

# RULE MAKING ACTIVITIES

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Each rule making is identified by an I.D. No., which consists of 13 characters. For example, the I.D. No. AAM-01-96-00001-E indicates the following:

- AAM -the abbreviation to identify the adopting agency  
01 -the *State Register* issue number  
96 -the year  
00001 -the Department of State number, assigned upon receipt of notice  
E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; or EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing.)

Italics contained in text denote new material. Brackets indicate material to be deleted.

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## Office of Children and Family Services

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### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### Public Assistance Employment Programs

I.D. No. CFS-06-07-00010-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** This is a consensus rule making to amend sections 358-1.1, 415.2(a)(1)(i), (2)(i) and 415.4(a)(3).

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f) and 410-x(3)

**Subject:** Public assistance employment programs.

**Purpose:** To correct out-dated cross-references.

**Text of proposed rule:** Section 358-1.1 is amended to read as follows:

These regulations govern the fair hearing process and establish the rights and obligations of applicants, recipients, and social services agencies when an applicant or recipient seeks review of a social services agency action or determination regarding that individual's assistance or benefits under public assistance programs, medical assistance, food stamp, food assistance, and the home energy assistance (HEAP) programs and under various service programs as defined in section 358-2.20 of this Part and any program or service administered through the New York State [Depart-

ment of Labor (DOL)] *Office of Temporary and Disability Assistance (OTDA)* as described in [12 NYCRR Part 1300] *18 NYCRR Part 385*.

Subparagraph (i) of paragraph (1) of subdivision (a) of section 415.2 is amended to read as follows:

(i) A social services district must guarantee child care services to a family who has applied for or is receiving public assistance when such services are needed for a child under 13 years of age in order to enable the child's parent(s) or caretaker relative(s) to participate in activities required by a social services official including orientation, assessment, or work activities as defined in [12 NYCRR Part 1300] *18 NYCRR Part 385*. The guarantee applies to all of the eligible children of the parent(s) or caretaker relative(s) regardless of the child's status as part of the public assistance filing unit.

Subparagraph (i) of paragraph (2) of subdivision (a) of section 415.2 is amended to read as follows:

(i) A family which has applied for or is receiving public assistance when such services are needed for an eligible child aged 13 or older, who has special needs or is under court supervision, in order to enable the child's parent(s) or caretaker relative(s) to participate in activities required by social services officials including orientation, assessment, or work activities defined in [12 NYCRR Part 1300] *18 NYCRR Part 385*.

Paragraph (3) of subdivision (a) of section 415.4 is amended to read as follows:

(3) Initial eligibility for child day care, informal child care and legally-exempt group child care services must be determined pursuant to the requirements of this Part, Part 404 of this Title and, where applicable, [12 NYCRR Part 1300] *18 NYCRR Part 385*. In addition, required documentation and a completed service plan are necessary prerequisites to the determination of eligibility and must be retained in the case folder.

**Text of proposed rule and any required statements and analyses may be obtained from:** Public Information Office, Office of Children and Family Services, 52 Washington St., Rensselaer, NY 12144, (518) 473-7793

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**This action was not under consideration at the time this agency's regulatory agenda was submitted.**

#### Consensus Rule Making Determination

The Office of Children and Family Services (OCFS) is filing this rulemaking proposal as a consensus rule. Under the New York State Administrative Procedure Act section 102(11)(c), a consensus rule is defined as a rule that is proposed by an agency for expedited adoption that makes technical changes, where no party is likely to object to the changes or to the adoption of the rule. OCFS has considered the changes proposed by this rule and has concluded that the proposed amendment is non-controversial because it only makes technical corrections.

The proposed rule would change out-dated cross-references in 18 NYCRR 358-1.1, 18 NYCRR 415.2(a)(1)(i), 18 NYCRR 415.2(a)(2)(i) and 18 NYCRR 415.4(a)(3), pertaining to child care services to facilitate work activity participation from 12 NYCRR 1300 to 18 NYCRR 385. In addition, the proposed rule would also correct the out-dated reference from the New York State Department of Labor to New York State Office of Temporary and Disability Assistance in 18 NYCRR 358-1.1. Neither the underlying regulatory standards nor the substance of the regulations are changed. As a result, OCFS reasonably believes that no party is likely to object to the adoption of the proposed rule as written.

The proposal would amend the regulations listed above to correct out-dated cross-references. Pursuant to Chapter 57 of the Laws of 2005, the New York State Department of Temporary and Disability Assistance assumed oversight of the public assistance employment programs from the New York State Department of Labor. As part of that transfer, the regulations that govern public assistance employment programs were transferred from 12 NYCRR Part 1300 to 18 NYCRR Part 385. Currently, 18 NYCRR 358-1.1, 18 NYCRR 415.2(a)(1)(i), 18 NYCRR 415.2(a)(2)(i) and 18 NYCRR 415.4(a)(3) all contain a cross-reference to 12 NYCRR 1300 rather than the correct reference to 18 NYCRR 385. This regulatory proposal corrects these cross-references. The reference to the New York State Department of Labor in 18 NYCRR 358-1.1 would be corrected to the New York State Office of Temporary and Disability Assistance.

The Office only seeks to amend the regulations to correct out-dated references; the underlying regulatory standards will not be changed by this proposal. Based on the forgoing, OCFs has concluded that the proposed rule should be published as consensus proposal, as no party is likely to object to the rule as proposed.

#### **Job Impact Statement**

The Office does not anticipate the loss of any jobs as a result of the proposed regulations. The proposed regulations only serve to make technical corrections by correcting out-dated cross-references to the specified sections of the regulations and do not alter the substance of any of the specified sections of the regulations. It is thus evident from the subject matter of the proposed regulations that they could only have a positive impact or no impact on jobs and employment opportunities.

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## Department of Civil Service

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### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### **Jurisdictional Classification**

**I.D. No.** CVS-06-07-00002-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the non-competitive class in the Department of Agriculture and Markets.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Agriculture and Markets, by adding thereto the position of Horticultural Inspector 3 (Apiculture) (1).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6203, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Brian S. Reichenbach, Counsel, Department of Civil Service, State Campus, Albany, NY 12239, (518) 473-2624, e-mail: brian.reichenbach@cs.state.ny.us

**Public comment will be received until:** 45 days after publication of this notice.

#### **Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 10, 2007 under the notice of proposed rule making I.D. No. CVS-02-07-00003-P.

### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### **Jurisdictional Classification**

**I.D. No.** CVS-06-07-00003-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional classification.

**Purpose:** To delete a position from the non-competitive class in the Department of Labor.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Labor under the subheading "State Insurance Fund," by deleting therefrom the position of Administrative Officer 6 (1).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6203, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Brian S. Reichenbach, Counsel, Department of Civil Service, State Campus, Albany, NY 12239, (518) 473-2624, e-mail: brian.reichenbach@cs.state.ny.us

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### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### **Jurisdictional Classification**

**I.D. No.** CVS-06-07-00004-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the non-competitive class in the Department of Taxation and Finance.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Taxation and Finance, by adding thereto the position of Assistant Director, Excise Tax Investigations (1).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6203, e-mail: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Brian S. Reichenbach, Counsel, Department of Civil Service, State Campus, Albany, NY 12239, (518) 473-2624, e-mail: brian.reichenbach@cs.state.ny.us

**Public comment will be received until:** 45 days after publication of this notice.

#### **Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 10, 2007 under the notice of proposed rule making I.D. No. CVS-02-07-00003-P.

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## Department of Correctional Services

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### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### **Cape Vincent Correctional Facility**

**I.D. No.** COR-06-07-00005-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** This is a consensus rule making to amend section 100.121 of Title 7 NYCRR.

**Statutory authority:** Correction Law, section 70

**Subject:** Cape Vincent Correctional Facility.

**Purpose:** To amend specific inmate housing unit designations from program dorms to regular dorms.

**Text of proposed rule:** Subdivision (c) of section 100.121 of Title 7, NYCRR is hereby amended and paragraph (1) and (2) of subdivision (c) and subdivision (d) of section 100.121 of Title 7, NYCRR is hereby repealed as follows:

§ 100.121 Cape Vincent Correctional Facility.

(a) There shall be in the department an institution to be known as Cape Vincent Correctional Facility, which shall be located in the Town of Cape Vincent in Jefferson County and which shall consist of property under the jurisdiction of the department.

(b) Cape Vincent Correctional Facility shall be a correctional facility for males 16 years of age or older.

(c) Cape Vincent Correctional Facility shall be classified as a medium security facility, to be used [for the following functions:] *as a general confinement facility.*

[(1) general confinement facility, and]

[(2) alcohol and substance abuse treatment facility.]

[(d) An approximate 400-bed annex/unit consisting of dorms C, D, E and F on the grounds of Cape Vincent Correctional Facility shall also be used as an alcohol and substance abuse treatment correctional annex.]

**Text of proposed rule and any required statements and analyses may be obtained from:** Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 485-9613, e-mail: AJAnnucci@docs.state.ny.us

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**Consensus Rule Making Determination**

The Department of Correctional Services has determined that no person is likely to object to the proposed rule as written as it merely changes the designations of four inmate housing units from alcohol and substance abuse treatment program dorms to regular housing dorms. While the alcohol and substance abuse treatment program is still available to inmates at Cape Vincent Correctional Facility, the overall reduction of the inmate population at this facility has reduced the number of inmate participants in this treatment program. The facility management requires discretion and flexibility in how the program is administered and the number of dorms required. This change is to make dorm designations consistent with other correctional facilities throughout the State and is non-controversial.

**Job Impact Statement**

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal merely changes the program designations of some inmate housing units at Cape Vincent Correctional Facility.

**Purpose:** To allow the Crime Victims Board to reimburse the actual amount of itemized charges up to \$800 for certain services related to a sexual assault forensic exam instead of a flat reimbursement rate of \$800 regardless of the actual cost.

**Text of proposed rule:** Subsections (5) and (8) of subdivision (h) of section 525.12 are amended to read as follows:

(5) The provider shall be reimbursed [at] the *amount of itemized charges not exceeding* [rate of] \$800 for forensic examiner services, hospital or healthcare facility services directly related to the forensic exam, and related laboratory tests and pharmaceuticals directly related to the exam. The Board has determined that reimbursable expenses shall include at a minimum:

(8) For the forensic examination and services directly related to the forensic examination, the Board will reimburse the facility in which the forensic examination was conducted and whose operator's certificate number or facility identification, if applicable, appears on the Claim Form, the amount of *itemized charges not exceeding* \$800. The [\$800] *amount of itemized charges reimbursed* shall be proportionately allocated among the service providers by the billing facility.

**Text of proposed rule and any required statements and analyses may be obtained from:** John Watson, General Counsel, Crime Victims Board, 845 Central Ave., Suite 107, Albany, NY 12206, (518) 457-8066, e-mail: johnwatson@cvb.state.ny.us

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**Consensus Rule Making Determination**

This rule is being proposed as a consensus rule because, in accordance with the State Administrative Procedure Act section 102(11)(b), it implements or confirms to non-discretionary statutory provisions. Section 68 of Chapter 264 of the Laws of 2003 amended the Executive Law, adding a new subdivision 13 to Executive Law section 631 to authorize the New York State Crime Victims Board's direct reimbursement for the costs of certain services related to a sexual assault forensic exam performed by any New York State accredited hospital, accredited sexual assault examiner program or licensed health care provider.

Section 68 of Chapter 264 of the Laws of 2003 established the rate for reimbursement to be eight hundred dollars. That rate is reviewable and adjustable annually by the Crime Victims Board in consultation with the New York State Department of Health. The hospital, sexual assault examiner program or licensed health care provider must accept this fee as payment in full for the specified services. No additional billing of the survivor for said services is permissible. A sexual assault survivor may voluntarily assign any private insurance benefits to which she or he is entitled for the healthcare forensic examination, in which case the hospital or healthcare provider may not charge the board.

Pursuant to the annual review and adjustment allowed by Section 68 of Chapter 264 of the Laws of 2003, the proposed rule would amend section 525.12(h) of Title 9 NYCRR as it relates to the rate the hospital, sexual assault examiner program or licensed health care provider is reimbursed. The proposed rule does not increase or decrease the statutory amount of eight hundred dollars established by Section 68 of Chapter 264 of the Laws of 2003; rather it would allow the New York State Crime Victims Board to reimburse the actual amount of itemized charges up to that eight hundred dollar amount.

The proposed consensus rule is submitted by the New York State Crime Victims Board in order to conserve limited, valuable public resources while at the same time continuing to serve the public interest and operate under the spirit of the law.

**Job Impact Statement**

The New York State Crime Victims Board projects no substantial adverse impact on jobs or employment opportunities in the State of New York as a result of this rule. The rule simply allows the New York State Crime Victims Board to reimburse the actual amount of itemized charges up to that eight hundred dollar amount for the costs of certain services related to a sexual assault forensic exam performed by any New York State accredited hospital, accredited sexual assault examiner program or licensed health care provider. There will be no change in the number of agency employees as a result of these regulations. Nothing in the proposed regulations will increase or decrease the number of jobs in New York State, have an adverse impact on specific regions in New York State or negatively impact jobs in New York State.

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## Crime Victims Board

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**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Direct Reimbursement for the Costs of Certain Services**

**I.D. No.** CVB-06-07-00024-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** This is a consensus rule making to amend section 525.12(h) of Title 9 NYCRR.

**Statutory authority:** Executive Law, section 631(13)

**Subject:** Direct reimbursement for the costs of certain services related to sexual assault forensic exam.

## Department of Economic Development

### EMERGENCY RULE MAKING

#### Empire Zones Program

**I.D. No.** EDV-06-07-00006-E

**Filing No.** 82

**Filing date:** Jan. 18, 2006

**Effective date:** Jan. 18, 2006

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Parts 10-14 of Title 5 NYCRR.

**Statutory authority:** General Municipal Law, art. 18-B, section 959

**Finding of necessity for emergency rule:** Preservation of general welfare.

**Specific reasons underlying the finding of necessity:** The reforms enacted in L. 2005, ch. 63 require reconfiguration of the existing Empire Zones by January 1, 2006. Immediate guidance to the affected parties is required.

**Subject:** Empire Zones Program.

**Purpose:** To conform the regulations to existing statute and recent statutory amendments (L. 2005, ch. 63); and clarify and improve administrative procedures.

**Substance of emergency rule:** The emergency rule is the result of changes to Article 18-B of the General Municipal Law pursuant to Chapter 63 of the Laws of 2005, as well as a comprehensive review of administrative procedures and existing regulations. The amended laws require the existing Empire Zones to identify revised zone boundaries—that is, placement of zone acreage into “distinct and separate contiguous areas”—to the Department of Economic Development by January 1, 2006. The existing regulations are affected by this requirement, but at the same time the zones need immediate guidance which requires amending the existing regulations in an accelerated fashion. At the same time, the existing regulations contain several outdated references, and the Department has also taken the opportunity to improve its administrative procedures. The Empire Zone regulations contained in 5 NYCRR Parts 10 through 14 are hereby amended as follows:

First, pursuant to Chapter 63 of the Laws of 2000 and Chapter 63 of the Laws of 2005, the emergency rule would reflect the name change of the program from Economic Development Zones to the Empire Zones and add reference to three new tax benefits: the Qualified Empire Zone Enterprise (“QEZE”) Real Property Tax Credit, QEZE Tax Reduction Credit, and the QEZE Sales and Use Tax Exemption. The emergency rule also reflects the eligibility of agricultural cooperatives for Empire Zone tax credits and the QEZE Real Property Tax Credit.

Second, the emergency rule would conform the regulations to existing statutory terminology, definitions and practices. For example, an incorrect reference to a local empire zone administrator is being corrected to read local empire zone certification officer or simply, the local empire zone, if applicable. Pursuant to statute, the chief executive officer must ensure that the information on a designation application is accurate and complete, not the local legislative body. The requirements for a shift resolution did not contain all the criteria as set forth in statute. Certain regulatory provisions regarding application for zone designation were not in accord with the statute, such as whether certain information must be contained in local law rather than the application itself. In addition, tracking the statutory changes from Chapter 63 of the Laws of 2005, census tract zones are renamed “investment zones”, county-created zones are renamed “development zones”, and the new term “cost-benefit analysis” is defined. The emergency regulation also tracks the amended statute’s deletion of the category of contributions to a qualified Empire Zone Capital Corporation from those businesses eligible for the Zone Capital Credit.

Third, the emergency rule would amend the Department’s discretionary provision that limits the designation of nearby lands in investment zones to 320 acres. Such regulatory limitations are arbitrary and unnecessarily exceed or are inconsistent with State statute, and at the same time place undue limits on the reconfiguration of zones; municipalities cannot

effectively utilize zone acreage to create opportunities for business investment and job growth in economically distressed areas that are not necessarily located in eligible or contiguous census tracts. At the same time, the Department is required to provide guidance in regulation on placement of nearby zone lands, and cannot countenance abuse of the program’s requirements on acreage placement. Thus, placement of nearby lands can exceed 320 acres provided that the municipality demonstrates that (1) there is insufficient existing or planned infrastructure within eligible or contiguous tracts to accommodate business development in a highly distressed area, or to accommodate development of strategic businesses or (2) placing up to 960 acres in eligible or contiguous census tracts would be inconsistent with open space and wetland protection or (3) there are insufficient lands available for further business development within eligible or contiguous census tracts or (4) lands previously designated in the eligible or contiguous census tracts that were otherwise suitable for development and have not had any appreciable commercial activity or capital investment or (5) changes to eligible census tracts as a result of the 2000 Census, combined with the requirement in the amended statute that the distinct and separate contiguous areas accommodate already designated lands, alter the amount of nearby acreage used and available for development.

Fourth, the emergency rule clarifies the statutory requirement from Chapter 63, L. 2005 that development zones (formerly county zones) create up to three areas within their reconfigured zones as investment (formerly census tract) zones. The rule would require that 75% of the acreage used to define these investment zones be included within an eligible or contiguous census tract. Furthermore, the rule would not require a development zone to place investment zone acreage within a municipality in that county if that particular municipality already contained an investment zone, and the only eligible census tracts were contained within that municipality. The purpose of this is to fulfill the intent of the new statutory amendments that the counties place a substantial portion of the zone acreage within eligible or contiguous census tracts, and this provision follows essentially the same method for concentrating acreage within distressed areas as the General Municipal Law employed for census tract zones.

Fifth, the emergency rule tracks the statutory requirements that zones reconfigure their existing acreage in up to three (for investment zones) or six (for development zones) distinct and separate contiguous areas, and that zones can allocate up to their total allotted acreage at the time of designation. These reconfigured zones must be presented to the Empire Zones Designation Board for unanimous approval. The emergency rule makes clear that zones may not necessarily designate all of their acreage into three or six areas or use all of their allotted acreage, however, any subsequent additions after their official redesignation by the Designation Board will still require unanimous approval by that Board.

Sixth, the emergency rule tracks the new statutory requirement that certain defined “regionally significant” projects can be located outside of the new distinct and separate contiguous areas. There are four categories of projects identified in Chapter 63; only one category of applications, manufacturers projecting the creation of 50 or more jobs, are allowed to progress before the identification of the distinct and separate contiguous areas and/or the approval of certain regulations by the Empire Zones Designation Board. The emergency rule identifies a timetable for meeting the minimum job creation requirement: 25% of the minimum jobs required to meet the definition of regionally significant project within 2 years of the date of designation of the project as regionally significant, 50% of the minimum jobs within 3 years, 75% of the minimum jobs within 4 years, and 100% of the minimum jobs within 5 years. Failure to achieve a milestone would trigger a decertification process.

Seventh, the emergency rule elaborates on the “demonstration of need” requirement mentioned in Chapter 63 of the Laws of 2005 for the addition (for both investment and development zones) of an additional distinct and separate contiguous area. A zone can demonstrate the need for a fourth or, as the case may be, a seventh distinct and separate contiguous area if (1) there is insufficient existing or planned infrastructure within the three (or six) distinct and separate contiguous areas to (a) accommodate business development and there are other areas of the applicant municipality that can be characterized as economically distressed and/or (b) accommodate development of strategic businesses as defined in the local development plan, or (2) placing all acreage in the other three or six distinct and separate contiguous areas would be inconsistent with open space and wetland protection, or (3) there are insufficient lands available for further business development within the other distinct and separate contiguous areas.

Eight, the emergency rule clarifies Chapter 63’s permission for zone-certified businesses which will be located outside of the distinct and

separate contiguous areas to receive zone benefits until decertified. The area which will be "grandfathered" shall be limited to the expansion of the certified business within the parcel or portion thereof that was originally located in the zone before redesignation. Each zone must identify any such business by December 30, 2005.

Ninth, the emergency rule tracks Chapter 63's requirement that new zone development plans, created in the conjunction with the new distinct and separate contiguous areas to be approved by the Empire Zones Designation Board, are to be approved by the Department within 90 days of submission. The emergency rule defines the date of submission for each zone as the date of approval of the distinct and separate contiguous areas by the Empire Zones Designation Board.

Tenth, the emergency rule fulfills the requirements of Chapter 63 to subject all businesses applying for zone benefits to meet a "cost-benefit analysis". The cost-benefit analysis is to be included in the zone development plan by the applicant municipality. The definition included in the emergency rule lays out the basic formula for calculating the benefits received to the costs incurred.

Eleventh, the emergency rule clarifies the status of community development projects as a result of the reconfiguration of the zones pursuant to Chapter 63. The current regulations require the community development projects to be located in an Empire Zone in order for investments in those projects to qualify for tax benefits. Drawing distinct and separate contiguous areas around community development projects would severely limit the ability of Empire Zones to include as many eligible businesses as possible into the new distinct and separate contiguous areas. Community development projects are not necessarily required to be certified. There is a strong public policy preference for these projects and there is an expectation by their sponsors that they continue to offer tax credits to contributors until fundraising for the projects are completed. To that end, all community development projects approved by the Department before April 1, 2005 would be considered to be located within its respective Empire Zone, and a community development project will be considered to be located in the Empire Zone if it can demonstrate that a zone has been working with the project before April 1, 2005 for the purpose of submitting a boundary revision for inclusion in to the Zone that would include job creation.

Twelfth, the emergency rule would revise the application process in order to ensure timely action and improve efficiency and accountability. For example, the proposed process would no longer require the applicant to submit an application to both the Department and the Department of Labor. In addition, the proposed process allows the applicant to cure incomplete or deficient applications within a set time period.

Lastly, the emergency rule would add certain programmatic information that is helpful to zone administrators, applicants, and practitioners such as the method for determining the effective dates for certifications and boundary revisions.

The full text of the rule is available at [www.empire.state.ny.us](http://www.empire.state.ny.us)

**This notice is intended** to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire April 17, 2007.

**Text of emergency rule and any required statements and analyses may be obtained from:** Robert Regan, Department of Economic Development, 30 S. Pearl St., Albany, NY 12245, (518) 292-5120, [rregan@empire.state.ny.us](mailto:rregan@empire.state.ny.us)

#### **Regulatory Impact Statement**

##### STATUTORY AUTHORITY:

Section 959(a) of the General Municipal Law authorizes the Commissioner of Economic Development to adopt rules and regulations governing the criteria of eligibility for empire zone designation, the application process, and the joint certification of a business enterprise.

##### LEGISLATIVE OBJECTIVES:

The rule making accords with the public policy objectives the Legislature sought to advance because the majority of such revisions are in direct response to recent statutory amendments and the remaining revisions conform the regulations to existing statute or clarify administrative procedures of the program. It is the public policy of the State to offer special incentives and assistance that will promote the development of new businesses, the expansion of existing businesses and the development of human resources within areas designated as Empire Zones. The proposed amendments help to further such objectives by enabling the Department of Economic Development to administer the program in a more efficient manner.

##### NEEDS AND BENEFITS:

The emergency rule is required in order to bring the regulations into accord with statute and to improve the overall administration and effectiveness of the program. There are several benefits that would be derived

from this emergency rule making. First, the emergency regulations would conform to statutory provisions and thereby eliminate potential confusion to the practitioner. Second, the emergency rule would clarify the application process to ensure timely action and improve efficiency and accountability.

##### COSTS:

I. Costs to private regulated parties (the Business applicants): None. The emergency regulation will not impose any additional costs to the business applicants beyond the existing program. In fact, there may be a cost savings due to a clearer application and the ability to cure application deficiencies rather than being immediately denied.

II. Costs to the regulating agency for the implementation and continued administration of the rule: While there will be additional costs to the Department of Economic Development associated with the emergency rule making, this is a result of the statutory changes which the emergency regulation language tracks or interprets. All existing Empire Zones have to revise their boundaries as a result of the statutory changes, with certain exceptions tied to specific types of business or the timing of certain applications. This results in more paperwork and additional staff time over the course of the next twelve months as the program is reconfigured. However, over time staff and paperwork costs will be minimized because the statutory changes have clarified eligibility for the program and the revised regulations have made procedures for processing applications easier to understand.

III. Costs to the State government: None. There will be no additional costs to New York State as a result of the emergency rule making.

IV. Costs to local governments (the Local Zone administration): None. The emergency regulation will not impose any additional costs to the local zone administration beyond any additional costs associated with implementing the statutory requirements which reform the program. In the long term, there may be some cost savings in regards to staff time due to a clarification of program requirements.

##### LOCAL GOVERNMENT MANDATES:

None. Local governments are not mandated to participate in the Empire Zones Program. If a local government chooses to participate, there is a cost associated with local administration. However, this emergency rule does not impose any additional costs to the local governments beyond any additional costs associated with implementing the statutory requirements which reform the program.

##### PAPERWORK:

The emergency rule does create additional paperwork, insofar as the various Empire Zones have to refile applications to reconfigure their Zone acreage, identify regionally significant projects and "grandfathered" businesses where necessary, and process boundary revisions before deadlines enumerated in statute which are reproduced verbatim from the statute.

##### DUPLICATION:

The emergency rule will not duplicate or exceed any other existing Federal or State statute or regulation.

##### ALTERNATIVES:

No alternatives were considered with regard to amending the regulations in response to statutory revisions. Certain alternatives to policies seeking to be adopted were considered in certain subject areas where the Legislature provided some room for interpretation; for example, acreage devoted to existing businesses outside of the reconfigured zone areas, creation of investment zones within development zones, the placement of "nearby" acreage, the location of "grandfathered" businesses and the continuation of community development projects. In each case, interpretation was geared to preserving, to the extent possible, the expectation of benefits for existing zone businesses, making zone reconfiguration as clear as possible for existing zones, and enabling zone acreage to be utilized in the most effective manner. Finally, with regard to the application process, an alternative was considered to include more time for review of the application at the State level. This alternative was rejected because it was determined that certification of a business, which has a complete and sufficient application, should not be delayed.

##### FEDERAL STANDARDS:

There are no federal standards in regard to the Empire Zones program; it is purely a state program that offers, among other things, state and local tax credits. Therefore, the emergency rule does not exceed any Federal standard.

##### COMPLIANCE SCHEDULE:

The affected State agencies (Economic Development and Labor), local zone administration and the business applicants will be able to achieve compliance with the emergency regulation as soon as it is implemented.

#### **Regulatory Flexibility Analysis**

Participation in the Empire Zones Program is entirely at the discretion of each eligible municipality and business enterprise. Neither General Municipal Law Article 18-B nor the emergency regulations impose an obligation on any local government or business entity to participate in the program. The emergency regulation does not impose any adverse economic impact, reporting, recordkeeping, or other compliance requirements on small businesses and/or local governments. In fact, the emergency regulations may have a positive economic impact on the small businesses and local governments that do participate due to clarifying changes, the added flexibility and a new application process. The administrative structure of the program was designed to offer a streamlined application and approval process by extracting only essential information from the applicants. In addition, the changes to the regulations that track changes in statute and result in a reconfiguration of zones will actually enhance the ability of businesses yet to apply which are located in distressed areas to receive program benefits. Local governments will have the additional short-term burden of taking the legal and administrative steps necessary to reconfigure their zones, but this is a statutorily imposed burden, not solely a regulatory one. Because it is evident from the nature of the emergency rule that it will have either no substantive impact, or a positive impact, on small businesses and local governments, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local government is not required and one has not been prepared.

#### **Rural Area Flexibility Analysis**

The program is a statewide program. There are eligible municipalities and businesses in rural areas of New York State. However, participation is entirely at the discretion of eligible applicant municipalities and eligible business enterprises. The program does impose some responsibility on those municipalities and businesses which participate in the program such as submitting applications and reports. The emergency rule will not impose any additional reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Therefore, the emergency regulation will not have a substantial adverse economic impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

#### **Job Impact Statement**

The emergency regulation relates to the Empire Zones Program. The Empire Zones Program itself is a job creation incentive. The emergency regulation will not have a substantial adverse impact on jobs and employment opportunities. In fact, the regulations, which result from statutory-based reforms, will enable the program to better fulfill its mission: job creation and investment for economically distressed areas. At the same time, businesses currently receiving benefits will not have their status jeopardized as a result of the regulations. Because it is evident from the nature of the emergency amendment that it will have either no impact, or a positive impact, on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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## Department of Environmental Conservation

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### EMERGENCY RULE MAKING

#### **Architectural and Industrial Maintenance Coatings**

**I.D. No.** ENV-49-06-00015-E

**Filing No.** 81

**Filing date:** Jan. 17, 2007

**Effective date:** Jan. 17, 2007

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Part 205 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0301 and 19-0305

**Finding of necessity for emergency rule:** Preservation of public health and general welfare.

**Specific reasons underlying the finding of necessity:** To achieve the reductions of emissions of volatile organic compounds necessary to demonstrate attainment with the ozone national ambient air quality standards. Attainment of this standard is necessary to protect the public health and welfare.

**Subject:** Architectural and industrial maintenance coatings.

**Purpose:** To end the small manufacturer exemption on Dec. 31, 2006 and establish a sell-through end date of May 15, 2007 to eliminate the unlimited sell-through of non-complying coatings manufactured before Jan. 1, 2005.

**Text of emergency rule:** Sections 205.1 through 205.2 remain unchanged.

Section 205.3 (a) is amended to read as follows:

Section 205.3 Standards.

(a) 'VOC content limits.' Except as provided in [subdivision] *subdivisions* (b) and (g) of this section, no person shall manufacture, blend, or repack for sale within the State of New York, supply, sell, or offer for sale within the State of New York or solicit for application or apply within the State of New York any architectural coating manufactured on or after January 1, 2005 which contains volatile organic compounds in excess of the limits specified in the following Table of Standards. Limits are expressed in grams of VOC per liter of coating thinned to the manufacturer's maximum recommendation, excluding the volume of any water, exempt compounds, or colorant added to tint bases. 'Manufacturer's maximum recommendation' means the maximum recommendation for thinning that is indicated on the label or lid of the coating container.

The remainder of section 205.3(a) remains unchanged.

Sections 205.3(b) through 205.3(f) remain unchanged.

New Section 205.3(g) is added to read as follows:

(g) '*Sell Through of Coatings.*' A coating manufactured prior to January 1, 2005, or previously granted an exemption pursuant to Section 205.7, may be sold, supplied, or offered for sale until May 15, 2007, so long as the coating complied with standards in effect at the time the coating was manufactured.

Sections 205.4 through 205.7(e) remain unchanged.

Section 205.7(f) is amended to read as follows:

(f) Any exemption granted under subdivision (d) of this section may remain in effect no later than December 31, [2007] 2006.

Section 205.7(g) is deleted.

Section 205.7(h) is renumbered as follows:

[(h)] (g) Limited exemptions for small AIM coatings manufacturers as approved by the director, Division of Air Resources, Department of Environmental Conservation under this Part, will be submitted to the EPA as State Implementation Plan revisions for approval.

Section 205.8 remains unchanged.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this proposed rule as a permanent rule, having previously published a notice of emergency rule making, I.D. No. ENV-49-06-00015-P, Issue of November 21, 2006. The emergency rule will expire March 17, 2007.

**Text of emergency rule and any required statements and analyses may be obtained from:** Daniel S. Brinsko, P.E., Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8396, e-mail: 205aim@gw.dec.state.ny.us

**Additional matter required by statute:** Pursuant to Article 8 of the (State Environmental Quality Review Act), a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file.

#### **Summary of Regulatory Impact Statement**

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York has promulgated regulations designed to limit the VOCs emitted by various paints, stains, and sealers also known as architectural and industrial maintenance coatings (AIM coatings).

The Department now proposes to revise Part 205 to implement two rule changes. First, the Department proposes to modify the provision in section 205.7 whereby small manufacturers could apply for and obtain an exemption from VOC content limits through December 31, 2007, with the option to apply to renew the exemption for an additional three years. This exemption is otherwise known as the small manufacturer's exemption or "SME."

By adoption of this regulation on an emergency basis, the Department ended the SME effective December 31, 2006. Second, the Department proposes to include a "sell-through" end date provision so that products manufactured prior to January 1, 2005, or granted a SME, which do not meet Part 205 VOC content limits, cannot be sold indefinitely. Together, these modifications will ensure that the State achieves the VOC emission reductions from AIM coatings needed to address the emission shortfall identified by EPA for the NYCMA in connection with the one-hour ozone NAAQS and that the State can make immediate progress towards attaining the eight-hour ozone NAAQS statewide (although EPA's implementing regulations were vacated by the court, the eight-hour standard is still valid and is a health based standard, so the Department is still obligated under the Clean Air Act to implement measures to meet the NAAQS as expeditiously as practicable).

In 2005, the Department granted SMEs to twenty small manufacturers for specific AIM coatings. The Department has analyzed the information submitted in connection with the SME applications, and has now determined that the SMEs account for approximately 4 tons of VOC emission reductions per ozone season day (tpd) out of the 14 tpd of reductions that were anticipated to be achieved when the VOC content limits in Part 205 took effect in 2005. One of the objectives of this rulemaking is to recover for the 2007 ozone season and thereafter the 4 tpd of VOC emission reductions that were not achieved as a result of the SMEs. In addition to the VOC emission reductions lost due to the SMEs, the Department is concerned about the VOC emissions lost from the continued sale of AIM coatings produced prior to the January 1, 2005 compliance date in Part 205. The VOC content limits in Part 205 do not apply to products manufactured prior to January 1, 2005, only products manufactured on or after that date. In discussions with AIM coatings manufacturers, the Department has learned that some pre-2005 product is still being sold. The Department proposes to add a "sell-through" end date of May 15, 2007, after which all AIM products sold in New York State must comply with the low VOC content limits in Part 205. By eliminating the SMEs and establishing a "sell-through" end date, the Department will be able to demonstrate progress towards attaining both the one-hour and the eight-hour NAAQS for ozone.

The Department is filing an emergency adoption to make these rule revisions effective immediately. Under these revisions, the SMEs ended on December 31, 2006. Manufacturers will have until May 15, 2007 to sell non-compliant products that were manufactured before January 1, 2005 or were granted a SME. The Department realizes, however, that manufacturers granted one or more SMEs will need time to shift their production to compliant coatings. Both large and small manufacturers who were selling non-compliant coatings manufactured before the new VOC standards took effect need time to liquidate their existing inventories or transfer those inventories to states outside of the Ozone Transport Region with less stringent AIM coatings regulations. The adoption of these revisions on an emergency basis ensures that manufacturers have significant advance notice to react to these rule changes in a timely manner and achieve compliance with Part 205 by the "sell-through" end date.

The promulgation of these Part 205 amendments is authorized by the following sections of the Environmental Conservation Law which, taken together, clearly empower the Department to establish and implement the Program: Section 1-0101; Section 3-0301; Section 19-0103; Section 19-0105; Section 19-0301 and Section 19-0305.

The 2003 amendments to Part 205 included the SME provision that allowed the Department to grant an exemption to a small AIM coatings manufacturer in order to allow more time for the manufacturer to acquire the technology to comply with the new VOC content limits. Twenty-two small manufacturers applied for and twenty received SMEs pursuant to section 205.7. Revised Part 205 was estimated to achieve VOC emission reductions of 14 tons per ozone season day (tpd) and the Department has determined that as a result of granting the SMEs, 4 tpd of VOC emission reductions that had been anticipated were not realized. These emission reductions are essential to the Department's strategy to bring NYCMA into attainment with the NAAQS for ozone. In a letter dated January 27, 2006 from Raymond Werner, Chief, Air Programs Branch, USEPA Region 2 Office, to Dave Shaw, Director Division of Air Resources of DEC, EPA requested an accounting of the shortfall measures to meet the 42 tpd VOC emission reduction shortfall. New York cannot make this demonstration unless it is able to take credit for all of the emission reductions anticipated through implementation of the six "shortfall measures", which included the 14 tpd from Part 205, the AIM Coatings rule.

In addition to evaluating the SME provision, the Department also reviewed a provision that was considered during the last rulemaking but

not included in the final adopted rule in 2003. Prior to the emergency adoption of revisions on November 7, 2006, Part 205 allowed the sale of all AIM coatings manufactured prior to January 1, 2005 to continue indefinitely. Because the Department believed that AIM coatings moved quickly through the market (based upon discussions with industry during the rulemaking process), it was believed that there was not a need for a cut-off date. Since adoption of the final rule in 2003, the Department has discovered that some of these products do have long shelf lives and have remained in the market for periods sometimes exceeding two years. Moreover, the Department has also been advised that some manufacturers stockpiled AIM coatings manufactured prior to the rule implementation date of January 1, 2005 to ensure that they could continue to sell 2004 formulations after the revised rule took effect. As a result, it is important to establish a "sell-through" end date to ensure that the entire 14 tpd of VOC emission reductions are realized as soon as possible. The Department now concludes that if a "sell-through" end date is not invoked then noncompliant products will continue to be sold for a long time, and New York State will not realize the full potential of the VOC emission reductions expected during the rulemaking process. The Department's selection of May 15, 2007 as a "sell-through" end date effectively provides the regulated community with a "sell-through" period nearly two and a half years. Also, May 15th corresponds to the beginning of the ozone season, so removing these higher VOC products from the market before the start of the ozone season will improve New York's ability to attain the ozone NAAQS.

There are two types of ozone, stratospheric and ground level ozone. Ozone in the stratosphere is naturally occurring and is desirable because it shields the earth from harmful ultraviolet rays from the sun which may cause skin cancer. Ozone at ground level causes throat irritation, congestion, chest pains, nausea and labored breathing. It aggravates respiratory conditions like chronic lung and heart diseases, allergies and asthma. Ozone damages the lungs and may contribute to lung disease. Even exercising healthy adults can experience 15 percent to 20 percent reductions in lung function from exposure to low levels of ozone over several hours. Children are most at risk from exposure to ozone. Because their respiratory systems are still developing, they are more susceptible than adults. This problem is exacerbated because ozone is a summertime phenomenon. Children are outside playing and exercising more often during the summer which results in children being exposed to ozone more than adults. Outdoor workers are also more susceptible to lung damage because of their increased exposure to ozone.

Implementation of the Part 205 revisions will, in concert with similar regulations adopted by other States and other measures undertaken by New York, lower levels of ozone in New York State and will decrease the adverse public health and welfare effects described above.

The cost of the proposed regulations will mostly affect the twenty SME manufacturers to whom the Department granted a SME. There may be some cost to other manufacturers that still have supplies of AIM coatings manufactured before January 1, 2005, but Department staff expects this to be minor. Large manufacturers who have existing inventories of product manufactured prior to January 1, 2005 will have to ensure that the product is sold before the "sell-through" end date or moved out of New York State for sale in other states which do not have an AIM coatings rule.

Small manufacturers may have increased costs associated with the production of compliant AIM coatings and may experience a reduction in profits to the extent that their sales increased during the SME as a result of their ability to make and sell higher VOC products. These manufacturers must now make and sell complying coatings and accordingly their production costs may increase slightly and they may sell less product. Since compliant formulations are available for all AIM coating categories, however, the Department expects that the financial effects of this rule are beneficial to the overall market since all manufacturers must meet the same VOC content limits.

It should be noted that the impact to consumers is expected to be minimal since there are already a large amount of complying coatings on store shelves (produced by manufactures that did not receive a SME). Competition from these existing complying coatings will likely constrain any price increases as manufacturers will not be able to pass on all of their costs to the consumers. This is likely to control any actual retail price increases.

The Department evaluated several alternatives and determined that the most preferable alternative was to end the SME in December 2006 and the "sell-through" in May 2007. This option provides time for the manufacturers who have products granted a SME or products manufactured prior to January 1, 2005 to "sell-through" any remaining inventory. In particular, ending the "sell-through" by May 15, 2007 allows manufacturers time to

liquidate inventory while ensuring that sale of non-complying products is curtailed by the 2007 ozone season. This is the preferred option because it ensures New York can realize the necessary VOC emission reductions.

EPA approved Part 205 into New York's State Implementation Plan on December 13, 2004. As a result of EPA's action, the VOC content limits in Part 205 represent the Federal standards for AIM coatings in New York. EPA has asked New York to demonstrate compliance with the ozone NAAQS. To do this, the Department needs to demonstrate 42 tpd of VOC emission reductions identified by EPA as the shortfall. In order to achieve the 42 tpd of shortfall reductions, the Department adopted six VOC control measures including the Part 205 AIM coatings rule. The AIM coatings rule was expected to produce 14 tpd of the VOC shortfall emission reductions but because of the SME and the unlimited sell-through provisions the Department is not able to make its shortfall demonstration to EPA. These revisions will allow the Department to comply with that federal mandate.

#### **Regulatory Flexibility Analysis**

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York has promulgated regulations designed to limit the VOCs emitted by various paints, stains, and sealers also known as architectural and industrial maintenance coatings (AIM coatings).

On July 18, 1997, the EPA promulgated the eight-hour ozone national ambient air quality standard (NAAQS). In June of 2004, EPA designated several areas within New York State to be in nonattainment with the eight-hour NAAQS. However, in December 2006, the United States Circuit Court of Appeals for the District of Columbia vacated EPA's eight-hour ozone implementation rule. Based upon that Court decision, New York State is still required to meet the requirements related to the one-hour ambient air quality standard for ozone. Federal regulations require New York State to develop and implement enforceable strategies to get nonattainment areas into attainment by 2007. Since attainment is determined over a three-year period, VOC emission reductions are needed immediately in order to demonstrate attainment in 2007.

The Department of Environmental Conservation (the Department) proposes to revise Part 205 to implement two rule changes. First, the Department proposes to modify the provision in section 205.7 whereby small manufacturers could apply for and obtain an exemption from VOC content limits through December 31, 2007, with the option to apply to renew the exemption for an additional three years. This exemption is otherwise known as the small manufacturer's exemption or "SME." By adoption of this regulation on an emergency basis, the Department ended the SME effective December 31, 2006. Second, the Department proposes to include a "sell-through" provision so that products manufactured prior to January 1, 2005, or granted a SME, and which do not meet Part 205 VOC content limits cannot be sold indefinitely. Together, these modifications will ensure that the State achieves the VOC emission reductions from AIM coatings needed to address the emission shortfall identified by EPA for the NYCMA in connection with the one-hour ozone NAAQS and that the State can make immediate progress towards attaining the eight-hour ozone NAAQS statewide (although EPA's implementing regulations were vacated by the court, the eight-hour standard is still valid and is a health based standard, so the Department is still obligated under the Clean Air Act to implement measures to meet the NAAQS as expeditiously as practicable).

In 2005, the Department granted a SME to twenty small manufacturers for specific AIM coatings. The Department has analyzed the information submitted in connection with the SME applications, and has now determined that the SMEs account for 4 tons per ozone season day (tpd) out of the 14 tpd of VOC emission reductions that were anticipated to be achieved when the VOC content limits in Part 205 took effect in 2005. One of the objectives of this rulemaking is to recover the 4 tpd of VOC emission reductions that were not achieved as a result of the SMEs. In addition to the VOC emission reductions lost due to the SMEs, the Department is concerned about the VOC emissions lost from AIM coatings produced prior to the January 1, 2005 compliance date in Part 205. The VOC content limits in Part 205 do not apply to products manufactured prior to January 1, 2005, only products manufactured on or after that date. In discussions with AIM coatings manufacturers, the Department has learned that some pre 2005 product is still being sold. The Department proposes to add a "sell-through" end date of May 15, 2007 which would require that only VOC compliant coatings be sold after that date. By eliminating the SMEs and establishing a "sell-through" end date, the

Department will be able to demonstrate progress in its efforts to attain both the one-hour and the eight-hour NAAQS for ozone.

The Department has filed an emergency adoption that made these rule revisions effective immediately. Under these revisions, the SMEs ended effective December 31, 2006. Manufacturers will have until May 15, 2007 to sell non-compliant products that were manufactured before January 1, 2005 or were granted a SME. The Department realizes, however, that manufacturers granted one or more SMEs will need time to shift their production to compliant coatings. Both large and small manufacturers who were selling non-compliant coatings manufactured before the new VOC standards took effect need time to liquidate their existing inventories or transfer those inventories to states outside of the OTR with less stringent AIM coatings regulations. The adoption of these revisions on an emergency basis ensures that manufacturers have significant advance notice to react to these rule changes in a timely manner and achieve compliance with Part 205 by the "sell-through" end date.

1. Effects on Small Businesses and Local Governments. No local governments will be directly affected by the revisions to 6 NYCRR Part 205, the Architectural and Industrial Maintenance (AIM) Coatings regulation. Small businesses that manufacture AIM coatings for sale pursuant to a small manufacturer exemption (SME) provision for certain products under section 205.7 had a three year exemption that would have ended on December 31, 2007. With these rule revisions, the SME ended on December 31, 2006. In addition, as a result of the new sell through provision, AIM coatings manufacturers will have until May 15, 2007 to sell products which were grandfathered or received a SME.

2. Compliance Requirements. Local governments are not directly affected by the revisions to 6 NYCRR Part 205. Small businesses which were not granted a SME will face no additional requirements. Manufacturers who were granted a SME will have to comply with the low VOC content limits of Part 205, which may involve reformulating some of their coatings. Contractors and retailers who use or sell AIM simply need to continue to purchase compliant coatings.

3. Professional Services. Local governments are not directly affected by the revisions to 6 NYCRR Part 205. It is not anticipated that small businesses that manufacture architectural coatings will need to contract out for professional services to comply with this regulation. In the few cases where small manufacturers do not already have compliant formulations to replace those SME products complying formulations are available at little or no cost from both the solvent and the raw material suppliers to this industry. See Chemidex.com on the web.

4. Compliance Costs. There are no additional compliance costs for small businesses and local governments as a result of this rule except for the 11 New York State manufacturers granted a SME. Since there are compliant coatings now available in all AIM categories, small businesses and local governments that previously purchased AIM coatings that received a SME, they are not expected to see a price increase for the purchase of compliant AIM coatings.

There may be some cost to other manufacturers that still have supplies of AIM coatings manufactured before January 1, 2005, but the Department expects this to be minor. Manufacturers that have existing inventories of product manufactured before January 1, 2005 will need to ensure that the product is sold before the "sell-through" end date or moved out of New York State for sale in other states which do not have an AIM coatings rule.

The proposed regulations will mostly affect the eleven New York urban/suburban businesses that received an SME for certain products. Some of manufacturers may have increased costs associated with the production of compliant AIM coatings. The Department is aware of some small manufacturers who, after having been granted a SME, were able to increase sales and market share of their products. These manufacturers will now be required to produce compliant coatings which will have to compete in the market place with the compliant coatings of other manufacturers. Consequently, they might experience reduced profits to the extent they cannot maintain the same level of sales with compliant VOC coatings as they did with their higher VOC content coatings. Compliant formulations are available for all coating categories, however, so all manufacturers should be able to access that technology going forward. Department staff believe that the financial effects of this rule are beneficial to the overall market since this rule would no longer provide a market advantage to those companies that received the SMEs or had large inventories of products manufactured before January 2005.

It should be noted that the impact to consumers is expected to be minimal since there are already large amounts of complying coatings on store shelves (produced by manufactures that did not receive a SME). Competition from these existing complying coatings will likely constrain

any price increases as manufacturers will not be able to pass on all of their costs to the consumers. This is likely to control any actual retail price increases.

5. **Minimizing Adverse Impact.** Local governments are not directly affected by the revisions to 6 NYCRR Part 205. The emergency adoption of these revisions ensures that manufacturers have significant advance notice to react to these rule changes in a timely manner and achieve compliance with Part 205 by the “sell-through” end date. The Department has provided four months advance notice of the end of the SME and almost nine months notice of the sell through end date. This will provide manufacturers time to liquidate their existing inventories, or transfer those inventories to non-OTR states.

6. **Small Business and Local Government Participation.** Since local governments are not directly affected by this regulation, the Department did not contact local governments directly. On September 21, 2005 the Department notified all the manufacturers who had been granted a SME of its intent to end the SME by December 31, 2006, with no extensions. Only two (one New York company) of the twenty companies with SMEs responded and also that those responses were many months after the initial notification. While the one New York company indicated that they would like to see the SME provision remain as well as the ability to sell non-complying manufactured before January 1, 2005, indications are that they now have the ability to reformulate their products to comply with Part 205. The Department has also given official notice of this rulemaking to each of the twenty companies with SMEs.

7. **Economic and Technological Feasibility.** Local governments are not directly affected by the revisions to 6 NYCRR Part 205. Compliant products are available in all coating categories statewide to meet all consumer needs. The VOC content limits adopted in 2003 were based in large part on the 2000 California Air Resources Boards (CARB) suggested control measure (SCM) for AIM coatings. The SCM is a model AIM coatings rule that is used as a template by the California Air Districts for their AIM coatings regulations. The SCM is based on a 1998 AIM coatings survey by CARB in which they determined the technical feasibility of VOC content limits for each AIM coating category. In effect, the availability of products in a particular coating category at or below a specific VOC content limit indicated the feasibility of that category establishing a standard at that content limit. Since inception of the SCM VOC content limits into California in 2003, there have been no known complaints by small businesses with regards to compliance with the new AIM coatings standards. Likewise, according to CARB, there have been no known small manufacturers to go out of business as a result of the new AIM coatings regulations. By eliminating the SMEs and invoking a “sell-through” end date, this will keep New York State consistent with California as well as the other OTC states that don’t have an SME provision.

#### **Rural Area Flexibility Analysis**

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York has promulgated regulations designed to limit the VOCs emitted by various paints, stains, and sealers also known as architectural and industrial maintenance coatings (AIM coatings). See 6 NYCRR Part 205.

On July 18, 1997, the EPA promulgated the eight-hour ozone national ambient air quality standard (NAAQS). In June of 2004, EPA designated several areas within New York State to be in nonattainment with the eight-hour NAAQS. However, in December 2006, the United States Circuit Court of Appeals for the District of Columbia vacated EPA’s eight-hour ozone implementation rule. Based upon that Court decision, New York State is still required to meet the requirements related to the one-hour ambient air quality standard for ozone. Federal regulations require New York State to develop and implement enforceable strategies to get nonattainment areas into attainment by 2007. Since attainment is determined over a three-year period, VOC emission reductions are needed immediately in order to demonstrate attainment in 2007.

The Department of Environmental Conservation (the Department) proposes to revise Part 205 to implement two rule changes. First, the Department proposes to modify the provision in section 205.7 whereby small manufacturers could apply for and obtain an exemption from VOC content limits through December 31, 2007, with the option to apply to renew the exemption for an additional three years. This exemption is otherwise known as the small manufacturer’s exemption or “SME.” By adoption of this regulation on an emergency basis, the Department ended the SME

effective December 31, 2006. Second, the Department proposes to include a “sell-through” provision so that products manufactured prior to January 1, 2005, or granted a SME, and which do not meet Part 205 VOC content limits cannot be sold indefinitely. Together, these modifications will ensure that the State achieves the VOC emission reductions from AIM coatings needed to address the emission shortfall identified by EPA for the NYCMA in connection with the one-hour ozone NAAQS and that the State can make immediate progress towards attaining the eight-hour ozone NAAQS statewide (although EPA’s implementing regulations were vacated by the court, the eight-hour standard is still valid and is a health based standard, so the Department is still obligated under the Clean Air Act to implement measures to meet the NAAQS as expeditiously as practicable).

In 2005, the Department granted a SME to twenty small manufacturers for specific AIM coatings. The Department has analyzed the information submitted in connection with the SME applications, and has now determined that the SMEs account for 4 tons per ozone season day (tpd) out of the 14 tpd of VOC emission reductions that were anticipated to be achieved when the VOC content limits in Part 205 took effect in 2005. One of the objectives of this rulemaking is to recover the 4 tpd of VOC emission reductions that were not achieved as a result of the SMEs. In addition to the VOC emission reductions lost due to the SMEs, the Department is concerned about the VOC emissions lost from AIM coatings produced prior to the January 1, 2005 compliance date in Part 205. The VOC content limits in Part 205 do not apply to products manufactured prior to January 1, 2005, only products manufactured on or after that date. In discussions with AIM coatings manufacturers, the Department has learned that some pre 2005 product is still being sold. The Department proposes to add a “sell-through” end date of May 15, 2007 which would require that only VOC compliant coatings be sold after that date. By eliminating the SMEs and establishing a “sell-through” end date, the Department will be able to demonstrate progress in its efforts to attain both the one-hour and the eight-hour NAAQS for ozone.

The Department is filing an emergency adoption to make these rule revisions effective immediately. Under these revisions, the SMEs ended effective December 31, 2006. Manufacturers will have until May 15, 2007 to sell non-compliant products that were manufactured before January 1, 2005 or were granted a SME. The Department realizes, however, that manufacturers granted one or more SMEs will need time to shift their production to compliant coatings. Both large and small manufacturers who were selling non-compliant coatings manufactured before the new VOC standards took effect need time to liquidate their existing inventories or transfer those inventories to states outside of the OTR with less stringent AIM coatings regulations. The adoption of these revisions on an emergency basis ensures that manufacturers have significant advance notice to react to these rule changes in a timely manner and achieve compliance with Part 205 by the “sell-through” end date.

1. **Types and estimated number of rural areas:** Rural areas are not particularly affected by the revisions. Part 205 will continue to apply on a statewide basis. This is due in large part to the fact that only eleven of the twenty manufacturers granted SMEs are located in New York State. Of the eleven, nine manufacturers are located in NYCMA, and the other two are located in upstate New York in urban/suburban communities. None of the eleven manufacturers are located in rural communities. The impact to rural consumers, if any, is expected to be minimal since there are already a large number of compliant AIM coatings available for retail sale throughout the state.

2. **Reporting, recordkeeping and other compliance requirements:** Part 205 will continue to apply on a statewide basis. Rural areas are not particularly affected by the revisions. Reporting, record keeping, and labeling requirements are essentially unchanged since January 2005 when the Part 205 revisions went into effect. Eleven of the twenty SMEs are for businesses located in New York urban or suburban communities. Rural area businesses are not expected to be effected by these revisions. Professional services are not anticipated to be necessary to comply with this rule.

3. **Costs:** The cost of the proposed regulations will mostly affect the eleven New York urban/suburban businesses that received an SME for certain products. There may be some cost to other manufacturers that still have supplies of AIM coatings manufactured before January 1, 2005, but the Department expects this to be minor. Manufacturers that have existing inventories of product manufactured prior to January 1, 2005 will need to ensure that the product is sold before the “sell-through” end date or moved out of New York State for sale in other states which do not have an AIM coatings rule.

It is expected that the small manufacturers may have increased costs associated with the production of compliant AIM coatings. The Department is aware of some small manufacturers who, after having been granted a SME, were able to increase sales and market share of their products. These manufacturers will now be required to produce compliant coatings which will have to compete in the market place with the compliant coatings of other manufacturers. Consequently, they might experience reduced profits to the extent they cannot maintain the same level of sales with compliant VOC coatings as they did with their higher VOC content coatings. Compliant formulations are available for all coating categories, however, so all manufacturers should be able to access that technology going forward. Department staff believe that the financial effects of this rule are beneficial to the overall market since this rule would no longer provide a market advantage to those companies that received the SMEs or had large inventories of products manufactured before January 2005.

It should be noted that the impact to consumers is expected to be minimal since there are already large amounts of compliant coatings on store shelves (produced by manufacturers that did not receive a SME). Competition from these existing compliant coatings will likely constrain any price increases as manufacturers will not be able to pass on all of their costs to the consumers. This is likely to control any actual retail price increases. Since eleven of the twenty SMEs are for businesses located in New York urban or suburban communities, rural area businesses are not expected to be effected by these revisions.

4. Minimizing adverse impact: Part 205 was not anticipated to have an adverse effect on rural areas when it was promulgated in 2003 and took effect in January 2005. To date, the Department is unaware of any particular adverse impacts experienced by rural areas as a result of the promulgation of Part 205 in 2003. Rather, the rule is intended to create air quality benefits for the entire state, including rural areas, through the reduction of ozone forming pollutants. These revisions are not expected to adversely impact on rural areas since many of the products affected are currently not sold in rural areas and compliant products are available in all coating categories statewide to meet all consumer needs. Ending the SMEs by December 31, 2006 and establishing a May 15, 2007 "sell-through" end date ensures a fair and level playing field for all AIM coatings manufacturers and, more importantly, that the State, as a whole, can achieve compliance with the NAAQS for ozone in a timely manner.

5. Rural area participation: Rural areas are not particularly affected by the revisions. Eleven of the twenty SMEs were granted to businesses located in New York, all of which are located in urban or suburban communities and non are located in rural areas. Consequently, the Department did not see a need to reach out to rural communities.

#### **Job Impact Statement**

1. Nature of impact: The Department of Environmental Conservation (the Department) proposes to revise Part 205 to implement two rule changes. First, the Department proposes to modify the provision in section 205.7 whereby small manufacturers could apply for and obtain an exemption from VOC content limits through December 31, 2007, with the option to apply to renew the exemption for an additional three years. By adoption of this regulation on an emergency basis, the Department ended the small manufacturers exemption (SME) effective December 31, 2006. These businesses needed to stop manufacturing non-complying products by December 31st and had to reformulate their AIM coatings to comply with the content limits in Part 205 if they did not already have compliant formulations. The Department is aware that some manufacturers already had compliant formulations and thus were able to make this transition easily. Second, the Department proposes to include a "sell-through" provision so that products manufactured before January 1, 2005, or granted a SME, and which do not meet Part 205 VOC content limits cannot continue to be sold indefinitely. Companies will have until May 15, 2007 to liquidate their existing inventory or move it out of the State. In most cases, manufacturers have already sold all products manufactured before 2005 or will be able to sell such products before May 15, 2007 and will therefore, not be adversely impacted by this rule.

These revisions are not expected to have an adverse impact on jobs and employment opportunities in the State. Part 205 has applied Statewide since it was promulgated in 2003 and it will continue to apply on a statewide basis. Since the VOC content limits went into effect on January 1, 2005, there has been no evidence of an adverse impact on employment as a result of regulating AIM coatings. If anything, these revisions will have a positive economic impact in terms of placing all AIM manufacturers on a level economic playing field.

2. Categories and numbers affected: This rule will affect eleven in-State and nine out-of-State small manufacturers who were granted a SME

by the Department. In addition, the rule will affect manufacturers who have remaining inventories of AIM coatings manufactured prior to January 1, 2005 that does not comply with Part 205 VOC content limitations.

3. Regions of adverse impact: The Department does not expect there to be regions of adverse impact in the State. The VOC emission limits in Part 205 have applied state-wide since January 1, 2005, and there has been no resulting adverse impact on any particular region of the State. Of the eleven in-state manufacturers who were granted a SME, nine are located in the New York City Metropolitan Area (NYCMA). The Department, however, expects that these coatings manufacturers will be able to readily reformulate their products through the purchase of commercially available technology and that there will be no adverse impact on employment as a result of this rulemaking.

4. Minimizing adverse impact: The Department has provided advance notice of these rule revisions to the regulated community so that companies have sufficient time to take the necessary steps to come into compliance with Part 205. These steps include reformulating products and ensuring that existing inventories of non-complying products are sold prior to May 15, 2007, or moved out of the State. Compliant formulations are available for all AIM coating categories and are currently being sold throughout the State. The Department, therefore, does not anticipate any adverse impacts on employment from the adoption of these rule revisions. The Department, moreover, believes that this rule will have a positive economic impact on the AIM coatings market because all manufacturers will be operating on a level playing field. Competition will likely constrain manufacturers from passing on production costs to consumers. In sum, the Department does not expect this regulation to have an adverse effect on employment in the State.

5. Self employment opportunities: not applicable.

### **NOTICE OF ADOPTION**

#### **Revision to Part 621, Uniform Procedures Concerning Air Pollution**

**I.D. No.** ENV-47-06-00008-A

**Filing No.** 86

**Filing date:** Jan. 23, 2007

**Effective date:** 30 days after filing

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of section 621.4(g)(2)(iii) of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 70-0107 and 3-0301(2)(m) and State Administrative Procedures Act, section 301(3)

**Subject:** Revision of Part 621, Uniform Procedures Concerning Air Pollution.

**Purpose:** To delete the reference to the Federal Prevention of Significant Deterioration (PSD) regulations. The department returned delegation of the PSD Permit Program to the USEPA and is no longer implementing the Federal PSD Permit Program in the State.

**Text of final rule:** Section 621.1 through subparagraph (ii) of section 621.4(g)(2) remains unchanged.

All of subparagraph (iii) of section 621.4(g)(2) is repealed, a new subparagraph (iii) of section 621.4(g)(2) is added as follows:

(iii) projects subject to major new source review permitting under Part 231 of this Title;

Subparagraph (iv) of section 621.4(g)(2) through Section 621.19 remains unchanged.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 621.4(g)(2)(iii).

**Text of rule and any required statements and analyses may be obtained from:** Robert Bielewa, P.E., Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, NY 12233, (518) 402-8396, e-mail: airsips@gw.dec.state.ny.us

**Additional matter required by statute:** Pursuant to Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file.

#### **Job Impact Statement**

There were no changes to the previously published Job Impact Statement. The effect of the Regulations remains the same.

## Department of Health

### EMERGENCY RULE MAKING

#### Neonatal Herpes Reporting and Laboratory Specimen Submission

**I.D. No.** HLT-39-06-00006-E

**Filing No.** 85

**Filing date:** Jan. 22, 2007

**Effective date:** Jan. 22, 2007

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of sections 2.1 and 2.5 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 224(4), 225(5)(a), (g), (h) and (i)

**Finding of necessity for emergency rule:** Preservation of public health and general welfare.

**Specific reasons underlying the finding of necessity:** Neonatal herpes is a serious disease that can cause permanent neurological impairments to an infant and neonatal death. Most cases of neonatal herpes are acquired from perinatal transmission from an infected mother, with additional cases acquired by exposure in utero or postnatal exposure to persons with herpes in the community.

Unlike most serious communicable diseases, neonatal herpes is not reportable in New York State. Little data exists to accurately estimate the incidence of the disease, but national data suggest that there are approximately 80 neonates infected each year in New York State. Approximately the same number of cases are estimated to occur in New York State exclusive of New York City, and in New York City.

Current diagnostic and therapeutic advances enable the disease to be detected in infected neonates. Without timely antiviral therapy, 80% of the infected neonates will die and one to two-thirds of the survivors will have lasting neurodevelopment impairment.

The new reporting requirements will enable the NYSDOH to have more comprehensive and complete information on neonatal herpes cases. Given the ability to detect and treat cases if identified in a timely fashion, it is imperative to better estimate the incidence of neonatal herpes infection. This information will also enable the NYSDOH to systematically monitor outbreaks of neonatal herpes and prevent further transmission. Data can also be used to identify gaps in knowledge by clinicians and the public about maternal and other routes of transmission of herpes to the neonate, as well as the detection and treatment of cases of neonatal herpes, and provide necessary education.

By adopting this rule, neonatal herpes will be added to the list of communicable diseases. Immediate adoption of this rule is necessary for accurate identification and monitoring of neonatal herpes and for preservation of the public health and general welfare.

**Subject:** Neonatal herpes infection reporting and laboratory specimen submission.

**Purpose:** To diagnose, prevent and effectively manage and call public attention to this disease.

**Text of emergency rule:** Subdivision (a) of Section 2.1 is amended to read as follows:

Section 2.1. Communicable diseases designated: cases, suspected cases and certain carriers to be reported to the State Department of Health.

(a) When used in the Public Health Law and in this Chapter, the term infectious, contagious or communicable disease, shall be held to include the following diseases and any other disease which the commissioner, in the reasonable exercise of his or her medical judgment, determines to be communicable, rapidly emergent or a significant threat to public health, provided that the disease which is added to this list solely by the commissioner's authority shall remain on the list only if confirmed by the Public Health Council at its next scheduled meeting:

- Amebiasis
- Anthrax
- Arboviral infection
- Babesiosis
- Botulism
- Brucellosis
- Campylobacteriosis

- Chancroid
- Chlamydia trachomatis infection
- Cholera
- Cryptosporidiosis
- Cyclosporiasis
- Diphtheria
- E. coli 0157:H7 infections
- Ehrlichiosis
- Encephalitis
- Giardiasis
- Glanders
- Gonococcal infection
- Group A Streptococcal invasive disease
- Group B Streptococcal invasive disease
- Hantavirus disease
- Hemolytic uremic syndrome
- Hemophilus influenzae (invasive disease)
- Hepatitis (A; B; C)
- Herpes infection in infants aged 60 days or younger (neonatal)
- Hospital-associated infections (as defined in section 2.2 of this Part)
- Influenza (laboratory-confirmed)
- Legionellosis
- Listeriosis
- Lyme disease
- Lymphogranuloma venereum
- Malaria
- Measles
- Melioidosis
- Meningitis
  - Aseptic
  - Hemophilus
  - Meningococcal
  - Other (specify type)
- Meningococemia
- Monkeypox
- Mumps
- Pertussis (whooping cough)
- Plague
- Poliomyelitis
- Psittacosis
- Q Fever
- Rabies
- Rocky Mountain spotted fever
- Rubella
- Congenital rubella syndrome
- Salmonellosis
- Severe Acute Respiratory Syndrome (SARS)
- Shigellosis
- Smallpox
- Staphylococcal enterotoxin B poisoning
- Streptococcus pneumoniae invasive disease
- Syphilis, specify stage
- Tetanus
- Toxic Shock Syndrome
- Trichinosis
- Tuberculosis, current disease (specify site)
- Tularemia
- Typhoid
- Vaccinia disease: (as defined in Section 2.2 of this Part)
- Viral hemorrhagic fever
- Yersiniosis

Section 2.5 is amended to read as follows:

2.5 Physician to submit specimens for laboratory examination in cases or suspected cases of certain communicable diseases. A physician in attendance on a person affected with or suspected of being affected with any of the diseases mentioned in this section shall submit to an approved laboratory, or to the laboratory of the State Department of Health, for examination of such specimens as may be designated by the State Commissioner of Health, together with data concerning the history and clinical manifestations pertinent to the examination:

- Anthrax
- Babesiosis
- Botulism
- Brucellosis

Campylobacteriosis  
 Chlamydia trachomatis infection  
 Cholera  
 Congenital rubella syndrome  
 Conjunctivitis, purulent, of the newborn (28 days of age or less)  
 Cryptosporidiosis  
 Cyclosporiasis  
 Diphtheria  
 E. coli 0157:H7 infections  
 Ehrlichiosis  
 Giardiasis  
 Glanders  
 Gonococcal infection  
 Group A Streptococcal invasive disease  
 Group B Streptococcal invasive disease  
 Hantavirus disease  
 Hemophilus influenzae (invasive disease)  
 Hemolytic uremic syndrome  
*Herpes infection in infants aged 60 days or younger (neonatal)*  
 Legionellosis  
 Listeriosis  
 Malaria  
 Melioidosis  
 Meningitis  
     Hemophilus  
     Meningococcal  
 Meningococemia  
 Monkeypox  
 Plague  
 Poliomyelitis  
 Q Fever  
 Rabies  
 Rocky Mountain spotted fever  
 Salmonellosis  
 Severe Acute Respiratory Syndrome (SARS)  
 Shigellosis  
 Smallpox  
 Staphylococcal enterotoxin B poisoning  
 Streptococcus pneumoniae invasive  
 Syphilis  
 Tuberculosis  
 Tularemia  
 Typhoid  
 Viral hemorrhagic fever  
 Yellow Fever  
 Yersiniosis

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-39-06-00006-P, Issue of September 27, 2006. The emergency rule will expire March 21, 2007.

**Text of emergency rule and any required statements and analyses may be obtained from:** William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

#### Regulatory Impact Statement

##### Statutory Authority:

Sections 225(4) and 225(5)(a), (g), (h), and (i) of the Public Health Law ("PHL") authorize the Public Health Council to establish and amend State Sanitary Code provisions relating to designation of communicable diseases dangerous to public health, designation of diseases for which specimens shall be submitted for laboratory examination, and the nature of information required to be furnished by physicians in each case of communicable disease. PHL Section 206(1) (d) authorizes the commissioner to "investigate the causes of disease, epidemics, the sources of mortality, and the effect of localities, employments and other conditions, upon the public health." PHL Section 206(1) (e) permits the commissioner to "obtain, collect and preserve such information relating to marriage, birth, mortality, disease and health as may be useful in the discharge of his duties or may contribute to the promotion of health or the security of life in the state." PHL Article 21 requires local boards of health and health officers to guard against the introduction of such communicable diseases as are designated in the sanitary code by the exercise of proper and vigilant medical inspection.

##### Legislative Objectives:

This regulation meets the legislative objective of protecting the public health by adding neonatal herpes to reportable disease requirements, thereby permitting enhanced monitoring of disease, prompt identification of cases and unusual or dramatic increases in disease reporting that might indicate an outbreak, and the ability to implement measures, if necessary, to prevent further transmission.

##### Needs and Benefits:

Neonatal herpes, defined as herpes infection in infants aged 60 days or less, is a serious disease associated with neurological devastation of the infant and neonatal death. Neonatal herpes can result from infection with either herpes simplex virus (HSV) type 1 (HSV-1) or HSV type 2 (HSV-2). The disease can be localized to skin, eye and mouth (SEM disease), involve the central nervous system (CNS), or manifest as disseminated infection involving multiple organs. Most infants with CNS or disseminated disease have neurological sequelae, and the mortality rate in the absence of therapy is very high (80%) for these babies.

There are three ways that neonatal herpes infection can occur: (1) congenital (in utero) from an infected mother to the fetus; (2) perinatal from an infected mother to the neonate at delivery; or (3) following delivery (postnatal acquisition).

##### Congenital infection:

Intrauterine infection represents approximately 5% of cases of neonatal herpes infection. It can result from an ascending infection from the cervix or vulva or as a consequence of transplacental transmission. The risk of herpes transmission to the neonate is greatest, approximately 50 percent, if the pregnant woman develops a primary infection in the third trimester.

##### Perinatal infection:

Neonatal infection with HSV most often occurs during delivery. In 85% of cases, HSV infection is transmitted to the neonate during labor when the baby comes into direct contact with infected maternal secretions in the birth canal. The risk of neonatal herpes is increased if the woman has obvious lesions at delivery. Delivery by Caesarean section appears to decrease the risk of HSV transmission in the presence of an active lesion.

##### Post-partum infection:

Postnatal acquisition of HSV accounts for approximately 10% of all cases of neonatal herpes and occurs as a consequence of the baby coming into contact with an environmental source of herpes, such as a family member or caregiver with orolabial herpes or lesions at other sites (e.g. breast, herpetic whitlow).

Based on national estimates, neonatal herpes is one of the most common of all congenital and perinatal infections in the United States, infecting approximately 1/1,500 to 1/3,200 live births each year. Based on these estimates, it can be estimated that of the 133,532 births in New York State in 2003, exclusive of New York City, there could have been approximately 40 neonatal herpes cases. Another 40 cases could be estimated to have occurred among the 119,469 births in New York City.

Diagnostic tests and therapies exist to properly identify and treat infected mothers and detect early cases of neonatal herpes. Type-specific serologic tests for herpes are commercially available and amplification tests such as polymerase chain reaction (PCR) have increased the sensitivity of diagnostic testing. Antiviral therapy can be used to reduce viral shedding of an infected pregnant woman and to treat an infected neonate. Cesarean delivery of infants born to mothers presenting with genital lesions can also reduce the likelihood of perinatal transmission.

Making neonatal herpes a reportable disease will assist in the diagnosis, prevention and effective management of neonatal herpes and call public attention to this disease. Multi-center studies of neonatal herpes show that delays in instituting appropriate therapies persist. Clinicians need to be educated to include neonatal herpes in the differential diagnosis for a febrile neonate, and recognize clinical signs. Educating expecting parents with known genital herpes about risks to the newborn can also promote early intervention. New York State reporting of neonatal herpes is needed to:

- Accurately measure the incidence of this disease by transmission category;
- Increase awareness of the disease by providers and the public;
- Investigate cases of neonatal herpes to systematically assess and address gaps in provider knowledge of prevention and treatment strategies;
- Identify outbreaks of postnatally-acquired neonatal herpes in a timely fashion, identify the source, and intervene to prevent subsequent infection.

Neonatal herpes is currently a reportable condition in seven states (Connecticut, Florida, Louisiana, Massachusetts, Nebraska, South Dakota

and Washington). The New York City Department of Health and Mental Hygiene recently amended the New York City Health Code to require reporting of neonatal herpes.

**Costs:**

**Costs to Regulated Parties:**

The costs associated with implementing the reporting of this disease are minimal as reporting processes and forms already exist. Hospitals, practitioners and clinical laboratories are accustomed to reporting communicable disease to public health authorities.

In the event of post-partum cases of neonatal herpes, it is imperative to the public health that suspect cases be reported immediately and investigated thoroughly to curtail additional exposure and potential morbidity and mortality.

**Costs to Local and State Governments:**

The staff who will be involved in reporting and tracking neonatal herpes at the State and local health departments are the same as those currently involved with other communicable diseases listed in 10 NYCRR Section 2.1 and existing disease reporting processes will be used. Therefore, minimal incremental cost is expected. The time expended by a local health department to report a neonatal herpes case is estimated to be low to receive the report, obtain any missing information, and enter the report into the surveillance data system.

The additional cost to local or state governments associated with investigating and implementing control strategies to curtail the spread of neonatal herpes, particularly post-partum cases of neonatal herpes, could become significant depending upon the extent of any outbreak. Suspect cases are to be reported to the local health department, who should immediately notify the Regional Epidemiologist or the New York State Department of Health (NYSDOH) after-hours duty officer.

By monitoring and preventing the spread of neonatal herpes, savings may include reducing costs associated with public health control activities, morbidity, treatment and premature death.

**Costs to the Department of Health:**

The NYSDOH already collects communicable disease reports from local health departments, checks the reports for accuracy and transmits them to the federal Centers for Disease Control and Prevention. The addition of neonatal herpes to the list of communicable diseases should lead to slight to moderate additional costs, mostly related to investigating cases. Existing staff should be able to handle the incremental increase in workload.

**Paperwork:**

The existing general communicable disease reporting form (DOH-389) will be revised. This form is familiar to and is already used by regulated parties.

**Local Government Mandates:**

Under Part 2 of the State Sanitary Code (10 NYCRR Part 2), the city, county or district health officer receiving reports of neonatal herpes will be required to immediately forward such reports to the State Health Commissioner.

**Duplication:**

There is no duplication of this initiative in existing State or federal law.

**Alternatives:**

No other alternatives are available. Reporting of cases of neonatal herpes is of critical importance to public health. There is an urgent need to conduct surveillance, identify cases in a timely manner, and reduce the potential for further exposure to contacts.

**Federal Standards:**

Currently there are no federal standards requiring the reporting of neonatal herpes.

**Compliance Schedule:**

Reporting of neonatal herpes is currently mandated, pursuant to the authority vested in the Commissioner of Health by 10 NYCRR Section 2.1(a). This mandate will be extended upon emergency adoption of this regulation by the Public Health Council, and filing of a Notice of Emergency Adoption of this regulation with the Secretary of State and made permanent by publication of a Notice of Adoption of this regulation in the New York State Register.

**Regulatory Flexibility Analysis**

**Effect on Small Business and Local Government:**

This proposed rule will apply to physicians, hospitals, nursing homes, diagnostic and treatment centers and clinical laboratories. There are approximately 65,000 licensed and registered physicians in New York State; it is not known how many of them practice in small businesses. Three

hospitals, 100 nursing homes, 237 diagnostic and treatment centers, and 1,000 clinical laboratories employ less than 100 persons and qualify as small businesses.

Implementation will require reporting of neonatal herpes in all 57 counties of the State outside of New York City. New York City has already passed regulations making neonatal herpes a reportable disease.

**Compliance Requirements:**

Existing reporting forms will be revised. Clinical laboratories that are small businesses will utilize the revised NYSDOH electronic reporting format.

**Professional Services:**

No additional professional staff will be needed to complete the required forms manually and mail to the county health department.

**Compliance Costs:**

No initial capital costs of compliance are anticipated. The reporting of neonatal herpes should have a negligible to modest effect on the estimated cost of disease reporting. The cost of complying with required reporting includes staff time to complete the necessary forms and mail to the respective local health department. The cost of reporting neonatal herpes by laboratories should be modest given the estimated small number of cases.

**Minimizing Adverse Impact:**

There are no alternatives to the reporting or laboratory testing requirements. Adverse impacts have been minimized since revised forms and reporting staff will be utilized by regulated parties. Electronic reporting will save time and expense. The approaches suggested in the State Administrative Procedure Act Section 202-b(1) were rejected as inconsistent with the purpose of the regulation.

**Feasibility Assessment:**

The NYSDOH estimates minimal increases in workload and costs associated with the requirement to report neonatal herpes.

**Small Business and Local Government Participation:**

Local governments have been consulted in the process through ongoing communication on this issue with local health departments and the New York State Association of County Health Officers (NYSACHO).

**Rural Area Flexibility Analysis**

**Effect on Rural Areas:**

The proposed rule will apply statewide. It is assumed that the distribution of neonatal herpes will be less in rural counties than in more urban or metropolitan areas similar to the population distribution.

**Compliance Requirements:**

Compliance requirements are the same in rural areas as those in all other areas of the state. Existing reporting forms will be revised. Clinical laboratories will use the revised NYSDOH electronic reporting format.

**Professional Services:**

No additional professional staff should need to be hired to complete the required forms and mail to the county health department. Rural providers are expected to use existing staff to comply with the requirements of this regulation.

**Compliance Costs:**

No initial capital costs of compliance are anticipated. See cost statement in Regulatory Impact Statement for additional information.

**Minimizing Adverse Impact:**

There are no alternatives to the reporting requirements. Adverse impacts have been minimized since familiar forms and existing staff will be utilized by regulated parties. The approaches suggested in State Administrative Procedure Act Section 202-b(2) were rejected as inconsistent with the purpose of the regulation.

**Rural Area Input:**

The New York State Association of County Health Officers (NYSACHO), including representatives of rural counties, has been informed about this change and has voiced no objections.

**Job Impact Statement**

This regulation adds neonatal herpes to the list of diseases that clinical laboratories, clinicians, and hospitals must report to public health authorities and for which clinicians must submit laboratory specimens. The staff who are involved in reporting neonatal herpes at the local and State health departments are the same as those currently involved with reporting, monitoring and investigating other communicable diseases. Implementation should not significantly increase the demands on existing staff nor increase the need to hire additional staff for laboratories, hospitals, and providers. The NYSDOH has determined that this regulatory change will not have a substantial adverse impact on jobs and employment.

## Insurance Department

### EMERGENCY RULE MAKING

#### Homeowners Insurance Disclosure Information and Other Notices

**I.D. No.** INS-06-07-00001-E

**Filing No.** 80

**Filing date:** Jan. 17, 2007

**Effective date:** Jan. 17, 2007

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Part 74 (Regulation 159) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 3425, 3445 and 5403

**Finding of necessity for emergency rule:** Preservation of general welfare.

**Specific reasons underlying the finding of necessity:** Chapter 162 of the Laws of 2006, which goes into effect on November 23, 2006, amends Section 3425(e) of the Insurance Law to require notices of cancellation, nonrenewal, and conditional renewal to include certain minimum notification requirements with respect to certain homeowners policies as defined in Section 2351(a) of the Insurance Law where the property is located in an area served by a market assistance program established by the Superintendent for the purpose of facilitating placement of homeowners insurance. These notices shall advise a policyholder of possible eligibility for coverage through a market assistance program or through the New York Property Insurance Underwriting Association (NYPIUA) when the policyholder receives a notice of cancellation, nonrenewal or conditional renewal for a homeowners insurance. Chapter 162 also added a new Section 5403(d), which directs NYPIUA to notify policyholders that may be eligible of the availability of coverage in the market assistance program.

Chapter 162 requires the Superintendent to promulgate a regulation that establishes the minimum standards for the notices required by Section 3425(e). Insurers and NYPIUA must comply with the standards in the regulation as of the effective date of the new law. Given the short period before the law goes into effect and in order to afford insurers and NYPIUA sufficient time to incorporate these notices, this regulation must be promulgated on an emergency basis. Therefore it is essential that insurers and NYPIUA be made aware of the new notice requirements as soon as possible.

For the reasons cited above, this regulation is being promulgated on an emergency basis for the preservation of the general welfare.

**Subject:** Homeowners insurance disclosure information and other notices.

**Purpose:** Set forth the minimum notification requirements pertaining to the notices required by section 3425(e) and section 5403(d).

**Text of emergency rule:** The Title of Part 74 is hereby amended as follows:

[HOMEOWNER'S] HOMEOWNERS INSURANCE DISCLOSURE INFORMATION AND OTHER NOTICES

Section 74.0 is amended to read as follows:

Section 74.0 Introduction and purpose.

(a)(1) Chapter 44 of the Laws of 1998 enacted a new section 3445 of the Insurance Law, requiring the superintendent to establish by regulation disclosure requirements with respect to the operation of any deductible in a [homeowner's] homeowners insurance policy or dwelling fire personal lines policy [which] that applies as the result of a windstorm. Further, section 3445 requires such regulation to prescribe the form of a notice to be provided by an insurer to an insured and provides that the notice shall explain in clear and plain language the amount of the deductible, the circumstances under which the deductible applies and any other matters which the superintendent, in his or her discretion, shall deem necessary or appropriate.

[(b)] (2) [The purpose of this] This Part [is to set] sets standards for the uniform display of windstorm deductibles, which consist of hurricane and non-hurricane deductibles, in the policy declarations; and [to provide] provides the minimum provisions to be contained in the policyholder

disclosure notice, which will explain the purpose and operation of the hurricane deductible, and must accompany new and renewal policies containing such deductibles.

(b)(1) Chapter 162 of the Laws of 2006 amended section 3425(e) of the Insurance Law to direct the superintendent to establish by regulation standards for notices of cancellation, nonrenewal, and conditional renewal for certain homeowners policies as defined in section 2351(a) of the Insurance Law where the property is located in an area served by a market assistance program established by the superintendent for the purpose of facilitating placement of homeowners insurance. Chapter 162 also added a new section 5403(d), which directs the New York Property Insurance Underwriting Association (NYPIUA) to notify policyholders that may be eligible for coverage in the market assistance program of the availability of coverage.

(2) This Part establishes the minimum requirements pertaining to the notices required by Chapter 162.

New Sections 74.2 and 74.3 are added to read as follows:

Section 74.2 Insurer cancellation, nonrenewal and conditional renewal notices.

Every notice of cancellation, nonrenewal or conditional renewal issued on or after November 23, 2006 for a homeowners insurance policy as defined in section 2351(a) of the Insurance Law insuring property that may be eligible for participation in a market assistance program established by the superintendent for the purpose of facilitating placement of homeowners insurance shall advise the insured of the availability of the market assistance program and the availability of coverage through NYPIUA for insurance. The notice shall be conspicuous and provide sufficient information on how to apply to the market assistance program and to NYPIUA, including the name, address, telephone number and Web site address of the administrator of the market assistance program and of NYPIUA.

Section 74.3 NYPIUA notices.

On and after November 23, 2006, with respect to a NYPIUA policyholder whose insured property is located in an area served by a market assistance program established by the superintendent for the purposes of facilitating placement of homeowners insurance, upon issuance or renewal of the policy, NYPIUA shall provide the notice required by section 5403(d) of the Insurance Law and this section. The notice shall be conspicuous and provide sufficient information on how to apply to the market assistance program including the name, address, telephone number and Web site address of the administrator of the market assistance program.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 16, 2007.

**Text of emergency rule and any required statements and analyses may be obtained from:** Andrew Mais, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2285, e-mail: amais@ins.state.ny.us

#### Regulatory Impact Statement

1. Statutory authority: Sections 201, 301, 3425, 3445, and 5403 of the Insurance Law. Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the Insurance Law as well as effectuating any power granted to the Superintendent under the Insurance Law and to prescribe forms or otherwise make regulations. Section 3425 governs cancellation and renewal provisions of certain property/casualty insurance policies. Section 3445 authorizes the Superintendent to prescribe regulations regarding disclosure requirements for windstorm insurance. Section 5403 provides the procedures for the New York Property Insurance Underwriting Association (NYPIUA).

2. Legislative objectives: The Legislature in enacting Chapter 162 of the Laws of 2006, intended to improve public awareness of market assistance programs, such as the Coastal Market Assistance Program (CMAP), that may be available to homeowners in New York, and of NYPIUA. Chapter 162 requires that when a policyholder receives a notice of cancellation, nonrenewal or conditional renewal for a homeowners insurance policy as specified in Section 3425(e) of the Insurance Law, on property located in an area served by a market assistance program established by the Superintendent for the purpose of facilitating placement of homeowners insurance, that the policyholder is also notified by the insurer of possible eligibility for coverage through the market assistance program or through NYPIUA. In addition, Chapter 162 requires NYPIUA to notify its policyholders whose properties are located in an area served by a market assistance program to be notified of their possible eligibility for coverage through the market assistance program. In the Senate bill memorandum in support of the bill, it was stated that many consumers who were eligible for CMAP were unaware of its existence. By ensuring that consumers who

may be eligible for CMAP or other market assistance programs that may be established are made aware of the availability of the program, CMAP or other programs would be used to their fullest potential and more insureds would have access to more complete coverage than that offered by NYPIUA. In order to implement Chapter 162, the Legislature required the Superintendent to promulgate regulations governing the notices required by Chapter 162.

3. Needs and benefits: The rule, which is required by Chapter 162, is necessary to set forth certain minimum notification requirements to assure that policyholders that may be eligible for a market assistance program or NYPIUA are notified of this including information necessary to apply for coverage. This notification would make information on how to apply for an insurance policy from a market assistance program or from NYPIUA more readily available to the policyholders.

4. Costs: This rule imposes no compliance costs on state or local governments. There will be no additional costs incurred by the Insurance Department. The rule requires specific information to be included in the notice of cancellation, nonrenewal or conditional renewal for a homeowners insurance policy as defined in Section 2351 of the Insurance Law. There will be costs associated with the insurance companies adding the specific information onto the homeowners notices specified in Section 3425(e) of the Insurance Law. However, the notice requirement is mandated by the statute and not by this regulation, which implements the statutory requirement. Moreover, these costs should be minimal as the insurance companies are already issuing the cancellation, nonrenewal or conditional renewal notices and the rule only requires that the insurance companies add the specific information onto the notices.

In addition, NYPIUA is required to notify policyholders that may be eligible, of the availability of coverage in a market assistance program. There will be costs associated with NYPIUA issuing these new notices. However, the notice is required by the statute and not by this regulation, which implements the statutory requirement.

5. Local government mandates: None.

6. Paperwork: The insurance companies will incur additional paperwork associated with adding the specific information required by the rule to the cancellation, nonrenewal, and conditional renewal notices specified in Section 3425(e) of the Insurance Law. However, the paperwork should be minimal as the insurance companies are adding the required language to notices already being issued by the company. Moreover, this notice is required by the statute and not by this regulation.

NYPIUA will incur additional paperwork in notifying policyholders that may be eligible of the availability of coverage in a market assistance program. However, this notice is required by the statute and not by this regulation.

7. Duplication: None.

8. Alternatives: The Department considered requiring the names and contact information of the insurance companies participating in market assistance programs to be included in the notice. However, since a market assistance program is voluntary, there could be additional market assistance programs established, and the list of participating insurance companies could change frequently, it was determined that this requirement should not be included in the rule.

The Department did outreach with various trade organizations. One of the trade organizations expressed concern that insurers may have problems complying with the November 23, 2006 effective date. The Department has no discretion in setting the date as it was set forth by Chapter 162 of the Laws of 2006. In addition, as long as the information required by the rule is part of the cancellation, nonrenewal, or conditional renewal notice and the information is conspicuous, the information required by the rule may be on a separate page of the notice.

The trade organization requested that the Department consider exempting, from the market assistance plan notice requirement, cancellation notices issued for non payment of premium or issued at the request of the insured. Chapter 162 does not provide exceptions to the notice requirements.

9. Federal standards: None.

10. Compliance schedule: The effective date of the enabling legislation, Chapter 162 of the Laws of 2006, is November 23, 2006. The rule provides that every notice of cancellation, nonrenewal or conditional renewal issued on or after November 23, 2006 for a homeowners policy as specified in Section 3425(e) of the Insurance Law to be in compliance. On or after November 23, 2006, NYPIUA shall provide the notice required by Section 5403(d) of the Insurance Law upon issuance or renewal of a policy.

#### **Regulatory Flexibility Analysis**

The Insurance Department finds that this rule would not impose reporting, recordkeeping or other requirements on small businesses. The basis for this finding is that this rule is directed to property/casualty insurance companies that do business in New York State, none of which fall within the definition of "small business".

The Insurance Department has reviewed/or monitored Reports on Examination and Annual Statements of property/casualty insurers and believes that none of them would fall within the definition of "small business" contained in section 102(8) of the State Administrative Procedure Act, because there are none which are independently owned and have under 100 employees.

The Insurance Department finds that this rule will not impose reporting, recordkeeping or other compliance requirements on local governments. The basis for this finding is that this rule is directed at insurance companies, none of which are local governments.

#### **Rural Area Flexibility Analysis**

The Insurance Department finds that this rule does not impose any additional burden on persons located in rural areas, and the Insurance Department finds that it will not have an adverse impact on rural areas. This rule applies uniformly to parties that do business in both rural and nonrural areas of New York State.

#### **Job Impact Statement**

This rule should not have any adverse impact on jobs and employment opportunities in this state since the rule is merely setting forth minimum notification requirements pertaining to the notices required by Section 3425(e) and Section 5403(d).

## **PROPOSED RULE MAKING NO HEARING(S) SCHEDULED**

### **Financial Statement Filings and Accounting Practices and Procedures**

**I.D. No.** INS-06-07-00007-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** This is a consensus rule making to amend Part 83 (Regulation 172) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 107(a)(2), 201, 301, 307, 308, 1109, 1301, 1302, 1308, 1404, 1405, 1411, 1414, 1501, 1505, 3233, 4117, 4233, 4239, 4301, 4310, 4321-a, 4322-a, 4327 and 6404; Public Health Law, sections 4403, 4403-a, 4403-c and 4408-a; and L. 2002, ch. 599

**Subject:** Financial statement filings and accounting practices and procedures.

**Purpose:** To update a citation in section 83.2(c) to refer to an accounting manual entitled Accounting Practices and Procedures Manual as of March 2006 (instead of 2005).

**Text of proposed rule:** Subdivision (c) of Section 83.2 of Part 83 is amended to read as follows:

(c) To assist in the completion of the Financial Statements, the NAIC also adopts and publishes from time to time certain policy, procedures and instruction manuals. The latest of these manuals, the Accounting Practices and Procedures Manual as of March [2005\*]2006\* ("Accounting Manual") includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles ("SSAPs"). The Accounting Manual shall be used in the preparation of Quarterly Statements and the Annual Statement for [2005]2006, which will be filed in [2006]2007.

The footnote to subdivision (c) of Section 83.2 is amended to read as follows:

\*ACCOUNTING PRACTICES AND PROCEDURES MANUAL AS OF MARCH [2005] 2006. Copyright 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006 by National Association of Insurance Commissioners, in Kansas City, Missouri.

**Text of proposed rule and any required statements and analyses may be obtained from:** Andrew Mais, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2285, e-mail: mbarry@ins.state.ny.us

**Data, views or arguments may be submitted to:** Sam Wachtel, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5269, e-mail: swachtel@ins.state.ny.us

**Public comment will be received until:** 45 days after publication of this notice.

#### **Consensus Rule Making Determination**

No person is likely to object to the rule because the action is a technical amendment that merely updates a reference to Accounting Practices and Procedures Manual As Of March 2006 (“Accounting Manual”), which is incorporated by reference into this regulation. The latest edition was adopted by the NAIC in March 2006.

**Job Impact Statement**

The proposed rule changes should have no adverse impact on jobs and employment opportunities in New York State. The regulation codifies numerous accounting practices and procedures that had not previously been organized in such a unified and coherent manner. The current amendment only changes a publication date references to a publication incorporated by reference in the regulation and should have no adverse impact on jobs or employment opportunities.

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## Division of the Lottery

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### EMERGENCY RULE MAKING

**Lucky Sum Promotional Game**

**I.D. No.** LTR-06-07-00009-E

**Filing No.** 84

**Filing date:** Jan. 19, 2007

**Effective date:** Jan. 19, 2007

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Parts 2828 and 2832 of Title 21 NYCRR.

**Statutory authority:** Tax Law, title 21, ch. XLIV, section 2804.6

**Finding of necessity for emergency rule:** Preservation of general welfare.

**Specific reasons underlying the finding of necessity:** The New York Lottery will be conducting Lucky Sum as a new feature to existing games available to New York’s Numbers and Win 4 players. Game sales are scheduled to commence on or about January 29, 2007 thereby leaving insufficient time for the normal rulemaking process under SAPA § 202 to be completed. This game is necessary to assist the Lottery in reaching its project revenue target for this fiscal year. This feature is intended to improve somewhat slow revenues and will provide needed aid to education by the end of this fiscal year.

**Subject:** Lucky Sum promotional game feature.

**Purpose:** To add the Lucky Sum promotional game feature to current New York Lottery regulations.

**Text of emergency rule:**

DIVISION OF THE LOTTERY  
21 NYCRR 2828 and 21 NYCRR 2832

Lucky Sum

Section 1. Section 2828.3 is amended by adding a new subdivision (h) to read as follows:

(h) *Lucky Sum is a feature of New York’s Numbers game. Lucky Sum shall determine winners from bet tickets by correctly matching the sum of the player’s number selection against the sum of the winning numbers drawn by the Lottery for that drawing.*

(1) *To place a bet, a purchaser must communicate*

(i) *the desired game bet data to an agent pursuant to subdivision (e) of this section; and*

(ii) *communicate to the agent that such purchaser’s desire to add a Lucky Sum wager to the normal wager, who will issue a bet ticket. Such bet ticket will reflect the sum of the numbers played by the purchaser on that wager as the additional Lucky Sum wager.*

(2) *Lucky Sum wagers shall not be placed with pairs wagers.*

(3) *Up to fifty percent of the sales from each drawing will be allocated to a prize pool for that drawing.*

(4) *Prize structure and odds for this feature.*

Sum of Number Picked	Number of Ways to Match a Number	Expected Odds	Prize
0	1	1,000	\$500.00
1	3	333	\$166.00
2	6	167	\$83.00
3	10	100	\$50.00
4	15	67	\$33.00
5	21	48	\$23.50
6	28	36	\$17.50
7	36	28	\$13.50
8	45	22	\$11.00
9	55	18	\$9.00
10	63	16	\$7.50
11	69	14	\$7.00
12	73	14	\$6.50
13	75	13	\$6.50
14	75	13	\$6.50
15	73	14	\$6.50
16	69	14	\$7.00
17	63	16	\$7.50
18	55	18	\$9.00
19	45	22	\$11.00
20	36	28	\$13.50
21	28	36	\$17.50
22	21	48	\$23.50
23	15	67	\$33.00
24	10	100	\$50.00
25	6	167	\$83.00
26	3	333	\$166.00
27	1	1,000	\$500.00

(5) *Lucky Sum bets may be purchased for a minimum of \$1.00 per wager.*

§ 2. Section 2832.3 is amended by adding a new subdivision (g) to read as follows:

(g) *Lucky Sum is a feature of Win-4 game. Lucky Sum shall determine winners from bet tickets by correctly matching the sum of the player’s number selection against the sum of the winning numbers drawn by the Lottery for that drawing.*

(1) *Lucky Sum wagers shall not be placed with pairs wagers.*

(2) *To place a bet, a purchaser must communicate:*

(i) *the desired game bet data to an agent pursuant to subdivision (e) of this section; and*

(ii) *communicate to the agent that such purchaser’s desire to add a Lucky Sum wager to the normal wager, who will issue a bet ticket. Such bet ticket will reflect the sum of the numbers played by the purchaser on that wager as the additional Lucky Sum wager.*

(3) *Up to fifty percent of the sales from each drawing will be allocated to a prize pool for that drawing.*

(4) *Prize structure and odds for this feature.*

Sum of Number Picked	Number of Ways to Match a Number	Expected Odds	Prize
0	1	10,000	\$5,000.00
1	4	2,500	\$1,250.00
2	10	1000	\$500.00
3	20	500	\$250.00
4	35	286	\$142.00
5	56	179	\$89.00
6	84	119	\$60.00
7	120	83	\$42.00
8	165	61	\$30.00
9	220	45	\$22.50
10	282	35	\$17.50
11	348	29	\$14.00
12	415	24	\$12.00
13	480	21	\$10.00
14	540	19	\$9.00
15	592	17	\$8.00
16	633	16	\$7.50
17	660	15	\$7.50
18	670	15	\$7.50
19	660	15	\$7.50

20	633	16	\$7.50
21	592	17	\$8.00
22	540	19	\$9.00
23	480	21	\$10.00
24	415	24	\$12.00
25	348	29	\$14.00
26	282	35	\$17.50
27	220	45	\$22.50
28	165	61	\$30.00
29	120	83	\$42.00
30	84	119	\$60.00
31	56	179	\$89.00
32	35	286	\$142.00
33	20	500	\$250.00
34	10	1,000	\$500.00
35	4	2,500	\$1,250.00
36	1	10,000	\$5,000.00

(5) Lucky Sum bets may be purchased for a minimum of \$1.00 per wager.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 18, 2007.

**Text of emergency rule and any required statements and analyses may be obtained from:** Julie B. Silverstein Barker, Acting General Counsel, Division of the Lottery, One Broadway Center, P.O. Box 7500, Schenectady, NY 12301-7500, (518) 388-3408, e-mail: [jbarker@lottery.state.ny.us](mailto:jbarker@lottery.state.ny.us)

**Regulatory Impact Statement**

1. Statutory authority: Pursuant to the authority conferred in New York State Tax Law, Section 1604[a] and the Official Compilation of Codes, Rules and Regulations of the State of New York, Title 21, Chapter XLIV, Section 2828 and 2832, the following official game rules shall take effect and shall remain in full force and effect throughout the New York Lottery's Lucky Sum as a new feature to existing games.

2. Legislative objectives: The purpose of operating Lottery games is to generate revenue for the support of education in the State. Amendment of these regulations forwards the mission of the New York State Lottery to generate revenue for education.

3. Needs and benefits: The New York Lottery has sustained competitive pressure from large jackpot lottery games in adjoining states. New Yorkers routinely travel outside the state to participate in those games. The New York Lottery's Lucky Sum, as an existing game feature, allows the New York Lottery to continue its effort to keep and enlarge its market share of players (from within New York State and those visiting New York State from other states) who participate in large jackpot lottery games. The New York Lottery's Lucky Sum as a new feature to existing games is anticipated on a full annual basis, to bring in more than \$53.9 million in revenue to benefit education in the State.

4. Costs:

a. Costs to regulated parties for the implementation and continuing compliance with the rule: None.

b. Costs to the agency, the State, and local governments for the implementation and continuation of the rule: No additional operating costs are anticipated, since funds originally appropriated for the expenses of operating the existing lottery games are expected to be sufficient to support this new game.

c. Sources of cost evaluations: The foregoing cost evaluations are based on the New York State Lottery's experience in operating State Lottery games for more than 30 years.

5. Local government mandates: None.

6. Paperwork: There are no changes in paperwork requirements. Game feature brochures will be issued by the New York State Lottery for public convenience at retailer locations free of charge.

7. Duplication: None

8. Alternatives: The alternative to adding New York Lottery's Lucky Sum as an existing game feature is not to proceed and forfeit the investment already made by the New York State Lottery for the game feature. The failure to proceed will also result in lost revenue to education that is anticipated to be earned.

9. Federal standards: None.

10. Compliance schedule: None.

**Regulatory Flexibility Analysis, Rural Area Flexibility Analysis, Job Impact Statement**

The proposal does not require a Regulatory Flexibility Statement, Rural Flexibility Statement or Job Impact Statement. There will be no adverse impact on jobs, rural areas, small business or local governments.

**Department of Motor Vehicles**

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Colored Lights**

**I.D. No.** MTV-06-07-00011-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** This is a consensus rule making to amend Part 44 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a) and 375(41)

**Subject:** Colored lights.

**Purpose:** To authorize the affixing and display of blue lights on police vehicles as required by L. 2006, ch. 45.

**Text of proposed rule:** Subdivision (a) of Section 44.4 is re-numbered to be subdivision (a-1), and a new subdivision (a) is added to read as follows:

(a) *One or more blue lights or combination blue and red lights or combination blue, red and white lights may be affixed to a police vehicle, provided that such blue light or lights shall be displayed on a police vehicle for rear projection only. In the event that the trunk or rear gate of a police vehicle obstructs or diminishes the visibility of other emergency lighting on such vehicle, a blue light may be affixed to and displayed from the trunk, rear gate or interior of such vehicle. Such lights may be displayed on a police vehicle when such vehicle is engaged in an emergency operation. Nothing contained in this subdivision shall be deemed to authorize the use of blue lights on police vehicles unless such vehicles also display one or more red, or combination red and white lights as otherwise authorized in this section.*

(a-1) One blue light may be affixed to any motor vehicle owned by a volunteer member of a fire department or on a motor vehicle owned by a member of such person's family residing in the same household or by a business enterprise in which such person has a proprietary interest or by which he is employed.

Subdivision (c) of Section 44.4 is amended to read as follows:

(c) Authorization to affix a blue light to each of the motor vehicles described in subdivision [(a)] (a-1) must be in writing, signed by the chief of the fire department or company. Authorization to affix a green light to each of the vehicles described in subdivision (b) must be in writing and signed by the chief officer of the volunteer ambulance service. The authorization given to members of their respective organization may be revoked at any time by the chief officer who issued the same or his successor in office. Such written authority must be carried upon the person of the operator of the vehicle whenever such lights are displayed.

Subdivision (f) of Section 44.4 is amended to read as follows:

(f) [A] *Except for police vehicles, a green light may be affixed to a vehicle which is entitled to have a blue light affixed and such blue light is affixed and both are properly authorized.*

Subdivision (h) of Section 44.4 is amended to read as follows:

(h) [A] *Except for police vehicles, a blue or green light may not be affixed to a vehicle which is entitled to have red lights affixed and one or more red lights are so affixed.*

Subdivision (k) of Section 44.4 is amended to read as follows:

(k) A blue or green light affixed to and displayed upon a vehicle pursuant to [the preceding provisions] subdivisions (a-1) or (b) shall also comply with the following:

- (1) Only one such light may be displayed which must be visible from in front of such vehicle.
- (2) REPEALED 11/6/02.
- (3) Such light may not be part of the headlamp system.
- (4) No inscription may appear across the face of the lens or dome.
- (5) Such light may be a fixed, unidirectional light, either steady or flashing, mounted in front of or behind the grille or anywhere on the

vehicle, or a revolving, rotating, oscillating or constantly moving light which must be mounted above the headlamps preferably on the roof to avoid reflected glare or distraction to the operator. If mounted upon the dashboard inside the vehicle, a suitable cover, which may consist of paint, must be used to prevent reflected glare or distraction to the operator.

(6) Such light must consist of a lamp with a blue or green lens and not an uncolored lens with a blue or green bulb, except that a roof-mounted dome unit which does not include a lens, must consist of a blue or green dome and not an uncolored dome with a blue or green bulb.

(7) The lens of such a light must be not less than three inches nor more than six inches in diameter, except that a roof-mounted dome unit which does not include a lens must be not more than nine inches in height.

(8) A roof-mounted dome unit may consist of one or more bulbs or sealed-beam lamps whose light source cannot exceed 32 candlepower.

(9) The affixing of more than one light or lighting device or fixture whereby the lights or lamps are made to flash alternately is prohibited.

**Text of proposed rule and any required statements and analyses may be obtained from:** Michele L. Welch, Counsel's Office, Department of Motor Vehicles, Six Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

**Data, views or arguments may be submitted to:** Sean J. Martin, Assistant Counsel, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

**Public comment will be received until:** 45 days after publication of this notice.

#### **Consensus Rule Making Determination**

This proposed regulation would amend 15 NYCRR Part 44. 4 to authorize the affixing and display of blue lights on police vehicles. The proposal implements Chapter 45 of the Laws of 2006. Prior to this enactment, police vehicles were authorized to affix and display only red, or a combination of red and white lights.

This is a consensus rule because it is a minor change that merely tracks the language set forth in Chapter 45. There are no known objections to this proposal.

#### **Job Impact Statement**

A Job Impact Statement is not submitted with this regulation because the authorization for police vehicles to display blue lights shall have no impact on job opportunities in New York State.

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## Public Service Commission

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### NOTICE OF ADOPTION

#### **Water Rates and Charges and Issuance of Debt by Windover Water Works**

**I.D. No.** PSC-14-06-00020-A

**Filing date:** Jan. 22, 2007

**Effective date:** Jan. 22, 2007

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** The commission, on Jan. 17, 2007, adopted an order allowing Windover Water Works (Windover) to increase its quarterly flat rate charge from \$20 to \$111, and denied Windover's request to finance \$99,400 to make water system improvements.

**Statutory authority:** Public Service Law, sections 89-c(10) and 89-f

**Subject:** Water rates and charges and issuance of debt.

**Purpose:** To approve the quarterly flat rate charge from \$20 to \$111, and deny the finance of \$99,400 to make water system improvements.

**Substance of final rule:** The Commission approved the request of Windover Water Works (Windover) to increase its Quarterly Flat Rate Charge from \$20 to \$111, and denied Windover's request to finance \$99,400 to make water system improvements, subject to the terms and conditions set forth in order.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-

1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

#### **Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(06-W-0327SA1)

### NOTICE OF ADOPTION

#### **Indebtedness Incurred by the New York Independent System Operator**

**I.D. No.** PSC-45-06-00017-A

**Filing date:** Jan. 19, 2007

**Effective date:** Jan. 19, 2007

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** The commission, on Jan. 17, 2007, adopted an order granting the New York Independent System Operator authority to enter into a four-year unsecured Revolving Credit Agreement with four separate three-year term loan conversions to provide funding for the management of the New York power grid for the period of 2007-2010.

**Statutory authority:** Public Service Law, section 69

**Subject:** Indebtedness to be incurred by the New York Independent System Operator, Inc.

**Purpose:** To approve the indebtedness incurred by the New York Independent System Operator, Inc.

**Substance of final rule:** The Commission approved the New York Independent System Operator's request to enter into an \$80,000,000 Revolver/Term Loan for a four-year period to provide funding for the management of the New York power grid for the period of 2007-2010, subject to the terms and conditions of the order.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

#### **Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(06-E-1254SA1)

### NOTICE OF ADOPTION

#### **Electric Water Heater Leasing Business by Central Hudson Gas and Electric Corporation**

**I.D. No.** PSC-46-06-00018-A

**Filing date:** Jan. 17, 2007

**Effective date:** Jan. 17, 2007

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** The commission, on Jan. 17, 2007, adopted an order regarding a plan filed by Central Hudson Gas & Electric Corporation (Central Hudson) to terminate the electric water heater leasing business as required in the terms and conditions of the Commission Order Establishing Rate Plan dated July 24, 2006.

**Statutory authority:** Public Service Law, sections 65(1), 66(1), (5), (10) and (12)

**Subject:** Central Hudson's plan and schedule to terminate all activities related to its electric water heater leasing business.

**Purpose:** To approve a plan and schedule to terminate all activities.

**Substance of final rule:** The Commission approved with modification, a plan filed by Central Hudson Gas & Electric Corporation to terminate its electric water heater leasing business, subject to the terms and conditions of this order.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-E-0934SA5)

### NOTICE OF ADOPTION

**Asset Sale Gain Account by New York State Electric & Gas Corporation**

**I.D. No.** PSC-46-06-00020-A

**Filing date:** Jan. 18, 2007

**Effective date:** Jan. 18, 2007

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** The commission, on Jan. 17, 2007, adopted the terms and provisions of an Oct. 26, 2006 joint proposal, and directed New York State Electric & Gas Corporation (NYSEG) to refund customers \$77.1 million from its asset sale gain account (ASGA).

**Statutory authority:** Public Service Law, sections 2(13), 5(1)(b), 66(1), (12-a) and 107(1)

**Subject:** Distribution of \$77.1 million from NYSEG's ASGA to its customers.

**Purpose:** To approve the distribution.

**Substance of final rule:** The Commission adopted the terms and provisions of an October 26, 2006 joint proposal, and directed New York State Electric & Gas Corporation to refund its customers \$77.1 million from its Asset Sale Gain Account, subject to the terms and conditions of the order.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-E-1222SA5)

### NOTICE OF ADOPTION

**Transfer of Ownership Interests by WPS Empire State, Inc., et al.**

**I.D. No.** PSC-47-06-00013-A

**Filing date:** Jan. 22, 2007

**Effective date:** Jan. 22, 2007

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** The commission, on Jan. 17, 2007, adopted an order approving the petition of WPS Empire State, Inc., WPS Niagara Generation LLC and USRG Niagara Biomass LLC for the transfer of ownership interests in an approximately 53 MW electric generating facility located in Niagara Falls, NY.

**Statutory authority:** Public Service Law, section 70

**Subject:** Transfer of ownership interests in an approximately 53 MW electric generating facility located in Niagara Falls, NY.

**Purpose:** To approve the transfer of ownership interests.

**Substance of final rule:** The Commission approved the petition of WPS Empire State, Inc., WPS Niagara Generation LLC and USRG Niagara Biomass LLC for the transfer of ownership interests in an approximately 53 MW electric generating facility located in Niagara Falls, New York, subject to the terms and conditions set forth in order.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-

1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-E-1301SA1)

### NOTICE OF ADOPTION

**Indebtedness to be Incurred by USRG Niagara Biomass LLC**

**I.D. No.** PSC-47-06-00014-A

**Filing date:** Jan. 22, 2007

**Effective date:** Jan. 22, 2007

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** The commission, on Jan. 17, 2007, adopted an order approving the petition of USRG Niagara Biomass LLC to incur indebtedness through debt obligations of no more than \$50 million.

**Statutory authority:** Public Service Law, section 69

**Subject:** Indebtedness to be incurred by USRG Niagara Biomass LLC.

**Purpose:** To approve indebtedness incurred by USRG Niagara Biomass LLC.

**Substance of final rule:** The Commission approved the petition of USRG Niagara Biomass LLC to incur indebtedness through debt obligations of no more than \$50 million, subject to the terms and conditions set forth in order.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-E-1307SA1)

### NOTICE OF ADOPTION

**Transfer of Franchises or Stock by Aqua New York, Inc.**

**I.D. No.** PSC-47-06-00017-A

**Filing date:** Jan. 22, 2007

**Effective date:** Jan. 22, 2007

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** The commission, on Jan. 17, 2007, adopted an order approving the joint petition of Aqua New York Inc. and New York Water Service Corporation (NYWS) to extend the current New York Water Service rate plan.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and 89-h

**Subject:** Transfer of franchises or stock and water rates and charges.

**Purpose:** To approve the supplemental joint petition filed on Oct. 31, 2006.

**Substance of final rule:** The Commission adopted an order approving the joint petition of Aqua New York Inc. and New York Water Service Corporation (NYWS) to extend the current New York Water Service rate plan, and directed Aqua New York Inc. to file the necessary tariff leaf to establish and maintain a Distribution System Improvement Charge, subject to the terms and conditions set forth in the order.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-0700SA2)

**PROPOSED RULE MAKING  
HEARING(S) SCHEDULED**

**Rates, Practices, Terms and Conditions by Orange & Rockland Utilities, Inc.**

**I.D. No.** PSC-06-07-00017-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** By Order to Show Cause issued Dec. 15, 2006 in Case 06-E-1433, the commission is examining the reasonableness of the electric rates of Orange & Rockland Utilities, Inc. (Orange & Rockland) as well as the utility's practices and terms and conditions of electric service. The commission may order rate changes, make existing rate levels temporary, require changes in Orange & Rockland's accounting practices or implement other relief as appropriate.

**Statutory authority:** Public Service Law, sections 66(5), 72 and 114

**Subject:** Rates, practices, terms and conditions of Orange & Rockland electric service.

**Purpose:** To ensure just and reasonable rates, practices and terms and conditions for electric service of Orange & Rockland.

**Public hearing(s) will be held at:** 10:30 a.m., Feb. 28, 2007\* at Three Empire State Plaza, 3rd Fl. Hearing Rm., Albany, NY.

\*There could be requests to reschedule the hearing. Notification of any subsequent scheduling changes will be available at the DPS Web site ([www.dps.state.ny.us](http://www.dps.state.ny.us)) under Case 06-E-1433.

**Accessibility:** All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

**Interpreter Service:** Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

**Substance of emergency/proposed rule:** By Order to Show Cause issued December 15, 2006 in Case 06-E-1433, the Commission is examining the reasonableness of the electric rates of Orange & Rockland Utilities, Inc. (Orange & Rockland) as well as the utility's practices and terms and conditions of electric service. The Commission may order rate changes, make existing rate levels temporary, require changes in Orange & Rockland's accounting practices or implement other relief as appropriate.

**Text of rule may be obtained from:** Elaine Lynch, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 486-2660

**Data, views and arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement:**

Statements and analyses not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(06-E-1433SA2)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Interconnection Agreement between Verizon New York Inc. and Transbeam, Inc.**

**I.D. No.** PSC-06-07-00012-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a modification filed by Verizon New York Inc. and Transbeam, Inc. to revise the interconnection agreement effective on June 29, 2002.

**Statutory authority:** Public Service Law, section 94(2)

**Subject:** Inter-carrier agreement to interconnect telephone networks for the provisioning of local exchange service.

**Purpose:** To amend the agreement.

**Substance of proposed rule:** The Commission approved an Interconnection Agreement between Verizon New York Inc. and Transbeam, Inc. in June 2002. The companies subsequently have jointly filed amendments to clarify a unitary rate for inter-carrier compensation for certain types of traffic, as well as interconnection architecture arrangements.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(02-C-0411SA2)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Petition for Rehearing by Verizon New York Inc.**

**I.D. No.** PSC-06-07-00013-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** The commission is considering whether to grant, in whole or in part, the petition for rehearing, filed by Verizon New York Inc., of the Dec. 18, 2006, order resolving interconnection agreement issues, in the Manhattan Telephone Corp.—Verizon New York Inc. arbitration.

**Statutory authority:** Public Service Law, section 94(2); 47 U.S.C. 252

**Subject:** Petition for rehearing of arbitration order.

**Purpose:** To consider the petition for rehearing.

**Substance of proposed rule:** The Commission is considering whether to grant, in whole or in part, the Petition for Rehearing, filed by Verizon New York Inc., of the December 18, 2006, Order Resolving Interconnection Agreement Issues, in the Manhattan Telephone Corp.—Verizon New York Inc. arbitration.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(04-C-1176SA2)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Interconnection Agreement between Verizon New York Inc. and CommPartners, LLC**

**I.D. No.** PSC-06-07-00014-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a modification filed by Verizon New York Inc. and CommPartners, LLC to revise the interconnection agreement effective on March 7, 2006.

**Statutory authority:** Public Service Law, section 94(2)

**Subject:** Intercarrier agreement to interconnect telephone networks for the provisioning of local exchange service.

**Purpose:** To amend the agreement.

**Substance of proposed rule:** The Commission approved an Interconnection Agreement between Verizon New York Inc. and CommPartners, LLC in March 2006. The companies subsequently have jointly filed amendments to clarify a unitary rate for intercarrier compensation for certain types of traffic, as well as interconnection architecture arrangements.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(05-C-1545SA2)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Meter Reading and Billing Practices by Central Hudson Gas & Electric Corporation**

**I.D. No.** PSC-06-07-00015-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** The Public Service Commission is considering a proposal by Central Hudson Gas & Electric Corporation (Central Hudson), made pursuant to its approved electric rate plan in a filing dated Dec. 7, 2006, to decline at this time to implement monthly meter reading and billing for all customers, and to continue its current practice of bimonthly billing for electric service for the majority of its customers.

**Statutory authority:** Public Service Law, sections 65(1), (2) and (3) and 66(1), (2) and (5)

**Subject:** Central Hudson's meter reading and billing practices.

**Purpose:** To continue its current meter reading and billing practices.

**Substance of proposed rule:** The New York State Public Service Commission is considering whether to accept, reject, or modify, in whole or in part, a proposal by Central Hudson Gas & Electric Corporation, made pursuant to its approved electric rate plan, to decline at this time to implement monthly meter reading and billing for all customers, and to continue its current practice of bimonthly billing for electric service for the majority of its customers. The utility's proposal is based on the findings of a study that Central Hudson Gas & Electric Corporation undertook of the benefits and costs of implementing monthly meter reading and billing, as required by the rate plan.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(05-E-0934SA6)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Meter Installation and Reading Practices by Central Hudson Gas & Electric Corporation**

**I.D. No.** PSC-06-07-00016-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** The Public Service Commission is considering whether to accept or to reject, in whole or in part, a proposal by Central Hudson Gas & Electric Corporation (Central Hudson), made pursuant to its approved electric rate plan in a filing dated Dec. 28, 2006, to undertake a pilot program to implement Automated Meter Reading (AMR) using a fixed network for up to 5,000 of its customers.

**Statutory authority:** Public Service Law, sections 65(1), 66(1) and (2) and 67

**Subject:** Central Hudson's meter installation and reading practices.

**Purpose:** To undertake an AMR Pilot Program in its service territory.

**Substance of proposed rule:** The New York State Public Service Commission is considering whether to accept, reject, or modify, in whole or in part, a proposal by Central Hudson Gas & Electric Corporation, made pursuant to its approved electric rate plan, to undertake a pilot program to implement Automated Meter Reading (AMR) using a fixed network for up to 5,000 of its customers. The proposed pilot program is intended to provide experience with the operations, functionality and costs of fixed-network AMR in the utility's service territory, and a basis for determining the costs and feasibility of potential future expansion of AMR beyond the pilot program.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(05-E-0934SA7)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Submetering of Electricity by Profile Energy Inc.**

**I.D. No.** PSC-06-07-00018-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Profile Energy, Inc., on behalf of Summit Mall, to submeter electricity at 6929 Williams Rd., Niagara Falls, NY.

**Statutory authority:** Public Service Law, sections 2, 4(1), 65(1), 66(1) and 67(1)

**Subject:** Petition for the submetering of electricity.

**Purpose:** To consider the request of Profile Energy, Inc., on behalf of Summit Mall, to submeter electricity at 6929 Williams Rd., Niagara Falls, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Profile Energy, Inc., on behalf of Summit Mall, to submeter electricity at 6929 Williams Road, Niagara Falls, New York.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(07-E-0014SA1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Submetering of Electricity by Bay City Metering Company**

**I.D. No.** PSC-06-07-00019-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Bay City Metering Company, Inc., on behalf of Astor Court Owners Corporation, to submeter electricity at 205 W. 89th St., New York, NY.

**Statutory authority:** Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

**Subject:** Petition for the submetering of electricity.

**Purpose:** To consider the request of Bay City Metering Company, Inc., on behalf of Astor Court Owners Corporation, to submeter electricity at 205 W. 89th St., New York, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or in part, the petition filed by Bay City Metering Company, Inc., on behalf of Astor Court Owners Corporation, to submeter electricity at 205 West 89th Street, New York, New York.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-E-0071SA1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Meter Reading and Billing Practices by Central Hudson Gas & Electric Corporation**

**I.D. No.** PSC-06-07-00020-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** The Public Service Commission is considering a proposal by Central Hudson Gas & Electric Corporation (Central Hudson), made pursuant to its approved gas rate plan in a filing dated Dec. 7, 2006, to decline at this time to implement monthly meter reading and billing for all customers, and to continue its current practice of bimonthly billing for gas service for the majority of its customers.

**Statutory authority:** Public Service Law, sections 65(1), (2) and (3) and 66(1), (2) and (5)

**Subject:** Central Hudson's meter reading and billing practices.

**Purpose:** To continue its current meter reading and billing practices.

**Substance of proposed rule:** The New York State Public Service Commission is considering whether to accept, reject, or modify, in whole or in part, a proposal by Central Hudson Gas & Electric Corporation, made pursuant to its approved gas rate plan, to decline at this time to implement monthly meter reading and billing for all customers, and to continue its current practice of bimonthly billing for gas service for the majority of its customers. The utility's proposal is based on the findings of a study that Central Hudson Gas & Electric Corporation undertook of the benefits and costs of implementing monthly meter reading and billing, as required by the rate plan.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(05-G-0935SA5)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Meter Installation and Reading Practices by Central Hudson Gas & Electric Corporation**

**I.D. No.** PSC-06-07-00021-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** The Public Service Commission is considering whether to accept or to reject, in whole or in part, a proposal by Central Hudson Gas & Electric Corporation (Central Hudson), made pursuant to its approved gas rate plan in a filing dated Dec. 28, 2006, to undertake a pilot program to implement Automated Meter Reading (AMR) using a fixed network for up to 5,000 of its customers.

**Statutory authority:** Public Service Law, sections 65(1), 66(1) and (2) and 67

**Subject:** Central Hudson's meter installation and reading practices.

**Purpose:** To undertake an AMR Pilot Program in its service territory.

**Substance of proposed rule:** The New York State Public Service Commission is considering whether to accept, reject, or modify, in whole or in part, a proposal by Central Hudson Gas & Electric Corporation, made pursuant to its approved gas rate plan, to undertake a pilot program to implement Automated Meter Reading (AMR) using a fixed network for up to 5,000 of its customers. The proposed pilot program is intended to provide experience with the operations, functionality and costs of fixed-network AMR in the utility's service territory, and a basis for determining the costs and feasibility of potential future expansion of AMR beyond the pilot program.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(05-G-0935SA6)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Water Rates and Charges by Emerald Green Lake Louise Marie Water Company**

**I.D. No.** PSC-06-07-00022-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, tariff revisions filed by Emerald Green Lake Louise Marie Water Company, Inc. to make various changes in the rates, charges, rules and regulations in its tariff schedule, P.S.C. No. 1—Water, to become effective May 1, 2007.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

**Subject:** Water rates and charges.

**Purpose:** To increase Emerald Green Lake Louise Marie Water Company, Inc.'s annual revenues by about \$56,227 or 17.9 percent and impose a surcharge of \$12 per customer per year for a 10 year period.

**Substance of proposed rule:** On January 12, 2007, a petition was filed by Emerald Green Lake Louise Marie Water Company, Inc. (Emerald Green or the company) to increase its annual revenues by about \$56,227 or 17.9% and to establish an annual \$12 per customer surcharge over a ten year period to recover costs incurred because of dam repairs. On January 16, 2007, Staff electronically filed, on the company's behalf, the following tariff amendments to P.S.C. No. 1—Water: Leaf No. 12, Revision 2 and Water Source Surcharge Statement No. 1. These tariff amendments have an effective date of May 1, 2007. The company provides flat rate water service to 797 customers in the real estate developments known as Lake Louise Marie and Emerald Green located in the Town of Rock Hill, Sullivan County. The typical residential customer's annual flat rate bill would increase from \$394 to \$464. Fire protection service is not provided. Emerald Green's tariff, along with its proposed changes (Leaf No. 12, Revision 2 and Water Source Surcharge Statement No. 1) is available on the Commission's Home Page on the World Wide Web ([www.dps.state.ny.us](http://www.dps.state.ny.us))—located under the file room—Tariffs. The commission may approve or reject, in whole or in part, or modify, the company's proposed tariff revisions.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-1584SA1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Water Rates and Charges by West Valley Crystal Water Company, Inc.**

**I.D. No.** PSC-06-07-00023-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, tariff revisions filed by West Valley Crystal Water Company, Inc. to make various changes in the rates, charges, rules and regulations in its tariff schedule, P.S.C. No. 4—Water, to become effective July 1, 2007.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

**Subject:** Water rates and charges.

**Purpose:** To increase West Valley Crystal Water Company, Inc.'s annual revenues by about \$10,588 or 48.2 percent.

**Substance of proposed rule:** On January 22, 2007, West Valley Crystal Water Company, Inc. (West Valley or the company) filed, to become effective on July 1, 2007, tariff amendments (Rate Leaf No. 12) to its electronic tariff schedule P.S.C. No. 4 — Water. The company has filed new rates to produce additional annual revenues of about \$10,588 or 48.2%. Also, the company proposes a new rate structure to eliminate and establish rates for certain customers in its tariff. The company provides unmetered water service to approximately 228 customers in the Village of West Valley, Cattaraugus County. The company's tariff, along with its proposed changes, will be available on the Commission's Home Page on the World Wide Web ([www.dps.state.ny.us](http://www.dps.state.ny.us) located under Commission Documents). The Commission may approve or reject, in whole or in part, or modify the company's request.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (07-W-0062SA1)

**Racing and Wagering Board**

**NOTICE OF EXPIRATION**

The following notice has expired and cannot be reconsidered unless the Racing and Wagering Board publishes a new notice of proposed rule making in the NYS Register.

**Race Day Medications**

I.D. No.	Proposed	Expiration Date
RWB-03-06-00010-P	January 18, 2006	January 18, 2007

**EMERGENCY  
RULE MAKING**

**Internet and Telephone Account Wagering on Horseracing**

**I.D. No.** RWB-06-07-00008-E

**Filing No.** 83

**Filing date:** Jan. 19, 2007

**Effective date:** Jan. 19, 2007

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Addition of Part 5300 to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 222, 301, 401, 518, 520, 1002 and 1012

**Finding of necessity for emergency rule:** Preservation of general welfare.

**Specific reasons underlying the finding of necessity:** These amendments are necessary to detect and deter unlawful financial activity in off-track betting over the internet and telephone. These amendments give regulatory force and effect to the statutory amendments that permit the use of the Internet in account wagering which go into effect on January 22, 2007, and are contained in Chapter 314 of the Laws of 2006 as codified in Section 1012 of the RPWBL. Specifically, the amendments are necessary to provide guidelines and safeguards that allow for the use of state-of-the-art communication equipment in account wagering while preserving the

integrity of pari-mutuel wagering in New York State, thereby ensuring substantial revenue for state and local governments and strengthening and furthering the racing, breeding and pari-mutuel wagering industry in New York State. The 2002 Breeders' Cup Ultra Pick 6 scandal, which involved the use of telephone account wagering in the fraudulent placing of bets and threatened to undermine public confidence in off-track betting, demonstrated the need for heightened scrutiny of account wagering. These rules are designed to detect and deter such unlawful activity which potentially threatens government revenue derived from off-track betting.

**Subject:** Internet and telephone account wagering on horseracing.

**Purpose:** To ensure the integrity of parimutuel wagering by adopting licensing and regulatory standards for internet and telephone account wagering; and establish reporting, recordkeeping, operational and application requirements for race track operators and off-track betting corporations within New York State that offer internet and telephone account wagering.

**Substance of emergency rule:** 5300.1 Definitions and general provisions.

Contains definitions of various words and terms, when used in this chapter including: Account, Account holder, Account wager, Account wagering, Account wagering center, Account activity, Authorized pari-mutuel wagering entity, Board, Internet, Official, Stored value instrument, Totalisator system, and Wagering device.

5300.2 Account wagering, general.

Allows authorized pari-mutuel wagering entities (hereinafter "entity") to offer account wagering with prior board approval, restricting accounts to wagering purposes only; and determines which entities account wagers are deemed to be on track wagers and which are to be deemed off-track.

5300.3 Approval of account wagering.

Provides that entities authorized to conduct account wagering shall have a Board approved written plan of operation, including at least a proposed system of accepting wagers, internal controls, system security details, account wagering rules, and an independent recording for each transaction.

5300.4 Establishment of an account.

(a) Sets forth minimum criteria for establishment of accounts, allowable purposes, information to be provided, who may open an account, standards for verification of identity, notification standards, information allowed to be collected.

(b) Bearer accounts.

Provides standards for the use of bearer accounts evidenced by a card with a PIN number for customers without collecting identity information.

5300.5 Official address.

Provides that the entity may use the address listed on the account wagering application for listed purposes, until the entity is informed by the account holder of a change in address.

5300.6 Changes to account information.

Requires the entity to provide a method for the account-wagering holder to make official changes to his/her account information.

5300.7 Right to refuse an account.

Provides for refusal of account based on business judgment, and for mandatory exclusion of certain persons.

5300.8 Segregation of funds.

Requires the entity to deposit account holder's money within 72 hours of receipt in a segregated account.

5300.9 Conduct of wagering.

Provides rules for acceptance of wagers from established account holders via the telephone, internet, or other means subject to an approved plan of operation.

5300.10 Record of wager; pari-mutuel tickets.

This section deems all wagers placed through the account wagering system pari-mutuel tickets subject to all rules and laws governing pari-mutuel tickets.

5300.11 Withdrawals and other debits to accounts.

Sets forth standards for withdrawals from accounts, including identity, means, record keeping and time requirements; authorizes electric fund transfers.

5300.12 Credits to accounts.

States requirements for making and crediting deposits and winning payoffs, effect of IRS requirements, and other credits.

5300.13 Account statements.

Sets requirements for frequency, means of delivery and content of account statements.

5300.14 Record keeping.

Sets forth record keeping requirements for entities, including details and time required to be kept, and how account liabilities are to be recorded on books and records.

5300.15 Confidentiality of accounts.

Requirement for keeping accounts confidential, states exceptions.

5300.16 Closing of accounts.

Sets requirements for closing of accounts at request of account holders.

5300.17 Dormant accounts.

States rule for distribution of dormant accounts.

5300.18 Surcharge.

States rule for suspension of surcharge on accounts.

5300.19 Vouchers.

Defines vouchers and states these are not accounts or account wagers.

5300.20 Reports to board.

Sets forth time and content requirements for reports on handle, number of accounts or other reports.

5300.21 Yearly Audit

Contains minimum frequency requirements for audits.

5300.22 Disputes/Complaints.

Sets forth requirements for handling customer disputes including documentation and audit requirements.

5300.23 Cooperation with officials.

Sets forth requirement for entity to cooperate with Board officials upon request.

**This notice is intended** to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire April 19, 2007.

**Text of emergency rule and any required statements and analyses may be obtained from:** Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, e-mail: info@racing.state.ny.us

#### **Regulatory Impact Statement**

(a) STATUTORY AUTHORITY: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 222, 301, 401, 518, 520, 1002 and 1012. Subdivision 1 of section 101 of the Racing, Pari-Mutuel Wagering and Breeding Law (RPWBL) vests the Racing and Wagering Board (the Board) with general jurisdiction over all horse racing and all pari-mutuel wagering activities in New York State. Section 222 authorizes the conduct of pari-mutuel betting on horse races for the purpose of deriving a reasonable revenue for the support of government and to promote agriculture and breeding of horses in New York State. Subdivision 1 of section 301 grants the Board the authority to supervise generally all harness race meetings in New York State at which pari-mutuel betting is conducted and the authority to adopt rules accordingly. Subdivision 1 of section 401 grants the Board the power to supervise generally all quarterhorse race meetings in the state at which pari-mutuel betting is conducted. Section 518 authorizes off-track pari-mutuel betting so long as it is conducted under the administration of the Board. Subdivision 1 of section 520 grants general jurisdiction to the Board over the operation of all off-track pari-mutuel betting facilities within the state, and directs the Board to issue rules and regulations regarding off-track pari-mutuel betting activity. Subdivision 1 of section 1002 grants the Board general jurisdiction and rulemaking power over the simulcasting of horse races within the state. Subdivision 5 of section 1012 requires that the maintenance and operation of telephone accounts for wagers placed on licensed pari-mutuel racing shall be subject to rules and regulations of the New York State Racing and Wagering Board.

Legislative Objectives: These amendments give regulatory force and effect to the statutory amendments contained in Chapter 314 of the Laws of 2006 as codified in Section 1012 of the RPWBL. Specifically, the amendments provide the necessary definitions, guidelines and safeguards that allow for the use of state-of-the-art communication equipment in account wagering while preserving the integrity of pari-mutuel wagering in New York State, thereby ensuring substantial revenue for state and local governments and strengthening and furthering the racing, breeding and pari-mutuel wagering industry in New York State.

(b) NEEDS AND BENEFITS: The New York State and the Racing and Wagering Board needs to ensure that the hundreds of millions of dollars that may potentially be wagered by telephone and the Internet in any given year can be accounted for using uniform and reliable methods. These regulatory amendments are necessary to implement the statutory provisions of Chapter 314 of the Laws of 2006, which becomes effective January 22, 2006 and amends Section 1012 of the Racing, Pari-Mutuel Wagering and Breeding Law (RPWBL) by expanding the authorized method of placing account wagers to include "all those wagers which

utilize any wired or wireless communication device, including but not limited to wireline telephones, wireless telephones, wireless telephones, and the internet." This rule is necessary to ensure the integrity of Internet and telephone account wagering in New York State. While Chapter 314 authorized in general terms the use of certain electronic devices in pari-mutuel wagering activities, this rule establishes the specific guidelines necessary for practical implementation of the statutory amendments. Telephone account wagering has been available in New York State for approximately 30 years, but there have been no comprehensive Board rules for account wagering. This will establish such rules. The New York State Legislature has recognized the potential of Internet account wagering in bolstering New York horse racing, and these rules will ensure that the use of the Internet in pari-mutuel wagering will be conducted in an open and honest manner.

(c) COSTS:

(i) The costs for the implementation of, and continuing compliance with, the rule to regulated persons will be negligible. Racetrack operators and off-track betting corporations already make telephone account wagering available and can comply with this rule by using existing accounting equipment and personnel. Such entities also have their own web sites and web server networks.

(ii) There would be no new costs for the implementation of, and continued administration of, the rule to the New York State Racing and Wagering Board, and the state and local governments. The Board and the Department of Taxation and Finance currently monitor telephone account wagering, and can continue to use current resources to administer this rule. The addition of internet wagering as a method of account wagering will not impose any new costs given the inherent accountability qualities of Internet servers and software systems. There would be no new costs to local governments because they do not regulate pari-mutuel wagering.

(iii) The information regarding costs was determined by Board staff. It made this determination based upon practical knowledge of the existing telephone account wagering systems, which it currently supervises pursuant to its general powers under the RPWBL.

(d) PAPERWORK: This rule does not impose any specific form requirement, but does include reporting requirements.

Authorized pari-mutuel wagering entities will be required to maintain for three years documentation of all persons excluded from opening an internet wagering account. Entities will also be required to maintain documentation of customer disputes and complaints for three years. All such documents must be made available to the Racing and Wagering Board upon request.

Authorized pari-mutuel wagering entities will be required to submit a written plan of operations for approval by the Racing and Wagering Board.

Authorized pari-mutuel wagering entities will be required to furnish monthly account statements to their customers.

Authorized pari-mutuel entities will be required submit annual reports detailing handle information and account activity from the previous calendar year. Entities will also be required to conduct annual audits of the account wagering system data input and account updates.

(e) LOCAL GOVERNMENT MANDATES: There are no local government mandates. Pari-mutuel wagering activities in New York State are exclusively regulated by the New York State Racing and Wagering Board.

(f) DUPLICATION: Because the New York State Racing and Wagering Board has exclusive regulatory authority over pari-mutuel wagering activity, there are no other state or federal rules that duplicate, overlap or conflict with this rule. This rule is intended to give force and effect to Chapter 314 of the Laws of 2006. This rule is consistent with the provisions of the federal Unlawful Internet Gambling Enforcement Act of 2006, which amends Chapter 53 of Title 31, United States Code.

(g) ALTERNATIVE APPROACHES: No alternative approaches were considered in drafting this rule as Board staff attempted a model rule approach to rulemaking by incorporating internet and telephone account wagering already in place in other states. Board staff also considered the Advance Deposit Wagering Rules of the Association of Racing Commissioners International and the telephone account wagering practices currently used in New York State. All of these similar rules and practices are relatively uniform and therefore, no alternative approaches were considered.

In drafting this rule, the Board solicited and considered public comment from all entities engaged in pari-mutuel wagering in the State of New York, including thoroughbred and harness track operators, off-track betting corporations, and pari-mutuel wagering totalizator companies. There was general support for the Board's approach to accountability and reporting. No significant alternative approaches were offered. The Board did

revise certain aspects of the rule based upon public comments, but ultimately retained the overall regulatory approach as originally proposed.

(h) FEDERAL STANDARDS: There are no federal standards which specifically govern these pari-mutuel wagering activities. The Unlawful Internet Gambling Act of 2006 states that "unlawful Internet gambling" shall not include any activity that is allowed under the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 *et seq.*).

(i) COMPLIANCE SCHEDULE: These rules will become effective upon the date of publication in the State Register subsequent to final adoption by the Board. It is anticipated that regulated entities can achieve compliance on the date of publication of this rule.

**Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

This proposal does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement as the amendment addresses the limited issue of operational and administrative aspects of Internet and telephone account wagering. This rule would affect race track operators and off-track betting corporations throughout New York State, all of who currently offer telephone account wagering. This rule is consistent with current practices employed by such entities, as well as certain disclosure and operational plan requirements of the Racing and Wagering Board. This rule is intended to modify the Board's rules to properly regulate the expansion of pari-mutuel wagering into the realm of the Internet and telephone wagering as authorized by the Legislature in 2006. It does not limit job opportunities. In fact, the increased revenue from pari-mutuel wagering over the Internet may help preserve and expand economic opportunities in the New York State horse racing industry by capturing revenue that is wagered over the Internet on horseracing in other states and countries. Establishing Internet and telephone account wagering standards does not impact upon a small business pursuant to such definition in the State Administrative Procedure Act § 102(8) because race track operators and off-track betting corporations are not small businesses. Nor does this rule affect employment. The proposal will not impose an adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any significant technological changes on the industry because the race track operators and off-track betting corporations are able to use the current telephone account wagering and Internet server technology that they currently possess.

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## Susquehanna River Basin Commission

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18 CFR Parts 803, 804, 805, 806, 807 and 808

Review and Approval of Projects; Special Regulations and Standards;  
Hearings and Enforcement Actions

AGENCY: Susquehanna River Basin Commission (SRBC).

ACTION: Final rule.

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SUMMARY: This document contains amendments to the SRBC's project review regulations currently published at 18 CFR Parts 803, 804 and 805. The regulations provide the procedural and substantive rules for SRBC review and approval of water resources projects and the procedures governing hearings and enforcement actions. These amendments include additional due process safeguards, add new standards for projects, improve organizational structure, incorporate recently adopted policies and clarify language. The amendments were first proposed on July 7, 2006 in the *Federal Register*, Vol. 71, No. 130, p. 38692. Comments received on the proposed rule making are summarized with accompanying responses in the "Supplementary Information" section below. Changes were made to the proposed rules in the final rule making in response to these comments, including the "removal and reservation" of Parts 803, 804 and 805 and the substitution therefore in this final rule making action of Parts 806, 807 and 808, respectively.

DATES: These rules shall be effective January 1, 2007.

ADDRESSES: Susquehanna River Basin Commission, 1721 N. Front Street, Harrisburg, PA 17102-2391.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel, 717-238-0423; Fax: 717-238-2436; e-mail: rcairo@srbc.

net. Also, for further information on the final rule making action, visit the Commission's Web site at <http://www.srbc.net>.

#### SUPPLEMENTARY INFORMATION:

##### Background

The SRBC proposed rules amending its "Regulations and Procedures for the Review of Projects" presently found at 18 CFR Parts 803, 804 and 805, which were published on July 7, 2006 in the FR, Vol. 71, No. 130, p. 38692. Those rules establish: (1) The scope and procedures for review and approval of projects under Section 3.10 of the Susquehanna River Basin Compact, Pub. L. 91-575; 83 Stat. 1509 *et seq.* (the compact); (2) special standards under Section 3.4(2) of the compact governing water withdrawals and consumptive use of water; and (3) procedures for hearings and enforcement actions. The SRBC received numerous comments on the proposed rule making action, which are summarized below with an accompanying response to each. The SRBC made a number of adjustments and changes to the proposed rules in this final rule making action in response to those comments. One change that should be noted is the removal and reservation of 18 CFR Parts 803, 804 and 805, and the substitution therefore in this final rule making action of Parts 806, 807 and 808 respectively. The contents that appeared in Parts 803, 804 and 805 of the proposed rule making now appear in Parts 806, 807 and 808 respectively; hence, this is not an enlargement of the purposes of the proposed rule making, but simply an editorial change in response to a comment that SRBC received pointing to the possible confusion of retaining the same numbering system for the revised regulations. Comments received on the proposed rule making referred to the numbering system as published, namely Parts 803, 804 and 805, and comments and responses set forth below follow that same construction, even though now superseded by Parts 806, 807 and 808, respectively.

##### General Comments

Comment: Revisions will strengthen and streamline SRBC project review regulations.

Response: The Commission agrees that the revisions will strengthen and streamline its regulatory program.

Comment: SRBC proposed regulations should more strongly emphasize the importance of economic development in its statement of purposes and in the criteria on which an approval will be granted or denied. SRBC should attempt to more carefully balance the economic benefits of a project versus other interests such as the environment. Tools should be developed for analyzing the "harms" of a project versus its "benefits." If there are only minor environmental impacts and great economic benefits, projects should be approved.

Response: The Commission believes that there are already sufficient references to the purposes of economic development in both the Susquehanna River Basin Compact (the "compact") and the project review regulations. The Commission, in its review process, does take into consideration the economic development aspects of a project and works with project sponsors to help them use water resources in a way that will enhance economic growth while avoiding conflicts with other users.

Comment: SRBC should explore the use of free market tools such as credits and trading for compliance with its regulations.

Response: The Commission considers that tools such as credits and trading for compliance with regulations are probably more applicable to water quality regulations than to water quantity regulations of the type administered by the Commission. Nevertheless, an element of free market tools is already incorporated in the proposed regulation Section 803.22 ("Standards for consumptive uses of water"), in that project sponsors are allowed a wide choice of mitigation methods, including the free market acquisition of water for flow augmentation.

Comment: In several instances, the Commission is writing authority into the regulations that does not exist under the compact. For example, Article 11 of the compact pertaining to protected areas is the only section that mentions any authority for approval of withdrawals. Also, there is no compact authority for other items in the regulations such as cease and desist orders and the issuance of subpoenas. Many other examples are cited.

Response: This comment reads the terms of the compact far too narrowly and fails to consider other broad grants of power given to the Commission to manage the river basin's water resources. For example, Section 3.5(4) of the compact states that the Commission "shall assume jurisdiction in any matter affecting water resources whenever it determines \* \* \* that the effectuation of the comprehensive plan or the implementation of the compact so requires." Also, Section 3.4(9) states that the Commission "may have and exercise all powers necessary or convenient to carry out its express powers and other powers which reasonably may be implied

therefrom." Finally, Section 3.10(2) of the compact makes it clear that the Commission's power to approve projects is not limited.

Comment: SRBC has seemingly unlimited authority to arbitrarily impose enforcement action and prescribe remedies, and is not responsible or accountable to its basin-constituent population or economic interests.

Response: Like any other government agency, the Commission does not operate without limits imposed by the compact, the Constitution, and laws of the United States. Also, the Commission is directly responsible to its member jurisdictions, each of which is represented on the Commission.

Comment: The proposed regulations should have been presented in a redline/black-line format that shows changes along side of current regulations. Old regulation sections from which regulations were moved or deleted should have been "reserved" instead of reused with new regulatory material because existing policies that refer to these same sections will no longer be accurate and could lead to confusion among those persons reviewing those policies.

Response: These revised regulations represent a complex overhaul of the current Commission regulations that involved the wholesale reorganization of the existing sections, the extensive revision of existing sections, and the addition of whole new sections. Such changes cannot be effectively placed in redline/black-line, side-by-side format without creating even more confusion for a reviewer attempting to review the disjointed mixture of moving text, additions, and deletions. It was therefore decided that the proposed revisions would be presented as an entirely new package of regulations and that the major changes would be described section by section in the preamble of the proposed rulemaking action. Most policies were incorporated into the body of the regulations, which will provide clarity for the regulated community and others. References to sections of the regulations that are no longer accurate will be revised accordingly. Also, with regard to "reserving" old sections of the regulations, the Commission has decided that, as part of its final rulemaking action, it will "remove and reserve" Parts 803, 804 and 805 and replace those Parts respectively with new Parts 806, 807 and 808. This is being done in accordance with Federal Register guidelines. All references in this Comment: and Response: document will reference section numbers as originally proposed (i.e., Parts 803, 804, and 805).

Comment: The new policies, procedures, and regulations implemented by the Commission over the last six years have already imposed significant administrative burdens on the regulated community. Some in the regulated community are now concerned that these new regulations will impose even more burdens that will adversely affect the economic vitality of the basin and drive investors to basins with a friendlier regulatory environment.

Response: The Commission acknowledges that compliance with Commission regulations does place certain short-term administrative and financial obligations upon the regulated community. However, the long-term benefits of Commission management and protection of a critical resource must also be considered. Project sponsors and other water users receive certain protections related to their water use that extend far beyond the protections afforded by the common law. Furthermore, the incorporation of policies and overall refinement of the regulations are intended to foster sustainable use of the resource over the term of an approval, even through times of drought. As such, some of the rigor complained about affords protection to existing uses, including economic uses, and allows for responsible economic development in the basin.

Comment: SRBC should establish a more integrated project approval process that directly considers the impacts of a project in terms of both water quantity and quality, and facilitates implementation of statewide water quality programs and mandates, including the Chesapeake Bay Tributary Strategies program, the anti-degradation program and the TMDL program.

Response: The member jurisdictions continue to maintain primary jurisdiction for regulating water quality pursuant to federal regulations under the Clean Water Act. In order to avoid duplication, the Commission focuses its review on water quantity while considering the impacts of a project on water quality, primarily through integrated, extensive coordination with agencies of its member jurisdictions.

Comment: SRBC should encourage "smart growth" communities that cluster development and have less impact on the environment. SRBC, by increasing regulatory thresholds, eliminating transferability of approvals, shortening amortization times and generally creating uncertainty about future water rights, would seem to promote sprawl by encouraging large lot development with individual wells to avoid SRBC regulation.

Response: The Commission rejects the notion that this set of revised regulations will somehow discourage clustered development and create uncertainty about future water rights. If anything, these strengthened regu-

lations improve the Commission's ability to effectively manage the water resources of the basin, and will reinforce certainty about future water supplies by assuring users that they are drawing on reliable sources of water that will not be subject to conflict or interference with other users. It also acknowledges that land use decisions are made at the local level in all of its member jurisdictions.

Comments by Section, Part 803

#### Section 803.1 Scope

Comment: Decisions made by the Commission should reference the section of the comprehensive plan that is relied upon.

Response: Docket approvals presently do reference the project's compliance with the terms of the comprehensive plan, but a reference to a single section of the comprehensive plan would be too limiting in most cases.

#### Section 803.2 Purposes

Comment: The reference to economic development should be strengthened by stating that it is a purpose of the regulations to promote economic development and financial investment. It was further suggested that the purposes section should acknowledge the water-related dependency of many large and small commercial, industrial, and mining industries in the basin. Finally, the words "and control" should be deleted from Section 803.2(a)(2).

Response: Again, the Commission feels that the existing reference to economic development in this section is sufficient. The Commission also promotes economic stability and certainty by protecting the sources of water that all such activities depend on for their use and development. The Commission protects more than just the environment; the Commission heads off conflicts between users and helps users maintain reliable sources of water. The word "control" comes directly from the purposes section of the Susquehanna River Basin Compact and cannot be removed or deleted.

#### Section 803.3 Definitions

Comment: Revise the "groundwater" definition to indicate that "groundwater \* \* \* includes that water contained in quarries, pits and underground mines not originating directly from surface water inflow (runoff)." Also add that the term groundwater \* \* \* "includes water derived from a spring by pumping or other means of drainage which reduces or eliminates the surface flow."

Response: The definition has been modified to include "or other means of drainage." The Commission does not consider the addition of the other suggested wording to be necessary.

Comment: The last sentence in the "groundwater" definition is confusing and, when read in conjunction with the "surface water" definition, may exclude ground or surface water that is intended to be included.

Response: Agreed. Additional language contained in the current definition has been reinserted to clarify the definition.

Comment: The "surface water" definition uses the term "surface of the earth," while the "groundwater" definition uses the term "surface of the ground."

Response: Agreed. The term has been changed to "surface of the ground."

Comment: There is a need to define the term "undertake" to make clear what constitutes the commencement of a project requiring approval under Section 803.4, and, to insure that mere site preparation such as clearing and grubbing are not included under the definition, a definition of "construction" should also be included.

Response: Agreed. New definitions have been included for the term "undertake" and for the term "construction." The definition of construction insures that mere site preparation activity will not be included under the definition of "undertake". Combined, these definitions clarify what activity is subject to prior review and approval.

Comment: Revise the "project" definition because it is confusing and ambiguous.

Response: This definition utilizes wording taken directly from the Susquehanna River Basin Compact.

Comment: Revise the "pre-compact consumptive use" definition by adding the following words after the date "January 23, 1971": "established on the basis of credible documentation."

Response: The Commission does not consider the suggested language to be necessary. All such determinations are already made on the basis of credible documentation evaluated by Commission staff.

Comment: Revise the "water resources" definition to remove the term "and related natural resources" because it is unclear what these "related natural resources" are.

Response: This definition utilizes wording taken directly from the Susquehanna River Basin Compact.

Comment: Restore the use of the words "for use" in the "withdrawal" definition.

Response: The Commission agrees to restore the words "for use in the basin."

#### Section 803.4 Projects Requiring Review and Approval

Comment: The proposal to require a new review and approval by the Commission after a change of ownership of a project will substantially complicate and hinder the transfer of projects and therefore reduce the attractiveness of investments in projects in the basin. Frequent corporate changes, reorganizations, and mergers are common in the energy industry today. Requiring a new docket application for each such event would be administratively unwieldy, reduce predictability, and will add unnecessary risk for anyone willing to sponsor a project.

Comment: Requiring approvals upon change of ownership of a project may also discourage water companies from taking over smaller, inadequate systems due to the uncertainties created regarding the new quantities of water that will be available under a reissued approval. Furthermore, there does not appear to be a need to require that full project reviews be performed when there is a change of ownership of a project unless there is a change in conditions that really warrants such a full review.

Comment: The Commission should consider some way of preliminarily evaluating whether there has been such a change before requiring submission of a new application by transferees or simply reopening the docket under its reopening authority. Also, the Commission may want to focus on the ability of a transferee to comply with the existing approval. Yet another suggestion is for the Commission to require the submission of a notice of a change of ownership prior to the transfer, together with a transfer fee. This would enable the Commission to stay fully informed about which entities hold approvals, facilitate enforcement of any limitations or conditions, and offset the Commission's processing and administrative costs.

Response: The Commission has added new paragraph (b) that lists categories of projects that are exempt from the requirement for Commission approval upon a change of ownership. These exemptions were originally contained in the "change of ownership" definition and have been relocated to this section. The Commission has also added new paragraph (c) that allows projects not otherwise exempt under paragraph (b), to be undertaken by a new project sponsor (the transferee) upon a change of ownership pending action by the Commission on an application submitted by such new project sponsor requesting review and approval of the project. Both paragraphs (b) and (c) relate to projects that did not require Commission approval prior to January 1, 2007.

Comment: New owners should be required to seek approval of their water consumption and have full accountability for compliance with the terms for approval.

Response: Subject to the exceptions noted in our response above, the Commission agrees.

Comment: The Commission should not end the grandfathering of consumptive uses existing prior to January 23, 1971. The Commission has not provided a good reason to end this practice that has been a part of the Commission's regulations since their inception, and which project sponsors have come to rely on.

Comment: The intention of grandfathering is to protect the expectations of the person, but not the project. The proposed limitation on grandfathering does not affect the reasonable expectations of any person who is the current owner. Ending grandfathering assures fair implementation of the regulations. Exemptions provided to ag and family transfers should be continued indefinitely.

Response: 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.

Comment: The federal reservations to the Susquehanna River Basin Compact specifically prohibit the Commission from charging for pre-compact uses of water under Section 3.9 of the compact. Section 3.9 only allows the Commission to charge for use of its facilities or its services. Waters consumptively used are not a product of the Commission facilities or services, but are produced by the streams and rivers owned by the individual states. There is no basis for charging these projects a fee. Finally, grandfathered amounts encourage water conservation.

Response: The fees paid by consumptive users are not made under the authority of Section 3.9 of the compact and are therefore not subject to the federal reservations regarding charges under Section 3.9 of the compact. Instead, these fees are just one of several means of compliance with the consumptive use regulation that a project sponsor can employ. The Commission places the proceeds of such charges into a special water management fund where they are used to purchase storage for release during low flow and to implement other measures to mitigate the effects of consumptive water use. Project sponsors are free to propose other means of mitigation.

Comment: Section 803.4(a)(4) requiring approval of any consumptive use that adversely affects purposes outlined in Section 803.2 is overly broad and too vague to effectuate compliance because it provides no quantitative or qualitative benchmarks.

Response: Agreed that this paragraph may be overly broad in scope. This paragraph has therefore been stricken.

Comment: In (a) Consumptive use of water, and (b) Withdrawals, change the reference to Section 803.12 to Section 803.13.

Response: Agreed. This cross-reference was incorrect and has been changed.

Comment: The proposal to regulate combined surface and groundwater withdrawals of 100,000 gpd or greater brings more withdrawals under review and approval, and better enables the Commission to ensure that substantial withdrawals do not compromise basin water resources.

Response: The Commission strongly agrees.

Comment: Combining groundwater and surface water to reach the withdrawal threshold of 100,000 gpd opens the regulatory process to include both when only one may be increased. Approval thresholds should remain separate.

Response: The Commission strongly believes that the hydrologic link between surface and groundwater justifies combining surface and groundwater withdrawals under one regulation that can consider and manage their mutual impacts. This conforms to the comprehensive management principles set forth in the compact.

Comment: The combined surface and groundwater requirement will force applicants to file two applications and pay two application fees.

Response: The proposed regulation does not have the effect referenced in the comment. If finally adopted, the Commission intends to institute a new application system for withdrawals and intends to modify its fee schedule to accommodate combined withdrawals.

Comment: The Commission should exempt the first 20,000 gallons per day (gpd) of an into-basin diversion as it has exempted the first 20,000 gpd of an out-of-basin diversion.

Response: The Commission does not agree that into-basin diversions should also be exempted up to 20,000 gpd. Regardless of quantity, the Commission wishes to insure that only water of good quality or properly treated water is being diverted into the Susquehanna River Basin. Rather than grant a blank exemption, the Commission will consider the possibility of a future "administrative agreement" or other informal arrangement with member states to accept their review and approval of a discharge into the basin (diversion) as an approval by the Commission.

Comment: Diversions should only be approved when the applicant demonstrates the clear need and a lack of alternatives.

Response: The Commission feels that the new regulation, which incorporates the Commission's out-of-basin diversion policy, adequately covers these criteria with respect to out-of-basin diversions.

Comment: There are no substantive criteria in 803.4(g) to establish a threshold as to when "other projects" may be required to submit an application.

Response: This paragraph is in conformance with Section 3.10(3) of the compact that grants the Commission and the member jurisdictions the broad authority to identify other projects that require Commission approval.

#### Section 803.5 Projects That May Require Review and Approval

Comment: With respect to (a), terms used such as "affect interstate water quality or interstate waters" and "significant effect" are too vague and do not sufficiently establish a quantitative standard. There is no requirement to identify which part of the comprehensive plan is adversely affected and therefore there is no way for an applicant to determine this.

Response: This is language that simply restates and is consistent with the language of the compact, Section 3.10. A project sponsor whose project affects the comprehensive plan would be informed about which part of the plan is so affected when it is notified in writing by the Executive Director under Section 803.4(g).

Comment: With respect to (b), there should be a "pre-determination notice" procedure that would afford a project sponsor the opportunity to supplement information, discussion, and technical interaction before a determination is made by the Executive Director.

Response: If the Executive Director is called upon to make a determination, he/she will notify the project sponsor to submit such information prior to a determination. This will be part of the due process automatically afforded a project sponsor and there is no need to provide for it separately in the regulation.

#### Section 803.6 Transferability of Project Approvals

Comment: Support expressed for limited classes of transfers.

Comment: The proposed language should be eliminated for the same reasons given under the comments submitted on Section 803.4. regarding "change of ownership" and the existing rule regarding transfers should be retained. Essentially, restrictions on the transfer of Commission approvals create the same burdens on the regulated community as described in the comments on Section 803.4 above.

Response: This section has been extensively revised to now generally permit the transfer of project approvals. All transfers would require advance notification and certification to comply with all terms and conditions of the transferred approval. Transfers qualifying under new paragraph (b) can be made automatically without further Commission action. Transfers qualifying under new paragraph (c) can be made conditionally with a subsequent application to the Commission within 90 days from the transfer requesting review and approval of previously unapproved aspect of the project. Transfers qualifying under new paragraph (d) can also be made conditionally with a subsequent application to the Commission within 90 days from the transfer requesting review and approval of the entire project.

#### Section 803.7 Concurrent Project Review by Member Jurisdictions

Comment: Insert the words "to avoid delays" after the words "to avoid duplication of work." All reviews should be carried on in parallel with other agencies so as to avoid any delays in the review process.

Response: The suggested language is seen as unnecessary since it is the express purpose of the section.

Comment: Substitute the words "appropriate administrative agreements" or "informal arrangements" for "agreements of understanding" and "agreements" to be consistent with Section 804.3.

Response: Agreed.

#### Section 803.8 Waiver/Modification

Comment: The "modify" portion of this section gives the Commission too much discretion to actually change the requirements of a regulation that has already been promulgated. Therefore, the references to "modification" and "modify" in this section should be deleted.

Response: This section has been a part of the Commission's regulations since the first omnibus rulemaking package was adopted in 1995. It is generally used to relieve project sponsors of unnecessary requirements, rather than to place additional requirements upon a project sponsor. The Commission expects that this type of use of the "waiver" section will continue, although it reserves the right to use such discretion in appropriate circumstances.

#### Section 803.12 Constant-Rate Aquifer Testing

Comment: There should be an introductory paragraph that includes a statement of purpose.

Response: The Commission has added additional wording that explains the purpose of constant-rate aquifer testing.

Comment: This section should state that constant-rate aquifer testing plans shall be prepared by a qualified and licensed professional geologist.

Response: The Commission defers to state law on this matter. Geologists are not formally licensed in New York or Maryland.

Comment: This section should state that constant-rate aquifer testing plans shall follow published Commission guidelines which shall be consistent with current industrial standards.

Comment: Once testing is complete, the Commission should not be able to require additional testing or monitoring unless the purposes of the first testing have not been met. The specific circumstances requiring additional testing should be set forth.

Response: These comments are addressed in the Commission's revised Aquifer Testing Guidance. Testing is conducted to provide a sound scientific basis for the Commission's decision regarding a project. Additional testing and monitoring is required to confirm assumptions in the interpretation of data or to verify system performance.

Comment: Paragraph (d) allows the Commission to impose arbitrary demands for additional testing.

Response: As is the case with every governmental agency, the Commission may not constitutionally impose arbitrary requirements.

Comment: This section deserves support.

Response: Agreed.

#### Section 803.13 Submission of Application

Comment: Add a new subsection that describes the deadlines to which the Commission would be obliged with respect to: (1) Administrative completeness; (2) technical reviews of applications; (3) review of supplemental submissions required by the Commission; and (4) actions to be taken by the Commission.

Response: The Commission feels that it would be more appropriate to address this comment in a set of accompanying guidelines rather than in the regulation itself.

Comment: In paragraph (b), how will a transferee of a project know that it is to comply with all of the requirements to certify an intention to comply and assume all associated obligations?

Response: This provision has been relocated to Sec. 806.6. The Commission will make available appropriate notification and certification forms to assist transferees in complying with the requirements.

Comment: In paragraph (c), the Commission should impose a time limit on itself to determine the completeness of an application.

Response: The provision has been deleted.

#### Section 803.14 Contents of Application

Comment: Applications by project sponsors should demonstrate the consistency of projects with locally adopted comprehensive plans and with state water plans.

Response: The notice of application procedure, which covers notification to local municipalities and county planning agencies, provides an ample opportunity for those entities to submit comments to the Commission on the consistency of the projects with local plans. The Commission coordinates with state agencies on each project application, providing the states with an opportunity to comment on the consistency of the projects with any of their water plans.

Comment: Some items that are now required to be provided in project applications are made discretionary on the part of the Commission in the new regulations. Many of these items provide information relevant to whether a proposed project impacts water resources of the basin. These should continue to be mandated.

Response: The regulation has been restructured to mandate certain information that is uniformly applicable to all projects. The informational requirements listed as discretionary are also important, but not all are necessary for all projects. The Commission believes some discretion is needed to tailor informational needs on a case-by-case basis.

Comment: Applications should not be deemed incomplete if they lack a plan for avoiding or mitigating consumptive use because large volume consumptive use may be a legitimate purpose. Instead preface with statement "As may be appropriate, depending upon the nature of the project, plans for avoiding \* \* \* (etc.)".

Response: Mitigation is one of the fundamental purposes of the consumptive use regulation. It is essential that a project sponsor develop a plan for mitigating its consumptive use. Development of a plan does not in any way imply that the use is not legitimate.

Comment: Two additional subsections should be added to allow the applicant to provide information regarding: (1) The benefits of the project; and (2) plans to mitigate adverse impacts of potential adverse effects.

Response: The project sponsor may, as it chooses, submit this information to the Commission. There is no need to make it a required submission.

Comment: Add a new item (xi) Evidence of compliance with all registration requirements of the Commission and the appropriate member jurisdictions.

Response: Agreed.

Comment: In (a)(2)(i), the project location should be determined by gps accurate to 10 meters.

Response: Agreed.

Comment: Paragraph (a)(2)(v) would seem to allow a requirement for a constant-rate aquifer test even if the application is for surface water, and it is the surface water application that causes the combined request to exceed 100,000 gpd.

Response: Commission staff will take into account such situations and, as appropriate, recommend a waiver of the constant-rate aquifer test.

Comment: With respect to paragraph (a)(3)(ii), is a PNDI being required?

Response: The Commission currently conducts a review for threatened or endangered species and their habitats. Under the new regulations, the project sponsor will submit this information with the application.

Comment: With respect to (b)(1)(ii), under what authority can the Commission require information on the ability of a project sponsor to fund a project?

Response: This is a necessary and convenient power under Section 3.4(8) to reasonably ascertain the financial ability of the project sponsor to carry out a project in a manner to be approved by the Commission, including any conditions that the Commission may impose. This authority is only exercised in very limited situations.

Comment: With respect to (b)(1)(iii), relating to the identification of alternatives, what is a reasonable alternative? Will there be any guidance in this regard?

Response: Reasonable in this context refers to alternatives that may be appropriate for a particular situation. Commission staff will provide guidance and consultation as needed.

Comment: With respect to (b)(1)(iv), will the Commission maintain an inventory of anticipated uses?

Response: It is not necessary for the Commission to maintain such an inventory. Existing and anticipated uses should be identifiable by project sponsors or their consultants in each situation. For example, if the project is proposed for an area that has experienced rapid growth, anticipated uses should be evident, or reasonably discernable.

Comment: With respect to paragraph (3), it is much too open ended, allowing the Commission to ask for anything it deems necessary without limit.

Response: Again, as in any action it takes as a government agency, the Commission must act reasonably. Under constitutional law principles, there must be a rational relationship between what regulatory actions the Commission takes and a legitimate regulatory objective.

Comment: The regulations should continue the requirement for submission of comprehensive information about potential impacts of withdrawals and availability of alternatives, rather than allow its submission to be discretionary on the part of the Commission.

Response: Again, the regulation has been restructured to mandate certain information that is uniformly applicable to all projects. The informational requirements listed as discretionary are also important, but not all are necessary for all projects. The Commission believes some discretion is needed to tailor informational needs on a case-by-case basis.

Comment: There should be compatibility with regional and state Act 220 plans.

Response: The Commission routinely coordinates its approvals with its member jurisdictions. The project sponsor is required to give notice to the municipality and county planning agency of its application for approval, thereby providing an opportunity for local and regional interests to comment on the compatibility of projects.

#### Section 803.16 Completeness of Application

Comment: Add a statement providing that the Commission will provide the project sponsor with either a formal notice of administrative completeness, or a deficiency notice within a prescribed time.

Response: The Commission currently provides deficiency notices, when appropriate, as reviews are undertaken.

#### Section 803.21 General Standards

Comment: Omit the sentence containing the subjective terms "detri-mental" and "proper."

Response: The wording comes directly from the compact.

Comment: The words "modify and approve as modified" should be rephrased to "With the applicant's consent, the Commission may modify \* \* \*" Only the applicant should have the right to modify a project, not the Commission.

Response: Again, the wording comes directly from the compact. Also, this sentence is not meant to imply that the Commission would unilaterally modify a project without prior notice. It may condition its approval on the project sponsor making a modification or incorporating a condition that would help meet a Commission regulatory objective, but the Commission would not unilaterally modify a project without prior notice and an opportunity to be heard.

Comment: Add a new subsection that requires that Commission staff provide a draft docket to project sponsors at least 10 days in advance of Commission action on that docket. If the staff is recommending modifications, they should be required to provide the reasons for the recommended modifications in writing with quantitative analysis.

Response: The Commission strives to provide project sponsors with a draft docket as far in advance of final Commission action as possible. However, due to fluctuations in the number and complexity of dockets before the Commission at any particular meeting, a guarantee of ten (10) days advance review is not possible in all cases.

Comment: The Commission should not suspend review or revoke approval due to the disapproval of another government agency, especially when what some other agency is deciding has little or nothing to do with the water resources of the project. Furthermore, this provision seems to limit the Commission's power to preempt municipal regulations that, at least under Pennsylvania Law, illegally attempts to regulate water withdrawals. Instead of suspending review, the Commission should proceed expeditiously with its review and approval process and simply condition its approval on the applicant obtaining and retaining all other applicable approvals.

Response: The Commission will not suspend its review or approval of a project in response to the illegal exercise of authority by another governmental jurisdiction. However, it makes sense to coordinate Commission review and approval actions with other governmental jurisdictions. By the same token, it makes little sense for the Commission to expend staff resources on the review of projects that have been rejected by other governmental jurisdictions and cannot, therefore, be implemented.

Comment: This section should be supported because it allows the Commission to streamline its decision making with other government entities involved in project review.

Response: Agreed. See response to prior comment.

Comment: Should include language acknowledging the importance of economic interests of the applicant, community, region, etc.

Response: See above responses regarding purposes of the regulations.

Section 803.22 Standards for Consumptive Uses of Water

Comment: Eliminating the Q7-10 trigger flow for providing makeup during periods of low flow leaves too much discretion to SRBC and leaves no guidance to project sponsors to determine risk and costs.

Response: The elimination of the Q7-10 trigger flow criterion effectively changes little because few consumptive use projects approved by the Commission are now tied to this criterion. Most project sponsors opt for payment of the consumptive use fee as a means of compliance rather than release storage or shut down during low flow periods. When the Commission does set a low flow criterion, it does so on a case-by-case basis using modern assessment techniques that allow the Commission to more accurately assess the particular needs of the affected stream. The Commission establishes passby flow requirements the same way. In cases involving a consumptive use as well as a withdrawal, the established passby flow serves as the low flow criterion for a project. In the rare event that a flow criterion is set for a particular project, it will be done only after the project sponsor is given the opportunity at a public hearing to submit information and make relevant arguments regarding the establishment of a flow criterion for its project. The criterion will not be established arbitrarily and without notice and opportunity for response.

Comment: "Sole Discretion" language too open ended and must incorporate reasonableness.

Response: See responses above to allegation that the Commission may act arbitrarily under these proposed regulations.

Comment: Support expressed for the approval by rule procedures as a means of streamlining the approval process.

Response: The Commission agrees.

Comment: Section 803.22(b)(4) is inconsistent with the other alternatives provided under (b).

Response: Agreed. It has been made a separate item.

Comment: With respect to (b)(1)(ii), an explanation should be included as to why a project may be required to reduce its withdrawal to an amount greater than its consumptive use.

Response: Agreed. The words "or greater than" have been removed.

Comment: Eliminate mitigation requirement.

Response: Mitigation of consumptive use is a fundamental purpose of the consumptive use regulation and an element of the regulation that comes directly from the Commission's comprehensive plan. Eliminating mitigation requirements essentially would ignore the provisions of the comprehensive plan.

Comment: On the approval by rule provision, the Commission should provide for a 30- to 60-day notification instead of 90 days.

Response: The Commission feels that the 90-day notification is appropriate for qualified projects.

Section 803.23 Standards for Water Withdrawals

Comment: SRBC withdrawal regulations relating to the protection of existing users should make clear that inefficient existing sources of water may not necessarily be protected.

Response: The Commission does not wish to imply that it will protect existing users under all circumstances, thus in effect granting a prior appropriation of water, which is prohibited under the compact.

Comment: Section 803.23(b)—Add the word "significant" before the words adverse impacts.

Response: Agreed. This will remove the implication that a de minimis adverse impact will form the basis for some limitation or condition.

Comment: Section 803.23(b)(2)—Add "Commission may consider and balance."

Response: As it has always done, the Commission will carefully weigh the necessity of any requirement or limitation that it imposes versus the benefit to be achieved.

Comment: Section 803.23(b), that allows the Commission to deny, limit or condition an approval to insure no adverse impact, incorrectly suggests that lowering of groundwater levels and stream flow levels is an adverse impact. These may be perfectly legitimate occurrences in connection with use of an aquifer.

Response: The Commission has added "significant" before the words "adverse impact" to remove the implication that a de minimis adverse impact will form the basis for some limitation or condition.

Comment: In Section 803.23(b), the Commission should not accord protection status to intermittent streams, as such protection would unduly restrict the use and potential of aquifers that can be used as groundwater reservoirs to provide economically important water supplies.

Response: The Commission believes that headwaters must be carefully managed to insure a proper balance of sustainable development, responsible use, and conservation. Intermittent streams are not afforded special protection; however, Commission staff does evaluate for potential adverse impacts. The withdrawal of large quantities of groundwater from small headwater basins can dewater springs and wetlands, and reduce the groundwater contribution (base flow) to headwater streams. This can change the previous intermittent reaches to ephemeral reaches and the uppermost perennial reaches to intermittent reaches. While the loss of perennial stream length is generally a small fraction of the entire stream, it often represents the most pristine portion of the watershed with respect to water quality and habitat.

Comment: The Commission needs to define the term "low flow." The most logical definition is the Q7-10 low flow. To protect stream flows at any higher level would unduly restrict the use and potential of aquifers that can be used as reservoirs for economically important activities.

Response: The Commission sets low flow criteria on a case-by-case basis using modern assessment techniques to accurately assess the particular needs of the affected stream. The Commission will carefully weigh any limitation it imposes versus the benefit to be achieved.

Comment: The Commission should provide its regulatory requirements concerning the establishment of passby standards in Section 803.23. The current practice of setting a passby standard at 20 percent of average daily flow is not a fair, reasonable and appropriate approach to balancing the need to allow a beneficial stream withdrawal with the need to protect the stream ecology.

Response: The Commission has incorporated passby standards in guidelines that it makes available to all applicants. The Commission sets a low flow criterion based on the particular needs of the stream, the best available science, and on a case-by-case basis. Instream needs are assessed using standard methodologies and can always be refined by local studies. Incorporating the standards in guidance enables the Commission to periodically update those standards as new science emerges.

Comment: The Commission should define terms such as "adverse impact, aquatic habitat and water quality degradation."

Response: The latter two items, as used in Section 803.23, are listed only as possible indicators of adverse impacts that the Commission may consider in each individual case or circumstance. It is not necessary or desirable to place specific weight or limiting criteria on factors that are merely indicators of possible adverse impacts. The term "adverse impacts" or "adverse effect" comes directly from the language of Section 3.10 of the Susquehanna River Basin Compact granting authority to the Commission to review and approve projects that may cause an adverse effect.

Comment: In 803.23(b)(3), make it clear that the applicant shall have the right to propose mitigation measures to offset potential adverse impacts of the proposed project.

Response: The Commission encourages a project sponsor to propose mitigation for any potential adverse impacts in its application(s). Further, the Commission carries on an active dialogue with project sponsors during the review process, and the project sponsor is free at that time to propose any reasonable form of mitigation.

Comment: A decision to deny, modify or conditionally approve a withdrawal project should be accompanied by a technical evaluation that is provided to the project sponsor in a timely manner to allow sponsor to

rebut the conclusions or revise its application to address concerns raised by the Commission.

Response: As stated above, the Commission carries on an active dialogue with the project sponsor during the review process that allows for an exchange of information on staff conclusions and concerns, and how such concerns may be resolved.

Comment: The Commission should consider a new MOU with DEP Mining to avoid the "double jeopardy" concern.

Response: The proposed Section 803.7 provides for administrative agreements or other cooperative arrangements with agencies of the member jurisdictions. The Commission anticipates that existing agreements will be reconsidered following adoption of the new regulations.

#### Section 803.24 Standards for Diversions

Comment: This section should be supported or even strengthened to explicitly state that an applicant for a diversion must demonstrate "by clear and convincing evidence" a need for the diversion.

Response: The Commission believes that the language proposed ensures that the project sponsor will be required to adequately demonstrate a need for the diversion without the formal inclusion of an evidentiary standard that may be subject to further construction or interpretation.

#### Section 803.25 Water Conservation Standards

Comment: AWWA standards should be used for customer meter testing under Section 803.25(a)(2). Is the definition for "flow control device" correct?

Response: The water conservation standards were taken directly from the current regulations. The Commission intends to revisit this section in the future and will evaluate the published standards at that time.

#### Section 803.30 Monitoring

Comment: The Commission should accept testing and monitoring done in accordance with member state standards when the state has a parallel or equally stringent procedure.

Response: The water conservation standards were taken directly from the current regulations. The Commission intends to revisit this section in the future and will evaluate the published standards at that time.

Comment: The Commission should consider whether PWS source meters should be certified annually, rather than every five years, with a possible exception for agriculture.

Response: The regulations set the minimum standard for all projects. The Commission can specify certification more frequently than once every five (5) years for source meters of public water suppliers if warranted, or as required in other permits.

Comment: In Section 803.30(b)(2)(ii), a monitoring loss should be reported within five days of such loss, regardless of the length of time the loss continues.

Response: Agreed.

Comment: The Commission should continue to mandate that project sponsors monitor the water quality impacts of their withdrawals to help the Commission fulfill the compact purposes of "stream quality control" and the "abatement of pollution."

Response: The requirement to collect water quality data was burdensome for the project sponsor, burdensome for Commission staff to review and maintain, and it is generally not used by Commission programs because similar data are available from other sources, particularly from its member jurisdictions, each of which administers a comprehensive water quality program. The Commission reserves the right on any given application to require water quality sampling, if water quality is an issue.

#### Section 803.31 Duration of Approvals and Renewals

Comment: The Commission should not be reducing the duration of approvals from 25 years to 15 years. Many water resources projects involve large investments of money and many years of planning that are not well accommodated by an approval of 15 years. Instead, the Commission should rely on its authority to reopen a docket if there is a potential problem. The Commission should not have deleted the language that appears in the existing regulations allowing the Commission "to modify this duration in consideration of such factors as the time needed to amortize a project investment, the time needed to secure project financing, the potential risks of interference with an existing project, and other equitable factors."

Response: The Commission has found that both projects and the water resources that serve them are subject to many changes over 25 years and, therefore, it is appropriate to review these applications on a more frequent basis. The Commission agrees to reinsert the deleted language allowing the Commission to modify the standard duration, when appropriate, in consideration of the factors enumerated in this comment.

Comment: The time for commencement of a project after approval should take into account that some large projects require longer permitting periods and longer construction times. Opponents sometimes attempt to delay projects using administrative appeals and other devices that can prevent a large project from commencement.

Response: The Commission agrees that there may be circumstances in which a longer time frame is needed for undertaking a project. The Commission is inserting language that will allow adjustments to this time limit on a case-by-case basis.

Comment: The submission of an application one year in advance for the renewal of an approval is too long and unneeded.

Response: The time was set to afford both the project sponsor and Commission staff sufficient time to evaluate changes to the project and changes to the resource, and is reasonable considering current review times. Having said that, the Commission is nonetheless willing to modify the period to six (6) months. As modified, a project sponsor who submits a complete application six (6) months in advance, is given the benefit of having an existing approval automatically extended until such time as the Commission renders a decision on the new application. This eliminates the risk of having an approval expire before the Commission has an opportunity to act.

Comment: In (a), the reduction of the duration of approvals to 15 years is appropriate. In fact, 10 years would be more appropriate.

Response: The Commission agrees that the reduction of the term to 15 years is appropriate so that commitment of water to a particular use can be reviewed more frequently and any changes in conditions can be addressed sooner.

Comment: In (c), there should be a notification to the state agency with jurisdiction over the project, at the time a waiver is applied for.

Response: The Commission routinely coordinates with member jurisdictions on such project-related matters.

Comment: How will the Commission fund the increased workload resulting from shorter duration periods?

Response: The Commission has no special plans for funding any increase in workload resulting from a shorter approval term. The member jurisdictions who approve the Commission's budget will need to consider any such increased workload associated with the completion of the Commission's responsibilities under the compact.

Comment: With respect to paragraph (d), abandonment should have to be proven by the Commission and not inferred. Notice should be provided to the project sponsor.

Response: Under general legal principles, any inference of abandonment acted upon by the Commission will have to be supported by substantial evidence and appropriate notice and opportunity to be heard. There is no need for the wording suggested by this comment.

Comment: Application fees should be adjusted downward to account for shorter durations.

Response: The main purpose of shortening the term of approvals is not to realize more revenues from project review fees. In fact, these fees cover no more than half the cost of conducting a review. Project reviews conducted on a more frequent basis will actually involve increased costs that will more than offset any increased revenues from application fees.

#### Section 803.32 Reopening/Modification

Comment: In (a), the word "significant" should be substituted for the word "substantial" before the words "adverse impact."

Response: Agreed.

Comment: In (c), the Commission should retain the discretion to require a project sponsor to provide a temporary source of potable water at the project sponsor's expense, if interference should occur during a pumping test of a source under development.

Response: Agreed.

Comment: The language of 803.32(b) is too strong in that it does not spell out how to remedy situations where a project sponsor fails to comply with a term or condition of its docket approval.

Response: The remedy will be worked out administratively between the Commission and the project sponsor without providing for a specific remedy in the regulation.

#### Section 803.33 Interest on Fees

Comment: Rate should be established and equally imposed.

Response: Interest rates change as they are affected by market forces and therefore should not be set permanently by regulation. Whatever rate is established will be uniformly imposed.

#### Section 803.34 Emergencies

Comment: In (b), at the end of the paragraph, delete the word “information” before the colon. Also, in (b)(2), delete the word “information” following the word “application.”

Response: Agreed.

Comment: In (b)(1), replace “an emergency” with “a completed emergency” before the words “application form.”

Response: Agreed.

Comment: In (b)(2)(x), because of the immediate inclusion of an application fee may delay submittal of an emergency application, provision should be made in the regulation for reduction, waiver, or later submittal of an “appropriate” fee.

Response: Agreed; however, this is a change that can be made in the SRBC Project Fee Schedule, rather than these regulations.

Comments by Section, Part 804

Section 804.2 Time Limits

Comment: Registration language strongly supported.

Response: Agreed.

Section 804.3 Administrative Agreements

Comment: Add the following: “In conjunction with such agreements or arrangements, the Commission will require submission of all necessary registration forms to the member jurisdiction as part of a complete application for renewal of an existing project or new or expanded agricultural project or as a condition of approval of any other new or expanded project.”

Response: Although not using this suggested language, the Commission has revised this section and renamed it “Administrative coordination” to address this comment.

Comments by Section, Part 805

Section 805.1 Public Hearings

Comment: Participants to a hearing should be limited to interested parties.

Response: Who is able to participate in a hearing will depend on the circumstances and will be controlled by a decision of the presiding officer.

Comment: Notice of hearings should continue to be posted at Commission offices.

Response: Agreed.

Comment: Why does the Commission need three days notice?

Response: This is not mandated by the regulation but is more in the form of a request to participants. Three days allows the Commission to assemble a list of participants and establish an order of call for those wishing to provide testimony.

Section 805.2 Administrative Appeals

Comment: Administrative hearings should be held in the state where the project or controversy is located. Also, the Commission should appoint an “impartial” hearing officer who shall not be a member of the Commission or an officer of the Commission. The Commission should absorb all hearing costs.

Response: Wherever practicable, the Commission will conduct such hearings in the general vicinity where the project or controversy is located. The Commission will also take steps to insure the impartiality of the hearing officer. Such steps do not require, however, that the Commission automatically disqualify members of the Commission or officers of the Commission. Hearing officers only make findings of fact and law that serve as recommendations to the Commission. The ultimate decision in any matter rests with the Commission. With respect to costs, they should be distributed equitably and not assigned automatically to any single party. The Commission has included an *in forma pauperis* procedure in Section 805.3 for parties who genuinely cannot pay hearing costs and have acted in good faith.

Comment: Parties should have at least 60 days to file an administrative appeal, rather than the 30 days given in proposed Section 805.2. Sometimes there is delay in a party learning of a Commission decision, effectively reducing the time for appeals.

Response: The Commission feels that thirty (30) days strikes the appropriate balance for having its action open for appeal.

Section 805.3 Hearing on Administrative Appeal

Comment: Cost of expert consultants should be paid by the Commission.

Response: Again, the presiding officer should be able to weigh the equities of assigning costs for a hearing without being bound by a specific rule, some of which may be assigned to the Commission.

Section 805.10 Scope of Subpart

Comment: Regulated entities should be legally obligated to meet the terms and conditions for their approvals and SRBC must have the authority to ensure that they do.

Response: The Commission strongly agrees and that is why the compliance and enforcement provisions of these regulations have been strengthened.

Section 805.12 Investigative Powers

Comment: The Commission does not have authority from the compact to provide for warrantless searches.

Response: Agreed. This provision will be stricken. The Commission will acquire an administrative search warrant whenever it is legally required to do so.

Comment: Strongly supported as necessary for the Commission to effectively enforce its regulations.

Response: The Commission strongly agrees.

Section 805.14 Orders

Comment: The Commission does not have authority from the compact to issue orders.

Response: As noted in the Commission’s response to the general comments, the Commission strongly disagrees with this contention. The Susquehanna River Basin Compact, P.L. 91-575 provides broad and sweeping powers to the Commission to carry out its purposes, including under Section 3.4 the power to have and exercise all powers necessary or convenient to carry out its express powers and other powers which reasonably may be implied therefrom. Also, that same section empowers the Commission to adopt, amend, and repeal rules and regulations to implement the compact.

Comment: Strongly supported as necessary for the Commission to effectively enforce its regulations.

Response: The Commission strongly agrees.

Final Rule

List of Subjects in 18 CFR Parts 803, 804, 805, 806, 807 and 808 Administrative practice and procedure, Water resources.

Accordingly, for the reasons set forth in the preamble, under the authority of Secs. 3.4, 3.5(5), 3.8, 3.10, and 15.2, Pub. L. 91-575, 84 Stat. 1509 *et seq.*, Chapter VIII of the Code of Federal Regulations is amended as follows:

PARTS 803, 804, AND 805 — [REMOVED AND RESERVED]

1. Parts 803, 804, and 805 are removed and reserved.

2. Part 806 is added to read as follows.

PART 806 — REVIEW AND APPROVAL OF PROJECTS

Subpart A — General Provisions

Sec.

806.1 Scope.

806.2 Purposes.

806.3 Definitions.

806.4 Projects requiring review and approval.

806.5 Projects that may require review and approval.

806.6 Transfer of approvals.

806.7 Concurrent project review by member jurisdictions.

806.8 Waiver/modification.

Subpart B — Application Procedure

806.10 Purpose of this subpart.

806.11 Preliminary consultations.

806.12 Constant-rate aquifer testing.

806.13 Submission of application.

806.14 Contents of application.

806.15 Notice of application.

806.16 Completeness of application.

Subpart C — Standards for Review and Approval

806.20 Purpose of this subpart.

806.21 General standards.

806.22 Standards for consumptive uses of water.

806.23 Standards for water withdrawals.

806.24 Standards for diversions.

806.25 Water conservation standards.

Subpart D — Terms and Conditions of Approval

806.30 Monitoring.

806.31 Term of approvals.

806.32 Reopening/modification.

806.33 Interest on fees.

806.34 Emergencies.

806.35 Fees.

Authority: Secs. 3.4, 3.5 (5), 3.8, 3.10, and 15.2, Pub. L. 91-575, 84 Stat. 1509, *et seq.*

Subpart A — General Provisions

Sec. 806.1 Scope.

(a) This part establishes the scope and procedures for review and approval of projects under Section 3.10 of the Susquehanna River Basin Compact, Public Law 91-575, 84 Stat. 1509 *et seq.*, (the compact) and establishes special standards under Section 3.4(2) of the compact governing water withdrawals and the consumptive use of water. The special standards established pursuant to Section 3.4(2) shall be applicable to all water withdrawals and consumptive uses in accordance with the terms of those standards, irrespective of whether such withdrawals and uses are also subject to project review under Section 3.10. This part, and every other part of 18 CFR Chapter VIII, shall also be incorporated into and made a part of the comprehensive plan.

(b) When projects subject to Commission review and approval are sponsored by governmental authorities, the Commission shall submit recommendations and findings to the sponsoring agency, which shall be included in any report submitted by such agency to its respective legislative body or to any committee thereof in connection with any request for authorization or appropriation therefor. The Commission review will ascertain the project's compatibility with the objectives, goals, guidelines and criteria set forth in the comprehensive plan. If determined compatible, the said project will also be incorporated into the comprehensive plan, if so required by the compact. For the purposes of avoiding conflicts of jurisdiction and of giving full effect to the Commission as a regional agency of the member jurisdictions, no expenditure or commitment shall be made by any governmental authority for or on account of the construction, acquisition or operation of any project or facility unless it first has been included by the Commission in the comprehensive plan.

(c) If any portion of this part, or any other part of 18 CFR Chapter VIII, shall, for any reason, be declared invalid by a court of competent jurisdiction, all remaining provisions shall remain in full force and effect.

(d) Except as otherwise stated in this part, this part shall be effective on January 1, 2007.

(e) When any period of time is referred to in this part, such period in all cases shall be so computed as to exclude the first and include the last day of such period. Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the law of the United States, such day shall be omitted from the computation.

(f) Any Commission forms or documents referenced in this part may be obtained from the Commission at 1721 North Front Street, Harrisburg, PA 17102-2391, or from the Commission's Web site at <http://www.srbc.net>.

#### Sec. 806.2 Purposes.

(a) The general purposes of this part are to advance the purposes of the compact and include, but are not limited to:

- (1) The promotion of interstate comity;
- (2) The conservation, utilization, development, management and control of water resources under comprehensive, multiple purpose planning; and
- (3) The direction, supervision and coordination of water resources efforts and programs of federal, state and local governments and of private enterprise.

(b) In addition, Sec. Sec. 806.22, 806.23 and 806.24 of this part contain the following specific purposes: Protection of public health, safety and welfare; stream quality control; economic development; protection of fisheries and aquatic habitat; recreation; dilution and abatement of pollution; the regulation of flows and supplies of ground and surface waters; the avoidance of conflicts among water users; the prevention of undue salinity; and protection of the Chesapeake Bay.

(c) The objective of all interpretation and construction of this part and all subsequent parts is to ascertain and effectuate the purposes and the intention of the Commission set out in this section. These regulations shall not be construed in such a way as to limit the authority of the Commission, the enforcement actions it may take, or the remedies it may prescribe.

#### Sec. 806.3 Definitions.

For purposes of parts 806, 807 and 808, unless the context indicates otherwise, the words listed in this section are defined as follows:

**Agricultural water use.** A water use associated primarily with the raising of food, fiber or forage crops, trees, flowers, shrubs, turf, livestock and poultry. The term shall include aquaculture.

**Application.** A written request for action by the Commission including without limitation thereto a letter, referral by any agency of a member jurisdiction, or an official form prescribed by the Commission.

**Basin.** The area of drainage of the Susquehanna River and its tributaries into the Chesapeake Bay to the southern edge of the Pennsylvania Railroad bridge between Havre de Grace and Perryville, Maryland.

**Change of Ownership.** A change in ownership shall mean any transfer by sale or conveyance of the real or personal property comprising a project.

**Commission.** The Susquehanna River Basin Commission, as established in Article 2 of the compact, including its commissioners, officers, employees, or duly appointed agents or representatives.

**Commissioner.** Member or Alternate Member of the Susquehanna River Basin Commission as prescribed by Article 2 of the compact.

**Compact.** The Susquehanna River Basin Compact, Pub. L. 91-575; 84 Stat. 1509 *et seq.*

**Comprehensive plan.** The comprehensive plan prepared and adopted by the Commission pursuant to Articles 3 and 14 of the compact.

**Construction.** To physically initiate assemblage, installation, erection or fabrication of any facility involving or intended for the withdrawal, conveyance, storage or consumptive use of waters of the basin.

**Consumptive use.** The loss of water transferred through a manmade conveyance system or any integral part thereof (including such water that is purveyed through a public water supply or wastewater system), due to transpiration by vegetation, incorporation into products during their manufacture, evaporation, injection of water or wastewater into a subsurface formation from which it would not reasonably be available for future use in the basin, diversion from the basin, or any other process by which the water is not returned to the waters of the basin undiminished in quantity.

**Diversion.** The transfer of water into or out of the basin.

**Executive Director.** The chief executive officer of the Commission appointed pursuant to Article 15, Section 15.5, of the compact.

**Facility.** 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; of 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.

**Governmental authority.** A federal or state government, or any political subdivision, public corporation, public authority, special purpose district, or agency thereof.

**Groundwater.** Water beneath the surface of the ground within a zone of saturation, whether or not flowing through known and definite channels or percolating through underground geologic formations, and regardless of whether the result of natural or artificial recharge. The term includes water contained in quarries, pits and underground mines having no significant surface water inflow, aquifers, underground water courses and other bodies of water below the surface of the earth. The term also includes a spring in which the water level is sufficiently lowered by pumping or other means of drainage to eliminate the surface flow. All other springs are considered to be surface water.

**Member jurisdiction.** The signatory parties as defined in the compact, comprised of the States of Maryland and New York, the Commonwealth of Pennsylvania, and the United States of America.

**Member state.** The States of Maryland and New York, and the Commonwealth of Pennsylvania.

**Person.** An individual, corporation, partnership, unincorporated association, and the like and shall have no gender and the singular shall include the plural. The term shall include a governmental authority and any other entity which is recognized by law as the subject of rights and obligations.

**Pre-compact consumptive use.** The maximum average daily quantity or volume of water consumptively used over any consecutive 30-day period prior to January 23, 1971.

**Project.** Any work, service, activity, or facility undertaken which is separately planned, financed or identified by the Commission, or any separate facility undertaken or to be undertaken by the Commission or otherwise within a specified area, for the conservation, utilization, control, development, or management of water resources which can be established and utilized independently, or as an addition to an existing facility, and can be considered as a separate entity for purposes of evaluation.

**Project sponsor.** Any person who owns, operates or proposes to undertake a project. The singular shall include the plural.

**Public water supply.** A system, including facilities for collection, treatment, storage and distribution, that provides water to the public for human consumption, that:

- (1) Serves at least 15 service connections used by year-round residents of the area served by the system; or
- (2) Regularly serves at least 25 year-round residents.

Surface water. Water on the surface of the ground, including water in a perennial or intermittent watercourse, lake, reservoir, pond, spring, wetland, estuary, swamp or marsh, or diffused surface water, whether such body of water is natural or artificial.

Undertake. Except for activities related to site evaluation, the initiation of construction or operation of a new or expanded project, or the operation of an existing project, that is subject to Commission review and approval.

Water or waters of the basin. Groundwater or surface water, or both, within the basin either before or after withdrawal.

Water resources. Includes all waters and related natural resources within the basin.

Withdrawal. A taking or removal of water from any source within the basin for use within the basin.

Sec. 806.4 Projects requiring review and approval.

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

(1) Consumptive use of water. Any consumptive water use project described below shall require an application to be submitted in accordance with Sec. 806.13, and shall be subject to the standards set forth in Sec. 806.22, and, to the extent that it involves a withdrawal from groundwater or surface water, shall also be subject to the standards set forth in Sec. 806.23. Except to the extent that they involve the diversion of the waters of the basin, public water supplies shall be exempt from the requirements of this section regarding consumptive use; provided, however, that nothing in this section shall be construed to exempt individual consumptive users connected to any such public water supply from the requirements of this section.

(i) Any project initiated on or after January 23, 1971, involving a consumptive water use of an average of 20,000 gallons per day (gpd) or more in any consecutive 30-day period.

(ii) With respect to projects previously approved by the Commission for consumptive use, any project that will involve an increase in a consumptive use above that amount which was previously approved.

(iii) With respect to projects that existed prior to January 23, 1971, any project that increases its consumptive use by an average of 20,000 gpd or more in any consecutive 30-day period above its pre-compact consumptive use.

(iv) Any project, regardless of when initiated, involving a consumptive use of an average of 20,000 gpd or more in any 30-day period, and undergoing a change of ownership, unless such project satisfies the requirements of paragraphs (b) or (c) of this section or the existing Commission approval for such project is transferred pursuant to Sec. 806.6.

(2) Withdrawals. Any project described below shall require an application to be submitted in accordance with Sec. 806.13, and shall be subject to the standards set forth in Sec. 806.23. Hydroelectric projects, except to the extent that such projects involve a withdrawal, shall be exempt from the requirements of this section regarding withdrawals; provided, however, that nothing in this paragraph shall be construed as exempting hydroelectric projects from review and approval under any other category of project requiring review and approval as set forth in this section, Sec. 806.5, or 18 CFR part 801.

(i) Any project initiated on or after the applicable dates specified in paragraph (a)(2)(iv) below, withdrawing a consecutive 30-day average of 100,000 gpd or more from a groundwater or surface water source, or a combination of such sources.

(ii) With respect to projects previously approved by the Commission, any project that increases a withdrawal above that amount which was previously approved and any project that will add a source or increase withdrawals from an existing source which did not require approval prior to January 1, 2007.

(iii) Any project which involves a withdrawal from a groundwater or surface water source and which is subject to the requirements of paragraph (a) of this section regarding consumptive use.

(iv) With respect to groundwater projects in existence prior to July 13, 1978, and surface water projects in existence prior to November 11, 1995, any project that will increase its withdrawal from any source or combination of sources, by a consecutive 30-day average of 100,000 gpd or more, above that maximum consecutive 30-day amount which the project was withdrawing prior to the said applicable date.

(v) Any project, regardless of when initiated, involving a withdrawal of a consecutive 30-day average of 100,000 gpd or more, from either groundwater or surface water sources, or in combination from both, and undergo-

ing a change of ownership, unless such project satisfies the requirements of paragraphs (b) or (c) of this section or the existing Commission approval for such project is transferred pursuant to Sec. 806.6.

(3) Diversions. The projects described below shall require an application to be submitted in accordance with Sec. 806.13, and shall be subject to the standards set forth in Sec. 806.24. The project sponsors of out-of-basin diversions shall also comply with all applicable requirements of this part relating to consumptive uses and withdrawals.

(i) Any project initiated on or after January 23, 1971, involving the diversion of water into the basin, or involving a diversion of water out of the basin of an average of 20,000 gallons of water per day or more in any consecutive 30-day period.

(ii) With respect to diversions previously approved by the Commission, any project that will increase a diversion above the amount previously approved.

(iii) With respect to diversions initiated prior to January 23, 1971, any project that will increase a diversion into the basin by any amount, or increase the diversion of water out of the basin by an average of 20,000 gpd or more in any consecutive 30-day period.

(iv) Any project, regardless of when initiated, involving the diversion of water into the basin or involving a diversion of an average of 20,000 gallons of water per day or more in any consecutive 30-day period out of the basin, and undergoing a change of ownership, unless such project satisfies the requirements of paragraphs (b) or (c) of this section or the Commission approval for such project is transferred pursuant to Sec. 806.6.

(4) Any project on or crossing the boundary between two member states.

(5) Any project in a member state having a significant effect on water resources in another member state.

(6) Any project which has been or is required to be included by the Commission in its comprehensive plan, or will have a significant effect upon the comprehensive plan.

(7) Any other project so determined by the commissioners or Executive Director pursuant to Sec. 806.5 or 18 CFR part 801. Such project sponsors shall be notified in writing by the Executive Director.

(b) Any project that did not require Commission approval prior to January 1, 2007, and undergoing a change of ownership, shall be exempt from the requirements of paragraph (a)(1)(iv), (a)(2)(v) or (a)(3)(iv) of this section if it satisfies any of the following categories:

(1) A corporate reorganization of the following types:

(i) Where property is transferred to a corporation by one or more corporations solely in exchange for stock or securities of the transferee corporation, provided that immediately after the exchange the transferor corporation(s) own 80 percent of the voting stock and 80 percent of all other stock of the transferee corporation.

(ii) Where the corporate reorganization is merely a result of a change of the name, identity, internal corporate structure or place of organization and does not affect ownership or control.

(2) Transfer of a project to the transferor's spouse or one or more lineal descendants, or any spouse of such lineal descendants, or to a corporation owned or controlled by the transferor, or the transferor's spouse or lineal descendants, or any spouse of such lineal descendants, for so long as the combined ownership interest of the transferor, the transferor's spouse and/or the transferor's lineal descendant(s) and their spouses, continues to be 51 percent or greater.

(3) Transfer of land used primarily for the raising of food, fiber or forage crops, trees, flowers, shrubs, turf, livestock, or poultry, or for aquaculture, to the extent that, and for so long as, the project's water use continues to be for such agricultural water use purposes.

(c) Any project that did not require Commission approval prior to January 1, 2007, and not otherwise exempt from the requirements of paragraph (a)(1)(iv), (a)(2)(v) or (a)(3)(iv) pursuant to paragraph (b) of this section, may be undertaken by a new project sponsor upon a change of ownership pending action by the Commission on an application submitted by such project sponsor requesting review and approval of the project, provided such application is submitted to the Commission in accordance with this part on or before the date change of ownership occurs and the project features related to the source, withdrawal, diversion or consumptive use of water, or the nature or quantity of water withdrawal, diversion or consumptive use associated with the project do not change pending review of the application. For purposes of this paragraph, changes in the quantity of water withdrawal, diversion or consumptive use shall only relate to increases in quantity in excess of the quantity withdrawn, diverted or consumptively used prior to the change of ownership.

Sec. 806.5 Projects that may require review and approval.

(a) The following projects, if not otherwise requiring review and approval under Sec. 806.4, and provided that the project sponsor is notified in writing by the Executive Director, may be subject to Commission review and approval as determined by the Commission or the Executive Director:

(1) Projects that may affect interstate water quality.

(2) Projects within a member state that have the potential to affect waters within another member state. This includes, but is not limited to, projects which have the potential to alter the physical, biological, chemical or hydrological characteristics of water resources of interstate streams designated by the Commission under separate resolution.

(3) Projects that may have a significant effect upon the comprehensive plan.

(4) Projects not included in paragraphs (a)(1) through (a)(3) of this section, but which could have an adverse, adverse cumulative, or interstate effect on the water resources of the basin.

(b) Determinations by the Executive Director may be appealed to the Commission within 30 days after receipt of notice of such determination as set forth in Sec. 808.2.

Sec. 806.6 Transfer of approvals.

(a) An existing Commission project approval may be transferred, or conditionally transferred, without prior Commission review and approval, to a new project sponsor upon a change of ownership of the project, subject to the provisions of paragraphs (b), (c) and (d) below, provided the new project sponsor notifies the Commission in advance of the date of the change of ownership, which notice shall be on a form and in a manner prescribed by the Commission and under which the new project sponsor certifies its intention to comply with all terms and conditions of the transferred approval and assume all other associated obligations.

(b) An existing Commission project approval for any of the following categories of projects may be transferred, without Commission review or approval, upon a change of ownership and the new project sponsor may operate such project under the terms and conditions of the transferred approval:

(1) A project undergoing a change of ownership as a result of a corporate reorganization of the following types:

(i) Where property is transferred to a corporation by one or more corporations solely in exchange for stock or securities of the transferee corporation, provided that immediately after the exchange the transferor corporation(s) own 80 percent of the voting stock and 80 percent of all other stock of the transferee corporation.

(ii) Where the corporation reorganization is merely a result of a change of the name, identity, internal corporate structure or place of organization and does not affect ownership or control.

(2) A project being transferred to the transferor's spouse or one or more lineal descendants, or any spouse of such lineal descendants, or to a corporation owned or controlled by the transferor, or the transferor's spouse or lineal descendants, or any spouse of such lineal descendants, for so long as the combined ownership interest of the transferor, the transferor's spouse and/or the transferor's lineal descendant(s) and their spouses, continues to be 51 percent or greater.

(3) A project involving the transfer of land used primarily for the raising of food, fiber or forage crops, trees, flowers, shrubs, turf, livestock or poultry, or for aquaculture, to the extent that, and for so long as, the project's water use continues to be for such agricultural water use purposes.

(4) A project that satisfies all of the following conditions:

(i) The existing Commission approval is less than ten (10) years old.

(ii) The project has no associated pre-compact consumptive water use.

(iii) The project has no associated diversion that was initiated prior to January 23, 1971.

(iv) The project has no associated groundwater withdrawal that was initiated prior to July 13, 1978, unless such withdrawal has otherwise been approved by the Commission.

(v) The project has no associated surface water withdrawal that was initiated prior to November 11, 1995, unless such withdrawal has otherwise been approved by the Commission.

(vi) The project is not the subject of a pending compliance or enforcement matter before the Commission.

(vii) The project features related to the source, withdrawal, diversion or consumptive use of water, or the nature or quantity of water withdrawal, diversion or use associated with the project, as identified in the existing Commission approval, have not changed or will not change upon its transfer. For purposes of this paragraph, changes in the quantity of water withdrawal, diversion or consumptive use shall only relate to increases in

quantity in excess of the approved quantity. If the project involves both a consumptive water use and an associated withdrawal, then the withdrawal must have been approved by the Commission.

(c) An existing Commission approval of a project that satisfies the following conditions may be conditionally transferred and the project sponsor may operate such project under the terms and conditions of the conditionally transferred approval, pending action by the Commission on the application submitted in accordance with paragraph (c)(3) below:

(1) The project satisfies all of the following conditions:

(i) The existing approval is less than ten (10) years old.

(ii) The project is not the subject of a pending compliance or enforcement matter before the Commission.

(iii) The project features related to the source, withdrawal, diversion or consumptive use of water, or the nature or quantity of water withdrawal, diversion or consumptive use associated with the project, as identified in the existing Commission approval, have not changed or will not change upon its transfer. For purposes of this paragraph, changes in the quantity of water withdrawal, diversion or consumptive use shall only relate to increases in quantity in excess of the approved quantity.

(2) The project satisfies one or more of the following conditions:

(i) The project has an associated pre-compact consumptive water use.

(ii) The project has an associated diversion that was initiated prior to January 23, 1971.

(iii) The project has an associated groundwater withdrawal that was initiated prior to July 13, 1978 and that has not been approved by the Commission.

(iv) The project has an associated surface water withdrawal that was initiated prior to November 11, 1995 and that has not been approved by the Commission. The project has a consumptive water use approval and has an associated withdrawal that has not been approved by the Commission.

(3) The project sponsor submits an application to the Commission, in accordance with this part, within ninety (90) days from the date of the change of ownership, requesting review and approval of the applicable consumptive use, diversion or withdrawals, identified in paragraph (c)(2) above, as a modification to the conditionally transferred approval.

(d) An existing Commission project approval for any project not satisfying the requirements of paragraphs (b) or (c) above may be conditionally transferred and the project sponsor may operate such project under the terms and conditions of the conditionally transferred approval, pending action by the Commission on an application the project sponsor shall submit to the Commission, provided that:

(1) The new project sponsor submits an application to the Commission, in accordance with this part, within ninety (90) days from the date of the change of ownership, requesting review and approval of the project; and

(2) The project features related to the source, withdrawal, diversion or consumptive use of water, or the nature or quantity of water withdrawal, diversion or consumptive use associated with the project do not change pending review of the application. For purposes of this paragraph, changes in the quantity of water withdrawal, diversion or consumptive use shall only relate to increases in quantity in excess of the quantity withdrawn, diverted or consumptively used prior to the change of ownership.

Sec. 806.7 Concurrent project review by member jurisdictions.

(a) The Commission recognizes that agencies of the member jurisdictions will exercise their review authority and evaluate many proposed projects in the basin. The Commission will adopt procedures to assure compatibility between jurisdictional review and Commission review.

(b) To avoid duplication of work and to cooperate with other government agencies, the Commission may develop administrative agreements or other cooperative arrangements, in accordance with the procedures outlined in this part, with appropriate agencies of the member jurisdictions regarding joint review of projects. These agreements or arrangements may provide for joint efforts by staff, delegation of authority by an agency or the Commission, or any other matter to support cooperative review activities. Permits issued by a member jurisdiction agency shall be considered Commission approved if issued pursuant to an administrative agreement or other cooperative arrangement with the Commission specifically providing therefor.

Sec. 806.8 Waiver/modification.

The Commission may, in its discretion, waive or modify any of the requirements of this or any other part of its regulations if the essential purposes set forth in Sec. 806.2 continue to be served.

Subpart B—Application Procedure

Sec. 806.10 Purpose of this subpart.

The purpose of this subpart is to set forth procedures governing applications required by Sec. Sec. 806.4, 806.5, 806.6 and 18 CFR part 801.

## Sec. 806.11 Preliminary consultations.

(a) Any project sponsor of a project that is or may be subject to the Commission's jurisdiction is encouraged, prior to making application for Commission review, to request a preliminary consultation with the Commission staff for an informal discussion of preliminary plans for the proposed project. To facilitate preliminary consultations, it is suggested that the project sponsor provide a general description of the proposed project, a map showing its location and, to the extent available, data concerning dimensions of any proposed structures, anticipated water needs, and the environmental impacts.

(b) Preliminary consultation is optional for the project sponsor (except with respect to aquifer test plans, see Sec. 806.12 but shall not relieve the sponsor from complying with the requirements of the compact or with this part.

## Sec. 806.12 Constant-rate aquifer testing.

(a) Prior to submission of an application pursuant to Sec. 806.13, a project sponsor seeking approval to withdraw or increase a withdrawal of groundwater shall perform a constant-rate aquifer test in accordance with this section.

(b) The project sponsor shall prepare a constant-rate aquifer test plan for prior review and approval by Commission staff before testing is undertaken. Such plan shall include a groundwater availability analysis to determine the availability of water during a 1-in-10-year recurrence interval.

(c) Unless otherwise specified, approval of a test plan is valid for two years from the date of approval.

(d) Approval of a test plan shall not be construed to limit the authority of the Commission to require additional testing or monitoring.

(e) The project sponsor may be required, at its expense, to provide temporary water supply if an aquifer test results in interference with an existing water use.

## Sec. 806.13 Submission of application.

Project sponsors of projects subject to the review and approval of the Commission under Sec. 806.4, 806.5 or 806.6 shall submit an application and applicable fee to the Commission, in accordance with this Subpart.

## Sec. 806.14 Contents of application.

(a) Applications shall include, but not be limited to, the following information and, where applicable, shall be submitted on forms and in the manner prescribed by the Commission.

(1) Identification of project sponsor including any and all proprietors, corporate officers or partners, the mailing address of the same, and the name of the individual authorized to act for the sponsor.

(2) Description of project and site in terms of:

(i) Project location, including global positioning system (gps) coordinates accurate to within 10 meters.

(ii) Project purpose.

(iii) Proposed quantity of water to be withdrawn.

(iv) Proposed quantity of water to be consumed, if applicable.

(v) Constant-rate aquifer tests. The project sponsor shall provide the results of a constant-rate aquifer test with any application which includes a request for a groundwater withdrawal. The project sponsor shall obtain Commission approval of the test procedures prior to initiation of the constant-rate aquifer test.

(vi) Water use and availability.

(vii) All water sources and the date of initiation of each source.

(viii) Supporting studies, reports, and other information upon which assumptions and assertions have been based.

(ix) Plans for avoiding or mitigating for consumptive use.

(x) Copies of any correspondence with member jurisdiction agencies.

(xi) Evidence of compliance with applicable water registration requirements of the member jurisdiction in which the project is located.

(3) Anticipated impact of the proposed project on:

(i) Surface water characteristics (quality, quantity, flow regimen, other hydrologic characteristics).

(ii) Threatened or endangered species and their habitats.

(iii) Existing water withdrawals.

(4) Project estimated completion date and estimated construction schedule.

(b) The Commission may also require the project sponsor to submit the following information related to the project, in addition to the information required in paragraph (a) of this section, as deemed necessary.

(1) Description of project and site in terms of:

(i) Engineering feasibility.

(ii) Ability of project sponsor to fund the project or action.

(iii) Identification and description of reasonable alternatives, the extent of their economic and technical investigation, and an assessment of their

potential environmental impact. In the case of a proposed diversion, the project sponsor should include information that may be required by Sec. 806.25 or any policy of the Commission relating to diversions.

(iv) Compatibility of proposed project with existing and anticipated uses.

(v) Anticipated impact of the proposed project on:

(A) Flood damage potential considering the location of the project with respect to the flood plain and flood hazard zones.

(B) Recreation potential.

(C) Fish and wildlife (habitat quality, kind and number of species).

(D) Natural environment uses (scenic vistas, natural and manmade travel corridors, wild and wilderness areas, wild, scenic and recreation rivers).

(E) Site development considerations (geology, topography, soil characteristics, adjoining and nearby land uses, adequacy of site facilities).

(F) Historical, cultural and archaeological impacts.

(2) Governmental considerations:

(i) Need for governmental services or finances.

(ii) Commitment of government to provide services or finances.

(iii) Status of application with other governmental regulatory bodies.

(3) Any other information deemed necessary by the Commission.

(c) A report about the project prepared for any other purpose, or an application for approval prepared for submission to a member jurisdiction, may be accepted by the Commission provided the said report or application addresses all necessary items on the Commission's form or listed in this section, as appropriate.

## Sec. 806.15 Notice of application.

(a) The project sponsor shall, no later than 10 days after submission of an application to the Commission, notify each municipality in which the project is located, the county planning agency of each county in which the project is located, and each contiguous property owner that an application has been submitted to the Commission. The project sponsor shall also publish at least once in a newspaper of general circulation serving the area in which the project is located, a notice of the submission of the application no later than 10 days after the date of submission. All notices required under this section shall contain a description of the project, its purpose, requested water withdrawal and consumptive use amounts, location and address, electronic mail address, and phone number of the Commission.

(b) The project sponsor shall provide the Commission with a copy of the United States Postal Service return receipt for the municipal notification under (a) and a proof of publication for the newspaper notice required under (a). The project sponsor shall also provide certification on a form provided by the Commission that it has made such other notifications as required under paragraph (a) of this section, including a list of contiguous property owners notified under paragraph (a). Until these items are provided to the Commission, processing of the application will not proceed.

## Sec. 806.16 Completeness of application.

(a) The Commission's staff shall review the application, and if necessary, request the project sponsor to provide any additional information that is deemed pertinent for proper evaluation of the project.

(b) An application deemed administratively incomplete will be returned to the project sponsor, who shall have 30 days to cure the administrative deficiencies. An application deemed technically deficient may be returned to the project sponsor, who shall have a period of time prescribed by Commission staff to cure the technical deficiencies. Failure to cure either administrative or technical deficiencies within the prescribed time may result in termination of the application process and forfeiture of any fees submitted.

(c) The project sponsor has a duty to provide information reasonably necessary for the Commission's review of the application. If the project sponsor fails to respond to the Commission's request for additional information, the Commission may terminate the application process, close the file and so notify the project sponsor. The project sponsor may reapply without prejudice by submitting a new application and fee.

## Subpart C—Standards for Review and Approval

## Sec. 806.20 Purpose of this subpart.

The purpose of this subpart is to set forth general standards that shall be used by the Commission to evaluate all projects subject to review and approval by the Commission pursuant to Sec. Sec. 806.4, 806.5 and 806.6, and to establish special standards applicable to certain water withdrawals, consumptive uses and diversions. This subpart shall not be construed to limit the Commission's authority and scope of review. These standards are authorized under Sections 3.4(2), 3.4(8), 3.4(9), and 3.10 of the compact and are based upon, but not limited to, the goals, objectives, guidelines and criteria of the comprehensive plan.

## Sec. 806.21 General standards.

(a) A project shall not be detrimental to the proper conservation, development, management, or control of the water resources of the basin.

(b) The Commission may modify and approve as modified, or may disapprove, a project if it determines that the project is not in the best interest of the conservation, development, management, or control of the basin's water resources, or is in conflict with the comprehensive plan.

(c) Disapprovals—other governmental jurisdictions.

(1) The Commission may suspend the review of any application under this part if the project is subject to the lawful jurisdiction of any member jurisdiction or any political subdivision thereof, and such member jurisdiction or political subdivision has disapproved or denied the project. Where such disapproval or denial is reversed on appeal, the appeal is final, and the project sponsor provides the Commission with a certified copy of the decision, the Commission shall resume its review of the application. Where, however, an application has been suspended hereunder for a period greater than three years, the Commission may terminate its review. Thereupon, the Commission shall notify the project sponsor of such termination and that the application fee paid by the project sponsor is forfeited. The project sponsor may reactivate the terminated docket by reapplying to the Commission, providing evidence of its receipt of all necessary governmental approvals and, at the discretion of the Commission, submitting new or updated information.

(2) The Commission may modify, suspend or revoke a previously granted approval if the project sponsor fails to obtain or maintain the approval of a member jurisdiction or political subdivision thereof having lawful jurisdiction over the project.

## Sec. 806.22 Standards for consumptive uses of water.

(a) The project sponsors of all consumptive water uses subject to review and approval under Sec. 806.4, 806.5 or 806.6 of this part shall comply with this section.

(b) Mitigation. All project sponsors whose consumptive use of water is subject to review and approval under Sec. 806.4, 806.5 or 806.6 of this part shall mitigate such consumptive use. Except to the extent that the project involves the diversion of the waters out of the basin, public water supplies shall be exempt from the requirements of this section regarding consumptive use; provided, however, that nothing in this section shall be construed to exempt individual consumptive users connected to any such public water supply from the requirements of this section. Mitigation may be provided by one, or a combination of the following:

(1) During low flow periods as may be designated by the Commission for consumptive use mitigation.

(i) Reduce withdrawal from the approved source(s), in an amount equal to the project's total consumptive use, and withdraw water from alternative surface water storage or aquifers or other underground storage chambers or facilities approved by the Commission, from which water can be withdrawn for a period of 90 days without impact to surface water flows.

(ii) Release water for flow augmentation, in an amount equal to the project's total consumptive use, from surface water storage or aquifers, or other underground storage chambers or facilities approved by the Commission, from which water can be withdrawn for a period of 90 days without impact to surface water flows.

(iii) Discontinue the project's consumptive use, except that reduction of project sponsor's consumptive use to less than 20,000 gpd during periods of low flow shall not constitute discontinuance.

(2) Use, as a source of consumptive use water, surface storage that is subject to maintenance of a conservation release acceptable to the Commission. In any case of failure to provide the specified conservation release, such project shall provide mitigation in accordance with paragraph (3), below, for the calendar year in which such failure occurs, and the Commission will reevaluate the continued acceptability of the conservation release.

(3) Provide monetary payment to the Commission, for annual consumptive use, in an amount and manner prescribed by the Commission.

(4) Implement other alternatives approved by the Commission.

(c) Determination of manner of mitigation. The Commission will, in its sole discretion, determine the acceptable manner of mitigation to be provided by project sponsors whose consumptive use of water is subject to review and approval. Such a determination will be made after considering the project's location, source characteristics, anticipated amount of consumptive use, proposed method of mitigation and their effects on the purposes set forth in Sec. 806.2 of this part, and any other pertinent factors. The Commission may modify, as appropriate, the manner of mitigation, including the magnitude and timing of any mitigating releases, required in a project approval.

(d) Quality of water released for mitigation. The physical, chemical and biological quality of water released for mitigation shall at all times meet the quality required for the purposes listed in Sec. 806.2, as applicable.

(e) Approval by rule for consumptive uses.

(1) Any project whose sole source of water for consumptive use is a public water supply withdrawal, may be approved under this paragraph (e) in accordance with the following, unless the Commission determines that the project cannot be adequately regulated under this approval by rule:

(i) Notification of Intent: No fewer than 90 days prior to construction or implementation of a project or increase above a previously approved quantity of consumptive use, the project sponsor shall:

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

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

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

(2) Metering, daily use monitoring and quarterly reporting. The project sponsor shall comply with metering, daily use monitoring and quarterly reporting as specified in Sec. 806.30.

(3) Standard conditions. The standard conditions set forth in Sec. 806.21 above shall apply to projects approved by rule.

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

(5) Compliance with other laws. The project sponsor shall obtain all necessary permits or approvals required for the project from other federal, state or local government agencies having jurisdiction over the project. The Commission reserves the right to modify, suspend or revoke any approval under this paragraph (e) if the project sponsor fails to obtain or maintain such approvals.

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

(7) Approval by rule shall be effective upon written notification from the Commission to the project sponsor, shall expire 15 years from the date of such notification, and shall be deemed to rescind any previous consumptive use approvals.

## Sec. 806.23 Standards for water withdrawals.

(a) The project sponsors of all withdrawals subject to review and approval under Sec. 806.4, 806.5 or 806.6 of this part shall comply with the following standards, in addition to those required pursuant to Sec. 806.21.

(b) Limitations on withdrawals.

(1) The Commission may limit withdrawals to the amount (quantity and rate) of water that is needed to meet the reasonably foreseeable needs of the project sponsor.

(2) The Commission may deny an application, limit or condition an approval to ensure that the withdrawal will not cause significant adverse impacts to the water resources of the basin. The Commission may consider, without limitation, the following in its consideration of adverse impacts: Lowering of groundwater or stream flow levels; rendering competing supplies unreliable; affecting other water uses; causing water quality degradation that may be injurious to any existing or potential water use; affecting fish, wildlife or other living resources or their habitat; causing permanent loss of aquifer storage capacity; or affecting low flow of perennial or intermittent streams.

(3) The Commission may impose limitations or conditions to mitigate impacts, including without limitation:

(i) Limit the quantity, timing or rate of withdrawal or level of drawdown.

(ii) Require the project sponsor to provide, at its own expense, an alternate water supply or other mitigating measures.

(iii) Require the project sponsor to implement and properly maintain special monitoring measures.

(iv) Require the project sponsor to implement and properly maintain stream flow protection measures.

(v) Require the project sponsor to develop and implement an operations plan acceptable to the Commission.

(4) The Commission may require the project sponsor to undertake the following, to ensure its ability to meet its present or reasonably foreseeable water needs from available groundwater or surface water without limitation:

(i) Investigate additional sources or storage options to meet the demand of the project.

(ii) Submit a water resource development plan that shall include, without limitation, sufficient data to address any supply deficiencies, identify alternative water supply options, and support existing and proposed future withdrawals.

Sec. 806.24 Standards for diversions.

(a) The project sponsors of all diversions subject to review and approval under Sec. Sec. 806.4, 806.5 or 806.6 of this part shall comply with the following standards.

(b) For projects involving out-of-basin diversions, the following requirements shall apply.

(1) Project sponsors shall:

(i) Demonstrate that they have made good faith efforts to develop and conserve sources of water within the importing basin, and have considered other reasonable alternatives to the diversion.

(ii) Comply with the general standards set forth in Sec. Sec. 801.3, 806.21, and 806.22, and the applicable requirements of this part relating to consumptive uses and withdrawals.

(2) In deciding whether to approve a proposed diversion out of the basin, the Commission shall also consider and the project sponsor shall provide information related to the following factors:

(i) Any adverse effects and cumulative adverse effects the project may have on the ability of the Susquehanna River Basin, or any portion thereof, to meet its own present and future water needs.

(ii) The location, amount, timing, purpose and duration of the proposed diversion and how the project will individually and cumulatively affect the flow of any impacted stream or river, and the freshwater inflow of the Chesapeake Bay, including the extent to which any diverted water is being returned to the basin or the bay.

(iii) Whether there is a reasonably foreseeable need for the quantity of water requested by the project sponsor and how that need is measured against reasonably foreseeable needs in the Susquehanna River Basin.

(iv) The amount and location of water being diverted to the Susquehanna River Basin from the importing basin.

(v) The proximity of the project to the Susquehanna River Basin.

(vi) The project sponsor's pre-compact member jurisdiction approvals to withdraw or divert the waters of the basin.

(vii) Historic reliance on sources within the Susquehanna River Basin.

(3) In deciding whether to approve a proposed diversion out of the basin, the Commission may also consider, but is not limited to, the factors set forth in paragraphs (i) through (v) of this paragraph (b)(3). The decision whether to consider the factors in this paragraph (b) and the amount of information required for such consideration, if undertaken, will depend upon the potential for the proposed diversion to have an adverse impact on the ability of the Susquehanna River Basin, or any portion thereof, to meet its own present and future needs.

(i) The impact of the diversion on economic development within the Susquehanna River Basin, the member states or the United States of America.

(ii) The cost and reliability of the diversion versus other alternatives, including certain external costs, such as impacts on the environment or water resources.

(iii) Any policy of the member jurisdictions relating to water resources, growth and development.

(iv) How the project will individually and cumulatively affect other environmental, social and recreational values.

(v) Any land use and natural resource planning being carried out in the importing basin.

(c) For projects involving into-basin diversions, the following requirements shall apply.

(1) Project sponsors shall:

(i) Provide information on the source, amount, and location of the water being diverted to the Susquehanna River Basin from the importing basin.

(ii) Provide information on the water quality classification, if any, of the Susquehanna River Basin stream to which diverted water is being discharged and the discharge location or locations.

(iii) Demonstrate that they have applied for or received all applicable withdrawal or discharge permits or approvals related to the diversion, and demonstrate that the diversion will not result in water quality degradation

that may be injurious to any existing or potential ground or surface water use.

Sec. 806.25 Water conservation standards.

Any project sponsor whose project is subject to Commission approval under this part proposing to withdraw water either directly or indirectly (through another user) from groundwater or surface water sources, or both, shall comply with the following requirements:

(a) Public water supply. As circumstances warrant, a project sponsor of a public water supply shall:

(1) Reduce distribution system losses to a level not exceeding 20 percent of the gross withdrawal.

(2) Install meters for all users.

(3) Establish a program of water conservation that will:

(i) Require installation of water conservation devices, as applicable, by all classes of users.

(ii) Prepare and distribute literature to customers describing available water conservation techniques.

(iii) Implement a water pricing structure which encourages conservation.

(iv) Encourage water reuse.

(b) Industrial. Project sponsors who use water for industrial purposes shall:

(1) Designate a company representative to manage plant water use.

(2) Install meters or other suitable devices or utilize acceptable flow measuring methods for accurate determination of water use by various parts of the company operation.

(3) Install flow control devices which match the needs of the equipment being used for production.

(4) Evaluate and utilize applicable recirculation and reuse practices.

(c) Irrigation. Project sponsors who use water for irrigation purposes shall utilize irrigation systems properly designed for the sponsor's respective soil characteristics, topography and vegetation.

(d) Effective date. Notwithstanding the effective date for other portions of this part, this section shall apply to all groundwater and surface water withdrawals initiated on or after January 11, 1979.

Subpart D—Terms and Conditions of Approval

Sec. 806.30 Monitoring.

The Commission, as part of the project review, shall evaluate the proposed methodology for monitoring consumptive uses, water withdrawals and mitigating flows, including flow metering devices, stream gages, and other facilities used to measure the withdrawals or consumptive use of the project or the rate of stream flow. If the Commission determines that additional flow measuring, metering or monitoring devices are required, these shall be provided at the expense of the project sponsor, installed in accordance with a schedule set by the Commission, be accurate to within 5 percent, and shall be subject to inspection by the Commission at any time.

(a) Project sponsors of projects that are approved under this part shall:

(1) Measure and record on a daily basis, or such other frequency as may be approved by the Commission, the quantity of all withdrawals, using meters or other methods approved by the Commission.

(2) Certify, at the time of installation and no less frequently than once every 5 years, the accuracy of all measuring devices and methods to within 5 percent of actual flow, unless specified otherwise by the Commission.

(3) Maintain metering or other approved methods so as to provide a continuous, accurate record of the withdrawal or consumptive use.

(4) Measure groundwater levels in all approved production wells, as specified by the Commission.

(5) Measure groundwater levels at additional monitoring locations, as specified by the Commission.

(6) Measure water levels in surface storage facilities, as specified by the Commission.

(7) Measure stream flows, passby flows or conservation releases, as specified by the Commission, using methods and at frequencies approved by the Commission.

(b) Reporting.

(1) Project sponsors whose projects are approved under this section shall report to the Commission on a quarterly basis on forms and in a manner prescribed by the Commission all information recorded under paragraph (a) of this section, unless otherwise specified by the Commission.

(2) Project sponsors whose projects are approved under this section shall report to the Commission:

(i) Violations of withdrawal limits and any conditions of approvals, within 5 days of such violation.

(ii) Loss of measuring or recording capabilities required under paragraph (a)(1) of this section, within 5 days after any such loss.

Sec. 806.31 Term of approvals.

(a) Approvals issued under this part shall have a term equal to the term of any accompanying member jurisdiction approval regulating the same subject matter, but not longer than 15 years, unless an alternate period is provided for in the Commission approval. If there is no such accompanying member jurisdiction approval, or if no term is specified in such accompanying member jurisdiction approval, the term of a Commission approval issued under this part shall be no longer than 15 years or the anticipated life of the project, whichever is less, unless an alternate period is provided for in the Commission approval.

(b) Commission approval of a project shall expire three years from the date of such approval if the withdrawal, diversion or consumptive use has not been commenced, unless an alternate period is provided for in the docket approval or such 3-year period is extended in writing by the Commission upon written request from the project sponsor submitted no later than 120 days prior to such expiration. The Commission may grant an extension, for a period not to exceed two years, only upon a determination that the delay is due to circumstances beyond the project sponsor's control and that there is a likelihood of project implementation within a reasonable period of time. The Commission may also attach conditions to the granting of such extensions, including modification of any terms of approval that the Commission may deem appropriate.

(c) If a withdrawal, diversion or consumptive use approved by the Commission for a project is discontinued for a period of five consecutive years, the approval shall be null and void, unless a waiver is granted in writing by the Commission, upon written request by the project sponsor demonstrating due cause and with notification thereof to the member jurisdiction in which the project is located, prior to the expiration of such period.

(d) If the Commission determines that a project has been abandoned, by evidence of nonuse for a period of time and under such circumstances that an abandonment may be inferred, the Commission may rescind the approval for such withdrawal, diversion or consumptive use.

(e) If a project sponsor submits an application to the Commission no later than six months prior to the expiration of its existing Commission approval, the existing approval will be deemed extended until such time as the Commission renders a decision on the application, unless the existing approval or a notification in writing from the Commission provide otherwise.

Sec. 806.32 Reopening/modification.

(a) Once a project is approved, the Commission, upon its own motion, or upon application of the project sponsor or any interested party, may at any time reopen any project approval and make additional orders that may be necessary to mitigate or avoid adverse impacts or to otherwise protect the public health, safety, and welfare or water resources. Whenever an application for reopening is filed by an interested party, the burden shall be upon that interested party to show, by a preponderance of the evidence, that a significant adverse impact or a threat to the public health, safety and welfare or water resources exists that warrants reopening of the docket.

(b) If the project sponsor fails to comply with any term or condition of a Commission approval, the Commission may issue an order suspending, modifying or revoking its approval of the project. The Commission may also, in its discretion, suspend, modify or revoke its approval if the project sponsor fails to obtain or maintain other federal, state or local approvals.

(c) For any previously approved project where interference occurs, the Commission may require a project sponsor to provide a temporary source of potable water at the project sponsor's expense, pending a final determination of causation by the Commission.

(d) The Commission, upon its own motion, may at any time reopen any project approval and make additional corrective modifications that may be necessary.

Sec. 806.33 Interest on fees.

The Executive Director may establish interest to be paid on all overdue or outstanding fees of any nature that are payable to the Commission.

Sec. 806.34 Emergencies.

(a) Emergency certificates. The other requirements of these regulations notwithstanding, in the event of an emergency requiring immediate action to protect the public health, safety and welfare or to avoid substantial and irreparable injury to any person, property, or water resources when circumstances do not permit a review and determination in the regular course of the regulations in this part, the Executive Director, with the concurrence of the chairperson of the Commission and the commissioner from the affected member state, may issue an emergency certificate authorizing a

project sponsor to take such action as the Executive Director may deem necessary and proper in the circumstances, pending review and determination by the Commission as otherwise required by this part.

(b) Notification and application. A project sponsor shall notify the Commission, prior to commencement of the project, that an emergency certificate is needed. If immediate action, as defined by this section, is required by a project sponsor and prior notice to the Commission is not possible, then the project sponsor must contact the Commission within one (1) business day of the action. Notification may be by certified mail, facsimile, telegram, mailgram, or other form of written communication. This notification must be followed within one (1) business day by submission of the following:

(1) A completed emergency application form or copy of the State or Federal emergency water use application if the project sponsor also is requesting emergency approval from either a state or federal agency.

(2) As a minimum, the application shall contain:

- (i) Contact information.
- (ii) Justification for emergency action (purpose).
- (iii) Location map and schematic of proposed project.
- (iv) Desired term of emergency use.
- (v) Source(s) of the water.
- (vi) Quantity of water.
- (vii) Flow measurement system (such as metering).
- (viii) Use restrictions in effect (or planned).
- (ix) Description of potential adverse impacts and mitigating measures.
- (x) Appropriate fee, unless reduced, waived or delayed with the approval of the Executive Director.

(c) Emergency certificate issuance. The Executive Director shall:

(1) Review and act on the emergency request as expeditiously as possible upon receipt of all necessary information stipulated in paragraph (b)(2) of this section.

(2) With the concurrence of the chairperson of the Commission and the commissioner from the affected member state, issue an emergency certificate for a term not to extend beyond the next regular business meeting of the Commission.

(3) Include conditions in the emergency certificate which may include, without limitation, monitoring of withdrawal and/or consumptive use amounts, measurement devices, public notification, and reporting, to assure minimal adverse impacts to the environment and other users.

(d) Post approval. Actions following issuance of emergency certificates may include, but are not limited to, the following:

(1) The Commission may, by resolution, extend the term of the emergency certificate, upon presentation of a request from the project sponsor accompanied by appropriate evidence that the conditions causing the emergency persist.

(2) If the condition is expected to persist longer than the specified extended term, the project sponsor must submit an application to the Commission for applicable water withdrawal or consumptive use, or the emergency certificate will terminate as specified. If the project sponsor has a prior Commission approval for the project, the project sponsor must submit an application to modify the existing docket accordingly.

(e) Early termination. With the concurrence of the chairperson of the Commission and the commissioner from the affected member state, the Executive Director may terminate an emergency certificate earlier than the specified duration if it is determined that an emergency no longer exists and/or the certificate holder has not complied with one or more special conditions for the emergency withdrawal or consumptive water use.

(f) Restoration or mitigation. Project sponsors are responsible for any necessary restoration or mitigation of environmental damage or interference with another user that may occur as a result of the emergency action.

Sec. 806.35 Fees.

Project sponsors shall have an affirmative duty to pay such fees as established by the Commission.

3. Part 807 is added to read as follows.

PART 807 — WATER WITHDRAWAL REGISTRATION

Sec.

807.1 Requirement.

807.2 Time limits.

807.3 Administrative agreements.

807.4 Effective date.

807.5 Definitions.

Authority: Secs. 3.4(2) and (9), 3.8, 3.10 and 15.2, Pub. L. 91-575, 84 Stat. 1509 *et seq.*

Sec. 807.1 Requirement.

In addition to any other requirements of Commission regulations, and subject to the consent of the affected member state to this requirement, any person withdrawing or diverting in excess of an average of 10,000 gpd for any consecutive 30-day period, from ground or surface water sources, as defined in part 806 of this chapter, shall register the amount of this withdrawal with the Commission and provide such other information as requested on forms prescribed by the Commission.

Sec. 807.2 Time limits.

(a) Except for agricultural water use projects, all registration forms shall be submitted within one year after May 11, 1995, or within six months of initiation of the water withdrawal or diversion, whichever is later; provided, however, that nothing in this section shall limit the responsibility of a project sponsor to apply for and obtain an approval as may be required under part 806 of this chapter. All registered withdrawals shall register with the Commission within five years of their initial registration, and at five-year intervals thereafter, unless the withdrawal is sooner discontinued. Upon notice by the Executive Director, compliance with a registration or reporting requirement, or both, of a member state that is substantially equivalent to this requirement shall be considered compliance with this requirement.

(b) Project sponsors whose existing agricultural water use projects i.e., projects coming into existence prior to March 31, 1997) withdraw or divert in excess of an average of 10,000 gpd for any consecutive 30-day period from a ground or surface water source shall register their use no later than March 31, 1997. Thereafter, project sponsors of new projects proposing to withdraw or divert in excess of 10,000 gpd for any consecutive 30-day period from a ground or surface water source shall be registered prior to project initiation.

Sec. 807.3 Administrative agreements.

The Commission may complete appropriate administrative agreements or arrangements to carry out this registration requirement through the offices of member jurisdictions. Forms developed by the Commission shall apprise registrants of any such agreements or arrangements, and provide appropriate instructions to complete and submit the form.

Sec. 807.4 Effective date.

This part shall be effective on January 1, 2007.

Sec. 807.5 Definitions.

Terms used in this part shall be defined as set forth in Sec. 806.3 of this chapter.

4. Part 808 is added to read as follows.

PART 808—HEARINGS AND ENFORCEMENT ACTIONS

Subpart A—Hearings

Sec.

808.1 Public hearings.

808.2 Administrative appeals.

808.3 Hearing on administrative appeal.

808.4 Optional joint hearing.

Subpart B—Compliance and Enforcement

808.10 Scope of subpart.

808.11 Duty to comply.

808.12 Investigative powers.

808.13 Notice of violation.

808.14 Orders.

808.15 Show cause proceeding.

808.16 Civil penalty criteria.

808.17 Enforcement of penalties, abatement or remedial orders.

808.18 Settlement by agreement.

808.19 Effective date.

Authority: Secs. 3.5 (9), 3.5 (5), 3.8, 3.10, and 15.2, Pub. L. 91-575, 84 Stat. 1509 *et seq.*

Subpart A—Conduct of Hearings

Sec. 808.1 Public hearings.

(a) A public hearing shall be conducted in the following instances:

(1) Addition of projects or adoption of amendments to the comprehensive plan, except as otherwise provided by Section 14.1 of the compact.

(2) Rulemaking, except for corrective amendments.

(3) Consideration of projects, except projects approved pursuant to memoranda of understanding with member jurisdictions.

(4) Hearing requested by a member jurisdiction.

(5) As otherwise required by the compact or Commission regulations.

(b) A public hearing may be conducted by the Commission in any form or style chosen by the Commission when in the opinion of the Commission, a hearing is either appropriate or necessary to give adequate consideration to issues relating to public health, safety and welfare, or protection of the environment, or to gather additional information for the record or

consider new information, or to decide factual disputes in connection with matters pending before the Commission.

(c) Notice of public hearing. At least 20 days before any public hearing required by the compact, notices stating the date, time, place and purpose of the hearing including issues of interest to the Commission shall be published at least once in a newspaper or newspapers of general circulation in the area affected. Occasions when public hearings are required by the compact include, but are not limited to, amendments to the comprehensive plan, drought emergency declarations, and review and approval of diversions. In all other cases, at least 10 days prior to the hearing, notice shall be posted at the office of the Commission (or on the Commission Web site), mailed by first class mail to the parties who, to the Commission's knowledge, will participate in the hearing, and mailed by first class mail to persons, organizations and news media who have made requests to the Commission for notices of hearings or of a particular hearing. In the case of hearings held in connection with rulemaking, notices need only be forwarded to the directors of the New York Register, the Pennsylvania Bulletin, the Maryland Register, and the Federal Register, and it is sufficient that this notice appear only in the Federal Register at least 20 days prior to the hearing and in each individual state publication at least 10 days prior to any hearing scheduled in that state.

(d) Standard public hearing procedure.

(1) Hearings shall be open to the public. Participants to a public hearing shall be the project sponsor and the Commission staff. Participants may also be any person wishing to appear at the hearing and make an oral or written statement. Statements may favor or oppose the project/proposal, or may simply express a position without specifically favoring or opposing the project/proposal. Statements shall be made a part of the record of the hearing, and written statements may be received up to and including the last day on which the hearing is held, or within a reasonable time thereafter as may be specified by the presiding officer, which time shall be not less than 10 days nor more than 30 days, except that a longer time may be specified if requested by a participant.

(2) Participants (except the project sponsor and the Commission staff) are encouraged to file with the Commission at its headquarters written notice of their intention to appear at the hearing. The notice should be filed at least three days prior to the opening of the hearing.

(e) Representative capacity. Participants wishing to be heard at a public hearing may appear in person or be represented by an attorney or other representative. A governmental authority may be represented by one of its officers, employees or by a designee of the governmental authority. Any individual intending to appear before the Commission in a representative capacity on behalf of a participant shall give the Commission written notice of the nature and extent of his/her authorization to represent the person on whose behalf he/she intends to appear.

(f) Description of project. When notice of a public hearing is issued, there shall be available for inspection at the Commission offices all plans, summaries, maps, statements, orders or other supporting documents which explain, detail, amplify, or otherwise describe the project the Commission is considering. Instructions on where and how the documents may be obtained will be included in the notice.

(g) Presiding officer. A public hearing shall be presided over by the Commission chair, the Executive Director, or any member or designee of the Commission. The presiding officer shall have full authority to control the conduct of the hearing and make a record of the same.

(h) Transcript. Whenever a project involving a diversion of water is the subject of a public hearing, and at all other times deemed necessary by the Commission or the Executive Director, a written transcript of the hearing shall be made. Other public hearings may be electronically recorded and a transcript made only if deemed necessary by the Executive Director or general counsel. A certified copy of the transcript and exhibits shall be available for review during business hours at the Commission's headquarters to anyone wishing to examine them. Persons wishing to obtain a copy of the transcript of any hearing shall make arrangements to obtain it directly from the recording stenographer at their expense.

(i) The Commission may conduct any public hearings in concert with any other agency of a member jurisdiction.

Sec. 808.2 Administrative appeals.

(a) A project sponsor or other person aggrieved by any action or decision of the Commission or Executive Director, may file a written appeal requesting a hearing. Such appeal shall be filed with the Commission within 30 days of that action or decision.

(b) The appeal shall identify the specific action or decision for which a hearing is requested, the date of the action or decision, the interest of the person requesting the hearing in the subject matter of the proposed hearing,

and a summary statement setting forth the basis for objecting to or seeking review of the action or decision.

(c) Any request filed more than 30 days after an action or decision will be deemed untimely and such request for a hearing shall be considered denied unless upon due cause shown the Commission, by unanimous vote, otherwise directs. Receipt of requests for hearings, pursuant to this section, whether timely filed or not, shall be submitted by the Executive Director to the commissioners for their information.

(d) Hearings may be conducted by one or more members of the Commission, by the Executive Director, or by such other hearing officer as the Commission may designate.

(1) The petitioner or an intervener may also request a stay of the action or decision giving rise to the appeal pending final disposition of the appeal, which stay may be granted or denied by the Executive Director after consultation with the Commission chair and the member from the affected jurisdiction.

(2) The request for a stay shall include affidavits setting forth facts upon which issuance of the stay may depend and the citations of applicable legal authority, if any.

(3) In addition to the contents of the request itself, the Executive Director, in granting or denying the request for stay, will consider the following factors:

- (i) Irreparable harm to the petitioner or intervener.
- (ii) The likelihood that the petitioner or intervener will prevail on the merits.
- (iii) The likelihood of injury to the public or other parties.

(e) The Commission shall grant the hearing request pursuant to this section if it determines that an adequate record with regard to the action or decision is not available, the case involves a determination by the Executive Director or staff which requires further action by the Commission, or that the Commission has found that an administrative review is necessary or desirable. If the Commission denies any request for a hearing in a contested case, the party seeking such a hearing shall be limited to such remedies as may be provided by the compact or other applicable law or court rule.

(f) If administrative review is granted, the Commission shall refer the matter for hearing, to be held in accordance with Sec. 808.3, and appoint a hearing officer.

(g) Intervention.

(1) If a hearing is scheduled, a notice of intervention may be filed with the Commission by persons other than the petitioner no later than 10 days before the date of the hearing. The notice of intervention shall state the interest of the person filing such notice, and the specific grounds of objection to the action or decision or other grounds for appearance.

(2) Any person filing a notice of intervention whose legal rights may be affected by the decision rendered hereunder shall be deemed an interested party. Interested parties shall have the right to be represented by counsel, to present evidence and to examine and cross-examine witnesses. In addition to interested parties, any persons having information concerning the subject matter of any hearing scheduled hereunder for inclusion in the record may submit a verified written statement to the Commission. Any interested party may submit a request to examine or cross-examine any person who submits a written statement. In the absence of a request for examination of such person, all verified written statements submitted shall be included with the record and such statements may be relied upon to the extent determined by the Hearing Officer or the Commission.

(h) Notice of any hearing to be conducted pursuant to this section shall comply with the provisions of Section 15.4 (b) of the compact relating to public notice unless otherwise directed by the Commission. In addition, both the petitioner and any interveners shall provide notice of their filings under this section to the list of additional interested parties compiled by the Commission under Sec. 806.14 (a).

(i) Where a request for an appeal is made, the 90-day appeal period set forth in Section 3.10 (6) and Federal reservation (o) of the compact shall not commence until the Commission has either denied the request for or taken final action on an administrative appeal.

(j) Where the request for appeal relates to an action taken on a project, any hearing conducted pursuant to this section shall be convened in the general vicinity of the project location.

Sec. 808.3 Hearings on administrative appeal.

(a) Unless otherwise agreed to by the Commission and the party requesting an administrative appeal under Sec. 808.2 of this part, the following procedures shall govern the conduct of hearing on an administrative appeal.

(b) Hearing procedure.

(1) The hearing officer shall have the power to rule upon offers of proof and the admissibility of evidence, to regulate the course of the hearing, to set the location or venue of the hearing, to hold conferences for the settlement or simplification of issues and the stipulation of facts, to determine the proper parties to the hearing, to determine the scope of any discovery procedures, to delineate the hearing issues to be adjudicated, and to take notice of judicially cognizable facts and general, technical, or scientific facts. The hearing officer may, with the consent of the parties, conduct all or part of the hearing or related proceedings by telephone conference call or other electronic means.

(2) The hearing officer shall cause each witness to be sworn or to make affirmation.

(3) Any party to a hearing shall have the right to present evidence, to examine and cross-examine witnesses, submit rebuttal evidence, and to present summation and argument.

(4) When necessary, in order to prevent undue prolongation of the hearing, the hearing officer may limit the number of times any witness may testify, the repetitious examination or cross-examination of witnesses, or the extent of corroborative or cumulative testimony.

(5) The hearing officer shall exclude irrelevant, immaterial or unduly repetitious evidence, but the parties shall not be bound by technical rules of evidence, and all relevant evidence of reasonably probative value may be received provided it shall be founded upon competent, material evidence which is substantial in view of the entire record.

(6) Any party may appear and be heard in person or be represented by an attorney at law who shall file an appearance with the Commission.

(7) Briefs and oral argument may be required by the hearing officer and may be permitted upon request made prior to the close of the hearing by any party. They shall be part of the record unless otherwise ordered by the presiding officer.

(8) The hearing officer may, as he/she deems appropriate, issue subpoenas in the name of the Commission requiring the appearance of witnesses or the production of books, papers, and other documentary evidence for such hearings.

(9) A record of the proceedings and evidence at each hearing shall be made by a qualified stenographer designated by the Executive Director. Where demanded by the petitioner, or any other person who is a party to the appeal proceedings, or where deemed necessary by the Hearing Officer, the testimony shall be transcribed. In those instances where a transcript of proceedings is made, two copies shall be delivered to the Commission. The petitioner or other persons who desire copies shall obtain them from the stenographer at such price as may be agreed upon by the stenographer and the person desiring the transcript.

(c) Staff and other expert testimony. The Executive Director shall arrange for the presentation of testimony by the Commission's technical staff and other experts, as he/she may deem necessary or desirable, to be incorporated in the record to support the administrative action, determination or decision which is the subject of the hearing.

(d) Written testimony. If the direct testimony of an expert witness is expected to be lengthy or of a complex, technical nature, the presiding officer may order that such direct testimony be submitted to the Commission in sworn, written form. Copies of said testimony shall be served upon all parties appearing at the hearing at least 10 days prior to said hearing. Such written testimony, however, shall not be admitted whenever the witness is not present and available for cross-examination at the hearing unless all parties have waived the right of cross-examination.

(e) Assessment of costs.

(1) Whenever a hearing is conducted, the costs thereof, as herein defined, shall be assessed by the presiding officer to the petitioner or such other party as the hearing officer deems equitable. For the purposes of this section, costs include all incremental costs incurred by the Commission, including, but not limited to, hearing officer and expert consultants reasonably necessary in the matter, stenographic record, rental of the hall and other related expenses.

(2) Upon the scheduling of a matter for hearing, the hearing officer shall furnish to the petitioner a reasonable estimate of the costs to be incurred under this section. The project sponsor may be required to furnish security for such costs either by cash deposit or by a surety bond of a corporate surety authorized to do business in a member state.

(3) A party to an appeal under this section who desires to proceed in forma pauperis shall submit an affidavit to the Commission requesting the same and showing in detail the assets possessed by the party, and other information indicating the reasons why that party is unable to pay costs incurred under this section or to give security for such costs. The Commission may grant or refuse the request based upon the contents of the

affidavit or other factors, such as whether it believes the appeal or intervention is taken in good faith.

(f) Findings and report. The hearing officer shall prepare a report of his/her findings and recommendations based on the record of the hearing. The report shall be served by personal service or certified mail (return receipt requested) upon each party to the hearing or its counsel. Any party may file objections to the report. Such objections shall be filed with the Commission and served on all parties within 20 days after the service of the report. A brief shall be filed together with objections. Any replies to the objections shall be filed and served on all parties within 10 days of service of the objections. Prior to its decision on such objections, the Commission may grant a request for oral argument upon such filing.

(g) Action by the Commission. The Commission will act upon the findings and recommendations of the presiding officer pursuant to law. The determination of the Commission will be in writing and shall be filed in Commission records together with any transcript of the hearing, report of the hearing officer, objections thereto, and all plans, maps, exhibits and other papers, records or documents relating to the hearing.

#### Sec. 808.4 Optional joint hearing.

(a) The Commission may order any two or more public hearings involving a common or related question of law or fact to be consolidated for hearing on any or all of the matters at issue in such hearings.

(b) Whenever designated by a department, agency or instrumentality of a member jurisdiction, and within any limitations prescribed by the designation, a hearing officer designated pursuant to Sec. 808.2 may also serve as a hearing officer, examiner or agent pursuant to such additional designation and may conduct joint hearings for the Commission and for such other department, agency or instrumentality. Pursuant to the additional designation, a hearing officer shall cause to be filed with the department, agency, or instrumentality making the designation, a certified copy of the transcript of the evidence taken before him/her and, if requested, of his/her findings and recommendations. Neither the hearing officer nor the Susquehanna River Basin Commission shall have or exercise any power or duty as a result of such additional designation to decide the merits of any matter arising under the separate laws of a member jurisdiction (other than the compact).

#### Subpart B—Compliance and Enforcement

##### Sec. 808.10 Scope of subpart.

This subpart shall be applicable where there is reason to believe that a person may have violated any provision of the compact, or the Commission's rules, regulations, orders, approvals, docket conditions, or any other requirements of the Commission. The said person shall hereinafter be referred to as the alleged violator.

##### Sec. 808.11 Duty to comply.

It shall be the duty of any person to comply with any provision of the compact, or the Commission's rules, regulations, orders, approvals, docket conditions, or any other requirements of the Commission.

##### Sec. 808.12 Investigative powers.

(a) The Commission or its agents or employees, at any reasonable time and upon presentation of appropriate credentials, may inspect or investigate any person or project to determine compliance with any provisions of the compact, or the Commission's rules, regulations, orders, approvals, docket conditions, or any other requirements of the Commission. Such employees or agents are authorized to conduct tests or sampling; to take photographs; to perform measurements, surveys, and other tests; to inspect the methods of construction, operation, or maintenance; to inspect all measurement equipment; and to audit, examine, and copy books, papers, and records pertinent to any matter under investigation. Such employees or agents are authorized to take any other action necessary to assure that any project is constructed, operated and maintained in accordance with any provisions of the compact, or the Commission's rules, regulations, orders, approvals, docket conditions, or any other requirements of the Commission.

(b) Any person shall allow authorized employees or agents of the Commission, without advance notice, at any reasonable time and upon presentation of appropriate credentials, and without delay, to have access to and to inspect all areas where a project is being constructed, operated, or maintained.

(c) Any person shall provide such information to the Commission as the Commission may deem necessary to determine compliance with any provisions of the compact, or the Commission's rules, regulations, orders, approvals, docket conditions, or any other requirements of the Commission. The person submitting information to the Commission shall verify that it is true and accurate to the best of the knowledge, information, and belief of the person submitting such information. Any person who know-

ingly submits false information to the Commission shall be subject to civil penalties as provided in the compact and criminal penalties under the laws of the member jurisdictions relating to unsworn falsification to authorities. Sec. 808.13 Notice of violation.

When the Executive Director or his/her designee issues a Notice of Violation (NOV) to an alleged violator, such NOV will:

(a) List the violations that are alleged to have occurred.

(b) State a date by which the alleged violator shall respond to the NOV. Sec. 808.14 Orders.

(a) Whether or not an NOV has been issued, where exigent circumstances warrant, the Executive Director may issue an order directing an alleged violator to cease and desist any action or activity to the extent such action or activity constitutes an alleged violation, or may issue any other order related to the prevention of further violations, or the abatement or remediation of harm caused by the action or activity.

(b) If the project sponsor fails to comply with any term or condition of a docket approval, the commissioners may issue an order suspending, modifying or revoking approval of the docket. The commissioners may also, in their discretion, suspend, modify or revoke a docket approval if the project sponsor fails to obtain or maintain other federal, state or local approvals.

(c) The commissioners may issue such other orders as may be necessary to enforce any provision of the compact, the Commission's rules or regulations, orders, approvals, docket conditions, or any other requirements of the Commission.

(d) It shall be the duty of any person to proceed diligently to comply with any order issued pursuant to this section.

##### Sec. 808.15 Show cause proceeding.

(a) The Executive Director may issue an order requiring an alleged violator to appear before the Commission and show cause why a penalty should not be assessed in accordance with the provisions of this chapter and Section 15.17 of the compact. The order to the alleged violator shall:

(1) Specify the nature and duration of violation(s) that is alleged to have occurred.

(2) Set forth the date and time on which, and the location where, the alleged violator shall appear before the Commission.

(3) Set forth any information to be submitted or produced by the alleged violator.

(4) Identify the limits of the civil penalty that will be recommended to the Commission.

(5) Name the individual(s) who has been appointed as the enforcement officer(s) in this matter pursuant to paragraph (b) of this section.

(b) Simultaneous with the issuance of the order to show cause, the Executive Director shall designate a staff member(s) to act as prosecuting officer(s).

(c) In the proceeding before the Commission, the prosecuting officer(s) shall present the facts upon which the alleged violation is based and may call any witnesses and present any other supporting evidence.

(d) In the proceeding before the Commission, the alleged violator shall have the opportunity to present both oral and written testimony and information, call such witnesses and present such other evidence as may relate to the alleged violation(s).

(e) The Commission shall require witnesses to be sworn or make affirmation, documents to be certified or otherwise authenticated and statements to be verified. The Commission may also receive written submissions or oral presentations from any other persons as to whether a violation has occurred and any resulting adverse consequences.

(f) The prosecuting officer(s) shall recommend to the Commission the amount of the penalty to be imposed. Based upon the record presented to the Commission, the Commission shall determine whether a violation(s) has occurred that warrants the imposition of a penalty pursuant to Section 15.17 of the compact. If it is found that such a violation(s) has occurred, the Commission shall determine the amount of the penalty to be paid, in accordance with Sec. 808.16.

##### Sec. 808.16 Civil penalty criteria.

(a) In determining the amount of any civil penalty or any settlement of a violation, the Commission shall consider:

(1) Previous violations, if any, of any provision of the compact, the Commission's rules or regulations, orders, approvals, docket conditions or any other requirements of the Commission.

(2) The intent of the alleged violator.

(3) The extent to which the violation caused adverse consequences to public health, safety and welfare or to water resources.

(4) The costs incurred by the Commission or any member jurisdiction relating to the failure to comply with any provision of the compact, the

Commission's rules or regulations, orders, approvals, docket conditions or any other requirements of the Commission.

(5) The extent to which the violator has cooperated with the Commission in correcting the violation and remediating any adverse consequences or harm that has resulted therefrom.

(6) The extent to which the failure to comply with any provision of the compact, the Commission's rules or regulations, orders, approvals, docket conditions or any other requirements of the Commission was economically beneficial to the violator.

(7) The length of time over which the violation occurred and the amount of water used during that time period.

(b) The Commission retains the right to waive any penalty or reduce the amount of the penalty recommended by the prosecuting officer under Sec. 808.15(f) should it determine, after consideration of the factors in paragraph (a) of this section, that extenuating circumstances justify such action.

Sec. 808.17 Enforcement of penalties, abatement or remedial orders.

Any penalty imposed or abatement or remedial action ordered by the Commission or the Executive Director shall be paid or completed within such time period as shall be specified in the civil penalty assessment or order. The Executive Director and Commission counsel are authorized to take such additional action as may be necessary to assure compliance with this subpart. If a proceeding before a court becomes necessary, the penalty amount determined in accordance with Sec. 808.15(f) shall constitute the penalty amount recommended by the Commission to be fixed by the court pursuant to Section 15.17 of the compact.

Sec. 808.18 Settlement by agreement.

(a) An alleged violator may offer to settle an enforcement proceeding by agreement. The Executive Director shall submit to the Commission any offer of settlement proposed by an alleged violator. No settlement will be submitted to the Commission by the Executive Director unless the alleged violator has indicated, in writing, acceptance of the terms of the agreement and the intention to comply with all requirements of the settlement agreement, including advance payment of any settlement amount or completion of any abatement or remedial action within the time period provided or both. If the Commission determines not to approve a settlement agreement, the Commission may proceed with an enforcement action in accordance with this subpart.

(b) In the event the violator fails to carry out any of the terms of the settlement agreement, the Commission may reinstitute a civil penalty action and any other applicable enforcement action against the alleged violator.

Sec. 808.19 Effective date.

This part shall be effective on January 1, 2007.

Dated: January 4, 2006.

Paul O. Swartz,

Executive Director.