

# PROPOSED RULEMAKING

## SUSQUEHANNA RIVER BASIN COMMISSION

[ 25 PA. CODE CH. 801 ]

### Review and Approval of Projects

*Summary:* This document contains proposed rules that would amend the regulations of the Susquehanna River Basin Commission (Commission) to provide rules for agency procurement and bid protest procedures. This rulemaking also updates the general policies of the Commission to include climate change and environmental justice, revises the procedures regarding the adoption of the comprehensive plan and adds language memorializing the Commission's Dry Cooling Resolution. These rules are designed to clarify the Commission's existing authorities to manage the water resources of the basin and provide transparency and accountability procedures to the Commission's public procurement practices.

*Dates:* Comments on the proposed rulemaking may be submitted to the Commission on or before May 13, 2024. The Commission has scheduled a public hearing on the proposed rulemaking to be held by in person and by telephone on May 2, 2024. The location of the public hearing is listed in the addresses section of this document.

*Addresses:* Comments may be mailed to: Jason E. Oyler, Esq., General Counsel, Susquehanna River Basin Commission, 4423 N. Front Street, Harrisburg, PA 17110-1788, or e-mailed to [regcomments@srbc.net](mailto:regcomments@srbc.net). This public hearing will be conducted in person and by telephone. You may attend in person at Susquehanna River Basin Commission, 4423 N. Front St., Harrisburg, Pennsylvania, or join by telephone at Toll-Free Number 1-877-304-9269 and then enter the guest passcode 2619070 followed by #.

Those wishing to testify are asked to notify the Commission in advance, if possible, at the regular or electronic addresses given below.

*For Further Information Contact:* Jason E. Oyler, Esq., General Counsel, telephone: 717-238-0423, ext. 1312; fax: 717-238-2436; e-mail: [joyler@srbc.net](mailto:joyler@srbc.net). Also, for further information on the proposed rulemaking, visit the Commission's website at <http://www.srbc.net>.

#### *Supplementary Information:*

The Commission is proposing revisions to Part 801 to add rules for agency procurement and bid protest procedures and amend the existing rules to include climate change and environmental justice, to revise the procedures regarding the adoption of the comprehensive plan and to memorialize the Commission's Dry Cooling Resolution.

The proposed regulations incorporate by reference Part 801 (relating to general policies) into Title 25 and have been filed in accordance with Section 15.2 of the Compact.

#### *Addition of § 801.15 Commission Procurement Procedures; Protests*

The Commission, as an independent compact agency, is not subject to any of its member jurisdictions' laws regarding public procurement. The Susquehanna River Basin Compact provides the rules governing purchasing by the Commission in Section 15.9. The Compact also provides the Commission the ability to provide for the

internal organization and administration of the Commission (Section 15.1(b)(3)) and to make rules and regulations to effectuate the Compact (Section 15.2).

As a companion to this rulemaking, the Commission is also seeking comment on a proposed policy entitled "SRBC Procurement Procedures" that outlines the details and procedures related to the purchasing and procurement of goods and services by the Commission. The adoption and any revisions to this policy shall be consistent with § 15.9 of the Compact and undertaken in accordance with appropriate public notice and comment consistent with the requirements of 18 CFR 808.1(b).

The goal of the rulemaking is to provide more transparency to the Commission's procurement process as well as to establish a bid protest procedure. The proposed rule provides that a protest must be filed with the Commission within ten calendar days after the aggrieved protestant knew or should have known of the facts giving rise to the protest. In no event may a protest be filed later than ten calendar days after the date the contract was awarded. These time frames differ from the 30 day appeal period for other administrative appeals in 18 CFR 808.2, but are generally in line with the bid protest timelines of our member jurisdictions. The rule outlines the exclusive procedure for procurement protests before the Commission.

#### *Other Changes Proposed to Part 801*

The proposed rulemaking also provides other changes to the existing Part 801 that the Commission deems beneficial. The Commission proposes to amend § 801.2 to remove paragraph (b)(9) requiring periodic reports be submitted to the Commission as that practice no longer occurs. In its place, the Commission proposes to work with our member jurisdictions on actions that can be taken to improve climate resiliency and address environmental justice. This change reflects the additions of these critical issues to the Commission's adopted 2021—2041 Comprehensive Plan.

Additional changes are proposed to revise § 801.5 related to the Comprehensive Plan. The process, presentation and layout for the adoption of the Comprehensive Plan has evolved since 1973. The proposed revisions more accurately reflect the modern process that was most recently used in 2021, but also are designed in a way that is meant to be more adaptable for future plan revisions and adoptions. Notably, the proposed process in § 801.5(a)(4) will enable the list of projects approved by the Commission each quarter to be included in the Comprehensive Plan by their continual updating in the publicly available viewer application (currently the Water Application and Approval Viewer, or WAAV).

Finally, the Commission proposes the addition of paragraph (d) to § 801.12 related to electric power generation facilities. This new paragraph memorializes and elevates the Use of Dry Cooling Technology for Power Generation and Other Facilities, Commission Resolution No. 2015-02 (Dry Cooling Resolution). The Dry Cooling Resolution has been instrumental in reducing the water consumption of new power plants in the basin. The Commission recognizes that an increasing number of power generation facilities, most recently combined cycle natural gas powered plants, are utilizing dry cooling technology to reduce the environmental footprint in the basin, and are demonstrating overall efficiencies in operations that are equivalent to wet cooling processes. Dry cooling technology

significantly reduces the water demand of such facilities and provides increased flexibility in siting facilities in proximity to fuel sources and electrical transmission lines. Use of dry cooling technology reduces impacts to aquatic ecosystems through the reduction of thermal impacts associated with large industrial volume discharges. The proposal would require consideration of dry cooling technologies to any new or significantly modified power generation facilities and an alternatives analysis to continue the consideration of water conservation technologies in an industry that is the largest consumptive user of water in the basin.

*List of Subjects in 18 CFR Part 801*

Administrative practice and procedure, Water resources.

Accordingly, for the reasons set forth in the preamble, the Susquehanna River Basin Commission proposes to amend 18 CFR part 801 as follows:

**PART 801—GENERAL POLICIES**

1. The authority citation for part 801 continues to read as follows: Authority: Secs. 3.1, 3.4, 3.5(1), 15.1 and 15.2, Pub.L. No. 91-575 (84 Stat. 1509 et seq.)

2. Amend § 801.2 by revising paragraph (b)(9) as follows:

**§ 801.2 Coordination, cooperation, and intergovernmental relations.**

\* \* \* \* \*

(b) \* \* \* \* \*

(9) Coordinate and cooperate with the appropriate agencies of a member jurisdiction on implementing actions to address resiliency in the face of changing climatic conditions and to support the aims of environmental justice.

3. Revise § 801.5 to read as follows:

**§ 801.5 Comprehensive plan.**

(a) The Compact requires that the Commission formulate and adopt a comprehensive plan for the immediate and long-range development and use of the water resources of the basin.

(1) The plan will include existing and proposed public and private programs, projects, and facilities which are required, in the judgment of the Commission, to meet present and future water resources needs of the basin. Consideration shall be given to the effect of the plan, or any part of the plan, on the receiving waters of the Chesapeake Bay. The Commission shall consult with interested public bodies and public utilities and fully consider the findings and recommendations of the signatory parties, their various subdivisions and interested groups. Prior to adoption of the plan the Commission shall conduct at least one public hearing in each signatory State.

(2) The plan will reflect consideration of multiple objectives, including economic growth; sustainable regional development and environmental resilience; coordinated study and consideration of water quantity and water quality and the nexus with existing and proposed land uses; and the promotion of cooperation and collaboration between all levels of government and non-governmental entities.

(3) The Commission will strive to complete a comprehensive update of the comprehensive plan every 20 years. If adjustments are needed during the life span of the plan to address emergent priorities, goals, or objectives, the

comprehensive plan will be revised in accordance with requirements of the Compact.

(4) Projects requiring Commission review and approval will be included in the comprehensive plan after formal action is taken at Commission business meetings. Approved projects will be incorporated into the comprehensive plan and accessible via the Commission’s Water Application and Approval Viewer or successor viewer applications.

(b) The comprehensive plan shall provide for the immediate and long-range use, development, conservation, preservation, and management of the water resources of the basin. The plan will be presented in a form and order as determined by the Commission and shall include but not be limited to the following:

- (1) Statement of authority, purpose, objectives, and scope.
- (2) Identification of priorities, goals and objectives of the Commission.
- (3) Inventory of the basin’s water resources and existing developments, projects and facilities.
- (4) Projection of immediate and long range water resources needs of the basin.
- (5) Outline of plan implementation measures.
- (6) Procedures for updating and modifying the plan.
- (7) Necessary appendices.

4. Amend § 801.12 by adding paragraph (d) to read as follows:

**§ 801.12 Electric power generation.**

\* \* \* \* \*

(d) Project sponsors proposing new or significantly modified power generation plants in the basin shall consider the use of dry cooling technologies and submit to the Commission a rigorous alternatives analysis. This analysis shall include evaluation of the costs, benefits, trade-offs and drawbacks of various cooling and water conservation techniques, and a full evaluation of options for providing effective consumptive use mitigation.

5. Add § 801.15 to read as follows:

**§ 801.15 Commission Procurement Procedures; Protests.**

(a) *Procedures.* The Commission shall maintain a policy entitled “SRBC Procurement Procedures” that outlines the details and procedures related to the purchasing and procurement of goods and services by the Commission. Any revisions to this policy shall be consistent with § 15.9 of the Compact and undertaken in accordance with appropriate public notice and comment consistent with the requirements of § 808.1.

(b) *Right to Protest.* A bidder or offeror, a prospective bidder or offeror or a prospective contractor that is aggrieved in connection with the solicitation or award of a contract, may protest to the Commission in writing.

(c) *Filing of Protest.* A protestant shall file the protest on a form and in a manner prescribed by the Commission. A protest shall be filed within ten calendar days after the aggrieved protestant knew or should have known of the facts giving rise to the protest, except that in no event may a protest be filed later than ten calendar days after the date the contract was awarded. The failure to file a timely protest shall be deemed as a waiver of the right to protest by any bidder or offeror, prospective bidder or offeror or a prospective contractor. Untimely

filed protests shall be disregarded by the Commission. The Executive Director or his/her designee shall be the presiding officer to hear the bid protest. The awardee of the contract, if any, will be informed by the Commission of any bid protest that may affect the contract and the awardee may intervene as a party in any protest filed.

(d) *Contents of Protest.* A protest shall state all the grounds upon which the protestant asserts the solicitation or award of the contract was improper. The protestant may submit with the protest any documents or information it deems relevant to the protest.

(e) *Response and Reply.* Within 15 calendar days of receipt of a protest, the purchasing officer may submit to the presiding officer and the protestant a response to the protest, including any documents or information deemed relevant to the protest. The protestant may file a reply to the response within ten calendar days of the response.

(f) *Evaluation of Protest.* The presiding officer shall review the protest and any response or reply and may request and review such additional documents or information as they deem relevant to render a decision and may, at their sole discretion, conduct a hearing consistent with § 808.3. All parties will be provided with a reasonable opportunity to review and address any additional documents or information deemed relevant by the presiding officer to render a decision. Additional documents and information deemed relevant by the presiding officer will be included in the record.

(g) *Findings and Report.* Upon completing an evaluation of the protest, the presiding officer shall prepare a report of their findings and recommendations based on the record. The report shall be served by electronic mail or certified mail upon each party to the proceeding. Any party may file objections to the report. Such objections to the report shall be filed with the Commission and served on all parties within 20 calendar days after service of the report. A brief shall be filed together with the objections. Any replies to the objections and briefs will be filed and served on all parties within ten calendar days of service of the objections. Prior to its decision on such objections, the Commission may, in its sole discretion, grant a request for oral argument.

(h) *Action by the Commission.* The Commission will review the findings and recommendations of the presiding officer and the objections and render a determination. The Commission's determination will be in writing and will be served by electronic or certified mail upon each party to the proceeding.

(i) *Appeal.* Any final action by the Commission may be appealed to the appropriate United States District Court

within 90 days as set forth in § 3.10(6) and Federal reservation (o) of the Compact.

(j) *Record of Determination.* The Commission's record of determination for review by the court shall consist of the solicitation; the contract, if any; the administrative record of the protest before the presiding officer; the report of the presiding officer, along with any objections and replies filed; transcripts and exhibits, if any; and the final determination of the Board of Commissioners.

(k) *Stay of Procurement During Pendency of Protest.* In the event a protest is filed timely under this section, the purchasing officer shall not proceed further with the solicitation or with the award of the contract unless and until the Executive Director makes a written determination that the protest is clearly without merit, or that award of the contract without delay is necessary to protect substantial interests of the Commission, or until the Commission enters a final determination under paragraph (h) of this section.

(l) *Exclusive Procedure.* This section shall be the exclusive procedure for protesting a solicitation or award of a contract by a bidder or offeror, a prospective bidder or offeror or a prospective contractor that is aggrieved in connection with the solicitation or award of a contract by the Commission.

Dated: March 18, 2024.

ANDREW D. DEHOFF,  
*Executive Director*

**Fiscal Note:** 72-17. No fiscal impact; recommends adoption.

**Annex A**

**TITLE 25. ENVIRONMENTAL PROTECTION  
PART IV. SUSQUEHANNA RIVER BASIN  
COMMISSION  
CHAPTER 801. GENERAL PROVISIONS**

**§ 801.1. Incorporation by reference.**

**The regulations set forth in 18 CFR Part 801 (2018) (relating to general policies) are incorporated by reference and made part of this title.**

**§ 801.14. [ Incorporation by reference ] [ Reserved ].**

**[ The regulation set forth in 18 CFR 801.14 (relating to public access to records) is incorporated by reference and made part of this title. ]**

[Pa.B. Doc. No. 24-497. Filed for public inspection April 12, 2024, 9:00 a.m.]