

DELAWARE RIVER BASIN COMMISSION

PROPOSED

PUBLIC NOTICE

Notice of Proposed Rulemaking and Public Hearing

Proposed Amendments to the *Rules of Practice and Procedure* to Allow Each Signatory Party and the DRBC to Administer a Single Process for the Review and Adjudication of Projects

The Delaware River Basin Commission (“DRBC” or “Commission”) is a federal-interstate compact agency charged with managing the water resources of the Delaware River Basin without regard to political boundaries. Its commissioners are the governors of the four basin states – Delaware, New Jersey, New York, and Pennsylvania – and a federal representative, the North Atlantic Division Commander of the U.S. Army Corps of Engineers. The Commission is not subject to the requirements of the Delaware Administrative Procedures Act. This notice is published by the Commission for information purposes.

Summary: The Commission will hold a **public hearing** to receive comments on proposed amendments to its *Administrative Manual Part III – Rules of Practice and Procedure* (18 C.F.R. Part 401) to provide for DRBC and each of the parties to the *Delaware River Basin Compact* (United States Public Law 87-328, Approved September 27, 1961, 75 Statutes at Large 688; and 53 Delaware Laws, Chapter 71, Approved May 1, 1961, (“the Compact”) – Delaware, New Jersey, New York, Pennsylvania and the federal government (“Signatory Parties”) – to coordinate and collaborate in the administration of a single process for the review and adjudication of projects. The program, called “One Process/One Permit,” (also herein, “the Program”) will allow DRBC and administrative agencies of the Signatory Parties participating in the Program to incorporate the requirements and determinations of both DRBC and the Signatory Party agency into a single permit or other approval instrument.

Dates: The **public hearing** will start on or around 2:00 P.M. on Tuesday, June 9, 2015, during the Commission’s regularly scheduled public hearing. The hearing will continue until all those wishing to testify have had an opportunity to do so. Depending upon the number of people wishing to speak, the hearing officer may impose time limits on speakers. Written comments will be accepted by any of the means described below and must be received by 5:00 P.M. on Wednesday, July 1, 2015. More information regarding the procedures for the hearing and comments is set forth in the section “Oral Testimony and Written Comments.”

Addresses: The **public hearing** will be held at the Washington Crossing Historic Park Visitor’s Center at 1112 River Road in Washington Crossing, Pennsylvania. Please check washingtoncrossingpark.org/contact/ for directions, as Internet mapping services provide unreliable directions to this location.

Oral Testimony and Written Comments: Persons wishing to testify at the hearing are asked to register in advance by contacting Paula Schmitt at 609-883-9500, ext. 224 or paula.schmitt@drbc.state.nj.us. Written comments may be submitted as follows: If by email (preferred), to paula.schmitt@drbc.state.nj.us; by fax, to Commission Secretary at 609-883-9522; by U.S. Mail, to Commission Secretary, DRBC, P.O. Box 7360, West Trenton, NJ 08628-0360; or by overnight mail, to Commission Secretary, DRBC, 25 State Police Drive, West Trenton, NJ 08628-0360. Comments also may be delivered by hand at any time during DRBC’s regular office hours (Monday through Friday, 8:30 A.M. through 5:00 P.M. except on national holidays) until the close of the comment period. In all cases, please include the commenter’s name, address and affiliation, if any, in the comment document and “One Process/One Permit” or “OPOP” in the subject line.

For Further Information: The rule text is available on the DRBC website, DRBC.net. Also posted to the website are an extensive FAQ document; DRBC Resolution No. 2015-4, authorizing the Executive Director to initiate rulemaking and enter into an administrative agreement with the New Jersey Department of Environmental Protection (NJDEP) for demonstration of the Program; and the administrative agreement between DRBC and the NJDEP to provide for the demonstration program, which includes provisions for fully implementing One Process/One Permit once a final rule has been adopted. Detailed procedures of the DRBC for public hearings, public meetings and “Public Dialogue” are available on the web at: <http://www.state.nj.us/drbc/library/documents/procedures120414.pdf>. For further information, please contact Commission Secretary Pamela M. Bush, 609-477-7203.

Supplementary Information

Background. Because DRBC and its Signatory Parties share common water resource management objectives,

sponsors of many water resource-related projects in the Delaware River Basin are currently required to apply to both the DRBC and a state agency, among others, for approvals. The proposed rule provides for DRBC and the administrative agencies of the Signatory Parties to identify regulatory programs that by mutual agreement will be managed through a single process resulting in one decision or approval. Agreements between DRBC and federal agencies are possible under the rule, but none are currently contemplated.

One Process/One Permit is intended to promote interagency cooperation and collaboration on shared mission objectives, achieve regulatory program efficiencies, avoid unnecessary duplication of effort, and reduce the potential for confusion on the part of regulated entities and the public. The regulatory standards and authorities of the DRBC and each of its Signatory Parties are expressly preserved by the Program, including in the proposed rule. The more protective of the applicable DRBC or Signatory Party agency's requirements will be included in each permit or approval issued under the Program.

The proposed rule provides for DRBC and each Signatory Party agency choosing to implement One Process/One Permit to enter into an administrative agreement that identifies the types of projects and approvals to be covered. Initially, the Program is expected to be implemented for (a) withdrawals of basin waters subject to both DRBC review and state allocation programs; and (b) wastewater discharges subject to DRBC review and the state-administered National Pollutant Discharge Elimination System (NPDES) program. For water withdrawals, the lead agency under One Process/One Permit may be the state or the DRBC, depending upon current state programs. The delegated state environmental agencies will be lead agencies for the review of wastewater discharges. Other regulatory programs, such as programs relating to floodplain management, could be included in the future. All administrative agreements between DRBC and agencies of the Signatory Parties for implementing One Process/One Permit will be subject to Commission approval following a public hearing.

Authority. Sections 1.5 and 3.9 of the Compact and existing DRBC rules allow and encourage the Commission to use the agencies of the Signatory Parties wherever feasible and advantageous consistent with the Compact. Accordingly, under the proposed rule, permits issued by Signatory Party agencies may include a finding required by Section 3.8 of the Compact. Specifically, after the rule and amended agreements are in place, based on the appropriate level of review and a recommendation by the DRBC staff, approvals issued under the Program may include the finding that when operated in accordance with the terms and conditions of the approval, the activities regulated by the approval will not substantially impair or conflict with DRBC's comprehensive plan.

Operation of the Program. Under the proposed rule, an application for initial approval, renewal or revision of project activities subject to the One Process/One Permit program will be filed only with the lead agency. This does not mean that the DRBC or others will not be involved in the review of applications for new and renewal water withdrawal and discharge projects. Rather, DRBC and the Signatory Party agency will follow a single process, and reviews will be performed more efficiently and more collaboratively.

Consistent with the proposed rule, the agreements between DRBC and Signatory Party agencies will provide for a level of DRBC review appropriate to the circumstances. Some reviews, such as those for simple and standard renewals of existing permits, may be significantly streamlined or subject to inter-agency notifications only. Others, including to implement standards for which the DRBC staff have special expertise, will involve substantial DRBC staff effort. For example, under the wastewater discharge program, DRBC staff will continue to perform modeling to determine "No Measurable Change" requirements for the Commission's Special Protection Waters program and to calculate an alternative mixing zone for a discharge of treated industrial wastewater to the Delaware Estuary. For certain projects, DRBC staff also will continue to identify conditions of approval to ensure that projects subject to review under the Compact and implementing regulations do not impair or conflict with the Commission's comprehensive plan. The purpose of One Process/One Permit is to eliminate unnecessary effort, not to eliminate effort needed to fully review a project under all applicable standards and rules. Under the Program, each party continues to recognize the authority of the other to promulgate rules, regulations and standards. The rule does not change that authority.

Notably, a separate DRBC review and decision for water withdrawal and discharge activities will still be required in certain cases, such as when a new project must be incorporated into the Commission's comprehensive plan. Both parties also will retain the right to act separately, such as in the instances, anticipated to be rare, where the parties cannot agree on the terms and conditions of approval. Certain categories of projects that are subject to DRBC review will not be covered by the Program, and the Executive Director and Commissioners will have the ability to remove a project from the Program. However, the objective of One Process/One Permit is to encompass most, if not all, elements of the review and approval for covered projects.

The proposed rule does not modify the existing project review fee schedule of the DRBC or that of any Signatory Party agency. Although One Process/One Permit is expected to improve process efficiency, in many instances as described above, the DRBC will devote significant resources and work effort to review projects and support its regulatory programs. Accordingly, the DRBC regulatory program will continue for the present to be supported by its existing regulatory program fees. The Commission's fee schedule set forth in Resolution No. 2009-2 will remain in effect unless and until the Commission amends it through rulemaking or a comparable public process. Under One Process/One Permit, all DRBC fees applicable under current practices will continue to be paid directly to the Commission.

The proposed rule provides that persons aggrieved by the final action of a state agency on behalf of the Commission

under One Process/One Permit must exhaust their administrative remedies under the law of the Signatory Party agency that issued the decision.

New Jersey Demonstration Program. By Resolution No. 2015-4 approved by the Commission on March 11, 2015, DRBC and NJDEP have agreed to "practice" using new collaborative processes between the two agencies for the review of wastewater discharge applications, pending the adoption of a new rule such as the one proposed today. The agreement between DRBC and NJDEP provides for the demonstration program and sets forth provisions needed to fully implement One Process/One Permit once a final rule has been adopted. In the event that a project reviewed under the New Jersey Demonstration Program reaches the stage where it is ready for final approval before DRBC has adopted a final rule, the application will be acted upon by DRBC and the NJDEP independently. As explained above, additional information about the New Jersey Demonstration Program is available on the Commission's website.

Preservation of the 1954 Supreme Court Decree. In accordance with Sections 3.3(a) and 3.5 of the Compact, the proposed rule expressly provides that it does not grant authority to any Signatory Party agency to impair, diminish or otherwise adversely affect the diversions, compensating releases, rights, conditions, obligations and provisions for administration thereof provided in the United States Supreme Court decree in *New Jersey v. New York*, 347 U.S. 995 (1954) ("Decree"). The rule further reiterates that any such action may be taken only by the Commission with the unanimous consent of the parties to the Decree or upon unanimous consent of the members of the Commission following a declaration of a state of emergency in accordance with Section 3.3(a) of the Compact.

No Effect on Section 401 State Water Quality Certification Programs. The proposed rule also does not affect the authority of Signatory Party states to issue water quality certifications under Section 401 of the Clean Water Act.

Dated: May 14, 2015

PAMELA M. BUSH, ESQ.
Commission Secretary

Text of proposed amendments:

It is proposed to amend Article 3 of the *Administrative Manual – Rules of Practice and Procedure* with the addition of the following section:

2.3.11 One Permit Program

A. Purpose. The purpose of the One Permit Program set forth in this Section is to provide for the environmental agency and/or other administrative agency of a Signatory Party ("Signatory Party Agency") and the Commission to coordinate and collaborate in the administration of a single process for the review and adjudication of projects. The One Permit Program will incorporate, where appropriate, the Signatory Party Agency and Commission requirements and determinations in a single permit or other approval instrument.

B. Scope. This Section applies to all projects that: are reviewable under the Compact; meet the thresholds for review set forth in Section 2.3.5 of these Rules of Practice and Procedure; are subject to review by a Signatory Party Agency under its own statutory authorities; and are within categories of projects that have been identified in a duly adopted Administrative Agreement between the Commission and a Signatory Party Agency under this Section 2.3.11 of the Rules.

C. Regulatory Programs. A Signatory Party Agency or the Commission may at any time propose to the other that a regulatory program be administered within the Basin under the One Permit Program. Regulatory programs eligible for administration under the One Permit Program include but are not limited to those concerning: basin discharges, basin water withdrawals, and basin flood plain requirements.

D. Procedure. The categories of projects covered and the procedures for processing applications under the One Permit Program shall be set forth in one or more Administrative Agreements between the Commission and the Signatory Party Agency that have been adopted by the Commission following a duly noticed public hearing and are in form and substance acceptable to the Commission and the Signatory Party Agency, consistent with the following:

1. Except as provided in subsection 2.3.11.E of these Rules or in an Administrative Agreement that has been duly executed by the Commission and the Signatory Party Agency under this Section, an application for initial approval, renewal or revision of any project subject to the One Permit Program shall be filed only with the Signatory Party Agency.
2. Notice that the project sponsor has filed an application with the Signatory Party Agency shall be provided to the Commission in the manner specified in the applicable Administrative Agreement.
3. The Signatory Party Agency receiving the application shall for those categories of projects identified in the Administrative Agreement as requiring Commission input, solicit the recommendation of the Commission staff as to any conditions of approval that may be necessary or appropriate to include in the project review determination under § 3.8 of the Compact. The process for solicitation of the recommendation by Commission staff shall be as defined within the applicable Administrative Agreement.
4. Unless the Signatory Party Agency disapproves the project or the Administrative Agreement provides for separate Commission action under § 3.8 of the Compact, the Signatory Party Agency shall make the project

review determination under § 3.8 of the Compact as to the regulatory program covered by the Signatory Party Agency's approval and include the determination and any associated conditions of approval within the permit or other approval instrument that it issues to the project sponsor.

5. The Commission will maintain a list of all projects being administered pursuant to the Program.

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 before initiating project design. 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 of a project in the Comprehensive Plan that does not 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.

F. Retention of Commission Review and Enforcement Authorities. Notwithstanding any other provision of this Section 2.3.11, any Commissioner or the Executive Director may designate for Commission review any project that is reviewable under the Compact. Nothing in this Section 2.3.11 shall limit the authority of the Commission to exercise its review authority under the Compact and applicable Commission regulations. Similarly, although Administrative Agreements executed pursuant to this Section may include collaborative and cooperative compliance and enforcement procedures, nothing in this Section 2.3.11 shall limit the authority of the Commission to exercise its enforcement authority under the Compact and applicable regulations.

G. Exhaustion of Signatory Party Administrative Remedies Prerequisite to Appeal. Before commencing an action in a court of appropriate jurisdiction challenging any final action taken by a Signatory Party Agency on behalf of the Commission, the appellant must first exhaust its administrative remedies under the law of the Signatory Party whose agency issued the decision at issue.

H. Fees. The Commission shall establish and maintain a schedule of fees for any or all of the services it renders pursuant to this Section 2.3.11. Project sponsors shall pay such fees, if any, directly to the Commission in accordance with such schedule and applicable rules.

I. Termination of existing Commission docket. At such time as the Signatory Party Agency makes the Project Review Determination and issues a permit or other approval instrument to a project sponsor in accordance with this Section 2.3.11, the Executive Director is authorized to terminate in whole or in part any Commission docket then in effect with respect to such project, provided that such termination shall not serve to remove a project from or otherwise modify the Comprehensive Plan.

J. Modification of Rules of Practice and Procedure to Conform to this Section. Any project subject to the One Permit Program shall be governed by this Section 2.3.11 and not Sections 2.1.4, 2.1.5, 2.1.6, 2.1.8, 2.3.4 A, C and E, 2.3.6, 2.3.7 and Article 6 where they are inconsistent with the procedures provided in this Section.

K. No Interference with Supreme Court Decree. In accordance with Sections 3.3(a) and 3.5 of the Compact, nothing in this Section 2.3.11 shall grant the authority to any Signatory Party Agency to impair, diminish or otherwise adversely affect the diversions, compensating releases, rights, conditions, obligations and provisions for administration thereof provided in the United States Supreme Court decree in *New Jersey v. New York*, 347 U.S. 995 (1954) ("Decree"). Any such action shall be taken only by the Commission with the unanimous consent of the parties to the Decree or upon unanimous consent of the members of the Commission following a declaration of a state of emergency in accordance with Section 3.3(a) of the Compact.

18 DE Reg. 926 (06/01/15) (Prop.)