

RESOLUTION FOR THE MINUTES

A Resolution for the Minutes regarding the request of Delaware River Partners pursuant to Section 401.41(a) of the Commission's *Rules of Practice and Procedure* for an extension of the expiration date of Docket D-2017-009-2 issued to Delaware River Partners LLC for the Gibbstown Logistics Center Dock 2.

WHEREAS, on June 12, 2019, the Commission issued Docket D-2017-009-2 (the "Docket") to Delaware River Partners LLC ("DRP") approving a dredging and deep water berth construction project known as the Gibbstown Logistics Center Dock 2 ("GLC Dock 2"); and

WHEREAS, following a lengthy administrative hearing granted by the Commission to resolve administrative appeals of the Docket, on December 9, 2020 the Commission entered its final decision affirming the Docket; and

WHEREAS, Section 401.41(a) of the Commission's *Rules of Practice and Procedure*, 18 C.F.R. Part 401 (the "RPP") provides as follows: "Approval by the Commission under these regulations shall expire three years from the date of Commission action unless prior thereto the sponsor has expended substantial funds (in relation to the cost of the project) in reliance upon such approval. An approval may be extended or renewed by the Commission upon application."; and

WHEREAS, on June 2, 2022, while preserving its position that the three-year expiration period in Section 401.41(a) commenced on December 9, 2020, DRP wrote to the Commission "to request an extension of Docket No. D-2017-009-2" until June 12, 2025 pursuant to Section 401.41(a), offering evidence to demonstrate that it had expended sufficient funds to satisfy the showing required by Section 401.41(a); and

WHEREAS, DRP's request for an extension under Section 401.41(a) does not seek to modify the GLC Dock 2 project or a Docket condition but only to extend the three-year expiration period in Section 401.41(a) by virtue of DRP's expenditure of substantial funds; and

WHEREAS, based upon the information presented by DRP and consistent with the Commission's past practice, the Executive Director approved the requested extension by letter dated June 16, 2022; and

WHEREAS, by letters dated July 27 and August 12, 2022, respectively, the Delaware Riverkeeper Network ("DRN") and a group of environmental organizations under the name "Delaware River LNG Coalition" (collectively the "Objectors") submitted letters to the Commission objecting to the Executive Director's action as exceeding his authority, challenging DRP's demonstration that it had expended substantial funds in relation to the cost of the GLC Dock 2 project, and requesting Commission consideration of the matter after a public hearing as allegedly required by 18 C.F.R. 401.5; and

WHEREAS, by letter dated August 15, 2022, the Executive Director responded that it would be beneficial for DRP's request to be considered by the Commissioners, invited DRN and

DRP to submit their positions in writing for consideration by the Commissioners, and requested DRP to include in its submission an updated estimate of the cost of the project and a statement of the amount of project costs expended after issuance of the Docket; and

WHEREAS, the Commission received written submissions from DRN on August 17, 2022, and from the Delaware River LNG Coalition on August 25, 2022, disputing the authority of the Executive Director to issue his June 16, 2022 approval, asserting that Section 401.5 of the RPP and Section 14.4(b) of the Delaware River Basin Compact require the Commission to conduct a public hearing on DRP's extension request, disputing that DRP had expended substantial funds in relation to the cost of the GLC Dock 2 project, and contending that the Commission should review a modified plan for rail infrastructure on the upland portion of the Gibbstown Logistics Center site; and

WHEREAS, by letter dated August 29, 2022, DRP responded to the Objectors' submissions and provided an updated statement of GLC Dock 2 project costs and expenditures made to date in reliance on the Commission's Docket approval.

NOW THEREFORE, BE IT RESOLVED by the Delaware River Basin Commission that:

1. The Commission incorporates the WHEREAS Clauses above as though fully set forth herein.
2. In reliance on the Commission's Docket approval, DRP has expended \$1,813,949 to date in engineering, licensing and tax costs. The balance of the \$113,497,584 of project costs are for in-water dredging and construction work and planning, engineering and other construction-related costs. The in-water work remains the subject of multiple legal challenges which DRP continues to defend at considerable expense.
3. The costs DRP has expended in reliance on the Commission's Docket approval are substantial in relation to the total estimated cost of the GLC Dock 2 project.
4. The rail plans that are the subject of the Objectors' challenge do not require Commission review because the rail loop is upland of the GLC Dock 2 project, is separate from the activities the Commission authorized for the GLC Dock 2 project, and does not constitute a "project" requiring review under Section 3.8 of the Compact as it has no substantial effect on the water resources of the Basin.
5. The Commission approved the GLC Dock 2 project under Section 3.8 of the Compact after a public hearing and an additional extensive administrative hearing based on the Commission's determination that the project, as limited by the conditions in the Docket, did not impair or conflict with the Comprehensive Plan. The Commission did not add the project to the Comprehensive Plan.
6. Section 14.4(b) of the Compact requires the Commission to hold at least one public hearing prior to the adoption of the Comprehensive Plan. Section 401.5 of the RPP

requires the Commission to conduct public hearings on each project application for projects that are considered for inclusion in the Comprehensive Plan. Because the GLC Dock 2 project is not part of the Comprehensive Plan, the Compact and the RPP do not require the Commission to conduct a public hearing. When, as here, a request by a project sponsor does not seek a change to the terms and conditions of a Docket previously issued following public hearing, the Commission's practices likewise do not require the Commission to conduct an additional public hearing.

7. DRP demonstrated that it expended substantial funds in relation to the cost of the project within the three years following the Commission's approval, and that it was entitled to an extension of the three-year period in Section 401.41(a) of the RPP.
8. The pending appeals of federal and state approvals of the GLC Dock 2 project provide an independent ground for the Commission to extend the three-year expiration period in Section 401.41(a) or to waive the expiration period in accordance with Section 401.123 of the RPP.
9. DRP's request for an extension until June 12, 2025 of the three-year period set forth in Section 401.41 is approved.
10. This action supersedes and replaces the Executive Director's action taken by letter dated June 16, 2022.

ADOPTED: September 8, 2022