

DELAWARE RIVER BASIN COMMISSION

Statutory Authority: 53 Delaware Laws, Chapter 71, Approved May 26, 1961

FINAL

ORDER

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

Proposed: Delaware *Register of Regulations* (18 DE Reg. 926-930 (06/01/2015)) on June 1, 2015

Adopted: December 9, 2015 by the Delaware River Basin Commission, Pamela M. Bush, Esq., Secretary.

Filed: February 12, 2016 as a final regulation.

Effective: March 4, 2016 (thirty days after publication in the Federal Register, which occurred on February 3, 2016).

Summary: By Resolution No. 2015-9 on December 9, 2015, the Delaware River Basin Commission (“DRBC” or “Commission”) approved amendments to the Commission’s *Administrative Manual Part II – Rules of Practice and Procedure* to provide for the One Process/One Permit Program. The Program 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 regarding regulatory requirements applicable to projects.

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Supplementary Information: The Delaware River Basin Commission is a federal-interstate compact agency charged with managing the water resources of the Delaware River Basin on a regional basis without regard to political boundaries. Its members are the governors of the four basin states – Delaware, New Jersey, New York and Pennsylvania – and the North Atlantic Division Commander of the U.S. Army Corps of Engineers, representing the federal government. The Commission is not subject to the requirements of the Delaware Administrative Procedure Act. The purpose of this notice is to advise the public that duly adopted regulations of the Commission have been filed with the state in accordance with Section 14.2 of the Delaware River Basin Compact.

Background. This final rule amends the *Administrative Manual Part II – Rules of Practice and Procedure* by the addition of a new section 2.3.11 (18 CFR § 401.42), providing for DRBC and each of the parties to the *Delaware River Basin Compact* (United States Public Law 87-328, Approved September 27, 1961, 75 U.S. Statutes at Large 688; 53 Delaware Laws, Chapter 71, Approved May 26, 1961; New Jersey Laws of 1961, Chapter 13, Approved May 1, 1961; New York Laws of 1961, Chapter 148, Approved March 17, 1961; and Pennsylvania Acts of 1961, Act No. 268, Approved July 7, 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 certain projects, including, where appropriate, issuance of a single permit or other approval instrument.

Currently, the sponsors of many water resource-related projects in the Delaware River Basin are required to apply to both the DRBC and a state agency, among others, for approvals. New §2.3.11 (18 CFR 401.42) of the Commission’s *Rules of Practice and Procedure* provides for the DRBC and the administrative agencies of the Signatory Parties to identify regulatory programs that by mutual agreement will be managed through a single process that may result in one decision or approval. The program, known as One Process/One Permit (hereinafter, “the Program” or “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 regarding regulatory requirements applicable to projects. Importantly, the rule expressly preserves the authorities of the DRBC and each of its Signatory Parties and effects no change to federal, state or DRBC substantive standards and requirements.

In accordance with this final rule, administrative agreements between DRBC and Signatory Party agencies to implement the Program may be approved by the Commission after each such agreement undergoes a duly noticed public hearing. Notably, each Signatory Party may choose whether and when to initiate an agreement or agreements with DRBC under the Program.

In accordance with Resolution No. 2015-4 of the Commission, which was adopted on March 11, 2015 following a public hearing on March 10, 2015, an administrative agreement between the DRBC and the New Jersey Department of Environmental Protection (NJDEP) was executed, in part to demonstrate how the Program would operate in New Jersey. With adoption of the final rule, DRBC and NJDEP will fully implement their March 2015 agreement. A draft agreement between DRBC and the New York State Department of Environmental Conservation (NYSDEC) was published on January 29, 2016. The earliest date on which the Commission could approve the agreement with NYSDEC is at its next scheduled public meeting on March 16, 2016.

Procedural background. The Commission introduced One Permit to the basin community during meetings with regulated entities, environmental organizations and other stakeholders on February 12 and March 3, 2015 and through

publication on the DRBC website of a press release and a set of FAQs on February 27, 2015. During the Commission's quarterly public meeting on March 10-11, 2015, the Commission approved Resolution No. 2015-4, in part authorizing and directing the Executive Director to initiate rulemaking to amend DRBC's *Rules of Practice and Procedure* to provide specific authorization for and define the scope of the Program. A notice of proposed rulemaking was published on the Commission's web site on May 17, 2015.

Notice of the proposed amendments appeared in the *Federal Register* at 80 FR 28567, May 19, 2015; *Delaware Register of Regulations*, 18 DE Reg. 1002, June 1, 2015; *New Jersey Register*, 47 N.J.R. 1256, June 1, 2015; *New York State Register*, May 27, 2015 (page 4); and *Pennsylvania Bulletin*, 45 Pa. B. 2611, May 30, 2015. The Commission held a public hearing on the proposed rule on June 9, 2015 and accepted written comments on the rule through July 1, 2015.

Changes to the draft rule. In its action adopting the final rule, the Commission also adopted a detailed comment and response document identifying the commenters and comments received during the comment period and setting forth the Commission's responses, including changes to the rule to address concerns and respond to recommendations submitted by stakeholders.

Revisions to the draft rule include the following:

- Paragraph B (18 CFR 401.42(b)) was clarified to provide that applications for approvals required by the Compact and Commission regulations, but not within the scope of the Program, must continue to be submitted to the Commission. This clarification makes express the intent of the draft rule.
- To ensure continued public access to information on the status of all projects under review pursuant to the *Delaware River Basin Compact*, including those administered under One Permit, a new paragraph D.2. (18 CFR 401.42(d)(2)) was added, establishing that participating Signatory Party agencies will notify DRBC at least once monthly of applications received under the Program; and paragraph D.5 18 CFR 401.42(d)(5)) was revised to establish that the list that the Commission will maintain of projects being administered under One Permit will be posted on the Commission's website. Additional benefits of these changes are described in the comment and response document.
- Paragraph H (18 CFR 401.42(h)) of the draft rule was revised to clarify that DRBC's current Project Review Fee Schedule as set forth in Resolution No. 2009-2 will be the operative fee schedule for projects reviewed under the Program, unless and until the Commission replaces it.
- Paragraph I (18 CFR 401.42(i)) was revised to provide more efficient mechanisms for the disposition of Commission dockets during the transition to One Permit. A new paragraph I.1 (18 CFR 401.42(i)(1)) provides that for projects covered by the Program, the most recent docket will be deemed administratively continued when a renewal application is timely submitted to the Signatory Party Agency. A new paragraph I.2 (18 CFR 401.42(i)(2)) eliminates the need for separate Executive Director action to terminate provisions of each docket by providing that unless the Executive Director or the Commission otherwise directs, upon the Signatory Party Agency's final action on an application for a project subject to the Program, (a) any existing or administratively continued docket will terminate as to all of its provisions and conditions within the scope of the Signatory Party Agency approval; and (b) such docket will continue in effect as to any provisions and conditions outside the scope of the Signatory Party Agency approval, including for example, addition of a project to the Comprehensive Plan.
- The rule as proposed authorizes Signatory Party agencies, in accordance with an applicable administrative agreement, to issue in their approvals for projects to be administered under the Program the finding and determination required by section 3.8 of the Compact that a project subject to section 3.8 review does not substantially impair or conflict with the Commission's Comprehensive Plan ("the finding"). Paragraph D.4 (18 CFR 401.42(d)(4)) of the draft rule was revised to clarify that where in accordance with an applicable administrative agreement implementing One Permit the finding continues to be made by the Commission, the Signatory Party agency may include the Commission's finding in the agency's approval, together with any conditions identified by the Commission as necessary to support it, thereby achieving a unified permit.

Minor additional revisions to the rule text were made as deemed necessary for clarity or accuracy. In particular, changes were made to underscore two aspects of the rule that have been part of One Permit from the start: (1) that participation in the program by Signatory Party agencies is voluntary; and (2) that the scope of a Signatory Party Agency's participation is defined by an administrative agreement between DRBC and the agency that has been duly adopted in accordance with paragraph D (18 CFR 401.42(d)) of the rule.

Additional Materials: Additional materials can be found on the Commission's web site at www.drbc.net. These include DRBC Resolution No. 2015-9 approving the final rule, at http://www.nj.gov/drbc/library/documents/Res2015-09_OPOPwith-final-rule-text.pdf; and the Commission's detailed comment and response document, which identifies commenters, summarizes comments received on the proposed rule, and sets forth the Commission's responses, at http://www.nj.gov/drbc/library/documents/OPOP/comment-and-response_OPOP.pdf.

The version of the *Rules of Practice and Procedure* that is currently posted on DRBC's website at http://www.nj.gov/drbc/library/documents/admin_manual.pdf uses DRBC's original numbering system, which is different from that of the *Code of Federal Regulations*. In the DRBC codification, the One Permit Program rules are set forth at new section 2.3.11. A list of the CFR units and corresponding DRBC units follows. A complete stand-alone version of the Rules of Practice and

Procedure using the CFR system will be available on the DRBC website shortly.

| <u>CFR Unit</u> | <u>DRBC Unit</u> | <u>Title or Caption</u> |
|---|---|--|
| Title 18 | | |
| Conservation of Power and Water Resources | — | — |
| Chapter III— | | |
| Delaware River Basin Commission | — | — |
| Subchapter A— | | |
| Administrative Manual | Administrative Manual [Part II] | — |
| Part 401—Rules of Practice and Procedure | Rules of Practice and Procedure | — |
| Subpart C—Project Review Under Section 3.8 of the Compact | Article 3 – Project Review Under Section 3.8 of the Compact | — |
| 401.42 | 2.3.11 | One Permit Program |
| 401.42(a) | 2.3.11 A. | Purpose |
| 401.42(b) | 2.3.11 B. | Scope |
| 401.42(c) | 2.3.11 C. | Regulatory programs |
| 401.42(d) | 2.3.11 D. | Procedure |
| 401.42(e) | 2.3.11 E. | Comprehensive Plan projects |
| 401.42(f) | 2.3.11 F. | Retention of Commission review and enforcement authorities |
| 401.42(g) | 2.3.11 G. | Exhaustion of Signatory Party administrative remedies prerequisite to appeal |
| 401.42(h) | 2.3.11 H. | Fees |
| 401.42(i) | 2.3.11 I. | Effect of One Permit Program on Commission dockets |
| 401.42(j) | 2.3.11 J. | Modification of Rules of Practice and Procedure to conform to this section |
| 401.42(k) | 2.3.11 K. | No interference with Supreme Court decree |

Pamela M. Bush
 Commission Secretary and Assistant General Counsel
 Dated: February 9, 2016

The rule text, shown with the CFR numbering system, follows:

§ 401.42 One Permit Program.

(a) *Purpose.* The purpose of the One Permit Program set forth in this section is to provide the opportunity 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 allows the Signatory Party Agency and Commission to incorporate requirements and determinations of both entities in a single permit or other approval instrument, pursuant to a duly adopted Administrative Agreement under paragraph (d) of this section.

(b) *Scope.* This section applies to all projects that:

- (1) Are reviewable under the Compact;
- (2) Meet the thresholds for review set forth in § 401.35 of these *Rules of Practice and Procedure*;
- (3) Are subject to review by a Signatory Party Agency under its own statutory authorities; and
- (4) Are within regulatory programs that have been identified in a duly adopted Administrative Agreement between the Commission and a Signatory Party Agency under this section. For any project that requires an approval under the Compact that is outside the scope of the Signatory Party Agency's approval issued in accordance with an Administrative Agreement under this section, the project sponsor shall apply to the Commission in accordance with procedures established by the Commission.

(c) *Regulatory programs.* Regulatory programs eligible for administration under the One Permit Program may 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 paragraphs (b) and (e) of this section 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. To enable the Commission to compile and make available to the public a current list of pending applications for projects within the Basin subject to Commission jurisdiction, the Signatory Party Agency shall notify the Commission at least monthly of applications the Signatory Party has received during the preceding month that may be eligible for review under the One Permit Program.
3. For those categories of projects identified in the Administrative Agreement as requiring Commission input, the Commission staff shall provide the Signatory Party Agency with such input, including where specified by the Administrative Agreement, a recommendation as to any conditions of approval that may be necessary or appropriate to include in the project review determination under Section 3.8 of the Compact as to those regulatory programs identified in an Administrative Agreement in accordance with paragraph (b) of this section.
4. Unless the Signatory Party Agency disapproves the project or the Administrative Agreement provides for separate Commission action under Section 3.8 of the Compact, the Signatory Party Agency shall make the project review determination under Section 3.8 of the Compact, as specified in the Administrative Agreement, 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. If in accordance with the applicable Administrative Agreement the determination under Section 3.8 of the Compact is made by the Commission, the Signatory Party Agency may include the determination together with any associated conditions of approval in its permit or other approval instrument covering the project.
5. The Commission will maintain on its website 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. 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 or modification 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, any Commissioner or the Executive Director may designate for Commission review any project that is reviewable under the Compact. Nothing in this section 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 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 under this section, 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. The applicable fee(s) for Commission services rendered pursuant to this section shall be those set forth in DRBC Resolution No. 2009-2 (available at <http://www.nj.gov/drbc/library/documents/Res2009-2.pdf>) for the review and renewal of project approvals. Project sponsors shall pay such fees, if any, directly to the Commission in accordance with the current schedule and applicable rules.

(i) *Effect of One Permit Program on Commission dockets.*

(1) Unless the Executive Director or Commission otherwise directs, if a docket holder submits, or has submitted, a timely application to a Signatory Party Agency for a project subject to review under an Administrative Agreement duly adopted under paragraph (d) of this section, the most recent docket for the project shall, upon expiration, be deemed administratively continued until final action is taken in accordance with paragraph (i)(2) of this section.

(2) Unless the Executive Director or Commission otherwise directs, upon a Signatory Party Agency's final action on an application for a project subject to the One Permit Program:

(i) Any existing or administratively continued docket for such project shall terminate as to all of its provisions and conditions that pertain to regulatory programs administered by the Signatory Party Agency under the Administrative Agreement ("the Covered Programs"); and

(ii) The docket shall continue in effect as to any provisions and conditions not pertaining only to Covered Programs, including, as applicable, the incorporation of the project in the Commission's Comprehensive Plan.

(j) *Modification of rules of practice and procedure to conform to this section.* Any project subject to review under an Administrative Agreement duly adopted under paragraph (d) of this section, shall be governed by this section and not §§ 401.4, 401.5, 401.6, 401.8, 401.34(a), (c) and (e), 401.37, 401.38 and 18 CFR part 401, subpart F, 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 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.

19 DE Reg. 838 (03/01/16) (Final)