

PROPOSED RULEMAKING

DELAWARE RIVER BASIN COMMISSION

[25 PA. CODE CH. 901]

Public Hearing Regarding Revised Proposed Amendments to the Comprehensive Plan and Water Code Relating to a Flexible Flow Management Plan for Operation of the New York City Delaware Basin Reservoirs

The Delaware River Basin Commission (Commission) will hold a public hearing and accept written comment on a revised proposal to amend the agency's Comprehensive Plan and Water Code to establish a Flexible Flow Management Program (FFMP) for the New York City Delaware Basin Reservoirs ("City Delaware Reservoirs") for multiple objectives, including, among others: (a) providing safe and reliable supplies of water; (b) managing discharges; (c) assisting in mitigating floods; (d) providing flows in the tailwaters to help sustain cold water fisheries; and (e) providing flows to help protect ecological health, support withdrawal and nonwithdrawal uses and repel salinity. The current reservoir releases program, established by Resolution No. 2004-3, and the current spill mitigation program, established by Resolution No. 2006-18, both were due to expire on May 31, 2007. By Resolution No. 2007-7 on May 10, 2007, the Commission extended these programs through September 30, 2007 in light of this ongoing rulemaking process. The Commission will also accept comment on alternative reservoir management strategies that may be adopted in the event that the decree parties do not unanimously consent to the proposed FFMP or the Commission does not promulgate regulations embodying the FFMP. The alternative reservoir releases options to be considered are: (1) extending the current reservoir releases program; or (2) reinstating a previous reservoir releases program. In evaluating these options, the Commission will also consider a seasonal spill mitigation program or an annual spill mitigation program for the three reservoirs and an amelioration program for the potential effects on the tailwaters fishery of the Lake Wallenpaupack drought operating plan adopted by Resolution No. 2002-33. The releases program adopted in the event that the proposed FFMP is not approved would continue in effect until any expiration date contained in the program adopted or unless and until replaced by another program that has been approved by the Commission. If approved by the Commission, the FFMP will supersede Docket D-77-20 CP (Revised) until the FFMP's expiration on May 31, 2010 or further renewal date, and all other versions of Docket D-77-20 CP shall be rescinded or expire. A comprehensive reassessment of safe yield and operations of selected basin reservoirs will be undertaken during the first three years that the FFMP is in effect.

Any alternative program addressing issues regarding which the public has not been provided notice through the present rulemaking may require a further notice and comment rulemaking process. In accordance with Section 3.3 of the Delaware River Basin Compact, any program affecting the diversions, compensating releases, rights, conditions, and obligations of the 1954 Supreme Court Decree in the matter of *New Jersey v. New York*, 347 U. S. 995, 74 S. Ct. 842 also requires the unanimous consent of

the decree parties, which include the states of Delaware, New Jersey and New York, the Commonwealth of Pennsylvania, and the City of New York.

Dates

Two public hearings on the revised FFMP proposal will be conducted at 2:30 p.m. and 6:30 p.m. respectively on Tuesday, August 14, 2007, at the office building of the Delaware River Basin Commission in West Trenton, NJ. Written comments will be accepted through Wednesday, August 15, 2007. To allow sufficient time for consideration of written comments, comments must be received, not merely postmarked, by that date. In addition, three informational meetings will be held on the revised proposal. The first informational meeting took place during a meeting of the Commission's Regulated Flow Advisory Committee, held at 10 a.m. on June 27, 2007 at the PPL Lake Wallenpaupack Environmental Learning Center in Hawley, PA. The second will take place during the morning conference session of the Commission's regularly scheduled meeting at 10:15 a.m. on Wednesday, July 18, 2007 at the DRBC office building in West Trenton, NJ. The third informational meeting will take place at 1 p.m. on Tuesday, August 14, 2007, immediately prior to the first public hearing on the proposal, scheduled for that date at the Delaware River Basin Commission office building in West Trenton, NJ. Directions to the Commission's office building, located at 25 State Police Drive in West Trenton, NJ, are available on the DRBC website at www.drbc.net. Do not rely upon MapQuest or other Internet mapping services for driving directions, as they may not provide accurate directions to the DRBC. Written comments must include the name, address and affiliation of the commenter. Comments may be submitted by email to paula.schmitt@drbc.state.nj.us; by U. S. Mail to: Commission Secretary, DRBC, P. O. Box 7360, West Trenton, NJ 08628-0360; and by fax to Attn: Commission Secretary at (609) 883-9522. In all cases, the subject line should include the phrase, "FFMP Comment."

Previously Submitted Comments

Written comments submitted to the Commission during the prior comment period, or presented orally or in writing to the Commission at its prior scheduled public hearings, with regard to the form of the FFMP posted on the Commission's website in February, 2007, will be included in the administrative record for this rulemaking and need not be resubmitted.

Supplementary Information

The flow management objectives considered by the Supreme Court Decree of 1954 were narrower than the diverse objectives that have emerged in the decades since. Today, the finite waters of the Delaware and the limited storage available in the basin are being managed for multiple purposes, including among others water supply and drought mitigation, flood mitigation, habitat protection in the tailwaters fishery, the mainstem and the estuary and salinity repulsion. In accordance with the Delaware River Basin Compact, a statute concurrently enacted in 1961 by the United States and the four basin states—Delaware, New Jersey, New York and Pennsylvania—the Delaware River Basin Commission may modify diversions, releases, rights, conditions and obligations established by the decree, provided that the decree parties unanimously consent to such modifications. The Commission and decree parties have made use of this

authority to provide flexibility to respond to fluctuating hydrologic conditions and evolving priorities throughout the Commission's history.

Unlike the experimental programs instituted by the Commission in the past, the FFMP is intended to provide a comprehensive framework for addressing multiple flow management objectives, including, in addition to water supply, drought mitigation and protection of the tailwaters fishery, a diverse array of habitat protection needs in the mainstem, estuary and bay, assistance in mitigating the impacts of flooding, recreational goals and salinity repulsion. Some of the flow needs identified by the parties have not yet been defined sufficiently for the development of detailed plans. These include protection of the dwarf wedgemussel, a Federal and state-listed endangered species present in the mainstem, oyster production in Delaware Bay, and protection of warm-water and migratory fisheries in the lower basin. Incremental and periodic adjustments are expected to be made to the FFMP for these purposes, based upon ongoing monitoring, scientific investigation and periodic reevaluation of program elements.

A central feature of the reservoir release programs implemented to date for management of the tailwaters fishery has been the use of reservoir storage "banks" employed for narrowly defined purposes under specific hydrologic and temperature conditions and at specified times of the year. These are applied in conjunction with a set of fixed seasonal flow targets. The system requires complex daily flow and temperature modeling as a component of determining the releases, and as a result, the program is difficult and costly to administer. The current approach also lacks the seasonal fluctuations characteristic of a natural flow regime. The FFMP would largely eliminate the use of banks and would base releases instead on reservoir storage levels, resulting in larger releases when water is abundant and smaller releases when storage is at or below normal. The result would more closely approximate a natural flow regime. In addition, the FFMP would provide for more gradual transitions (or "ramping") from higher to lower releases and vice versa than the current regime. The FFMP would include a discharge (spill) mitigation component similar to but enhancing the temporary programs implemented in the past. The storage represented by snowpack water content would continue to be considered.

The decree parties have considered the broad range of public comments that were received on the FFMP that was published in February and have proposed several revisions in response to those comments. The discharge mitigation provisions of the release program would be enhanced by increasing the rate of releases and modifying the release triggering curves by extending the period during which releases are triggered at the 75% storage

level and expanding the period of time during the year covered by the program. These releases would also serve to provide more water than did the previous FFMP proposal for fisheries protection during the spring and early summer. A Temporary Release Quantity would be established for a 3-year period, supported by the Excess Release Quantity specified in the decree, and making release water available to meet Montague and Trenton flow objectives under certain conditions. The maximum New Jersey diversion authorized in the decree, which was reduced during drought operations by the Good Faith Agreement of the decree parties and the Commission's Water Code would be partially restored by the revised FFMP, resulting in continuation of New Jersey's 100 mgd diversion during normal and drought watch operations; and diversions of 85 mgd during drought warning and drought emergency operations. The Montague flow objective would be detached from the Good Faith Agreement's salt front vernier during drought emergency operations.

Hydrologic modeling and habitat assessments are being undertaken to evaluate the sustainable benefits of the FFMP for the tailwaters fishery and for discharge mitigation. In addition, an evaluation is being made of the potential benefits and costs of increasing storage in one or more of the City Delaware Reservoirs that may improve the capacity of the system to meet the full range of flow objectives.

If a decision of DRBC commissioners on details of the FFMP with the unanimous consent of the decree parties cannot be reached at the Commission meeting on September 26, 2007, the parties intend to continue to work at refining and improving the FFMP. Under such circumstances, for an interim period, the parties will consider extending the current fisheries management program or reinstating a previous regime. In either case, a discharge mitigation plan and an amelioration program for the potential effects of the Lake Wallenpaupack drought operating plan will also be considered.

Further Information, Contacts

The text of the proposed FFMP in its entirety and the proposed regulations embodying the FFMP will be posted on the website of the Delaware River Basin Commission, www.drbc.net, on or before July 16, 2007 and will remain posted through September 26, 2007. Contact Pamela M. Bush, Esquire, Commission Secretary and Asst. General Counsel at (609) 883-9500, Ext. 203 with questions about the proposed rule change or the rulemaking process.

PAMELA M. BUSH,
Secretary

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