

DELAWARE RIVER BASIN COMMISSION

Statutory Authority: 53 Delaware Laws, Chapter 71, Approved May 26, 1961 (Delaware River Basin Compact); United States Public Law 87-328, approved September 27, 1961, 75 Statutes at Large 688.

FINAL

RULE

Rules of Practice and Procedure

Proposed: *Delaware Register of Regulations* on October 1, 2023 (27 Del. Reg. 206-217).

Adopted: June 5, 2024, by the Delaware River Basin Commission, Pamela M. Bush, Esq., Commission Secretary.

Filed: June 17, 2024, as a final regulation.

Effective: July 22, 2024.

Summary: The Delaware River Basin Commission is amending its Rules of Practice and Procedure to: resolve ambiguities around the automatic termination of project approvals issued by the Commission and 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 incorrect references to the Federal Freedom of Information Act in the Commission's regulations providing for access to public records; align pronouns with the Commission's policies regarding diversity, inclusion, and belonging; and correct certain cross-references.

Contact: Pamela M. Bush, Esquire, 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 states of 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, 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.

On September 28, 2023, the Commission published a proposed rule (88 FR 66722) to amend the RPP to: resolve ambiguities around the automatic termination of project approvals issued by the Commission and 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 incorrect references to the Federal Freedom of Information Act in the Commission's regulations providing for access to public records; and align pronouns with the Commission's policies regarding diversity, inclusion, and belonging. A notice of the proposed amendments appeared in the *Delaware Register of Regulations*, 27 Del. Reg. 196, 206, on October 1, 2023, the *New Jersey Register*, 55 N.J.R. 2179(a), on October 16, 2023, the *New York Register*, 45 N.Y. Reg. 9, on October 11, 2023, and the *Pennsylvania Bulletin*, 53 Pa. B. 6698, on October 28, 2023.

¹United 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.

Opportunity for public input on the proposed rules was provided during a comment period that ran from September 28, 2023, through November 30, 2023. In addition to soliciting written comments, the Commission accepted oral comment at two hearings conducted via Zoom and telephone. The Commission received a total of 209 public comment submissions, consisting of 199 written submissions and ten oral comments. The submissions typically consisted of a set of comments from a single individual or organization, and they typically addressed more than one aspect or provision of the proposed amendments. In many instances, a single submission included a set of comments by two or more individuals or organizations. Some submissions consisted of petitions or a set of comments with multiple signers. Similar or identical comments were in many instances submitted by individual commenters using form letters or template language provided by others. Commenters were not limited to a single submission, and some commenters offered two or more submissions. The "199" figure represents the number of individual written submissions the Commission received during the comment period without regard to the number of comments within a submission, the number of signers on a single submission, or the number of individuals making a joint submission.

The Commission reviewed all comments and supporting material it received during the comment period. The staff, in consultation with the Commissioners, prepared a Comment and Response Document summarizing the comments on the proposed rule and setting forth the Commission's responses and revisions in detail. By Resolution No. 2024 - 06 on June 5, 2024, the Commission adopted the Comment and Response Document simultaneously with its adoption of the final rule.

Changes from the Proposed Rule

The final rule differs from the proposed in the following respects:

Action on request for extension. The final rule provides that the Commissioners, not the Executive Director, will approve or deny all requests for extended or renewed approval under amended § 401.41(a) and (b), respectively. In conjunction with this change, rather than establishing a prescribed extension term of five years, as originally proposed, the final rule at § 401.41(a) provides for the Commissioners to grant an extension of *up* to five years.

Eligibility for extension. Under the final rule, to qualify for extension of a docket approval that would otherwise expire under § 401.41, in addition to demonstrating that approved activities, site conditions, and the Comprehensive Plan have not materially changed, the docket holder (project sponsor) will be required to demonstrate that it is diligently pursuing the project, which can be shown through its planning, construction or project operational activities, its project expenditures, its efforts to secure government approvals necessary for the project, or its active participation in appeals of government decisions on its applications for government approvals.

The docket holder will not be required to demonstrate that it has expended a fixed, minimum dollar amount, a proposal to which commenters objected. Nor will the docket holder be obligated to show that it has expended a substantial sum in relation to the project cost, as the rule originally provided, or that it has expended a fixed percentage representing a substantial sum in relation to the total cost of the project, as some commenters proposed. In the Commission's view, those approaches are impracticable where the project costs consist primarily of construction costs, and where the sponsor could not lawfully or reasonably commence construction because all final approvals have not been secured.

Public process. In accordance with the final rule, the Commission will publish notice that it has received a request for a docket extension under § 401.41(a) and provide an opportunity for written comment of at least ten days' length on whether the docket holder has demonstrated all elements requisite for an extension-i.e., that the approved activities, site conditions, and Comprehensive Plan have not materially changed, and that the project sponsor has diligently pursued the project in reliance on the Commission's approval. The project sponsor will be afforded an opportunity to respond to the comments received but will not be obligated to do so. The Commission will provide notice at least ten days prior to the date of a business meeting at which the Commissioners consider action on a request pursuant to § 401.41(a).

Public hearing. The final rule provides that a public hearing on a request for a docket extension under § 401.41(a) will be held if three or more Commission members request such a hearing in writing to the Executive Director or by vote at a public meeting.

Administrative continuance. Under the final rule, a docket that is the subject of a request for extension under § 401.41(a) filed at least 90 days before the docket's expiration will be administratively continued pending final Commission action on the request in the event that such action occurs after the otherwise effective date of termination.

Construction complete. The final rule clarifies that if the activities authorized by the Commission's docket are limited to construction activities, an extension in accordance with § 401.41(a) is no longer required once construction is complete. Because some dockets issued for construction activities impose ongoing obligations on docket holders, the final rule further clarifies that the expiration of the docket, including any approved extension, does not eliminate ongoing docket obligations

expressly identified as such in the docket approval.

Language of final § 401.41(b). The final language adopted for § 401.41(b) has been modified from the originally proposed language to more accurately reflect that the burden is on the docket holder to demonstrate eligibility for an extension under § 401.41(a).

Process for re-application. Under the final rule, if a request for extension under § 401.41(a) is denied, and the project sponsor wishes to apply for renewal of its docket approval under paragraph (b), the project sponsor must do so by a date to be established by the Commission. In this situation, the docket approval is not thereafter administratively continued automatically. However, the Commission may, in its discretion, administratively extend the docket approval in whole or in part for a period ending on or before the date on which the Commission renders a final decision on the sponsor's renewal application.

Correcting Amendments

On October 8, 1987, the Commission redesignated portions of the Rules of Practice and Procedure (52 FR 37602). The final rule that contained the redesignation inadvertently failed to update certain cross-references affected by the redesignation. This final rule corrects those cross-references. The affected provisions are 18 CFR 401.108(c), 401.109(a), (d), and (e), 401.113, and 401.115(b).

Additional Materials

Additional materials can be found on the Commission's website at: https://www.nj.gov/drbc/about/regulations/finalrule_RPPamendments.html. These include links to Resolution No. 2024 - 06 of June 5, 2024 adopting the final rule and incorporating a clean copy of the rule text; the Commission's Comment and Response Document; a mark-up comparing the final to the proposed rule text; a mark-up comparing the final to the former rule text; and copies of the comments received.

The Commission's notice of proposed rulemaking and proposed rule text can be found on the Commission's website at: https://www.nj.gov/drbc/meetings/proposed/notice_RPP_amendments.html.

Pamela M. Bush,
Commission Secretary/Assistant General Counsel
Dated: June 17, 2024

For the reasons set forth in the preamble, effective July 22, 2024, the Commission's final rule amends chapter III of Title 18 of the Code of Federal Regulations. The rule text is set forth below:

PART 401 - RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 401 continues to read as follows:
Authority: Delaware River Basin Compact (75 Stat. 688) unless otherwise noted.

Subpart A -- Comprehensive Plan

2. In § 401.8, revise paragraph (a) to read as follows:

§ 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 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 a material change within the meaning of this part.

* * * * *

Subpart B -- Water Resources Program

3. Revise §§ 401.22 and 401.23 to read as follows:

§ 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. 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. 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 project's sponsor shall furnish the information listed in § 401.4(b) prior to the inclusion of the project in the Comprehensive Plan and Water Resources Program.

§§ 401.24 through 401.26 [Removed]

4. Remove §§ 401.24 through 401.26.

Subpart C -- Project Review Under Section 3.8 of the Compact

5. In § 401.38, revise the introductory text to read as follows:

§ 401.38 Form of referral by State or Federal agency.

Upon receipt of an application by any state or federal agency for 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.

* * * * *

6. Revise § 401.39 to read as follows:

§ 401.39 Form of submission of projects.

- (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>.

7. Revise § 401.41 to read as follows:

§ 401.41 Limitation of approval; dormant applications.

- (a) *Extension (no material change)-(1) Term of approval; extension request.* 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 Commission extends the approval for an additional period of up to five years, based upon a written request from the project sponsor accompanied by supporting documentation demonstrating that the following criteria have been met:
 - (i) No material changes to the project as approved are proposed;
 - (ii) 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;
 - (iii) 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; and
 - (iv) The project sponsor is diligently pursuing the project as shown by its planning, construction or project operational activities, its project expenditures, its efforts to secure government approvals necessary for the project, or its active participation in appeals of government decisions on its applications for government approvals. The project sponsor is not required by this paragraph (a)(1)(iv) to conduct activities that it is not

legally authorized to conduct or that it demonstrates would be unreasonable for it to conduct before obtaining all necessary final government approvals.

- (2) *Denial of extension request.* Otherwise, the extension request shall be denied, and the project sponsor may apply for renewal of its approval under paragraph (b) of this section by a date to be established by the Commission. If the Commission denies the request for an extension pursuant to this section, the docket approval shall not be administratively continued automatically pursuant to paragraph (a)(5) of this section. The Commission may, however, in its discretion, administratively extend the docket approval in whole or in part for a period ending on or before the date on which the Commission renders a final decision on the sponsor's re-application under paragraph (b) of this section.
- (3) *Public notice.* The Commission will publish notice of receipt of a request for extension under this paragraph (a) and will provide notice at least ten days prior to the date of a business meeting at which the Commissioners may act on such request.
- (4) *Public comment.* An opportunity for written comment of at least ten days' length will be provided on a request for extension. The project sponsor will be afforded an opportunity to respond in writing to the comments received. A public hearing will be provided if three or more Commission members ask the Executive Director in writing to schedule one or vote during a public meeting of the Commission to provide one.
- (5) *Administrative continuance.* A docket that is the subject of a request for extension under paragraph (a) of this section filed at least 90 days before the docket's expiration shall be administratively continued pending the Commission's final action on the request in the event that such action occurs after the otherwise effective date of termination under this section.
- (6) *Extensions no longer needed.* If the activities authorized by a docket are limited to construction activities, an extension is no longer required once construction is complete; however, the expiration of the docket, including any approved extension, does not eliminate ongoing docket obligations expressly identified as such in the docket approval.
- (b) *Re-application (material change).* If the Commission determines that the project sponsor has failed to demonstrate that no material changes to the project as approved are proposed and that the other criteria listed in paragraph (a)(1) of this section are satisfied, the project sponsor must apply for renewal and any necessary 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.

8. In § 401.42, revise paragraph (e) to read as follows:

§ 401.42 One permit 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. 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 this part. 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 may be submitted only to the Signatory Party Agency unless otherwise specified in the Administrative Agreement.

* * * * *

9. In § 401.43:

- a. Revise paragraphs (b)(1)(ii) and (b)(4)(ii) through (iv); and
- b. In paragraph (e), in table 3, remove the entries for "Name change" and "Change of Ownership" and add an entry at the end of the table for "Name Change or Change of Ownership" in their place.

The revisions and addition read as follows:

§ 401.43 Regulatory program fees.

* * * * *

(b) * * *
 (1) * * *

(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 from the project as described in the Plan shall be deemed to be a new and different project for purposes of this section.

* * * * *

(4) * * *

(ii) *Late filed renewal application.* Any renewal application submitted fewer than 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, any material change to the project 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 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.

* * * * *

(e) * * *

Table 3 to § 401.43--Additional Fees

Proposed action	Fee	Fee maximum
* * * * *	*	*
Name Change or Change of Ownership	\$1,917 ¹	

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

Subpart H -- Public Access to Records and Information

10. Remove the authority citation to subpart H.

11. In § 401.103, revise paragraph (a) to read as follows:

§ 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, whether or not the provisions of this part are mentioned in the request, and shall be governed by the provisions of this part.

* * * * *

12. Revise § 401.104 to read as follows:

§ 401.104 Preparation of new records.

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.

13. In § 401.105, paragraph (b) is revised to read as follows:

§ 401.105 Indexes of certain records.

* * * * *

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

14. Revise § 401.106 to read as follows:

§ 401.106 Records Access Officer.

The Executive Director shall designate a Commission employee as the Records Access Officer. The Records Access Officer shall be responsible for Commission compliance with the provisions of this part. All requests for agency records shall be sent to the Records Access Officer in a manner consistent with § 401.108(a).

15. In § 401.108, revise paragraphs (a), (b)(1), (c), and (d) to read as follows:

§ 401.108 Filing a request for records.

(a) All requests for Commission records shall be submitted to the Records Access 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 to the Commission, 25 Cosey Road, West Trenton, NJ 08628.

(b) * * *

(1) If the description is insufficient to locate the records requested, the Records Access 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 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 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.

16. In § 401.109, revise paragraphs (a), (b) introductory text, and (c) through (e) to read as follows:

§ 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 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 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 request.

(b) Within 10 working days (excepting Saturdays, Sundays, and legal public holidays) after a request for records is logged by the Records Access 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 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 designee shall make a determination and notify the appellant of such 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.

- (d) If the request for records will result in a fee of more than \$25, determination letter under paragraph (b) of this section shall specify or estimate the fee involved and may require prepayment, as well as payment of any amount not yet received as a result of any previous request, before the records are made available. If the fee is less than \$25, prepayment shall not be required unless payment has not yet been received for records disclosed as a result of a previous request.
- (e) Whenever possible, the determination letter required under paragraph (b) of this section, relating to a request for records that involves a fee of less than \$25.00, shall be accompanied by the requested records. Where this is not possible, the records shall be forwarded as soon as possible thereafter. For requests for records involving a fee of more than \$25.00, the records shall be forwarded as soon as possible after receipt of payment.

17. In § 401.110, revise paragraphs (a)(1)(i)(A) and (c) to read as follows:

* * * * *

§ 401.110 Fees.

(a) * * *

(1) * * *

(i) * * *

(A) Processing 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 Officer.

18. Revise § 401.113 to read as follows:

§ 401.113 Segregable materials.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this part, except as provided in § 401.102.

19. Revise § 401.115 to read as follows:

§ 401.115 Discretionary disclosure by the Executive Director.

- (a) The Executive Director may exercise discretion to disclose part or all of any Commission record that is otherwise exempt from disclosure pursuant to this part whenever the Executive Director 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 disclose any other record that is exempt from disclosure.

* * * * *

Subpart I -- General Provisions

20. In § 401.121, redesignate paragraph (e) as paragraph (f) and add new paragraph (e) to read as follows:

§ 401.121 Definitions.

* * * * *

- (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.

* * * * *