

NO. 2022 – 04

A RESOLUTION to amend the Comprehensive Plan and DRBC regulations regarding importations of water into and exportations of water from the Delaware River Basin and discharges of wastewater from high volume hydraulic fracturing (“HVHF”) and HVHF-related activities.

WHEREAS, by a [Resolution for the Minutes on February 25, 2021](#), the Commissioners directed the Executive Director to prepare and publish for public comment a set of amendments to the Comprehensive Plan and implementing regulations to update the Commission’s policies and provisions concerning importation and exportation of water and wastewater into and from the Basin and “to include such other proposed amendments . . . as [the Executive Director, in consultation with the Commissioners] deem necessary or appropriate”; and

WHEREAS, in accordance with the Commissioners’ February 25, 2021 directive, the Commission on October 28, 2021 issued a [Notice of Proposed Rulemaking, FAQs](#), and proposed [amended rule text](#) to:

- amend the Water Code by clarifying the circumstances in which exportations of water, including wastewater, from the Basin and importations of water, including wastewater, into the Basin are considered by the Commission and the factors to be used in evaluating whether such proposed imports and exports of water may be approved;
- amend the Commission's Special Regulations, 18 C.F.R. Part 440—High Volume Hydraulic Fracturing, to prohibit the discharge of wastewater from HVHF and HVHF-related activities to waters or land within the Basin; and
- amend Article 4 of the Commission’s Water Quality Regulations to facilitate the alignment of certain Basin state discharge permits with the Commission’s Special Regulations by incorporating into the Water Quality Regulations the prohibition on the discharge of wastewater from HVHF and HVHF-related activities; and

WHEREAS, prior to the close of the comment period on February 28, 2022, the Commission held five (5) virtual public hearings on the draft rules: two on December 8, 2021; two on December 15, 2021; and one on February 3, 2022; and

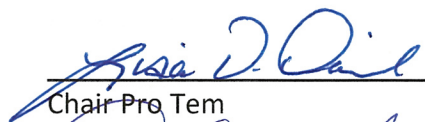
WHEREAS, during the comment period, the Commission heard oral comment on the draft rules from 73 individuals and received 2,388 written submissions, many of which included multiple comments. [Transcripts from each of the public hearings and copies of all of the written comments](#) are posted on the Commission’s website; and

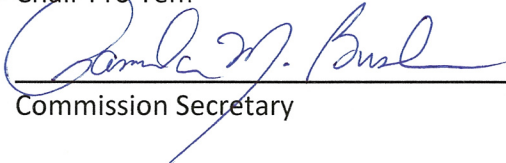
WHEREAS, the Commission staff, in consultation with the Commissioners and their technical and policy advisors, has developed a detailed response to comments and a set of final regulations; now therefore,

BE IT RESOLVED by the Delaware River Basin Commission:

A. The Commission hereby finds and determines that:

1. The waters of the Delaware River Basin are limited in quantity, and the Basin is frequently subject to drought warnings, drought declarations, and drought operations due to limited water supply storage and streamflow during dry periods. In addition, portions of the Basin have been delineated by the Commission as groundwater protected areas due to water shortages. Therefore, it is the policy of the Commission to promote the conservation and preservation of water and related natural resources, including aquatic ecosystems, and effectuate the Comprehensive Plan and the uses of the water resources of the Basin identified therein, by discouraging, limiting, or placing conditions on the exportation of Basin water as may be required to protect the health and safety of Basin residents, aquatic ecosystems and the uses of water identified in the Compact and Comprehensive Plan.
 2. Basin waters have limited capacity to assimilate pollutants without significant impacts to the health and safety of Basin residents, the health and functioning of aquatic ecosystems in the Basin, and the effectuation of the Comprehensive Plan. Accordingly, it is the policy of the Commission to discourage, limit, or condition the importation of wastewater into the Delaware River Basin as necessary to avoid impairment of Basin waters.
 3. The discharge of wastewater from HVHF 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.
 4. The Commission further finds and determines that controlling future pollution by prohibiting discharges of wastewater from HVHF and HVHF-related activities to waters or land within the Basin 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.
- B. The Commission hereby:
1. adopts the December 7, 2022 Comment and Response Document in its entirety.
 2. adopts the revised regulations attached hereto as its final regulations and incorporates the final regulations into the Comprehensive Plan.


Chair Pro Tem


Commission Secretary

ADOPTED: December 7, 2022

ATTACHMENTS

DELAWARE RIVER BASIN WATER CODE, SECTION 2.30 (AS AMENDED)

WATER QUALITY REGULATIONS, ARTICLE 4 (AS AMENDED)

SPECIAL REGULATIONS, Part 440 - HIGH VOLUME HYDRAULIC FRACTURING (AS AMENDED)

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Section 2.30 of the Delaware River Basin Water Code, as amended, is shown below.

2.30 IMPORTATIONS AND EXPORTATIONS OF WATER, INCLUDING WASTEWATER

2.30.1 Definitions (*Resolutions Nos. 91-9 and 2022-04*). For purposes of this section 2.30:

- A. “Adjacent public water system” means a public water system (as defined herein) located outside the Delaware River Basin that has a service area directly bordering the service area of a public water system located in whole or in part within the Basin.
- B. “Adjacent public wastewater collection system” means a public wastewater collection system (as defined herein) located outside the Delaware River Basin that has a service area directly bordering the service area of a public wastewater collection system located in whole or in part within the Basin.
- C. “Basin water” (also, “waters of the Basin”) means water in, on, under or above the ground within the Delaware River Basin. “Basin water” includes wastewater.
- D. “Delaware River Basin” (or “Basin”) has the meaning assigned to it by Section 1.2(a) of the *Delaware River Basin Compact* – the area of drainage into the Delaware River and its tributaries, including Delaware Bay.
- E. “Exportation” means the conveyance, transfer, or diversion of Basin water from a source within the Delaware River Basin to a location outside the Basin without return of such water to the Basin. Exportations from the Basin of consumer goods or foods that have been manufactured, bottled, packaged, or processed using Basin water are not considered “exportations” for purposes of this rule.
- F. “Importation” 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.
- G. “Public water system” means a system primarily for the provision to the public of piped water for human consumption, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals. A “public water system” may be publicly or privately owned.
- H. “Public wastewater collection system” means a system with all required state and federal approvals that serves more than 250 people or conveys more than 25,000 gallons of wastewater per day and is primarily for the collection and conveyance of domestic sewage from private, commercial, institutional, or industrial sources, to a treatment system with all necessary state and federal approvals. A “public wastewater collection system” may be publicly or privately owned.
- I. “Straddled public water system” means a public water system that serves an area partially within and partially outside of the Delaware River Basin.

- J. “Straddled public wastewater collection system” means a public wastewater collection system that serves an area partially within and partially outside of the Delaware River Basin.
- K. “Wastewater” means water that is stored, transported or discharged after use, including, but not limited to, any water for which a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act or any state or DRBC approval is required before the water can lawfully be discharged to waters or land within the Basin.

2.30.2 **Protection and Preservation**

- A. The waters of the Delaware River Basin are limited in quantity, and the Basin is frequently subject to drought warnings, drought declarations, and drought operations due to limited water supply storage and streamflow during dry periods. In addition, portions of the Basin have been delineated by the Commission as groundwater protected areas due to water shortages. Therefore, it is the policy of the Commission to promote the conservation and preservation of water and related natural resources, including aquatic ecosystems, and effectuate the Comprehensive Plan and the uses of the water resources of the Basin identified therein, by discouraging, limiting, or placing conditions on the exportation of Basin water as may be required to protect the health and safety of Basin residents, aquatic ecosystems and the uses of water identified in the Compact and Comprehensive Plan.
- B. The Commission shall review a proposed new exportation of Basin water, including any proposed increase in the rate or volume of an existing exportation, and may impose conditions, obligations and release requirements related thereto, pursuant to Sections 3.3, 3.8, 5.2, 10.3, 10.4 and Article 11 of the Compact and the regulations and docket approvals implementing these provisions.
- C. A proposed new exportation of Basin water that is subject to review under the Compact and implementing regulations, including any proposed increase in the rate or volume of an existing exportation, may be approved by the Commission after consideration of the factors set forth at Section 2.30.3 below, if:
 - 1. the sponsor demonstrates that the exportation of Basin water is required to serve a straddled or adjacent public water system;
 - 2. the sponsor demonstrates that the exportation of Basin water is required to meet public health and safety needs on a temporary, short-term, or emergency basis; or
 - 3. the sponsor is proposing an exportation of wastewater and demonstrates either (i) that the wastewater is being conveyed to a straddled or adjacent public wastewater collection system; or (ii) that the wastewater may not lawfully be discharged to a public wastewater collection system and is being exported for treatment, disposal or both at a waste management facility that has all required state and federal approvals to lawfully receive it.
- D. Basin waters have limited capacity to assimilate pollutants without significant impacts to the health and safety of Basin residents, the health and functioning of aquatic ecosystems in the Basin, and the effectuation of the Comprehensive Plan. Accordingly, it is the policy of the Commission to discourage, limit, or condition the importation of wastewater into

the Delaware River Basin as necessary to avoid impairment of Basin waters. A proposed new importation of water, including any proposed increase in the rate or volume of an existing importation, shall be reviewed by the Commission consistent with the factors set forth at Section 2.30.3 below.

- E. This Section 2.30 shall not apply to importations and exportations of water, including wastewater, that existed prior to enactment of the Compact or that were approved by the DRBC prior to December 7, 2022.

2.30.3 **Commission Considerations** (*Resolutions Nos. 91-9 and 2022-04*). In evaluating importations and exportations, the Commission's review will include consideration of the following factors:

- A. For exportations of Basin water (including wastewater):
 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.

- B. For importations of water (including wastewater):
1. the effect of the importation on the health and safety of the Basin community with due consideration of the available alternatives to the importation;
 2. the characterization and treatability of the water, if it consists of wastewater;
 3. the potential impacts on water resources of the Delaware River Basin of the proposed importation and of each available alternative, including alternatives that avoid an importation of water, including wastewater. The potential impacts considered will include the effects of the quality, volume, flow rate, timing and duration of the proposed importation in relation to:
 - a. flow objectives or passing or instream flow requirements contained in DRBC regulations or project approvals;
 - b. the record of hydrologic conditions in the proposed receiving region and the larger Delaware River Basin;
 - c. water uses as established by the Comprehensive Plan, including the DRBC Water Code;
 - d. the effect of the importation on aquatic ecosystems;
 - e. water quality and waste assimilation capacity in the affected receiving streams; and
 - f. prior regulations or orders of the Commission which may be identified during the course of the Commission's review.

2.30.4 **Analyses by Applicant for Section 3.8 Approval.** When an importation or exportation of water or wastewater is subject to review by the Commission, the applicant shall furnish the Commission with such analyses of the factors set forth in Sections 2.30.2 and 2.30.3 above and as the Commission may direct.

2.30.5 **Water Charges** (*Resolutions Nos. 91-9 and 2022-04*). Exportation of Basin water constitutes consumptive water use and will be subject to the water charges in effect at the time of transfer in accordance with the Commission's Water Supply Charges regulations (18 CFR Part 420), as amended.

2.30.6 **Wastewater Treatment Requirements** (*Resolution No. 91-9*). It is the policy of the Commission to give no credit toward meeting wastewater treatment requirements for importations of wastewater. An effluent loading or concentration authorized in accordance with a water-quality-based effluent limit such as a wasteload allocation may not include loadings attributable to an importation of wastewater.

- 2.30.7 **Existing Allocations** (*Resolution No. 91-9*). It is the policy of the Commission to charge all exportations of Basin water against any special regional allocation or any depletive use allocation as may exist at the time of receipt of a completed application for exportation.
- 2.30.8 **1954 Supreme Court Decree**. This Section 2.30 is intended to preserve the diversions, compensating releases, rights, conditions, and obligations of the parties to the U.S. Supreme Court Decree of 1954 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.

Article 4 of the DRBC's Water Quality Regulations, as amended, is shown below. Asterisks represent no change to the existing rule text.

ARTICLE 4

APPLICATION OF STANDARDS

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Section 4.40 Ground Water Quality Requirements

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4.40.2 **Enforcement Procedures.** The enforcement procedure of Section 4.60 with respect to effluent quality requirements for discharges shall be deemed applicable to the enforcement of this Section and Section 3.40. For the purposes thereof, the word "discharger" as used in Section 4.60 includes any party affected by this Section.

Section 4.50 Wastewater from High Volume Hydraulic Fracturing and Related Activities. The provisions of 18 CFR 440.4 and the purpose and definitions applicable thereto, encompassing 18 CFR 440.1 and 18 CFR 440.2, are hereby incorporated into these Water Quality Regulations.

Section 4.60 Enforcement Procedures.

4.60.1 **Scope.** * * *

4.60.2 **Abatement Schedules and Permits.**

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4.60.3 **Waste Load Allocations.** * * *

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4.60.4 **Inspection and Surveillance.**

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4.60.5 **Noncompliance; Notice.**

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4.60.6 **Order of Abatement; Sanctions.** * * *

Part 440 of DRBC’s Special Regulations at Title 18 of the Code of Federal Regulations, as amended, is shown below.

SUBCHAPTER B – SPECIAL REGULATIONS

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PART 440 – HIGH VOLUME HYDRAULIC FRACTURING

Sec.

- 440.1 Purpose, authority and relationship to other requirements
- 440.2 Definitions
- 440.3 High volume hydraulic fracturing
- 440.4 Wastewater from high volume hydraulic fracturing and related activities.

440.1 Purpose, authority and relationship to other requirements.

- (a) *Purpose.* The purpose of this part is to protect and conserve the water resources of the Delaware River Basin. To effectuate this purpose, this section establishes standards, requirements, conditions, and restrictions to prevent or reduce depletion and degradation of surface and groundwater resources and to promote sound practices of water resource management.
- (b) *Authority.* This part implements Sections 3.1, 3.2(a), 3.2 (b), 3.6(b), 3.6(h), 4.1, 5.2, 7.1, 13.1 and 14.2(a) of the Delaware River Basin Compact.
- (c) *Comprehensive Plan.* The Commission has determined that the provisions of this part are required for the immediate and long range development and use of the water resources of the Basin and are therefore incorporated into the Commission's Comprehensive Plan.
- (d) *Relationship to other Commission requirements.* The provisions of this part are in addition to all applicable requirements in other Commission regulations, dockets, permits, and determinations.
- (e) *Severability.* The provisions of this part are severable. If any provision of this part or its application to any person or circumstances is held invalid, the invalidity will not affect other provisions or applications of this part, which can be given effect without the invalid provision or application.
- (f) *Coordination and avoidance of duplication.* In accordance with and pursuant to section 1.5 of the Delaware River Basin Compact, to the fullest extent it finds feasible and advantageous the Commission may enter into an Administrative Agreement (Agreement) with any Basin state or the Federal Government to coordinate functions and eliminate unnecessary duplication of effort. Such Agreements will be designed to: Effectuate intergovernmental cooperation, minimize the efforts and duplication of state and Commission staff resources wherever possible, ensure compliance with Commission-approved requirements, enhance early notification of the general public and other interested parties regarding proposed activities in the Basin, indicate where a host state's requirements satisfy the Commission's regulatory objectives, and clarify the relationship and

project review decision making processes of the states and the Commission for projects subject to review by the states under their state authorities and by the Commission under Section 3.8 and Articles 6, 7, 10 and 11 of the Compact.

440.2 Definitions.

For purposes of this part, the following terms and phrases have the meanings provided. Some definitions differ from those provided in regulations of one or more agencies of the Commission's member states and the Federal Government. Other definitions are consistent with terms defined by the Delaware River Basin Compact.

Basin is the area of drainage into the Delaware River and its tributaries, including Delaware Bay.

Commission is the Delaware River Basin Commission (DRBC) created and constituted by the Delaware River Basin Compact.

Discharge of wastewater from HVHF and HVHF-related activities is an intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying, spreading, spraying, injecting, leaching, dumping, or disposing of such wastewater to waters or land within the Basin, and including the abandonment or discarding of barrels, containers, and other receptacles containing such wastewater.

Fracturing fluid(s) is a mixture of water (whether fresh or recycled) and/or other fluids and chemicals or other additives, which are injected into the subsurface and which may include chemicals used to reduce friction, minimize biofouling of fractures, prevent corrosion of metal pipes or remove drilling mud damage within a wellbore area, and propping agents such as silica sand, which are deposited in the induced fractures.

High volume hydraulic fracturing (HVHF) is hydraulic fracturing using a combined total of 300,000 or more gallons of water during all stages in a well completion, whether the well is vertical or directional, including horizontal, and whether the water is fresh or recycled and regardless of the chemicals or other additives mixed with the water.

HVHF-related activities are:

- (1) Construction of an oil or natural gas production well that is to be stimulated using HVHF as defined in this section;
- (2) Chemical mixing or storage of proppant, chemicals and other additives to make fracturing fluid; and
- (3) Management of wastewater from hydraulic fracturing, including storage, disposal, treatment, or reuse in hydraulic fracturing operations or other uses.

Hydraulic fracturing is a technique used to stimulate the production of oil and natural gas from a well by injecting fracturing fluids down the wellbore under pressure to create and maintain induced fractures in the hydrocarbon-bearing rock of the target geologic formation.

Person is any natural person, corporation, partnership, association, company, trust, Federal, state, or local governmental unit, agency, or authority, or other entity, public or private.

Wastewater from HVHF and HVHF-related activities is:

- (1) Any wastewater, brine, or sludge containing chemicals, naturally occurring radioactive materials, heavy metals or other contaminants that have been used for or generated by high volume hydraulic fracturing or HVHF-related activities;
- (2) Leachate from solid wastes associated with HVHF-related activities, except if the solid wastes were lawfully disposed of in a landfill within the Basin prior to [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]; and
- (3) Any products, co-products, byproducts or waste products resulting from the treatment, processing or modification of the wastewater described in paragraphs (1) and (2) of this definition.

Water resource(s) is, in accordance with Section 1.2(i) of the *Delaware River Basin Compact*, water and related natural resources in, on, under, or above the ground, including related uses of land, which are subject to beneficial use, ownership or control within the Delaware River Basin.

440.3 High volume hydraulic fracturing (HVHF)

- (a) **Determination.** The Commission has determined that high volume hydraulic fracturing poses significant, immediate and long-term risks to the development, conservation, utilization, management, and preservation of the water resources of the Delaware River Basin and to Special Protection Waters of the Basin, considered by the Commission to have exceptionally high scenic, recreational, ecological, and/or water supply values. Controlling future pollution by prohibiting such activity in the Basin 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.
- (b) **Prohibition.** High volume hydraulic fracturing in hydrocarbon bearing rock formations is prohibited within the Delaware River Basin.

440.4 Wastewater from high volume hydraulic fracturing and related activities

- (a) **Determination.** The Commission has determined that the discharge of 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. 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.

- (b) **Prohibition.** No person may discharge wastewater from high volume hydraulic fracturing or HVHF-related activities to waters or land within the Basin.