamond State is “a public entity within the Delaware Department of State, created to support the public interest and to serve Delaware citizens.”⁴ Diamond State is responsible for promoting and maintaining the Port of Wilmington as a competitive and viable commercial operation.⁵

² PORTAPPX000905-89.

³ Secretary’s Order, p. 2, PORTAPPX000029.

⁴ Environmental Appeals Board Hearing Transcript, February 13, 2024 (“Board Tr.”), p. 140, CURRANAPPX-0162.

⁵ <https://port.delaware.gov/>.

Curran is a Delaware citizen who resides in Sussex County. He previously worked as a Stevedore/Marine Terminal operator at several ports and assisted in dredging projects.⁶ He has worked, boated, and fished on the Delaware River for over 30 years, including a few times in recent years.⁷

Greenwich owns and operates a marine terminal at the Port of Philadelphia and two port terminals in New Jersey.⁸ These terminals receive delivery all types of goods, including perishable products, from ships traveling up the Delaware River, passing the Port of Wilmington.⁹ Receiving ships into a port is highly sequenced; delays in shipments put the value of the goods at risk, impact longshoremen staffing and tugboats scheduling, and the ability to receive other ships, all resulting in increased costs.¹⁰ Larger ships traverse the river only at high tide, so stoppages can result in delaying deliveries by more than 12 hours.¹¹

B. *The Project*

In 2020, Diamond State announced its development of the Edgemoor site into a new state-of-the-art port to expand the current Port of Wilmington (the “Project”). The new port would vastly expand capacity, clean up the toxic waste, avoid impact on wetlands that other potential sites would have created, create (directly or

⁶ Curran Aff., CURRANAPPX-0685.

⁷ *Id.*

⁸ Whene Aff., PORTAPPX000339; Inskeep Aff., PORTAPPX000346.

⁹ *Id.*

¹⁰ Whene Aff., PORTAPPX000340-41.

¹¹ Inskeep Aff., PORTAPPX000348.

indirectly) 3,000 jobs, and generate economic benefits to Delaware in the tens of millions.¹² Delaware is vying for the business generated by servicing New Panamax ships.¹³

The Project requires large-scale dredging in the area of the new port to accommodate the large ships' depth requirements. In addition to the dredging required for the port's construction, annual dredging would be required to maintain the needed depth.

1. *DNREC's Permitting Process*

DNREC does not advocate for permits, but evaluates permit applications by engaging subject-matter experts and considering comments from the public, among other relevant information.¹⁴ A technical response memorandum is prepared for the DNREC Hearing Officer to incorporate into the Report to the Secretary of DNREC.¹⁵ The Secretary makes the final permitting decision, which may be appealed to the Board.¹⁶

¹² Remand Decision, pp. 19-20.

¹³ In 2017, the Panama Canal expanded its capacity to accommodate larger New Panamax ships. These ships can carry more than twice the cargo as ships passing through the canal before the expansion. The main Channel was dredged to increase its depth to 45 feet. Remand Decision, p. 18. *See Greenwich Terminals LLC v. U.S. Army Corps of Engineers*, 2024 WL 4595590, at *2 (E.D. Pa. Oct. 28, 2024).

¹⁴ Remand Decision, pp. 20-21.

¹⁵ *Id.*, pp. 21-22.

¹⁶ *Id.*, p. 22.

2. *The Permit Application and Mitigation Plan*

In June 2020, Diamond State applied for a Subaqueous Lands Permit to construct the new port (the “Permit”).¹⁷ The Permit application proposed installing a 2,600 foot long pile-supported wharf and 3,200 feet of shoreline bulkhead.¹⁸ A turning basin, which would allow ships to navigate in and out of the port, extends into the main navigational path in the channel (the “Channel”), which will impact other ships traversing the Channel.¹⁹

The new facility would occupy over 5.5 acres of subaqueous lands and require dredging 3.3 million cubic feet of river sediment and underlying soil to increase the depth to 45 feet.²⁰ In addition to dredging at the site of the new port, the area adjacent to the main Channel into the port (another 87 acres) also would need to be dredged to allow ships to use the turning basin to enter the port.²¹

The dredging would occur between September 1 and December 31, and the dredged material would be removed through a pipeline discharged to a confined disposal facility.²² The initial dredging is expected to take over a year.²³

¹⁷ Diamond State Permit Application, PORTAPPX000091-126.

¹⁸ *Id.*, PORTAPPX000117.

¹⁹ Remand Decision, p. 38.

²⁰ Diamond State Permit Application, PORTAPPX000120; Secretary’s Order, p. 2, PORTAPPX000029.

²¹ Environment Assessment Technical Document, p. 2, PORTAPPX000141.

²² Diamond State Permit Application, PORTAPPX000124-25.

²³ *Id.*, PORTAPPX000122.

Maintenance dredging is expected to be performed on an annual basis, and shoaling fans were “being pursued as means of reducing the frequency of dredging.”²⁴

DNREC provided notice of the Permit application on August 23, 2020 and held a virtual public hearing on September 29, 2020.²⁵ The public comment period was held open until December 1, 2020.²⁶ Curran and Greenwich objected.²⁷ Curran’s objections focused on environmental and navigational issues, future dredging activities, and inadequate mitigation.²⁸ Greenwich objected to the use of shoaling fans, impact on navigation in the main Channel, the potential impact on aquatic life, and the lack of mitigation.²⁹

3. *The Secretary’s Order*

After the public hearing and comment period, technical experts in DNREC’s Division of Water prepared a Technical Response Memorandum (“TRM”), dated September 21, 2021.³⁰ It organized the public comments in opposition to the Permit into 12 categories and provided an analysis of each issue.³¹

²⁴ *Id.*, PORTAPPX000121.

²⁵ Hearing Officer’s Report, PORTAPPX00038-90.

²⁶ Remand Decision, p. 22.

²⁷ *Id.*

²⁸ *Id.*, p. 25.

²⁹ *Id.*, pp. 22-23.

³⁰ *Id.*, p. 25.

³¹ TRM, PORTAPPX00062-90; CURRANAPPX-0351-64.

A Hearing Officer's Report (the "Officer's Report"), dated September 29, 2021, was then prepared.³² It identified the record from the public hearing, summarized the TRM's 12 categories of public comments and its conclusions on each category, and summarized the components of Diamond State's Mitigation Plan.³³ The Officer's Report stated that the DNREC experts who prepared the TRM "conducted a comprehensive review" of the Permit application and information provided by Diamond State, reviewed the Mitigation Plan, and "considered all statutes and regulations" that govern the Project and recommended that the Permit be approved.³⁴

The DNREC Secretary then issued an order approving the Permit (the "Secretary's Order"). The Secretary's Order reiterated the procedural history of the Permit application and public hearing and comments,³⁵ summarized the TRM, Officer's Report, and the DNREC Memo on the Mitigation Plan.³⁶ The Secretary "f[oun]d and conclude[d]" that Diamond State complied with all statutes and regulations and approved the Permit.³⁷

³² CURRANAPPX-0331.

³³ CURRANAPPX-0335, 343, 378-79.

³⁴ Hearing Officer's Report, p. 21, PORTAPPX000059.

³⁵ Secretary's Order, pp. 1-5, CURRANAPPX-0380-84.

³⁶ *Id.*, pp. 6-8, CURRANAPPX-0385-87.

³⁷ *Id.*, pp. 9-10, CURRANAPPX-0388-89.

III. APPEALS TO THE BOARD

Any person “whose interest is substantially affected by any action of the Secretary may appeal to” the Board.³⁸ The record before the Board “shall include the entire record before the Secretary” but “it is a denial of an appellant’s due process rights for the Board to limit the evidence before it to that evidence considered by the Secretary.”³⁹ Thus, “[a]ll parties to the appeal . . . may produce any competent evidence in their behalf.”⁴⁰ Still, there are limits on the evidence submitted to the Board. The Board has discretion to exclude “any evidence which is plainly irrelevant, immaterial, insubstantial, cumulative or unduly repetitive, and may limit unduly repetitive proof, rebuttal and cross-examination.”⁴¹ “The rules of evidence are relaxed ‘because the Board is the finder of fact, not a jury.’”⁴²

The appellant has the burden to “show that the Secretary’s decision is not supported by the evidence on the record before the Board.”⁴³ 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.’”⁴⁴

³⁸ 7 Del. C. § 6008(a).

³⁹ *Tulou v. Raytheon Serv. Co.*, 659 A.2d 796, 803 (Del. Super. 1995) rev’d on other grounds, *Delaware Solid Waste Auth. v. Delaware Dep’t of Nat. Res. & Env’t Control*, 250 A.2d 94 (Del. 2021).

⁴⁰ 7 Del. C. § 6008(b).

⁴¹ *Id.*

⁴² *Delmarsh, LLC v. Env’t Appeals Bd.*, 277 A.3d 281, 289-90 (Del. 2022) (citation omitted).

⁴³ 7 Del. C. § 6008(b).

⁴⁴ *Delmarsh*, 277 A.3d at 292 (quoting *Delaware Solid Waste Auth.*, 250 A.3d at 115).

On October 20, 2021, three objectors appealed the Secretary’s Order to the Board.⁴⁵ After motion practice, the Board consolidated the appeals. The parties stipulated to submitting testimony by affidavit. After briefing, the parties presented oral argument to the Board. On May 10, 2024, the Board issued a Decision and Final Order (the “Decision”).⁴⁶

After appeal to the Superior Court, the Decision was reversed. The Court remanded to the Board with instructions to provide a written evaluation of the evidence and reasoning for its rulings. On July 14, 2025, the Board issued the Remand Decision, making the following findings and conclusions:

A. *Coordination of permitting relating to the Project*

DNREC’s permitting authority “is limited to the subaqueous lands involved in [a permit] application.”⁴⁷ It is not unusual for a project to require permits from multiple agencies, each being evaluated independently.⁴⁸ In considering the Permit, DNREC relied on its own subject-matter experts and coordinated with many other agencies, including the United States Army Corps of Engineers (the “Army Corps”), the United States Coast Guard (the “Coast Guard”), the Delaware River Basin

⁴⁵ Additional objectors also appealed but their appeals were dismissed for lack of standing or failure to have legal representation. CURRANAPPX-0645-62.

⁴⁶ PORTAPPX000001-22.

⁴⁷ Remand Decision, p. 26.

⁴⁸ *Id.*

Commission, and the Delaware Department of Transportation.⁴⁹ In connection with the Permit application, the Army Corps was designated the lead federal agency.⁵⁰

B. *The Objectors*

The Philadelphia Regional Port Authority, a public agency of the Commonwealth of Pennsylvania (“PhilaPort”) objected and appealed to the Board. The Board found that PhilaPort is a an up-river competitor of the Port of Wilmington and is engaged in its own multi-billion dollar expansion project.⁵¹ PhilaPort is operated by Holt Logistics Company (“Holt”), which also runs Greenwich’s operations.⁵² Curran was an executive and operations director at Holt from 1989 to 2011.⁵³ With these connections, the Board viewed the objectors’ arguments and evidence through a biased lens.⁵⁴

C. *Regulation 4.0*

The Board found that Regulation 7504-4.0 “provides DNREC with a series of non-exclusive operational checklists” and “[h]ow DNREC fulfills those checklist requirements depends on the nature of the application.”⁵⁵ The Board also found that

⁴⁹ *Id.*, p. 27.

⁵⁰ *Id.*

⁵¹ *Id.*, p. 28.

⁵² *Id.*, pp. 28-29.

⁵³ *Id.*, p. 29.

⁵⁴ *Id.*

⁵⁵ *Id.*, p. 31.

DNREC satisfied each requirement as set forth in Regulation 7504-4.0⁵⁶ and addressed the regulations:

1. *Regulation 4.6*

Regulation 4.6 requires DNREC to consider a variety of factors, such as whether the Project could be accomplished in any other way, as provided in Sections 4.6.5 and 4.6.9. The Board determined, based on the testimony from Brian Devine,⁵⁷ that the proposed expansion of the Port of Wilmington is necessary to achieve the goal of attracting the large Panamax cargo ships.⁵⁸

Regulation 4.6 also requires that DNREC to “consider the public interest”⁵⁹ including: “[t]he potential effect on the public with respect to commerce, navigation, recreation, aesthetic enjoyment and natural resources...”, as provided in Section

⁵⁶ *Id.*

⁵⁷ Mr. Devine is a geotechnical engineer with experience in environmental permitting associated with dredging and subaqueous construction. Devine Aff., DSPCAPPX2_00200-73. He provided a timeline for the Project and discussed (i) the history of the Project and the alternatives considered for the site, (ii) the Army Corps’ review of the Project for implications on existing federal projects, (iii) the MITAGS Study, (iv) the notice and comments periods, (v) the new port’s impact on Delaware’s economy, (vi) the Mitigation Plan, and (vii) an assessment of the proposed dredging, including the removal of the shoaling fans.

⁵⁸ Remand Decision, p. 34.

⁵⁹ “Public Interest” means:

demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would exceed all demonstrable environmental, social, and economic costs of the proposed action. In determining the public interest in a request for the use, sale, lease, or transfer of interest in subaqueous lands, [DNREC] shall consider the ultimate project purpose to be served by said use, sale, permit, lease, or transfer of lands or materials.

7 *Del. Admin. Code* § 7504-1.0.

4.6.3; “[t]he extent to which any disruption of public land use ... is temporary or permanent,” as provided in Section 4.6.4; and “[t]he extent to which the applicant’s primary purpose and objectives can be realized by alternatives, *i.e.*, minimize the scope or extent of a[] ... project and its adverse impact,” as provided in Section 4.6.6.

a. *Navigation - Section 4.6.3*

The Board found that DNREC’s authority over navigational issues is limited to the subaqueous land affected by the proposed construction.⁶⁰ In connection with the Project, the scope of DNREC’s authority therefore is limited to the 5.5 acres of public subaqueous land occupied by the proposed new port.⁶¹ Navigational issues in the main Channel and the turning basin fall within the authority of the Army Corp.⁶²

With the Permit application, Diamond State submitted the Full Mission Ship Simulation for Edgemoor Navigation Feasibility Study conducted by the Maritime Institute of Technology and Graduate Studies (the “MITAGS Study”).⁶³ The study’s objective was to “demonstrate that the terminal will have minimal adverse impact on vessels transiting inbound and outbound on the Delaware [River].”⁶⁴ The Pilots’

⁶⁰ Remand Decision, p. 37.

⁶¹ *Id.*, n.85.

⁶² *Id.*, pp. 37-38 citing Smailer Aff., ¶ 28, Devine Aff., ¶ 10, and Army Corp Engineering Manual 1110-2-1613, Section 9-2.c.2.

⁶³ MITAGS Study, PORTAPPX000412-80; Board Tr., p. 18, CURRANAPPX-0040.

⁶⁴ MITAGS Study, PORTAPPX000412-80.

Association for the Bay & River Delaware (the “Pilots Association”) and the Army Corp also reviewed and commented on the MITAGS Study.⁶⁵

Because public comments raised concerns over navigation in the main Channel, DNREC conferred with the Pilots Association and the Coast Guard.⁶⁶ The Coast Guard advised that it did “not see this project posing a risk to safe navigation”⁶⁷ and the Pilots Association stated that “[t]he simulation results indicated the proposed Edgemoor Terminal would have minimal impact on ships as they transit the existing navigation channel.”⁶⁸ Thus, the navigational and safety issues raised by the objectors were being addressed by agencies that have authority over navigation in the main Channel.⁶⁹

DNREC imposed 17 special conditions to minimize the impact on navigation due to dredging and construction on the 5.5 acres under DNREC’s authority, and it subjected the approval of the Permit to approval by the Army Corps.⁷⁰ The Board therefore found that DNREC properly considered the Project’s impact on the subaqueous land under its jurisdiction and the waters outside of its jurisdiction.⁷¹

⁶⁵ Remand Decision, p. 39, PORTAPPX000948.

⁶⁶ *Id.*

⁶⁷ PORTAPPX000764; Remand Decision, pp. 40-41.

⁶⁸ Pilots Association’s letter, PORTAPPX000776; Remand Decision, pp. 40-41.

⁶⁹ Remand Decision, p. 42.

⁷⁰ *Id.*

⁷¹ *Id.*

The Board also addressed the evidence presented by Greenwich. It relied on the testimony of Captain Kichner, a retired Coast Guard Captain with over 50 years' experience in vessel safety and navigation.⁷² Captain Kichner opined that none of the MITAGS Study, the Pilots Association's letter, or the Coast Guard's response adequately addressed safety and navigational issues in the main Channel.⁷³ The Captain's testimony was "well-received by the Board," but it did not address the subaqueous land within DNREC's jurisdiction (the 5.5. acres on which the new port would sit).

Greenwich also submitted affidavits from Peter Inskeep and David Whene, managers of Holt's marine terminals.⁷⁴ These witnesses explained the negative impact any delays in traveling up the Channel would have on the products received at the upstream terminals and the trickling effect on various other parties involved in the operations.⁷⁵ While Messrs. Inskeep and Whene were "undoubtedly experience and knowledgeable regarding shipping," the Board found that their bias undermined their testimony and therefore, the testimony was "not given [any] weight."⁷⁶

⁷² Kichner Aff., PORTAPPX000386-407.

⁷³ *Id.*

⁷⁴ Remand Decision, pp. 43-44, n.104.

⁷⁵ Remand Decision, p. 44; Whene Aff., PORTAPPX00039-41; Inskeep Aff., PORTAPPX000346-48.

⁷⁶ Remand Decision, p. 44.

b. *Recreation, Aesthetic Enjoyment, and Natural Resources - Section 4.6.3*

In considering these environmental factors, DNREC relied on the TRM, testimony by Diamond State witnesses, including Mr. Devine, and an Environmental Assessment Technical Document prepared by Duffield Associates in March 2020 and revised in April 2022 (the “Technical Memo”),⁷⁷ among other evidence.⁷⁸ The Technical Memo concluded that recreational use on the river near the Project was limited due to the poor water quality because of chemical contamination.⁷⁹ The memo further found that the impact on recreational boating in the area would be minimal and would not impact species in the area, including herring, alewife, and striped bass.⁸⁰

To minimize the impact on endangered species in the area, DNREC prohibited “in-water” work between March 15 and June 30 each year, which is the spawning season.⁸¹ Additionally, in-situ monitoring during dredging activities was required to ensure no adverse impact on sensitive species in the area.⁸²

⁷⁷ DSPCAPPX2_000001-199.

⁷⁸ Remand Decision, p. 45.

⁷⁹ *Id.*; Technical Memo, DSPCAPPX2_000074-75, 90-91.

⁸⁰ Remand Decision, p. 46; Technical Memo, DSPCAPPX2_000187; Devine Aff., ¶¶ 105-07, DSPCAPPX2_000229-30.

⁸¹ Remand Decision, p. 47.

⁸² *Id.*

Mr. Devine testified that the subaqueous lands affected by the Project are not “practically accessible for public recreation.”⁸³ None is accessible from the shoreline and the area is “heavily industrialized,” further limiting the opportunity for recreational use.⁸⁴

The Board also considered Curran’s testimony that he uses the waters near the Project for recreational use. The Board did not find his testimony credible because he lives in Sussex County (which has easily accessible fishing and water recreation options) and he was vague about where he engaged in these activities in relation to the subaqueous lands impacted by the Project.⁸⁵

The Board concluded that DNREC properly considered the public interest as required by Regulation 4.6.3. Objections raised by Curran and Greenwich relating to navigation and safety issues in the main Channel, the Board ruled, fall within the jurisdiction of other agencies and expertise of other entities (Army Corp, Coast Guard, Pilots Association and Wilmington Tug, Inc.) and DNREC properly deferred to them.⁸⁶

⁸³ *Id.*, p. 46.

⁸⁴ *Id.*, p. 46.

⁸⁵ *Id.* Curran claimed to use the river all the way from Philadelphia to Lewes. *Id.*

⁸⁶ Remand Decision, pp. 50-51.

2. Regulation 4.7

Regulation 4.7 mandates that DNREC “shall” consider:

4.7.1.2: Any effect on shellfishing, finfishing, or other recreational activities, and existing or designated water uses..⁸⁷

4.7.1.3: Any harm to aquatic or tidal vegetation, benthic organisms or other flora and fauna and their habitats..⁸⁸

4.7.1.5: Any impact of air quality, whether temporarily or permanently, including noise, odors, and hazardous chemicals..⁸⁹

4.7.4: ...whether any significant impacts or potential harm could be offset or mitigated by appropriate actions or changes to the proposed activity by the applicant. If so, the required mitigating measures may be included as conditions of the permit or lease..⁹⁰

a. Recreation

For the reasons discussed above, the Board found that recreational fishing would not be impacted by the Project, as Curran contends..⁹¹

b. Other Environmental Impacts

Beginning in 2016, Duffield Associates conducted several rounds of sampling and analyses of the sediment and surface water at the site..⁹² Working with federal agencies, such as the EPA and Army Corp, a plan was developed for monitoring

⁸⁷ 7 Del. Admin. C. § 7504-4.7.1.2.

⁸⁸ 7 Del. Admin. C. § 7504-4.7.1.3.

⁸⁹ 7 Del. Admin. C. § 7504-4.7.1.5.

⁹⁰ 7 Del. Admin. C. § 7504-4.7.4.

⁹¹ Remand Decision, p. 52, PORTAPPX000961.

⁹² *Id.*, p. 53.

construction dredging and disposal of dredged sediment.⁹³ With the extensive contamination from the DuPont facility, dredging was expected to have a positive impact, “leading to a ‘healthier more diverse benthic community.’”⁹⁴

The initial permit application included the “unprecedented use” of shoaling fans as a means to reduce the amount of maintenance dredging needed. The objectors raised concerns over the shoaling fans. DNREC objected to the fans due to their potential impact on aquatic life, including fish mortality.⁹⁵ Duffield Associates then submitted a revised plan that removed the shoaling fans and included a mitigation package to address the aquatic concerns.⁹⁶ The Board found that the public comments regarding the fans were addressed by DNREC.

DNREC also considered the environmental impact of dredging activities. The TRM found that the impact of sediment particles carrying contaminants and impacting water quality to “be limited in extent” and would be monitored.⁹⁷ Water samples would be analyzed on a regular basis and Diamond State will be required to regularly sample the dredging slurry for toxins.⁹⁸ If discharge samples register outside applicable standards, “corrective actions will be implemented.”⁹⁹ The

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*, pp. 54-55.

⁹⁶ *Id.*, p. 55.

⁹⁷ *Id.*, p. 56.

⁹⁸ *Id.*, pp. 56-57.

⁹⁹ *Id.*, pp. 57-58, 61-62.

Board, relying on the TRM and the subject-matter experts, found that the proposed monitoring and corrective actions sufficiently addressed DNREC's concerns.¹⁰⁰

The Board also addressed Curran's evidence on environmental impacts. Curran's expert, Damian Preziosi,¹⁰¹ offered opinions on the Project's impact on aquatic life and habitats in the Project area. Mr. Preziosi opined that DNREC did not consider the impact on the habitat of Atlantic sturgeon.¹⁰² The Board found that contrary to this opinion, the record reflected extensive evidence on this "very topic."¹⁰³ Curran also tendered the testimony of Dr. Tomasi, who opined that DNREC failed to require adequate mitigation for the loss of recreational fishing and boating in the area.¹⁰⁴ Dr. Tomasi then provided his proposal for appropriate mitigation. The Board found that Dr. Tomasi was "clearly a qualified expert in this area" but it was appropriate for DNREC to rely on its subject-matter experts whose conclusions were supported by evidence in the record.¹⁰⁵

¹⁰⁰ *Id.*, pp. 57, 62-63. The Board also found the record supported the conclusion that DNREC's concerns with air quality were addressed by various air quality regulations with which Diamond State must comply. Remand Decision, pp. 57-58.

¹⁰¹ Mr. Preziosi is "an environmental consultant specializing in ecological risk assessment." CURRANAPPX-0915.

¹⁰² Remand Decision, p. 63, PORTAPPX000972.

¹⁰³ *Id.*; Technical Memo, DSPCAPPX2_000029-33, 50-51.

¹⁰⁴ Remand Decision, pp. 63-64.

¹⁰⁵ *Id.*, p. 64.

c. *The Mitigation Plan*

DNREC required Diamond State to include a mitigation plan to mitigate against the potential impact of the Project, including the loss of 5.5 acres of subaqueous lands (the “Mitigation Plan”).¹⁰⁶ Diamond State’s Mitigation Plan contained three phases. In Phase One, Diamond State will construct one acre of intertidal wetlands north of Fox Point State Park and maintain and monitor the wetlands for three years to ensure successful habitat creation.¹⁰⁷ Diamond State will be financially responsible for all aspects of this phase.¹⁰⁸

In Phase Two, Diamond State will fund an environmental DNA Fisheries Monitoring Program (eDNA). This will help DNREC “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.”¹⁰⁹

Phase Three calls for Diamond State to make improvements at Fox Point State Park, including walking trails, an observation platform, and removal of vegetation

¹⁰⁶ Board Tr., p. 121, CURRANAPPX-0143. DNREC rejected Diamond State’s initial mitigation proposal but accepted the plan after modifications were made. Board Tr., p. 133, CURRANAPPX-0155; Remand Decision, p. 65.

¹⁰⁷ Hearing Officer’s Report, p. 20, PORTAPPX000058.

¹⁰⁸ Remand Decision, p. 66.

¹⁰⁹ Hearing Officer’s Report, p. 20, PORTAPPX000058.; Remand Decision, p. 67.

to improve views of the river, in addition to other potential improvements.¹¹⁰ Additional enhancements, such as road and lighting enhancements, are under consideration.¹¹¹

Relying on the testimony of Steven Smailer,¹¹² John Cargill,¹¹³ and Brian Devine, and the TRM, the Board concluded that the Mitigation Plan “provides an adequate combination of direct in-kind replacement of lost habitat.”¹¹⁴

The Board again addressed the evidence presented by Curran. Mr. Preziosi testified that the Mitigation Plan was “grossly insufficient” and did not “meet compensatory mitigation requirements.”¹¹⁵ The Board noted that the applicable regulation does not mandate how mitigation is to be implemented and Mr. Preziosi cited no legal authority for his conclusions. While Mr. Preziosi provided examples of what DNREC “might have done,” the Board found that the Mitigation Plan adequately balanced the public interest and the benefits of the Project.¹¹⁶

¹¹⁰ Hearing Officer’s Report, p. 21, PORTAPPX000059.

¹¹¹ Remand Decision, p. 68.

¹¹² DSPCAPPX2_000303-313. Mr. Smailer is DNREC’s Director of the Division of Water. He testified to the application process and Diamond State’s application timeline, the parallel federal agency process, and the environmental impacts and mitigation for the Project.

¹¹³ DSPCAPPX2_000314-323. Mr. Cargill is a DNREC employee. He provided a timeline of events relating to the Permit process, evaluation of environmental impact and mitigation, the shoaling fans, and navigation issues.

¹¹⁴ Remand Decision, pp. 65-71.

¹¹⁵ *Id.*, p. 69.

¹¹⁶ *Id.*

Mr. Preziosi also opined on the need for mitigation of future maintenance dredging. The Board, however, found that future dredging is not a part of the initial permitting process and Diamond State will be required to apply for further permits which will address that issue.¹¹⁷

3. Regulation 4.11

Section 4.11.1.2 requires the Project “be designed” to “[m]aintain the navigability of channels.” The objectors argued that DNREC did not comply with the regulation as it relates to future dredging activities.¹¹⁸ The Board noted that Diamond State’s initial proposal included the use of shoaling fans to potentially help reduce the need for future maintenance. After the fans were removed from the proposal, the objectors asserted that DNREC did not address the impact of maintenance dredging.

The Board recognized the need for “future maintenance dredging” but found that the Permit only related to the new construction.¹¹⁹ With respect to future maintenance, the Board found that Diamond State conducted an initial assessment, which estimated approximately 500,000 cubic yards would need to be dredged annually (an amount consistent with the annual dredging required at the current Port

¹¹⁷ *Id.*

¹¹⁸ PORTAPPX000019.

¹¹⁹ Remand Decision, p. 73.

of Wilmington and the Delaware City refinery).¹²⁰ This dredging would take 17 days and it will not impact the main Channel because dredging will be limited to the berthing area.¹²¹

The Board also found that removal of the shoaling fans did not impact the dredging estimates because Diamond State was unable to determine the fans' efficacy.¹²²

The Board found that future maintenance dredging will require Diamond State to apply for additional permitting. At that time, DNREC will seek input from various partner agencies and include such mitigation as it finds necessary based on the scope of the work. Therefore, "the Secretary would be premature to opine regarding future dredging."¹²³

Curran offered the testimony of Dr. Craig Jones on the impact of construction and maintenance dredging.¹²⁴ Dr. Jones has been "engaged as a technical expert on sediment, dredging, and environmental matters on most of the large estuaries in the northeastern United States including the Delaware River."¹²⁵ Dr. Jones opined that

¹²⁰ *Id.*, p. 74.

¹²¹ *Id.*

¹²² *Id.*, p. 75.

¹²³ PORTAPPX000020; Remand Decision, p. 77.

¹²⁴ Jones Aff., PORTAPPX000777-91.

¹²⁵ CURRANAPPX-0694.

Diamond State significantly underestimated the annual dredging.¹²⁶ He also opined on the navigational hazards created by the dredging activities.¹²⁷

Mr. Preziosi found the annual dredging was “unusual for the area.”¹²⁸

While the Board again found Dr. Jones to be well-qualified, he did not have any experience “relevant to the Delaware River.” The Board also found Mr. Devine’s testimony to be “more persuasive.”¹²⁹

The Board also found Mr. Perziosi’s testimony to be contradictory to Mr. Devine’s, who the Board found to be more persuasive.¹³⁰

4. Regulation 3.1.3

Section 3.1.3 requires that a permit applicant keep its application current and notify DNREC of any changes. The objectors argued that after Diamond State removed the shoaling fans, it was required to update its application to address the need for maintenance dredging and because it did not do so, the application was incomplete. In the summary judgment phase of the appeal, the Board ruled that “Diamond State’s removal of the shoaling fans from the Project was not substantial enough to require the permit process to restart” and it was not DNREC’s practice “to

¹²⁶ CURRANAPPX-0697.

¹²⁷ CURRANAPPX-0707.

¹²⁸ Remand Decision, p. 76. Preziosi Aff., ¶¶ 8-14, CURRANAPPX-0916-917.

¹²⁹ Remand Decision, p. 77.

¹³⁰ *Id.*, p. 76.

require resubmission of applications when the changes reduce[d] the environmental impact of the Project as a whole.”¹³¹

David Small specializes in project management and support for environmental permitting and compliance with state and federal environmental regulations.¹³² He provided testimony on DNREC’s customs and practices for issuing subaqueous land permits. Mr. Small testified that the permitting process is fluid and changes are often made that do not require a new application.¹³³ He further testified that Diamond State’s permit application was “consistent with DNREC’s historic actions.”¹³⁴ The Board found his testimony “convincing and not challenged in the record.”¹³⁵

D. *Board’s conclusion*

After considering the factual record, the Board concluded that the objectors failed to carry their burden of proving that the Secretary’s Order was not supported by evidence in the record. Therefore, the Board affirmed the Secretary’s decision.

¹³¹ PORTAPPX000020.

¹³² DSPCAPPX2_00274-288.

¹³³ Remand Decision, p. 79.

¹³⁴ *Id.*

¹³⁵ *Id.*

IV. THE PARTIES' CONTENTIONS

Greenwich makes three arguments on appeal. First, it asserts that the Board committed legal error by ruling that DNREC was not required to consider navigational issues in the main Channel and to the extent that DNREC did consider navigational issues, the Board's conclusion is not supported by substantial evidence.

Second, the Board committed legal error by failing to consider the impact of dredging on navigation in the main Channel.

Third, the Board and DNREC committed an error of law by not requiring Diamond State to update its application after the removal of the shoaling fans.

Curran argues that the Remand Decision is not supported by substantial evidence in finding that the impact of the Project was limited to the 5.5 acres of subaqueous land and that Diamond State provided adequate mitigation. Curran argues that the Board improperly rejected his and his expert's testimony.

DNREC claims that the Board and this Court lack jurisdiction to hear the appeals and therefore, these appeals must be dismissed. On the merits, DNREC argues that its interpretation of its regulations is entitled to substantial weight and cannot be overturned because DNREC's determinations are not clearly erroneous.

Diamond State argues that the Board did not commit legal error and its finding that the Secretary adequately considered recreation and fishing, and mitigation are

supported by substantial evidence. Finally, its Permit application was updated and accurate throughout the application process.

V. STANDARD OF REVIEW

The court is to determine “whether the [agency’s] decision is supported by substantial evidence and is free from legal error.”¹³⁶ Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹³⁷ “It is more than a mere scintilla but less than a preponderance of the evidence.”¹³⁸ Legal determinations are reviewed *de novo*.¹³⁹ The court will not reverse a discretionary decision unless it was an abuse of discretion, or arbitrary or capricious.¹⁴⁰

The court is required “to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did.”¹⁴¹ Ultimately, “[t]he Court may affirm, reverse, or modify the Board’s decision.”¹⁴² The court must affirm if the agency’s

¹³⁶ *Delaware Solid Waste Auth. v. Delaware Dep’t of Nat. Res. & Env’t Control*, 250 A.2d 94, 105 (Del. 2021); *Booth v. Garvin*, 2019 WL 462486, at *2 (Del. Super. Feb. 6, 2019). The Court “accepts the Board’s findings of fact if there is substantial evidence to support them.” *Falconi v. Coombs & Coombs, Inc.*, 902 A.2d 1094, 1098 (Del. 2006).

¹³⁷ *Protecting Our Indian River v. Delaware Dep’t Nat. Res. & Env’t Control*, 2015 WL 54616204, at *6 (Del. Super. Aug. 14, 2015).

¹³⁸ *Delaware Solid Waste Auth.*, 250 A.2d at 105 (cleaned up).

¹³⁹ *Fasano v. Delaware Dep’t of Nat. Res. & Env’t Control*, 2024 WL 469638, at *2 (Del. Super. Feb. 2, 2024).

¹⁴⁰ *Kreshtool v. Delmarva Power & Light Co.*, 310 A.2d 649, 652 (Del. Super. 1973).

¹⁴¹ *Fasano*, 2024 WL 469638, at *2 (quoting *Nat’l Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. 1980)).

¹⁴² 7 Del. C. § 6009(b)).

decision is free from legal error and supported by substantial evidence even if the court “would have reached a contrary conclusion from the same evidence.”¹⁴³ Reversal “is warranted if [the agency] abused its discretion, committed an error of law, or made findings of fact unsupported by substantial evidence.”¹⁴⁴

“Although [this Court’s] standard of review of a decision by [an administrative agency] is deferential, it is not altogether without teeth.”¹⁴⁵ The Court does not weigh evidence, determine credibility, or make factual findings,¹⁴⁶ but “it cannot defer to a decision . . . that fails to reflect a rational consideration of the evidence.”¹⁴⁷

VI. DISCUSSION

A. *Diamond State’s Request for Judicial Notice*

While the first appeal was pending, the United States District Court for the Eastern District of Pennsylvania issued its decision in *Greenwich Terminals LLC v. U.S. Army Corps of Engineers*.¹⁴⁸ which addressed the federal permits for the Project.

¹⁴³ *Kreshtool*, 310 A.2d at 652.

¹⁴⁴ *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1244 (Del. 1985).

¹⁴⁵ *Delaware Div. of Pub. Advoc. v. Delaware Pub. Serv. Comm’n*, 2023 WL 2641492, at *6 (Del. Super. Mar. 24, 2023) (quoting *Neece v. Unemployment Ins. Appeal. Bd.*, 2022 WL 130870, at *4 (Del. Super. Jan. 14, 2022)) (citing *Murphy & Landon P.A. v. Pernic*, 121 A.3d 1215, 1217 (Del. 2015)).

¹⁴⁶ *Protecting Our Indian River*, 2015 WL 54616204, at *6.

¹⁴⁷ *Div. of Pub. Advoc.*, 2023 WL 2641492, at *6.

¹⁴⁸ 2024 WL 4595590 (E.D. Pa. Oct. 28, 2024).

The District Court vacated Diamond State’s federal permit due, in part, to the Army Corp’s approval being arbitrary and capricious.¹⁴⁹

In this appeal, Greenwich referenced the District Court’s ruling in briefs. After briefing was complete, Diamond State filed a letter arguing that Greenwich improperly referenced the District Court case and requested an opportunity to file an expert report submitted in connection with the federal permit application.¹⁵⁰ Greenwich opposed the request.¹⁵¹

After the appeals were fully briefed, the Court held oral argument on limited issues.¹⁵² During argument, the District Court’s decision was discussed. Specifically, the Court asked the parties for their view on the impact, if any, of that ruling, and the Court noted that it could take judicial notice of the District Court’s ruling.¹⁵³

After the hearing, Diamond State filed a Motion for Application of Judicial Notice (the “Motion”).¹⁵⁴ The Motion asks the Court to take judicial notice of an Army Corp Memorandum of Record, issued April 4, 2026 (the “Document”), which Diamond State obtained through a Freedom of Information Act request.¹⁵⁵ Diamond

¹⁴⁹ *Id.* at *27.

¹⁵⁰ D.I. 33.

¹⁵¹ D.I. 34.

¹⁵² D.I. 36.

¹⁵³ The Court’s judicial notice of the District Court case was limited to the ruling itself and not to establish the truth of any adjudicative facts. *See* Del. R. Evid. 202(a)(1).

¹⁵⁴ D.I. 38.

¹⁵⁵ Motion, p. 4.

State argues that this memorandum, consisting of hundreds of pages of material, is publicly available and reflects actions taken after the District Court's decision. Diamond State argues that this Court "must take judicial notice" of the Document.

Greenwich opposes the Motion.¹⁵⁶ It contends that the attempt to add the Document to the record is improper. It argues that the Document does not fall into the category of material of which a court may take judicial notice, because, among other reasons, Diamond State adding the Document to its webpage does not constitute a document being "duly published" as contemplated by the rule.

A court may take judicial notice under Delaware Rule of Evidence 202(d) of "the duly enacted ordinances and duly published regulations and determinations of governmental subdivisions or agencies of the United States, of this State and of every other state, territory and jurisdiction of the United States."¹⁵⁷

A document that was obtained through a Freedom of Information Act request is clearly not a published regulation or determination of a governmental agency. Adding a document to one's website does not constitute a "published" action by a governmental agency. Diamond State is asking this Court to take judicial notice of a document to establish disputed facts. And it is attempting to add this Document (with no evidentiary support) to the appeal record. The Document is not the type of

¹⁵⁶ D.I. 39.

¹⁵⁷ D.R.E. 202(d)(B). The Motion also cites Rule 202(a), but that subsection applies to judicial notice of laws. The document clearly does not fall within this provision.

information of which the court may take judicial notice. Further, the record on appeal is limited to the record before the Board.¹⁵⁸ For these reasons, the Motion is **DENIED.**

B. *Does this Court and the Board have jurisdiction to hear the appeals?*

For the first time in these proceedings, DNREC argues that neither the Board nor this court has jurisdiction to hear the appeals. This is so, DNREC argues, because exclusive jurisdiction over projects that convey an interest in subaqueous lands lies with DNREC. It relies on *Worldwide Salvage, Inc. v. Envirn. Appeals Bd.*¹⁵⁹ to assert that the Act precludes *any appeal* from a subaqueous lands permit decision.¹⁶⁰

Worldwide Salvage addressed whether the court had jurisdiction to hear an appeal under the Underwater Lands Act, which placed exclusive jurisdiction for granting permits on subaqueous lands with the DNREC Secretary and the Governor.¹⁶¹ After the Secretary made a recommendation to lease a parcel of subaqueous land to an applicant and the Governor accepted that recommendation, a second applicant, whose application had not been acted upon, appealed. The court found that there was no right of appeal and dismissed the action.

¹⁵⁸ Super. Ct. Civ. R. 72(g).

¹⁵⁹ 1986 WL 3650 (Del. Ch. Jan. 30, 1986).

¹⁶⁰ Delaware Department of Natural Resources and Environmental Controls' Answering Brief, p. 17 (D.I. 15), p. 19 (D.I. 26).

¹⁶¹ *Worldwide Salvage*, 1986 WL 3650, at *1.

The court based its ruling on three grounds. First, 7 *Del. C.* § 6008(e) provided that there is no right to appeal the *denial* of a permit. The second applicant's application was effectively denied when the first application was accepted by the Governor. Second, neither the statute nor the regulations addressed the Governor's discretionary decisions to accept or reject the Secretary's recommendation.¹⁶² Third, the Underwater Lands Act, unlike the Delaware Environmental Protection Act which created the Board and affords administrative review of regulatory decisions, did not provide for such administrative appeal rights.¹⁶³

The Underwater Lands Act was repealed in July 1986 and the Subaqueous Lands Act was adopted.¹⁶⁴ Section 7210 of the Act expressly provides for a right of appeal. It states that any person "substantially affected by any action of the Secretary or of the Department taken pursuant to this chapter," may appeal to the Board and the "appeal shall be governed by §§ 6008¹⁶⁵ and 6009¹⁶⁶.... There shall be no appeal of a decision by the Secretary to deny a permit ..."¹⁶⁷

¹⁶² *Id.*, at *4.

¹⁶³ *Id.*

¹⁶⁴ <https://legis.delaware.gov/SessionLaws/Chapter?id=23236>

¹⁶⁵ 7 *Del. C.* § 6008 governs appeals to the Board ("Any person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeal Board....") (no appeals from denial of a permit, unless the decision was discriminatory).

¹⁶⁶ 7 *Del. C.* § 6009 governs appeals to the Superior Court ("Any person or persons, jointly or severally, or any taxpayer, or any officer, department, board or bureau of the State, aggrieved by any decision of the Board, may appeal to the Superior Court...").

¹⁶⁷ 7 *Del. C.* § 7210.

The Court finds that *Worldwide Salvage* is distinguishable. *Worldwide Salvage* construed a different statute, which did not provide for a right of appeal and it has now been repealed. Second, the Board did not exist when the Underwater Lands Act was adopted. Delaware Environmental Protection Act created the Board.¹⁶⁸ When the Act was adopted, it expressly provided for a right of appeal. Thus, the Board had jurisdiction to hear the appeals, as does this court.¹⁶⁹

C. *Did the Board properly consider navigational issues – Regulation 7504-4.6?*

Greenwich argues that the Board erroneously found that DNREC’s navigational jurisdiction was limited to the subaqueous lands effected by the construction portion of the Project.¹⁷⁰ It asserts that Regulation 7504-4.6 requires DNREC to also consider navigation over all of the subaqueous land it owns, which stretches to the “low water mark” on the New Jersey side of the River, including the main Channel.

In support of this argument, Greenwich points to DNREC’s Laura Mensch’s communications with the Coast Guard regarding the MITAGS Study.¹⁷¹ Ms.

¹⁶⁸ *Worldwide Salvage*, 1986 WL 3650, at *4.

¹⁶⁹ See also, *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892 (Del. 1994) (determining test for standing to appeal under the “substantially affected” standard in Section 7210); *Reed v. Del. Dept. of Nat. Resources*, 2024 WL 1931027 (Del. Super. April 30, 2024) (discussing standing to appeal under Sections 6008(a) and 7210).

¹⁷⁰ Greenwich Opening Brief (“OB”), pp. 14-18 (D.I. 17).

¹⁷¹ Ms. Mensch, DNREC’s Principle Planner in the Division of Climate, Coastal and Energy, provided a history of her involvement in the permitting process and coordination with state and federal agencies. Ms. Mensch also provided a timeline of the removal of the shoaling fans from

Mensch emailed the Coast Guard stating: “I am interested in [] hearing your thoughts on the navigational component of this project, and on whether the attached supplemental information provided by consultants for the Port of Wilmington Edgemoor project addresses navigation concerns associated with the operation of the port.”¹⁷² She later followed up, writing: “[th]e outstanding pieces in my review are to confirm that the emergency plan provided is adequate and that there is no concern regarding impacts to the main navigation channel.”¹⁷³ Greenwich argues that Ms. Mensch’s communications show that DNREC in fact had jurisdiction over navigation in the main Channel, otherwise, there was no need for these communications.

DNREC and Diamond State do not contest that DNREC’s jurisdiction over waterways extends beyond the area of the subaqueous land impacted by the Permit. But they argue that DNREC’s authority is subordinate to the governing federal agencies.¹⁷⁴ In reply, Greenwich asserts that it does not matter what federal agency DNREC relied upon, it was incumbent on DNREC “to determine whether the other

Diamond State’s Permit application and her assessment of responsibility for navigational issues in the Channel. Mensch Aff., DSPCAPPX2_000292-302.

¹⁷² PORTAPPX00706.

¹⁷³ PORTAPPX00703.

¹⁷⁴ Diamond State Answering Brief (D.I. 27), p. 20 (“DNREC’s authority over navigation within the Channel is subordinate to federal regulation...”). At oral argument, DNREC acknowledged that its jurisdiction is beyond the subaqueous land covered by the Permit. *See also* DNREC Answering Brief (D.I. 26), p. 21 (“The cited regulations require that DNREC consider navigation, but they do not give DNREC the authority to overrule a federal agency.”).

agency's analysis was properly done before basing its issuance of the permit on it.”¹⁷⁵ When pressed at oral argument by the Court on what Greenwich contends DNREC is required to do with respect to these federal agencies, it responded that DNREC was required to compel the agencies to “show your work.”¹⁷⁶

In the Board's consideration of navigation, the Remand Decision states: “DNREC's authority over navigational issues is limited to the public interest in the subaqueous lands effected [*sic*] by the construction permit.”¹⁷⁷

DNREC is granted “jurisdiction over any project involving ungranted subaqueous lands owned by the State...”¹⁷⁸ The statute grants DNREC the authority “to adopt rules and regulations to effectuate the purposes of” the Subaqueous Lands Act.¹⁷⁹ DNREC adopted such regulations.

The purpose of Regulation 7504 is to “protect[] against uses or changes which may impair the public interest in the use of tidal or navigable waters.”¹⁸⁰ Regulation 7504-4.6.3. requires DNREC to consider “the public interest in any proposed activity which might affect the use of subaqueous lands,” which includes “[t]he potential

¹⁷⁵ Greenwich Reply Brief (D.I. 30), p. 8.

¹⁷⁶ At oral argument, Greenwich acknowledged that DNREC was not required to conduct its own navigational impact study.

¹⁷⁷ Remand Decision, p. 37.

¹⁷⁸ 7 Del. C. § 7203.

¹⁷⁹ 7 Del. C. § 7201.

¹⁸⁰ 7 Del. Admin. C. § 7504; 7 Del. C. § 7201.

effect on the public with respect to ... navigation”¹⁸¹ Regulation 7504 defines

“Public Interest” as:

demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would exceed all demonstrable environmental, social, and economic costs of the proposed action. In determining the public interest in a request for use, sale, lease, or transfer of interest in subaqueous lands, the Department shall consider the ultimate project and purpose to be served by said use, sale, permit, lease, or transfer of lands or materials.¹⁸²

While the Permit is for the construction of the new port on the 5.5 acres of subaqueous land, it requires the use of the navigable Channel for the turning basin. DNREC is mandated to consider the interest of the “public at large.” Accordingly, DNREC is required to consider the impact of a proposed use for the subaqueous land beyond the new port’s boundaries.

With there being no real dispute over the requirement for DNREC to consider navigation outside of the 5.5 acres, the questions is: How is DNREC required to discharge this duty? Greenwich agrees that DNREC is not required to commission its own safety study, but argues that DNREC was required to do more than rely on the responses provided by the agencies in connection with the Project. Greenwich attacks the sufficiency of the MITAGS Study, the Coast Guard email, and the Pilots Association’s letter.

¹⁸¹ Regulation 7204-4.6.3.

¹⁸² 7 Del. Admin. C. § 7504.

The Coast Guard is the “federal agency responsible for piloting and traffic management” of the Channel, which includes the turning basin.¹⁸³ Ms. Mensch communicated with the Coast Guard regarding safety issues in the main Channel.¹⁸⁴ After discussions with Lieutenant Commander Cook, he advised Ms. Mensch that “Command” wanted a briefing on the issues.¹⁸⁵ After review of the documents provided by Ms. Mensch, the Coast Guard responded that it did not “see this project posing a risk to safe navigation.”¹⁸⁶

Greenwich argues that the Coast Guard email is insufficient because it contained no “explanation or analysis.”¹⁸⁷ As noted above, the record reflects that DNREC’s communications were more extensive than a one-line email. The Coast Guard has expertise in navigational management in the main Channel, as Greenwich acknowledges.¹⁸⁸ It is the Coast Guard that ultimately is charged with ensuring that travel in the Channel is safe. This is the reason the Board found the evidence of communications with the Coast Guard to be persuasive.

¹⁸³ *Greenwich Terminals LLC v. U.S. Army Corp of Engineers*, 2024 WL 4595590, at *21 (E.D. Pa. Oct. 28, 2024). Smailer Aff., ¶ 29, DSPCAPPX2_000308.

¹⁸⁴ PORTAPPX000703-729.

¹⁸⁵ PORTAPPX000703.

¹⁸⁶ PORTAPPX000770.

¹⁸⁷ OB at 24.

¹⁸⁸ *Id.*

The Army Corp is responsible for assessing and approving the design of the turning basin in the Channel.¹⁸⁹ The Army Corp is also responsible for dredging in the Channel, including maintenance dredging.¹⁹⁰

The Pilots are responsible for the safe navigation of commercial vessels in the Channel.¹⁹¹ A pilot will board a ship before it enters the Channel and directs the navigation of the vessel through the Channel.¹⁹² The Pilot Association's letter stated that the Project would have minimal impact on ships navigating the Channel.

The Channel has one lane of traffic, traveling in each direction and turning basins are used to navigate a ship into a port.¹⁹³ "It is common and customary for vessels in the navigation channel to need to slow and complete turns of varying degrees to enter facilities along the navigation channel."¹⁹⁴ Ships entering and exiting ports are assisted by tug boats.¹⁹⁵ Tug boats are also used in the main Channel in emergency situations, such as when a ship loses power.¹⁹⁶ Wilmington Tug Inc.'s letter stated that the turning basin was expected to be consistent with its experience of berthing a ship along the Delaware River.¹⁹⁷

¹⁸⁹ *Id.*; Remand Decision, pp. 37-38.

¹⁹⁰ Devine Aff., ¶ 8, DSPCAPPX2_000222.

¹⁹¹ <https://delpilots.org/>.

¹⁹² Devine Aff., ¶ 8, DSPCAPPX2_000203.

¹⁹³ Devine Aff., ¶¶ 9-10, DSPCAPPX2_000203.

¹⁹⁴ *Id.*, ¶ 12, DSPCAPPX2_000204.

¹⁹⁵ *Id.*, ¶ 14, DSPCAPPX2_000205.

¹⁹⁶ *Id.*

¹⁹⁷ PORTAPPX000776.

The Board found that operational and safety navigational issues in the Channel fall within the responsibility of the Army Corp, the Coast Guard, the Pilots Association, and Wilmington Tug, Inc.¹⁹⁸ DNREC properly looked to, and relied upon, these experts to assess safety and navigational issues in the Channel. Furthermore, the Permit is subject to and conditioned on “all appropriate [Army Corp] authorization.”¹⁹⁹ The Court finds that DNREC did not commit legal error relying on these agencies’ and entities’ expertise on navigational and safety concerns in the Channel.

The Board’s decision is supported by substantial evidence. The record reflects that the Army Corp, which was the lead agency, coordinated with the Coast Guard (among other agencies) and DNREC almost weekly between June 2021 and July 2023.²⁰⁰

At the time the Permit was issued, Diamond State’s applications to the Army Corp were under consideration. As reflected in the Technical Memo, Diamond State applied for a permit under Section 404 of the Clean Water Act²⁰¹ and approval under Section 14 of the Rivers and Harbors Act of 1899.²⁰² After issuance of the Permit, the Army Corp approved Diamond State’s application. Greenwich challenged the

¹⁹⁸ Remand Decision, pp. 36, 39.

¹⁹⁹ Permit, Special Condition 14, CURRANAPPX-0392.

²⁰⁰ Smailer Aff., ¶ 29, CURRANAPPX-1415.

²⁰¹ 33 U.S.C. § 1344.

²⁰² 33 U.S.C. § 408; Technical Memo, p. 1, PORTAPPX000140; *Greenwich Terminals LLC*, 2024 WL 4595590, at *1, 9 (approval/permit issued August 4, 2022).

issuance of the federal permit/approval in the United States District Court for the Eastern District of Pennsylvania, making many of the same arguments it raises here.²⁰³ Greenwich was successful in its appeal, as the District Court vacated the permit/approval, finding the Army Corp’s analysis of the impact of the turning basin on navigation in the Channel and its consideration of safety was “largely non-existent.”²⁰⁴

That the District Court vacated the Army Corp’s approval does not show that the Board’s decision is not supported by substantial evidence, as Greenwich argues.²⁰⁵ Rather, it shows that the Army Corp is responsible for the very issues of which Greenwich complains as it relates to safety and navigation in the Channel.²⁰⁶ It also shows that when the basis for the federal agency’s approval process is called into question, there is an avenue to have those concerns addressed. These subsequent

²⁰³ *Greenwich Terminals LLC*, 2024 WL 4595590.

²⁰⁴ *Id.* at *26-27.

²⁰⁵ OB at 18-28.

²⁰⁶ Greenwich challenged the MITAGS Study through the testimony of Captain Kichner, which the Board found was “well-received.” His testimony was directed to the navigational issues in the Channel, which is under the Army Corp’s jurisdiction. Captain Kichner’s testimony on the navigational issues and the MITAGS Study were presented in Greenwich’s appeal in the District Court. *Greenwich Terminals LLC*, 2024 WL 4595590, at *5, *23. Thus, the sufficiency of the study is being vetted through the federal permitting process. DNREC was ensuring that safety issues were being addressed by conditioning the Permit on satisfying the Army Corp requirements to obtain the federal permits.

events do not undermine DNREC's process or the Board's decision. Diamond State must obtain approval from the Army Corp, as required by the Permit.²⁰⁷

D. *Did the Board properly consider the impact of dredging - Regulation 7504-4.11.1?*

Greenwich argues that DNREC and the Board failed to consider the impact of dredging on navigation, either during the initial construction or in connection with annual maintenance dredging. Greenwich is not concerned with dredging activities that occur over the 5.5 acres of subaqueous land on which the new port will sit, but rather, the impact on navigation in the Channel.

As Mr. Smailer testified, the structures on the new site do not create navigational concerns.²⁰⁸ As discussed above, authority to control and ensure navigational safety in the Channel lies with the Army Corp. Thus, to the extent that dredging impacts navigation in the Channel, it falls within the authority of the Army Corp. A point Greenwich does not dispute.

²⁰⁷ Greenwich also contends that the Board's decision must be reversed because it did not address Greenwich's argument that DNREC failed to consider the Project's impact on the Channel as required by Regulation 7504-4.7.5.1. This regulation requires DNREC to consider the degree to which a project "interferes with public lands, waterways or surrounding private interests." Greenwich argues that the Channel is a "waterway" and DNREC failed to consider it. OB at 29-30. This argument, however, is simply another version of Greenwich's contention that DNREC has authority over navigation in the Channel. As this decision has already found, that authority lies with the Army Corp. Thus, for the same reasons Greenwich's navigational argument fails, this argument likewise fails.

²⁰⁸ Smailer Aff., ¶ 66, CURRANAPPX-1419.

As for future maintenance dredging, Diamond State will be required to apply for a permit. But the initial assessment concluded that the future annual dredging would be consistent with the amount of dredging occurring annually at the current port site.²⁰⁹ Further, the annual dredging is expected to take 17 days and would be limited to the berthing area and will not impact the main Channel. The Board accepted this testimony over that offered by the objectors.²¹⁰ This Court will not weigh evidence or assess credibility. Substantial evidence in the record supports the Board's conclusion.

E. *Did the Board properly consider Regulation 7504-4.6, 4.7—recreation?*

Curran makes four arguments to support his position that the Board failed to consider the impact of the Project on recreational use and fishing in the area. First, he contends that the Board made a factual error by limiting the impact of the Project to the 5.5 acres on which the new port will sit. Curran argues that the Project impacts an additional 87 acres, which the Board ignored.

Second, Curran asserts that the Board “reached an indefensible conclusion about the credibility” of Curran and his witnesses. He challenges the Board giving more weight to other witnesses and ignoring (or giving less weight) to his and his experts' testimony. He suggests that because the testimony was provided through

²⁰⁹ Remand Decision, p. 74. Devine Aff. ¶¶ 108-112, DSPCAPPX2_00231.

²¹⁰ Remand Decision, p. 76.

affidavits, that this Court is in just as good of a position as the Board to assess witness credibility.

Third, Curran contends that the Board failed to adequately consider the Project's impact on recreational use and fishing as no study was conducted. Further, to the extent that recreation was considered, the Board's review was cursory, conclusory and not supported by the record.

Finally, Curran argues that the Board unfairly balanced the pros and cons of the Project, focusing largely on the benefits and giving short shrift to the negative aspects. The Court addresses each ground below.

1. *Scope of the impact of the Project*

Curran points to the Board's findings in the Remand Decision that reference the loss of 5.5 acres of subaqueous land and argues that the Board failed to consider that the Project impacts an additional 87 acres.²¹¹ He says that when dredging occurs on this additional acreage, the subaqueous lands will be unavailable for public recreation.²¹² According to Curran, this area, which runs along the shore line, is the exact area recreational users will need to navigate to stay away from the commercial shipping activity in the main Channel. He complains that the dredging operations will serve as a "roadblock" to the recreational boaters.

²¹¹ Opening Brief of Appellant Walter F. Curran ("Curran OB") at 12-14, citing Remand Decision, at 37, fn 85, 45-48. (D.I. 13).

²¹² Curran OB at 13.

Diamond State counters that the Board did not misunderstand the impact of the Project. Its reference to the 5.5 acres, Diamond State argues, referred to the area for which the Permit was being requested. The larger area impacted by the Project relates to the dredging from the edge of the Channel into the new port, which will only be temporarily impacted.²¹³

The Court agrees that the Board did not misunderstand the impact of the Project. The Board acknowledged that the Project would impact more than the 5.5 acres, but the Permit and Mitigation Plan were directed at the 5.5 acres. The larger area of impact is the result of dredging required to attain the needed depth from the edge of the main shipping Channel into the new berth.²¹⁴ The impact of the dredging, including beyond the 5.5 acres, as discussed below, was addressed by the Board.

2. *The Board's assessment of credibility and impact on recreational use and fishing*

Curran takes issue with the Board's determination that he and his witnesses were biased, as every participant in an adversarial process is biased. He complains that the Board was skeptical of Curran and his experts, but did not apply the same

²¹³ Diamond State Port Corporation's Answering Brief in Opposition to Walter Curran's Appeal ("Curran AB") at 24-25 (D.I. 16).

²¹⁴ CURRANAPPX-0469. *See also*, Technical Memo, at 150 ("Dredging operations will directly impact the proposed action area....[T]he project is anticipated to use sunken pipelines for sections of the pipeline route in areas of navigation channels or recreational boating extents of the pipeline route.") CURRANAPPX-0617.

level of scrutiny to Diamond State’s or DNREC’s witnesses. He contends that the Board all together ignored Curran’s testimony on specific points.

Diamond State counters that the Board did not ignore Curran’s testimony, it properly found the testimony was not credible.

As noted above, the Board (not this Court) makes credibility determinations and the Court will not substitute its judgment for that of the Board. Absent a finding that the Board abused its discretion, the Court will not disturb the Board’s findings.²¹⁵ The record supports the Board’s credibility determinations.

Curran’s objection was based on his personal use of the river being impacted by the Project. By Curran’s own testimony, however, he had not regularly boated on the Delaware River after his retirement in 2011.²¹⁶ He boated or fished on the river twice in 2022 (from the Delaware/Pennsylvania line down to the Christina River) and once in 2023 (“in the areas of Wilmington and Philadelphia”).²¹⁷ When he fished in the vicinity of the Project (at some unspecified time), he observed “many recreational boats passing.”²¹⁸ While Curran also testified that he typically observed 20-50 boats when he was on the river, he does not specify where this observation occurred, as he has also fished on the Delaware River near the Delaware Bay.²¹⁹

²¹⁵ *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1244 (Del. 1985).

²¹⁶ Curran Aff., ¶ 16, CURRANAPPX-0682-0692.

²¹⁷ *Id.*, ¶¶ 19-20, CURRANAPPX-0687-687.

²¹⁸ *Id.*, ¶ 24, CURRANAPPX-0687.

²¹⁹ *Id.*, ¶¶ 19-20, 25, CURRANAPPX-0686-687.

Curran's own testimony supports the Board's credibility assessment. His assessment of the impact on recreational boating was based on nothing more than his personal observation. With his very limited use of the river near the Project site in recent years, his testimony fairly could be assessed as carrying little, if any, weight. Further, Curran worked for Holt (a competitor of Diamond State), directly or indirectly, for approximately 22 years. There was nothing improper about the Board finding that Curran's testimony may have been colored by his loyalties to his long-time employer.

Curran argues that the Board failed to address the recreational impact of the Project. In support, he offered the testimony of Dr. Tomasi, who criticized Diamond State and DNREC for failing to conduct a scientific analysis of the recreational use of the river near the Project. Dr. Tomasi offered his opinion on how DNREC could have assessed the impact of recreational boating in the area.²²⁰ Curran argues that without an analytical method or approach, DNREC failed to properly consider recreational use, as required by Regulation 7504.²²¹ In fact, he argues, boating and fishing are "barely mentioned" in the Remand Decision.

²²⁰ Remand Decision, pp. 63-64. Curran OB at 22-24.

²²¹ Curran OB at 19-22.

The record supports the Board's finding that recreational boating in this area is limited due to the contamination,²²² the industrial nature of the surrounding area, and the lack of boat access.²²³ Additionally, the impact on the use of this area during dredging is temporary and cannot occur between March 15 and June 30.²²⁴ Dredging was not expected to have a significant impact on vessels in the Channel and because "[s]mall craft have greater mobility around dredging equipment, "restrictions on small craft is unlikely and insignificant."²²⁵

While Dr. Tomasi offered an alternative analytical method, DNREC was not required to implement a specific approach to considering of impact on recreational use. It was within the Board's purview to find that reliance on Diamond State's and DNREC's subject matter experts was reasonable. Thus, simply because the Board did not provide a more extensive analysis of the impact to the limited recreational use does not mean the Board did not give it adequate consideration.

²²² Curran attacks this finding, arguing that in "nearly 200 pages of this 'Technical Assessment' document" there was no actual assessment of the extent of recreational use. Curran OB at 27-28. Curran does not contest that the Technical Memo included multiple analyses of the contamination in the subaqueous lands around the site, which made the water unsuitable for fishing and swimming. Technical Memo, at 53-66, 98, CURRANAPPX-1251-1266, 1298. Removal of these contaminants were expected to improve the water quality and thereby promoting more recreational fishing. *Id.* at 66.

²²³ Remand Decision, pp. 36, 45-48.

²²⁴ Technical Memo, p. 67, CURRANAPPX-0534.

²²⁵ *Id.* Curran also complains that the Remand Decision barely mentions "fishing" and argues that protecting fish is not sufficient to consider the impact on *fishing*. Curran OB at 22. He posits that whether or not one can eat the fish (if fish are even present) does not matter because one can still fish. *Id.* These arguments ignore the record evidence that dredging is expected to have little impact on the recreational use in the area.

Curran's arguments center around the concept that the required dredging will be a "roadblock" for recreational boaters and, he appears to argue that there can be *no* impact on such users. First, there is no evidence in the record that dredging operations will be a roadblock, other than Curran's say-so. The Board was not required to accept his testimony. Second, DNREC regulations require it to weigh the various considerations, but they do not require DNREC, or a permit applicant, to eliminate all negative impacts of a proposed project. Certainly dredging creates a hazard in the water. Curran's expert identified such hazards. The Coast Guard warns recreational boaters to operate their vessel at a safe speed and keep a safe distance from dredging equipment due to the hazards.²²⁶ But just because there are hazards associated with this activity does not mean the Board did not consider the impact on recreational use.

The Courts finds that there is substantial evidence in the record to support the Board's credibility determinations and its factual findings.

3. *Balancing of competing considerations*

Curran contends that the Board improperly put too much emphasis on the positive aspects of the Project, while dismissing the negative; namely annual maintenance dredging.²²⁷ He asserts that the Board applied a "double-standard" by

²²⁶ Jones Aff., Ex. D, E, CURRANAPPX-0783-0788.

²²⁷ Curran OB at 29-31.

touting the speculative future economic benefits of the Project and ignoring the certain future harm caused by the dredging. Curran argues the Board “dodge[d the] issue by claiming that any maintenance dredging will be the subject of future permitting.”²²⁸

Curran’s objection is based on the Board failing to consider (or give due consideration of) the impact of future dredging. But the Board did consider this issue. As noted in the Remand Decision, Diamond State commissioned a study on the scope of future maintenance dredging.²²⁹ The study found, and the Board accepted, that maintenance dredging for the new port was estimated to be consistent with the annual dredging that occurs at nearby Port of Wilmington and Delaware City refinery and would take approximately 17 days.²³⁰ The estimated scope of the annual dredging was conservatively high.²³¹ Further, maintenance dredging was not expected to significantly impact recreational use.²³²

Curran’s contention that the Board shirked its duty by finding that future maintenance dredging would be the subject of future permit application is likewise without merit. As Mr. Small explained, DNREC requires different permits for construction dredging and maintenance dredging.²³³ Construction dredging, he

²²⁸ *Id.* at 30.

²²⁹ Remand Decision, pp. 73-74. Devine Aff., ¶¶ 108-09, DSPCAPPX2_000230-231.

²³⁰ Remand Decision, p. 74.

²³¹ Devine Aff., ¶ 114, DSPCAPPX2_000232.

²³² Remand Decision, p. 74; Devine Aff., ¶ 112, DSPCAPPX2_000231.

²³³ Small Aff., ¶¶ 35-37, DSPCAPPX2_000286.

explained, is more extensive because it is the first time sediment is moved.²³⁴ The scope of maintenance dredging is narrower and varies each year “based on a number of natural environmental factors.”²³⁵ Although an applicant may be asked to identify “ways in which the applicant believes future dredging is going to be reduced” or minimized, it is not required to include any such measures.²³⁶

At bottom, Curran’s argument is another iteration of his objection to how the Board weighed the evidence. DNREC followed its procedure regarding the permit process for maintenance dredging and doing so did not impact the validity of the construction Permit. There is substantial evidence in the record to support the Board’s findings and conclusions and the Court will not disturb them.

F. *Mitigation*

Curran contends that DNREC failed to evaluate the extent of recreational mitigation needed to compensate for the direct impact on boating and fishing.²³⁷ He argues that DNREC failed to consider the “destruction” of the additional 87 acres of subaqueous land due to dredging. He asserts that the Mitigation Plan is inadequate because the 1.1 acres of restored wetlands required by the Mitigation Plan is not a 1:1 replacement for the loss of 5.5 acres.²³⁸ According to his expert, 25 acres of

²³⁴ *Id.*, ¶¶ 38-40, DSPCAPPX2_000286-287.

²³⁵ Devine Aff., ¶ 113, DSPCAPPX2_000232.

²³⁶ Small Aff., ¶ 40, DSPCAPPX2_000287.

²³⁷ Curran OB at 33-34.

²³⁸ *Id.* at 35-36.

restored wetlands would be required to compensate for the loss of the 5.5 acres where the new port will sit. He further asserts that the eDNA monitoring does not actually mitigate anything. Curran attacks the Mitigation Plan on the additional ground that any mitigation at Fox Point State Park is not mandatory.²³⁹ Finally, Curran argues that the Mitigation Plan was proposed and approved in only a matter of days and its rushed approval shows that DNREC failed to properly consider mitigation.

DNREC counters that mitigation is not mandated by its regulations, but it must consider the extent that the loss of subaqueous land *may* be offset. It argues that the Mitigation Plan adequately compensates for the losses here. Diamond State similarly argues that the Mitigation Plan is adequate.

First addressing the timing of the Mitigation Plan, Curran's argument ignores the record of extensive discussions and back-and-forth between Diamond State and various state and federal agencies on mitigation. Mr. Cargill, a DNREC expert in contamination evaluation and clean up processes, provides a detailed description of mitigation of the contamination in the subject lands. These discussions started in January 2021 and continued in the spring, summer and fall, culminating in the Mitigation Plan.²⁴⁰ Mr. Smailer, DNREC's Director of the Division of Water, also recounted the history of the development of the Mitigation Plan.²⁴¹

²³⁹ *Id.* at 15.

²⁴⁰ Cargill Aff., ¶¶ 30-56, CURRANAPPX-139297.

²⁴¹ Smailer Aff., ¶¶ 51-56, CURRANAPPX-1416-17.

Second, Curran’s position that mitigation must be on a one-for-one basis is based on an incorrect premise. When subaqueous lands are lost due to proposed activities, the permit applicant “*may be required* to take measures which will offset or mitigate the loss.”²⁴² DNREC’s determination of whether and how to mitigate a loss is multifactorial, including whether in-kind replacement in proximity to the impact area is available.²⁴³ Such was the case here.

Mr. Smailer explained that due to the industrial nature of the surrounding area and the desire to avoid additional subaqueous land disturbance (potentially requiring more mitigation), the to-be-constructed wetlands were considered an enhancement to the riverfront, benefiting the public.²⁴⁴ Another “obvious” concern was the potential impact on fisheries in the river and the timing of those impacts.²⁴⁵ To address this concern, DNREC required Diamond State to provide funding for DNREC to monitor the impact (eDNA program) of the Project. Contrary to Curran’s contention that this was no mitigation at all, DNREC found this program important to address the uncertain impact of the Project and provide data “necessary to identify additional meaning mitigation opportunities for future projects.”²⁴⁶

²⁴² 7 Del. C. § 7205(a) (emphasis added). See also 7 Del. Admin. C. § 7504-4.7.4.

²⁴³ Smailer Aff., ¶ 56, CURRANAPPX-1417.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

Mr. Smailer went on to explain that DNREC typically charges an applicant \$1 per square foot of filled subaqueous lands and \$150,000 per acre for tidal wetland mitigation (not impacted here). Using these parameters, the mitigation cost for the Project would have been between \$240,000 and \$825,000.²⁴⁷ The Mitigation Plan was valued at approximately \$3 million. Mr. Smailer concluded:

The Program considered localized in-kind replacement, direct community benefit, and the development of a Statewide eDNA monitoring program as sufficient mitigation for the filling of 5.5 acres of subaqueous lands associated with the conversion of an inactive industrialized waterfront with legacy contamination issues to an active industrialized waterfront with much of the legacy contaminants removed.²⁴⁸

DNREC interprets its regulations to apply mitigation factors when the loss of the subaqueous land is a permanent loss.²⁴⁹ The additional 87 acres Curran complains about are not lost. Rather, there is a temporary impact during dredging. As such, DNREC did not require mitigation for the 87 acres, nor was it error not to do so.

Curran's argument that the Mitigation Plan did not consider the loss of recreational use fails because the substantial evidence in the record supports the

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Smailer Aff., ¶ 56. CURRANAPPX-1417. *See also State Farm Mut. Auto Ins. v. Mundorf*, 659 A.2d 215, 220 (Del. 1995) ("substantial weight and deference is accorded to the construction of a regulation enacted by an agency which is also charged with its enforcement.")

conclusion that there will be limited impact on recreational use. Further, the loss of transitory use of the river by recreational users is temporary, not requiring mitigation.

Finally, the phasing of the Mitigation Plan and the conditional nature of Phase Three does not require reversal. The Mitigation Plan makes clear that Phases One and Two were the top priorities. It includes a budget for each Phase and²⁵⁰ expressly states that Phase Three is subject to the overall project costs, after completion of the first two Phases. Thus, while Phase Three may be subject to a condition, it is not optional.

G. *Did the Board err by issuing the Permit without requiring the application to be updated or resubmitted?*

Greenwich argues that Diamond State “blatantly violated” Regulations 7504-3.1.1.2 and 3.1.3 by failing to update its application after removal of the shoaling fans.²⁵¹ Greenwich’s objection is based on the premise that without the shoaling fans, “more sediment will build up, requiring more ongoing dredging which will present more obstacles to navigation and safety.”²⁵² Greenwich contends that Diamond State was required to start the permitting process anew. By failing to require an updated application, Greenwich argues, DNREC’s issuance of the Permit

²⁵⁰ CURRANAPPX-0398-416.

²⁵¹ OB at 34.

²⁵² *Id.* at 35.

must be reversed. Greenwich relies on the 2002 decision from the Board in *Hegman v. Del. Dep't of Nat. Res. and Env't'l Controls.*, EAB 2000-10.

The Board accepted the testimony of David Small on the application process. Mr. Small worked for DNREC for nearly 30 years, including holding the position of Secretary for three years.²⁵³ He testified to the DNREC permitting process, including the various appendices to be filed with a permit application. He went on to state that Appendix S is required for a new dredging project and Appendix R is required for a maintenance dredging permit.²⁵⁴

An application for a construction permit requiring new dredging must include Appendix S.²⁵⁵ While the application may also address future dredging and include Appendix R, it is not required.²⁵⁶ Thus, Mr. Small testified, a new dredging application that does not address future maintenance dredging is not inaccurate or incomplete.²⁵⁷ Mr. Small testified that a permit application is a fluid process and to encourage positive changes (such as in response to objections), DNREC does not require a new or updated application when such changes are made.

The initial permit included the “unprecedented use” of shoaling fans as a means to reduce the amount of maintenance dredging needed. After the objectors

²⁵³ Small Aff., ¶ 6, DSPCAPPX2_000277.

²⁵⁴ *Id.* at ¶¶ 13-14, 37, DSPCAPPX2_000280-281, 286.

²⁵⁵ *Id.* at ¶ 37, DSPCAPPX2_000286.

²⁵⁶ *Id.* at ¶ 40, DSPCAPPX2_000287.

²⁵⁷ *Id.* at ¶ 41, DSPCAPPX2_000287.

and DNREC objected to the use of the fans, they were removed.²⁵⁸ The record reflects the shoaling fans were removed due to the potential detrimental impact on aquatic life and that their efficacy could not be guaranteed.²⁵⁹ As discussed above, measures that may reduce future maintenance dredging may be included in a permit application, but they are not required.

Greenwich's reliance on *Hegman* is misplaced. There, the permit application was admittedly "rubber stamped" and lacked any meaningful review by DNREC management. These were among the many failings in approval of the permit.²⁶⁰ The record here is extensive and the application was reviewed at various levels within DNREC.

The Board's decision is supported by substantial evidence. Diamond State was not required to address future maintenance dredging in its permit application. Removal of the shoaling fans, which was an attempt to address future maintenance dredging, therefore, did not impact the validity of the Permit application.

VII. CONCLUSION

Greenwich and Curran bear the burden in these appeals to show that the Board committed legal error or its findings and rulings were not supported by substantial evidence. The Board, not the reviewing court, makes credibility determinations. As

²⁵⁸ Remand Decision, pp. 54-55.

²⁵⁹ *Id.*, p. 74.

²⁶⁰ *Hegman* at 75 ("too many people dropped the ball here.").

the Board did not commit legal error and its rulings are supported by substantial evidence in the record. Greenwich and Curran failed to sustain their burden and the Remand Decision is **AFFIRMED**.

IT IS SO ORDERED.

/s/Kathleen M. Miller

Kathleen M. Miller, Judge