

**BEFORE THE DELAWARE RIVER BASIN COMMISSION**

**In Re: DRBC** :  
**Docket D-2017-009-2** :  
**Gibbstown Logistics** :  
**Center, Dock 2** :

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**DRBC STAFF COMMENTS ON HEARING OFFICER’S REPORT AND INTERESTED PARTY OBJECTIONS; RECOMMENDED COMMISSION ACTION**

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**I. Summary Statement of Staff Comment and Recommendation**

From the outset of this proceeding, the staff has maintained that the Delaware River Basin Commission (the “Commission” or “DRBC”) had sufficient information on June 12, 2019 to support its finding that as conditioned by Docket D-2017-009-2 (the “Docket”) the Gibbstown Logistics Center Dock 2 project (the “Project”) would not substantially impair or conflict with the Commission’s Comprehensive Plan. *See generally*, DRBC-001 (Kovach Decl.).<sup>1</sup> In the course of the adjudicatory hearing provided under Article 6 of the Commission’s *Rules of Practice and Procedure* (18 C.F.R. 401, Subpart F), objectors The Delaware Riverkeeper and Delaware Riverkeeper Network (collectively, “DRN”) were afforded ample opportunity to show by a preponderance of the evidence that the Commission erred. They have failed to demonstrate either (a) that the record in support of the Docket was or is inadequate; or (b) that, as DRN has phrased it, “more likely than not, the [Dock 2 project], as approved, will substantially impair or conflict

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<sup>1</sup> The hearing exhibits are numbered with the prefix “J-” for exhibits proffered jointly by the interested parties, “DRN-” or “DRP-” for exhibits proffered by one or the other of the interested parties, and “DRBC-” for the sole exhibit proffered only by the DRBC—the Amended Declaration of David Kovach. Where expert reports are cited herein, the author’s name is provided in parentheses after the exhibit number. For other types of exhibits, a short descriptor is offered. References to the transcript of live testimony are denoted herein by “Tr.” followed by the page(s), a colon, and the line numbers of the transcript, and in parentheses, the witness’s last name. Where exhibits are referenced repeatedly in a single section or paragraph, the descriptor is sometimes dropped.

with the Comprehensive Plan.” *See* DRN’s Brief in Support of Objections to the July 21, 2020 Report of the Hearing Officer (hereinafter, “DRN Obj. Br.”) at 20. To the contrary, since the Commission’s initial action on June 12, 2019, the testimony of multiple witnesses and a determination by the National Marine Fisheries Service (“NMFS”) have added compelling evidence in support of the Commission’s Dock 2 approval. The staff thus concurs in the Hearing Officer’s recommendation that the Commission affirm its decision of June 12, 2019 and the Docket remain unchanged.

DRN’s objections to the Hearing Officer’s *Report of Findings and Recommendations* (the “Report”<sup>2</sup>) emphasize an error in the Report’s legal analysis. Like DRN, the staff is troubled by the Hearing Officer’s conclusion that the Commission is empowered by the Delaware River Basin Compact to act arbitrarily. *See* Report at 83. As a group of scientists, engineers, planners and other professionals dedicated to responsible water resource management based on sound science, the staff strongly objects to the idea that it would offer recommendations that lack any rational basis or that the Commission would adopt them. As the Hearing Officer’s Report goes on to document, and as set forth at greater length below, that is not what occurred in this case. DRN also takes issue with the deference accorded by the Commission to the determinations of expert agencies of its member states and the federal government with respect to matters on which the Comprehensive Plan and DRBC regulations contain little detail and agencies of its members have mature programs. The statutory and substantive basis for such deference is set forth clearly in the testimony of DRBC’s Project Review Branch Manager David Kovach, *see* DRBC-001 ¶¶ 9-11, and is properly recognized by the Report, *see* Report at 85-86. DRN’s objections on this basis are

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<sup>2</sup> Note that the Report includes numbered paragraphs comprising the Hearing Officer’s recommended findings of fact, followed by a narrative. References to the findings of fact appear herein as “Report ¶” followed by the paragraph number. References to the Report narrative appear as “Report at” followed by the page number.

thus unfounded and unavailing. With respect to the subset of concerns raised by DRN that are relevant to the Comprehensive Plan, the record as supplemented by the hearing process presided over by Mr. Kelly amply reinforces support for the Docket as issued.

**II. Discussion: The Hearing Process has Reinforced Support for the Commission's Docket Decision in all Respects.**

Staff's understandings of the Compact, Comprehensive Plan, Commission regulations, project review practices and many relevant facts that supported the Commission's Docket issued in June of 2019 are set forth in the Amended Declaration of David Kovach (DRBC-001) and in staff's post-hearing brief of June 17, 2020 and reply brief June 24. Counsel for Docket holder Delaware River Partners LLC ("DRP") have comprehensively recited the hearing evidence in support of the Commission's action in their post-hearing brief of June 17, 2020 and reply brief of June 24, 2020. DRP's August 10, 2020 letter brief in response to the Hearing Officer's Report contains clarifications in discrete areas, with which the staff concurs. The table provided in Appendix A of DRP's June 24 submission is particularly helpful in summarizing each of DRN's substantive claims and the locations in the record where contravening evidence can be found. Key findings and evidence adduced during the hearing process in support of the Commission's decision approving the Dock 2 project are summarized below. However, the record is extensive, and this narrative by no means exhaustive.

**A. Resuspension of contaminants; sediment sampling.**

In reviewing DRP's docket application, DRBC staff determined that the Sediment Sampling and Analysis Plan ("SSAP") developed by DRP in accordance with regulations and guidance of the New Jersey Department of Environmental Protection ("NJDEP") adequately characterized the material to be dredged and that DRP's Dredged Material Management Plan ("DMMP") included reasonable measures for limiting both the resuspension of existing

contaminants into the water column and the exposure of aquatic life to these contaminants. DRBC-001 ¶ 19-20 (Kovach Decl.) The staff further concluded that by removing contaminated sediments from the system, DRP's proposed dredging of approximately 45 acres of the riverbed would be a net benefit to water quality. *Id.* ¶ 20. After the testimony of multiple experts during an eight-day hearing, DRP admits it has failed to demonstrate by a preponderance of the evidence that the resuspension of contaminated sediments caused by dredging will impair water quality or harm aquatic life in the vicinity of the GLC, *see*, DRN Post-Hearing Br. at 149.

DRN nevertheless continues to object that the composite sampling performed for Dock 2 in accordance with NJDEP requirements is of no relevance in evaluating the water quality impacts of the dredging and to protest that a series of speculative harms may ensue: that the dredging *may* de-stabilize and erode near-shore slopes 600 feet from the dredge footprint (which, DRN alleges, *may* themselves be highly contaminated); and *may*, as a consequence of elevated TSS that DRN alleges *may* drift beyond the envelope predicted by a study accepted by the NJDEP, NMFS, and other agencies, in combination with TSS caused by vessel traffic, harm submerged aquatic vegetation that *may* otherwise hold near-shore sediments in place. DRN has not demonstrated that any of these speculative harms, if realized would so diminish water quality and so injure aquatic life as to substantially impair or conflict with the Comprehensive Plan. Its reports and testimony in any case are insufficient to outweigh the compelling testimony of DRP's experts that at least some of these alleged harms are implausible, and the conclusions of multiple interstate, state and federal agencies with expertise of their own that resuspension of contaminants in sediment associated with dredging for Dock 2 will not substantially harm threatened or endangered species, their habitat, prey species or other anadromous fish.

*Sediment Sampling.* The 17 composite samples collected from the Dock 2 dredge site were analyzed for bulk sediment chemistry in accordance with the SSAP approved by the NJDEP. DRP 140 ¶ 27 (George Decl.); Report ¶ 230. NJDEP may require collection and analyses of additional sediment samples “[i]f implementation of the approved SSAP does not provide data that are representative of, or fully characterize[] the sediments to be dredged[,]” J-7 at AR000594 (Approved SSAP). But NJDEP in this instance concluded that the SSAP was “extensive” and did not require further sampling. J-50 at 4 (NJDEP Response to Comment). The Comprehensive Plan and Commission regulations are silent on sediment sampling requirements for dredging projects. DRP’s post-hearing reply brief of June 24 effectively rebuts in detail DRN’s objections to the SSAP. *See* DRP Reply Br. at 11-14. Expert testimony supporting the conclusion that the SSAP for Dock 2 adequately characterized sediments is highlighted below.

DRP’s water quality expert Jerry Pasquale,<sup>3</sup> who has overseen sediment sampling in the Delaware River “for ‘dozens’ of dredging projects[,]” testified that bulk sediment data is an “initial level of screening ... used to identify contaminants that may be of concern and warrant further evaluation.” DRP-127 at 2 (Pasquale). Because the composite sediment samples analyzed for the Dock 2 project showed contaminant concentrations “typical of sediments for this section of the Delaware River[,]” Report ¶ 246 (*citing* Tr. 1887:8-24 (Pasquale)), additional sampling was not required or needed. *Also see:* DRP-127 at 10 (Pasquale) (“The sediments to be dredged are typical of the sediments dredged in any uncontaminated reach of the Delaware River”); Report ¶ 248

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<sup>3</sup> Jerry J. Pasquale is the Chief of the Environmental Resources Branch of the USACE, Philadelphia District. He has 38 years of experience with the USACE – 9 years as a biologist and 29 years as a supervisory biologist. His responsibilities involved managing and supervising technical specialists engaged in environmental studies and investigations, including but not limited to habitat evaluations of aquatic, wetland and upland sites to determine fish and wildlife resource values, investigations of federally listed threatened or endangered species, water quality studies, and studies to determine the presence and potential impact of pollutants in water resources. His most recent assignments included all environmental requirements for the Delaware River Main Channel Deepening Project, and sediment and water quality investigations associated with dredging and dredged material disposal projects. DRP-157 at 1 (Pasquale CV).

(“Based on previous studies by USACE, which involved monitoring water quality both at the point of dredging and at dredged material disposal facilities, the detected concentrations of metals in the bulk sediment data for the Project do not present any water quality concerns. DRP-127, p. 9.”; and DRP-130 at 6 (Cavallo<sup>4</sup>) and Tr. 1940:9-10, 1976:20-22 (Cavallo)) (PCB concentrations in the bulk sediment data are “as low as some of the lowest concentrations” of PCBs Mr. Cavallo has seen elsewhere in the Delaware Estuary, are “commensurate with background concentrations” based on previous sediment investigations he oversaw during his time on the DRBC staff, and are below NJDEP’s residential soil standards by “several orders of magnitude.”).

Although bulk sediment data are primarily used to characterize dredged sediment for purposes of disposal, the data also provide information about contaminants that could be resuspended during dredging. Tr. 1823:18—1824:4 (Blye<sup>5</sup>); 1824:4-10 (Pasquale); DRP-130 at 6 (Cavallo). Where contaminant concentrations are low, as for Dock 2, less resuspension of contaminated sediments is expected. DRP-130 at 6 (Cavallo); DRP-127 at 4 (Pasquale). The opinions of Mr. Pasquale, Mr. Blye, and Mr. Cavallo align with NJDEP’s determination that more detailed sampling for Dock 2 was unwarranted, particularly in view of the dredge method to be used.

*Dredge Methods.* Agency determinations and expert testimony indicate that the approved dredge method effectively minimizes resuspension. NJDEP’s response to comments on its

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<sup>4</sup> Now in private practice as a consultant, Greg Cavallo retired from the DRBC staff in 2018 after more than 30 years, much of which he spent in the Commission’s Monitoring, Modeling and Assessment Branch. Mr. Cavallo was a key member of the team that developed the Stage 1 Estuary PCB TMDLs developed by the DRBC and issued by the United States Environmental Protection Agency (“EPA”) in 2003 and 2006. He was also responsible for advising dischargers on their PCB pollutant minimization plans (“PMPs”) and for reviewing and approving these plans. *See* DRP-153 (Cavallo CV).

<sup>5</sup> David Blye is a Certified Environmental Analytical Chemist with more than 26 years of experience in the field of environmental chemistry, including in planning, developing and implementing field sampling and analytical projects, and in interpreting organic and inorganic analysis data. *See* DRP-151 (Blye CV).

Waterfront Development Permit (“WDP”) for the Dock 2 project explains that studies in the New York – New Jersey Harbor (which NJDEP presumably relied upon or oversaw) demonstrated that the use of a closed clamshell environmental bucket and other specified BMPs required in the WDP for Dock 2 demonstrated that this type of bucket reduces TSS to roughly background levels. *See*, J-50 at 4, 8 (*cited in* Report ¶358(a)). The Hearing Officer adopts as recommended findings the opinions of Mr. Pasquale that “While some sediment may escape the sealed and enclosed clamshell [dredge] bucket after it emerges from the water, elevated TSS levels will only extend a few hundred feet from the dredge location just below the surface and would return to background levels within minutes.” Report ¶ 188 (*citing* Tr. 1891:3-23 (Pasquale)). *Also see*, Report ¶ 189 (“When operated in accordance with other BMPs ... an environmental [clamshell] bucket will retain more than 95% of sediment that is captured during the dredging process. (DRP-131 [(Pasquale)], p. 8)” and Report ¶ 174 (“Previous studies of dredging in the Delaware Estuary indicate that PCBs in such low concentrations will not have a negative impact on water quality during dredging” (*citing* DRP-130 and Tr. 1978:19-1979:2 (Cavallo)). The Report specifically references the “Versar Report,” conducted for the Delaware main channel deepening project, which:

indicates that even when concentrations for PCBs were higher than concentrations like those detected in the bulk sediment data for Dock 2, resuspension of PCBs from dredging using a bucket dredge (not the environmental clamshell bucket that will be used for Dock 2) would not cause exceedances of DRBC’s acute or chronic water quality criteria.

Report ¶ 174 (*citing*, Tr. 1978:19-1979:2 (Cavallo); DRP-130 at 6 (Cavallo); and DRN-25 at 9-16 (Versar Report)). DRBC Project Review Manager David Kovach testified that he and his staff reviewed the DMMP furnished by DRP and determined that the project sponsor was employing reasonable measures for limiting the resuspension of existing contaminants into the water column and for limiting the exposure of aquatic life to these contaminants. DRBC-001 ¶ 20. The NJDEP’s

Waterfront Development Permit (J-105), the Docket (J-01) and the Corps' Section 10/404 permit (J-57) make those measures requirements.

In his live testimony during the hearing, Mr. Kovach related that he consulted DRBC's Director of Science and Water Quality Management Dr. Namsoo Suk, and Water Quality Assessment Manager John Yagecic, P.E. on water quality impacts of the Dock 2 project associated with the proposed dredging before reaching his conclusion that the project would not substantially impair or conflict with the Comprehensive Plan. *See* Tr. 1318:8-15 (Kovach). *Also see* Tr. 1319:22-25 (Mr. Yagecic is lead advisor on the Commission's Water Quality Advisory Committee), and 1323:24-25—1324:1-8 (with contributions from Mr. Yagecic and Dr. Suk and from Tom Amidon (DRBC staff successor to Mr. Cavallo for work on PCBs), Mr. Kovach was able to complete a thorough review and was fully satisfied that the Dock 2 project would not substantially impair or conflict with the Comprehensive Plan). Mr. Kovach offered similar testimony with respect to Dock 1. *See*, Tr. 1318:7-15 and 1324:9-16 (Kovach).

On the basis of the testimony of Ms. George, Mr. Pasquale, Mr. Cavallo, Mr. Kovach and others, the Hearing Officer correctly found that “[p]roperly executed dredging, removal and disposal of PCB-contaminated sediments is a net benefit to water quality in the River.” Report ¶ 249 (citing DRP-130 at 6 (Cavallo)). The Hearing Officer echoed this conclusion in his narrative, explaining that “Because DRP’s proposed dredging of approximately 45 acres of the riverbed will also remove contaminated sediments from the system, the result will be a net benefit to the Basin.” Report at 100.

*Erosion of potentially contaminated near-shore sediments.* DRN’s experts posited that dredging for the Dock 2 project could result in “slumping” that exposes to the water column near-shore sediments with unknown contamination. *See* DRN-10 at 4 (Crouch Report); DRN-22 at 4

(Schmid Report). Dr. Schmid added to this the possibility that a reduction in submerged aquatic vegetation (“SAV”) potentially caused by elevated turbidity associated with dredging “would adversely affect the stability and/or erosion of the near-shore sediments at Dock 2.” DRN-14 at 8 (Schmid); Report ¶ 143. However, Dr. Crouch is not a geotechnical engineer and has no experience performing or evaluating a slope stability analysis for a dredging project. Tr. 284:17-20, 305:25—306:6-10 (Crouch Test.). Nor did he “recall ever having worked on another dredging project.” Tr. 238:12-15 (Crouch). For his part, Dr. Schmid at times offered testimony that undercut the concerns he and Dr. Crouch raised. In particular Dr. Schmid recommended that near-shore sediments be sampled and opined that if contaminated, they should be removed, DRN-14 at 4; Tr. 451:17-20 (Schmid), presumably, by dredging. Dr. Schmid acknowledged that “[d]redging for Dock 2 will occur no closer than 600 feet from the shoreline.” (Tr. 396:4-11 (DRN-14)); Report ¶ 16. Dr. Schmid also testified that “SAV has declined in the GLC area of the River in recent years (i.e. prior to the commencement of any dredging for Dock 2), although the cause of the decline is unknown and could be due to natural causes.” Tr. 421:21—422:5 (Schmid); DRP-118 at § 3.1 and App. D at 8 (DRP 2019 SAV Mitigation Monitoring Report); Report ¶ 133. Dr. Schmid also noted that “Fluctuations in SAV bed limits are expected since they are dynamic and not the same every year.” Tr. 423:4-11 (Schmid); Report ¶ 134.

In response to the conjectures of Drs. Crouch and Schmid, DRP’s dredging expert Anthony DePasquale, a Civil and Geotechnical Engineer with 37 years of experience as a designer, construction manager, negotiator and permitting consultant with the Corps,<sup>6</sup> testified that “[t]he likelihood that the dredging or the final dredged slope for the Dock 2 Project will disturb sediments

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<sup>6</sup> From September 1981 to March 2018, Mr. DePasquale was the Chief of the Operations Division of the Corps’ Philadelphia District. He is currently employed as Director of Environmental Services for S.T. Hudson Engineers, Inc. See DRP-154 (DePasquale CV).

located more than 600 feet away near the shoreline of the GLC is ‘practically impossible.’” (Tr. 1684:1-18 (DePasquale)); Report ¶ 202. Mr. DePasquale averred that, “There are numerous examples of new work dredging projects that have been located on the Delaware River that were dredged to a 3:1 slope and that remained stable for decades.” DRP-131 at 10 (DePasquale); Tr. 1783:7—1785:6 (DePasquale)); Report ¶ 204. *Also see* Report ¶ 205 (“The amount of slumping associated with the Dock 2 Project is expected to be ‘small and localized,’ and a landslide of near-shore sediment as a result of any such sloughing is ‘practically impossible.’”) (*citing* Tr. 1683:1—1684 :18; 1721:18—1722:8 (DePasquale)).

*Impact on biota.* Finally, NMFS biologists found negligible the risks to threatened and endangered species and their prey associated with resuspension of contaminated sediments. NMFS concluded with respect to Dock 1 (where dredged sediments were more contaminated than for Dock 2):

[N]o indirect effects, or change from the baseline, are expected from resuspension and resettling of contaminated sediment because of this action, since dredging will not expose benthic prey to contaminant concentrations above existing background levels in river sediments within the action area. All effects to sturgeon will be too small to be meaningfully measured, detected, or evaluated. Effects are insignificant.

J-38 at 137-138 (NMFS BiOp). NMFS later reaffirmed this conclusion with respect to Dock 2. *See generally*, J-53 (Letter of Concurrence).

*Adequate information.* Unable to overcome the weight of the evidence offered by DRP’s experts and the judgment of multiple regulators based on their institutional expertise and experience, DRN incorrectly argues this proceeding has not afforded it access to the information it needed to prove its hypotheses, *see* DRN Obj. at 149, and improperly seeks to shift to the Commission, the adjudicator in this matter, the burden of proving its speculative claims incorrect, *id.* 149-50. The Hearing Officer correctly determined that “Nothing in the record . . . would require

the Commission to reconsider the Docket based on water quality concerns from contaminated dredged sediment.” Report at 89. Because the evidence adduced during the hearing confirms the Commission’s finding that the resuspension of contaminants during dredging for the Dock 2 project will not substantially impair water quality and aquatic life in the vicinity of the Dock 2 project, the staff’s view on this subject remains unchanged.

**B. Localized turbidity associated with dredging.**

Navigation, along with aquatic life, is a designated use in Water Quality Zone 4 where the GLC is located. As staff has pointed out, this portion of the Delaware River Estuary has been a commercial and industrial port for more than 200 years and has been continually dredged since before the Commission was created in 1961. A 2015 report by DRBC scientists describes the “remarkable” water quality improvements achieved since then by the combined efforts of the DRBC, its member states, federal agencies and stakeholders, including “the recovery of both dissolved oxygen and most fish” during a time when the Estuary continued to be influenced by expanding urban, suburban and industrial land uses and an active commercial port complex. *See*, DRBC Post-Hearing Memo at 3 (*citing* [Existing Use Evaluation for Zones 3, 4, & 5 of the Delaware Estuary Based on Spawning and Rearing of Resident and Anadromous Fishes, Sept. 30, 2015](#), p. 3). The record in this matter shows that elevated turbidity associated with the dredging proposed for the construction of Dock 2 will be transient and localized, that the dredge plume is unlikely to reach sensitive aquatic vegetation, that best management practices (“BMPs”) will be employed to ensure this outcome, and that the BMPs in combination with seasonal restrictions imposed by DRBC and other regulators will further protect sensitive species.

In its brief setting forth its objections to the Report, DRN strenuously repeats its protest to the use by DRP’s consultant Ramboll of a turbidity analysis performed for the Arthur Kill waterway in the New York – New Jersey Harbor Estuary. *See e.g.*, DRN Obj. Br. at 11-12. DRN

further objects to the reliance placed on the Arthur Kill analysis by regulators, including NMFS, DRBC and the Corps. *Id.* at 21-22, 27 (perhaps inadvertently failing to include NJDEP, which also accepted DRP’s use of the Arthur Kill study and may possibly have overseen its application in the New York – New Jersey Harbor). Finally, DRN objects to the Hearing Officer’s view that pursuant to sections 1.5 and 3.9 of the Compact the Commission may defer to the expert agencies of its member states and the federal government that accepted the Ramboll analysis.<sup>7</sup> *See* Report ¶ 376; *id.* at 85-86 and 91.

In its August 10, 2020 letter brief, DRP aptly points out that DRN offered no evidence that called into question the accuracy or reliability of Ramboll’s estimate of TSS concentrations associated with the proposed dredging. *See*, DRP Ltr. Br. at 3. (pointing out that “[n]one of DRN’s experts performed any independent analysis of anticipated TSS concentrations associated with the dredging operations for the [Dock 2] Project ... [or] refute[d] Ramboll’s conclusion regarding the anticipated concentrations associated with the dredging operations for the Project.”) (citations omitted, from the hearing testimony of Dr. Silldorff, Dr. Crouch, Mr. Schmid, and Mr. Fisher). The staff concurs in DRP’s clarification of an inaccurate statement in the Hearing Officer’s report on this subject. The statement reads, “DRN’s expert witnesses questioned the accuracy and reliability of the 328’ circular limits that, DRP claims, will be the extent of higher turbidity from dredging for the Project.” Report at 90. Given the lack of any expert testimony by DRN refuting the Ramboll analysis, staff agrees that DRN’s argument is a legal one that is not supported by

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<sup>7</sup> Section 1.5 of the Compact articulates the signatory parties’ intention that the Commission “utilize and employ [the] offices and agencies [of the member states and federal government] for the purpose of this Compact to the fullest extent it finds feasible and advantageous.” Section 3.9 of the Compact underscores that the Commission may “employ any other agency or instrumentality of any of the signatory parties or of any political subdivision thereof, ... for any ... purpose.” *Also see*, DRBC-01 ¶ 9 (Kovach Decl.).

evidence in the record. Staff recommends that this statement by the Hearing Officer thus not be adopted by the Commission in its final determination.

There is ample evidence in the hearing record controverting DRN's claim that localized and transient turbidity will (or as DRN in its post-hearing briefs qualifies it, "more likely than not, will") substantially impair water quality and/or aquatic life uses in Zone 4 of the Estuary. *See, e.g.*, DRN Obj. at 20. By way of example, the Hearing Officer's findings include that:

When operated in accordance with other BMPs as described in further Findings of Fact below [referencing conditions of the New Jersey Department of Environmental Protection ("NJDEP") recited in Report ¶ 191], an environmental bucket will retain more than 95% of sediment that is captured during the dredging process.

Report ¶ 189 (citing DRP-131 at 8 (DePasquale)); and that:

In performing its suspended sediment analysis, NMFS stated the following regarding turbidity:

a. Given that no egg or larvae will be present, that []<sup>8</sup> TSS levels expected for all activities are lower than what have been found adversely affecting juvenile and adult estuarine fish, that only benthic invertebrates in a narrow zone near the edge of the dredged area may negatively affected by suspended sediment, that ample foraging habitat exists in the river channel at the project site, that any avoidance of turbidity plumes will be small and not hinder normal essential behaviors, we conclude that the effects of suspended sediment on sturgeon resulting from proposed activities when added to baseline conditions will be so small that effects cannot be meaningfully detected, evaluated, or measured. Therefore, effects on sturgeon are insignificant.

Report ¶ 208 (*citing* J-38 at 137-138 (NMFS BiOp)). The NMFS Biological Opinion of 2017, which was amended and reaffirmed by NMFS's Letter of Concurrence in 2019 to address the cumulative effects of GLC Dock 1 and Dock 2, further provides that:

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<sup>8</sup> The quote as it appears in ¶208 of the Report omits the word "that" rather than the superfluous word "expected." For better comprehension, the word "that," is restored here and the word "expected," which appears both before and after "TSS levels" in the original NMFS document, is omitted.

[N]o indirect effects, or change from the baseline, are expected from resuspension and resettling of contaminated sediment because of this action, .... All effects to sturgeon will be too small to be meaningfully measured, detected, or evaluated. Effects are insignificant.

J-38 at 137-38 (NMFS BiOp). The Letter of Concurrence also states:

The effects from increased total suspended solids (TSS) on benthic prey ... for the terminal facility and Dock 1 ... were insignificant and/or discountable. For construction of Dock 2, TSS levels are expected to reach 120 mg/l, which is below the threshold of 390 mg/l known to elicit effects to benthic habitat, as such any possible effects of increased TSS on benthic prey are extremely unlikely to occur.

J-53 at 3. *Also see*, Report ¶ 309 (“NMFS and the USACE both concluded that the estimated TSS levels of 120 mg/L above background is below the threshold level of 350 mg/L known to elicit harmful effects in aquatic life[.]”) (*citing* J-51 at 19 (att. to email of Sept. 26, 2019 from Corps staffer to NOAA staffer)); and J-53 at 3 (Letter of Concurrence)).

Importantly, NMFS also found negligible the risks to *other* estuarine species associated with resuspension of contaminated sediments. It concluded:

TSS levels expected for all activities are lower than what have been found adversely affecting juvenile and adult estuarine fish ....

J-38 at 137 (NMFS BiOp).

In view of the foregoing, the Hearing Officer correctly found that “DRN presented no evidence to impugn the work or expertise of these respected agencies[.]” Report at 91, and concluded that with respect to turbidity associated with dredging for Dock 2, “While the DRBC may not be bound by USACE and NMFS conclusions, nothing in the Compact or the Water Code requires it to conduct an independent inquiry or to compel DRP to produce a different study.” *Id.*<sup>9</sup>

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<sup>9</sup> Paragraph 118 of the Report’s findings of fact is in tension with this conclusion. It reads, “NJDEP issued its WDIP permit despite the risks of increases in TSS concentrations resulting from the dredging for Dock 2 and/or the

On the record highlighted above, the Commission may reasonably affirm its June 2019 determination that the transitory, short-term and localized elevations in turbidity expected to occur during dredging of the Dock 2 project will not substantially impair or conflict with the aquatic life use and water quality criteria established by the Comprehensive Plan.

**C. Protections for submerged aquatic vegetation (SAV).**

DRBC's Water Code provides that the "quality of Basin waters shall be maintained in a safe and satisfactory condition for ... wildlife, fish and other aquatic life." Water Code, § 2.200. This policy is implemented through DRBC's Water Quality Regulations, which provide that the quality of Zone 4 waters shall be maintained in a safe and satisfactory condition for a variety of uses, including "maintenance of resident fish and other aquatic life." WQR, § 3.30.4. The Comprehensive Plan, Water Code and Water Quality Regulations are otherwise silent on the subject of SAV. *See* Tr. 1305:8—1306:6 (Kovach).

DRN's Dr. Schmid opined that SAV beds outside of the Dock 2 dredging and construction footprint could potentially be impacted by: (1) sediment resuspension and turbidity; (2) potential destabilization of the shoreline; and (3) stormwater discharges from the newly constructed GLC. *See* DRN-14 at 6-12 (Schmid Report); DRN-22 at 7-9 (Schmid Rebuttal). The issues of turbidity and resuspension of sediment are discussed in Section 2 above. DRBC addressed the issue of stormwater discharges from the GLC in its review and approval in 2017 of Docket D-2017-009-1 for Dock 1 and the upland portion of the GLC. In that approval, the Commission included a

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probabilities of increased ship traffic, and the potential effects thereof on mussels. Exhibit J-3 [(NJDEP Waterfront Development Permit)]." Report ¶ 118. In its letter brief of August 10, 2020, DRP objects to this finding on grounds that, "[t]he suggestion that NJDEP issued the WDIP 'despite the risks of increases in TSS concentrations' is ... not entirely accurate and is potentially misleading[]"; that "the record contains no evidence that the [Dock 2 project] will result in an increase in ship traffic[]"; and that "there is no evidence that mussels are present in the [Dock 2 project] area." That NJDEP issued the permit is not in dispute, but, as DRP notes, "Based on the other findings in the Report, it is clear that the Hearing Officer did not intend to suggest that there existed any 'risks of increases in TSS concentrations' from dredging. *See, e.g.*, [Report] ¶¶ 152, 183-197." Staff concurs and recommends that the finding at paragraph 118 of the Report be excluded from the Commission's final determination.

requirement that in accordance with NJDEP’s stormwater discharge permit for the site when issued, confirmatory monitoring of stormwater outfalls must be conducted for the site when fully redeveloped, to ensure that legacy PCBs, which were and are present on the former DuPont Repauno Works property (also herein, “Repauno Site”), are no longer present in stormwater from the GLC area following its remediation and redevelopment. *See* J-24 at AR001544 (docket for GLC and Dock 1); *also see* DRP-140 ¶ 65 (“Ramboll is currently ... coordinating with Cavallo Environmental Services to finalize the PCB sampling plan, which will be ... implemented as new stormwater outfalls at the facility become operational.”); Tr. 1905:24-1907:8 (Cavallo) (PCB stormwater sampling plan under development); and DRP-130 at 5 (Cavallo Report).<sup>10</sup> Dr. Schmid on behalf of DRN premised his concern regarding stormwater on the incorrect belief that no stormwater plans existed for the GLC. Tr. 391:21 (Schmid) (“Plans haven’t been made, to my knowledge.”). The record shows that, to the contrary, DRP prepared stormwater plans for the GLC, NJDEP approved them as complying with NJDEP’s stormwater management requirements, and DRP submitted them to DRBC, as approved, in December 2018. *See* Report ¶ 256 (*citing* Tr.1460:13-1461:13, 1476:1-1477:7, 1490:4-23, 1502:10-23 (George)).

The record also shows that DRP took or has proposed to take multiple measures to avoid harming SAV. *See* Report at 95. To avoid disturbing a 3.78-acre bed of wild celery, DRP re-designed and re-positioned Dock 2 during a pre-application design phase of the project. *See* Report ¶ 147. *Also see*, Report ¶ 358(c) (*citing* J-50 at 5 (NJDEP’s Response to Comments on the Individual Waterfront Development Permit for GLC Dock 2)). As noted above, DRP will also use a dredge technique that minimizes the size of the TSS plume associated with dredging, keeping it

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<sup>10</sup> DRP submitted the PCB stormwater sampling plan to the Commission on July 8, 2020. The plan was produced to DRN on July 21, 2020 in response to a request for records under Article 8 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. Part 401, Subpart H.

away from the bed of wild celery. Finally, in addition to the contaminated site remediation work that was required by the State of New Jersey for the GLC redevelopment project to advance, a new stormwater collection, conveyance and treatment system to be installed for the facility is expected to improve the quality of stormwater runoff from the redeveloped site as compared to its previous condition. *See* Report ¶ 65 (*citing* DRP-140 ¶ 7 (George Decl.)); DRBC J-25 at AR001549 (DRBC Dock 1 Staff Recommendation & Response to Comments); and Tr. 1324:9-17 (Kovach Test.). *Also see supra*, n.10 (a PCB stormwater sampling plan in satisfaction of a requirement of the Commission’s 2017 docket approval for the GLC and Dock 1 has been submitted).

Thus, the Hearing Officer correctly found that none of the concerns raised by DRN regarding potential adverse effects of the Dock 2 project on SAV—temporary and localized increases in TSS, resuspension of contaminants in sediment, and stormwater discharges from the upland portion of the GLC—clearly indicate harm to SAV constituting a substantial impairment or conflict with the Comprehensive Plan. Report at 96.

**D. State-listed threatened or endangered freshwater mussels; mussel beds.**

The Commission in its Comprehensive Plan has provided that the “quality of Basin waters shall be maintained in a safe and satisfactory condition for ... wildlife, fish and other aquatic life” (Water Code, § 2.200); has designated “maintenance of resident fish and other aquatic life” as a water use in Zone 4 (WQR, § 3.30.4), where the GLC site is located; and has established water quality criteria to protect that use. However, the Comprehensive Plan, Water Code and Water Quality Regulations say little about threatened or endangered species or critical habitat. *See* DRBC-001 ¶ 10 (Kovach Decl.) (“In ... instances[] such as in the designation and protection of critical habitat, the state and federal programs afford protections that exceed those in the Comprehensive Plan[;]”); and *id.* ¶ 11(e) (concerning “[f]ederal and state-listed threatened and endangered species[,] ... federal and state programs...provide protections beyond those afforded

by the Comprehensive Plan and DRBC regulations.”). Thus, in performing project reviews under Section 3.8 of the Compact, consistent with the Compact’s directives at Sections 1.5 and 3.9, Mr. Kovach has testified, “I and my staff routinely defer to the Commission’s member state and federal agency programs that complement DRBC’s regulations.” DRBC-001 ¶ 10.

Under such programs, searches of New Jersey’s Natural Heritage Program database were performed on DRP’s behalf in accordance with the state’s Waterfront Development Permit application. The search results, which were also submitted to the Commission as part of DRP’s docket application for the Dock 2 project, identified no threatened or endangered mussel species within or near the area proposed to be dredged. Record ¶ 350 (*citing* DRP-140 ¶ 40 (George Decl.); DRP-5 (Database Search Results); and Tr. 1412:10-14 (George)). Although New Jersey’s Coastal Zone Management Rules authorize the NJDEP to require a permit applicant to conduct a further assessment of potential impacts to threatened or endangered species or their habitat, Report ¶ 353 (*citing* N.J.A.C. § 7:7-9.36(d)), NJDEP did not ask DRP to conduct an on-site survey into the potential presence of any threatened or endangered species beyond the Natural Heritage Database desktop search, Report ¶ 352 (*citing* Tr. 1614:12-22 (George)). This exercise of discretion by the NJDEP is especially compelling in light of testimony that NJDEP’s Office of Dredging would have consulted with the Endangered and Non-Game Species Program during its review of the Waterfront Development Permit application for the Dock 2 Project, Tr. 1412:16-24 (George), and that the head of that program, Ms. Jeannette Bowers-Altman, is “a leading biologist in freshwater mussels distribution and biology.” Tr. 117:12-118:2, 119:6-13 (Silldorff).

Notwithstanding DRN’s vociferous objections, the law and the record clearly support Mr. Kovach’s judgment in deferring to a mature state program for the protection of state-listed threatened and endangered mussels, where the Comprehensive Plan provides little guidance on the

issue, the state's program is led by a respected expert on freshwater mussels, and the Commission staff lacks comparable expertise. Although in his discussion of endangered species, the Hearing Officer's Report focuses on sturgeon and does not expressly address mussels, the Report reaches the correct conclusion that the Commission acted properly in deferring to an expert state agency in this regard. *See* Report at 98-99.

Concerning alleged harm to mussel beds generally within the dredge area and vicinity, DRN's evidence similarly falls short. The opinion of DRN's expert Dr. Silldorff that dredging for Dock 2 could result in the loss of significant numbers of mussels (*see* Report ¶ 342 (*citing* DRN-19 at 3) relies on data collected from areas that differ markedly from the Dock 2 project area in water depth, sediment material (fine-grained silt and clay vs. course-grained sediment), and shoreline development. *See* Report ¶¶ 343-346; *see also*, DRP Proposed Findings of Fact and Conclusions of Law (in post-hearing submission of June 17, 2020) ¶¶ 359-370. Modifications to the Docket on the basis of conjecture unsupported by the evidence are not warranted, particularly where, as here, neither the Comprehensive Plan nor state law requires relocation or other measures to preserve the resources in question.

#### **E. Risk to Groundwater**

The Commission's Comprehensive Plan establishes as a policy of the Commission "to prevent degradation of ground water quality[,]" WC and WQR § 3.40.4 B. The Plan further provides that "[n]o substances or properties which are in harmful or toxic concentrations or that produce color, taste, or odor of the water shall be permitted or induced by the activities of man to become ground water." *Id.*, § 3.40.5 B. DRN's claims about impacts to groundwater beneath the Repauno Site as a result of dredging for Dock 2 and landside development of the GLC are summarized succinctly in the Hearing Officer's Report, *see* p. 92, and recited in detail in DRP's post-hearing brief and the summary table attached thereto, *see e.g.* Summary Table, §§ 8-9 at 38-

50. The majority of these relate to the potential for mobilization of legacy contaminants on the former DuPont Repauno Works property as a result of redevelopment for the GLC on a portion of that property and dredging for Dock 2.

As Mr. Kovach of the DRBC explained in his written testimony, with the exception of regulations regarding PCBs, the Comprehensive Plan contains little direction regarding the clean-up of contaminated sites. DRBC-01 (Kovach Decl.) ¶ 11(b). In contrast, DRBC's member state and federal agencies have comprehensive standards and programs governing the restoration of such sites. *Id.* Consistent with the Compact's directives at Sections 1.5 and 3.9, Mr. Kovach and his staff routinely defer to the work of the Commission's member state and federal agencies with respect to contaminated site clean-ups in performing project reviews under Section 3.8 of the Compact. *Id.* ¶ 10.

Although DRN's concerns regarding mobilization of legacy contaminants in soil and groundwater on the GLC property relate primarily to the Commission's 2017 approval of the upland portion of the GLC and Dock 1, under a liberal ruling on admissible evidence, they were exhaustively explored during the eight-day hearing in this matter through the oral testimony of DRN's experts Peter Demicco of Demicco and Associates, LLC and Marc Henderson of Meliora Design, and DRP's experts Laura George of Ramboll and Greg Martin of Roux Associates. As the transcripts and recordings show, each and every theory propounded by Demicco and Henderson was thoroughly and at times devastatingly refuted by DRP's witnesses George and Martin. The levels of oversight and coordination under the New Jersey program have clearly been high, with appropriate, built-in redundancies. With respect to this category of concerns, the Hearing Officer was correct, if understated, in concluding that "DRBC's disinclination to duplicate

the work of other agencies or to doubt their integrity was a reasonable exercise of its discretion under Section 3.8.” Report at 93.

Mr. Demicco’s theory that dredging for Dock 2 could open a conduit or increase existing movement of river water into the primary regional aquifer system, altering flows in the aquifer (*see e.g.* DRN-17 at 9-10 (Demicco)), was also effectively controverted during the hearing. Mr. Demicco acknowledged movement of water from the Delaware River towards the Repauno Property and into the regional aquifer is a natural phenomenon that would occur absent any dredging or construction activity on this property or in the river adjoining it. Tr. 893:25—894:4 (Demicco).

Mr. Demicco also opined that the addition of impervious cover and other changes associated with land-side development of the GLC would lower the water table beneath the Repauno Site, potentially resulting in more infiltration of the aquifer with low-quality river water, changes in the capture zone of an existing groundwater recovery and treatment system, and “movement of contamination from the site into aquifers.” J-11 at 4, 8 (Demicco). Mr. Demicco acknowledged in his testimony, however, that because the hydraulic head of the Delaware River is higher than the groundwater level, the river water is already naturally migrating southward beneath the property through groundwater. *See* Tr. at 893:16—894:12 (Demicco). Moreover, under an ongoing remediation program involving recovery and treatment of groundwater beneath the property, contaminant levels in the groundwater have steadily declined. *See* DRP-33 at 17-19 (Martin); *see also, e.g.*, DRP-86 at Appendix D, Time-Series Charts and Appendix E, Historical Groundwater Results (2018 Annual Groundwater Report) (reflecting declining trends in sampled constituents in groundwater). Groundwater beneath the Repauno Site is still being investigated

and actively remediated by Chemours. *See* Tr. 2353:15-21 (Martin). *Also see*, DRP Proposed Findings of Fact ¶¶ 453-465.

With respect to potential adverse effects on groundwater, the hearing testimony effectively supported the Commission’s view that no substantial impairment or conflict with the Comprehensive Plan would result from development of the GLC and Dock 2. The Hearing Officer correctly concluded that the Commission made no improper or unsupported assumptions in this regard. Report at 93.

**F. Endangered Sturgeon and anadromous fish populations**

The table provided as Attachment A of DRP’s Post-Hearing Brief of June 17, 2020 lists approximately one dozen arguments by DRN’s expert Matt Fisher alleging harms or risks of harms to federally listed sturgeon species and their habitat posed by the GLC Dock 2 project. *See* DRP Summary Table, § 6 at 28-36. A number of these relate to topics discussed in sections 1 and 2 hereof, concerning the claims that dredging for Dock 2 will result in resuspension of contaminants, and that dredging and vessel traffic associated with the GLC will cause elevations in turbidity that are harmful to sturgeon and other biota. With respect to these issues and others relating to federally listed species and their habitat, the Hearing Officer confirmed that the Commission appropriately relied on the expertise of NMFS as set forth in the latter’s Biological Opinion (J-38) and Letter of Concurrence (J-53) pursuant to a consultation with the Corps required by Section 7 of the Endangered Species Act. Report at 99; *also see* DRBC-01 ¶¶ 10, 11(e) (Kovach Decl.). That the Letter of Concurrence was issued after DRBC’s docket decision in June of 2019 is not material. As the Hearing Officer’s Report correctly states, DRBC’s regulations “do not contain language prohibiting the Commission from approving a Docket condition contingent on all necessary State and Federal approvals.” Report at 87. Mr. Kovach testified and DRN well knows that this is the Commission’s customary practice. DRBC-01 ¶ 10. *Also see id.* ¶ 13 (“the DRBC routinely

approves projects either before DRBC's member state and federal agencies have acted or afterward, generally based on the preferences of the host state under the particular circumstances.”).

The Report properly includes NMFS's key finding that as conditioned by state and federal permits, the potential harms associated with the GLC, Dock 1 and Dock 2 to threatened sturgeon species and other anadromous fishes would be either “too small to be meaningful measured, detected or evaluated” (*see e.g.*, J-53 at 3) or would otherwise be insignificant. *Also see*, Report ¶ 286 (“project will not adversely impact shortnose sturgeon or Atlantic sturgeon or result in any significant adverse impacts to critical habitat for Atlantic sturgeon” (*citing* among others, J-38 at 197 and J-53 at 2)); *id.* ¶ 303 (“the increase in vessel activity, and consequent risk of accidents causing spills, when added to baseline vessel activity is small” (*citing* J-38 at 161)); *id.* ¶ 305 (“the effects of suspended sediment on sturgeon resulting from the proposed activities when added to baseline conditions will be so small that effects cannot be meaningfully detected, evaluated, or measured.” (*citing* J-38 at 137-138)).

In discrete instances, however, the Hearing Officer's findings concerning impacts on sturgeon related to water quality are unsupported and should either be excluded from the Commission's findings or offered only with clarification.

First, the Commission should not adopt as its finding the statement of DRN's expert that “[d]redging in the Delaware River causes the salt line to move upriver because more water volume is needed to occupy the area of the removed sediments and that water comes from the open end of the system, the Atlantic Ocean.” Report ¶ 290 (*citing* DRN-12 at 4 (Fisher)). As DRP explains in a similar comment, Mr. Fisher is a marine biologist, not a hydrologist or hydrographer, and he conceded in testimony that he did not cite any qualified authority for this opinion. *See* DRP Ltr.

Br. at 2 (*citing* Tr. 588:23—589:6). Mr. Fisher admitted that the movement of the salt line is influenced by a “number of complicated things,” Tr. 587:20—588:8. The Hearing Officer declined to allow into the record a short memo by Amy Shallcross of the Commission staff refuting Mr. Fisher’s contention. The memo was offered as an attachment to Mr. Kovach’s Declaration, but was removed by order of the Hearing Officer on grounds that “the record contain[ed] sufficient evidence on this issue of salinity, so it would be duplicative at this point.” Tr. 1115:8-10. DRBC agrees with DRP that the evidence proffered by DRBC was not duplicative of that supplied by Mr. Fisher and would have provided credible evidence contrary to his testimony.

Second, the staff supports only in part the finding that “[t]he combined effects of climate change and the cumulative impacts of dredging from multiple projects, including but not limited to the GLC project, may result in the salt line moving upriver.” Report ¶ 289. In the view of staff, with respect to “the cumulative impact of dredging from multiple projects” that finding is also dubious. Referencing a Corps analysis published in 2009, DRP’s sturgeon expert Hal Brundage pointed out that, “Hydrodynamic modeling for the Delaware River Main Channel Deepening Project suggested that deepening of the main navigation channel to a controlling depth of -45 ft MLLW would result in a 0.07 ppt increase in salinity at Chester, PA (river mile 83), located 3.5 miles downriver of the Dock 2 project area under *worst-case* low river flow conditions (1965 drought of record) (USACE, 2009).” DRP-129 at 5 (Brundage) (*emphasis in original*) (*citing the Corps’ Environmental Assessment for the Main Channel Deepening Project*). Although more detailed testimony on the matter was not admitted, DRBC staff are of the view that the impacts on Estuary salinity reported by the Corps in its 2009 channel deepening analysis are insignificant relative to salinity incursion predicted to

occur as a result of climate change.<sup>11</sup> In light of this information, the Commissioners should consider whether paragraph 289 of the Hearing Officer’s recommended findings should be adopted with modifications or also expressly excluded from the Commission’s final decision. Seeking additional testimony on this question would seem unnecessary, however, given NMFS’s ultimate conclusion, included in the Hearing Officer’s findings of fact, that “salt water incursion linked to climate change would not significantly impact sturgeon migration and spawning or juvenile habitat. Report ¶ 291 (*citing* J-38 at 129).

A third questionable finding in the Report, again derived from Mr. Fisher’s testimony, reads, “Since the Industrial Revolution, the Delaware River has had extreme issues with the dissolved oxygen sags because of the nutrients coming into the river from treated sewage and other land uses that fuel algae blooms. Report ¶ 293 (*citing* DRN-12 at 2). Although the first part of this statement (up to “oxygen sags”) is not in dispute, the historic and current causes are complex, and the record contains no evidence as to such causes or to algal blooms. Again, the Commissioners are urged to consider whether paragraph 293 of the Hearing Officer’s recommended findings should be adopted only with modifications.

### **G. Management of PCBs**

The Commission concluded in its reviews of the GLC and Dock 1 in 2017 and Dock 2 in 2019 that DRP’s proposed redevelopment of a portion of the former Dupont Repauno Works property would result in a net benefit to the Delaware River with respect to releases of PCBs

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<sup>11</sup> Mr. Brundage cites in his report to a 2015 study by Ross *et al.* for the proposition that “climate change has been identified as a factor affecting salinity distributions in the Delaware Estuary.” DRP-129 at 5, 12 (Brundage). *Also see*, on the DRBC website, [State of the Basin Report 2019](#) at 15 (“Sea level rise is anticipated to affect the mixing of fresh and salt water in the estuary[,] ... and may require new management measures, operations and/or additional water to maintain control of salinity.”); and slide 33 of a public presentation by DRBC’s Amy Shallcross at: [https://www.nj.gov/drbc/library/documents/Shallcross\\_climate-change-wrm\\_WRADRBnov2018.pdf](https://www.nj.gov/drbc/library/documents/Shallcross_climate-change-wrm_WRADRBnov2018.pdf) (showing predictions in the upstream migration of the 250 parts per million chloride concentration under different climate scenarios).

through either stormwater runoff or sediment resuspension. *See* DRBC-01 at ¶¶ 25-26. The issues of legacy PCB contamination at the site are addressed in Section 1 above with respect to sediment sampling and resuspension of contaminants, and in Section 3 above concerning stormwater runoff and its potential to affect SAV. In his Report of Findings and Recommendations, the Hearing Officer properly confirmed that “no substantial impairment to the Plan is apparent from DRN’s evidence regarding PCBs at the [GLC or Dock 2].” Report at 98.

#### **H. Ballast water exchanges; spills**

The staff has maintained that “the United States Coast Guard (‘USCG’), working jointly with the United States Environmental Protection Agency (‘EPA’) and state agencies, is the lead agency in addressing issues associated with ship traffic, ballast water exchange, vessel loading, release prevention, and emergency response.” DRBC-01 ¶ 11(a). Evidence offered during the hearing and the Hearing Officer’s findings confirm that this position is entirely appropriate. *See generally*, DRP-132 (Kichner Report). *Also see*, Report ¶ 364(d) (“Vessels calling at Dock 2 will need to abide by applicable [USCG] regulations to avoid adverse effects of non-invasive species that might be present in ballast water, with most ballast water exchanges being required to occur in off-shore marine waters.”) (*citing* DRP-123 at 21-22) (Corps response to comments of DRN and others on the Dock 2 project). The Hearing Officer’s findings also cite to relevant opinions offered by NMFS. *See* Report ¶¶ 301-302 (“On the subject of spills of liquid energy products, NMFS found the risks to sturgeon to be insignificant...” and “NMFS further noted that the proposed marine terminal ... will not result in an increase in tanker vessels on the Delaware River or in Delaware Bay.”) (*citing* J-38 at 161).

Additional evidence in the hearing record in support of the Commission’s determination that ballast water discharges and any incremental risk of spills associated with the Dock 2 project will not substantially impair or conflict with the Comprehensive Plan is summarized by DRP in its

proposed findings of fact and its table summarizing the hearing evidence. *See, e.g.*, DRP Fof ¶¶ 414-421; DRP Summary Table at 20-21.

### **I. Route 44 Bypass**

In our post-hearing submission of June 17, 2020 responding to questions posed by the Hearing Officer, staff explained that the classes of projects “deemed not to have a substantial effect on the water resources of the Basin and [thus] not required to be submitted [to the DRBC for review] under Section 3.8 of the Compact” include “bridges and highways unless they would pass in or across an existing or proposed reservoir or recreation project area as designated in the Comprehensive Plan[.]” RPP § 401.35(a)(10). Additional evidence adduced during the hearing to the effect that the Route 44 Bypass was neither part of the GLC project nor subject to the Commission’s review pursuant to Section 3.8 of the Compact is summarized in DRP’s post-hearing submission of June 24, 2020. *See* DRP Summary Table, § 7 at 37. The Hearing Officer apparently agreed, as he did not deem the issues raised by DRN on this topic worthy of discussion in his Report.

### **J. Public Process**

That the Commission fully complied with the procedural requirements of the Compact and DRBC regulations before issuing Docket D-2017-009-2 for the Dock 2 project on June 12, 2019 is not in dispute. These procedures included a written comment period of 14 days (from March 24 through June 7, 2019) and a duly noticed public hearing, which occurred on June 6. Consistent with DRBC practice when multiple comments opposing a draft docket are submitted, the staff also prepared a written response to comments, which was furnished to the Commissioners prior to their action on June 12. *See*, DRBC staff comment and response document dated June 12, 2019, with attachments. DRN nevertheless alleged in its July 11, 2019 request for an Article 6 hearing on the Docket, as in its oral and written comments submitted before June 12, 2019 that the Commission

failed to provide the public with adequate information or time to “present cogent concerns, including seeking expert input,” on DRP’s Dock 2 application. DRN Request for Article 6 Hearing at 16 (Bates AR0014990). In providing the adjudicatory hearing, the Commission remedied any alleged deficiency in the public process it had provided pursuant to its organic statute and implementing regulations.

In addition to giving DRN an opportunity to develop and submit expert testimony, in accordance with the rules governing the adjudicatory hearing, the Commission invited “any person ... desiring to present comments concerning the subject matter of the Hearing for inclusion in the record ... [to] submit a written statement to the Commission[.]” RPP, § 2.6.4(a) (18 C.F.R. 401.84(a)). Those interested in submitting written comments were afforded a period of 55 days—or approximately eight weeks—to do so, from March 1, when notice of this opportunity was published on the DRBC website,<sup>12</sup> through Friday, April 24, 2020. The Commission received a total of 314 additional comments during that period, nearly all of them echoing one or more of DRN’s objections to the GLC and/or the Dock 2 project. All are included in the record.

In DRN’s brief in support of its objections to the Report of the Hearing Officer, DRN strangely continues to object to the Commission’s original, 2019 process. It protests, still, that staff did not have sufficient time before the Commission acted on June 12, 2019 to consider the comments the Commission received from members of the public prior to that date. That a fairly comprehensive response to those comments is part of the record in this matter tends to contradict DRN’s claim. More importantly, Project Review Branch Manager David Kovach testified to the contrary during the hearing. First, he noted that the comments objecting to the Dock 2 project

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<sup>12</sup> Publication on or around that date was also provided in the five federal and member state registers, and via multiple social media platforms. *See*, Message of April 10, 2020 from Commission Secretary and Assistant General Counsel Pam Bush to Hearing Officer John D. Kelly and counsel of record.

were very similar to those raised during the Commission’s review of the GLC and Dock 1 in 2017 (on which the DRN did not afterward request a hearing). *See* Tr. 1351:23—1352:15. The issues were thus not entirely new to the staff and Commissioners. Second, he stood by testimony offered in his written declaration. In that testimony, Mr. Kovach stated that “[i]n the case of Dock 2, we were careful to ensure that neither the Comprehensive Plan nor the public process was compromised by the timing of DRBC’s review.” In his live testimony, Mr. Kovach reiterated that between March 12, 2019, when the Commission received DRP’s application, and June 12, 2019, when the Commission approved the Docket, he and his staff were able to perform a complete review of the Dock 2 project. Tr. 1350:16—1352:4.

More importantly, Mr. Kovach and other members of the staff have now had the benefit of reading more than a dozen expert reports on the issues raised by DRN and have attended hours of live testimony by those experts. Although they approached the hearing with curiosity and open minds, their opinion—that if implemented in accordance with the conditions set forth in the Docket as issued, the Dock 2 project will not substantially impair or conflict with the Comprehensive Plan—remains unchanged.

### **III. Conclusion**

The adjudicatory hearing and additional public process provided DRN with ample opportunity to show that the Commission’s Docket was not supported by the record, and to supplement the record with additional data and information that would support its claims. DRN succeeded at neither task and now protests that still more information is needed. The Hearing Officer concluded that “While the information that DRN demands might certainly provide further enlightenment to the Commission about potential environmental concerns arising from the work, the lack of such information is not proof sufficient to allow the reversal of the Dock 2 approval.”

Report at 89. The staff would alter this conclusion only slightly. The evidence adduced by DRN in the course of the hearing is not proof sufficient to *compel* the Commission to reverse or modify its decision. Rather, the opportunity accorded DRN to more fully present its concerns gave DRP and the staff an equal opportunity to more fully refute them. The record in support of the Docket is more robust post-hearing than it was before. The Docket should thus remain unchanged.

Respectfully submitted,

DELAWARE RIVER BASIN COMMISSION

*/s/ Pamela M. Bush*

Dated: August 21, 2020

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