

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

DELAWARE RIVERKEEPER	:	
NETWORK, et al.,	:	
	:	
Plaintiffs,	:	Civil Action No.
	:	1:20-cv-4824 (NLH) (JS)
v.	:	
	:	Judge Noel L. Hillman
UNITED STATES ARMY CORPS OF	:	
ENGINEERS, et al.,	:	Magistrate Judge Joel Schneider
	:	
Defendants,	:	Notice of Motion
	:	
and	:	Oral Argument Requested
	:	
DELAWARE RIVER PARTNERS,	:	
LLC,	:	
	:	
Intervenor-Defendant.	:	
	:	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1, Plaintiffs Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper, respectfully move this Court for summary judgment on its Amended Complaint as follows:

1. Declaring that the Defendants' action of issuing the Dock 2 Permit was arbitrary, capricious, an abuse of discretion, and in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4370h, and its

implementing regulations, 40 C.F.R. Parts 1500–08 (2019), as well as the U.S. Army Corps of Engineers' ("Corps") own NEPA regulations, 33 C.F.R. pt. 325, app. B, because Defendants failed to prepare a final environmental document and notify the public of its availability prior to issuing the permit, and vacating the Dock 2 Permit and remanding the matter to the Corps for further action;

2. Declaring that the Defendants' action of issuing the Dock 2 Permit was arbitrary, capricious, an abuse of discretion, and in violation of NEPA and its implementing regulations, as well as the Corps' own NEPA regulations, because Defendants failed to prepare an Environmental Impact Statement ("EIS") including the required scope of actions, alternatives, and impacts of the Dock 2 Project, and vacating the Dock 2 Permit and remanding the matter to the Corps to prepare an EIS;

3. Declaring that the Defendants' action of issuing the Dock 2 Permit was arbitrary, capricious, an abuse of discretion, and in violation of the Corps' own permitting regulations, 33 C.F.R. § 325.2(a)(6), because the Statement of Findings was not signed by the District Engineer or a designee prior to issuing the Dock 2 Permit, and vacating the Dock 2 Permit and remanding the matter to the Corps for further action;

4. Declaring that the Defendants' action of issuing the Dock 2 Permit was arbitrary, capricious, an abuse of discretion, and in violation of the Corps' Public Interest Review regulations, 33 C.F.R. § 320.4(a), because it failed to account for

the detrimental effects of greenhouse gas emissions caused by the operation of the Dock 2 Project, and vacating the Dock 2 Permit and remanding the matter to the Corps for a revised public interest review;

5. Declaring that the Defendants' action of issuing the Dock 2 Permit was arbitrary, capricious, an abuse of discretion, and in violation of the Corps' Public Interest Review regulations, 33 C.F.R. § 320.4(a), because it failed to account for the safety risks associated with the transportation and transloading of LNG associated with the Dock 2 Project and vacating the Dock 2 Permit and remanding the matter to the Corps for a revised public interest review;

6. Declaring that the Defendants' action of issuing the Dock 2 Permit was arbitrary, capricious, an abuse of discretion, and in violation of the Clean Air Act, 42 U.S.C. § 7506(c), and its implementing regulations, 40 C.F.R. Part 93, by limiting the scope of emissions to be included in its general conformity applicability analysis, and vacating the Dock 2 Permit and remanding the matter to the Corps for a revised applicability analysis;

7. Enter final judgment in favor of Plaintiffs and against the Defendants for their violations of: the Administrative Procedure Act, 5 U.S.C. §§ 701–706; NEPA; the Corps' Public Interest Review regulations; and the Clean Air Act;

8. Declare Plaintiffs the prevailing parties in this matter, and the government's position not substantially justified, for purposes of the award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412; and

9. For such other and further relief as the Court deems just and proper.

Oral argument is requested pursuant to L. Civ. R. 78.1(b).

In support of this Motion, Plaintiffs rely on the attached brief.

Respectfully submitted,

Dated: October 30, 2020

/s/ Kacy C. Manahan

Kacy C. Manahan, Esq.

N.J. Attorney No. 275122018

DELAWARE RIVERKEEPER NETWORK

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*Counsel for Plaintiffs Delaware Riverkeeper
Network and Maya van Rossum, the
Delaware Riverkeeper*

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I caused a true and correct copy of Plaintiffs' Notice of Motion for Summary Judgment, Proposed Order, Statement of Material Facts Not in Dispute, Brief in Support of Motion for Summary Judgment, Declaration of Maya van Rossum, Declaration of David Steinberg, and Declaration of Jeanne Jordan to be served on all counsel of record through the Court's electronic notification system.

Dated: October 30, 2020

/s/ Kacy C. Manahan

Kacy C. Manahan, Esq.

N.J. Attorney No. 275122018

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and	:	
	:	
DELAWARE RIVER PARTNERS,	:	
LLC,	:	
	:	
Intervenor-Defendant.	:	
	:	

ORDER

AND NOW, this _____ day of _____, 2021, upon consideration of the Motion of Plaintiffs Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper, for Summary Judgment, Defendants' Opposition thereto, Intervenor-Defendant's Opposition thereto, Plaintiffs' Reply, and upon consideration of the memoranda and other materials submitted in support thereof and in opposition thereto,

IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Motion for Summary Judgment is **GRANTED**.

BY THE COURT:

Joel Schneider, U.S.M.J.

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	:	Material Facts Not in Dispute
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DELAWARE RIVER PARTNERS,	:	
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	:	
Intervenor-Defendant.	:	
	:	

**PLAINTIFFS' STATEMENT OF
MATERIAL FACTS NOT IN DISPUTE**

This case arises out of the decision by Defendant the United States Army Corps of Engineers ("Corps") to issue Permit No. CENAP-OP-R-2016-0181-39 (the "Permit") to Intervenor-Defendant Delaware River Partners, LLC ("DRP") pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and Section 404 of the Clean Water Act, 33 U.S.C. § 1344, for the construction of a proposed new docking facility ("Dock 2") and associated dredging in the Delaware River

adjacent to the Gibbstown Logistics Center ("GLC") in Gibbstown, New Jersey. Plaintiffs challenge the Corps' decision as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Plaintiffs respectfully submit that the following facts are undisputed:

1. Delaware Riverkeeper Network ("DRN") is a plaintiff herein. Am. Compl. ¶ 1. DRN is a not-for-profit membership organization established to protect and restore the Delaware River, its tributaries and habitats. Am. Compl. ¶ 8; *see also* Decl. of van Rossum.

2. DRN brought this action on behalf of itself and its members, whose interests are affected by the Dock 2 Project. Am. Compl. ¶¶ 10, 11; *see also* Decl. of van Rossum; Decl. of Steinberg; Decl. of Jordan.

3. Maya van Rossum, in her professional capacity as the Delaware Riverkeeper, is a plaintiff herein. Am. Compl. ¶ 1. The Delaware Riverkeeper, as chief executive officer of DRN, advocates and works for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of the Delaware River, its estuary, bay, tributaries, and habitats. Am. Compl. ¶ 9; *see also* Decl. of van Rossum.

4. The Corps is a defendant herein, and is a direct reporting unit within the Department of the Army. Congress gave the Secretary of the Army, acting

through the Chief of Engineers, the authority to issue permits for certain activities taken or proposed to be taken in waters of the United States. Am. Compl. ¶ 12.

5. Ryan D. McCarthy, in his official capacity as Secretary of the Army, is a defendant herein. Am. Compl. ¶ 13. Secretary McCarthy is responsible for implementing the policies, procedures and requirements of the Corps and applicable statutes and regulations relative to all water resources and Corps-owned or operated properties within the United States of America. Am. Compl. ¶ 13.

6. R.D. James, in his official capacity as Assistant Secretary of the Army for Civil Works, is a defendant herein. Am. Compl. ¶ 14. Assistant Secretary James establishes policy direction and provides supervision of the Department of the Army functions relating to all aspects of the Corps' Civil Works program, including programs for conservation and development of the nation's water and wetland resources, flood control, navigation, and shore protection. Am. Compl. ¶ 14.

7. Lieutenant General Todd T. Semonite, in his official capacity as the Chief of Engineers and Commanding General of the Army Corps, is a defendant herein. Am. Compl. ¶ 15. As Chief of Engineers, Lt. Gen. Semonite advises the Secretary of the Army and other principal officials on matters related to general, combat, and geospatial engineering; construction, real property, public infrastructure and natural resources science and management. Am. Compl. ¶ 15. As the Army Corps Commanding General, he is responsible for more than 32,000 civilian

employees and 700 military personnel who provide project management, construction support and science and engineering expertise in more than 110 countries. Am. Compl. ¶ 15.

8. Major General Jeffrey L. Milhorn, in his official capacity as Commander and Division Engineer of the U.S. Army Corps of Engineers, North Atlantic Division, is a defendant herein. Am. Compl. ¶ 16. Major General Milhorn oversees an annual program of more than \$5 billion to plan, design, and construct projects to support the military, protect America's water resources, mitigate risk from disasters, and restore and enhance the environment. Am. Compl. ¶ 16. He is also responsible for a variety of Division engineering and construction activities for international, federal, state and local governments and agencies in more than a dozen Northeastern states as well as overseas. Am. Compl. ¶ 16.

9. Lieutenant Colonel David C. Park, in his official capacity as the Commander and District Engineer of the U.S. Army Corps of Engineers, Philadelphia District, is a defendant herein. Am. Compl. ¶ 17. Lieutenant Colonel David C. Park leads a 500-person District with missions that include dredging waterways for navigation, protecting communities from flooding and coastal storms, responding to natural and declared disasters, regulating construction in the nation's waters and wetlands, remediating environmental hazards, restoring ecosystems, building facilities for the Army and Air Force, and providing engineering,

contracting and project management services for other government agencies upon request. Am. Compl. ¶ 17.

10. Todd Schaible, in his official capacity as the Chief of the Regulatory Branch of the U.S. Army Corps of Engineers, Philadelphia District, is a defendant herein. Am. Compl. ¶ 18.

11. The Delaware River and Bay is a part of the water resources of the United States overseen and managed by the Philadelphia District of the Corps. Am. Compl. ¶ 19. The District Engineer of the Philadelphia District is authorized to issue or deny permits pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act, including with respect to the Permit in this case. 33 C.F.R. § 325.8; Am. Compl. ¶ 19; Fed. Defs.' Answer to Am. Compl. ¶ 19.

12. DRP is intervenor-defendant herein. Order Granting Mot. to Intervene, ECF No. 18 (Aug. 19, 2020). DRP is the recipient of the Permit challenged in this action. ACE002341.

13. The Permit, dated February 25, 2020, ACE002348, authorizes "the construction of a proposed new docking facility consisting of two (2) loading platforms, eight breasting dolphins, 11 mooring dolphins, walkways to provide access between the loading platforms and dolphins, a trestle supporting a one-lane vehicular roadway with adjacent pedestrian access and an internal pipe system for the transfer [of] bulk liquid product (including Liquefied Natural Gas (LNG)), and

mechanical dredging in the waterway." ACE002341. The docking facility and associated activities authorized by the Permit is generally referred to as "Dock 2" of the GLC. ACE000527.

14. DRP was also a recipient of a Department of the Army Permit dated December 21, 2017, ACE000439, which authorized "demolition of the existing bulkhead and installation of docking structures, performance of dredging, installation of 5 outfall structures and future maintenance dredging." ACE000431. The docking structures and associated activities authorized by the 2017 permit are generally referred to as "Dock 1" of the GLC. ACE000527.

15. The Dock 2 project is "focused on the export of liquid energy commodities," and would support transloading operations, which "are a critical component of the entire facility." ACE000527.

16. Dock 2 and the GLC are located along the Delaware River in Gibbstown, Greenwich Township, Gloucester County, New Jersey, at approximately River Mile 86. ACE000529.

17. The GLC is located on a portion of the former DuPont Repauno Works facility. ACE000529. The site was used for industrial purposes in the past, include the manufacture of chemicals and explosives, for more than 100 years. Am. Compl.

¶ 85.

18. DRP acquired the property for the GLC from Chemours Co. LLC ("Chemours") in 2016, and Chemours continues to implement long-term environmental remediation of the property under the oversight of the New Jersey Department of Environmental Protection ("NJDEP"). ACE0000529.

19. On March 4, 2019, DRP submitted an application to the Corps for an "Individual Permit under Section 10 of the Rivers and Harbor Act and Section 404 of the Clean Water Act to construct a two-berth dock" at the Gibbstown Logistics Center, located on Block 8, Lots 2, 3, 4.01, 4.02, and portions of Lot 4 in Greenwich Township, Gloucester County, New Jersey. ACE000503–781.

20. The following additional Federal permits and/or approvals are necessary solely for the construction of Dock 2: a Jurisdictional Determination from the Corps; United States Department of Energy ("DOE") Part 590 Approval; and a United States Coast Guard ("USCG") Part 127 Letter of Recommendation. ACE000528.

21. In addition to those Federal permits, the construction of Dock 2 requires: a Water Quality Certificate pursuant to the Clean Water Act Section 401, 33 U.S.C. § 1341, from the State of New Jersey; a New Jersey Individual Waterfront Development Permit; New Jersey Tidelands Licenses; Delaware River Basin Commission ("DRBC") Project Approval; Gloucester County Soil Conservation

District Approval; Gloucester County Planning Board Approval; and Greenwich Township Planning Board Approval. ACE000528.

22. DRP has estimated that 37 vessels capable of carrying bulk liquid products would annually call on Dock 2, and that it will take 10 days to fully load the vessel. ACE000535.

23. On March 15, 2019, the Corps asked DRP whether the GLC would be considered an LNG facility. ACE000796. DRP's representative responded on March 19, 2019, that the GLC "is not an 'LNG facility' as defined by the applicable regulations" and that "[t]here will be no on-site manufacturing or processing of [LNG] at the GLC, nor will LNG be transmitted by pipeline to or from the GLC. LNG will simply be transloaded from truck or rail car, through on-site infrastructure, and onto vessels for export." ACE000796.

24. During the process of drafting the Public Notice for DRP's permit application, there was disagreement between the Corps and DRP's representative concerning how the GLC was to be described. ACE000798–799, ACE000818–828.

25. Originally, as drafted by the Corps, the paragraph read:

The site will be designed to handle a multitude of products including, butane, isobutane, propane, liquefied natural gas (LNG) and ethane, as well as a variety of other liquid products. There will be no on-site manufacturing or process of LNG the site, nor will LNG be transmitted by pipeline to or from the site. LNG will simply be loaded from truck or rail car, through on-site infrastructure, and

onto vessels for export. No manufacturing of liquid products is planned for the proposed site.

ACE000825.

26. DRP proposed the following, alternate description:

The site will be designed to transload various liquid products from truck and railcar to vessels. As a transload facility, products will not be manufactured on site, but rather products will arrive on site in trucks or railcars and be transferred from those trucks and railcars through on-site infrastructure to vessels. The site will be designed to handle a variety of liquid products, including, but not limited to, butane, isobutane, liquefied natural gas and propane.

ACE000826.

27. Ultimately, the April 4, 2019 Public Notice of DRP's application described the GLC as follows:

The site will be designed to handle a multitude of products including, butane, isobutane, propane, liquefied natural gas (LNG) and ethane, as well as a variety of other liquid products. The site will be designed to transload various products from truck and railcar to vessels. As a transload facility, products will not be manufactured on site, but rather products will arrive on site in trucks or railcars and be transferred from those trucks and railcars through on-site infrastructure to vessels.

ACE000873.

28. The April 4, 2019 Public Notice also solicited "comments from the public; Federal, State and local agencies and officials; Indian Tribes; and other interested parties in order to consider and evaluate the impacts of this proposed

activity." The Public Notice also provided that "[c]omments are used in the preparation of an Environmental Assessment and/or an Environmental Impact Statement pursuant to the National Environmental Policy Act." ACE000873.

29. On May 28, 2019, DRN sent a letter to the Corps, the DRBC, the Federal Energy Regulatory Commission ("FERC"), the U.S. Coast Guard, NJDEP, and the Delaware Department of Natural Resources and Environmental Control ("DNREC"), alerting those agencies to the "logistics pipeline" planned by New Fortress Energy, LLC ("New Fortress"), an affiliate of DRP, that would transport LNG from a liquefaction facility in Wyalusing, Pennsylvania to the GLC via tanker trucks for ultimate export by vessel. ACE000944–949.

30. On June 13, 2019, the Corps requested clarification from DRP regarding truck traffic to the GLC based on a news article explaining that New Fortress intended to bring 3.5 million gallons of LNG per day to the GLC by truck or rail. ACE001056.

31. DRP responded to the Corps' request on June 14, 2019, and described the proposed construction of a public bypass road by Gloucester County and the Gloucester County Improvement Authority to re-route traffic that currently travels through downtown Gibbstown on State Route 44 to reach the GLC. ACE001094.

32. It was not clear whether the Route 44 bypass would be completed prior to the commencement of LNG trucking operations at the GLC. ACE001094.

33. DRP expects that approximately 15 trucks per hour will enter and leave the GLC. ACE001094.

34. On June 14, 2019, DRN requested that the Corps re-open the public comment period on the Dock 2 Permit application based on information recently made available to the public regarding the LNG export operations at the GLC. ACE001066–1098.

35. DRN's June 14, 2019 request also raised issues bearing on the environmental and human health impacts of the proposed LNG and LHG export operations at the GLC, including: truck traffic safety, air pollution, noise pollution, property value reduction, quality of life impacts, safety of transloading operations, impact of Dock 2 operations on Atlantic and shortnose sturgeon, environmental impacts to the GLC site itself, upstream climate and environmental impacts of gas extraction, downstream environmental and climate impacts from the use of exported LNG, water quality impacts of discharged ballast water, water quality impacts of dredging an area where sediment may be contaminated, air quality effects of gas flaring, risk of accidents and explosion during transport, storage or transfer of LNG, the presence of historic contamination at the property and the risk of release, the flood risk for the site, risks and impacts to residential properties near the GLC, economic ramifications of LNG export, vulnerability to terrorist attack, and the impact of LNG export on domestic jobs. ACE001066–1098.

36. Attached to DRN's June 14, 2019 communication was a Letter of Intent ("LOI") submitted pursuant to 33 C.F.R. § 127.007 by a DRP representative to the U.S. Coast Guard and dated November 16, 2017. ACE001077–1088.

37. As of November 16, 2017, DRP planned to export approximately 1.5 million metric tonnes per annum of LNG from the GLC. ACE001078.

38. As of November 16, 2017, approximately one month prior to having received its Corps permit for Dock 1, *see* ACE000431–463, DRP was planning to use 200-220 trucks carrying LNG per day to transload LNG to tankers, each tanker taking approximately 15 days to fill. ACE001083–1084.

39. The November 16, 2017 LOI also stated that boil-off gas, gas removed from the berthed LNG tanker, and the vapors of these gases could be flared. ACE001084.

40. The November 16, 2017 LOI also described liquefied LHG receiving, storage, and exporting activity, stating that the LHG would be received via rail car, loaded into storage tanks, then later loaded into LHG tankers over a period of 11-12 days. ACE001084–1085.

41. The November 16, 2017 LOI stated that the GLC would also be capable of "transport[ing] commodities such as Roll-on/Roll-off ("RoRo"), Break Bulk, and other bulk liquids, potentially including crude oil and refined products." ACE001085.

42. On June 20, 2019, counsel for DRP wrote to the Corps, explaining its position that the GLC is not a facility subject to FERC's jurisdiction based on a September 7, 2017 meeting with FERC staff about the project. ACE001098-1099.

43. On June 29, 2019, the Corps asked DRP how many rail cars carrying LNG would be expected at the GLC per day. DRP responded that since the United States Department of Transportation had not yet authorized transportation of LNG by rail car, it was "not possible to predict the volume of LNG that would be moved by rail." ACE001109.

44. On July 16, 2019, the Corps issued a supplemental public notice "[i]n an effort to ensure that the public is fully aware and understands the proposed activities under review" and provided a fifteen-day public comment period. ACE001136.

45. According to the July 16, 2019 supplemental public notice, the Corps intended to prepare an Environmental Assessment for the Dock 2 Permit pursuant to NEPA. ACE001136.

46. The July 16, 2019 supplemental public notice stated that the Route 44 bypass "will not require any approvals from the Corps of Engineers but is being evaluated due to the single and complete/reasonable related nature of this component." ACE001137.

47. During the fifteen-day public commenting period in July 2019, the Corps received hundreds of comments from members of the public opposing the Dock 2 Permit. ACE001152–001828.

48. Among other concerns, commenters expressed concerns about the following:

a. The need for a full Environmental Impact Statement ("EIS") pursuant to NEPA. ACE001831–1832; ACE001871–1874; ACE001893 – 1898; ACE001947.

b. The lack of clarity on the character and extent of LNG-related operations at the GLC and Dock 2. ACE001851; ACE001858–1859; ACE001943; ACE001947–1949.

c. The unlawful segmentation under NEPA of Dock 1 and Dock 2. ACE001892–1893.

d. The safety of the transportation of LNG by truck and rail and the transloading operations at the GLC. ACE001832–1833; ACE001833–1835; ACE001844; ACE001857–1858; ACE001867–1868; ACE001875–1882; ACE001939–1941; ACE001942; ACE001945; ACE001950.

e. The connection between the GLC and a natural gas liquefaction plant in Wyalusing, Pennsylvania. ACE001831–1832; CE001849; ACE001940; ACE001949

f. Environmental justice concerns based on increased traffic and increase risk to already-burdened communities. ACE001949–1950

g. Climate change impacts associated with increased fossil fuel infrastructure. ACE001831–1832; ACE001833–1836; ACE001843; ACE001874–1875; ACE001940; ACE001950–1951.

h. The upstream impacts on fracking that will occur as a result of the increased demand for natural gas created by the Dock 2 Project. ACE001836; ACE001849; ACE001943

i. Surface and groundwater quality impacts. ACE001837–1839; ACE001840–1843; ACE001852–1853; ACE001882–1886; ACE001939; ACE001945.

j. Air quality impacts. ACE001886.

k. Impacts on wildlife and endangered or threatened species. ACE001837–1839; ACE001860; ACE001862–1867; ACE001886–1891; ACE001939

l. Traffic impacts on roads and on the Delaware River. ACE001832–1833; ACE001940.

m. Flood hazards. ACE001839–1840; ACE001870–1871.

49. On April 11, 2019, the National Oceanic and Atmospheric Administration's ("NOAA's") National Marine Fisheries Service ("NMFS")

requested an interagency meeting and site visit to determine the Dock 2 Project's potential impact on NOAA trust resources, Endangered Species Act listed Atlantic sturgeon and shortnose sturgeon, and the designated critical habitat for Atlantic sturgeon. ACE000913–914.

50. On April 17, 2019, the Corps responded to NMFS that, because "no new stressors that were not previously considered during the initial [Dock 1] permit review are anticipated during the proposed additional work at the site" for Dock 2, "re-co-ordination [sic] with your office pursuant to the Endangered Species Act is not warranted." ACE000916.

51. In a second letter on the same date, the Corps approved NMFS's request for an interagency meeting and site visit. ACE000918.

52. On May 30, 2019, NMFS provided comments and recommendations to the Corps pursuant to the Fish and Wildlife Coordination Act and the Magnuson-Stevens Fishery Conservation and Management Act due to the Dock 2 Project's potential impact on essential fish habitat. ACE000996–ACE001010.

53. In NMFS's May 30, 2019 comments, they raised the issue of potential segmentation of the entire GLC project:

We are concerned that this new proposal for the construction of an additional wharf at the project site was not included in the original evaluation of the project's direct, indirect, individual, and cumulative effects on aquatic resources. It appears from the information provided that the applicant had intended from the outset of

the development at this site to construct more than one wharf, but the original permit application and accompanying analysis of need, alternatives and effects only addressed the construction of one wharf. As a result, the full environmental effects of the total action at the site have not been fully evaluated and it appears that the project has been segmented in order to avoid the appearance of significance of the total action as part of the National Environmental Policy Act (NEPA) review. As you are aware, under NEPA, the scope of an action must include the consideration of connected, cumulative, and similar actions. This is of particular concern with the additional 45 acres of dredging proposed and the significant increase in vessel traffic to the facility.

ACE000998.

54. On October 11, 2019, the Corps provided NMFS with its Biological Assessment, ACE002100–2131, which concluded that construction of the Dock 2 Project "may affect but is not likely to adversely affect shortnose or Atlantic sturgeon or designated critical habitat." ACE002127.

55. The October 11, 2019 Biological Assessment further concluded that the operation of Dock 2 would not result in an increase in vessel traffic above the baseline condition established in NMFS's 2017 Biological Opinion for Dock 1, thus, no additional "take" was anticipated as a result of Dock 2's operation. ACE002127.

56. On November 19, 2019, NMFS responded to the Corps' Biological Assessment and stated that:

Based on our review of your request for re-initiation, effects analysis, related materials, and our knowledge, we concur with your determination that re-initiation of

consultation is necessary and that the effects of the currently proposed action are not likely to adversely affect ESA-listed species or critical habitat under our jurisdiction.

ACE002137.

57. On December 5, 2019, the United States Department of Transportation Pipeline and Hazardous Materials Safety Administration ("PHMSA") issued a special permit to Energy Transport Solutions, LLC, for the transport of LNG by railcar from Wyalusing, Pennsylvania, to Gibbstown, New Jersey. ACE002289. Am. Compl. ¶¶ 88, 123 Intervenor-Def.'s Answer to Am. Compl. ¶¶ 88, 123; Defs.' Answer to Am. Compl. ¶ 123.

58. On August 19, 2019, the United States Environmental Protection Agency ("EPA") Region 2 submitted comments on the Dock 2 Project. ACE002014–2015.

59. EPA's comments included the following concerns: (1) whether a general conformity applicability analysis under the Clean Air Act pursuant to 40 C.F.R. § 93.153 had been performed; (2) that the Route 44 bypass had not been placed on the Transportation Improvement Program ("TIP") for New Jersey and that the Route 44 bypass construction should be included in the Corps' review of indirect impacts of Dock 2; (3) whether FERC had jurisdiction over the construction and operation of the terminal, and whether the United States Department of Energy ("DOE") had jurisdiction over the export of LNG; (4) the impacts of the Federal

Emergency Management Administration's flood zone designation for the GLC; and (5) whether a thermal radiation protection exclusion zone had been calculated for the GLC based on its LNG handling operations. ACE002014–2015.

60. The Dock 2 Project is located in the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE marginal nonattainment area for the 2008 federal Ozone Standard ("PA-NJ-MD-DE Nonattainment Area"), which is within an Ozone Transport Region (OTR). ACE002280, Am. Compl. ¶ 192.

61. On September 6, 2019, in response to comments submitted by the United States Environmental Protection Agency ("EPA"), DRP submitted a General Conformity Applicability Analysis "to ensure that the action will not (1) cause or contribute to any new violation of any air quality standard, (2) increase the frequency or severity of any existing violation of any air quality standard, or (3) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area." ACE002089.

62. The September 6, 2019 General Conformity Applicability Analysis estimated that the emissions caused by construction of Dock 2 in 2019 would result in 0.62 tons per year (tpy) of volatile organic compounds (VOCs), and 19.61 tpy of nitrogen oxides (NO_x), both of which are precursors to ozone. ACE002094; *see also* 40 C.F.R. § 93.153(b)(1).

63. The September 6, 2019 General Conformity Applicability Analysis estimated that the emissions caused by construction-related emissions of Dock 2 in 2020 would result in 1.43 tpy of VOCs, and 25.75 tpy of NO_x. ACE002094.

64. On February 3, 2020, the Corps informed DRP by email that a Clean Air Act conformity statement was required not only for the direct effects of the construction of Dock 2, but also for the indirect effect of emission from trucks delivering bulk liquids to Dock 2. ACE002274–2275.

65. On February 20, 2020, DRP submitted a revised "General Conformity Applicability Review" to the Corps. ACE002277–002284.

66. The revised applicability review estimated that the emissions caused by construction of Dock 2 in 2020 would result in 0.62 tpy of VOCs, and 19.61 tpy of NO_x. ACE002281.

67. The revised applicability review estimated that the emissions caused by construction of Dock 2 in 2021 would result in 1.43 tpy of VOCs, and 25.75 tpy of NO_x. ACE002281.

68. The revised applicability review estimated that the emissions caused by the truck traffic to, from, and at the GLC would result in 2.06 tpy of VOCs, and 16.84 tpy of NO_x. ACE002283.

69. On February 24, 2020, a Memorandum for Record ("Memorandum") was prepared by Lawrence M. Slavitter, a Corps biologist, ACE002215, and

reviewed by Michael Hayduk, Chief of Applications Section II in the Corps's Philadelphia District, ACE002274. *See* ACE002340.

70. The Memorandum also contained a signature line labeled "Approved by:" and marked for the signature of Edward Bonner, who, at the time of the Permit issuance, was the Regulatory Branch Chief of the Philadelphia District. *See* ACE002274, Fed. Defs.' Answer to Am. Compl. ¶ 21.

71. The "Approved by:" signature line on the Memorandum is blank. ACE002274.

72. The Memorandum states that it "constitutes the Environmental Assessment, 404(b)(1) Guidelines Evaluation, as applicable, Public Interest Review, and Statement of Findings for the subject application," which is identified at the top of the page as "Delaware River Partners Dock Number 2." ACE002286.

73. In describing the "scope of analysis for National Environmental Policy Act (NEPA)", the Memorandum states that:

The scope of analysis will include the in-water work for the dredging and construction of the dock. Additionally, the pipeline leading from the dock to the truck/train car that contains the bulk liquid products to be off-loaded will be included in the scope of analysis for this action. While not under the jurisdiction of this office, the [Corps] is considering potential impacts from the truck traffic that would be using the proposed access road.

ACE002290.

74. According to the Memorandum, the purpose and need of the Dock 2 project is

to redevelop a site and create a deep water marine terminal that can accommodate two (2) bulk liquid vessels simultaneously. The applicant stated that the market has shifted from what was presented during the permit review for Dock 1 at the site. There is now a higher need for vessels carrying bulk liquid products, which could not be economically accommodated at Dock 1. Each vessel that would carry LNG would be a maximum length of 966 feet, a beam width of 155, with a maximum of a 42 foot draft.

ACE002291.

75. The Memorandum addressed whether the Dock 2 Project should be considered together with the Dock 1:

The applicant stated that Dock 1 has independent utility and will still be functional regardless of the permit decision rendered by this office regarding Dock 2. The two docks will handle different types of vessels, receive different types of cargo, and operate independently. Vessels calling at Dock 1 will deliver cargo such as automobiles (roll-on/roll-off), non-containerized break bulk cargoes, bulk products, and bulk liquids. Vessels calling at Dock 2 will be delivering bulk liquids, but in larger vessels with greater capacity than the bulk liquid deliveries at Dock 1. Dock 1 is not necessary for Dock 2 to operate and Dock 2 is not necessary for Dock 1 to operate. The applicant states that the issuance of a permit for Dock 1 did not limit options for a second dock at the site. The applicant states that “changes in the market conditions after issuance of the permits for Dock 1 led to consideration for a second dock”. This office must accept the information presented by the applicant unless there is clear evidence to the contrary. An alternative analysis was included with the permit application for Dock 2 that

looked at several sites in the area for a marine terminal facility, and those sites were considered by the Corps.

ACE002304–2305.

76. The Memorandum described the direct impacts of the Dock 2 Project as: dredging within the 45 acres of the Delaware River; placement of the dredged material into scow for transport to the disposal site; if Whites Basin is used, the release of the material into the re-handling basin; the construction and installation of the structure in the river; shading of submerged aquatic vegetation in the waterway; and vessels that would use the structure for loading of bulk liquid products navigating in the river. ACE002331.

77. The Memorandum described the indirect impacts of the Dock 2 Project as: increased truck traffic in and around the project site; slight increase in boat traffic in the waterway; extra security required for vessels handling LNG, including when vessels leave port and pass within certain sections of the waterway as determined by the U.S. Coast Guard; and potential general impacts to the environment from an industrial property. ACE002331.

78. The Memorandum described the geographical scope of the cumulative effects analysis as follows:

The scope of the project this office directly regulates is the portion of the river where the dredging will occur and the location of the structure. Also, the locations on the uplands where the tankers would be placed to be off-loaded and the pipelines leading from the tankers to the

vessels. Impacts off-site resulting from the use of the bypass road are also included in the Corps scope. Additionally, the portions of the Federal navigation channels where vessels will enter and exit near the project site.

ACE002331–2332.

79. The Memorandum described the temporal scope of the cumulative effects analysis as thirty years—the life expectancy of the Dock 2 Project.

ACE02332.

80. In describing the cumulative impacts of the Dock 2 Project, the Memorandum describes the Project's direct and indirect impacts to

the portion of the river where the dredging will occur and the location of the structure. Also, the locations on the uplands where the tankers would be placed to be off-loaded and the pipelines leading from the tankers to the vessels. Impacts off-site resulting from the use of the bypass road are also included in the Corps scope. Additionally, the portions of the Federal navigation channels where vessels will enter and exit near the project site.

ACE002332.

81. The Memorandum's conclusion regarding cumulative impacts is as follows:

When considering the overall impacts that will result from the proposed activity, in relation to the overall impacts from past, present, and reasonably foreseeable future activities, the incremental contribution of the proposed activity to cumulative impacts in the area described in section 9.2, are not considered to be significant.

Compensatory mitigation will not be required to help offset the impacts to eliminate or minimize the proposed activity's incremental contribution to cumulative effects within the geographic area described in Section 9.2. Mitigation required for the proposed activity is discussed in Section 8.0.

ACE002333.

82. The Memorandum does not identify the "overall impacts from past, present, and reasonably foreseeable future activities" that are not a direct or indirect impact of the Dock 2 Project in its cumulative impacts discussion. ACE002331–2333.

83. The Memorandum reached the following conclusion with regard to the Corps's NEPA analysis:

After conducting review under NEPA as required by 33 CFR Appendix B to Part 325, this office has made a Finding of No Significant Impact with respect to the overall activities at both docks, at the project site. The FONSI is based on all available information, including the information supplied to this office from all interested parties, including the Federal resource agencies and the general public. The decision document generated for this action serves as the Environmental Assessment for this action. As such, this office has completed its requirements under NEPA and therefore, no Environmental Impact Statement is required. See 33 CFR Appendix B to Part 325, Section 7.

ACE002305.

84. The Memorandum's further concluded with regard to the Corps' NEPA analysis: "Having reviewed the information provided by the applicant and all

interested parties and an assessment of the environmental impacts, I find that this permit action will not have a significant impact on the quality of the human environment. Therefore, an environmental impact statement will not be required." ACE002340.

85. The Memorandum also contained a Public Interest Review pursuant to 33 C.F.R. § 320.4 in the form of a chart measuring the effects of each factor. ACE002325–2330.

86. In addressing the "conservation" factor, the Memorandum concluded that the impact was "neutral (mitigated)" stating only that "[i]mpacts for resources outside the control of the Corps are being addressed by the appropriate state/Federal resource agency. ACE002326.

87. In addressing the "economics" factor, the Memorandum concluded that the impact was "beneficial," stating only that "[i]t is expected that the project will improve economic conditions around the project site." ACE002326.

88. In addressing the "aesthetics" factor, the Memorandum concluded that the impact was "negligible," stating only that "[t]he additional structures and upland construction activities that would result from the project will have an impact on the aesthetics surrounding the site. Site has been extensively modified over the years for commercial uses." ACE002326.

89. In addressing the "general environmental concerns" factor, the Memorandum concluded that the impact was "neutral (mitigated)," stating only that "[w]hile impacts will result from the development and operation of the facility, overall impacts on the environment will be mitigated with the inclusion of special conditions." ACE002326.

90. In addressing the "wetlands" factor, the Memorandum concluded that the impact was "neutral (mitigated)," stating only that "[n]o Federally regulated wetlands will be impacted as a result of the project. Any wetland impacts are under the review of the NJDEP. Potential secondary impacts from wave action from the vessels using the dock should also be minimal due to reduced speed of vessels as they enter/leave port." ACE002326.

91. In addressing the "historic properties" factor, the Memorandum concluded that the impact was "neutral (mitigated)," stating that:

In a memo dated March 18, 2019, the District's CRS/TL stated that "The USACE has reviewed the report titled, Phase I Underwater Archaeological Investigations, Thompson Point, Repauno Site, Delaware River, Greenwich Township, Gloucester County, New Jersey prepared by Dolan Research, Inc. and dated February 2019. Analysis of fieldwork data confirms the presence of three magnetic targets and nine acoustic targets in the permit area; however, none of these targets are considered to be suggestive of potential submerged cultural resources and no further archaeological work is recommended.

ACE002326.

92. In addressing the "fish and wildlife values" factor, the Memorandum concluded that the impact was "negligible," stating that:

Any work performed in the river will have an effect on aquatic resources. Measures will be taken during the construction phase to minimize impacts to these resources. With respect to the 2 sturgeon species, a BiOP was developed for the Dock 1 by NMFS, and modified with respect to the second structure. Additionally, project was coordinated with USFWS, no objections with respect to fish and wildlife values were received from the USFWS.

ACE002327.

93. In addressing the "flood hazards" factor, the Memorandum concluded that the impact was "neutral (mitigated)," stating that: "The project will not have any impact on potential flooding around the site. The NJDEP has issued a Flood Hazard permit for the work at the site." ACE002327.

94. In addressing the "floodplain values" factor, the Memorandum concluded that the impact was "negligible," stating that: "Structures will be located in the floodplain, having a slight impact on this resource." ACE002327.

95. In addressing the "land use" factor, the Memorandum concluded that the impact was "neutral (mitigated)," stating that: "The site has been abandoned for many years. The site is part of a larger complex that was owned by DuPont. As stated above, a docking structure was previously located within the river. An existing intake structure in the waterway will be used as part of the fire suppression system." ACE002327.

96. In addressing the "navigation" factor, the Memorandum concluded that the impact was "negligible," stating that: "The vessels using Dock 2 will be new to the river, the project will have minimal impacts on general navigation in the waterway. The USCG is developing a protocol on how the LNG ships will navigate within the waterway. The waterway is a major navigation route in the area, only licensed pilots are allowed to command the larger vessels that would use the project site." ACE002327.

97. In addressing the "shoreline erosion and accretion" factor, the Memorandum concluded that the impact was "negligible," stating that: "Based on the design of the dock, the distance from shore and the existing bank stabilization at the site, overall impact to this resource is expected to be minimal." ACE002327.

98. In addressing the "recreation" factor, the Memorandum concluded that the impact was "neutral (mitigated)," stating that: "Recreational users of the waterway are used to seeing large commercial vessels navigating through the river. Based on the information supplied by the applicant, only 7 vessels/month not currently using the waterway will use Docks 1 and 2. This should have minimal impacts to recreation boats in the area." ACE002328.

99. In addressing the "water supply and conservation" factor, the Memorandum concluded that the impact was "negligible," stating that: "During dredging at the site, background sediment levels in the waterway will increase,

which may have a temporary effect on water intake systems along the waterway."
ACE002328.

100. In addressing the "water quality" factor, the Memorandum concluded that the impact was "negligible," stating that: "No lasting water quality impacts are expect by the project. The NJDEP issued a WQC for the project on September 5, 2019." ACE002328.

101. In addressing the "energy needs" factor, the Memorandum concluded that the impact was "beneficial," stating that: "There will still be a need for petroleum products through the lifespan of this project (30 years). While renewable energy alternatives will increase in scale and prevalence, there will still be a need for fossil fuels. This site will help deliver the fuels to places around the county and the world."
ACE002328.

102. In addressing the "safety" factor, the Memorandum concluded that the impact was "neutral (mitigated)," stating only that: "The applicant has stated that all state and Federal regulations as required by law will be followed at the project site."
ACE002328.

103. In addressing the "food and fiber production" factor, the Memorandum concluded that the impact was "negligible," stating that: "The project will have a minor effect on this public interest factor. The increase in vessels traffic will have a minor impact on fishing interests within Delaware Bay." ACE002328.

104. In addressing the "mineral needs" factor, the Memorandum concluded that the impact was "beneficial," stating that: "Natural gas products may be considered a mineral resource and would be relevant to this application. As stated above, petroleum products are going to be needed for the life expectancy of the project." ACE002328.

105. In addressing the "consideration of property ownership" factor, the Memorandum concluded that there was no impact, stating that: "The applicant is the owner of the subject property." ACE002328.

106. In addressing the "needs and welfare of the people" factor, the Memorandum concluded that the impact was "neutral (mitigated)," stating that: "As previously stated, petroleum products will be required the world for years to come. As with all industrial sites, there the potential for accidents that can affect the surrounding community. The applicant has stated that all safety measures as required by law will be followed at the project site." ACE002329.

107. The Memorandum also discussed the climate change effects of the Dock 2 Project, stating:

The proposed activities within the Corps federal control and responsibility likely will result in a negligible release of greenhouse gases into the atmosphere when compared to global greenhouse gas emissions. Greenhouse gas emissions have been shown to contribute to climate change. Aquatic resources can be sources and/or sinks of greenhouse gases. For instance, some aquatic resources sequester carbon dioxide whereas others release methane;

therefore, authorized impacts to aquatic resources can result in either an increase or decrease in atmospheric greenhouse gas. These impacts are considered de minimis. Greenhouse gas emissions associated with the Corps federal action may also occur from the combustion of fossil fuels associated with the operation of construction equipment, increases in traffic, etc. The Corps has no authority to regulate emissions that result from the combustion of fossil fuels. These are subject to federal regulations under the Clean Air Act and/or the Corporate Average Fuel Economy (CAFE) Program. Greenhouse gas emissions from the Corps action have been weighed against national goals of energy independence, national security, and economic development and determined not contrary to the public interest.

ACE002329.

108. The Memorandum's public interest determination concludes: "Having reviewed and considered the information above, I find that the proposed project is not contrary to the public interest." ACE002340.

109. The Memorandum describes the Corps' Clean Air Act Section 176(c)

General Conformity Rule review as follows:

The proposed permit action has been analyzed for conformity applicability pursuant to regulations implementing Section 176(c) of the Clean Air Act. It has been determined that the activities proposed under this permit will not exceed de minimis levels of direct or indirect emissions of a criteria pollutant or its precursors and are exempted by 40 CFR Part 93.153. Any later indirect emissions are generally not within the Corps' continuing program responsibility and generally cannot be practicably controlled by the Corps. For these reasons a conformity determination is not required for this permit action.

ACE002339.

110. The Corps issued a Department of the Army Permit to DRP authorizing the construction and operation of Dock 2 on February 25, 2020, specifically "the construction of a proposed new docking facility consisting of two (2) loading platforms, eight breasting dolphins, 11 mooring dolphins, walkways to provide access between the loading platforms and dolphins, a trestle supporting a one-lane vehicular roadway with adjacent pedestrian access and an internal pipe system for the transfer bulk liquid product (including Liquefied Natural Gas (LNG)) and mechanical dredging in the waterway." ACE002341–2373.

111. Special Condition 18 of the Permit provided: "The decision to issue this permit was partially based upon the proposal for truck traffic accessing the port via the Gloucester County Route 44 by-pass in order to minimize traffic impacts to the community. As such, trucks containing Liquefied Natural Gas shall not access the site other than from the by-pass. Should the development of the by-pass be delayed or abandoned, you shall contact this office and no work shall begin until this office has re-evaluated traffic impacts to the community." ACE002346.

112. On February 28, 2020, the Corps issued a Public Notice stating that the Dock 2 Project was "Not Contrary to the Public Interest, and as such, a Department of the Army permit has been issued to Delaware River Partners LLC for the work as proposed." ACE002374–2375.

113. In addressing the various concerns of public commenters, the February 28, 2020 Public Notice simply stated that "[m]any of the concerns raised by the public involved issues that are administered by other state and Federal agencies. These agencies include the US Coast Guard, US Environmental Protection Agency, the New Jersey Department of Environmental Protection and both state and Federal Departments of Transportation." ACE002375.

114. The February 28, 2020 Public Notice stated that the "applicant has addressed the issues raised by the public. This office must accept the information supplied by the project proponent when making the final determination for this action." ACE002375.

115. The February 28, 2020 Public Notice did not say that the Corps had prepared an EA/FONSI, an EA, an EIS, or made a finding that the Dock 2 Permit was categorically excluded. ACE002374–2375.

116. The February 28, 2020 Public Notice did not mention the process or outcome of the Corps' NEPA analysis at all. ACE002374–2375.

Respectfully submitted,

Dated: October 30, 2020

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

DELAWARE RIVERKEEPER	:	
NETWORK, et al.,	:	
	:	
Plaintiffs,	:	Civil Action No.
	:	1:20-cv-4824 (NLH) (JS)
v.	:	
	:	Judge Noel L. Hillman
UNITED STATES ARMY CORPS OF	:	
ENGINEERS, et al.,	:	Magistrate Judge Joel Schneider
	:	
Defendants,	:	Brief in Support of
	:	Motion for Summary Judgment
and	:	
	:	Oral Argument Requested
DELAWARE RIVER PARTNERS,	:	
LLC,	:	
	:	
Intervenor-Defendant.	:	
	:	

BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. SUMMARY OF ARGUMENT

Plaintiffs Delaware Riverkeeper Network ("DRN") Maya van Rossum, the Delaware Riverkeeper, bring this challenge under the Administrative Procedure Act ("APA"), 5 U.S.C. §706, to the Defendants' decision to issue a Department of the Army Permit Number CENAP-OP-R-2016-0181-39 (the "Permit") to Intervenor-Defendant Delaware River Partners, LLC ("DRP") on February 25, 2020. Defendants' decision to issue this permit was arbitrary, capricious, an abuse of discretion, and contrary to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4370h, the United States Army Corps of Engineers ("Corps") Public Interest Review regulation, 33 C.F.R. § 320.4(a), and the Clean Air Act, 42 U.S.C. §§ 7401–7671q.

The Permit allows DRP to construct and operate a dock ("Dock 2") at the Gibbstown Logistics Center ("GLC") on the Delaware River in Gibbstown, Gloucester County, New Jersey. Dock 2 is designed to accommodate two large tanker vessels, and transload bulk liquid products, primarily high volumes of liquefied natural gas ("LNG"), from trucks and trains traveling from Wyalusing, Pennsylvania, into those vessels for export to foreign countries.

Defendants issued the Permit without complying with NEPA because they did not produce a final environmental document or notify the public of the outcome of the NEPA process. The only evidence of Defendants NEPA process that exists in

the record is a "Memorandum for Record" that is not signed by the District Engineer or a delegatee, as required by NEPA and its implementing regulations. Within that Memorandum is a purported Environmental Assessment and Finding of No Significant Impact ("EA/FONSI"), which is based on an arbitrarily narrow scope that excludes Federal actions connected to the Dock 2 Project. Considering the full scope of actions requiring a NEPA review, the Federal action at issue is major, and requires the preparation of a full Environmental Impact Statement ("EIS").

Defendants also conducted an arbitrary and capricious Public Interest Review as they did not comply with procedural regulations governing District Engineer approval, and because defendants failed to consider important aspects of the Dock 2 Project, namely the climate change impacts of this massive fossil fuel infrastructure buildout, as well as the unknown safety risks of transporting LNG by truck and rail through highly populated areas within the Philadelphia region.

Finally, because Defendants' NEPA and Public Interest analyses were arbitrarily and capriciously narrow, the Clean Air Act applicability analysis must be re-initiated to account for all direct and indirect emissions that would be caused by the Dock 2 Project, to ensure that those emissions do not exceed the de minimis threshold that trigger the requirement for a conformity determination.

II. STANDARD OF REVIEW

Plaintiffs challenge a final agency action of the Corps. Under the Administrative Procedure Act ("APA"), a reviewing court will "hold unlawful and set aside" final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). Although the court's scope of review is "narrow and a court is not to substitute its judgment for that of the agency," the agency is required to "examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Prometheus Radio Project v. Fed. Commc'ns Comm.*, 939 F.3d 567, 577 (3d Cir. 2019) (alteration in original) (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)). An agency's decision is arbitrary and capricious where

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; [it] may not supply a reasoned basis for the agency's action that the agency itself has not given.

CBS Corp. v. Fed. Commc'ns Comm., 663 F.3d 122, 137 (3d Cir. 2011) (quoting *State Farm*, 463 U.S. at 43).

When conducting a review pursuant to the APA, the court "confine[s its] review to 'the full administrative record that was before the [agency] at the time' it took the action under review." *SIH Partners LLLP v. Comm'r of Internal Revenue*, 923 F.3d 296, 302 (3d Cir. 2019) (second alteration in original) (quoting *C.K. v. N.J. Dep't of Health & Human Servs.*, 92 F.3d 171, 182 (3d Cir. 1996)). Accordingly, on summary judgment, "there are no disputed facts that the district court must resolve," and the "function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. Immigration & Naturalization Serv.*, 753 F.2d 766, 769 (9th Cir. 1985); *see also Morsemore Sav. & Loan Ass'n v. Marston*, 500 F. Supp. 1253, 1254 (D.N.J. 1980) ("Since the statutory review is on the basis of the administrative record, which has been supplied, the motion for 'summary judgment' is actually no more than a convenient device for initiating the filing of briefs and hearing of oral argument, as though before an appellate court.").

III. STANDING

Plaintiffs the Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper, have standing to bring this action. Defendants' failure to comply with the law regarding the issuance of the Dock 2 Permit has impaired DRN's ability to provide services to its members, as DRN has devoted significant resources to gathering and analyzing information about the Dock 2 Project and the

GLC that would otherwise have been readily available to DRN and the public had Defendants complied with the law. *See* Decl. of van Rossum at ¶¶ 9–10. Thus, DRN has standing to bring this action on its own behalf. In addition, as evidenced by the attached declarations, Plaintiff Delaware Riverkeeper Network has members, including its executive director, who live in, work in, and/or recreate in the area to be affected by construction and operation of the Dock 2 Project. *See* Decl. of van Rossum at ¶¶ 1, 7, 8, 13, 15; Decl. of Steinberg at ¶¶ 1, 2, 8, 9, 13; Decl. of Jordan at ¶¶ 1, 2, 5–7, 9. Plaintiffs endeavor to protect the natural resources that would be affected by the Dock 2 Project, and the interests of Plaintiffs and the members of DRN would be injured should the Dock 2 Project proceed to completion. *See* Decl. of van Rossum at ¶¶ 3–8, 15; Decl. of Steinberg at ¶¶ 6, 9, 11, 14; Decl. of Jordan at ¶¶ 8, 10, 11. The Delaware Riverkeeper Network's mission is to champion the rights of communities to a Delaware River and tributary streams that are free flowing, clean, healthy and abundant with a diversity of life. *See* Decl. of van Rossum at ¶ 3. Finally, only this court can provide Plaintiffs with relief to their injuries. Thus, Plaintiffs have established their standing to bring this action.

IV. ARGUMENT

A. Defendants Violated the National Environmental Policy Act by Failing to Prepare an Environmental Impact Statement Prior to Issuing the Dock 2 Permit, Which is a Major Federal Action Significantly Affecting the Quality of the Human Environment.

The Corps failed to complete the NEPA process prior to issuing the Permit, and failed to notify the public of the availability of the final environmental document, in violation of NEPA and its implementing regulations. Assuming arguendo that an unsigned "Memorandum of Record" contained in the administrative record for the Permit is a valid and complete Environmental Assessment/Finding of No Significant Impact ("EA/FONSI"), the Corps' conclusions in that document are based on an arbitrarily and capriciously truncated scope of analysis contrary to NEPA, its implementing regulations, and the Corps' own NEPA regulations.

NEPA was enacted at the height of the environmental crisis in 1970 to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." 42 U.S.C. § 4321. The Council on Environmental Quality ("CEQ") has

promulgated regulations implementing NEPA. *See* 40 C.F.R. Parts 1500–1508 (2019).¹

To effectuate that purpose, NEPA requires that all agencies of the Federal government prepare a "detailed statement" prior to engaging in "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). This statement, known as an environmental impact statement or "EIS", must describe (1) the "environmental impact of the proposed action"; (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented"; (3) any "alternatives to the proposed action"; and (4) any "irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented." *Id.* "Major Federal actions" requiring preparation of an EIS include projects that require federal approval, such as the Dock 2 Project. 40 C.F.R. § 1508.18(b)(4) (2019).

"NEPA's procedural requirements aim to ensure that an agency 'consider[s] every significant aspect of the environmental impact of a proposed action' and 'inform[s] the public that it has indeed considered environmental concerns in its decisionmaking process.'" *Tinicum Twp., Pa. v. U.S. Dep't of Transp.*, 685 F.3d 288,

¹ As of September 14, 2020, CEQ's updated NEPA regulations went into effect. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, Coun. on Env'tl. Quality, 85 Fed. Reg. 43,304 (July 16, 2020). The discussion in this brief will be based on the prior regulations, which were applicable at the relevant time of Defendants' decision.

294 (3d Cir. 2012) (alterations in original) (quoting *N.J. Dep't of Env'tl. Prot. v. U.S. Nuclear Regulatory Comm'n*, 561 F.3d 132, 134 (3d Cir. 2009)). "Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Coun.*, 490 U.S. 332, 349 (1989). In reviewing the adequacy of an agency's compliance with NEPA, this court examines the analysis prepared by the agency and "make[s] a pragmatic judgment whether the . . . form, content and preparation foster both informed decision-making and informed public participation." *Tinicum Twp.*, 685 F.3d at 294 (quoting *Concerns Citizens Alliance, Inc. v. Slater*, 176 F.3d 686, 705 (3d Cir. 1999)).

1. Defendants Failed to Follow NEPA Procedures and Issued the Permit Without Completing a NEPA Analysis.

Federal agencies such as the Corps decide whether to prepare an EIS based on a step-by-step process. First, the Corps is required to determine whether the proposed action—issuing the Permit to DRP—is one which normally requires an EIS or whether the proposed action is categorically excluded by the Corps' supplemental NEPA regulations. *See* 40 C.F.R. § 1501.4(a) (2019). If, as is the case here,² the

² Decisions on permit applications to the Corps "require either an environmental assessment or an environmental impact statement unless it is included within a categorical exclusion." 33 C.F.R. § 325.2(a)(4). Categorically excluded activities are listed in 33 C.F.R. § 230.9 and Part 325, appendix B(6).

proposed action does not belong in either category, the Corps is required to "prepare an environmental assessment," also known as an EA, and to "involve environmental agencies, applicants, and the public, to the extent practicable, in preparing" the EA. 40 C.F.R. § 1501.4(b) (2019).

An EA is a "concise public document" that is intended to "provide sufficient evidence and analysis for determining whether to prepare" an EIS and "[s]hall include brief discussions of the need for the proposal, of alternatives . . . , of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(a)(1), (b) (2019). Based on the EA, the Corps then determines whether an EIS is warranted. *See* 40 C.F.R. § 1501.4(c) (2019).

Regulations governing the Corps' preparation of an EA in this case are found at 40 C.F.R. § 1508.9 (2019), 33 C.F.R. § 230.10, and 33 C.F.R. pt. 325, app. B(7). The District Engineer is charged with the task of completing the EA, and may delegate the signing of the EA. 33 C.F.R. pt. 325, app. B(7); *see also* 33 C.F.R. § 325.2(a)(6). If, after completing the EA, the Corps determines that the proposed action "significantly affects the quality of the human environment," 42 U.S.C. § 4332(C), then an EIS must be prepared, otherwise, if it "determines on the basis of the [EA] not to prepare an [EIS]," then it will "[p]repare a finding of no significant impact," also known as a FONSI. 40 C.F.R. § 1501.4(e) (2019).

Throughout the process of preparing an EA, the Corps is required to "[m]ake diligent efforts to involve the public in preparing and implementing [its] NEPA procedures" and "[p]rovide public notice of . . . the availability of environmental documents so as to inform those persons and agencies who may be interested or affected." 40 C.F.R. § 1506.6(a), (b) (2019); *see also* 40 C.F.R. § 1508.10 (2019) ("environmental document" defined to include EAs and FONSI). The district engineer is charged with the task of completing the EA/FONSI or EIS/Record of Decision ("ROD"), and may delegate the signing of the final environmental document. 33 C.F.R. pt. 325, app. B(7); 33 C.F.R. § 325.2(a)(6).

On February 25, 2020, the Corps issued a Department of the Army permit to DRP for the construction of Dock 2, and provided notice to the public of this action on February 28, 2020. *See* ACE002341–2373; ACE002259–002261. In that Public Notice, contrary to the Corps' earlier assertions that it was engaging in a NEPA process, *see* ACE000873, ACE001136, the Corps simply stated that the Dock 2 Project was "Not Contrary to the Public Interest, and as such, a Department of the Army permit has been issued" ACE002375. Within the administrative record is a "Memorandum for Record" that constitutes the Environmental Assessment . . . for the subject application," but that Memorandum is unsigned.

The Corps failed to provide public notice of the availability of its NEPA analysis, as the Public Notice announcing the issuance of the Permit did not address

the Corps's compliance with NEPA. ACE002374–2375. Furthermore, the purported EA/FONSI that appears in the administrative record is not signed by the District Engineer, nor is it signed by any delegatee. ACE002274. From the public's perspective, the Corps did not reach a conclusion as to whether the Dock 2 Permit constituted a significant impact on the human environment. Thus, the Corps's NEPA analysis was not completed prior to the issuance of the Permit on February 25, 2020. *See, e.g. Greater Yellowstone Coal. v. Bosworth*, 209 F. Supp. 2d 156, 164 (D.D.C. 2002) ("The NEPA analysis is, after all, designed to assess the environmental impact . . . *before* the permit issues." (emphasis added)).

2. *If the Memorandum Constitutes the Final Environmental Document under NEPA, Defendants Arbitrarily and Capriciously Limited the Scope of their Analysis Contrary to NEPA and its Implementing Regulations.*

If the Memorandum is indeed the Corps's final environmental document, then the Corps arbitrarily and capriciously limited the scope of its review contrary to NEPA, CEQ regulations, the Corps's own regulations, and case law. The Corps defined the scope of its NEPA review as follows:

The scope of analysis will include the in-water work for the dredging and construction of the dock. Additionally, the pipeline leading from the dock to the truck/train car that contains the bulk liquid products to be off-loaded will be included in the scope of analysis for this action. While not under the jurisdiction of this office, the [Corps] is considering potential impacts from the truck traffic that would be using the proposed access road.

ACE002290. This unlawfully narrow scope segments the construction of Dock 2 from Dock 1, the GLC, and the "logistics pipeline" that will transfer LNG from Wyalusing, Pennsylvania, to the GLC for export to foreign countries. *See* ACE000944-949.

In deciding whether a proposed action is a major federal action significantly affecting the quality of the human environment, the Federal agency must first identify the "scope" of the NEPA analysis. *See* 40 C.F.R. § 1502.4(a) (2019). The scope "consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement." 40 C.F.R. § 1508.25 (2019). The agency must consider connected, cumulative, and similar actions, as well as direct, indirect, and cumulative impacts. 40 C.F.R. § 1508.25(a), (c) (2019); *see also* 40 C.F.R. § 1508.8 (2019) ("Effects and impacts are used in these regulations are synonymous.").

Direct effects are "caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a) (2019). Indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," including "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate" 40 C.F.R. § 1508.8(b) (2019).

Cumulative impacts are

impact[s] on the environment which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or

person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7 (2019).

Connected actions are "closely related and therefore should be discussed in the same impact statement," including actions that "automatically trigger other actions which may require environmental impact statements", actions that "cannot or will not proceed unless other actions are taken previously or simultaneously", and actions that are "interdependent parts of a larger action and dependent on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1) (2019). Cumulative actions are those that, "when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. § 1508.25(a)(2) (2019). Similar actions are those that, "when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." 40 C.F.R. § 1508.25(a)(3) (2019).

Where an agency . . . attempts to consider such related actions separately by segmenting the mandated unified review into multiple independent analyses that insulate each project from the impacts created by its sister projects, it "fails to address the true scope and impact of the activities that should be under consideration" and therefore runs afoul of NEPA.

Twp. of Bordentown, N.J. v. Fed. Energy Regulatory Comm'n, 903 F.3d 234, 248 (3d Cir. 2018) (quoting *Del. Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 735 F.3d 1304, 1313 (D.C. Cir. 2014)).

Here, the Dock 2 Project is a part of a larger action—first, it is a segment of the entire GLC, including Dock 1.

For those activities that require a [Department of the Army] permit for a major portion of a shoreside facility, the scope of analysis should extend to upland portions of the facility. For example, a shipping terminal normally requires dredging, wharves, bulkheads, berthing areas and disposal of dredged material in order to function. Permits for such activities are normally considered sufficient Federal control and responsibility to warrant extending the scope of the analysis to include the upland portions of the facility.

33 C.F.R. pt. 325 app. B(7)(b)(3). Thus, the transloading operations as well as the upland storage and handling of LNG, LHG, and other potentially dangerous bulk liquids are within the scope of the Corps's NEPA analysis, and the impacts of those actions must be included in the final environmental document.

Second, Dock 2 and the GLC are both part of a larger action subject to Federal approval—the transportation of LNG from Wylausing, Pennsylvania, to Gibbstown, New Jersey, and the exportation of that LNG to foreign countries. This larger action requires Federal approval at almost every juncture: a special permit to transport the LNG by rail from the Pipeline and Hazardous Materials Safety Administration ("PHMSA"); the Corps permit at issue here for the dredging of the Delaware River

and construction of a dock that will allow DRP to transload the LNG from trucks and railcars to ocean-going vessels; approval from the Coast Guard for LNG and LHG vessel traffic, permission from the Department of Energy to export the LNG to foreign countries; and, depending on the outcome of recent petitions submitted to FERC,³ approval may be required for the siting of the liquefaction facility and/or export facility and the transportation of natural gas in interstate commerce. Thus, by focusing only on the dredging and construction of Dock 2, the Corps impermissibly segmented its review of the entire "physically, functionally, and financially connected" Project. *See Del. Riverkeeper Network*, 753 F.3d at 1308.

Corps regulations require that, when determining the scope of the NEPA analysis, the District Engineer must "address the impacts of the specific activity requiring the . . . permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal Review." 33 C.F.R. pt. 325 app. B(7)(b)(1) (emphasis added). The District Engineer has sufficient

³ On September 11, 2020, DRP petitioned FERC for a declaratory order disclaiming jurisdiction over its facilities in Gibbstown, New Jersey, and seeking expedited action on that petition. *See* Petition, Document Accession No. 20200911-5331, Delaware River Partners LLC, FERC Docket No. CP20-522-000 (Sept. 11, 2020). On September 18, 2020, Bradford County Real Estate Partners, LLC, an affiliate of DRP, petitioned FERC for a declaratory order disclaiming jurisdiction over its liquefaction facilities in Wyalusing, Pennsylvania, and seeking expedited action on that petition. *See* Petition, Document Accession No. 20200918-5180, Bradford County Real Estate Partners LLC, FERC Docket No. CP20-524-000 (Sept. 18, 2020). Plaintiffs in this action have moved to intervene and submitted protests in both matters.

control and responsibility over the entire project where "Federal involvement is sufficient to turn an essentially private action into a Federal action." 33 C.F.R. pt. 325 app. B(7)(b)(2).

Factors used in making this determination include whether the activity is "merely a link" in a corridor-type project, whether there are aspects of the upland facility that affect the location and configuration of the regulated activity, the extent to which the entire project will be within Corps jurisdiction, and the extent of cumulative Federal control and responsibility. *Id.* "Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project." 33 C.F.R. pt. 325 app. B(7)(b)(2)(A).⁴

Here, rather than recognizing the cumulative Federal control and responsibility over the Dock 2 Project—which, in order to achieve its "basic purpose"⁵ requires approval from PHMSA for the transport of LNG by rail, a

⁴ In situations where multiple Federal agencies are involved, the Corps regulations direct the district engineer to contact the appropriate agencies to determine which agency will serve as lead agency for the purpose of drafting the EIS and which agency or agencies will be cooperating agencies. 33 C.F.R. pt. 325 app. B(7)(b)(2)(C); B(8)(a), (b); *see also* 40 C.F.R. § 1501.5 (2019) (defining the role of lead agencies) *and* 40 C.F.R. § 1501.6 (2019) (defining the role of cooperating agencies).

⁵ The project's "basic purpose" as determined by the Corps is "to establish a marine terminal at which multiple types of bulk liquids, including LNG and other petroleum

determination from the U.S. Coast Guard that the waterway is suitable for LNG or LHG marine traffic, authorization from the U.S. Department of Energy to export LNG to foreign countries, and possibly approval from FERC—the Corps uses the jurisdiction of these other Federal entities as a justification for segmenting connected actions and curtailing the full scope of the Project's environmental impacts. *See* ACE002308–2309.

The Supreme Court has held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect" and therefore the agency need not consider those effects in its NEPA analysis. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004). In *Public Citizen*, the causal chain was broken by Presidential authority to authorize or prohibit the cross-border operations of Mexican motor carriers. *Id.* The President, however, is not a "Federal agency" subject to NEPA's requirements. *See* 40 C.F.R. § 1508.12 (2019). If the rule in *Public Citizen* were applied where jurisdiction over a project was shared by multiple Federal agencies subject to NEPA, then the CEQ's and the Corps' regulations governing lead and cooperating agencies would be rendered meaningless. Each Federal agency would be required to evaluate the environmental effects of the

products, can be transferred from trucks/train cars to vessels for transport." ACE002291.

actions subject to its approval in a vacuum, and the public would be provided with a myopic understanding of how a project will impact their lives. Thus, *Public Citizen* does not provide the Corps with a justification for narrowing the scope of its NEPA analysis when faced with approving a portion of a project that is subject to cumulative Federal control and responsibility.

Furthermore, the D.C. Circuit has explained that the scope of a Federal agency's NEPA review is not limited by the activities regulated by that agency, but rather by the *factors that the agency can consider* when regulating in its proper sphere. *Sierra Club v. Fed. Energy Regulatory Comm'n (Sabal Trail)*, 867 F.3d 1357, 1373 (D.C. Cir. 2017). In *Sabal Trail*, the court described FERC's authority to approve pipelines as broad, as the Natural Gas Act, 15 U.S.C. §§ 717–717w, instructs FERC to consider the "public convenience and necessity," allowing it to "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment." *Sabal Trail*, 867 F.3d at 1373 (citing 15 U.S.C. § 717f(e)). Similarly, in this case, the Corps has the authority through its public interest review to deny a Department of the Army permit to an applicant on the ground that a project's environmental detriments outweigh its overall benefits, and that the project is thus contrary to the public interest. *See* 33 C.F.R. § 320.4(a)(1). Accordingly, the rule in *Public Citizen* does not excuse the Corps from considering indirect environmental effects of the Dock 2 Project. *See Sabal Trail*, 867 F.3d at 1373.

By arbitrarily and capriciously narrowing the scope of its NEPA analysis to "the in-water work for the dredging and construction of the dock," "the pipeline leading from the dock to the truck/train car that contains the bulk liquid products to be off-loaded," and "potential impacts from the truck traffic that would be using the proposed access road," ACE002290, the Corps has segmented its review of the Dock 2 Project, as that project is an interdependent part of a larger action to transport LNG from Pennsylvania via truck and rail to New Jersey for export to foreign countries, and it depends on that larger action for its justification. *See* 40 C.F.R. § 1508.25(a)(1)(iii) (2019).

3. Defendants Were Required to Prepare an Environmental Impact Statement Because the Dock 2 Project is a Major Federal Action.

Based on an evaluation of Dock 2, Dock 1, the GLC, and the liquefaction, transportation, and export of natural gas through Dock 2 as connected actions in a single environmental document, the Corps must conclude that issuing a Department of the Army permit for Dock 2 is a major federal action and prepare an Environmental Impact Statement. "[O]nce the scope of analysis has been defined, the NEPA analysis for that action should include direct, indirect and cumulative impacts on all Federal interests within the purview of the NEPA statute." 33 C.F.R. pt. 325 app. B(7)(b)(3). If the impacts of the Federal action or actions within the scope of the Corps' analysis are significant, then the Federal action is major and an EIS is required.

A "major federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly." 40 C.F.R. § 1508.18 (2019). The term "significantly as used in NEPA requires considerations of both context and intensity" 40 C.F.R. § 1508.27 (2019). The action "must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a) (2019). Intensity is determined by evaluating a number of factors bearing on the severity of the action's impact, including:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or

represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significant cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or other objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27(b) (2019). "Implicating any one of the factors may be sufficient to require development of an EIS." *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019).

Regarding factor (4), the word "'controversial' . . . refers to situations where 'substantial dispute exists as to the size, nature, or effect of the major federal action,'" and requires "something more" than the opposition's willingness to seek relief in court. *Id.* at 1083 (quoting *Town of Cave Creek v. Fed. Aviation Admin.*, 325 F.3d

320, 331 (D.C. Cir. 2003)). Where an agency's "assessment of the scope of . . . effects has drawn consistent and strenuous opposition, often in the form of concrete objections to the [agency's] analytical processes and findings, from agencies entrusted with preserving . . . resources and organizations with subject-matter expertise," such opposition establishes the "something more" necessary to show controversy. *Id.* at 1086 (citing 40 C.F.R. § 1508.27(b)(4) (2019)). "Indeed, Congress created the EIS process to provide robust information in situations . . . where, following an environmental assessment, the scope of a project's impacts remains both uncertain and controversial." *Id.* at 1087–88.

Here, during the process of re-initiating consultation in accordance with Section 7 of the Endangered Species Act, 16 U.S.C. § 1536, the National Marine Fisheries Service ("NMFS") voiced its concern that the Dock 2 Project "has been segmented in order to avoid the appearance of significance of the total action as part of the National Environmental Policy Act (NEPA) review." ACE000998. In addition, hundreds of members of the public and environmental organizations commented during the Corps' second fifteen-day public commenting period, after the Corps made clear the extent of the LNG operations that Dock 2 would allow at the GLC. *See* ACE001150–1828; ACE001831–1845; ACE001849; ACE001850–1951. The controversy surrounding the exact parameters of the Dock 2 Project and how its receipt and handling of LNG will affect the human environment is

sufficiently substantial to implicate intensity factor 4 and trigger the need to prepare an EIS.

Intensity factor (5), the "degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks," 40 C.F.R. § 1508.27(b)(5) (2019), also weights in favor of preparing an EIS. Many commenters, including members of the public and environmental organizations expressed concern about the unknown risks of transporting LNG by truck and rail through the highly-populated Philadelphia metro area. Commenters also wondered about the risks posed by the large LNG vessels and the amount of time they would be transloading LNG at Dock 2. Rather than addressing those risks in an EIS, the Corps simply listed other agencies responsible in some way for the hazardous materials to be handled on site, and regulations that generally apply to hazardous materials. ACE002308–2309. Such a compilation is far from a "full and fair discussion of significant environmental impacts" required by NEPA. *See* 40 C.F.R. § 1502.1 (2019).

Regarding intensity factor (6), the "degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration," 40 C.F.R. § 1508.27(b)(6) (2019), weighs in favor of preparing an EIS. The Corps was aware that, by issuing the Dock 2 Permit, it would be permitting the operation of a facility that handles and transloads LNG to vessels for export—an activity typically closely regulated by FERC. *See*

ACE001098–1099. The Corps was also aware that the question of whether or not FERC actually did have jurisdiction over the facility was not definitively resolved. *See* ACE001098-1099; *see also* ACE002309 ("The applicant represented that [FERC] does not have jurisdiction since Dock 2 is not an 'LNG Terminal.' This office contacted FERC to confirm, and was informed that DRP's interpretation . . . was reasonable."). By deciding to issue a permit for Dock 2 that would allow it to function as an LNG export facility without FERC's jurisdiction over siting of such a facility, the Corps has set a precedent for how LNG export facilities are regulated in the United States. A full and complete EIS would provide the Corps and the public with the information necessary to determine whether the absence of FERC jurisdiction creates any increased environmental risk, or whether alternatives that would have triggered FERC jurisdiction were available.

Finally, intensity factor (7), "whether the action is related to other actions with individually insignificant but cumulatively significant impacts," 40 C.F.R. § 1508.27(b)(7) (2019), was simply not explored by the Corps in its EA. *See* ACE002331–2333. Although there is a section of the EA ostensibly devoted to "cumulative impacts," that section only discusses some of the direct and indirect impacts of the construction and operation of Dock 2, and does not discuss any other "past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. §

1508.7 (2019). An example of cumulative impacts are GHG impacts contributing to climate change. *See* ACE001874–1875. Another example is the evaluation of the Dock 2 Project on nearby environmental justice communities that are overburdened with the environmental effects of multiple industrial activities. *See* ACE001949–1950. Finally, the past contamination of the site is a cumulative impact, although the contamination was released decades ago. *See* ACE001884–1885. Because the Dock 2 Project is being built in a highly-populated, highly-industrialized area with a history of past environmental contamination, a discussion of the cumulative impacts is warranted.

In sum, because the Dock 2 Project implicates at least four of the intensity factors, issuing the permit allowing the project to proceed is a major Federal action on the part of the Corps, and preparation of an EIS is well-justified. *See Nat'l Parks Conservation Ass'n*, 916 F.3d at 1082.

B. Defendants Violated the Administrative Procedure Act by Conducting a Public Interest Review that Failed to Account for the Project's Full Scope, thus Rendering the Corps' Analysis Arbitrary and Capricious.

If Dock 2 were constructed, the GLC would be the first LNG export facility in the region utilizing a new method of transporting and transloading LNG by rail, and would increase the demand for fracked gas from the Marcellus shale formation. *See* ACE001893. Both the increased demand for fossil fuels and the novelty of the mode of transportation warrant an in-depth public interest review—otherwise the

duty to consider the public interest in issuing permits pursuant to the Rivers and Harbors Act of 1899 would be abandoned by the Corps.

The Supreme Court in *United States v. Alaska* describes the history of the Corps' implementation of the Rivers and Harbors Act of 1899. 503 U.S. 569, 580–82 (1992). In the first three-quarters of the twentieth century, the Corps exercised its jurisdiction based on a narrow concern for navigation only. *Id.* at 580 (citing 27 Op. Atty. Gen. 284, 288). In 1968, the Corps promulgated regulations authorizing it to consider "water quality, recreation, fish and wildlife, pollution, our natural resources, as well as the effects on navigation." *Id.* at 580–81 (quoting 33 C.F.R. § 209.330(a) (1968)). In 1970, the House Committee on Government Operations urged that the Corps "should instruct its district engineers . . . to increase their emphasis on how the work will affect *all aspects of the public interest.*" *Id.* at 581 (quoting H.R. Rep. No. 91–917, p. 6 (1970)).

The Corps now applies its public interest review to Clean Water Act Section 404 permits as well as Rivers and Harbors Act Section 10 Permits. 33 C.F.R. § 320.4. During the public interest review, the Corps engages in "an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use" by "weighing . . . all those factors which become relevant in each particular case." 33 C.F.R. § 320.4(a)(1). The Corps weighs the "benefits which reasonably may be expected to accrue from the proposal" against its "reasonably

foreseeable detriments." *Id.* By virtue of its authority to perform this balancing act, "[t]he Corps 'exercises the discretion of an enlightened despot' in issuing discharge permits, and considers a broad range of factors set forth in its regulations." *Del. Dep't of Nat. Res. & Env't'l Control v. U.S. Army Corps of Eng'rs*, 685 F.3d 259, 279 (3d Cir. 2012) (quoting *Rapanos v. United States*, 547 U.S. 715, 721 (2006)).

Among those relevant factors are "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people." *Id.* The Corps will issue a permit "unless the district engineer determines that it would be contrary to the public interest" based on his or her evaluation of these factors. *Id.*

1. *Defendants Failed to Comply with Corps Permitting Regulations Because the Statement of Findings Was Not Signed by the District Engineer or a Designee.*

The district engineer is responsible for documenting the public interest review in a statement of findings ("SOF"), or, where an EIS is prepared for the permitted activity, in the record of decision ("ROD"). 33 C.F.R. § 325.2(a)(6). The SOF/ROD "shall be dated, signed, and included in the record prior to final action on the application." *Id.* "Where the district engineer has delegated authority to sign permits for and in his behalf, he may similarly delegate the signing of the SOF or ROD." *Id.*

Because the Memorandum identifies itself as the Corps' "Public Interest Review and Statement of Findings for the subject application," ACE002286, the absence of the District Engineer's signature or the signature of a delegatee means that the Corps' own procedural regulations were not followed. From the perspective of the public, it is unclear whether the Memorandum is a draft, or the final decision document.

Even if the Memorandum is the Corps' final decision document, that document arbitrarily and capriciously fails to capture the full effect of the Dock 2 Project on the public interest, not in small part due to the Corps' deficient NEPA analysis. *See* 33 C.F.R. § 325.2(a)(6) (the "ROD shall include the district engineer's views on the probable effect of the proposed work on the public interest").

2. Defendants' Public Interest Review Failed to Account for the Detrimental Effects of Greenhouse Gas Emissions Caused by the Dock 2 Project.

During the second public commenting period, the Corps received substantial comments asking it to evaluate the greenhouse gas emissions associated with the Dock 2 Project. *See, e.g.,* ACE001831–1832; ACE001833–1836; ACE001843; ACE001874–1875; ACE001940; ACE001950–1951. In its Memorandum discussing the effect of the Dock 2 Project on climate change, the Corps considered only "[t]he proposed activities within the Corps federal control and responsibility," and concluded that those activities "likely will result in a negligible release of greenhouse gas emissions." ACE002329. The Corps also stated that it "has no

authority to regulate emissions that result from the combustion of fossil fuels" and that the combustion of fossil fuels is "subject to federal regulations under the Clean Air Act and/or the Corporate Average Fuel Economy (CAFE) Program." *Id.*

Presumably, however, this is also true of nearly all of the other public interest factors that the Corps has the authority to consider when granting or denying a permit. The Corps does not decline to consider land use impacts because it is not a local zoning board, ignore the energy needs factor because the Natural Gas Act is on the books, or bypass food and fiber production because it is not an agency within the Department of Agriculture. Thus, it is arbitrary, capricious, and an abuse of discretion for the Corps to overlook the climate change impacts of the massive fossil fuel infrastructure project in which Dock 2 plays an integral role.

3. Defendants' Public Interest Review Failed to Account for the Safety Risks Associated with the Transportation and Transloading of LNG Associated with the Dock 2 Permit

Safety at the GLC and the risk of transporting LNG to Dock 2 using trucks and railcars was a primary apprehension shared by commenters on DRP's application. *See* ACE001832–1833; ACE001833–1835; ACE001844; ACE001857–1858; ACE001867–1868; ACE001875–1882; ACE001939–1941; ACE001942; ACE001945; ACE001950. In response to this public anxiety, the Corps concluded that "[t]he applicant has stated that all state and Federal regulations as required by law will be followed at the project site." ACE002328. Earlier in the memorandum,

specifically responding to comments about the storage and transportation of hazardous materials at the GLC, the Corps went into great detail identifying the other governmental entities responsible for safety and the regulations that they apply, without discussing what effect the application of those regulations would have at the GLC, or even what safety measures the regulations require. ACE002308–2309. This cursory review "entirely fail[s] to consider an important aspect of the problem," *CBS Corp.*, 663 F.3d at 137, and is thus arbitrary, capricious, and an abuse of the Corps' discretion under Section 10 of the Rivers and Harbors Act of 1899.

C. Defendants Violated the Clean Air Act by Failing to Account for All Emissions that Would be Generated by the Project, Leading to an Arbitrary and Capricious Conclusion that a Conformity Determination Was Not Required.

Defendants' conclusion that "a conformity determination is not required for this permit action," ACE002339 is based on a submission by DRP that accounted only for emissions caused by construction of Dock 2 and emissions caused by 15 trucks per hour traveling at 15 miles per hour on a 0.6 mile stretch of Route 44. ACE002280–2284. Because the applicability review was based on an unlawfully narrow public interest review, which has the potential to define the category of emissions required to be evaluated by the Clean Air Act and its implementing regulations, the Corps' applicability analysis was arbitrary and capricious.

The Clean Air Act was enacted to, among other things, "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare

and the productive capacity of its population" and "to encourage and assist the development and operation of regional air pollution prevention control programs." 42 U.S.C. § 7401(b)(1), (4). To that end, the United States Environmental Protection Agency ("EPA") has identified air pollutants "the emissions of which . . . cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," known as criteria pollutants. 42 U.S.C. § 7408(a)(1)(A). For each of the criteria pollutants, EPA has promulgated primary and secondary ambient air quality standards which are requisite to protect the public health and welfare. 42 U.S.C. § 7409; *see also* 40 C.F.R. Part 50.

The Clean Air Act requires states to adopt implementation plans, which "provide[] for implementation, maintenance, and enforcement of" the primary and secondary air quality standards promulgated by EPA. 42 U.S.C. §§ 7410, 7407. The United States is thus divided into geographical air quality control regions, which may be designated as nonattainment (does not meet air quality standards), attainment (meets air quality standards), or unclassifiable. 42 U.S.C. § 7407(b), (d).

The Clean Air Act prohibits any "department, agency, or instrumentality of the Federal Government" from licensing, permitting, or approving "any activity which does not conform to an implementation plan" if the activity is to take place in a nonattainment area. 42 U.S.C. § 7506(c)(1), (5). The head of the Federal "department, agency or instrumentality" is responsible for assuring that the activity

conforms to the state implementation plan. 42 U.S.C. § 7506(c)(1). The Dock 2 Project is located in the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE marginal nonattainment area for the 2008 federal Ozone Standard ("PA-NJ-MD-DE Nonattainment Area"), which is within an Ozone Transport Region (OTR). ACE002280, Am. Compl. ¶ 192.

"Conformity" means that the activity "conform[s] to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards" and that the activity will not "cause or contribute to any new violation of any standards in any area," "increase the frequency or severity of any existing violation of any standard in any area," or "delay timely attainment of any standard or any required interim emission reductions or other milestones in any area." 42 U.S.C. § 7506(c)(1)(A)–(B).

EPA regulations governing the conformity determination provide that the "Federal agency must make a determination that a Federal action conforms to the applicable implementation plan . . . before the action is taken." 40 C.F.R. § 93.150(b). In order to determine whether a conformity determination is required, the Federal agency must first engage in an applicability analysis. 40 C.F.R. § 93.153(b). A conformity determination is required for criteria pollutants or precursors "where the total of *direct and indirect emissions caused by* a Federal action would equal or

exceed" the rates specified in 40 C.F.R. § 93.153(b)(1) or (2). 40 C.F.R. § 93.153(b) (emphasis added).

"Direct emissions" are "those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and originate in a nonattainment or maintenance area and occur at the same time and place as the action and are reasonably foreseeable." 40 C.F.R. § 93.152. "Indirect emissions" are "those emissions of a criteria pollutant or its precursors: (1) That are caused or initiated by the Federal action and originate in the same nonattainment or maintenance area but occur at a different time or place as the action; (2) That are reasonable foreseeable; (3) That the agency can practically control; and (4) For which the agency has continuing program responsibility." *Id.*

"Caused by . . . means emissions that would not otherwise occur in the absence of the Federal action." *Id.* The Supreme Court has held that, unlike NEPA's more demanding causal connection, "the EPA has made clear that for purposes of evaluating causation in the conformity review process, some sort of 'but for' causation is sufficient." *Pub. Citizen*, 541 U.S. at 772. If the applicability analysis reveals that a conformity determination is needed, the Federal agency must make a conformity determination and must provide public notice and allow for public comment. 40 C.F.R. §§ 93.154, 93.156(b).

Here, the Corps' applicability analysis included the trucks coming to and from Dock 2 as an *indirect emission* because the Corps chose to condition DRP's permit on traffic concerns, which it has the authority to do under its public interest review. *See* ACE002346. The truck emissions were "caused or initiated by the Federal action and originate in the same nonattainment or maintenance area" but since they will not occur until Dock 2 is operational, they are "reasonably foreseeable" actions that will "occur at a different time or place as the action." *See* 40 C.F.R. § 93.152. By conditioning the permit on the alleviation of truck traffic, the Corps "can practically control" the traffic and it retains "continuing program responsibility" through the administration of the permit. *See id.*

After completing an EIS that complies with NEPA, and conducting its public interest review based on the information garnered in preparing the EIS, the Corps may choose to impose additional conditions on the operation of the Dock 2 Project. Accordingly, the appropriate scope of the Corps' applicability analysis on remand will depend on the extent of its practical control and continuing responsibility over Dock 2's operations.

V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request this Court grant summary judgment in favor of Plaintiffs on all counts of Plaintiffs' Amended Complaint.

Respectfully submitted,

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