IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000709-19

IN THE MATTER OF CHALLENGE OF DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM-THE DELAWARE RIVERKEEPER TO DELAWARE RIVER PARTNERS, LLC WATERFRONT DEVELOPMENT INDIVIDUAL PERMIT NO. 0807-16-0001.2 WFD 19001	STATE AGENCY ON APPEAL FROM NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

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

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I. PRELIMINARY STATEMENT

The New Jersey Department of Environmental Protection's ("NJDEP's") decision to issue and then reinstate a Waterfront Development Individual Permit and Water Quality Certificate (collectively, the "Permit") to Delaware River Partners, LLC ("DRP") was arbitrary, capricious, unreasonable, lacked support in the evidence, and failed to comply with NJDEP's own regulations.

DRP's Dock 2 Project will allow the Gibbstown Logistics Center ("GLC") to handle substantial amounts of bulk liquid energy products, including liquefied natural gas ("LNG") and liquefied hazardous gas ("LHG"), which includes liquid petroleum gas. In fact, the GLC will require authorization from the United States Department of Energy prior to commencing its LNG export operations. The GLC is unique, in that it would be the only facility in the nation that would receive LNG by railcar and truck rather than by pipeline, after the natural gas is liquefied in Wyalusing, Pennsylvania.

Puzzlingly, however, NJDEP chose not to review the Dock 2 Project as an "energy facility" under its own regulations, ignored prohibited adverse impacts to Federally-listed sturgeon, allowed for the destruction of submerged aquatic vegetation without a viable plan for restoration or mitigation, and declined to consider the unique hazards of the proposed LNG

exporting operation. NJDEP also approved a sediment sampling plan that failed to account for known contaminants at the GLC site, and never followed up on the results of a sampling analysis that would have ensured that water draining from the dredged material was pollutant-free. Finally, NJDEP ignored new information about upland development associated with the Dock 2 Project which triggered compliance with NJDEP's Stormwater Management Resource Rule.

For these reasons, NJDEP's decision to issue the Permit must be reversed.

II. PROCEDURAL HISTORY

This is an appeal from the decision of NJDEP to reinstate a Waterfront Development Individual Permit and Water Quality Certificate for DRP and specifically DRP's proposed Dock 2 Project associated with its proposed GLC facility. NJDEP issued its decision on September 5, 2019. The agency docket number is 0807-16-0001.2 WFD 19001.

On March 5, 2019, NJDEP received DRP's application for the Permit (23a). NJDEP determined the application, 0807-16-0001.2 WFD 190001, to be administratively complete on March 20, 2019. (23a). On May 20, 2019, NJDEP issued the Permit. (23a).

However, on June 5, 2019, NJDEP suspended the Permit due to failure to provide public notice of NJDEP's receipt of DRP's application. (464a). NJDEP published notice in the June 5, 2019

NJDEP Bulletin, and provided a 15-day comment period. (462a) On June 20, 2019, Appellants Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper, submitted timely comments and objected to the Permit on numerous grounds. (386a).

On September 5, 2019, NJDEP lifted its June 5, 2019 suspension, reinstated the Permit, and issued a Response to Comments Document. (2a). Appellants learned of NJDEP's action on September 10, 2019. (1a). This appeal followed. (11a).

III. STATEMENT OF FACTS

The site in question is located along the Delaware River, near the Philadelphia Airport, residential areas in Gibbstown, and the Little Tinicum Island Natural Area. The site on which the GLC would be located, is a former industrial site. (874a). It was purchased by the E.I. du Pont de Nemours and Company ("DuPont") in 1880, and became known as the DuPont Repauno Works. (874a). The site is undergoing active remediation by Chemours Co, LLC ("Chemours"), a successor to DuPont. (874a). The site has hosted a variety of operations, including, *inter alia*, explosives manufacturing and research, industrial diamond manufacturing, and storage and shipment of anhydrous ammonia. (1128a, 1162a).

Much of the site has naturalized, despite the past contamination, with Chemours having ceased operations a few decades ago. (433a, 1188a) Presently, of the entire 1600-acre

site, the GLC facility occupies approximately 371 acres, and is one of the only operations on the site. (630a).

On April 10, 2017, and June 30, 2017, NJDEP issued a Waterfront Development, Flood Hazard Area, Coastal Wetlands and Freshwater Wetlands Permit to DRP for the construction of Dock 1 and an associated marine terminal ("Dock 1" or "Dock 1 Project"). (874a), see also NJDEP File No. 0807-16-001.2 WFD160001, WFD160002, FHA160001, FHA160002, and CSW160001. The dock portion of Dock 1 was completed in 2018 and upland development is ongoing. (874a).

The Permit subject to this appeal pertains to DRP's proposed Dock 2 Project, which is a deep-water port intended to receive and export liquefied natural gas ("LNG"), to store and ship out liquefied hazardous gas ("LHG"), and to handle other miscellaneous products such as roll-on/roll-off, perishables, and non-containerized break-bulk cargo. (226a, 352a, 874a, 882a). The Dock 2 project is primarily, if not solely, focused on export of bulk liquid products (e.g. LNG and LHG). (352a). The Dock 2 project entails the construction of two vessel berths, including associated dredging of approximately 665,000 cubic yards of river bottom; piping; and other needed site and water development (e.g. mooring dolphins, loading platforms, trestle with pedestrian and vehicular access, etc.). (630a, 878a).

On June 12, 2019, the Delaware River Basin Commission ("DRBC") approved Docket D-2017-009-2 for the Dock 2 Project. On September 11, 2019, the DRBC granted the Delaware Riverkeeper Network's and Maya van Rossum, the Delaware Riverkeeper's request for an adjudicatory hearing on the docket approval. The hearing took place May 11 through May 20, 2020. A hearing officer's report is forthcoming, the date is currently uncertain.

Once operational, the GLC will receive LNG by truck and rail from a liquefaction processing facility in Wyalusing, Pennsylvania. (325a). On December 5, 2019, the United States Department of Transportation Pipeline and Hazardous Materials Safety Administration ("PHMSA") issued a special permit authorizing the transport of LNG in DOT specification 113C120W rail cars. On February 25, 2020, the United States Army Corps of Engineers issued a permit to DRP for the Dock 2 Project pursuant to Section 404 of the Federal Clean Water Act, 33 U.S.C. § 1344, and Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403.

IV. ARGUMENT

A. Standard of Review

The Permit was issued pursuant to the Waterfront Development Law, N.J.S.A. 12:5-3 to -11, and the federal Clean Water Act, 33 U.S.C. §§ 1251–1388. The New Jersey Tidelands

Resource Council, within NJDEP, also issued a tidelands license and a dredging license to DRP for its Dock 2 Project pursuant to N.J.S.A. 13:1B-13. The Waterfront Development Law requires that:

> All plans for the development of any waterfront upon any navigable water or stream of this State or bounding thereon, which is contemplated by any person or municipality, in the nature of individual improvement or development or as a part of a general plan which involves the construction or alteration of a dock, wharf, pier, bulkhead, bridge, pipeline, cable, or any other similar or dissimilar waterfront development shall be first submitted to the Department of Environmental Protection. No such development or improvement shall be commenced or executed without the approval of the Department of Environmental Protection first had and received, or as hereinafter in this chapter provided.
>
> [N.J.S.A. 12:5-3(a).]

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

> Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.
>
> [33 U.S.C. § 1341(a).]

In addition, a State may condition the Water Quality Certificate as follows:

> Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.
>
> [Id. at § 401(d).]

Because the Dock 2 Project requires a Federal permit from the Army Corps of Engineers, DRP's permit application to NJDEP was also an application for a Water Quality Certificate. NJDEP utilizes its Coastal Zone Management Rules, N.J.A.C. 7:7-1.1 to -29.10, in evaluating applications under the Waterfront Development Law and "in the review of water quality certificates subject to Section 401 of the Federal Clean Water Act, 33 U.S.C. § 1341 . . . ." N.J.A.C. 7:7-1.1(a).

In New Jersey, judicial review of administrative agency action is a constitutional right. See N.J. Const. art. VI, § 5, ¶ 4. Accordingly, Rule 2:2-3(a)(2) provides for review in the Appellate Division of the Superior Court of "final decisions or action of any state administrative agency or officer." In

reviewing an agency action, this court "will not reverse the ultimate determination of an agency unless the court concludes that it was 'arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence, or that it violated legislative policies' expressed or implied in the act governing the agency." In re Orban, 461 N.J. Super. 57, 72 (App. Div. 2019) (quoting In re Freshwater Wetlands Gen. Permit No. 16, 379 N.J. Super. 331, 341 (App. Div. 2005)).

Although a court will defer to an agency's "specialized expertise," id. (quoting In re Freshwater Wetland Prot. Act Rules, 180 N.J. 478, 489 (2004)), "a court may intervene when 'it is clear that the agency action is inconsistent with its mandate.'" In re Proposed Quest Academy, 216 N.J. 370, 385 (2013) (quoting In re Petitions for Rulemaking, N.J.A.C. 10:82-1.2 & 10:85-4.1, 117 N.J. 311, 325 (1989)). An appellate court is "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue . . . ." In re Carter, 191 N.J. 474, 483 (2005) (quoting Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)).

This court focuses on three questions:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the

> facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
>
> [Id. at 385-86 (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).]

Importantly, "because a permitting decision by the Department [of Environmental Protection] is a quasi-judicial determination, reasoned fact-finding is essential." Orban, 461 N.J. Super. at 72 (citing In re Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 594 (App. Div. 2004)).

"[A]rbitrary and capricious action taken by an administrative agency must be overturned," and if the Appellate Division finds an action to be arbitrary and capricious, it is "require to set [it] aside." Application of Holy Name Hosp., 301 N.J. Super. 282, 295 (App. Div. 1997) (first citing Worthington v. Fauver, 88 N.J. 183, 204 (1982), and then citing Drake v. Dep't of Human Servs., 186 N.J. Super. 532, 536 (App. Div. 1982)).

B. NJDEP's Failure to Analyze Dock 2 as an Energy Facility under the Energy Facility Use Rule, N.J.A.C. 7:7-15.4, was Arbitrary, Capricious, Unreasonable, and Constitutes a Failure to Follow the Law, and Requires that NJDEP's Decision to Issue the Permit Be Reversed Due to Dock 2's Adverse Impact on Federally-Listed Sturgeon. (91a, 92a,

94a, 98a, 100a–103a)

New Jersey's Coastal Zone Management Rules define "energy facilities" as "includ[ing] facilities, plants or operations for the . . . distribution . . . or storage of energy or fossil fuels" and "also include[s] onshore support bases and marine terminals." N.J.A.C. 7:7-15.4(a). DRP's Dock 2 Project is described in its Compliance Statement in Support of WFD Individual Permit Application as "a deep-water facility for the export of bulk liquid products" that is "focused on the export of liquid energy commodities" and will attract "37 vessels capable of carrying bulk liquid products" per year. (872a, 881a). DRP's Compliance Statement denies that N.J.A.C. 7:7-15.4, known as the "Energy Facility Use Rule," applies to its operations. (910a). In its Response to Comments document, NJDEP stated that 1) the GLC does not meet the definition of an LNG facility under N.J.A.C. 7:7-15.4(s), and that 2) in prior land use permitting, DRP addressed the storage of crude oil or other hazardous substances, N.J.A.C. 7:7-15.4(p), and the presence of a tanker terminal, N.J.A.C. 7:7-15.4(q), and compliance with those rules was demonstrated at the time of the Dock 1 application. (100a).

The Dock 2 Project, independent from the Dock 1 Project, by itself meets the regulatory definition of an energy facility and constitutes a tanker terminal. Specifically, the Dock 2

Project is an operation for the distribution of fossil fuels, with an all-new marine terminal. See N.J.A.C. 7:7-15.4(a). The Dock 2 Project will involve transloading of LNG and other liquid energy commodities onto tanker marine vessels. (872a, 881a). Accordingly, NJDEP was required to evaluate the Dock 2 Project as an energy facility under the Energy Facility Use Rule.

NJDEP's statement that DRP already addressed storage of energy products and the presence of a tanker terminal during the Dock 1 permitting process, (100a), ignores the substantial changes proposed by the Dock 2 Project and essentially gives DRP free reign to expand and modify GLC as it sees fit without any additional scrutiny from NJDEP. It is arbitrary, capricious, and unreasonable for NJDEP to conclude that because DRP's Dock 1 Project complied with the regulations, the Dock 2 Project, which involves two new berths and truck and rail transloading operations, must also be compliant.

Notably, the data supporting NJDEP's decision regarding Dock 1's compliance with N.J.A.C. 7:7-15.4 is absent from the record. So too is any analysis or explanation of why the new features of the Dock 2 Project should not change NJDEP's conclusion about the GLC overall. DRP simply states in its application that N.J.A.C. 7:7-15.4 does not apply at all to the Dock 2 Project, (242a), and NJDEP accepts that assertion without examination. "[A]n administrative agency must conduct an

independent evaluation of all relevant evidence and legal arguments presented in support of and in opposition to proposed administrative agency action" and a "failure to do so may make the agency's decision arbitrary and capricious and require a remand for reconsideration. Mainland Manor Nursing & Rehab. Ctr. V. N.J. Dep't of Health & Senior Servs., 403 N.J. Super. 562, 571 (App. Div. 2008) (citing In re Virtua-W. Jersey Hosp., 194 N.J. 413, 424–36 (2008)).

As further evidence of the insufficiency of its analysis, NJDEP's Response to Comments document acknowledges that DRP did not disclose the presence of LNG in either its original Dock 1 permit applications and that NJDEP did not consider the presence of LNG until it modified DRP's original permits in November 2018 to include a requirement that DRP submit a risk management plan prior to handling LNG on site. (91a–92a).

1. *NJDEP's Failure to Consider the Siting Standards for an Energy Facility in Considering DRP's Dock 2 Permit was Arbitrary, Capricious, Unreasonable, and Contrary to Law, and NJDEP's Issuance of the Dock 2 Permit Must Be Reversed Because Dock 2 Will Adversely Impact Federally-Listed Sturgeon. (100a, 92a, 94a)*

The Energy Facility Use Rule contains specific siting standards, including a requirement that "[e]nergy facilities

shall not be sited in special areas as defined at N.J.A.C. 7:7-9.1 through 9.40, 9.42, and 9.44, and marine fish and fisheries areas defined at N.J.A.C. 7:7-16.2, unless site-specific information demonstrates that such facilities will not result in adverse impacts to these areas . . . .” N.J.A.C. 7:7-15.4(b)(1).

NJDEP determined that the construction of Dock 2 “would not impact marine fisheries” and restricted in-water construction activities to protect migrating Atlantic Sturgeon. (92a). NJDEP failed to look beyond construction, however, and analyze whether the *operation* of an energy facility would result in adverse impacts to marine fish and fisheries areas, finfish migratory pathways special areas, and endangered or threatened wildlife habitats. See N.J.A.C. 7:7-15.4(b)(1); -9.5; -9.36. In advocating for a finding of “no adverse impact” in its Atlantic and Shortnose Sturgeon Impact Assessment, DRP stated that there will be no increased vessel traffic in the Delaware River as a result of Dock 2 operations, as compared to the “baseline” level of vessel traffic caused by Dock 1 operations. (979a–980a). Because the National Marine Fisheries Service (NMFS) already evaluated the impacts of Dock 1 vessel traffic, DRP reasons, then there is no additional risk to sturgeon presented beyond what NMFS has already accounted for. (979a–980a, 982a). While DRP claims there will be no increase in ship traffic as a result

of Dock 2, that remains to be seen since there has been no application or approval from the United States Coast Guard for Dock 2 that verifies ship traffic volume.

What DRP and NJDEP fail to appreciate, however, is that the 2017 NMFS Biological Opinion concluded that vessel traffic from Dock 1 *would result in adverse effects to listed sturgeon.* (959a). Accordingly, even with no increase in vessel traffic, the Dock 2 Project will result in adverse impacts to listed sturgeon. NJDEP could not have known of NMFS's conclusion during the review of the Dock 1 Project, as the Biological Opinion was issued December 2017. Now, however, it is clear that the GLC *is* an energy facility that, if constructed, would result in adverse impacts. For that reason, NJDEP's approval of DRP's permit was arbitrary, capricious, unreasonable, and contrary to law, and must be reversed. See Green v. State Health Benefits Comm'n, 373 N.J. Super. 408, 415 (App. Div. 2004) (agency decision that fails to address fundamental legal and factual issues is arbitrary and capricious).

Regarding submerged vegetation habitat special areas, see N.J.A.C. 7:7-9.6, NJDEP stated that "the location of Dock 2 and dredge area has been situated to avoid the existing submerged aquatic vegetation (SAV) beds" and that "DRP is continuing to evaluate the project area for the presence of SAV to ensure that impacts to this resource are minimized." (94a). NJDEP's

reasoning fails to comply with N.J.A.C. 7:7-15.4(b)(1), which states that energy facilities "shall not be sited in special areas," including submerged vegetation habitat special areas, "unless site-specific information demonstrates that such facilities *will not result in adverse impacts* to these areas . . . ." Id. (emphasis added). NJDEP could not have made that determination based on the record before it, since as of the date of the WFD permit's reissuance, mitigation had not yet been determined to be successful, and in fact, days later on September 19, 2019, NJDEP informed DRP that the SAV mitigation had failed. (109a). Thus, without a viable mitigation plan, there was no rational basis for NJDEP to conclude that the Dock 2 construction would not result in adverse impacts to the SAV beds. See In re Proposed Xanadu Redevelopment Project, 402 N.J. Super. 607, 642 (App. Div. 2008) ("The term 'arbitrary and capricious' in the law means having no rational basis." (quoting Bayshore Sewerage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974))).

2. NJDEP's Failure to Consider the Siting Standards for a Tanker Terminal in Considering DRP's Dock 2 Permit was Arbitrary, Capricious, Unreasonable, and

Contrary to Law. (98a)

Specifically addressing the impacts of tanker terminals, the Energy Facility Use Rule states that:

> Onshore tanker facilities pose potential adverse environmental impacts and could encourage secondary development activity that is not necessarily coastal dependent. Also, even medium sized tankers require minimum channel depths of 30 feet . . . . New or expanded tanker terminals are therefore directed toward New Jersey's established port areas. Deepwater ports appear attractive to industry due to increasingly larger tankers, limitations on dredging and the scarcity of waterfront land. However, a deepwater port may, depending on its location, cause severe adverse primary and secondary impacts on the built, natural, and social environment.
>
> [N.J.A.C. 7:7-15.4(q)(4).]

Accordingly, new tanker terminals are "discouraged" outside of the "Port of New York and New Jersey and the Port of Camden and Philadelphia, where adequate infrastructure exists to accommodate the secondary impacts which may be generated by such terminals, such as processing and storage facilities." N.J.A.C. 7:7-15.4(q)(2), (1)(i).

In its alternatives analysis, DRP considered the Port of Camden, but ultimately rejected it as an option because the Port of Camden has no additional land or wharf space to build a new terminal, its infrastructure is aging and will require reconstruction, some of the existing berths cannot be deepened

without strengthening, and the Port of Camden does not currently "have the capabilities necessary for operations relating to handling bulk liquids." (1013a). DRP's alternatives analysis also considered the Southport Marine Terminal Complex in Philadelphia, but concluded that because one of the "primary goals" of that yet-to-be-developed site is an automated container terminal, this goal did not align with the goals of the Dock 2 Project. (1030a). DRP also noted that the land area was "constrained." (1030a).

In its Response to Comments document, NJDEP stated that N.J.A.C. 7:7-15.4(q) was considered during the Dock 1 permitting process, and described the tanker terminal provision of the Energy Use Rule as "concentrating these types of industries in existing port areas, like the Delaware River region, and locating these types of industries at existing port facilities which currently handle the storage of crude oil, gases and other hazardous substances." (100a). This response suggests that NJDEP erroneously believed that N.J.A.C. 7:7-15.4(q)(2) applied to the entire Delaware River, as opposed to the specifically-named sites in that provision: the Port of New York and New Jersey and the Port of Camden and Philadelphia. See also N.J.A.C. 7:7-15.4(q)(1)(i). Although a reviewing court "extend[s] substantial deference to an agency's interpretation of its own regulations, . . . 'an agency may not use its power to interpret

its own regulations as a means of amending those regulations or adopting new regulations.'" Orban, 461 N.J. Super. at 72 (citations omitted) (quoting In re Gen. Permit No. 16, 379 NJ. Super. at 341–42). This misinterpretation of the tanker terminal provision of the Energy Use Rule resulted in an arbitrary, capricious, and unreasonable conclusion that the Dock 2 Project complied with that rule.

3. *NJDEP's Failure to Adequately Address Public Health, Safety and Welfare Concerns Meant to be Addressed by the Application of the Energy Facility Use Rule Was Arbitrary, Capricious, and Unreasonable. (91a, 101a–103a)*

NJDEP's decision not to analyze the Dock 2 Project as an LNG facility under the Energy Use Rule was unreasonable because the Dock 2 Project raises the same concerns that are addressed by the LNG facility provision of that rule. Even if the Dock 2 Project does not meet the word-for-word definition of an LNG facility, NJDEP should have liberally construed its regulations to address the public health, safety, and welfare issues that are addressed by the Energy Use Rule. See N.J.A.C. 7:7-1.7 ("This chapter shall be liberally construed to effectuate the purpose of the Acts under which it was adopted.")

One of the reasons why the Dock 2 Project and the GLC do not explicitly meet the regulatory definition of an LNG facility

is because the GLC's operations are the first of its kind in the nation. The Coastal Zone Management Rules describe LNG facilities as "marine terminals and associated facilities that receive, store, and vaporize liquefied natural gas for transmission by pipeline." N.J.A.C. 7:7-15.4(s)(1). This narrow definition reflects the fact that, until 2012, all coastal LNG facilities in the United States were import facilities. See Sabine Pass Liquefaction, LLC, 139 FERC ¶ 61,039 (2012). Not only are LNG export facilities relatively new, but GLC will be the first LNG export facility to receive the LNG by rail car and truck rather than pipeline. See Special Permit DOT-SP 20534, Pipeline and Hazardous Materials Safety Admin, U.S Dep't of Transp. (Dec. 5, 2019).

While this novelty cannot retroactively amend the Energy Facility Use Rule's definition of an LNG facility, it provides a justification for not completely disregarding the rationale supporting N.J.A.C. 7:7-15.4(s):

> The tankering, transfer, and storage of LNG pose significant risks to Public health, safety and welfare and may cause serious adverse environmental impacts which may not be restricted to one state, given the likely potential locations of LNG terminals along interstate waterway. New Jersey therefore recommends that the siting of LNG facilities be treated as a regional issue on an interstate basis.
>
> [N.J.A.C. 7:7-15.4(s)(2).]

Based on this concern for public health, safety, and welfare, the Energy Facility Use Rule requires that "the proposed facility is located and constructed so as to neither unduly endanger human life and property, nor otherwise impair the public health, safety and welfare . . . ." N.J.A.C. 7:7-15.4(s)(1). The Energy Facility Use Rule includes specific siting requirements based on federal laws including the Natural Gas Act, 15 U.S.C. §§ 717-717z, which is administered by the Federal Energy Regulatory Commission ("FERC"). See N.J.A.C. 7:7-15.4(s)(1)(i). During the permit application process, however, DRP informed NJDEP that although it "will apply for all required government approvals as appropriate prior to either construction or start of operations, . . . [s]pecific permits or approvals from FERC . . . are not required." (246a). Thus, it is unknown whether these federal laws came into play in the siting of the Dock 2 Project. Regardless, the Energy Facility Use Rule independently requires NJDEP to analyze siting criteria for LNG facilities, including "risks inherent in tankering LNG along New Jersey's waterways," "risks inherent in transferring LNG onshore," and "[t]he compatibility of the facility with surrounding land uses, population densities, and concentrations of commercial or industrial activity." N.J.A.C. 7:7-15.4(s)(1)(ii).

Again, because NJDEP found that Dock 2 and the GLC do not meet the regulatory definition of "LNG facility," these siting factors were not addressed. Regarding operational concerns, however, NJDEP stated in its Response to Comments document that DRP's original Waterfront Development permits for the Dock 1 Project included a condition that DRP comply with NJDEP's Toxic Catastrophe Prevention Act (TCPA) Program rules, "which mandate an extensive risk analysis and demonstration through a TCPA risk management plan prior to the introduction of LNG products onto the site." (92a). NJDEP further noted that DRP has not yet begun the TCPA risk management process, and the "analysis has yet to be completed." (92a). NJDEP's decision to rely on a future risk management plan in approving the Dock 2 Project was arbitrary, capricious, and unreasonable because: 1) it assumes—without making a finding—that a TCPA-compliant risk management plan adequately addresses concerns in the Coastal Zone Management Rules, and 2) it deprives the public, who must bear the health and safety risks presented by GLC, of the opportunity to review and comment on the risk management plan prior to the issuance of the Waterfront Development permit.

NJDEP's TCPA Program rules do not include a requirement for a public notice and comment period upon receipt of a proposed risk management plan. See N.J.A.C. 7:31-1.1 to -11.5. The public is only able to obtain a finalized risk management plan

via the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 to -13, after the fact. See N.J.A.C. 7:31-10.2(a). This is a poor substitute for the public process provided by the Coastal Zone Management Rules. See N.J.A.C. 7:7-24.3(d)(1)(iii) (providing fifteen days for comment on permit applications). NJDEP has failed to adequately assess the hazards inherent in an LNG transloading operation by relying on a to-be-announced risk management plan rather than analyzing the GLC's operations to determine compliance with the Coastal Zone Management Rules.

C. NJDEP's Decision to Issue the Dock 2 WFD Permit and Water Quality Certificate Without Sufficient Information about Whether the Project will Adversely Affect Water Quality was Arbitrary, Capricious, and Unreasonable because it Lacked Evidential Support. (93a-94a, 96a-97a)

NJDEP issued the Dock 2 Permit without sufficient information about the project's impact on water quality. DRP's Sediment Sampling and Analysis Plan ("SSAP") failed to account for whole categories of contaminants, and specifically those contaminants known to be present in the upland portion of the site. As a result, the Dredged Material Management Plan ("DMMP") was based on insufficient information, and arbitrarily excluded a sampling protocol that would have detected soluble contaminants in the dredged material dewatering effluent.

As DRN pointed out in its June 20, 2019 comments, the former DuPont Repauno site has a history of contamination, specifically including the substances nitrobenzene and aniline. (333a). This fact is also known to NJDEP, as evidenced by the complaint it filed in the Law Division on March 27, 2019. See Compl. at 2-3, N.J. Dep't of Envtl. Prot. v. E.I. Du Pont De Nemours & Co., No. L-0388-19 (Mar. 27, 2019) ("The natural resources at and near the site are damaged by, among other hazardous substances and pollutants, trichloroethylene ('TCE'), nitrobenzene, aniline, diphenylamine, benzene, metals, and polychlorinated biphenyls ('PCBs').").

Despite this known contamination, in December 2018, NJDEP approved DRP's SSAP, which included plans for a bulk sediment chemistry analysis, an effluent (modified) elutriate analysis, a synthetic precipitation leaching procedure analysis, and a structural fill protocol. (1368a, 1373a). The SSAP did not require any sampling for volatile organic compounds (VOCs). (1369a). The SSAP stated that the dewatering method for the dredged material would be "barge/scow dewatering," and that the dredged material would be placed both at a confined disposal facility and be beneficially used at a site remediation project or landfill. (1365a).

In January and February of 2019, DRP conducted sediment sampling in accordance with the SSAP. (631a). However, at the

time DRP submitted its DMMP, the results of the effluent (modified) elutriate analysis and structural fill protocol had not been received from the testing laboratory. (634a–635a). Consequently, DRP submitted its DMMP without these results on the basis that "results of the bulk sediment chemistry analysis . . . demonstrated that the dredged material meets the RDCSCC [sic], it is anticipated that these results will not impact dredge material management options." (634a). It is unclear what RDCSCC refers to, however, "RDCSRS" refers to the New Jersey Residential Direct Contact Soil Remediation Standards. Based on the context, it appears that DRP believed that because the dredged material met the RDCSRS based on the bulk sediment chemistry analysis, there was no need for NJDEP to see the effluent (modified) elutriate analysis. Nevertheless, DRP confirmed that the DMMP would be updated upon receipt of these analyses. (634a-635a). On July 25, 2019, DRP's representative responded to an inquiry from NJDEP, claiming that DRP had forgotten to send the effluent (modified) elutriate analysis results, and seemingly intended to provide them shortly. (192a). The effluent (modified) elutriate analysis apparently was never provided, as it does not appear in the administrative record.

According to NJDEP's own Dredging Technical Manual, a modified elutriate test is "used to predict the quality of

dewatering effluent discharged from upland confined disposal facilities and similar operations." N.J.A.C. 7:7 Appx. G, Section VII. It "involves mixing dredged material with dredging-site water and allowing the mixture to settle—the potential release of dissolved chemical constituents from the dredged material is determined by chemical analysis of the supernatant (elutriate) remaining after undisturbed settling." Id.

According to DRP's DMMP, once the dredged material is placed on the barge, the decant water will be held in the decant holding scow "for a minimum of 24 hours after the last addition of water to the scow" unless "it can be demonstrated that total suspended solids (TSS) meets the background level of 30 milligrams per liter (mg/l), based on three consecutive TSS analyses . . . ." (636a). After the decant water settles, DRP plans to "[d]ischarg[e] decant water only within [the] dredging area, unless dredged sediments are approved for disposal at a confined disposal facility ('CDF') on the waterway, where decanting may be authorized." (636a). The manner in which the decant water will be handled makes it readily apparent that an elutriate test would have provided NJDEP with vital information about the chemical composition of the decant water prior to its discharge into the Delaware River. Accordingly, it was arbitrary and capricious for NJDEP to approve the DMMP by issuing the WFD

permit and Section 401 Certificate without first receiving and analyzing the results of the elutriate sampling.

The DMMP also failed to sample for known contaminants on site, an oversight that began when NJDEP approved DRP's SSAP without requiring sampling for VOCs. Table 6 of DRP's DMMP, which displays the results of the composite bulk sediment chemistry analysis, does not include any results for contaminants known to be present at the GLC site, including aniline, nitrobenzene, and TCE. (650a-657a).

1. *NJDEP Arbitrarily, Capriciously, and Unreasonably Failed to Follow the Procedures Outlined in its Own Regulations for Permitting Dewatering Dredged Material. (93a-94a)*

According to NJDEP's Dredging Technical Manual, "authority for the permitting of the effluent from dewatering dredged material to surface waters of the State can be found in Section 401 of the Federal Clean Water Act for the issuance of [Water Quality Certificates]." N.J.A.C. 7:7 Appx. G, Section IV-C(3)(a). The objective of the Water Quality Certificate is "to prevent any adverse impacts of the discharge on the receiving water body . . . includ[ing] toxic effects or bioaccumulation of contaminants in aquatic organisms, as well as adverse effects in humans through finfish and shellfish consumption or water exposure." N.J.A.C. 7:7 Appx. G, Section IV-C(3)(b).

As detailed in DRP's DMMP, the dredged material will be placed on a barge, the decant water will drain from the dredged material into a holding scow where the suspended solids in the water will be allowed to settle, and then the decant water will be discharged back into the Delaware River, either on-site or at a CDF. (636a).

"Dredged material dewatering effluent returning to the same water body from which the material was originally dredge[d] will require a [Water Quality Certificate]." N.J.A.C. 7:7 Appx. G, Section IV-C(3)(c)(1). The Water Quality Certificate contains "discharge conditions similar, if not identical, to those which would be found in a [New Jersey Pollutant Discharge Elimination System] NJPDES/Discharge to Surface Water permit . . . ." Id. Regulatory oversight is accomplished in one of two ways: applying technology-based discharge criteria or water quality-based discharge criteria. N.J.A.C. 7:7 Appx. G, Section IV-C(3)(b). The use of water quality based discharge criteria is "the method of choice when the dredged material originates in the same water body to which the effluent from the dewatered dredged material is being discharged. N.J.A.C. 7:7 Appx. G, Section IV-C(3)(b)(ii).

"The primary information used to assess potential surface water impacts are previous and current bulk sediment chemistry and modified elutriate analyses of site sediments." N.J.A.C.

7:7 Appx. G, Section IV-C(3)(d). NJDEP's Dredging Technical Manual makes clear that "[u]nless the bulk sediment chemistry data shows *no detections for the target analytes listed in Attachment D*, the Modified Elutriate Test will be required to predict pollutant concentrations in the discharge, *both soluble and particulate-bound.*" Id. (emphases added). Attachment D to N.J.A.C. 7:7 Appendix G is a comprehensive target analyte list, which includes volatiles such as benzene and trichloroethene (also known as Trichloroethylene or "TCE"), and semivolatiles such as nitrobenzene. Id.

NJDEP's approval of DRP's SSAP and DMMP, which excluded these analytes without explanation, and ultimately NJDEP's issuance of the permit, was arbitrary, capricious, and unreasonable for two reasons: 1) the inclusion of these analytes are required by NJDEP's own regulations governing discharge of dredged material dewatering effluent, and 2) these analytes are known to be present in the upland portions of the site. Additionally, it was arbitrary, capricious, and unreasonable for NJDEP to rely on the bulk sediment chemistry analysis in issuing the Water Quality Certificate for two reasons: 1) the bulk sediment chemistry data showed detections for the (limited) analytes tested, thus requiring a modified elutriate test, and 2) the dewatering and discharge process proposed by DRP for its decant water could result in soluble pollutants being discharged

into the Delaware River. Again, an agency cannot unilaterally amend its own regulations by choosing not to apply them, which NJDEP apparently did here. See Orban, 461 N.J. Super. at 72.

2. Because NJDEP Failed to Follow its Own Procedures Concerning Management of Dredged Materials, There Was Insufficient Evidence in the Record to Make Any Findings Based on Water Quality under the Coastal Zone Management Rules. (96a–97a)

The Coastal Zone Management Rules include several provisions addressing the significance of water quality as a factor to be considered by NJDEP in issuing a coastal permit. In fact, "[c]oastal development which would violate the Federal Clean Water Act, or State laws, rules and regulations enacted or promulgated pursuant thereto, is prohibited." N.J.A.C. 7:7-16.3(b). An accurate understanding of a project's water quality impacts undergirds NJDEP's entire analysis of the Project under the Coastal Zone Management Rules.

The New Dredging provision requires that any new dredging for boat moorings shall be conditioned on a "[p]re-dredging chemical and physical analysis of the dredged material, including water quality predictive analyses for surface water and ground water . . . where the Department suspects contamination of sediments. N.J.A.C. 7:7-12.7(c)(10)(ii). As made clear by comments submitted to NJDEP during the comment

period, and as evidenced by NJDEP's natural resource damages lawsuit concerning the historic contamination of the DuPont Repauno site, NJDEP had ample reason to suspect contamination of sediments adjacent to the site. As a result, NJDEP should have required an SSAP that tested for all constituents listed in NJDEP's Target Analyte List. See N.J.A.C. 7:7 Appx. G, Attachment D. Furthermore, NJDEP should not have issued the WFD Permit based on an incomplete DMMP, which did not include the effluent (modified) elutriate testing.

D. NJDEP's Decision to Approve the Dock 2 Permit without DRP Having Obtained an Industrial Stormwater Permit as Required by the Stormwater Management Resource Rule, N.J.A.C. 7:7-16.6 was Arbitrary, Capricious, Unreasonable and Contrary to Law. (99a)

The Stormwater Management Resource rule requires that a "project or activity . . . comply with the Stormwater Management rules at N.J.A.C. 7:8" if that project or activity "meets the definition of 'major development' at N.J.A.C. 7:8-1.2 . . . ." N.J.A.C. 7:7-16.6(a). A "major development" is defined as "an individual 'development,' as well as multiple developments that individually or collectively result in" the disturbance of one or more acres of land, the creation of one-quarter acre or more of "regulated impervious surface," or the creation of one-quarter or more of "regulated motor vehicle

surface." N.J.A.C. 7:8-1.2. A "regulated impervious surface" means

> any of the following, alone or in combination: 1. A net increase of impervious surface; 2. The total area of impervious surface collected by a new stormwater conveyance system . . . ; 3. The total area of impervious surface proposed to be newly collected by an existing stormwater conveyance system; and/or 4. The total area of impervious surface collected by an existing stormwater conveyance system where the capacity of that conveyance system is increased."
>
> [Id.]

In its Compliance Statement submitted with its WFD application, DRP stated that the Stormwater Management Resource Rule did not apply to the Dock 2 Project. (1289a). In its Response to Comments document, NJDEP explained that the rule "is not applicable to the construction of Dock 2 and the associated dredging of the berthing area." (99a). NJDEP stated that the "stormwater management system for the upland portion of the [GLC] has been reviewed and approved by the Department on April 10, 2017" in connection with the Dock 1 permitting process, during which DRP demonstrated compliance with the Stormwater Management Rule. (99a).

Despite these assertions by DRP and NJDEP, on July 19, 2019—after NJDEP had initially issued the Dock 2 WFD Permit in error, but before NJDEP reissued the permit—DRP submitted a

Request for Authorization (RFA) to discharge industrial stormwater under the New Jersey Basic Industrial Stormwater General Permit 5G2. (158a). The activities covered by the RFA "include the transloading of liquefied petroleum gases (including butane and propane) directly from rail cars to marine vessels." (162a). Included in the RFA was an overall grading and drainage plan showing the stormwater management controls for the new upland activities to take place at Dock 2. (175a). Although not calculated in the RFA, it appears that the new upland features associated with Dock 2 include more than one-quarter of an acre of impervious surface. See (175a).

Thus, NJDEP received new information about the Dock 2 Project's upland impacts while the Dock 2 WFD permit was still under consideration. It was arbitrary and capricious for NJDEP to ignore the RFA in its review of the Dock 2 Project, as the RFA demonstrated that new impervious upland features were being constructed in connection with Dock 2. Accordingly, NJDEP's conclusion that the Stormwater Management Rule did not apply was not supported by the evidence in the record, and NJDEP should have required compliance with the Stormwater Management Rule prior to issuing the WFD Permit for the Dock 2 Project.

V. CONCLUSION

For the foregoing reasons, Appellants Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper,

respectfully request that this Court reverse NJDEP's decision to issue the Dock 2 Permit.

Respectfully submitted,

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