

DELAWARE RIVER BASIN COMMISSION

18 CFR Part 401

Rules of Practice and Procedure; Amendments to Administrative Manual—Rules of Practice and Procedure

AGENCY: Delaware River Basin Commission.

ACTION: Final rule.

SUMMARY: At its November 19, 1997 business meeting, the Delaware River Basin Commission amended its Administrative Manual—Rules of Practice and Procedure for clarification and conformance with existing Commission interpretations and practices.

EFFECTIVE DATE: November 19, 1997.

ADDRESSES: Copies of the Commission's Administrative Manual—Rules of Practice and Procedure are available from the Delaware River Basin Commission, P.O. Box 7360, West Trenton, New Jersey 08628.

FOR FURTHER INFORMATION CONTACT: Susan M. Weisman, Commission Secretary, Delaware River Basin Commission: Telephone (609) 883-9500 ext. 203.

SUPPLEMENTARY INFORMATION: On October 22, 1997 the Commission held a public hearing on proposed amendments to its Rules of Practice and Procedure as noticed in the **Federal Register**, Vol. 62, No. 168, August 29, 1997 and Vol. 62, No. 200, October 16, 1997. In response to comments received on that proposal, the Commission made several modifications to its initial proposal, providing further clarification, correcting typographical errors and revising language concerning assessment of Hearing costs.

List of Subjects in 18 CFR Part 401

Administrative practice and procedure, Environmental impact statements, Freedom of information, Water pollution control, Water resources.

18 CFR Part 401 is amended as follows:

SUBCHAPTER A—ADMINISTRATIVE MANUAL

PART 401—RULES OF PRACTICE AND PROCEDURE

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

Authority: Delaware River Basin Compact, 75 Stat. 688.

2. Section 401.0 Introduction is revised to read as follows:

§ 410.0 Introduction.

(a) The Delaware River Basin Compact requires the Commission to formulate and adopt a Comprehensive Plan and Water Resources Program. In addition, the Compact provides in Section 3.8 that no project having a substantial effect on the water resources of the Basin shall be undertaken unless it shall have been first submitted to and approved by the Commission. The Commission is required to approve a project whenever it finds and determines that such project would not substantially impair or conflict with the Comprehensive Plan. Section 3.8 further provides that the Commission shall provide by regulation for the procedure of submission, review and consideration of projects and for its determinations pursuant to Section 3.8.

(b) The Comprehensive Plan consists of all public and those private projects and facilities which the Commission has directed be included therein. It also includes those documents and policies which the Commission has determined should be included with the Comprehensive Plan as being needed to insure optimum planning, development, conservation, use, management and control of the water resources of the Delaware Basin to meet present and future needs. The Comprehensive Plan is subject to periodic review and revision as provided in Sections 3.2 and 13.1 of the Compact.

(c) The Water Resources Program is based upon the Comprehensive Plan. It is required to be updated annually and to include a systematic presentation of the quantity and quality of water resources needs of the area to be served for such reasonably foreseeable period as the Commission may determine, balanced by existing and proposed projects required to satisfy such needs. The Commission's review and modification of the Water Resources Program is conducted pursuant to the provisions of Articles 3.2 and 13.2 of the Compact.

(d) The Commission's Rules of Practice and Procedure govern the adoption and revision of the Comprehensive Plan, the Water Resources Program, the exercise of the Commission's authority pursuant to the provisions of Article 3.8 and other actions of the Commission mandated or authorized by the Compact.

(e) These Rules of Practice and Procedure extend to the following areas of Commission responsibility and regulation:

- Article 1—Comprehensive Plan.
- Article 2—Water Resources Program.
- Article 3—Project Review Under Section 3.8 of the Compact.

- Article 4—(Reserved).
- Article 5—Appeals or Objections to Decisions of the Executive Director in Water Quality Cases.
- Article 6—Administrative and Other Hearings.
- Article 7—Penalties and Settlements in Lieu of Penalties.
- Article 8—Public Access to the Commission's Records and Information.
- Article 9—General Provisions.

(f) These rules are subject to Commission revision and modification from time to time as the Commission may determine. The Commission reserves the right to waive any Rule of Practice and Procedure it determines should not be applicable in connection with any matter requiring Commission action. All actions by the Commission, however, shall comply fully with the applicable provisions of the Compact.

3. Subpart A—Comprehensive Plan is revised to read as follows:

Subpart A—Comprehensive Plan

- Sec.
- 401.1 Scope.
- 401.2 Concept of the Plan.
- 401.3 Other agencies.
- 401.4 Project applications and proposed revisions and changes.
- 401.5 Review of applications.
- 401.6 Proposed revisions and changes.
- 401.7 Further action.
- 401.8 Public Projects under Article 11 of the Compact.
- 401.9 Custody and availability.

§ 401.1 Scope.

This subpart shall govern the submission, consideration, and inclusion of projects into the Comprehensive Plan.

§ 401.2 Concept of the Plan.

(a) The Comprehensive Plan shall be adopted, revised and modified as provided in Sections 3.2 and 13.1 of the Compact. It is the Commission's responsibility to adopt the Comprehensive Plan, after consultation with water users and interested public bodies, for the immediate and long-range development and uses of the water resources of the Basin. The Plan shall include the public and private projects and facilities which the Commission determines are required for the optimum planning, development, conservation, utilization, management and control of the water resources of the Basin to meet present and future needs. In addition to the included projects and facilities, the Comprehensive Plan consists of the statements of policies, and programs that the Commission determines are necessary to govern the proper development and use of the River Basin. The documents within the Comprehensive Plan expressing the

Commission's policies and programs for the future, including the means for carrying them out, may be set forth through narrative text, maps, charts, schedules, budgets and other appropriate means.

(b) Specific projects and facilities and statements of policy and programs may be incorporated, deleted or modified from time to time to reflect changing conditions, research results and new technology. The degree of detail described in particular projects may vary depending upon the status of their development.

§ 401.3 Other agencies.

Projects of the federal agencies affecting the water resources of the Basin, subject to the limitations in Section 1.4 of the Compact, shall be governed by Section 11.1 of the Compact. Projects of the signatory states, their political subdivisions and public corporations affecting the water resources of the Basin, shall be governed by the provisions of Section 11.2 of the Compact.

§ 401.4 Project applications and proposed revisions and changes.

(a) Applications for inclusion of new public projects and the deletion or alteration of previously included public projects may be submitted by signatory parties and agencies or political subdivisions thereof. Owners or sponsors of privately owned projects may submit applications for the inclusion of new private projects and the deletion or alteration of previously included private projects in which the applicant has an interest. The Commission may also receive and consider proposals for changes and additions to the Comprehensive Plan which may be submitted by any agency of the signatory parties, or any interested person, organization, or group. Any application or proposal shall be submitted in such form as may be required by the Executive Director to facilitate consideration by the Commission.

(b) Applications for projects shall include at least the following information:

- (1) Purpose or purposes, including quantitative measures of physical benefit anticipated from the proposal;
- (2) The location, physical features and total area required.
- (3) Forecast of the cost or effect on the utilization of water resources;
- (4) Relation to other parts of the existing Comprehensive Plan;
- (5) A discussion of conformance with Commission policies included in the Comprehensive Plan; and

(6) A discussion of the alternatives considered.

§ 401.5 Review of applications.

Following staff study, examination, and review of each project application, the Commission shall hold a public hearing upon notice thereon as provided in paragraph 14.4(b) of the Compact and may take such action on a project application as it finds to be appropriate.

§ 401.6 Proposed revisions and changes.

Proposals for changes and additions to the Comprehensive Plan submitted by any agency of the signatory parties or any interested person, organization or group shall identify the specific revision or change recommended. In order to permit adequate Commission consideration of any proposal, the Executive Director may require such additional information as may be needed. Review or consideration of such proposals shall be based upon the recommendation of the Executive Director and the further direction of the Commission.

§ 401.7 Further action.

The Commission will review the Comprehensive Plan in its entirety at least once every six years from the date of the initial adoption of the Comprehensive Plan (March 28, 1962). Such review may include consideration of proposals submitted by the signatory parties, agencies or political subdivision thereof or other interested parties. The amendments, additions, and deletions adopted by the Commission will be compiled and the Plan as so revised shall be made available for public inspection.

§ 401.8 Public Projects under Article 11 of the Compact.

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

(b) Any public project not having a substantial effect on the water resources of the Basin, as defined in subpart C of

this part, may proceed without reference to Article 11 of the Compact.

§ 401.9 Custody and availability.

The Comprehensive Plan shall be and remain in the custody of the Executive Director. The Plan, including all maps, charts, description and supporting data shall be and remain a public record open to examination during the regular business hours of the Commission, under such safeguards as the Executive Director may determine to be necessary to preserve and protect the Plan against loss, damage or destruction. Copies of the Comprehensive Plan or any part or parts thereof shall be made available by the Executive Director for public sale at a price covering the cost of production and distribution.

4. Subpart C—Project Review Under Section 3.8 of the Compact is revised to read as follows:

Subpart C—Project Review Under Section 3.8 of the Compact

Sec.

- 401.31 Scope.
- 401.32 Concept of 3.8.
- 401.33 Administrative agreements.
- 401.34 Submission of project required.
- 401.35 Classification of projects for review under Section 3.8 of the Compact.
- 401.36 Water supply projects—
Conservation requirements.
- 401.37 Sequence of approval.
- 401.38 Form of referral by State or Federal agency.
- 401.39 Form of submission of projects not requiring prior approval by State or Federal agencies.
- 401.40 Informal conferences and emergencies.
- 401.41 Limitation of approval.

§ 401.31 Scope.

This subpart shall govern the submission and review of projects under Section 3.8 of the Delaware River Basin Compact.

§ 401.32 Concept of 3.8.

Section 3.8 is intended to protect and preserve the integrity of the Comprehensive Plan. This section of the Compact provides:

“No project having a substantial effect on the water resources of the basin shall hereafter be undertaken by any person, corporation or governmental authority unless it shall have been first submitted to and approved by the Commission, subject to the provisions of Sections 3.3 and 3.5. The Commission shall approve a project whenever it finds and determines that such project would not substantially impair or conflict with the Comprehensive Plan and may modify and approve as modified, or may disapprove any such project whenever it finds and determines that the project would substantially impair or conflict with such Plan. The Commission shall provide by regulation for the procedure of submission,

review and consideration of projects, and for its determinations pursuant to this section. Any determination of the Commission hereunder shall be subject to judicial review in any court of competent jurisdiction.”

§ 401.33 Administrative agreements.

The Executive Director is authorized and directed to enter into cooperative Administrative Agreements with federal and state regulatory agencies concerned with the review of projects under federal or state law as follows:

(a) To facilitate the submission and review of applications and the determinations required under Section 3.8 of the Compact;

(b) To avoid unnecessary duplication of staff functions and hearings required by law; and

(c) For such other and different purposes as he may deem feasible and advantageous for the administration of the Compact or any other law.

§ 401.34 Submission of project required.

Any project which may have a substantial effect on the water resources of the Basin, except as provided in paragraph (d) of this section, shall be submitted to the Commission for a determination as to whether the project impairs or conflicts with the Comprehensive Plan, as follows:

(a) Where the project is subject to review by a state or federal agency which has entered into an Administrative Agreement with the Commission, such project will be referred to the Commission in accordance with the terms of the Administrative Agreement, and appropriate instructions will be prepared and issued by the Executive Director for guidance of project sponsors and applicants.

(b) Where no other state or federal agency has jurisdiction to review and approve a project, or no Administrative Agreement is in force, the project sponsor shall apply directly to the Commission.

(c) Any project proposal, which may have a substantial effect on the water resources of the Basin, may be received and reviewed by the staff informally in conference with the project sponsor during the preliminary planning phase to assist the sponsor to develop the project in accordance with the Commission's requirements.

(d) Whenever a project sponsored by one of the signatory parties, or by any agency, political subdivision or public corporation thereof, has been included in the Water Resources Program in the "A List" classification, the project, to the extent of such inclusion and as described in the Program, shall be

deemed approved for the purposes of Section 3.8 of the Compact.

(e) Whenever a project is subject to review and approval by the Commission under this section, there shall be no substantial construction activity thereon, including related preparation of land, unless and until the project has been approved by the Commission; provided, however, that this prohibition shall not apply to the drilling of wells for purposes of obtaining geohydrologic data, nor to in-plant control and pretreatment facilities for pollution abatement.

§ 401.35 Classification of projects for review under Section 3.8 of the Compact.

(a) Except as the Executive Director may specially direct by notice to the project owner or sponsor, or as a state or federal agency may refer under paragraph (c) of this section, a project in any of the following classifications will be deemed not to have a substantial effect on the water resources of the Basin and is not required to be submitted under Section 3.8 of the Compact:

(1) The construction of new impoundments or the enlargement or removal of existing impoundments, for whatever purpose, when the storage capacity is less than 100 million gallons;

(2) A withdrawal from ground water for any purpose when the daily average gross withdrawal during any 30 consecutive day period does not exceed 100,000 gallons;

(3) A withdrawal from impoundments or running streams for any purpose when the daily average gross withdrawal during any 30 consecutive day period does not exceed 100,000 gallons;

(4) The construction of new domestic sewage treatment facilities or alteration or addition to existing domestic sewage treatment facilities when the design capacity of such facilities is less than a daily average rate of 10,000 gallons per day in the drainage area to Outstanding Basin Waters and Significant Resource Waters or less than 50,000 gallons per day elsewhere in the Basin; and all local sewage collector systems and improvements discharging into authorized trunk sewage systems;

(5) The construction of new facilities or alteration or addition to existing facilities for the direct discharge to surface or ground waters of industrial wastewater having design capacity of less than 10,000 gallons per day in the drainage area to Outstanding Basin Waters and Significant Resource Waters or less than 50,000 gallons per day elsewhere in the Basin; except where

such wastewater contains toxic concentrations of waste materials;

(6) A change in land cover on major ground water infiltration areas when the amount of land that would be altered is less than three square miles;

(7) Deepening, widening, cleaning or dredging existing stream beds or relocating any channel, and the placement of fill or construction of dikes, on streams within the Basin except the Delaware River and tidal portions of tributaries thereto, and streams draining more than one state;

(8) Periodic maintenance dredging;

(9) Encroachments on streams within the Basin caused by:

(i) Floating docks and anchorages and buoys and navigational aids;

(ii) Temporary construction such as causeways, cofferdams and falsework required to facilitate construction on permanent structures;

(10) Bridges and highways unless they would pass in or across an existing or proposed reservoir or recreation project area as designated in the Comprehensive Plan;

(11) Liquid petroleum products pipelines and appurtenances designed to operate under pressures less than 150 psi; local electric distribution lines and appurtenances; local communication lines and appurtenances; local natural and manufactured gas distribution lines and appurtenances; local water distribution lines and appurtenances; and local sanitary sewer mains, unless such lines would involve significant disturbance of ground cover affecting water resources;

(12) Electric transmission or bulk power system lines and appurtenances; major trunk communication lines and appurtenances; natural and manufactured gas transmission lines and appurtenances; major water transmission lines and appurtenances; unless they would pass in, on, under or across an existing or proposed reservoir or recreation project area as designated in the Comprehensive Plan; unless such lines would involve significant disturbance of ground cover affecting water resources;

(13) Liquid petroleum products pipelines and appurtenances designed to operate under pressures of more than 150 psi, unless they would pass in, on, under or across an existing or proposed reservoir or recreation project area as designated in the Comprehensive Plan, or in, on, under or across any stream within the Basin; unless such lines would involve significant disturbance of ground cover affecting water resources;

(14) Landfill projects, unless no state-level review and permit system is in effect; broad regional consequences are

anticipated; or the standards or criteria used in state level review are not adequate to protect the water of the Basin for the purposes prescribed in the Comprehensive Plan;

(15) Draining, filling or otherwise altering marshes or wetlands when the area affected is less than 25 acres; provided; however, that areas less than 25 acres shall be subject to Commission review and action;

(i) Where neither a state nor a federal level review and permit system is in effect, and the Executive Director determines that a project is of major regional or interstate significance requiring action by the Commission, or

(ii) When a Commissioner or the Executive Director determines that the final action of a state or federal permitting agency may not adequately reflect the Commission's policy as to wetlands of the Basin. In the case of a project affecting less than 25 acres for which there has been issued a state or federal permit, a determination to undertake review and action by the Commission shall be made no later than 30 days following notification of the Commission of such permit action. The Executive Director, with the approval of the Chairman, may at any time within the 30-day period inform any permit holder, signatory party or other interested party that the Commission will decline to undertake review and action concerning any such project;

(16) The diversion or transfer of water from the Delaware River Basin (exportation) whenever the design capacity is less than a daily average rate of 100,000 gallons;

(17) The diversion or transfer of water into the Delaware River Basin (importation) whenever the design capacity is less than a daily average rate of 100,000 gallons except when the imported water is wastewater;

(18) The diversion or transfer of wastewater into the Delaware River Basin (importation) whenever the design capacity is less than a daily average rate of 50,000 gallons; and

(19) Temporary or short term projects determined to have non-substantial impact on the water resources of the Basin by the Executive Director.

(b) All other projects which have or may have a substantial effect on the water resources of the Basin shall be submitted to the Commission in accordance with this part for determination as to whether the project impairs or conflicts with the Comprehensive Plan. Among these are projects involving the following (except as provided in paragraph (a) of this section):

(1) Impoundment of water;

(2) Withdrawal of ground water;

(3) Withdrawal of water from impoundment or streams;

(4) Diversion of water into or out of the Basin;

(5) Deepening or widening of existing stream beds, channels, anchorages, harbors or turning basins, or the construction of new or enlarged channels, anchorages, harbors or turning basins, or the dredging of the bed of any stream or lake and disposal of the dredged spoil, when the nature or location of the project would affect the quantity or quality of ground or surface waters, or fish and wildlife habitat;

(6) Discharge of pollutants into surface or ground waters of the Basin;

(7) Facilities designed to intercept and transport sewage to a common point of discharge; and pipelines and electric power and communication lines;

(8) Facilities for the direct discharge to surface or ground waters of industrial wastewater;

(9) Projects that substantially encroach upon the stream or upon the 100-year flood plain of the Delaware River or its tributaries;

(10) Change in land cover on major ground water infiltration areas;

(11) Hydroelectric power projects, including pumped storage projects;

(12) Projects or facilities of Federal, state and local agencies such as highways, buildings and other public works and improvements, affecting the water and related land resources of the Basin;

(13) Draining, filling or otherwise altering marshes or wetlands;

(14) Regional wastewater treatment plans developed pursuant to the Federal Water Pollution Control Act;

(15) Landfills and solid waste disposal facilities affecting the water resources of the Basin;

(16) State and local standards of flood plain regulation;

(17) Electric generating or cogenerating facilities designed to consumptively use in excess of 100,000 gallons per day of water during any 30-day period; and

(18) Any other project that the Executive Director may specify direct by notice to the project sponsor or land owner as having a potential substantial water quality impact on waters classified as Special Protection Waters.

(c) Whenever a state or federal agency determines that a project falling within an excluded classification (as defined in paragraph (a) of this section) may have a substantial effect on the water resources of the Basin, such project may be referred by the state or federal agency to the Commission for action under this part.

(d) Except as otherwise provided by § 401.39 the sponsor shall submit an application for review and approval of a project included under paragraph (b) of this section through the appropriate agency of a signatory party. Such agency will transmit the application or a summary thereof to the Executor, pursuant to Administrative Agreement, together with available supporting materials filed in accordance with the practice of the agency of the signatory party.

§ 401.36 Water supply projects—Conservation requirements.

Maximum feasible efficiency in the use of water is required on the part of water users throughout the Basin. Effective September 1, 1981 applications under Section 3.8 of the Compact for new water withdrawals subject to review by the Commission shall include and describe water-conserving practices and technology designed to minimize the use of water by municipal, industrial and agricultural users, as provided in this section.

(a) Applications for approval of new withdrawal from surface or ground water sources submitted by a municipality, public authority or private water works corporation whose total average withdrawals exceed one million gallons per day shall include or be in reference to a program prepared by the applicant consisting of the following elements:

(1) Periodic monitoring of water distribution and use, and establishment of a systematic leak detection and control program;

(2) Use of the best practicable water-conserving devices and procedures by all classes of users in new construction or installations, and provision of information to all classes of existing users concerning the availability of water-conserving devices and procedures; and

(3) A contingency plan including use priorities and emergency conservation measures to be instituted in the event of a drought or other water shortage condition. Contingency plans of public authorities or private water works corporations shall be prepared in cooperation with, and made available to, all municipalities in the area affected by the contingency plan, and shall be coordinated with any applicable statewide water shortage contingency plans.

(b) Programs prepared pursuant to paragraph (a) of this section shall be subject to any applicable limitations of public utility regulations of the

signatory party in which the project is located.

(c) Applications for approval of new industrial or commercial water withdrawals from surface or ground water in excess of an average of one million gallons per day shall contain

(1) A report of the water-conserving procedures and technology considered by the applicant, and the extent to which they will be applied in the development of the project; and

(2) A contingency plan including emergency conservation measures to be instituted in the event of a drought or other water shortage. The report and contingency plan shall estimate the impact of the water conservation measures upon consumptive and non-consumptive water use by the applicant.

(d) Applications for approval of new agricultural irrigation water withdrawals from surface or ground water sources in excess of one million gallons per day shall include a statement of the operating procedure or equipment to be used by the applicant to achieve the most efficient method of application of water and to avoid waste.

(e) Reports, programs and contingency plans required under this section shall be submitted by the applicant as part of the permit application to the state agency having jurisdiction over the project, or directly to the Commission in those cases where the project is not subject to the jurisdiction of a state agency. State agencies having jurisdiction over a project that is subject to the provisions of this section shall determine the adequacy and completeness of the applicant's compliance with these requirements and shall advise the Commission of their findings and conclusions.

§ 401.37 Sequence of approval.

A project will be considered by the Commission under Section 3.8 of the Compact either before or after any other state or federal review, in accordance with the provisions of the Administrative Agreement applicable to such project.

§ 401.38 Form of referral by State or Federal agency.

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

(a) The Commission will rely on the appropriate agency in each state to

review and regulate the potability of all public water supplies. Applications before the Commission should address the impact of the withdrawal, use and disposal of water on the water resources of the Basin.

(b) The Commission will rely on signatory party reviews as much as possible and generally the Commission will not review the performance standards of individual components of treatment processes but will require compliance with all policies in the Comprehensive Plan including all applicable Water Quality Standards.

§ 401.39 Form of submission of projects not requiring prior approval by State or Federal agencies.

Where a project does not require approval by any other State or Federal agency, or where such approval is required but an Administrative Agreement is not in force, the project shall be submitted directly to the Commission for review and determination of compatibility with the Comprehensive Plan, in such form of application, with such supporting documentation, as the Executive Director may reasonably require for the administration of the provisions of the Compact. These shall include without limitation thereto:

(a) *Exhibits to accompany application.* The application shall be accompanied by the following exhibits:

- (1) Abstract of proceedings authorizing project, where applicable;
- (2) General map showing specific location and dimension of a structural project, or specific language of a standard or policy in the case of a non-structural proposal;
- (3) Section of the United States Geological Survey topographic map showing the territory and watershed affected;

(4) Maps, drawings, specifications and profiles of any proposed structures, or a description of the specific effects of a non-structural project;

(5) Written report of the applicant's engineer showing the proposed plan of operation of a structural project;

(6) Map of any lands to be acquired or occupied;

(7) Estimate of the cost of completing the proposed project, and sufficient data to indicate a workable financial plan under which the project will be carried out; and

(8) Analyses and conclusions of regional water supply and wastewater investigations.

(b) *Letter of transmittal.* The application shall be accompanied by a letter of transmittal in which the applicant shall include a list of all

enclosures, the names and addresses to which communications may be directed to the applicant, and the names and addresses of the applicant's engineer and counsel, if any.

(c) Unless otherwise ordered by the Commission, two copies of the application and accompanying papers shall be filed. If any application is contested, the Commission may require additional copies of the application and all accompanying papers to be furnished by the applicant. In such cases, certified copies of photographic prints or reproduction may be used.

§ 401.40 Informal conferences and emergencies.

(a) Whenever the Executive Director shall deem necessary, or upon request of the applicant, an informal conference may be scheduled to explain, supplement or review an application.

(b) In the event of an emergency requiring immediate action to protect the public interest or to avoid substantial and irreparable injury to any private person or property, and the circumstances do not permit a review, hearing and determination in the regular course of the regulations in this part, the Executive Director with the approval of the chairman of the Commission may issue an emergency certificate authorizing an applicant to take such action as the Executive Director may deem necessary and proper in the circumstances, pending review, hearing and determination by the Commission as otherwise required in this part.

§ 401.41 Limitation of approval.

(a) Approval by the Commission under this part shall expire three years from the date of Commission action unless prior thereto the sponsor has expended substantial funds (in relation to the cost of the project) in reliance upon such approval. An approval may be extended or renewed by the Commission upon application.

(b) Any application that remains dormant (no proof of active pursuit of approvals) for a period of three years from date of receipt, shall be automatically terminated. Any renewed activity following that date will require submission of a new application.

Subpart D—[Removed and Reserved.]

- 5. Subpart D is removed and reserved.
- 6. Subpart E is revised to read as follows:

Subpart E—Review in Water Quality Cases

- Sec.
- 401.71 Scope.
- 401.72 Notice and request for hearing.
- 401.73 Form of request.
- 401.74 Form and contents of report.

- 401.75 Protection of trade secrets;
Confidential information.
401.76 Failure to furnish report.
401.77 Informal conference.
401.78 Consolidation of hearings.

§ 401.71 Scope.

This subpart shall apply to the review, hearing and decision of objections and issues arising as a result of administrative actions and decisions taken or rendered by the Executive Director under the Compact and the regulations in this chapter. Any hearings shall be conducted pursuant to the provisions of subpart F of this part.

§ 401.72 Notice and request for hearing.

The Executive Director shall serve notice of an action or decision by him under the Compact and the regulations in this chapter by personal service or certified mail, return receipt requested. The affected discharger shall be entitled (and the notice of action or decision shall so state) to show cause at a Commission hearing why such action or decision should not take effect. A request for such a hearing shall be filed with the Secretary of the Commission not more than 30 days after service of the Executive Director's determination. Failure to file such a request within the time limit shall be deemed to be an acceptance of the Executive Director's determination and a waiver of any further hearing.

§ 401.73 Form of request.

(a) A request for a hearing may be informal but shall indicate the name of the individual and the address to which an acknowledgment may be directed. It may be stated in such detail as the objector may elect. The request shall be deemed filed only upon receipt by the Commission.

(b) When the Executive Director determines that the request for a hearing is insufficient to identify the nature and scope of the objection, or that one or more issues may be resolved, reduced or identified by such action, he may require the objector to prepare and submit to the Commission, within such reasonable time (not less than 30 days) as he may specify, a technical report of the facts relating to the objection prior to the scheduling of the hearing. The report shall be required by notice in writing served upon the objector by certified mail, return receipt requested, addressed to the person or entity filing the request for hearing at the place indicated in the request.

§ 401.74 Form and contents of report.

(a) *Generally.* A request for a report under this subpart may require such information and the answers to such

questions as may be reasonably pertinent to the subject of the action or determination under consideration.

(b) *Waste loading.* In cases involving objections to an allocation of the assimilative capacity of a stream, wasteload allocation for a point source, or load allocation for a new point source, the report shall be signed and verified by a technically qualified person having personal knowledge of the facts stated therein, and shall include such of the following items as the Executive Director may require:

(1) A specification with particularity of the ground or grounds for the objection; and failure to specify a ground for objection prior to the hearing shall foreclose the objector from thereafter asserting such a ground at the hearing;

(2) A description of industrial processing and waste treatment operational characteristics and outfall configuration in such detail as to permit an evaluation of the character, kind and quantity of the discharges, both treated and untreated, including the physical, chemical and biological properties of any liquid, gaseous, solid, radioactive, or other substance composing the discharge in whole or in part;

(3) The thermal characteristics of the discharges and the level of heat in flow;

(4) Information in sufficient detail to permit evaluation in depth of any in-plant control or recovery process for which credit is claimed;

(5) The chemical and toxicological characteristics including the processes and/or indirect discharges which may be the source of the chemicals or toxicity;

(6) An analysis of all the parameters that may have an effect on the strength of the waste or impinge upon the water quality criteria set forth in the Compact and the regulations in this chapter, including a determination of the rate of biochemical oxygen demand and the projection of a first-stage carbonaceous oxygen demand;

(7) Measurements of the waste as closely as possible to the processes where the wastes are produced, with the sample composited either continually or at frequent intervals (one-half hour or, where permitted by the Executive Director, one hour periods), so as to represent adequately the strength and volume of waste that is discharged; and

(8) Such other and additional specific technical data as the Executive Director may reasonably consider necessary and useful for the proper determination of a wasteload allocation.

§ 401.75 Protection of trade secrets; Confidential information.

No person shall be required in such report to divulge trade secrets or secret processes. All information disclosed to any Commissioner, agent or employee of the Commission in any report required by this part shall be confidential for the purposes of Section 1905 of Title 18 of the United States Code which provides:

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association; or permits any income return or copy thereof to be seen or examined by any persons except as provided by law; shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and shall be removed from office or employment. June 25, 1948, C.645, 62 Stat. 791.

§ 401.76 Failure to furnish report.

The Executive Director may, upon five days' notice to the objector dismiss the request for a hearing as to any objector who fails to file a complete report within such time as shall be prescribed in the Director's notice.

§ 401.77 Informal conference.

Whenever the Executive Director deems it appropriate, he may cause an informal conference to be scheduled between an objector and such member of the Commission staff as he may designate. The purpose of such a conference shall be to resolve or narrow the ground or grounds of the objections.

§ 401.78 Consolidation of hearings.

Following such informal conferences as may be held, to the extent that the same or similar grounds for objections are raised by one or more objectors, the Executive Director may in his discretion and with the consent of the objectors, cause a consolidated hearing to be scheduled at which two or more objectors asserting that ground may be heard.

7. Subpart F is revised to read as follows:

Subpart F—Administrative and Other Hearings

Sec.

401.81 Hearings generally.

401.82 Authorization to conduct hearings.

- 401.83 Hearing Officer.
 401.84 Hearing procedure.
 401.85 Staff and other expert testimony.
 401.86 Record of proceedings.
 401.87 Assessment of costs; Appeals.
 401.88 Findings, report and Commission review.
 401.89 Action by the Commission.
 401.90 Appeals from final Commission action; Time for appeals.

§ 401.81 Hearings generally.

(a) *Scope of subpart.* This subpart shall apply to contested cases required to be held under subparts C and E of this part, to the conduct of other administrative hearings involving contested cases and to proceedings which Commission regulation or the Commission directs be conducted pursuant to this subpart.

(b) *Definition of contested case.* "Contested case" means a proceeding in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are involved. Such a proceeding may involve personnel matters, project applications and docket decisions but shall not extend to the review of any proposed or adopted rule or regulation of the Commission.

(c) *Requests for hearings.* Any person seeking a hearing to review the action or decision of the Commission or the Executive Director may request a hearing pursuant to the provisions of this subpart provided such a request is received by the Commission within thirty (30) days of the action or decision which is the subject of the requested hearing. Requests shall be submitted in writing to the Secretary of the Commission and 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. Any request filed more than thirty days after an action or decision will be deemed untimely and such request for a hearing shall be considered denied unless the Commission by unanimous vote otherwise directs. Receipt of requests for hearings, pursuant to this subpart, whether timely filed or not, shall be submitted by the Secretary to the Commissioners for their information.

(d) *Optional joint hearings.* Whenever designated by a department, agency or instrumentality of a signatory party, and within any limitations prescribed by the designation, a Hearing Officer designated pursuant to this subpart 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 and, if requested, of his findings and recommendations. Neither the Hearing Officer nor the Delaware 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 signatory party (other than the Delaware River Basin Compact).

(e) *Schedule.* The Executive Director shall cause the schedule for each hearing to be listed in advance upon a "hearing docket" which shall be posted in public view at the office of the Commission.

(f) *Notice of hearing.* Notice of any hearing to be conducted pursuant to this subpart shall comply with the provisions of Section 14.4(b) of the Compact relating to public notice unless otherwise directed by the Commission.

§ 401.82 Authorization to conduct hearings.

(a) *Written requests for hearings.* Upon receipt of a written request for a hearing pursuant to this subpart, the Executive Director shall review the record available with regard to the action or decision for which a hearing is requested. Thereafter, the Executive Director shall present the request for a hearing to the Commission for its consideration. The Commission shall grant a request for a hearing pursuant to this subpart if it determines that an adequate record with regard to the action or decision is not available, the contested case involves a determination by the Executive Director or staff which requires further action by the Commissioner that the Commission has found that an administrative hearing 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.

(b) *Commission directed hearings.* This subpart shall be applicable to any proceeding which Commission regulation or the Commission directs be conducted in accordance with the provisions, of this subpart.

§ 401.83 Hearing Officer.

(a) *Generally.* Hearings shall be conducted by one or more members of the Commission, by the Executive Director, or by such other Hearing Officer as the Chairman may designate, except as provided in paragraph (b) of this section.

(b) *Wasteload allocation cases.* In cases involving the allocation of the assimilative capacity of a stream:

(1) The Executive Director shall appoint a hearing board of at least two persons. One of them shall be nominated by the water pollution control agency of the state in which the discharge originates, and he shall be chairman. The board shall have and exercise the powers and duties of a Hearing Officer;

(2) A quorum of the board for purposes of the hearing shall consist of two members; and

(3) Questions of practice or procedure during the hearing shall be determined by the Chairman.

§ 401.84 Hearing procedure.

(a) *Participation in the hearing.* In any hearing, the person requesting the hearing shall be deemed an interested party and shall be entitled to participate fully in the hearing procedure. In addition, any person whose legal rights may be affected by the decision rendered in a contested case 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 a contested case or desiring to present comments concerning the subject matter of the Hearing for inclusion in the record may submit a written statement to the Commission. Any interested party may request the right to examine or cross-examine any person who submits a written statement. In the absence of a request for examination of such person, all written statements submitted shall be included within the record and such statements may be relied upon to the extent determined by the Hearing Officer or the Commission.

(b) *Powers of the Hearing Officer.* The Hearing Officer shall:

(1) Rule upon offers of proof and the admissibility of evidence, regulate the course of the hearings, hold conferences for the settlement or simplification of procedures or issues, and shall schedule submission of documents, briefs and the time for the hearing.

(2) Cause each witness to be sworn or to make affirmation.

(3) Limit the number of times any witness may testify, limit repetitious examination or cross-examination of witnesses or the extent to which corroborative or cumulative testimony shall be accepted.

(4) Exclude irrelevant, immaterial or unduly repetitious evidence, but the interested parties shall not be bound by technical rules of evidence and all relevant evidence of reasonably probative value may be received.

(5) Require briefs and oral arguments to the extent determined necessary which shall be included as part of the record unless otherwise ordered by the Hearing Officer.

§ 401.85 Staff and other expert testimony.

(a) *Presentation on behalf of the Commission.* The Executive Director shall arrange for the presentation of testimony by the Commission's technical staff and other experts, as he may deem necessary or desirable, to incorporate in the record or support the administrative action, determination or decision which is the subject of the hearing.

(b) *Expert witnesses.* An interested party may submit in writing to the Hearing Officer the report and proposed testimony of an expert witness. No expert report or proposed testimony, however, shall be included in the record if the expert is not available for examination unless the report and proposed testimony shall have been provided to the Commission and all interested parties prior to the hearing and the Commission and interested parties have waived the right of cross-examination.

(c) The Executive Director may designate for inclusion in the record those records of the Commission which the Executive Director deems relevant to a decision in a contested case or to provide an understanding of applicable Commission policies, regulations or other requirements relating to the issues in the contested case. The designation of such Commission documents shall be provided to all interested parties prior to the hearing.

§ 401.86 Record of proceedings.

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 applicant, objector, or any other person who is a party to these 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

applicant, objector, 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.

§ 401.87 Assessment of costs; Appeals.

(a) Whenever a hearing is conducted under this subpart, the costs thereof, as defined in this subpart, shall be assessed by the Hearing Officer to the party requesting the hearing unless apportioned between the interested parties where cost sharing is deemed fair and equitable by the Hearing Officer. For the purposes of this section costs include all incremental costs incurred by the Commission, including, but not limited to, hearing examiner and expert consultants reasonably necessary in the matter, stenographic record, rental of a hearing room and other related expenses.

(b) Upon scheduling of a matter for hearing, the Secretary shall furnish to the applicant and/or interested parties a reasonable estimate of the costs to be incurred under this section. The applicant and/or interested parties 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 signatory state.

(c) An appeal of the assessment of costs may be submitted in writing to the Commission within ten (10) days of the assessment. A copy of the appeal shall be filed with the Secretary and served on all interested parties. The filing of said appeal shall not stay the Hearing.

§ 401.88 Findings, report and Commission review.

(a) The Hearing Officer shall prepare a report of his findings and recommendations. In the case of an objection to a waste load allocation, the Hearing Officer shall make specific findings of a recommended allocation which may increase, reduce or confirm the Executive Director's determination. The report shall be served by personal service or certified mail (return receipt requested) upon each party to the hearing or its counsel unless all parties have waived service of the report. The applicant and any objector may file objections to the report within 20 days after the service upon him of a copy of the report. A brief shall be filed together with any objections. The report of the Hearing Officer together with objections and briefs shall be promptly submitted to the Commission. The Commission may require or permit oral argument upon such submission prior to its decision.

(b) The Executive Director, in addition to any submission to the Hearing Officer, may also submit to the Commission staff comments upon, or a response to, the Hearing Officer's findings and report and, where appropriate, a draft docket or other recommended Commission action. Interested parties shall be served with a copy of such submission and may have not less than ten (10) days to respond before action by the Commission.

§ 401.89 Action by the Commission.

(a) The Commission will act upon the findings and recommendations of the Hearing Officer pursuant to law.

(b) Commission Counsel shall assist the Commission with its review of the hearing record and the preparation of a Commission decision to the extent directed to do so by the Chairman.

(c) The determination of the Commission will be in writing and shall be filed 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. All such records, papers and documents may be examined by any person at the office of the Commission, and shall not be removed therefrom except temporarily upon the written order of the Secretary after the filing of a receipt therefor in form prescribed by the Secretary. Copies of any such records and papers may be made in the office of the Commission by any person, subject to such reasonable safeguards for the protection of the records as the Executive Director may require.

§ 401.90 Appeals from final Commission action; Time for appeals.

Any party participating in a hearing conducted pursuant to the provisions of this subpart may appeal any final Commission action. To be timely, such an appeal must be filed with an appropriate federal court, as provided in Article 15.1(p) of the Commission's Compact, within forty-five (45) days of final Commission action.

Dated: November 21, 1997.

Susan M. Weisman,

Secretary.

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RAILROAD RETIREMENT BOARD

20 CFR Part 255

RIN 3220-AA44

Recovery of Overpayments

AGENCY: Railroad Retirement Board.