Susquehanna River Basin Commission Comment Response Document Regarding Proposed Rule (Fed. Reg.) Final Rule Adopted June 2017 and Consumptive Use Mitigation Policy.

The Susquehanna River Basin Commission (Commission) published a notice of proposed rulemaking in the **Federal Register** on September 21, 2016 (81 FR 64812); *New York Register* on October 5, 2016; *Pennsylvania Bulletin* on October 8, 2016; and *Maryland Register* on October 14, 2016. The Commission convened four public hearings: November 3, 2016, in Harrisburg, Pennsylvania; November 9, 2016, in Binghamton, New York; November 10, 2016, in Williamsport, Pennsylvania; and December 8, 2016, in Annapolis, Maryland. A written comment period was held open through January 30, 2017, for the proposed rulemaking and January 6, 2017, for the CU Mitigation Policy, which was extended to be coterminous with the public comment period for the proposed rule.

Commission staff conducted two webinars on October 11 and 17, 2016, and also conducted an additional webinar for the membership of the PA Municipal Authorities Association (PMAA), the PA State Association of Township Supervisors, PA Municipal League, and PA Association of Boroughs Association on January 5, 2017.

The Commission received 14 public comments from:

Lindsay DiFrancesco
Kevin Sunday, PA Chamber of Business and Industry
Stephen Frank, NRG Energy
Thomas Sniscak, Hawke, McKeon and Sniscak, LLP
Stephen Matzura, Hanover Foods Corporation
Robert Judge, Chester Water Authority
Phyllis Chant, Glatfelter
Senators Scarnati and Yaw, Pennsylvania Senate
Borough of Wellsboro, PA
Tioga County Commissioners (PA)
Jim Welty, Marcellus Shale Coalition
Tim O'Donnell, Pennsylvania Waste Industries Association
Amy Wolfe, Trout Unlimited
Grant Gulibon, Pennsylvania Farm Bureau

The Commission also received public testimony from Trout Unlimited at its public hearing in Annapolis, Maryland.

The Commission has combined similar comments and has organized the comments and the Commission's responses generally by topic or section number of the proposed regulation. The comments and responses are below.

Registration of Grandfathered Projects

Subpart E, in general

Comment: It is only fair that grandfathered projects are held to the same standards and requirements as regulated projects.

Response: The regulations still preserve the exemption from project review and approval for grandfathered projects, so these projects are not on the same regulatory footing as the regulated projects. However, the registration process does provide for continued reporting of the water withdrawn and/or used by grandfathered projects, which is beneficial to the Commission's water resource management goals as discussed in the preamble to the proposed rulemaking.

Comment: These regulations build a foundation for future enhanced regulations of projects regardless of when they were initiated.

Response: As noted, the final regulations allow the continued exemption from the Commission's project review regulations for projects that register their grandfathered use in § 806.4. Any additional regulations would need to be proposed and subject to notice and comment in a future rulemaking. The Commission does not contemplate any such rulemaking at this time.

Comment: Accounting for the total consumptive use in the river is vital to maintaining water resources.

Response: The Commission agrees and believes the final regulations will achieve that laudable goal.

Comment: The Commenter supports the rulemaking because it will help to maintain the water resources of the basin and provide better management processes.

Response: The Commission agrees.

Comment: The proposed rules create serious practical problems concerning applicability to consumptive uses within public water supply systems. Requiring commercial building owners with water-based HVAC systems to calculate and separately report their usage adds complication to the regime without adding to data accuracy.

Response: The Commission established in 2007 an Approval by Rule process in § 806.22(e) for large consumptive users who receive their water solely from a public water supply. This process is simpler, cheaper, and less complicated than review and approval under the normal consumptive use permitting process, and has been used effectively for these types of projects including users with water-based HVAC units. The Commission will continue to work with the Basin's public water suppliers to identify consumptive users that use enough water to potentially trigger the threshold (20,000 gpd over a 30-day average equates to a total usage of 600,000 gallons used in any rolling 30-day period). The Commission anticipates that it will be able to

effectively register these types of users under the process set forth in Subpart E. The Commission also does not agree that the proposed rule will not add to data accuracy.

Comment: The proposed grandfathering registration requirements may be an improper retroactive regulation. The rule actually regulates grandfathered projects and makes them submit information that was never expected to be maintained in the past, such as its withdraw and usage data over the past five years.

Response: The requirements of the proposed rulemaking are forward looking and are not a retroactive regulation. The current regulations provide for an exemption for grandfathered projects and the final rule establishes a registration requirement that preserves that exemption for projects and provides a two year window for these projects to file that registration. The proposed rule does not *require* grandfathered projects to collect or possess five years' worth of data. Section 806.42(a)(6) clearly contemplates that some projects may not have five years of withdrawal and consumptive use data, but noting "If quantity data are not available, any information available upon which a determination of quantity could be made." This may include information on hours of operation, pump run times, etc.

Comment: The proposed rule fails to acknowledge or accommodate water rights created or memorialized by agreement with the sovereign.

Response: Consistent with the Commission's long-standing practice regarding grandfathering determinations, the approach will establish the grandfathered quantities based on data for the actual peak historic usage rather than capacity. The registration requirements do allow a project sponsor to present a variety of information regarding water withdrawals and consumptive use quantities, especially if quantity data are not available. The grandfathering determination process specifically includes a provision for "other relevant factors" to acknowledge and accommodate a variety of unusual circumstances that a particular project sponsor's unique situation may present.

Comment: The proposed rule should be modified to allow the Commission to make a case-by-case determination of how to best estimate water withdrawn and consumed, to allow alternatives for facilities that may have multiple, intertwined processes that are difficult or infeasible to meter. Grandfathered amounts should be allowed to be made by statistical analysis when withdrawal or consumption data are not capable of being metered.

Response: The Commission believes the proposed rule is constructed in a way to allow it to make case-by-case determinations. For example, § 806.42(a)(6) asks for at least the last five years of quantity data, but also allows that if "quantity data are not available, any information available upon which a determination of quantity could be made," including statistical or engineering analyses. Section 806.43 allows the Commission to require a metering *or monitoring* plan, recognizing that there are situations where meters may not be practical.

Comment: The rules should provide flexibility by allowing an interim registration and/or flexibility for installing meters where none are currently installed.

Response: Section 806.43 could lead to a metering and monitoring plan, if the current metering is not adequate for reporting under the rule. The development of such a plan with the Commission could invariably include the flexibility that the project sponsor seeks to deploy new meters or identify statistical or engineering calculations to be used in lieu of meters. The Commission does not believe that an interim registration is necessary for three reasons. First, because the registration requirements are not effective for six months after adoption of final rulemaking and the registration period lasts two years, a project sponsor has the potential to collect one or two years' worth of data/information that can be used in its registration to aid in the establishment of a grandfathered quantity, if they so choose. Second, if data do not exist or have not been collected, the proposed rule allows other information to be used to establish a grandfathered quantity. Third, for a project that is unique and complex, the registration process does not put a firm time limit for action to establish a grandfathered quantity, allowing both the Commission and the project sponsor to work through these complicated issues during the technical review of a registration.

Comment: Article 11 of the Compact limits the Commission's authority to regulate water diversions and withdrawals authorized by pre-Compact permits or approvals. A grandfathered withdrawal or use is not a new "project" as defined in the Compact.

Response: Article 11 of the Compact does not mention "pre-Compact" uses or withdrawals, only approvals granted prior to a declaration of a protected area. The Compact provides ample authority for the Commission to regulate grandfathered projects and the regulations for such are promulgated pursuant to the Commission's authority in Article 3 of the Compact. The definition of project includes "any work, service, or activity which is separately….*identified* by the Commission." The Commission routinely identifies categories of projects that may have an effect on the management of the waters of the Basin through the promulgation of regulations. However, the definition further provides that a project is "any separate facility *undertaken or to be undertaken* by the Commission or otherwise." "Facility" is defined by the Compact as "any real or personal property, within or without the basin, and improvements thereof or thereon, and any and all rights of way, water, water rights, plants, structures, machinery, and equipment acquired, constructed, operated, or maintained for the beneficial use of water resources or related land uses or otherwise including, without limiting the generality of the foregoing, any and all things and appurtenances necessary, useful, or convenient for the control, collection, storage, withdrawal, diversion, release, treatment, transmission, sale, or exchange of water; or for navigation thereon, or the development and use of hydroelectric energy and power, and public recreational facilities; or the propagation of fish and wildlife; or to conserve and protect the water resources of the basin or any existing or future water supply source, or to facilitate any other uses of any of them."

The Commission's interpretation of these definitions is that the framers of the Compact intended both present, i.e. existing, projects to be included in the powers of the Commission in addition to those projects yet to be commenced, as well as, projects that facilitate the use, diversion or withdrawal of water. This is supported by the purposes expressly laid out in the Compact itself. As noted in Article 1.3(4) of the Compact, "Present and future demands require increasing economies and efficiencies in the use and reuse of water resources, and these can be brought about only by comprehensive planning, programming and management under the direction of a single administrative agency."

Indeed, the Commission has regulated "pre-compact" consumptive uses and withdrawals through the operation of its regulations throughout its history. The recognition of grandfathered projects being exempt from project review and approval is a creation of the regulations themselves, and is not mandated by the Compact. From the inception of this exemption, there have been methods by which a project may lose the grandfathering exemption, which have been augmented over the years. For example, when the Commission added a change of ownership as an additional method where a project's grandfathering exemption could be lost in 2006, it noted: "The rationale for gradually retiring grandfathered benefits upon the transfer of ownership of a project is that, with few exceptions, such portions of the Basin's water resources should not be allowed to continue indefinitely into the future unmanaged. Under the Compact, the Commission is responsible for the comprehensive management of all of the Basin's resources. While it was reasonable to allow those who possess grandfathered benefits to continue their use of them, the unfettered transfer of them to subsequent purchasers effectively creates a situation of prior appropriation."

Section 806.4

Comment: The proposed rule at §§ 806.4(a)(1)(iii)(A) and (a)(2)(iv)(A) changes the current rule that allows a grandfathered consumptive use an additional increase of up to 20,000 gpd and a grandfathered withdrawal an additional increase of up to 100,000 gpd before review and approval of the grandfathered activity is triggered. This leeway should be restored for grandfathered projects.

Response: In most instances, the registration process will allow grandfathered projects sufficient margin for operational flexibility. However, the Commission agrees that the registration process should not put a project in jeopardy of needing review and approval subsequent to registration absent a change to the project. A new factor is added as § 806.44(b)(4) that allows the Executive Director to consider whether the grandfathered amount includes an operational margin of safety.

Comment: With the trigger at any amount above the grandfathering determination in § 806.44, a project could trigger review and approval based on an accident (pipe bursting, water main break) or single exceedance.

Response: The possibility of triggering the Commission's review and approval based on an accident or single occurrence that boosts the 30-day average exists in the current regulations. However, it should be noted that the Commission has not based a determination that a project sponsor must apply for review and approval based on these types of accidents or single occurrences. It has used its enforcement discretion in these instances and will continue to do so into the future under the revised final rule.

Comment: The Commission could enforce its grandfathering registration requirements without the need for a project to lose grandfathering if it does not register. The commenter also questions whether the knowledge gap by not knowing the number, type and usage of grandfathered projects justifies the proposed regulation. In Pennsylvania, the reporting under Act 220 should be sufficient for the Commission's purposes. In order to reduce duplicative reporting

requirements, the Commission should work with PA Department of Environmental Protection (PADEP) and other states to identify unregulated withdrawals within the Basin and utilize existing state records to collect actual water use data.

Response: The ability to operate a withdrawal or use large enough to exceed the Commission's jurisdictional thresholds without any technical and environmental review and approval is an extraordinary benefit to grandfathered projects. Accordingly, the Commission finds the structure of the rules appropriate to provide ample incentive for grandfathered projects to register this exemption or risk losing it.

The amount of water use estimated to be associated with grandfathered projects is close to 1 billion gallons per day, roughly equal to that currently regulated by the Commission. The absence of any reliable data associated with such large water uses, especially when operating many times within close proximity of other regulated users, poses a significant challenge to managing the resource in any predictable and sustainable manner. Definitive determinations would prove to be protective to the grandfathered use, as well as beneficial to surrounding users with respect to operational certainty. The Commission's ongoing work in managing the basin's water resources puts it in a unique position to understand the breadth and limitations of the data collected by its member jurisdictions and the knowledge gap discussed in the preamble to the final rulemaking is real.

The Commission is aware of the data collected by the states and is also aware of the data gaps that underlay the need for the registration process. The Commission is sensitive to not duplicating state efforts on reporting, however both the final rule and Act 220 have provisions that work to ease any duplication concerns. The final rule in § 806.43(c) provides that the Commission may accept the quantities reported by states to satisfy the ongoing reporting requirements for grandfathered projects. Specifically with respect to Act 220, the act already has a provision to avoid duplication of efforts. Act 220 provides: "To avoid duplication of efforts, regulations implementing the periodic requirements of this subsection shall provide that the requirements may be satisfied by the filing of…water withdrawal and use reports prepared and submitted pursuant to regulations adopted by the Delaware River Basin Commission and Susquehanna River Basin Commission…to the extent that the reports provide the required information." 27 Pa. C.S. § 3118(b)(4).

However, filling in the knowledge gap is not the only reason the Commission has proposed the registration of grandfathered projects. The Commission expects the registration of grandfathered projects will also achieve a number of crucial goals to allow better management of basin resources. As noted previously, 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. It will also improve the compliance rate of the member jurisdictions' existing registration programs.

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 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.

Section 806.40

Comment: Project sponsors that have dockets for a part of their project should not have to register grandfathered elements as identified in § 806.40(a)(4).

Response: The proposed rule requires project sponsors who may have an approval or docket for some elements of their project, but also have associated elements that are grandfathered, to register. Some of the Commission's more recent dockets include a grandfathering determination of all sources associated with the project, but not all dockets have done this. If the Commission has determined a grandfathered amount in a docket, and the project sponsor wishes to have that be their grandfathered determination, then the registration process will be simpler for such a project. Other changes to § 806.42 in the final rulemaking ensure that the Commission can waive certain required information elements of the registration for these types of project sponsors.

Comment: The triggering of project review and applicability of grandfathering to withdrawals from a combination of sources under § 806.40(a)(5) should be clarified. While this question was created from the existing regulations adopted in 2007, it will be exacerbated by the registration requirements. If a company has a series of wells, each individual well serving a plant, but where multiple plants are in the same area, is that one project with a combination of sources or a series of projects? Should the municipality consider only the sources which primarily supply a particular system or must it consider all sources in all systems within the area or Basin?

Response: The Commission appreciates that the combination of sources provision from the 2007 regulations does raise legitimate questions about the scope and extent of a project under the Commission's regulations. Commission staff have worked with project sponsors to answer those questions on a case-by-case basis, as they are fact specific and some projects can present unique scenarios. As with the current regulations, Commission staff will assist projects with questions about their specific situation and provide concrete guidance as to whether a registration is necessary or not. It should be noted that the end result of the registration process will actually remove this ambiguity for a project, by adequately defining the project subject to registration and setting a clear threshold of withdrawal or use that the project can operate under without triggering review and approval.

With respect to the question posed by the commenter for a company with multiple plants: If the individual plants can be reasonably considered or determined as separate, consistent with the definition of "Facility" and "project", then they would be considered separate projects. This

would also generally mean that there are no physical connections between the water- related portions of the facilities. If they are not separate or have connected water-related infrastructure, then it generally would be considered one project with a combination of sources.

With respect to the question posed by the commenter regarding municipal systems: Generally a municipality would consider only the sources that primarily supply an individual system as a project.

Comment: The Commission should clarify how "grandfathered projects" and "pre-compact consumptive uses" operate under the proposed registration rules in § 806.40(a)(4). Specifically, the commenter has a docket for consumptive use that has a specified pre-compact consumptive use in the docket.

Response: Under the proposed registration requirements, the commenter is not a grandfathered project that would need to register its consumptive use under § 806.40(a)(4). Under the current rules, when a project with a pre-compact consumptive use triggers review and approval, the grandfathered status is lost by operation of the regulations. The Commission, by longstanding practice and interpretation of § 806.4, in those instances reviews the entire consumptive use of the project, including pre-compact use and post-compact increases in use. When a docket is written approving the consumptive use, it includes documentation of the pre-compact consumptive use and exempts the mitigation requirement for that quantity. For projects that lose the grandfathered status of their consumptive use by increasing the consumptive use by greater than 20,000 gallons per day, the Commission has required the project sponsor to provide mitigation only for the amount of consumptive use above its pre-compact consumptive use. However, for projects that lose their grandfathered exemption for consumptive use via change of ownership, the Commission has interpreted its transfer regulation requirements under § 806.6 to require mitigation on the entire consumptive use, including pre-compact consumptive use.

In either scenario, the consumptive use has been subject to the review and approval process under the Commission's regulations in Part 806. The only remnant that may remain of the prior grandfathered use is a recognition and condition in the docket that the Commission did not subject the pre-compact portion of the consumptive use to an active mitigation requirement.

Comment: Under § 806.40(b), the Commission needs to clarify what happens if a withdrawal or consumptive use is found to not be eligible for grandfathering registration. The Commission could hold a project ineligible for grandfathering based on an increase of a withdrawal or consumptive use that was greater than its historical levels. If projects are subject to large penalties, retroactive collection of consumptive uses fees, or imposition of stringent passby flow requirements, they may be reluctant to come forward.

Response: Section 806.40(b) provides that a project is not eligible for registration as a grandfathered project if it can be determined to have been required to seek Commission approval under the pertinent regulations in place at the time. Further, § 806.41(c) provides that any project that is not eligible to register under paragraph (a) of this section shall be subject to Commission's review and approval under § 806.4.

The preamble to the proposed rule notes that these sections mean that the registration process does not protect projects that can be shown to have clearly lost grandfathered status under the rules in effect at the time the relevant action took place.

It is true that, under current rules, a project that increases its withdrawal from a source 100,000 gpd over its relevant pre-regulation withdrawal, or a consumptive use that increases 20,000 gpd over its pre-compact consumptive use, loses its grandfathered exemption. However, the Commission is only requiring project sponsors to provide *at least* the last five years of data to set a grandfathering determination. This determination is an administrative determination that will become administratively final. The project sponsor controls how much data beyond the last five years is provided to the Commission during registration. The Commission is willing to live with its determination number, even if it inures to the benefit of project sponsors who have, for example, exceeded their pre-1978 withdrawal from a groundwater well by greater than 100,000 gpd. The higher, most recent withdrawal rate will become the grandfathered amount for the purposes of triggering review and approval on the basis of quantity into the future. Under the final rule once a project has completed the determination process under § 806.44, the plus 100,000 gpd pathway to lose grandfathering for project sponsors is eliminated. At that point the increase of any quantity over the amount determined under § 806.44 will require review and approval of the project.

Projects that register as grandfathered projects that either are not truly grandfathered projects (i.e., all their sources and use were initiated after the applicable dates) or were grandfathered at one point but lost the exemption (i.e., added a new source or underwent a change of ownership) must seek review and approval because they are out of compliance with the existing Commission regulations. These projects will need to enter into a consent order and agreement (COA) with the Commission, which would allow the project to continue to operate while it goes through the review and approval process. It is typical for, and the Commission would expect, the COA to set operational limits based on the information provided by the project in the registration. The COA will also set a schedule for the project to submit application(s) to the Commission. The timing of that schedule would consider both the complexity of the project, the number of sources used by the project, and the projected workload of the Commission's project review staff. The result could be that a project may be operating under the COA for a year or more before it will be required to submit its application(s). As such, the COA would also establish metering and reporting requirements for the interim and apply the Annual Compliance and Monitoring Fee, as is currently provided for in the Commission's Regulatory Fee Schedule. Unlike other compliance actions, the Commission will not be seeking payment of any mitigation fees for consumptive use of water for the project's operations prior to the effective date of the registration regulations. The project would be responsible for consumptive use mitigation fees after the effective date of the registration regulations and these would be imposed at the time the Commission acted on their consumptive use application. For projects discovered through the registration process, the Commission would seek a reduced settlement in lieu of civil penalty depending on the cooperation demonstrated, the complexity of the project, and the sophistication of the project sponsor and knowledge of the Commission's rules.

§ 806.41

Comment: Because project sponsors of grandfathered projects may have had very little interaction with the Commission, a two year deadline to submit a registration is not sufficient time to provide the necessary outreach needed to ensure that all project sponsors are aware of these new rules. The period should be extended to a five year period.

Response: The Commission has provided for a six month delay in the effective date of any final rulemaking for grandfathering registration to allow for outreach before registration commences. Upon final rulemaking, projects will have two and a half years to prepare and submit a registration. The Commission believes this timeframe is more than adequate to allow the Commission to perform effective outreach and for project sponsors to submit timely registrations. In reality, the Commission began its outreach process through the extensive efforts to publicize and engage with the regulated community for the proposed rule. In addition to the outreach activities mentioned at the beginning of this comment response document, the Commission contacted numerous groups and trade associations, issued press releases and e-mailed all projects in the Commission's database.

§ 806.42

Comment: Section 806.42 should be amended to allow project sponsors to include in each registration submitted quantity data for water withdrawals in excess of the previous five years.

Response: Section 806.42(a)(6) provides that a registration shall include quantity data for "a minimum" of the previous five calendar years. This section does not limit the project sponsor to only submitting the past five years of data. The Commission will accept and consider withdrawal (or consumptive use) data older than the previous five years.

Comment: Section 806.42 should be amended to allow project sponsors to submit projections of future water quantity demands.

Response: Grandfathering registration is by its nature a backward looking exercise. Projections of future demand are not necessary or relevant.

Comment: The Registration form should include an exclusion to § 806.42(a)(6)-(9) for project sponsors that have received a prior Commission determination of grandfathered consumptive use or withdrawals.

Response: A project may elect to rely on a prior grandfathering determination by the Commission. If so, the registration form for that project would be less comprehensive. The Commission will revise § 806.42(b) to allow the Commission to waive any of the registration form requirements in (a) as necessary for projects that wish to rely on a prior grandfathering determination.

Comment: Project sponsors should be required to provide the quantity data prior to 1/23/1971 to demonstrate withdrawals and consumptive use, and, if reliable data is not available, should then be allowed to provide more recent data in lieu of older data as an option.

Response: Section 806.42(a)(6) provides for a registrant to provide quantity data for *a minimum* of the previous five calendar years. A project sponsor is not limited by the proposed regulation or the Commission in how much data it can provide. Further, § 806.44 provides that the Commission can consider data, the reliability and accuracy of the data, and other relevant factors. A project is free to provide all available data and, if it has reliable data of usage that

predate the Compact, the Commission will consider it. However, the Commission's experience is that accurate and reliable data rarely exist, especially for the pre-Compact consumptive uses. The proposed rule sets forth a data-based inquiry into determining the amount of grandfathered consumptive use that is less costly and more administratively efficient for both the Commission and the project sponsor. If a project is dissatisfied with the determination, it may appeal to the Commission under § 806.45.

§ 806.43

Comment: Ongoing reporting requirements need to be linked to member jurisdiction reporting to avoid duplication of effort and confusion.

Response: The Commission agrees with the commenter that it is important to avoid unnecessary duplication of effort with state law requirements. Section 806.43(c) notes that if quantity reporting is required by the member jurisdiction where the project is located, the Commission may accept that reporting to satisfy the requirements of this paragraph. This evidences the Commission's intent to use its best efforts to accept state reporting requirements where appropriate. The Commission will add language to § 806.42(a)(6) and 806.43(c) to clarify its intention to rely on member jurisdiction reporting where it is able, and that any additional reporting required will be because it is not duplicated by the member jurisdiction. A new paragraph 806.43(d) is added to emphasize the commitment of the Commission and its member jurisdiction to share all reporting data and to further the goal of creating a unified data set for all agencies involved.

§ 806.44

Comment: The factor for determining grandfathered amounts states it will be based on the "most recent withdrawal use and data," does not convey enough flexibility for the Commission to consider a number of variables that may affect a project's withdrawal and use throughout time. The grandfathered amount should not be pegged only to the last five years of data.

Response: The registration will only require *at least* the last five years of data. Certainly, projects that have data going back 10, 15, 20 years or longer may provide that data as a part of registration, and the Executive Director will make a determination on the data provided. For example, if a facility cut back its production in response to the economic downturn starting in 2008, but has data showing higher or greater water use prior to that time, the Commission will consider that data in making its determination of a grandfathered amount under § 806.44. The Commission will adjust the language of this factor to ensure the consideration of any data provided.

Comment: The proposed rule provides that the determination of the grandfathered quantity will be based on the most recent data. This may be too restrictive and projects should be allowed to submit more than the last five years of data and where such data is submitted, the Executive Director should base the determination under § 806.44 on the peak 30-day average for withdrawals and consumptive uses shown by the data.

Response: The Commission agrees that the factor as written could be clarified and the final rule reflects a revision to § 806.44(b)(1) to allow more than a minimum of five years of data to be submitted and that the Executive Director will consider the withdrawal and use data and the peak consecutive 30-day average shown by all the data submitted.

Comment: The Commission should allow projects to register a grandfathered amount previously determined by the Commission if it is not seeking a higher amount through the registration process.

Response: The Commission agrees that previous grandfathering determinations should be honored if the project wishes to register that amount. A new paragraph (c) is added in § 806.44 allowing the Executive Director to use past grandfathering determinations, and revisions are made to § 806.42(b) allowing the Commission to waive certain registration information if a project is relying on a past grandfathering determination.

Grandfathering Registration Fees

Comment: The fees are not a part of the rulemaking, but they should be set so everyone knows them at the outset.

Response: The Commission reviews its project review and compliance fees annually and generally adopts a fee schedule for the year at its June meeting. The Commission will adopt a fee schedule that establishes grandfathering registration fees as proposed in the preamble.

Comment: The Commission should share its projection of costs of setting up and operating the registration program so the regulated community can clearly understand the cost rationale behind the fee proposed and how those costs were allocated.

Response: The Commission projects that the registration program will cost approximately $750,000, which includes $50,000 for setting up the program and $700,000 for operating the program. The Commission projects that, based on the waivers and discounts that will be granted for project sponsors who register early, only $350,000 in fees will be paid. This means that only 45 percent of the costs of the program will be covered by fees if projections are accurate. The remaining costs for the program will be covered by the Commission's reserve funds.

Comment: The preamble notes that the registration fee is a one-time fee, but the registration requirements provide for ongoing reporting by grandfathered projects. The Commission should disclose whether or not it is considering imposing some type of ongoing reporting fee on grandfathered users. Such a fee would be inappropriate. This fee would be a precedent used to justify the future imposition or expansion of fees for water usage on certain agricultural and other operations within the Commission's jurisdiction.

Response: Section 806.41(d) provides the Commission the option to establish fees for obtaining and maintaining registration in accordance with § 806.35. The Commission enacted a Regulatory Fee Schedule on June 16, 2017 (effective July 1, 2017) that provided for the registration fee discussed in the preamble of the proposed rulemaking. The Commission did not

establish any ongoing or annual fees for registered projects and the Commission has no plans to do so. Any action to implement an annual fee on registered projects would have to be adopted pursuant to a future fee schedule, which is published by the Commission and subject to public comment and a hearing. Nothing in the rulemaking authorizes a fee on water usage.

Consumptive Use Mitigation and Consumptive Use Mitigation Policy

Comments: The Commission should not adopt the Consumptive Use Mitigation Policy and the changes to the Consumptive Use Mitigation Rule.

Because the draft CU Mitigation Policy mirrors the proposed rules, the draft policy should be withdrawn until the proposed rules are issued final.

The proposed policy provides that acceptance of a monetary fee is the least preferred mitigation option. If the Commission interprets this as phasing out the opportunity to provide monetary payment unless all other alternatives have been exhausted, the Commission should solicit additional comment as it would drastically change the way mitigation is currently managed in the Basin.

The Commission should revise the policy to acknowledge the recycling of flowback water and produced water may be an acceptable alternative that is considered as part of an overall mitigation plan or strategy.

The Commenter questions the shift in the Commission's policy from providing regionalized mitigation to project sponsor supplied mitigation, which may be more balkanized and uncoordinated.

The Commission must recognize that most project sponsors will have limited capacity to implement significant consumptive use mitigation projects, as they do not have the power of eminent domain.

The Commission should employ a practical approach to consumptive use mitigation analysis, with rational classifications and exceptions, including an abbreviated analysis for smaller projects (i.e., less than 500,000 gpd). Another commenter suggests an abbreviated analysis for projects with a consumptive use of 750,000 gpd or less.

The mitigation plan proposal should be removed or smaller projects should be able to have an abbreviated consumptive use mitigation alternative analysis.

The Commission should not presume that larger users can undertake physical mitigation. The five million gpd threshold for stricter scrutiny is arbitrary. Providing storage for such a large use is impractical and the Commission has not adequately explained any additional alternative for consumptive use mitigation that may be contemplated under the existing § 806.22(b)(4).

The Commission should not shift the responsibility for physical consumptive use mitigation to project sponsors because project sponsor based mitigation will be more balkanized and less

effective and the Commission has powerful tools to set up projects to provide such mitigation from the Compact.

The Policy should not mandate the use of physical mitigation.

The Commission should clarify that consumptive use mitigation plans do not need to be prepared under seal by professional engineers or other licensed professionals.

New consumptive use mitigation requirements should not be applied retroactively to existing projects upon renewal.

The proposed rule should be revised to allow greater use of groundwater storage and quarries and be more flexible with respect to the "no impacts" to surface water requirements for such mitigation.

The Commission should focus its mitigation requirements to the low flow period.

The Commission should further explain and clarify how and when mitigation options are triggered and implemented during low flow periods.

The Commission must utilize mitigation measures in a coordinated manner to meet regional objectives.

For water critical areas where the area has been identified or designated by a member jurisdiction as requiring more intensive water planning, is there a process in place for adding these watersheds only with prior notice and acceptance of public stakeholder comment? Potentially affected stakeholders should be given the opportunity to participate before a watershed is defined as a water critical area. The identification of water critical areas should be explained to clarify that this a determination made solely by the Commission and not by member jurisdictions.

All references to water critical planning areas should be removed. Article 11 of the Compact provides for designation of protected areas. This concept appears to circumvent those procedures.

Water critical areas should not be based on member jurisdiction planning areas and it should not be a mechanism to require mitigation for pre-compact consumptive use.

The commenter supports the change to § 806.22 lowering the 90-day standard to 45-days for the mitigation of consumptive uses to reduce barriers for project sponsors to find alternate mitigation strategies.

The Commission should clarify what "impacts" must be avoided as a part of the rule.

The commenter proposes that the Commission replace the language in 806.22(c) providing that the Commission will, *in its sole discretion*, determine the acceptable manner of mitigation with

language basing the determination on a "reasoned consideration of all available facts, circumstances and factors."

The Commission should amend § 806.22 to clearly acknowledge that pre-compact consumptive uses are not subject to mitigation requirements.

Response: The Commission has reviewed the detailed comments regarding how the Commission requires consumptive use mitigation and the options of projects to provide such mitigation. The Commission will further examine and reevaluate its policies and procedures for consumptive use and consumptive use mitigation in a more comprehensive fashion. As a result, the Commission will not move forward with the changes to the Consumptive Use Mitigation Policy and the consumptive use mitigation rule as follows. The definition of "water critical area" in § 806.3 is removed and all references to water critical areas are removed from §§ 806.22 and 808.1. The reference and changes associated with a mitigation plan in § 806.22(b) are removed. The changes associated with amending the 90 day mitigation requirement to 45 days in § 806.22(b)(1)(i) and (ii) are removed and reserved for the reevaluation process for consumptive use mitigation described above.

Project Review Processes and Standards

§§ 806.12 and 806.14

Comment: The Commission should reconcile the application requirements in § 806.14 to recognize that the potential for waiver of the aquifer testing requirements in § 806.12.

Response: The Commission agrees and has revised §§ 806.14(b)(2)(i) and (d)(2)(i).

Comment: The Commission should clarify how the alternatives analysis under § 806.14(b)(2)(v) differs from the previous provision in the current rules at 806.14(b)(1)(iii) and specify what is expected from applicants.

Response: The purpose for this requirement is to document the project sponsor's consideration of alternatives during planning of the proposed project to include, but not be limited to, identification of reasonable alternatives to the proposed water withdrawal project, the extent of the project sponsor's economic and technical investigation, the adequacy of the source to meet the demand, an assessment of the potential environmental impact, and measures for avoidance or minimization of adverse impact of each alternative. Specifically, the alternatives analysis should include identification of reasonable alternative water sources and locations, including opportunities for uses of lesser quality waters; project footprint and infrastructure; opportunities for water conservation or water saving technology; requirements of the uses of the water as related to the proposed locations; the economic feasibility of the alternative(s) and technical opportunities or limitations identified in the evaluation of reasonable alternate sites. The Commission is preparing a draft policy to outline how alternative analyses should be conducted and evaluated, and will release it for public comment prior to consideration for Commission adoption. In addition, on final rulemaking, the Commission will adjust the language of §

806.14(b)(1)(v) to make clear that the analysis is needed only for new projects and for major modifications that seek to increase the surface water withdrawal.

Comment: The Commission should clarify whether renewals that involve a major modification should be handled under the new application and major modification standards in § 806.14(a)-(b) or in the renewal standards in § 806.14(c)-(d).

Response: The Commission agrees that the rule should be clarified and proposes changes to §§ 806.14(c) and 806.14(d)(2), (4) and (6) to establish that renewal applications, with either minor or major modifications, are subject to §§ 806.14(c)-(d).

Comment: The Commission should clarify whether the groundwater availability analysis report in § 806.14(d)(2)(iii) is a separate requirement for renewals of groundwater withdraws or part of an aquifer test plan.

Response: Section 806.14(d)(2)(iii) uses the word "current" which the Commission interprets to mean "updated" based on conditions within the recharge area at the time of the renewal application (i.e. new land use, other withdrawals or discharges within the identified groundwater recharge area).

Comment: Section 806.14(d)(3)(ii) is unduly broad and should be changed to "Changes to the facility design *that directly affect consumptive use of water since the latest application.*"

Response: Because the regulatory authority is over water withdrawals, consumptive use and diversions, it can be assumed that only information on the facility design changes that are relevant to those authorities are required.

Comment: The catchall provision of § 806.14(g) is overly broad because it is not tied to what is "necessary" as the current regulation reads. The section should be amended to add at the end of (g), "to the extent deemed necessary to determine that a project will not adversely impact the water resources of the basin."

Response: The Commission believes that the language of § 806.14(g) is not overly broad as it should be read in the context of the entirety of § 806.14.

§ 806.15

Comment: The Commission should accept other types of certified mail proof of delivery beyond the US Postal Service under § 806.15(g).

Response: The Commission agrees and § 806.15(g) is revised to include the verified return delivery receipt from a comparable delivery service to the U.S. Postal Service.

Comment: The Commission should revise § 806.15(b)(3) to clarify which property is subject to the notice requirements and should read "where the property *of such property owner* is served by a public water supply."

Response: The Commission agrees and the final rulemaking is revised accordingly.

§ 806.23

Comment: The Commission should exempt AMD passive treatment systems from the requirements for mining and construction dewatering under §§ 806.14(b)(6) and (d)(6) and 806.23(b)(5).

Response: The Commission has not extended its review jurisdiction over *passive* AMD treatment facilities and nothing in the proposed rule was meant to alter that long standing determination. Accordingly, the final rule contains revisions to §§ 806.14(b)(6) and (d)(6) and 806.23(b)(5) to remove the word "gravity-drained" and clarify its application to "AMD facilities that qualify as a withdrawal."

Part 808 Hearings, Appeals and Enforcement

Comments: The commenter is concerned about the expansion of the Executive Director's enforcement authority.

The commenter supports the changes to §§ 808.14(e) and 808.18(a) that expressly allows Consent Orders and Agreements to settle violations and allow enforcement settlements to be approved by the Executive Director in order to streamline the process.

Response: The changes to Part 808 allow the Executive Director to act in the first instance on behalf of the Commission in fulfilling its obligations for compliance and enforcement of the Compact and the attendant regulations. The changes also allow the Executive Director to enter into Consent Order and Agreements (COA) and settlement agreements to allow for a more efficient and constructive resolution of most enforcement actions. The changes to § 808.2 provide for a clear appeal of any action taken by the Executive Director to the Board of Commissioners.

Comment: Including in § 808.2(a) that the 30 day appeal period can run from publication on the Commission's website creates issues, including knowing whether the appeal period runs from publication on the website or the **Federal Register** and the fact that it is not always clear when something is posted to a website or is easily found on the website.

Response: The final rule revises § 808.2(a) to remove this language. The 30-day appeal period for third party appeals will run from the date of publication in the **Federal Register**.

Miscellaneous Provisions

Comment: The addition of "or other fluids associated with the development of natural gas resources" to the definition of "production fluids" under § 806.3 is inaccurate and over-inclusive. The revised definition of production fluids would cause confusion with the member jurisdiction

terminology. The commenter is supportive of the stated goal of this change and proposed additional language to be added in other parts of regulations.

Response: The final rule removes the change to the definition of "production fluid." The revision proposed by the commenter will be evaluated for inclusion in a future rulemaking.

Comment: The addition of "consumptive use" to the definition of "facility" in § 806.3 is unwarranted as the definition of "facility" matches the definition in the Compact.

Response: The final rule will remove the amendment to the definition of "facility". However, the definition of facility includes plants, structures, machinery and equipment acquired, constructed, operated or maintained for the beneficial use of water resources that includes the consumptive use of water.

Comment: The addition of § 806.4(a)(3)(vii) which allows production fluids to enter the Basin for treatment or disposal is a commonsense approach that will allow for the proper treatment and disposal of these fluids in accordance with the environmental regulations of the member jurisdictions.

Response: The Commission agrees.

Comment: While the rule does not propose any revisions to § 806.8, the Commission should revise to allow the Executive Director to waive or modify any requirements under the regulations.

Response: This comment is beyond the scope of the proposed rulemaking.

Comment: Section 806.30(a)(8) should be clarified as to what "other monitoring" the Commission may require as these are issues within the province of state environmental regulatory agencies.

Response: Other monitoring could include items requested by the environmental regulatory agencies of our member jurisdictions during the Commission's coordination of project review with its member jurisdictions. Examples of other monitoring could include: wetlands or spring flow monitoring to verify no adverse impact as a result of withdrawal; water quality sampling for verification of AMD impairment and proper application of the Commission's discretion under Commission Policy No. 2012-01 (Low Flow Protection Policy).

Comment: The commenter supports the change to § 806.31(e), which clarifies that the previous ABR approval continues as long as the renewal was submitted one month prior to the expiration date.

Response: The Commission appreciates the comment.