



BY EMAIL

December 3, 2020

Delaware River Basin Commission
25 Cosey Road
P.O. Box 7360
West Trenton, NJ 08628-0360

Re: Proposed Dock 2 Expansion at the Gibbstown Logistics Center
DRBC Docket D-2017-009-2

Dear DRBC Commissioners and Staff:

We are writing you regarding the current proposal by Delaware River Partners (DRP), a subsidiary of New Fortress Energy, to expand a deep-water port terminal on the Delaware River in Gibbstown, New Jersey to export liquefied natural gas (LNG).

As set forth in this letter, the Natural Resources Defense Council (NRDC) believes that the existing facility, known as the Gibbstown Logistics Center, is in violation of clean water laws and regulations. Specifically, based on the record for this proposal, we believe this facility is out of compliance with federal, state and Delaware River Basin Commission (DRBC) laws governing the implementation of a U.S. Environmental Protection Agency-established Total Maximum Daily Load (TMDL) for toxic PCBs in the section of the Delaware River where this terminal would be located. The Gibbstown facility is also out of compliance with an explicit 2017 DRBC approval condition relating to PCBs and TMDLs. And it is possible that stormwater discharges from the site have violated water quality standards for PCBs in the Delaware River.

Under these circumstances, we believe DRBC should defer any additional approvals to expand this facility, including construction of "Dock 2," until these legal deficiencies are fully examined and addressed.

BACKGROUND

NRDC is a national and international non-profit environmental advocacy organization with over three million members and activists nationally and over 385,000 in New Jersey, Pennsylvania, Delaware, and New York. NRDC has a long history of litigating and advocating for clean water at the state and federal levels, including in the states through which the Delaware River crosses. In 1972, NRDC helped enact the federal Clean Water Act, America's bedrock water-protection law. NRDC has also litigated federal Clean Water Act cases around the country to establish and implement the TMDL program. And almost since its founding in 1970, NRDC has been directly involved in eliminating the use of PCBs and cleaning up PCB contamination on land and in waterways, including in the Hudson River.

The Gibbstown Proposal: Docks 1 and 2

The Gibbstown proposal, located on a portion of the former DuPont-Chemours-Repauno site, consists of two phases – first, the construction of Dock 1 and then the construction of Dock 2. If completed, this project would be the first LNG facility to be sited within the Delaware River Basin.

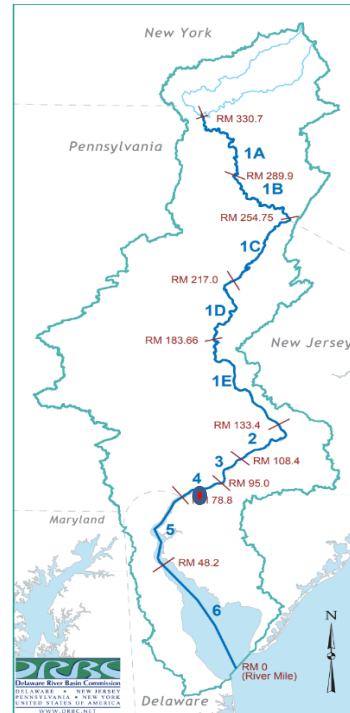
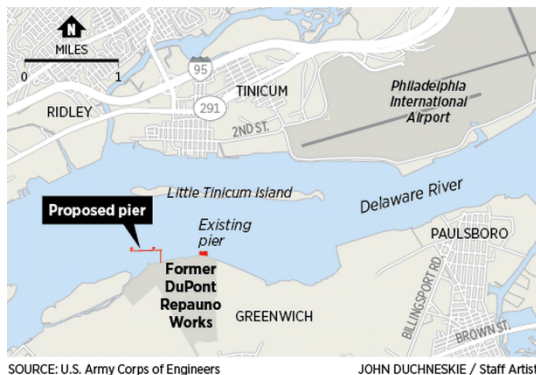


FIGURE 1 Above: Location of Gibbstown Logistics Center on the Delaware River
FIGURE 2 Right: Map of Delaware River Estuary Zones (Gibbstown site in red)

In December 2017, DRBC approved the construction of Dock 1.¹ The construction of this first Dock, which is approximately 750 feet long, involved demolition of the existing wharf and bulkhead, along with the construction of a new bulkhead, a new pile-supported wharf structure, and six new stormwater outfall structures. In addition to this construction, Dock 1 also entailed the dredging of 371,000 cubic yards of contaminated sediments in a 27-acre area of the Delaware River to construct a deep-water berth. According to news reports, construction on Dock 1 was completed in December 2018.²

In June 2019, DRBC initially approved the construction of Dock 2.³ The proposed Dock 2 project includes the creation of two additional ship berths, each approximately 1,300 feet long, and provides for navigational access, mooring, and loading equipment for two ships. Dock 2 also requires the dredging of a 45-acre area of the River and scooping out an additional 665,000

¹ Del. River Partners LLC - Gibbstown Logistics Ctr., Docket No. D-2017-009-1, Del. River Basin Comm'n (2017), <https://www.nj.gov/drbc/library/documents/dockets/121317/2017-009-1.pdf>.

² Nick Snow, *DRBC Approves Dock, Adds Products to Gibbstown Project*, OIL & GAS J. (June 17, 2019), ogj.com/general-interest/government/article/17278972/drbc-approves-dock-adds-products-to-gibbstown-project.

³ Del. River Partners LLC - Gibbstown Logistics Ctr., Docket No. D-2017-009-2, Del. River Basin Comm'n (2019) <https://www.state.nj.us/drbc/library/documents/dockets/061219/2017-009-2.pdf>.

cubic yards of contaminated sediments. This dredging operation would be double the size of the dredging conducted for Dock 1.⁴

Among the conditions of its preliminary approval, DRBC stated that any person who objected to its decision could request an administrative hearing to appeal its determination. Acting under this provision, in July 2019, the Delaware Riverkeeper Network requested an administrative hearing for DRBC’s approval of Dock 2. Following a multi-day hearing in May 2020, as well as additional briefings, Hearing Officer John D. Kelly issued a “Report of Findings and Recommendations,” dated July 21, 2020, that supported DRBC’s initial approval of Dock 2. In August 2020, the Delaware Riverkeeper Network filed objections to this final report, and DRBC staff filed comments in support of his recommendations.⁵

At a meeting on September 10, 2020, DRBC approved a motion to stay any construction of Dock 2 until “such time as the Commission makes a final determination resolving the administrative appeal.”⁶ Since that meeting, DRBC has indicated possible action on the Dock 2 matter at its upcoming December 9, 2020 meeting.

The Delaware River PCB TMDLs

PCBs, or polychlorinated biphenyls, are present on both the land of the proposed Gibbstown facility as well as in the abutting Delaware River. PCBs are man-made toxins that are known human carcinogens and one of only a handful of chemicals ever banned in the United States. It has been well known for decades that PCBs are deeply harmful chemicals. But recent scientific evidence has shown that PCBs are far more toxic than scientists or environmental agencies realized even 15 years ago.⁷

In December 2003, DRBC prepared, and U.S. EPA established, “Stage 1” Total Maximum Daily Loads (TMDLs) for PCBs in the Delaware Estuary – including in the “Zone 4” portion of the River where the Gibbstown site is located.⁸

The federal Clean Water Act establishes TMDLs as one of the tools to address situations where technology-based controls are not sufficient to meet applicable water quality standards for a

⁴ *Id.* at 2, 3.

⁵ See Del. Riverkeeper Network, Objections of Del. Riverkeeper Network and the Del. Riverkeeper to the Jul. 21, 2020 Report of Findings and Recommendations of Hearing Officer (Aug. 10, 2020); DRBC Staff, Comment Letter on Hearing Officer’s Report and Interested Party Objections; Recommended Comm’n Action (Aug. 21, 2020).

⁶ Unofficial Transcript of General Counsel Report and Vote on Gibbstown Administrative Appeal, Del. River Basin Comm’n (Sept. 10, 2020), https://www.nj.gov/drbc/library/documents/UnofficialTranscript_DRBC-Gen-Counsel-Rpt_excerpt091020.pdf.

⁷ See generally WORLD HEALTH ORG. INT’L AGENCY FOR RSCH. ON CANCER, POLYCHLORINATED BIPHENYLS AND POLYBROMINATED BIPHENYLS, IARC MONOGRAPHS ON THE EVALUATION OF CARCINOGENIC RISKS TO HUMANS 107 (June 29, 2015), <http://monographs.iarc.fr/ENG/Monographs/vol107/mono107.pdf>; Polychlorinated Biphenyls (PCBs), EPA (last updated Nov. 9, 2020) <https://www.epa.gov/pcbs>.

⁸ PCBs, DEL. RIVER BASIN COMM’N (Last updated Jan. 23, 2019), <https://www.state.nj.us/drbc/quality/toxics/pcb.html>.

waterbody. Under federal law, a TMDL is the calculation of the maximum amount of a pollutant allowed to enter a waterbody so that the waterbody will meet and continue to meet water quality standards for that pollutant. A TMDL determines a pollutant reduction target and allocates load reductions necessary to the source(s) of the pollutant. Pollutant sources are characterized as either point sources that receive a wasteload allocation (WLA), or nonpoint sources that receive a load allocation (LA).⁹ In accordance with federal regulations, all National Pollutant Discharge Elimination System (NPDES) permits must include a water quality-based effluent permit limitation (WQBEL) that is consistent with the assumptions and requirements of any available wasteload allocation for which a TMDL has been established.¹⁰

The 2003 PCB TMDL for the Zone 4 portion of the Delaware River where the Gibbstown Facility would be located is currently 56.71 milligrams per day. The WLA for this Zone 4 TMDL is 6.54 mg/day and the LA is 47.34 mg/day (with a 2.84 mg/day Margin of Safety).¹¹

This allocation is extremely strict: for context, 56 milligrams is equal to 0.00197534 ounces. And the WLA for all point sources in this Zone is the equivalent of 0.0002306917 ounces.

In 2003, and since then, DRBC also committed to developing a “Stage 2” PCB TMDL for this zone (and other River zones).¹² To date, these Stage 2 TMDLs have not been promulgated.

When the Stage 1 TMDLs were established by EPA in 2003, the final TMDL document stated that “[a]ll [NPDES] permits issued, reissued or modified after the approval of the Stage 1 TMDLs, and prior to the approval of the Stage 2 TMDLs, will include non-numeric WQBELs.”¹³ It explained that non-numeric WQBELs were justified for Stage 1 TMDLs in part because of the difficulty of precisely calculating numeric limits with the data and modeling used at that time. And it further clarified that these non-numeric WQBELs, which would be used to implement the WLAs for Stage 1 TMDLs, would require “PCB minimization and reduction program and additional monitoring” consistent with state and federal regulations.¹⁴

In 2009, in a TMDL implementation document, DRBC added that “[a] requirement to develop, submit and implement a Pollutant Minimization Plan (PMP) is a key component of the TMDL Implementation Plan.”¹⁵ And it explained further in this 2009 document that all NPDES permittees covered by Stage 1 TMDLs were required to either (a) submit and implement PMPs or (b) conduct additional monitoring to determine the need for a PMP requirement.¹⁶

⁹ *Overview of Total Maximum Daily Loads (TMDLs)*, EPA (last updated Sept. 13, 2018), <https://www.epa.gov/tmdl/overview-total-maximum-daily-loads-tmdls>.

¹⁰ 40 C.F.R. §122.44(d)(1)(vii)(B) (2019).

¹¹ DEL. RIVER BASIN COMM’N, U.S. EPA REGIONS II & III TOTAL MAXIMUM DAILY LOADS FOR POLYCHLORINATED BIPHENYLS (PCBs) FOR ZONES 2-5 OF THE TIDAL DEL. RIVER xi (2003) (hereinafter “TMDL”).

¹² *See id.* at viii; DEL. RIVER BASIN COMM’N, *supra* note 8.

¹³ TMDL, *supra* note 11 app. 1 at 6.

¹⁴ *Id.* app. 1 at 11.

¹⁵ DEL. RIVER BASIN COMM’N, IMPLEMENTATION PLAN FOR POLYCHLORINATED BIPHENYLS (PCBs) FOR ZONES 2-6 OF THE DEL. RIVER ESTUARY 10 (2009).

¹⁶ *See id.* at 11.

DRBC's PCB Requirements

The DuPont-Chemours-Repauno site has historically been one of the top 10 biggest PCB loading point-sources in the Delaware Estuary. According to a 2018 DRBC presentation, as of 2016, the site is likely contributing as much as 180.57 mg/day of PCBs into the River.¹⁷ This number is more than triple the total amount of PCBs currently allowed into the entire Zone 4 under the federally established Stage 1 TMDL.

In its December 2017 approval of Dock 1, DRBC set forth a detailed description of the PCB TMDLs in a section entitled “**Delaware River PCB Total Maximum Daily Load (TMDL).**” DRBC noted that this Gibbstown site was one of the largest PCB point sources to the Delaware Estuary and that PCBs had been detected on the land to be redeveloped as well as in the in-river dredging area for Dock 1. DRBC noted that DuPont and Chemours had previously implemented a PCB PMP in accordance with DRBC water quality regulations.¹⁸

But DRBC determined that DRP:

is required to apply for and obtain a New Jersey Pollutant Discharge Elimination System (NJPDES) permit from the NJDEP for discharges associated with the site redevelopment. In accordance with the NJPDES permit when issued, the docket holder will be required to perform an investigation of the site to assess the disposition of stormwater and the flow paths for individual stormwater outfalls either directly or indirectly to the Delaware River in order to develop a PCB stormwater sampling plan. Upon evaluation of the sampling results by the NJDEP in consultation with the DRBC, DRP may be required to develop and implement a separate PMP for PCBs (Condition C.I.1.) to ensure that PCB load reductions achieved by DuPont and Chemours are maintained or enhanced by the planned redevelopment.¹⁹

During the appeal process for Dock 2, Hearing Officer Kelly noted that “DRP intends to install new stormwater collection, conveyance and treatment systems in conjunction with development of the Site.”²⁰ He also noted that DRP had obtained two NPDES permits “from NJDEP for the land-side construction associated with Dock 2 and for industrial activity at the Gibbstown Logistics Center.”²¹ But he also noted that “Dock 2 does not require any additional or different

¹⁷ GREGORY J. CAVALLO, DEL. RIVER BASIN COMM'N, IMPLEMENTATION OF THE PCB TMDLS IN THE DEL. ESTUARY AND BAY (Feb. 20, 2018),

https://www.state.nj.us/drbc/library/documents/PCB_PMPpresentation_DRBCtoEPA022018.pdf.

¹⁸ Del. River Partners LLC - Gibbstown Logistics Ctr., Docket No. D-2017-009-1, Del. River Basin Comm'n 5 (2017), <https://www.nj.gov/drbc/library/documents/dockets/121317/2017-009-1.pdf>.

¹⁹ *Id.* (emphasis added).

²⁰ John D. Kelly, DRBC Docket D-2017-009-2 GIBBSTOWN LOGISTICS CENTER Dock 2, Report of Findings and Recommendations 24 (July 21, 2020).

²¹ *Id.* at 75.

stormwater outfalls or controls.”²² Additionally, the Hearing Officer acknowledged that the Dock 1 approval “requires DRP to prepare and implement a PCB stormwater sampling plan to assess potential PCBs in stormwater discharges from the redeveloped site,” and that this “sampling plan is to be incorporated into DRP’s New Jersey Pollution Discharge Elimination System (‘NJPDES’) Permit covering” the Gibbstown site.²³

Hearing Officer Kelly also wrote in his final report that this NJPDES-incorporated sampling plan “will be used by DRBC and NJDEP to determine the potential need for DRP to develop a PCB PMP for the Gibbstown site.”²⁴ Further, the Hearing Officer noted more generally in his report that “[t]o address PCB-related contamination issues, the Commission developed a comprehensive PCB database and established a Pollutant Minimization Plan (“PMP”) program, which was incorporated into DRBC Water Quality Regulations and Water Code.”²⁵ But he stated that “information regarding such investigation and sampling program is not of record in the instant case.”²⁶

The Hearing Officer also noted that, under its Basic Industrial Stormwater Permit, DRP is also required to develop and implement a Stormwater Pollution Prevention Plan (“SPPP”) – which would presumably cover a wide range of contaminants beyond just PCBs – to ensure that stormwater from the facility will not adversely affect water quality in the Delaware River.²⁷ As to that separate NPDES permit requirement, Hearing Officer Kelly noted that, as of the date of the hearing, DRP’s SPPP also “was not yet fully developed.”²⁸ It is our understanding that after the hearing, on July 8, 2020, DRP submitted to the Commission a SPPP and a PCB sampling plan.

CLEAN WATER VIOLATIONS

The record in this matter shows that the Dock 1 construction and redevelopment project appears to be in violation of federal, state, and DRBC clean water laws and regulations.

As set forth above, there is a federally approved TMDL in effect for the portion – Zone 4 – of the River where Docks 1 and 2 would be located. Under Clean Water Act regulations, including those issued by DRBC, this TMDL for PCBs requires all NJPDES permits issued after 2003 to include water quality-based limits for PCBs. DRBC made the decision that only non-numeric water quality limits would be used to implement the WLAs for these Stage 1 TMDLs. DRBC further decided that to implement these non-numeric limits, it would require PCB minimization, reduction and monitoring programs. And to carry out this minimization and monitoring program, DRBC required all permittees covered by a Stage 1 TMDL to either: (a) submit and

²² *Id.* at 55.

²³ *Id.* at 23.

²⁴ *Id.*

²⁵ *Id.* at 39.

²⁶ *Id.* at 41.

²⁷ *Id.*

²⁸ *Id.*



implement PMPs for PCBs or (b) conduct additional monitoring to determine the need for a PMP requirement to address PCBs.

Consistent with these TMDL rules, DRBC stated in its 2017 approval of Dock 1 that DRP was required obtain an NPDES permit from NJDEP for discharges associated with the site redevelopment that, among other things, would require DRP “to perform an investigation of the site to assess the disposition of stormwater and the flow paths for individual stormwater outfalls either directly or indirectly to the Delaware River in order to develop a PCB stormwater sampling plan.”²⁹

But as Hearing Officer Kelly acknowledged, nothing in the record demonstrates such an NPDES permit with the PCB requirements was ever obtained by DRP. And although DRP did submit a PCB sampling plan to the Commission after the hearing, in July 2020, there is no evidence in the record demonstrating the PCB investigation and sampling program has been undertaken to date. Further, construction of Dock 1 and its associated structures has apparently been completed – thus any future sampling plan DRP intends to carry out under an NPDES permit will have failed to assess PCB discharges during the period of time when there was the greatest risk of contaminated runoff.

Thus, the record shows that Dock 1 was constructed without an NPDES permit that incorporated water quality-based effluent limits as required by the federally approved TMDL for PCBs. DRP also failed to comply with DRBC’s own approval condition from 2017 for Dock 1 to obtain an NPDES permit with a PCB investigation and sampling program. And it is possible that stormwater discharges from construction or operation have caused or contributed to the violation of water quality standards for PCBs in the Delaware River.

There are significant real-world consequences of DRP’s failure to comply with these requirements. As noted, the site on which Dock 1 was built, and where DRP has proposed to build Dock 2, has been one of the largest PCB contributors to the Delaware Estuary. And even miniscule amounts of PCBs released into the River could have adverse environmental impacts and could represent an exceedance of the existing TMDL. Yet, again, as noted, there is no evidence in the record that DRP has yet implemented any PCB sampling or monitoring for the Gibbstown site. Thus, there is a real possibility that some PCBs have migrated, or will continue to migrate, into the River from the Gibbstown location.

There is a reason why DRBC and EPA have put in place a TMDL for PCBs in the Delaware River—EPA and DRBC have classified PCBs as a “probable human carcinogen,” and have noted that PCBs have been shown “to have an adverse impact on human reproductive and immune systems and may act as an endocrine disruptor.”³⁰ Specifically, they can be transferred

²⁹ Del. River Partners LLC - Gibbstown Logistics Ctr., Docket No. D-2017-009-1 at 5, Del. River Basin Comm’n (2017), <https://www.nj.gov/drbc/library/documents/dockets/121317/2017-009-1.pdf>

³⁰ TMDL, *supra* note 11 at ii.

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from a mother to her unborn baby, increasing the risk of preterm delivery and low birth weight.³¹ They can also be transferred via breastmilk from mother to baby, which has been associated with learning defects.³² Due to the accumulation of PCBs in Delaware River fish populations, for example, the Basin states, including Delaware, New Jersey, and Pennsylvania, began issuing fish consumption advisories starting in the 1980s. Today, these warnings extend to the entire river and its tributaries.

Now, having failed to comply with DRBC's explicit approval condition from 2017 for Dock 1, DRP is proposing to expand operations at the site. Additional land disturbance associated with Dock 2's construction and operation could send even more PCB pollution into the River, including potentially through the same Dock 1 outfalls that appear to be out of compliance with Clean Water Act and DRBC requirements. Under these circumstances, DRBC should defer any final approval for Dock 2, and stay any further construction at the Gibbstown site, until these legal deficiencies are fully examined and addressed.

Thank you in advance for your attention to these critical issues.

Respectfully,



Mark A. Izeman, New York Regional Director & Senior Attorney
Kimbery Ong, Senior Attorney
Alex Liguori, Law Clerk

Cc: The Honorable John Carney, Chair, DRBC
Brigadier General Thomas J. Tickner, Vice Chair, DRBC
The Honorable Tom Wolf
The Honorable Phillip D. Murphy
The Honorable Andrew M. Cuomo

³¹ Mayo Clinic, *Nutrition and Healthy Eating*, <https://www.mayoclinic.org/healthy-lifestyle/nutrition-and-healthy-eating/expert-answers/fish-and-pbcs/faq-20348595> (Aug. 27, 2020).

³² *Id.*