



April 29, 2020

Ms. Sunila Agrawal
Bureau of Stationary Sources
New Jersey Department of Environmental Protection
401 E State Street, 2nd Floor, PO Box 420, Mail Code 401-02
Trenton, New Jersey 08625

Submitted by email to: Sunila.Agrawal@dep.nj.gov

Re: DRAFT PRECONSTRUCTION PERMIT MODIFICATION FACILITY: DELAWARE RIVER PARTNERS LLC Program Interest (PI): 56309 / Permit Activity Number: PCP190002

Delaware Riverkeeper Network submits these comments on behalf of our 25,000 members and in service of our mission to defend and enhance the Delaware River Watershed, its habitats, environment, and communities. Delaware Riverkeeper Network Deputy Director Tracy Carluccio made oral testimony at the New Jersey Department of Environmental Protection (DEP) virtual Public Hearing held on April 22, 2020. These comments are submitted in addition to that testimony.

Delaware Riverkeeper Network objects to the proposed Air Pollution Control Preconstruction Permit Modification for Delaware River Partners' (DRP) Gibbstown Logistics Center (GLC) and requests that the permit modification be denied. As stated in verbal testimony, Delaware Riverkeeper Network states that both the process and the substance of the proposal does not meet the requirements of New Jersey's air quality regulations or the required federal standards and processes that protect air quality and prevent degradation.

The proposed permit modification notification states:

“The original permit allowed the facility to transload product between railcars/tanker trucks and the existing hard rock cavern on site. This modification would allow the facility to further transload product between railcars and marine vessels at the existing multi-purpose dock as the facility will construct additional two rail loading racks and an enclosed flare (CD3).” (Revised Notice 4/8/2020)

The notification continues:

“Both the existing permit and the modification application only allows storage and transfer of LPG (butane and/or propane); it does not allow storage and transfer of natural gas and/or liquid natural gas.” (Revised Notice 4/8/2020)

DELAWARE RIVERKEEPER NETWORK
925 Canal Street, Suite 3701
Bristol, PA 19007
Office: (215) 369-1188
fax: (215) 369-1181
drm@delawareriverkeeper.org
www.delawareriverkeeper.org

The Draft Permit states that butane and propane (LPG) will be transferred and that rail cars, tanker trucks, marine vessels, and the underground storage cavern will be degassed and depressurized, utilizing two enclosed flares for control of emissions. There is currently one flare for the underground storage cavern that stores butane. The flare is permitted by NJDEP to degas butane. The proposed permit modification will allow for the expansion of liquid petroleum gases to be handled at the site to include propane. It will also allow the expansion of operations to include two rail racks of 20 cars each, totaling 40 rail cars and the handling of gases from the operations at the truck loading rack and the marine loading dock, where one ship would be accommodated at one berth (Dock 1).

Air Pollution and Public Health Impacts

Under this permit modification, there would be continuous emissions of pollutants that include methane, volatile organic compounds (VOC), Nitrogen Oxide, Carbon Monoxide, Carbon Dioxide, Total Suspended Particulate Matter, Particulate Matter 10, and Sulphur Dioxide. The Hazardous Air Pollutants emissions are below the required reporting threshold, according to information provided by DRP to NJDEP. (Emissions Calculations, Potential to Emit, Delaware River Partners Gibbstown Logistics Center, EXCEL) VOC emissions would increase from 5.44 tons/year to 8.61 tons/year, and increase of 2.66 tons/year, according to the proposed permit. These pollutants will be in the air breathed by the people who live, work, and recreate in the region around the GLC and the emissions will contribute NOx and VOC to the region's airshed, which is a nonattainment area for ozone. The emissions will impact climate through carbon and methane emissions to the atmosphere.

The American Lung Association (ALA) reports that the Philadelphia-Camden region has air pollution problems that negatively impact human health. In a recent study comparing air quality across the United States it was found that the Philadelphia-Camden region ranked 23 for high ozone days out of 229 metropolitan areas; ranked 48 for 24-hour particle pollution out of 216 metropolitan areas; and ranked 12 for annual particle pollution out of 204 metropolitan areas. (American Lung Association, "State of the Air", 2020, <http://www.stateoftheair.org/city-rankings/most-polluted-cities.html>). Both Delaware and Philadelphia Counties are graded by the ALA as "F" for High Ozone Days (<http://www.stateoftheair.org/city-rankings/states/pennsylvania/>). Gloucester and Camden Counties are graded as "F" for High Ozone Days (<http://www.stateoftheair.org/city-rankings/states/new-jersey/>).

The report at <http://www.stateoftheair.org/air-quality-facts/> states that:

- Breathing ozone irritates the lungs, resulting in something like a bad sunburn within the lungs.
- Breathing in particle pollution can increase the risk of lung cancer, according to the World Health Organization.
- Particle pollution can also cause early death and heart attacks, strokes and emergency room visits for people with asthma and cardiovascular disease.
- Particles are smaller than 1/30th the diameter of a human hair. When you inhale them, they are small enough to get past the body's natural defenses.
- Ozone and particle pollution are both linked to increased risk of lower birth weight in newborns.
- People who work or exercise outside face increased risk from the effects of air pollution.
- Millions of people are especially vulnerable to the effects of air pollution, including infants, older adults and people with lung diseases like asthma.

- People of color and those earning lower incomes are often disproportionately affected by air pollution that put them at higher risk for illnesses.
- Air pollution is a serious health threat. It can trigger asthma attacks, harm lung development in children, and can even be deadly.

According to Pennsylvania Department of Environmental Protection (PADEP), Delaware and Philadelphia Counties, which include the Philadelphia metropolitan region and the Delaware River region at Gibbstown, are a nonattainment area for ozone, based on federal standards. PADEP explains this status:

“There are six [principal pollutants](#), that act as indicators of air quality in this country. The Clean Air Act calls them "criteria pollutants". The National Ambient Air Quality Standards ([NAAQS](#)) are the concentrations of these principal pollutants, above which, adverse effects on human health may occur.

Areas of Pennsylvania where [air pollution levels](#) consistently stay below these standards are designated "attainment." Areas where air pollution levels persistently exceed these standards are designated "nonattainment".”

(<https://www.dep.pa.gov/Business/Air/BAQ/Regulations/Pages/Attainment-Status.aspx>)

The U.S. Environmental Protection Agency (EPA) designates the Philadelphia-Wilmington-Trenton area as nonattainment area for ozone.

(https://www3.epa.gov/airquality/urbanair/sipstatus/reports/nj_elembypoll.html#ozone-1hr_1979_53)

NJDEP reports that all of New Jersey is a nonattainment area for ozone, including Gloucester, Camden, and Salem Counties on the Delaware River. (<https://www.nj.gov/dep/cleanairnj/ozone.html>)

NJDEP explains on their website the connection between ozone and smog:

“Ground-level ozone, also known as smog, is an air pollutant known to cause a number of health effects and negatively impact air quality and the environment in the state of New Jersey. Ozone is formed when oxides of nitrogen (NOx) and volatile organic compounds (VOCs) react in the presence of sunlight. Smog can irritate any set of lungs, but those with lung-related deficiencies should take extra precautions on bad ozone days.”

(<https://www.nj.gov/dep/cleanairnj/whatissmog.html>)

Both NOx and VOCs will be continuously emitted by the LPG operations being permitted by the proposed permit modification for Dock 1 at GLC. This will harm the region, could increase the number and severity of pollution warning days in the region, and will result in human health harm as described by ALA.

Project Review

Delaware Riverkeeper Network filed in the United States District Court for the District of New Jersey an appeal of the Army Corps of Engineers permit for the Gibbstown Dock 2 project on April 22, 2020 (Civ. No.: 1:20-cv-4824) (“the Complaint”). One of Delaware Riverkeeper Network’s claims is that the Corps violated the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, by failing to comply with the Clean Air Act, 42 U.S.C. §§ 7401–7671q, by failing to determine whether the Dock 2 project will conform to the state implementation plan in a nonattainment area for ozone. (Complaint attached)

The Complaint also spells out why segmentation is unlawful under the National Environmental Policy Act, which is applicable to the Army Corps' review of the Gibbstown Dock 2 Project. The tenants of NEPA are founded on the same principles as the Clean Air Act's New Source Review program, which includes the Non-Attainment New Source Review and the Prevention of Significant Deterioration program, which does not allow segmentation to avoid jurisdictional thresholds.

The GLC export terminal has been under development for several years, seeking approval in stages according to the DRP's business plan. Different agencies have reviewed the project for different permits, plans and approvals, often without knowledge of the facts presented in applications to agencies other than their own. This has led to a piecemeal approval process for the GLC, starting in 2015 when the project was described as one dock with one shipping berth and infrastructure on land to deliver various cargoes by truck and rail with export by shipping vessels.

As stated in Delaware Riverkeeper Network's Complaint:

85. In a May 14, 2015 filing with the United States Securities and Exchange Commission describing its acquisition of the Gibbstown Logistics Center, FTAI stated that it "intend[s] to utilize the existing infrastructure for our development plans, including constructing refrigerated warehouses for perishable goods, building a dock and using remaining acreage for additional warehouse space, bulk storage and a liquid natural gas facility."

86. In a July 24, 2016 Philadelphia Inquirer article, FTAI's managing director was quoted as saying that an LNG facility was "no longer in [FTAI's] designs [.]" ("Plan to revive old South Jersey industrial site draws fans and fears", by David O'Reilly, Staff Writer, Philadelphia Inquirer, Posted: July 24, 2016

https://www.inquirer.com/philly/news/new_jersey/20160724_Plan_to_revive_old_South_Jersey_industrial_site_draws_fans_and_fears.html)

The Delaware River Basin Commission (DRBC) docket approval for the GLC in 2017 described the project as:

"The docket holder proposes to construct a new multi-use, deep-water port and logistics center to accommodate a range of ocean-going vessels of a maximum length of 870 feet and maximum draft of 40 feet, and will include a marine terminal for automobile import (roll-on/roll-off), a parking lot for vehicles, processing facilities, perishables handling, non-containerized break bulk cargo handling, bulk-liquids and gases handling, two warehouse buildings, and a stormwater management system and associated infrastructure." (DRBC DOCKET NO. D-2017-009-1, p. 2)

The Army Corps of Engineers Public Notice described the activity at GLC in 2017 as:

"The applicant's stated purpose is to redevelop a site and create a deep water marine terminal that can accommodate vessels with a maximum length of 870 feet with a maximum of a 40 foot draft." (U.S. Army Corps of Engineers Public Notice #CENAP-OP-R-2016-0181-39)

Since the approvals given by those agencies and others, the project has greatly changed, based on the New Fortress Energy's market plans, according to news articles. (Fortress Transportation and Infrastructure Investors (FTIA) is tied to New Fortress Energy and Delaware River Partners (DRP) is a subsidiary of New Fortress Energy). These changes have been incrementally added between 2015 and 2020, each being

considered separately and without consideration of the upcoming planned operations and construction at GLC.

The July 16 2019 Army Corps of Engineers Public Notice described a second dock for the facility (“Dock 2”) and included a description of the handling of Liquefied Natural Gas (LNG) as a major activity for the proposed expansion of GLC. The Notice described the activity as LNG being transported into the GLC site at a rate of 13 trucks per hour, 24/7; each truck carrying approximately 12,000 gallons of liquid; LNG being directly loaded from the truck to the shipping vessel at the berth of Dock 2; with a ship loading time of approximately two weeks. (U.S. Army Corps of Engineers Supplemental Public Notice #CENAP-OP-R-2016-0181-39)

The DRBC approved docket for GLC Dock 2 describes the project as:

“The GLC, which is currently under construction, is a multi-use marine terminal and international logistics center located at the former Repauno site (also formerly known as the “Chemours Repauno industrial site” and “DuPont Repauno Works”) in Greenwich Township, Gloucester County, New Jersey. Previous DRBC, federal, state and local approvals for the GLC authorized Delaware River dredging and construction for the deep-water berth referred to as “Dock 1,” consisting of one-ship berth on a pile-supported wharf structure. Dock 2 will consist of an additional pile-supported wharf structure that accommodates two ship berths and associated infrastructure. The construction of Dock 2 involves dredging approximately 665,000 cubic yards (cy) of sediment from the Delaware River to a depth of 43 feet below (-43) mean lower low water (MLLW) to accommodate the two deep-water berths.” (DRBC DOCKET NO. D-2017-009-2, June 12, 2019, p. 1)

“Dock 2 will consist of a wharf featuring two deep water berths to accommodate a range of ocean-going vessels of a maximum length of 966 feet and maximum draft of 39.7 feet. The project involves dredging of approximately 665,000 cy of Delaware River sediment (primarily silts and sands) in a 45-acre area to provide access to the Federal Navigation Channel of the Delaware River. Dock 2 is designed for the loading of bulk liquid products directly from railcar or truck onto ocean-going vessels for export and includes infrastructure for transloading operations. Dock 2 will support the transloading of a variety of bulk liquid products, including butane, isobutane, propane (collectively liquefied petroleum gas, or LPG), liquefied natural gas (LNG), and ethane. The products will arrive at the site via truck and/or railcar. Once at the site, the products will be transferred to vessels via on-site infrastructure.” (DRBC DOCKET NO. D-2017-009-2, June 12, 2019, p. 2)

According to these descriptions, the project has grown by June 2019 to two docks with 2 berths at the new Dock 2, larger marine vessels from a maximum length of 870 feet to a maximum length of 966 feet entering the export and leaving terminal docks, expanded the LPG activities and infrastructure, included using both rail cars and trucks for LPG and LNG transport, and shifted focus of the majority of activity at GLC from dry cargo to liquid cargo, which appears now, by volume, to be primarily LNG.

The reason the project added the use of railcars for the transport of LNG is because the Pipeline and Hazardous Materials Safety Administration granted a Special Permit for the transport of LNG by railcar from New Fortress Energy’s planned LNG liquefaction plant in Wyalusing, Bradford County, PA to GLC in December 2019. The permit was applied for on August 21, 2017 by Energy Transfer Solutions, a subsidiary of New Fortress Energy but the public was not aware of the application and apparently some agencies were not aware of a potential Special Permit that would add railcar transport of LNG to GLC’s operations. LNG

is banned from being transported by railcar on the nation's railways due to safety concerns; this Special Permit is an exception to that prohibition and the only transport of this kind using rail cars (as opposed to ISO containers). The Special Permit was granted by PHMSA only for transport between these 2 locations and allows up to 100 rail cars to be shipped daily to GLC from Wyalusing. (Pipeline and Hazardous Materials Safety Administration, Special Permit DOT-SP 20534 to Energy Transport Solutions, LLC, 12.05.2019)

Apparently, the application for this Special Permit was not known by the Army Corp of Engineers at the time of the supplemental Public Notice in July 2019 since it is not mentioned in the description of the project. Once again, the GLC project has been changed by the addition of rail car shipments of LNG up to 100 cars per day, changing substantially the volume of cargo that can be transferred at the terminal. The most recent approvals for GLC's Dock 2 by federal and state agencies do not reflect an accurate or comprehensive environmental assessment of the potential impacts of the construction and operations that can occur due to this piecemeal and non-transparent progression of permitting for GLC.

Further evidence of an attempt to segment the review of this project is the lack of disclosure of concurrent applications before different agencies by DRP. For instance, despite the statement reported in the Philadelphia Inquirer in 2016 by Gary Lewis of New Fortress Energy that LNG was "no longer in the plans", by September 2017, the company had applied to the U.S. Coast Guard for approval to ship LNG by marine vessel on the Delaware River from GLC. But this was not disclosed to the municipality or the public.

From DRN's Complaint appealing the Army Corps of Engineers permit for the Gibbstown Dock 2 project: 88. On November 16, 2017, in a Letter of Intent to the United States Coast Guard, Sector Delaware Bay, a consultant for DRP described the Gibbstown Logistics Center as a "multi-use, deep-water port and logistics center that may include a variety of separate uses including handling of imported and exported automobiles, other bulk freight and liquid energy products including, but not limited to liquefied petroleum gas ("LPG") and liquefied natural gas ("LNG")."

89. The November 16, 2017 Letter of Intent also stated that DRP would be seeking authorization from the United States Department of Energy "to export LNG to both Free Trade Agreement and Non-Free Trade Agreement countries[.]"

The public, and apparently some agencies, were not aware of the application to the U.S. Coast Guard or DRP's plans to seek approval from the Department of Energy to export LNG for sale overseas, further dividing the scope of this project into small, disconnected parts, with the true nature of the company's plans hidden from the public and from reviewing agencies. The result, once again, is segmentation of the various aspects of the project and the lack of proper review by agencies with jurisdiction due to the missing but essential information.

Finally, another example of the piecemeal development of GLC is the lack of accuracy and clarity of the true build-out of traffic to be generated by the project at the county and municipal level. Different descriptions have been offered at Greenwich Township Zoning and Planning Board Hearings and at Gloucester County agency reviews. For instance, a report prepared for the Rt. 44 Bypass, which would service GLC, projected over 1,650 trucks trips each day would come and go from the Gibbstown Logistics Center.

According to Gloucester County's report:

“Additionally, proposed development at the DuPont Repauno site, located adjacent to Repauno Avenue north of Route 44, is expected to be completed by Year 2020 and includes warehousing, liquid storage, an auto storage terminal and a marine terminal. These land uses are expected to generate approximately 8,450 daily trips to/from the DuPont Repauno site, including nearly 1,650 truck trips.” (“Drainage & SWM Report for Route 44 Truck Bypass and DuPont Port Access, Township of Greenwich, Gloucester County, NJ” *Prepared for:* Gloucester County Improvement Authority *Prepared by:* McCormick Taylor, Inc., February 2019, Page 2)

According to the July 16 2019 Army Corps of Engineers Public Notice, the number of trucks carrying LNG for Dock 2 would be 13 per hour and the number of trucks for Dock 1 is not specified by the Army Corps or DRBC. However, the discrepancy between 1,650 truck trips per day and 312 trucks per day (or, 624 truck trips per day) is enormous and the environmental impacts of such a large volume have not been addressed. The discrepancy indicates either an attempt to piecemeal the growth of the traffic and its environmental impacts over time as the development of the docks and associated infrastructure plays out or it is plain obfuscation on the part of the applicant regarding the information provided to the various agencies regarding the project. The result is the same: the project is not completely evaluated by any one agency as a whole, at build out, denying the opportunity for a full and comprehensive analysis of the environmental impacts of GLC.

In DRN's Complaint appealing the Army Corps of Engineers permit for the Gibbstown Dock 2 project, segmentation is raised as an important issue:

43. “Similar actions, . . . 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). (page 11)

44. “An agency impermissibly ‘segments’ NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration.” *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1313 (D.C. Cir. 2014). (page 11)

45. The rule against segmentation “prevent[s] agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” *Id.* at 1314 (quoting *NRDC v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988)) (alteration in original). (page 11)

102. The April 4, 2019 Notice stated that “[t]he 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.” (page 20)

103. On May 30, 2019, in a comment provided to the Army Corps, NMFS expressed a concern that the Dock 2 project was not included in the original Dock 1 permitting process, despite that the “applicant had intended from the outset of the development at this site to construct more than one wharf[.]” Accordingly, NMFS stated “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 [NEPA] review.” (page 20)

This evidence of segmentation and piecemeal development is relevant for the subject proposed air permit modification because the modification only considers one part of the project's activities that result in air pollution. The same piecemeal approach is being used in regards to the air permitting as it has been with other agencies throughout GLC's development. The first air quality permit was for the one flare for the butane cavern, now this modification is for another flare and expansion of the LHG activities and infrastructure at GLC. DRP will next come back to NJDEP for the Dock 2 flare, which will include LNG.

DRP received the Dock 2 Waterfront Development Permit from NJDEP on September 10, 2019. There is no explanation as to why they are not applying for the full build-out of GLC, including all cargoes, at this time. Additionally, there are planned sphere tank(s) at a "tank farm" that is shown on various iterations of DRP's site plans for GLC and a proposed "small capacity" natural gas liquefier on site. There has even been some discussion of DRP adding another underground cavern on the property. The development plans for GLC are not fully understood or disclosed and shift according to DRP and New Fortress Energy's business plans, which benefit from a lack of comprehensive and unsegmented review of the needed permits.

NJDEP must insist that DRP disclose its complete build-out plans for GLC. DRP should apply for a Title V permit based on all activities and operations that are planned at GLC and not be allowed to segment off partial activities, which has the effect of unlawful segmentation that avoids jurisdictional review and prevents a full environmental analysis of the emissions from GLC.

Climate Impacts

The activities at GLC that involve the transport, transloading, storage, and shipping of LPG, the subject of this proposed permit modification, will release methane and carbon, as per the calculations submitted by DRP. The full life cycle releases of methane and carbon (carbon dioxide and carbon monoxide) must be considered to accurately assess the potential impacts of these greenhouse gas emissions. That includes the releases from the extraction point (the shale gas well); the transport by pipeline, truck and/or rail to Gibbstown; the handling and storage of LPG at GLC; the marine vessel storage; and the end use of the gas.

The American Lung Association points out that climate change enhances conditions for ozone to form and makes it harder to keep ozone from forming. As discussed earlier in this comment, VOCs and NOx will both be emitted if this permit modification is approved. The American Lung Association also states that climate change increases the risk of wildfires that spread particle pollution and ozone in the smoke.

<http://www.stateoftheair.org/air-quality-facts/>

It is incumbent upon each state agency to perform its part in meeting the adopted goals of the State of New Jersey to reduce greenhouse gas emissions as declared in the NJ Energy Master Plan, the Global Warming Response Act, Governor Murphy's Executive Orders, and New Jersey's service to the nation's responsibility to international climate accords. Methane and carbon emissions cannot be expanded, which this proposed permit modification will allow, without undermining these priority commitments. Some reasons New Jersey must act to reduce, not increase, these emission are:

- The 2019 Intergovernmental Panel on Climate Change ("IPCC") report from the United Nations describes how the ocean and cryosphere have and are expected to change with ongoing global warming,

the risks and opportunities these changes bring to ecosystems and people, and mitigation, adaptation and governance options for reducing future risks.¹

- The Intergovernmental Panel on Climate Change (“IPCC”) report says limiting warming to 1.5C will require reducing greenhouse gases by 45% from 2010 levels by 2030 and that there can be no carbon emissions from energy production by about 2050.²
- Scientists estimate that at least 45% - 50% reduction of greenhouse gases must be achieved by 2030 in order to effectively limit atmospheric warming. “Emissions need to be halved by 2030 to limit warming to 1.5 degrees Celsius but temperatures are on track to reach double that by the end of the century even if countries’ current plans are fully implemented, research by scientists shows.”³
- Rising air and water temperatures and changes in precipitation are intensifying droughts, increasing heavy downpours and flooding, reducing snowpack, and causing declines in surface water quality, with varying impacts across different regions of the country.⁴ Changes in temperature and precipitation are increasing air quality and health risks from wildfire and ground-level ozone pollution. All of these climate change impacts effect water resources, including river flows, temperature, and seasonal variability, reservoir levels, water quality and the concentration of pollutants in bath ground and surface water, Delaware River Watershed species (both flora and fauna) and their habitats, recreation, economic values, and human health.
- Climate change has already had observable impacts on biodiversity, ecosystems, and the benefits they provide to society. These impacts include the migration of native species to new areas and the spread of invasive species, which will worsen and could affect ecological balance.⁵
- Yields from major U.S. crops are expected to decline as a consequence of increases in temperatures and possibly changes in water availability (drought conditions), soil erosion, and disease and pest outbreaks.⁶
- The Fourth National Climate Assessment looks at the Northeast region climate impacts. These are among expected changes in the near term:
 - Less distinct seasons with milder winter and earlier spring conditions are already altering ecosystems and environments in ways that adversely impact tourism, farming, forestry, and other economies.⁷
 - Warmer ocean temperatures, sea level rise, and ocean acidification threaten ocean habitats, ecosystem services, and livelihoods.⁸
 - Major negative impacts on critical infrastructure, urban economies, and nationally significant historic sites are already occurring and will become more common with a changing climate.⁹
 - Changing climate threatens the health and well-being of people in the Northeast through more extreme weather, warmer temperatures, degradation of air and water quality, and sea level rise.¹⁰

¹ *Intergovernmental Panel on Climate Change, Summary for Policymakers, Revised on January 2019 by the IPCC, Switzerland, ISBN 978-92-9169-151-7*, downloaded at: <https://www.ipcc.ch/sr15/>

² Ibid.

³ <https://climateactiontracker.org/publications/warming-projections-global-update-dec-2018/>

⁴ *Intergovernmental Panel on Climate Change, Summary for Policymakers, Revised on January 2019 by the IPCC, Switzerland, ISBN 978-92-9169-151-7*, downloaded at: <https://www.ipcc.ch/sr15/>

⁵ USGCRP, 2018: *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II: Report-in-Brief* [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 186 pp. Retrieved from <https://nca2018.globalchange.gov/> at 16.

⁶ Ibid at 14.

⁷ Ibid at 116.

⁸ Ibid at 117.

⁹ Ibid at 117.

¹⁰ Ibid at 117.

- Weather events have become more frequent and more intense. Anthropogenic climate change has increased precipitation, winds, and extreme sea level events associated with a number of observed tropical- and extra-tropical cyclones.¹¹
- Extreme El Niño and La Niña events are likely to occur more frequently with global warming and are likely to intensify existing impacts, with drier or wetter responses in several regions across the globe, even at relatively low levels of future global warming.¹²
- Sea level rise translates into river level rise in the tidal Delaware River. The rising of the seas moves upriver from the ocean, the Bay, the estuary and into tidal reaches of the river, raising the river's level and the level of the river's freshwater tributaries. In the nontidal river and its watershed, extreme weather events cause inland flooding and its cascade of impacts to natural ecosystems, streams, habitats, infrastructure and the human environment, and to the hydrology of waterways and the hydrologic cycle, which is altered by increased stormwater runoff, wetland disruption and less natural infiltration and natural floodplain functions.
- Sea level rise is a dramatic and measurable impact of climate changes. Impacts will be exacerbated in cases of land reclamation and where anthropogenic barriers prevent inland migration of marshes and mangroves and limit the availability and re-location of sediment.¹³ In the absence of adaptation, more intense and frequent extreme sea level events, together with trends in coastal development, will increase expected annual flood damages by 2-3 orders of magnitude by 2100.¹⁴
- Since the early 1980s, the occurrence of harmful algal blooms (HABs) and pathogenic organisms (e.g. *Vibrio*) has increased in coastal areas in response to warming, deoxygenation and eutrophication, with negative impacts on food provisioning, tourism, the economy, and human health.¹⁵
- Rutgers University's report published in 2019 points out that "New Jersey has already been disproportionately affected by climate change—sea-level rise projections in New Jersey are more than two times the global average."¹⁶ This is consistent with the findings of other reports that from Virginia northward, sea level rise is having greater effects. New Jersey's condition is exacerbated by the fact that, as the Rutgers Study explains, "Over the last four thousand years, the dominant long-term driver of SLR in New Jersey has been the sinking of the land as part of the ongoing response to the disappearance of the North American ice sheet."¹⁷
- In a report published last year by the Rhodium Group, New Jersey damages from climate change were examined and calculated. In addition to the growing extent and costs of coastal flooding, the report points out "While New Jersey's coastal communities face the bulk of hurricane-driven flood risk, the potential for wind damage from these storms extends inland. Four decades ago, the odds that an average

¹¹ IPCC (2019). The Ocean and Cryosphere in a Changing Climate. Intergovernmental Panel on Climate Change. Retrieved from https://report.ipcc.ch/srocc/pdf/SROCC_FinalDraft_FullReport.pdf at 6-3.

¹² Ibid at 6-4.

¹³ Ibid at 4-5.

¹⁴ Ibid.

¹⁵ Ibid at 5-5.

¹⁶ Kopp, R.E., C. Andrews, A. Broccoli, A. Garner, D. Kreeger, R. Leichenko, N. Lin, C. Little, J.A. Miller, J.K. Miller, K.G. Miller, R. Moss, P. Orton, A. Parris, D. Robinson, W. Sweet, J. Walker, C.P. Weaver, K. White, M. Campo, M. Kaplan, J. Herb, and L. Auermuller. New Jersey's Rising Seas and Changing Coastal Storms: Report of the 2019 Science and Technical Advisory Panel. Rutgers, The State University of New Jersey. Prepared for the New Jersey Department of Environmental Protection. Trenton, New Jersey. p. 1 <https://bloustein.rutgers.edu/njdep-releases-report-on-sea-level-rise-building-on-previous-rutgers-studies/>

¹⁷ Ibid. p. 9.

New Jersey home outside the state’s coastal counties would experience hurricane-force winds in a given year was less than 1-in-200. That has grown to between 1-in-30 and 1-in-100.”¹⁸

The report explains:

“Global average temperatures have risen by 2° Fahrenheit since the late nineteenth century and by more than 1° Fahrenheit over the past four decades, with the pace of warming accelerated as concentrations of carbon dioxide (CO₂) and other greenhouse gases in the atmosphere have increased. Oceans are also responding to these changes. Sea surface temperature in the Northeast US has warmed faster than 99% of the global ocean since 2004, and projections indicate that this area will continue to warm more quickly than other ocean regions through the end of the century.⁵ 2018 also marked the warmest year on record for ocean heat content, surpassing a record set in 2017.⁶ Warming oceans take up more space, a process known as thermal expansion, which contributes—along with melting glaciers and ice sheets—to sea-level rise.”¹⁹

- The damage to buildings in all the counties along Delaware River tidal waters has increased due to climate impacts since 1980 according to the Rhodium Group study. Mapping shows the greatest increases for the Delaware estuarine waters to be Cape May County (from 20.9% to 27% - both from the Delaware Bay and the Atlantic Ocean) and Salem County (12.5% to 15.3%).²⁰
- The “increase in expected average annual loss, as a percent of county output, due to changes in sea level and expected hurricane activity since the 1980s” is greatest in Cape May, Hudson, and Salem Counties of all New Jersey counties, according to the Rhodium study.²¹ This is a significant cost for these two Delaware River Basin counties.
- Storm surge exacerbates the flooding from storm-induced flooding and was an important factor in the damages caused by Hurricane Sandy in 2012.²²
- The Delaware Valley Regional Planning Commission (DVRPC) reports “...water levels of the tidal section of the Delaware River will rise as sea level rises along the Atlantic Coast. These rising water levels will be a permanent change to the landscape and will introduce new flooding vulnerabilities along the Delaware that communities will need to address.”²³
- In the NOAA Technical Report on global and relative sea level rise, it is concluded that seas will continue to rise due to climate change even if substantial action is taken now to address climate change impacts.

These impacts include:

“Significant, direct impacts of long-term [relative sea level] (RSL) rise, including loss of life, damage to infrastructure and the built environment, permanent loss of land (Weiss et al., 2011), ecological regime shifts in coastal wetlands and estuary systems (Kirwan et al., 2010), and water quality impairment (Masterson et al., 2014), also occur when key thresholds in the coastal environment are crossed (Wong et al., 2014).²⁴

- In an earlier DVRPC report, the study on the effects of sea level rise concluded:

¹⁸ RHODIUM GROUP, “NEW JERSEY’S RISING COASTAL RISK”, October 2019. p. 2 https://rhg.com/wp-content/uploads/2019/10/Rhodium_NJCoastalRisk_Oct2019final.pdf

¹⁹ Ibid. p. 3, 4.

²⁰ Ibid. Figure 4, p. 7.

²¹ Ibid. Figure 8, p. 12.

²² Ibid. p. 7.

²³ DVRPC, Coastal Effects of Climate Change in Southeastern PA, Introduction and Project Background, November 5, 2019. <https://www.arcgis.com/apps/MapSeries/index.html?appid=8080c91a101d460a9a0246b90d4b4610>

²⁴ National Oceanic and Atmospheric Administration, U.S. DEPARTMENT OF COMMERCE, National Ocean Service Center for Operational Oceanographic Products and Services, “GLOBAL AND REGIONAL SEA LEVEL RISE SCENARIOS FOR THE UNITED STATES”, NOAA Technical Report NOS CO-OPS 083, Silver Spring, Maryland, January 2017. P. 1

“The study concludes that a three- to four-foot rise in sea level during the next 100 years will have a wide range of impacts. Rising seas will inundate almost all of Pennsylvania's 1,500 acres of tidal wetlands. The salt line in the Delaware River will migrate further upstream, threatening Philadelphia's drinking water supply. The pollutants found in contaminated sites may be released into estuary waters. Efforts to increase public access to the waterfront may be jeopardized by rising waters.”²⁵

It is important that NJDEP recognize that the emission of fugitive methane, which is not included in the calculations and planning regarding this permit modification - nor any other NJDEP permit - is highly consequential in terms of the area greenhouse gas contribution to the atmosphere. This is illustrated by various recent analyses that address the potency of methane as a greenhouse gas:

- Greenhouse gas emissions must address methane, which means curtailing natural gas development. According to recent tracking greenhouse gas reports, “However, energy-related carbon dioxide emissions were at a record high last year and new renewable power capacity has stalled after years of strong growth. At the same time, methane, a more potent greenhouse gas than carbon dioxide, has risen in recent years due to oil and gas production, including fracking.”²⁶
- Atmospheric methane levels rose steadily during the last few decades of the 20th century before leveling off for the first decade of the 21st century.²⁷ Since 2008, however, methane concentrations have again been rising rapidly. This increase, if it continues in coming decades, will significantly increase global warming and undercut efforts to reach the COP21 target of < 2 degrees C above the pre-industrial baseline by 2021.²⁸ Limiting warming to 1.5C will be even more difficult, if not impossible.
- The composition of natural gas is about 95% methane. Methane leaks or is vented or flared at all stages of the natural gas process (extraction/production, gathering, processing, transmission, storage, local distribution and consumption). Methane is 86 times more efficient than CO₂ at trapping heat over a 20-year period.²⁹ Unless methane emissions are dramatically and intentionally reduced, it will be impossible to meet the required 45% reduction of greenhouse gases that the IPCC and other scientists have concluded is necessary to meet climate goals.
- Natural gas systems emit more anthropogenic methane than any other source in the United States, and are the third highest source for carbon dioxide emissions nationally.³⁰ Natural gas, considered “clean” or a “bridge fuel” is, in fact, a bigger problem than other fossil fuels due to uncontrolled and uncontrollable leaks, intentional flaring and venting. “Methane is far more potent than carbon dioxide in contributing to climate change. That makes it particularly harmful to the environment when it is

²⁵ DVRPC, “Sea Level Rise Impacts in the Delaware Estuary of Pennsylvania”, Product No.: 04037, 6/2004, Abstract.

<https://www.dvrpc.org/Products/04037/>

²⁶ <https://www.insurancejournal.com/news/international/2019/06/19/529839.htm>

²⁷ Howarth, R. (2019). Ideas and perspectives: is shale gas a major driver of recent increase in global atmospheric methane? *Biogeosciences* (16), 3033-3046. Retrieved from <https://www.biogeosciences.net/16/3033/2019/bg-16-3033-2019.pdf>

²⁸ Ibid.

²⁹ Myhre, G. et al. 2013. Anthropogenic and Natural Radiative Forcing. In: *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change.* Stocker, T.F., D. Qin, G.K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex, and P.M. Midglet (eds). Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA. and https://en.wikipedia.org/wiki/Global_warming_potential

³⁰ EPA 2016. Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2014.

<https://www.epa.gov/ghgemissions/us-greenhouse-gas-inventory-report-1990-2014>

discharged into the atmosphere. In the U.S. alone, the methane that leaks or is released from oil and gas operations annually is equivalent to the greenhouse gas emissions from more than 69 million cars, according to a Wall Street Journal analysis using conversion formulas from the Environmental Protection Agency and emissions estimates for 2015 published last year in the journal Science.”³¹

- Methane’s impact on atmospheric warming is much shorter and simpler than carbon, as explained in the VOX.com article: “Reduced emissions [of methane] have an almost immediate climate impact. It’s a short-term climate lever, and if the countries of the world are going to hold rising temperatures to the United Nations’ target of “well below” 2 degrees Celsius above the preindustrial baseline, they’re going to need all the short-term climate levers they can get.”³²
- According to Dr. Howarth of Cornell University, the planet is going to continue to warm to 1.5 degrees C in 12 years and to 2 degrees C in 35 years or less unless we substantially cut methane emissions.³³ He points out that the planet responds much faster to methane than carbon dioxide. There is already so much carbon in the atmosphere that the ONLY hope of meeting global climate targets is to address methane because that can quickly reduce greenhouse gases and slow the warming of the atmosphere.³⁴

Conclusion and Recommendation

Delaware Riverkeeper Network opposes the proposed Air Pollution Control Preconstruction Permit Modification for Delaware River Partners’ (DRP) Gibbstown Logistics Center (GLC) and respectfully requests that the permit modification be denied. The proposed permit action does not meet the requirements of the Air Pollution Control Act, Chapter 106, P.L. 1967 (N.J.S.A. 26:2C-1 et. seq.) and enabling state regulations the required federal standards and processes that protect air quality and prevent degradation. Any future applications for air pollution control permits submitted to NJDEP must include all emissions generated by GLC at build out, allowing for the fulfillment of a comprehensive, nonsegmented review by NJDEP pursuant to the provisions of New Jersey’s Air Pollution Control Act and enabling regulations and the federal Clean Air Act.

Thank you for the opportunity to comment.

Respectfully submitted,



Maya van Rossum
the Delaware Riverkeeper

Tracy Carluccio
Deputy Director

Imbedded Attachment: Delaware Riverkeeper Network Complaint filed in the United States District Court for the District of New Jersey appealing the Army Corps of Engineers permit for the Gibbstown Dock 2 project, April 22, 2020 (Civ. No.: 1:20-cv-4824)

³¹ Wall Street Journal, *The Leaks That Threaten the Clean Image of Natural Gas*, <https://www.wsj.com/articles/the-leaks-that-threaten-the-clean-image-of-natural-gas-11565280375>

³² <https://www.vox.com/energy-and-environment/2019/8/15/20805136/climate-change-fracking-methane-emissions>

³³ Dr. Robert Howarth, Cornell University, “COP21 Reflections on the Historic Paris Climate Agreement”, http://events.cornell.edu/event/cop21_reflections_on_the_historic_climate_agreement

³⁴ Ibid.

Kacy C. Manahan, Esq. (N.J. Bar No. 275122018)
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19007
215-369-1188 x115
kacy@delawareriverkeeper.org

Attorney for Plaintiffs

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

DELAWARE RIVERKEEPER NETWORK,
and MAYA VAN ROSSUM, the
DELAWARE RIVERKEEPER,

Plaintiffs,

Civ. No.: 1:20-cv-4824

v.

UNITED STATES ARMY CORPS OF
ENGINEERS, RYAN D. MCCARTHY,
Secretary of the Army (in his official
capacity), R.D. JAMES, Assistant Secretary
of the Army for Civil Works (in his official
capacity), LIEUTENANT GENERAL TODD
T. SEMONITE, Commanding General of the
U.S. Army Corps of Engineers (in his official
capacity), MAJOR GENERAL JEFFREY L.
MILHORN, Commander and Division
Engineer of the U.S. Army Corps of
Engineers North Atlantic Division (in his
official capacity), LIEUTENANT COLONEL
DAVID PARK, Commander of the U.S.
Army Corps of Engineers Philadelphia
District (in his official capacity), and
EDWARD E. BONNER, Chief of the
Regulatory Branch of the U.S. Army Corps of
Engineers Philadelphia District (in his official
capacity),

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Defendants.

TO THE HONORABLE COURT:

Plaintiffs Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper, by and through their undersigned counsel, allege as follows:

INTRODUCTION

1. In this action, Plaintiffs the Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper (collectively, “DRN”), 925 Canal Street #3701, Bristol, Pennsylvania 19007, challenge the United States Army Corps of Engineers’ (“Corps” or “Army Corps”), 441 G Street NW, Washington, District of Columbia 20001, February 28, 2020 Public Notice (“Notice”) regarding the issuance of a permit to Delaware River Partners, LLC (“DRP”) pursuant to Section 10 of the Rivers and Harbors Act, 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 Facility”), which will transfer liquefied natural gas (“LNG”) to docked vessels.

2. This action by the Army Corps is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. The Corps violated the APA by failing to comply with the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321–4370h, which requires a “detailed statement by the responsible official” regarding “major Federal actions significantly affecting the quality of the human environment[.]” The Corps’ public interest review pursuant to its own regulations at 33 C.F.R. § 320.4 was arbitrary and capricious because it did not give sufficient weight and analysis to climate change impacts and safety concerns. Finally, the Corps violated the APA by failing to comply with the Clean Air Act, 42 U.S.C. §§ 7401–7671q, by failing to determine whether the Dock 2 project will conform to the state implementation plan in a nonattainment area for ozone.

3. Until Defendants comply with the requirements of the APA by completing and complying with all applicable federal and state laws, rules, and regulations, Plaintiffs will seek temporary, preliminary, or permanent injunctions against any activities in furtherance of the Dock 2 Project, and any other such relief as Plaintiffs deem appropriate.

4. This relief is necessary to preserve the status quo, to prevent illegal agency action, and to forestall irreparable injury to the environment and to Plaintiffs' interests.

JURISDICTION

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); 5 U.S.C. § 702 (APA); and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201 and 2202 (declaratory and injunctive relief).

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claims occurred in this District. Venue is also proper in this District because Plaintiffs and a substantial number of the members of Plaintiff organization Delaware Riverkeeper Network reside, work, and/or recreate in the District. Venue is also proper in this District because the Dock 2 facilities are located in Greenwich Township in New Jersey, and the adverse effects of the facilities will substantially affect New Jersey.

7. Plaintiffs have no adequate remedy at law. Unless this Court grants the requested relief, the Defendants' actions will continue to cause irreparable harm to the environment, to Plaintiffs, and to the public in violation of state and federal law and the public interest. No monetary damages or other legal remedy could adequately compensate Plaintiffs or the public for these harms. Plaintiffs are persons adversely affected or aggrieved by federal agency action within the meaning of Section 702 of the APA. 5 U.S.C. § 702.

PARTIES

A. Plaintiffs

8. Plaintiff Delaware Riverkeeper Network was established in 1988 to protect and restore the Delaware River, its tributaries and habitats. To achieve these goals, Delaware Riverkeeper Network organizes and implements stream restoration projects, volunteer water quality and ecosystem monitoring, educational programs, community technical assistance projects, environmental advocacy initiatives, community/member action and involvement projects, recreational activities, and environmental litigation throughout the entire Delaware River watershed, including the Delaware Estuary and Delaware Bay, and at a state or national level when necessary to advance the organization's mission. The watershed includes portions of New Jersey, New York, Pennsylvania, and Delaware. Delaware Riverkeeper Network is a not-for-profit membership organization with over 25,000 members, including members who live in, work in, and/or recreate in the State of Delaware, the State of New Jersey, and the Commonwealth of Pennsylvania. Delaware Riverkeeper Network members fish, canoe, kayak, boat, swim, birdwatch, hike, bike, and participate in other recreational activities in the Lower Delaware River Watershed, including in the State of New Jersey. Delaware Riverkeeper Network undertakes numerous activities and initiatives that take place in, directly benefit from, and/or directly impact State of New Jersey waters, habitats, ecosystems, and communities.

9. Plaintiff the Delaware Riverkeeper, Maya K. van Rossum, is a full-time privately-funded ombudsman who is responsible for the protection of the waterways in the Delaware River Watershed. The Delaware Riverkeeper advocates 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. The Delaware Riverkeeper regularly visits the Delaware River for

personal and professional reasons. The Delaware Riverkeeper is the chief executive officer of the Delaware Riverkeeper Network.

10. Delaware Riverkeeper Network brings this action on behalf of its members, including many who live in the vicinity of the Delaware River and Estuary, or rely on them for recreational, professional, personal, or aesthetic uses, and will suffer injuries from the ecological and/or economic damage and the safety concerns caused by the Dock 2 Project. The Corps' violation of the APA causes Delaware Riverkeeper Network members to also suffer procedural and substantive injuries from the Corps' arbitrary and capricious action, which fails to comply with state and federal law.

11. Delaware Riverkeeper Network also brings this action on behalf of itself. The Corps' violation of the APA causes Delaware Riverkeeper Network to suffer substantive and procedural injuries from the Corps' arbitrary and capricious action, which fails to comply with state and federal law.

B. Defendants

12. Defendant Army Corps is a Federal agency of the United States of America, within the Department of the Army of the United States Department of Defense. The Corps has been delegated responsibility by the Department of the Army for, among other things, construction, management, and operation of various rivers, lakes and other water resources of the United States of America, and the issuance, modification and revocation of permits relative to various activities taken or proposed to be taken on waters of the United States and its tributaries. The Corps issued a permit to DRP allowing it to construct the Dock 2 Facilities. Army Corps Headquarters are located at 441 G Street NW, Washington, DC 20314-1000.

13. Defendant the Honorable Ryan D. McCarthy is named in his official capacity as the Secretary of the Army. 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.

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

15. Defendant Lieutenant General Todd T. Semonite is named in his official capacity as the Chief of Engineers and Commanding General of the Army Corps. As Chief of Engineers, an Army Staff Principal, 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. 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.

16. Major General Jeffrey L. Milhorn is named in his official capacity as Commander and Division Engineer of the U.S. Army Corps of Engineers, North Atlantic Division. 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. 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.

17. Lieutenant Colonel David C. Park is named in his official capacity as the Commander of the U.S. Army Corps of Engineers, Philadelphia District. 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.

18. Edward E. Bonner is named in his official capacity as the Chief of the Regulatory Branch and District Engineer of the U.S. Army Corps of Engineers, Philadelphia District.

19. 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 Army Corps. Authority to issue the permit described herein has been delegated to the District Engineer of the Philadelphia District.

STATUTORY FRAMEWORK GIVING RISE TO PLAINTIFF'S CLAIMS FOR RELIEF

A. NEPA and Implementing Regulations

20. NEPA's essential purpose is "to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c).

21. To accomplish that purpose, NEPA requires that all agencies of the Federal government must prepare a "detailed statement" regarding all "major Federal actions significantly affecting the quality of the human environment[.]" 42 U.S.C. § 4332(2)(C).

22. This statement, known as an Environmental Impact Statement (“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.*

23. “Major Federal actions” requiring preparation of an EIS include projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies. 40 C.F.R. § 1508.18(a).

24. The Council on Environmental Quality (“CEQ”) is an agency within the Executive Office of the President and has promulgated regulations implementing NEPA. 40 C.F.R. §§ 1500-1508.

25. CEQ regulations direct Federal agencies to adopt their own regulatory procedures to supplement CEQ regulations. 40 C.F.R. § 1507.3. The Army Corps’ NEPA regulations are found at 33 C.F.R. Part 230.

26. CEQ regulations describe the process by which a Federal agency must decide whether to prepare an EIS. 40 C.F.R. § 1501.4.

27. First, a Federal agency must determine whether the proposed action is one which normally requires an EIS or whether the proposed action is categorically excluded by the Federal agency’s supplemental NEPA regulations. 40 C.F.R. § 1501.4(a).

28. If the proposed action does not belong in either category, CEQ regulations direct the Federal agency to “prepare an environmental assessment [(“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).

29. CEQ regulations direct the Federal agency to “make its determination whether to prepare an [EIS]” based on the EA. 40 C.F.R. § 1501.4(c).

30. If the Federal agency “determines on the basis of the environmental assessment not to prepare an [EIS],” then it should “[p]repare a finding of no significant impact,” also known as a FONSI. 40 C.F.R. § 1501.4(e).

31. CEQ regulations delineate factors that must be considered in determining the significance of an action, including context and intensity. 40 C.F.R. § 1508.27.

32. In evaluating the intensity of an action, “[r]esponsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action.” 40 C.F.R. § 1508.27(b). Relevant factors include:

(2) The degree to which the proposed action affects public health or safety.

....

(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. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

40 C.F.R. § 1508.27(b).

33. An EIS must “provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

34. When more than one Federal agency “[p]roposes or is involved in the same action” or “[i]s involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity[,]” then a “lead agency shall supervise the preparation of an environmental impact statement[.]” 40 C.F.R. § 1501.5.

35. The scope of an EIS includes connected actions, cumulative actions, and similar actions, as well as the direct, indirect, and cumulative impacts of the action. 40 C.F.R. § 1508.25(a), (c).

36. CEQ regulations require Federal agencies to consider “direct effects,” defined as effects “which are caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a).

37. Federal agencies must also consider “indirect effects,” which are defined as “effects which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b).

38. Cumulative impacts “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.” 40 C.F.R. § 1508.7.

39. Also within the scope of an agency’s NEPA review are connected actions, cumulative actions, and similar actions. 40 C.F.R. § 1508.25(a).

40. “Connected actions” are “closely related and therefore should be discussed in the same impact statement.” 40 C.F.R. § 1508.25(a)(1).

41. Actions are considered connected if they “automatically trigger other actions which may require environmental impact statements,” “cannot or will not proceed unless other actions are

taken previously or simultaneously,” or “[a]re interdependent parts of a larger action and depend on the larger action for their justification.” *Id.*

42. CEQ regulations also require that “cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts” be considered in a single EIS. 40 C.F.R. § 1508.25(a)(2).

43. “Similar actions, . . . 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).

44. “An agency impermissibly ‘segments’ NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration.” *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

45. The rule against segmentation “prevent[s] agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” *Id.* at 1314 (quoting *NRDC v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988)) (alteration in original).

46. Regulations governing the preparation of Environmental Assessments (“EAs”) are found at 40 C.F.R. § 1508.9 and 33 C.F.R. § 230.10.

47. EAs are “concise public document[s]” intended to “provide sufficient evidence and analysis for determining whether to prepare” an EIS or a FONSI. 40 C.F.R. § 1508.9(a)(1).

48. An EA “[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. § 1508.7(b).

49. The Corps is required to “prepare an environmental assessment . . . when necessary under the procedures adopted by [the Corps] to supplement [CEQ] regulations[.]” 40 C.F.R. § 1501.3(a).

50. Corps regulations state that “regulatory actions,” such as permits, are “[a]ctions normally requiring an EA, but not an EIS[.]” 33 C.F.R. § 230.7(a).

51. The district commander is responsible for making the determination whether to prepare an EIS or a FONSI and for “keeping the public informed of the availability of the EA and FONSI.” 33 C.F.R. § 230.10.

52. CEQ’s “Forty Questions” Guidance strongly encourages circulation of a draft EA “where there is either scientific or public controversy over the proposal.” Coun. On Env’tl. Quality, Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Ref. 18026 (Mar. 23, 1981), as amended (1986).

53. The district commander must prepare a record of decision “for the signature of the final decisionmaker[.]” 33 C.F.R. § 230.14.

54. CEQ regulations direct agencies to prepare a FONSI if the agency determines on the basis of the EA not to prepare an EIS, 40 C.F.R. § 1508.13, and, at a minimum, make the FONSI available to the affected public. 40 C.F.R. § 1506.6; 40 C.F.R. § 1501.4(e).

55. CEQ regulations require the agency 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).

B. The Army Corps’ Regulatory Public Interest Review

56. The Corps’ public interest review applies to Clean Water Act Section 404 permits as well as Rivers and Harbors Act Section 10 Permits. 33 C.F.R. § 320.4.

57. 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 . . . factors which become relevant in each particular case.” The Corps weighs the “benefits which reasonably may be expected to accrue from the proposal” against its “reasonably foreseeable detriments.” 33 C.F.R. § 320.4(a)(1).

58. The Corps’ decision “should reflect the national concern for both protection and utilization of important resources” and must include the consideration of “[a]ll factors which may be relevant to the proposal . . . including the cumulative effects thereof[.]” *Id.*

59. 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.*

C. Clean Air Act and Implementing Regulations

60. 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).

61. 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).

62. 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. § 109; *see also* 40 C.F.R. Part 50.

63. 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; *see also* § 7407.

64. Under the Clean Air Act, the United States is 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).

65. 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).

66. The head of the Federal “department, agency or instrumentality” is responsible for assuring that the activity conforms to the state implementation plan. *Id.*

67. “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 standard 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).

68. The EPA's regulations governing the conformity determination process are found at 40 C.F.R. §§ 93.150–93.165.

69. According to EPA regulations, a “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).

70. A Federal agency must first engage in an applicability analysis to determine whether a conformity determination is required for the Federal action. 40 C.F.R. § 93.153(b).

71. “[A] conformity determination is required for each criteria pollutant or precursor 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). *Id.*

72. “Caused by . . . means emissions that would not otherwise occur in the absence of the Federal action.” 40 C.F.R. § 93.152.

73. “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.” *Id.*

74. “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 reasonably foreseeable; (3) That the agency can practically control; and (4) For which the agency has continuing program responsibility.” *Id.*

75. Continuing program responsibility “means a Federal agency has responsibility for emissions caused by: (1) Actions it takes itself; or (2) Actions of non-Federal entities that the Federal agency, in exercising its normal programs and authorities, approves, funds, licenses or

permits, provided the agency can impose conditions on any portion of the action that could affect the emissions.” *Id.*

76. 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).

FACTS GIVING RISE TO PLAINTIFF’S CLAIMS FOR RELIEF

A. Overview of the Dock 2 Project

77. DRP is a subsidiary of Fortress Transportation and Infrastructure Investors, LLC (“FTAI”), a company that invests across a number of major sectors within the transportation industry, including aviation, energy, intermodal transport and rail.

78. DRP is developing a site located at Block 8, Lots 1, 2, 3, 4, 4.01, and 4.02 in Greenwich Township, Gloucester County, New Jersey, commonly known as 200 North Repauno Avenue (the “Gibbstown Logistics Center”).

79. The Gibbstown Logistics Center is located on the site of a former DuPont facility, which was in use for over one hundred years for explosives manufacturing, anhydrous ammonia production, and the manufacturing of organic compounds.

80. DuPont’s operations ceased in 1986, and the site began remediation in 2002.

81. The subject of this Complaint is the proposed Dock 2 Project, a new marine terminal consisting of two loading platforms, eight breasting dolphins, eleven 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 LNG, and mechanical dredging in the Delaware River.

82. The LNG operations at the proposed Dock 2 Facility will involve the arrival of LNG by truck (approximately fifteen trucks per hour, twenty-four hours per day, seven days per week, carrying 12,000 gallons of LNG per truck based on information submitted to the Corps by DRP), and by railcar pursuant to a special permit from the United States Department of Transportation Pipeline and Hazardous Materials Safety Administration (“PHMSA”) (up to 100 railcars per day according to the PHMSA special permit conditions).

83. The LNG will be pumped directly from the truck or railcar into a LNG vessel docked at Dock 2. It will take approximately two weeks to fill each LNG vessel.

84. The plan is for LNG trucks to access the site via a new by-pass proposed by Gloucester County, which will divert the truck traffic from Route 44 and avoid residential areas of Gibbstown.

B. The Army Corps’ Approval of the Dock 1 Project

85. In a May 14, 2015 filing with the United States Securities and Exchange Commission describing its acquisition of the Gibbstown Logistics Center, FTAI stated that it “intend[s] to utilize the existing infrastructure for our development plans, including constructing refrigerated warehouses for perishable goods, building a dock and using remaining acreage for additional warehouse space, bulk storage and a liquid natural gas facility.”

86. In a July 24, 2016 Philadelphia Inquirer article, FTAI’s managing director was quoted as saying that an LNG facility was “no longer in [FTAI’s] designs[.]”

87. On March 7, 2017, the Army Corps issued a Public Notice regarding receipt of an application under Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, and Section 404 of the Clean Water Act, 33 U.S.C. § 1344, submitted by DRP for “installing docking structures, performing dredging and installing 6 outfall structures” (the “Dock 1 Project”).

88. On November 16, 2017, in a Letter of Intent to the United States Coast Guard, Sector Delaware Bay, a consultant for DRP described the Gibbstown Logistics Center as a “multi-use, deep-water port and logistics center that may include a variety of separate uses including handling of imported and exported automobiles, other bulk freight and liquid energy products including, but not limited to liquefied petroleum gas (“LPG”) and liquefied natural gas (“LNG”).”

89. The November 16, 2017 Letter of Intent also stated that DRP would be seeking authorization from the United States Department of Energy “to export LNG to both Free Trade Agreement and Non-Free Trade Agreement countries[.]”

90. On December 8, 2017, pursuant to the Endangered Species Act Section 7 consultation requirement, 16 U.S.C. § 1536(a)(2), the National Marine Fisheries Service (“NMFS”), of the United States Department of Commerce’s National Oceanic and Atmospheric Administration issued a Biological Opinion concluding that construction of the Dock 1 project would not adversely affect the listed species shortnose and Atlantic sturgeon, sea turtles, and whales, and that it would not adversely affect Atlantic sturgeon critical habitat. The Biological Opinion also concluded that vessel traffic due to operation of the Dock 1 project would result in adverse effects to listed sturgeon, but concluded that the effect would not jeopardize their continued existence.

91. On December 21, 2017, the Army Corps issued a permit with special conditions to DRP for the construction of the Dock 1 Project.

C. The Army Corps’ Approval of the Dock 2 Project.

92. Over a year later, on March 6, 2019, the Corps received an Application for Individual Permit (“Application”) under Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, and Section 404 of the Clean Water Act, 33 U.S.C. § 1344, submitted by DRP for the Dock 2 Project.

93. The Application described the project site as “Dock 2 at Gibbstown Logistics Center, Block 8, Lots 2, 3, 4.01, 4.02, Portions of Lot 4, Greenwich Township, Gloucester County, New Jersey.”

94. The Application describes the project purpose as: “to construct a dock and berths that will provide safe navigational access, mooring, and loading equipment for two vessels up to 173,400 cubic meters in capacity.”

95. The Dock 2 project is further described in the Application as “a deep-water facility for the export of bulk liquid products.”

96. The Application acknowledges that the Dock 2 project will require “[Department of Energy (“DOE”)] Part 590 Approval.”

97. The Natural Gas Act (“NGA”) prohibits the import or export of liquefied natural gas from or to a foreign country without prior approval from the DOE. 15 U.S.C. § 717b. Those who wish to import or export LNG must file for authorization pursuant to DOE regulations found in 10 C.F.R. Part 590.

98. On March 15, 2019, following an inquiry by DRN, the Corps asked DRP whether the Gibbstown Logistics Center would be considered an LNG facility.

99. On March 19, 2019, DRP’s consultant answered that the Gibbstown Logistics Center was not an LNG facility “within the meaning of the applicable regulations” because there “will be no on-site manufacturing or processing of liquefied natural gas . . . 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.”

100. On April 4, 2019, the Corps issued a Public Notice No. CENAP-OR-R-2016-0181-39, which described the Application and solicited comments from the public.

101. The April 4, 2019 Notice stated 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.”

102. The April 4, 2019 Notice stated that “[t]he 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.”

103. On May 30, 2019, in a comment provided to the Army Corps, NMFS expressed a concern that the Dock 2 project was not included in the original Dock 1 permitting process, despite that the “applicant had intended from the outset of the development at this site to construct more than one wharf[.]” Accordingly, NMFS stated that “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 [NEPA] review.”

104. NMFS’s May 30, 2019 comment also stated that the Dock 2 project was a modification of the Dock 1 project, therefore consultation under the ESA needed to be re-initiated.

105. On June 14, 2019, DRN sent a letter to the Army Corps requesting that it re-open the public comment period for 90 days regarding the Dock 2 project.

106. DRN’s June 14, 2019 request was based on the April 4, 2019 Notice’s failure to include the fact that the Dock 2 project would allow the Gibbstown Logistics Center to export LNG.

107. On July 16, 2019, the Corps issued a Supplemental Public Notice regarding the Dock 2 project.

108. The Supplemental Public Notice was to “provide[] additional information not included in the original public notice and expand[] [the Corps’] discussion of the public interest

factors relevant to the Corps of Engineer review which will also be considered for preparation of an Environmental Assessment prepared under [NEPA].”

109. The Supplemental Public Notice stated that “[LNG] will not be processed or stored on the project site. This product will arrive at the proposed structure via truck or tanker railcar.”

110. The Supplemental Public Notice solicited additional public comment for a fifteen-day period.

111. During that additional public comment period, DRN commented that an EIS must be prepared by the Corps due to the magnitude of the impact the proposed LNG export operations would have on the human environment, including:

- a. Increased ship traffic and increased docking
- b. Storage of liquefied hazardous gas (“LHG”) on site
- c. Additional equipment and facilities on site
- d. Increased motor vehicle traffic, including trucks
- e. Increased rail traffic
- f. Impact of port construction
- g. Harm to marine fish and fisheries from both construction and operation
- h. Increased impermeable surfaces creating stormwater runoff
- i. Dredging activity in the Delaware River at a site with known contaminants
- j. Impact on submerged aquatic vegetation
- k. Impacts on endangered and threatened wildlife
- l. Impacts on state and federal protected critical wildlife habitats
- m. Development of a known contaminated site
- n. Impacts on the scenic and recreational values of the naturally-restored site

- o. Development within a floodplain
- p. Unique safety risks and dangers of LNG and LHG transport and handling
- q. Impacts of transporting LNG by motor vehicle from Pennsylvania to the facility
- r. Impacts of transporting LNG by railcar from Pennsylvania to the facility
- s. Impacts of ballast water releases from vessels
- t. Climate change impacts of exporting LNG, including onsite, downstream use, and upstream/induced production
- u. Air quality impacts of construction and operation
- v. Potential release of PCBs due to construction or operation of the site

112. DRN also highlighted in its comment that the Dock 2 project may require “approvals from the U.S. Coast Guard, the Federal Energy Regulatory Commission, the Pipeline and Hazardous Materials Safety Administration (PHMSA), U.S. Department of Transportation, and the Federal Railroad Administration.”

113. On August 19, 2019, the EPA’s Region 2 office submitted a comment to the Corps advising it that the Dock 2 project was “within the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE nonattainment area for the ozone National Ambient Air Quality Standards” and that the project must undergo a “general conformity applicability analysis” pursuant to 40 C.F.R. § 93.153.

114. On August 21, 2019, Energy Transport Solutions, LLC applied to PHMSA for a special permit to “authorize the transportation in commerce of methane, refrigerated liquid in DOT specification 113C120W tank cars” between Wyalusing, Pennsylvania, and Gibbstown, New Jersey.

115. On September 26, 2019, the Army Corps re-initiated consultation with NMFS because the Dock 2 project was a modification of the Dock 1 project. The Corps prepared a “Biological Assessment of Effects to Endangered Species Act Listed Species.”

116. On November 19, 2019, NMFS informed the Army Corps that “the effects of the currently proposed action are not likely to adversely affect any ESA-listed species or critical habitat under our jurisdiction” and that the Biological Opinion remains valid based on NMFS’s evaluation of the impacts of both Dock 1 and Dock 2, collectively.

117. On December 5, 2019, Energy Transport Solutions, LLC received a special permit from PHMSA authorizing “the transportation in commerce of methane, refrigerated liquid in DOT specification 113C120W tank cars.”

118. On February 28, 2020, the Army Corps issued a public notice stating: “Based on all available information, it is the determination of this office that the project is 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.”

119. The Army Corps’ February 28, 2020 Public Notice did not mention NEPA.

120. On March 5, 2020, in response to a Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, request by DRN, the Army Corps produced a “Memorandum for Record” from CENAP-OP-R-2016-0181-39 titled “Department of the Army Environmental Assessment and Statement of Findings for the Above-Referenced Standard Individual Permit Application” (“Memorandum for Record”).

121. The Memorandum for Record was not “Approved by” Defendant Edward E. Bonner, District Engineer and Chief of the Regulatory Branch of the Army Corps Philadelphia District.

122. Mr. Bonner is the “final decisionmaker” as to the Dock 2 permit, as his signature was required to make the permit effective.

123. The Corps’ own NEPA regulations require Mr. Bonner’s signature on any record of decision under NEPA. 33 C.F.R. § 230.14.

124. As of the date of this filing, the Army Corps has not published a draft EIS, EA, or EA/FONSI, nor has it published a final EIS, EA, or EA/FONSI.

125. The Memorandum for Record contains the Corps’ public interest review.

126. In addressing “conservation,” the Corps stated that “[i]mpacts for resources outside the control of the Corps are being addressed by the appropriate state/Federal resource agency.”

127. In addressing “general environmental concerns,” the Corps stated 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.”

128. In addressing “safety,” the Corps stated that “[t]he applicant has stated that all state and Federal regulations as required by law will be followed at the project site.”

129. In addressing the “needs and welfare of the people,” the Corps notes that “[a]s previously stated, petroleum products will be required [by] the world for years to come. As with all industrial sites, there [is] 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.”

130. In addressing “climate change,” the Corps concluded that “[t]he 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 gases emissions.”

131. The Corps further stated that “authorized impacts to aquatic resources can result in either an increase or decrease in atmospheric greenhouse gas” and that those “impacts are considered de minimis.”

132. The Corps went on to admit that “[g]reenhouse 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.”

133. However, the Memorandum for Record later states that “[t]he 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 or other liquid petroleum products 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.”

134. In the Memorandum for Record the Corps stated that the Dock 2 project “has been analyzed for conformity applicability” pursuant to the Clean Air Act and “[i]t 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.”

135. The Memorandum for Record goes on to say that “[a]ny later indirect emissions are generally not within the Corps’ continuing program responsibility and generally cannot be practicably controlled by the Corps.”

COUNT I: RELIEF SOUGHT PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT FOR VIOLATIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT

136. Plaintiffs hereby repeat and incorporate by reference all of the above allegations, set forth in paragraphs 1 through 135.

137. The Army Corps' action in issuing a permit for the Dock 2 Project without preparing an EA as required by NEPA and its implementing regulations is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

138. NEPA requires that all agencies of the Federal government must prepare a "detailed statement" regarding all "major Federal actions significantly affecting the quality of the human environment," also known as an EIS. 42 U.S.C. § 4332(2)(C).

139. If an action is neither categorically excluded from NEPA nor is the type of action typically requiring an EIS, CEQ regulations direct the Federal agency to prepare 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).

140. Corps regulations state that "regulatory actions," such as permits, are "[a]ctions normally requiring an EA, but not an EIS[.]" 33 C.F.R. § 230.7(a).

141. Thus, DRP's application for a permit to construct Dock 2 triggered the Corps regulation requiring an EA.

142. The district commander is responsible for making the determination whether to prepare an EIS or a FONSI and for "keeping the public informed of the availability of the EA and FONSI." 33 C.F.R. § 230.10.

143. CEQ's "Forty Questions" Guidance strongly encourages circulation of a draft EA "where there is either scientific or public controversy over the proposal." Coun. On Env'tl. Quality,

Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (Mar. 23, 1981), as amended (1986).

144. At no point during the permit process did the Corps make available a draft or final EA to the public, despite the considerable controversy surrounding this first LNG export facility proposed in the region, thus circumventing the requirements of NEPA.

145. The district commander must prepare a record of decision "for the signature of the final decisionmaker[.]" 33 C.F.R. § 230.14.

146. The final decisionmaker is District Engineer and Chief of the Regulatory Branch Edward E. Bonner, as his signature was required to make the Dock 2 permit effective.

147. Although the Corps' Memorandum for Record, which purportedly includes an EA/FONSI, has a signature line for Edward E. Bonner, his signature was not affixed to that document.

148. CEQ regulations direct agencies to prepare a FONSI if the agency determines on the basis of the EA not to prepare an EIS, 40 C.F.R. § 1508.13, and, at a minimum, make the FONSI available to the affected public. 40 C.F.R. § 1506.6; 40 C.F.R. § 1501.4(e).

149. The Memorandum for Record, purportedly including an EA/FONSI, was not made available to the affected public, and was obtained in its incomplete form via a FOIA request from DRN.

150. CEQ regulations require the agency 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).

151. Throughout the permit process, the Corps has failed to involve the public in preparing and implementing its NEPA procedures. NEPA was mentioned in the April 4, 2019 Public Notice and the July 16, 2019 Supplemental Public Notice, but a draft EA was never circulated, and when the permit was ultimately issued, the February 28, 2020 Public Notice made no mention of the outcome of the Corps' NEPA process.

152. The Corps' issuance of the permit, without engaging in a NEPA analysis, constitutes a final agency action reviewable by this Court under the APA. 5 U.S.C. § 704.

153. The Corps' issuance of the Dock 2 permit without following the procedures required by NEPA was arbitrary, capricious, an abuse of discretion, and not in accordance with law in violation of the APA. 5 U.S.C. § 706.

154. The Corps must re-initiate the NEPA process and circulate a draft EA for public comment, due to the highly controversial nature of this being the first LNG export facility in the region, which will be using trains (pursuant to a special permit) and trucks to bring LNG to the facility rather than pipelines.

155. Ultimately, the Corps should prepare an EIS that includes within its scope the environmental impacts of both the Dock 1 and Dock 2 facilities, as well as the environmental impacts of the scheme to transport LNG by truck and railcar from Pennsylvania to the Gibbstown Logistics Center for export. The Corps should also analyze the effects of upstream induced fracking and downstream consumption of LNG.

156. This Court should declare the Corps action to be arbitrary and capricious, an abuse of discretion, and not in accordance with law, and enjoin the effectiveness of the Dock 2 permit pending the Corps' full and complete compliance with NEPA.

**COUNT II: RELIEF SOUGHT PURSUANT TO THE ADMINISTRATIVE
PROCEDURE ACT DUE TO AN ARBITRARY AND CAPRICIOUS PUBLIC
INTEREST REVIEW**

157. Plaintiff hereby repeats and incorporates by reference all of the above allegations, set forth in paragraphs 1 through 156.

158. The Army Corps' action in issuing a permit for the Dock 2 Project was based on an inadequate, arbitrary, and capricious public interest review in violation of the APA.

159. The Corps' public interest review applies to Clean Water Act Section 404 permits as well as Rivers and Harbors Act Section 10 Permits. 33 C.F.R. § 320.4.

160. 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 . . . factors which become relevant in each particular case." The Corps weighs the "benefits which reasonably may be expected to accrue from the proposal" against its "reasonably foreseeable detriments." 33 C.F.R. § 320.4(a)(1).

161. The Gibbstown Logistics Center's Dock 2 Facility will be the first LNG export facility in the region, utilizing a new method of transporting and transloading LNG by rail, and increasing the demand for fracked gas in the region.

162. The Corps acknowledged in its Memorandum for Record that although it knows that approximately fifteen trucks carrying LNG will enter the Gibbstown Logistics Center per hour, the incoming volume of railcars carrying LNG was never provided to the Corps by DRP.

163. The Corps acknowledged in its Memorandum for Record that greenhouse gases will be emitted from construction activities and traffic at the Dock 2 Facility, but states that the Corps does not have the authority to regulate these emissions.

164. At the same time, the Corps has chosen to condition the Dock 2 permit on the construction and utilization of the Gloucester County by-pass, which is based on off-site traffic concerns, without explaining why this area of regulation is not beyond the Corps' purview.

165. Even if the Corps' assertion that it cannot control emissions was correct, the Corps' public interest review is not limited to factors that are within its direct regulatory control, as those factors include "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." 33 C.F.R. § 320.4(a)(1).

166. The Corps' decision "should reflect the national concern for both protection and utilization of important resources" and must include the consideration of "[a]ll factors which may be relevant to the proposal . . . including the cumulative effects thereof[.]" Id.

167. Accordingly, the Corps arbitrarily and capriciously refused to consider the foreseeable greenhouse gas emissions that would result from the construction and operation of the Dock 2 Facility.

168. The Corps should not have issued the Dock 2 permit without first obtaining all necessary information from DRP to determine the amount of greenhouse gases that will be emitted by the Dock 2 Facility, both through its construction and operation, and through upstream induced fracking and downstream combustion of natural gas.

169. By considering only the benefits of LNG export and refusing to acknowledge its detrimental effects, the Corps has abdicated its responsibility to holistically determine whether the Dock 2 Project is contrary to the public interest.

170. The Corps' issuance of the permit, without completing a comprehensive public interest review, constitutes a final agency action reviewable by this Court under the APA. 5 U.S.C. § 704.

171. The Corps' issuance of the Dock 2 permit without completing a comprehensive public interest review was arbitrary, capricious, an abuse of discretion, and not in accordance with law in violation of the APA. 5 U.S.C. § 706(2).

172. This Court should declare the Corps action to be arbitrary and capricious, an abuse of discretion, and not in accordance with law, and enjoin the effectiveness of the Dock 2 permit pending the Corps' full and complete public interest review of the proposed project.

**COUNT III: RELIEF SOUGHT PURSUANT TO THE ADMINISTRATIVE
PROCEDURE ACT FOR VIOLATIONS OF THE CLEAN AIR ACT**

173. Plaintiff hereby repeats and incorporates by reference all of the above allegations, set forth in paragraphs 1 through 172.

174. The Army Corps' action in issuing a permit for the Dock 2 project without complying with relevant federal and state law regarding the control of air pollution for the Dock 2 project is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

175. The Clean Air Act prohibits a Federal agency from licensing, permitting, or approving any activity that does not conform to a state's implementation plan if the activity is to take place in a nonattainment area. 42 U.S.C. § 7506(c)(1), (5).

176. The Dock 2 project is to take place in the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE nonattainment area for the ozone National Ambient Air Quality Standards.

177. In its Memorandum for Record, the Army Corps arbitrarily and capriciously concluded that emissions from the Dock 2 project would be de minimis, without identifying the sources of the emissions, the pollutants or precursors to be emitted, or the quantities of emissions.

178. The Corps further stated that indirect emissions resulting from the Dock 2 facility are not within the Corps' control, which was an arbitrary and capricious conclusion and directly contrary to the EPA's regulatory definition of "indirect emissions." 40 C.F.R. § 93.152.

179. That the Corps has chosen to exercise control over the traffic flow into the Gibbstown Logistics Center as a condition of the Dock 2 permit is directly contrary to its assertion that it cannot control emissions from the Dock 2 facility, thus, the assertion is arbitrary, capricious, and not in accordance with the Clean Air Act and its implementing regulations.

180. The Army Corps is in violation of the APA because it has violated the Clean Air Act and state law by issuing the Dock 2 permit without having conducted an applicability analysis to determine whether a conformity determination is necessary.

181. The Corps' issuance of the permit, without a valid applicability analysis, constitutes a final agency action reviewable by this Court under the APA. 5 U.S.C. § 704.

182. The Corps must re-initiate the applicability analysis as required by 40 C.F.R. § 93.153, and quantify the amount of direct and indirect emissions to be caused by the Dock 2 facility in order to determine if they will exceed the rates listed in 40 C.F.R. § 93.153(b)(1) and (2).

183. This Court should declare the Corps action to be arbitrary and capricious, an abuse of discretion, and not in accordance with law, and enjoin the effectiveness of the Dock 2 permit pending the Corps' full and complete compliance with the Clean Air Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

1. For a declaratory judgment that, pursuant to the Administrative Procedure Act, the Army Corps' action of issuing the Dock 2 Permit is arbitrary and capricious, and not in accordance with law. The declaration is warranted and should further declare:
 - a. Under NEPA, the Defendants failed to follow its procedures by failing to involve the public in the drafting of an EA, and failed to provide a record of decision; therefore, the Dock 2 Permit is vacated and remanded to the Corps so that it may comply with NEPA prior to granting or denying DRP's permit application.
 - b. Under the Corps' own public interest review regulations, Defendants' decision that the Dock 2 Project was not contrary to the public interest was arbitrary, capricious, and an abuse of discretion because it failed to account for the detrimental effects of greenhouse gas emissions and safety risks associated with the Dock 2 Project; therefore, the Dock 2 Permit is vacated and remanded to the Corps so that it may engage in a comprehensive public interest review prior to granting or denying DRP's permit application.
 - c. Under the Clean Air Act, the Defendants improperly limited the scope of emissions to be included in its applicability analysis thereby avoiding the requirement to engage in a conformity determination as required by 42 U.S.C. § 7506; therefore, the Dock 2 Permit is vacated and remanded to the Corps so that the agency may perform an applicability analysis that includes all direct and indirect emissions of pollutants caused by the Dock 2 Project, prior to granting or denying DRP's permit application.

2. For a preliminary and permanent order enjoining the effectiveness of the Dock 2 Permit pending full and complete compliance with:
 - a. Administrative Procedure Act, 5 U.S.C. §§ 701–706.
 - b. National Environmental Policy Act, 42 U.S.C. §§ 4321–4370h.
 - c. Public Interest Review Regulations, 33 C.F.R. § 320.4(a); and
 - d. Clean Air Act, 42 U.S.C. §§ 7401–7671q.
3. For this Court to retain continuing jurisdiction to review Defendants’ compliance with all judgments and orders entered herein;
4. For an award of Plaintiffs’ costs of litigation, including reasonable attorney’s fees; and
5. For such other and further relief as the Court may deem just and proper to effectuate a complete resolution of the legal disputes between Plaintiffs and Defendants.

Respectfully Submitted,

s/ Kacy C. Manahan
Kacy C. Manahan, Esq.
Delaware Riverkeeper Network
925 Canal Street #3701
Bristol, PA 19007
215-369-1188 x115
kacy@delawariverkeeper.org

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

DATE: April 22, 2020