

# Susquehanna River Basin Commission

a water management agency serving the Susquehanna River Watershed



**DRAFT**

*(For presentation at the September 16, 2010, Commission meeting, Corning, New York)*

## Comment and Response Document Notice of Proposed Rulemaking 75 FR 36301 (June 25, 2010)

### PART 806 – REVIEW AND APPROVAL OF PROJECTS

#### Subpart C – Standards for Review and Approval

##### Section 806.4 Projects requiring review and approval.

**1. Comment:** With respect to gas well development and hydrofracking operations, there is a need for the Commission to evaluate the cumulative impacts of water withdrawals and to require flow monitoring at water withdrawal sites.

**Response:** *The Commission does employ cumulative impact analysis in its review and approval of projects. Flows are monitored at all sites where passby flow requirements have been imposed either directly or through the use of reference gages. Commission field inspectors verify that users required to cease taking water at given flow levels are in fact abiding by passby limitations. In addition, the Commission has implemented a Remote Water Quality Monitoring Network with 30 monitoring stations in the areas where drilling in the Marcellus Shale formation is most active.*

**2. Comment:** The Commission should exercise greater regulatory authority over drilling operations in the Marcellus Shale formation, including assuming jurisdiction over water quality related matters.

**Response:** *The Commission's current regulatory authority extends only to water withdrawal and consumptive use by gas drilling operations. As established in Section 3.2 of the Susquehanna River Basin Compact, the Commission is directed to utilize the existing agencies of federal and state government who currently exercise regulatory authority on water quality, underground injection, and on the extraction of mineral resources. At this point, the member states are asserting their regulatory authority and it would not be appropriate for the Commission to interpose its authority and duplicate the plenary authority exercised by the states in this area. If, at some point in the future, the Commission concludes, after public hearing, that it must assume jurisdiction in order to effectuate the terms of the comprehensive plan or implement the terms of the Compact, it may then do so.*



## **Section 806.6 Transfer and re-issuance of approvals**

**3. Comment:** Allowing “transfer of approvals” under 18 CFR §806.6 is inappropriately treating water as a “commodity” instead of as a “common resource” of the basin.

**Response:** *Under 18 CFR §806.6, the instances where approvals may be transferred with only administrative approval of the Executive Director are limited. Transfers of approvals more than ten years old, those changing the quantity or use of the water, or having pre-compact or pre-regulation elements will require a subsequent application for approval, thus phasing out grandfathered uses and bringing these projects under the authority of the Commission, where the water used can be better managed as a “common resource” of the basin. We would also note that transfer of approvals is not limited to the gas drilling industry. Other transfers occur, such as the transfer of water withdrawal approvals from municipalities to municipal authorities, whenever a project using the waters of the basin is sold to a new owner.*

## **Section 806.15 Notice of Application**

**4. Comment:** Notification of property owners within one-half mile of a withdrawal is insufficient. Notice should be provided to all property owners in the watershed or even to all basin residents because of the high volumes of water withdrawals for gas production and the contents of fracking water. Also, people farther than a half mile may experience impacts to their water, air, and soil quality.

**Response:** *The one-half mile notification requirement for withdrawals provides more effective notice than the current contiguous property owner requirement that is based on proximity, not science. Ongoing scientific evaluations indicate that a one-half mile notice will cover the vast majority of areas affected by groundwater and surface water withdrawals. Thus, the Commission believes this new standard is both reasonable and appropriate. If data is collected during the aquifer test that indicates that the influence of the withdrawal extends beyond a half mile radius, the staff has the discretion to direct project applicants to send notification to property owners in these extended areas. Because newspaper notice is also required and because the Commission publishes an advanced notice for all withdrawal applications in the Federal Register and state notice publications prior to taking action, other interested parties throughout the watershed and the basin will have notice and opportunity to comment on such applications. Similar information is also provided to the public by the Commission through its web-based Water Resources Portal.*

**5. Comment:** In amending its notification requirements for project applications, the Commission is properly focusing on those persons who are actually affected and who have a real interest in participating in the approval process.

**Response:** *Agreed*

**6. Comment:** The Commission’s proposed rules are scientifically based and therefore sound.

**Response:** *Agreed*

**7. Comment:** The notice sent to landowners within one-half mile of a groundwater withdrawal should include an opportunity for the property owner to comment on the project application.

**Response:** *18 CFR §806.15 (a) specifies that all notices required under this section contain the address, electronic mail address, and phone number of the project sponsor and the Commission, and comments are therefore welcome from any landowner or other interested party who wishes to do so. Also, the form of notice sent to landowners contains information concerning the submission of comments and providing relevant contact information.*

**8. Comment:** The notice sent to property owners within one-half mile of a groundwater withdrawal should include information on how the 72-hour testing will be done, when it will occur, and other information concerning the evaluation and approval of the groundwater withdrawal project. Follow-up information should be provided to property owners receiving notifications such as the results of water withdrawal testing.

**Response:** *The Commission readily understands that landowners may have an interest in aquifer testing information at the application stage. Under current Commission procedures, however, applicants submit testing plans and conduct tests prior to the filing of an application that triggers the notice requirement. At this pre-application stage, applicants may also submit information supporting a request for a waiver of the testing requirements, which may or may not be granted. The Commission believes that the requirement for pre-application submission of test information is a conservative management approach helping to ensure that applications are supported by science. Rather than modifying this procedure, the Commission feels that the legitimate concerns expressed in this comment can best be addressed by providing landowners with a right of access to the information sought.*

**9. Comment:** For applications to use wastewater discharge sources, in addition to the newspaper notice, any property owner within 1,000 feet of the use (or some other appropriate distance compatible with other resource agencies) should be notified by mail.

**Response:** *Newspaper notices noting the use of a wastewater discharge source will be required in every area where the water will be used for natural gas development. The Commission believes that this form of notice will be sufficient. Also, all approved water sources that a natural gas developer may use on a given site are available for viewing on line by interested landowners at the Commission's web based Water Resources Portal.*

## **Section 806.24 Standards for Diversions**

**10. Comment:** The meaning of the “catch all phrase” in the proposed revision to 18 CFR §806.24 requiring consideration of the “extent to which the proposed diversion satisfies all other applicable standards set forth in subchapter C of this part,” is not clear. It is recommended that this phrase be struck.

**Response:** *While the Commission agrees that a clarification is needed, it is important that the sponsors of diversion projects understand that they must also abide by the Commission's general and specific standards set forth in subchapter C of Part 806 governing withdrawals and*

*consumptive use. The Commission has modified this language in the final rule to add more clarity.*

**11. Comment:** For projects involving a diversion of water out of the basin, the in-basin public should be noticed and have an opportunity to provide written comments. This notice should tell the public where the water is being diverted and why.

**Response:** *The proposed regulations do provide for newspaper publication in the in-basin area, plus since the diversion will also involve a withdrawal of some kind in the in-basin area, property owners within one-half mile will also receive notifications in accordance with 18 CFR §806.15.*

### **General Comments**

**12. Comment:** The Commission should institute a moratorium on approval of any unconventional gas drilling related water withdrawals until the completion of certain studies that will assess the environmental impacts of drilling and fracking activity.

**Response:** *The Commission can find no evidence linking its approval of water withdrawals and consumptive uses by gas drilling operations in the Marcellus Shale formation with a threat of harm or of injury to the public justifying a moratorium on all approvals. Ultimately, a moratorium based on supposition rather than science cannot be legally justified or defended. It is also far more appropriate for the states and the federal government, who exercise broader authority with respect to water quality, underground injection and mineral extraction, and who have such studies underway, to inform the Commission's regulatory program as that science develops. In the interim, the Commission continues to study and evaluate the cumulative impact of these withdrawals and consumptive use on the water resources of the basin.*

**13. Comment:** The idea of allowing water withdrawals for any other reason than to support life is abhorrent.

**Response:** *The Susquehanna River Basin Compact and the Commission Comprehensive Plan do place importance upon the conservation of water to support the living resources of the basin and the Chesapeake Bay, and the Commission devotes a major part of its mission to protecting those resources; however, the purposes of the Compact and the goals of the Comprehensive Plan also include the utilization and development of the basin's water resources to make secure and protect developments within the states (i.e. economic development). Managing the basin's waters to protect living resources and developments within the states are not mutually exclusive efforts.*

**14. Comment:** The Commission did not give sufficient public notice of the public hearings on these proposed rules.

**Response:** *The Commission followed the notice requirements of its own regulations found at 18 CFR §808.1, publishing well in advance of public hearings the text of the proposed rules in the Federal Register and in the member state notice publications, and including in those notices the date, time and place of two public hearings held in Binghamton, N.Y. on July 27, 2010 and*

Harrisburg, Pa. on July 29, 2010.<sup>1</sup> Written comments were also invited through August 10, 2010. The Commission gave further notice of the proposed rulemaking contents, the public hearings, and the comment period via its web site and in a news release sent to media throughout the basin. These are the same notice procedures followed by the Commission on past proposed rulemaking actions as well. The Commission is, nevertheless, considering ways that it can improve notice procedures in future rulemaking actions and welcomes this comment.

**15. Comment:** The Pennsylvania Department of Environmental Protection (PADEP) is permitting gas drilling on lands subject to frequent inundation, creating a danger that toxic materials or waters stored on such land will be washed away and contaminate streams and rivers.

**Response:** 18 CFR §806.21 provides that the Commission may suspend the review of any project that has not been approved by a member jurisdiction or a political subdivision thereof. The Commission may also modify, suspend, or revoke a previously granted approval where the project sponsor fails to obtain or maintain the approval of member jurisdiction or political subdivision thereof. All land uses in Pennsylvania in flood prone designated communities are subject to the provisions of the Pennsylvania Flood Plain Management Act and local ordinances adopted pursuant thereto. If a project sponsor is not in compliance with these local ordinances, they run the risk of having their Commission approval suspended or revoked.

**16. Comment:** The Commission has been blocking participation of landowners in the approval process for gas drilling consumptive use and withdrawal approvals by withholding information on pending project applications.

**Response:** The Commission disagrees with this comment. The Commission has historically welcomed and encouraged public comment on applications submitted to the Commission for its review and consideration. It continues to improve its notice requirements, as witnessed by the modifications being made to 18 CFR 806.15 of this final rule, and has taken considerable steps to build its online Water Resources Portal web application to facilitate that end.

## **PART 808 – HEARINGS AND ENFORCEMENT ACTIONS**

### **Subpart A – Conduct of Hearings**

#### **Section 808.2 Administrative Appeals**

**17. Comment:** There is a need to improve some of the provisions of the proposed changes to the administrative appeal provisions of 18 CFR §808.2 by removing certain unneeded language, defining a standard for granting nunc pro tunc appeals and specifying a deadline for filing an appeal for consideration at the next regular Commission meeting.

**Response:** Agreed. These changes have been made to the text of 18 CFR §808.2 in the final rulemaking document.

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<sup>1</sup> The notice appeared in the Federal Register on June 25, 2010; the Pennsylvania Bulletin on July 10, 2010; the New York Register on July 7, 2010; and the Maryland Register on July 16, 2010.