IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-001897-21 &
A-002270-21

IN THE MATTER OF PERMIT NUMBERS 0807-21-0001.2 LUP 210001 & LUP 210002 ISSUED BY THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION TO DELAWARE RIVER PARTNERS, LLC	STATE AGENCY ON APPEAL FROM NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEF OF APPELLANTS DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM—THE DELAWARE RIVERKEEPER

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TABLE OF CONTENTS

I. PRELIMINARY STATEMENT..... **1**

II.PROCEDURAL HISTORY **2**

III. STATEMENT OF FACTS..... **4**

IV. ARGUMENT..... **8**

A. Standard of Review 8

B. DEP's issuance of Permit No. 0807-21-0002.1 LUP210001 and Permit No. 0807-21-0002.1 LUP210002 was arbitrary, capricious, unreasonable, and contrary to law because DEP issued the Permit despite the unresolved issue of whether LNG may be transported by rail and truck to the GLC and transloaded for export under various federal laws and regulations. (0668a; 0698a). 12

C. DEP's issuance of Permit No. 0807-21-0002.1 LUP210002 was arbitrary, capricious, unreasonable, and contrary to law because the GLC development has been segmented through piecemeal permitting applications, depriving DEP of its authority to engage in a holstic analysis of the GLC's environmental impacts. (0669a; 0698a). 17

D. DEP's issuance of Permit No. 0807-21-0002.1 LUP210001 and Permit No. 0807-21-0002.1 LUP210002 was arbitrary, capricious, unreasonable, unsupported by the record, and contrary to law because DRP failed to provide sufficient information regarding the stormwater impacts of the proposed Rail Loop and GLC as a whole, and consequently, the Permit does not comply with the Stormwater Management Rules at N.J.A.C. 7:8, the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A, the Coastal Zone Management Rules at N.J.A.C. 7:7, and Section 401 of the Clean Water Act, 33 U.S.C. § 1341. (0669a; 0699a). 22

E. DEP's issuance of Permit No. 0807-21-0002.1 LUP210002 was arbitrary, capricious, unreasonable, unsupported by the record, and contrary to law because DRP failed to provide DEP with site-specific information needed to demonstrate compliance with the Coastal Zone Management Rules, N.J.A.C. 7:7, the Flood Hazard Area Rules, N.J.A.C. 7:13, and the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A. (0670a; 0699a). 29

F. DEP's issuance of Permit No. 0807-21-0002.1 LUP210001 and Permit No. 0807-21-0002.1 LUP210002 was arbitrary, capricious, unreasonable, unsupported by the record, and contrary to law because DRP's Rail Loop proposes unacceptable adverse impacts

to threatened and endangered species as well as wetlands contrary to the Flood Hazard Area Rules, N.J.A.C. 7:13, the Coastal Zone Management Rules, N.J.A.C. 7:7, and the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A. (0670a; 0699a). 36

V. CONCLUSION **44**

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

Decision	Record Location
Decision by New Jersey Department of Environmental Protection to Approve Waterfront Development Individual Permit, Coastal Wetlands Permit, and Water Quality Certificate for Delaware River Partners, LLC, issued December 30, 2021	0003a
Decision by New Jersey Department of Environmental Protection to Freshwater Wetlands Individual Permit for Delaware River Partners, LLC, issued February 25, 2022	0020a

TABLE OF AUTHORITIES

Cases

Application of Holy Name Hosp., 301 N.J. Super. 282 (App. Div. 1997) 12
In re Carter, 191 N.J. 474 (2005)..... 11
In re N.J. Dep't of Envtl. Prot. CAFRA Permit No. 0000-15-0007.1, No. A-3293-16T1, 2019 N.J. Super. Unpub. LEXIS 1668(Super. Ct. App. Div. July 22, 2019) 20
In re Orban, 461 N.J. Super. 57 (App. Div. 2019)..... 10
In the Matter of Challenge of Delaware Riverkeeper Network and Maya van Rossum-The Delaware Riverkeeper To Delaware River Partners, LLC Waterfront Development Individual Permit No. 0807-16-0001.2 WFD 19001, 2021 N.J. Super. Unpub. LEXIS 1229 (N.J. Super. June 23, 2021) 6
In the Matter of Challenge of Delaware Riverkeeper Network and Maya van Rossum-The Delaware Riverkeeper To Delaware River Partners, LLC Waterfront Development Individual Permit No. 0807-16-0001.2 WFD 19001, 2022 N.J. LEXIS 33 (N.J. Jan. 14, 2022) 6
Pinelands Pres. All. v. State, Dep't of Envtl. Prot., 436 N.J. Super 510(App. Div. 2014) 11

Statutes

15 U.S.C. § 717a(11)(A)—(B)..... 13
33 U.S.C. § 1314(a)..... 9
33 U.S.C. §§ 1251-1388..... 8
N.J.S.A. 12:5-3 to -11..... 8
N.J.S.A. 12:5-3(a)..... 9
N.J.S.A. 58:16A-50..... 8, 9

Other Authorities

Rule 424(b)(4)], Fortress Transportation & Infrastructure Investors LLC, SEC Accession No. 0001193125-15-191922 (May 18, 2015) 18

Rules

Rule 2:2-3(a)(2) 10

Regulations

N.J.A.C. 7:13-11.6(d) 36, 38
N.J.A.C. 7:13-12.1(b)(1) 33
N.J.A.C. 7:13-2.1(a) 10
N.J.A.C. 7:13-2.1(b)(6) 10
N.J.A.C. 7:7-1.1 to -29.10 9
N.J.A.C. 7:7-1.1(a) 9, 27
N.J.A.C. 7:7-1.1(c)(1)(i) 32
N.J.A.C. 7:7-15.4(a) 29
N.J.A.C. 7:7-15.4(b)(1) 30
N.J.A.C. 7:7-15.4(p)(2) 33
N.J.A.C. 7:7-16.6(b) 28
N.J.A.C. 7:7-6.2(a) 28
N.J.A.C. 7:7A-10.1 ..... 18, 21
N.J.A.C. 7:7A-11.11 41
N.J.A.C. 7:7A-2-7 27
N.J.A.C. 7:7A-3.3(d) 39, 40
N.J.A.C. 7:8-1.2 23
N.J.A.C. 7:8-2.2(a)(1) 25
N.J.A.C. 7:8-2.2(a)(8) 25
N.J.A.C. 7:8-5.4(b)(3)(1) 26

Constitutional Provisions

N.J. Const. art. VI, § 5, ¶ 4 10

Administrative and Executive Materials

Delaware River Partners LLC; Notice of Petition for Declaratory Order, 85 Fed. Reg. 59,302 (Sept. 21, 2020) 6, 13

Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail, 86 Fed. Reg. 61,731 (Nov. 8, 2021) 17, 35

I. PRELIMINARY STATEMENT

The New Jersey Department of Environmental Protection's ("DEP's") decisions to issue a Waterfront Development Individual Permit, Flood Hazard Area Individual Permit, Coastal Wetlands Permit, Water Quality Certificates, and Freshwater Wetlands Individual Permit (collectively, the "Permits") to Delaware River Partners, LLC ("DRP") were arbitrary, capricious, unreasonable, lacked support in the evidence, and failed to comply with DEP's own regulations.

DRP's rail loop infrastructure will allow the Gibbstown Logistics Center ("GLC" or "Facility") to transload bulk liquid energy products, including, but not limited to, liquefied natural gas ("LNG"). In order to make use of the rail loop infrastructure in the manner in which DRP currently intends—to stage train cars, at least one of which is to store LNG that has been transported via railway from Wyalusing, Pennsylvania—DRP will first need a declaratory order from the Federal Energy Regulatory Commission ("FERC") disclaiming its Natural Gas Act Section 3 and Section 7 jurisdiction over the GLC. Additionally, both the specific authorization to transport LNG by rail to the GLC, as well as a rule allowing transportation of LNG by rail nationally, are currently under review by the Pipeline and Hazardous Materials Safety Administration ("PHMSA").

Despite these significant and unresolved issues of federal oversight regarding the transportation and transloading of LNG by rail, DEP has approved another set of permits in a series of permits for the GLC over the past five years. The most recent Permits central to this appeal concern the rail loop infrastructure intended to support the transloading of LNG for the GLC Facility. DEP has permitted DRP to artificially segment portions of the same project, which has deprived the agency of its authority to holistically analyze the GLC's environmental impacts. Accordingly, DEP impermissibly allowed DRP to rely on its Stormwater Management Plan for the entire GLC Facility to establish the rail loop infrastructure's compliance with the Stormwater Management Rules, rather than require an updated Stormwater Management Plan that accounted for the new project. Additionally, DRP offered, and DEP accepted, a dearth of site-specific information regarding adverse impacts to both marine fish and fisheries areas, and threatened and endangered species from the rail loop infrastructure.

For these reasons, DEP's decision to approve the Permits must be reversed.

II. PROCEDURAL HISTORY

This is a consolidated appeal from DEP's issuance of Permits 0807-21-0002.1 LUP 210001 and LUP 210002. Appellants challenge the Waterfront Development Individual Permit, Coastal Wetlands Permit, Water Quality Certificates, Flood Hazard Area Individual Permit,

and Freshwater Wetlands Individual Permit for DRP and specifically DRP's new rail infrastructure associated with its GLC Facility. DRP's new rail infrastructure is proposed to be approximately 11,600 linear feet of a double-track rail loop formed by following the alignment of an unpaved roadway that runs parallel to Sand Ditch (referred to as "Sand Ditch Road") and the levee road that runs parallel to the Delaware River." (0003a). The new rail infrastructure will be used to support the transportation of LNG and liquified hazardous gas ("LHG"), which includes liquid petroleum gas, at the GLC.

DRP applied for its Permits on May 25, 2021. (0075a–0525a). On June 15, 2021, DEP determined that the Permits' application ("Joint Application") was administratively complete. (0532a). On July 14, 2021 DEP requested additional technical information, which DRP provided on September 3, 2021. (0539a–0541a; 0549a–0585a). On October 12, 2021, Appellants submitted public comments to DEP regarding Permit No. 0807-21-0002.1 LUP 210001, urging DEP not to issue the draft permits while remaining questions of federal jurisdiction over the GLC Facility had yet to be resolved. (0596a–0598a). On December 6, 2021, Appellants submitted additional public comments to DEP urging the agency not to issue the draft permits. (0609a–0644a). DEP issued its decision for the Waterfront Development Permit, Coastal Wetlands Permit, Flood Hazard Area Individual Permit, and Water Quality Certificate on December 30,

2021. (0003a–0009a). The agency docket number for those approvals is 0801-21-0002.1 LUP210001. Appellants learned of DEP's approval of DRP's Flood Hazard Area Individual Permit, Waterfront Development Individual Permit, and Water Quality Certificate on January 12, 2022. (0001a). Appellants submitted its Notice of Appeal for this permit on February 25, 2022. (0010a–0012a).

On February 25, 2022, DEP approved DRP's application for its Freshwater Wetlands Individual Permit and Water Quality Certificate. (0020a–0026a). The agency docket number for this approval is 0807-21-0002.1 – LUP-210002. Appellants learned of DEP's approval of Freshwater Wetlands Individual Permit and Water Quality Certificate on March 14, 2022. (0019a). Appellants filed their Notice of Appeal for this permit on March 29, 2022. On April 4, 2022, Appellants filed a motion to consolidate the appeals, which the court granted on April 18, 2022.

III. STATEMENT OF FACTS

The property in question is located in Gibbstown, Gloucester County, along the Delaware River, near the Philadelphia Airport, residential areas in Gibbstown, and the Little Tinicum Island Natural Area. The site on which the GLC is located is a former industrial site. (0178a). In 1880, E.I. du Pont de Nemours and Company ("DuPont") purchased the property, which then became known as the DuPont Repauno Works. (0180a). The property is undergoing active remediation by Dupont's successor, Chemours Co, LLC

("Chemours"). (0180a). The property has hosted a variety of operations, including, *inter alia*, explosives manufacturing and research, industrial diamond manufacturing, and storage and shipment of anhydrous ammonia. (0448a). Much of the property has been naturalized because Chemours ceased operations a few decades ago. (0180a). The GLC facility is one of the only operations on the property and the developed area currently occupies approximately 371 of the total 1600 acres. (0180a).

DEP first issued permits for DRP's construction of the GLC in 2017, which authorized a dock and associated marine terminal. (0036a–0064a). Then, in 2019, DEP issued another Waterfront Development Permit and Water Quality Certificate for a deep-water port ("Dock 2") intended to receive and export LNG, among other products. (0067a–0074a). After submitting public comments, Appellants appealed DEP's issuance of the Dock 2 permits, challenging, *inter alia*, DEP's failure to analyze Dock 2 as an Energy Facility under the Energy Facility Use Rule, DEP's decision to approve the Dock 2 permits without sufficient information about the Dock 2 project's effects on water quality, and DEP's decision to approve the Dock 2 permit before DRP had obtained an Industrial Stormwater Permit as required by the Stormwater Management Resource Rule. *See generally* In the Matter of Challenge of Delaware Riverkeeper Network and Maya van Rossum-The Delaware Riverkeeper To Delaware River Partners, LLC Waterfront Development Individual

Permit No. 0807-16-0001.2 WFD 19001, 2021 N.J. Super. Unpub. LEXIS 1229 (N.J. Super. June 23, 2021).

This Court affirmed DEP's issuance of the Dock 2 permits. Id. Appellants then petitioned the Supreme Court of New Jersey for an Order certifying the final judgment of the Appellate Division. The Supreme Court of New Jersey denied Appellants' Petition for Certification. In the Matter of Challenge of Delaware Riverkeeper Network and Maya van Rossum-The Delaware Riverkeeper To Delaware River Partners, LLC Waterfront Development Individual Permit No. 0807-16-0001.2 WFD 19001, 2022 N.J. LEXIS 33 (N.J. Jan. 14, 2022).

However, on September 11, 2020, DRP filed a petition for a declaratory order from FERC stating that the DRP's LNG operations at GLC would not subject the GLC to FERC's jurisdiction under Section 3 or Section 7 of the Natural Gas Act. Delaware River Partners LLC; Notice of Petition for Declaratory Order, 85 Fed. Reg. 59,302 (Sept. 21, 2020). As of the date of this appeal, FERC has yet to issue a ruling on DRP's petition for declaratory order. Nevertheless, DRP has completed substantial construction of the GLC, and DEP has since issued subsequent permits for additional construction and infrastructure to support the GLC's LNG transloading operations: the subject of this appeal.

On December 30, 2021, and February 25, 2022, DEP issued a Waterfront Development Individual Permit, Flood Hazard Area Permit, Coastal Wetlands Permit, Freshwater Wetlands Individual

Permit, and Water Quality Certificate to DRP for the construction of 11,600 linear feet of a new double track rail loop for trains to support the transloading of cargo, including LNG at the GLC. Specifically, DRP intends to use the rail infrastructure to "stage" two trains, one of which will be loaded with hazardous liquid, including LNG. (0243a). The location rail loop infrastructure is contiguous with the DRP-owned parcel of land that includes the previously-approved marine terminal. (0180a). In an attempt to demonstrate the rail loop infrastructure's compliance with the Stormwater Management Rules (and Coastal Zone Management Rules and Freshwater Management Rules), DRP cited only to the existing Stormwater Management Plan for the entire GLC Facility. (0213a). Similarly, to establish its compliance with the Coastal Zone Management Rules' requirement that energy facilities may not be sited in special areas or marine and fisheries areas without a demonstration that "such facilities will not result in adverse impacts," DRP simply stated that "fishery resources will not be adversely affected" and that it would use soil erosion and sediment control measures during construction to avoid the impacts the Coastal Zone Management Rules prohibit. (0191a). DRP additionally failed to include in its Joint Application a draft of the Soil Erosion and Sediment Control Plan that was intended to be approved by the encompassing soil conservation district. (0192a). To Appellants' current knowledge, DRP has yet to furnish this plan to

DEP. DRP also did not provide evidence to suggest how the rail loop infrastructure's use is "compatible with or adequately buffered from surrounding uses" in accordance with Coastal Zone Management Rules. (0211a). DRP similarly proffered insufficient information demonstrating how the removal of vegetation in the project area and fill of exceptional resource value wetlands will not result in permanent adverse impacts to marine fish and fisheries, and threatened and endangered species. Despite these gross deficiencies, DEP has accepted the dearth of information in the Joint Application as sufficient to demonstrate compliance with the above-mentioned rules.

IV. ARGUMENT

A. Standard of Review

The Permits were issued pursuant to the Waterfront Development Law, N.J.S.A. 12:5-3 to -11, the federal Clean Water Act, 33 U.S.C. §§ 1251-1388, and the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.

The Waterfront Development Law requires that:

> All plans for the development of any waterfront upon any navigable water or stream of this State or bounding thereon, which is contemplated by any person or municipality, in the nature of individual improvement or development or as part of a general plan which involves the construction of or alteration of a dock, wharf, pier, bulkhead, bridge, pipeline, cable, or any other similar or dissimilar waterfront development shall be first submitted to the Department of Environmental Protection. No such development

> or improvement shall be commenced or executed without the approval of the Department of Environmental Protection first had and received, or hereinafter in this chapter provided.
>
> [N.J.S.A. 12:5-3(a).]

DEP utilizes its Coastal Zone Management Rules, N.J.A.C. 7:7-1.1 to -29.10, in evaluating applications under the Waterfront Development Law and "in the review of water quality certificates subject to Section 401 of the Federal Clean Water Act, 33 U.S.C. § 1341 . . . ." N.J.A.C. 7:7-1.1(a).

The Federal Clean Water Act requires an applicant for a Federal permit that may result in a discharge to obtain a Water Quality Certificate from the relevant State:

> Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of sections 113, 1312, 1313, 1316, and 1317 of this title.
>
> [33 U.S.C. § 1314(a).]

The Flood Hazard Area Control Act ("FHACA") authorizes DEP to " . . . adopt land use regulations for the flood hazard area . . ." N.J.S.A. 58:16A-50. The FHACA implementing regulations provide that "no person shall engage in a regulated activity in a regulated area without a flood area permit as required by [the Flood Hazard Area Control Act Rules], or a coastal permit as required by

N.J.A.C. 7:7 [].” N.J.A.C. 7:13-2.1(a). Further, under the Flood Hazard Area Control Act Rules,

> . . . a person undertaking any regulated activity in a regulated area shall do so only in accordance with one of the following:
>
> . . . .
>
> 6. A coastal permit, pursuant to N.J.A.C. 7:7:, provided:
>
> i. The application for the coastal permit was declared by the Department as complete for final review on or after November 5, 2007; and
>
> ii. If the activities are proposed in a fluvial flood hazard area, the applicant meets one of the four conditions at N.J.A.C. 7:13-5.5(a) regarding the need for a verification of the flood hazard area and/or floodway onsite.
>
> [N.J.A.C. 7:13-2.1(b)(6).]

In New Jersey, judicial review of administrative agency action is a constitutional right. See N.J. Const. art. VI, § 5, ¶ 4. Further, New Jersey Court Rule 2:2-3(a)(2) permits review in the Appellate Division of the Superior Court of “final decisions of any state administrative agency or officer.” In reviewing a final agency decision, this court “will not reverse the ultimate determination of an agency unless the court concludes that it was ‘arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence, or that it violated legislative policies’ expressed or implied in the act governing the agency.” In re Orban, 461 N.J. Super. 57, 72 (App. Div. 2019) (quoting In re Freshwater

Wetlands Gen. Permit No. 16, 379 N.J. Super. 331, 341 (App. Div. 2005).

While a court will traditionally defer to an agency's "specialized expertise.," id. (quoting In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 489 (2004)), a court "need not surrender to it." Id. (quoting N.J. Chapter of Nat'l Ass'n of Indus. & Office Parks v. N.J. Dep't of Envtl. Prot., 241 N.J. Super. 145, 165 (App. Div. 1990)). In application, "a court is never bound by an agency's determination of a purely legal issue." Pinelands Pres. All. v. State, Dep't of Envtl. Prot., 436 N.J. Super 510, 524 (App. Div. 2014) (citing In re Stream Encroachment Permit, 402 N.J. Super. 587, 597 (App. Div. 2008)). A purely legal issue is one that "involves the interpretation of statutes and regulations, which [the appellate court] consider[s] de novo." Id. (quoting Klawitter v. City of Trenton, 395 N.J. Super. 302, 318 (App. Div. 2007)).

This court focuses on three questions:

> (1)whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
>
> In re Carter, 191 N.J. 474, 482-83 (2005) (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).

If this court determines that an administrative agency's action is arbitrary and capricious, "it is not only privileged, but required to set [it] aside." Application of Holy Name Hosp., 301 N.J. Super. 282, 295 (App. Div. 1997) (citing Drake v. Dep't of Human Servs., 186 N.J. Super. 532, 536 (App. Div. 1982)).

B. DEP's issuance of Permit No. 0807-21-0002.1 LUP210001 and Permit No. 0807-21-0002.1 LUP210002 was arbitrary, capricious, unreasonable, and contrary to law because DEP issued the Permit despite the unresolved issue of whether LNG may be transported by rail and truck to the GLC and transloaded for export under various federal laws and regulations. (0668a; 0698a).

Currently, two outstanding issues central to Permit No. 0807-21-0002.1 LUP210001 and Permit No. 0807-21-0002.1 LUP210002 remain unresolved. Because these issues remain unresolved, DEP's action in approving the Permits was premature and, consequently, arbitrary, capricious, unreasonable, and contrary to law.

First, DRP has requested FERC to disclaim its exclusive authority over the siting and construction of LNG facilities under the federal Natural Gas Act ("NGA"), 15 U.S.C. §§ 717–717w, as it would otherwise apply to the GLC Facility. In its Petition for Declaratory Order to FERC—in which DRP has requested of the Commission to declare that the GLC is not under the Commission's jurisdiction under either Section 3 or Section 7 of the NGA—DRP provides that, for its multi-fuel handling facility, including Dock 1 and the then-proposed Dock 2, it "plans to construct additional truck- and *railcar-unloading facilities to handle LNG*

transloading operations at the Facility." 85 Fed. Reg. 59,302, 59,303 (Sept. 21, 2020) (referring to the full text of DRP's Petition for Declaratory Order)(emphasis added).

Section 3(e)(1) of the NGA provides that "[t]he Commission shall have the exclusive authority to approve or deny an application for the siting construction, expansion, or operation of an LNG terminal." Section 2(11) of the NGA defines "LNG terminal" as including

> all natural gas facilities located onshore *or* in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States . . . , exported to a foreign country . . . , or transported in interstate commerce by waterborne vessel, but does not include—(A) waterborne vessels used to deliver natural gas to or from any such facility; or (B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 7.
>
> 15 U.S.C. § 717a(11)(A)—(B)(emphasis added).

By DRP's own description, the GLC fits squarely within the definition of an "LNG terminal" under the NGA. The additional rail loop infrastructure that DEP has permitted is the onshore "railcar-unloading facilit[y] to handle LNG transloading operations at the [GLC]." 85 Fed. Reg. 59,302, 59,303 (Sept. 21, 2020) (referring to the full text of DRP's Petition for Declaratory Order). The rail loop that DEP has permitted is intended to support the LNG transloading operations at the GLC. While the ultimate disposition

of the issue of whether FERC has exclusive jurisdiction over the siting and construction over the GLC is not before this court, the issue of whether FERC has exclusive jurisdiction over the LNG transloading facility, which includes the permitted rail loop infrastructure, remains unresolved. Nevertheless, DEP has permitted the rail loop.

Because DEP has permitted the rail-loop infrastructure while the issue of FERC's NGA Section 3 jurisdiction over the GLC remains unresolved, DEP's action was premature and, thus, arbitrary and unreasonable. Simply, DEP should have denied DRP's joint application because the FERC jurisdiction issue is still pending resolution. While DEP's authority under the federal Coastal Zone Management Act and the federal Water Pollution Control Act, was trigged when DRP applied for its Permits, DEP nonetheless maintains the independent authority to determine whether a land use permit application is both administratively and technically complete (*i.e.*, through a "completeness determination"). (0669a); N.J.A.C. 7:7A-19.2; N.J.A.C 7:7-26.2; N.J.A.C. 7:13-21.2. For example, DEP made a technical deficiency determination on DRP's Joint Permit Application on June 6, 2021 for want of the requisite applicant authorization and public notices. (0613a).

For a Land Use permit to be "technically complete" it must "provide sufficient information for [DEP] to declare the application complete for review." N.J.A.C. 7:7A-1.3; N.J.A.C. 7:7-

1.5; N.J.A.C. 7:13-1.2. Under the Freshwater Wetlands Protection Act Rules, DEP must also make the co-equal determination of whether the regulated activity—here, the construction of the additional rail infrastructure to support the transloading of LNG at the Facility—is "otherwise lawful." N.J.A.C. 7:7A-10.2(b).

Taken together, a reasonable interpretation of DEP's duty to ensure DRP's Freshwater Wetlands Individual permit application was 1) sufficiently supported with technical information and 2) "otherwise lawful" would have directed DEP to issue completeness determination that resulted in a technical deficiency, with the condition that DRP first receive the determination from FERC concerning the Commission's NGA jurisdiction over the Facility and its supporting rail infrastructure. Of the enumerated concerns DRN raised in its comments to DEP regarding the Joint Application was the issue of DRP's pending petition for declaratory order before FERC.

DRP originally filed its petition for declaratory order to FERC on September 11, 2020. At a minimum, DEP was made aware of this outstanding jurisdictional issue on October, 12, 2021, when Appellants first urged DEP to refrain from issuing the draft permits while the FERC jurisdictional issue remained unresolved. Appellants again urged DEP to refrain from issuing the permits on December 6, 2021, citing, in part, the unresolved FERC jurisdictional issue. Though DRP filed its Joint Application

before it filed its petition to declaratory order to FERC, DEP would not go on to approve the Permits until December 30, 2021, and February 25, 2022, respectively. The controlling administrative rules—most reasonably read—would require DEP to have denied the joint permit application without prejudice until such time as FERC answered the question of whether the transloading of LNG at the Facility via rail tank cars and associated infrastructure is within its exclusive jurisdiction. This is not merely a technical hiccup: FERC's NGA authority provides the public with important oversight over the siting and construction over natural gas facilities and its supporting infrastructure.

DEP has correctly noted that its authority under both the Coastal Zone Management Act and the Federal Water Pollution Control Act would not be preempted by the NGA should FERC determine it had jurisdiction. (0669a). That DEP would not be preempted from issuing Land Use Permits at an LNG facility does not mean that it was nevertheless reasonable for the agency to issue approvals for infrastructure that are part and parcel of the GLC Facility. DEP was made aware of the pending jurisdictional issue before FERC and DRP's intention to construct the additional rail loop infrastructure to support the transportation of LNG well before it had issued the Permits.

One of the primary purposes of the GLC Facility is to transport LNG by rail. The issue of whether DRP will be permitted to

transport LNG by rail, including via the rail loop infrastructure, remains unanswered. The Special Permit issued by PHMSA that would have allowed unit trains to transport LNG to the Facility expired as of November 30, 2021, and is currently under review for renewal. Further, on November 8, 2021, PHMSA published notice of its proposed suspension of the Hazardous Materials Regulations' amendments that currently authorizes LNG by rail nationwide ("LNG by Rail Rule"). Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail, 86 Fed. Reg. 61,731 (Nov. 8, 2021). Thus, the legal status of being able to transport LNG by rail—a primary purpose of both the GLC Facility and the rail loop infrastructure—is currently in question. This is directly relevant to the issue at hand because DEP's premature permitting decision authorizes impacts that may result in abandonment of construction and impacts that were not considered because the agency did not have an accurate understanding of what type of operations would be taking place at the facility.

C. DEP's issuance of Permit No. 0807-21-0002.1 LUP210002 was arbitrary, capricious, unreasonable, and contrary to law because the GLC development has been segmented through piecemeal permitting applications, depriving DEP of its authority to engage in a holistic analysis of the GLC's environmental impacts. (0669a; 0698a).

The Freshwater Wetlands Protection Act Rules provide that "an applicant shall not segment a project of its impacts by separately

applying for individual permits for different portions of the same project." N.J.A.C. 7:7A-10.1. From its inception, the GLC was designed as a major facility to handle bulk liquid products, including LNG. [Rule 424(b)(4)], Fortress Transportation & Infrastructure Investors LLC, SEC Accession No. 0001193125-15-191922 (May 18, 2015). Nonetheless, DRP applied for three separate sets of DEP-issued permits for the facility while it developed the GLC rather than presenting DEP with a single application that included all planned development.

Specifically, DRP knew since at least August 2017—when Energy Transport Solutions, LLC, a subsidiary of New Fortress Energy, Inc., applied for a Special Permit from the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration to transport hazardous materials, including LNG, to the GLC—that its plans for the GLC involved the use of unit trains to transport LNG specifically from Wyalusing, Pennsylvania to the GLC Facility. For context, New Fortress Energy, Inc. is majority-owned by Fortress Investment Group, LLC ("FIG, LLC").[1] DRP is a subsidiary of Fortress Transportation and Infrastructure Investors, LLC, which is externally managed by and an affiliate of FIG, LLC. Accordingly, DRP planned to use unit trains at the site

[1] *See* New Fortress Energy, Sec. & Exch. Comm'n Form 10-Q, para. 24 "Related Party Transactions" (Mar. 24, 2022) (available at https://www.sec.gov/ix?doc=/Archives/edgar/data/1749723/000174972322000010/nfe-20220331.htm).

a year and a half prior to its 2019 application for an individual Waterfront Development Permit to construct the upland marine terminal, the purpose of which is to transload LNG from railcars and trucks to marine vessels. The Project at issue in this appeal is additional infrastructure to "increase on-site rail capacity" related to the movement of cargo, including LNG, at the GLC. (0182a).

This Court should follow the analysis underpinning an unpublished Appellate Division decision, *In the Matter of New Jersey Department of Environmental Project CAFRA Permit No. 0000-15-00007.1 CAF 150001 and Freshwater Wetlands Protection Act Permit NO. 0000-15-0007.1 FWW 15001 Issued to New Jersey Natural Gas*,[2] which discussed impermissible segmentation. In that case, the appellate panel interpreted the Freshwater Wetlands Protection Act rules against segmentation. *See* N.J.A.C. 7:7A-5.3(f); N.J.A.C. 7:7A-10.1(c). There, the appellate panel determined that two entities and their respective projects were not impermissibly segmented because the entities were separate and had independently and discretely applied for approval of their respective projects. Further, the Court determined that the projects at issue were not

[2] In re N.J. Dep't of Envtl. Prot. CAFRA Permit No. 0000-15-0007.1, No. A-3293-16T1, 2019 N.J. Super. Unpub. LEXIS 1668 (Super. Ct. App. Div. July 22, 2019). A copy of this unpublished opinion has been included in the appendix to this brief at 0717a, and Appellants are unaware of any contrary opinions. R. 1:36-3.

impermissibly segmented because they were "being built on separate, non-contiguous parcels not owned or controlled by the same entity . . . ." Id.

Here, DRP is the sole "applicant" on all of its individual permits sought to develop the GLC Facility. The three sets of permits DRP sought are all located on the same, contiguous parcel owned and controlled by DRP. As such, "the location of [the] new rail infrastructure is contiguous with the marine terminal and will connect to an existing rail car transloading rack. . ." (0182a). While DEP is authorized to interpret its own rules, its implicit classification of the rail loop as an independent project from the GLC is plainly unreasonable.

Through its submission of three individual sets of applications while it developed the GLC, DRP has artificially siloed the impacts of the GLC Facility as a whole. In response to Appellants' public comment addressing the issue of impermissible segmentation, DEP has offered that

> [t]he original freshwater wetlands impacts to construct the marine terminal were greater than one acre which precluded DRP from applying for freshwater wetlands general permits for each individual regulated activity pursuant to N.J.A.C. 7:7A-5.4 (a) 2. Instead, the freshwater wetlands for the entire site, including the 0.017 acres of freshwater wetlands impacts associated with the rail infrastructure project, are reviewed under the individual permit requirements including an alternative analysis to minimize impacts to freshwater wetlands for the entire project and including mitigation for all impacts associated with the project and overall site.
>
> (0669a).

While DEP is correct in stating that it was precluded from issuing a general permit for DRP's marine terminal because that project area exceeded one acre of permanent wetlands disturbance, the Freshwater Wetlands Protection Act Rules regarding impermissible segmentation does not turn on the triggering requirements between general and individual permits. Rather, N.J.A.C. 7:7A-10.1 prevents applicants from "segment[ing] a project or its impacts by separately applying for individual permits for different portions of the same project." Appellants do not contend that DRP was required to apply for a general permit for either its marine terminal project or the Project at issue in this appeal. Instead, Appellants argue that DRP was prohibited from applying for individual permits at artificially staged intervals for different portions of the same project, all of which are intended to support the transloading of bulk cargo, including

LNG, at the GLC Facility. For example, at the time DRP applied for the land use permits for its Dock 1 facility, the rail loop infrastructure central to this appeal was not included within the blueprint. DEP made its siting decisions for Dock 1 and Dock 2 without the benefit of knowing that additional rail loop infrastructure was necessary to support the overall purpose to transload and transport hazardous liquid materials. It is exactly this type of segmentation that the Freshwater Wetlands Protection Act Rules expressly prohibit and that DEP has nonetheless authorized.

A development as significant as the GLC must not be allowed to proceed through the regulatory process in such a piecemeal fashion. Because the Freshwater Wetlands Protection Act plainly prohibits the artificial segmentation of different portions of the same project, DEP acted arbitrarily, capriciously, unreasonably, and contrary to law by incrementally reviewing and approving DRP's applications for different portions of the same project: the GLC.

D. DEP's issuance of Permit No. 0807-21-0002.1 LUP210001 and Permit No. 0807-21-0002.1 LUP210002 was arbitrary, capricious, unreasonable, unsupported by the record, and contrary to law because DRP failed to provide sufficient information regarding the stormwater impacts of the proposed Rail Loop and GLC as a whole, and consequently, the Permit does not comply with the Stormwater Management Rules at N.J.A.C. 7:8, the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A, the Coastal Zone Management Rules at N.J.A.C. 7:7, and Section 401 of the Clean Water Act, 33 U.S.C. § 1341. (0669a; 0699a).

The Project meets the regulatory definition of "major development" at N.J.A.C. 7:8-1.2, and accordingly, it must comply with the Stormwater Management Rules. In section 7.2 of its Joint Application Compliance Statement, DRP states that "[a] Stormwater Management Plan has been developed and implemented for the marine Terminal. Compliance with Stormwater Management Rules for this Project is detailed in Section 9.4.1." Section 9.4.1 provides:

> The proposed activities disturb greater than one acre of land and therefore meet the definition of a "major development" at N.J.A.C. 7:8-1.2. Stormwater management measures will be designed to meet the groundwater recharge standards, and stormwater runoff quality standards as applicable. Where feasible, green infrastructure BMPs will be used to meet the groundwater recharge standards and runoff quality standards. Therefore, this condition is met.
>
> [LUP CS pg. 38]

In response to a technical deficiency notice from DEP on June 6, 2021, DRP provided additional detail regarding how the Project would comply with N.J.A.C. 7:8-5.3, 5.4, 5.5, and 5.6. (0613a). However, DRP cited to the Stormwater Management Plan for the entire GLC Facility as evidence of compliance with the Stormwater Management Rules for the Joint Application instead of providing DEP with an updated Stormwater Management Plan that included the proposed Project Area. (0213a). In so doing, DEP and the public were denied the opportunity to evaluate the stormwater effects of

the new Project and its relationship with the GLC Facility as a whole.

In response to the public comments Appellants submitted to DEP regarding the DRP's compliance with the Stormwater Management Rules, DEP provided

> [t]he stormwater management system for the upland portion of the Gibbstown Logistic Center was reviewed and approved by the Department on April 10, 2017 and, at that time, DRP demonstrated compliance with the Stormwater Management Rules. The stormwater management for the rail loop was also reviewed for compliance with the Stormwater Management Rules and, provided that DRP complies with the conditions specified in the permit, the construction of the Rail Loop will also comply with the Stormwater Management Rules.
>
> (0669a).

By approving the Joint Application without first requiring DRP to demonstrate—beyond a cursory statement that "stormwater management measures will be designed to meet the groundwater recharge standards, and stormwater runoff quality standards as applicable"—that the proposed Project Area would comply with the Stormwater Management Rules, DEP's decision to accept as sufficient DRP's Joint Application was arbitrary, capricious, unreasonable, and unsupported by the law. Specifically, the Stormwater Management Rules require that stormwater management plans "minimize, to the extent practicable, any increase in stormwater runoff from *any new development*." N.J.A.C. 7:8-

2.2(a)(1) (emphasis added). Further, stormwater management plans must

> [m]inimize pollutants in stormwater runoff from *new* and existing development in order to restore, enhance, and maintain the chemical, physical, and biological integrity of the waters of the State, to protect public health, to safeguard fish and aquatic life and scenic and ecological values, and to enhance the domestic, municipal, recreational, industrial and other uses of water.
>
> [N.J.A.C. 7:8-2.2(a)(8) (emphasis added).]

Because the Project Area is a new development that was plainly unaccounted for in DRP's initial Stormwater Management Plan for the marine terminal at the GLC Facility, DEP should have required DRP to update its Stormwater Management Plan to include the new Project in accordance with the goals of the Stormwater Management Rules. The information regarding the stormwater impacts of the new Project area specifically was not included in the Joint Application. Thus, there was insufficient evidence in the record regarding compliance with the Stormwater Management Rules for DEP to have issued the Permits. Applying the goals of the Stormwater Management Rules to account for stormwater runoff from new development(s) in SMPs, DEP clearly erred by approving the Joint Application without a showing that DRP accounted for the stormwater impacts from the new Project development.

Additionally, the latest version of DRP's Stormwater Pollution Prevention Plan ("SPPP") associated with its 5G2 Basic Industrial

Stormwater permit—that Appellants are currently aware of—fails to address compliance with the Total Maximum Daily Load for polychlorinated biphenyls in the Delaware River. Thus, an updated SPPP that includes the proposed Project and any potential PCB-laden discharges was necessary for NJDEP to have evaluated compliance with the Stormwater Management Rules, as well as to fully understand site-specific water quality impacts. Further, the Stormwater Management Rules mandate that "stormwater from areas of high pollutant loading" "shall not be recharged." N.J.A.C. 7:8-5.4(b)(3)(1). Because the Project will be used to support the movement and storage of bulk liquid cargo, such as petroleum, and because DRP states in its Joint Application that the Project would "allow for two trains (one loaded and one empty) to be temporarily staged on the Site . . .," DRP needed to have addressed the potential leaking of fuel or refrigerant from the train equipment itself, as well as the risk of spills and cargo leaks. (0243a). DEP's approval of the Joint Application without having first required this necessary information was arbitrary, capricious, unreasonable, unsupported by the record, and contrary to law because, without this information, DEP could not have reasonably determined whether "stormwater from [an] area[] of high pollutant loading" would be recharged at the project site. N.J.A.C. 7:8-5.4(b)(3)(1). Nevertheless, DEP approved the Joint Application without requiring or addressing this necessary information.

Importantly, the Freshwater Wetlands Protection Act Rules require compliance with the Stormwater Management Rules "[i]f a project requires an individual permit under [the Freshwater Wetlands Protection Act Rules] and the project in its entirety (that means the whole project, not just the portions within wetlands or transition) meets the definition of 'major development' at N.J.A.C. 7:8-1.2." N.J.A.C. 7:7A-2.7. As previously discussed, the new Project area meets the definition of a "major development." (0213a). Because DRP's application for a Freshwater Wetlands Individual permit for the Project—a "major development"—did not comply with the Stormwater Management Rules, it likewise failed to comply with the Freshwater Wetland Protection Act Rules that expressly incorporates compliance therein. DEP's approval of the Joint Application was thus contrary to law because a failure to comply with the Stormwater Management Rules in this instance was also a failure to comply with the Freshwater Wetlands Protection Act Rules.

In a similar vein, the Coastal Zone Management Rules apply to DRP's application for its Freshwater Wetlands individual permit because DRP received its state water quality certification concomitantly with its Freshwater Wetlands individual permit. The Coastal Zone Management Rules are "used in the review of water quality certificates subject to the Section 401 of the Federal Clean Water Act, 33 U.S.C. § 1341 . . ." N.J.A.C. 7:7-1.1(a).

Relevantly, the Coastal Zone Management Rules expressly incorporate compliance with the Stormwater Management Rules at N.J.A.C. 7:7-6.2(a). As such, "[i]f a project or activity meets the definition of 'major development' at N.J.A.C. 7:8-1.2, then the project or activity shall comply with the Stormwater Management Rules at N.J.A.C. 7:8."

The Coastal Zone Management Rules reinforce the important rationale that "[b]ecause development and land use activities contribute greatly to the types and amount of pollutants that are found in stormwater runoff, it is appropriate for major development projects in the coastal zone to comply with the Stormwater Management Rules' standards." N.J.A.C. 7:7-16.6(b). Because DRP did not demonstrate compliance with the Stormwater Management Rules' standards, it similarly did not demonstrate compliance with the Coastal Zone Management Rules and Section 401 of the Federal Clean Water Act incorporated therein. Consequently, it was arbitrary, capricious, unreasonable, and contrary to law for DEP to have approved the Joint Application because DRP failed to proffer sufficient information demonstrating compliance with the Stormwater Management Rules and the several rules discussed above that expressly require compliance with the Stormwater Management Rules.

E. DEP's issuance of Permit No. 0807-21-0002.1 LUP210002 was arbitrary, capricious, unreasonable, unsupported by the record, and contrary to law because DRP failed to provide DEP with site-specific information needed to demonstrate compliance with the Coastal Zone Management Rules, N.J.A.C. 7:7, the Flood Hazard Area Rules, N.J.A.C. 7:13, and the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A. (0670a; 0699a).

Under the Coastal Zone Management Rules, the Project is a "energy facility" because it is a "facilit[y]" for the distribution and storage of energy or fossil fuels. N.J.A.C. 7:7-15.4(a). In its Joint Application Compliance Statement, DRP provides that the Project ". . . will allow for two trains (one loaded and one empty) to be temporarily staged on the Site . . .," which DRP states is necessary because the Site "does not [currently] have adequate length to hold a train while still allowing for passing rail traffic or vehicular traffic from the new bypass to enter the site." (0243a).

DRP has tactfully described the Project as a "onsite area to stage trains" in its Joint Application. Id. pg. 169. Unsurprisingly, "staging" of energy or fossil fuels is not a term within the Coastal Zone Management Rules governing energy facilities and their corresponding standards. Despite this careful linguistic footwork, DRP's characterization of the fossil fuel "staging" at the GLC through the Project outsteps the bounds of reason. The one "loaded" train and one "empty" train at the Project will, plainly, be temporarily storing and distributing fossil

fuels. Consequently, the Project qualifies as an "energy facility" under the Coastal Zone Management Rules.

Though DRP asserted in its Joint Application that the Project is not independently an energy facility, DRP nevertheless stated that the Project "does *facilitate the distribution* of fossil fuel" and subsequently addressed the Project's compliance with the sections of the Coastal Zone Management Rules that govern energy facilities. (0211a). In doing so, DRP has proffered a distinction without a difference as there is no tenable difference between facilitating distribution and distributing. This is further evidenced by DRP's proffered compliance with the Coastal Zone Management Rules governing energy facilities despite its incorrect categorization of the Project as a non-energy facility. (0211a).

Because the Project is an "energy facility" under the Coastal Zone Management Rules, the Project may not be sited in special areas or marine fish and fisheries areas "unless site-specific information demonstrates that such facilities will not result in adverse impacts to these areas." N.J.A.C. 7:7-15.4(b)(1). In Section 6 of its Joint Application Compliance Statement, DRP responded to the requirement that Project will not result in adverse impacts to marine fish and fisheries area by flatly concluding that "fishery resources will not be adversely affected." (0191a).

In support of this conclusion, DRP cited to Appendix E of its Joint Application, which evaluates the impact of the Project on threatened and endangered species habitat. (0191a). DRP also claims that it will use soil erosion and sediment control measures during construction to avoid water quality impacts. (0191a). This analysis imbued with some-day intentions falls far short of site-specific information that demonstrates a lack of adverse impact for several reasons.

Specifically, this analysis fails to address potential impacts to all marine fish and fisheries beyond just threatened and endangered species. The analysis likewise does not include a site-specific construction plan detailing the erosion and sediment control measures to be used. Additionally, the analysis does not describe any site-specific impacts associated with the operation of the Project post-construction.

For example, the Project involves the disturbance of a man-made waste treatment ditch system that has been used to hold wastewater, treated groundwater, and conveyed stormwater for centuries. (0186a). Because of the Project's proximity to priceless marshland, habitats, and the mainstem river, waste leaching from this site due to compromised structures could be perilous for wildlife, including marine fish. Site-specific information is needed to evaluate potential contamination within and near the ditch system that may be disturbed during construction or operation

of the Project. Some of the express policies of the Coastal Zone Management Act Rules require DEP to "protect, enhance and restore coastal habitats and their living resources to promote biodiversity, water quality, aesthetics, recreation and healthy ecosystems." N.J.A.C. 7:7-1.1(c)(1)(i). By approving the Freshwater Wetlands Individual Permit without evaluating site-specific information demonstrating that the Project's disturbance of the waste treatment ditch system would not disturb or compromise the surrounding coastal habitats, DEP failed to adhere to the enumerated policies of the Coastal Zone Management Act Rules.

Additionally, DRP states that "a tide gate is located at the northern outlet of the Sand Ditch to Aunt Deb's Ditch." (0188a). DRP claims this tide gate "restricts passage [of fish, including sturgeon] between the Delaware River and the on-site waterbodies." (0188a). This evidence of compliance with the Coastal Zone Management Rules is grossly insufficient. DEP should not have approved the Joint Application without site-specific information about the effectiveness of the tide gate or explanation of whether fish may still enter Aunt Deb's Ditch and the on-site ditch system by other means or during high tide conditions or flooding events.

Further, DRP explained in its Joint Application that a Soil Erosion and Sediment Control ("SESC") Plan will be approved by the Gloucester County Soil Conservation District prior to beginning work, but absent from the Joint Application is a draft of a of the

proposed SESC Plan for DEP to have evaluated the site-specific impacts of the Project. (0191a). The Joint Application lacks site-specific information about erosion and sedimentation controls, as well as stormwater controls. For example, because the Atlantic sturgeon feeds on benthic creatures, excess siltation could directly impact foraging success on the bottom of the sturgeons' habitats. (0615a). Accordingly, the Flood Hazard Area Control Act Rules directs DEP to issue individual permits for regulated activities "only if it determines that the regulated activity is not likely to cause significant and adverse impacts on the following: (1) water quality." N.J.A.C. 7:13-12.1(b)(1). Because DRP failed to provide site-specific information regarding the water quality impacts from erosion and sediment control as well as stormwater, DEP's approval of the Joint Application was arbitrary, capricious, unsupported by the record, and contrary to law. DEP should have required site-specific information that demonstrated that the Project will not result in these adverse impacts.

Because the Project's use will involve the "storage of . . . gases and other potentially hazardous liquid substances," DEP must also evaluate the Project under the standards listed in N.J.A.C. 7:7-15.4(p). That use is "conditionally acceptable in the Urban Area, Northern Waterfront and Delaware River regions if it is compatible with or adequately buffered from surrounding uses." N.J.A.C. 7:7-15.4(p)(2). Whether the proposed storage and

distribution of LNG and other hazardous substances such as natural gas liquids, liquid petroleum gases, and liquid hazardous gases are "compatible with or adequately buffered from surrounding uses" depends on the risks associated with those substances. Id. Here, the risks associated with LNG, and specifically LNG rail tanks, render the proposed use incompatible. Without a scintilla of evidence that the use of LNG in the Project area is compatible or adequately buffered from surrounded uses, it was arbitrary, capricious, unreasonable, lacked support in the evidence, and contrary to law for DEP to have authorized the Project.

The risks of approving the Joint Application without a robust federal and state regulatory review are dire. For example, PHMSA has recently acknowledged that

> LNG poses potential hazards as a cryogenic liquified flammable gas, including cryogenic temperature exposure, fire, and asphyxiation hazards. Transportation of any hazardous material introduces risk to safety and the environment, and each additional tank car theoretically increases overall risk of an incident occurring and the quantity that could be released in the event of a derailment.
>
> . . . .
>
> No release of LNG vapor to the environment is allowed during the normal transportation of LNG in tank cars whether by roadway or railway. However, methane is odorless, and LNG contains no odorant, making detection of a release resulting from an incident difficult without a detection device. Releases of LNG due to venting or to accidents, without immediate ignition, involving . . . a DOT-113C120W9 rail tank car have the potential to create flammable vapor clouds of natural gas

> because recently gasified LNG does not dissipate in the atmosphere as quickly as ambient-temperature natural gas. Large releases of LNG due to the breach of the inner tank of these transport vessels could result in a pool fire, vapor fire, and explosion hazards if methane vapors become confined. These flammability hazards pose a risk of higher potential impacts than localized cryogenic hazards.
>
> [86 Fed. Reg. at 61,741 (Nov. 8, 2021).]

As such, PHMSA has proposed suspension of the 2020 amendments to its Hazardous Materials Regulations that initially authorized transportation of LNG in DOT-113C120W9 specification rail tank cars in order to develop a more complete understanding of the risks associated with this activity. 86 Fed. Reg. at 61,731. PHMSA specifically identified "potential direct and indirect GHG emissions associated with authorizing LNG by rail tank car and the adequacy of emergency planning and response resources" as areas in need of further study. Id. at 61,734—35. DEP's conclusion that the proposed Project is "compatible with or adequately buffered from surrounding uses" or that the proposed LNG facility is acceptable while these questions being explored by PHMSA remain unresolved was manifestly arbitrary, capricious, unsupported by the evidence, and contrary to law. In addition, and as detailed earlier in this brief, the Special Permit issued by PHMSA for the transport of LNG by rail to Gibbstown is currently under review for renewal by PHMSA.

F. DEP's issuance of Permit No. 0807-21-0002.1 LUP210001 and Permit No. 0807-21-0002.1 LUP210002 was arbitrary, capricious, unreasonable, unsupported by the record, and contrary to law because DRP's Rail Loop proposes unacceptable adverse impacts to threatened and endangered species as well as wetlands contrary to the Flood Hazard Area Rules, N.J.A.C. 7:13, the Coastal Zone Management Rules, N.J.A.C. 7:7, and the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A. (0670a; 0699a).

Under the Flood Hazard Area Rules, DEP is authorized to issue individual permits "only if the activity will not destroy, jeopardize, or adversely modify a present or documented habitat for threatened or endangered species, and [the regulated activity] shall not jeopardize the continued existence of any local population of a threatened or endangered species." N.J.A.C. 7:13-11.6(d). The bald eagle, osprey, and Atlantic and shortnose sturgeon all use habitat in the vicinity of or near the Project area. (0188a). Additionally, and as explained previously in this brief, the information contained in the Joint Application is insufficient for DEP to adequately evaluate the impacts of the Project on fish and marine life, including the endangered sturgeon habitat.

The threatened red knot, bog turtle, and sensitive joint vetch were also identified as being potentially present in the area. (0188a). The Joint Application must include site-specific information about these species. Red knots forage in wet habitats, move towards sedge meadows and shores as they mature, and utilize marine habitats, sandy beaches, salt marshes, mudflats of

estuaries to forage (where invertebrate prey may be high). (0618a). Excess siltation from construction activities may disturb the red knot's foraging area by reducing sunlight necessary for vegetation growth or filling in crevices and other complex habitat necessary for invertebrate species. (0618a).

Bog turtles exist in small discrete populations and are incredibly dependent on many habitats such as sedge meadows, marshes, and rivers adjacent to wooded areas. (0618a). Their eggs are often laid in areas elevated from the waterway and habitat occupied. (0618a). Siltation of bog turtle habitat poses a great threat to the bog turtle populations. (0618a). Bog turtles feed on insects, snails, and worms—all of which depend on predictable conditions in benthic habitat and will suffer when the conditions change too much too rapidly. (0618a).

Last, in its Joint Application, DRP ignored the potential impacts to several NJ Species of Special Concern that likely inhabit the project area, including the Fowler's toad (Anaxyrus fowleri) and eastern box turtle (Terrapene carolina carolina). The marsh habitat is also highly suitable for the Atlantic Coast leopard frog (Lithobates kauffeldi), the conservation status of which has not been assessed yet due to how recently the species was discovered. (0618a). Given the lack of site-specific information DRP offered in its Joint Application regarding the aforementioned species, DEP's approval of the project is not in

accordance with the Flood Hazard Area Rules that prohibit the approval of individual permits for regulated activities that "destroy, jeopardize, or adversely modify a present or documented habitat for threatened or endangered species". N.J.A.C. 7:13-11.6(d).

In order to prevent flooding within the tidal flood hazard area of the Delaware River, removal of vegetation—especially trees—must be minimized. Trees and other vegetation represent some of the only natural flood buffers within the actual project site. (0618a). Given the proximity of the GLC to tidal waters, trees and other vegetation are indispensable for the health of the encompassing water ways. DRP proposes removal of vegetation, and explains that these areas "will be revegetated by reseeding with native vegetation and planting of native shrubs and trees to promote rapid reestablishment of vegetation." (0184a). Removing and then planting new trees would result in decades of degraded habitat and buffers until the newly-planted trees reached the level of maturity necessary to provide the benefits of the trees that they replaced. DEP's approval of the Joint Application was arbitrary, unreasonable, unsupported by the record, and contrary to law because the agency manifestly failed to account for this long-term impact to the habitat of fish and marine life.

DRP asserts that the Project will result in the fill of 0.017 exceptional resource value wetlands, as well as permanently impact

4.132 acres of transition area of intermediate and exceptional resource value wetlands that fall outside of the limit of disturbance. (0201a). In addition, eight freshwater wetland features were identified and delineated in the Study Area with a total area of approximately one acre. (0279a). All eight of these wetlands are also exceptional resource value wetlands due to the presence of threatened and endangered species (*i.e.*, ospreys and bald eagles). These wetlands were identified as follows: SD-WB01 (0.211-acres); SD-WB02 (0.092-acres); SD-WB03 (0.016-acres); SD-WB04 (0.021-acres); SD-WB05 (0.014-acres); SD-WB06 (0.175-acres); SD-WB07 (0.152-acres); SD-WB08 (0.253-acres). (0280a–0282a).

According to the Freshwater Wetland Protection Act Rules' provision concerning the identification of a transition area:

> (d) The standard widths of a transition area are set forth at (d)1 and 2 below. These standard widths shall only be modified through the issuance of a transition area waiver. The types of transition area waivers are listed at N.J.A.C. 7:7A-8.1(a).
>
> 1. The standard width of a transition area adjacent to a freshwater wetland of exceptional resource value shall be 150 feet.
> 2. The standard width of a transition area adjacent to a freshwater wetland of intermediate resource value shall be 50 feet.
>
> [N.J.A.C. 7:7A-3.3(d).]

Transition area waivers, if approved, may reduce the 150-foot transition area to 75 feet under certain conditions:

> (i) With the exception of a transition area waiver for access approved in accordance with (a)5 above or a transition area waiver meeting the requirements for an individual permit at N.J.A.C. 7:7A-8.3(g), a transition area waiver shall not be approved to allow encroachment within 75 feet of an exceptional resource value wetland.
>
> [N.J.A.C. 7:7A-3.3(d)].

DRP did not demonstrate that its special activity transition area waiver would meet the standards for a freshwater wetlands individual permit because there are feasible alternatives and the activity would jeopardize or adversely modify a present or documented habitat for threatened or endangered species.

Therefore, the proposed activity does not qualify for a special activity transition waiver and is subject to a standard 150-foot transition area or 75 feet at a minimum with an approved averaging plan transition area waiver. However, DRP has not indicated any intention to maintain a 150-foot transition area for these exceptional resource value wetlands, nor have they indicated any intention to pursue a waiver for a 75-foot transition area. In fact, the transition area waiver section of the checklist was left blank in the application. (0107a).

DRP also states that "the purchase of wetland mitigation bank credits is the most appropriate mitigation for the proposed permanent wetlands impacts associated with the Project." (0183a). However, mitigation bank credits are a contingency utilized when

onsite mitigation is not feasible. Under their Alternatives Analysis, DRP has not demonstrated that onsite mitigation is not feasible. The Freshwater Wetland Protection Act Rules provide that onsite mitigation must be prioritized:

> (a) This section governs the mitigation alternative required and the location of mitigation in relation to the disturbance for a transition area impact in accordance with N.J.A.C. 7:7A-8.3(g) (special activity transition area waivers based upon individual permit criteria). Mitigation for a transition area disturbance shall be performed through restoration or enhancement of transition areas carried out on the site of the disturbance to the maximum extent feasible.
>
> (b) If onsite transition area restoration or enhancement is not feasible, mitigation shall be performed through:
>
> 1. The purchase of credits from a mitigation bank with a service area that includes the area of disturbance; or
> 2. Offsite restoration or enhancement in the same watershed management area as the disturbance.
>
> [N.J.A.C. 7:7A-11.11.]

Not only are wetland mitigation bank credits inappropriate in this case, but also onsite restoration efforts should focus on the osprey nesting habitat that was previously destroyed by DRP. In accordance with the Waterfront Development Individual Permit issued for the construction of the Marine Terminal (DLUR No. 0807-16-0001.2), osprey nests within the footprint of the terminal were removed, structures within the Marine Terminal that could support

nests were made unattractive to nesting, and five nesting platforms were installed on the property outside the main Marine Terminal area. According to DRP:

> In February 2018, osprey activity was observed near the nest box adjacent to the western tide gate on the Property. However, osprey never established a nest at this location and appeared to stop using it as a perching/resting location. A likely explanation for this is the increased presence and occurrence of eagle activity observed in the vicinity of Monds Island shortly after the installation of the nest box.
>
> (0367a).

The notion that ospreys have not utilized the nest box due to the presence of bald eagles is unfounded and highly unlikely. While both species can be territorial, ospreys and bald eagles have completely different nesting habits and preferences. (0620a). Ospreys are conditioned to the presence of bald eagles because they have coexisted with them at the site long before DRP's habitat destruction. (0620a – 0621a). It is clear that the alteration of the original habitat and the disturbance from the construction activity from DRP is what drove the ospreys away. (0621a). The ospreys built their original, but since-removed, nests in that location for a reason. (0621a). DEP's approval of the Joint Application was thus plainly unreasonable because the agency did not reach a conclusion to the outstanding issue of why the ospreys

have not utilized the man-made nesting boxes, which were intended to be a viable replacement for the natural nesting habitat.

The application also mentions that potential vernal pool habitat was identified (Vernal Pool Habitat ID 1060), but DRP never addressed potential impacts to vernal pool habitat from the project, nor did it characterize the size of the habitat area. (0621a). The DEP vernal pool mapping shows that Vernal Pool Habitat ID 1060 is extensive and borders the project area. (0621a).

Together, DEP's decision to approve the Permits was arbitrary, capricious, unreasonable, unsupported by the record, and contrary to law because DRP's Rail Loop proposes unacceptable adverse impacts to threatened and endangered species and precious wetland areas.

V. CONCLUSION

For the foregoing reasons, Appellants Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper, respectfully request that this Court reverse DEP's decisions to issue the Permits authorizing the construction of the rail loop infrastructure.

Respectfully submitted,

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