

**DELAWARE RIVER BASIN COMMISSION**

**Importations of Water Into and Exportations of Water From the Delaware River Basin;  
Discharges of Wastewater from High Volume Hydraulic Fracturing and Related Activities**

ADOPTED: December 7, 2022, by the Delaware River Basin Commission, Pamela M. Bush, Esq.,  
Commission Secretary.

Effective Date: March 6, 2023.

SUMMARY: By Resolution No. 2022 – 04 on December 7, 2022, the Delaware River Basin Commission (“DRBC” or “Commission”) approved amendments to its Comprehensive Plan and the Delaware River Basin Water Code concerning importations of water into and exportations of water from the Delaware River Basin; its Special Regulations – High Volume Hydraulic Fracturing, to prohibit discharges to waters or land within the basin of wastewater from high volume hydraulic fracturing (“HVHF”) and HVHF-related activities; and its Water Quality Regulations, to facilitate the implementation in state-issued permits of the prohibition on such discharges.

**For further information, contact:** Pamela M. Bush, Esquire, Commission Secretary and Assistant General Counsel, at [pam.bush@drbc.gov](mailto: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 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 Division Engineer, North Atlantic Division of the U.S. Army Corps of Engineers, representing the Federal Government.

## **Background**

By a Resolution for the Minutes on February 25, 2021, the DRBC 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 inter-basin transfers of water and wastewater from and into the basin and to "include in the draft regulations such other proposed amendments . . . as [the Executive Director, in consultation with the Commissioners] deem necessary or appropriate." The directive accompanied the Commission's decision not to include in its final rule adopted on the same date, portions of a proposed rule published in the Federal Register in January 2018 that concerned the exportation of water to support high volume hydraulic fracturing ("HVHF") and the importation, treatment, and discharge of "produced water" and "CWT wastewater" (with accompanying definitions).<sup>1</sup> In accordance with the Commission's February 25, 2021 directive, the Commission published a new proposed rule on its website on October 28, 2021.<sup>2</sup> A notice of proposed rulemaking and accompanying rule text appeared in the Federal Register, 86 Fed. Reg. 66250, on November 22, 2021; the Delaware Register of Regulations, 25 Del. Reg. 548, 559, on December 1, 2021; the New Jersey Register, 53 N.J.R. 1994, on December 6, 2021; the New York Register on November 17, 2021, p. 2; and the Pennsylvania Bulletin, 51 Pa. B. 7471 on December 4, 2021.

---

<sup>1</sup> See 86 FR 20628 (April 21, 2021) and 83 FR 1586, pp. 1589, 1591 (January 12, 2018).

<sup>2</sup> By a Resolution for the Minutes dated September 9, 2021, the DRBC Commissioners extended from September 30, 2021 to November 30, 2021 the date by which draft regulations would be published.

Opportunity for public input on the proposed rules was provided during a comment period that ran from October 28, 2021, through February 28, 2022. In addition to accepting written comments, the Commission accepted oral comment at five hearings conducted via Zoom and telephone. The fifth hearing included toll-free telephone access and real-time English-to-Spanish and Spanish-to-English professional translation, which allowed attendees to listen and participate in either English or Spanish. The Commission received a total of 2,461 public comment submissions, consisting of 2,388 in writing and 73 oral comments. Notably, in many cases, a single written submission consisted of comments with multiple signatories or parts, and many similar or identical comments were separately submitted by multiple commenters using form letters or template language provided by organizations.

The Commission reviewed the statements, consultant reports, scientific literature and other materials submitted by commenters. 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. 2022 – 04 on December 7, 2022, the Commission adopted the Comment and Response Document simultaneously with its adoption of the final rule.

### **Final Rule**

The elements of the Commission's final rule are summarized below.

*Water Code.* With respect to imports and exports of water into and from the Delaware River Basin, the Commission in its proposed and final rule reaffirms and expands on findings and policies it previously added to the Water Code (at Section 2.30) and Comprehensive Plan by Resolution No. 1991-9 in June of 1991. The December 2022 amendments restate and provide for the implementation of these policies with greater specificity.

*Special Regulations—High Volume Hydraulic Fracturing.* The final amendments to the Special Regulations at 18 CFR part 440 include as proposed a new Section 440.4(a) comprising the Commission’s determination that “[t]he 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” and further, that “[c]ontrolling 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.” The final amendments at new Section 440.4(b) prohibit the discharge of wastewater from high volume hydraulic fracturing and HVHF-related activities (hereinafter “HVHF wastewater”) to waters or land within the basin.

*Water Quality Regulations.* The amendments to the Commission’s Water Quality Regulations, consisting of a new Section 4.50, facilitate the implementation in state-issued permits of the prohibition set forth in the Special Regulations at 18 CFR 440.4.

*Incorporation by Reference.* The final rule incorporates by reference into the Code of Federal Regulations at 18 CFR part 410 the Commission’s Water Quality Regulations and the Delaware River Basin Water Code as amended by the Commission on December 7, 2022.

### **Changes From the Proposed Rule**

*Water Code.* After careful consideration of the comments received, the Commission revised its proposed amendments to Section 2.30 of the Delaware River Basin Water Code (the “Water Code”) concerning the exportation of wastewater to better align these aspects of the rule with the Commission’s policies for water conservation and pollution prevention.

The language originally proposed at Section 2.30.2 C.3 of the Water Code would have allowed the Commission to approve any exportation of wastewater, subject to an evaluation of factors designed to ensure no harm to the basin’s water resources or the health and safety of the basin community. Many commenters were concerned that this exception was too broad. Upon further consideration, the Commission agrees. It concluded that to consider and, subject to an evaluation of the factors set forth at Section 2.30.3, approve *any* exportation of wastewater risks undercutting the conservation objectives served by limiting exportations of basin water in accordance with the introductory paragraph and paragraphs 1. and 2. of Section 2.30.2 C. of the proposed, now final, amendments. Accordingly, the final language of section 2.30.2 C.3 narrows the circumstances in which the Commission may approve an exportation of wastewater to instances in which the project sponsor demonstrates either (i) that the wastewater is to be 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 to a waste management facility that has all state and federal approvals required to lawfully receive it.

Thus, the final rule subjects proposed exportations of wastewater to limitations that are consistent with those applicable to exportations of water generally. Because water and wastewater service areas often straddle basin boundaries, the final rule also ensures that straddled and adjacent wastewater collection systems, including for both sewer and hauled septage, may continue to operate, and if necessary, expand, normally. And it recognizes that in the interest of preserving water quality, state-permitted facilities and federal-permitted facilities for the proper treatment and disposal of difficult-to-treat wastewater that may be located outside the basin must remain available to wastewater generators within the basin.

To clarify the changes to Section 2.30.2 C.3 of the Water Code, Section 2.30.1 of the final rule includes definitions of “Public wastewater collection system,” “Adjacent public wastewater collection system,” and “Straddled public wastewater collection system” that were not included in the proposed rule. The definitions are designed to parallel those previously proposed for “Public water system,” “Adjacent public water system,” and “Straddled public water system,” respectively.

The final rule includes additional non-substantive changes in two sections. Language in Section 2.30.1 A., defining “Adjacent public water system,” was revised for greater stylistic consistency and clarity. The wording of Section 2.30.2 C.2. was changed slightly to make clear that any exportation under that provision must be for the purpose of meeting public health and safety needs of the receiving system regardless of whether the exportation is intended to be temporary, short-term, or in response to an emergency.

*Special Regulations—High Volume Hydraulic Fracturing.* The final rule in § 440.2 includes a new defined term, “Discharge of wastewater from HVHF and HVHF-related activities,” to make the meaning of the rules more explicit. In the same section, the definition of “Wastewater from HVHF and HVHF-related activities” was altered by the addition of two words. The words “or” and “containing” were inserted in subsection (1) of the definition to clarify that the definition refers to wastewater, brine, or sludge *containing* (as opposed to constituting) the various listed contaminants. Additional non-substantive changes were made to conform proposed rule text in § 440.2 to Code of Federal Regulations standards.

*Water Quality Regulations.* The final rule includes no changes from the amendments proposed to the Water Quality Regulations.

### **Activities Prohibited and Activities not Regulated by the Final Rule**

Many commenters urged the Commission to prohibit activities that were prohibited by the language of the rule as proposed and are now prohibited by the final rule at 18 CFR 440.4. The final rule at Section 440.4(b) prohibits the discharge of wastewater “from high volume hydraulic fracturing and HVHF-related activities to waters or land within the basin.” The terms “HVHF-related activities” and “wastewater from HVHF and HVHF-related activities” are defined in detail in Section 440.2. Activities about which multiple commenters expressed concern and that are prohibited by the final rule include (but are not necessarily limited to) the following:

- discharge of HVHF wastewater to waters or land within the basin;
- road spreading of HVHF wastewater;
- injection of HVHF wastewater into deep wells within the basin;

- disposal of HVHF wastewater in basin landfills;
- discharge of leachate from any landfill in the basin that accepts HVHF waste after the effective date of the final regulations, including after treatment at an onsite or off-site leachate or wastewater treatment plant; and
- spills and leaks during transport, transfer, or storage of HVHF wastewater within the basin if not fully captured by a containment system in place throughout the duration of the spill or leak and thereafter promptly removed or remediated.

Other commenters urged the Commission to prohibit activities that are beyond the scope of the proposed rule. As explained in detail in the Commission's Comment and Response document, the final rule does not:

- regulate air emissions from HVHF activities;
- categorically prohibit the transfer of HVHF wastewater into the basin when no resulting discharge is proposed;
- regulate the transportation and storage of HVHF materials, which are regulated under detailed state and federal programs focused on these activities;
- categorically prohibit the transfer of water from the basin if it would be used to support HVHF (or any other specified activity). However, the rule does limit the circumstances under which transfers of water from the basin will be considered and provides for an evaluation of such proposals based on factors designed to ensure no harm to the basin's water resources or the health and safety of the basin community; or
- prohibit road spreading of wastewater from *conventional* drilling activities, an activity not within the scope of DRBC's proposed rulemaking. The Commission will continue to



coordinate with the basin states to review the scientific evidence regarding harm to water resources caused by road spreading of conventional oil and gas production wastewater and may in the future consider whether additional regulation of the practice is needed in the basin.

Additional Materials: Detailed information about the public process, including links to the rule text and guidance are available on the Commission's website, [www.drbc.gov](http://www.drbc.gov).

Additional materials can be found on the Commission's website, [www.drbc.gov](http://www.drbc.gov), at [https://www.nj.gov/drbc/about/regulations/final-rule\\_import-export-hvhf-discharge.html](https://www.nj.gov/drbc/about/regulations/final-rule_import-export-hvhf-discharge.html).

These include links to Resolution No. 2022 – 04 of December 7, 2022 adopting the final rule; the Commission's Comment and Response Document; mark-ups comparing the final to the proposed rule text for Section 2.30 of the Water Code and for the Commission's Special Regulations at 18 CFR part 440; mark-ups comparing the amended to the existing rule text for 18 CFR part 440 and the Commission's Water Quality Regulations; and clean drafts of the amended and existing Section 2.30 of the Water Code for comparison.

The Commission's notice of proposed rulemaking, proposed rule text, written comments received, and transcripts of public hearings can be found on the DRBC website at [https://www.state.nj.us/drbc/meetings/proposed/notice\\_import-export-rules.html](https://www.state.nj.us/drbc/meetings/proposed/notice_import-export-rules.html).