



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

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Secretary

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**Secretary's Order No. 2008-W-0052**

**Re: Application of Premcor Refining Group, Inc. for a Subaqueous Lands  
Permit and Water Quality Certification to Dredge Portions of Cedar Creek  
and the Delaware River for the Delaware City Refinery, Delaware City, New  
Castle County**

**Date of Issuance: September 29, 2008**

**Effective Date: September 29, 2008**

Under the authority granted the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") under 7 *Del. C.* §6003, the following findings, reasons and conclusions are entered as an Order of the Secretary. This Order considers Premcor Refining Group, Inc. ("Applicant") permit application submitted to the Department's Division of Water Resources ("DWR"), Wetlands and Subaqueous Land Section for a subaqueous lands permit under the Subaqueous Lands Act, 7 *Del. C. Chap. 72*, ("SLA") and a Water Quality Certification required under Section 401 of the federal Clean Water Act.<sup>1</sup>

The permit application seeks permission to dredge the following portions of Cedar Creek and the Delaware River ("Project"): 1) the navigational channel in the Delaware River used by oil tankers to navigate to and from the berthing area, 2) the berthing area where oil tankers unload crude oil, and 3) Cedar Creek, which provides the major source of water used by Applicant's petroleum refinery located at 4550 Wrangle Hill Road, Delaware City, New Castle County ("Facility").

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<sup>1</sup> Both approvals are needed and in this Order they will be referred to as a single permit.

On September 22, 2008, the Department held a public hearing on the application, at which time the Applicant repeated a request made in a September 4, 2008 letter that sought approval of authority to dredge prior to October 2008. Applicant requested expedited consideration due to its concern that low water conditions in Cedar Creek may pose a risk that the Facility may not receive enough water to operate safely and in compliance with the law, the Department's regulations and permits. The Applicant indicated that Cedar Creek's water level may soon be below the minimum level necessary to allow the Facility to receive water and to operate properly. The prior permit that expired May 30, 2008 allowed Applicant to conduct periodic maintenance dredging to 12 feet below mean low water level ("MLW"). The current depths in Cedar Creek are approximately 6 feet MLW, which is at a level the Applicant considers to be the minimum level to ensure safe operations of the Facility. This low level places the Facility at risk for unforeseen weather events. As a result of Applicant's request for expedited consideration, the Department's presiding hearing officer denied requests from the public at the public hearing to keep the public comment period open after the public hearing for written comments.

The public comments presented at the public hearing all opposed the issuance of the requested permit. The opposition cited possible harm to the environment from the dredging, and possible adverse impact on aquatic life in Cedar Creek from Applicant's intake of water and its subsequent discharge.

The Department's authority under the Subaqueous Lands Act, *7 Del. C. Chap 72*, does not directly regulate the intake or discharge of water the Facility uses. Instead, the Department directly regulates the Facility's water intake and its subsequent discharge

under two other permit programs. The Applicant's water intake is regulated by a water supply permit issued by the DWR's Water Supply Section under *7 Del. C. Chapter 60*. DWR's Surface Water Discharge Section regulates the Facility's surface water discharge under the federal National Pollution Discharge Elimination System ("NPDES") permit and a similar State discharge permit issued under *7 Del. C. Chapter 60*. These permits are not subject to modification in this proceeding. Nevertheless, the subaqueous lands permit is essential to maintaining water levels in Cedar Creek, which allows the Facility to operate safely and in compliance with other environmental laws, regulations and permits, notably the many air pollution control permits that regulate the Facility's air emissions. A Department decision to deny dredging to maintain water access or the Department's failure to take prompt action to allow dredging of Cedar Creek could result in the shutdown of the Facility and the release of air pollutants in excess of the limits in the Department's air pollution control permits that may be caused by such a shutdown.

The issue of the risk of the Facility running out of water due to low water conditions in Cedar Creek is serious and immediate. Following the public hearing, the Department requested additional information from the Applicant on the impact of loss of its water supply from the Delaware River. The Applicant provided the requested information, which indicated that a loss of water, even for short durations, would cause the Facility to experience upset conditions that would in turn result in increased emissions of harmful air pollutants. Indeed, the Facility experienced such low water recently that caused releases of pollutants in excess of the limits in the Facility's air pollution control permits.

Based upon these circumstances, I agree that it would be ideal for the Department to review the other permits as part of the dredge permit decision, but such coordination often is not possible due to timing issues, such as present in this application. After consulting with the Department's experts, I have decided to separate the Department's SLA decision-making into two parts. The first part shall be this Order, which is issued as an interim Order to address the immediate need to dredge Cedar Creek as quickly as possible to avoid a possible loss of water from Cedar Creek. The Department shall authorize this dredging in Cedar Creek for a period not to exceed March 31, 2009, or until superseded by the prior issuance of the final Order on the pending permit application. This interim dredging in Cedar Creek is authorized to a depth of 12 feet MLW, which is the same as the depth in the permit that expired May 30, 2008. This decision to separate the SLA decision-making process should solve the immediate concern that the Facility may not have sufficient water in the near future, while allowing the Department to carefully consider the many issues raised by the application and the public comments.

The need for expedited consideration of the dredging of Cedar Creek is that it experiences periodic low water conditions. These conditions primarily are caused by silt from the Delaware River, which fills in Cedar Creek and cause there to be less water available at the intake. The low water from silt can occur rapidly, particularly due to storms. In addition, factors such as low tides, lunar cycles, and certain wind conditions can make even less water available for use by the Facility. The weather conditions with strong winds can significantly reduce water levels in Cedar Creek. The dredging authorized will allow the Facility to maintain sufficient water levels to allow the Facility

access to water, which access the Department previously authorized and is not subject of the pending permit application. I agree with the Department's experts that there is an unacceptable risk that the Facility will not get sufficient water if dredging does not occur in Cedar Creek soon.

I refrain from deciding now the entire pending permit application until the Department receives additional public comments and otherwise fully investigates the underlying application, which seeks more authorization than granted by this interim Order and for a longer duration. This interim Order will not have any impact on the Department's decision on the underlying permit application and the public comments, but is issued solely to avoid the potential risk of harm to the environment and public health and safety from a loss of water to the Facility.

This Order is issued based upon the Department's finding that the continued safe operation of the Facility is vitally important to Delaware, and that any delay in deciding to dredge Cedar Creek may expose Delaware's environment and public health to an undue risk of harm. The Facility also is important to the State's economy, and economic impact is one of the many factors to be considered in a subaqueous lands permit decision. Indeed, the Facility is important to the national energy market with its production of refined heating oil products such as diesel fuel and heating oil, gasoline and propane for residential and commercial uses. Absent sufficient water to operate, the Facility likely will exceed the limits of air pollution control permits because the refinery's various unit operations also rely on the water to operate properly.

In light of this interim Order, I find that the presiding hearing officer's time concern with closing the public comment period in order to allow an expedited decision

prior to October 2008 is no longer present. Consequently, I direct that the public comment period be re-opened for an additional 90 days, which also will be included in a new public notice. The Department's presiding hearing officer may also require a new hearing if he determines that such procedural steps should be done in light of certain procedural issues raised at the public hearing.

Finally, the Department hereby directs the Applicant to prepare a proposed mitigation or offset plan for the Department's consideration based upon the showing that the proposed dredging will result in a loss to the public of a substantial resource in the aquatic life in the areas to be dredged. This proposed plan should address all considerations identified in Section 3.01. B of the Department's *Regulations Governing the Use of Subaqueous Lands*. This additional information is required under Section 7207(b) of the SLA and appropriate based upon the claims of serious harm to the environment from the proposed dredging. Applicant is to submit its conceptual proposed plan within 45 days of this Order, and this proposed plan will be considered in issuing the final Order. This submission date will also allow the public to comment on the Applicant's proposed plan since it will be forty-five days before public comments are due.

In sum, I adopt and direct the following as an interim order of the Department:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding and to separate its decision-making in the issuance of an interim Order that provides limited relief based upon certain conditions that may pose an undue risk of harm to the environment and public health;

2. The Department provided adequate public notice of the proceeding and the public hearing, and held the public hearing in a manner required by the law and its regulations;

3. The Department considered all timely and relevant public comments in making its determination to provide interim relief, but also has determined to re-open the public comment period for ninety days from the date of this Order in order to allow written public comments. The presiding hearing officer shall have discretion to hold an additional public hearing if he determines that another hearing would be appropriate;

4. The Applicant shall prepare and submit to the Department within 45 days of this Order a mitigation plan to offset the loss to the public of substantial resource in the aquatic life that would be caused by the proposed dredging and to address the public interest considerations set forth in 3.01.B of the Department's *Regulations Governing the Use of Subaqueous Lands*;

5. The record supports the issuance of a subaqueous lands permit to dredge Cedar Creek to a depth of 12 feet below MLW. This permit shall expire on March 31, 2009, unless superseded by a prior issuance of a final Order on the underlying permit application;

6. The application shall remain pending and this interim Order will not be dispositive of any issues raised by the application;

7. The duly authorized Department official shall timely prepare and issue the permit and certification consistent with this Order; and

8. The Department shall provide notice of this Order to the persons affected by this Order, as determined by the Department, including those who participated in the hearing process.

*s/John A. Hughes*  
John A. Hughes  
Secretary