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Via Electronic Mail

Pamela M. Bush, Commission Secretary
Delaware River Basin Commission
P.O. Box 7360
West Trenton, NJ 08628-0360
Pamela.bush@drbc.gov

Partner responsible:
John F. Gullace (NJ)
Brenda H. Gotanda (HI)

Re: Extension of Docket No. D-2017-009-2

Dear Ms. Bush:

On behalf of our client, Delaware River Partners, LLC (“DRP”), I write in response to the August 15, 2022 letter from Steve Tambini, Executive Director of the Delaware River Basin Commission (“DRBC”) ¹ and the August 17, 2022 letter from the Delaware Riverkeeper Network (“DRN” or “the Riverkeeper”) ² regarding the extension of Docket No. D-2017-009-2 (the “Dock 2 Docket”), which authorizes dredging and related construction activities for a second dock at DRP’s Gibbstown Logistics Center (“GLC”).

By way of a June 15, 2022 letter (the “Extension Letter”) from Mr. Tambini, DRBC extended the Dock 2 Docket for a second three-year period that will expire on June 12, 2025. Mr. Tambini issued the Extension Letter in response to a June 2, 2022 letter from DRP seeking an extension on the basis that DRP had expended substantial funds in reliance on the Dock 2 Docket (the “Extension Request”). DRP has enclosed a copy of the Extension Request as **Exhibit 1** and fully incorporates the Extension Request into this response.

The Riverkeeper opposes the docket extension and alleges that DRBC was required to hold a public hearing prior to granting the extension on the theory that DRP’s Extension Request

¹ Mr. Tambini’s August 15th letter was issued in response to a July 27, 2022 letter from DRN and an August 12, 2022 letter from a group of organizations, including DRN, which identifies itself as the “Delaware River LNG Coalition.” The July 27th and August 12th letters essentially repeat the arguments in DRN’s August 17th letter and request that DRBC rescind the extension of the Dock 2 Docket.

² On August 25, 2022, DRN’s Deputy Director submitted an additional letter to the Commission on behalf of the Delaware River LNG Coalition, even though Mr. Tambini did not solicit a written response from the Coalition. The August 25th letter again repeats the arguments in DRN’s August 17th letter and the previous correspondence.



constituted a project application within the meaning of the Compact and DRBC's Rules of Practice and Procedure ("RPP"). For the reasons set forth herein, the Commission should reject DRN's arguments and ratify Mr. Tambini's decision to issue the Extension Letter.

The Extension Request Was Not a "Project Application" Requiring Action by the Commissioners Following a Public Hearing.

DRN contends that the Extension Letter was issued improperly because DRP's Extension Request constituted an "application" within the meaning of DRBC's Rules and that DRBC was required to hold a public hearing prior to granting such request. The Riverkeeper's position, however, has no support in the *Compact* or the RPP. The Extension Letter was issued pursuant to DRBC's authority under Section 401.41(a) of the RPP, which *requires* DRBC to extend a docket beyond its initial three-year term upon a showing by a project sponsor that it has "expended substantial funds (in relation to the cost of the project) in reliance on such approval." 18 C.F.R. § 401.41(a). So long as a project sponsor provides evidence of the expenditure of substantial funds, DRBC must extend the docket.

DRN's position that DRBC must hold a public hearing prior to extending a docket is based on language in Section 401.41(a), which provides that a docket "may be extended or renewed by the Commission upon application." *Id.* Regardless of whether or not the Extension Request satisfies the RPP's general definition of "Application" (*see* 18 C.F.R. 401.121), nothing in the text of Section 401.41(a) or otherwise supports the contention that a docket extension can only be "decided upon at a public hearing after notice by the Commission." *See* DRN Letter, page 2. In fact, the lone citation DRN provides for its claim is to Section 401.5 of Subpart A to the RPP, which governs only the Commission's review of "project applications" for inclusion in the Comprehensive Plan. *See also* 18 C.F.R. 401.1 (stating that **Subpart A "shall govern the submission, consideration, and inclusion of projects into the *Comprehensive Plan*"**).

Surely, a mere request to extend the expiration date of an already-approved project such as Dock 2, which the Commission has thoroughly evaluated and deemed appropriate for inclusion into DRBC's *Comprehensive Plan*, is not a "project application" under Subpart A and need not undergo yet another comprehensive review and public hearing. Requiring so would directly conflict with the express language in Section 401.41(a) mandating an extension of an already-approved docket upon a showing by the project sponsor that it has expended substantial funds in reliance thereto. Because Section 401.41(a) limits the extension inquiry to a consideration of the expenditure of substantial funds, there would be nothing gained from a public hearing, as the project sponsor alone is uniquely positioned to provide DRBC with the only information pertinent to the decision. Such a public hearing would serve as nothing more than a drain on the Commission's already-limited resources without providing DRBC with any relevant information on which to base its extension decision.

In addition, DRP notes that it has been the regular practice of the Commission to extend already-approved projects via a letter from DRBC's Executive Director without holding a public

hearing or otherwise involving the Commissioners. DRBC's decision to comport with its past practice by issuing the Extension Letter is eminently reasonable, particularly where, as discussed above, the extension inquiry is limited to a consideration of funds expended by the project sponsor in reliance on a docket.

Notwithstanding the plain language of Section 401.41(a) and DRBC's prior practice of extending dockets via letter from the Executive Director, DRN argues that a public hearing is necessary because a docket extension actually serves as a project modification. *See* DRN Letter at 3. Such claim, however, is wrong on its face, as all conditions of the Dock 2 Docket remain in place and the scope of the project has not changed in any way. DRN further makes an unfounded claim that NJDEP's recent approval of construction of a rail loop at the GLC constitutes a modification of the Dock 2 Docket. DRP's planned rail loop is wholly unrelated to the activities authorized by Dock 2 and does not itself constitute a "project" requiring review and approval under Section 3.8 of the *Compact*. Given that DRN is actively involved in a challenge to New Jersey's approval of the rail loop development, DRP is disappointed that the Riverkeeper has conflated the rail loop and the Dock 2 Project, presumably in the hopes of sowing confusion among the Commissioners.

In light of the foregoing, it was appropriate for DRBC to extend the Dock 2 Docket via the Extension Letter, and no public hearing was or is required.

The Dock 2 Docket Was Appropriately Extended Because DRP Has Expended Substantial Funds In Reliance on the Approval.

DRP has expended substantial funds in reliance on the Dock 2 Docket and is entitled to an extension of same. As set forth in Attachment A to the Extension Request, DRP, as of May 2022, had spent \$1,798,766 on engineering, licensing, and taxes since DRBC issued the Dock 2 Docket on June 12, 2019. Since May 2022, DRP has incurred an additional \$15,183 of costs. Such costs, totaling **\$1,813,949**, or roughly 1.6 percent of the overall estimated project cost of \$113,497,584, clearly demonstrate that DRP has expended substantial funds in reliance on the Dock 2 Docket and is, therefore, entitled to a docket extension as set forth in 18 C.F.R. 401.41(a).

In addition to its engineering, licensing and tax costs, DRP has also incurred and continues to incur substantial legal expenses in direct reliance on the Commission's approval of the Dock 2 Docket, actively defending the Commission's action both in administrative proceedings before the Commission and now in federal court. DRP did not include these legal costs in its initial submission given the magnitude of the amounts spent on non-legal expenses, which alone should be more than sufficient to justify an extension of the Dock 2 Docket. Nevertheless, DRP's legal costs in defending the Dock 2 Docket are undoubtedly funds expended "in reliance on" the Commission's approval. Indeed, had DRP not taken action to defend the Dock 2 Docket and simply surrendered in the face of DRN's challenges to the project, the Commission alone would have been left defending its action.

To date, DRP has incurred approximately \$2,488,000 in legal fees to defend the legal and administrative challenges that DRN has brought against the Dock 2 Docket. When added all together, the overall costs that DRP has incurred in reliance on the Dock 2 Docket to date is **\$4,301,949**, or roughly 3.8% of the overall estimated project cost.

As requested by Mr. Tambini in his August 15th letter and consistent with the information discussed in this section, DRP has included updated cost information at **Exhibit 2** to this letter.

While DRN Argues that DRP Has Not Spent Enough Money on the Dock 2 Project, the Overwhelming Portion of the Costs Yet to be Incurred Relate to In-Water Work that DRN Itself Has Actively Opposed While its Legal Challenges Remain Pending.

On a final note, DRP feels compelled to point out the hypocrisy of the Riverkeeper's opposition to the Dock 2 Docket extension and its claim that DRP has not expended substantial enough funds. Although the \$4,301,949 that DRP has spent is "substantial" on its face, the Riverkeeper claims that such costs are insufficient in relation to the overall project budget for Dock 2. Yet as demonstrated in Exhibit 2, the largest proportion of overall remaining costs, by a wide margin, relates to the in-water dredging and construction work, which DRN has actively opposed in the series of legal and administrative challenges that DRN alone has brought against the Dock 2 Project.

As the Commission knows, DRBC granted DRN's request for an adjudicatory hearing following the initial issuance of the Dock 2 Docket in June 2019. Thereafter, the Commission designated an independent Hearing Officer, John D. Kelly, Esquire, to proceed over an unprecedented, 8-day administrative hearing, which took place between May 11-20, 2020 and during which DRN was given an opportunity to present evidence demonstrating that the Dock 2 Project would impair or conflict with the *Comprehensive Plan*. After post-hearing procedures were complete, the Commission undertook to review the voluminous administrative record developed at Hearing and stayed the Dock 2 Docket on September 10, 2022 during the pendency of the Commission's review. The docket suspension coincided with DRP's seasonal construction window and effectively prevented DRP from conducting any in-water work during the Fall 2020 – Spring 2021 season. *See* Dock 2 Docket Condition C.2. On December 9, 2020, the Commission issued its final decision affirming the issuance of the Dock 2 Docket and lifting the stay, nearly 18 months after DRBC's initial approval.³ DRN then appealed the Commission's final decision to the United States District Court for the District of New Jersey, where the matter remains pending.

³ As set forth in DRP's Extension Request, DRP believes that the appropriate date for the commencement of the three-year period under 18 C.F.R. 401.41(a) is the date that the Commission took its final action with respect to the Dock 2 Docket – December 9, 2020. However, DRP submitted the Extension Request in June 2022 out of an abundance of caution in the event that the Commission were to conclude that the three-year period should run from the initial issuance date of June 12, 2019.

In addition to DRN's challenges directly involving DRBC, DRN has further challenged permitting decisions by the New Jersey Department of Environmental Protection ("NJDEP") and the United States Army Corps of Engineers (the "Army Corps") that authorized the dredging and construction activities that comprise the Dock 2 Project. DRN's challenge to NJDEP's issuance of various Coastal Zone approvals has been rejected by the New Jersey Superior Court, Appellate Division. *See In the Matter of Challenge of Del. Riverkeeper et al. to Del. River Partners LLC Waterfront Dev. Individual Permit No. 0807-16-0001.2 WFD 19001*, No. A-0709-19, 2021 WL 2562541 (N.J. Super. Ct. App. Div. June 23, 2021), *cert. denied* 249 N.J. 459 (Jan. 14, 2022). DRN's challenge to the Army Corps' permit remains pending before the same judge assigned to DRN's challenge to the Dock 2 Docket. Since November 2020, the Army Corps case has been stayed at the request of the U.S. Department of Justice ("DOJ") pending the completion of a related matter before the Federal Energy Regulatory Commission, with which the Riverkeeper is also involved. As a condition of the Riverkeeper's consent to such stay, DRN required DOJ to notify its counsel if and when DRP provide notice to the Army Corps of its intent to commence in-water work. Undoubtedly, the purpose of this maneuver was to ensure that DRN would have the opportunity to file a motion with the court to issue an injunction prohibiting DRP from commencing such work.

Against this backdrop, where DRN has opposed at every turn any effort by DRP to initiate in-water work while its challenges to the project remain pending, the Commission should reject the Riverkeeper's latest attempt to use the project delays that DRN itself has advocated for as a reason to reject DRP's Extension Request. A failure to endorse Mr. Tambini's decision to issue the Extension Letter would penalize DRP for attempting to resolve open legal issues prior to its expenditure of more than \$100 million and would create perverse incentives for any person opposed to a project to engage in a series of stall tactics with the intent to "run out the clock" on a properly issued docket. Such an outcome would go against the cooperative principles of the *Compact* and would create uncertainty for every docket holder within the Delaware River Basin.

* * * * *

DRP appreciates your consideration of this matter and requests that the Commission endorse Mr. Tambini's decision to issue the Extension Letter in light of the substantial funds that DRP has incurred in reliance on the Dock 2 Docket. Please do not hesitate to reach out should you have any questions.

Sincerely,



Kathleen B. Campbell

For MANKO, GOLD, KATCHER & FOX, LLP

cc: Kacy C. Manahan, Esq.
Michael Dillon, Esq.

EXHIBIT 1

June 2, 2022

David Kovach, P.G.
Manager, Project Review
Delaware River Basin Commission
25 Cosey Rd.
P.O. Box 7360
West Trenton, NJ 08628
david.kovach@drbc.gov

Re: Docket No. D-2017-009-2

Dear Mr. Kovach,

On behalf of Delaware River Partners, LLC (“DRP”), I am writing to request an extension of Docket No. D-2017-009-2 (the “Docket”), which authorizes dredging and construction of a second dock at DRP’s Gibbstown Logistics Center (the “Dock 2 Project”). The Commission initially issued the Docket on June 12, 2019. After a lengthy administrative appeal process initiated by the Delaware Riverkeeper Network (“DRN” or the “Riverkeeper”), during which the Commission stayed the Docket for approximately three months, the Commission affirmed its initial decision on December 9, 2020.

The Commission’s *Rules of Practice and Procedure* specify that an approval by the Commission expires three years from the date of issuance unless, before the expiration date, the project sponsor has “expended substantial funds (in relation to the cost of the project) in reliance on such approval.” 18 C.F.R. 401.41(a). Additionally, the Commission has discretion to extend a docket upon application by the docket holder. *Id.*

The *Rules of Practice and Procedure* do not specify when the three-year period begins to run in a situation where, as here, the Commission issues a docket which is then the subject of an administrative hearing held by the Commission under Article V. Nor do they address whether a stay pending resolution of the hearing tolls the three-year period. Under the circumstances, DRP believes that the appropriate date for the commencement of the three-year period is the date that the Commission took its final action with respect to the Docket – December 9, 2020. Nevertheless, in an abundance of caution, DRP is now requesting an extension of the Docket in the event that the Commission determines that the initial Docket issuance date of June 19, 2019 is the appropriate start date. As further set forth herein, DRP has expended substantial funds in reliance upon the Commission’s approval. Moreover, DRP has faced and continues to face unanticipated delays of the dredging and construction activities authorized by the Docket. For these reasons, DRP respectfully requests that the Commission extend the Docket for an additional three-year period.

The Dock 2 Project has faced a series of administrative and legal challenges that began almost immediately upon the Commission's approval of DRP's Docket application. Following issuance of the Docket in June 2019, DRN filed with the Commission a request for an adjudicatory hearing under DRBC's *Rules of Practice and Procedure*. On September 11, 2019, the Commission granted DRN's request and subsequently designated an independent Hearing Officer, John D. Kelly, Esquire, to preside over the administrative hearing.

After pre-hearing proceedings were completed, the Hearing Officer presided over eight days of a formal, trial-type administrative hearing that took place between May 11-20, 2020. The Hearing Officer issued his Report of Findings and Recommendations on July 21, 2020, a 101-page report containing 385 findings of facts ultimately concluding with a recommendation that the Commission uphold the Docket as approved in June 2019. Upon the filing of the Hearing Officer's report, post-hearing procedures commenced in accordance with DRBC's rules, with DRP and the Riverkeeper submitting objections to the Hearing Officer's report on August 10, 2020 and DRBC Staff serving comments on the report on August 31, 2020.

Thereafter, the Commission undertook to review the voluminous administrative record developed at Hearing, which contained more than 200 exhibits and testimony from 13 expert and three fact witnesses. On September 10, 2020, the Commissioners stayed the Docket pending their review of the Hearing record and issuance of a final decision. DRBC's suspension of the Docket coincided with DRP's seasonal construction window that is intended to minimize impacts to migrating and spawning anadromous fish, which effectively prevented DRP from conducting any in-water work during the Fall 2020 – Spring 2021 season. *See* Docket Condition C.2. On December 9, 2020, the Commission issued its final decision affirming the issuance of the Docket, nearly 18 months after DRBC's initial approval. The three-month stay of the Docket was lifted concurrently upon the Commissioners' final decision to uphold the Docket.

The Riverkeeper then appealed the Commissioners' decision to the U.S. District Court for the District of New Jersey on January 25, 2021 (Case No. 1:21-cv-1108), where the case remains pending. Briefing before the Court only just concluded on April 29, 2022, and DRP does not anticipate a decision from the Court until sometime after June 2022, more than three years since issuance of the Docket.

Nevertheless, DRP remains fully committed to the Dock 2 Project and intends to commence the work authorized by the Docket as soon as practicable. DRP's commitment to the Dock 2 Project is evidenced by the substantial sums that DRP has expended in reliance on the Docket, totaling almost **\$1.8 Million** to date. Additional detail about the costs that DRP has incurred thus far in furtherance of the Dock 2 Project can be found in **Attachment A**.

In light of the foregoing, DRP requests your concurrence that the Docket should be extended for an additional three-year period, until June 12, 2025, to allow DRP additional time to complete the Dock 2 Project, for which it has already incurred substantial cost in furtherance

David Kovach, P. G.
June 2, 2022
Page 3

thereof. Please do not hesitate to reach out should you have any questions about the content of this letter. I look forward to hearing from you soon.

Sincerely,

A handwritten signature in black ink, appearing to read 'H. Alexander', with a long horizontal flourish extending to the right.

Harry J. Alexander, CEO

cc: Kathleen Campbell, Esq., Manko Gold
Michael Dillon, Esq., Manko Gold
Laura George, Ramboll

ATTACHMENT A

Delaware River Partners LLC- Dock 2

Costs in Reliance on Dock 2 Docket through May 2022*

Architecture & Engineering

Langan Engineering and Environmental Services Inc	Engineering	49,814
Matrix New World Engineering	Engineering	48,172
Moffatt and Nichol	Engineering	1,074,730
Ramboll Environ US Corporation	Engineering	363,854
		<hr/>
		1,536,570

Legal, Licences & Fees

Township of Greenwich	Licenses	84,296
Treasurer, State of New Jersey	Licenses	5,050
		<hr/>
		89,346

Other

Township of Greenwich	Property Taxes	172,850
		<hr/>
		172,850

Total

1,798,766

* Legal costs, including those incurred by DRP in defense of the Dock 2 Docket, not included.

EXHIBIT 2

Delaware River Partners LLC- Dock 2

Costs in Reliance on Dock 2 Docket (June 12, 2019 - August 2022)

Architecture & Engineering

Langan Engineering and Environmental Services Inc	Engineering	49,814
Matrix New World Engineering	Engineering	48,172
Moffatt and Nichol	Engineering	1,074,730
Ramboll Environ US Corporation	Engineering	363,854
		<u>1,536,570</u>

Legal, Licences & Fees

Legal and Expert Fees in Defense of Dock 2 Docket	Legal Fees	2,488,000
Township of Greenwich	Licenses	84,296
Treasurer, State of New Jersey	Licenses	5,050
		<u>2,577,346</u>

Other

Township of Greenwich	Property Taxes	188,033
		<u>188,033</u>

Total		<u><u>4,301,949</u></u>
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Delaware River Partners LLC- Dock 2
Development Cost Estimate

<u>In-Water Work and Dock Construction</u>	<u>89,017,713</u>
Contractor Mobilization	
Dredging	
Bulkhead	
Return Wall	
Fill and Grade Approach	
Dolphins	
Walkways	
Marine Equipment	
Mechanical/Electric	
<u>Soft Costs</u>	<u>11,127,214</u>
Planning Studies	
Field Investigations	
Environmental & Permitting	
Architectural/Engineering Design	
Construction Management/Support	
<u>Mitigation, Geotechnical & Surveys</u>	<u>13,352,657</u>
Total	<u><u>113,497,584</u></u>