

Proposed Regulations Addressing Importation and Exportation of Water and the Discharge of Wastewater from High Volume Hydraulic Fracturing



Frequently Asked Questions (FAQs)

1. Why has the Delaware River Basin Commission (DRBC or Commission) released new proposed rules?

The Delaware River Basin Commission is a federal/interstate government agency that manages the water resources of the Delaware River Basin. The five Commission members are the governors of the Basin states (Delaware, New Jersey, New York, and Pennsylvania) and the commander of the U.S. Army Corps of Engineers' North Atlantic Division, who represents the federal government.

On November 30, 2017, the DRBC published draft rules regulating high volume hydraulic fracturing (HVHF) in the Delaware River Basin. On February 25, 2021, the Commissioners approved a final rule prohibiting HVHF in the Delaware River Basin and, separately adopted a Resolution for the Minutes directing DRBC's executive director to propose amendments to update the Commission's rules concerning importation of wastewater from outside the Basin and exportation of Basin waters.

The proposed rules, which were published on the Commission's web site on October 28, 2021, among other things prohibit the discharge of wastewater from HVHF and HVHF-related activities to waters or land within the Basin. They also clarify and establish as a Commission policy that in order to protect and preserve the water resources of the Basin the DRBC will discourage, limit, or place conditions on the importation into and exportation from the Basin of water and wastewater.

2. What proposed rules has the Delaware River Basin Commission released for public comment regarding discharges of wastewater from high volume hydraulic fracturing (HVHF)?

To protect the water resources of the Basin, the Commission is proposing amendments to Part 440 of title 18, chapter III of the Code of Federal Regulations and to the Commission's Water Quality Regulations, Article 4—Application of Standards. Specifically:

- **Amended Part 440 would:** Prohibit the discharge of wastewater from high volume hydraulic fracturing or HVHF-related activities to waters or land within the Basin.
- **Amended Article 4 of the Water Quality Regulations would:** Facilitate the alignment of certain Basin state discharge permits with the Commission's proposed amendments to 18 CFR Part 440, by incorporating into the Water Quality Regulations the prohibition on the discharge of wastewater from HVHF and related activities.

3. What proposed rules has the Commission released for public comment regarding importations and exportations of water from the Delaware River Basin?

The Commission is proposing amendments to Section 2.30 of its Water Code by clarifying the circumstances under which exportations of water, including wastewater, from the Basin and importations of water, including wastewater, into the Basin may be considered by the Commission and the factors to be used in evaluating whether such proposed imports and exports of water may be approved.

The proposed Water Code amendments clarify that proposed new or increased *exportations* of water may be approved by the Commission only if the project sponsor demonstrates as a threshold matter that the exportation: is needed to serve a straddled or adjacent public water system; is required on a temporary, short-term, or emergency basis to meet public health and safety needs; or is an exportation of wastewater. If one or more of these eligibility criteria is satisfied, then under the revised rule, the Commission will evaluate the proposed exportation using the ten factors set forth at section 2.30.3 A. The factors include, among others, effects of the export on the health and safety of the Basin community and on aquatic ecosystems within the Basin, and the availability of alternatives to the exportation.

Under the revised rule, the Commission will evaluate proposed *importations* of water, including wastewater, using the factors set forth at section 2.30.3 B. These include, among others, the effects of the importation on the health and safety of the Basin community and the findings of a requisite characterization of the wastewater and an analysis of its treatability.

Importantly, “importation” under the proposed amendments means “the conveyance, transfer, or diversion of water, including wastewater, into the Delaware River Basin from a source outside the Basin, *resulting in a discharge of the imported water to land or water within the Basin*, with or without prior treatment” (emphasis added). Although a proposed importation of wastewater resulting in a discharge to land or water within the Basin would be subject to review using the factors set forth at section 2.30.3 B. of the Water Code, discharges of treated or untreated wastewater from HVHF and related activities are prohibited under proposed 18 CFR 440.4(b) and thus not eligible for review under the proposed amendments.

No changes to the Commission’s thresholds for review, set forth at 18 CFR 401.35(a) and (b) (in DRBC’s *Rules of Practice and Procedure*) are proposed.

4. Do the proposed rules prohibit the importation of high volume hydraulic fracturing wastewater into the Delaware River Basin?

Yes, if the proposed importation of wastewater from HVHF and related activities would be accompanied by a discharge to land or waters of the Basin. Otherwise, no. The proposed amendments expressly prohibit the *discharge* of treated and untreated wastewater from HVHF and related activities to waters or land within the Basin.

The draft regulations include a specific determination that the discharge of treated or untreated wastewater from high volume hydraulic fracturing and HVHF-related activities poses significant, immediate and long-term risks to the development, conservation, utilization, management, and preservation of the Basin's water resources, and that controlling future pollution by prohibiting such discharge is required to effectuate the Comprehensive Plan, avoid injury to the waters of the Basin as contemplated by the Comprehensive Plan, and protect the public health and preserve the waters of the Basin for uses in accordance with the Comprehensive Plan. The Commission has made no such determination regarding the transport of HVHF wastewater into or across the Basin (by rail, truck, or other means) or the storage of HVHF wastewater in the Basin.

5. Do the proposed rules prohibit the transport of high volume hydraulic fracturing wastewater into the Delaware River Basin?

No. DRBC's authority is limited to water resources of the Delaware River Basin. It has responsibility for protecting these resources and proposes to do so by prohibiting *discharges* of HVHF wastewater to the land or waters of the Basin. The Commission is not proposing to regulate the transport or storage of wastewater originating outside of or within the Basin. These activities are regulated by other administrative agencies of our member states and the United States.

6. Do the proposed rules prohibit the treatment of high volume hydraulic fracturing wastewater within the Delaware River Basin?

No, the proposed rules do not prohibit the treatment of HVHF wastewater. To protect the water resources of the Basin, the proposed rules prohibit the *discharge* of treated or untreated wastewater from HVHF and related activities to land or water within the Basin.

7. Why do the proposed draft regulations not include a provision for ensuring safe and protective storage and treatment as contemplated by the resolution dated September 13, 2017?

In November of 2017 the Commission proposed regulations that included provisions for the treatment and discharge within the Basin of wastewater from HVHF and related activities. Upon adoption of a final rule prohibiting HVHF in the Basin on February 25, 2021, the Commission withdrew from further consideration these portions of its 2017 proposal. It did so based upon

comments received on the draft rules and on new data and information released by the U.S. EPA and other investigators. The draft regulations published by the Commission on October 28, 2021 were developed under a new directive from the Commission—a Resolution for the Minutes approved on February 25, 2021—that did not include the same charge as the 2017 directive. The draft rules currently under consideration protect the Basin’s water resources by prohibiting discharges of HVHF wastewater to water or land within the Basin, eliminating the need for provisions relating to treatment and disposal of this waste stream. The storage of waste is regulated under detailed state and federal programs that support effectuation of the DRBC’s Comprehensive Plan and that the Commission has no reason to duplicate.

8. *Do the proposed rules prohibit the exportation of water to support HVHF outside the Delaware River Basin?*

The proposed rules provide for the Commission to review proposed exportations that meet existing review thresholds if the proposed export:

1. is to serve a straddled or adjacent public water system;
2. would provide water on a temporary, short-term, or emergency basis to meet public health and safety needs; or
3. when the proposal is for an exportation of wastewater.

Other classes of exportations are ineligible for Commission review and approval.

The Commission is proposing these eligibility criteria because the Basin’s waters are limited in quantity and the Basin is frequently subject to drought warnings and drought declarations due to limited water supply storage and streamflow during dry periods.

9. *For projects involving the exportation of Basin water that are subject to review by the Commission, what factors are considered in the Commission’s review?*

As outlined in Section 2.30.3 A. of the proposed Water Code amendments, once eligibility for consideration is established under Section 2.30.2 C., the Commission will consider 10 factors in evaluating a project that involves an exportation. These are:

1. the effect of the exportation on the health and safety of the Basin community;
2. the effect of the exportation on existing or future water availability or shortages, including, but not limited to, sources within areas designated by the Commission as protected areas pursuant to Section 10.2 of the Compact, sources within Delaware River reaches with flows that are frequently augmented by reservoir releases due to low flows, and sources in areas subject to DRBC drought operations or state drought declarations within the past five years;

3. the effect of the exportation on aquatic ecosystems;
4. the effect of the exportation on water quality and waste assimilation;
5. the effect of the exportation on salinity concentrations;
6. the effect of the exportation on the water uses protected by the Comprehensive Plan, DRBC regulations or DRBC docket approvals, or on the ability of DRBC to effectuate the Comprehensive Plan;
7. the effect of the exportation, including its volume, rate, timing and duration, on passby or instream flow requirements contained in DRBC regulations or project approvals;
8. the sponsor's planned use for the water and any resulting public benefits;
9. the availability to the sponsor of alternatives to the exportation of Basin water and whether these alternatives have been diligently pursued, including without limitation a review of the sponsor's uses of water outside the sponsor's service area, if any; conservation measures undertaken by the sponsor or a public water system in the service area where the sponsor is located to forestall the need for a transfer of Basin water; and the results of a water audit (or audits) performed by the sponsor in accordance with Section 2.1.8 of the Delaware River Basin Water Code; and
10. whether the exportation would contravene sections 3.3 and 3.5(a) of the Compact by impeding or interfering with the rights, powers, privileges, conditions or obligations contained in the Supreme Court Decree in *New Jersey v. New York*, 347 U.S. 995 (1954), as modified by the Commission with the unanimous consent of the parties to the Decree.

10. Can "straddled" or "adjacent" public systems sell water for HVHF or related activities?

DRBC's authority is limited to the protection of the water resources of the Delaware River Basin. The Commission's evaluation of proposed exportations that meet the applicable DRBC threshold for review and satisfy the proposed eligibility criteria (at proposed Water Code section 2.30.2 C.) will remain within this scope. Under the draft amendments, proposed new or expanding exports that meet the review threshold and are eligible for Commission consideration pursuant to section 2.30.2 C. will be evaluated using the ten factors set forth at proposed section 2.30.3 A. The factors include, among others, the effects of the proposed export on the health and safety of the Basin community and on aquatic ecosystems within the Basin, and the availability of alternatives to the exportation.

11. Why are exportations of wastewater allowable under the proposed regulations?

Because water and wastewater service areas often straddle basin boundaries, it is not uncommon for wastewater generated in one basin to be disposed of in another. Imports and exports of

wastewater occur routinely around the Basin boundary in this manner. Under the proposed rules, exportations that the Commission has previously approved will be permitted to continue. To be eligible for review and approval under the proposed amended regulations, new and expanding exportations that meet the threshold set forth in the Commission's Rules of Practice and Procedure must also satisfy at least one of the criteria at proposed Water Code section 2.30.2 C. The purpose of making exportations of wastewater eligible for review and approval is to ensure that straddled and adjacent systems can continue to operate, and if necessary, expand, normally; the provision is not intended to support exportations of wastewater for HVHF or other uses. As noted elsewhere in this document, in addition to the eligibility criteria at section 2.30.2 C., the draft amendments include ten evaluation factors at section 2.30.3 A. that the Commission will apply in evaluating proposed exportations of Basin water, including wastewater, that are eligible for approval. The factors include, among others, the availability of alternatives to the exportation.

12. *Was there a moratorium on the exportation of water for hydraulic fracturing or the importation of wastewater from hydraulic fracturing? Aren't these rules taking a step backwards?*

No. The Commissioners' May 5, 2010 Resolution for the Minutes (sometimes referred to as the "*de facto* moratorium") was silent concerning exports of water to support hydraulic fracturing (HF) or importations of HF wastewater, leaving the existing importation and exportation regulations in the Water Code and Rules of Practice and Procedure unchanged.

With respect to exportation, at the request of New York State, the Commission for a time deferred the consideration of any proposed exportations of Basin waters from within New York State to support HVHF until the State Environmental Quality Review (SEQR) process was complete. New York's SEQR process on HVHF was completed in 2015. The Commission has never approved an exportation of water to support HVHF, and no such proposals are currently under review.

Since 2008, many of the Commission's dockets issued for wastewater treatment plant discharges have included a condition prohibiting the docketed facility from accepting HF wastewater for treatment and discharge without the Commission's prior review and approval. To date, no docket holder has applied for or obtained the Commission's approval to treat and discharge HF wastewater. Upon adoption of a final rule prohibiting the discharge of treated or untreated wastewater from HVHF and related activities, the docket restrictions relating to HF wastewater will continue and will be reinforced by the new prohibition.

13. *Would the spreading of HVHF wastewater or by-products on roads be permitted if the proposed rule amendments are adopted?*

Land application of HVHF wastewater by road spreading would constitute a prohibited discharge under 18 CFR 440.4(b) of the proposed amendments, which provides that "no person may

discharge wastewater from high volume hydraulic fracturing or HVHF-related activities to waters or land within the Basin.”

14. Can DRBC enforce these proposed rules?

Once final rules are adopted, Section 14.17 of the Compact and Article 7 of the Commission’s Rules of Practice and Procedure (18 C.F.R. Part 401, Subpart G) provide the Commission with the ability to seek penalties for non-compliance. The Commission will work within its authority and in coordination with the host states in the unlikely event of a violation of the proposed rules.

15. Has the Commission made a final decision to adopt the proposed rules?

No. The Commission will not adopt final rules until it has gathered and considered public comment on the revised draft regulations. After the close of the public comment period, the Commission will review the public’s comments and consider any changes to the draft rules that may be appropriate based on the comments.

16. Why are the public hearings not in person?

Remote meeting technology allows the Commission to conduct these hearings in a manner that provides access to all while supporting public and community health measures. Even those without access to the Internet may attend by phoning in.

17. Will the Commission add more hearings if needed?

DRBC staff will monitor the hearing capacity and registrations and consider adding additional hearing sessions if needed.

18. Do I need to register to attend a hearing or to provide oral comments?

You do not need to register simply to attend one or more of the hearings virtually. If you wish to provide oral comments at one of the hearing sessions, you must register in advance. Information on how to attend the virtual hearings and register to speak at one of the hearings can be found at: https://www.nj.gov/drbc/meetings/proposed/notice_import-export-rules.html.

19. Can I register to speak at more than one hearing?

No. Each individual may provide oral comments at only one hearing.

20. Do I need to register to provide written comments?

No. Anyone can provide written comments through DRBC’s online comments system at any time through February 28, 2022. Access to the online comments system is provided at:

<https://dockets.drbc.commentinput.com/?id=x2K8A>. Comments via e-mail, mail, delivery service, personal delivery or any method other than the on-line system will not be included on the record unless an exception has been obtained from the Commission Secretary, based on lack of Internet access. To request an exception from use of the online system, please contact: Commission Secretary, DRBC, P.O. Box 7360, West Trenton, NJ 08628.

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