

BEFORE THE DELAWARE RIVER BASIN COMMISSION

In Re: Request of the Delaware Riverkeeper and the)
Delaware Riverkeeper Network for a Hearing to)
Review Commission Approval of Docket D-2017-)
009-2 for Delaware River Partners, LLC (NJ))
Gibbstown Logistics Center Dock 2)

**REQUEST FOR HEARING OF THE DELAWARE RIVERKEEPER AND THE
DELAWARE RIVERKEEPER NETWORK UNDER ARTICLE 6 OF THE
COMMISSION’S RULES OF PRACTICE AND PROCEDURE**

Pursuant to Section 2.6.1.C of Article 6 of the Commission’s Rules of Practice and Procedure (“RPP”), the Delaware Riverkeeper and the Delaware Riverkeeper Network (collectively, “DRN”) respectfully request a hearing to review the Commission’s decision to approve Docket D-2017-009-2 (“Decision”) for the Delaware River Partners, LLC (“DRP”) Gibbstown Logistics Center Dock 2 project (“Dock 2 Project”). The Commission approved the Dock 2 Project at its regularly-scheduled business meeting on June 12, 2019. This hearing request is timely submitted within 30 days of the Commission’s Decision.

DRN submitted comment letters to the Commission dated May 28, 2019, June 3, 2019, and June 7, 2019. DRN also was present at the Commission’s June 6, 2019 Hearing on draft Docket D-2017-009-2 and at the Commission’s June 12, 2019 business meeting. DRN presented testimony and comment at the June 6, 2019 Hearing and made public comment at the June 12 2019 informal public comment period. In its letters and testimony/comment, DRN urged the Commission either to: 1) disapprove the draft docket; or 2) withdraw the draft docket until a comprehensive analysis of potential impacts, including those reviewed by other agencies, was complete. The Commission’s Decision effectively denied these requests.

Under Article 6 of the RPP, “any person seeking a hearing to review the . . . decision of . . . the Commission . . . may request a hearing within thirty (30) days” of the Decision. Article 6 governs contested cases, including cases arising under Article 3 of the RPP (pertaining to project review under Section 3.8 of the Compact). A contested case is “a proceeding in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are involved” and includes docket decisions. RPP Article 6, Section 2.6.1.B; Docket No. D-2017-009-2, Section C.14.

The Dock 2 Project – both alone and in conjunction with the previously-approved proposed Gibbstown Logistics Center/Dock 1 project (“GLC/Dock 1 Project”) – will substantially affect water resources of the Basin, and came before the Commission under Article 3 of the RPP. The Decision authorizes a project with substantial effects on water resources of the Basin and that will substantially conflict with or impair the Comprehensive Plan. The Decision also, as further explained in this letter, adversely impacts DRN, including its members. Therefore, this is a contested case.

I. Specific Action or Decision for Which a Hearing is Requested

The specific action or decision for which a hearing is requested is the Commission's Decision to approve the Dock 2 Project. The Dock 2 Project is a substantial expansion of the previously-approved proposed GLC/Dock 1 Project under Docket No. D-2017-009-1. The Dock 2 Project entails, *inter alia*, a new dock, two more deep water ship berths, associated infrastructure, and an additional 45 acre area of proposed dredging – almost *double* the amount already proposed and approved (27 acre area) under Docket No. D-2017-009-1.

II. Date of the Action or Decision

The Commission issued the Decision on June 12, 2019. This hearing request is timely because it is made within 30 days of the Decision, as required by RPP Article 6, Section 2.6.1.C.

III. The Interests of the Delaware Riverkeeper and the Delaware Riverkeeper Network

The Decision on which DRN requests a hearing is of strong interest to the Delaware Riverkeeper, and to DRN and its members because of the potential environmental, health, and safety impacts that the Dock 2 Project, including in conjunction with the GLC/Dock 1 Project, is likely to have on the Delaware River and associated natural resources and local communities. These interests and impacts are further set forth below.

The Delaware Riverkeeper is a full-time privately-funded ombudsman who is responsible for the protection of the waterways in the Delaware River Watershed. The Delaware Riverkeeper advocates for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of the Delaware River, its tributaries and habitats. The Delaware Riverkeeper regularly visits the Delaware River for personal and professional reasons and her use and enjoyment of the River will be adversely affected by any change in water quality due to the Dock 2 Project and the associated natural gas infrastructure that the proposed Gibbstown facility in its entirety facilitates. Ms. van Rossum recreates throughout the watershed, including in areas impacted by fracked gas infrastructure development. The proposed Gibbstown facility only helps to expand the harmful impacts from such development.

Ms. van Rossum boats along the Delaware Estuary, including in the reaches impacted by the Dock 2 and GLC/Dock 1 Projects, for personal and professional reasons, including to recreationally enjoy the Delaware Estuary, its bird life, and its aquatic life. Ms. van Rossum has been personally and professionally active in seeking endangered species and critical habitat protection of the Atlantic sturgeon of the Delaware. The Delaware River's genetically-unique population of Atlantic sturgeon is of particular concern to Ms. van Rossum. She is personally interested in the protection of this species, has written about the species, speaks to its current status and the many threats it faces, and, in her professional role, has ensured an organizational focus on its protection. Ms. van Rossum has been personally and professionally active in protecting the Delaware Estuary, including in the areas to be impacted by the Dock 2 Project. For example, she led the effort to oppose the Delaware River deepening project, to respond to the Athos I oil spill, and she serves on multiple agency committees focused on waterway protection, including the U.S. Coast Guard's Area Committee and the DRBC's Water Quality Advisory

Committee. She will be adversely affected by any changed public perception regarding the health, quality, and safety of the Delaware Estuary due to the construction and operation of the proposed project and the direct and indirect activities it will engender.

The Delaware Riverkeeper Network is a non-profit organization established in 1988 to protect and restore the Delaware River, its tributaries and habitats. To achieve these goals, DRN organizes and implements streambank restorations, a volunteer monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and litigation throughout the entire Delaware River watershed. DRN is a membership organization with over 20,000 members and over 18,000 households throughout the watershed and beyond. Thus, the protection and improvement of water quality in the watershed is germane to DRN's mission and purpose.

DRN has a demonstrated interest in harms from fracked gas infrastructure throughout the Basin, including transportation and export projects such as the proposed Gibbstown facility. DRN has ongoing legal activities regarding these types of projects at the local, state, and federal levels. It is involved in the Wayne Land Mineral Group litigation and is helping to defend the Commission's ability to address impacts from natural gas development on water resources of the Basin.

DRN has also been extensively involved in advocating for the area of the River in which the proposed Gibbstown facility would be located. It was involved in advocating against DRP's GLC/Dock 1 Project. DRN also has participated in matters related to Chemours/DuPont's remediation of contaminated sites. It has actively supported state initiatives to provide funds for remediation of polluted locations in the Delaware River Watershed through natural resource damage processes and other initiatives to clean up industrial contamination at many sites, including in Greenwich Township where the proposed facility would be located, Paulsboro, and other neighboring municipalities in Gloucester County. It fought the Delaware River deepening project for many of the same reasons set forth herein, including the harmful impacts on endangered Atlantic sturgeon and shortnose sturgeon species and water quality in the River, and DRN continues to monitor the progress and impacts of the deepening project including associated dredging and blasting activities. DRN is active in seeking better protections for water quality and aquatic life impacted by the Salem Nuclear Generating Station and is actively engaged in litigation to secure needed protections. DRN has an active monitoring initiative focused on securing volunteer response to catastrophic oil spills and other harmful events in the Delaware Estuary and the watershed. For example, DRN led the volunteer response to the Athos I oil spill and continues to be active with the U.S. Coast Guard on how to best engage volunteers in waterway response actions.

DRN has petitioned the Commission for the protection of fish populations of the Delaware Estuary through recognition of the existing fish propagation in Estuary waters and the setting of oxygen standards necessary to support fish populations, including propagation and migration. It also worked cooperatively with the U.S. Coast Guard as a member of the Sector Delaware Bay Area Committee to proactively safeguard the water quality and safety of the Delaware Estuary and Bay. DRN serves as a member of the Commission's Toxics Advisory Committee. DRN has advocated and participated in years of public processes to clean up per-

and poly-fluoroalkyl substances (“PFAS”) contamination of ground and surface waters of the Delaware River Watershed, including in Greenwich Township and neighboring municipalities in Gloucester County and Salem County and has sought protective standards that would remove PFAS from drinking water and other environmental media.

DRN also has an interest in supporting the Commission’s regulatory authority over projects like the Dock 2 Project on behalf of its members, many of whom live in Delaware Estuary communities and the estuary portion of the watershed, or use the area for recreational, professional, or aesthetic use. DRN members boat, birdwatch, fish, hike, and participate in other recreational activities throughout the watershed, including the Delaware Estuary and those reaches that would be impacted by this project. DRN members will be adversely affected by the water quality, health, safety, species impacts, and river impacts that will result from construction and operation of an liquefied natural gas (“LNG”) export facility at this site, as well as from the associated public perception of a waterway that is less healthy and less safe.

IV. Summary Statement of Basis for Objecting to and Seeking Review of the Commission’s Decision

Below is a summary of DRN’s bases for objecting to and seeking review of the Commission’s Decision. DRN respectfully incorporates by reference its comment letters and hearing/meeting testimony and comment as additional support for its request. The Commission’s Decision violates Section 3.8 of the Compact, Commission project review regulations, and the Commission’s Water Code. The Commission also rendered its Decision despite inadequate notice to the public of the true nature and scope of the Dock 2 Project, particularly as to LNG.

A. Violation of Section 3.8 of the Compact, Commission Project Review Regulations, and the Commission’s Water Code

The Commission’s Decision violates Section 3.8 of the Compact and certain Commission project review regulations because, *inter alia*, the Commission approved the Dock 2 Project without full information on impacts on water resources to the Basin, and thus could not actually determine whether the Dock 2 Project would substantially impair or conflict with the Comprehensive Plan. The Decision fails to address the full scope of impacts from the Dock 2 Project on water resources of the Basin. Also, the Dock 2 Project is a substantial expansion of what the Commission already approved for the GLC/Dock 1 Project. However, the Commission failed to address cumulative impacts of the GLC/Dock 1 and Dock 2 Projects together, let alone cumulative impacts of the Dock 2 Project alone. Additional bases for violations include: the Commission approval of the Dock 2 Project despite DRP’s violations of GLC/Dock 1 Project conditions (including conditions that would provide information to the Commission and protect water resources of the Basin); a lack of evidence to support compliance with Commission Zone 4 Water Quality Standards under the Commission’s Water Code; and the Decision fails to adequately address impacts for which it did have information, and in turn permits a project that substantially conflicts with and/or impairs the Comprehensive Plan.

1. Failure to Address Full Scope of Impacts to Water Resources of the Basin, Including Cumulative Impacts from Entire Gibbstown Facility

The Decision fails to account for the full scope of the Dock 2 Project's impacts on water resources of the Basin, and likewise fails to address cumulative impacts when both the GLC/Dock 1 Project and the Dock 2 Project are viewed as a whole.

The Compact states:

3.8 Referral and Review. *No project having a substantial effect on the water resources of the basin* shall hereafter be undertaken by any person, corporation or governmental authority *unless it shall have been first submitted to and approved by the commission*, subject to the provisions of Sections 3.3 and 3.5. The commission *shall approve a project* whenever it finds and determines that such project *would not substantially impair or conflict with the comprehensive plan* and may modify and approve as modified, *or may disapprove any such project whenever it finds and determines that the project would substantially impair or conflict with such plan*. The commission shall provide by regulation for the procedure of submission, review and consideration of projects, and for its determinations pursuant to this section. Any determination of the commission hereunder shall be subject to judicial review in any court of competent jurisdiction.

DRBC Compact, Section 3.8 (emph. added).

“Water resources’ shall include water *and related natural resources* in, on, under, or above the ground, including related uses of land, which are subject to beneficial use, ownership or control.” Compact, Section 1.2(i) (emph. added). Thus, aquatic life, wetlands, and aquatic vegetation (among other related natural resources) all are among the water resources of the Basin the Commission must consider when reviewing projects under Section 3.8 of the Compact.

The Commission, logically, cannot determine if a project with “a substantial effect on the water resources of the basin” would “substantially impair or conflict with the comprehensive plan” without full information on and analysis of the project’s impacts, including cumulative impacts. To make a decision in the absence of full information, as the Commission did here, violates one of the Commission’s core obligations under the Compact.

The Commission’s project review regulations, which help implement Section 3.8, reinforce that the Commission needs complete information from an applicant in order to fulfill its obligations under Section 3.8 of the Compact. 18 C.F.R. § 401.42.

For example, Commission regulations state:

Where a project does not require approval by any other State or

Federal agency, *or where such approval is required but an Administrative Agreement is not in force*, the project shall be submitted *directly* to the Commission for review and determination of compatibility with the Comprehensive Plan, in such form of application, with such supporting documentation, as the Executive Director may reasonably require for the administration of the provisions of the Compact. *These shall include without limitation thereto:*

(a) Exhibits to accompany application. The application shall be accompanied by the following exhibits:

(1) *Abstract of proceedings authorizing project*, where applicable;

(5) Written report of the applicant's engineer showing the *proposed plan of operation* of a structural project;

18 C.F.R. § 401.39(a)(1) and (5) (emph. added).

This imposes a two-fold duty upon DRP: 1) provide all approvals authorizing the project when such approvals are needed; and 2) provide information on the operation of the proposed project. DRP failed in both respects.

As to Section 401.39(a)(1), DRP could not provide all required approvals authorizing the project because it has not obtained them all. Indeed, it has never even obtained Federal Energy Regulatory Commission ("FERC") approval for the *GLC/Dock 1 project* that is already under construction and, according to Coast Guard documentation, is targeted for LNG activity,¹ in part thanks to the Commission's prior approval. DRP still requires at least the following for the Dock 2 Project:

- U.S. Army Corps of Engineers ("USACE") approval;
- New Jersey Coastal Zone Management Act ("CZMA") consistency determination;
- New Jersey Waterfront Development Permit/Section 401 Water Quality Certificate;
- Review under the National Environmental Policy Act ("NEPA") due to federal agency

¹ Under the Natural Gas Act ("NGA") and FERC regulations, any entity constructing an LNG terminal or who otherwise plans "to site, construct, or operate facilities which are to be used for the export of natural gas from the United States to a foreign country" must apply for FERC approval. 18 C.F.R. § 153.5(a); 15 U.S.C. § 717b(a), (e). An "LNG terminal" includes "*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 . . . *exported* to a foreign country from the United States, or transported in interstate commerce by waterborne vessel" 15 U.S.C. § 717a(11); *see also* 18 C.F.R. § 153.2(d). DRP has clearly stated, since at least 2017, that it plans to export LNG from its proposed Gibbstown facility. However, it has never sought FERC approval.

involvement;

- FERC approval (as of this date, DRP has not even pre-filed with FERC, which is required under FERC regulations for LNG terminals. 18 C.F.R. § 157.21(a));
- US Coast Guard (“USCG”) Letter of Recommendation; and
- Those permits listed as “pending” in the Decision, pp.7-8.

As for Section 401.39(a)(5), DRP only provided a limited amount of information to the Commission on its site operations, and only did so after the Commission specifically asked for the information after receiving DRN’s comment letters. Further, the plans DRN obtained from the Commission do not even show the proposed Dock 2 operations. Even worse, DRP *specifically omitted* from these plans *any* information on where LNG operations are proposed for the site and/or how LNG operations could and/or would impact water resources. This notably contrasts to what DRP submitted to the U.S. Coast Guard *in 2017*. DRP is deliberately not providing the Commission with full information, and the Commission effectively allowed this to continue by approving the Project.

As DRN already noted in its May 28, 2019 letter to the Commission, DRP’s omission of its LNG operations in its application materials is a significant informational gap. As detailed in DRN’s prior letter, LNG operations pose specific and adverse risks to surrounding neighborhoods and the local environment. The inclusion of LNG operations is a significant aspect of the proposed project that must receive close review. Understanding where and how LNG (and liquefied hazardous gas (“LHG”)) operations are to be handled, transferred, and stored (in the case of LHG) are important for understanding what contamination risks there are to water resources, whether it be from truck unloading or some other transfer method. The frequency of ships in and out of the proposed facility also affects the amount of ballast water that has to be handled and the volume and size of ships has implications for ship strikes on species such as the endangered Atlantic sturgeon. DRP has already segmented its operations at Gibbstown into different projects, even though they all support each other. Continuing to permit such segmentation masks the environmental and health harms of DRP’s operations as a whole. The Commission’s claims that it “is not reviewing or approving the cargo that moves through the marine terminal and logistics facility or the operation of that facility,”² ignores the fact that the operation of such facility and its cargo pose risks to water resources subject to the Commission’s review under Section 3.8 of the Compact. The Commission’s claim conflicts with its approach to protecting water resources of the Basin through review of land use activities that impact such waters.³ It also conflicts with the Commission’s regulations that require an applicant to submit a written engineer report “showing the proposed plan of operation of a structural project.” 18 C.F.R. § 401.39(a)(5).

² June 6, 2019 Letter from Steven J. Tambini, Commission Executive Director to Maya van Rossum, Delaware Riverkeeper (“Tambini Letter”), page 2.

³ See, e.g., 18 C.F.R. § 401.35(b)(6), (b)(10), (b)(18); Water Resources Plan for the Delaware River Basin, September 2004, at pp.37-38, 42-43, https://www.state.nj.us/drbc/library/documents/BasinPlan_Sept04.pdf; <https://www.state.nj.us/drbc/programs/natural/>

The Commission claims that it “routinely approves projects either before state and federal agencies have acted or afterward, generally based on the preferences of the host state under the particular circumstances.”⁴ This appears to be based on a misapplication of 18 C.F.R. § 401.37, which only pertains to the timing of project review relative to state or federal approvals *when an Administrative Agreement is applicable to the project*. There is no Administrative Agreement in force with New Jersey or federal government agencies as to this project, and thus Section 401.37 does not apply. Section 401.39 applies instead.

The Commission relies on a claim that other agencies address some of the concerns DRN and others raised, and that Section 401.39(a)(1) does not require obtaining every approval before the Commission acts.⁵ The Commission’s Decision and its comment/response document further confirms that the Commission intends to rely on other agency reviews and approvals.

First, Section 401.39(a)(1) simply is not written to say that an applicant need not have every approval. Second and more importantly, there is a difference between the Commission relying on other agencies’ analyses to avoid duplicating efforts, and the Commission approving a project without those other agencies’ analyses having been completed. The Commission mistakenly maintains it can rely on other agencies while not also waiting for their analyses. This contradicts the plain language of its regulations and Section 3.8 of the Compact. Relying on other agencies’ analyses might be valid – *so long as the Commission actually waits for those analyses to be completed*. Without them, the Commission lacks necessary information to determine if a project would substantially impair or conflict with the Comprehensive Plan, in contravention of Section 3.8 of the Compact. The Commission in turn is simply making a guess at whether a project is going to comply with Section 3.8.

DRP’s two-part project here is a good example of why waiting for other agency approvals is important. The GLC/Dock 1 Project, which the Commission approved in 2017, is already well underway. DRP *still has never applied for Department of Energy export or FERC approval*. There are aspects of the GLC/Dock 1 Project that have never been reviewed by *any* agency.⁶ Now DRP wants to substantially expand what the Commission already approved, and the Commission has greenlighted it – despite the continued lack of review by necessary agencies as to impacts of this project on water resources of the Basin (including cumulative impacts, and endangered species), in addition to the health, safety, and welfare of residents surrounding the proposed facility. The Compact specifically states:

The water resources of the basin are functionally inter-related, and the uses of these resources are interdependent. *A single*

⁴ Tambini Letter, p.1.

⁵ Tambini Letter, p.1.

⁶ There are additional information gaps because of DRP’s noncompliance with the Commission’s conditions on its decision approving the GLC/Dock 1 Project. These impact the Dock 2 Project, and are discussed further in the next section.

administrative agency is therefore essential for effective and economical direction, supervision and coordination of efforts and programs of federal, state and local governments and of private enterprise.

Compact, Article 1.3(c) (emph. added). The Decision, like the 2017 one, does not accomplish this.

The Commission should be making decisions in a way that incorporates the work of other agencies into its review and that looks for any remaining gaps that must be addressed to answer whether a project would substantially conflict with or impair the Comprehensive Plan due to impacts on water resources of the Basin. For example, here, no entity has yet addressed state threatened and endangered freshwater mussels due to DRP's failure to flag their presence. The Commission in its role should address that gap. The Commission failed to do that, leaving the matter instead to other agencies – even though no agency is currently addressing the matter. (Comment/Response Document, p.7). Further, until the agencies engaged in Section 7 consultation under the Endangered Species Act make their determinations, the Commission has no basis on which to find that there is not going to be an unpermitted take of endangered and threatened species.

Lastly on this issue, DRP has disputed FERC's jurisdiction over the Gibbstown facility. The Commission – regardless of FERC – has an obligation under the Compact to ensure that the proposed project does not significantly interfere with or impair the Comprehensive Plan through harmful effects on water resources of the Basin. If FERC ultimately plays *no* role in overseeing the development of the site, the Commission's role is even more important because it would be the only agency to step in and protect the water resources of the Basin and review DRP's proposed facility (both GLC/Dock 1 and Dock 2) *as a whole* – rather than in segmented pieces or impacts as other agencies may do.

The Commission made its Decision despite a clear lack of information and analysis on the impacts of the Dock 2 Project, and in the absence of even full information on the GLC/Dock 1 Project (as further detailed in the next section). Without full information on impacts, including its cumulative impacts when analyzed together with the GLC/Dock 1 Project,⁷ the Commission simply could not and did not make an informed determination under Section 3.8 of the Compact about whether the Project would substantially impair or conflict with the Comprehensive Plan. Its Decision thus violates the Compact and its own regulations. This situation is compounded by the issues discussed further below.

2. Approval Despite Clear Non-Compliance with 2017 Docket Conditions for GLC/Dock 1 Project

The Decision is also improper and violates Section 3.8 of the Compact because the

⁷ Regardless of whether that information is expressly required by regulation (as it is here), or is simply necessary or important to understanding impacts on water resources of the Basin, including aquatic life.

Commission approved the Dock 2 Project when DRP was already violating conditions of the GLC/Dock 1 Project, including conditions that are necessary to protect water resources of the Basin, and to provide the Commission with information. That missing information would have assisted the Commission in its Decision, but it approved the Dock 2 Project without it.

a. Failure to Obtain NJPDES permit – Docket No. D-2017-009-1, Section C.I.I; Section B (re: PCBs)

In its 2017 approval, the Commission stated:

The former DuPont Repauno facility was . . . identified [in 2003] as one of the largest PCB point sources to the Delaware Estuary. Furthermore, a review of the proposed dredging area adjacent to the shoreline exhibits detectable concentrations of PCBs ranging from < 1ppm to 11 ppm, suggesting that the site may have previously contributed to PCB contamination in the tidal river.

(Docket No. D-2017-009-1, Section B (re: PCBs), p.5). The Commission further stated:

The docket holder is required to apply for and obtain a New Jersey Pollutant Discharge Elimination System (NJPDES) permit from the NJDEP for discharges associated with the site redevelopment. In accordance with the NJPDES permit when issued, the docket holder will be required to perform an investigation of the site to assess the disposition of stormwater and the flow paths for individual stormwater outfalls either directly or indirectly to the Delaware River in order to develop a PCB stormwater sampling plan. Upon evaluation of the sampling results by the NJDEP in consultation with the DRBC, DRP may be required to develop and implement a separate PMP for PCBs (Condition C.I.I.) to ensure that PCB load reductions achieved by DuPont and Chemours are maintained or enhanced by the planned re-development.

(Id.) To this end, the Commission included Condition C.I.I. in the 2017 approval.

DRP has never complied with this condition, and it appears that it does not intend to. For reasons currently unknown, the New Jersey Department of Environmental Protection (“NJDEP”) is, according to DRP, not requiring the NJPDES permit contemplated by Condition C.I.I. As of May 14, 2019, DRP’s submission for the Dock 2 Project listed the NJPDES permit as “pending.”⁸ The following day, DRP submitted a revised permit list showing the NJDPES permit as “not required” and stated that DRP “determined that the project will not require a

⁸ May 14, 2019 Email from David Kovach, P.G., Commission Project Review Manager, to Paul Hague, Gibbons Law.

NJPDES permit,” despite the Commission’s 2017 approval that required the permit.⁹ Even worse, the NJDEP stormwater permit issued to DRP *predates* the Commission’s 2017 approval, was not even provided to the Commission for its review in 2017, and requires nothing pertaining to PCBs.

DRP has been developing the site under the 2017 approval, without the protective measures the Commission required in Condition C.I.1. In its comment/response document, the Commission attempts to justify this by claiming that all work on the Dock 1 part of the project has to be done *before* any sampling and analysis plan. (Page 10). This is illogical from a water quality protection perspective. Dock 1 project work is actively disturbing site soils, and that material is being carried by stormwater into nearby water resources. Site analysis should have been done ahead of time. Further, the Commission’s assertion is not reflected in or consistent with Condition C.I.1. The Commission then claims that if no NJDPES permit is forthcoming (which it apparently is not), the Commission will require action by itself. (Page 10). The Commission failed to do so here.

The Commission has now approved *additional* disturbance on land and in water known to be contaminated with toxic pollutants. It has done so even though it is highly likely that DRP’s development has disturbed contaminated sediments due to DRP’s lack of compliance with Condition C.I.1. The proper response in this situation is to reject the facility expansion, or, at a minimum, put it on hold until the Commission can determine what NJDEP’s position is on the permitting situation and what the Commission must do to address what NJDEP is not. Instead, the Commission approved the project expansion.

b. Failure to Provide Information on Operations - Docket No. D-2017-009-1, Section C.I.c.

The Commission’s 2017 approval for the GLC/Dock 1 Project required:

The docket holder is required to submit detailed project site plans to the DRBC for the remainder of the work not submitted with the DRBC application, including the proposed: automobile import area / parking lot; processing facilities; perishables, ***bulk-liquid***, and bulk cargo ***handling areas***; warehouses and associated buildings; stormwater management system (including stormwater outfalls); and associated infrastructure.

(Docket No. D-2017-009-1, Section C.I.c. (Conditions) (emph. added)). DRN commented on the 2017 draft docket, expressing concern about the incompleteness of the application materials. The Commission did not heed these concerns in 2017, and instead inserted the above-referenced condition.

Had the Commission insisted on the missing information in 2017, it would have had a far

⁹ May 15, 2019 Email from Paul Hauge, Gibbons Law, to David Kovach, P.G., Commission Project Review Manager.

clearer picture of the site's proposed activities well in advance of this most recent approval. Indeed, the 2017 docket for the GLC/Dock 1 Project fails to identify that DRP required U.S. Coast Guard and FERC approval.¹⁰ A November 16, 2017 letter from DRP to the U.S. Coast Guard, which DRN recently obtained, *specifically* displays a site plan with LHG and LNG transloading facilities, along with liquid storage. The letter repeatedly discusses DRP's intent to export LNG, and details DRP's intent to store LHG onsite, and potentially other petroleum and crude products.

Instead, only after DRN pointed out to the Commission that LNG was proposed for this site did the Commission contact DRP for more information.¹¹ DRP has repeatedly failed to provide crucial site and operational information, on its own accord, to the Commission, despite the express condition in the Commission's 2017 approval that requires it do so. However, DRP was well aware of its intended plans for the site and in fact freely provided such site and operational information to the U.S. Coast Guard.¹²

The Commission maintains, in its comment/response document, that DRP has fulfilled these conditions via plans DRP submitted to the Commission. While the Commission claims that DRN has reviewed such plans, the plans DRN obtained from the Commission do not show the proposed Dock 2 operations anywhere. Further, those plans *specifically omit any* information on where LNG operations are proposed for the site. This notably contrasts to what DRP submitted to the U.S. Coast Guard *in 2017*. The fact remains that DRP has not complied with Condition C.I.c. and will continue to fail to do so if the Commission continues to allow DRP to provide it with incomplete site plans that hide the proposed LNG operations.

DRP's course of conduct over the last few years demonstrates a lack of forthrightness, a potential lack of desire to comply properly with the Commission's approval, and an inability to trust DRP's representations. Despite all this, and despite the continued lack of clarity from DRP about its operations and DRP's continued noncompliance with Condition C.I.c., the Commission's Decision approved a substantial expansion of DRP's project.

¹⁰ Of course, including the U.S. Coast Guard and FERC in the list of permits DRP submitted in its application to the Commission would have tipped someone off that this project involved LNG and/or LHG exports.

¹¹ June 5, 2019 Email from David Kovach, P.G., Commission Project Review Manager, to Paul Hauge, Gibbons Law, enclosing DRN June 3, 2019 Comment Letter. ("Kovach Email").

¹² Similar to the Commission, only *after* DRN alerted the Army Corps to the intended LNG uses of the site did the Army Corps inquire with DRP and itself receive confirmation of that intended use. This further confirms that the Commission's reliance on other agencies for ensuring full information and full review is misplaced. If DRN, a member of the public, was the primary notification source to *two* major reviewing agencies of the intended priority use of the site, there is a substantial question raised about what else has DRP failed to disclose.

3. Lack of Evidence to Support Compliance with Commission Zone 4 Water Quality Standards, Including Toxic Pollutant Stream Quality Standards under Water Code Section 3.30.4.C.12.

The Commission's Decision erroneously concludes, "The quality of Basin waters shall be maintained in a safe and satisfactory condition for wildlife, fish and other aquatic life." (Decision, p.7). The only apparent bases for this claim are: 1) the proposed dredging and wharf/berth construction plans; and 2) yet-to-be obtained agency approvals pertaining to endangered Atlantic and shortnose sturgeon. Id. The Commission's Decision also appears to rely on DRP's March 2019 sampling and analysis plan. (Decision, p.3; Comment/Response Document, p.3).

There is a lack of evidence to support the Commission's conclusion. First, as already noted, the Commission cannot simply make a conclusion in the absence of another agency's analysis. While there may be instances in which Commission may validly defer to analyses already completed by such agencies, the purpose of having an interstate Commission is to have a final check to ensure protection of interstate waters. By approving this project before other agencies have complete their analyses, the Commission improperly relinquished that role and duty. Second, as described above, DRP has failed to comply with important water quality docket conditions relative to the Commission's GLC/Dock 1 approval. See also Water Code, Section 4.30.9. Third, the Decision fails to extend those water quality docket conditions to the now-approved Dock 2 Project.

Fourth, there is known historic fill onsite, which DRP acknowledges and NJDEP mapping confirms. The composition of that fill is unknown. Thus, there could not have been any analysis or determination of the risks to water resources of the Basin from disturbance of that historic fill from site construction.

Fifth, DRP's March 2019 sampling ***failed to include*** constituents known to be, or likely to have been, discharged from the contaminated DuPont Chemours site.¹³ DRP did no sampling for any volatile organic compounds ("VOCs") and did no sampling for any of the following, known to be present at the site:¹⁴

- Benzene
- Nitrobenzene
- Aniline
- Sodium nitrite
- Nitric acid

¹³ DRP also failed to include results of sampling that DRP conducted, but for which results had not yet arrived. (DRP Dredged Material Maintenance Plan, pp.6-7).

¹⁴ See, e.g. NJ Dep't of Env't'l Prot., et al. v. E.I. Du Pont de Nemours, et al., Dkt. No. GLO-L-000388-19, Complaint, March 27, 2019, https://www.nj.gov/oag/newsreleases19/Repauno_Filed-Complaint_and_Jury-Demand.pdf ("NJ AG Lawsuit"); see also DRN's Comment Letters and Testimony/Comment to the Commission.

- Hexachlorocyclohexane (“BHC”)
- 2,4-dinitrotoluene (“DNT”)
- Petroleum compounds
- Nitrosylsulfuric acid
- Tetrachloroethylene (“TCE”)
- Dimethyl Terephthalate (“PDMT/DMT”)

Thus, DRP’s sampling of the dredging and wharf/berth construction areas, where sediments will most likely be stirred up and released into the surrounding water, fails to inform the Commission on the potential water quality impacts of DRP’s activities. The Commission lacks sufficient information to determine that DRP’s project will comply with the Toxic Pollutant Stream Quality Standards for Zone 4 of the River under Section 3.30.4.C.12 of the Water Code. Table 4 of the applicable standards includes a limit for nitrobenzene. (Water Code, Section 3.30.2, Table 4). Table 6 contains standards for benzene, TCE, DNT, and polycyclic aromatic hydrocarbons. (Water Code, Section 3.30.2, Table 6).

The Commission also lacks sufficient information to determine that the project will “maintain[] in a safe and satisfactory condition” the quality of Zone 4 waters for, *inter alia*, “passage of anadromous fish,” “maintenance of resident fish and other aquatic life,” wildlife, and secondary contact recreation. (Water Code, Section 3.30.4.B., B.2, B.3.a.).

For example, there is no data or analysis to support a conclusion that the project will not lower dissolved oxygen levels below the Commission’s standards and, in turn, harm the Atlantic sturgeon, shortnose sturgeon, and freshwater mussel species in the River around the site. All of these species, which are already significantly stressed, require dissolved oxygen levels to be at least in line with the DRBC’s standards, if not higher. DRN expressly told the Commission that beds of various critically-imperiled and state-listed freshwater mussel species are present in the River between Chester, PA and Trenton, NJ. DRP failed to address this matter, and the Commission’s Decision ignores the mussel species entirely, not even including requirements to study the project area and its surroundings for the species. DRN extensively explained how dredging activities, particularly of the extent proposed by DRP lower dissolved oxygen levels. Yet the Decision does not even mention dissolved oxygen issues relative to dredging.

Sixth, since the time DRP filed its application with the Commission, the State of New Jersey has sued Chemours over contamination at the site, and has alleged that Chemours’ site remediation representations are not fully accurate and/or have resulted in additional contamination as a result of site remediation efforts.¹⁵ This increases the importance of the Commission having full information on the proposed impacts of DRP’s project, including sampling results that address contaminants known to be at the site, and the short-term, long-term, and cumulative impacts of stirring up, uncovering, or otherwise releasing those contaminants into nearby water resources, including the River.

Lastly on this issue, DRP disclosed to USACE, but apparently not to the Commission,

¹⁵ NJ AG Lawsuit, ¶¶ 104, 105, https://www.nj.gov/oag/newsreleases19/Repauno_Filed-Complaint_and_Jury-Demand.pdf

that “some of the materials dredged from the Delaware River may be used as fill for the development activities on the site.” (USACE Notice No. CENAP-OP-R-2016-0181-39, p.2). The lack of complete testing on the dredged material thus increases the risk of placing contaminated fill onto an already-contaminated site presently in litigation – complicating remediation that has been ongoing for years, and posing an added risk to water resources, particularly in the absence of a NJDPES permit as required by the Commission’s prior approval.

The Commission’s approval of the Dock 2 Project without all the foregoing information, including that required by its prior GLC/Dock 1 approval, must be reversed.

4. The Decision Fails to Adequately Address Impacts for Which it Had Information and Approves a Project That Substantially Conflicts with And/or Impairs the Comprehensive Plan

For those impacts that the Commission had information to review, the Decision fails to adequately account for them and the Decision thus approves a project that substantially conflicts with or impairs the Comprehensive Plan. DRN’s comment letters and testimony provide an extensive explanation underpinning why the Decision is faulty on this basis.

As only one example, the Dock 2 Project proposes an extensive amount of dredging beyond what the GLC/Dock 1 Project already proposed. This adds to the potential resuspension of contaminants into the water column, negatively impacting endangered Atlantic and shortnose sturgeon species and other aquatic life. The increased shipping traffic for which the dredging is proposed means more potential ship strikes on the endangered sturgeon species, whose numbers are critically low, due in part to death by ship strikes with the existing amount of vessel traffic on the River.

B. Inadequate Public Notice

The Commission failed to give adequate public notice of the proposed project by including no specifics about the nature of the proposed operation, including LNG operations, at the site. The draft Docket for the Dock 2 Project had no mention of LNG, leaving the public unaware of the proposal to add LNG exports to the Gibbstown Logistics Center. While the Commission claims that it gave notice based on all that it had from the applicant, this simply abdicates the Commission’s responsibility to the public and its duties under the Compact. As noted throughout this letter, the Commission has allowed DRP to proceed with a course of conduct of not giving the Commission full and necessary information about the project. Any failures by DRP to provide complete information do not relieve the Commission of its duty to provide adequate public notice.

Further, the Commission was aware, prior to the June 6 hearing, that DRP was proposing LNG for this site, and failed to include it in its public notice. As one example, buried in a municipal notification letter in DRP’s application materials¹⁶ is a reference to liquefied natural

¹⁶ While DRN ultimately obtained a copy of this two days prior to the hearing, the Commission did not provide this information to the public at-large via public notice.

gas. Further, prior to the hearing, the Commission *emailed DRP for more information after receiving DRN's letters*. (DRBC Comment/Response Document, p.2).¹⁷ Yet, the Commission did not provide more time for comment, postpone the hearing, or postpone its Decision. As noted earlier, site and operations information on LNG and LHG are important for understanding what contamination risks the project poses to water resources, whether it be contamination from truck unloading or other activities onsite. By failing to notify the public about the site operations except at the last minute during the June 6 hearing, and failing to provide more time for comment prior to a decision, the Commission deprived the public of the opportunity to present cogent concerns, including seeking expert input, about the expansion of DRP's project to the Commission and its threats to water resources.

V. Conclusion

For the foregoing reasons, DRN respectfully requests a hearing, pursuant to RPP Article 6, Section 2.6.1.C, to review the Commission's Decision. Thank you for your prompt attention to this hearing request. Please do not hesitate to contact us with any questions.

Date: July 11, 2019

Respectfully,



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¹⁷ See also Kovach Email.