

PROPOSED RULEMAKING

PENNSYLVANIA GAMING CONTROL BOARD

[58 PA. CODE CHS. 403a, 491a, 493a, 494a, 495a,
497a, 499a AND 511a]

Rules of Practice and Procedures

The Pennsylvania Gaming Control Board (Board), under its general authority in 4 Pa.C.S. § 1202(b)(30) (relating to general and specific powers) and the specific authority in 4 Pa.C.S. § 1205 (relating to license or permit application hearing process; public input hearings), proposes to amend Chapters 403a, 491a, 493a, 494a, 495a, 497a, 499a and 511a to read as set forth in Annex A.

Purpose of the Proposed Rulemaking

The proposed rulemaking makes a number of revisions to the Board's practice and procedure regulations to: improve their clarity; conform to current practice; and simplify some of the existing requirements.

Explanation of Amendments to Chapters 403a, 491a, 493a, 494a, 495a, 497a, 499a and 511a

Throughout this proposed rulemaking, the phrase "report or recommendation" has been replaced with "report or report and recommendation." This reflects what the presiding officer actually does.

The Board has also eliminated the definition of the term "hearing officer" and various provisions and references to the term. The existing provisions in Chapter 491a (relating to general rules of practice) include hearing officers and presiding officers, but in practice, the Board only uses presiding officers. Therefore, the provisions related to hearing officers are not needed.

In § 491a.3 (relating to Office of the Clerk), the address for the Office of the Clerk has been updated to reflect its current location.

In § 491a.7(c) (relating to presiding officers), "issues of law" has been added to "a fact in issue" as a matter that the presiding officer will not discuss with one party without giving notice and an opportunity to participate to the other parties.

In §§ 491a.8 and 493a.9 (relating to hearings generally; and prehearing and other conferences), language has been added to allow the use of video conferencing. This will make it easier for parties to participate in prehearing conferences and hearings.

Subsection 491a.8(j), which makes hearing transcripts available for public inspection, has been expanded to include language stating that if the Board receives a request for a hearing transcript that has not been prepared, the Board will prepare the transcript and make it available for public inspection within 30 days.

Section 493a.2 (relating to complaints) has been rewritten to improve its organization, eliminate duplicative provisions and move provisions related to answers to § 493.5 (relating to answers to complaints, petitions, motions and other filings requiring a response).

In § 493a.4 (relating to petitions generally), duplicative provisions have been deleted.

Section 493a.5 (relating to answers) has been amended to delete duplicative provisions and add provisions pertaining to answers that previously were in § 493a.2.

In §§ 493a.5, 493a.10, 493a.13 and 494a.6, deadlines have been shifted from date of service to date of filing. This will make it easier for the Board to determine if answers have been filed in a timely manner.

A new § 493a.10a (relating to motions to protect confidential information) has been added to Chapter 493a. What is considered to be confidential information under the act has been a controversial issue. Accordingly, the Board is proposing this new section to establish a process that can be used in proceedings to address this issue.

In § 494a.8 (relating to rehearing or reconsideration), a new subsection (b) has been added to clarify that filing a petition for rehearing or reconsideration does not toll the 30-day appeal period.

In § 495a.1 (relating to form of documentary filings generally), subsection (d) has been amended to allow parties to indicate a fax number or email address where papers may be served instead of a mailing address. This is being done to make it easier and faster to serve documents.

Section 495a.6 (relating to number of copies) has been revised to only require that the original copy of documents be filed with the Board. Because the Board is using an electronic internal filing system, multiple copies of documents are no longer needed.

In § 497a.1 (relating to date of filing), new provisions have been added that allow documents to be submitted via electronic transmission. However, documents will not be deemed to be officially filed until the Board receives any required filing fees.

In § 499a.4 (relating to notice of appearance or withdrawal), subsection (c) has been deleted. The Board has never required and can not foresee a need to require a practitioner to file a power of attorney authorizing the practitioner to represent their client.

In § 499a.6 (relating to contemptuous conduct), subsection (a) has been amended to include contemptuous conduct before a presiding officer, as well as the Board, as a basis for exclusion from a hearing.

Affected Parties

These amendments will affect entities and individuals who are involved in Board proceedings.

Fiscal Impact

Commonwealth

Because most of the revisions in this rulemaking reflect current Board practice or reflect relatively minor changes, there will be no significant costs or savings to the Board or other State agencies as a result of these revisions. The Board will experience some savings from being allowed to file and serve some documents electronically.

Political Subdivisions

This proposed rulemaking will have no fiscal impact on political subdivisions of this Commonwealth.

Private Sector

Entities and individuals who are involved in Board proceedings will experience some slight savings from being required to submit fewer copies of documents and

being able to file and serve documents electronically. Individuals who participate in videoconferencing for hearings should also experience savings from reduced travel.

General Public

This proposed rulemaking will have no fiscal impact on the general public.

Paperwork Requirements

This proposed rulemaking reduces the number of copies of documents that must be filed with the Board and allows electronic service to replace mailing of documents to provide service.

Effective Date

The proposed rulemaking will become effective upon final-form publication in the *Pennsylvania Bulletin*.

Public Comments

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed rulemaking, within 30 days after the date of publication in the *Pennsylvania Bulletin* to Mickey Kane, Acting Secretary, Pennsylvania Gaming Control Board, P. O. Box 69060, Harrisburg, PA 17106-9060, Attention: Public Comment on Regulation #125-93.

Contact Person

The contact person for questions about this proposed rulemaking is Richard Sandusky, Director of Regulatory Review at (717) 214-8111.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on September 24, 2008, the Board submitted a copy of this proposed rulemaking and a copy of the Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Gaming Oversight Committee and the Senate Community, Economic and Recreational Development Committee. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor of comments, recommendations or objections raised.

MARY DIGIACOMO COLINS,
Chairperson

Fiscal Note: 125-93. No fiscal impact; (8) recommends adoption.

Annex A
TITLE 58. RECREATION
PART VII. GAMING CONTROL BOARD
Subpart A. GENERAL PROVISIONS
CHAPTER 403a. BOARD OPERATIONS AND ORGANIZATION

§ 403a.7. Temporary emergency orders.

* * * * *

(k) Once a temporary emergency order has been issued under this section, unless it has been subsequently

dissolved by the Executive Director, the temporary emergency order will be presented to the Board at its next meeting or within 10 business days, whichever is longer, at which time the Board may do one of the following:

* * * * *

(2) Refer the matter to the Office of Hearings and Appeals under § 491a.8 (relating to hearings generally) and direct that a hearing be conducted by a [**hearing**] **presiding** officer and a report submitted to the Board.

(1) In all hearings relating to the disposition of a temporary emergency order, whether the hearing is conducted by the Board or by a [**hearing**] **presiding** officer, the following procedure will occur:

* * * * *

(2) The Office of Enforcement Counsel will present evidence to the Board or the [**hearing**] **presiding** officer in support of the temporary emergency order.

* * * * *

Subpart H. PRACTICE AND PROCEDURE

CHAPTER 491a. GENERAL RULES OF PRACTICE

§ 491a.2. Definitions.

The following words and terms, when used in this subpart, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Exception—A formal objection to a report or **report and** recommendation of a presiding officer.

* * * * *

[*Hearing officer*—An employee of the Board designated to conduct a hearing relating to a matter within the jurisdiction of the Board.]

* * * * *

§ 491a.3. Office of the Clerk.

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(b) Filings and requests for practice and procedure information should be directed to:

Office of the Clerk
Pennsylvania Gaming Control Board
[**P. O. Box 69060**
Harrisburg, PA 17106-9060]
One Penn Center
2601 North 3rd Street, Suite 502
Harrisburg, PA 17110

* * * * *

§ 491a.6. [**Hearing officers**] (Reserved).

[(a) A hearing officer may be a presiding officer. Hearing officers shall be attorneys in good standing with the Supreme Court of Pennsylvania and shall be responsible for the timely disposition of assigned matters. Hearing officers are employed by the Board and may be discharged only for misconduct or good cause shown.

(b) Duties of the hearing officers may include:

(1) Conducting full and complete hearings, partial and bifurcated hearings.

(2) Taking testimony of witnesses.

(3) Presiding over or causing depositions to be taken.

(4) Submitting reports or recommendations to the Board.

(5) Other matters as the Board may direct.

(c) A hearing officer may withdraw when the hearing officer deems himself disqualified or a hearing officer may be withdrawn by the Board for good cause found after timely affidavits alleging personal bias or other disqualification have been filed and the matter has been heard by the Board or another presiding officer to whom the Board has delegated the matter for investigation and report.

(d) This section supersedes 1 Pa. Code § 35.186 (relating to disqualification of a presiding officer).]

§ 491a.7. Presiding officers.

* * * * *

(b) The Board and presiding officers shall have the power and authority to:

* * * * *

(9) Submit proposed reports or reports and recommendations in accordance with this subpart.

* * * * *

(c) Except as authorized by law and by this subpart, a presiding officer may not, in a proceeding, consult with a [person or] party on a fact in issue or issue of law unless notice and opportunity for parties to participate has been given.

* * * * *

§ 491a.8. Hearings generally.

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(e) Hearings will be conducted in Harrisburg, Pennsylvania or by video conference, unless otherwise directed by the Board or presiding officer.

* * * * *

(j) Hearing transcripts will be available for public inspection. If the Board receives a request for a transcript of a hearing for which a transcript has not been prepared, the Board will prepare a transcript and make it available for inspection within 30 days.

* * * * *

§ 491a.9. Prehearing and other conferences.

* * * * *

(b) When the Board or presiding officer directs that a prehearing conference be held, all parties shall appear at the time and place designated. Notice of the time and place of the conference will be given to all parties. At the discretion of the Board or presiding officer, the conferences may be conducted telephonically or by video conference.

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CHAPTER 493a. PLEADINGS

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§ 493a.2. Complaints.

(a) [The procedures for filing complaints shall be in accordance with 1 Pa. Code §§ 35.9—35.11 (relating to formal complaints) as supplemented by this

chapter.] A proceeding against a licensee, permittee, persons registered or certified by the Board or an employee of a licensee or persons registered or certified by the Board shall be initiated by written complaint filed by the complainant, which must include a statement setting forth in ordinary and concise language the matter complained of and the facts supporting the complaint.

* * * * *

(c) [A proceeding against a licensee, permittee, persons registered or certified by the Board or employee of a licensee or persons registered or certified by the Board shall be initiated by written complaint filed by the complainant, which must include a statement setting forth in ordinary and concise language the matter complained of and the facts supporting the complaint.]

(d)] Complaints will be served in accordance with § 491a.5 (relating to service by the Board).

[(e) Within 20 days of service of the complaint filed by the complainant, the respondent may file with the Clerk a notice of defense, in which the respondent may:

- (1) Request a hearing.
- (2) Admit the matter complained of and the alleged facts in whole or in part.
- (3) Present new matter or explanation by way of defense.
- (4) State any legal objection to the complaint.
- (5) Present affirmative defenses.

(f) The respondent may be entitled to a hearing on the merits if the respondent files the required notice of defense within the time allowed by subsection (e). The notice of defense will be deemed a specific denial of all parts of the complaint not expressly admitted.

(g) Failure to timely file the required notice of defense or to appear at the hearing constitutes an admission of all matters and facts contained in the complaint and a waiver of the respondent's rights to a hearing. The Board may conduct a hearing despite a respondent's failure to timely file the required notice of defense or to appear at the hearing.

(h) Affirmative defenses shall be specifically stated, and unless objection is taken as provided in subsection (e)(4), objections to the form of the complaint shall be deemed waived.

(i) The Clerk will deliver or send by mail a notice of the hearing date to all parties at least 10 days prior to a hearing.

(j) Applicants, licensees, permittees, persons registered or certified and other persons authorized by the Board may request a hearing on any matter by filing a written petition for special relief in accordance with § 493a.4 (relating to petitions generally).

(k) The complainant has the burden to demonstrate, by a preponderance of the evidence, that the respondent has failed to comply with the act or this part.

(l) (d) This section supplements 1 Pa. Code §§ 35.9—35.11 and 35.14 (relating to formal complaints; and orders to show cause).

§ 493a.4. Petitions generally.

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(c) [The procedure for petitions shall be in accordance with 1 Pa. Code §§ 35.17 and 35.18 (relating to petitions generally; and petitions for issuance, amendment, waiver or deletion of regulations).] Petitions must conform to § 491a.4 (relating to filing generally) and Chapters 495a and 497a (relating to documentary filings; and time), and be served on all persons directly affected.

(d) [Copies shall also be served in accordance with the Board's direction.

(e)] This section supplements 1 Pa. Code §§ 35.17 and 35.18.

§ 493a.5. Answers to complaints, petitions, motions and other filings requiring a response.

(a) Answers to complaints, petitions, motions and other filings requiring a response shall be filed with the Clerk and served on all other parties within 20 days after the date of [service] filing of [a] the complaint, petition, motion or other pleading, unless a different time is prescribed by the Board or presiding officer.

(b) [The procedures in 1 Pa. Code §§ 35.35—35.40 apply.] Failure to file a timely answer to a complaint or petition will constitute an admission of all matters and facts contained in the filing and may result in the waiver of the right to a hearing.

(c) Answers may contain the following:

- (1) Admissions of the matter complained of and the alleged facts, in whole or in part.
- (2) New matter or explanation by way of defense.
- (3) Legal objections.
- (4) Affirmative defenses.
- (5) A request for a hearing.

(d) This section supplements 1 Pa. Code §§ 35.35—35.40.

§ 493a.10. Motions for summary judgment and judgment on the pleadings.

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(c) Answers to motions. An answer to a motion for summary judgment or a motion for judgment on the pleadings, including an opposing affidavit to a motion for summary judgment, may be filed within 10 days of the date of [service] filing of the motion. An answer to a motion for summary judgment may be supplemented by pleadings and depositions, answers to interrogatories or further affidavits and admissions.

(d) Decisions on motions. If a motion is granted in whole or in part by a presiding officer, it will be in the form of a report or report and recommendation. The Board will make a final ruling on a motion for judgment on the pleadings or a motion for summary judgment.

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§ 493a.10a. Motions to protect confidential information.

(a) A party or individual may seek to protect confidential information under § 407a.3 (relating to

confidential information) in pleadings and other papers by filing a Motion to Protect Confidential Information.

(b) A Motion to Protect Confidential Information must:

(1) Set forth the specific reasons why the information should be deemed to be confidential information and, therefore, protected.

(2) Label as confidential documents or portions of documents in the filing that the party or individual is seeking to protect.

(c) Upon the filing of the Motion to Protect Confidential Information, the Director of Hearings and Appeals will review the motion and accompanying documents and may, upon determining that a substantial basis exists, issue an interim order to protect the documents from disclosure until the Board considers the matter in accordance with 65 Pa.C.S. §§ 701—716 (relating to open meetings).

§ 493a.12. Intervention.

* * * * *

(f) A party may file an answer to a petition to intervene, and in default thereof, will be deemed to have waived any objection to the granting of the petition. Answers shall be filed within 10 days after the date of [service] filing of the petition, unless for cause the Board prescribes a different time.

* * * * *

CHAPTER 494a. HEARING PROCEDURE

§ 494a.4. Report or report and recommendation of the presiding officer.

(a) A report or report and recommendation of the presiding officer may be required by the Board, in both oral and documentary hearings, except that recommendations will not be made in proceedings involving the issuance, approval, renewal, revocation, suspension or conditioning of a license.

(b) The presiding officer will file with the Clerk and certify to the Board a verbatim record of any oral hearing, all documents submitted for consideration, and a report or report and recommendation, when required, as soon as practicable after the conclusion of the hearing and expiration of the time for filing of briefs.

(c) The presiding officer's report or report and recommendation will include a statement of:

* * * * *

(d) The report or report and recommendation will be in writing, provided to all parties, and will be part of the public record, except for matters and materials designated as confidential by the Board. Service will be in accordance with § 491a.5(d) (relating to service by the Board).

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§ 494a.5. Review.

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(b) The Board will review the record of the hearing and the report or report and recommendation of the presiding officer. The Board may adopt some or all of the recommendations, conduct a full or partial de novo hearing, or remand all or part of the matter to a presiding officer for the taking of additional evidence or clarification of issues, or make an adjudication based on the record.

§ 494a.6. Reopening of record.

(a) After the conclusion of the hearing, a party in a proceeding may file with the presiding officer, prior to the issuance of a report or **report and** recommendation, a petition to reopen the proceeding for the purpose of taking additional evidence. The petition must set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or law alleged to have occurred since the hearing was concluded.

(b) After the issuance of a report or **report and** recommendation by a presiding officer and before the Board issues its final order, a party in a proceeding may file with the Board, a petition to reopen the proceeding for the purpose of taking additional evidence. The petition must set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or law alleged to have occurred since the issuance of a report or **report and** recommendation.

(c) Answers may be filed within 10 days of **[service] filing** of the petition. If no answers are filed, objections to the granting of the petition are waived.

* * * * *

(e) Prior to filing a report or **report and** recommendation, the presiding officer, after notice to the parties, may reopen the **[proceedings] proceeding** for the receipt of further evidence on his own motion, if the presiding officer has reason to believe that the facts or law have changed as to require, or that the public interest requires, the reopening of the **[proceedings] proceeding**.

* * * * *

§ 494a.7. Exceptions.

(a) A party may file exceptions to the report or **report and** recommendation of the presiding officer within 15 days of the date of the report or **report and** recommendation, unless the time is extended upon good cause shown.

* * * * *

(c) Failure to file exceptions within the time allowed shall constitute a waiver of all objections to the report or **[recommendations] report and recommendation**. Exceptions to any part of the report or **[recommendations] report and recommendation** may not thereafter be raised before the Board in oral argument, if an oral argument is permitted, or in an application for rehearing or reconsideration, and shall be deemed to be waived. The Board may refuse to consider exceptions to a ruling admitting or excluding evidence unless there was an objection at the time the ruling was made or within an extension of time prescribed by the presiding officer.

* * * * *

(f) The Board will issue its final order in consideration of the presiding officer's report or **report and** recommendation and any filed exceptions, and notify all parties by regular mail.

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§ 494a.8. Rehearing or reconsideration.

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(b) **Filing a petition for rehearing or reconsideration does not toll or stay the 30-day appeal period.**

(c) The petition must state concisely the alleged errors in the adjudication or other order of the Board. If a final order or other order of the Board is sought to be vacated, reversed or modified by reason of matters that have arisen since the hearing and decision or order, or by reason of a consequence that would result from compliance therewith, the matters relied upon by the petitioner must be set forth in the petition.

[(c)] (d) * * *

[(d)] (e) * * *

[(e)] (f) * * *

[(f)] (g) * * *

CHAPTER 495a. DOCUMENTARY FILINGS

§ 495a.1. Form of documentary filings generally.

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(d) Pleadings or other documents must include an address **[and phone number]**, **fax number or email address** where papers may be served in connection with the proceedings. **[Use of a fax number constitutes agreement to accept papers connected with the proceeding by fax.]**

* * * * *

§ 495a.6. Number of copies.

(a) An original **[and three copies]** copy of pleadings or documents other than correspondence shall be furnished to the Board at the time of filing, except as may be otherwise ordered or requested by the Board **or the presiding officer**.

(b) **[In the case of complaints or petitions, when more than one respondent is named, an additional copy of the complaint or petition shall be filed for each additional respondent.**

(c) **Subsections (a)—(b) supersede] Subsection (a) supersedes** 1 Pa. Code § 33.15 (relating to number of copies).

CHAPTER 497a. TIME

§ 497a.1. Date of filing.

(a) Whenever a pleading or other document is required or permitted to be filed under this part or by statute, it will be deemed to be filed on one of the following dates:

* * * * *

(4) On the date that the pleading or other document is received by electronic transmission in the Office of the Clerk.

* * * * *

(c) **[Except as otherwise permitted by the Board, a document transmitted by facsimile or electronically to the Board will not be accepted for filing within the meaning of this section.] Pleadings or other documents that require a filing fee will not be deemed filed until the Board receives the required fee.**

* * * * *

CHAPTER 499a. REPRESENTATION BEFORE THE BOARD

§ 499a.4. Notice of appearance or withdrawal.

* * * * *

(c) [A person appearing or practicing before the Board in a representative capacity may be required to file a power of attorney with the Board showing his authority to act in that capacity.

(d)] * * *

[(e)] (d) * * *

* * * * *

[(f)] (e) * * *

[(g)] (f) * * *

§ 499a.6. Contemptuous conduct.

(a) Contemptuous conduct at a hearing before the Board or a presiding officer will be grounds for exclusion from the hearing and for summary suspension without a hearing for the duration of the hearing.

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Subpart J. EXCLUSION OF PERSONS

CHAPTER 511a. PERSONS REQUIRED TO BE EXCLUDED

§ 511a.6. Demand for hearing on the placement of a person on the exclusion list.

* * * * *

(c) If a hearing is demanded by the excluded person, a hearing will be scheduled as provided in § 491a.8 (relating to hearings generally). At the hearing, the Bureau will have the affirmative obligation to demonstrate that the excluded person satisfies the criteria for exclusion in 4 Pa.C.S. § 1514 (relating to regulation requiring exclusion of certain persons) or § 511a.3 (relating to criteria for exclusion). Unless the matter is heard directly by the Board, the presiding officer will prepare a report and recommendation as provided in § 494a.4 (relating to report or report and recommendation of the presiding officer) for consideration by the Board.

§ 511a.9. Petition to remove name from the exclusion list.

* * * * *

(b) The petition must be signed by the excluded person, contain supporting affidavits, and state the specific grounds believed by the petitioner to constitute good cause for removal from the exclusion list. Upon receipt of the petition, the Bureau may file an answer in accordance with § 493a.5 (relating to answers to complaints, petitions, motions and other filings requiring a response).

* * * * *

[Pa.B. Doc. No. 08-1801. Filed for public inspection October 3, 2008, 9:00 a.m.]

SUSQUEHANNA RIVER BASIN COMMISSION

[25 PA. CODE CH. 806]

Review and Approval of Projects

Summary: This document contains proposed rules that would amend the project review regulations of the Susquehanna River Basin Commission (Commission) by

requiring review and approval of any natural gas well development project targeting the Marcellus, Utica or other shale formations and involving the withdrawal or consumptive use of waters of the Susquehanna River Basin, adding a provision providing for a specific approval by rule process for consumptive water use associated with such projects and modifying the definition of project. In addition, two editorial changes are made to the existing approval by rule provision related to the consumptive use of water withdrawn from public water supply systems to make that provision consistent with the new approval by rule provision for natural gas well development projects.

Dates: Public hearings will be held on October 21 and October 22, 2008, beginning at 7 p.m. regarding this proposed rulemaking action. The locations of the hearings are listed in the "Addresses" section of this notice. The deadline for submission of written comments on the proposed rulemaking is October 31, 2008.

Addresses: The October 21, 2008, public hearing will be held at Lycoming College, Academic Center, Lecture Hall Room D001, Mulberry Street, Williamsport, PA 17701; the October 22, 2008, public hearing will be held at Binghamton University, State University of New York, Lecture Hall Complex, Lecture Hall 1, Route 434 (Vestal Parkway East), Binghamton, NY 13903. Written comments may be submitted by mail to Richard A. Cairo, Susquehanna River Basin Commission, 1721 North Front Street, Harrisburg, PA 17102-2391 or by e-mail to rcairo@srbc.net.

For Further Information Contact: Richard A. Cairo, General Counsel, (717) 238-0423; Fax: (717) 238-2436; e-mail: rcairo@srbc.net. Also, for further information on the proposed rulemaking, visit the Commission's web site at www.srbc.net.

Supplementary Information:

Background and Purpose of Amendments:

As a result of advances in hydraulic fracturing, and higher natural gas prices, natural gas well development activity in the Susquehanna River Basin has increased dramatically in the past year, resulting in a large number of project applications being filed with the Commission seeking approval for the withdrawal and consumptive use of water for that activity. The Commission is hereby proposing a rulemaking action to handle the large and immediate influx of project applications, and to avoid adverse, cumulative adverse or interstate effects to the water resources of the basin.

The proposed rule modifies the definition of "project" for purposes of natural gas well development, requires review and approval of any natural gas well development project involving the withdrawal or consumptive use of water, and adds a specific approval by rule process associated with the consumptive use of water by such projects. The Commission's current approval by rule process is available for use only if the sole source of water is a public water supply system. Under the contemplated rule change, the approval by rule process would allow for the consumptive use of wastewater, acid mine water and other sources of water for natural gas well development projects. The proposal would not change the current process used to review groundwater or surface water withdrawals.

In addition, two editorial changes are made to the existing approval by rule provision relating to the consumptive use of water withdrawn from public water

supply systems to make that provision consistent with the new approval by rule provision for natural gas well development projects.

List of Subjects in 18 CFR Parts 806: Administrative practice and procedure, Water resources.

For the reasons set forth in the preamble, the Commission proposes to amend 18 CFR Part 806 as follows:

PART 806—REVIEW AND APPROVAL OF PROJECTS

Subpart A—General Provisions

1. The authority citation for Part 806 continues to read as follows:

Authority: Secs. 3.4, 3.5(5), 3.8, 3.10 and 15.2, Pub. L. No. 91-575, 84 Stat. 1509 et seq.

2. In § 806.3, revise the definition of “project” to read as follows:

§ 806.3 Definitions.

* * * * *

Project. Any work, service, activity, or facility undertaken, which is separately planned, financed or identified by the Commission, or any separate facility undertaken or to be undertaken by the Commission or otherwise within a specified area, for the conservation, utilization, control, development, or management of water resources, which can be established and utilized independently, or as an addition to an existing facility, and can be considered as a separate entity for purposes of evaluation. For purposes of natural gas well development activity, the project shall be considered to be the drilling pad upon which one or more exploratory or production wells are undertaken, and all water-related appurtenant facilities and activities related thereto.

* * * * *

3. In § 806.4, amend paragraph (a) to add paragraph (a)(8) to read as follows:

§ 806.4 Projects requiring review and approval.

(a) Except for activities relating to site evaluation or those authorized under § 806.34, no person shall undertake any of the following projects without prior review and approval by the Commission. The project sponsor shall submit an application in accordance with subpart B and shall be subject to the applicable standards in subpart C.

* * * * *

(8) Any natural gas well development project in the basin targeting the Marcellus, Utica or other shale formations for exploration or production of natural gas involving a withdrawal or consumptive use of waters of the basin, regardless of the quantity of such withdrawal or consumptive use. The project sponsor shall submit the appropriate applications in accordance with subpart B and the project shall be subject to the applicable standards set forth in subpart C.

4. In § 806.22, revise paragraph (e)(1), and insert a new paragraph (f) to read as follows:

§ 806.22 Standards for consumptive uses of water.

* * * * *

(e) * * *

(1) Except with respect to projects involving natural gas well development subject to the provision of paragraph (f) of this section, any project whose sole source of water for consumptive use is a public water supply

withdrawal, may be approved under this paragraph (e) in accordance with the following, unless the Commission determines that the project cannot be adequately regulated under this approval by rule:

(1) * * *

(ii) Within 10 days after submittal of an NOI under (i), the project sponsor shall submit to the Commission proof of publication in a newspaper of general circulation in the location of the project, a notice of intent to operate under this approval by rule, which contains a sufficient description of the project, its purposes and its location. This notice shall also contain the address, electronic mail address and telephone number of the Commission.

* * * * *

(f) Approval by rule for consumptive use related to natural gas well development.

(1) Any project involving the development of natural gas wells subject to review and approval under §§ 806.4, 806.5, or 806.6 of this part shall be subject to review and approval under this paragraph (f) regardless of the source or sources of water being used consumptively.

(i) *Notification of Intent:* No fewer than 60 days prior to undertaking a project or increasing a previously approved quantity of consumptive use, the project sponsor shall:

(A) Submit a Notice of Intent (NOI) on forms prescribed by the Commission, and the appropriate application fee, along with any required attachments.

(B) Send a copy of the NOI to the appropriate agencies of the member state, and to each municipality and county in which the project is located.

(ii) Within 10 days after submittal of an NOI under (i), the project sponsor shall submit to the Commission proof of publication in a newspaper of general circulation in the location of the project, a notice of intent to operate under this approval by rule, which contains a sufficient description of the project, its purposes and location and the sources, quantities and peak day use of water to be used consumptively by the project. This notice shall also contain the address, electronic mail address and telephone number of the Commission.

(2) The project sponsor shall comply with metering, daily use monitoring and quarterly reporting as specified in § 806.30, or as otherwise required by the approval by rule. Daily use monitoring shall include amounts delivered or withdrawn per source, per day, and amounts used per gas well, per day, for well drilling, hydrofracture stimulation, hydrostatic testing, and dust control. The foregoing shall apply to all water and fluids, including additives, flowback and brines, utilized by the project.

(3) The standard conditions set forth in § 806.21 above shall apply to projects approved by rule, as well as any special conditions incorporated into such approvals.

(4) The project sponsor shall comply with mitigation in accordance with § 806.22(b)(2) or (b)(3).

(5) Any produced flowback fluids or brines utilized by the project sponsor for hydrofracture stimulation undertaken at the project shall be separately accounted for, but shall not be included in the daily consumptive use amount calculated for the project, or be subject to the mitigation requirements of § 806.22(b).

(6) The project sponsor shall obtain all necessary permits or approvals required for the project from other Federal, State or local government agencies having juris-

diction over the project. The Commission reserves the right to modify, suspend or revoke any approval under this paragraph (f) if the project sponsor fails to obtain or maintain such approvals.

(7) The project sponsor shall demonstrate to the satisfaction of the Commission that all flowback and produced fluids, including brines, have been treated and disposed of in accordance with applicable State and Federal law.

(8) The Commission will grant or deny approval to operate under this approval by rule and will notify the project sponsor of such determination, including the sources and quantity of consumptive use approved.

(9) Approval by rule shall be effective upon written notification from the Commission to the project sponsor, shall expire 5 years from the date of such notification, and rescind any previous consumptive use approvals to the extent applicable to the project.

(10) Water withdrawals approved by the Commission pursuant to § 806.4(a)(2) after the date of issuance of the approval by rule may be utilized as a source for the consumptive use authorized for the project provided such withdrawal source is approved for such use and is registered with the Commission at least 10 days prior thereto on a form and in a manner as prescribed by the Commission.

(11) Approvals issued under this paragraph (f) shall not be transferable under § 806.6.

Dated: September 16, 2008.

PAUL O. SWARTZ,
Executive Director

Fiscal Note: 72-6. No fiscal impact; (8) recommends adoption.

Annex A

**TITLE 25. ENVIRONMENTAL PROTECTION
PART IV. SUSQUEHANNA RIVER BASIN
COMMISSION**

**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)] (2008) (relating to review and approval of projects) are incorporated by reference and made part of this title.

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