

# RULES AND REGULATIONS

## Title 25—ENVIRONMENTAL PROTECTION

### DELAWARE RIVER BASIN COMMISSION

[ 25 PA. CODE CH. 901 ]

#### Rules of Practice and Procedure Final Rule

*Proposed:* *Pennsylvania Bulletin*, 53 Pa.B. 6698 (October 28, 2023).

*Adopted:* June 5, 2024, by the Delaware River Basin Commission, Pamela M. Bush, Esq., Commission Secretary.

*Filed:* July 17, 2024, as a final regulation.

*Summary:* By Resolution No. 2024-06 on June 5, 2024, the Delaware River Basin Commission (“DRBC” or “Commission”) amended its *Rules of Practice and Procedure* to: resolve ambiguities around the automatic termination of project approvals issued by the Commission and make conforming amendments to related provisions as appropriate; update the Commission’s Water Resources Program and Project Review procedures to better conform them to current practice; remove incorrect references to the Federal Freedom of Information Act in the Commission’s regulations providing for access to public records; align pronouns with the Commission’s policies regarding diversity, inclusion, and belonging; and correct certain cross-references.

*Dates:* This final rule is effective July 22, 2024.

*For Further Information Contact:* Pamela M. Bush, Esquire, Commission Secretary and Assistant General Counsel, at pam.bush@drbc.gov (preferred) or 609-477-7203.

*Supplementary Information:* The Delaware River Basin Commission (“DRBC” or “Commission”) is a Federal-interstate compact agency formed by the enactment of concurrent legislation by four states and the United States in 1961<sup>1</sup> to manage the water resources of the Delaware River Basin (the “Basin”) without regard to political boundaries. The Commission’s members are, ex officio, the governors of the basin states (Delaware, New Jersey, New York, and Pennsylvania) and the Division Engineer of the U.S. Army Corps of Engineers North Atlantic Division, who represents the United States.

#### Background

The Commission’s *Rules of Practice and Procedure* (“RPP”), comprising part 401 of title 18 of the *Code of Federal Regulations*, govern the adoption and revision of the Commission’s Comprehensive Plan and Water Resources Program, exercise of the Commission’s authority pursuant to the provisions of Article 3.8 of the *Delaware River Basin Compact* (the “Compact”), and other actions of the Commission mandated or authorized by the Compact, including but not limited to the administration of public access to records and information in the Commission’s possession.

On September 28, 2023, the Commission published a proposed rule (88 FR 66722) to amend the RPP to: resolve ambiguities around the automatic termination of project

approvals issued by the Commission and make conforming amendments to related provisions as appropriate; update the Commission’s Water Resources Program and Project Review procedures to better conform them to current practice; remove incorrect references to the Federal Freedom of Information Act in the Commission’s regulations providing for access to public records; and align pronouns with the Commission’s policies regarding diversity, inclusion, and belonging. A notice of the proposed amendments appeared in the *Delaware Register of Regulations*, 27 Del. Reg. 196, 206, on October 1, 2023, the *New Jersey Register*, 55 N.J.R. 2179(a), on October 16, 2023, the *New York Register*, 45 N.Y. Reg. 9, on October 11, 2023, and the *Pennsylvania Bulletin*, 53 Pa.B. 6698, on October 28, 2023.

Opportunity for public input on the proposed rules was provided during a comment period that ran from September 28, 2023, through November 30, 2023. In addition to soliciting written comments, the Commission accepted oral comment at two hearings conducted via Zoom and telephone. The Commission received a total of 209 public comment submissions, consisting of 199 written submissions and ten oral comments. The submissions typically consisted of a set of comments from a single individual or organization, and they typically addressed more than one aspect or provision of the proposed amendments. In many instances, a single submission included a set of comments by two or more individuals or organizations. Some submissions consisted of petitions or a set of comments with multiple signers. Similar or identical comments were in many instances submitted by individual commenters using form letters or template language provided by others. Commenters were not limited to a single submission, and some commenters offered two or more submissions. The “199” figure represents the number of individual written submissions the Commission received during the comment period without regard to the number of comments within a submission, the number of signers on a single submission, or the number of individuals making a joint submission.

The Commission reviewed all comments and supporting material it received during the comment period. The staff, in consultation with the Commissioners, prepared a Comment and Response Document summarizing the comments on the proposed rule and setting forth the Commission’s responses and revisions in detail. By Resolution No. 2024-06 on June 5, 2024, the Commission adopted the Comment and Response Document simultaneously with its adoption of the final rule.

#### Changes from the Proposed Rule

The final rule differs from the proposed in the following respects:

*Action on request for extension.* The final rule provides that the Commissioners, not the Executive Director, will approve or deny all requests for extended or renewed approval under amended § 401.41(a) and (b), respectively. In conjunction with this change, rather than establishing a prescribed extension term of five years, as originally proposed, the final rule at § 401.41(a) provides for the Commissioners to grant an extension of up to five years.

*Eligibility for extension.* Under the final rule, to qualify for extension of a docket approval that would otherwise expire under § 401.41, in addition to demonstrating that approved activities, site conditions, and the Comprehensive Plan have not materially changed, the docket holder

<sup>1</sup> United States Public Law 87-328, Approved Sept. 27, 1961, 75 Statutes at Large 688; 53 Delaware Laws, Ch. 71, Approved May 26, 1961; New Jersey Laws of 1961, Ch. 13, Approved May 1, 1961; New York Laws of 1961, Ch. 148, Approved March 17, 1961; Pennsylvania Acts of 1961, Act. No. 268, Approved July 7, 1961.

(project sponsor) will be required to demonstrate that it is diligently pursuing the project, which can be shown through its planning, construction or project operational activities, its project expenditures, its efforts to secure government approvals necessary for the project, or its active participation in appeals of government decisions on its applications for government approvals.

The docket holder will not be required to demonstrate that it has expended a fixed, minimum dollar amount, a proposal to which commenters objected. Nor will the docket holder be obligated to show that it has expended a substantial sum in relation to the project cost, as the rule originally provided, or that it has expended a fixed percentage representing a substantial sum in relation to the total cost of the project, as some commenters proposed. In the Commission's view, those approaches are impracticable where the project costs consist primarily of construction costs, and where the sponsor could not lawfully or reasonably commence construction because all final approvals have not been secured.

*Public process.* In accordance with the final rule, the Commission will publish notice that it has received a request for a docket extension under § 401.41(a) and provide an opportunity for written comment of at least ten days' length on whether the docket holder has demonstrated all elements requisite for an extension—i.e., that the approved activities, site conditions, and Comprehensive Plan have not materially changed, and that the project sponsor has diligently pursued the project in reliance on the Commission's approval. The project sponsor will be afforded an opportunity to respond to the comments received but will not be obligated to do so. The Commission will provide notice at least ten days prior to the date of a business meeting at which the Commissioners consider action on a request pursuant to § 401.41(a).

*Public hearing.* The final rule provides that a public hearing on a request for a docket extension under § 401.41(a) will be held if three or more Commission members request such a hearing in writing to the Executive Director or by vote at a public meeting.

*Administrative continuance.* Under the final rule, a docket that is the subject of a request for extension under § 401.41(a) filed at least 90 days before the docket's expiration will be administratively continued pending final Commission action on the request in the event that such action occurs after the otherwise effective date of termination.

*Construction complete.* The final rule clarifies that if the activities authorized by the Commission's docket are limited to construction activities, an extension in accordance with § 401.41(a) is no longer required once construction is complete. Because some dockets issued for construction activities impose ongoing obligations on docket holders, the final rule further clarifies that the expiration of the docket, including any approved extension, does not eliminate ongoing docket obligations expressly identified as such in the docket approval.

*Language of final § 401.41(b).* The final language adopted for § 401.41(b) has been modified from the originally proposed language to more accurately reflect that the burden is on the docket holder to demonstrate eligibility for an extension under § 401.41(a).

*Process for re-application.* Under the final rule, if a request for extension under § 401.41(a) is denied, and the project sponsor wishes to apply for renewal of its docket approval under paragraph (b), the project sponsor must do so by a date to be established by the Commission. In

this situation, the docket approval is not thereafter administratively continued automatically. However, the Commission may, in its discretion, administratively extend the docket approval in whole or in part for a period ending on or before the date on which the Commission renders a final decision on the sponsor's renewal application.

#### *Correcting Amendments*

On October 8, 1987, the Commission redesignated portions of the *Rules of Practice and Procedure* (52 FR 37602). The final rule that contained the redesignation inadvertently failed to update certain cross-references affected by the redesignation. This final rule corrects those cross-references. The affected provisions are 18 CFR 401.108(c), 401.109(a), (d), and (e), 401.113, and 401.115(b).

#### *Additional Materials*

Additional materials can be found on the Commission's website at: [https://www.nj.gov/drbc/about/regulations/finalrule\\_RPPamendments.html](https://www.nj.gov/drbc/about/regulations/finalrule_RPPamendments.html). These include links to Resolution No. 2024-06 of June 5, 2024 adopting the final rule and incorporating a clean copy of the rule text; the Commission's Comment and Response Document; a mark-up comparing the final to the proposed rule text; a mark-up comparing the final to the former rule text; and copies of the comments received.

The Commission's notice of proposed rulemaking and proposed rule text can be found on the Commission's website at: [https://www.nj.gov/drbc/meetings/proposed/notice\\_RPP\\_amendments.html](https://www.nj.gov/drbc/meetings/proposed/notice_RPP_amendments.html).

For the reasons set forth in the preamble, effective July 22, 2024, the Commission's rule adoption amends the *Pennsylvania Code*, Title 25, Part V, Chapter 901 (incorporating by reference 18 CFR Part 401). The amendatory instructions and final rule text appear below:

### **PART 401—RULES OF PRACTICE AND PROCEDURE**

1. The authority citation for part 401 continues to read as follows:

**Authority:** Delaware River Basin Compact (75 Stat. 688) unless otherwise noted.

#### **Subpart A—Comprehensive Plan**

2. In § 401.8, revise paragraph (a) to read as follows:

#### **§ 401.8 Public projects under Article 11 of the Compact.**

(a) After a project of any Federal, State, or local agency has been included in the Comprehensive Plan, no further action will be required by the Commission or by the agency to satisfy the requirements of Article 11 of the Compact, except as the Comprehensive Plan may be amended or revised pursuant to the Compact and this part. Any project which is materially changed from the project as described in the Comprehensive Plan will be deemed to be a new and different project for the purposes of Article 11 of the Compact. Whenever a change is made the sponsor shall advise the Executive Director, who will determine whether the change is deemed a material change within the meaning of this part.

\* \* \* \* \*

#### **Subpart B—Water Resources Program**

3. Revise §§ 401.22 and 401.23 to read as follows:

#### **§ 401.22 Concept of the program.**

The Water Resources Program, as defined and described in section 13.2 of the Compact, will be a reason-

ably detailed amplification of that part of the Comprehensive Plan which the Commission recommends for action. That part of the Program consisting of a presentation of the water resource needs of the Basin will be revised only at such intervals as may be indicated to reflect new findings and conclusions, based upon the Commission's continuing planning programs.

**§ 401.23 Procedure.**

The Water Resources Program will be prepared and considered by the Commission for adoption annually. Projects included in the Water Resources Program shall have been previously included in the Comprehensive Plan, except that a project may be added to both the Plan and the Program by concurrent action of the Commission. In such instances, the project's sponsor shall furnish the information listed in § 401.4(b) prior to the inclusion of the project in the Comprehensive Plan and Water Resources Program.

**§§ 401.24 through 401.26 [Removed]**

- 4. Remove §§ 401.24 through 401.26.

**Subpart C—Project Review Under Section 3.8 of the Compact**

5. In § 401.38, revise the introductory text to read as follows:

**§ 401.38 Form of referral by State or Federal agency.**

Upon receipt of an application by any State or Federal agency for any project reviewable by the Commission under this part, if the project has not prior thereto been reviewed and approved by the Commission, such agency shall refer the project for review under section 3.8 of the Compact in such form and manner as shall be provided by Administrative Agreement.

\* \* \* \*

- 6. Revise § 401.39 to read as follows:

**§ 401.39 Form of submission of projects.**

(a) *Submission constituting application.* Where a project is subject to review under section 3.8 of the Compact, the submission shall be in accordance with such form of application as the Executive Director may prescribe and with such supporting documentation as the Executive Director may reasonably require for the administration of the provisions of the Compact. An application shall be deemed complete and the Commission's review of the application may commence upon submission of the completed form in accordance with paragraph (b) of this section, and payment of the applicable fee as set forth in § 401.43 together with all balances due the Commission, if any, by the applicant or any member of its corporate structure, for unpaid fees, penalties, or interest.

(b) *Submission of applications.* Application forms and accompanying submissions shall be filed in accordance with the filing instructions included on the application form.

(c) *Availability of forms.* Any person may obtain a copy of any form prescribed for use in paragraph (a) of this section on the Commission's website, <https://www.drbc.gov>.

- 7. Revise § 401.41 to read as follows:

**§ 401.41 Limitation of approval; dormant applications.**

(a) *Extension (no material change)—(1) Term of approval; extension request.* For any Commission approval not assigned an expiration date, the Commission's ap-

proval shall expire five years from the approval date unless prior thereto the Commission extends the approval for an additional period of up to five years, based upon a written request from the project sponsor accompanied by supporting documentation demonstrating that the following criteria have been met:

(i) No material changes to the project as approved are proposed;

(ii) The condition of the project site has not changed in a manner important to determining whether the project would substantially impair or conflict with the Commission's Comprehensive Plan;

(iii) The Commission's Comprehensive Plan has not changed in a manner important to determining whether the project would substantially impair or conflict with the Comprehensive Plan; and

(iv) The project sponsor is diligently pursuing the project as shown by its planning, construction or project operational activities, its project expenditures, its efforts to secure government approvals necessary for the project, or its active participation in appeals of government decisions on its applications for government approvals. The project sponsor is not required by this paragraph (a)(1)(iv) to conduct activities that it is not legally authorized to conduct or that it demonstrates would be unreasonable for it to conduct before obtaining all necessary final government approvals.

(2) *Denial of extension request.* Otherwise, the extension request shall be denied, and the project sponsor may apply for renewal of its approval under paragraph (b) of this section by a date to be established by the Commission. If the Commission denies the request for an extension pursuant to this section, the docket approval shall not be administratively continued automatically pursuant to paragraph (a)(5) of this section. The Commission may, however, in its discretion, administratively extend the docket approval in whole or in part for a period ending on or before the date on which the Commission renders a final decision on the sponsor's re-application under paragraph (b) of this section.

(3) *Public notice.* The Commission will publish notice of receipt of a request for extension under this paragraph (a) and will provide notice at least ten days prior to the date of a business meeting at which the Commissioners may act on such request.

(4) *Public comment.* An opportunity for written comment of at least ten days' length will be provided on a request for extension. The project sponsor will be afforded an opportunity to respond in writing to the comments received. A public hearing will be provided if three or more Commission members ask the Executive Director in writing to schedule one or vote during a public meeting of the Commission to provide one.

(5) *Administrative continuance.* A docket that is the subject of a request for extension under paragraph (a) of this section filed at least 90 days before the docket's expiration shall be administratively continued pending the Commission's final action on the request in the event that such action occurs after the otherwise effective date of termination under this section.

(6) *Extensions no longer needed.* If the activities authorized by a docket are limited to construction activities, an extension is no longer required once construction is complete; however, the expiration of the docket, including

any approved extension, does not eliminate ongoing docket obligations expressly identified as such in the docket approval.

(b) *Re-application (material change)*. If the Commission determines that the project sponsor has failed to demonstrate that no material changes to the project as approved are proposed and that the other criteria listed in paragraph (a)(1) of this section are satisfied, the project sponsor must apply for renewal and any necessary modification of its approval in accordance with the customary application procedure for any docket renewal or approval.

(c) *Automatic termination of application*. Any application that remains dormant (no proof of active pursuit of approvals) for a period of three years from date of receipt, shall be automatically terminated without further action of the Commission. Any renewed activity following that date will require submission of a new application.

8. In § 401.42, revise paragraph (e) to read as follows:

§ 401.42 One Permit Program.

\* \* \* \* \*

(e) *Comprehensive Plan projects*. Articles 11 and 13 of the Compact require certain projects to be included in the Comprehensive Plan. To add a project not yet included in the Comprehensive Plan, the project sponsor shall submit a separate application to the Commission. If following its review and public hearing the Commission approves the addition of the project to the Comprehensive Plan, the Commission's approval will include such project requirements as are necessary under the Compact and this part. All other project approvals that may be required from the Signatory Party Agency or the Commission under regulatory programs administered pursuant to this section may be issued through the One Permit Program. An application for renewal or modification of a project in the Comprehensive Plan that does not materially change the project may be submitted only to the Signatory Party Agency unless otherwise specified in the Administrative Agreement.

\* \* \* \* \*

9. In § 401.43:

a. Revise paragraphs (b)(1)(ii) and (b)(4)(ii) through (iv); and

b. In paragraph (e), in table 3, remove the entries for "Name change" and "Change of Ownership" and add an entry at the end of the table for "Name Change or Change of Ownership" in their place.

The revisions and addition read as follows:

§ 401.43 Regulatory program fees.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(ii) *Project requiring inclusion in the comprehensive plan*. Any project that in accordance with section 11 or section 13.1 of the Delaware River Basin Compact and DRBC regulations must be added to the Comprehensive Plan (also, "Plan"). In addition to any new project required to be included in the Plan, such projects include existing projects that in accordance with section 13.1 of the Compact are required to be included in the Plan and which were not previously added to the Plan. Any existing project that is materially changed from the project as described in the Plan shall be deemed to be a new and different project for purposes of this section.

\* \* \* \* \*

(4) \* \* \*

(ii) *Late filed renewal application*. Any renewal application submitted fewer than 180 calendar days in advance of the expiration date or after such other date specified in the docket or permit or letter of the Executive Director for filing a renewal application shall be subject to a late filed renewal application charge in excess of the otherwise applicable fee.

(iii) *Modification of a DRBC approval*. Following Commission action on a project, any material change to the project as approved shall require an additional application and accompanying fee. Such fee shall be calculated in accordance with paragraph (e) of this section and may be subject to an alternative review fee in accordance with paragraph (b)(3) of this section.

(iv) *Name change or change of ownership*. Each project with a docket or permit issued by the DRBC will be charged an administrative fee as set forth in paragraph (e) of this section if it undergoes a change in name or a "change in ownership" as that term is defined at § 420.31(e)(2) of this subchapter.

\* \* \* \* \*

(e) \* \* \*

Table 3 to § 401.43—Additional Fees

Proposed action	Fee	Fee maximum
* * * * *	* * *	*
Name Change or Change of Ownership	\$1,917 <sup>1</sup>	

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

Subpart H—Public Access to Records and Information

10. Remove the authority citation to subpart H.

11. In § 401.103, revise paragraph (a) to read as follows:

§ 401.103 Request for existing records.

(a) Any written request to the Commission for existing records not prepared for routine distribution to the public shall be deemed to be a request for records pursuant to the provisions of this part, whether or not the provisions of this part are mentioned in the request, and shall be governed by the provisions of this part.

\* \* \* \* \*

12. Revise § 401.104 to read as follows:

§ 401.104 Preparation of new records.

The provisions of this part apply only to existing records that are reasonably described in a request filed with the Commission pursuant to the procedures herein established. The Commission shall not be required to prepare new records in order to respond to a request for information.

13. In § 401.105, paragraph (b) is revised to read as follows:

§ 401.105 Indexes of certain records.

\* \* \* \* \*

(b) A copy of each such index is available at cost of duplication from the Records Access Officer.

14. Revise § 401.106 to read as follows:

§ 401.106 Records Access Officer.

The Executive Director shall designate a Commission employee as the Records Access Officer. The Records Access Officer shall be responsible for Commission compliance with the provisions of this part. All requests for agency records shall be sent to the Records Access Officer in a manner consistent with § 401.108(a).

15. In § 401.108, revise paragraphs (a), (b)(1), (c), and (d) to read as follows:

§ 401.108 Filing a request for records.

(a) All requests for Commission records shall be submitted to the Records Access Officer on such forms as the Executive Director may prescribe, which shall be available on the Commission's website, https://www.drbc.gov, or by written request to the Commission, 25 Cosey Road, West Trenton, NJ 08628.

(b) \* \* \*

(1) If the description is insufficient to locate the records requested, the Records Access Officer will so notify the person making the request and indicate the additional information needed to identify the records requested.

\* \* \* \* \*

(c) Upon receipt of a request for records, the Records Access Officer shall enter it in a public log (which entry may consist of a copy of the request). The log shall state the date and time received, the name and address of the person making the request, the nature of the records requested, the action taken on the request, the date of the determination letter sent pursuant to § 401.109(b), the date(s) any records are subsequently furnished, the number of staff-hours and grade levels of persons who spent time responding to the request, and the payment requested and received.

(d) A denial of a request for records, in whole or in part, shall be signed by the Records Access Officer. The name and title or position of each person who participated in the denial of a request for records shall be set forth in the letter denying the request. This requirement may be met by attaching a list of such individuals to the letter.

16. In § 401.109, revise paragraphs (a), (b) introductory text, and (c) through (e) to read as follows:

§ 401.109 Time limitations.

(a) All time limitations established pursuant to this section shall begin as of the time at which a request for records is logged in by the Records Access Officer pursuant to § 401.108(c). An oral request for records shall not begin any time requirement. A written request for records sent elsewhere within the Commission shall not begin any time requirement until it is redirected to the Records Access Officer and is logged in accordance with § 401.108(c). A request that is expected to involve fees in excess of \$50.00 will not be deemed received until the requester is promptly notified and agrees to bear the cost or has so indicated on the initial request.

(b) Within 10 working days (excepting Saturdays, Sundays, and legal public holidays) after a request for records is logged by the Records Access Officer, the record shall be furnished or a letter shall be sent to the person making the request determining whether, or the extent to which, the Commission will comply with the request, and, if any records are denied, the reasons therefor.

\* \* \* \* \*

(c) If any record is denied, the letter shall state the right of the person requesting such records to appeal any adverse determination to the Executive Director of the Commission. Such an appeal shall be filed within 30 days from receipt of the Records Access Officer's determination denying the requested information (where the entire request has been denied), or from the receipt of any information made available pursuant to the request (where the request has been denied in part). Within 20 working days (excepting Saturdays, Sundays, and legal public holidays) after receipt of any appeal, or any authorized extension, the Executive Director or the Executive Director's designee shall make a determination and notify the appellant of such determination. If the appeal is decided in favor of the appellant the requested information shall be promptly supplied as provided in this part. If on appeal the denial of the request for records is upheld in whole or in part, the appellant shall be entitled to appeal to the Commission at its regular meeting. In the event that the Commission confirms the Executive Director's denial the appellant shall be notified of the provisions for judicial review.

(d) If the request for records will result in a fee of more than \$25, determination letter under paragraph (b) of this section shall specify or estimate the fee involved and may require prepayment, as well as payment of any amount not yet received as a result of any previous request, before the records are made available. If the fee is less than \$25, prepayment shall not be required unless payment has not yet been received for records disclosed as a result of a previous request.

(e) Whenever possible, the determination letter required under paragraph (b) of this section, relating to a request for records that involves a fee of less than \$25.00, shall be accompanied by the requested records. Where this is not possible, the records shall be forwarded as soon as possible thereafter. For requests for records involving a fee of more than \$25.00, the records shall be forwarded as soon as possible after receipt of payment.

17. In § 401.110, revise paragraphs (a)(1)(i)(A) and (c) to read as follows:

§ 401.110 Fees.

(a) \* \* \*

(1) \* \* \*

(i) \* \* \*

(A) Processing requests for records;

\* \* \* \* \*

(c) Payment shall be made by check or money order payable to "Delaware River Basin Commission" and shall be sent to the Records Access Officer.

18. Revise § 401.113 to read as follows:

§ 401.113 Segregable materials.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this part, except as provided in § 401.102.

19. Revise § 401.115 to read as follows:

§ 401.115 Discretionary disclosure by the Executive Director.

(a) The Executive Director may exercise discretion to disclose part or all of any Commission record that is otherwise exempt from disclosure pursuant to this part whenever the Executive Director determines that such disclosure is in the public interest, will promote the

objectives of the Commission, and is consistent with the rights of individuals to privacy, the property rights of persons in trade secrets, and the need for the Commission to promote frank internal policy deliberations and to pursue its regulatory activities without disruption.

(b) Discretionary disclosure of a record pursuant to this section shall invoke the requirement that the record shall be disclosed to any person who requests it pursuant to § 401.108, but shall not set a precedent for discretionary disclosure of any similar or related record and shall not obligate the Executive Director to disclose any other record that is exempt from disclosure.

#### Subpart I—General Provisions

20. In § 401.121, redesignate paragraph (e) as paragraph (f) and add new paragraph (e) to read as follows:

##### § 401.121 Definitions.

\* \* \* \* \*

(e) *Material change* shall mean a change to a project previously approved by the Commission that is important in determining whether the project would substantially impair or conflict with the Commission's comprehensive plan.

\* \* \* \* \*

PAMELA M. BUSH,  
Secretary

**Fiscal Note:** Fiscal Note 68-62 remains valid for the final adoption of the subject regulations.

#### Annex A

### TITLE 25. ENVIRONMENTAL PROTECTION

#### PART V. DELAWARE RIVER BASIN COMMISSION

#### CHAPTER 901. GENERAL PROVISIONS

##### § 901.1. Rules of Practice and Procedure.

The rules of practice and procedure as set forth in 18 CFR Part 401 (2024) are hereby incorporated by reference and made a part of this title.

##### § 901.2. Comprehensive Plan and water quality.

The Comprehensive Plan regulations as set forth in 18 CFR Part 401, Subpart A (2024) and the Water Code and Water Quality Regulations as set forth in 18 CFR Part 410 (2023), are hereby incorporated by reference and made a part of this title.

[Pa.B. Doc. No. 24-1015. Filed for public inspection July 19, 2024, 9:00 a.m.]

## Title 37—LAW

### OFFICE OF ATTORNEY GENERAL

#### [ 37 PA. CODE CH. 301 ]

#### Automotive Industry Trade Practices

The Office of Attorney General (OAG), through its Public Protection Division, amends 37 Pa. Code Chapter 301 (relating to automotive industry trade practices) by amending §§ 301.1, 301.2 and 301.4 (relating to definitions; advertising and sales presentation requirements; and general provisions—motor vehicle dealer) to read as set forth in Annex A.

#### A. Effective Date

This final-form rulemaking will be effective 30 days after publication in the *Pennsylvania Bulletin*.

#### B. Contact Person

For further information on this final-form rulemaking, the primary contact is John Abel, Chief Deputy Attorney General, Bureau of Consumer Protection and the secondary contact is Mark Wolfe, Deputy Attorney General, Bureau of Consumer Protection, Office of Attorney General, Strawberry Square, 15th Floor, Harrisburg, PA 17120, (717) 787-9707.

#### C. Statutory Authority

This final-form rulemaking is being made under the authority of section 3.1 of the Unfair Trade Practices and Consumer Protection Law (act) (73 P.S. § 201-3.1), regarding the statutory rulemaking authority of the OAG.

#### D. Purpose and Background

This final-form rulemaking is designed to improve, enhance and update the OAG's unfair or deceptive acts or practices regulations. The specific purpose of this final-form rulemaking is described in more detail under the summary of final-form rulemaking.

#### E. Summary of Final-Form Rulemaking

##### 1. Introduction

The OAG enforces and administers the act. The OAG has determined that it is necessary for the enforcement and the administration of the act to amend the existing automotive industry trade practices regulations to provide adequate protections to consumers regarding the inspection of motor vehicles and the written disclosure of certain attributes of a motor vehicle's roadworthiness.

##### 2. Policy and determination

The OAG has long taken the policy position that certain unfair or deceptive automotive industry market trade practices constitute unfair methods of competition and unfair or deceptive acts or practices in violation of the act.

Through the experience of investigation and litigation, the OAG has identified that motor vehicle dealers are increasingly utilizing electronic means to advertise the sale of particular motor vehicles and motor vehicle goods and services, a practice which is not explicitly captured in the automotive industry trade practices regulations' current definition of "advertisement." The OAG has further identified that the disclosures and inspections which motor vehicle dealers are currently required to perform are insufficient to fully inform consumers that they are purchasing motor vehicles bearing certain unsafe conditions. The OAG has determined that this final-form rulemaking under the act will remedy these vacuums under Commonwealth law.

##### 3. Automotive industry trade practices

The OAG has adopted the staff recommendation to make certain amendments to the Automotive Industry Trade Practices regulations in Chapter 301 (Auto Regulations). First, § 301.1 includes electronic means in the definition of "advertisement." Second, § 301.2(5) is amended to require that the disclosure of the enumerated conditions be provided in writing. Third, § 301.2(5.1) is created. Paragraph (5.1) directs that a motor vehicle dealer may not advertise or offer a motor vehicle for sale unless the selling motor vehicle dealer designates a certified inspection mechanic to inspect a motor vehicle not more than 30 days after it enters the motor vehicle

dealer's inventory for all conditions listed in § 301.2(5). Thereafter, if the motor vehicle accumulates 500 miles or more while in the inventory of the selling motor vehicle dealer, the dealer must inspect the motor vehicle for the conditions listed in § 301.2(5) not more than 30 days prior to sale, excluding the ability of the vehicle to pass a State inspection. This section does not apply to sales of motor vehicles between two motor vehicle dealers, the sales of motor vehicles under a duly authorized vehicle auction license, the sales of salvaged or nonrepairable motor vehicles bearing the applicable certificate, or the sales of motor vehicles which are located outside this Commonwealth during the entire time it is advertised or offered for sale.

Finally, § 301.4(9.1) clarifies that compliance with § 301.2(5) regarding written disclosures is still required notwithstanding any use of the term "AS IS" under § 301.4(9) regarding disclaiming warranty. The selling motor vehicle dealer must describe the vehicle as being sold "AS IS" and list in writing any conditions listed in § 301.2(5) that are present in the vehicle.

These amendments have been prepared in light of comments previously submitted by interested parties, the Pennsylvania Automotive Association and the Independent Automobile Dealers Association of Pennsylvania.

#### 4. Basic policy choice

"The operative provision of the Unfair Trade Practices and Consumer Protection Law provides: 'Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce...are hereby declared unlawful.'" 73 P.S. § 201-3 (Emphasis omitted). *Gabriel v. O'Hara*, 368 Pa. Super. 383, 391, 534 A.2d 488, 492 (1987). The operative provision of the act provides the Legislature's basic policy choice which guides the OAG's rulemaking. The OAG proposes that Chapter 301 be amended to read as set forth in Annex A.

#### F. Paperwork

Generally, this final-form rulemaking will not increase paperwork and will not create new paperwork requirements. This final-form rulemaking will have a de minimis impact on paperwork for class action representatives purporting to settle and release OAG claims under the act.

#### G. Benefits, Costs and Compliance

Through this final-form rulemaking, consumers will be further protected from unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce by unscrupulous businesses. The clear articulation of this unfair or deceptive trade practices regulation will make the regulation easier to understand by the public and will facilitate compliance.

This final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The OAG estimates that the cost of compliance with this final-form rulemaking may average \$540 annually plus \$41 per vehicle entering the inventory of a dealership, subject to several caveats, including whether the particular motor vehicle dealership already subjects all vehicles entering their inventory to a safety inspection.

#### H. Sunset Review

The OAG is not establishing a sunset date for these regulations because they are needed for the OAG to carry out its statutory authority and because the OAG will periodically review these regulations for their effectiveness.

#### I. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on April 28, 2023, the OAG submitted a copy of the notice of proposed rulemaking, published at 53 Pa.B. 2590 (May 13, 2023) and a copy of a Regulatory Analysis Form (RAF) to the Independent Regulatory Review Commission (IRRC) and to the chairperson of the Judiciary Committee of the Senate and to the chairperson of the Judiciary Committee of the House of Representatives.

Under section 5(c) of the Regulatory Review Act, the OAG is required to submit to IRRC and the Senate and House committees copies of comments received during the public comment period, as well as other documents when requested. The OAG received and reviewed a number of public comments following its submission of its proposed rulemaking, as well as comments from IRRC and Representative Eric Nelson, MS, CSP. These comments have been considered and responded to by means of the Comment and Response Document included with the Regulatory Analysis Form (RAF) and summarized as follows. The Comment and Response Document is available to be viewed on IRRC's web site at <http://www.irrc.state.pa.us> by searching for Regulation # 59-001 or IRRC # 3373. Further, the OAG held a public hearing on December 13, 2023, at which it heard testimony from the Pennsylvania Automotive Association, both regarding the proposed rulemaking in general and in response to certain questions posed by the OAG in the *Pennsylvania Bulletin*.

Following the initial submission of this final-form rulemaking to IRRC and the Senate and House committees, on February 6, 2024, the OAG received an additional comment and suggestion from the Pennsylvania Automotive Association. Concluding that this suggested, slight modification would still effectuate the goals of this final-form rulemaking effort, the OAG temporarily withdrew its final-form rulemaking on February 23, 2024, to incorporate it into the rulemaking.

The OAG resubmitted this final-form rulemaking to IRRC and the Senate and House committees on March 19, 2024. Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on May 14, 2024, the final-form rulemaking was deemed approved by the Senate and House committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on May 15, 2024, and approved the final-form rulemaking.

#### J. Summary of Comments and Responses

The OAG considered each of the comments it received on its proposed rulemaking and identified 17 discrete questions, concerns and requests for clarification to which it has responded in its Comment and Response Document. These comments and the OAG's responses, including changes made in this final-form rulemaking, are summarized in this section.

IRRC requested that certain additional information be added to the RAF accompanying the rulemaking.

First, IRRC requested that the OAG quantify the number and type of consumer complaints it has received from consumers over the last 5 years and to explain how this final-form rulemaking will help prevent similar problems from occurring. From January 1, 2019, through December 18, 2023, the OAG's Bureau of Consumer Protection received more than 150,500 written consumer complaints. Over 22,000 (approximately 15%) have concerned motor vehicles, representing one of the most common categories of consumer complaint year to year. Of

these motor vehicle complaints, the OAG has determined that the issues intended to be addressed by this final-form rulemaking were presented in complaint narratives at least 6,500 times. The OAG anticipates that this final-form rulemaking will address these problems in two primary ways. First, a consumer may be less inclined to purchase a vehicle if they are shown in writing that a vehicle bears certain conditions which render it not roadworthy. Second, this final-form rulemaking will allow the OAG to more effectively enforce the act against the fraction of unscrupulous motor vehicle dealers who, under the regulations as they are presently written, may be able to skirt the law by claiming that certain unsafe conditions in a motor vehicle were disclosed verbally and, at any rate, were sold "AS-IS." In requiring these disclosures to be made in writing, the OAG will be on firmer footing should it be necessary to bring a proceeding to enjoin unfair or deceptive trade practices.

Second, IRRC requested that the OAG more concretely identify the types and numbers of persons, businesses (including small businesses) and organizations which will be affected or required to comply with the regulation and the possible costs associated with compliance. Using data from the United States Census Bureau and the State Board of Vehicle Manufacturers, Dealers and Salespersons, the OAG estimates that approximately 150 motor vehicle manufacturers, 6,000 motor vehicle dealers and over 10,000 motor vehicle repair shops constitute the "regulated community" covered by the Auto Regulations. The change in this final-form rulemaking applicable to all of these entities, amending the definition of "advertisement" is not expected to impose any significant costs. The bulk of this final-form rulemaking applies only to motor vehicle dealers. As previously set forth and in the OAG's RAF, the annual cost of compliance for a motor vehicle dealer may be \$540 to inspect the limited class of vehicles which will accumulate 500 miles while in their inventory for certain conditions and \$41 to subject each vehicle entering their inventory to a full safety inspection. However, this figure is subject to several caveats, including the size of the particular dealership and whether it already adheres to the common industry practice of inspecting all vehicles which come into their inventory. As a final note, the OAG estimates that approximately 95% of affected motor vehicle dealers would be considered "small businesses" under Federal and State guidelines. Per the United States Small Business Administration, 99.9% of American businesses are small businesses. The OAG expects that used motor vehicle dealers likely align with this figure, and new motor vehicle dealers are both fewer and less likely to be small businesses, and thus only reduce our estimated percentage slightly.

IRRC also asked certain clarifying questions. To address each question in turn: (1) If an auto dealer lists all of its inventory on its web site, that action would be considered an advertisement and therefore subject the auto dealer to all applicable requirements of Chapter 301. (2) There is no difference between a customer that finds an inventory list on a web site by means of their own research and a customer that is persuaded to view a web site through another advertisement, insofar as the Auto Regulations are concerned. (3) Out-of-State businesses have the same obligations as a business based in this Commonwealth in relation to the Auto Regulations, except where explicitly exempted therefrom, and the OAG has long relied on the act to enforce compliance upon all businesses which allegedly violate the act, wherever they are located.

IRRC further requested that the OAG explain how it will implement and administer the revised definition of "advertisement." In short, the amended definition of "advertisement" is merely intended to modernize the regulations and make explicit what had always been considered to be the case, that is that online advertisements fall within the definition of "advertisement" as presently written.

The OAG received additional comments from IRRC and the public which led directly to changes from the proposed rulemaking to this final-form rulemaking.

First, the OAG did not intend for the change of title from "Bureau of Consumer Protection" to "Unfair Trade Practices" to be included in the proposed rulemaking. The existing title of Part V is retained in this final-form rulemaking.

Second, the OAG deletes the proposed addition to § 301.2(5) in this final-form rulemaking. This would have required the advertiser or seller of a motor vehicle to disclose in writing "any other material condition which substantially impairs vehicle use or safety."

Third, the OAG takes several steps to make paragraph (5.1) clearer in both what is expected of motor vehicle dealers and to which kinds of transactions it is intended to apply. As a threshold matter, the OAG notes that it intends that this final-form rulemaking use the term "inspect" in its ordinary meaning (that is, to take a careful look) and not, in itself, to refer to a PennDOT safety inspection. However, since one of the conditions which would render a motor vehicle not to be unroadworthy is the inability to pass State inspection, this would be the practical effect.

Fourth, the OAG modifies the "500 mile" provision of paragraph (5.1) from a requirement that the motor vehicle dealer inspect vehicles in their inventory for certain conditions within 30 days after each time those vehicles accumulate 500 miles while in the dealer's inventory. In consideration of certain concerns with the practical implementation of this provision, it now requires the selling motor vehicle dealer to inspect the vehicle for certain conditions not more than 30 days prior to the sale of a vehicle which has accumulated more than 500 miles while in the dealer's inventory.

To better set forth the OAG's intent under paragraph (5.1), it is split into several subdivisions itself. Paragraph (5.1)(i)(A) addresses inspection upon a motor vehicle's entry into inventory and requires a certified inspection mechanic designated by the selling motor vehicle dealer to inspect the motor vehicle for "all conditions listed in paragraph (5)," including the ability or inability to pass a State inspection. Paragraph (5.1)(i)(B) addresses the limited class of situations in which a motor vehicle accumulates 500 miles or more while in the selling motor vehicle dealer's inventory. It merely requires the selling motor vehicle dealer to inspect the motor vehicle "for all conditions listed in paragraph (5), except the condition listed in paragraph (5)(iii)." The remaining conditions for which a motor vehicle dealer would be required to take a careful look for should not take substantial time or labor to discover, and further do not require the services of a certified inspection mechanic.

On the applicability of paragraph (5.1), the OAG notes that the definition of "dealer or motor vehicle dealer" in § 301.1 the Auto Regulations only includes persons who are "engaged in the business of selling, offering for sale or negotiating the retail sale of motor vehicles." However, given concerns raised in the comments, the OAG makes a



further alteration to paragraph (5.1) to expressly exempt certain transactions. These exemptions are now contained in subparagraph (ii), which states that the section “shall not apply to the advertisement or offering for sale of a motor vehicle under any of the following circumstances: (A) To another motor vehicle dealer. (B) Pursuant to a duly authorized vehicle auction license. (C) Bearing a certificate of salvage or a nonrepairable vehicle certificate, or both. (D) Located outside this Commonwealth at all times during which it is advertised or offered for sale.” The OAG makes these exemptions in recognition that certain types of motor vehicle transactions already have effective self-imposed safeguards in place and are largely populated by buyers who are more sophisticated than average and therefore less likely to require the protections afforded by this final-form rulemaking. The change also addresses issues which may arise in both compliance with and enforcement of the Auto Regulations in the context of a limited class of out-of-State motor vehicle dealers using certain novel business methods.

The OAG thanks the public, IRRC and Representative Eric Nelson, MS, CSP for providing comments in response to the proposed rulemaking. As a direct result of these comments, the OAG was able to prepare this final-form rulemaking which it believes to be much improved and which will more effectively protect consumers from harm from certain unscrupulous actors in the advertisement and sale of motor vehicles.

K. Findings

The OAG finds:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202), referred to as the Commonwealth Documents Law, and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) A public comment period was provided as required by law and all comments received were considered in drafting this final-form rulemaking.

(3) This final-form rulemaking does not enlarge the purpose of the proposed rulemaking published at 53 Pa.B. 2590 (May 13, 2023).

(4) This final-form rulemaking has been submitted to and has been deemed approved by the chairperson of the Judiciary Committee of the Senate and the chairperson of the Judiciary Committee of the House of Representatives.

(5) This final-form rulemaking has been submitted to and has been approved as being in the public interest by IRRC.

(6) This final-form rulemaking has been approved for form and legality by the Office of Attorney General, Legal Review Section.

(7) The adoption of this regulation in the manner provided by this Order is necessary and appropriate for the administration and enforcement of the act.

L. Order

The OAG, acting under the authority of section 3.1 of the act, orders:

(1) The regulations of the OAG, 37 Pa. Code Chapter 301, are amended by amending §§ 301.1, 301.2 and 301.4 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(2) The OAG shall certify this final-form rulemaking and deposit it with the Legislative Reference Bureau as required by law.

(3) This final-form rulemaking shall take effect 30 days after publication in the *Pennsylvania Bulletin*.

MICHELLE A. HENRY,  
Attorney General

(Editor’s Note: See 54 Pa.B. 3134 (June 1, 2024) for IRRC’s approval order.)

**Fiscal Note:** Fiscal Note 59-001 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 37. LAW

PART V. BUREAU OF CONSUMER PROTECTION

CHAPTER 301. AUTOMOTIVE INDUSTRY TRADE PRACTICES

§ 301.1. Definitions.

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

*Advertisement*—An oral, written or graphic statement which offers for sale a particular motor vehicle or motor vehicle goods and services or which indicates the availability of a motor vehicle or motor vehicle goods and services, including a statement or representations made in a newspaper, periodical, pamphlet, circular, other publication or on radio or television; contained in a notice, handbill, sign, billboard, poster, bill, catalog or letter; placed on a web site, in a mobile application, on a social media outlet or on any other electronic platform; or printed on or contained in a tag or label which is attached to merchandise.

\* \* \* \* \*

§ 301.2. Advertising and sales presentation requirements.

With respect to an advertisement or sales presentation offering or making available for sale a new or used motor vehicle or maintenance service or repair on a new or used motor vehicle, the following will be considered unfair methods of competition and unfair or deceptive acts or practices:

\* \* \* \* \*

(5) The representation in an advertisement or sales presentation that a motor vehicle or motor vehicle goods or services are of a particular style, model, standard, quality or grade if they are of another or if the representation conflicts with a written notice or disclosure required under this chapter. For the purposes of this chapter, a motor vehicle which is offered for sale is represented to be roadworthy, and the advertiser or seller shall disclose in writing prior to sale the following conditions if the advertiser or seller knows or should know that the conditions exist in the motor vehicle:

- (i) Frame bent, cracked or twisted.
- (ii) Engine block or head cracked.
- (iii) Vehicle unable to pass State inspection.
- (iv) Transmission damaged, defective or so deteriorated as to require replacement.
- (v) Vehicle flood damaged.
- (vi) Differential damaged, defective or so deteriorated as to require replacement.

(5.1)(i) The advertisement or offering of a motor vehicle for sale unless:

(A) A certified inspection mechanic designated by the selling motor vehicle dealer has inspected the motor vehicle not more than 30 days after the motor vehicle comes into the inventory of the selling motor vehicle dealer or advertiser for all conditions listed in paragraph (5); and

(B) The selling motor vehicle dealer has inspected the motor vehicle not more than 30 days prior to the sale if the motor vehicle accumulates 500 or more miles while in the inventory of the selling motor vehicle dealer or advertiser for all conditions listed in paragraph (5), except the condition listed in paragraph (5)(iii).

(ii) This section shall not apply to the advertisement or offering for sale of a motor vehicle under any of the following circumstances:

(A) To another motor vehicle dealer.

(B) Pursuant to a duly authorized vehicle auction license.

(C) Bearing a certificate of salvage or a nonrepairable vehicle certificate, or both.

(D) Located outside this Commonwealth at all times during which it is advertised or offered for sale.

(6) The making of a representation or statement of a fact in an advertisement or sales presentation if the advertiser or salesperson knows or should know that the representation or statement is false and misleading or if the advertiser or salesperson does not have sufficient

information upon which a reasonable belief in the truth of the representation could be based.

\* \* \* \* \*

**§ 301.4. General provisions—motor vehicle dealer.**

(a) With regard to a motor vehicle dealer, the following will be considered unfair methods of competition and unfair or deceptive acts or practices:

\* \* \* \* \*

(9.1) In an instance where a motor vehicle is not roadworthy at the time the motor vehicle is offered for sale, using the term “AS-IS” as set forth in this section does not satisfy the written disclosure requirement in § 301.2(5) (relating to advertising and sales presentation requirements). The written contract, required under subsection (a)(1) for the sale of a motor vehicle, must instead include, in a clear and conspicuous manner on the face of the document, information that the motor vehicle is sold “AS-IS” and a list of the conditions, as set forth in § 301.2(5) of this chapter, present in the motor vehicle.

(10) Failing to forward to the proper Commonwealth agency amounts and forms tendered by a purchaser, such as sales tax and transfer and registration fees, within the time prescribed by law.

(b) If the sales presentation and agreement of sale has been effected in a language other than English, the written information, notice and disclosures required by subsection (a) shall be given in the principal language in which the sale was transacted as well as English.

[Pa.B. Doc. No. 24-1016. Filed for public inspection July 19, 2024, 9:00 a.m.]

\_\_\_\_\_