

To: Delaware River Basin Commission

Re: Comment: Proposed Rulemaking: 18 CFR Part 401, Rules of Practice and Procedure

Date: November 30, 2023

We, the undersigned organizations and individuals, submit this comment to the Delaware River Basin Commission (DRBC) in opposition to the rulemaking for the proposed amendments to the Commission's Rules of Practice and Procedure, codified at 18 C.F.R. Part 401.

We object to the codification of a process that does not offer the opportunity for public participation in important decisions made by the DRBC. Public participation is a process that engages the public, provides opportunity for meaningful contribution from the public, and fully considers the public's input in the decisions that are made. This is the hallmark of participatory democracy and gives legitimacy to the government agencies that make decisions on projects, particularly an agency dedicated to the Delaware River, its Watershed and communities, the water supply for up to 17 million people, and home to diverse and irreplaceable species and ecosystems.

The DRBC states its mission as: "Managing, protecting and improving the water resources of the Delaware River Basin".[1] The DRBC describes inclusion of the public and public input, and public education and outreach, as key in carrying out its mission.[2] DRBC describes its "core values" as: "Service: to the public, the regulated community and our DRBC colleagues; Respect: for each other, the public and the Basin's water resources; Professionalism: defined by high ethical standards, integrity, continuous improvement and accountability; and Diversity and inclusion: promoted both as an employer and as a public agency." [3] The removal of the public from the decisionmaking does not uphold or affirm these values.

Proposed Rulemaking – Extension of Permits

The proposed rulemaking, among other provisions, codifies DRBC's practices regarding the extension of some permits that have substantial impacts on the public and the Delaware River's water resources and watershed. For projects with an "approval not assigned an expiration date" [Subpart C. Section 401.41(a)], the proposed rules prevent the public from being notified prior to an approval being granted and close out public participation in the decision process that leads to that approval. The decision about the extension of that approval is made solely by the DRBC's Executive Director based on criteria in the proposed rules. There is no requirement that the Executive Director disclose to the public that the extension is being considered, there is no opportunity for the public to review or comment on the extension, no public hearing required, and no vote is required by the DRBC Commissioners.

Additionally, the current rules allow an extension of three years and the proposed rules allow a five-year extension. This expansion of the approval length is even worse than the current regulations because over a longer period there is more opportunity for changes to occur that are central to the criteria that must be met in order for a project approval to be extended. These include: no material change has occurred [Section 401.41(a) ii]; that "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" [Section 401.41(a) iii]; or that the Comprehensive Plan has not changed [Section 401.41(a) iv].

The rules state that public notice of the Executive Director's decision is to be made "no later than the Commission's next regularly scheduled public hearing or business meeting following the determination." In other words, the extension of such an approval is done behind closed doors, without any public involvement or knowledge, unilaterally by the Executive Director, without public disclosure. The only public notice is after the fact and, depending on when the decision was made, it could be long after the fact since the DRBC only meets quarterly. We strenuously object to the lack of public participation and transparency in this proposed decisionmaking process. The rules propose that the Executive Director's decision is "appealable" but that is a long and expensive process that assumes people and/or organizations have the substantial resources required to do so. That assumption is not valid; unless the costs of an appeal are absorbed by others or waived, most members of the public will be without recourse, even if a project will directly adversely impact them.

Additionally, according to the DRBC's governing Compact, the DRBC Commissioners, "Serve as the governing body of the commission and exercise and discharge its powers and duties except as otherwise provided by or pursuant to this Compact" and administer the Commission.[4] Yet the proposed rules do not require a vote or public discussion of the determination made by the Executive Director on such approvals. The proposed rules remove the Commissioners from this key process that is part of their charge. The Commissioners are the Governors of the four watershed states (New York, New Jersey, Pennsylvania, and Delaware) and the Army Corps of Engineers, representing the federal government (President Biden) and are the elected officials that are accessible and accountable to their constituencies, providing public confidence. This is crucial to the trust people have that their representatives are serving the public good and shared resources first, not project applicants or special interests.

The Executive Director is invested with far too much authority in the determination of the extension of the referenced approvals. Regarding an extension, not only does the Executive Director make the final decision on the extension of an approval but also exercises personal judgment about whether the criteria cited above are met [Section 401.41(a)]. The criteria also include a finding as to whether the written application for an extension that the applicant is required to submit illustrates that they have "...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" [Section 401.41(a)i(A)] or "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 the required sums [Section 401.41(a)i(B)]. Terms such as "substantial funds" and "beyond the sponsor's control" are value-laden and are prone to subjectivity by the Executive Director. This subjectivity will not be open to public scrutiny nor DRBC Commissioner Assessment prior to a final determination. This process lacks guardrails that are needed to prevent erroneous decisions and/or the appearance or incidence of bias.

The DRBC's proposed changes are largely carving in stone several of the practices the DRBC already uses when they make permitting and policy decisions. Many of these practices we have protested in the past because it has led to bad decisions by the DRBC. Most notably, the DRBC Executive Director unilaterally approved the extension of the approval for the Gibbstown LNG Export Terminal Project "Dock 2" last year without any public input and even without a vote or public discussion by the DRBC Commissioners. The secret decision to extend the permit was only discussed at a public meeting and voted on by the Commissioners because the community demanded. The proposed rules remove the Commissioners even further than they were regarding the extension of the "Dock 2" approval, making a bad process even worse. We object to DRBC memorializing such an opaque and non-public process into codified rules.

Proposed Rulemaking – Other Sections

We object to other sections of the proposed rules. Under Subpart C. Section 401.39, the Executive Director is given sole power to decide what forms and documentation are needed for an application for a project and when an application is complete. These details should be covered by express requirements that prescribe what is required in an application in order to provide a level field of review and clear understanding by the public of exactly what is required "for the administration of the provisions of the Compact" [Section 401.39(a)]. This is a substantial responsibility where often the "devil is in the details" and should not be left to individual decisionmaking by the Executive Director on a case by case basis. Granting authority to the Executive Director and doing so one application at a time can lead to consequential inconsistencies, it could lead to subjectively influenced decisions, it doesn't afford any public notice and lacks objective reliability. This is entirely too much discretion invested in the spot judgment of the Executive Director.

Under Subpart A. Section 401.8, "substantially changed" is being changed to "materially changed." Under Subpart I. Section 401.121 a definition is provided for "material change." The proposed rules state "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" [Section 401.8].

There are other places in the proposal where the word "material" is being substituted for "substantial." Both of these words are value-laden and open to subjective interpretation. The definition provided in the proposed rule is also not clear, focusing primarily on how the evaluation will be used rather than what the term actually means. The ambiguity of "material" and "materially changed" does not improve the understanding of what value is being attached. The definition of the adverb "materially" is "substantially" or considerably", according to the Oxford Dictionary. These are words that seem to be interchangeable, with little difference. Why is the DRBC changing the term? The secondary dictionary definition of "materially" is described "in terms of wealth or material possessions." If DRBC intends to attach a financial or economic value to the term, then it must define what constitutes "material" so that the public understands under what circumstances a project would be considered a new project, requiring new reviews and approvals. A clear definition and certainty is needed for these terms.

As proposed, this is left, once again, to the sole discretion of the Executive Director, which places this decisionmaking process behind closed doors. Whether or not a change to a project will trigger a fresh review that would open the process up to public review and Commissioner action is of great importance and requires public transparency and Commissioner-level decision making.

Proposed Rulemaking – Public Records Access

Under Subpart H. in the proposed rules, access to public records is addressed. The removal of references to the federal Freedom of Information Act removes provisions in that law without replacing them fairly. It is not clear what the fees that are charged to a requester will be based on because “processing requests for records” is a general term [Section 401.110]. For instance, in many other state and federal regulations, including FOIA, there is a waiver provision that the agency will consider for the administrative costs of pulling records that are requested. By the requester showing a request is in the public interest, the federal FOIA and many agencies will waive the often high fees associated with the time spent by the agency responding to the request. This is because one of the duties of public agencies is to serve the public and provide transparency and access to records that will inform the public. This is a duty of the DRBC and, as stated at the top of this letter, DRBC recognizes this duty. A waiver provision must be provided in the rules to impart fairness and prevent access to information from being too expensive for people. Not allowing this provision discriminates against those who cannot afford the expense.

We also object to the Executive Director being empowered to decide whether or not to disclose a record. The proposal states that the Executive Director may exercise discretion in deciding 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” [Section 401.115]. These are decisions that many agencies entrust to attorneys who administer the law. There is no requirement in the proposed rules that the Executive Director must have the qualifications to implement the law and there is a danger that when exercising discretion there will be subjective influences. Regardless of whether FOIA applies, DRBC needs to create a public records request system that aligns with the laws in its member states and the federal FOIA so that the public has similar access to DRBC records and so that records requested for public interest purposes are not subject to a fee. One simple and straight-forward solution is to state that even though DRBC is not a federal agency, it will follow the federal FOIA law as it has for decades.

The public has fought long and hard for greater transparency and fair opportunities to provide meaningful and informed public participation on the approvals and policies that the DRBC makes. These critical decisions directly affect the quality of our environment, our drinking water, our air quality, the diversity and health of the Delaware River, its species, habitats, ecosystems, tributaries and communities throughout the entire magnificent Delaware River Watershed. We cannot effectively take part and influence outcomes if the decisionmaking process is not open and interactive, with all important decisions and the underlying information about them fully

disclosed and available for public review and comment. We object to the proposed inadequate process for public access to records.

We request that the DRBC not approve the rules as proposed. We request that the DRBC revise the sections of the proposed rules to which we object in this comment and replace those sections to provide greater transparency, public participation, and public access and that the decisionmaking process engage and require these important decisions to be made by the Commissioners rather than administrative and/or executive staff.

Thank you for the opportunity to comment on this critical proposed rulemaking.

[1] <https://www.nj.gov/drbc/library/documents/DRBCvision-mission-values.pdf>

Downloaded at: <https://www.nj.gov/drbc/about/60th-Anniversary.html>

[2] *Id.*

[3] *Id.*

[4] <https://www.nj.gov/drbc/library/documents/compact.pdf> P. 29

Organizations (4 additional organizations)

Sierra Club Atlantic Chapter

South Jersey Land & Water Trust

Aquashicola-Pohopoco Watershed Conservancy

Responsible Decarbonization Alliance (RDA)

Individuals (6 additional individuals)

Vincent Bradbury

Pamela Seubert

Joseph Feliciani

Cheryl Thompson

Carolyn Lange

Judy Beers