

M E M O R A N D U M

Date: October 17, 2016

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Subject: DRBC Response to Comments and Staff Recommendation on Proposed Amendments to the Commission's Rules of Practice and Procedure (18 CFR Part 401) and Water Supply Charges Regulations (18 CFR Part 420)

I. Summary and Recommendation

- A. Summary:** In accordance with the Delaware River Basin Compact and implementing regulations, on May 9, 2016 the Delaware River Basin Commission ("DRBC" or "Commission") published on the DRBC website a Notice of Proposed Rulemaking to (a) amend the *Rules of Practice and Procedure* by the addition of a revised project review fee structure and (b) amend the *Basin Regulations – Water Supply Charges* by providing for automatic inflation adjustments. A set of Frequently Asked Questions ("FAQs") and a press release accompanied the May 9, 2016 web posting.

The Notice of Proposed Rulemaking was also published in the Federal Register on June 3, 2016 (81 FR 35662), the Delaware Register of Regulations on June 1, 2016 (DE Reg. 1052), the New Jersey Register on June 6, 2016 (48 N.J.R. 949), the New York State Register on May 25, 2016 (p. 1), and the Pennsylvania Bulletin on June 11, 2016 (46 Pa. B. 2967).

A public informational meeting was held at 2:00 p.m. on Wednesday, June 15, 2016 at the Washington Crossing Historic Park Visitor Center, 1112 River Road, Washington Crossing, Pa. The informational meeting included presentations by DRBC staff and informal questions and answers. Oral comments for the record were not accepted at the informational meeting.

A duly noticed public hearing took place on Wednesday, July 27, 2016 at 1:00 p.m. at the Commission's office building, located at 25 State Police Drive, West Trenton, NJ. The hearing continued until those wishing to testify had had an opportunity to do so. Four members of the public attended.

One person offered oral testimony at the public hearing, and DRBC received two comment letters prior to the close of the comment period at 5:00 p.m. on August 12, 2016.

Based on our review of comments received, Commission staff have prepared the following recommendation and response to comments.

- B. Recommendation:** After careful consideration of the oral and written comments received on the proposed rule, DRBC staff have prepared the responses set forth in Section II of this memorandum and recommend adoption of the proposed rule with the changes shown below.

§ 401.43 Regulatory program fees.

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(b) *Types of fees.*

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(2) *Annual Monitoring and Coordination Fee.*

(i) Except as provided in paragraph (ii) below, An Annual Monitoring and Coordination Fee shall apply to each ~~active withdrawal and/or discharge project for which a~~ water allocation or wastewater discharge approval issued pursuant to the Compact and implementing regulations ~~is in effect~~, regardless of whether the approval was issued by the Commission in the form of a docket, permit or other instrument, or by a Signatory Party Agency under the one permit program rule (§ 401.42). The fee shall be based on the amount of a project's approved monthly water allocation and/or approved daily discharge capacity.

(ii) For any withdrawal or diversion covered in part by a certificate of entitlement issued pursuant to 18 CFR § 420.31-32 of the water supply charges regulations, the Annual Monitoring and Coordination Fee shall be based on the allocated amount, if any, in excess of the quantity specified in the entitlement.

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(e) *Fee schedules.* The fees described in this section shall be as follows.

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ANNUAL MONITORING AND COORDINATION FEE

	<u>Annual Fee</u>	<u>Allocation</u>
Water Withdrawal	\$300 ¹	< 4.99 mgm
	\$450 ¹	5.00 to 49.99 mgm
	\$650 ¹	50.00 to 499.99 mgm
	\$825 ¹	500.00 to 9,999.99 mgm
	\$1,000 ¹	> or = to 10,000 mgm
	<u>Annual Fee</u>	<u>Discharge Design Capacity</u>
Wastewater Discharge	\$300 ¹	< 0.05 mgd
	\$610 ¹	0.05 to 0.99 mgd
	\$820 ¹	1 to 9.99 mgd
	\$1,000 ¹	> or = to 10 mgd

¹ Subject to annual adjustment in accordance with paragraph (c) of this section.

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II. Comment and Response

A. Commenters

A list of the written and oral commenters follows:

Christopher S. Crockett, Ph.D., P.E., Vice President/Chief Environmental Officer, Aqua America (Letter of 8/10/2016)

Dennis Palmer, Chairman and Kathy Klein, President, Water Resources Association of the Delaware River Basin (“WRA”) (Letter of 8/10/2016)

Dennis Palmer, representing Association of Environmental Authorities of New Jersey and WRA (Oral comment, July 27, 2016 public hearing)

B. Response to Comments

Comment #1: While Aqua understands the need for and importance of the goal of fiscal sustainability for DRBC, resultant annual costs to Aqua due to the restructured fees currently proposed are significant. We estimate the annual cost for fees overall to increase from roughly \$5,000 a year to \$60,000, or a 12-fold increase, annually.

This is based on an average of project/docket actions we have undertaken in the past several years and the inventory of currently effective dockets regulated by the Commission.

Response #1: Aqua’s estimated annual cost of \$60,000 is accurate. Notably, Aqua’s inventory of dockets is the largest of any single entity operating in the Delaware River Basin. Aqua holds 42 active water withdrawal dockets in Pennsylvania, 7 active water withdrawal dockets in New Jersey, and 17 active wastewater discharge dockets in Pennsylvania, representing a total of 66 active water withdrawals and discharges involving the withdrawal, use, treatment and discharge of some 200 million gallons per day. The average annual cost of less than \$1,000 per docket for the Commission’s coordination and monitoring activities associated with Aqua’s withdrawals from and discharges to Basin waters is in our view reasonable. An analysis of cost impacts to users based on different allocation brackets was presented at the August 15 informational meeting and is included in the FAQs concerning the proposed rule posted on DRBC’s website (see FAQ no. 42). DRBC received no other comments on the cost impact of the proposed fee restructuring.

Comment #2: [Aqua] appreciate[s] that the Commission should be reimbursed fully for the costs of reviewing a new/modified project and the application fee should support such costs. We also agree that some level of adjustment for inflation with regard to the water supply charges is not unreasonable.

Response #2: The Commission concurs.

Comment #3: While Aqua understands the concept of an annual monitoring and compliance fee (item #2), we disagree that the fee should be at the actual amount proposed for projects which do not require active monitoring/data assessment or related activities. The use of annual fees to offset active and ongoing monitoring and data assessment on specific projects or dockets is reasonable and understandable. However, most of the inventory of currently effective dockets Aqua holds with the Commission either have had no action for decades, or do not presently contain active monitoring programs which entail effort for Commission staff. A specific example of this involves the currently effective four (4) dockets for our Hatboro system which have been essentially “dormant” since 1974. To now be assessed an ongoing, combined annual compliance fees of nearly \$2,000 for those dockets are not justified in our opinion. For such projects for which essentially no action or ongoing review is performed by DRBC, we recommend a substantially reduced/nominal annual compliance fee — to maintain your database/public records/etc. as required, on the order of \$50.00 per year instead of the \$540 proposed by the Commission.

Response #3: The proposed fee is an annual monitoring and coordination fee, not an “annual monitoring and compliance” fee. Although compliance is part of interagency coordination, the fee is proposed to cover a range of activities required

for an effective regulatory program. The Commission does not agree with the statement that most of Aqua’s inventory of docket “*either have had no action for decades, or do not presently contain active monitoring programs which entail effort for Commission staff.*” For example, 25 out of 42 Aqua withdrawal dockets require the submittal of annual water audits to DRBC. The docket holder notification and tracking, processing and evaluation of these water audits are activities to be supported by the proposed annual monitoring and coordination fee. Four (4) of Aqua’s withdrawal dockets require the submittal of annual hydrogeological reports. The tracking, processing and evaluation of these reports are likewise activities that would be supported by the proposed annual monitoring and coordination fee. Five (5) of Aqua’s 17 wastewater dockets require the submittal of an annual effluent monitoring report (AEMR). The docket holder notifications and tracking, processing and evaluation of AEMRs all are activities supported by the proposed annual monitoring and coordination fee.

Regarding Aqua’s Hatboro system and the four active dockets that cover this system, DRBC encourages Aqua to apply for consolidation of the approvals into a single comprehensive docket that allocates all sources for the system. The consolidation would result in an annual monitoring and coordination fee of \$650 per year, rather than the combined fee of \$1,900. The Aqua Hatboro system is a good candidate for consolidation because combining Aqua’s four Hatboro dockets into one would lighten the administrative burden for both Aqua and DRBC and would reduce Aqua’s fee by 34 percent. Consolidation in this instance could also reduce allocation redundancy and/or error. Staff do not recommend changes to the proposed amendments based on this comment.

Comment #4: Aqua also does not believe it is appropriate to charge an annual compliance fee for a pre-Compact project, i.e., our Entitlements, including 131 - Crum Creek; 130 - Neshaminy Creek; 129 - Pennypack Creek; and 128 - Pickering Creek. These projects which were in effect prior to the Commission are expressly exempt from charging under Section 15.1(b) of the Delaware River Basin Compact which provides that ‘no provision of Section 3.7 of the Compact shall be deemed to authorize the Commission to impose any charge for water withdrawals or diversions from the basin if such withdrawals or diversions could lawfully have been made without charge on the effective date of the Compact; Aqua believes that restructuring fees to presently charge for such projects directly conflicts with Section 15.1b of the Compact. Therefore Aqua requests there should be no annual compliance fees for this category of projects.

Response #4: The Commission’s view is that the annual monitoring and coordination (not “compliance”) fee is an administrative fee to cover DRBC’s costs for the review of projects and administration of approvals under the Compact, activities that benefit all basin water users by helping to provide for optimum and sustainable use of a vital shared resource. Notwithstanding that the Commission disagrees with the

commenter’s view, we are modifying the rule to exclude from the calculation of the annual monitoring and coordination fee all water for which an entitlement issued pursuant to Article 5.2 of the *Administrative Manual Part III – Basin Regulations – Water Supply Charges* (18 CFR 420.31-32) is in effect because the water could lawfully have been withdrawn or diverted without charge prior to enactment of the Compact. Where the allocated amount exceeds the amount specified in an entitlement, the Annual Monitoring and Coordination Fee will be based solely on the allocated amount in excess of the quantity specified in the entitlement.

Comment #5: We disagree that any annual charges should be applied for those projects for which Aqua provided the initial capital for construction/water supply storage. Such projects include Upper Merion Reservoir (D-1966-221 CP); Perkiomen Creek surface water withdrawal (D-2015-001 CP-1), which is effectively made possible only by augmentation from Green Lane Reservoir, which was funded entirely by Aqua, and to a partial extent our surface water withdrawal on the East Branch Brandywine Creek at Coatesville, East Bradford Township, Chester County (D-1975-019 CP). We believe such charges on these projects clearly contradicts Article 5.1.3(D.) of the DRBC Administrative Rules III — Basin Regulations — Water Supply Charges, which states that “...there shall be no charge for water made available from storage where: (1) The cost of the storage facility has or will be otherwise paid for by the user”.

Response #5: Section 5.1.3 D. of the *Administrative Manual – Basin Regulations – Water Supply Charges* (18 CFR 420.23(d)) refers specifically to a system of water supply charges relating to surface waters of the basin. The proposed monitoring and coordination fee is not related to and does not alter the water supply charges program. Aqua will continue to be exempt from water supply charges established pursuant to 18 CFR part 420 for its withdrawals from any storage facility that satisfies the conditions set forth at 18 CFR 420.23(d). Staff do not recommend any changes to the proposed amendments based on this comment.

Commenter: 8/10/2016 letter from Christopher S. Crockett, Ph.D., P.E. Vice President/Chief Environmental Officer, Aqua America

Comment #6: WRA supports DRBC being fully reimbursed for the costs of reviewing new/modified projects and that an adjustment for inflation with regard to water supply charges is reasonable.

Response #6: The Commission concurs.

Comment #7: WRA thinks that the annual monitoring and compliance fees should be based upon actual flow for discharges or withdrawals of the previous year, not the design flow or maximum flow in a permit, allocation or docket.

Response #7: The Commission disagrees. The proposed rule includes five brackets for water withdrawal annual fees and four brackets for wastewater discharge annual fees. The range covered by each bracket is wide, making it unlikely that utilizing actual flows rather than design flows would move many docket holders to a lower bracket. Additionally, tracking the actual flow rates of approximately 1,800 facilities annually would be cumbersome and inefficient. Staff do not recommend any changes to the proposed amendments based on this comment.

Comment #8: WRA does not believe it is appropriate to charge an annual compliance and monitoring fee to pre-Compact projects, citing Section 15.1(b) of the Compact. WRA believes that charging an annual fee to such projects directly conflicts with 15.1(b) of the Compact and that there should not be any annual compliance fee for this project category.

Response #8: Please see Response #4 above.

Comment #9: WRA does not think that any annual charges should apply to projects where the docket holder has provided the initial capital for construction/water supply. They believe the annual charge clearly contradicts Article 5.1.d(D.) of the Commission’s Basin Regulations – Water Supply Charges.

Response #9: Please see Response #5 above.

Commenters: 8/10/2016 letter from Dennis Palmer (Chairman) and Kathy Klein (President), Water Resources Association of the Delaware River Basin

Comment #10: Relating to using actual flow vs. permitted flow to calculate the annual compliance and monitoring fee, Mr. Palmer stated that in his own case, the actual flow at his facility is about 50% of the permitted flow. He suggested that we base the fee on actual flow data “available from the regulatory agencies”.

Response #10: Please see Response #7 above.

By way of illustration, DRBC’s records indicate that DRBC has issued to the Landis Sewerage Authority, with which Mr. Palmer is affiliated, approval for an 8.2 mgd wastewater treatment and discharge facility. Under the proposed rule, this facility would fall within the 1-10 mgd bracket and would pay an annual monitoring and compliance fee of \$820. The fee based on Landis Sewerage Authority’s actual flow of 4.1 mgd (~50% of the permitted flow) would fall within the same bracket and result in the same \$820 annual monitoring and coordination fee.

Commenter: Public Hearing, Dennis Palmer, representing Association of Environmental Authorities of New Jersey and Water Resources Association of the Delaware River Basin