



November 20, 2023

Administrative Agreement (AA) between New Jersey Department of Environmental Protection (NJDEP) and the Delaware River Basin Commission (DRBC)

Delaware River Basin Commission
25 Cosey Rd,
West Trenton, NJ 08628

Re: Amendments to the Administrative Agreement (AA) between NJDEP and the DRBC

Dear Commissioners,

The Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper (collectively, "DRN"), submit the following in response to the Delaware River Basin Commission's (DRBC, the Commission) released draft of the **Administrative Agreement (AA)** between New Jersey and the DRBC.

Background

DRN is filing this letter to address concerns and ambiguities raised by the amendments to the DRBC AA between the Commission and NJDEP. On Tuesday, October 10, 2023, Vol. 88, No. 202 of the Federal Register published a notice for a public hearing on November 8, 2023 and a business meeting on December 6, 2023. Among the several topics that were discussed at the November 8th public hearing is a draft of the amended AA between NJDEP and the DRBC. Items heard included the resolution and 26 draft dockets for withdrawals, discharges and other projects that could have a substantial effect on the Basin's water resources. Written comments for the AA amendments are due on November 20, 2023. This document serves as the written comments that highlight DRN's questions and concerns regarding the released draft of what may become the new AA between NJDEP and the DRBC.

The issues we raise are as follows:

This public commenting period should be rescheduled to a more convenient date.

Although an extension for the public commenting deadline has already been granted, a November 20th deadline may prove difficult to many members of the public. This deadline is leading up to the

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Thanksgiving holiday, one of the most traveled holidays in the country. Members of the public may find themselves preparing to travel, or readying their homes to receive family members. Amidst this busy holiday, finding time to not only review this AA but make sense of it, as well as formulate thoughts, opinions, and or concerns into a written comment may prove difficult for many residents of New Jersey that are affected by these changes. Allowing for a later commenting deadline, and even hosting a separate hearing after the holiday, would accomplish a great deal in promoting public inclusion by making participation accessible and convenient for the general public.

In order to promote public involvement, the DRBC should hold a public meeting to present materials to the public and explain the rationale behind each amendment to the Administrative Agreement between NJDEP and DRBC.

The DRBC should hold a public hearing dedicated solely to the draft amendments of the AA, where they should include presentation materials on the amendments and their application. As of right now, the only resource available to the public that describes the rationale and purpose behind these amendments is the FAQ for the 2023 draft amendments to the AA between DRBC and NJDEP.¹ A FAQ document alone is deficient when it comes to the several questions that the public might have regarding these changes. At best, the FAQ document only covers the most fundamental procedural and rationale questions. Furthermore, discussion of these amendments were held at a November 8th, 2023 public hearing, where the AA was discussed with a variety of other topics. A public hearing where other topics take time away from discussing the AA is insufficient. Not only are the changes to the AA numerous, but considering the many projects in the state of New Jersey that will be affected by this, the AA is a significant development regarding the permitting process in the State. The public is entitled to a meeting solely dedicated to this topic so that they can become oriented with this amended AA, as well as inquire about how these changes might affect the river, its watershed and its water supplies, and projects in their own localities.

The term “substantially impair” in the Administrative Agreement, in reference to the DRBC’s Rules of Practice and Procedure (RPP), is too ambiguous.

The term “substantially impair,” in reference to the DRBC’s responsibility and the AA’s objective to assure that a project does not “substantially impair or conflict with the Commission’s Comprehensive Plan,”² is an ambiguous standard. This standard is referred to in the Delaware River Basin Compact, and in all DRBC corresponding documents, as a 3.8 finding. The Compact states:

“No project having a substantial effect on the water resources of the basin shall hereafter be undertaken by any person, corporation or governmental authority unless it shall have been first submitted to and approved by the commission, subject to the provisions of Sections 3.3 and 3.5. The 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. The commission shall provide by regulation for the procedure of submission, review and consideration of projects, and for its determinations pursuant to this section. Any determination of the commission hereunder shall be subject to judicial review in any court of competent jurisdiction.”³

¹ FREQUENTLY ASKED QUESTIONS, Draft 2023 Amendments to the Administrative Agreement between the Delaware River Basin Commission and the New Jersey Department of Environmental Protection

² Administrative Agreement between the Delaware River Basin Commission and the New Jersey Department of Environmental Protection, II(B)(1), at 4.

³ Section 3.8 Referral and Review, Delaware River Basin Compact

The issue here is that neither the AA, DRBC's Rules of Practice and Procedure, or the Comprehensive Plan provide insight into what explicitly constitutes a substantial impairment to the Comprehensive Plan.

According to the AA, when NJDEP notifies DRBC on a water allocation application/renewal, the commission considers whether a project might be subject to 3.8 review. If DRBC determines that a project is subject to review, NJDEP must conduct a "3.8 finding," send their evaluation to the DRBC, and the DRBC will either respond with their own 3.8 evaluation, or may not provide a response at all if the DRBC agrees with NJDEP's findings.⁴ Without clear indication or insight on what the DRBC considers a substantial impairment to the Comprehensive Plan, the public can never have full confidence as to the decision making process within the DRBC. Without such confidence, New Jersey localities and members of the public that could be affected by proposed permits will struggle significantly to understand and vocalize their arguments related to said projects. The barrier this type of ambiguity creates not only undercuts public participation, but casts doubts on the conformity and standards that present and future DRBC Commissioners should rely on when evaluating if a project truly "substantially impairs or conflicts with the Comprehensive Plan." This concern undermines the objectives that an AA between NJDEP and DRBC seeks to accomplish.

There are several ambiguities regarding the 14 day period at the end of each month where NJDEP notifies DRBC of water allocation applications.

In relation to when the DRBC receives notification of water allocation applications from NJDEP, there remains procedural ambiguities regarding the permitting review process. The amended AA states "Within 14 days of the end of any month in which NJDEP receives water allocation permit applications or requests for pre-application meetings for projects within the Delaware River Basin, NJDEP will provide to DRBC a list of such applications and requests."⁵ Additionally, for underground storage caverns, "[w]ithin 14 days of the end of any month in which NJDEP has determined that an application for an underground storage cavern project within the Delaware River Basin is administratively complete, NJDEP will provide to DRBC for each such application."⁶ That being said, there is no information in the AA that elaborates on (1) how long the DRBC will have to respond to the application notifications, or (2) if NJDEP will pause the permitting process while they wait to notify on these applications in the last 14 days of each month/while the DRBC evaluates if these projects are subject to review. Furthermore, (3) for cases outside of underground storage caverns, will the public be allowed to comment during the DRBC's evaluation or only during the 30 day period they are provided to conduct 3.8 reviews of projects after the DRBC has already responded in the affirmative that a project is subject to their review?

The AA does not touch on any of these questions.

- (1) After receiving notification of a water allocation project, how long does the DRBC have to provide a response to NJDEP? Where other requirements on the AA give the DRBC deadlines to respond to NJDEP, or at least communicate to establish extended deadlines, the AA does not mention anything related to a timeline for DRBC to notify NJDEP if a water allocation project is subject to review or not.
- (2) Will NJDEP pause the permitting process while it waits to disclose these applications in the last 14 days of each month, or while the DRBC evaluates if these projects are subject to review? For W-2 category projects, the AA writes that "[t]he Parties agree that after 30 days, if the DRBC

⁴ Administrative Agreement between the Delaware River Basin Commission and the New Jersey Department of Environmental Protection

⁵ Id., III(D)(1)

⁶ Id., V(D)(1)(a)

staff has provided no written comments, then a renewal of the previous Section 3.8 Finding is recommended, finding that the project does not substantially impair or conflict with the Commission's Comprehensive Plan is implied and the permit issuance process for simple renewals will proceed.”⁷ When the AA states “the permit issuance process for simple renewals will proceed,” does that mean that the permitting process would have been paused after DRBC rendered an evaluation for a project disclosed within this 14 day period, or only after NJDEP has sent their pre-draft permits to DRBC so that the commission can conduct a 3.8 finding? If there is a pause for DRBC to review a pre-draft application within this 30 day period, it would make sense to also pause the permitting process when NJDEP is preparing to disclose received applications to the DRBC within the earlier end-of-month 14 day period mentioned above. However, there is no such explicit clarification on the AA. The AA should elaborate on if the permitting process pauses while NJDEP awaits to disclose water allocation projects to DRBC, and if it remains paused while NJDEP awaits a response from DRBC.

- (3) When and how will the DRBC and NJDEP schedule public hearings and allow for public comments after the DRBC has received a list of water allocation projects from NJDEP? The AA does not answer if the public will be afforded the opportunity to provide public comments on a proposed project after the DRBC publishes these pending applications, or even during the 30 day period. The most information the public receives regarding their involvement can be found on the FAQ document the DRBC has published on their website regarding the 2023 amendments to the AA. Here, they inform us that the public will be

“provided with notice that an application is pending and can seek additional information on the application from the Commission and the lead agency. In the case of storage cavern projects in the New Jersey portion of the basin, interested members of the public can comment on the application in accordance with the procedures and practices of the NJDEP.”⁸

But once again, besides directing the public to NJDEP in cases of underground storage projects and describing a general public notice, the AA and the FAQ sheet do not address when and how the DRBC will schedule public hearings and comments for these pending permits.

It is unclear whether the permitting process will pause for W-3 and new W-2 projects, like those in the W-2 categories, when DRBC receives pre-draft permits from NJDEP.

The AA does not elaborate on the permitting process regarding 3.8 findings for W-3 and new W-2 applications. For W-2 category projects, the AA states that “[t]he Parties agree that after 30 days, if the DRBC staff has provided no written comments, then a renewal of the previous Section 3.8 Finding is recommended, finding that the project does not substantially impair or conflict with the Commission's Comprehensive Plan is implied and the permit issuance process for simple renewals will proceed.”⁹ However, in relation to W-3 projects, the AA only states “within 30 days of receipt of a pre-draft or draft permit from NJDEP, [the DRBC will] provide NJDEP with comments, including any additional requirements, terms or conditions necessary or appropriate to support a Section 3.8 finding,”¹⁰ but nothing that might indicate “the permit issuance process for simple renewals will proceed.” Will W-3

⁷ Id., II(G)(1)(e)

⁸ FREQUENTLY ASKED QUESTIONS, Draft 2023 Amendments to the Administrative Agreement between the Delaware River Basin Commission and the New Jersey Department of Environmental Protection, #3 at 2.

⁹ Administrative Agreement between the Delaware River Basin Commission and the New Jersey Department of Environmental Protection, II(G)(1)(e)

¹⁰ Id., III(I)(2)(a)

permits pause to allow time for the DRBC to conduct a 3.8 findings before the permit issuance process proceeds, or is this omitted because a pause will not occur in these instances?

DRBC should always respond to NJDEP when it provides a “3.8 finding” to the Commission.

Regarding W-2 permits, “[t]he Parties agree that after 30 days, if the DRBC staff has provided no written comments, then a renewal of the previous Section 3.8 Finding is recommended, finding that the project does not substantially impair or conflict with the Commission’s Comprehensive Plan is implied and the permit issuance process for simple renewals will proceed.”¹¹ Although the DRBC can communicate to NJDEP if they require more time than 30 days to review the finding, DRBC should still always reply to NJDEP’s findings, even if they agree. Replying to findings creates a clear paper trail that the public can follow in order to know if a project has been approved. Otherwise, if DRBC didn’t reply to NJDEP’s 3.8 finding for W-2 categories, then the public wouldn’t understand what this means unless they read through and reviewed the AA. Furthermore, if the 30 day period falls within a holiday or any other world event that would prevent thorough evaluation and the DRBC does not respond with their own findings, NJDEP may proceed with an application that, in reality, did not receive the attention it should have. The DRBC is the leading expert authority regarding what “substantially impairs” means in a 3.8 finding. The Commission’s input provides expert insight into their rationale and the standard they employ for such findings. DRBC’s response is not just valuable, but should be considered necessary.

In relation to DRBC’s Special Protection Waters (SPW) review, notification of an application from NJDEP should occur once an application is administratively complete, instead of after technical completeness.

NJDEP’s submission of an application for SPW review should occur after they find an application is administratively complete, as opposed to technically complete. Regarding substantial alterations and additions for SPW’s, under Appendix A, the AA states that “[i]n the event that the time for DRBC’s SPW review and analysis exceeds 6 months after NJDEP notifies DRBC of its receipt of a technically complete application, the NJDEP will consult with DRBC to determine next steps.”¹² If NJDEP must disclose water allocation applications within the last 14 days of each month so that the DRBC can notify them if a project is subject to review, and “substantial alterations” to SPWs are activities that fall both under W-2 and W-3 water allocation permit categories, then NJDEP should wait for DRBC’s deliberation on a project’s review category before determining that an application is technically complete. Requiring an application to be technically complete prior to notification will: (1) delay the speed at which NJDEP will notify DRBC of a water allocation application, (2) delay the speed at which DRBC will notify the public of a pending permit, and (3) demand technical criteria from an application that is yet to be categorized by the commission – therefore risking undertaking steps on an application that may either be deficient or extraordinary in relation to what DRBC requires. Thus, DRBC should receive applications from NJDEP after an application is administratively complete, so that DRBC can publish these pending permits earlier, and inform NJDEP as to the criteria an application must meet in order to accomplish technical completeness.

DRN opposes the proposed AA as presented and urges the Commissioners to vote NO on the Resolution to approve the amended AA. DRN advocates that DRBC start over with a public process that will provide ample opportunity for the public to participate in this important decision making. DRN also advocates that the ambiguities we discuss in these comments be addressed and a sufficiently clear, publicly understandable, and more precise AA that encourages public participation at critical phases of review, be proposed at a future time.

¹¹ Id., II(G)(1)(e)
¹² Id., Appendix A

Thank you for your consideration of this request.

Sincerely,

A handwritten signature in blue ink that reads "Maya K. van Rossum".

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A handwritten signature in blue ink that reads "Tracy Carluccio".

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