

# RULES AND REGULATIONS

## Title 25—ENVIRONMENTAL PROTECTION

### SUSQUEHANNA RIVER BASIN COMMISSION

[25 PA. CODE CHS. 803—808]

#### Review and Approval of Projects; Special Regulations and Standards; Hearings and Enforcement Actions

*Summary.* This document contains amendments to the Susquehanna River Basin Commission (Commission) project review regulations currently published at 18 CFR Parts 803—805. The regulations provide the procedural and substantive rules for Commission review and approval of water resources projects and the procedures governing hearings and enforcement actions. These amendments include additional due process safeguards, add new standards for projects, improve organizational structure, incorporate recently adopted policies and clarify language. The amendments were first proposed on July 7, 2006 in the Federal Register, Vol. 71, No. 130, p. 38692. Comments received on the proposed rule making are summarized with accompanying responses in the "Supplementary Information" section below. Changes were made to the proposed rules in the final rule making in response to these comments, including the "removal and reservation" of Parts 803—805 and the substitution therefore in this final rule making action of Parts 806—808, respectively.

*Dates.* These rules shall be effective January 1, 2007.

*Addresses.* Susquehanna River Basin Commission, 1721 N. Front Street, Harrisburg, PA 17102-2391.

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#### *Supplementary Information:*

##### *Background*

The Commission proposed rules amending its "Regulations and Procedures for the Review of Projects" presently found at 18 CFR Parts 803—805, which were published on July 7, 2006, in the FR, Vol. 71, No. 130, p. 38692. Those rules establish: (1) The scope and procedures for review and approval of projects under Section 3.10 of the Susquehanna River Basin Compact, Pub. L. 91-575; 83 Stat. 1509 et seq. (the compact); (2) special standards under Section 3.4(2) of the compact governing water withdrawals and consumptive use of water; and (3) procedures for hearings and enforcement actions. The Commission received numerous comments on the proposed rule making action, which are summarized below with an accompanying response to each. The SRBC made a number of adjustments and changes to the proposed rules in this final rule making action in response to those comments. One change that should be noted is the removal and reservation of 18 CFR Parts 803—805, and the substitution therefore in this final rule making action of Parts 806—808 respectively. The contents that appeared in Parts 803—805 of the proposed rule making now appear in Parts 806—808 respectively; hence, this is

not an enlargement of the purposes of the proposed rule making, but simply an editorial change in response to a comment that Commission received pointing to the possible confusion of retaining the same numbering system for the revised regulations. Comments received on the proposed rule making referred to the numbering system as published, namely Parts 803—805, and comments and responses set forth below follow that same construction, even though now superseded by Parts 806—808, respectively.

#### *General Comments*

*Comment:* Revisions will strengthen and streamline Commission project review regulations.

*Response:* The Commission agrees that the revisions will strengthen and streamline its regulatory program.

*Comment:* Commission proposed regulations should more strongly emphasize the importance of economic development in its statement of purposes and in the criteria on which an approval will be granted or denied. SRBC should attempt to more carefully balance the economic benefits of a project versus other interests such as the environment. Tools should be developed for analyzing the "harms" of a project versus its "benefits." If there are only minor environmental impacts and great economic benefits, projects should be approved.

*Response:* The Commission believes that there are already sufficient references to the purposes of economic development in both the Susquehanna River Basin Compact (the "compact") and the project review regulations. The Commission, in its review process, does take into consideration the economic development aspects of a project and works with project sponsors to help them use water resources in a way that will enhance economic growth while avoiding conflicts with other users.

*Comment:* The Commission should explore the use of free market tools such as credits and trading for compliance with its regulations.

*Response:* The Commission considers that tools such as credits and trading for compliance with regulations are probably more applicable to water quality regulations than to water quantity regulations of the type administered by the Commission. Nevertheless, an element of free market tools is already incorporated in the proposed regulation Section 803.22 ("Standards for consumptive uses of water"), in that project sponsors are allowed a wide choice of mitigation methods, including the free market acquisition of water for flow augmentation.

*Comment:* In several instances, the Commission is writing authority into the regulations that does not exist under the compact. For example, Article 11 of the compact pertaining to protected areas is the only section that mentions any authority for approval of withdrawals. Also, there is no compact authority for other items in the regulations such as cease and desist orders and the issuance of subpoenas. Many other examples are cited.

*Response:* This comment reads the terms of the compact far too narrowly and fails to consider other broad grants of power given to the Commission to manage the river basin's water resources. For example, Section 3.5(4) of the compact states that the Commission "shall assume jurisdiction in any matter affecting water resources whenever it determines \*\*\* that the effectuation of the comprehensive plan or the implementation of the compact so

requires.” Also, Section 3.4(9) states that the Commission “may have and exercise all powers necessary or convenient to carry out its express powers and other powers which reasonably may be implied therefrom.” Finally, Section 3.10(2) of the compact makes it clear that the Commission’s power to approve projects is not limited.

*Comment:* The Commission has seemingly unlimited authority to arbitrarily impose enforcement action and prescribe remedies, and is not responsible or accountable to its basin-constituent population or economic interests.

*Response:* Like any other government agency, the Commission does not operate without limits imposed by the compact, the Constitution, and laws of the United States. Also, the Commission is directly responsible to its member jurisdictions, each of which is represented on the Commission.

*Comment:* The proposed regulations should have been presented in a redline/black-line format that shows changes along side of current regulations. Old regulation sections from which regulations were moved or deleted should have been “reserved” instead of reused with new regulatory material because existing policies that refer to these same sections will no longer be accurate and could lead to confusion among those persons reviewing those policies.

*Response:* These revised regulations represent a complex overhaul of the current Commission regulations that involved the wholesale reorganization of the existing sections, the extensive revision of existing sections, and the addition of whole new sections. Such changes cannot be effectively placed in redline/black-line, side-by-side format without creating even more confusion for a reviewer attempting to review the disjointed mixture of moving text, additions, and deletions. It was therefore decided that the proposed revisions would be presented as an entirely new package of regulations and that the major changes would be described section by section in the preamble of the proposed rulemaking action. Most policies were incorporated into the body of the regulations, which will provide clarity for the regulated community and others. References to sections of the regulations that are no longer accurate will be revised accordingly. Also, with regard to “reserving” old sections of the regulations, the Commission has decided that, as part of its final rulemaking action, it will “remove and reserve” Parts 803—805 and replace those Parts respectively with new Parts 806—808. This is being done in accordance with Federal Register guidelines. All references in this Comment and Response document will reference section numbers as originally proposed (that is, Parts 803—805).

*Comment:* The new policies, procedures, and regulations implemented by the Commission over the last six years have already imposed significant administrative burdens on the regulated community. Some in the regulated community are now concerned that these new regulations will impose even more burdens that will adversely affect the economic vitality of the basin and drive investors to basins with a friendlier regulatory environment.

*Response:* The Commission acknowledges that compliance with Commission regulations does place certain short-term administrative and financial obligations upon the regulated community. However, the long-term benefits of Commission management and protection of a critical resource must also be considered. Project sponsors and other water users receive certain protections related to their water use that extend far beyond the protections

afforded by the common law. Furthermore, the incorporation of policies and overall refinement of the regulations are intended to foster sustainable use of the resource over the term of an approval, even through times of drought. As such, some of the rigor complained about affords protection to existing uses, including economic uses, and allows for responsible economic development in the basin.

*Comment:* The Commission should establish a more integrated project approval process that directly considers the impacts of a project in terms of both water quantity and quality, and facilitates implementation of statewide water quality programs and mandates, including the Chesapeake Bay Tributary Strategies program, the anti-degradation program and the TMDL program.

*Response:* The member jurisdictions continue to maintain primary jurisdiction for regulating water quality pursuant to federal regulations under the Clean Water Act. To avoid duplication, the Commission focuses its review on water quantity while considering the impacts of a project on water quality, primarily through integrated, extensive coordination with agencies of its member jurisdictions.

*Comment:* The Commission should encourage “smart growth” communities that cluster development and have less impact on the environment. SRBC, by increasing regulatory thresholds, eliminating transferability of approvals, shortening amortization times and generally creating uncertainty about future water rights, would seem to promote sprawl by encouraging large lot development with individual wells to avoid SRBC regulation.

*Response:* The Commission rejects the notion that this set of revised regulations will somehow discourage clustered development and create uncertainty about future water rights. If anything, these strengthened regulations improve the Commission’s ability to effectively manage the water resources of the basin, and will reinforce certainty about future water supplies by assuring users that they are drawing on reliable sources of water that will not be subject to conflict or interference with other users. It also acknowledges that land use decisions are made at the local level in all of its member jurisdictions.

#### *Comments by Section, Part 803*

##### *Section 803.1. Scope*

*Comment:* Decisions made by the Commission should reference the section of the comprehensive plan that is relied upon.

*Response:* Docket approvals presently do reference the project’s compliance with the terms of the comprehensive plan, but a reference to a single section of the comprehensive plan would be too limiting in most cases.

##### *Section 803.2. Purposes*

*Comment:* The reference to economic development should be strengthened by stating that it is a purpose of the regulations to promote economic development and financial investment. It was further suggested that the purposes section should acknowledge the water-related dependency of many large and small commercial, industrial, and mining industries in the basin. Finally, the words “and control” should be deleted from Section 803.2(a)(2).

*Response:* Again, the Commission feels that the existing reference to economic development in this section is sufficient. The Commission also promotes economic stability and certainty by protecting the sources of water that all such activities depend on for their use and develop-

ment. The Commission protects more than just the environment; the Commission heads off conflicts between users and helps users maintain reliable sources of water. The word "control" comes directly from the purposes section of the Susquehanna River Basin Compact and cannot be removed or deleted.

*Section 803.3. Definitions*

*Comment:* Revise the "groundwater" definition to indicate that "groundwater" includes that water contained in quarries, pits and underground mines not originating directly from surface water inflow (runoff)." Also add that the term groundwater "includes water derived from a spring by pumping or other means of drainage which reduces or eliminates the surface flow."

*Response:* The definition has been modified to include "or other means of drainage." The Commission does not consider the addition of the other suggested wording to be necessary.

*Comment:* The last sentence in the "groundwater" definition is confusing and, when read in conjunction with the "surface water" definition, may exclude ground or surface water that is intended to be included.

*Response:* Agreed. Additional language contained in the current definition has been reinserted to clarify the definition.

*Comment:* The "surface water" definition uses the term "surface of the earth," while the "groundwater" definition uses the term "surface of the ground."

*Response:* Agreed. The term has been changed to "surface of the ground."

*Comment:* There is a need to define the term "undertake" to make clear what constitutes the commencement of a project requiring approval under Section 803.4, and, to insure that mere site preparation such as clearing and grubbing are not included under the definition, a definition of "construction" should also be included.

*Response:* Agreed. New definitions have been included for the term "undertake" and for the term "construction." The definition of construction insures that mere site preparation activity will not be included under the definition of "undertake". Combined, these definitions clarify what activity is subject to prior review and approval.

*Comment:* Revise the "project" definition because it is confusing and ambiguous.

*Response:* This definition utilizes wording taken directly from the Susquehanna River Basin Compact.

*Comment:* Revise the "pre-compact consumptive use" definition by adding the following words after the date "January 23, 1971": "established on the basis of credible documentation."

*Response:* The Commission does not consider the suggested language to be necessary. All such determinations are already made on the basis of credible documentation evaluated by Commission staff.

*Comment:* Revise the "water resources" definition to remove the term "and related natural resources" because it is unclear what these "related natural resources" are.

*Response:* This definition utilizes wording taken directly from the Susquehanna River Basin Compact.

*Comment:* Restore the use of the words "for use" in the "withdrawal" definition.

*Response:* The Commission agrees to restore the words "for use in the basin."

*Section 803.4. Projects Requiring Review and Approval*

*Comment:* The proposal to require a new review and approval by the Commission after a change of ownership of a project will substantially complicate and hinder the transfer of projects and therefore reduce the attractiveness of investments in projects in the basin. Frequent corporate changes, reorganizations, and mergers are common in the energy industry today. Requiring a new docket application for each such event would be administratively unwieldy, reduce predictability, and will add unnecessary risk for anyone willing to sponsor a project.

*Comment:* Requiring approvals upon change of ownership of a project may also discourage water companies from taking over smaller, inadequate systems due to the uncertainties created regarding the new quantities of water that will be available under a reissued approval. Furthermore, there does not appear to be a need to require that full project reviews be performed when there is a change of ownership of a project unless there is a change in conditions that really warrants such a full review.

*Comment:* The Commission should consider some way of preliminarily evaluating whether there has been such a change before requiring submission of a new application by transferees or simply reopening the docket under its reopening authority. Also, the Commission may want to focus on the ability of a transferee to comply with the existing approval. Yet another suggestion is for the Commission to require the submission of a notice of a change of ownership prior to the transfer, together with a transfer fee. This would enable the Commission to stay fully informed about which entities hold approvals, facilitate enforcement of any limitations or conditions, and offset the Commission's processing and administrative costs.

*Response:* The Commission has added new paragraph (b) that lists categories of projects that are exempt from the requirement for Commission approval upon a change of ownership. These exemptions were originally contained in the "change of ownership" definition and have been relocated to this section. The Commission has also added new paragraph (c) that allows projects not otherwise exempt under paragraph (b), to be undertaken by a new project sponsor (the transferee) upon a change of ownership pending action by the Commission on an application submitted by such new project sponsor requesting review and approval of the project. Both paragraphs (b) and (c) relate to projects that did not require Commission approval prior to January 1, 2007.

*Comment:* New owners should be required to seek approval of their water consumption and have full accountability for compliance with the terms for approval.

*Response:* Subject to the exceptions noted in our response above, the Commission agrees.

*Comment:* The Commission should not end the grandfathering of consumptive uses existing prior to January 23, 1971. The Commission has not provided a good reason to end this practice that has been a part of the Commission's regulations since their inception, and which project sponsors have come to rely on.

*Comment:* The intention of grandfathering is to protect the expectations of the person, but not the project. The proposed limitation on grandfathering does not affect the reasonable expectations of any person who is the current owner. Ending grandfathering assures fair implementation of the regulations. Exemptions provided to ag and family transfers should be continued indefinitely.

*Response:* The rationale for gradually retiring grandfathered benefits upon the transfer of ownership of a project is that, with few exceptions, such portions of the basin's water resources should not be allowed to continue indefinitely into the future unmanaged. Under the compact, the Commission is responsible for the comprehensive management of all of the basin's resources. While it was reasonable to allow those who possess grandfathered benefits to continue their use of them, the unfettered transfer of them to subsequent purchasers effectively creates a situation of prior appropriation.

*Comment:* The Federal reservations to the Susquehanna River Basin Compact specifically prohibit the Commission from charging for pre-compact uses of water under Section 3.9 of the compact. Section 3.9 only allows the Commission to charge for use of its facilities or its services. Waters consumptively used are not a product of the Commission facilities or services, but are produced by the streams and rivers owned by the individual states. There is no basis for charging these projects a fee. Finally, grandfathered amounts encourage water conservation.

*Response:* The fees paid by consumptive users are not made under the authority of Section 3.9 of the compact and are therefore not subject to the federal reservations regarding charges under Section 3.9 of the compact. Instead, these fees are just one of several means of compliance with the consumptive use regulation that a project sponsor can employ. The Commission places the proceeds of such charges into a special water management fund where they are used to purchase storage for release during low flow and to implement other measures to mitigate the effects of consumptive water use. Project sponsors are free to propose other means of mitigation.

*Comment:* Section 803.4(a)(4) requiring approval of any consumptive use that adversely affects purposes outlined in Section 803.2 is overly broad and too vague to effectuate compliance because it provides no quantitative or qualitative benchmarks.

*Response:* Agreed that this paragraph may be overly broad in scope. This paragraph has therefore been stricken.

*Comment:* In (a) Consumptive use of water, and (b) Withdrawals, change the reference to Section 803.12 to Section 803.13.

*Response:* Agreed. This cross-reference was incorrect and has been changed.

*Comment:* The proposal to regulate combined surface and groundwater withdrawals of 100,000 gpd or greater brings more withdrawals under review and approval, and better enables the Commission to ensure that substantial withdrawals do not compromise basin water resources.

*Response:* The Commission strongly agrees.

*Comment:* Combining groundwater and surface water to reach the withdrawal threshold of 100,000 gpd opens the regulatory process to include both when only one may be increased. Approval thresholds should remain separate.

*Response:* The Commission strongly believes that the hydrologic link between surface and groundwater justifies combining surface and groundwater withdrawals under one regulation that can consider and manage their mutual impacts. This conforms to the comprehensive management principles set forth in the compact.

*Comment:* The combined surface and groundwater requirement will force applicants to file two applications and pay two application fees.

*Response:* The proposed regulation does not have the effect referenced in the comment. If finally adopted, the Commission intends to institute a new application system for withdrawals and intends to modify its fee schedule to accommodate combined withdrawals.

*Comment:* The Commission should exempt the first 20,000 gallons per day (gpd) of an into-basin diversion as it has exempted the first 20,000 gpd of an out-of-basin diversion.

*Response:* The Commission does not agree that into-basin diversions should also be exempted up to 20,000 gpd. Regardless of quantity, the Commission wishes to insure that only water of good quality or properly treated water is being diverted into the Susquehanna River Basin. Rather than grant a blank exemption, the Commission will consider the possibility of a future "administrative agreement" or other informal arrangement with member states to accept their review and approval of a discharge into the basin (diversion) as an approval by the Commission.

*Comment:* Diversions should only be approved when the applicant demonstrates the clear need and a lack of alternatives.

*Response:* The Commission feels that the new regulation, which incorporates the Commission's out-of-basin diversion policy, adequately covers these criteria with respect to out-of-basin diversions.

*Comment:* There are no substantive criteria in 803.4(g) to establish a threshold as to when "other projects" may be required to submit an application.

*Response:* This paragraph is in conformance with Section 3.10(3) of the compact that grants the Commission and the member jurisdictions the broad authority to identify other projects that require Commission approval.

*Section 803.5. Projects That May Require Review and Approval*

*Comment:* With respect to (a), terms used such as "affect interstate water quality or interstate waters" and "significant effect" are too vague and do not sufficiently establish a quantitative standard. There is no requirement to identify which part of the comprehensive plan is adversely affected and therefore there is no way for an applicant to determine this.

*Response:* This is language that simply restates and is consistent with the language of the compact, Section 3.10. A project sponsor whose project affects the comprehensive plan would be informed about which part of the plan is so affected when it is notified in writing by the Executive Director under Section 803.4 (g).

*Comment:* With respect to (b), there should be a "pre-determination notice" procedure that would afford a project sponsor the opportunity to supplement information, discussion, and technical interaction before a determination is made by the Executive Director.

*Response:* If the Executive Director is called upon to make a determination, he/she will notify the project sponsor to submit such information prior to a determination. This will be part of the due process automatically afforded a project sponsor and there is no need to provide for it separately in the regulation.

*Section 803.6. Transferability of Project Approvals*

*Comment:* Support expressed for limited classes of transfers.

*Comment:* The proposed language should be eliminated for the same reasons given under the comments submitted on Section 803.4. regarding "change of ownership" and the existing rule regarding transfers should be retained. Essentially, restrictions on the transfer of Commission approvals create the same burdens on the regulated community as described in the comments on Section 803.4 above.

*Response:* This section has been extensively revised to now generally permit the transfer of project approvals. All transfers would require advance notification and certification to comply with all terms and conditions of the transferred approval. Transfers qualifying under new paragraph (b) can be made automatically without further Commission action. Transfers qualifying under new paragraph (c) can be made conditionally with a subsequent application to the Commission within 90 days from the transfer requesting review and approval of previously unapproved aspect of the project. Transfers qualifying under new paragraph (d) can also be made conditionally with a subsequent application to the Commission within 90 days from the transfer requesting review and approval of the entire project.

#### *Section 803.7. Concurrent Project Review by Member Jurisdictions*

*Comment:* Insert the words "to avoid delays" after the words "to avoid duplication of work." All reviews should be carried on in parallel with other agencies so as to avoid any delays in the review process.

*Response:* The suggested language is seen as unnecessary since it is the express purpose of the section.

*Comment:* Substitute the words "appropriate administrative agreements" or "informal arrangements" for "agreements of understanding" and "agreements" to be consistent with Section 804.3.

*Response:* Agreed.

#### *Section 803.8. Waiver/Modification*

*Comment:* The "modify" portion of this section gives the Commission too much discretion to actually change the requirements of a regulation that has already been promulgated. Therefore, the references to "modification" and "modify" in this section should be deleted.

*Response:* This section has been a part of the Commission's regulations since the first omnibus rulemaking package was adopted in 1995. It is generally used to relieve project sponsors of unnecessary requirements, rather than to place additional requirements upon a project sponsor. The Commission expects that this type of use of the "waiver" section will continue, although it reserves the right to use such discretion in appropriate circumstances.

#### *Section 803.12. Constant-Rate Aquifer Testing*

*Comment:* There should be an introductory paragraph that includes a statement of purpose.

*Response:* The Commission has added additional wording that explains the purpose of constant-rate aquifer testing.

*Comment:* This section should state that constant-rate aquifer testing plans shall be prepared by a qualified and licensed professional geologist.

*Response:* The Commission defers to state law on this matter. Geologists are not formally licensed in New York or Maryland.

*Comment:* This section should state that constant-rate aquifer testing plans shall follow published Commission guidelines which shall be consistent with current industrial standards.

*Comment:* Once testing is complete, the Commission should not be able to require additional testing or monitoring unless the purposes of the first testing have not been met. The specific circumstances requiring additional testing should be set forth.

*Response:* These comments are addressed in the Commission's revised Aquifer Testing Guidance. Testing is conducted to provide a sound scientific basis for the Commission's decision regarding a project. Additional testing and monitoring is required to confirm assumptions in the interpretation of data or to verify system performance.

*Comment:* Paragraph (d) allows the Commission to impose arbitrary demands for additional testing.

*Response:* As is the case with every governmental agency, the Commission may not constitutionally impose arbitrary requirements.

*Comment:* This section deserves support.

*Response:* Agreed.

#### *Section 803.13. Submission of Application*

*Comment:* Add a new subsection that describes the deadlines to which the Commission would be obliged with respect to: (1) Administrative completeness; (2) technical reviews of applications; (3) review of supplemental submissions required by the Commission; and (4) actions to be taken by the Commission.

*Response:* The Commission feels that it would be more appropriate to address this comment in a set of accompanying guidelines rather than in the regulation itself.

*Comment:* In paragraph (b), how will a transferee of a project know that it is to comply with all of the requirements to certify an intention to comply and assume all associated obligations?

*Response:* This provision has been relocated to Sec. 806.6. The Commission will make available appropriate notification and certification forms to assist transferees in complying with the requirements.

*Comment:* In paragraph (c), the Commission should impose a time limit on itself to determine the completeness of an application.

*Response:* The provision has been deleted.

#### *Section 803.14. Contents of Application*

*Comment:* Applications by project sponsors should demonstrate the consistency of projects with locally adopted comprehensive plans and with state water plans.

*Response:* The notice of application procedure, which covers notification to local municipalities and county planning agencies, provides an ample opportunity for those entities to submit comments to the Commission on the consistency of the projects with local plans. The Commission coordinates with state agencies on each project application, providing the states with an opportunity to comment on the consistency of the projects with any of their water plans.

*Comment:* Some items that are now required to be provided in project applications are made discretionary on the part of the Commission in the new regulations. Many of these items provide information relevant to whether a

proposed project impacts water resources of the basin. These should continue to be mandated.

*Response:* The regulation has been restructured to mandate certain information that is uniformly applicable to all projects. The informational requirements listed as discretionary are also important, but not all are necessary for all projects. The Commission believes some discretion is needed to tailor informational needs on a case-by-case basis.

*Comment:* Applications should not be deemed incomplete if they lack a plan for avoiding or mitigating consumptive use because large volume consumptive use may be a legitimate purpose. Instead preface with statement "As may be appropriate, depending upon the nature of the project, plans for avoiding \* \* \* (etc)".

*Response:* Mitigation is one of the fundamental purposes of the consumptive use regulation. It is essential that a project sponsor develop a plan for mitigating its consumptive use. Development of a plan does not in any way imply that the use is not legitimate.

*Comment:* Two additional subsections should be added to allow the applicant to provide information regarding: (1) The benefits of the project; and (2) plans to mitigate adverse impacts of potential adverse effects.

*Response:* The project sponsor may, as it chooses, submit this information to the Commission. There is no need to make it a required submission.

*Comment:* Add a new item (xi) Evidence of compliance with all registration requirements of the Commission and the appropriate member jurisdictions.

*Response:* Agreed.

*Comment:* In (a)(2)(i), the project location should be determined by gps accurate to 10 meters.

*Response:* Agreed.

*Comment:* Paragraph (a)(2)(v) would seem to allow a requirement for a constant-rate aquifer test even if the application is for surface water, and it is the surface water application that causes the combined request to exceed 100,000 gpd.

*Response:* Commission staff will take into account such situations and, as appropriate, recommend a waiver of the constant-rate aquifer test.

*Comment:* With respect to paragraph (a)(3)(ii), is a PNDI being required?

*Response:* The Commission currently conducts a review for threatened or endangered species and their habitats. Under the new regulations, the project sponsor will submit this information with the application.

*Comment:* With respect to (b)(1)(ii), under what authority can the Commission require information on the ability of a project sponsor to fund a project?

*Response:* This is a necessary and convenient power under Section 3.4 (8) to reasonably ascertain the financial ability of the project sponsor to carry out a project in a manner to be approved by the Commission, including any conditions that the Commission may impose. This authority is only exercised in very limited situations.

*Comment:* With respect to (b)(1)(iii), relating to the identification of alternatives, what is a reasonable alternative? Will there be any guidance in this regard?

*Response:* Reasonable in this context refers to alternatives that may be appropriate for a particular situation. Commission staff will provide guidance and consultation as needed.

*Comment:* With respect to (b)(1)(iv), will the Commission maintain an inventory of anticipated uses?

*Response:* It is not necessary for the Commission to maintain such an inventory. Existing and anticipated uses should be identifiable by project sponsors or their consultants in each situation. For example, if the project is proposed for an area that has experienced rapid growth, anticipated uses should be evident, or reasonably discernable.

*Comment:* With respect to paragraph (3), it is much too open ended, allowing the Commission to ask for anything it deems necessary without limit.

*Response:* Again, as in any action it takes as a government agency, the Commission must act reasonably. Under constitutional law principles, there must be a rational relationship between what regulatory actions the Commission takes and a legitimate regulatory objective.

*Comment:* The regulations should continue the requirement for submission of comprehensive information about potential impacts of withdrawals and availability of alternatives, rather than allow its submission to be discretionary on the part of the Commission.

*Response:* Again, the regulation has been restructured to mandate certain information that is uniformly applicable to all projects. The informational requirements listed as discretionary are also important, but not all are necessary for all projects. The Commission believes some discretion is needed to tailor informational needs on a case-by-case basis.

*Comment:* There should be compatibility with regional and state Act 220 plans.

*Response:* The Commission routinely coordinates its approvals with its member jurisdictions. The project sponsor is required to give notice to the municipality and county planning agency of its application for approval, thereby providing an opportunity for local and regional interests to comment on the compatibility of projects.

*Section 803.16. Completeness of Application*

*Comment:* Add a statement providing that the Commission will provide the project sponsor with either a formal notice of administrative completeness, or a deficiency notice within a prescribed time.

*Response:* The Commission currently provides deficiency notices, when appropriate, as reviews are undertaken.

*Section 803.21. General Standards*

*Comment:* Omit the sentence containing the subjective terms "detrimental" and "proper."

*Response:* The wording comes directly from the compact.

*Comment:* The words "modify and approve as modified" should be rephrased to "With the applicant's consent, the Commission may modify \* \* \*" Only the applicant should have the right to modify a project, not the Commission.

*Response:* Again, the wording comes directly from the compact. Also, this sentence is not meant to imply that the Commission would unilaterally modify a project without prior notice. It may condition its approval on the project sponsor making a modification or incorporating a condition that would help meet a Commission regulatory objective, but the Commission would not unilaterally modify a project without prior notice and an opportunity to be heard.

*Comment:* Add a new subsection that requires that Commission staff provide a draft docket to project sponsors at least 10 days in advance of Commission action on that docket. If the staff is recommending modifications, they should be required to provide the reasons for the recommended modifications in writing with quantitative analysis.

*Response:* The Commission strives to provide project sponsors with a draft docket as far in advance of final Commission action as possible. However, due to fluctuations in the number and complexity of dockets before the Commission at any particular meeting, a guarantee of ten (10) days advance review is not possible in all cases.

*Comment:* The Commission should not suspend review or revoke approval due to the disapproval of another government agency, especially when what some other agency is deciding has little or nothing to do with the water resources of the project. Furthermore, this provision seems to limit the Commission's power to preempt municipal regulations that, at least under Pennsylvania Law, illegally attempts to regulate water withdrawals. Instead of suspending review, the Commission should proceed expeditiously with its review and approval process and simply condition its approval on the applicant obtaining and retaining all other applicable approvals.

*Response:* The Commission will not suspend its review or approval of a project in response to the illegal exercise of authority by another governmental jurisdiction. However, it makes sense to coordinate Commission review and approval actions with other governmental jurisdictions. By the same token, it makes little sense for the Commission to expend staff resources on the review of projects that have been rejected by other governmental jurisdictions and cannot, therefore, be implemented.

*Comment:* This section should be supported because it allows the Commission to streamline its decision making with other government entities involved in project review.

*Response:* Agreed. See response to prior comment.

*Comment:* Should include language acknowledging the importance of economic interests of the applicant, community, region, etc.

*Response:* See above responses regarding purposes of the regulations.

#### *Section 803.22. Standards for Consumptive Uses of Water*

*Comment:* Eliminating the Q7-10 trigger flow for providing makeup during periods of low flow leaves too much discretion to SRBC and leaves no guidance to project sponsors to determine risk and costs.

*Response:* The elimination of the Q7-10 trigger flow criterion effectively changes little because few consumptive use projects approved by the Commission are now tied to this criterion. Most project sponsors opt for payment of the consumptive use fee as a means of compliance rather than release storage or shut down during low flow periods. When the Commission does set a low flow criterion, it does so on a case-by-case basis using modern assessment techniques that allow the Commission to more accurately assess the particular needs of the affected stream. The Commission establishes pass by flow requirements the same way. In cases involving a consumptive use as well as a withdrawal, the established pass by flow serves as the low flow criterion for a project. In the rare event that a flow criterion is set for a particular project, it will be done only after the project sponsor is given the opportunity at a public hearing to submit information and make relevant arguments regard-

ing the establishment of a flow criterion for its project. The criterion will not be established arbitrarily and without notice and opportunity for response.

*Comment:* "Sole Discretion" language too open ended and must incorporate reasonableness.

*Response:* See responses above to allegation that the Commission may act arbitrarily under these proposed regulations.

*Comment:* Support expressed for the approval by rule procedures as a means of streamlining the approval process.

*Response:* The Commission agrees.

*Comment:* Section 803.22 (b)(4) is inconsistent with the other alternatives provided under (b).

*Response:* Agreed. It has been made a separate item.

*Comment:* With respect to (b)(1)(ii), an explanation should be included as to why a project may be required to reduce its withdrawal to an amount greater than its consumptive use.

*Response:* Agreed. The words "or greater than" have been removed.

*Comment:* Eliminate mitigation requirement.

*Response:* Mitigation of consumptive use is a fundamental purpose of the consumptive use regulation and an element of the regulation that comes directly from the Commission's comprehensive plan. Eliminating mitigation requirements essentially would ignore the provisions of the comprehensive plan.

*Comment:* On the approval by rule provision, the Commission should provide for a 30- to 60-day notification instead of 90 days.

*Response:* The Commission feels that the 90-day notification is appropriate for qualified projects.

#### *Section 803.23. Standards for Water Withdrawals*

*Comment:* SRBC withdrawal regulations relating to the protection of existing users should make clear that inefficient existing sources of water may not necessarily be protected.

*Response:* The Commission does not wish to imply that it will protect existing users under all circumstances, thus in effect granting a prior appropriation of water, which is prohibited under the compact.

*Comment:* Section 803.23(b)—Add the word "significant" before the words adverse impacts.

*Response:* Agreed. This will remove the implication that a de minimis adverse impact will form the basis for some limitation or condition.

*Comment:* Section 803.23(b)(2)—Add "Commission may consider and balance."

*Response:* As it has always done, the Commission will carefully weigh the necessity of any requirement or limitation that it imposes versus the benefit to be achieved.

*Comment:* Section 803.23(b), that allows the Commission to deny, limit or condition an approval to insure no adverse impact, incorrectly suggests that lowering of groundwater levels and stream flow levels is an adverse impact. These may be perfectly legitimate occurrences in connection with use of an aquifer.

*Response:* The Commission has added "significant" before the words "adverse impact" to remove the implica-

tion that a de minimis adverse impact will form the basis for some limitation or condition.

*Comment:* In Section 803.23(b), the Commission should not accord protection status to intermittent streams, as such protection would unduly restrict the use and potential of aquifers that can be used as groundwater reservoirs to provide economically important water supplies.

*Response:* The Commission believes that headwaters must be carefully managed to insure a proper balance of sustainable development, responsible use, and conservation. Intermittent streams are not afforded special protection; however, Commission staff does evaluate for potential adverse impacts. The withdrawal of large quantities of groundwater from small headwater basins can dewater springs and wetlands, and reduce the groundwater contribution (base flow) to headwater streams. This can change the previous intermittent reaches to ephemeral reaches and the uppermost perennial reaches to intermittent reaches. While the loss of perennial stream length is generally a small fraction of the entire stream, it often represents the most pristine portion of the watershed with respect to water quality and habitat.

*Comment:* The Commission needs to define the term "low flow." The most logical definition is the Q7-10 low flow. To protect stream flows at any higher level would unduly restrict the use and potential of aquifers that can be used as reservoirs for economically important activities.

*Response:* The Commission sets low flow criteria on a case-by-case basis using modern assessment techniques to accurately assess the particular needs of the affected stream. The Commission will carefully weigh any limitation it imposes versus the benefit to be achieved.

*Comment:* The Commission should provide its regulatory requirements concerning the establishment of passby standards in Section 803.23. The current practice of setting a passby standard at 20 percent of average daily flow is not a fair, reasonable and appropriate approach to balancing the need to allow a beneficial stream withdrawal with the need to protect the stream ecology.

*Response:* The Commission has incorporated passby standards in guidelines that it makes available to all applicants. The Commission sets a low flow criterion based on the particular needs of the stream, the best available science, and on a case-by-case basis. Instream needs are assessed using standard methodologies and can always be refined by local studies. Incorporating the standards in guidance enables the Commission to periodically update those standards as new science emerges.

*Comment:* The Commission should define terms such as "adverse impact, aquatic habitat and water quality degradation."

*Response:* The latter two items, as used in Section 803.23, are listed only as possible indicators of adverse impacts that the Commission may consider in each individual case or circumstance. It is not necessary or desirable to place specific weight or limiting criteria on factors that are merely indicators of possible adverse impacts. The term "adverse impacts" or "adverse effect" comes directly from the language of Section 3.10 of the Susquehanna River Basin Compact granting authority to the Commission to review and approve projects that may cause an adverse effect.

*Comment:* In 803.23(b)(3), make it clear that the applicant shall have the right to propose mitigation measures to offset potential adverse impacts of the proposed project.

*Response:* The Commission encourages a project sponsor to propose mitigation for any potential adverse impacts in its application(s). Further, the Commission carries on an active dialogue with project sponsors during the review process, and the project sponsor is free at that time to propose any reasonable form of mitigation.

*Comment:* A decision to deny, modify or conditionally approve a withdrawal project should be accompanied by a technical evaluation that is provided to the project sponsor in a timely manner to allow sponsor to rebut the conclusions or revise its application to address concerns raised by the Commission.

*Response:* As stated above, the Commission carries on an active dialogue with the project sponsor during the review process that allows for an exchange of information on staff conclusions and concerns, and how such concerns may be resolved.

*Comment:* The Commission should consider a new MOU with DEP Mining to avoid the "double jeopardy" concern.

*Response:* The proposed Section 803.7 provides for administrative agreements or other cooperative arrangements with agencies of the member jurisdictions. The Commission anticipates that existing agreements will be reconsidered following adoption of the new regulations.

*Section 803.24. Standards for Diversions*

*Comment:* This section should be supported or even strengthened to explicitly state that an applicant for a diversion must demonstrate "by clear and convincing evidence" a need for the diversion.

*Response:* The Commission believes that the language proposed ensures that the project sponsor will be required to adequately demonstrate a need for the diversion without the formal inclusion of an evidentiary standard that may be subject to further construction or interpretation.

*Section 803.25. Water Conservation Standards*

*Comment:* AWWA standards should be used for customer meter testing under Section 803.25(a)(2). Is the definition for "flow control device" correct?

*Response:* The water conservation standards were taken directly from the current regulations. The Commission intends to revisit this section in the future and will evaluate the published standards at that time.

*Section 803.30. Monitoring*

*Comment:* The Commission should accept testing and monitoring done in accordance with member state standards when the state has a parallel or equally stringent procedure.

*Response:* The water conservation standards were taken directly from the current regulations. The Commission intends to revisit this section in the future and will evaluate the published standards at that time.

*Comment:* The Commission should consider whether PWS source meters should be certified annually, rather than every five years, with a possible exception for agriculture.

*Response:* The regulations set the minimum standard for all projects. The Commission can specify certification more frequently than once every five (5) years for source meters of public water suppliers if warranted, or as required in other permits.



*Comment:* In Section 803.30 (b)(2)(ii), a monitoring loss should be reported within five days of such loss, regardless of the length of time the loss continues.

*Response:* Agreed.

*Comment:* The Commission should continue to mandate that project sponsors monitor the water quality impacts of their withdrawals to help the Commission fulfill the compact purposes of "stream quality control" and the "abatement of pollution."

*Response:* The requirement to collect water quality data was burdensome for the project sponsor, burdensome for Commission staff to review and maintain, and it is generally not used by Commission programs because similar data are available from other sources, particularly from its member jurisdictions, each of which administers a comprehensive water quality program. The Commission reserves the right on any given application to require water quality sampling, if water quality is an issue.

#### *Section 803.31. Duration of Approvals and Renewals*

*Comment:* The Commission should not be reducing the duration of approvals from 25 years to 15 years. Many water resources projects involve large investments of money and many years of planning that are not well accommodated by an approval of 15 years. Instead, the Commission should rely on its authority to reopen a docket if there is a potential problem. The Commission should not have deleted the language that appears in the existing regulations allowing the Commission "to modify this duration in consideration of such factors as the time needed to amortize a project investment, the time needed to secure project financing, the potential risks of interference with an existing project, and other equitable factors."

*Response:* The Commission has found that both projects and the water resources that serve them are subject to many changes over 25 years and, therefore, it is appropriate to review these applications on a more frequent basis. The Commission agrees to reinsert the deleted language allowing the Commission to modify the standard duration, when appropriate, in consideration of the factors enumerated in this comment.

*Comment:* The time for commencement of a project after approval should take into account that some large projects require longer permitting periods and longer construction times. Opponents sometimes attempt to delay projects using administrative appeals and other devices that can prevent a large project from commencement.

*Response:* The Commission agrees that there may be circumstances in which a longer time frame is needed for undertaking a project. The Commission is inserting language that will allow adjustments to this time limit on a case-by-case basis.

*Comment:* The submission of an application one year in advance for the renewal of an approval is too long and unneeded.

*Response:* The time was set to afford both the project sponsor and Commission staff sufficient time to evaluate changes to the project and changes to the resource, and is reasonable considering current review times. Having said that, the Commission is nonetheless willing to modify the period to 6 months. As modified, a project sponsor who submits a complete application 6 months in advance, is given the benefit of having an existing approval automatically extended until such time as the Commission renders

a decision on the new application. This eliminates the risk of having an approval expire before the Commission has an opportunity to act.

*Comment:* In (a), the reduction of the duration of approvals to 15 years is appropriate. In fact, 10 years would be more appropriate.

*Response:* The Commission agrees that the reduction of the term to 15 years is appropriate so that commitment of water to a particular use can be reviewed more frequently and any changes in conditions can be addressed sooner.

*Comment:* In (c), there should be a notification to the state agency with jurisdiction over the project, at the time a waiver is applied for.

*Response:* The Commission routinely coordinates with member jurisdictions on such project-related matters.

*Comment:* How will the Commission fund the increased workload resulting from shorter duration periods?

*Response:* The Commission has no special plans for funding any increase in workload resulting from a shorter approval term. The member jurisdictions who approve the Commission's budget will need to consider any such increased workload associated with the completion of the Commission's responsibilities under the compact.

*Comment:* With respect to paragraph (d), abandonment should have to be proven by the Commission and not inferred. Notice should be provided to the project sponsor.

*Response:* Under general legal principles, any inference of abandonment acted upon by the Commission will have to be supported by substantial evidence and appropriate notice and opportunity to be heard. There is no need for the wording suggested by this comment.

*Comment:* Application fees should be adjusted downward to account for shorter durations.

*Response:* The main purpose of shortening the term of approvals is not to realize more revenues from project review fees. In fact, these fees cover no more than half the cost of conducting a review. Project reviews conducted on a more frequent basis will actually involve increased costs that will more than offset any increased revenues from application fees.

#### *Section 803.32. Reopening/Modification*

*Comment:* In (a), the word "significant" should be substituted for the word "substantial" before the words "adverse impact."

*Response:* Agreed.

*Comment:* In (c), the Commission should retain the discretion to require a project sponsor to provide a temporary source of potable water at the project sponsor's expense, if interference should occur during a pumping test of a source under development.

*Response:* Agreed.

*Comment:* The language of 803.32(b) is too strong in that it does not spell out how to remedy situations where a project sponsor fails to comply with a term or condition of its docket approval.

*Response:* The remedy will be worked out administratively between the Commission and the project sponsor without providing for a specific remedy in the regulation.

#### *Section 803.33. Interest on Fees*

*Comment:* Rate should be established and equally imposed.

*Response:* Interest rates change as they are affected by market forces and therefore should not be set permanently by regulation. Whatever rate is established will be uniformly imposed.

*Section 803.34. Emergencies*

*Comment:* In (b), at the end of the paragraph, delete the word "information" before the colon. Also, in (b)(2), delete the word "information" following the word "application."

*Response:* Agreed.

*Comment:* In (b)(1), replace "an emergency" with "a completed emergency" before the words "application form."

*Response:* Agreed.

*Comment:* In (b)(2)(x), because of the immediate inclusion of an application fee may delay submittal of an emergency application, provision should be made in the regulation for reduction, waiver, or later submittal of an "appropriate" fee.

*Response:* Agreed; however, this is a change that can be made in the SRBC Project Fee Schedule, rather than these regulations.

*Comments by Section, Part 804*

*Section 804.2. Time Limits*

*Comment:* Registration language strongly supported.

*Response:* Agreed.

*Section 804.3. Administrative Agreements*

*Comment:* Add the following: "In conjunction with such agreements or arrangements, the Commission will require submission of all necessary registration forms to the member jurisdiction as part of a complete application for renewal of an existing project or new or expanded agricultural project or as a condition of approval of any other new or expanded project."

*Response:* Although not using this suggested language, the Commission has revised this section and renamed it "Administrative coordination" to address this comment.

*Comments by Section, Part 805*

*Section 805.1. Public Hearings*

*Comment:* Participants to a hearing should be limited to interested parties.

*Response:* Who is able to participate in a hearing will depend on the circumstances and will be controlled by a decision of the presiding officer.

*Comment:* Notice of hearings should continue to be posted at Commission offices.

*Response:* Agreed.

*Comment:* Why does the Commission need three days notice?

*Response:* This is not mandated by the regulation but is more in the form of a request to participants. Three days allows the Commission to assemble a list of participants and establish an order of call for those wishing to provide testimony.

*Section 805.2 Administrative Appeals*

*Comment:* Administrative hearings should be held in the state where the project or controversy is located. Also, the Commission should appoint an "impartial" hearing

officer who shall not be a member of the Commission or an officer of the Commission. The Commission should absorb all hearing costs.

*Response:* Wherever practicable, the Commission will conduct such hearings in the general vicinity where the project or controversy is located. The Commission will also take steps to insure the impartiality of the hearing officer. Such steps do not require, however, that the Commission automatically disqualify members of the Commission or officers of the Commission. Hearing officers only make findings of fact and law that serve as recommendations to the Commission. The ultimate decision in any matter rests with the Commission. With respect to costs, they should be distributed equitably and not assigned automatically to any single party. The Commission has included an in forma pauperis procedure in Section 805.3 for parties who genuinely cannot pay hearing costs and have acted in good faith.

*Comment:* Parties should have at least 60 days to file an administrative appeal, rather than the 30 days given in proposed Section 805.2. Sometimes there is delay in a party learning of a Commission decision, effectively reducing the time for appeals.

*Response:* The Commission feels that 30 days strikes the appropriate balance for having its action open for appeal.

*Section 805.3. Hearing on Administrative Appeal*

*Comment:* Cost of expert consultants should be paid by the Commission.

*Response:* Again, the presiding officer should be able to weigh the equities of assigning costs for a hearing without being bound by a specific rule, some of which may be assigned to the Commission.

*Section 805.10. Scope of Subpart*

*Comment:* Regulated entities should be legally obligated to meet the terms and conditions for their approvals and SRBC must have the authority to ensure that they do.

*Response:* The Commission strongly agrees and that is why the compliance and enforcement provisions of these regulations have been strengthened.

*Section 805.12. Investigative Powers*

*Comment:* The Commission does not have authority from the compact to provide for warrantless searches.

*Response:* Agreed. This provision will be stricken. The Commission will acquire an administrative search warrant whenever it is legally required to do so.

*Comment:* Strongly supported as necessary for the Commission to effectively enforce its regulations.

*Response:* The Commission strongly agrees.

*Section 805.14 Orders*

*Comment:* The Commission does not have authority from the compact to issue orders.

*Response:* As noted in the Commission's response to the general comments, the Commission strongly disagrees with this contention. The Susquehanna River Basin Compact, P. L. 91-575 provides broad and sweeping powers to the Commission to carry out its purposes, including under Section 3.4 the power to have and exercise all powers necessary or convenient to carry out its express powers and other powers which reasonably may be implied

therefrom. Also, that same section empowers the Commission to adopt, amend, and repeal rules and regulations to implement the compact.

*Comment:* Strongly supported as necessary for the Commission to effectively enforce its regulations.

*Response:* The Commission strongly agrees.

#### Final Rule

List of Subjects in 18 CFR Parts 803, 804, 805, 806, 807 and 808

Administrative practice and procedure, Water resources.

Accordingly, for the reasons set forth in the preamble, under the authority of Secs. 3.4, 3.5 (5), 3.8, 3.10, and 15.2, Pub. L. 91-575, 84 Stat. 1509 et seq., Chapter VIII of the Code of Federal Regulations is amended as follows: Chapters 803—805. [Reserved] and Chapters 806—808 are amended.

PAUL O. SWARTZ,  
*Executive Director*

**Fiscal Note:** 73-3. No fiscal impact; (8) recommends adoption.

*Editor's Note:* The numbering of this final rulemaking has been changed from the proposed version at 36 Pa.B. 3547 (July 8, 2006). Chapters 803—805 have been rescinded and replaced with Chapters 806—808 as follows:

- § 803.101. (Reserved).
- § 804.1. (Reserved).
- § 805.1. (Reserved).
- § 806.1. Added
- § 807.1. Added
- § 808.1. Added

#### Annex A

### TITLE 25. ENVIRONMENTAL PROTECTION

#### PART IV. SUSQUEHANNA RIVER BASIN

#### CHAPTER 803. (RESERVED)

#### CHAPTER 804. (RESERVED)

#### CHAPTER 805. (RESERVED)

#### CHAPTER 806. REVIEW AND APPROVAL OF PROJECTS

##### § 806.1. Incorporation by reference.

The regulations and procedures for review of projects as set forth in 18 CFR Part 806 (2007) (relating to review and approval of projects) are incorporated by reference and made part of this title.

#### CHAPTER 807. WATER WITHDRAWAL REGISTRATION

##### § 807.1. Incorporation by reference.

The regulations and procedures for special regulations and standards as set forth in 18 CFR Part 807 (2007) (relating to water withdrawal registration) are incorporated by reference and made part of this title.

#### CHAPTER 808. HEARINGS AND ENFORCEMENT ACTIONS

##### § 808.1. Incorporation by reference.

The regulations and procedures for hearings/enforcement actions as set forth in 18 CFR Part 808 (2007) (relating to hearings and enforcement actions) are incorporated by reference and made part of this title.

[Pa.B. Doc. No. 07-243. Filed for public inspection February 16, 2007, 9:00 a.m.]