November 30th, 2023

Amendments to the Rules of Practices and Procedures

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

Re: Notice of Proposed Rulemaking – Delaware Riverkeeper Network's Comments Regarding the Commission's Proposed Amendments to the Commission's Rules of Practice and Procedure

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 ("DRBC," the Commission) proposed rulemaking on the Rules of Practice and Procedure ("RPP").

Background

DRN files this letter to address concerns and ambiguities raised by the proposed amendments to the Commission's RPP. DRN opposes the proposed rulemaking and requests that the concerns and ambiguities we raise herein are addressed and reflected in a revised proposed rulemaking. On Thursday, September 28, 2023, Vol. 88, No. 187 of the Federal Register published a notice of proposed rulemaking regarding amendments to the RPP. According to the summary published on the Federal Register, these amendments seek 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."[1] Written comments are due at 5 pm, Thursday, November 30, 2023, and two public hearings were held on November 13, 2023.[2]

The issues we raise are as follows:

[1] Rules of Practice and Procedure, 88 Fed. Reg. 66722 (Sept. 28, 2023) (proposing amendments to 18 C.F.R. § 401).
[2] *Id*.

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The Commission must explain in the proposed amendments to § 401.22 why ensuring flexibility in the time frame for Water Resources Programs is in the best interest of the Delaware River Basin and the public.

The Commission proposes removing the required time period that proposed projects and facilities will be adopted into the Water Resources Program (Program). The current language of § 401.22 states that "[t]he *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 ensuing six-year period."[3] The proposed amendments remove the reference "within the ensuring six-year period," to restore the "flexibility the Compact allows regarding the period to be covered by the annual program."[4] However, the Commission does not explain the purpose or benefit of allowing flexibility regarding the Program's time period.

The Commission has already developed Programs that do not abide by the required six-year period. The 2021 Program includes plans for only three years.[5] Consequently, the Commission must have already determined that it is beneficial to utilize a different time frame. The Commission must provide the reasoning, purpose, and benefit of no longer following the standard six year time period. Without an explanation, the public is left in the dark as to the purpose and motivations behind this amendment. The Commission's vision is "the conservation, utilization, development, management and control of water and related resources of the Delaware River Basin under a comprehensive multipurpose plan [that] will bring the greatest benefits and produce the most efficient service in the public welfare."[6] Therefore, the Commission must explain how this change brings the greatest benefit and produces the most efficient service in the public welfare. This will allow the public to comment and explain whether or not it agrees with the Commission's determination.

The proposed definition of "material change" in §§ 401.41(a), 401.8(a), 401.42(e), 401.43(b)(1)(ii), and 401.43(b)(4)(iii) is too ambiguous, overly subjective, and should be modified to notify the public of how the Commission will determine when a change is material.

The proposed definition of "material change" prohibits the public from meaningfully contributing to a decision about whether a change is material because it lacks any indication of what the Commission believes constitutes a "material change." A "material change" is 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.''[7] But the Commission provides no explanation as to what would meet the threshold of "importance" or "substantially impair[ing] or conflict[ing]" with the plan. The definition of "material change" simply restates the Commission's review responsibilities in Section 3.8 of the Compact. Section 3.8 of the Compact states that

> 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.[8]

[3] DELAWARE RIVER BASIN COMM'N, DELAWARE RIVER BASIN COMPACT 22 (1961) (reformatted in 2020).
[4] 88 Fed. Reg. at 66724.
[5] *See* DELAWARE RIVER BASIN COMM'N, WATER RESOURCES PROGRAM FY 2022-2024 ii (2021) (stating that "[t]he Water Resources Program (WRP) covers fiscal years (FY) 2022 through 2024 (July 1, 2021, through June 30, 2024)").
[6] *Id.* at i.
[7] 88 Fed. Reg. at 66724.
[8] DELAWARE RIVER BASIN COMPACT, *supra* note 3 at 9.

The Comprehensive Plan is meant to be the tool that provides for "the optimum planning, development, conservation, utilization, management and control of the water resources of the basin to meet present and future needs[.]"[9] The Plan dictates the development that is permitted within the Delaware River Basin and whether or not the Commission can approve a project. The Commission cannot use a term that is so ambiguous and overly subjective when it is meant to provide an assessment threshold for development in the Delaware River Basin. Without insight as to what a "material change" could mean, the public will be unable to express concerns over changes or alterations on projects that impact their communities – undercutting public participation and the public's ability to influence the decisions made by the Commission. This is not an appropriate procedure when the Commission is meant to provide the most efficient service and accessibility to the public. The Commission must provide more guidance and an explanation as to what constitutes a "material change."

The term could be interpreted differently in each context that it is used. The Commission proposes that the term replace some variation of "substantial change" in sections 401.41(a), 401.8(a), 401.42(e), 401.43(b)(1)(ii), and 401.43(b)(4)(iii). What does it mean when determining whether an extension of an approval is warranted or if the application should be considered a new project? Does it mean the same thing when determining whether a Comprehensive Plan project is a new project or just the alteration of an existing one? Similarly, can this term mean the same thing when discussing project approvals as it does when determining the allocation of fees? It is not clear if the assessment of a "material change" will consider the amount of money spent on a project, or if this is solely an assessment against the policies outlined in the Comprehensive Plan. As the proposed definition itself states, this assessment is important in determining whether the project impairs or conflicts with the comprehensive plan. Consequently, it is also important that the public understands what constitutes a "material change." The Commission must provide more guidance on this newly proposed term.

The amendments to § 401.38 must explain how modifying the form of referral upon receipt of an application by a State or Federal agency process will work.

The proposed amendments to § 401.38 reaffirm the Commission's role as a co-regulator in the project permitting and approval process. Requiring State and Federal agencies to refer an application upon receipt gives the Commission an opportunity to provide input on a project before it is finalized or permitted. With this change, it is important that the Administrative Agreements with the four states and the federal government are consistent in the timing and depth of review. The proposed amendments do not address many of the details of how the referral process will work in practice. It is not clear (1) when the Commission will receive the application from the State or Federal agency, (2) the level of review that the Commission will undertake to complete Section 3.8 review, or (3) how the public will be involved in the process. These ambiguities should be clarified in a manner that is consistent across all agencies that the Commission will receive referred applications from. The Commission must also ensure that the purposes of this revision are carried through all of the Agreements and that the Commission and the public play a meaningful role in its partnership with each member state and the federal government.

The documentation and information required for project review under Section 3.8 per § 401.39 should not be determined solely by the Executive Director.

The Commission proposes amending the required minimum forms and documentation for Section 3.8 review. The proposed amendments require all projects that are subject to Section 3.8 to submit an application "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 provision of the Compact."[10] The forms and supporting documentations that detail the minimum requirements for Section 3.8 review should not be determined on a case-by-case basis by the Executive Director. Instead, (1) all the

[9] DELAWARE RIVER BASIN COMPACT, *supra* note 3 at 22.
[10] 88 Fed. Reg. at 66724.

Commissioners should decide the required minimum forms and documentation, (2) the minimum forms and documentation should be uniform and consistent, (3) the Commission staff should determine what additional information and documentation is required after the initial threshold review, and (4) the public should have access to these minimum requirements before and after applications are filed.

(1) The minimum forms and documents that are required for an application should be determined by the Commissioners, not the Executive Director alone. Allowing one individual to decide what is required for Section 3.8 review bases the review on the subjective intent and bias of one individual, risking inconsistencies between project evaluations and throughout the decision making process. Section 3.8 review is meant to ensure that projects do not substantially impair or conflict with the Comprehensive Plan, which is a responsibility of the Commission as a whole, and not the sole determination of the Executive Director. Section 3.8 of the Compact states that "[n]o 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*[.]"[11] As Section 3.8 requires that the Commission receive and approve the application, and not the Executive Director, the Commission should determine the minimum forms and documentation that must be submitted. The Commission's ability to receive and approve projects through Section 3.8 of the Compact will be significantly hindered if the Executive Director is permitted alone to decide what minimum forms and documentation the Commission should be provided in order to make such decisions. Furthermore, Section 3.8 of the Compact states that "[t]he commission shall provide by regulation for the procedure of submission, review and consideration of projects, and for its determinations pursuant to this section."[12] Therefore, the Commission as a whole should determine what minimum forms and documentation are required, as this is a part of the procedure for the submission of a project.

(2) The minimum forms and documentation should be uniform and consistent for all projects that are subject to Section 3.8 review. It is unclear why the Commission proposes to address all Section 3.8 documentation on a fluid basis. The current version of § 401.39 has an enumerated list of what minimum documentation is required for review,[13] and the standard of review in Section 3.8, that a project does not substantially impair or conflict with the Comprehensive Plan,[14] has not changed. Inconsistent minimum forms and documentation results in assessments that are composed of subjective interpretation, political influence, and inconsistent review and approval. It is not disputed that different projects may require different information beyond what is requested in the minimum forms and documentation. Even still, it is not appropriate to allow fluidity in the minimum requirement forms and documentation. Instead, the Commission should request additional documentation after a threshold review.

(3) The Commission staff are the most well-suited and appropriate body to request additional information after reviewing the minimum requirements submitted through the standard minimum forms and documentation. The staff should request additional information as is needed to complete its review. As the staff will request more information as is needed depending on the unique characteristics of the proposed project, it is important to have consistent minimum requirements and forms so that the staff is better equipped to determine what additional information is needed on a case-by-case basis. Therefore, establishing consistent baseline requirements for all projects undergoing Section 3.8 review will allow the staff a better opportunity to request additional information after completing a threshold review on a case-by-case basis.

[11] DELAWARE RIVER BASIN COMPACT, *supra* note 3 at 9 (emphasis added).
[12] *Id.*
[13] *See* 18 C.F.R. § 401.39(a)(1)–(8) (describing what exhibits must be included in an application undergoing Section 3.8 review).
[14] DELAWARE RIVER BASIN COMPACT, *supra* note 3 at 9.

(4) The public should have access to the required forms and documentation before and after a project is submitted. This allows the public to understand the minimum requirements for Section 3.8 review and provide input on whether a project's application meets the threshold requirements. This is necessary because of the same reasoning that the Commission should develop the requirements for forms and documentation. Without access to the standard minimum forms and required documentation that a project must submit, the public will be unaware of the basic requirements necessary to satisfy Section 3.8 review. Consistent minimum requirements will inform the public and the Commission of what is required "for the administration of the provisions of the Compact."[15] Further, without access to the documentation after the project's application is submitted, the public cannot weigh in on whether the minimum requirements for Section 3.8 review have been met by that specific applicant, or what additional information should be requested for that project.

Extensions of approval of dredging and or construction activities per § 401.41 must be modified to allow for public input by providing public notice when there is a request for extension and involvement by the Commission in the decision making process.

The process for the extension of approval of dredging and or construction activities must be significantly modified. The process must (1) include public notice when there is a request for extension allowing for public input, (2) require the whole Commission to decide on extension requests, (3) not extend the extension period to five years, (4) not include litigation and litigation costs as a circumstance out of the project's control that would justify an extension, (5) utilize a more clear dollar expenditure requirement, (6) clarify what no "material change to a project" means and what a condition of the project site is.

(1) The proposed amendments currently provide no requirement that the public be notified that an extension for a project is being considered by the Executive Director. This lack of notice removes the public from all decisions for extensions of project approvals. There is no requirement that the Commission hold a public hearing to hear testimony from the public on whether an extension should be provided. This is counterintuitive when the newly proposed rule for project extensions requires that certain criteria be met. For example, that there is no "material change to the project," that a reasonable amount of money had already been expended on the project, that there is no change of condition on the project site, or that there were factors out of the project developer's control. Most of the criteria mentioned in the proposed amendments are subjective, and the public should have the opportunity to provide testimony on why a project should or should not receive an extension. The proposed extension process should not exclude public involvement in the determination.

(2) Likewise, the Commission as a whole should determine whether an extension should be granted. It should not be at the sole discretion of the Executive Director. As previously mentioned, assigning permitted decisions about a project's status to one individual may cause decisions that are subject to bias and result in inconsistent decisions. Requiring the entire Commission to determine whether a project meets the criteria for an extension will help to ensure that the same standards and expectations are used for the same criteria for all projects. Furthermore, this would allow the Commission an opportunity to hear from the public and assess the public's concerns or support for a project's extension. This would provide a more robust assessment, would provide more checks and balances, and would help in the determination of whether an extension is appropriate.

(3) The extension period should not be increased to five years to match renewals of operating permits as currently proposed. Several criteria for an extension require that there has not been a change to the project, to the project site, or to the Comprehensive Plan. Allowing more time in an extension means that there is more potential for a project to experience changes in one, if not all, of those categories. Furthermore, the

[15] 18 C.F.R. § 401.39(a).

Commission does not provide an explanation as to why changing the extension period from three to five years is beneficial for the Delaware River Basin or the public. The Commission simply states that

> 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[.][16]

A renewal of an operating permit is different from an extension of a dredging or construction authorization. An extension means that the project could not be completed in the initial expected timeframe. This is why the Commission requires that the project applicant demonstrate certain requirements, such as a certain amount of funds have been expended or that there are factors outside of the applicant's control, to show that the project deserves an extension. Additionally, as the Commission mentions, the Commission and NJDEP already utilize a five-year time period for renewing operating permits. However, an extension of an initial dredging or construction authorization does not serve the same purpose as the renewal of an operating permit. There is a significant difference between checking in on compliance with an operating permit every five years than approving a project extension and then not requiring completion for five years. Therefore, the Commission should not change the time period for dredging or construction activity extensions.

(4) Litigation should not be included as a factor outside of the applicant's control that warrants an extension. Allowing litigation and litigation expenses to be considered when assessing whether to award an extension allows project applicants to hide other problems behind litigation. A project may actually be suffering from internal corporate politics, not receiving the funding as was anticipated, market changes, or a plethora of other factors, but could still receive an extension by alleging that litigation is what held the project back. Therefore, a total assessment of the factors that are slowing a project's progress should be considered rather than whether the project is currently in the midst of litigation.

(5) The amount of money that must be spent to warrant an extension should be clarified. Requiring "the sum of one million dollars ($1,000,000) or an amount representing substantial funds in relation to the cost of the project" is an arbitrary standard that does not clearly indicate what is expected for this criteria. Not all proposed projects are of the same size or are projected to cost the same amount. Including the reference to "or an amount representing substantial funds" indicates that not all projects would be expected to expend one million dollars to receive an extension. Therefore, reviewing the differing projected total project cost for other Commission approved projects and determining what percentage the Commission would expect to warrant an extension, as well as providing the reasoning for that percentage, would provide much needed clarity.

(6) As previously mentioned, the term "material change" prohibits the public from meaningfully contributing to a decision about whether a change is material because it lacks any indication of what the Commission believes constitutes a "material change." Therefore, the Commission should elaborate on what would constitute a "material change" in the specific context of permitting extensions. Similarly, the Commission should provide more clarity on what a "condition of the project site" is. What does the Commission consider is a "condition?" Would another site developed near the proposed project site be enough to be a condition of the project site that changes the project in a substantial way? Or is a condition something that directly touches the project site, such as a major flood? There is too much ambiguity in

[16] 88 Fed. Reg. at 66723.

what may be considered a condition, and the public should have an opportunity to comment on what should be considered a "condition."

The Commission's system for public access to records in Subpart H of the RPP must have a process that allows the public reliable and consistent access to Commission records and information.

The Commission must create a public records request system that aligns with the laws in its member states and FOIA so that the public has similar access to Commission records with reduced fees. It is crucial that a decision making body, like the Commission, provides the public with reliable and consistent access to documents that the Commission relies on to make its decisions. The Commission's actions and decisions impact municipalities and communities throughout the Delaware River Basin. Those communities have a right to access the information that the Commission has. The Commission has committed to carrying out its mission of "develop[ing] and effectuat[ing] plans, policies and projects relating to the water resources of the Basin" through public education and outreach and public and stakeholder input.[17] It is unclear how the Commission truly intends to receive public and stakeholder input, as well as educate the public, when communities encounter this barrier to obtaining the information the Commission uses.

Although the Commission is not subject to FOIA, there are a multitude of examples that the Commission can use to design its own record requesting system. A process for public access to records has already been designed by both the Gateway Development Commission[18] and the Port Authority of New York and New Jersey (the Port Authority).[19] All members of the compact have a public records law: New Jersey Open Public Records Act,[20] New York Freedom of Information Law,[21] Pennsylvania Right to Know Law,[22] Delaware Freedom of Information Act,[23] and the federal Freedom of Information Act.[24] The members collectively, the Commission, should also be subject to a similar public records law.

Regardless of the approach that the Commission takes, it should be one that optimizes and maximizes the public's access to Commission records. In order to have an effective records request system, the Commission should have a dedicated records request form and a dedicated Records Request Officer. This makes it easier for the public to understand how to submit requests, while ensuring that these requests are receiving the attention that they deserve and that records are being released consistently in accordance with a public records policy. The Executive Director should not determine whether a request should be approved or denied. The proposed amendments state that the Executive Director has the discretion to decide that

> 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.[25]

This standard unnecessarily involves subjective opinions of one individual when there is not a standard public records policy that may result in inconsistent decisions. Laws such as those in the member states have already determined when the release of records is appropriate. Whether or not to release a record is usually decided by qualified personnel based on fairly prescriptive guidelines. The reasons for denying to release a record are what

[17] WATER RESOURCES PROGRAM FY 2022-2024, *supra* note 5 at i.
[18] NJ REV STAT § 32:36-6 (2022).
[19] Bernard Bell, *Compact Agencies and Transparency (Part I)*, YALE JOURNAL ON REGULATION (May 4, 2020), https://www.yalejreg.com/nc/compact-agencies-and-transparency-part-i/#_ftn37 (accessed Nov. 21, 2023).
[20] N.J.S.A. 47:1A-1 *et seq*.
[21] 21 NYCRR §§ 1401 *et seq*.
[22] 65 P. S. §§ 67.101 *et seq*.
[23] 29 Del. Laws, c. 100, §§ 10001 *et seq*.
[24] 5 U.S.C. § 552.
[25] 88 Fed. Reg. at 66728.

are cited in appeals of denials. Unless these reasons and guidelines are clear and consistent, it is unfair, can lead to partiality, and disadvantage those who appeal.

The Commission cannot continue to charge a reviewing attorney's hourly rate to members of the public before it will release records. For example, the Commission has quoted DRN a two-thousand dollar fee for access to records. After narrowing the request, DRN was able to lower the cost to six-hundred dollars. The Commission refused to fulfill DRN's request unless DRN agreed to pay hundreds of dollars for records that the public has a right to review. These fees are exorbitant, effectively exclude the public from access to Commission information that should be transparent and easily accessible, and excludes the public from Commission decision making by ensuring it is virtually impossible for many to afford access to such information when the public must pay three to four figures. Records that are requested in the interest of the public should be provided at no charge and other requests should be charged reasonable and reduced fees that are assessed by a predetermined fee schedule. There is no way for a member of the public to know what they will have to pay, making the Commission's records even more inaccessible. The Commission must institute a records request system that does not charge for documents that are requested in the public interest.

DRN opposes the proposed amendments to the RPP as presented and urges the Commissioners to vote NO on the Resolution to approve the amended RPP. The Commission should adopt the suggestions put forth in this comment. In addition, DRN advocates that the Commission provide more information explaining the rationale behind the proposed amendments and provide time and opportunity for further public comment. DRN also advocates that the ambiguities we discuss in these comments be addressed and a more precise and publicly understandable RPP be proposed at a future time.

Thank you for your consideration of this request.

Sincerely,

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