



STATE OF DELAWARE  
DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL

OFFICE OF THE  
SECRETARY

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**CONCILIATION ORDER BY CONSENT**

**SECRETARY'S ORDER NO. 2012-A-0012**

Issued Pursuant to 7 Del. C. § 6005(b)(3)

Date of Issuance: April 17, 2012

Issued to:

Diamond State Port Corporation  
Attn: Eugene Bailey, Executive Director  
Port of Wilmington  
1 Hausel Road  
Wilmington, DE 19801-5852

Dear Mr. Bailey:

Diamond State Port Corporation ("DSPC") and the Secretary of the Department of Natural Resources & Environmental Control ("Secretary" or "Department") are endeavoring by Conciliation to ensure compliance with 7 Del. C. Chapter 60. The Department believes that a violation of 7 Del. C. Chapter 60 and/or DSPC's air quality permit is either continuing or threatening to begin. The parties have agreed to this order to resolve solely any liabilities of DSPC for alleged violations of law and regulations associated with methyl bromide fumigation conducted at the facilities owned by the DSPC.

*Delaware's Good Nature depends on you!*

## **BACKGROUND**

DSPC has offices at 1 Hausel Road in Wilmington, Delaware. DSPC is an owner and operator of the Port of Wilmington (“Port”), which is located near the confluence of the Christina and Delaware Rivers. DSPC facilitates cargo handling operations at the Port, by virtue of agreements (often oral) with certain companies. On a seasonal basis, beginning mid-December through approximately April of the following year, various companies import fruits and vegetables from other countries into the United States using ports such as the Port of Wilmington. These fresh produce shipments and certain other commodities undergo fumigation as a condition of entry into the country.

The U.S. Department of Agriculture (“USDA”) has rules and regulations requiring quarantine fumigation of incoming shipments that are designed to eliminate dangerous agricultural pests from produce and other imports to the United States. Royal Pest Solutions Inc., formerly named Royal Fumigation Inc., d/b/a Royal Fumigation (“Royal”) is the U.S. East Coast quarantine fumigator that currently conducts fumigation activities at the Port and has conducted fumigation activities at the Port for at least the past 18 years. Royal has no contractual relationship with DSPC. Royal works for the companies that import commodities through the Port of Wilmington.

Methyl bromide is a hazardous air pollutant (“HAP”) and a volatile organic compound (“VOC”). It is also an ozone-depleting substance that is regulated under an international treaty to protect the upper atmosphere’s ozone layer, the Montreal Protocol, the terms of which have been adopted in the U.S. through the Clean Air Act. Most applications of methyl bromide to soil and structures were phased out by January of 2005 in favor of alternative technologies. However, methyl bromide will continue to be used in the U.S. for quarantine and pre-shipment

treatment of import/export commodities until alternatives are found. Royal uses, and has used, methyl bromide at the Port to fumigate incoming shipments in order to eradicate dangerous agricultural pests. Methyl bromide fumigation has occurred inside containers, inside buildings, and under tarpaulins at the Port. There currently are, and have been, no alternatives to methyl bromide fumigation approved by the United States Department of Agriculture (“USDA”) for treatment of the commodities that are imported through the Port. Royal has assured the DSPC that it has conducted, and continues to conduct, fumigations at the Port in compliance with USDA requirements and methodologies prescribed by the U.S. Environmental Protection Agency (“EPA”) under the Federal Insecticide, Fungicide and Rodenticide Act. Neither the Port nor Royal, however, has sought air permits relating to the emissions of methyl bromide under the EPA’s Clean Air Act or Delaware law.

On June 22, 2010, the Commonwealth of Virginia issued an Order by Consent to Royal for violations of Virginia’s air pollution control law and its regulations related to use of methyl bromide at a facility in Suffolk, Virginia. By letter dated June 22, 2010, the EPA submitted a Clean Air Act Section 114 Information Request to Royal requesting information related to its fumigation services. In October of 2010, DNREC met with representatives of the DSPC and Royal. At the meeting, DNREC requested copies of the information submitted to U.S. EPA. DSPC and Royal provided that information to DNREC.

In January of 2011, Royal submitted a sampling protocol designed to obtain relevant measurements of methyl bromide emissions during a fumigation of Chilean fruit at the Port. These shipments had begun in December and were expected to continue through April, on a schedule of approximately two ships per week. Royal indicated that the seasonal nature of the shipments meant that the opportunities to sample would be similarly limited. Royal noted that

the sampling protocol was developed through a joint effort involving Royal, an air emissions consultant and an industrial hygiene consultant familiar with USDA quarantine fumigation.

By letter dated October 4, 2011, DSPC submitted to DNREC the results of monitoring conducted by Royal during a fumigation event on February 23-24, 2011, at the Port. In that correspondence, DSPC reiterated that the purpose of the ambient air monitoring had been to gather initial data on ambient air concentrations of methyl bromide throughout a fumigation event. DNREC met with DSPC and Royal on November 23, 2011.

DNREC, based on the data recently submitted to it, believes that the fumigation activities at the Port require the owner and any operator of methyl bromide emitting activities to obtain a Title V permit, as it is a major source of methyl bromide emissions. Neither DSPC nor Royal is currently permitted to emit methyl bromide. Through this Conciliation Order by Consent, DNREC and DSPC are setting out a schedule through which DSPC will resolve its obligation to comply with 7 *Del. C.* Chapter 60 and the Title V program. This Conciliation Order by Consent is being issued pursuant to 7 *Del. C.* § 6013(b)(3) for that purpose.

### **FINDINGS**

Based on the above, the Secretary makes the following findings:

1. South American fruits and vegetables are brought into the United States via the Port of Wilmington.
2. USDA rules and regulations have exacting requirements for quarantine and pre-shipment treatment of import/export commodities including those South American fruits and vegetables. Under USDA rules and regulations, the only approved treatment for the types of perishable cargo imported through the Port, including Chilean fruits and vegetables, is methyl bromide fumigation.

3. Royal is providing fumigation services at the Port, in accordance with USDA rules and regulations and under USDA supervision, using methyl bromide to eradicate dangerous agricultural pests and in the course of fumigating is releasing methyl bromide to the atmosphere.

4. Methyl bromide is classified as a hazardous air pollutant and a volatile organic compound.

5. The existing air quality permit issued to the Port does not authorize any emissions of methyl bromide from the Facility. Likewise, Royal has not acquired any air permit to discharge emissions of methyl bromide from its fumigating operations at the Port.

6. The Port is operating a Facility at which methyl bromide, an air pollutant, is emitted without provisions in its air quality permit allowing methyl bromide emissions. Royal has been conducting fumigation operations which emit methyl bromide, an air pollutant, without a permit and has never sought to obtain a permit for its emissions.

7. Major sources of hazardous air pollutants and VOCs are required to obtain a Title V permit pursuant to the Federal Clean Air Act and Delaware laws and regulations.

8. DSPC and Royal are now studying the emissions of methyl bromide during fumigation activities at the Port to better quantify the amount of methyl bromide emitted and its impact on ambient air quality.

9. DSPC has commissioned a consultant to develop a recommendation for an acceptable ambient air concentration for methyl bromide.

10. DNREC believes that, based on the data currently in its possession, the Port is a major source of methyl bromide emissions and that the ongoing fumigation activities violate the Clean Air Act and Delaware law.

11. DNREC requires further information in order to make appropriate permitting decisions, including but not limited to appropriate permit conditions.

### **REGULATORY AND STATUTORY PROVISIONS**

Seven *Del. C.* § 6003 states in pertinent part:

(a) The Secretary shall enforce this chapter.

(b) Whoever violates this chapter or any rule or regulation duly promulgated thereunder, or any condition of a permit issued pursuant to § 6003 of this title, or any order of the Secretary, shall be punishable as follows:

\* \* \*

(2) \* \* \* If the violation is continuing or is threatening to begin, the Secretary may also seek a temporary restraining order or permanent injunction in the Court of Chancery. In his or her discretion, the Secretary may endeavor by conciliation to obtain compliance with all requirements of this chapter. Conciliation shall be giving written notice to the responsible party (i) specifying the complaint, (ii) proposing a reasonable time for its correction, (iii) advising that a hearing on the complaint may be had if requested by a date stated in the notice, and (iv) notifying that a proposed correction date will be ordered unless a hearing is requested. \* \* \*

### **CONCLUSION**

Based on the above findings, the Secretary has determined that a violation of the Clean Air Act, Delaware law and DSPC's air permit is continuing and has determined that at this time it is appropriate to endeavor to obtain compliance by DSPC by conciliation pursuant to 7 *Del. C.* § 6003(b)(1).

### **ASSESSMENT OF PENALTY**

Pursuant to the provisions of 7 *Del. C.* § 6005(b)(3), this is written notice to DSPC that, on the basis of its findings, the Department is assessing DSPC an administrative penalty of

\$250,000 that DSPC shall pay to the Department within 30 days of receipt of this Order. In addition, DSPC shall reimburse the Department for its costs in the amount of \$7,500.

Alternatively, DSPC may elect to pay an administrative penalty of \$50,000 to the Department within 30 days of the date of this Order, if it agrees to spend at least an additional \$40,000 on ambient monitoring outside the Port and \$160,000 on projects that would develop, implement and verify measures to control methyl bromide emissions from the Port, so that they do not cause ambient air concentrations to exceed an appropriate level. If DSPC elects the \$50,000 administrative penalty, DSPC must submit documentation of the costs of developing, implementing and verifying measures to control methyl bromide emissions to the Department's reasonable satisfaction, and must still pay the Department's costs in the amount of \$7,500. If DSPC fails to submit sufficient documentation of the development, implementation and verification of the required control measures, DNREC shall respond in writing detailing the deficiencies ("Documentation Deficiency Notice"). DSPC will have 30 days from receipt of the Documentation Deficiency Notice to correct all deficiencies to DNREC's reasonable satisfaction. If DSPC fails to correct all deficiencies to DNREC's reasonable satisfaction within 30 days, then DNREC shall give DSPC written notice of its failure to correct all deficiencies within the 30-day period ("Documentation Failure Notice"). Within 30 days of receipt of the Documentation Failure Notice, DSPC shall submit a check for the amount DNREC reasonably determines, which shall not exceed \$200,000.

Payment of the administrative penalty or demanded shortage shall be made payable to the "State of Delaware" and shall be directed to: Valerie M. Satterfield, Deputy Attorney General, Department of Justice, Environmental Unit, 102 W. Water Street, 3<sup>rd</sup> Floor, Dover, DE 19904.

## **CONCILIATION AND ORDER**

It is the desire of the Secretary that DSPC take actions to ensure that operations at the Port of Wilmington comply with DSPC's Air Permit and Delaware laws and regulations. Therefore, in consideration of the foregoing findings,

IT IS HEREBY ORDERED and agreed as follows:

1. DSPC shall take all steps necessary to develop, implement and verify measures to control methyl bromide emissions at the Port, so that they do not cause ambient air concentrations to exceed an appropriate level. Until such time as continuous compliance has been achieved, no changes to the current fumigation practices at the Port shall take place that would cause an increase in methyl bromide ambient air concentrations without prior approval of the Department, unless the changes are required by the USDA and would not create a condition of air pollution (as defined in Air Quality Management Regulations 1101 § 2.0 Definitions). DSPC shall report any changes required by USDA within five business days of implementation.

2. In order to make progress towards achieving continuous compliance, DSPC shall take the following actions as expeditiously as possible:

(a) As soon as practicable but not later than April 30, 2012, DSPC shall apply to DNREC for a permit to cover the methyl bromide emissions from fumigation activities at the Port.

(b) As part of its permit application, DSPC shall propose a limit or limits based on appropriate environmental and health factors and propose practices designed to meets those limits and methods of demonstrating compliance with the limits.

(c) DSPC agrees not to allow fumigation activities after April 30, 2012 by any provider who has not resolved any enforcement proceedings related to past



unpermitted fumigation activities at the Port and, as a permit condition, DSPC will be required to obtain DNREC's approval of any fumigation contractor that operates at the Port.

3. DSPC shall pay a stipulated penalty of \$50,000 for any material failure to comply with paragraphs 2.1., 2.b., or 2.c. above. DSPC shall pay an additional stipulated penalty of \$2,500 for every day after April 30, 2012 that its permit application is incomplete in any material respect.

4. By agreeing to the terms of this Conciliation Order by Consent ("Consent Order"), DSPC does not admit any violation of any permit, law, regulation, directive, instruction, order, obligation or duty, or any liability to any person or party.

5. This Consent Order constitutes a full and final settlement of, and the Department forever releases and discharges DSPC and its successors in interest, agents, employees, representatives, officers and directors (for the avoidance of doubt, this release expressly does not include Royal or provide any release of Royal's liability) from any and all liability for statutory or regulatory violations relating to air quality, any and all enforcement activities or actions by the Department or other claims, penalties, fees, fines, assessments, costs, expenses, or causes of action (of any form or type relating to air quality) arising from, related to or in connection with the use of methyl bromide for any purpose (including but not limited to fumigation), at any time prior to the Date of Issuance of the Consent Order. The foregoing release shall become null and void (i) if DSPC fails to make the payments and/or expenditures set forth in the Assessment of Penalty section of this Consent Order or (ii) if DSPC fails to comply with paragraphs 1, 2 and 3 of this Consent Order.

6. Failure to comply with paragraphs 1, 2, and 3 may also result in the Department pursuing other enforcement options in its discretion. If DNREC pursues other

enforcement options, DSPC reserves all its rights and defenses related to the alleged violations described in this Consent Order.


### PUBLIC HEARING

The Secretary is issuing this Conciliation Order on Consent anticipating that the Consent/Waiver provision herein will be signed by DSPC upon receipt. Nonetheless, should DSPC choose not to consent to the Order by signing the Consent/Waiver provision, the Order shall become effective and final 30 days after signature by the Secretary, unless the Secretary receives from DSPC within 30 days from receipt of this Notice, a written request for a public hearing on these matters as provided in 7 Del. C. § 6005(b)(3) and (c). In the event DSPC requests a hearing, the Secretary reserves the right to withdraw this Notice and Order and to take additional enforcement actions regarding these and other violations at DSPC's Facility, including but not limited to, the imposition of civil penalties and recovery of the Department's costs and attorney's fees. The Department does not otherwise intend to convene a public hearing on these matters, but reserves the right to do so at its discretion.

If you have any questions, please contact Paul Foster at (302) 323-4542.

Date: \_\_\_\_\_

4/17/12

  
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Collin O'Mara, Secretary

**CONSENT/WAIVER OF STATUTORY RIGHT TO A HEARING**

**Diamond State Port Corporation** hereby waives its right to a hearing and its opportunity to appeal or contest this Conciliation Order by Consent and agrees to the terms of this Order.

DIAMOND STATE PORT CORPORATION

Date: 4 | 4 | 12

By: Eugene Bailey

Title: EXECUTIVE DIRECTOR

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