

PROPOSED RULEMAKING

DELAWARE RIVER BASIN COMMISSION

[25 PA. CODE CH. 901]

Rules of Practice and Procedure

Summary: The Commission will hold public hearings and accept written comment on a proposal to amend its Rules of Practice and Procedure to: resolve ambiguities around the automatic termination of project approvals issued by the Commission; make conforming amendments to related provisions as appropriate; update the Commission's Water Resources Program and Project Review procedures to better conform them to current practice; remove references to the Federal Freedom of Information Act that create confusion about the regulations applicable to requests for Commission public records; and align pronouns with the Commission's policies regarding diversity, inclusion, and belonging.

Dates:

Written comments: Written comments will be accepted through 5 p.m. on November 30, 2023.

Public hearings: Public hearings will be held remotely via Zoom on the following dates at the noted times. Details about accessing the hearings are available on the Commission's website, www.drbc.gov.

1. November 13, 2023, 1:30 p.m. to no later than 4 p.m.
2. November 13, 2023, 6:30 p.m. to no later than 9 p.m.

A notice including these public hearing dates, times and locations was posted on the Commission's website on September 28, 2023, and circulated that day directly to Commission notice subscribers interested in this subject matter. Members of the public may sign up through the Commission's website to receive direct notice via email of additions or changes to the information provided above.

Addresses:

To submit written comments: Written comments will be accepted until 5 p.m. on November 30, 2023 through the Commission's online public comment collection system at: <https://hearing.drbc.commentinput.com?id=T95htQGAg>. To request an exception from use of the online system based on lack of access to the Internet, please contact: Commission Secretary, DRBC, P.O. Box 7360, West Trenton, NJ 08628.

To register to speak at public hearings: Although attendance at the hearings is not limited and requires no registration, those who wish to provide oral comment at a hearing must register in advance to do so. Registration will be through Zoom and Eventbrite. Links to register for each of the public hearing dates and times are posted at www.drbc.gov. Online registration will remain open until 5 p.m. on the day prior to the hearing date or until all available speaking slots have been filled, whichever is earlier. Each person who wishes to provide oral comment may do so at only one public hearing. Registrations will be monitored, and if capacity is not adequate to accommodate all who wish to speak, additional opportunities may be added.

See SUPPLEMENTARY INFORMATION for details regarding the substance of written comments.

For Further Information Contact: For information regarding the public hearings and submission of written comments, contact Kate Schmidt, Communications Specialist, at kate.schmidt@drbc.gov (preferred) or 609-883-9500, ext. 205. For information concerning the proposed amendments, contact Pamela Bush, Commission Secretary and Assistant General Counsel, at pam.bush@drbc.gov (preferred) or 609-477-7203.

Supplementary Information: The Delaware River Basin Commission ("DRBC" or "Commission") is a Federal-interstate compact agency formed by the enactment of concurrent legislation by four states and the United States in 1961¹ to manage the water resources of the Delaware River Basin (the "Basin") without regard to political boundaries. The Commission's members are, ex officio, the governors of the basin states (Delaware, New Jersey, New York, and Pennsylvania) and the Division Engineer of the U.S. Army Corps of Engineers North Atlantic Division, who represents the United States.

Background

The Commission's Rules of Practice and Procedure ("RPP"), comprising part 401 of Title 18 of the Code of Federal Regulations, govern the adoption and revision of the Commission's Comprehensive Plan and Water Resources Program, the exercise of the Commission's authority pursuant to the provisions of Article 3.8 of the Delaware River Basin Compact (the "Compact") and other actions of the Commission mandated or authorized by the Compact, including but not limited to the administration of public access to records and information in the Commission's possession.

The proposed amendments are intended primarily to resolve ambiguities in the current language of paragraph (a) of § 401.41 ("Limitation of approval"); to replace certain out-of-date provisions, such as the requirement for paper copies of project review applications under Section 3.8 of the Compact, that no longer conform to current practice; and to eliminate references to the Federal Freedom of Information Act ("FOIA") in Subpart H—Public Access to Records and Information, because the Commission is not a Federal agency and because the Compact expressly exempts the Commission from the Federal Administrative Procedure Act, of which FOIA is a part. The changes proposed to § 401.41 create the need for conforming changes in four other provisions of Subpart C but do not alter the Commission's interpretation or implementation of these provisions.

Ambiguities in the language of paragraph (a) of § 401.41 came to light in 2022 in connection with a request in accordance with this provision for extension of an approval issued in 2019 under Section 3.8 of the Compact. The current provision states that a Commission approval "shall expire three years from the date of Commission action unless prior thereto the sponsor has expended substantial funds (in relation to the cost of the project) in reliance upon such approval." The provision further provides that "[a]n approval may be extended or renewed by the Commission upon application." The questions raised by this language include: whether, if the listed conditions are met, an expiring docket automatically extends or renews without the need for Commission

¹ United States Public Law 87-328, Approved Sept. 27, 1961, 75 Statutes at Large 688; 53 Delaware Laws, Ch. 71, Approved May 26, 1961; New Jersey Laws of 1961, Ch. 13, Approved May 1, 1961; New York Laws of 1961, Ch. 148, Approved March 17, 1961; Pennsylvania Acts of 1961, Act. No. 268, Approved July 7, 1961.

action; whether, if acknowledgement or a decision is necessary, the Commission must vote on the matter or the Executive Director may issue the acknowledgment or render the decision; whether the project sponsor may be relieved of the requirement that it have “expended substantial funds” if circumstances beyond the sponsor’s control have prevented it from doing so; whether public notice and a public hearing should be provided before an extension is acknowledged, approved or denied; and the duration of an extension if acknowledged or approved.

Proposed Amendments

Amendments to § 401.41

Proposed § 401.41(a). Paragraph (a) of § 401.41 operates when the instrument of Commission approval contains no expiration date. This occurs when the Commission approves an activity such as dredging under Section 3.8 of the Compact and accompanying regulations at 18 CFR 401.35(a)(7) or construction under the Commission’s Flood Plain Regulations, 18 CFR part 415. Because the Commission exercises no continuing oversight over dredging and construction activities, no renewal of an approval for such activities is ordinarily required. Section 401.41(a) serves as a backstop in the unusual instances in which the approved activity is not promptly undertaken. In contrast, approvals for ongoing withdrawals and discharges are issued for limited terms of ten and five years, respectively, as set forth in the instrument of approval. Under existing regulations, an application for renewal of an approval, when required, must be submitted no fewer than 120 days in advance of the assigned expiration date unless the instrument of approval provides otherwise. See 18 CFR 401.43(b)(4)(ii). (An amendment proposed in this rulemaking would change the required timing of submission to 180 days in advance of the assigned expiration date.) That paragraph (a) of § 401.41 operates only when an approval contains no expiration date is made explicit in the amended rule.

In addition, the proposed amendments extend from three years to five the time by which a Commission approval that lacks an expiration date “shall expire” if certain requirements are not met. In the Commission’s view, a period of five years, rather than the current three, is appropriate given modern permitting and construction timeframes for Commission-approved projects. As noted above, five years is also the term of a Commission approval for a wastewater discharge, and is the term normally applied to individual permits issued under the Coastal Zone Management Rules established by an agency of one of the Commission’s member states, the New Jersey Department of Environmental Protection (“NJDEP”) (see N.J. Admin. Code Sec. 7.7-8.2).

Additional changes to § 401.41 are proposed to resolve ambiguities in the current language. Under the proposed revision, the project sponsor must submit a written request for an extension, accompanied by supporting documentation. In response, the Executive Director by a written determination must grant a five-year extension if the sponsor’s request and supporting documentation demonstrate to the Executive Director’s satisfaction that certain criteria are met. Specifically, the Executive Director must grant the extension if he or she determines: (1) that no material change is proposed to the project as approved; (2) that the sponsor has expended, at a minimum, the lesser of one million dollars or substantial funds in relation to the cost of the project or has been prevented from doing so by circumstances beyond the sponsor’s control; and (3)-(4), that neither the Commission’s Comprehensive Plan nor the condition of the project

site has changed in a manner important to determining whether the project would substantially impair or conflict with the Comprehensive Plan.

The term “material change” is proposed to be added to Subpart I—General Provisions, § 401.121 (Definitions), and defined as, “a change to a project previously approved by the Commission that is important in determining whether the project would substantially impair or conflict with the Commission’s comprehensive plan.” The proposed definition restates the purpose of the Commission’s review as set forth in Article 3.8 of the Compact, which provides in relevant part that “[t]he commission shall approve a project whenever it finds and determines that such project would not substantially impair or conflict with the comprehensive plan and may modify and approve as modified, or may disapprove any such project whenever it finds and determines that the project would substantially impair or conflict with such plan.”

As proposed, amended § 401.41(a) would also require public notice of a determination by the Executive Director on or before the Commission’s next quarterly public hearing or business meeting. The proposed language establishes that determinations by the Executive Director under the provision are appealable in accordance with Subpart F—Administrative and Other Hearings, §§ 401.81—401.90.

Proposed § 401.41(b). The proposed amendments include a new § 401.41(b), which makes clear that if one or more material changes to an approved project are proposed, or if the Executive Director determines that any one or more of the other criteria listed at proposed § 401.41(a) are not satisfied, the project sponsor must apply for renewal and modification of its approval in accordance with the customary application procedure for any docket renewal or approval issued by the Commission. This section applies to any Commission approval, whether or not it includes an expiration date, and regardless of whether the project sponsor has expended a minimum amount of funds in relation to the cost of a project (Existing § 401.43(b)(4)(iii) sets forth the fee associated with modification of a Commission approval).

Proposed § 401.41(c). Proposed § 401.41(c) would effectively preserve the current § 401.41(b), which provides that a project review application (as opposed to a Commission approval) that remains dormant (defined by the rule as “no active pursuit of approvals”) for three years from the date of Commission receipt of the application will terminate without further action by the Commission.

Conforming amendments in part 401

Introduction of the new defined term, “material change,” creates the need to replace existing language with the new term in four other provisions of part 401. In each of these instances, the current language includes the undefined term “substantial change,” or some variant of that term. The affected provisions are §§ 401.8(a), 401.42(e), 401.43(b)(1)(ii) and 401.43(b)(4)(iii).

Updates of subparts B and C

The proposed amendments would revise provisions of the RPP concerning the Water Resources Program (subpart B) and the review of projects under Section 3.8 of the Compact (subpart C), to align them with current practice.

Period to be covered by the Water Resources Program. Article 13.2 of the Compact requires the Commission to “annually adopt a water resources program, based upon the comprehensive plan, consisting of the projects and facilities which the commission proposes to be undertaken. . .during the ensuing six years or such other

reasonably foreseeable period as the commission may determine.” Currently, § 401.22 dictates that the Water Resources Program “will be a reasonably detailed amplification of that part of the Comprehensive Plan which the Commission recommends for action within the ensuing six-year period.” The proposed revision would restore the flexibility the Compact allows regarding the period to be covered by the annual program.

Information required for concurrent inclusion of a project in the Comprehensive Plan and Water Resources Program. Section 401.23 establishes that a project may be added to the Comprehensive Plan and included in the Water Resources Program by concurrent action of the Commission, provided that in such instances the project sponsor has furnished the Commission with detailed information, a list of which is set forth in the provision. As amended, the list is replaced by a reference to § 401.4(b), which contains a list of the information that must be provided for any project proposed to be included in the Comprehensive Plan.

Removal of provisions concerning out-of-use classifications. Sections 401.24–401.26 relate to a system of classifying projects included in the Water Resources Program as either “A” list or “B” list projects. Because this classification system is no longer in use, these sections are proposed to be deleted.

Time of referral of a project by a State or Federal agency. The proposed amendments include a revision of § 401.38, captioned “Form of referral by State or Federal agency,” to conform the language of this provision to current practice. In practice, the Commission reviews projects concurrently with reviews performed by the regulatory agencies of its member states and the Federal government. Accordingly, as proposed, § 401.38 provides that upon receipt of an application for a project that is subject to Commission review (rather than upon issuance of an approval as in the current rule), the member state agency will refer the application to the Commission.

Form of submission of a project review application. The proposed rule would amend § 401.39, captioned “Form of submission of projects,” to provide that for any project subject to review under Section 3.8 of the Compact, an application will be considered complete and ripe for technical review by Commission staff when the project sponsor submits a completed application using the form provided on the Commission’s website and pays the applicable fee plus any outstanding fees, penalties, or interest. The Commission’s ability to request additional information from a project sponsor is preserved. The amendment would leave certain submission requirements and procedures to the instructions in the applicable form. It would conform § 401.39 to the practice already used by the Commission and most applicants, as well as by some regulatory agencies of the Commission’s State and Federal members.

Timely submission of a renewal application. The proposed amendments include the revision of paragraph § 401.43(b)(4)(ii) to provide that a project sponsor must file its application for renewal of an expiring approval 180 calendar days prior to the date of expiration of the approval to avoid a late fee. The current rule requires that to avoid a late fee, a renewal application must be filed 120 days prior to the date of expiration of the approval.

Fees for name change and change of ownership. The amendments are proposed to include consolidation into a single fee of the fees that currently apply, respectively,

when the sponsor of a project undergoes a name change (§ 401.43(b)(4)(iv)) and when the project undergoes a change of ownership (§ 401.43(b)(4)(v)). A corresponding change is required to the accompanying Table 3 to § 401.43. The amendment is proposed because the two types of events entail comparable time and effort on the part of the Commission’s project review staff.

Public Access to Records and Information

Subpart H of the RPP contains regulations related to the disclosure of Commission records to members of the public upon request. The rules currently identify the Federal FOIA as authority pursuant to which the Commission promulgated Subpart H, and the subpart contains multiple references to the FOIA. Although certain language in the current Subpart H is identical to language in the FOIA, the Commission, a Federal-interstate compact agency, is not a Federal agency, and the Commission is expressly exempt by § 15.1(m) of the Compact from the Federal Administrative Procedure Act, of which FOIA is a part. The agenda for a January 29, 1975 Commission conference session and business meeting at which adoption of the then-draft Subpart H regulations was discussed makes clear the Commission understood this at the time. The agenda states, “The Commission is not subject to the Administrative Procedures (sic) Act. However, staff recommends approval of these regulations in any case as a matter of desirable policy.” At a business meeting on February 26, 1975, the Commission adopted the Subpart H regulations as proposed.

References to the FOIA in Subpart H have created confusion on the part of individuals who seek access to Commission records. In particular, requests for records filed with the Commission under Subpart H often cite to procedural provisions of the FOIA that differ from those in Subpart H. The proposed amendments would eliminate an important source of such confusion. The proposed amendments also would remove gendered pronouns used in the current regulations to align with the Commission’s support of diversity, equity, inclusion and belonging. No substantive changes to subpart H are proposed.

Public Process

Substance of comments. The Commission welcomes and will consider comments that concern the potential impacts of the proposed amendments on the conservation, utilization, development, management and control of the water and related resources of the Delaware River Basin and on public participation in the Commission’s water resource management activities.

Non-digitized, voluminous materials such as books, journals and collections of documents will not be accepted. Digital submissions of articles and websites must be accompanied by a statement containing citations to the specific findings or conclusions the commenter wishes to reference.

Submission of written comments. Written comments along with any attachments should be submitted through the Commission’s web-based comment system (<https://hearing.drbc.commentinput.com?id=T95htQGAg>) until 5 p.m. on November 30, 2023. All materials should be provided in searchable formats, preferably in .pdf searchable text. Notably, a picture scan of a document may not result in searchable text. Comments received through any method other than the designated on-line method, including via email, fax, postal/delivery services or hand delivery, will not be considered or included in the rulemaking record unless accompanied by a written request for an exception based on lack of access to the web-based

comment system. Such requests and accompanying materials may be sent to: Commission Secretary, DRBC, P.O. Box 7360, West Trenton, NJ 08628.

Public hearings. To provide for an orderly process, support public and community health measures, and provide expanded access to interested parties regardless of their geographic location, the Commission is conducting its public hearings virtually. Attendance at the hearings is not limited and requires no registration. However, to eliminate uncertainty on the part of attendees about whether they will have an opportunity to provide oral comment, those who wish to speak at a hearing must register in advance to do so, using the link on the Commission’s website. Registrations will be monitored, and if capacity is not adequate to accommodate all who wish to speak, additional opportunities may be added. Key elements of the procedure are as follows:

- Online registration to speak at a public hearing will remain open until 5 p.m. the day prior to each hearing.
- Each person who wishes to provide oral comment may do so at only one public hearing.
- Speaking time will be limited to approximately three minutes per speaker.
- Elected government officials and their staff will have the opportunity to identify themselves when registering to attend a hearing.
- Attendance at the public hearings is not limited and requires no advance registration.
- Written and oral comment will receive equal consideration.

The Commission appreciates the public’s participation and input on this important matter.

Translation Services for Rulemaking Materials. The Commission will consider requests for translation of this notice and the proposed rule text into languages other than English. To request translation of documents related to this rulemaking, please send an e-mail to translate@drbc.gov. Please specify both the requested language and the requested documents.

More Information. Detailed and up-to-date information about the public process, including all proposed rule text, related documents and links for online registration to speak at each of the scheduled public hearings, can be found on the DRBC website, www.drbc.gov.

For the reasons set forth in the preamble, the Delaware River Basin Commission proposes to amend its *Administrative Manual, Rules of Practice and Procedure*, as set forth below.

DELAWARE RIVER BASIN COMMISSION
18 C.F.R. CHAPTER III—SUBCHAPTER A—
ADMINISTRATIVE MANUAL
PART 401—RULES OF PRACTICE AND
PROCEDURE
[INCORPORATED BY REFERENCE AT
25 PA CODE §§ 901.1-901.2]

(Editor’s note: New text appears in bold face with underscore, and text to be deleted appears in bold face within brackets. Asterisks represent no change to the existing text.)

Subpart A—Comprehensive Plan

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§ 401.8 Public projects under Article 11 of the Compact.

(a) After a project of any Federal, State or local agency has been included in the Comprehensive Plan, no further action will be required by the Commission or by the agency to satisfy the requirements of Article 11 of the Compact, except as the Comprehensive Plan may be amended or revised pursuant to the Compact and this part. Any project which is **materially** changed [**substantially**] from the project as described in the Comprehensive Plan will be deemed to be a new and different project for the purposes of Article 11 of the Compact. Whenever a change is made the sponsor shall advise the Executive Director, who will determine whether the change is deemed [**substantial**] **a material change** within the meaning of this part.

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Subpart B—Water Resources Program

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§ 401.22 Concept of the program.

The Water Resources Program, as defined and described in Section 13.2 of the Compact, will be a reasonably detailed amplification of that part of the Comprehensive Plan which the Commission recommends for action [**within the ensuring six-year period**]. That part of the Program consisting of a presentation of the water resource needs of the Basin will be revised only at such intervals as may be indicated to reflect new findings and conclusions, based upon the Commission’s continuing planning programs.

§ 401.23 Procedure.

The Water Resources Program will be prepared and considered by the Commission for adoption annually. [Each project] Projects included in the Water Resources Program shall have been previously included in the Comprehensive Plan, except that a project may be added to both the Plan and the Program by concurrent action of the Commission. **In such instances, the [The] project’s sponsor shall furnish the [following] information listed in § 401.4(b) prior to the inclusion of the project in the Comprehensive Plan and Water Resources Program. [:**

- (a) **The Comprehensive Plan data brought up-to-date for the period of the Water Resources Program;**
- (b) **Specific location and dimension of a structural project, and specific language of a standard, policy or other non-structural proposal;**
- (c) **The plan of operation of a structural project;**
- (d) **The specific effects of a non-structural project;**
- (e) **Sufficient data to indicate a workable financial plan under which the project will be carried out; and**
- (f) **A timetable for implementation.**

§ 401.24 Preparation and adoption.

The Water Resources Program will be prepared and considered by the Commission for adoption annually. Projects required to satisfy the Basin

needs during the period covered by the Program may be classified as follows:

(a) A-List: This shall include public projects which require no further review, and inclusion in such list shall be deemed to be approved for the purposes of Section 3.8 of the Compact;

(b) B-List: This shall include public projects not included in the A-list and privately sponsored projects which are proposed or anticipated by the Commission.

§ 401.25 Alternatives for public projects.

Any public project which has been included in the Comprehensive Plan but is not on the "A" list of the current Water Resources Program, at the option of the sponsor, may be submitted for review and approval under Section 3.8 of the Compact in accordance with Subpart C of these regulations.

§ 401.26 Inventory of other projects.

Each Water Resources Program will include, for information purposes only, an inventory of projects approved during the previous year pursuant to Section 3.8 of the Compact but which are not part of the Comprehensive Plan or Water Resources Program.]

Subpart C—Project Review Under Section 3.8 of the Compact

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§ 401.38 Form of referral by State or Federal agency.

Upon receipt of an application [approval] by any [state] State or [federal] Federal agency for [of] any project reviewable by the Commission under these regulations, if the project has not prior thereto been reviewed and approved by the Commission, such agency shall refer the project for review under Section 3.8 of the Compact in such form and manner as shall be provided by Administrative Agreement.

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§ 401.39 Form of submission of projects [not requiring prior approval by State or Federal agencies].

[Where a project does not require approval by any other state or federal agency, or where such approval is required but an Administrative Agreement is not in force, the project shall be submitted directly to the Commission for review and determination of compatibility with the Comprehensive Plan, in such form of application, with such supporting documentation, as the Executive Director may reasonably require for the administration of the provisions of the Compact. These shall include without limitation thereto:

(a) Exhibits to accompany application. The application shall be accompanied by the following exhibits:

- (1) Abstract of proceedings authorizing project, where applicable;
- (2) General map showing specific location and dimension of a structural project, or specific language of a standard or policy in the case of a non-structural proposal;
- (3) Section of the United States Geological Survey topographic map showing the territory and watershed affected;

(4) Maps, drawings, specifications and profiles of any proposed structures, or a description of the specific effects of a non-structural project;

(5) Written report of the applicant's engineer showing the proposed plan of operation of a structural project;

(6) Map of any lands to be acquired or occupied;

(7) Estimate of the cost of completing the proposed project, and sufficient data to indicate a workable financial plan under which the project will be carried out; and

(8) Analyses and conclusions of regional water supply and wastewater investigations.

(b) Letter of Transmittal. The application shall be accompanied by a letter of transmittal in which the applicant shall include a list of all enclosures, the names and addresses to which communications may be directed to the applicant, and the names and addresses of the applicant's engineer and counsel, if any.

(c) Unless otherwise ordered by the Commission, two copies of the application and accompanying papers shall be filed. If any application is contested, the Commission may require additional copies of the application and all accompanying papers to be furnished by the applicant. In such cases, certified copies or photographic prints or reproductions may be used.]

(a) Submission constituting application. Where a project is subject to review under Section 3.8 of the Compact, the submission shall be in accordance with such form of application as the Executive Director may prescribe and with such supporting documentation as the Executive Director may reasonably require for the administration of the provisions of the Compact. An application shall be deemed complete and the Commission's review of the application may commence upon submission of the completed form in accordance with paragraph (b) of this section, and payment of the applicable fee as set forth in § 401.43 together with all balances due the Commission, if any, by the applicant or any member of its corporate structure, for unpaid fees, penalties, or interest.

(b) Submission of applications. Application forms and accompanying submissions shall be filed in accordance with the filing instructions included on the application form.

(c) Availability of forms. Any person may obtain a copy of any form prescribed for use in paragraph (a) of this section on the Commission's website, <https://www.drbc.gov>.

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§ 401.41 Limitation of approval; dormant applications.

[(a) Approval by the Commission under these regulations shall expire three years from the date of Commission action unless prior thereto the sponsor has expended substantial funds (in relation to the cost of the project) in reliance upon such approval. An approval may be extended or renewed by the Commission upon application.

(b) Any application that remains dormant (no proof of active pursuit of approvals) for a period of three years from date of receipt, shall be automati-

cally terminated. Any renewed activity following that date will require submission of a new application.]

(a) Extension by Executive Director. (1) For any Commission approval not assigned an expiration date, the Commission’s approval shall expire five years from the approval date unless prior thereto the Executive Director extends the approval for an additional five-year period based upon a written request from the project sponsor accompanied by supporting documentation demonstrating to the Executive Director’s satisfaction that the following criteria have been met:

(i) Either:

(A) The project sponsor has expended, at a minimum, the sum of one million dollars (\$1,000,000) or an amount representing substantial funds in relation to the cost of the project in reliance upon the Commission’s approval; or

(B) In the alternative, circumstances beyond the project sponsor’s control (including but not limited to, pending legal challenges to local, State or Federal permits) have prevented the sponsor from expending an amount equal to either of the sums set forth in paragraph (a)(1)(i)(A) of this section;

(ii) No material changes to the project as approved are proposed;

(iii) The condition of the project site has not changed in a manner important to determining whether the project would substantially impair or conflict with the Commission’s Comprehensive Plan; and

(iv) The Commission’s Comprehensive Plan has not changed in a manner important to determining whether the project would substantially impair or conflict with the Comprehensive Plan.

(2) Otherwise, the Executive Director shall deny the request.

(3) Public notice of a determination by the Executive Director pursuant to this paragraph (a) shall be provided no later than the Commission’s next regularly scheduled public hearing or business meeting following the determination. A determination by the Executive Director pursuant to this section is appealable in accordance with subpart F of this part.

(b) Review by Commissioners. If in the view of the Executive Director (or if appealed to the Commission pursuant to subpart F of this part, in the view of the Commission), one or more material changes to a project as approved are proposed, or if the Executive Director determines that any one or more of the other criteria listed in paragraph (a) of this section are not satisfied, the project sponsor must apply for renewal and modification of its approval in accordance with the customary application procedure for any docket renewal or approval.

(c) Automatic termination of application. Any application that remains dormant (no proof of active pursuit of approvals) for a period of three years from date of receipt, shall be automatically terminated without further action of the Commission. Any renewed activity following that date will require submission of a new application.

§ 401.42 One permit program.

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(e) *Comprehensive Plan projects.* Articles 11 and 13 of the Compact require certain projects to be included in the Comprehensive Plan. To add a project not yet included in the Comprehensive Plan, the project sponsor shall submit a separate application to the Commission. If following its review and public hearing the Commission approves the addition of the project to the Comprehensive Plan, the Commission’s approval will include such project requirements as are necessary under the Compact and Commission regulations. All other project approvals that may be required from the Signatory Party Agency or the Commission under regulatory programs administered pursuant to this section may be issued through the One Permit Program. An application for renewal or modification of a project in the Comprehensive Plan that does not **materially** change the project [**so substantially as to render it a new and different project**] may be submitted only to the Signatory Party Agency unless otherwise specified in the Administrative Agreement.

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§ 401.43 Regulatory program fees.

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(b) * * *

(1) * * *

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(ii) *Project requiring inclusion in the comprehensive plan.* Any project that in accordance with section 11 or section 13.1 of the Delaware River Basin Compact and DRBC regulations must be added to the Comprehensive Plan (also, “Plan”). In addition to any new project required to be included in the Plan, such projects include existing projects that in accordance with section 13.1 of the Compact are required to be included in the Plan and which were not previously added to the Plan. Any existing project that is **materially** changed [**substantially**] from the project as described in the Plan shall be deemed to be a new and different project for purposes of this section.

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(4) * * *

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(ii) *Late filed renewal application.* Any renewal application submitted fewer than [**120**] **180** calendar days in advance of the expiration date or after such other date specified in the docket or permit or letter of the Executive Director for filing a renewal application shall be subject to a late filed renewal application charge in excess of the otherwise applicable fee.

(iii) *Modification of a DRBC approval.* Following Commission action on a project, [**each**] **any material change to the project [revision or modification that the Executive Director deems substantial] as approved** shall require an additional application **and accompanying** fee. **Such fee shall be** calculated in accordance with paragraph (e) of this section and **may be** subject to an alternative review fee in accordance with paragraph (b)(3) of this section.

(iv) *Name change or change of ownership.* Each project with a docket or permit issued by the DRBC [**or by a Signatory Party Agency pursuant to the One Permit Program rule (§ 401.42)**] will be charged an administrative fee as set forth in paragraph (e) of this

section if it undergoes a change in name or a “change in ownership” as that term is defined at § 420.31(e)(2) of this subchapter.

[(v) *Change of ownership.* Each project that undergoes a “change in ownership” as that term is defined at 18 CFR 420.31(e)(2) will be charged an administrative fee as set forth in paragraph (e) of this section.]

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Table 3 to § 401.43—Additional Fees

Proposed action	Fee	Fee maximum
[Name change	\$1,228 ¹	
Name Change or Change of Ownership	\$1,842 ¹	

¹ Subject to annual adjustment in accordance with paragraph (c) of this section.

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Subpart H—Public Access to Records and Information

[Authority: 5 U.S.C. 552]

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§ 401.103 Request for existing records.

(a) Any written request to the Commission for existing records not prepared for routine distribution to the public shall be deemed to be a request for records pursuant to the provisions of this part [Freedom of Information Act], whether or not the provisions of this part are [Freedom of Information Act is] mentioned in the request, and shall be governed by the provisions of this part.

* * * * *
§ 401.104 Preparation of new records.

The [Freedom of Information Act and the] provisions of this part apply only to existing records that are reasonably described in a request filed with the Commission pursuant to the procedures herein established. The Commission shall not be required to prepare new records in order to respond to a request for information.

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§ 401.105 Indexes of certain records.

(b) A copy of each such index is available at cost of duplication from the Records Access [FOIA] Officer.

§ 401.106 Records Access [FOIA] Officer.

The Executive Director shall designate a Commission employee as the Records Access [FOIA] Officer. The Records Access [FOIA] Officer shall be responsible for Commission compliance with the provisions of this part [Freedom of Information Act and these regulations]. All requests for agency records shall be sent [in writing] to the Records Access Officer in a manner consistent with § 401.108(a). [:

FOIA Officer
Delaware River Basin Commission
P.O. Box 7360
West Trenton, New Jersey 08628-0360]

* * * * *

§ 401.108 Filing a request for records.

(a) All requests for Commission records shall be submitted [filed in writing delivered] to the Records Access [FOIA] Officer on such forms as the Executive Director may prescribe, which shall be available on the Commission’s website, <https://www.drbc.gov>, or by written request [mailing it] to the Commission[. The Commission will supply forms for written requests], 25 Cosey Road, West Trenton, NJ 08628.

(b) * * *

(1) If the description is insufficient to locate the records requested, the Records Access [FOIA] Officer will so notify the person making the request and indicate the additional information needed to identify the records requested.

* * * * *

(c) Upon receipt of a request for records, the Records Access [FOIA] Officer shall enter it in a public log (which entry may consist of a copy of the request). The log shall state the date and time received, the name and address of the person making the request, the nature of the records requested, the action taken on the request, the date of the determination letter sent pursuant to § 401.109(b), the date(s) any records are subsequently furnished, the number of staff-hours and grade levels of persons who spent time responding to the request, and the payment requested and received.

(d) A denial of a request for records, in whole or in part, shall be signed by the Records Access [FOIA] Officer. The name and title or position of each person who participated in the denial of a request for records shall be set forth in the letter denying the request. This requirement may be met by attaching a list of such individuals to the letter.

§ 401.109 Time limitations.

(a) All time limitations established pursuant to this section shall begin as of the time at which a request for records is logged in by the Records Access [FOIA] Officer pursuant to § 401.108(c). An oral request for records shall not begin any time requirement. A written request for records sent elsewhere within the Commission shall not begin any time requirement until it is redirected to the Records Access [FOIA] Officer and is logged in accordance with § 401.108(c). A request that is expected to involve fees in excess of \$50.00 will not be deemed received until the requester is promptly notified and agrees to bear the cost or has so indicated on the initial [his] request.

(b) Within [ten] 10 working days (excepting Saturdays, Sundays, and legal public holidays) after a request for records is logged by the Records Access [FOIA] Officer, the record shall be furnished or a letter shall be sent to the person making the request determining whether, or the extent to which, the Commission will comply with the request, and, if any records are denied, the reasons therefor.

* * * * *

(c) If any record is denied, the letter shall state the right of the person requesting such records to appeal any adverse determination to the Executive Director of the Commission. Such an appeal shall be filed within 30 days from receipt of the Records Access [FOIA] Officer’s

determination denying the requested information (where the entire request has been denied), or from the receipt of any information made available pursuant to the request (where the request has been denied in part). Within 20 working days (excepting Saturdays, Sundays, and legal public holidays) after receipt of any appeal, or any authorized extension, the Executive Director or **the Executive Director's [his]** designee shall make a determination and notify the appellant of **such [his]** determination. If the appeal is decided in favor of the appellant the requested information shall be promptly supplied as provided in this part. If on appeal the denial of the request for records is upheld in whole or in part, the appellant shall be entitled to appeal to the Commission at its regular meeting. In the event that the Commission confirms the Executive Director's denial the appellant shall be notified of the provisions for judicial review.

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§ 401.110 Fees.

- (a) * * *
- (1) * * *
- (i) * * *

(A) Processing [FOIA] requests **for records**;

* * * * *

(c) Payment shall be made by check or money order payable to "Delaware River Basin Commission" and shall be sent to the **Records Access [FOIA]** Officer.

* * * * *

§ 401.115 Discretionary disclosure by the Executive Director.

(a) The Executive Director may [, in his] **exercise discretion [,] to** disclose part or all of any Commission record that is otherwise exempt from disclosure pursuant to this part [. The] **whenever the** Executive Director [**shall exercise his discretion to disclose such records whenever he**] determines that such disclosure is in the public interest, will promote the objectives of the Commission, and is consistent with the rights of individuals to privacy, the property rights of persons in trade secrets, and the need for the Commission to promote frank internal policy deliberations and to pursue its regulatory activities without disruption.

(b) Discretionary disclosure of a record pursuant to this section shall invoke the requirement that the record shall be disclosed to any person who requests it pursuant to § 401.108, but shall not set a precedent for discretionary disclosure of any similar or related record and shall not obligate the Executive Director [**to exercise his discretion**] to disclose any other record that is exempt from disclosure.

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Subpart I—General Provisions

§ 401.121 Definitions.

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(e) **Material change shall mean a change to a project previously approved by the Commission that is important in determining whether the project would substantially impair or conflict with the Commission's comprehensive plan.**

(f) **Sponsor** shall mean any person authorized to initiate, construct or administer a project.

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Dated: October 3, 2023.

PAMELA M. BUSH, Esq.,
Secretary

Fiscal Note: 68-62. No fiscal impact; recommends adoption.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION
PART V. DELAWARE RIVER BASIN COMMISSION
CHAPTER 901. GENERAL PROVISIONS

§ 901.1. Rules of Practice and Procedure.

The rules of practice and procedure as set forth in 18 CFR Part 401 [(2018)] **2024** are hereby incorporated by reference and made a part of this title.

§ 901.2. Comprehensive Plan and water quality.

The Comprehensive Plan regulations as set forth in 18 CFR Part 401, Subpart A [(2014)] **(2024)** and the Water Code and Water Quality Regulations as set forth in 18 CFR Part 410 (2023) are hereby incorporated by reference and made a part of this title.

[Pa.B. Doc. No. 23-1466. Filed for public inspection October 27, 2023, 9:00 a.m.]