

Coralie Pryde

Please see attached file.



TO: DRBC Executive Director
DRBC Commissioners

Delaware River Basin Leagues' Comment to DRBC on Proposed Amendments 11-30-23

SUMMARY

The League of Women Voters of Delaware, New Jersey, New York and Pennsylvania (collectively the DRBC Leagues) oppose the amendments proposed by the Delaware River Basin Commission (hereinafter DRBC or the Commission) in 18 CFR Part 401, Rules of Practice and Procedure, because we find they are inconsistent with the DRBC's claims of operating transparently. Further, we find that they are inconsistent with the vision, mission, and values stated in the founding documents of the DRBC.¹ The values stated therein emphasize that the Commission should work collaboratively with all involved entities, value both public and stakeholder input, and adopt policies and practices informed by science to "protect and improve water quality" and "provide for the reasonable and sustainable development and use of surface and groundwater." Our examination of these changes suggests that they:

- Decrease transparency of actions taken by the DRBC.
- Vest an unacceptable level of power in the office of the Executive Director.
- Limit the public's ability to comment on the Commission's planned actions.
- Expose individuals or organizations to the possibility of paying excessively high fees to obtain requested documents or being denied access entirely.

For the LWVUS, one of the most fundamental goals is to "Promote an open governmental system that is representative, accountable, and responsive."² The DRBC Leagues find that the proposed changes transfer a significant amount of power from the DRBC Commissioners to the Executive Director. In doing so, they deprive the public of the right to petition their elected representatives (*i.e.* the four state governors representing us on the Delaware River Basin Commission).

As discussed in detail below, we are also concerned that the changes made to the Rules of Practice and Procedure were not made out of long experience that certain parts of the rules were ambiguous or otherwise unworkable. Instead, they appear to be written to codify into DRBC practice an action taken by the Executive Director to unilaterally renew a permit granted to Delaware River Partners for a dock to be used to ship liquefied natural gas (LNG) from the Marcellus Shale down the Delaware River for foreign export.*

* The DRBC Leagues have long been concerned about the effects of fracking on the natural resources of the Delaware River, its surrounding watershed, and its Estuary and Bay. Barring actual drilling in the Delaware

This action was brought to public attention by the Delaware Riverkeeper after it obtained a document through a Freedom of Information Request that revealed the unilateral permit extension. Among the amendments proposed for the current revision are changes stating that the Commission will no longer consider itself subject to the federal Freedom of Information Act (FOIA). (As discussed in the main text of our comment, the League does not believe that the DRBC has the capacity to make such a change in its regulations.)

Taken together, we find the proposed changes to be extremely alarming. They stand in direct contradiction to the LWVUS position on Citizens' Right to Know/Citizen Participation. As noted above, they also contradict what is stated in the founding documents of the DRBC. We strongly request that our DRBC Commissioners vote "NO" on adopting these amendments.

ANALYSIS of CHANGES

The Commission has stated that these amendments are primarily to resolve ambiguities around the automatic termination of project approvals issued by the Commission and to make conforming amendments to related provisions as appropriate. In fact, these amendments appear to greatly increase the power of the Executive Director (ED), decrease opportunities for public input and leave the Commissioners out of important aspects of decision-making.

One significant set of changes applies to **Subpart C. Section 401.41** now entitled **Limitation of approval; dormant applications**.³ As seen there, lengthy, detailed and consequential changes have been made. The time a permit remains open is increased from three to five years. Previously, it was the Commissioners who were charged with deciding if a permit should be renewed when the work seemed to be dormant (no proof of active pursuit of approval). Now the ED is, in essence, the default decision-maker who can decide to renew the application if either of two cases exists:

- The ED determines that the amount of money the project sponsor has spent on the project should be considered 'substantial' in relation to the project cost estimated in the permit application, or
- The ED determines that "circumstances beyond the project sponsor's control" (such as legal challenges to permits) have prevented the project sponsor from spending the 'substantial' amount of money described above.

The ED must also consider whether: there are 'material' changes to the project since approval; the project would "substantially impair or conflict with the Comprehensive Plan;" and the Comprehensive Plan has changed such that the project might now be considered inconsistent with the Plan.

If there are no problems, as per the conditions listed above, the ED may approve an extension of the permit for another five years without consulting the Commissioners. Our concerns are that the ED's

Basin, we are concerned about the effects of taking water for fracking from the Delaware River (or its tributaries) and allowing wastewater from fracking into the Basin, either as recovered wastewater or as wastewater that has undergone processes purported to remove toxic elements from it. We know that these issues have been a matter of great contention for the DRBC for almost 15 years. Our state Leagues have frequently joined other organizations in submitting heavily researched, science-based comments opposing both fracking and fracking-related activities.

decisions are not based on any clearly stated, quantitative guidelines. Instead, they are based on exactly how a given ED would define what a substantial amount of money is in comparison to the estimated cost of the project - - a value that frequently increases markedly as time passes and work on the project continues. These are never cut-and-dried decisions, but it would certainly be better to ensure that the opinions of the public and all the Commissioners will always be taken into account.

Similar changes appear to have been made in **Subpart B** in **Section 401.39 Form of Submission of Projects**. Once again, the ED would determine what forms are used and what supporting documentation is required in order to constitute a complete and valid application. Again, the changes remove the complete list of the items that must accompany the application form including maps, drawings, specifications, engineers reports and “Estimate of the cost of completing the proposed project”. This change leads to the question, “How can the ED determine, in the case of renewals, whether the money already spent is “substantial” when compared to the original estimate?”

If these instructions are no longer listed, how will the project sponsor know what information needs to be provided? Will the ED provide an individualized list for each different project? This is a very confusing change. What is the ED accomplishing by excluding the information in these sections?”

We are also extremely concerned that the ED is attempting to remove the DRBC from the responsibility of responding to FOIA requests. Our understanding is that the Delaware River Basin Commission is a federal-interstate compact agency empowered pursuant to the 1961 agreement among the federal government and the states of Delaware, New Jersey, New York, and Pennsylvania. Its members consist of the governors of the four basin states, namely 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. While the Commission has the right to operate independently, without the enabling authorization of the federal government, the DRBC would not exist. Accordingly, any assertions by the DRBC disavowing, or seeking to disavow, responsibility under the Freedom of Information Act is and will continue to be inconsistent with the DRBC’s mission as reflected in the Administrative Manual – Rules of Practice and Procedure⁴ and likewise contrary to its federally-empowered existence. It is therefore essential to maintain the procedures for FOIA as set forth in detail in Section 8 of the Manual, titled *Public Access to Records and Information*.⁵ Partial excerpts of these rules state, as follows: †

DISCUSSION

The amendments proposed here would have an extremely disruptive effect on the way in which the DRBC operates. In the past the Commissioners have been, as specified in the DRBC Compact, the

† 2.8.6 FOIA Officer. The Executive Director shall designate a Commission employee as the FOIA Officer. The FOIA Officer shall be responsible for Commission compliance with the Freedom of Information Act and these regulations. All requests for agency records shall be sent in writing to: FOIA Officer Delaware River Basin Commission P.O. Box 7360 West Trenton, New Jersey 08628-0360

2.8.7 Permanent File of Requests for Commission Records. The Commission shall maintain a permanent file of all requests for Commission records and all responses thereto, including a list of all records furnished in response to a request. This file is available for public review during working hours.

governing body of the Commission. They were delegated to “exercise and discharge its powers and duties except as otherwise provided by or pursuant to this Compact”.⁶ With these proposed amendments, the ED appears to be usurping the decision-making powers of the Commission, including the powers to grant or deny permits.

Delaware Riverkeeper Network’s discovery in 2022 -- through FOIA, that the ED extended the permit for Gibbstown LNG Export Terminal late in 2021 without any public input, a vote, or public discussion by the DRBC Commissioners -- generated numerous communications between the DRBC and the DRN. Following DRBC regulations would have required Delaware River Partners to submit a new application. Instead, in September 2022 four Commissioners voted to retroactively approve this extension. We are concerned that the proposed changes in their freedom of information policy stem from this.

We were pleased in February 2022 when the Commission banned fracking in the basin. Several Commissioners stated that they had been convinced by the strong, science-based comments submitted by the public that we did indeed need a complete ban on all fracking activities and that the new wording would be ready by the end of September.

One reason why the DRBC Commissioner for New York opposed the extension of the Permit for Delaware River Partners in September was that it would encourage the growth and production of natural gas, seriously impairing our efforts to halt the increase in global warming.

When the new regulations were proposed in November we were deeply disappointed to learn that they were much weaker than we had expected and would allow the importation of fracking waste into the Delaware River Basin and the export of clean water out of the Basin without a mechanism to ensure that the water can’t be sold for fracking, directly or indirectly.

Between loopholes, unsubstantiated assumptions that treatment facilities can remove all toxic and radioactive contaminants in wastewater, and the lack of any mechanism to enforce prohibitions on depositing the wastewater on land or into water in the Basin, the proposed regulations simply cannot protect the purity of water in the Basin nor ensure that exports of water would not result in insufficient water levels in the Delaware River during dry seasons.

The significant weakening of the proposed regulations in November, 2022 strongly suggests that outside pressure from interested parties was felt by the DRBC staff and/or Commissioners. Under FOIA there would be a chance that such interactions/communications could be discovered and made public. Under the currently proposed amendments, the ED would be free to unilaterally refuse any requests for information.

All Commissioners need to seriously consider what approving these latest amendments will mean to them, to those who will replace them, and to their constituents; the public. Many of the decisions now made by Commissioners in public meetings would be made behind closed doors if these rule changes are adopted, thus creating a situation where money and special interests could easily corrupt policies that were meant to serve the public.

The main reason for the creation of the Delaware River Basin Compact was to ensure that the waters of the Delaware River would be divided equitably among the four Basin states. Adopting these

amendments will negate much of the Commissioners' ability to protect the residents of our states in the ways the Compact originally intended.

The League of Women Voters believes in promoting an open governmental system that is representative, accountable and responsive; protecting the citizen's right to know; facilitating informed understanding and public participation in government decision-making; and promoting an environment beneficial to life through the protection and wise management of natural resources in the public interest.

CONCLUSIONS

All instances empowering the Executive Director with the unilateral right to make decisions formerly involving the Commissioners and the public pave the way for undue influence by industry forces and potential abuse of authority. If our four state governors capitulate to the Executive Director, who is not publicly elected, by ceding their power to him over all critical issues involving all Delaware River Basin States and our tax paying residents, then this -- simply put-- is contrary to the letter and spirit of the Commission's founding mission and is unequivocally unacceptable.

Finally, because the proposed changes to these regulations so thoroughly disrupt the way in which the DRBC has traditionally functioned, we find that the time allotted for public comment is completely insufficient. Because we are now in the annual holiday season, the deadline should be moved, at a minimum, to mid-January.

For all these reasons, we implore our Commissioners to reject these very unwise amendments.

Sincerely yours,



Tiffany Geyer Lydon, LWVDE President



Maria Delgado-Santana, President, LWV-PA



Nancy Rosenthal, President, LWV New York

Jennifer M. Howard, MD, MPH, President, League of Women Voters of New Jersey

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

NOTE: The vision of the Delaware River Basin Commission is built upon the Compact signed in 1961 by the states of Delaware, New Jersey and New York, the Commonwealth of Pennsylvania and the federal government. The vision as set forth in the Delaware River Basin Compact is for, “the conservation, utilization, development, management and control of water and related resources of the Delaware River Basin under a comprehensive multipurpose plan [to] bring the greatest benefits and produce the most efficient service in the public welfare.”

² Page 11 in https://www.lwv.org/sites/default/files/2023-02/LWV_ImpactOnIssues2022-2024.pdf

³ The relevant parts of the regulations are shown in red with removed text stricken and added text underlined in https://www.nj.gov/drbc/library/documents/ProposedRulemaking/RPPamendments_092823/RPPamendments_red_line.pdf

⁴ The DRBC Rules (with Amendments though July 1, 2023) are available here: https://www.nj.gov/drbc/library/documents/admin_manual.pdf

⁵ https://www.nj.gov/drbc/library/documents/admin_manual.pdf

⁶ <https://www.nj.gov/drbc/library/documents/compact.pdf> p. 29