

August 25, 2022

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VIA ELECTRONIC MAIL     [pamela.bush@drbc.gov](mailto:pamela.bush@drbc.gov)

**Re: Docket No. D-2017-009-2 for Delaware River Partners LLC, Gibbstown Logistics Center Dock 2, Greenwich Township, Gloucester County, New Jersey**

The Delaware River LNG Coalition is submitting the following in response to Delaware River Basin Commission (“Commission” or “DRBC”) Executive Director Steven J. Tambini’s August 15, 2022 letter. In short, we are writing to object to Delaware River Partners’ request for an extension of Docket No. D-2017-009-2 (the “Dock 2 Docket”) beyond the three-year authorization period pursuant to 18 C.F.R. § 401.41(a).<sup>1</sup>

As you may know, on June 2, 2022, Delaware River Partners requested by letter to DRBC Project Review Manager David Kovach, P.G., an extension of the “Dock 2 Docket” beyond the three-year authorization period pursuant to 18 C.F.R. § 401.41(a).<sup>2</sup> By letter dated June 16, 2022, DRBC Executive Director Steven J. Tambini purported to approve, by his singular action, DRP’s request to extend the date of expiration of the Dock 2 Docket from June 12, 2022, to June 12, 2025.<sup>3</sup>

On August 12, 2022, we sent Mr. Tambini a letter asking him to rescind the extension he granted for Docket No. D-2017-009-2 for Delaware River Partners LLC (“DRP”), Gibbstown Logistics Center Dock 2, Greenwich Township, Gloucester County, New Jersey.<sup>4</sup> As a part of this letter, we noted that Delaware River Partners’ request must be evaluated in compliance with the Commission’s Rules of Practice and Procedure, which require an opportunity for public comment and a vote on the extension request by the Commissioners.

On August 15, 2022, Mr. Tambini responded to DRN only, claiming that a public hearing was not required but that he would advise the Commission to “consider” the matter at its September 2022 business meeting.<sup>5</sup> In that letter, Mr. Tambini also solicited a written submission from DRN to the Commissioners, as well as a response from DRP detailing the

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<sup>1</sup> Attachment A.

<sup>2</sup> Attachment B.

<sup>3</sup> Attachment C.

<sup>4</sup> Attachment D.

<sup>5</sup> Attachment E.

“current estimate of the cost of the project and a statement of the amount of project costs expended after issuance of the docket.”<sup>6</sup> Accordingly, in response to your request, we submit the following for the Commission’s consideration.

**I. The Commission–Not the Executive Director–Must Decide on the Application, And Only after a Public Hearing**

We request that the Commission set this matter for a public hearing in accordance with the Commission’s Rules of Practice and Procedure (“RPP”) and the Delaware River Basin Compact (“Compact”), and that the Commission--not the Executive Director--make a determination on this application. From the outset, no public hearing was scheduled over this permit extension request, and the required process has not been followed. The solution Mr. Tambini proposes--to simply “advise” the Commission to “consider” the request for a permit extension--is insufficient to rectify these errors.

As established in our August 12, 2022 letter, the text of the RPP is clear: requests for an extension of an approval must be made by application, and only the Commission is empowered to act on that application:

Approval by the Commission under this part shall expire three years from the date of Commission action unless prior thereto the sponsor has expended substantial funds (in relation to the cost of the project) in reliance upon such approval. An approval may be extended or renewed *by the Commission upon application*.<sup>7</sup>

The RPP also states that applications are decided upon *at a public hearing after notice* by the Commission.<sup>8</sup>

The Executive Director does not have the authority to act upon an application except in limited emergency circumstances<sup>9</sup>—that do not exist here.

Mr. Tambini’s claim that the instant application is not an application request to be a ‘project application’ for purposes of the hearing rule<sup>10</sup> contravenes the plain language of the

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<sup>6</sup> Attachment E at 2.

<sup>7</sup> 18 C.F.R. § 401.41(a) (emphasis added).

<sup>8</sup> See *id.* § 401.5.

<sup>9</sup> The RPP provides that the Executive Director may only authorize an applicant’s request for action “[i]n the event of an emergency requiring immediate action to protect the public interest or to avoid substantial and irreparable injury to any private person or property” when “the circumstances do not permit a review, hearing and determination in the regular course of the regulations in this part . . . .” 18 C.F.R. § 401.40(b). There is no emergency that justifies the Executive Director’s approval here.

<sup>10</sup> Attachment E at 1.

Commission’s RPP. Under the plain language of the RPP § 401.41(a), applications for extensions are “applications.”<sup>11</sup>

Notwithstanding the unambiguous language of RPP § 401.41(a), the RPP also states that a hearing is required whenever the Comprehensive Plan is revised, and the text of the RPP is clear that private projects such as Dock 2 are part of the Comprehensive Plan.<sup>12</sup> The Comprehensive Plan includes “all . . . private projects and facilities which are required, in the judgment of the commission, for the optimum planning, development, conservation, utilization, management, and control of the water resources of the basin to meet present and future needs . . . .”<sup>13</sup> Furthermore, an extension of the three-year authorization period must be considered a revision of the Comprehensive Plan—without the extension, the Commission’s authorization would expire and the project would be removed from the Comprehensive Plan. The Comprehensive Plan also makes clear that “a project’s inclusion in the comprehensive plan is subject to its completion within a reasonable period of time.”<sup>14</sup> That reasonable period of time is defined by the Rules of Practice and Procedure as three years.<sup>15</sup> This revision must be subject to a public hearing in accordance with Sections 14.4(b) and 13.1 of the Compact. Moreover, an extension of the Commission’s three-year approval of a docket actually modifies a condition set out in the docket conditions—that any approval “shall expire three years from the date of Commission action . . . .”<sup>16</sup>

## II. **DRP’s June 2, 2022 Request for an Extension Should Be Denied.**

Regardless of the required procedure, DRP’s request to extend Docket No. D-2017-009-2 beyond its three-year period of authorization should be denied because DRP has not established that it has expended substantial funds in reliance of this approval. Moreover, because the project has been modified from the original terms of the approval, a new application should be submitted that is inclusive of the new anticipated construction that was not included in the original application.

First, it is not clear that the costs enumerated in Attachment A to its June 2, 2022 request were incurred *after* issuance of the Dock 2 Docket in reliance on the Commission’s

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<sup>11</sup> See 18 C.F.R. § 401.41(a) (“An approval may be extended or renewed by the Commission upon application.”).

<sup>12</sup> Section 14.4(b) of the Compact requires a hearing in certain enumerated circumstances, as well as “in all other cases wherein this Compact requires a public hearing.” Delaware River Basin Compact § 14.4(b), Pub. L. 87-328, 75 Stat. 688 (Sept. 27, 1961) (hereinafter “Compact”). Among those cases are those “with respect to the comprehensive plan prior to the adoption of the plan *or any part of the revision thereof.*” Compact § 13.1 (emphasis added).

<sup>13</sup> Compact § 13.1; *see also* Del. River Basin Comm’n, Comprehensive Plan § II (2001) (hereinafter “Comprehensive Plan”).

<sup>14</sup> Comprehensive Plan § II-D.

<sup>15</sup> See 18 C.F.R. § 401.41(a).

<sup>16</sup> *Id.*

authorization, as opposed to *prior* to its issuance in support of DRP’s original application to the Commission. In addition, DRP has not met the standard set out in 18 C.F.R. § 401.41(a)—that the funds expended are substantial *in relation to the cost of the project*. Without a comparison to the total cost of the project, the significance of the funds expended by DRP is unknowable. At the time of approval, the estimated cost of the project was \$94,600,000.00.<sup>17</sup> Even assuming all costs set out in Attachment A were incurred after issuance of the Dock 2 Docket in reliance thereon, \$1,798,796.00 is merely 1.9% of the total cost of the project. Such a small fraction of the total cost does not constitute a “substantial” amount.

Second, based on DRP’s own filings, the project itself has been modified since originally approved by the Commission. DRP recently sought and obtained approval from the New Jersey Department of Environmental Protection (“NJDEP”) for the construction of a large rail loop to support transloading at Dock 2 of the Gibbstown Logistics Center.<sup>18</sup> This significant change to a project that had allegedly<sup>19</sup> minimal upland impacts at the time of the Commission’s approval. The Commission’s review of DRP’s extension request must include any changes to the Project, including the new rail infrastructure intended to support transloading operations at Dock 2.

Accordingly, the Delaware River LNG Coalition requests that the Commission rescind Mr. Tambini’s letter dated June 16, 2022, and hold a vote on DRP’s application at a public hearing that has been properly noticed pursuant to 18 C.F.R. § 401.5. Based on the information submitted in DRP’s June 2, 2022 letter the request for extension of Docket No. D-2017-009-2 should be denied. In his August 15, 2022 letter, Mr. Tambini provided DRP an opportunity to respond to this submission with new information, including a cost estimate of the overall project and updated figures showing the funds expended since issuance of the docket. To ensure sufficient public notice of this request, this new information should be made available to the public for review along with DRP’s original June 2, 2022 request prior to the public hearing.

Respectfully submitted,

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<sup>17</sup> See Dock 2 Docket, ¶ 6.

<sup>18</sup> Attachment F. DRN has appealed NJDEP’s decisions to issue these permits to the Superior Court of New Jersey, Appellate Division. See *In the Matter of Permit Nos. 0807-21-001.2 LUP 210001 & LUP 210002 Issued by the N.J. Dep’t of Env’tl. Prot. To Delaware River Partners, LLC.*, Nos. A-001897-21 & A-002270-21 (N.J. Super., App. Div.).

<sup>19</sup> The Commission’s approval of the Dock 2 Docket is currently subject to judicial review in the U.S. District Court for the District of New Jersey. See *Del. Riverkeeper Network v. Del. River Basin Comm’n*, No. 1:21-cv-01108 (D.N.J.). Among the issues in that case is whether the Commission adequately considered the upland impacts of the project, which DRN maintains were more extensive than claimed by DRP or the Commission, who argued that upland impacts were limited to the temporary disturbance of 0.8 acres of land.

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