



September 6, 2022

VIA ELECTRONIC MAIL

Pamela M. Bush, Commission Secretary
Delaware River Basin Commission
25 Cosey Road
PO Box 7360
West Trenton, NJ 08628-0360
pamela.bush@drbc.gov

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

Dear Ms. Bush,

Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper, (collectively, "DRN") submit the following in reply to Delaware River Partners, LLC's ("DRP") August 29, 2022 response letter. As it is unclear from the Delaware River Basin Commission's ("Commission" or "DRBC") September 8, 2022 Business Meeting Agenda whether DRP's application will be subject to a public hearing as required by the DRBC's Rules of Practice and Procedure,¹ DRN hereby replies to new argument and information presented by DRP.

DRP misstates the appropriate standards by which the Commission's approval may be extended, and fails to provide a convincing reason why the Commission should depart from the plain language of the Rules of Practice and Procedure.

The RPP does not *require* DRBC to extend a docket approval. The only mandatory language in Section 401.41 states that "[a]pproval by the Commission under this part *shall expire* three years from the date of Commission action . . ."² The exception to this rule occurs when, prior to the three-year expiration date, an application is made to the Commission showing that "the sponsor has expended substantial funds (in relation to the cost of the project) in reliance upon such approval."³ If the Commission was required to extend its approval, Section 401.41 would not include permissive language describing the action that

¹ 18 C.F.R. § 401.5.

² *Id.* § 401.41(a).

³ *Id.*

the Commission “may” take.⁴ Instead, the RPP provides a procedure by which the Commission may determine that a project sponsor has expended substantial funds in reliance upon its previous approval, and thereby act to extend the approval.

DRP argues that a request for an extension of an “already-approved project” need not undergo the public hearing process because the project has already been “evaluated and deemed appropriate for inclusion into DRBC’s *Comprehensive Plan . . .*”⁵ Presumably this is also true of the many docket renewal applications that DRBC considers at its public hearings, and DRP fails to provide a reason why its requested extension should be processed any differently. DRP also claims that it alone possesses the information necessary for the Commission to determine whether the standard for an extension has been met. While evidence submitted by DRP is certainly relevant, competing evidence may be presented, and arguments may be made regarding whether the funds expended are substantial in relation to the cost of the project, or whether the funds were expended in reliance upon the Commission’s approval.⁶

DRP also claims, without support, that it is the “regular practice” of the Executive Director to extend docket approvals by letter without a public process. DRN is unaware of this regular past practice, and Executive Director Tambini’s August 15, 2022 letter did not describe such a practice. To DRN’s knowledge, this is the first time the Executive Director has taken such an action.

Finally, DRN does not seek to confuse the Commission by describing the additional upland infrastructure to be constructed in support of Dock 2. At the time of the Commission’s approval of the Dock 2 Docket, the Commission’s position was that the Dock 2 Project involved minimal, temporary disturbance to the upland area within the previously-approved footprint of the Gibbstown Logistics Center (“GLC”). Since that approval, DRP has sought to develop a rail loop that would be used to transload liquid energy products from railcars to vessels docked at Dock 2, and would be located primarily outside of the GLC’s original footprint. This change in the Dock 2 Project warrants additional consideration by the Commission—just as the Commission considered the landside development and infrastructure necessary to support Dock 1 in Docket No. D-2017-009-1.

New information submitted by DRP does not establish that it has expended substantial funds in reliance on the approval.

DRP has also submitted new information in support of its claim that it has expended substantial funds (in relation to the cost of the project) in reliance upon the Commission’s approval in Docket No. D-2017-009-2.⁷ The new total expenditure (minus legal fees) is \$1,813,949.00, **is merely 1.6%** of the new estimated project cost of \$113,497,584.00. Even including the legal fees, which were not expended in reliance upon the Commission’s

⁴ *Id.*

⁵ DRP August 29, 2022 Response at 2.

⁶ *See, e.g.*, DRN August 17, 2022 Submission.

⁷ DRP August 29, 2022 Response at 3–4, Exhibit 2.

approval, the expenditure **is merely 3.8%** of the cost of the Project. Regardless of whether the amount spent by DRP is “substantial’ on its face,” such small percentages *relative to the cost of the Project* cannot be considered substantial—the relevant standard here.

DRP’s claims concerning the reason behind its failure to expend substantial funds omits important context as to why the Dock 2 Project has been delayed.

Although Section 401.41 does not call for the Commission’s consideration of the reasons for a sponsor’s lack of substantial expenditures, DRN rejects the suggestion that it is the sole reason for the Dock 2 Project’s delays. First, the Dock 2 Project’s purpose is to transload liquefied natural gas (“LNG”) from railcars and trucks onto LNG vessels for export. The LNG was to be sourced from a facility in Wyalusing, Pennsylvania, to be developed by a subsidiary of New Fortress Energy Inc.⁸ That project has not yet broken ground, and the air quality permits for the operation of the project were recently allowed to expire.⁹ Additionally, DRP has been involved in a dispute over a \$75 million contract to construct the GLC.¹⁰

Perhaps most significantly, DRP initially decided to proceed with the permitting and development of the Dock 2 Project based on assurances from Federal Energy Regulatory Commission (“FERC”) staff that the Project would not be subject to FERC’s jurisdiction.¹¹ In June 2020, however, FERC issued an order to New Fortress Energy LLC to show cause why an LNG facility it constructed in San Juan, Puerto Rico was not subject to FERC’s jurisdiction.¹² This order prompted DRP to file a petition for declaratory order before FERC in September 2020, seeking a declaration that Dock 2 was not jurisdictional.¹³ That petition remains pending, and provides a more plausible explanation for why DRP has chosen to wait to begin construction on Dock 2.

⁸ See Petition for Declaratory Order at 2–3, Delaware River Partners LLC, FERC Docket No. CP20-522 (Sept. 11, 2020).

⁹ See Stipulation for Settlement, *Citizens for Pennsylvania’s Future v. DEP*, EHB Docket No. 2021-083-L (March 18, 2022).

¹⁰ See *Delaware River Partners, LLC v. Railroad Construction Company, Inc.*, No. A-2613-20, 2022 WL 2286928 (N.J. Super. Ct. App. Div. June 24, 2022).

¹¹ See Petition for Declaratory Order, *supra* n.8 at 1–2.

¹² See Order to Show Cause, New Fortress Energy LLC, 171 FERC ¶ 61,230 (June 18, 2020).

¹³ See Petition for Declaratory Order, *supra* n.8. The New Fortress entity developing the Wyalusing, Pennsylvania facility submitted a similar petition. See Petition for Declaratory Order, Bradford County Real Estate Partners LLC, FERC Docket No. CP20-524 (Sept. 18, 2020).

Conclusion

As requested in DRN's August 17, 2022 submission, the Commission should rescind Mr. Tambini's letter dated June 16, 2022, and consider DRP's application at a public hearing that has been properly noticed pursuant to 18 C.F.R. § 401.5. Should the Commission choose to act on DRP's application at its September 8, 2022 business meeting, the request for extension of Docket No. D-2017-009-2 should be denied.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Kacy C. Manahan', with a long horizontal stroke extending to the right.

Kacy C. Manahan
Senior Attorney

Cc: Kathleen Campbell, Esq. (*via email*)
Michael Dillon, Esq. (*via email*)