RESOLUTION FOR THE MINUTES

A RESOLUTION for the Minutes acting upon the findings and recommendations of the Hearing Officer in the matter of Docket D-2017-009-2 for the Gibbstown Logistics Center Dock 2 and affirming the Commission's Docket approval.

WHEREAS, on June 12, 2019, following a duly noticed public comment period and public hearing, the Commission (also herein, "DRBC") issued Docket D-2017-009-2 (the "Docket") pursuant to Section 3.8 of the Delaware River Basin Compact ("Compact"), approving a project at the Gibbstown Logistics Center ("GLC") known as the "Dock 2" project; and

WHEREAS, the Delaware Riverkeeper and Delaware Riverkeeper Network (collectively, "DRN") submitted written and oral comment opposing the Dock 2 project during the public comment period, and after the Docket was issued, pursued their objections through a request for administrative hearing under Article 6 of the Commission's Rules of Practice and Procedure ("RPP"), 18 C.F.R. Part 401; and

WHEREAS, in accordance with Section 2.6.3 of the RPP (18 C.F.R. § 401.83), the Commission at its quarterly business meeting on September 11, 2019 granted DRN's hearing request, and with the consent of Pennsylvania, the Commission Chair on November 1, 2019 designated John D. Kelly, Esquire, then serving as a hearing officer with the Pennsylvania Department of State, as the Commission's Hearing Officer for purposes of this administrative appeal; and

WHEREAS, in accordance with Section 2.6.4 of the RPP (18 C.F.R. § 401.84), after pre-hearing proceedings were completed, over an eight-day period from May 11 through May 15, 2020 and May 18 through May 20, 2020 the Hearing Officer afforded DRN and Docket holder Delaware River Partners LLC ("DRP") (collectively, the "interested parties") the opportunity to introduce evidence, whether or not previously offered to the Commission, and to cross-examine witnesses; the Commission Secretary, Pamela M. Bush, Esquire, also participated in the hearing as counsel for the DRBC staff; and

WHEREAS, in accordance with Section 2.6.5 of the RPP (18 C.F.R. § 401.85), the Hearing Officer heard testimony from thirteen expert witnesses and three fact witnesses, including witnesses from DRN and DRP and the Commission's project review manager; ; and

WHEREAS, other persons submitted written statements as permitted by Section 2.6.4 of the RPP (18 C.F.R. § 401.84), and neither interested party requested the opportunity to cross-examine the authors of these statements; and

WHEREAS, due to the onset of the Covid-19 pandemic in March of 2019, the Hearing Officer conducted the hearing via video conference; a video recording was made of each day's proceedings, and all recordings were posted to the Commission's website, drbc.gov, within 48 hours of the close of the day's proceedings; and

WHEREAS, transcripts of the hearing were also created and furnished to the interested parties, the Hearing Officer and the Commission; and

WHEREAS, following post-hearing briefing, in accordance with Section 2.6.8 of the RPP (18 C.F.R. § 401.88), the Hearing Officer on July 21, 2020 issued his Report of Findings and Recommendations ("Report"), containing 385 Proposed Findings ("Findings"), a Discussion, and a Conclusion and Recommendation; and

WHEREAS, the Hearing Officer recommended that "the Dock 2 Docket should remain as previously approved by the Commission" (Report, p. 101); and

WHEREAS, in accordance with Section 2.6.8 of the RPP (18 C.F.R. § 401.88), on August 10, 2020, DRN served objections to the Report, and DRP served objections limited to certain proposed Findings in the Report, and on August 21, 2020, the Commission's Executive Director, Steve Tambini, acting through Ms. Bush, served staff comments on the Report to which the interested parties responded on August 31, 2020; and

WHEREAS, upon the response of the interested parties to staff's comments on the Report, the administrative appeal became ripe for decision by the DRBC Commissioners (*see* RPP § 2.6.9 (18 C.F.R. § 401.89)); and

WHEREAS, upon receipt of the Report, the briefs and objections of the interested parties, and the comments of the Commission staff, and with the assistance of the Commission's General Counsel, the Commissioners each have carefully reviewed the Hearing Officer's findings and recommendations and the administrative record; and

WHEREAS, based on their review, the Commissioners have concluded that the Dock 2 project as conditioned by the Docket would not substantially impair or conflict with the Commission's Comprehensive Plan for the immediate and long range development and uses of the water resources of the basin (*see* Compact, §§ 3.8, 3.2(a), and 13.1); now therefore,

BE IT RESOLVED by the Delaware River Basin Commission:

1. The Commission adopts the findings of the Hearing Officer except as specified in the Opinion attached hereto and incorporated herein, and for the reasons stated in the Opinion the Commission adopts as its final determination the recommendation of the Hearing Officer to affirm the June 12, 2019 Docket approval.

2. The Commission hereby finds and determines that DRN has failed to meet its burden of demonstrating either that the Dock 2 project as conditioned in the Docket would substantially impair or conflict with the Comprehensive Plan or that the administrative record for the Docket contains insufficient information to support the Docket approval.

3. This Resolution constitutes the Commission's final determination in this matter pursuant to Section 2.6.9 of the RPP (18 C.F.R. § 401.89).

ADOPTED: December 9, 2020

BEFORE THE DELAWARE RIVER BASIN COMMISSION

In re: DRBC Docket D-2017-009-2 Gibbstown Logistics Center Dock 2	} } } }	Administrative Appeal

OPINION

I. Background

On June 12, 2019, the Delaware River Basin Commission ("DRBC" or "Commission") issued Docket D-2017-009-2 (the "Docket") pursuant to Section 3.8 of the Delaware River Basin Compact ("Compact") approving a project at the Gibbstown Logistics Center ("GLC") known as the "Dock 2" project. Hearing Exhibit ("Ex.") J-1 ("Docket"). The GLC is a multi-use, deep-water seaport and industrial logistics center located in Gibbstown, New Jersey. The GLC is situated on a portion of the 1630-acre Repauno facility formerly owned and operated by DuPont and thereafter by Chemours.

On March 12, 2019, Delaware River Partners ("DRP") submitted an application to DRBC seeking approval of the Dock 2 project. DRP proposed to dredge Delaware River sediments and construct a pile-supported wharf at River Mile 86.5 providing two deep-water-berths and associated infrastructure. As stated in the Application, "The purpose of Dock 2 is to develop a marine facility capable of accommodating the export of bulk liquid products by vessel, including infrastructure necessary for transloading operations which will allow vessels to be loaded directly from railcar or truck." Ex. J-2 (Application) at p. AR000011.[1] The Dock 2 wharf will

[1] The liquids to be transloaded to marine vessels at Dock 2 include liquefied hazardous gas ("LHG") and liquified natural gas ("LNG"). *See, e.g.,* Ex. DRP-132 at p. 1. LHGs are

be located approximately 650 feet from the shoreline and connected by a trestle to landside infrastructure at the GLC. Ex. DRP-14 at ¶ 17.

The GLC was also the subject of Docket D-2017-009-1 that DRBC issued to DRP for the "Dock 1" project and land-side development on December 13, 2017. *See* Ex. J-24 (DRBC docket for Dock 1). The Dock 1 project is located upriver of Dock 2 and involved construction of a new multi-use, deep-water port and logistics center to accommodate ocean-going vessels. As part of the Dock 1 project, DRP performed Delaware River dredging, and constructed a one-ship berth on a pile-supported wharf structure, a stormwater management system and other features. Unlike Dock 2 which will transload only bulk liquid products, the materials transloaded at the Dock 1 facility include a variety of products such as bulk liquids and gases, automobiles, perishable commodities and bulk cargo. *Id.*

On March 25, 2019, the Commission published on its website a Notice of Applications Received that included the Dock 2 project. On May 24, 2019, the Commission published notice of a public hearing and a draft docket for Dock 2. During the public hearing on June 6, 2019 and the public comment period which closed on June 7, 2019, the Delaware Riverkeeper Network and the Delaware Riverkeeper (collectively "DRN") and certain other members of the public submitted written and oral comments opposing the Dock 2 project.

DRN pursued its objections to the Dock 2 project after the Docket was issued through a request for an administrative hearing pursuant to Article 6 of the Commission's Rules of Practice and Procedure ("RPP"), 18 C.F.R. Part 401. On September 11, 2019, the Commission granted DRN's hearing request. On November 1, 2019, with the consent of Pennsylvania, the

components of natural gas in the ground and include, among others, liquified butane and propane. *Id.* at 6. For a definition of these terms, *see* 33 C.F.R. § 127.005.

Commission Chair designated John D. Kelly, Esquire, then serving as a hearing officer with the Pennsylvania Department of State, as the Commission's Hearing Officer for purposes of this administrative appeal.

After pre-hearing proceedings were completed, on May 11 through May 15, 2020 and on May 18 through May 20, 2020, the Hearing Officer afforded DRN and DRP (collectively, the "interested parties") the opportunity to introduce evidence whether or not previously offered to the Commission and to cross-examine witnesses. The Commission's Secretary and Assistant General Counsel, Pamela M. Bush, Esquire, also participated in the hearing as counsel for DRBC staff. The Hearing Officer heard testimony from thirteen expert witnesses and three fact witnesses, including DRN Deputy Director Tracy Carluccio and DRP's principal consultant with the engineering, architecture and consultancy firm Ramboll. At the request of the Executive Director, the Commission's Project Review Manager, David Kovach, also testified and was cross-examined. Other persons submitted written statements as permitted by Section 2.6.4 of the RPP, and neither interested party requested the opportunity to cross-examine the authors of these statements.

The logistics and timing of the hearing were complicated by the onset of the Covid-19 pandemic. As a result, the Hearing Officer conducted the hearing via video conference. The Commission expresses its appreciation to the Hearing Officer, the interested parties, DRBC staff, and to the counsel and witnesses, all of whom worked cooperatively to establish and implement the video conferencing procedures that allowed the hearing to proceed in a professional and safe manner.

On July 21, 2020, the Hearing Officer issued his Report of Findings and Recommendations ("Report").[2] *See* RPP § 2.6.8. The Report contains a list of exhibits, biographical information on witnesses, a Procedural History, 385 Proposed Findings ("Findings"), a Discussion, and a Conclusion and Recommendation. The Hearing Officer recommended that "the Dock 2 Docket should remain as previously approved by the Commission." Report at 101.

In accordance with Section 2.6.8 of the RPP, on August 10, 2020, DRN served objections to the Report, and DRP served objections limited to certain proposed Findings in the Report. On August 21, 2020, the Commission's Executive Director, Steve Tambini, acting through Assistant General Counsel Pamela M. Bush, Esquire, served staff comments on the Report to which the interested parties responded on August 31, 2020. The administrative appeal is now ripe for decision by the DRBC Commissioners. *See* RPP § 2.6.9.

II. Burden of Proof and Standard of Review

The interested parties have spent considerable time debating the burden of proof and standard of review. The Hearing Officer appropriately placed the burden of persuasion on DRN as the party challenging the Docket approval issued by the Commission. DRP agrees with this burden allocation and DRN seems to agree as well. *See* DRN Brief in Support of Objections (August 10, 2020) at 4. The Hearing Officer also correctly allocated the burden of production to DRP to the extent the relevant information was in its exclusive possession or in its possession and not reasonably available to DRN. *See* Hearing Officer Order dated December 12, 2019.

[2] Following the conclusion of the hearing but before submission of his Report, the Hearing Officer retired from service with the Pennsylvania Department of State. On the recommendation of the Commissioner's General Counsel and with the concurrence of the interested parties and the Executive Director, the Commission Chair continued the designation of Mr. Kelly as the Hearing Officer in the present administrative appeal.

The interested parties disagree on what DRN must prove to meets its burden of proof. At least until its August 31, 2020 submission, DRP contended that DRN must show that the Dock 2 project would substantially impair or conflict with DRBC's Comprehensive Plan. *See, e.g.*, letter from counsel for DRP dated August 10, 2020 (DRN "bore the burden by proving by a preponderance of the evidence that the Project will substantially impair or conflict with the Comprehensive Plan, and DRN failed to carry this burden."). In contrast, DRN argues that "[t]he Commission has a burden … to determine whether or not the project will substantially impair or conflict with the Comprehensive Plan," *see* DRN Brief in Support of Objections (August 10, 2020) at 5, and that absent such proof, a docket approval cannot properly be issued.[3]

Although in many circumstances the difference between the parties' positions would have little practical consequence, here it may be of import. DRN contends that the Commission approval should be vacated because the Commission has insufficient information to grant the approval, while DRP asserts that while sufficient information exists, the approval should also be affirmed on the ground that DRN failed to meets its burden to show that the Dock 2 project would substantially impair or conflict with the Comprehensive Plan. The Hearing Officer appears to have placed the burden of proving substantial impairment of, or conflict with, the Comprehensive Plan on DRN, and also stated that proof that DRBC abused its discretion would not be a sufficient ground on which to vacate the Docket. *See* Report, Section V.A. At other times, the Hearing Officer apparently considered and rejected DRN's abuse of discretion argument on the merits. *See* Report at 93 ("DRBC's disinclination to duplicate the work of other

[3] By "burden" we assume DRN means "statutory duty" in that DRBC performs an adjudicatory role under Section 3.8 of the Compact – DRBC is not a party bearing a "burden."

agencies or to doubt their integrity was a reasonable exercise of its discretion under Section 3.8").

We agree with the Commission staff that DRN's burden is to prove based on all evidence of record, including evidence presented at the hearing, that the Commission erred in issuing the Docket. *See* DRBC Staff Comments on Hearing Officer's Report and Interested Party Objections; Recommended Commission Action ("DRBC Staff Comments") at 2.[4] Evidence that the Docket decision was based on erroneous findings of fact, conclusions of law or an abuse of discretion would be relevant to satisfying this burden. For DRN to prevail, DRN must show that the Commission's error warrants opening, vacating, or modifying the Docket.

To be sure, proof that the Dock 2 project would substantially impair or conflict with the Comprehensive Plan would satisfy this burden. But a government agency decision such as the issuance of the Docket must be based on supporting information contained in an administrative record. Section 2.3.8 of the RPP, 18 C.F.R § 401.39, specifies the documentation that must accompany a project application, and affords the Executive Director discretion to require additional supporting documentation. Docket decisions are made by vote of the Commissioners based on recommendations of the Executive Director and Commission staff. DRN can prevail in its administrative appeal if it can show that the Commission abused its discretion by approving the Dock 2 project without first obtaining sufficient information to make a reasoned decision.

This principle does not mean that the Commission must require submission of all information that may be relevant. In most docket reviews, there is additional information that

[4] In its August 31, 2020 Letter Response to the Staff Comments, DRP stated that staff had properly characterized DRN's burden as a requirement to prove "that the Commission erred" in issuing the Docket. It thus seems that DRP may now agree with the Commission staff's formulation of the standard.

could be obtained and considered. Commission staff and the Commissioners must exercise their professional judgment to decide whether sufficient information has been submitted, or whether the applicant should be required to supplement its application. To prevail on an argument that DRBC abused its discretion by not obtaining additional information, the DRN must show that without first obtaining and evaluating more information, DRBC could not reasonably conclude whether the Dock 2 project would substantially impair or conflict with the Comprehensive Plan. And because this administrative appeal affords the interested parties the opportunity to supplement the administrative record with documents and testimony, the relevant question before us is whether after consideration of the evidence presented at the hearing, there is now sufficient information to support the Docket approval.

As the Hearing Officer recognized, Sections 1.5 and 3.9(b) of the Compact authorize the Commission to utilize and employ the offices and agencies of the Basin states and federal government "to the fullest extent it finds feasible and advantageous." The Commission frequently implements this authority in the context of performing its project reviews under Section 3.8 of the Compact, particularly where state and federal government agencies are performing environmental reviews of the same project pursuant to their own statutory authorities. This coordination eliminates or reduces duplicative reviews and affords DRBC the benefit of the expertise of these agencies.

In the present case, the relevant state and federal actions included, among others, permitting decisions by the New Jersey Department of Environmental Protection ("NJDEP") and the U.S. Army Corps of Engineers ("USACE"), two agencies of the signatory parties to the Compact whose professional staff evaluated water quality and other aspects of the Dock 2 projects as part of their own permit reviews. The information submitted to and reviewed by

those agencies, and the results of their evaluations, are important components of the information supporting DRBC's Docket approval.

DRN argues that when implementing Sections 1.5 and 3.9(b) of the Compact, DRBC accorded excessive deference to other agencies,[5] and that *no* deference is due to the Commission itself. *See* DRN brief in support of objections to the July 21, 2020 report of findings and recommendations of the Hearing Officer (August 10, 2020) at 15. The Conditions section of the Docket stated that the docketholder was not exempt from obtaining all necessary permits and/or approvals from other agencies. All of the permits applicable to the Dock 2 project were issued before the conclusion of the administrative hearing and are part of the administrative record for the Docket *See* Findings ¶¶ 373 and 374. In challenging the weight DRBC afforded to reviews by other agencies, DRN asserts that the Compact is merely a contract, not a statute, *see* DRN brief in support of objections to the July 21, 2020 report of findings and recommendations of the Hearing Officer (August 10, 2020) at pp. 16 and 18, and that as a result, deference principles such as those in *Chevron*[6] and *Auer*[7] are inapplicable, *id.* at p. 15.

We agree in part and disagree in part with DRN's arguments. As enacted by the legislatures of the Basin states and the U.S. Congress, the Compact is both statute and a contract, not merely a contract as DRN asserts. *See, e.g., Kansas v. Nebraska,* 135 S. Ct. 1042, 1053 (2015) (Compact is federal law); *Alabama v. North Carolina*, 130 S. Ct. 2295, 2312 (2010) ("But

[5] DRN's June 17, 2020 and August 31, 2020 submissions clarify this position by stating that DRBC may defer to other agencies, but must review their work and determine whether it is complete enough for the Commission to understand the impact of the project on the Comprehensive Plan. *See* DRN Post-Hearing Brief (June 17, 2020) at 99; DRN Response to DRBC Staff Comments (August 31, 2020) at 25.

[6] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[7] *Auer v. Robbins,* 519 U.S. 452 (1997). *See also, Kisor v. Wilkie*, 139 U.S. 2400 (2019).

an interstate compact is not just a contract, it is a federal statute enacted by Congress"). Nevertheless, pursuant to the Third Circuit's decision in *Wayne Land and Mineral Group LLC v. DRBC*, 894 F. 3d 509 (3rd Cir. 2018), the Compact is interpreted in accordance with contractual principles, and *Chevron* deference does not apply. These propositions do not, however, resolve the weight the Commission may give to the determinations of other agencies or Commission staff. *Chevron* deference relates to an agency's interpretation of the ambiguous provisions of a statute the agency is administering. Similarly, *Auer* deference relates to an agency's interpretation of an ambiguous provision of its regulations. Here, the "deference" objections DRN raises mostly pertain to the weight given to professional judgment exercised by the staff of the Commission or other expert government agencies on matters within their technical competence, not to interpretation of an ambiguous statutory or regulatory term.[8]

Particularly in light of the express authority given to DRBC in Sections 1.5 and 3.9(b) of the Compact to utilize the agencies of government including the Compact's signatory parties, it is appropriate under the present circumstances for the Commission to give weight to the decisions of the Commission's member state and federal agencies when acting in their areas of scientific and technical expertise. DRBC will ordinarily accept the results of the analyses and judgments of these agencies that it has found "advantageous" to utilize. Although when making a decision under the Compact DRBC maintains the authority to review the work of other agencies and reach a different conclusion where warranted, in many instances doing so is unnecessary and would result in duplication of effort. In accordance with the Compact, in this

[8] One exception is whether the word "substantially" in the phrase "substantially impair or conflict" in Section 3.8 of the Compact modifies both the word "impair" and the word "conflict." DRBC's course of performance shows that DRBC has interpreted "substantially" as modifying both terms.

case DRBC reached its Docket decision based upon the facts, sound science, professional judgment, and policy considerations, utilizing the reviews by other government agencies as to specific aspects of the Dock 2 project where, but only where, DRBC found it "advantageous" to do so.[9]

III. Findings of Fact

DRBC commends the Hearing Officer for his thorough consideration of the hearing record and his extensive Findings of Fact ("Findings"). DRBC adopts the Findings set forth in the Hearing Officer's Report, except to the limited extent identified in Appendix A to this Opinion.

IV. DRN's Objections

In response to the Hearing Officer's Report, DRN submitted various objections. *See* DRN Objections dated August 10, 2020.[10] Objections relating to the burden of proof and standard are addressed by the discussion in Section II above.

DRN also raises a series of objections aimed at potential harms to water resources that DRN contends may result from implementation of the Dock 2 project. In DRN's view, the evidence shows that the project will substantially impair or conflict with the Comprehensive Plan, or that DRBC abused its discretion in issuing the Docket without first acquiring

[9] DRN also notes that it is inappropriate for the Hearing Officer to defer to the Commission. As the governing body of the Commission, the Commissioners issuing this Opinion do not "defer" to the Commission or its staff, but rather are guided by the factors discussed in this Opinion. Of course, the Commissioners value, consider, and where appropriate rely on the work, professional judgment and recommendations of Commission staff.

[10] To the extent DRN has not raised by way of objections certain issues that it contested before the Hearing Officer, DRBC considers them waived. To the extent that these issues are addressed on the merits in the DRBC Staff Comments, in addition to finding them waived, DRBC adopts the reasoning in the Staff Comments.

information necessary to its decision. DRN's post-hearing briefs focused principally on the latter argument that DRBC issued the Docket based on insufficient information. The Hearing Officer rejected DRN's arguments and recommended that the Commissioners affirm the decision approving the Dock 2 Docket. Report at 101.

After reviewing all of the evidence adduced at the hearing, the Commission's Executive Director submitted to the Hearing Officer the comments of the DRBC staff stating in part that staff "concurs in the Hearing Officer's recommendation that the Commission affirm its decision of June 12, 2019, and the Docket remain unchanged." With the assistance of the Commission's General Counsel, the Commissioners have reviewed the hearing record, the objections and briefs of the interested parties, the DRBC Staff Comments, and the responses of the interested parties to the DRBC Staff Comments. The Commissioners agree with the recommendations of the Hearing Officer and DRBC staff that the Commission's June 10, 2019 decision approving the Docket for the Dock 2 project be affirmed. The Commission has determined that the administrative record contains sufficient information to support the decision to affirm the Docket and adopts the DRBC Staff Comments which identify certain of the evidentiary bases for the Commission's determination.[11] Without restating the entirety of the DRBC Staff Comments, this Opinion emphasizes certain of the reasons for the Commission's determination.

Pursuant to Section 3.8 of the Compact, the Commission reviews projects having a substantial effect on the water resources of the Basin to determine whether such projects would substantially impair or conflict with the Comprehensive Plan. As developed over the course of the Commission's 59 years of existence, the Comprehensive Plan "for the immediate and long

[11] The Commission does not similarly adopt the discussion in the Hearing Officer's Report, although like the Hearing Officer and Commission staff, the Commission has concluded that the Docket Decision should be affirmed.

range development and uses of the water resources of the basin" includes various public and private projects and facilities and the Commission's regulations and policies. *See* Compact, §§ 3.2(a), 13.1. DRN does not contend that the Dock 2 project would substantially impair or conflict with any projects included in the Comprehensive Plan. The thrust of DRN's objections is focused on potential violations of DRBC's Water Quality Regulations ("WQR") and Water Code, 18 C.F.R. Part 410, which have been incorporated into the Comprehensive Plan. The provisions relevant to DRN's objections are those establishing designated uses to be protected in Zone 4 of the Delaware Estuary where the Dock 2 project will be located and corresponding stream quality objectives. The designated uses include, among others, maintenance of aquatic life and navigation. *See* Water Code § 2.200; WQR §§ 3.10.3.C, 3.30.4.B.2.a, 3.30.4.B.4.a. and 3.30.4.C.

The harms and the impairments to the Comprehensive Plan DRN foresees are primarily those it contends may result from dredging of sediment in and around the planned location of Dock 2.[12] DRP intends to dredge approximately 665,000 cubic yards of Delaware River sediment in a 45-acre area no closer than 600 feet from the shoreline. *See* Findings ¶¶ 16 and 38. The construction will also temporarily disturb approximately 0.8 acres of land. *See* Findings ¶ 38. DRN is concerned with the potential for contaminated sediments to be resuspended by the dredging and thereby increase the toxicity and turbidity of the surrounding waters.

Dredging for channel deepening or maintenance occurs from time to time in the Delaware River Estuary. As DRP noted, the Delaware River Deepening Project involved

[12] In its comments submitted to the Commission during the public comment period on the Docket, DRN expressed particular concern about one of the products to be exported from the GLC, liquefied natural gas ("LNG"). The evidence at the hearing showed that any releases of LNG or LHG at the GLC are unlikely to pose a risk to water resources. *See* Findings ¶¶ 304 and 385.

dredging over 10,000 acres in the Delaware River; DRP's Dock 1 project approved by the Commission likewise involved dredging Delaware River sediments. *See* DRP Post-Hearing Brief at 14. With these examples, and there are others, it is clear that dredging can be conducted under some circumstances without substantially impairing or conflicting with the Comprehensive Plan. *See also,* Section 2.3.5.A.8 of the RPP (maintenance dredging). After examining the details of the proposed Dock 2 project, the Commission concludes that the proposed dredging for Dock 2 under the conditions imposed in the Docket would not substantially impair or conflict with the Comprehensive Plan.

We turn first to the potential impact of the Dock 2 project on resuspension of PCBs and other contaminants in the Delaware River sediments. The Delaware River Estuary is impaired for PCBs, and the Commission in cooperation with the Basin States has implemented a program to reduce discharges of PCBs by requiring dischargers to submit and implement pollutant minimization plans. *See* WQR § 4.30.9. DRN contends that resuspension of sediments containing PCBs from dredging activity may adversely affect water quality.

The Commission does not have specific programs for managing dredging in the Delaware River or protecting endangered or threatened species. New Jersey regulates dredging in its waters pursuant to its Coastal Management Program, and likewise has a mature program for the protection of endangered and threatened species. The NJDEP Dredging Manual provides guidance and criteria for, among other things, sediment sampling and testing for dredging projects. *See, e.g.,* Findings ¶ 213; Ex. DRP-39 (NJDEP Dredging Manual); N.J.A.C. 7:7 (NJDEP Coastal Zone Management Rules). The USACE regulates dredging under its Section

10/404 program[13] and also performs dredging activities of its own. When required by the Endangered Species Act, the USACE consults with the National Marine Fisheries Service ("NMFS") which reviews potential adverse impacts of federal actions on threatened and endangered species.

In the case of the Dock 2 project, all three of these agencies reviewed DRP's plans to dredge the Dock 2 area. After examining potential water quality impacts, the NJDEP, and the USACE after consulting with NMFS, approved the project by issuing a Waterfront Development Permit ("WDP"), Ex. J-3 and J-33, and a Section 10/404 Permit, respectively. *See* Findings ¶¶ 359 and 371. The WDP includes a state water quality certificate under section 401 of the Clean Water Act.[14] *See* Findings ¶ 373(a). The approvals are subject to temporal (seasonal) restrictions on construction activities and use of best management practices ("BMPs"). *See, e.g.*, Findings ¶¶ 85, 90, 99, 124, and 125.

The record evidence supports the weight given by DRBC to these approvals. With respect to PCBs and other toxic substances, the evidence showed that sediment resuspension is unlikely to cause or significantly contribute to a violation of DRBC water quality standards for PCBs or any other constituent. As explained in the DRBC Staff Comments, the New Jersey WDP for the Dock 2 project requires DRP to use a closed clamshell environmental bucket with limits on the rate of descent and lift and to implement other BMPs that will limit total suspended solids roughly to background levels. *See* Findings ¶¶ 191 and 358(a); Ex. J-50 (NJDEP

[13] Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403; Section 404 of the Clean Water Act, 33 U.S.C. § 1344.

[14] 33 U.S.C. §1341. A water quality certificate from New Jersey was required because DRP sought a permit from the USACE. The New Jersey certificate constitutes a determination by the state that the discharge meets applicable effluent limitations and water quality standards. *See, e.g., PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

responses to comments on the WDP) at 4 and DRBC Staff Comments at 7. The WDP also requires DRP to retain an independent dredging inspector. *See* Findings ¶ 359. The area of increased turbidity is expected to be small.[15] Recognizing that dredging will permanently remove from the Delaware River those dredged sediments sent to disposal locations, the Hearing Officer found that properly executed dredging and removal of PCB-contaminated sediments will confer a net water quality benefit. *See* Findings ¶¶ 58 and 249. *See also,* DRBC Staff Comments at 8.[16]

The Hearing Officer cited the "Versar" report which examined the USACE's Delaware River main channel deepening project. The Versar report concluded that sediments containing concentrations of PCBs (as determined by bulk sediment data) when suspended by a bucket dredge (not an environmental clamshell bucket) would not cause DRBC's water quality criteria to be exceeded using worst case assumptions. *See* Ex. DRN-25 (Versar Report – PCB Mobilization During Dredging Operations and Sequestration by Upland Confined Disposal Facilities) at 9-18; Findings ¶ 175. The record also shows that concentrations of PCBs found in the Dock 2 dredging area are expected to be at a range typical of the Delaware River Estuary. *See* Findings ¶ 246.[17] Likewise, the evidence showed that the detected concentrations of metals in the bulk sediment data do not present any water quality concerns. *See* Findings ¶ 248. In light

[15] DRP's expert Ramboll concluded that "elevated concentrations of TSS [total suspended solids] would extend 'only a small area around the dredge' resulting in maximum concentrations of TSS up to 120 mg/L above background, which would drift no further than approximately 328 feet down-current from the dredge bucket before returning to background levels." Findings ¶ 197.

[16] The Commission recognizes that dredging has been used as a method of remediating sediments contaminated with PCBs. *See, e.g.,* www.epa.gov/hudsonriverpcbs.

[17] DRP's PCB expert, Gregory Cavallo, P.E., testified that the detected concentrations of PCBs in the bulk sediment data were "commensurate with background concentrations." Findings ¶ 171. He also opined that the probability of having a material adverse impact to water quality during dredging "is almost non-existent." Findings ¶ 173.

of the typical concentrations of PCBs in the sediments, the requirements imposed by NJDEP to utilize an environmental clamshell bucket and other BMPs, and the location of the dredging at least 600 feet from the shore, the water quality impacts from the Dock 2 dredging are unlikely to create concentrations of PCBs or other toxic substances that would substantially impair or conflict with the Comprehensive Plan.

DRN challenges this conclusion on the ground that DRP improperly relied on the results of composite sampling to show that the concentration of contaminants in sediments would not harm water quality. Pursuant to a Sediment Sampling and Analysis Plan ("SSAP") approved by the NJDEP and also submitted to DRBC, *see* Findings ¶¶ 223 and 242, DRP collected 17 composite samples which were analyzed for bulk chemistry. The sampling results were presented to the NJDEP in DRP's Dredged Material Management Plan for the Dock 2 project and approved as part of the WDP. According to DRN, these composite samples are taken solely to characterize sediments for disposal and are of no value in evaluating the potential impacts of dredging on water quality in the area to be dredged. *See* DRN Objections 21-23.

The testimony of the USACE Philadelphia District's Chief of the Environmental Resources branch and of an analytic chemist refuted DRN's contention. According to their testimony, the bulk sediment data, which are primarily used to characterize dredged sediment for purposes of disposal, also provide information about contaminants that may be resuspended during dredging. *See* Staff Comments at 6 and citations therein; Tr. 1842: 4-10 (Pasquale). Here, the results showed contaminant concentrations typical of sediments for this section of the Delaware River. *See* Findings ¶ 246 and Ex. DRP-127 at pp. 1 and 9. In light of the BMPs required for dredging, these concentrations do not present water quality concerns. *See* DRBC Staff Comments at 5-6 and evidence cited therein. Although DRBC or NJDEP could have

required additional sampling if circumstances warranted, here they did not. The totality of record evidence shows that DRBC did not abuse its discretion by not requiring further and different sediment sampling in conjunction with the Dock 2 project.

DRN also contends that turbidity created during dredging for the Dock 2 project will harm aquatic life in the Delaware River Estuary. For purposes of analysis under Section 3.8 of the Compact, this contention was evaluated under Section 2.200 of the Water Code, 18 C.F.R. Part 410, which provides: "the quality of Basin waters shall be maintained in a safe and satisfactory condition for… wildlife, fish and other aquatic life." Section 3.30.4 of the Water Quality Regulations implements this Water Code provision by requiring that water quality in Zone 4 be maintained in a safe and satisfactory condition, for, among other uses, "maintenance of resident fish and other aquatic life." *See also*, additional WQR provisions cited on page 12 of this Opinion.

As an initial matter, the record evidence showed that the turbidity created by the dredging will be localized, temporary, and of low concentration. *See* Findings ¶¶ 152, 197, 307, 308, 316. The environmental bucket required for the Dock 2 project will retain more than 95% of sediment *See* Findings ¶ 189. Significantly, in the course of its own permit review of the Dock 2 project, the USACE conferred with the NMFS in accordance with the requirements of Section 7 of the Endangered Species Act. NMFS issued a Biological Opinion in 2017 in conjunction with the Dock 1 project, which it amended and reaffirmed in a 2019 Letter of Concurrence addressing the cumulative effects of the Dock 1 and Dock 2 projects. *See* Findings ¶¶ 96-98. NMFS found the levels of total suspended solids (TSS) were expected to be well below the threshold known to elicit harmful effects to benthic habitat or aquatic life. *See* Exhibits J-51 (USACE biological assessment), J-53 (NMFS Letter of Concurrence); J-38 (NMFS Biological Opinion for Dock 1)

and Findings ¶¶ 208, 209. Nonetheless, NMFS recommended and USACE imposed a prohibition on construction between March 15 and September 15 to protect juvenile sturgeon. NMFS characterized the effects of the project as "insignificant and/or discountable," and concluded that effects to sturgeon will be too small to be meaningfully measured, detected or evaluated.[18]

DRN contends that the Dock 2 project will violate the requirement in the Water Quality Regulations for maintenance of aquatic life because it will allegedly harm submerged aquatic vegetation ("SAV"). SAV is a form of aquatic biota classified as aquatic life under Section 1.20.6.E of the Water Quality Regulations. "Vegetated shallows," which may contain SAV, are designated by the U.S. Environmental Protection Agency as a special aquatic site under § 404(b)(1) of the Clean Water Act. These shallow, vegetated areas provide habitat for aquatic species and other ecological benefits. *See* 40 C.F.R. § 230.43 and Findings ¶ 135. DRN's expert witness James A. Schmid, Ph.D. opined that sediment resuspension and turbidity, destabilization of the shoreline and stormwater discharges from the Dock 2 project will cause adverse impacts to

[18] DRN objects to the reliance by NJDEP, NMFS, USACE and DRBC on data from a different waterbody, the Arthur Kill, to estimate the extent of turbidity that will result from the Dock 2 dredging. DRN contends that DRP should have been required to demonstrate to DRBC the applicability of the Arthur Kill data to conditions in the Delaware River, or should have been required to perform site-specific modeling and monitoring. NMFS and NJDEP, whose staff have expertise on endangered and threatened species, concluded that the data had sufficient relevance to the Delaware River conditions to warrant their consideration. Based on their evaluation of the evidence presented at the hearing, neither the Hearing Officer nor DRBC staff were persuaded that this conclusion was incorrect or sufficiently uncertain to necessitate further study. It was appropriate for DRBC to rely on NJDEP and NMFS. *See* Compact §§ 1.5 and 3.9(b). In addition, although the Hearing Officer recognized that juvenile sturgeon may not be able to swim away if an area of high turbidity were to be created during dredging, *see* Findings ¶ 289, NMFS found the expected TSS levels would not adversely affect juvenile and adult estuarine fish. Findings ¶ 305. The restriction on dredging between March 15 and September 15 required by USACE and the BMPs required by NJDEP should also serve to avoid harm to early life stages of sturgeon and render insignificant any impacts to juvenile and other life stages of sturgeon in the area. Ex. J-53 at p. 3.

SAV. *See* Ex. DRN-14 at pp. 6-12 (Schmid Report) and DRN-22 at 7-9 (Schmid rebuttal report).

As NJDEP noted in its response to comment document regarding its WDP (J-50), DRP reduced potential impacts to SAV by repositioning Dock 2 to avoid SAV beds. *See* Findings ¶¶ 147-149 and ¶ 358(c). The area of SAV to be impacted by the Dock 2 project is less than 0.1 acres. *See* Findings ¶ 138. The prohibition the USACE imposed on construction between March 15 and September 15 protects SAV during much of its growing season. With respect to any remaining SAV in the project area, use of the environmental bucket and other dredging BMPs required by NJDEP will minimize the area of SAV impacted by resuspended sediment. DRP's consultant Laura George of Ramboll testified that based on studies of other dredging projects, Ramboll concluded that elevated TSS concentrations would extend on a temporary basis to only a small area around the dredge and not impact SAV beds located near the shore which were the focus of the concerns of DRN's expert. *See* Tr.1451:7-1452:7; 1562:23-1563:8. *See also*, DRP Post-Hearing Brief, n.15 (USACE endorsed Ramboll's assessment in its Biological Assessment (J-51 at 19), and NMFS concurred, J-53 at 3 (Letter of Concurrence) and accompanying text); and evidence cited in *id.*, Attachment A at 1. Based on the record evidence, the impact of dredging on SAV would be minimal and would not substantially impair or conflict with the Comprehensive Plan.

Likewise, the evidence did not show that the ongoing contaminated soil remediation work at the GLC undertaken in accordance with NJDEP requirements[19] or the temporary disturbance of 0.8 acres of land for the Dock 2 project (*see* Findings ¶ 271) posed sufficient risk

[19] The contaminants present in soils and groundwater in the GLC due to historic industrial activities are being remediated under the New Jersey Department of Environmental Protection's Site Remediation Program.

to SAV to require further investigation or denial of project approval. A new stormwater collection, conveyance, and treatment system to be installed has been approved by NJDEP and its plans have been submitted to DRBC as required by the docket for GLC Dock 1. This system is expected to improve the quality of stormwater runoff or discharges. *See* DRBC Staff Comments at 15-17 and citations therein. No additional stormwater outfalls or controls are required for the Dock 2 project. *See* Findings ¶ 267. The sediment will be dredged to a standard 3:1 slope, and sloughing will be minimal. *See* Findings ¶¶ 202, 203, and 205. The evidence shows that the potential impact to SAV is not a valid basis for denying approval of the Dock 2 project.

DRN further asserted for the first time on administrative appeal that mussels, including state-listed threatened or endangered freshwater mussels, will be harmed. While the Comprehensive Plan designates maintenance of aquatic life as a use in Zone 4, it does not contain a specific program for threatened and endangered species or for mussels. As such, DRBC ordinarily relies on state and federal endangered species programs to provide any protections for these species beyond those DRBC would ordinarily require. The Commission retains authority to impose additional requirements supported by the particular circumstances of a proposed project.

DRN did not produce evidence of the quantity or types of freshwater mussels that may be present in and around the dredged area. It argues that there is sufficient evidence of the possibility of the presence of mussels to warrant requiring DRP to conduct a mussel survey. DRN's expert acknowledged the difficulty in conducting such a survey in Zone 4 of the Estuary which contains waters that are deep and turbid. *See* Findings ¶ 338.

Searches of New Jersey's National Heritage Program database were performed on DRP's behalf in conjunction with DRP's New Jersey WDP application. *See* DRBC Staff Comments at 18 and citations therein; Findings ¶¶ 117, 348. No threatened or endangered mussel species were identified within or near the area to be dredged. After consulting with New Jersey's Endangered and Non-Game Species Program led by a biologist who specializes in the distribution and biology of freshwater mussels, NJDEP did not request additional surveying. *See* DRBC Staff Comments at 16. DRBC staff properly utilized the NJDEP to determine whether additional information on mussels should be gathered.

Evidence introduced at the hearing supported the decision of these agencies not to request a site-specific mussel survey. The evidence showed that the dredging will occur in waters approximately 20-40 feet deep with little or no SAV present, in sediment that is fine grained, and in open water near the Federal Navigation Channel. *See* DRP Proposed Findings of Fact 364-368 and record citations therein. These conditions do not provide favorable mussel habitat. *See* Findings ¶ 346. Staff reasonably concluded that the testimony at the hearing from DRN's expert regarding data collected from areas that differ markedly from the Dock 2 project area in water depth, sediment material, and shoreline development did not warrant requiring a mussel survey in the Dock 2 area. Under these circumstances, the decision not to require further sampling was reasonable.

V. Conclusion

As a whole, the administrative record supporting the Docket decision demonstrates that the Commission had sufficient information from which to conclude that the Dock 2 project would not substantially impair or conflict with the Comprehensive Plan. The Docket decision is affirmed in accordance with the Commission's Resolution of this date.

Dated: December 9, 2020

JOINED IN FULL: By those Signatory Parties to the Compact voting in favor of the Resolution adopting this Opinion.

APPENDIX A – MODIFIED FINDINGS OF FACT

Findings are numbered identically to Hearing Officer's Proposed Findings of Fact

3. DRN is a non-profit organization established in 1988 to protect and restore the Delaware River, its tributaries and habitats. Maya van Rossum serves as the Delaware Riverkeeper and is an employee and officer of the Delaware Riverkeeper Network ("DRN"). The Delaware Riverkeeper is a full-time privately-funded ombudsman whose stated mission is the protection of the waterways in the Delaware River Watershed. (Request for Hearing. pp. 2-3)

104. The tidal Delaware River and its tidal tributaries near the Site provide habitat for a group of bivalves (clams) known as freshwater or "pearly" mussels which were once more abundant in the region. (DRN-15, p. 2)

106. Freshwater mussels play an important role in the diversity and function of the freshwater ecosystems in which they live. (DRN-15, p.3)

118. NJDEP concluded that any potential effects on mussels from transitory increases in TSS concentrations resulting from the dredging of Dock 2 or from any alleged increased ship traffic were insufficient to preclude issuance of the WDIP permit. (Exhibit J-3).

135. The U.S. Environmental Protection Agency has designated vegetated shallows as a special aquatic site under § 404(b)(1) of the Clean Water Act. The vegetation in the shallows, which may include SAV, has value for nesting, spawning, nursery, cover, forage, and protection of shorelines from erosion and wave action. (40 C.F.R. § 230.43)

137. Add at the beginning: Depending on the extent of dredging and the dredging methodology and BMPs used, it is possible that….

140. Dredging for the construction of Dock 2 as well as any future maintenance dredging will generate turbidity and decrease water transparency to the extent further described in these Findings of Fact. (DRN-14, p.6 and other Findings herein).

142. Add at end: although the BMPs and temporal restrictions required by NJDEP and USACE will reduce any adverse impact.

143. Add at end: although as a result of the BMPs and temporal restrictions required by NJDEP and USACE, and DRP's relocation of its planned structures, no significant adverse impacts on SAV are expected.

155. Although the potential impact of stormwater discharge from the Site on wild celery beds outside the Dock 2 dredging area have not been quantified, the stormwater management system and discharges approved by NJDEP will likely reduce any stormwater discharge impacts that would occur absent construction and operation of the stormwater management system. (DRN-14, p. 6)

182. Add: DRBC's Docket does not exempt DRP from complying with the terms of its NJDEP permits, including a NJPDES stormwater permit.

185. By using a closed clamshell environmental bucket during construction of Dock 2, DRP will conduct dredging by a method protective of the environment. (Tr. 1788:12-17 (DePasquale); DRP-131, p. 9)

187. After "river water" add: -- i.e., will have only low concentrations of dredged sediments --.

192. The above-described BMPs are in accord with national and international industry practices and represent a stringent set of requirements. (DRP-131, p. 8)

289. Add sentence: Sea level rise due to climate change has by far the most substantial effect, possibly rendering the cumulative effect of all dredging in the Delaware River insignificant.

290. Delete Finding

293. Since the industrial revolution, the Delaware River Estuary has experienced significant dissolved oxygen sags. (DRN-12, p. 2)

299. It is possible for salt line incursion and dissolved oxygen sags to occur at the same time, potentially leaving sturgeon with no suitable refuge. (DRN-12, p. 2)

300. Change “clarification letter” to “letter of concurrence”.

334. Change “‘project reach’” to “Delaware River Estuary”.

337. Two of the more detailed shallow water collections from these surveys were conducted within approximately 1 to 2 miles of the Dock 2 facility. (DRN-19 at 3; Tr. 91:6-8)

355. As of 1961, forty-three State agencies, fourteen interstate agencies, and nineteen Federal agencies exercised a multiplicity of powers and duties regarding the water resources of the Basin. (Compact, Preamble, ¶ 5). Many government agencies have such duties at the present time.