



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

89 KINGS HIGHWAY  
DOVER, DELAWARE 19901

Office of the  
Secretary

Phone: (302) 739-9000  
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**Secretary's Order No. 2011-W-0004**

**Re: APPLICATION OF DELMARVA AGGREGATES, L.L.C. FOR WATER  
QUALITY CERTIFICATION AND SUBAQUEOUS LANDS ACT AUTHORITY  
FOR MAINTENANCE DREDGING AND CONSTRUCTION IN THE  
NANTICOKE RIVER ADJACENT TO 26056 RIVER ROAD, SEAFORD,  
SUSSEX COUNTY**

**Date of Issuance: February 10, 2011  
Effective Date: February 10, 2011**

Under the authority granted the Secretary of the Department of Natural Resources and Environmental Control (Department), the following findings, reasons and conclusions are entered as an Order of the Secretary.

**Background**

This Order considers Delmarva Aggregates, LLC's (Applicant) November 4, 2009 application for a federal water quality certification<sup>1</sup> and approval under the Subaqueous Lands Act (SLA). Applicant seeks SLA approval: 1) to conduct maintenance dredging in the Nanticoke River to a depth of 10 feet below mean low water for its barge mooring and navigational channel, 2) to construct 2 additional mooring dolphins, and 3) to lease additional public subaqueous lands for the mooring dolphins. The SLA regulated activity would be in public subaqueous lands and would be used by Applicant's affiliate, Vulcan Materials Company

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<sup>1</sup> The SLA is 7 *Del. C. Chap. 72* and the federal water quality certification is required by Section 401 of the Water Pollution Control Act, or Clean Water Act.

LP (Vulcan) at its Seaford Sales Yard at 26056 River Road, Seaford, Sussex County, located adjacent to the Nanticoke River.

The application was the subject of a request for a public hearing, which the Department held on November 4, 2010 before the Department's presiding hearing officer, Robert P. Haynes. Mr. Haynes prepared a Report, dated January 17, 2011 and attached hereto, which recommends approval of the SLA permit and lease amendment based upon a recommended record developed at the public hearing, as supplemented by the information provided by the Department's experts in the Division of Water, Wetlands and Subaqueous Land Section (WSLS), who drafted a permit and lease attached to the Report.

### **Findings and Reasons**

I adopt the Report and direct that Applicant be issued the necessary approvals to allow the requested work to commence. I find that the record supports issuance of the requested authority, subject to the reasonable terms and conditions recommended by the Department's experts in WSLS.

This Order will allow Vulcan to continue maintenance dredging of the mooring area and navigational channel, which are used by barges and tugboats for shipping sand and stones. The Department first approved this barge docking facility in its 1997 approval, and subsequent approvals in 2002, and 2007. The Nanticoke River's natural movement of sediment and spillage during barge loading require dredging periodically 3 times every 5 years, with the dredging done when the depth is only approximately 9 feet below mean low water. The Department finds that the proposed dredging to return the navigable area to its prior depth of 10 feet below mean low water line is appropriate. This depth will allow Vulcan's continued use of barges for its business. This Order and Department permit will authorize the three requested dredging events, with each dredging limited to no more than 500 cubic feet for a maximum of 1,500 cubic feet of subaqueous lands to be removed. The permit also approves the continued disposal method in

which the dredged material is temporarily stored on site until mixed with commercial products sold for roadway construction and related uses. In sum, the dredging is an appropriate use of the subaqueous lands to maintain navigation for an existing use and it will not cause any undue direct or secondary adverse environmental impact or otherwise require mitigation.

I also find appropriate support to grant Applicant's requested authority to build 2 additional mooring dolphins, which would be located 85 feet from the end of the 2 existing mooring dolphins. This approval is reasonable to provide a more secure means to secure barges when moored, particularly during storms. Thus, this request entails an amendment of the existing SLA lease of public subaqueous lands, which should be granted as reasonable.

The Department carefully has considered the public comments' issues with continued use of barges and possible contaminants in the sediment. The Department finds that the record supports continued use of the barge access is appropriate under the SLA, and is consistent with the Department's other environmental considerations, such as reducing air pollution from the use of trucks. In addition, the Department's experts required sediment testing, and the results showed no threat of pollution from contaminants in the sediment to be dredged. Consequently, the permit and lease, as drafted by WSLs' experts, and authorized by this Order shall contain sufficient safeguards to ensure that the environment will be protected.

### **Conclusions**

In sum, I direct the following as the final order of the Department:

1. The Department has jurisdiction under its statutory authority to make an interim determination in this proceeding under its state and delegated federal authority;
2. The Department provided adequate public notice of the application 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 this interim determination and has documented a record to support its decision as identified herein and in the Report;

4. The Department shall issue approval for the water certification, the dredging, the mooring dolphin construction and the use of additional public subaqueous lands by the additional mooring dolphins based upon the draft permit and lease prepared by the Department's experts in WSLS;

5. The conditions and terms in the permit and lease will protect the environment from any undue harm from the activity in the subaqueous lands and will allow the Applicant to continue to conduct its business operations in an efficient and safe manner; and

6. The Department shall publish this Order on its web site and provide such notice of it in a manner required by the law and the Department regulations.

*s/Collin P. O'Mara*  
Collin P. O'Mara  
Secretary

## HEARING OFFICER'S REPORT

TO: The Honorable Collin P. O'Mara  
Secretary, Department of Natural Resources and Environmental Control

FROM: Robert P. Haynes, Esquire  
Senior Hearing Officer, Office of the Secretary  
Department of Natural Resources and Environmental Control

RE: APPLICATION OF DELMARVA AGGREGATES, L.L.C. FOR WATER QUALITY  
CERTIFICATION AND SUBAQUEOUS LANDS ACT AUTHORITY FOR  
MAINTENANCE DREDGING AND CONSTRUCTION IN THE NANTICOKE  
RIVER ADJACENT TO 26056 RIVER ROAD, SEAFORD, SUSSEX COUNTY

DATE: January 17, 2011

### I. PROCEDURAL HISTORY

This Report provides the Secretary of the Department of Natural Resources and Environmental Control (Department) with recommendations on Delmarva Aggregates LLC's (Applicant) November 4, 2009 application for authority under Subaqueous Lands Act<sup>1</sup> (SLA) and water quality certification under delegated federal authority in the Clean Water Act.

On November 25, 2009, the Department's Division of Water, Wetlands and Subaqueous Lands Section (WSLS), published public notice of the application to provide the public with the opportunity to comment.

In a letter dated December 9, 2009, Thomas Darby provided comments and timely requested a public hearing. The Department granted the request for a public hearing, and on October 13, 2010 published public notice of a November 4, 2010 public hearing. I presided over the public hearing, which was held at the Hardin Hall, 18 West Fourth Street, Blades, Sussex County.

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<sup>1</sup> 7 Del. C. Chap. 72.

The November 4, 2010 public hearing developed a record from public comments. I requested WSLs to prepare a draft permit and lease to protect the environment if the Secretary decides to issue the approval, and on December 14, 2010 WSLs prepared drafts of a permit and lease, which are attached hereto as Appendix A.

I determine that the record is sufficiently complete and that it supports this recommended report's recommended approval of the requested SLA authority.

## **II. SUMMARY OF THE RECOMMENDED RECORD**

Applicant seeks permission under the SLA to dredge the Nanticoke River to a depth of 10 feet below man low water (MLW) line in a 65,000 square foot area approximately 74 feet wide navigational channel between a barge mooring area and dock and the Nanticoke River's federally maintained main navigational channel. The dredging is requested to allow barges and tugboat access to Applicant's property to shipping of sand and stone for Applicant's affiliate, Vulcan Construction Materials, LP (Vulcan) at its Seaford Sales Yard located 26056 River Road, Seaford, Sussex County adjacent to the Nanticoke River. The authority seeks to maintenance dredge in order to restore the same navigable depth the Department initially authorized in 1997 and renewed in 2002 and 2007. Up to 500 cubic yard of subaqueous lands may be removed during each dredging and Applicant anticipates 3 dredging events will be needed over the 5 year duration of the permit.

The dredged material consists of sand and silt, which will be temporarily stored on-site in a contained area until mixed into products sold for roadway construction and similar uses. The application also requests approval to construct two additional mooring dolphins to be located 85 feet upstream and downstream of the existing two mooring dolphins, which will require a lease amendment to reflect use of approximately 25 square feet additional public subaqueous lands.

I recommend that the Department's record contain the following: 1) the verbatim transcript of the November 4, 2010 public hearing; 2) the documents identified and introduced at the hearing, 3) the information the Department requested from the Applicant to address some concerns with the impact on the environment; and 4) this Report and the attached WSLS draft permit and lease.

At the public hearing, the Department's representatives, Laura Herr, Program Manager of WSLS, described WSLS' role in the SLA permit application process. Melanie Tymes, an Environmental Scientist in WSLS, also identified the following relevant documents from WSLS' files as exhibits: Applicant's SLA permit application (DNREC Ex. 1); the public notice of the application (DNREC Ex. 2); the public comments received from the notice (DNREC Ex. 3); the public notice of the public hearing (DNREC Ex. 4); public comments from the public hearing notice (DNREC Ex 5); photos of the site (DNREC Ex. 6); the memo assigning the presiding hearing officer (DNREC Ex. 7); the memo to the court reporter (DNREC Ex. 8); and the Department's SLA regulations (DNREC Ex. 9).

The Applicant's representative, Johnny Johnson, P.E., made a brief presentation in which he stated that the dredging and construction of the barge loading facility was approved by the Department and the United States Army Corps of Engineers (Corps), which issued a 10 year maintenance dredging approval. He stated that in 2000, Vulcan became the managing partner and obtained a state permit to conduct maintenance dredging to restore the water depths to the original permitted level of 10 feet below MWL. Mr. Johnson discussed how barges bring stone from Havre de Grace, Maryland, which Vulcan sells locally and that Vulcan also uses barges to sell sand to customers, which he described as an efficient two-way hauling process using barges to keep a lot of trucks off the road. He noted how Vulcan worked with state regulators to reduce

the spillage of products during loading and unloading during and that the lease was extended for 20 years. He indicated that the measured depth near the existing dock is only 8-9 feet below MLW, which unless dredged again will cause problems with the barges and tugboats. He indicated that the results from the sediment analysis showed no harmful material would be removed. He addressed the request for additional mooring dolphins as needed to provide increased safety and security for the barges' mooring, particularly during storms. The dolphins would be located in line with the existing dolphins and would allow two additional points to secure the barges. He responded to the Department's inquiry about the dredged materials by stating that the material would be removed by mechanical process with a geo-textile filter fabric so that the dredged material silt is placed on the barge and then removed by the same process used to remove the material from the barges, except that the silt is placed at a temporary location for reuse in the crush and run product that is sold.

Thomas Darby presented comments and provided documents for the record, including a newspaper articles on the Nanticoke River's water quality, a report by the Creek Watchers for the Nanticoke Watershed Alliance. Mr. Darby recounted how he had obtained information from the Department on the application and how he was concerned about the monitoring data from the proposed dredging location because it was based on one sample taken by the Applicant. He expressed concern with the testing level for arsenic at 20 milligrams per kilogram. He questioned the source of the stones shipped in and the lack of information about it, which he considered important in that the Applicant indicated that the stones spilled into the Nanticoke River during unloading. Mr. Johnson indicated that it was a safe product used in roads, concrete, asphalt and that spillage was minimized because it cost the Applicant money.

Mr. Darby inquired about dust control and mentioned his observation of river water taken and used for dust control. Ms. Herr explained that the Department's concerns with fine dust particles that may carry contaminants, but she noted that generally they do not attach to sand or gravel such as the dust from the Applicant's operations.

Mr. Darby provided documents, which were introduced as Darby Exhibits 1-4, with Exhibit 1 having 14 numbered attachments.

Morris Dryden spoke in support of the application and indicated the benefit of not using trucks to ship the 4,000 tons of sand or stone that can be carried by each barge.

John King spoke in support of more sediment testing and also that the additional mooring dolphin was a good idea.

Mr. Johnson replied to the public comments on the sediment testing and noted that he took the original sediment samples in July 2010, but found out that there was no Delaware laboratory able to certify the samples. He indicated that a consultant was then hired for the sampling. The consultant, he said, discovered the proper test parameters for arsenic and took additional samples that were tested.

Robert Hutton spoke as one of the Creek Watchers and as a resident who lives on the Nanticoke directly across from Applicant's property. He indicated that he tests the water quality, but not for the presence of minerals. He reported that he has not found any spikes in the four years he has tested. He indicated that when tug boats are operating that they can cause the water to get cloudy.

Mr. Johnson noted that business currently was poor and so only 3 barges a month were needed, as opposed to 3-5 a week used during normal business conditions.

WSLS provided the latest sediment results that the Applicant obtained at the Department's request and they are in the recommended record as DNREC Ex 10. Based upon my discussions with Ms. Tymes, I report that the results do not show any contaminant above any allowed levels, which means no corrective action needs to be taken.

### **III. RECOMMENDED FINDINGS AND DISCUSSION**

I recommend that the Department issue the SLA permit for maintenance dredging of the existing mooring area pursuant to the terms and conditions of the permit, as drafted by WSLS. Each dredging event should be limited to no more than 500 cubic yards of public subaqueous lands removed for a total approved removal not to exceed 1,500 cubic yards over the duration of the permit. The draft permit includes terms and conditions that will allow the Department to monitor the dredging and that the material will be placed on an on-site contained storage site, where it will be de-watered. The dredged material will be mixed into products sold for roadway construction and similar uses. I recommend approval of this storage and use is reasonable and appropriate use for the silt and sand, which the Department has tested and found nothing to preclude such storage and use.

The draft permit specifies also certain control measures to be used to minimize water pollution during the dredging. The draft permit also prohibits dredging during the times of the year when dredging may be harmful to fish, and this is a reasonable term to reduce the risk of harm. I find adequate support in the record that the dredging for the business purposes previously approved by the Department to allow barge and tugboat access. The dredging is no deeper than previously authorized. Applicant has requested that the permit terms and conditions should be consistent with the Corps dredging permit, and this request seems reasonable although the Applicant has not identified any discrepancies. The Department has more of an environmental

purpose than the Corps, which is primarily concerned with maintaining navigation. Nevertheless, I recommend that the Applicant's concerns be considered by WSLS if practical and without diminishing the Department's duty to safeguard the environment.

I also recommend the approval of the construction of the two steel tripod style (3 pilings) mooring dolphins to be located 85' from each end of the existing dock as set forth in the plans. WSLS notes that the needed to revise the lease to reflect this additional use of public subaqueous lands, and I recommend that the lease be amended based upon the draft lease WSLS has prepared, which will provide an additional years of usage of the subaqueous lands.

The public comments raised valid concerns and the Department investigated them and required additional testing of the sediment, which shall be included in the record. The record, however, supports the appropriate use of barge transportation for Applicant's shipping of the bulk sand and stones. The only other alternative method would be truck transportation and this would have adverse environmental impacts. The continuation of maintenance dredging will provide safe and economical transportation of sand and stone. I agree that the Department should encourage two-way hauling by barges in order to avoid the use of trucks that otherwise would have to be used for shipping goods to and from Applicant's property. Moreover, truck usage would make the business less competitive. Of note, the dredging only is to maintain the depth previously authorized in 1997, 2002 and 2007. I agree with the Applicant and the WSLS that continued safe navigation for barges and tugboats supports the dredging, and the removal of silt for reuse by the Applicant as part of its product. The Department has thoroughly investigated the contents of the sediment and its experts report nothing in the samples that warrant denial of the dredging.

I also recommend that the two additional mooring dolphins be approved on additional subaqueous lands and that the Department and Applicant execute a lease amendment for Applicant's use of the public subaqueous lands. The additional dolphins will enable the barge to be fastened to two additional mooring dolphins, which is reasonable to provide increased safety for the barges during severe weather. The risk of a barge breaking loose from its mooring will be reduced with the use of the additional two mooring dolphins. Consequently, I recommend this construction be approved and that the use of the subaqueous land be extended by a lease amendment.

#### **IV. RECOMMENDED CONCLUSIONS**

Based on the recommended record set forth in this Report, I recommend that the Department approve the following conclusions:

1. The Department has jurisdiction to make a determination based on the record, which provides adequate reasonable support for approval of the requested authority;
2. The Department provided adequate public notice of the application and the public hearing as required by the law and the Department regulations;
3. The Department held a public hearing in a manner required by the law and its regulations and has considered all timely and relevant public comments in making its determination;
4. The Department grants the SLA permit for the dredging, mooring dolphin construction, Section 401 water quality certification, and the lease amendment, as recommended by WSLS; and that

5. The Department shall publish the Order on its web site and shall notify others consistent with Department regulations and as the Department determines is appropriate.

*s/Robert P. Haynes*  
Robert P. Haynes, Esquire  
Senior Hearing Officer

Supplemental Approval: SU-344/09  
Subaqueous Lands Lease: SL-304/06  
Date of Issuance:  
Construction Expiration Date:  
Tax Parcel No.: 132-1.00-3.07  
Amended Date:

**SUPPLEMENTAL APPROVAL GRANTED TO GRANTED TO  
DELMARVA AGGREGATES, LLC  
TO INSTALL 2-3 PILING MOORING DOLPHINS  
CONNECTED TO AN EXISTING 3,200 SQUARE FOOT COMMERCIAL DOCKING  
FACILITY WITH TWO MOORING DOLPHINS IN THE NANTICOKE RIVER AT 26056  
RIVER ROAD, SEAFORD, SUSSEX COUNTY, DELAWARE**

Johnny Johnsson  
Delmarva Aggregates, LLC  
Vulcan Construction Materials, LP  
875 Oxford Ave  
P.O. Box 468  
Hanover, PA 17331

Pursuant to the provisions of 7 Del. C. 7203, and the Department's Regulations Governing the Use of Subaqueous Lands, permission is hereby granted on this \_\_\_\_\_ day of \_\_\_\_\_ A. D. 2010, to amend an existing Lease to construct the above-referenced project in accordance with the approved plans for this Supplemental Approval (3 Sheets), as approved on \_\_\_\_\_, 2010; and the application dated October 30, 2009, and received by this Division on November 4, 2009.

WHEREAS, the State of Delaware is the owner of ungranted subaqueous lands lying beneath the waters of the Nanticoke River; and

WHEREAS, Johnny Johnsson, the duly authorized representative of Delmarva Aggregates, owner of certain adjoining lands to the Nanticoke River, has applied for permission to construct 2 mooring dolphins;

WHEREAS, pursuant to the provisions of 7 Del. C. 7203, the Secretary of the Department of Natural Resources and Environmental Control, through his duly authorized representative, finds that it is not contrary to the public interest if this project is approved subject to the terms and conditions herein set forth.

THIS Supplemental Approval is issued in accordance with the plans and application submitted to the Department of Natural Resources and Environmental Control, a copy of which is attached hereto and made a part hereof.

THIS Supplemental Approval is issued subject to the following conditions:

1. This Supplemental Approval shall not be considered valid until it has been duly recorded in the office for the Recorder of Deeds in and for the appropriate County and a copy of the recorded Lease is returned to, and has been received by, the Department.
2. This Lease authorizes the lessee to maintain the approved structures on public subaqueous land from through January 14, 2027.
3. The current leased area of structure over public subaqueous lands is approximately 3,315 square feet represented by the docking facility and four dolphin pilings constructed channelward of the mean low water line.
4. This Supplemental Approval is an addendum to Subaqueous Lands Lease No. SL-304/06 granted to Delmarva Aggregates by the State of Delaware on March 16, 2007. This Supplemental Approval shall be attached thereto and made a part thereof.
5. A total of approximately 3,200 square feet of filled docking area is authorized to be located in public subaqueous lands. The annual lease fee for filled subaqueous lands is \$1.00/square foot. Therefore, the leased subaqueous land is subject to an annual fee of \$3,200 with a fee of \$64,000 for the twenty-year term of the Lease. The lessee will be billed annually in September for the \$3,200 annual fee.
6. No portion of the structure authorized by this Supplemental Approval shall exceed the approved dimensions for that structure identified on Page One.
7. No portion of any structure channelward of the mean high water line shall be constructed using creosote treated lumber.
8. The dolphins shall be constructed a minimum of ten (10) feet from any adjoining property or navigation channel.
9. This Supplemental Approval does not authorize any repairs, additions, or modifications to the existing structures other than those authorized herein. Such activities require separate written authorization from the Department of Natural Resources and Environmental Control.
10. The work authorized by this permit is subject to the terms and conditions of the attached Department of the Army Permit CENAP-OP-R- Delaware SPGP-20.
11. The lessee shall notify the Department of Natural Resources and Environmental Control within ten (10) days of completion of the work authorized by this Lease by completing and signing the enclosed Contractor's Post Construction Completion Report form.
12. A copy of this Approval and approved plans must be available on site during all phases of construction activity.

13. The project is to be undertaken in accordance with the plans submitted and attached hereto. Any activities not specifically authorized herein may require a supplemental approval from this office prior to the initiation of construction. A determination on the need for a supplemental approval will be made by this office pursuant to the lessee submitting written notification and revised plans indicating project changes to this office.
14. This Supplemental Approval shall expire if the project has not been completed within three (3) years from the date of issuance.
15. If the lessee considers three (3) years insufficient for completion of the project, the lessee may file one permit extension request of up to one (1) year if necessary to complete the authorized work. The extension request shall contain a project time schedule for consideration by the Department. If the time schedule is approved it shall be attached hereto and made a part hereof. Such requests must be received by the Department at least thirty (30) days prior to the construction expiration date.
16. All other terms and conditions of Subaqueous Lands Lease No. SL-304/06 shall remain in full force and effect.
17. Failure to comply with any of the terms or conditions of this Supplemental Approval may result in enforcement action, which could include the revocation of this Lease and subsequent restoration of the site to preconstruction conditions.

IN WITNESS WHEREOF I, Johnny Johnsson, duly authorized representative of Delmarva Aggregates, have caused this instrument to be executed on this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
Johnny Johnsson (Lessee)

\_\_\_\_\_  
Notary Public

(Notary)

IN WITNESS WHEREOF, I, Collin P. O'Mara, Secretary, Department of Natural Resources and Environmental Control, have hereunto set my hand this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
Collin P. O'Mara  
Secretary of the Department of Natural Resources  
and Environmental Control