

**Susquehanna River Basin Commission**  
**Proposed Rulemaking – September 2016**

SUPPLEMENTARY INFORMATION:

Since the subpart for the registration of grandfathered projects is a new addition to the regulations, the Commission believes that an explanation for the rationale for the proposed rules relating to the registration of grandfathered projects would be helpful for the public.

**Sources and Activities That Predate Regulations**

The Commission’s regulations provide that certain withdrawals and pre-compact consumptive uses that are in excess of the Commission’s regulatory thresholds do not require Commission approval under § 806.4(a) if those sources predated regulations, provided there is no environmental harm. This exemption from review and approval is commonly referred to as “grandfathering.” Generally, pre-compact consumptive uses initiated prior to January 23, 1971, groundwater withdrawals initiated prior to July 13, 1978, and surface water withdrawals initiated prior to November 11, 1995, are considered “grandfathered” and do not need to apply for a regulatory approval by the Commission. The Commission’s current regulations provide several mechanisms by which a grandfathered project must apply for regulatory approval, including a change in the nature of the use, change of ownership, an increase in the quantity of the withdrawal or use, or adding a new source.

However, in enacting the Compact that created the Commission, Congress and the participating states declared that...

*the conservation, utilization, development, management and control of the water resources of the Susquehanna River Basin **under comprehensive multiple purpose planning** will produce the greatest benefits and produce the most efficient service in the public interest.* Compact Preamble Sect 1 – emphasis added.

The Commission’s “Comprehensive Plan for the Water Resources of the Susquehanna Basin” contains an objective to wisely manage the water resources of the Basin to assure short-term resource availability and long-term balance between healthy ecosystems and economic viability (SRBC Comprehensive Plan, 2013). The desired result of one of the key water resource needs, identified as Sustainable Water Development, is to regulate and plan for water resources development in a manner that maintains economic viability, protects instream users, and ensures ecological diversity; and meets immediate and future needs of the people of the Basin for domestic,

municipal, commercial, agricultural and industrial water supply and recreational activities.

As part of this objective, the Commission recently completed a major effort to characterize water use and availability for the Susquehanna River Basin. The *Cumulative Water Use and Availability Study for the Susquehanna River Basin* (CWUAS) represents the most comprehensive analysis to date regarding water availability. The Commission is increasingly concerned about the availability of water to meet immediate and future needs as water is needed to satisfy the continuing prospect of growing population and increasing demands for drinking water, freshwater inflow to the Chesapeake Bay, power generation, industrial activity, commercial uses, recreation and ecological diversity. Water resources are neither limitless nor equally distributed across the basin, and in some areas the demand for and use of water resources may be approaching or exceeding the sustainable limit.

As part of the CWUAS, the Commission developed a comprehensive water use database by integrating water use records from the Commission, and its member jurisdictions of New York, Pennsylvania, and Maryland in an unprecedented compilation effort. Compiling accurate water use data is a common challenge for water resource agencies, even recognizing advances in accessing data records through electronic reporting for both the Commission and our member states. The study shows water availability in nearly 1 in 10 watersheds is sufficiently compromised to warrant additional analysis and improved knowledge of patterns of withdrawal and use.

The CWUAS also reveals the limitations of the currently available water use data. While these data include records of regulated public water supply withdrawals for all states, withdrawals for the remaining variety of self-supplied uses are commonly lacking with the exception of those projects regulated by the Commission. Coverage for unregulated withdrawals, including grandfathered projects, is provided through state registration programs and varies widely in data quality and completeness among the member jurisdictions. For the most part, data for consumptive use not regulated by the Commission are absent altogether.

At the time of its formation and adoption of its initial regulations, neither the Commission nor its member jurisdictions conducted any inventory of existing water users, their sources or the quantity of existing water use. Grandfathered water withdrawals and use are clearly factors in the determination of sustainable water availability. The Commission's analysis estimates a total of 760 grandfathered projects with an estimated water use of 970 million gallons per day, which is approximately equal to the total existing regulated consumptive use approved by the Commission.

With such large water quantities in question, it is obvious that some of the grandfathered projects are among the largest users of basin waters. Therefore, appropriate regulation and comprehensive planning for the use of the water resources are seriously hampered without accurate and reliable data regarding the quantity of the grandfathered uses and withdrawals. This is even more critical for areas identified as potentially stressed, water challenged or otherwise having limited water availability.

While our member jurisdictions have made efforts to collect water withdrawal data, and the Commission uses that data as available, our member jurisdictions do not comprehensively register consumptive water use. In addition, they do not have comprehensive historic data for legacy water users to effectively determine the quantity of water withdrawn prior to 1995 or the water consumptively used prior to 1971. This lack of comprehensive and reliable data hampers the Commission by creating significant gaps in our knowledge and data of water withdrawals and water use in the basin, which in turn hinders our ability to comprehensively manage the water resources of the basin and fulfill our regulatory and planning functions.

It is, therefore, appropriate for the Commission to act to address this knowledge gap as no other jurisdiction is solely capable of insuring the effectuation of the comprehensive plan. In these regulations the Commission is proposing a mechanism for acquiring accurate water use and withdrawal information for grandfathered projects through a required registration program. It is imperative that we have no misrepresentations about the sustainability of our water supply so that sound water resource decisions can be made for the benefit of all the basin's users. Grandfathered uses and withdrawals represent a longstanding gap in knowledge and, as such, have increasingly become a water management issue in the Commission's regulation and planning for water resources development.

Registration of grandfathered uses and withdrawals will definitively answer questions about the number of grandfathered projects, the locations of their sources, how much water they are withdrawing and from which water bodies and aquifers, and how much of that water they are using consumptively. In short, it will allow water resource decisions to be made with more certainty and confidence. The registration requirements proposed do not require review and approval of dockets under § 806.4 and do not add any new pathways for a grandfathered project to be subject to review and approval if it registers in accordance with the proposed regulation.

The Commission expects the registration of grandfathered uses will achieve a number of crucial goals to allow better management of basin resources. The Commission will receive more consistent and complete data than what can be obtained

through voluntary registration programs, such as peak quantities, patterns of usage and accurate locational data for withdrawals and uses. The data required for registration is more easily attainable data from the most recent five years, as opposed to historical data. This data will be more recent and based on more accurate and reliable metering and measurement devices. Registration will eliminate legacy issues by closing the knowledge gap about grandfathered withdrawals from and usage of the water resources of the basin. The information obtained through the registration will allow the Commission staff to conduct thorough water availability analyses.

Registration will also provide more direct benefits to the grandfathered projects by providing the Commission with complete, contemporary withdrawal and usage data that can be utilized by the Commission in evaluating new withdrawals or consumptive uses in the watersheds where the grandfathered projects operate and allow the Commission to better prevent impacts and interference to the operations of grandfathered projects by newer projects. Registration will also provide unambiguous determinations concerning pre-regulation quantities of withdrawals and consumptive uses in the basin for both project sponsors and the Commission, providing much more certainty with regards to how a grandfathered project may operate and retain their existing exempt status and avoid the full project review and approval process. As such, project sponsors can plan and anticipate when they might fall under the Commission's jurisdiction and avoid situations where they unknowingly could fall into noncompliance, as currently happens.

Registration also should provide for ongoing information concerning contemporary water withdrawals and uses at grandfathered projects, to meet Commission management goals of the Comprehensive Plan, including:

- ⊙ Supporting water conservation measures through monitoring and reporting data;
- ⊙ Making informed regulatory decisions about cumulative effect on other uses/ withdrawals, including analyses for low flow protection (passby flows) and consumptive use mitigation;
- ⊙ Projecting future water availability to support and inform development decisions, including siting of new facilities critical for water supply, energy development and industrial needs; and
- ⊙ Identifying critical water planning areas where potential shortages due to drought are projected or intense competition among water users exists.

Registration of grandfathered projects allows the Commission to continue to allow those projects to receive the exemption from the Commission's review and approval under § 806.4 but also fulfills the Commission's need to have accurate, current

and reliable data on the amount of the water withdrawals and consumptive use of grandfathered projects to use in the Commission's management decisions for the water resources of the basin. Registration is a one-time event that allows a grandfathered project to continue to operate under the exemption from the Commission's regulations for review and approval of projects, and the only ongoing obligation of project registration is to periodically report withdrawal and usage data. Registration is not review and approval of the project and the proposed rulemaking does not eliminate the grandfathering exemption for projects that register. This means a grandfathered project will not need to meet the requirements and standards set forth in part 806, subparts A through D, which include making an application to Commission, conducting an aquifer test for groundwater withdrawals, evaluation for the sustainability of water withdrawals, evaluation of impact on surface water features, wetlands, other water supplies and wells, establishment of passby flows to protect surface waters, imposition of mitigation for withdrawals or consumptive use, or imposition of conditions or limits on the grandfathered withdrawal or consumptive use. In addition, the Commission has designed the registration to be as simple and accessible as possible to greatly minimize costs, and/or eliminate the need for a grandfathered project to engage a consultant to complete the registration process.

#### **New subpart E and revisions to 18 CFR § 806.4 –Registration of Grandfathered Projects.**

New subpart E sets forth the rules related to registration of grandfathered projects.

Section 806.40 defines the grandfathered projects within the scope of the regulations and registration requirement.

Section 806.41 provides that grandfathered projects must register within a two-year window or they become subject to review and approval by the Commission in accordance with the Commission's project review regulations and standards. The proposal also contains corresponding changes in § 806.4(a)(1)(iii) and (a)(2)(iv) to clearly provide when a project with some grandfathered aspect or element is subject to review and approval.

The proposed regulations in §§ 806.40(b) and 806.41(c) do not protect grandfathered projects that can be shown to have clearly lost grandfathered status under the regulations in effect at the time the relevant action took place. For example, a grandfathered project that underwent a change of ownership, but did not seek review and approval as required by the §§ 806.4 and 806.6, is not eligible to register and will be required to submit an application for review and approval of the project.

Other projects that have a grandfathered aspect, but that do not withdraw or use water at a jurisdictional threshold to qualify as a grandfathered project under § 806.40, are not eligible to register and will be subject to review and approval if those projects ever withdraw or consumptively use water above the jurisdictional thresholds, pursuant to §§ 806.4(a)(1)(iii)(B), 806.4(a)(2)(iv)(B), and 806.40(c).

Paragraph 806.41(e) provides that the Commission may establish fees in accordance with § 806.35. The Commission will establish any registration fee simultaneously at the time of the adoption of a final rule. Because the amount of any fee will likely be of interest to the public, the Commission, in conjunction with this proposed rulemaking, is proposing a staggered fee for registration. Section 806.41(a) establishes a two-year window during which grandfathered projects must register.

The Commission proposes that project sponsors that submit their registration within the first 6 months of that two-year registration period will pay no fee. During the next 6 months of the registration period, the fee will be \$500. During the last year of the registration period, the fee will be \$1,000. The registration fee is a one-time fee. By providing a no fee option during the first six months of the registration period, the Commission intends to provide relief for project sponsors that may be concerned about payment of a registration fee and to incentivize project sponsors to register sooner which will lead to an earlier submission of the data that the Commission is seeking through the registration process.

Section 806.42 outlines the primary information needs of the Commission for registration of withdrawals and consumptive uses. Because of the problems frequently encountered with producing reliable historical data, paragraph 806.42(a)(6) requests the most recent five years of quantity data for a project's withdrawals and consumptive use for at least the past five calendar years.

Section 806.43 provides that the Commission shall review the project's current metering and monitoring for its grandfathered withdrawals and consumptive uses. The Commission may require the project to follow a metering and monitoring plan to ensure that withdrawal and use quantities are accurate and reliable. This section also provides for ongoing reporting of quantities for grandfathered withdrawals and consumptive uses. The Commission may accept quantities reported under the requirements of the applicable member jurisdiction in lieu of additional monitoring data. This information is vital to the Commission in its ongoing evaluation of the water resources of the basin and will be used in revising the Commission's Comprehensive Plan, in its ongoing evaluation of cumulative water use in the basin and to provide data

to assess and evaluate impacts of new projects seeking review and approval by the Commission.

Sections 806.44 and 806.45 provide a process for the determination of grandfathered quantities for withdrawals and consumptive uses. This determination will be made by the Executive Director taking into account the most reliable data. An increase above this amount would require review and approval under §§ 806.4(a)(1)(iii)(A) and 806.4(a)(2)(iv)(A). A project will be able to appeal this determination to the Commission. Any hearing conducted will be done in accordance with the Commission's appeal procedures in Part 808.