RULES AND REGULATIONS

Title 7—AGRICULTURE

DEPARTMENT OF AGRICULTURE

[7 PA. CODE CH. 59]

Deletion of Grade AA Regulatory Standards for Milk

The Department of Agriculture (Department) amends Chapter 59 (relating to milk sanitation) by deleting all provisions that allow milk to be designated as Grade AA.

The statutory authority for this regulatory amendment is the act of July 2, 1935 (P. L. 589, No. 210) (31 P. S. §§ 645—660f), which authorizes the Department to regulate the production, processing, storage and packaging of milk to safeguard human health.

The current Grade AA standard for milk is in direct conflict with the requirements of the Nationwide compact under which Grade A milk moves unimpeded in interstate commerce. The regulatory amendment is necessary to keep Pennsylvania-produced milk and milk products competitive in interstate commerce.

The Commonwealth is a participant in the National Conference of Interstate Milk Shippers (NCIMS). The NCIMS is an organization created by the United States Food and Drug Administration Milk Safety Branch, state regulatory agencies and the Nation's dairy industry to standardize regulations to ensure the safety of the milk supply and to facilitate the interstate shipment of milk. Prior to NCIMS, individual states—and even individual municipalities—had established milk sanitation and testing requirements that impeded the flow of milk in interstate commerce. The NCIMS developed a uniform set of standards—the Grade A Pasteurized Milk Ordinance (Grade A PMO)—which, when adhered to by a member state, allow that state's milk to move in interstate commerce to other member states without those other member states imposing any further sanitation or testing requirements.

The Grade A PMO explicitly prohibits the use of super grade designations such as Grade AA with respect to milk produced by member states. The ultimate result of the Department's failure to eliminate the Grade AA standard for milk would be restrictions on Pennsylvania-produced milk and milk products in interstate commerce. Grade A milk represents over 90% of this Commonwealth's dairy output. Grade AA milk, by contrast, accounts for less than 5% of the Commonwealth's dairy output. On balance, the Department agrees the Grade AA standard for milk must be deleted to protect the Commonwealth's dairy industry.

Comments

Notice of proposed rulemaking was published at 26 Pa.B. 3546 (July 27, 1996), and provided for a 30-day public comment period.

Comments were received from a dairy operation that has been producing milk to meet Grade AA standards since 1994 and a dairy operation that supports the elimination of Grade AA standards. The House Agriculture and Rural Affairs Committee (House Committee) also offered comments.

The Independent Regulatory Review Commission (IRRC) offered no objections, comments or suggestions with respect to the proposed rulemaking.

A dairy operation that has been producing milk to meet Grade AA standards since 1994 raised the question: "What do we tell our customers now that we can't sell Grade AA milk?" The Department acknowledges that the elimination of Grade AA milk standards may, at the outset, cause some confusion in the marketplace as consumers who were familiar with the Grade AA designation on the containers of milk they purchase discover they can no longer purchase milk in containers bearing that designation. Any adverse impact should be blunted, to some extent, by the fact that no other containers of milk being offered for sale in this Commonwealth will bear the Grade AA designation.

The same dairy operation expressed apprehension that the family farms which ship milk to that operation might be hurt by the elimination of Grade AA milk standards. The dairy operation had paid these suppliers approximately $480,000 in quality premiums for Grade AA milk since 1994.

The Department responds that the dairy operation remains free to pay premiums for milk that exceeds Grade A standards. It is generally accurate that—all other factors being identical—milk with a lower bacterial count will keep longer than milk with a higher bacterial count. It is also generally accurate that bacterial count ultimately impacts upon the taste of milk. A dairy operation remains free to pay producers a premium based on this added value.

The same dairy operation expressed concern that it would be difficult to derive any economic benefit from producing milk that exceeds Grade A milk standards if it cannot express on its product labeling that the milk is somehow above average.

The Department responds that a milk producer remains free to put accurate, nonmisleading statements as to milk composition and testing on its milk container labeling.

Another dairy operation offered its support for the elimination of Grade AA milk standards.

The House Committee asked whether the Department believes it has fully pursued the alternative of amending the Grade A PMO to allow all participating states the option of voluntary Grade AA standards for milk. The Department responds that it has pursued this possibility and that the attainment of this revision to the Grade A PMO is not likely to occur in the foreseeable future. As a group, state regulatory agencies are concerned primarily with the safety of milk for human consumption—and not the keeping quality or taste of the milk. Milk produced in accordance with Grade A standards is safe.

The milk processor has a direct financial interest in producing milk that is of good taste and keeping quality. If a milk processor believes there is a benefit to be derived from testing milk more often than is called for under the Grade A PMO, it remains free to do so. It may not designate this milk Grade AA, though.

The House Committee offered its reluctant concurrence with the Department's proposed deletion of Grade AA milk standards:

> . . .The committee does, however, recognize the fact that because of the substantial negative implications for the entire milk industry of the NCIMS ruling that Pennsylvania's Grade AA standards violate the Pas-

teurized Milk Ordinance, the department has very little choice but to proceed with this proposal. . .

When all factors are considered, we do acknowledge that the adverse impact of failing to repeal Grade AA standards far outweighs our reservations expressed herein. . .

For the reasons expressed in the proposed rulemaking and in this final rulemaking the Department deems it necessary to enter this order.

Fiscal Impact

Commonwealth

The amendments will impose no costs and have no fiscal impact upon the Commonwealth.

Political Subdivisions

The amendments will impose no costs and have no fiscal impact upon political subdivisions.

Private Sector

The amendments may impose some costs upon the Pennsylvania-based dairy processors that currently produce milk meeting Grade AA requirements. Although the amendments will decrease the testing costs borne by these dairy processors, these processors might suffer some short-term financial loss as consumers familiar with the Grade AA designation on milk containers encounter Grade A designations for the first time. It is not known whether these losses would be entirely offset by decreased testing costs.

The result of failing to proceed with these amendments would be to subject Pennsylvania-produced milk and milk products to embargoes or inspection requirements of other NCIMS member states. The adverse fiscal impact on this Commonwealth's dairy industry would be immediate and dramatic, and would far outweigh any adverse fiscal impact that the Commonwealth's Grade AA dairy processors might suffer as a result of these amendments.

General Public

The amendments will impose no costs and have no fiscal impact upon the general public.

Paperwork Requirements

The amendments will not result in an appreciable increase in paperwork.

Contact Person

Further information is available by contacting the Department of Agriculture, 2301 North Cameron Street, Harrisburg, Pa. 17110-9408, Attention: James Dell.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on July 16, 1996, the Department submitted a copy of the notice of proposed rulemaking published at 26 Pa.B. 3546, to IRRC and to the Chairpersons of the House and Senate Standing Committees on Agriculture and Rural Affairs for review and comment. In compliance with section 5(b.1) of the Regulatory Review, the Department also provided IRRC and the Committees with copies of the comments received, as well as other documentation.

In preparing these final-form regulations, the Department has considered the comments received from IRRC, the Committees and the public.

These final-form regulations were deemed approved by the Senate Committee and the House Committee on November 12, 1996, and were approved by IRRC on November 12, 1996, in accordance with section 5(c) of the Regulatory Review Act.

Findings

The Department finds that:

(1) Public notice of intention to adopt the final-form regulations encompassed by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and that the comments received were considered.

(3) Any modification made to these regulations in response to comments received did not enlarge the purpose of the proposed amendments published at 26 Pa.B. 3546.

(4) The amendments meets the requirements of Executive Order 1996-1, "Regulatory Review and Promulgation."

(5) The adoption of the amendments in the manner provided by this order is necessary and appropriate for the administration of the authorizing statute.

Order

The Department, acting under the authorizing statute, orders that:

(a) The regulations of the Department, 7 Pa. Code Chapter 59, are amended by amending §§ 59.1, 59.12, 59.52 and 59.310 to read as set forth at 26 Pa.B. 3546.

(b) The Secretary of Agriculture shall submit this order and 26 Pa.B. 3546 to the Office of General Counsel and the Office of Attorney General for approval as required by law.

(c) The Secretary of Agriculture shall certify this order and 26 Pa.B. 3546 and deposit them with the Legislative Reference Bureau as required by law.

(4) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

CHARLES C. BROSIUS,
Secretary

Fiscal Note: Fiscal Note 2-108 remains valid for the final adoption of the subject regulations.

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 26 Pa.B. 5915 (December 7, 1996).)

[Pa.B. Doc. No. 96-2088. Filed for public inspection December 13, 1996, 9:00 a.m.]

Title 22—EDUCATION

DEPARTMENT OF EDUCATION

[22 PA. CODE CH. 142]

Grants for Public Library Construction

The Department of Education (Department), Commonwealth Libraries, State Library of Pennsylvania (Commonwealth Libraries) is responsible for promulgating regulations relating to public library facilities grant programs authorized by the Keystone Recreation, Park and Conservation Fund Act (act) (32 P. S. §§ 2011—2024). The Department is publishing Chapter 142 (relating to grants

for public library facilities) in final form. The statutory authority for this chapter appears in the act and in The Library Code (24 P. S. §§ 4101—4503), as follows: section 8(a) of the act (32 P. S. § 2018(a)), states "Each agency shall promulgate rules and regulations that are necessary to carry out the purposes of this act consistent with the criteria set forth in this act," and section 201(15) of The Library Code (24 P. S. § 4201(15)), gives the State Librarian the power and duty "Generally, to promulgate rules and regulations for the purpose of carrying out the powers and duties relating to libraries as are imposed by law. . . ."

These regulations provide rules of a public library facilities grant program to pay costs of planning, acquisition, rehabilitation or development (that is, new construction, improvement, alteration or renovation required for and compatible with the physical development or improvement of land or buildings for library purposes). The Department will make grants to municipalities to benefit their public libraries.

Purpose of the Regulations

These final-form regulations are connected with Keystone Recreation, Park and Conservation Fund (Fund) grant programs and, specifically, will govern the program of grants for the planning, acquisition, development and rehabilitation of public library facilities. The Fund is being developed from the proceeds of $50 million Commonwealth bond issue and the dedication of 15% of the revenue from the State Realty Transfer Tax. A portion of this Fund is being allocated to the Department to use for the planning, acquisition, development and rehabilitation of public library facilities. Two million five hundred thousand dollars from the bond revenues and 4% of the dedicated portion of the State Realty Transfer Tax are being allocated to the Department to provide grants to municipalities to pay up to 50% of eligible project costs.

Over a 3-year period beginning October 1994, the Commonwealth has been issuing bonds. The proceeds of the bond issue are being added to the Fund and made available to the Department of Education for purposes of the act. An amount of the State Realty Transfer Tax has been and will continue to be transferred to the Fund at the end of each month beginning July 31, 1994. Moneys transferred to the Fund from State Realty Transfer Tax revenues were made available to the Department during the fiscal year beginning July 1, 1995.

The final-form regulations set up rules for a competitive grant program. The Department and the Commonwealth Libraries will administer the grant program according to the final-form regulations and will provide grants from the Fund to municipalities for public library projects as authorized by section 8(d) of the act. Municipalities will be eligible to apply for grants to benefit their public libraries.

Explanation of Regulatory Requirements/Comment and Response Summary

The final-form regulations provide specific rules for a grant program for planning, acquisition, development and rehabilitation of public library facilities. During the public comment period, the Department received two letters, one recommending a rewording of three sections, the other not recommending change. The regulations were also reviewed by the Senate and House Education Committees and the Independent Regulatory Review Commission (IRRC). The House Education Committee and IRRC both made suggestions for revisions to the regulations. Because there were many comments, this preamble will review the comments and the Department's responses section by section.

Section 142.1 (relating to definitions) defines words and terms. The proposed regulations listed words and terms defined in the act and stated they would retain those definitions. IRRC recommended definitions be provided for all terms listed. The Department responded by adding definitions for the following terms: "acquisition," "administrative expenses," "agency," "development," "fund," "land," "planning," "rehabilitation" and "technical assistance." At IRRC's suggestion, the Department revised the act's definitions for "acquisition," "agency," "development," "planning" and "rehabilitation" to apply only to the public library facilities program. In addition, at IRRC's recommendation the Department added two new definitions, for "indirect costs" and "minor civil division."

The proposed regulations defined "sponsoring municipality" in a way that differed from the definition of "municipality" in the act. Because the word "sponsoring" does not appear in The Library Code or regulations, IRRC recommended it be deleted and the word "municipality" be defined as it is in the act. The Department agreed and made this change. In addition, wherever the term "sponsoring municipality" was used throughout the proposal it was changed to "municipality."

The act defines "library" but not "public library." However, the term "public library" is used in section 8(d) of the act: "The Department of Education shall provide grants from bond revenues and realty transfer tax revenues to municipalities and appropriate organizations to pay up to 50% of the eligible project cost for planning, acquisition, development and rehabilitation of public libraries." The Department wanted, in regulation, to provide a definition of public library that would be consistent with policy followed for other Federal and State library programs administered by the Commonwealth Libraries. Section 142.1 defined a "public library" as "a library or library system receiving State aid under Article III of The Library Code (24 P. S. §§ 4301—4304)." Providing grants for State-aided public library facilities helps to ensure the Commonwealth Libraries allocates the limited funds available to projects with the most potential for long term success.

IRRC questioned this approach and asked the statutory basis for this more restrictive definition. The statutory basis is found in section 201(15) of The Library Code (24 P. S. § 4201(15)), which gives the State Librarian the power and duty "Generally, to promulgate rules and regulations for the purpose of carrying out the powers and duties relating to libraries as are imposed by law. . . ." IRRC staff agreed that, as the custodial agency responsible for administering the grant funds, the Commonwealth Libraries could set restrictions consistent with prudent use of State funds. However, IRRC maintained the legally correct place for the restrictions would be the section dealing with eligible grantees rather than in the definitions section. The Department, therefore, has modified the definition to remove reference to libraries receiving State aid. A new eligibility requirement has been added to § 142.6 (relating to eligible matching funds) as described in this Preamble.

IRRC questioned the definition of the term "sponsoring school district" and recommended its deletion because the Legislature did not intend school districts to benefit from the Fund. The Department agrees the Fund is not to be used for school libraries and has deleted the definition. However, there are a few public libraries in this Common-

wealth that receive most of their operating funds from the school district. These libraries meet the definition of "library" in the act, meet all standards for receipt of public library State aid and meet the definition of "public library" in the final form regulations. Section 142.4 (relating to eligible grantees) was revised to ensure these libraries are eligible to benefit from Fund grants.

The regulations state the Commonwealth Libraries will develop a long-range plan to ensure the grant program is equitable and meets the needs of all regions of this Commonwealth (See, § 142.2). The proposal stated this plan would include a Statewide needs assessment, an action plan to meet identified needs, policies, funding priorities, criteria for grant awards and procedures for administration. The plan was also to include provision of technical assistance by the agency, monitoring of ongoing projects and evaluation of completed projects.

IRRC questioned some proposed components of the plan, specifically priorities, criteria for grant awards and procedures for administration. IRRC cited a Commonwealth Court decision in *DER v. Rushton Mining*, 591 A.2d 1168 (1991), in which the Court defined the differences between statements of policy and regulations by adopting the "binding norm test." IRRC stated that if funding would be contingent on priorities, criteria for grant awards or grant administration procedures, then they would be binding norms more properly in regulation rather than in a long-range plan. The Department did not mean for these terms to describe binding norms. All eligibility requirements applicants must meet to receive grants are in the act or the final-form regulations. The words were intended to refer to instances when the Commonwealth Libraries must apply judgement, as in evaluating competing grant applications when only a small percentage can be funded. Since the legal meaning of these terms—priorities, criteria, procedures—seems at odds with the Department's intended use of them, the terms were deleted from the final-form regulations. This change should remove any misconception the long-range plan is in any way intended to constitute a regulation or administrative law.

IRRC also recommended the initial plan and subsequent updates be published in the *Pennsylvania Bulletin*. The Department has taken this suggestion and added publication of the plan in § 142.2(d). The Department agrees this will be a cost-effective method to disseminate the plan. IRRC suggested further that a public comment period be held, after which the plan be published in final form. The Department prefers to take a different, and potentially more effective approach. The planning process will be very participatory. The regulations specify consultation with the Advisory Council on Library Development (a representative group of library professionals and laypersons appointed by the Governor), with municipal officials, and with library representatives. The Commonwealth Libraries has found using such a process ensures public participation and comment more effectively than requesting public comment in the *Pennsylvania Bulletin*. As evidence of this, one might consider the result of publication as a proposed rulemaking of these regulations, which deal with eligibility, matching funds and other issues important to those needing grants. Despite the Commonwealth Libraries' attempt to widely publicize the proposed rulemaking by mailing it to every public library and municipality in the State, these regulations generated only two letters from the public, one suggesting no change and one suggesting small changes. Commonwealth Libraries held a public hearing as announced in the *Pennsylvania Bulletin*, but no one came to testify.

The regulations specify eligible project costs. See § 142.3 (relating to eligible project costs). In the proposed regulations, this section included definitions for "planning," "acquisition," "development" and "rehabilitation." The definitions were deleted from this section in the final-form regulations because they now appear in the definition section.

Section 142.4 defines eligible grantees. The proposal included a statement that eligibility would be contingent upon inclusion of the library's development in a county plan for library service. IRRC recommended that, unless The Library Code is amended to include a requirement for county plans for library service, this part of the section be deleted. The Department agreed and deleted the subsection. Using exact language suggested by IRRC staff, the Department revised § 142.4(a) to be more consistent with the wording of the act. Similarly, the Department added § 142.4(c) and revised the wording of proposed § 142.4(c), now numbered § 142.4(d), using word-for-word the suggestions of IRRC staff. Finally, at IRRC's staff's suggestion, § 142.4(e) was added. This new subsection allows school district sponsored public libraries—not school libraries—to benefit from grants.

Finally a new subsection was added to require the public library benefitting from the grant to receive State aid under Article III of The Library Code. If a municipality receives a grant to build a new facility or renovate/rehabilitate an existing building for a new library that previously did not exist, this subsection requires that library to be eligible for and to apply for State aid the year it opens to the public. For the following reasons, the Department believes this eligibility restriction is necessary for the responsible and prudent administration of State grant funds:

(1) Providing grants for only State-aided public libraries is a policy followed consistently in all other Commonwealth Libraries grant programs.

(2) Allowing grants to benefit only State-aided libraries is a prudent use of scarce State funds. State-aided libraries are more likely to be viable organizations with reliable sources of operating funds. These regulations introduce some modicum of quality control because State-aided libraries must meet standards in Chapter 131 (relating to general provisions; State aid).

(3) The definition of "library" in the act establishes no minimum level of funding, staffing, materials or resources. Under this definition, an all volunteer library with a few old books, open 1 or 2 hours per week can call itself a public library. Many people do not realize that there are many non-State-aided public libraries fitting this description in this Commonwealth. In some parts of this Commonwealth, these tremendously inadequate libraries have proliferated. Often these organizations are not incorporated. While the motives of the people who open these libraries are noble, the results are pale imitations of true, adequate public library service. Providing State funds to these uncertain operations would not be responsible.

(4) Public library service is a voluntary (not mandated) local initiative in this Commonwealth. It has not been the experience in this Commonwealth that if a library building is constructed, new operating funds will automatically flow from the community. In fact, local support of public libraries is a problem, with Pennsylvania ranking 41st in its support of libraries as compared with all other states (National Center for Education Statistics, 1993). The Commonwealth Libraries wants to ensure grants made

from the Fund will build and rehabilitate facilities that continue to be operated as public libraries.

(5) This Commonwealth has more than 600 State-aided public library outlets (counting branch libraries). While few areas need more libraries, it is a goal of the Commonwealth Libraries to develop stronger public libraries and improved library facilities. Limiting grant awards to State-aided outlets moves the Commonwealth in the direction of this goal.

Proposed § 142.5 (relating to funding guidelines) elicited comments from a member of the public, Representative William R. Lloyd, Jr. and IRRC. The Commonwealth Libraries anticipates demand for grants will be greater than available funds, and expects it will make grants for less than 50% of the costs of many projects. More affluent communities are better able to provide a larger share of project costs. Therefore, the proposed section stated the Commonwealth Libraries would give priority to economically distressed communities in awarding grants to pay a full 50% of project costs, the maximum share allowed by the act. The section listed criteria to determine economically distressed communities. These criteria were intended to measure the health of the local economy using authoritative and timely data for three economic indicators: market value, personal income and unemployment rate. The intent was for grant applicants to be considered in relation to the entire State and the other applicants in determining the relative economic health of their communities.

Representative Lloyd commented that the factors in § 142.5(d) would be equally valid in ranking applications from communities that are not economically distressed. He suggested the Department consider setting forth priorities to be used in ranking applications. IRRC agreed with his assessment, and recommended a ratio or percentage range be used to replace the terms "low" (as in low market value) and "high" (as in high unemployment). The Department concurred and revised the proposal accordingly. The final-form regulations include percentile measurements to define economic distress.

The measurement for unemployment includes the term "minor civil division" because the Department of Labor and Industry provides unemployment statistics for certain size minor civil divisions. IRRC was concerned about the undefined use of this term. Although the term is used by the United States Census and has a specific meaning in this Commonwealth, the Department could not find a legal definition to reference. Therefore, the final-form regulations add a definition of the term to the definitions section.

IRRC additionally suggested the word "ensure" in § 142.5(b) and (c) be replaced by "demonstrate." The Department adopted this change and agrees it makes stronger the requirement for an applicant to prove matching funds are available.

The final-form regulations describe eligible matching funds. See § 142.6 (relating to eligible matching funds). The proposal allowed certain specified costs incurred up to 2 years prior to the grant award to be used as matching funds. See § 142.6(d)(5). This Department recognizes that the applicant must incur a number of costs, such as the services of a building consultant, architect or engineer, prior to submission of a grant application as part of the process of developing that application. The proposal also allowed other costs, such as acquisition and site preparation, if incurred up to 2 years prior to the grant award. Because of State bidding and contracting requirements, prevailing wage law and other State requirements for construction projects, neither the proposal nor the final-form regulations allow actual construction work done before the award of the grant to be used for matching funds.

The 2-year limit drew comment from Representative Lloyd, who stated the up-front costs could be significant for a small library. Given the competition for grants, an applicant might need to apply several different times before receiving a grant. He suggested the Department allow the recovery of costs under § 142.6(d)(4) and (5) if they were incurred within 2 years of filing of the initial application. IRRC agreed with Representative Lloyd, but suggested the Department might consider a ceiling on the maximum number of years for which the provisions of § 142.6(d)(4) and (5) might be valid. The Department revised the final-form language to accord with Representative Lloyd's suggested wording. It considered putting in a ceiling, but decided one would not be necessary. It has been the experience of the Commonwealth Libraries that after the agency turns a grant application down once or twice, the applicant either drops the project if it was not essential or finds local funds to complete it without a grant. Often, public library rehabilitation or construction projects are motivated by necessity that does not allow time to wait for the next grant application opportunity. A leaking roof demands immediate attention.

Considering the financial constraints faced by many Commonwealth municipalities and public libraries, the Commonwealth Libraries has taken an expensive approach to encourage and reward local effort and initiative. Therefore, matching funds may include third party contributions and costs, rules for which are found in § 142.7 (relating to third-party in-kind contributions and third-party costs). The final-form regulations also provide methods for valuation of donated services, § 142.8 (relating to valuation of donated services) and donated equipment, buildings and land, § 142.9 (relating to valuation of donated equipment, buildings and land). The Department intends these provisions to provide particular benefit for small communities in meeting matching fund requirements.

IRRC commented on use of the term "indirect costs" in § 142.7. It questioned how the Department defined the term and requested clarification in the final-form rulemaking. The Department provided this clarification by defining the term in the definitions section.

IRRC commented on § 142.8(a) which allows the municipality to value volunteer services provided by individuals at rates consistent with those ordinarily paid for similar work in the municipality or public library. IRRC questioned how values for services would be applied consistently and suggested the Department provide additional standards and clarity for what constitutes "volunteer service." The Department examined the proposal and decided sufficient clarity about what constitutes volunteer service already existed in the definition of "third-party in-kind contributions": "Property or services that benefit a grant-supported project and that are contributed without charge to the grant recipient by a third party other than a municipality, a school district, or a public library." It is true the value of services may be different in different labor markets, but the Department does not see this as a problem. For example, if an engineer or carpenter donates his services, the rates charged may vary in different areas of this Commonwealth, but this would also be true if they did not donate their services.

IRRC also suggested the Department add a requirement that volunteer service counted toward satisfying matching requirements must be directly related to the project. The Department notes that § 142.7(a) already states "The municipality may use third party in-kind contributions and third party costs to count towards satisfying the matching requirement only when those contributions and costs are directly related to the public library planning, acquisition, development or rehabilitation project. The municipality may not use third party in-kind contributions and third party costs for operation of the public library to count towards satisfying the matching requirement." The addition of a phrase such as "including volunteer services" would be redundant.

IRRC commented on § 142.8(a) which allows the municipality to include a reasonable amount for fringe benefits and asked what the Department will consider reasonable. The Department considers reasonable an allowance for fringe benefits similar to the benefits paid to actual employes. In some cases, the valuation is for services not ordinarily performed by municipal or library employes, therefore the Department prefers not to make an inflexible rule about exactly how the grantee must calculate fringe benefits.

IRRC also requested a justification for the inconsistency in allowance for fringe benefits in the valuation of donated services between § 142.8(a) and (b). Section 142.8(a) allows the municipality to include a reasonable amount for fringe benefits when calculating the value of service donated by individual volunteeers working directly for the library or municipiality on the project. Section 142.8(b) does not allow fringe benefits to be used in calculating the value of service donated by an employer furnishing one of its employes free of charge. The Department has two reasons that justify different rules for the two circumstances. First, these subsections are similar to the regulations governing the Federal library construction grant funds. The Department anticipates some municipalities will receive combination grants using Federal dollars to pay a partial match for the State dollars. It will be easier for these grantees to comply in valuation of donated services if they can follow one consistent set of rules. Second, monitoring the reasonableness of fringe benefits paid by the municipality or the library is easier for the Department than verifying these figures for private companies that are not recipients of the grant contract or under any obligation to the granting agency.

There were no comments about § 142.9.

Section 142.10 (relating to title to site) addresses the issue of title to site. The proposal attempted to ensure, once a project is completed, that the new or rehabilitated structure would remain in use as a public library for 50 years or the useful life of the facility, whichever is shorter. Representative Lloyd, the House Education Committee and IRRC all commented on the need to change this section. Some grants will be made for fixtures or nonroutine maintenance—projects that may have a useful life of less than 50 years. The Department concurred and revised the wording of this section to reflect the comments. The final-form regulations use the exact language recommended by Representative Lloyd and the House Education Committee.

IRRC had a further recommendation concerning § 142.10. It was noted section 10 of the act (24 P. S. § 2010) prohibits grant recipients from disposing of property acquired under the act for other than the purpose approved in the grant application without prior written approval from the agency head. The section also requires a refund with interest if the disposition or conversion of property occurs without agency permission. The Department complied with this recommendation by adding subsection (d), which states the action the Department may take when property is disposed of without prior approval of the Department. The wording for this subsection is based on the language in the act.

The proposed regulations provided rules for beginning, completing and supervising projects. See §§ 142.11—142.13 (relating to beginning the grant project; completing the grant project; and supervision and inspection by the municipality). These sections were intended to safeguard the interests of the Commonwealth by helping to ensure projects would begin soon after the grant award, be completed without undue delay and be adequately supervised.

Section 142.11(a) states the municipality shall begin work on a grant project within a reasonable time after the grant award. IRRC questioned how the Department would determine "reasonable" and requested clarification of the term. The Department found it difficult to clarify the term to apply to all projects. Grantees often delay construction projects for reasonable causes. For example, a recent Federal grant made by the Commonwealth Libraries to the Free Library of Philadelphia was delayed when it was discovered the architect's plans to excavate the basement could not be used because the space under the existing building was solid granite. The grantee requested a completely understandable and reasonable delay while the city retained the services of a different architect and revised the plans. Other times projects have been delayed due to discovery of asbestos or lead paint, both of which require abatement procedures. Another project was delayed when the contractor found unexpected and unmapped sewer lines in the area to be excavated for the library addition. Usually judging whether a delay is reasonable or not depends on the individual project. Since all grants are made through State contracts, and since these contracts include beginning and ending dates, the Department decided to deal with the issue of timely project starts through the contractual process. Section 142.11(a) was deleted from the final-form regulations.

There were no comments on § 142.12.

IRRC commented on § 142.13 and suggested the Department consider requiring that supervision and inspection be conducted by an engineer certified by the State Architects Licensure Board (49 Pa. Code Chapter 9). However, it was later discovered this Board does not certify engineers. The Department revised the regulation to indicate certification by the appropriate board. While the Department agreed that requiring this level of inspection would be prudent for many projects, it would not be cost effective for very small nonroutine maintenance projects. For example, it would probably not be necessary to have this sort of inspection for installation of floor tiles or fluorescent lighting fixtures. The Department did not want the regulation to be burdensome to small communities with small projects. In the final-form regulations, therefore the Department added language requiring inspection by an engineer or architect when the supervision is determined to be necessary by the Commonwealth Libraries.

Section 142.14 (relating to operation and maintenance of facility) is intended to ensure the applicant will be able to operate and mainitain the new or improved facility. It is not in the interest of the Commonwealth to provide funds to improve library facilities which must then close

or severely reduce hours open to the public because of insufficient operating funds. IRRC suggested clarifying the requirement by strengthening the language to read that the grantee must certify assurance on a form provided by the Department. The Department agreed and made the change in the final-form regulations.

IRRC also suggested the Department consider consolidating § 142.14 with § 142.5. Section 142.5 deals with funding guidelines for grant projects and not with operational funding of public libraries. It is important to distinguish between project funding, which consists of the grant and local matching funds, and operational funding, which may not be counted as project costs. The Commonwealth Libraries wants to make sure the rules for funding of grant projects are treated completely separately from any rules dealing with operational funding of a library once the project is complete. Therefore, the Department decided to keep § 142.14 separate and distinct.

Entities Affected

Municipalities, as defined in section 13 of the act (32 P. S. § 2013), which sponsor public libraries, will be affected by these regulations because they will be eligible to apply for grants. Public libraries will be affected because they will be the beneficiaries of the grants for their facilities. Local libraries, as defined in section 102 of the Library Code (24 P. S. § 4102) and library systems, as defined in § 141.24(b)(1) (relating to Library systems) are considered public libraries affected by the final-form regulations.

Cost and Paperwork Requirements

Commonwealth

The Department, Commonwealth Libraries, Library Development will incur costs of administering a grant program. Costs include professional staff to conduct needs assessments, develop a coordinated Statewide plan, provide technical advice to applicants, review project applications including architectural drawings, monitor funded projects and evaluate results. Estimated costs for administering the program will be approximately $80,000 per year for the first 3 years and $60,000 per year thereafter, once the Statewide needs assessment and plan have been completed. The estimated cost for each year is 5% of the total amount available for the public library facilities grant program, as permitted by section 8 of the act.

Municipalities

Municipalities that are awarded grants to improve their public library facilities will save costs because this program will pay up to 50% of the costs of these projects. This will amount to approximately $1.5 million in benefits for the first 3 years of the program, and approximately $1.1 million thereafter.

The paperwork required will be similar to reports currently required for other Commonwealth Libraries grant programs. Quarterly narrative and financial reports are typically two or three pages long and not burdensome to complete. The final report includes a one page financial section and a narrative describing project accomplishments, problems and evaluation. No separate financial audit will be required.

Private Sector

These regulations do not directly involve the private sector. It is not expected these regulations will impose any additional costs on the architects, building consultants and general construction contractors who may work on projects for municipal grantees.

Effective Date

These regulations will be effective as soon as they are published in final form.

Sunset Date

No sunset date has been established because the act has established an ongoing program. The Commonwealth Libraries will continue to administer the public library facilities grant program in accordance with these regulations unless changes to the program or public library needs, or both, necessitate revisions.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Department submitted a copy of the notice of proposed rulemaking published at 24 Pa.B. 6149 (December 10, 1994), to IRRC and to the Chairpersons of the House and Senate Committees on Education for review and comment. In compliance with section 5(b.1) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments received, as well as other documentation.

In preparing these final-form regulations, the Department has considered the comments received from IRRC, the Committees and the public.

These final-form regulations were deemed approved by the House Education Committee and the Senate Education Committee on October 31, 1996. IRRC met on November 7, 1996 and approved the final-form regulations in accordance with section 5(c) of the Regulatory Review Act.

Findings

The Department, Commonwealth Libraries, finds that:

(1) Public notice of the intention to adopt these regulations was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2.

(2) The regulations are necessary and appropriate for the administration of the authorizing statute.

Order

The Department of Education, Commonwealth Libraries, orders that:

(a) The regulations of the Department, 22 Pa. Code, are amended by adding §§ 142.1—142.14 to read as set forth in Annex A.

(b) The Secretary of Education shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form as required by law.

(c) The Secretary of Education shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

EUGENE W. HICKOK,
Secretary

Fiscal Note: Fiscal Note 6-251 remains valid for the final adoption of the subject regulations.

(*Editor's Note:* For the text of the order of IRRC relating to this document, see 26 Pa. B. 5766 (November 23, 1996).)

Annex A

TITLE 22. EDUCATION

PART IX. STATE LIBRARY AND ADVISORY COUNCIL ON LIBRARY DEVELOPMENT

Subpart B. ADVISORY COUNCIL ON LIBRARY DEVELOPMENT

CHAPTER 142. GRANTS FOR PUBLIC LIBRARY FACILITIES

Sec.

§ 142.1. Definitions.

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

Acquisition—The purchase or lease with an option to purchase of land or buildings for public library uses.

Act—The Keystone Recreation, Park and Conservation Fund Act (32 P. S. §§ 2011—2024).

Administrative expenses—An expenditure of funds, including expenditures of Commonwealth agencies for personnel and other operating costs necessary to accomplish the purposes of the act.

Agency—The Department of Education.

Commonwealth Libraries—The State Library of Pennsylvania, part of the Department of Education.

Development—New construction, improvement, alteration or renovation required for and compatible with the physical development, improvement of land or buildings for public library purposes.

Fund—The Keystone Recreation, Park and Conservation Fund established by the act.

Indirect costs—Costs including administration or utilities that are not readily identifiable as particular, eligible costs directly related to the project.

Land—Real property, including improvements thereon, right-of-ways, water, riparian and other rights, easements, privileges and any other physical property or rights of interest of any kind or description relating to or connected with real property.

Library—A free, public, nonsectarian library, whether established and maintained by a municipality or by a private association, corporation or group, which serves the informational, educational and recreational needs of the residents of the area for which its governing body is responsible by providing free access, including free lending and reference services, to an organized and currently useful collection of printed items and other materials and to the services of a staff trained to recognize and provide for these needs.

Minor civil division—A city, borough, incorporated town, township, home rule municipality or other local government within a county for which the Department of Labor and Industry provides unemployment statistics.

Municipality—A county, city, borough, incorporated town, township, home rule municipality or an official agency created by the foregoing units of government under the laws of the Commonwealth. Actions of an authority or other official agency taken under the act shall be first approved by the participating local governing bodies in that authority or other official agency.

Planning—Master site development plans, feasibility studies, maintenance, management plans, and other plans and documents, including long-range plans for the allocation of grants, useful to municipalities and State agencies in the planning, development, operation, protection and management of their public library facilities and programs. Planning may be performed by State agency staff or by outside consultants.

Public library—A library, as defined in section 3 of the act (32 P. S. § 2013), or library system, as defined in § 141.24(b)(1) (relating to library systems).

Rehabilitation—The improvement or restoration, excluding routine maintenance of existing public library facilities.

Routine maintenance—Recurring upkeep needed on a regular basis for physical facilities, including cleaning, minor repair of fixtures or structures, painting, regular servicing of heating, air conditioning or other equipment and landscape maintenance such as lawn care or pruning.

Technical assistance—The provision of grant and professional service to municipalities, organizations and citizens, including publications, video tapes, workshops, meetings, phone consultation and written and electronic communication.

Third-party in-kind contributions—Property or services that benefit a grant-supported project and that are contributed without charge to the grant recipient by a third party other than a municipality, a school district or a public library.

Third-party costs—Direct expenditures for property or services that benefit a grant-supported project and that are contributed without charge to the grant recipient by a third party other than a municipality, a school district or a public library.

§ 142.2. Long-range plan.

(a) Commonwealth Libraries, in consultation with the Advisory Council on Library Development, will prepare a 3 to 5 year long-range plan for the allocation of grants available to municipalities for public library planning, acquisition, development or rehabilitation from the Fund. In preparing the long-range plan, Commonwealth Libraries will consult with municipal officials and library representatives. The long-range plan will be reviewed each year by Commonwealth Libraries and modified as need dictates. The long-range plan will include the following components:

(1) A library facility needs assessment, including an analysis of the need in different geographical regions of this Commonwealth and of libraries serving various size municipalities, and a consideration of county library system plans.

(2) An action plan to meet the need for improved library facilities through the use of the Fund and other available moneys.

(3) Commonwealth Libraries' policies concerning the grants for public library facilities.

(4) A plan for Commonwealth Libraries' administration of the program, including provision of technical assistance, monitoring of ongoing projects and evaluation of completed projects.

(b) Grants to municipalities for public library planning, acquisition, development or rehabilitation will be made in accordance with the long-range plan.

(c) Commonwealth Libraries will incur administrative expenses to meet costs of activities listed in the component of the long-range plan described in subsection (a)(4), to meet costs of planning, and to meet other costs of grants administration.

(d) Commonwealth Libraries will publish the long-range plan and subsequent modifications to the long-range plan in the *Pennsylvania Bulletin*.

§ 142.3. Eligible project costs.

(a) Commonwealth Libraries, in accordance with the policies in its long-range plan for library facilities, may provide grants to pay for the following eligible project costs:

(1) Planning.

(2) Acquisition.

(3) Development.

(4) Rehabilitation.

(b) Grants may not be used for the following ineligible costs:

(1) Operating costs of a public library, including costs of purchasing books and other library materials, personnel costs and costs of routine maintenance.

(2) Costs of equipment or software, or both, to automate public library functions and catalogs unless the automation is part of the development or rehabilitation of a public library facility.

(3) Planning, acquisition, development or rehabilitation of facilities that are not public libraries. In the case of shared facilities, the grant and related matching funds may pay only for that portion of the facility to be used as a public library.

§ 142.4. Eligible grantees.

(a) A municipality that intends to plan, acquire, develop or rehabilitate a public library is eligible to apply for a grant.

(b) The public library for which a municipality applies for a grant shall have a formal, legal relationship with that municipality, either by being a department or unit of local government or through a contract describing mutual obligations and responsibilities.

(c) A municipality, alone or in cooperation with other municipalities, is eligible to apply for a grant for a public library funded by local tax revenue or monies raised by the levy of special taxes to establish or maintain, or both, a public library which directly provides public library service, delegates responsibility for public library service to a board of directors, or delegates responsibility for public library service to a nonprofit corporation.

(d) If a public library serves more than one municipality, the municipalities shall come to mutual agreement and designate one to apply for a grant for that library.

(e) When a public libary is sponsored by a school district or any entity other than a municipality, the municipality where the public library is located may apply for a grant for that public library.

(f) The public library that benefits from the grant shall be receiving State aid under Article III of the Library Code (24 P. S. §§ 4301—4304) at the time of the grant application and shall continue to receive State aid for the term of the grant. If the public library did not exist prior to the grant-funded project to acquire, plan, develop or rehabilitate its facility, that newly formed public library is eligible for and may apply to receive State aid under Article III of the Library Code when it opens to the public.

§ 142.5. Funding guidelines.

(a) Commonwealth Libraries will award grants from the Fund to municipalities to pay up to 50% of eligible public library project costs.

(b) The municipality shall demonstrate that sufficient matching funds from eligible sources are available to meet at least 50% of project costs.

(c) The municipality shall demonstrate that the grant award plus other available funds are sufficient to complete the proposed project.

(d) Commonwealth Libraries will give priority to economically distressed communities in awarding grants meeting 50% of costs and may award grants meeting a smaller percentage of project costs to municipalities whose local economies better enable local support of the project. For purposes of this grant program, in deciding whether a community is considered economically distressed, Commonwealth Libraries will be guided by one or more of the following criteria:

(1) The public library to benefit from the grant received equalization aid in the year of the grant application or will be eligible to receive equalization aid in the year following the grant application under section 303(b)(6) of the Library Code (24 P. S. § 4303(b)(6)).

(2) The municipality is a city, borough, incorporated town or township having a market value per capita below the twentieth percentile of all like cities, boroughs, incorporated town and townships, as certified annually by the State Tax Equalization Board.

(3) The municipality is a county or is located in a county having a personal income per capita below the twentieth percentile of all counties, as certified annually by the Department of Revenue.

(4) The municipality is a county or is located in a county or is a minor civil division with a population of 25,000 or higher having an average annual unemployment rate above the eightieth percentile of all counties or all minor civil divisions, as determined annually by the Department of Labor and Industry.

§ 142.6. Eligible matching funds.

(a) Commonwealth Libraries may award Federal library construction funds, when available, to pay additional portions of project costs and meet matching requirements of grants awarded from the Fund. Priority for these Federal grants will be given to municipalities in economically distressed communities, using criteria in § 142.5(d) (relating to funding guidelines).

(b) The municipality may use Federal funds, other than those awarded under subsection (a), which are available to it or to the public library, as matching funds, if the Federal funds are not already being used to match another State grant.

(c) The municipality may use State funds, other than those awarded from the Fund, and which are available to it or to the public library, as matching funds, if the funds

were not appropriated as compensation to public libraries under the Library Access Statewide Card Program or as library State-aid under terms of Article III of the Library Code (24 P. S. §§ 4301—4304).

(d) The municipality may use the following local monies, costs and contributions as matching funds:

(1) Local tax revenues.

(2) Proceeds from local bond issues.

(3) Cash contributions from individuals, corporations and others.

(4) The fair market value of land or buildings provided to the public library by the municipality up to 2 years previous to award of the grant. The market value shall be for the time at which the land or buildings were designated for the public library.

(5) Costs incurred by the municipality or the public library up to 2 years prior to filing of the initial application for the following:

(i) Services of a library building consultant, registered architect, engineering firm used in the development of plans for the project.

(ii) Acquisition of real estate as part of the project.

(iii) Physical site preparation.

(6) Third party in-kind contributions and third party costs which conform to the rules in §§ 142.7—142.9 (relating to third party in-kind contributions and third party costs; valuation of donated services; and valuation of donated equipment, buildings and land).

§ 142.7. Third party in-kind contributions and third party costs.

(a) The municipality may use third party in-kind contributions and third party costs towards satisfying the matching requirement only when those contributions and costs are directly related to the public library planning, acquisition, development or rehabilitation project. The municipality may not use third party in-kind contributions and third party costs for operation of the public library to count towards satisfying the matching requirement.

(b) If third party in-kind contributions and third party costs are used as matching funds, the municipality shall be able to verify those contributions and costs from its records or the records of the public library. The municipality shall show from the records how the value placed on third-party in-kind contributions was calculated. To the extent feasible, the municipality shall verify the value of volunteer services by using the same methods that the municipality or the public library uses to support the allocation of its regular personnel costs.

(c) The municipality may use third-party in-kind contributions towards satisfying the matching requirement only when, if the municipality or public library receiving the contributions were to pay for them, the payments would be eligible matching funds.

(d) The municipality may not use third-party in-kind contributions towards satisfying the matching requirement if they represent indirect costs.

§ 142.8. Valuation of donated services.

(a) The municipality shall value volunteer services provided by individuals to the municipality or public library at rates consistent with those ordinarily paid for similar work in the municipality or public library. If the municipality or public library does not have employes performing similar work, the municipality shall use rates consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, the municipality may include a reasonable amount for fringe benefits in the valuation.

(b) When an employer other than the municipality or public library furnishes free of charge the services of an employee in the employe's normal line of work, the municipality shall value the services at the employe's rate of pay exclusive of fringe benefits and the employer's overhead costs. If the services are in a different line of work, subsection (a) applies.

§ 142.9. Valuation of donated equipment, buildings and land.

(a) The municipality may count as matching funds the market value of donated equipment, buildings or land at the time of donation.

(b) If it is necessary to establish the market value of land or a building, Commonwealth Libraries may require that the market value be established by a certified real property appraiser and that the value be certified by the municipality and by the public library.

§ 142.10. Title to site.

(a) The municipality or public library shall have or obtain a full title or other interest in the site upon which the public library facility is or will be located, including right of access, that is sufficient to insure the undisturbed use and possession of the facility as a public library for 50 years or the useful life of the project to be funded by the grant, whichever is shorter.

(b) If the title to the site upon which the public library facility is or will be located is held by the municipality, the municipal officials shall pass a resolution or ordinance ensuring the undisturbed use of the facility as a public library for 50 years or the useful life of the project to be funded by the grant, whichever is shorter.

(c) If during the 50-year period, the municipality or public library desires that the facility be used for other than public library purposes, it may request a waiver from the State Librarian. In deciding whether to grant that waiver, the State Librarian will consider the public library's need for a facility and how that need will be met.

(d) Recipients of grants for public library facilities under the act may not dispose of nor at any time convert property acquired with the grant to other than the purposes approved in the project application without the prior written approval of the Commissioner of Libraries, the State Librarian. If disposition or conversion occurs without prior written approval, the State Librarian may require:

(1) The recipient to refund all grant funds for the particular project, including 10% annual interest compounded four times annually from the date the original grant-in-aid was received until it is repaid.

(2) Acquisition by the recipient of equivalent replacement land, as determined by the State Librarian.

§ 142.11. Beginning the grant project.

Before grant project work is advertised or placed on the market for bidding, the municipality shall get approval from Commonwealth Libraries of final working drawings and specifications.

§ 142.12. Completing the grant project.

(a) The sponsoring municipality shall complete its grant project within a reasonable time.

(b) The municipality shall complete the grant project in accordance with the grant application and approved drawings and specifications.

§ 142.13. Supervision and inspection by the municipality.

In the case of grants for development or rehabilitation, the municipality shall retain a licensed architect or professional engineer for supervising or inspecting at the project site to insure the work conforms to the approved drawings and specifications when the supervision is determined to be necessary by Commonwealth Libraries.

§ 142.14. Operation and maintenance of facility.

An authorized representative of the grantee shall sign a form provided by the Agency to assure that, when the project is completed, sufficient funds will be available for effective operation and maintenance of the public library.

[Pa.B. Doc. No. 96-2089. Filed for public inspection December 13, 1996, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 86]

Area Unsuitable for Surface Mining Activities; Squaw Run

The Environmental Quality Board (Board) by this order amends § 86.130(b) (relating to areas designated as unsuitable for mining). The amendment adds paragraph (17) designating a 450-acre tract of land located in Slippery Rock and Wayne Townships, Lawrence County, as unsuitable for surface mining operations.

This order was adopted by the Board at its meeting of August 20, 1996.

A. *Effective Date*

This amendment will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. *Contact Person*

For further information, contact Roderick A. Fletcher, P.E., Director, Bureau of Mining and Reclamation, Room 209, Executive House, P. O. Box 8461, Harrisburg, PA 17105-8461 (717) 787-5103 or Joseph Pizarchik, Assistant Counsel, Bureau of Regulatory Counsel, 9th Floor, Rachel Carson State Office Building, P. O. Box 8464, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T relay service by calling (800) 654-5984 (T.D.D. users) or (800) 654-5988 (voice users). This proposal is available electronically through the Department of Environmental Protection's (Department) Web site (http://www.dep.state.pa.us).

C. *Statutory Authority*

This final rulemaking is being made under the authority of the following acts: section 4.5(b)(3) of the Surface Mining Conservation and Reclamation Act (SMCRA) (52 P. S. § 1396.4e(b)(3)); section 6.1(b)(3) of the Coal Refuse Disposal Control Act (52 P. S. § 30.56a(b)(3)); and section 315(i)(3) of The Clean Streams Law (35 P. S. § 691.315(i)(3)) which all authorize designation of an area as unsuitable for mining if mining will affect renewable resource lands and result in substantial loss or reduction of productivity of a water supply, aquifer and aquifer recharge areas; and section 4.2(a) of SMCRA (52 P. S. § 1396.4b(a)) which provides for general rulemaking authority; section 3.2(a) of the Coal Refuse Disposal Control Act (52 P. S. § 30.53b(a)), which authorizes adoption of rules and regulations; section 5 of The Clean Streams Law (35 P. S. § 691.5), which authorizes adoption of rules and regulations; and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20) which authorizes the Board to promulgate the rules and regulations as may be determined by the Board to be necessary for the proper performance of the work of the Department; and section 1930-A of The Administrative Code of 1929 (71 P. S. § 510-30) which authorizes the Board to designate an area as unsuitable for mining.

D. *Background and Summary*

Section 522 of the Federal Surface Mining Control and Reclamation Act (30 U.S.C.A. § 1272) requires each state seeking primary jurisdiction from the Federal government to regulate surface coal mining to establish a procedure for the designation of areas as unsuitable for surface mining operations. The statutory authority for this procedure was created in the 1980 amendments to the authorizing acts as part of the Commonwealth's effort to obtain primacy over the regulation of coal mining. On October 10, 1980, the Board adopted Chapters 86—90 as part of the Commonwealth's effort to obtain primacy. These regulations were published at 10 Pa.B. 4789 (December 20, 1980). Chapter 86, Subchapter D (relating to areas unsuitable for mining) contains the Department's regulations for procedures and criteria for the designation of areas as unsuitable for surface mining operations. Several technical amendments were made to Subchapter D by the Board on April 20, 1982, and published at 12 Pa.B. 2473 (July 31, 1982). The Commonwealth obtained primacy on July 30, 1982 (47 FR 13050), and Chapters 86—90 went into effect on July 31, 1982 (12 Pa.B. 2382).

Under this legal authority, the Board has designated 16 areas as unsuitable for surface mining operations. For further information, see § 86.130(b)(1)—(16) published at 23 Pa.B. 5274 (October 30, 1993).

A petition requesting that a 450-acre tract of land located in Slippery Rock and Wayne Townships, Lawrence County, be designated as unsuitable for surface mining operations was received on May 24, 1993. The petition was submitted by Carl Thalgott and Dale Mackey who own, or have interests in, properties located within the petition area.

The petitioners alleged that private water supply sources, within the petition area, have been adversely affected by previous surface mining operations which caused degradation of groundwater aquifers and that further surface mining would cause additional losses in quality and quantity of water supplies for which no suitable replacements are available.

The Department conducted a study of the petition area and the petitioners' allegations of fact. The results of this study are presented in a document entitled "A Petition to Designate Areas Unsuitable for Mining, Petition # 37939901, Squaw Run, Slippery Rock and Wayne Townships, Lawrence County." The findings of the technical study are as follows:

Wells and springs, which derive recharge from aquifers at or above the Middle Kittanning coal seam, have high potential to be degraded by surface mining operations.

Private water wells have been degraded by surface mining to the point of requiring the mine operator to replace the wells.

A surface mining permit application to mine within the petition area was denied by the Department, partly because no suitable replacements for private water supplies were identified for wells, which could be affected by surface mining operations.

In light of those findings, the Board proposed to designate, by regulation, the 450-acre tract of land as unsuitable for all types of surface mining operations.

The proposed recommendation concerning this petition was presented to the Mining and Reclamation Advisory Board (MRAB) at its October 13, 1994, meeting where it was discussed. This final rulemaking was discussed by the MRAB at its meeting of April 25, 1996, and was approved for presentation to the Board.

The designation of this area as unsuitable for all surface mining operations provides assurance to the residents of the petition area that their private water supplies will not be degraded by further surface mining operations within the petition area.

E. *Summary of Comments and Responses on the Proposed Rulemaking*

Comments in support of the proposed rulemaking were received from the petitioners, Carl Thalgott and Dale Mackey. The petitioners cite the potential loss or degradation of private water supply sources if further mining were to occur in this area. The Department agrees with these comments and recommends designation of the petition area as unsuitable for all types of surface mining operations.

There were no comments in opposition to the proposed rulemaking.

F. *Benefits, Costs and Compliance*

Executive Order 1996-1 requires a cost/benefit analysis of the final-form regulation.

Benefits

The amendment will benefit persons who have property interests or reside within the area proposed for designation as unsuitable for surface mining operations in that further surface and groundwater degradation due to surface mining operations will not occur.

The designation process also serves to aid the planning of coal operators who might otherwise have considered surface mining in this area. The Department may not issue permits where mining would adversely affect a water supply, unless the applicant shows the availability of an equivalent replacement supply. The Department's current policy on water supply replacement provides that, unless the owner of the property specifically agrees to a replacement supply of lesser quality, the replacement supply must be of equal or better quality than the original supply. The wells within the petition area associated with the Middle Kittanning coal have the potential to be degraded by surface mining. Replacement wells, which are developed on deeper aquifers, are prone to elevated iron and manganese concentrations and objectionable sulfide odor. Replacement wells would require perpetual treatment and maintenance costs to produce water suitable for domestic use.

Compliance Costs

The designation will preclude mining of approximately 1.158 million tons of Middle Kittanning coal, valued at approximately $28 million, based on a market value of $24 per ton. Mining of this coal would provide 356 employe-years of direct employment and 712 employe-years of support employment, at least some of which would come from the local labor market. For the purpose of calculating these costs, it was assumed that the coal could be extracted by surface mining methods and that the coal was laterally persistent throughout the petition area. These estimates, therefore, represent a liberal interpretation of surface mineable reserves within the area proposed for designation.

An operator who adversely affects a water supply would be responsible for the costs associated with well replacement and treatment. Designation of the petition area as unsuitable for mining will help operators avoid these costs.

Because of the failure of coal operators to demonstrate that suitable alternate private water supplies are available within the petition area, it is unlikely that the Department would issue permits for surface mining in this area if it was not designated unsuitable for surface mining operations.

Compliance Assistance Plan

The amendment prohibits surface mining operations within the petition area. Aside from public notification of the regulation, no compliance assistance is anticipated.

Paperwork Requirements

The only paperwork requirements imposed by the amendment are those necessary to make operators and Department personnel aware of the location of the designated area. Copies of the amendment containing a description of the area and a map of the location will be held on file at the appropriate District Office and at the Bureau of Mining and Reclamation Office in Harrisburg, PA.

G. *Sunset Review*

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

H. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Department submitted a copy of the notice of proposed rulemaking, published at 25 Pa.B. 4773 (November 4, 1995), on October 25, 1995, to IRRC and the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment. In compliance with section 5(b.1) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments received, as well as other documentation.

In preparing this final-form regulation, the Department has considered the comments received from IRRC and the public. No comments were received from the Committees.

The final-form regulation was deemed approved by the House and Senate Committees on October 7, 1996. IRRC met on October 17, 1996, and approved the final-form regulation in accordance with section 5(c) of the Regulatory Review Act.

I. *Findings of the Board*

The Board finds that:

(1) Public notice of the proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968

(P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and the comments were considered.

(3) This amendment does not enlarge the purpose of the proposal published at 25 Pa.B. 4773.

(4) This amendment is necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this Preamble.

J. *Order*

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 25 Pa. Code Chapter 86, are amended by amending § 86.130 to read as set forth in Annex A, with ellipses referring to the existing text of the regulation.

(b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval and review as to legality and form, as required by law.

(c) The Chairperson of the Board shall submit this order and Annex A to IRRC and the Senate and House Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(e) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

JAMES M. SEIF,
Chairperson

(*Editors Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 26 Pa.B. 5289 (November 2, 1996). See 26 Pa. B. 5962 (December 14, 1996) for a document concerning this subject.)

Fiscal Note: Fiscal Note 7-292 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

CHAPTER 86. SURFACE AND UNDERGROUND COAL MINING: GENERAL

Subchapter D. AREAS UNSUITABLE FOR MINING

§ 86.130. Areas designated as unsuitable for mining.

* * * * *

(b) The following is a list of descriptions of areas which are unsuitable for all or certain types of surface mining operations and where all or certain types of surface mining operations will not be permitted:

* * * * *

(17) All types of surface mining operations within a tract of 450 acres located in Slippery Rock and Wayne Townships, Lawrence County described as follows:

Beginning at the intersection of Township Road T-347 and Township Road T-472; then in a northerly direction following Township Road T-472 for a distance of approximately 4,800 feet to the Wayne Township and Slippery Rock Township boundary line; then in a westerly direction following the township line for a distance of approximately 800 feet to the southwest corner of a land parcel owned, or formerly owned, by Edris Ann Thalgott; then in a northerly direction following the Edris Ann Thalgott property line for a distance of approximately 2,050 feet to the southwest corner of a land parcel owned, or formerly owned, by Lois Mackey; then following the Lois Mackey property line in a northerly direction for a distance of approximately 950 feet to the intersection of the Lois Mackey property line with State Road SR 2024; then in an easterly direction following State Road SR 2024 for a distance of approximately 2,100 feet to the intersection with the southwest corner of a land parcel owned, or formerly owned, by Dale Mackey; then in a northerly direction following the Dale Mackey property line for a distance of approximately 1,650 feet to the northwest corner of the Dale Mackey property; then in an easterly direction following the Dale Mackey property line for a distance of approximately 600 feet to the northeast corner of the Dale Mackey property; then following the Dale Mackey property line in a southerly direction for a distance of approximately 1,250 feet to the Dale Mackey property line intersection with the northeast corner of a land parcel owned, or formerly owned, by Richard E. Michaels; then following the Richard E. Michaels property line in a southerly direction for a distance of approximately 250 feet to the Richard E. Michaels property line intersection with State Road SR 2024; then following Township Road T-478 in a southerly direction for a distance of approximately 7,200 feet to the intersection of Township Road T-478 with Township Road T-347; then in a westerly direction following Township Road T-347 for a distance of approximately 2,000 feet to the point of origin.

[Pa.B. Doc. No. 96-2090. Filed for public inspection December 13, 1996, 9:00 a.m.]

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 86]

Criteria and Procedures for Designating Areas Unsuitable for Surface Mining Activities

The Environmental Quality Board (Board) by this order amends Chapter 86 (relating to areas unsuitable for mining). The amendments clarify ambiguous language contained in Subchapter D (relating to areas unsuitable for mining) concerning the designation of areas as unsuitable for mining and correct several typographical errors.

This order was adopted by the Board at its meeting of August 20, 1996.

A. *Effective Date*

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. *Contact Persons*

For further information, contact Roderick A. Fletcher, P.E., Director, Bureau of Mining and Reclamation, Room 209, Executive House, P.O. Box 8461, Harrisburg, PA 17105-8461 (717) 787-5103 or Joseph Pizarchik, Assistant Counsel, Bureau of Regulatory Counsel, 9th Floor, Rachel Carson State Office Building, P.O. Box 8464, Harrisburg, PA 17105-8464 (717) 787-7060. Persons with a disability

may use the AT&T relay service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). These amendments are available electronically through the Department of Environmental Protection's (Department) Web site (http://www.dep.state.pa.us).

C. *Statutory Authority*

These amendments are adopted under the authority of the following provisions of the Surface Mining Conservation and Reclamation Act (SMCRA) (52 P. S. §§ 1396.1—1396.19a): section 4.2(a) (52 P. S. § 1396.4b(a)), which provides general rulemaking authority; section 4.5 (52 P. S. § 1396.4e), which provides for the designation of an area as unsuitable for all or certain types of surface mining operations; and under the following provisions of the Coal Refuse Disposal Control Act (52 P. S. §§ 30.51—30.66): section 3.2(a) (52 P. S. § 30.53b(a)), which authorizes the adoption of rules and regulations; section 6.1 (52 P. S. § 30.56a), which provides for the designation of an area as unsuitable for all or certain types of coal refuse disposal operations; and under the following provisions of The Clean Streams Law (35 P. S. §§ 691.1—691.1001): section 5 (35 P. S. § 691.5), which authorizes the adoption of rules and regulations; section 315 (h)—(o) (35 P. S. § 691.315 (h)—(o)), which provides for the designation of an area as unsuitable for all or certain types of surface mining operations; and under Section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), which authorizes the adoption of regulations necessary for the Department to perform its work.

D. *Background*

The statutes and regulations which contain the requirements and implementation procedures for the areas unsuitable for mining program are based on the premise that certain land areas should be designated unsuitable for mining to protect values which would be irretrievably lost or damaged by coal mining.

The criteria for designation of areas unsuitable for mining are separated into two distinct categories identified as mandatory and discretionary criteria.

The mandatory criterion (§ 86.122(a) (relating to criteria for designating lands as unsuitable)) requires designation in the event it can be demonstrated that reclamation of an area is not technologically and economically feasible. This criterion is narrow in scope and up to now has been used exclusively where coal mining would, in all probability, result in the production of acid mine drainage which would cause significant environmental damage.

The discretionary criteria (§ 86.122(b) (1)—(4)) are broad in scope and provide for protection of areas where reclamation could feasibly be accomplished under current laws, but where coal mining would be incompatible with existing land use or cause significant damage to or long term losses of important environmental features. There are four discretionary criteria which identify areas which may be designated unsuitable for mining where coal mining will: 1) be incompatible with land use plans; 2) affect fragile or historic lands; 3) affect renewable resource lands with loss or reduction of water supply or of food or fiber products; or 4) affect natural hazard lands where coal mining could endanger life or property.

Rulemaking was proposed to add language to § 86.122 (b)(1)—(4) to identify the specific criteria and circumstances that the Department would consider in exercising its discretion to recommend that an area be designated as unsuitable for mining.

In the processing of previous areas unsuitable for mining petitions, the Board received comments indicating that § 86.130 (b) (relating to areas designated as unsuitable for mining) referred to "surface mining operations" for which no regulatory definition exists. Elsewhere in Subchapter D, the activities subject to Subchapter D are referred to as "surface mining activities," "surface mining," "surface coal mining," "surface coal mining operations," "surface mining operation," "mining," "mining operations" or "mining activities." With the exception of "surface mining activities," these terms are not defined in the statutes or regulations. The Board therefore proposed that these terms be replaced with the term "surface mining activities" which was defined in § 86.101.

E. *Summary of Comments and Responses on the Proposed Rulemaking*

Numerous comments were received in opposition to the proposed amendments to the discretionary criteria in § 86.122(b). Several commentators believed that the changes would narrow and limit the protection of historic resources available under the existing language while other commentators believed the proposed changes broaden and expand the criteria and conditions under which the Department would consider designation of an area as unsuitable for mining. After an informal review of the proposed rulemaking, the Federal Office of Surface Mining Reclamation and Enforcement (OSMRE) indicated that the proposed rulemaking would be less effective than the corresponding Federal regulations.

In consideration of these comments, all proposed changes to the discretionary criteria in § 86.122(b)(1)—(4) have been deleted. The only changes being made to this subsection are replacement of the term "surface mining activities," which was used in the proposed amendments, with the term "surface mining operations" for these final amendments as discussed in this Preamble.

Although the Board had not proposed revisions to the definition of the term "surface mining activities" in § 86.101, comments were received which questioned the legal and statutory authority for the definition and use of the term "surface mining activities" contained in § 86.101, because SMCRA and The Clean Streams Law which authorize designation of areas unsuitable for mining use the term "surface mining operations." The Board had proposed that a variety of terms used in Subchapter D be replaced with the term "surface mining activities" which was also used in Subchapter D and was defined in § 86.101. The comments also pointed out that the term "surface mining activities" is defined differently in § 86.1 (relating to definitions) and the use of the same term in Subchapter D but with a different definition was confusing.

To understand the changes to the final rulemaking which were made in response to the comments concerning the legal bases for the definition of "surface mining activities" in § 86.101, it is necessary to know the history of the areas unsuitable for mining provisions. The following history also explains the legal basis for the § 86.101 definition and the use of the term "surface mining operations" in the final rulemaking.

The designation of areas as unsuitable for mining originated with the 1977 enactment of the Federal Surface Mining Control and Reclamation Act (Federal SMCRA) (30 U.S.C.A. § 1201 et seq.). The areas unsuitable for mining provisions are in section 522 of the Federal SMCRA (30 U.S.C.A. § 1272). These provisions apply to surface coal mining operations. Section 522 of the Federal SMCRA and the Federal regulations use the same term, "surface coal mining operations," which is

defined in section 701 of the Federal SMCRA and section 700.5 of the Federal regulations to mean:

> (a) Activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountain top removal, box cut, open pit, and area mining; the use of explosives and blasting; in situ distillation or retorting; leaching or other chemical or physical processing; and the cleaning, concentrating, or other processing or preparation of coal. Such activities also include the loading of coal for interstate commerce at or near the mine site. Provided, these activities do not include the extraction of coal incidental to the extraction of other minerals, where coal does not exceed 16 2/3 percent of the tonnage of minerals removed for purposes of commercial use or sale, or coal exploration subject to section 512 of the Act; and, Provided further, that excavation for the purpose of obtaining coal includes extraction of coal from coal refuse piles; and
>
> (b) The areas upon which the activities described in paragraph (a) of this definition occur or where such activities disturb the natural land surface. These areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage and excavation, workings, impoundments, dams, ventilation shafts, entry ways, refuse banks, dumps, stock piles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to those activities.

30 CFR 700.5, 30 U.S.C.A. § 1291(28). Section 516 of the Federal SMCRA is titled "Surface effects of underground coal mining operations" and regulates every surface effect of underground coal mining.

When OSMRE adopted regulations to implement the areas unsuitable for mining program on March 13, 1979, OSMRE stated:

> Section 522 of the Act establishes a procedure to designate areas unsuitable for all or certain types of coal mining, thereby enabling the State and Federal governments to respond to conflicts which often arise between coal mining and the other uses of the land . . . . The petition process, the Federal coal lands review and the Congressional designations, except where specifically exempt, all apply to the surface effects of underground mining as well as surface mining.
>
> Under the provisions for designation citizens can petition the regulatory authority (DEP) to designate certain areas unsuitable for all or certain types of surface or underground coal mining. . . .

44 FR at 14989. It was clearly OSMRE's position that the areas unsuitable for mining petition process applies to all types of surface and underground coal mining.

In 1980, the General Assembly made numerous changes to the Commonwealth's mining statutes to secure primary control over the regulation of coal mining in this Commonwealth. To secure primacy these changes had to make the Commonwealth's laws as effective as Federal law. These changes included the addition of areas unsuitable for mining provisions to section 4.5 of SMCRA, section 315(h)—(o) of The Clean Streams Law and section 6.1 of the Coal Refuse Disposal Control Act. These statutory changes, as well as necessary regulatory changes, were drafted by the Ad Hoc Task Force on Mining Legislation, a group of industry, environmental, government, public interest and labor representatives. The stated purpose of the Ad Hoc Task Force was to "upgrade the existing Pennsylvania surface mining program where it was necessary to meet minimum Federal requirements while retaining the more stringent state requirements" (10 Pa. B. 4789 (December 20, 1980)).

The provisions drafted by the Ad Hoc Task Force on Mining Legislation in 1980 and added to SMCRA by the General Assembly closely parallel Federal SMCRA; however, SMCRA used the term "surface mining operations" which it states is defined in section 3 of SMCRA (52 P. S. § 1396.3). Section 315(h) of The Clean Streams Law, which requires designation if reclamation is not technologically and economically feasible, also uses the term "surface mining operations" as defined in section 3 of SMCRA. Section 3 of SMCRA does not, however, contain a definition of "surface mining operations." Presumably this omission was an oversight by the Ad Hoc Task Force on Mining Legislation and the General Assembly. Sections 315(i)—(o) of The Clean Streams Law, which provides for discretionary designations and the other areas unsuitable for mining provisions, use the term "mining operations," which is also undefined.

The areas unsuitable for mining regulations developed by the Ad Hoc Task Force in 1980 paralleled the statutory language, but used a variety of terms for the activities covered by this program (10 Pa. B. 4789). The term most often used was "surface mining" which was defined in § 86.101 to mean:

> The extraction of coal from the earth or from waste or stock piles or from pits or banks by removing the strata or material which overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, strip, and auger mining, dredging, quarrying, and leaching and all surface activity connected with surface or underground coal mining including but not limited to exploration, site preparation, entry, tunnel, slope, drift, shaft and borehole drilling and construction and activities related thereto, and all activities involved in or related to underground coal mining which are conducted on the surface of the land, produce changes in the land surface, or disturb the surface, air or water resources of the area.

Other terms used, which were not defined, included "mining," "surface mining operations," "mining operations" and "surface coal mining operations." In 1982, the regulatory definition of "surface mining" in § 86.101 was amended to include "coal refuse disposal," "coal processing" and "coal preparation activities" (12 Pa. B. 2473). These three terms were added to satisfy the Federal law requirement that State programs be at least as effective as the Federal law (30 U.S.C.A. § 1253) and because Subchapter D also implemented the areas unsuitable for mining provisions of the Coal Refuse Disposal Control Act.

In 1990, the Board amended §§ 86.102 and 86.103 and 86.121—86.124 by changing the term "surface mining operations" to "surface mining activities." Section 86.101 was amended by changing the term "surface mining" to "surface mining activities." The definition of the term "surface mining" in § 86.101 was not changed (20 Pa.B. 3383). Not all references to "surface mining" in Subchapter D were changed to "surface mining activities."

In the proposed rulemaking, the Board had proposed amending Subchapter D to switch the remaining references to "surface mining" to "surface mining activities" as defined in § 86.101. The Board also proposed changing the terms "surface coal mining operations," "surface mining operations" and "surface coal mining" which appeared in Subchapter D to "surface mining activities" to, for the first time, provide for consistent use of terminology in Subchapter D. No changes were proposed to the § 86.101 definition of "surface mining activities."

In response to comments received on the proposed changes, Subchapter D is being modified to replace the term "surface mining activities" with "surface mining operations." Surface mining operations is the term used in SMCRA authorizing the designation of areas as unsuitable for mining. The term "surface mining operations" is being used to be consistent with SMCRA. "Surface mining operations" is also defined in § 86.101 to remedy the lack of a definition in SMCRA. The definition of this term in § 86.101 of the regulations is the same definition developed by the Ad Hoc Task Force on Mining Legislation to obtain primacy, is consistent with the primacy requirements of Federal SMCRA, was approved by OSMRE in 1982 and has been in the regulations for over 15 years. Finally, while the definition of "surface mining operations" uses different words than are used in the Federal definition of "surface coal mining operations" they both cover the same activities.

Although no revisions to the existing definition in § 86.101 were proposed and it is believed that the definition is consistent with the statutory and legal requirements of the Federal program, OSMRE has been requested to provide clarification of the definition in the context of the "surface effects" of underground mining. Upon receipt of the requested clarification, any revisions to this existing definition which are found to be necessary will be addressed in future rulemaking.

The draft changes of the final rulemaking were presented to the Mining and Reclamation Advisory Board (MRAB) at its meeting of April 25, 1996. The MRAB approved the final-form rulemaking.

F. *Benefits, Costs and Compliance*

Executive Order 1996-1 requires a cost/benefit analysis of the final-form regulations.

Benefits

The amendments will clarify and eliminate ambiguities in the existing regulations which will benefit all persons who may wish to request that an area be designated as unsuitable for mining and would also benefit coal producers and coal owners who may be affected by this designation.

Compliance Costs

The amendments impose no direct or indirect costs on coal producers or the general public.

Compliance Assistance Plan

The amendments do not affect the way in which the regulations are implemented, so no compliance assistance plans are anticipated.

Paperwork Requirements

The amendments do not change any current regulatory procedures and do not impose any additional paperwork requirements. Areas which do not qualify for designation as unsuitable for mining remain subject to the permitting requirements of Commonwealth statutes and regulations.

G. *Sunset Review*

These regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

H. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Department submitted a copy of proposed rulemaking published at 25 Pa. B. 4767 (November 4, 1995) on October 25, 1995, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment. In compliance with section 5 (b.1) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments received as well as other documentation.

In preparing these final-form regulations, the Department has considered all comments received from IRRC and the public. No comments were received from the Committees.

These final-form regulations were deemed approved by the House Environmental Resources and Energy Committee on October 7, 1996, and were deemed approved by the Senate Environmental Resources and Energy Committee on October 7, 1996. IRRC met on October 17, 1996, and approved the amendments in accordance with section 5(c) of the Regulatory Review Act.

I. *Findings of the Board*

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No 204) (45 P. S. §§ 1201 and 1202) and regulations promulgated thereunder at 1 Pa.Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments were considered.

(3) These amendments do not enlarge the purpose of the proposal published at 25 Pa.B. 4767.

(4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this Preamble.

J. *Order of the Board*

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 25 Pa.Code Chapter 86, are amended by amending §§ 86.101—86.103 and 86.121—86.130 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval and review as to legality and form as required by law.

(c) The Chairperson shall submit this order and Annex A to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(e) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

JAMES M. SEIF
Chairperson

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission relating to this document, see 26 Pa. B. 5289 (November 2, 1996). See 26 Pa. B. 5960 (December 14, 1996) for a document concerning this subject.)

Fiscal Note: Fiscal Note 7-293 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHAPTER 86. SURFACE AND UNDERGROUND COAL MINING: GENERAL

Subchapter D. AREAS UNSUITABLE FOR MINING

CRITERIA AND PROCEDURES FOR DESIGNATING AREAS AS UNSUITABLE FOR SURFACE MINING

§ 86.101. Definitions.

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

Cemetery—An area of land where human bodies are interred.

Community or institutional building—A structure other than a public building or an occupied dwelling, which is used primarily for meetings, gatherings or functions of local civic organizations or other community groups; functions as an educational, cultural, historic, religious, scientific, correctional, mental health or physical health care facility; or is used for public services, including, but not limited to, water supply, power generation or sewage treatment.

Fragile lands—Geographic areas containing natural, ecologic, scientific or esthetic resources that could be damaged or destroyed by surface mining. Examples include, but are not limited to, valuable habitats for fish or wildlife, critical habitats for endangered or threatened species of animals or plants, uncommon geologic formations, National Natural Landmark sites, areas where mining may cause flooding, environmental corridors containing a concentration of ecologic and esthetic features, areas of recreational value due to high environmental quality and buffer zones adjacent to the boundaries of areas where surface mining operations are prohibited under section 4.5(h) of the Surface Mining Conservation and Reclamation Act (52 P. S. § 1396.4e(h)).

Historic lands—Historic or cultural districts, places, structures or objects, including archaeological and paleontological sites, National Historic Landmark sites, sites listed or eligible for listing on a State or National Register of Historic Places, sites having religious or cultural significance to native Americans or religious groups or sites for which historic designation is pending.

Natural hazard lands—Geographic areas in which natural conditions exist which pose, or as a result of surface mining operations, may pose a threat to the health, safety or welfare of people, property or the environment, including areas subject to landslides, cave-ins, severe wind or soil erosion, frequent flooding, avalanches and areas of unstable geology.

Public building—A structure that is owned by a public agency or used principally for public business, meetings or other group gatherings.

Public park—An area dedicated or designated by a Federal, State or local agency for public recreational use, whether or not the use is limited to certain times or days, including land leased, reserved or held open to the public because of that use. For the purposes of this subchapter, local agency includes nonprofit organizations owning lands which are dedicated or designated for public recreational use.

Publicly owned park—A public park owned by a Federal, State or local governmental agency.

Renewable resource lands—Aquifers and areas for the recharge of aquifers and other underground waters, areas for agricultural or silvicultural production of food and fiber, and grazing lands.

Significant recreational, timber, economic or other values incompatible with surface mining—Significant values which could be damaged by, and are not capable of existing together with, surface mining operations because of the undesirable effects mining would have on those values, either on the area included in the permit application or on offsite areas which could be affected by mining. Values to be evaluated for their importance include:

(i) Nature recreation, including hiking, boating, camping, skiing, fishing, hunting or other related outdoor activities.

(ii) Timber management and silviculture.

(iii) Agriculture, aquaculture or production of other natural, processed or manufactured products which enter commerce.

(iv) Scenic, historic, archaeologic, esthetic, fish, wildlife, plants or cultural interests.

Substantial legal and financial commitments in a surface mining operation—Significant investments that have been made prior to January 4, 1977, on the basis of a long-term contract in power plants, railroads, mineral handling, preparation, extraction or storage facilities and other capital-intensive activities. Costs of acquiring the mineral in place or of the right to mine it without an existing mine are not sufficient commitments, standing alone, to constitute substantial legal and financial commitments.

Surface mining operations—The extraction of coal from the earth or from waste or stock piles or from pits or banks by removing the strata or material which overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, strip and auger mining, dredging, quarrying and leaching and surface activity connected with surface or underground coal mining, including, but not limited to, exploration, site preparation, entry, tunnel, slope, drift, shaft and borehole drilling and construction and activities related thereto, coal refuse disposal, coal processing and preparation facilities and activities involved in or related to underground coal mining which are conducted on the surface of the land, produce changes in the land surface, or disturbs the surface, air or water resources of the area.

§ 86.102. Areas where mining is prohibited or limited.

Subject to valid existing rights as defined in § 86.1 (relating to definitions), surface mining operations except those which existed on August 3, 1977, are not permitted:

(1) On lands within the boundaries of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic River Act (16 U.S.C.A. § 1276(a)) and National Recreation Areas designated by act of Congress.

(2) On Federal lands within the boundaries of a National forest. Surface mining operations may be permitted on the lands, if the Secretary of the United States Department of Interior and the Secretary find that there are no significant recreational, timber, economic or other values incompatible with surface mining operations and the surface mining operations and impacts are incident to an underground coal mine.

(3) Which will adversely affect a publicly-owned park or a place included on or eligible for inclusion on the National Register of Historic Places, unless approved jointly by the Department and the Federal, State or local governmental agency with jurisdiction over the park or places.

(4) On lands within the State park system. Surface mining operations may be permitted if the Department finds that significant land and water conservation benefits will result when remining of previously mined land is proposed.

(5) On lands within State forest picnic areas, State forest natural areas and State forest wild areas. Surface mining operations may be permitted on State forest lands other than picnic areas, natural areas and wild areas, if the Department finds that one or more of the following apply:

(i) There will be no significant adverse impact to natural resources, including timber, water, wildlife, recreational and aesthetic values.

(ii) Significant land and water conservation benefits will result when remining of previously mined lands is proposed.

(6) On lands within the game land system of this Commonwealth. Surface mining operations may be permitted by the Department if the Game Commission consents and finds that one or more of the following apply:

(i) There will be no significant long-term adverse impacts to aquatic or terrestrial wildlife populations and their habitats.

(ii) Significant wildlife habitat and land and water conservation benefits will result when remining of previously mined lands is proposed.

(7) On lands within the authorized boundaries of Pennsylvania Scenic River Systems which have been legislatively designated as such under the Pennsylvania Scenic Rivers Act (32 P. S. §§ 820.21—820.29). Surface mining operations may be permitted if the Department finds that significant land and water conservation benefits will result when remining of previously mined lands is proposed, or when the Department finds that the surface mining operation is consistent with the Scenic Rivers System designation and will not adversely affect the values which the designation is designed to protect.

(8) Within 100 feet measured horizontally of the outside right-of-way line of a public road, except:

(i) For mine access roads or haulage at the point where they join the right-of-way lines.

(ii) When the Department, with concurrence of the agency with jurisdiction over the road, allows the public road to be relocated or the area affected to be within 100 feet of the road, after the following:

(A) Public notice and opportunity for a public hearing in accordance with § 86.103(c) (relating to procedures).

(B) Making a written finding that the interests of the affected public and landowners will be protected.

(9) Within 300 feet measured horizontally from an occupied dwelling, unless the only part of the surface mining operations which is within 300 feet of the dwelling is a haul road or access road which connects with an existing public road on the side of the public road opposite the dwelling or unless the current owner thereof has provided a written waiver consenting to surface mining operations closer than 300 feet. The waiver shall be knowingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver from the current owner.

(10) Within 300 feet measured horizontally of a public building, school, church, community or institutional building or public park.

(11) Within 100 feet measured horizontally of a cemetery.

(12) Within 100 feet measured horizontally of the bank of a perennial or intermittent stream. The Department may grant a variance from this distance requirement if the operator demonstrates beyond a reasonable doubt that there will be no adverse hydrologic impacts, water quality impacts or other environmental resources impacts as a result of the variance. The variance will be issued as a written order specifying the methods and techniques that shall be employed to prevent adverse impacts. Prior to granting a variance, the operator is required to give public notice of application thereof in two newspapers of general circulation in the area once a week for 2 successive weeks. If a person files an exception to the proposed variance within 20 days of the last publication thereof, the Department will conduct a public hearing with respect thereto. The Department will also consider information or comments submitted by the Fish and Boat Commission prior to taking action on a variance request.

§ 86.103. Procedures.

(a) Upon receipt of a complete permit application for surface mining operations the Department will review the application to determine whether the surface mining operations are limited or prohibited under § 86.102 (relating to areas where mining is prohibited or limited) on the lands which would be disturbed by the proposed operation.

(b) If the proposed surface mining operations would include Federal lands within the boundaries of a National forest, and the applicant seeks a determination that mining is permissible under § 86.102(2), the applicant shall submit a permit application to the Regional Director of the Office of Surface Mining Reclamation and Enforcement and the Department for processing under 30 CFR Chapter 7 Subchapter D (relating to Federal lands pro-

gram). Approval from the Director is required before a permit may be issued by the Department.

(c) If the proposed surface mining operations are to be conducted within 100 feet measured horizontally of the outside right-of-way line of a public road—except where mine access road or haulage roads join the right-of-way line—or if the applicant proposes to relocate a public road, the Department will:

(1) Require the applicant to obtain necessary approvals of the authority with jurisdiction over the public road.

(2) Provide notice in a newspaper of general circulation in the affected locale of a public hearing, if one has been requested, at least 2 weeks before the hearing.

(3) Insure that an opportunity for a public hearing has been afforded in the locality of the proposed surface mining operations, at which members of the public may participate, for the purpose of determining whether the interests of the public and affected landowners will be protected.

(4) Review the information received at the public hearing, if one has been held, and the findings of applicable State and local agencies as to whether the interests of the public and affected landowners will be protected from the proposed surface mining operations.

(d) When the proposed surface mining operations would be conducted within 300 feet measured horizontally of any occupied dwelling, the applicant shall submit with the application a written waiver from the current owner of the dwelling, consenting to the surface mining operations within a closer distance of the dwelling as specified in the waiver. The waiver shall be knowingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver from the current owner.

(e) When the proposed surface mining operations may adversely affect a public park or a place included on the National Register of Historic Places, the Department will transmit to the Federal, State or local agencies with jurisdiction over, or a statutory or regulatory responsibility for, the park or historic place a copy of the completed permit application containing the following:

(1) A request for that agency's approval or disapproval of the surface mining operations.

(2) A notice to the appropriate agency that it shall respond within 30 days from receipt of the request.

(f) If the Department determines that the proposed surface mining operations are not prohibited under § 86.102, it may nevertheless, pursuant to appropriate petitions, designate the lands as unsuitable for all or certain types of surface mining operations under §§ 86.121—86.129.

CRITERIA AND PROCEDURES FOR DESIGNATING AREAS AS UNSUITABLE FOR SURFACE MINING

§ 86.121. Areas designated unsuitable for surface mining operations.

(a) The requirements of this section and §§ 86.122—86.129 do not apply to permit areas on which surface mining operations were being conducted on August 3, 1977, or are being conducted under a permit issued under the Surface Mining Conservation and Reclamation Act (52 P. S. §§ 1396.1—1396.19a), or if substantial legal and financial commitments as defined by the Office of Surface Mining Reclamation and Enforcement, United States Department of the Interior under section 522 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C.A. § 1272) if the surface mining operations were in existence prior to January 4, 1977.

(b) Permits for surface mining operations will not be issued in areas designated unsuitable under this subchapter. The permits may be issued in areas where the applicant has prior substantial legal and financial commitments in a surface mining operation if the applicant establishes the existence of the commitments to the satisfaction of the Department. In considering the permit applications in designated areas, the Department will impose terms and conditions to preserve and protect the applicable values and uses of the area.

§ 86.122. Criteria for designating lands as unsuitable.

(a) Upon petition, an area shall be designated as unsuitable for all or certain types of surface mining operations if the Department determines that reclamation is not technologically and economically feasible.

(b) Upon petition, an area may be designated as unsuitable for all or certain types of surface mining operations if the surface mining operations will:

(1) Be incompatible with existing Commonwealth or local land use plans or programs.

(2) Affect fragile or historic lands in which the surface mining operations could result in significant damage to important historic, cultural, scientific or esthetic values or natural systems.

(3) Affect renewable resource lands in which the surface mining operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products.

(4) Affect natural hazard lands in which the surface mining operations could substantially endanger life and property, the lands to include areas subject to frequent flooding and areas of unstable geology.

§ 86.123. Procedures: petitions.

(a) A person who has an interest which is, or may be, adversely affected has the right to petition the Department to have an area designated as unsuitable for surface mining operations or to have an existing designation terminated.

(b) Under the procedures in this section, the Department may initiate proceedings seeking to have an area designated as unsuitable for surface mining operations or to have the designation terminated.

(c) The petitioner shall provide the following information to the Department's Bureau of Mining and Reclamation (Bureau) on forms developed by that Bureau:

(1) The location and approximate size of the area covered by the petition, utilizing property or boundary lines or landmarks, and including a 7 1/2-minute topographic map published by the United States Geological Survey with the perimeter of the area shown thereon.

(2) Allegations of facts and supporting evidence which would tend to establish that the areas are unsuitable for all or certain types of surface mining operations assuming that contemporary mining practices required under applicable regulatory practices would be followed if the area were to be mined.

(3) A description of how mining of the area has affected or may adversely affect people, land, air, water or other resources.

(4) The petitioner's name, address, telephone number and notarized signature.

(5) Identification of the petitioner's interest which is or may be adversely affected.

(d) A person who has an interest which is or may be adversely affected may petition to terminate a designation. The petition shall contain:

(1) The location and size of the area covered by the petition, including a 7 1/2-minute topographic map published by the United States Geologic Survey with the perimeters of the area shown thereon.

(2) Allegations of newly discovered facts, with newly discovered supporting evidence, not contained in the record of the proceeding in which the area was designated unsuitable, and which were unavailable at that time, which evidence would tend to establish the statements or allegations, and which statements or allegations indicate that the designation should be terminated based on one or more of the following:

(i) The nature or abundance of the protected resource or condition or other basis of the designation if the designation was based on criteria found in § 86.122(b) (relating to criteria for designating lands as unsuitable).

(ii) Reclamation now being technologically and economically feasible, if the designation was based on the criteria found in § 86.122(a)

(iii) The resources or condition not being affected by surface mining operations, or in the case of land use plans, not being incompatible with surface mining operations during and after mining, if the designation was based on the criteria found in § 86.122(b).

(3) The petitioner's name, address and telephone number.

(4) Identification of the petitioner's interest which is or may be adversely affected by the continuation of the designation.

§ 86.124. Procedures: initial processing, recordkeeping and notification requirements.

(a) Within 30 days of receipt of a petition, the Department will notify the petitioner by certified mail whether or not the petition is complete as required by § 86.123 (relating to procedures: petitions). If the 30-day requirement of this subsection cannot be met due to the staff limitations of the Department, the Department may process the petitions in accordance with the priority system authorized by subsection (b)(2). Within this 30-day period, the Department will also notify an applicant with pending surface mining operation permit applications in the area covered by the petition.

(1) The Department will determine whether identified coal resources exist in the area covered by the petition. If the Department finds there are not identified coal resources in that area, it may return the petition to the petitioner with a statement of the findings.

(2) The Department may reject petitions for designations or terminations of designations which are frivolous. Once the requirements of § 86.123 are met, no party may bear a burden of proof, but each accepted petition will be considered and acted upon by the Department under the procedures of this part.

(3) When considering a petition for an area which was previously and unsuccessfully proposed for designation, the Department will determine if the new petition presents new allegations of fact. If the petition does not contain new allegations of fact, the Department will refuse to consider the petition and may return the petition to the petitioner, with a statement of its findings and a reference to the record of the previous designation proceedings when the facts were considered.

(4) If the Department determines that the petition is frivolous, it will return the petition to the petitioner, with a written statement of the reasons for the determination. If the petition is incomplete, the Department will indicate the categories of information needed to make the petition complete. The Department will hold the incomplete petition until the petitioner has been given 30 days to make the application complete.

(5) The Department will notify the person who submits a petition of an application for a permit received which proposes to include an area covered by the petition.

(6) The Department will not issue permits for surface mining operations in areas included within a petition for a designation under § 86.122 (relating to criteria for designating lands as unsuitable) if the petition is received by the Department prior to the close of the public comment period for the permit, unless the permit applicant establishes prior substantial legal and financial commitments in a surface mining operation within the proposed permit area. A petition received after the close of the public comment period on a permit application relating to the same permit area will not prevent the Department from issuing a decision on that permit application. For the purpose of this section, "close of the public comment period" means at the close of a public hearing held on the permit, or, if no hearing is held, at the close of the comment period following public notice of the permit application. Once a petition has been returned to the petitioner under this subchapter, the Department may proceed to issue a decision on a permit application received for surface mining operations in the area included within the petition.

(b) Within 3 weeks after the determination that a petition is complete, the Department will send notice of receipt of the petition to, and request submissions of relevant information from, other interested governmental agencies, the petitioner, intervenors and other persons known to the Department to own or have an interest in the property.

(1) Within 3 weeks after the determination that a petition is complete, the Department will notify the general public of the receipt of the petition and request submissions of relevant information by a newspaper advertisement placed once a week for 2 consecutive weeks in the locale of the area covered by the petition, in the newspaper of largest circulation in the region, and in the *Pennsylvania Bulletin*.

(2) The Department may establish a priority system to decide the order in which petitions or classes of petitions submitted under this section will be processed. A high priority will be given to petitions which include areas where surface mining operation permit applications are pending.

(c) Until 3 days before the EQB holds a hearing under § 86.125 (relating to procedures: hearing requirements), a person may become an intervenor in the proceeding by filing allegations of facts, supporting evidence, a short statement identifying the petition to which the allegations pertain, a request for intervenor status, and name, address and telephone number.

(d) Beginning immediately after a complete petition is filed, the Department will compile and maintain a record

consisting of documents relating to the petition filed with or prepared by the Department. The Department will make the record available for public inspection, free of charge and copying at reasonable cost, during normal business hours at the Bureau of Mining and Reclamation district office in the county or multicounty area in which the land petitioned is located, and at the main office of the Department.

(e) Prior to designating land areas unsuitable for surface mining operations, the Department will prepare a detailed statement, using existing and available information on the potential resources of the area, the demand for resources, and the impact of the designation on the environment, the economy and the supply of coal.

(f) The Department will prepare a recommendation in the form of a proposed rulemaking on each complete petition received under this section and submit it to the EQB as a proposed regulation under this section.

§ 86.125. Procedures: hearing requirements.

(a) Within 10 months of the receipt of a complete petition, the EQB will hold a public hearing in the locality of the area covered by the petition. If all petitioners and intervenors agree, the hearing need not be held. The hearing shall be legislative and fact-finding in nature, without cross examination of witnesses. The EQB will make a verbatim transcript of the hearing.

(b) The EQB will give notice of the date, time and location of the hearing to:

(1) Local, State and Federal agencies which may have an interest in the decision on the petition.

(2) The petitioner and the intervenors.

(3) A person with an ownership or other interest made known to the Department in the area covered by the petition.

(4) Notice of the hearing shall be sent by first class mail and postmarked not less than 30 days before the scheduled date of the hearing.

(c) The EQB will notify the general public of the date, time and location of the hearing by placing a newspaper advertisement once a week for 2 consecutive weeks in the locale of the area covered by the petition and once during the week prior to the scheduled date of the public hearing. The consecutive weekly advertisement shall begin between 4 and 5 weeks before the scheduled date of the public hearing.

(d) The EQB may consolidate in a single hearing the hearings required for each of several petitions which relate to areas in the same locale.

(e) The EQB will receive and consider written comments on the petition 15 days after the conclusion of the public hearing. If a hearing will not be held on a petition, the comments may be received and considered for 45 days following publication of a notice that there will be no public hearing. Within 60 days of the close of the public comment period, the EQB will make a final written decision.

(f) If that all petitioners and intervenors so stipulate, the petition may be withdrawn from consideration prior to the hearing.

§ 86.126. Procedures: decision.

(a) In reaching its decision on the proposed rule, the EQB will consider:

(1) The information contained in the database and inventory system.

(2) Information provided by other governmental agencies.

(3) The detailed statement prepared under § 86.124(e) (relating to procedures: initial processing, recordkeeping and notification requirements).

(4) Oral and written testimony received during and written testimony received subsequent to public hearing.

(5) The recommendations of the Department.

(b) A final written decision in the form of a regulation will be issued by the EQB within 60 days following the public hearing, including a statement of reasons for the decision. The EQB will promptly send the decision by certified mail to the petitioner, intervenors, and to the Regional Director of the Office of Surface Mining Reclamation and Enforcement, and will deposit and publish its decision as a regulation in the manner required by the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1102, 1201—1208 and 1602); 45 Pa.C.S. §§ 501—907; and sections 3 and 4 of the act of July 9, 1976 (P. L. 877, No. 160) (45 Pa.Sp. Pamph. 84 page 35).

§ 86.127. Data base and inventory system requirements.

(a) The Department will expeditiously develop a database and inventory system which will permit evaluation of whether reclamation is feasible in areas covered by petitions.

(b) The Department will include in the system information relevant to the criteria in § 86.122 (relating to criteria for designating lands as unsuitable), including, but not limited to, information received from the United States Fish and Wildlife Service, the State Historic Preservation Office, the Fish and Boat Commission, the Department of Conservation and Natural Resources' Scenic Rivers Program, the Game Commission, the Department of Community and Economic Development, private conservancies and the agency administering section 127 of the Clean Air Act (42 U.S.C.A. § 7470).

(c) The Department will review and update the database and inventory system as information becomes available:

(1) On potential mineral resources of this Commonwealth, demand of the resources, the environment, the economy and the supply of minerals sufficient to enable the Department to prepare the statements required by § 86.124(e) (relating to procedures: initial processing, recordkeeping and notification requirements).

(2) From petitions, publications, experiments, permit applications, mining and reclamation operations and other sources.

§ 86.128. Public information.

The Department will:

(1) Make the information and database system developed under § 86.127 (relating to data base and inventory system requirements) available to the public for inspection free of charge and for copying at reasonable cost during established office hours.

(2) Provide information to the public on the petition procedures necessary to have an area designated as unsuitable for all or certain types of surface mining operations or to have designations terminated and describe how the inventory and database system can be used.

(3) Maintain a map of areas designated as unsuitable for all or certain types of surface mining operations.

(4) Make available to persons information within its control regarding designation or terminations, including mineral or elemental content which is potentially toxic in the environment. Other information which is properly classified as proprietary or confidential will be protected by the Department as may be required by law.

§ 86.129. Coal exploration.

The submission of a petition to designate an area unsuitable for all or certain types of surface mining operations or designation of an area as unsuitable for all or certain types of surface mining operations under this chapter does not prohibit coal exploration operations in the area. Coal exploration may not be conducted on an area designated as unsuitable for surface mining operations or where a petition to designate an area unsuitable for surface mining operations has been received by the Department in accordance with this chapter unless the exploration is consistent with the designation or the purposes of the submitted petition and will be conducted to preserve and protect the applicable values and uses of the area. Exploration may not be conducted unless the Department has been notified in advance and has issued written approval for the exploration under § 86.133(f) (relating to general requirements). Approval will not be issued unless the person seeking the approval has described the nature and extent of the proposed operation, and has described in detail the measures to be employed to prevent adverse effects.

§ 86.130. Areas designated as unsuitable for mining.

(a) Under the criteria and procedures in §§ 86.121—86.129, the EQB has designated the areas described in subsection (b) as unsuitable for all or certain types of surface mining operations.

(b) The following is a list of descriptions of areas which are unsuitable for all or certain types of surface mining operations and where all or certain types of surface mining operations will not be permitted:

(1) The tract of approximately 233 acres in Blacklick Township, Cambria County, described as follows:

Beginning at the northwest corner of the land owned by the Griffithtown Water Association and proceeding to the southwest corner, then easterly towards the southeast corner of the property and continuing in the same easterly direction to a point located 100 feet horizontal distance west of the Lower Freeport outcrop; then continuing in a southerly direction, remaining 100 feet from and paralleling the Lower Freeport outcrop as the outcrop proceeds easterly to intersect the 2,040 foot elevation contour; then along a straight line extending in a northeasterly direction intersecting the 2,282-foot elevation point and continuing to US 422; then west along US 422 to an intersection formed by a road, driveway or farmlane approaching US 422 from the north and located approximately 1.86 miles east of the junction of US 422 and Pa. Route 271 in Belsano; then continuing southwesterly in a straight line to the northwest corner of the Griffithtown Water Association property.

(2) The surface area overlying surface mineable coal reserves in a tract of approximately 11,200 acres in Rush Township, Centre County, which tract is described as follows:

The surface water drainage basin of Cold Stream upstream from the mouth of Tomtit Run, including the surface water drainage basins of all tributaries to Cold Stream upstream from and including Tomtit Run except for the surface water drainage of a tributary known locally as Big Spring Run that enters Cold Stream from the west approximately 500 feet upstream from the Stony Point Road (Township Road 600) bridge over Cold Stream.

(3) The tract of approximately 119 acres in Logan Township, Blair County and Gallitzin Township, Cambria County within the Mill Run watershed, that is underlain by surface mineable coal reserves, and that has not been previously disturbed by surface or deep mining. The tract is more particularly described as follows:

Beginning at the summit of a hill in the northwest corner of the Mill Run-Little Laurel Run watershed divide, southwest of the village of Buckhorn on or near the Cambria-Blair County line, and being at the eastern edge of the previously surface mined area; then along the watershed divide in a northeasterly direction for a distance of approximately 2,500 feet to the point of intersection of the watershed divide with the Mercer coal seam outcrop; then proceeding in a southeasterly and southerly direction along the Mercer coal outcrop, and running roughly parallel to and 100 to 200 feet easterly of the old Louden deep mine railroad grade, for a distance of approximately 5,500 feet to the northern terminus of the Louden deep mine, then proceeding westerly and northwesterly along the edge of the Louden deep mine, exclusive of an approximately 2-acre ungraded surface mine, to its intersection with the toe of spoil of the previously surface mined area; then in a northwesterly direction along the spoil banks remaining from previous surface mining activity a distance of approximately 3,800 feet to the summit of the hill, being the place of beginning.

(4) The surface mineable coal reserves in a tract of approximately 5,600 acres in Rush Township, Centre County, which tract is the surface water drainage basin of Black Bear Run.

(5) The surface mineable coal reserves in the surface water drainage basin of Powell Run that are situated east of Pa. Route 865, which tract is located in Reade Township, Cambria County and Antis Township, Blair County.

(6) The surface mineable coal reserve in the surface water drainage basin of Byrnes Run, which tract is located in Jay and Fox Townships, Elk County.

(7) The surface mineable coal reserves of the Lower Kittanning, Clarion No. 1, Clarion No. 2 and Mercer coal seams in the surface water drainage basin of the upper portion of Little Muddy Run located above the Janesville Dam, which tract is located in Gulich Township, Clearfield County and Reade Township, Cambria County; except that the surface mineable coal reserves of the four designated seams, located in the recharge area for identified preexisting pollutional discharges to Little Muddy Run are not designated unsuitable for surface mining operations authorized under Chapter 87, Subchapter F (relating to surface coal mines: minimum requirements for remining areas with pollutional discharges) which governs the remining of areas having preexisting pollutional discharges.

(8) The surface mineable coal reserves in the surface water drainage basin of Rogues Harbor Run, which tract

is in Chest Township, Clearfield County, and Chest Township, Cambria County, except Upper Freeport coal within that tract.

(9) The tract of approximately 525 acres in Elder Township, Cambria County, described as follows:

Beginning at the northern edge of a raw water storage tank located approximately 2,000 feet south of Township Route 551 and 2,150 feet west of State Route 36; then proceeding in a northeasterly direction, intersecting the Borough of Hastings Water Authority access road at a point approximately 1,450 feet from the access road's junction with Township Route 551; then continuing due north, intersecting Township Route 551 at a property, fence or tree line located approximately 1,250 feet west of the junction of Township Route 551 and State Route 36; then north along the property, fence or tree line to a point located on Legislative Route 221 approximately 1,100 feet west of State Route 36 in St. Boniface; then continuing in a southeasterly direction to the junction of State Route 36 and Legislative Route 11056; then along Legislative Route 11056 to a point approximately 1,300 feet east of State Route 36; then continuing south along a property, fence or tree line to another property, fence or tree line that is approximately 475 feet south of Legislative Route 11056; then 575 feet due west along this property, fence or tree line to a point located approximately 350 feet east of State Route 36; then due south to meet State Route 36 at its junction with a private road, driveway or farm lane approaching State Route 36 from the east, located approximately 950 feet south of the junction of Township Route 551 and State Route 36; then south along State Route 36 for approximately 900 feet to a tree, fence or property line; then along the line, intersecting the Laurel Hill anticline axis at a point approximately 1,575 feet due east of State Route 36; then south along the anticlinal axis (which trends approximately N 40°E) intersecting State Route 36 approximately 625 feet north of the junction of Legislative Routes 221 and 11077 and intersecting Legislative Route 11076 approximately 600 feet north of its junction with Legislative Routes 221 and 11067 for 6,800 feet to a point approximating the edge of an Upper Kittanning underground coal mine complex known as the Pardee No. 29; then continuing in the same southwesterly direction to a point located 200 feet horizontal distance southwest of the Pardee No. 29 Mine complex; then proceeding in a northerly direction remaining 200 feet from and paralleling the edge of the Pardee No. 29 Mine complex for approximately 4,250 feet to a point that is approximately 200 feet horizontal distance west of the Upper Kittanning coal outcrop (intersecting an unnamed tributary to a farm pond located approximately 3,300 feet due south of Township Route 551 and 3,300 feet due west of State Route 36); then continuing north, remaining 200 feet from and parallel to the coal outcrop to a property, fence or tree line located approximately 1,820 feet south of Township Route 551; then due east along the line to the northwest corner of the land owned by the Borough of Hastings; then returning to the point of origin.

(10) The tract of 527 acres of surface mineable coal reserves in the southern surface water drainage basin of North Fork Tangascootack Creek watershed. The 527 acres encompass the Mercer coal crop line to the southern watershed divide of the North Fork Tangascootack Creek watershed, which tract is located in Bald Eagle, Grugan and Beech Creek Townships, Clinton County.

(11) The surface mineable coals within the Montgomery Creek and Moose Creek watersheds upstream of the Clearfield Municipal Authority's public water supply reservoir dams. The two tracts are located in parts of Lawrence, Pike and Pine Townships, Clearfield County.

(12) The surface mineable coal reserves in the surface water drainage basins of Rankin Hollow Run and the East Fork Brewster Hollow Run, tributaries of Sixmile Run, upstream of the water supplies for the Coaldale Borough-Six Mile Run Area Water Corporation. The two tracts, totalling approximately 525 acres, are located in Broad Top Township, Bedford County.

(13) The surface mineable coal reserves of the Lower Kittanning, Clarion and Mercer coals in the surface water drainage basin of Bells Gap Run, which tract is located in Antis and Logan Townships, Blair County and Dean and Reade Townships, Cambria County; except that the surface mineable coal reserves of the three designated seams are not designated unsuitable for surface mining operations in the following areas:

(i) A tract of approximately 41 acres of abandoned mine lands located northwest of the town of Highland Fling, said tract being described as follows:

Beginning at the point where Township Route 502 intersects the surface water drainage divide between Tubb Run and Brubaker Run approximately 750 feet northwest of the intersection of Township Route 502 and State Route 1016; then proceeding due east, to a point on State Route 1016 approximately 475 feet north-northeast of the intersection of State Route 1016 and Township Route 502; then continuing to a point approximately 2,250 feet north along State Route 1016; then due west to a point on the surface water drainage divide between Tubb Run and Brubaker Run approximately 2,800 feet north-northwest of the intersection of Township Route 502 and State Route 1016; then in a southerly direction along the said surface water drainage divide to the point of origin.

(ii) The permit areas of Cambria Coal Company SMP # 11783035, Cambria Coal Company SMP # 11823006, Swistock Associates Coal Corp. MDP # 4278BC10, E. P. Bender Coal Co. SMP # 11793025, and Benjamin Coal Company MDP # 4278SM2, in accordance with § 86.121(a).

(14) The surface mineable coal reserves within the Goss Run watershed upstream of the Brisbin Dam, including a small tract of land within the watershed of the West Tributary to Goss Run, a total of approximately 555 acres, are designated unsuitable for all types of surface mining operations. This includes a land area beginning at the breast of the Brisbin Dam, thence due southwest to Pa. Route 153, thence north along the centerline of Pa. Route 153 to the intersection of Pa. Route 153 with township route T-657, thence north along the watershed divide between the Brisbin Dam drainage and the West Tributary drainage to a point at the intersection of the Goss Run and Little Beaver Run watershed divide, thence southwest along the Goss Run and Little Beaver Run watershed divide to a point at the intersection of the Brisbin Dam drainage divide, thence southwest along the Brisbin Dam drainage divide to the point of beginning; except that the surface mineable coal reserves are not designated unsuitable for surface mining operations in the following areas:

The permit areas of the James I. Cowfer Contracting, Inc. SMP 17663037 and James I. Cowfer Contracting, Inc. SMP 17820152, in accordance with § 86.121(a).

(15) The surface mineable coal reserves within the entire Paddy Run watershed, all surface mineable coal reserves within the Drury Run watershed occurring upstream of the Drury Run reservoir, and all surface mineable coals within the Drury Run watershed which occur within the Woodley Draft sub-basin and within the Slab Hollow drainage of the Stony Run sub-basin. These areas are located in Chapman, Leidy and Noyes Townships, Clinton County.

(16) The surface mineable coal reserves of the Lower Kittanning, Clarion and Brookville coals in the surface water drainage basin of Laurel Run, which tract is located in Jackson, West Taylor and Middle Taylor Townships, Cambria County.

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[Pa.B. Doc. No. 96-2091. Filed for public inspection December 13, 1996, 9:00 a.m.]

DELAWARE RIVER BASIN COMMISSION

[25 PA. CODE CH. 901]

Amendments to Comprehensive Plan, Water Code of the Delaware River Basin and Administrative Manual—Part III Water Quality Regulations

Agency: Delaware River Basin Commission.

Action: Final rule.

Summary: At its October 23, 1996 business meeting, the Delaware River Basin Commission amended its Comprehensive Plan, Water Code and Water Quality Regulations concerning water quality criteria for toxic pollutants, and policies and procedures to establish wasteload allocations and effluent limitations for point source discharges to Zones 2 through 5 (Trenton, New Jersey to the Delaware Bay) of the tidal Delaware River.

Effective Date: January 1, 1997.

Addresses: Copies of the Commission's Water Code of the Delaware River Basin, Administrative Manual—Part III Water Quality Regulations, the full text of the amendments and Response Document—September 5, 1996 Public Hearing 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 5, 11 and 13, 1995, the Commission held public hearings on proposed amendments to its water quality regulations as noticed in the *Pennsylvania Bulletin* issues of August 26 and September 23, 1995. As a result of comments received on that proposal and discussions with the Commission's Water Quality and Toxics Advisory Committees, the Commission modified its initial proposal. The proposed regulations, as modified, were the subject of a public hearing on September 5, 1996 as noticed in the *Pennsylvania Bulletin* issue of July 27, 1996.

Specifically, water quality criteria for selected toxic pollutants are incorporated in the Comprehensive Plan and Article 3 of the Water Code and Water Quality Regulations as stream quality objectives. Article 4 of the Water Quality Regulations has also been amended to include policies and procedures to be used to establish wasteload allocations for those discharges containing pollutants which exceed the stream quality objectives and impact the designated uses of the river.

Adoption of these amendments provides a mechanism for identifying toxic pollutants which impair aquatic life and human health, and developing uniform and equitable wasteload allocations for those NPDES discharges to the tidal Delaware River which contribute to their impairment. The permitting authorities of the Basin states will utilize allocations developed by the Commission to establish effluent limitations for NPDES permittees in their jurisdiction, as appropriate.

Based upon testimony received since the initial proposal and considerable deliberation, the Commission has amended its Comprehensive Plan, Water Code of the Delaware River Basin and Administrative Manual—Part III Water Quality Regulations.

1. Article 3 of the Administrative Manual—Part III Water Quality Regulations, the Comprehensive Plan and Article 3 of the Water Code of the Delaware River Basin are hereby amended as follows:

a. Subsections 3.10.3C. and D. are added to read as follows:

C. *Aquatic Life Objectives for Toxic Pollutants.* It is the policy of the Commission to designate numerical stream quality objectives for the protection of aquatic life for the Delaware River Estuary (Zones 2 through 5) which correspond to the designated uses of each zone. Aquatic life objectives for the protection from both acute and chronic effects are herein established on a pollutant-specific basis for:

pollutants listed as toxic under Section 307(a)(1) of the Clean Water Act for which the U. S. Environmental Protection Agency (EPA) has published final criteria,

other chemicals for which EPA has published final criteria under Section 304(a) of the Act, and

pollutants and other chemicals in combinations.

Other toxic substances for which any of the three Estuary states have adopted criteria or standards may also be considered for the development of stream quality objectives.

1. For the purpose of determining compliance with stream quality objectives for the protection of aquatic life, the duration of exposure of aquatic organisms shall be 1 hour for acute objectives and 4 days for chronic objectives.

2. Stream quality objectives for cadmium, chromium, copper, lead, nickel, silver and zinc shall be expressed as the dissolved form of the metal. Adjustment factors established by the Commission based upon the best available scientific information shall be used to convert total recoverable criteria published by the U.S. Environmental Protection Agency to dissolved stream quality objectives. In the absence of data to develop a factor for any of the metals, an adjustment factor of 1.0 shall be utilized. Stream quality objectives for other metals shall be expressed as the concentration of the total recoverable form of the metal.

D. *Human Health Objectives for Toxic Pollutants.* It is the policy of the Commission to designate numerical stream quality objectives for the protection of human health for the Delaware River Estuary (Zones 2 through 5) which correspond to the designated uses of each zone.

Stream quality objectives for protection from both carcinogenic and systemic effects are herein established on a pollutant-specific basis for:

pollutants listed as toxic under Section 307(a)(1) and other toxic pollutants, and

other chemicals for which EPA has published final criteria under Section 304(a) of the Act.

Other toxic substances for which any of the three Estuary states have adopted criteria or standards may also be considered for the development of stream quality objectives.

1. An objective to protect against carcinogenic effects shall only be established if the pollutant is classified A, B or C under the EPA classification system for carcinogens, and if a cancer potency factor (CPF) exists in IRIS.

2. An objective to protect against systemic effects shall only be established for a pollutant if a reference dose (RfD) exists in IRIS. An additional safety factor of 10 shall be utilized in establishing the stream quality objectives to protect against systemic effects for pollutants classified as carcinogens if a CPF is not available in IRIS.

3. In the absence of toxicological data for an RfD or CPF in IRIS, data published in the 1980 U.S. EPA water quality criteria documents will be considered.

4. In establishing stream quality objectives for carcinogens, the level of risk is established at 10^{-6} or one additional cancer in every 1,000,000 humans exposed for a lifetime (70 years).

5. For the purpose of determining compliance with human health stream quality objectives, the duration of exposure shall be 70 years for carcinogens and 30 days for systemic toxicants.

6. A rate of ingestion of water of 2.0 liters per day is assumed in calculating objectives for river zones where the designated uses include public water supplies after reasonable treatment. A rate of ingestion of fish of 6.5 grams per day (equivalent to consuming a 1/2 pound portion every 35 days) is assumed in calculating freshwater stream quality objectives for human health. A rate of ingestion of fish of 37 grams per day (equivalent to consuming a 1/2 pound portion every 6 days) is assumed in calculating marine stream quality objectives for human health.

7. Maximum Contaminant Levels (MCLs) shall be applied as stream quality objectives in Zones 2 and 3 which are designated for use as public water supplies for those toxic pollutants where the MCL value is more stringent than the calculated human health objectives for carcinogens or systemic toxicants.

8. Numerical criteria for toxic pollutants to protect the taste and odor of ingested water and fish shall be applied as stream quality objectives in the Estuary if these criteria are more stringent than the calculated human health objectives for carcinogens or systemic toxicants.

b. Subsection 3.10.5D. is revised to read as follows:

D. *Streamflow.* Numerical stream quality objectives are based on a minimum consecutive 7-day flow with a 10-year recurrence interval unless otherwise specified.

c. Subsection 3.10.5E. is added to read as follows:

E. *Requests for Modification of Stream Quality Objectives.* The Commission will consider requests to modify the stream quality objectives for toxic pollutants based upon site-specific factors. Such requests shall provide a demonstration of the site-specific differences in the physical, chemical or biological characteristics of the area in question, through the submission of substantial scientific data and analysis. The demonstration shall also include the proposed alternate stream quality objectives. The methodology and form of the demonstration shall be approved by the Commission.

d. Subsections 3.10.6H. through P. are added to read as follows:

H. *IRIS.* The Integrated Risk Information System established and maintained by the U.S. Environmental Protection Agency. An electronic data base containing information on the toxicity and carcinogenicity of individual substances which can be accessed by regulatory agencies and the public.

I. *Carcinogen.* A substance for which there is no level of exposure that does not pose a small, finite probability of inducing benign or malignant tumors.

J. *Systemic Toxicant.* A substance having a threshold exposure which must be exceeded before deleterious effects (other than cancer) are observed in organ systems.

K. *Acute Effects.* Effects (including but not limited to lethality) due to exposure to a toxicant over a short time period.

L. *Chronic Effects.* Effects (including but not limited to reduced reproduction, reduced growth and lethality) due to exposure to a toxicant over a relatively long period of time relative to the life span of the exposed organism.

M. *Cancer Potency Factor (CPF).* The slope of the dose response curve in the low dose region expressed as the risk per milligram of a toxic substance per kilogram of body weight per day (mg/KG/day)^{u1}.

N. *Reference Dose (RfD).* The daily exposure to a substance that is likely to be without an appreciable risk of deleterious effects during a lifetime expressed as milligram of the substance per kilogram of body weight per day (mg/KG/day).

O. *Maximum Contaminant Level (MCL).* The maximum permissible level of a contaminant in water which is delivered to any user of a public water system.

P. *Stream Quality Objectives.* Numeric values for specific pollutants and narrative descriptions of the quality of a waterbody that will assure that the designated uses of the waterbody, including the protection of aquatic life and human health, are achieved.

e. Subsection 3.30.2C.14. is added to read as follows:

14. *Toxic Pollutants.*

a. Applicable MCLs and criteria to protect the taste and odor of ingested water and fish are presented in Tables 3 and 4.

b. Applicable freshwater stream quality objectives for the protection of aquatic life are presented in Table 5.

c. Applicable freshwater stream quality objectives for the protection of human health are presented in Tables 6 and 7.

f. Subsection 3.30.3C.15. is added to read as follows:

15. *Toxic Pollutants.*

a. Applicable MCLs and criteria to protect the taste and odor of ingested water and fish are presented in Tables 3 and 4.

b. Applicable freshwater stream quality objectives for the protection of aquatic life are presented in Table 5.

c. Applicable freshwater stream quality objectives for the protection of human health are presented in Tables 6 and 7.

g. Subsection 3.30.4C.12. is added to read as follows:

12. *Toxic Pollutants.*

a. Applicable criteria to protect the taste and odor of ingested water and fish are presented in Table 4.

b. Applicable freshwater stream quality objectives for the protection of aquatic life are presented in Table 5.

c. Applicable freshwater stream quality objectives for the protection of human health are presented in Tables 6 and 7.

h. Subsection 3.30.5C.11. is added to read as follows:

11. *Toxic Pollutants.* Freshwater stream quality objectives apply in areas upstream of the Delaware Memorial Bridges (River Mile 68.75), and the more stringent of the freshwater or marine stream quality objectives apply in areas below RM 68.75.

a. Applicable criteria to protect the taste and odor of ingested water and fish are presented in Table 4.

b. Applicable freshwater and marine stream quality objectives to protect aquatic life are presented in Table 5.

c. Applicable freshwater and marine stream quality objectives to protect human health are presented in Tables 6 and 7.

Table 3: MAXIMUM CONTAMINANT LEVELS TO BE APPLIED AS HUMAN HEALTH STREAM QUALITY OBJECTIVES IN ZONES 2 AND 3 OF THE DELAWARE RIVER ESTUARY.

Parameter	*Maximum Contaminant Level (ug/l)*
Antimony	6
Arsenic	50
Barium	2.0 mg/l
Cadmium	5
Chromium (total)	100
Nickel	100
Selenium	50
1,2-trans-Dichloroethene	100
1,2-Dichloropropane	5
Ethylbenzene	700
gamma-BHC (Lindane)	0.2
1,2,4-Trichlorobenzene	70
Total Trihalomethanes	100

Table 4: CRITERIA TO PROTECT THE TASTE AND ODOR OF INGESTED WATER AND FISH TO BE APPLIED AS HUMAN HEALTH STREAM QUALITY OBJECTIVES IN ALL ZONES OF THE DELAWARE RIVER ESTUARY.

Parameter	*STREAM QUALITY OBJECTIVE (ug/l)*
Phenol	300
2-Chlorophenol	0.1
2,4-Dichlorophenol	0.3
2,4-Dimethylphenol	400
4-Chloro-3-methylphenol	3.0 mg/l
Pentachlorophenol	30
Acenaphthene	20
Chlorobenzene	20
Hexachlorocyclopentadiene	1.0
Nitrobenzene	30

Table 5: STREAM QUALITY OBJECTIVES FOR TOXIC POLLUTANTS FOR THE PROTECTION OF AQUATIC LIFE IN THE DELAWARE RIVER ESTUARY.

Parameter	*Freshwater Objectives (ug/l)*		*Marine Objectives (ug/l)*	
	Acute	*Chronic*	*Acute*	*Chronic*
	Metals (Values indicated are total recoverable; see Section 3.10.3.C.2. for form of metal)			
Aluminum	750	87	—	—
Arsenic (trivalent)	360	190	69	36
Cadmium	$e^{(1.128*LN(Hardness)-3.828)}$	$e^{(0.7852*LN(Hardness)-3.49)}$	43	9.3
Chromium (trivalent)	$e^{(0.8190*LN(Hardness)+3.688)}$	$e^{(0.8190*LN(Hardness)+1.561)}$	—	—
Chromium (hexavalent)	16	11	1,100	50
Copper	$e^{(0.9422*LN(Hardness)-1.464)}$	$e^{(0.8545*LN(Hardness)-1.465)}$	5.3	3.4
Cyanide (total)	22	5.2	1.0	—
Lead	48	16	220	8.5
Mercury	2.4	0.012	2.1	0.025
Nickel	$e^{(0.846*LN(Hardness)+3.3612)}$	$e^{(0.846*LN(Hardness)+1.1645)}$	75	8.3
Selenium	20	5.0	300	71
Silver	$e^{(1.72*LN(Hardness)-6.52)}$	—	2.3	—
Zinc	$e^{(0.8473*LN(Hardness)+0.8604)}$	$e^{(0.8473*LN(Hardness)+0.7614)}$	95	86
	Pesticides/PCBs			
Aldrin	1.5	—	0.65	—
gamma-BHC (Lindane)	1.0	0.08	0.08	—
Chlordane	1.2	0.0043	0.045	0.004
Chlorpyrifos (Dursban)	0.083	0.041	0.011	0.0056
DDT and metabolites (DDE & DDD)	0.55	0.001	0.065	0.001
Dieldrin	1.25	0.0019	0.355	0.0019

Parameter	Freshwater Objectives (ug/l) Acute	Freshwater Objectives (ug/l) Chronic	Marine Objectives (ug/l) Acute	Marine Objectives (ug/l) Chronic
Endosulfan	0.11	0.056	0.017	0.0087
Endrin	0.09	0.0023	0.019	0.0023
Heptachlor	0.26	0.0038	0.027	0.0036
PCBs (Total)	1.0	0.014	5.0	0.03
Parathion	0.065	0.013	—	—
Toxaphene	0.73	0.0002	0.21	0.0002
Acid Extractable Organics				
Pentachlorophenol	$e^{(1.005*pH-4.83)}$	$e^{(1.005*pH-5.29)}$	13	7.9
Indicator Parameters				
Whole Effluent Toxicity	0.3 Toxic Units$_{acute}$	1.0 Toxic Units$_{chronic}$	0.3 TU$_a$	1.0 TU$_c$

Table 6: STREAM QUALITY OBJECTIVES FOR CARCINOGENS FOR THE DELAWARE RIVER ESTUARY.

PARAMETER	EPA CLASS.	FRESHWATER OBJECTIVES (µg/l) FISH & WATER INGESTION	FRESHWATER OBJECTIVES (µg/l) FISH INGESTION ONLY	MARINE OBJECTIVES (µg/l) FISH INGESTION ONLY
Beryllium	B2	0.00767	0.132	0.0232
Aldrin	B2	0.00189	0.0226	0.00397
alpha-BHC	B2	0.00391	0.0132	0.00231
Chlordane	B2	0.000575	0.000588	0.000104
DDT	B2	0.000588	0.000591	0.000104
DDE	B2	0.00554	0.00585	0.00103
DDD	B2	0.00423	0.00436	0.000765
Dieldrin	B2	0.000135	0.000144	0.0000253
Heptachlor	B2	0.000208	0.000214	0.0000375
Heptachlor epoxide	B2	0.000198	0.000208	0.0000366
PCBs (Total)	B2	0.0000444	0.0000448	0.0000079
Toxaphene	B2	0.000730	0.000747	0.000131
Acrylonitrile	B1	0.0591	0.665	0.117
Benzene	A	1.19	71.3	12.5
Bromoform	B2	4.31	164.0	28.9
Bromodichloromethane	B2	0.559	55.7	9.78
Carbon tetrachloride	B2	0.254	4.42	0.776
Chlorodibromomethane	C	0.411	27.8	4.88
Chloroform	B2	5.67	471.0	82.7
1,2-Dichloroethane	B2	0.383	98.6	17.3
1,1-Dichloroethene	C	0.0573	3.20	0.562
1,3-Dichloropropene	B2	87.0	14.1	2.48
Methylene chloride	B2	4.65	1,580	277
Tetrachloroethene	B2	0.80	8.85	1.55
1,1,1,2-Tetrachloroethane	C	1.29	29.3	5.15
1,1,2,2-Tetrachloroethane	C	0.172	10.8	1.89
1,1,2-Trichloroethane	C	0.605	41.6	7.31
Trichloroethene	B2	2.70	80.7	14.2
Vinyl chloride	A	2.00	525.0	92.9
Benzidine	A	0.000118	0.000535	0.000094
3,3-Dichlorobenzidine	B2	0.0386	0.0767	0.0135
PAHs				
Benz[a]anthracene	B2	0.00171	0.00177	0.00031
Benzo[b]fluoranthene	B2	0.000455	0.000460	0.000081
Benzo[k]fluoranthene	B2	0.000280	0.000282	0.000049
Benzo[a]pyrene	B2	0.0000644	0.0000653	0.0000115
Chrysene	B2	0.0214	0.0224	0.00394
Dibenz[a,h]anthracene	B2	0.0000552	0.0000559	0.0000098
Indeno[1,2,3-cd]pyrene	B2	0.0000576	0.0000576	0.0000101
Bis(2-chloroethyl)ether	B2	0.0311	1.42	0.249
Bis(2-ethylhexyl)phthalate	B2	1.76	5.92	1.04
Dinitrotoluene mixture (2,4 & 2,6)	B2	17.3	1420	249
1,2-Diphenylhydrazine	B2	0.0405	0.541	0.095
Hexachlorobenzene	B2	0.000748	0.000775	0.000136
Hexachlorobutadiene	C	0.445	49.7	8.72
Hexachloroethane	C	1.95	8.85	1.56

PARAMETER	EPA CLASS.	FRESHWATER OBJECTIVES (µg/l) FISH & WATER INGESTION	FRESHWATER OBJECTIVES (µg/l) FISH INGESTION ONLY	MARINE OBJECTIVES (µg/l) FISH INGESTION ONLY
Isophorone	C	36.3	2590	455
N-Nitrosodi-N-methylamine	B2	0.000686	8.12	1.43
N-Nitrosodi-N-phenylamine	B2	4.95	16.2	2.84
N-Nitrosodi-N-propylamine	B2	0.00498	1.51	0.265
Pentachlorophenol	B2	0.282	8.16	1.43
2,4,6-Trichlorophenol	B2	2.14	6.53	1.15
Dioxin (2,3,7,8-TCDD)	—	1.3×10^{-8}	1.4×10^{-8}	2.4×10^{-9}

Table 7: STREAM QUALITY OBJECTIVES FOR SYSTEMIC TOXICANTS FOR THE DELAWARE RIVER ESTUARY.

PARAMETER	EPA CLASS.	FRESHWATER OBJECTIVES (ug/l) FISH & WATER INGESTION	FRESHWATER OBJECTIVES (ug/l) FISH INGESTION ONLY	MARINE OBJECTIVES (ug/l) FISH INGESTION ONLY
Antimony		14.0	4,310	757
Arsenic	A	9.19	73.4	12.9
Beryllium	B2	165	2,830	498
Cadmium		14.5	84.1	14.8
Chromium (Trivalent)		33,000	673,000	118,000
Hexavalent chromium	A	166	3,370	591
Mercury	D	0.144	0.144	0.144
Nickel		607	4,580	805
Selenium	D	100	2,020	355
Silver	D	175	108,000	18,900
Thallium		1.70	6.20	1.10
Zinc		9,110	68,700	12,100
Aldrin	B2	0.96	11.5	2.03
gamma-BHC (Lindane)		7.38	24.9	4.37
Chlordane	B2	0.0448	0.0458	0.00805
DDT	B2	0.100	0.100	0.0176
Dieldrin	B2	0.108	0.115	0.020
Endosulfan		111	239	42.0
Endrin	D	0.755	0.814	0.143
Heptachlor	B2	0.337	0.344	0.060
Heptachlor epoxide	B2	0.0234	0.0246	0.00433
Total PCBs	B2	0.00839	0.00849	0.00149
Acrolein		320	780	137
Ethylbenzene		3,120	28,700	5,050
Bromoform	B2	682	25,900	4,560
Bromodichloromethane	B2	693	69,000	12,100
Dibromochloromethane	C	690	46,600	8,190
Carbon tetrachloride	B2	23.1	402	70.6
Chloroform	B2	346	28,700	5,050
Chlorobenzene	D	677	20,900	3,670
1,1-Dichloroethene	C	309	17,300	3,040
1,2-trans-Dichloroethene		696	136,000	23,900
1,3-Dichloropropene	B2	10.4	1,690	297
Methyl bromide		49.0	N/A	N/A
Methylene chloride	B2	2,090	710,000	125,000
1,1,2-Trichloroethane	C	138	9,490	1,670
Tetrachloroethene		318	3,520	618
1,1,1,2-Tetrachloroethane	C	1,000	22,400	3,940
Toluene		6,760	201,000	35,400
Acenaphthene		1,180	2,670	469
Anthracene	D	4,110	6,760	1,190
Benzidine	A	81.8	369	64.9
Bis(2-chloroisopropyl)ether		1,390	174,000	30,600
Bis(2-ethylhexyl)phthalate	B2	492	1,660	291
Butylbenzl phthalate	C	298	520	91.4
Diethyl phthalate	D	22,600	118,000	20,700
Dimethyl phthalate	D	313,000	2,990,000	526,000
Dibutyl phthalate	D	2,710	12,100	2,130

PARAMETER	EPA CLASS.	FRESHWATER OBJECTIVES (ug/l) FISH & WATER INGESTION	FRESHWATER OBJECTIVES (ug/l) FISH INGESTION ONLY	MARINE OBJECTIVES (ug/l) FISH INGESTION ONLY
1,2-Dichlorobenzene	D	2,670	17,400	3,060
1,3-Dichlorobenzene	D	414	3,510	617
1,4-Dichlorobenzene		419	3,870	677
2,4-Dinitrotoluene		69.2	5670	996
Fluoranthene		296	375	65.8
Fluorene	D	730	1,530	268
Hexachlorobenzene	B2	0.958	0.991	0.174
Hexachlorobutadiene	C	69.4	7,750	1,360
Hexachlorocyclopentadiene		242	17,400	3,050
Hexachloroethane	C	27.3	124	21.7
Isophorone	C	6,900	492,000	86,400
Nitrobenzene	D	17.3	1,860	327
Pyrene	D	228	291	51.1
1,2,4-Trichlorobenzene	D	255	945	166
2-Chlorophenol		122	402	70.6
2,4-Dichlorophenol		92.7	794	139
2,4-Dimethylphenol		536	2,300	403
2,4-Dinitrophenol		70	14,300	2,500
Pentachlorophenol	B2	1,010	29,400	5,160
Phenol		20,900	4,620,000	811,000

2. Article 4 of the Administrative Manual—Part III Water Quality Regulations is hereby amended as follows:

a. Subsection 4.20.4B. is revised to read as follows:

B. so that the assimilation of such waste by the interstate waters will not result in a violation of such water quality criteria.

1. For the purposes of establishing wasteload allocations for toxic pollutants for the Delaware River Estuary, the lower of the 95th percentile of the available data at the appropriate criteria duration, or the water quality criterion at or above the head of the tide shall be used to establish boundary conditions.

b. Subsection 4.20.5 is added to read as follows:

4.20.5 Application of Criteria for Toxic Pollutants.

A. *Delaware River Estuary.*

1. In establishing wasteload allocations and other effluent requirements, exceedances of stream quality objectives for the protection of aquatic life from acute effects may be permitted in small areas near outfall structures, provided that all of the following requirements are met.

a. As a guideline, the dimensions of the area where objectives are exceeded should be limited to the more stringent of the following restrictions:

1). a distance of 50 times the discharge length scale in any direction from the outfall structure, or

2). a distance of 5 times the local water depth in any direction from the outfall structure.

b. Stream quality objectives shall not be exceeded in areas designated as critical habitat for fish and benthic organisms.

c. Stream quality objectives shall not be exceeded where effluent flows over exposed benthic habitat prior to mixing with the receiving waters.

d. A zone of passage for free-swimming and drifting organisms equal to 50% of the surface width of the river at the location of the discharge shall be provided.

e. The total surface area of the Delaware River Estuary where stream quality objectives for the protection of aquatic life from acute effects are exceeded shall be limited to:

1). 5% of the total surface area of Zones 2, 3 and 4, and

2). 5% of the total surface area of Zone 5.

f. Upon the request of one or more dischargers, the Executive Director may consider requests for alternatives to the requirements of subsections a. through e. of Section 4.20.5.A.1. Such requests shall provide a demonstration that the alternative requirement requested will not adversely impact free-swimming, drifting and benthic organisms. The demonstration(s) shall provide a sound rationale, and be supported by substantial scientific data and analysis. The methodology and form of the demonstration shall be approved by the Executive Director. The Executive Director may reject any requests which are not substantive. The Commission may establish alternative areas where acute stream quality objectives may be exceeded based upon the evaluation of submitted demonstrations.

g. The Executive Director may consider requests to conduct studies to confirm the mixing characteristics and the predicted dilution isopleths of a discharge. Such requests shall provide a demonstration based upon sound scientific and technical rationale, and be supported by substantial data and analysis. The methodology and form of the demonstration shall be approved by the Executive Director. The Executive Director may reject any requests which are not substantive. The Commission may establish alternative dilution factors based upon the evaluation of submitted demonstrations.

2. For those stream quality objectives whose numerical value is related to hardness, a median hardness value of 74 mg/l as CaCO3 shall be used to represent the hardness of the receiving water for the purposes of determining the numerical value of those objectives. This median hardness value shall be used to establish the aquatic life objective for protection from chronic effects; and in conjunction with the site-specific median hardness value of the efflu-

ent and the dilution factor, the aquatic life objective for protection from acute effects.

3. For those stream quality objectives whose numerical value is related to pH, a median pH value of 7.1 shall be used to represent the pH of the receiving water for the purposes of determining the numerical value of those objectives. This median pH value shall be used to establish the aquatic life objective for protection from chronic effects; and in conjunction with the site-specific median pH value of the effluent and the dilution factor, the aquatic life objective for protection from acute effects.

4. *Assumptions for Estuarine Mixing.* Complete vertical and lateral mixing shall be assumed in the Estuary in applying chronic aquatic life and human health stream quality objectives under design conditions. Site-specific data which does not support this assumption will be considered by the Executive Director in establishing allocations to discharges.

5. *Deriving Total Recoverable Wasteload Allocations for Metals.* Wasteload allocations developed from the dissolved stream quality objectives for seven cationic metals shall be converted into total recoverable wasteload allocations using a translator. The translator shall be determined using procedures specified by the Commission. In the absence of data to develop a translator for any of the metals, the reciprocal of the conversion factor established under Section 3.10.3C.2. shall be used for the translator.

B. *Definitions.*

1. *Critical Habitat.* Specific areas within the tidal Delaware River which are or could be occupied by a species absent the toxic effect of pollutants; and which have those physical, chemical and biological features which are essential to the conservation and maintenance of the Delaware Estuary population. The Commission shall identify and determine critical habitat within the tidal Delaware River. Such determination shall consider the spatial and temporal requirements of the species including critical life stages. Determinations shall be governed by the Commission's Rules of Practice and Procedure relating to review, hearing and decisions of objections thereto.

2. *Discharge Length Scale.* The square root of the cross-sectional area of any discharge outlet.

c. Subsection 4.30.7A.4.a. is revised to read as follows:

a. The reserve in each zone shall be utilized to accommodate new discharges or major revisions to an allocation, or any reallocation, when appropriate in the judgment of the Commission.

d. Subsection 4.30.7A.5. is revised to read as follows:

5. *Reallocations.*

a. *Carbonaceous Oxygen Demand*

1). All allocations shall be subject to review by the Commission and, after such review, the Commission may make such reallocation as it deems necessary.

2). If any factors upon which an individual allocation is based change significantly, application shall be made to the Executive Director for a revised allocation.

3). Whenever the reserve in a zone approaches depletion, or when the full use of the assimilative capacity is approached, or when in the judgment of the Commission, the allocations existing at that time are no longer equitable, the capacity in the zone, minus a reserve, will be reallocated among the waste dischargers in that zone.

b. *Toxic Pollutants*

1). All allocations shall be subject to review by the Commission and, after such review, the Commission may make such reallocation as it deems necessary.

2). If any factors upon which an individual allocation is based change significantly, application shall be made to the Executive Director for a revised allocation. The Executive Director shall provide notice to interested and affected parties prior to establishing the revised allocation.

3). Allocations shall, as a minimum, be reviewed and, if required, revised every five years, or as directed by the Commission.

e. Subsection 4.30.7A.8. is added to read as follows:

8. *Design Effluent Flow.* For the purpose of determining the waste assimilative capacity of a stream and the wasteload allocations for discharges of toxic pollutants, the following design effluent flows will be used:

a. For industrial wastewater treatment plant discharges covered by Effluent Limitations Guidelines (ELG) promulgated by the U.S. EPA, the effluent design flow shall be the average daily flow associated with:

1). the month having the highest monthly production rate of the previous twelve months or, if greater,

2). the year having the highest annual production rate of the previous five years.

b. If the discharge from an industrial wastewater treatment plant is not covered by Effluent Limitations Guidelines (ELG) promulgated by the U.S. EPA, is mixed with stormwater or cooling water or production data are not available, the effluent design flow shall be the average daily flow associated with:

1). the month with the highest monthly flow rate of the previous twelve months, or if greater,

2). the year having the highest annual flow rate of the previous five years.

c. For municipal wastewater treatment plant discharges, the effluent design flow shall be the higher of:

1). the average daily flow of the plant for the previous three years including a growth factor based upon a five-year projection, if available, or

2). the capacity of the plant that was used to establish effluent limitations for the NPDES permit expressed as the annual average flow.

f. Subsection 4.30.7B.2. is added to read as follows:

2. *Toxic Pollutants.* Pursuant to Sections 3.10.4.E. and 4.30.7.A. of these regulations, the Commission shall establish wasteload allocations and other effluent requirements that may be necessary to meet the stream quality objectives for toxic pollutants contained in Section 3.30.

a. *Reserve.* A reserve allocation of 5% of the Total Maximum Daily Load (TMDL) shall be established as a part of an allocation or reallocation, by increasing the effluent design flow by 5%.

b. *Margin of Safety.* As part of an allocation or reallocation, a proportion of the Total Maximum Daily Load shall be established as a margin of safety. The proportion established shall reflect the degree of uncertainty in the data and resulting water quality-based controls.

c. *Allocation to Discharges.*

1). Wasteload allocations shall be established for Phase 1 continuous point source discharges to address acute

aquatic life protection, chronic aquatic life protection and both carcinogenic and systemic toxicants.

a). The water quality objective for the establishment of any allocation or reallocation shall be the stream quality objectives contained in Section 3.30. If the background concentration of a toxic pollutant at the appropriate criteria duration exceeds the stream quality objective as a result of loadings from sources not subject to control, then the water quality objective shall be the background concentration of the pollutant.

b). The minimum flows for aquatic life protection and to protect the taste and odor of ingested water and fish are based on a minimum consecutive 7-day flow with a 10-year recurrence interval for all tributaries; and for the Delaware River, a flow of 2500 cfs at Trenton. For the protection of human health, the harmonic mean flow shall be used for carcinogens, and the minimum consecutive 30-day flow with a 5-year recurrence interval shall be used for systemic toxicants.

2). Allocations shall be determined by the Executive Director using the procedure described in Section 4.30.7.B.2.c.4). or alternative procedures that are consistent with the doctrine of equitable apportionment, and achieve the following:

a). assure compliance with applicable stream quality objectives;

b). provide maximum equity among competing discharges; and

c). minimize the overall cost of compliance.

3). The loadings of toxic pollutants identified in Section 4.30.7.B.2.c. shall be allocated among individual Phase 1 continuous point source discharges which meet any of the following criteria:

a). The discharge has an existing permit limit for the parameter,

b). Effluent data indicates the presence of the parameter, or

c). The reasonable potential exists for the parameter to occur in the discharge.

4). Allocations for Phase 1 continuous point source discharges will be based upon the equal marginal percent reduction procedure which has been determined to be consistent with the requirements of Section 4.30.7.B.2.c.2). This procedure requires all dischargers, whether they are part of a multiple discharge wasteload allocation scenario or not, to provide treatment of their wastewater to achieve the applicable water quality standard; and in addition, requires some dischargers to provide additional treatment due to the cumulative impact of all discharges.

a). Alternative wasteload allocation procedures may be considered by the Commission if they provide timely compliance with Section 4.30.7.B.2.c.2). and include the consent of all dischargers affected by the alternative procedure.

b). Discharges meeting any of the requirements of Section 4.30.7.B.2.c.3). will be assigned an initial loading based upon the following information in order of preference:

i). The average monthly limit obtained from effluent guideline limitations promulgated by the U.S. Environmental Protection Agency for the point source category applicable to the discharge,

ii). Any average monthly limitation for the parameter in the current discharge permit,

iii). Monitoring data of sufficient quantity and quality, as determined by the Executive Director, to characterize the concentration of the parameter in the discharge, or

iv). Minimum performance standards established by the Executive Director for industrial and municipal wastewater treatment plants discharging to the tidal Delaware River.

In assigning the initial loading, the average loading at the appropriate criteria duration will be calculated using the coefficient of variation (CV) calculated from monitoring data or a default value of 0.6 in the absence of data of sufficient quantity and quality, as determined by the Executive Director.

c). Discharges contributing to an exceedance of a stream quality objective due to the cumulative effect of all discharges may not be required to provide additional treatment or loading reduction if the discharge does not represent a significant proportion of the marginal loading.

5). Allocations established by the Executive Director and reallocations required under Section 4.30.7.A.5.b.2). shall be published in a document containing the specific procedures, tools and assumptions used to derive the allocations.

6). Wasteload allocations established under Section 4.30.7.B.2.c. shall be referred to the appropriate agency of the signatory parties, respectively, for use, as appropriate, in developing effluent limitations, schedules of compliance, and other requirements in permits.

d. *Adjustment for Pollutants in Intake Water.* Wasteload allocations established for an industrial discharge may be adjusted by the Executive Director, in consultation with the appropriate agency of the signatory parties, to account for pollutants present in water withdrawn for use by the facility from the receiving water provided that the following conditions are met:

1). In the absence of pollutants in the water withdrawn, there would be no exceedance of the stream quality objectives for toxic pollutants;

2). Pollutants in the discharge resulting from any other activity, operation or materials used or produced at the facility do not significantly contribute to an exceedance of the stream quality objectives for toxic pollutants contained in Section 3.30.;

3). No statistically significant difference can be detected between the intake and effluent concentrations and loadings of a toxic pollutant based upon a rigorous analysis of data representative of operating and ambient conditions at the facility; and

4). No practicable alternative source of intake water is available.

g. Subsection 4.30.7C. is added to read as follows:

C. *Definitions.*

1. *Wasteload Allocation.* The portion of the Total Maximum Daily Load of a body of water or section thereof that is allocated to an existing or future point source of pollution. Or, any limitation on the loading and/or concentration of a pollutant discharged from a point source required to ensure that stream quality objectives are not exceeded.

2. *Total Maximum Daily Load (TMDL).* The maximum daily loading of a pollutant from all sources which still ensures that water quality objectives are met.

3. Margin of Safety. A factor that takes into account any uncertainty or lack of knowledge about the relationship between pollutant loadings and the quality of the receiving water.

4. *Marginal Load.* The portion of the loading of a pollutant that contributes to an exceedance of a stream quality objective when the cumulative loading from all point sources is considered.

5. *Effluent Limitations Guidelines.* Effluent limitations for pollutants for categories and classes of point sources promulgated by the U.S. Environmental Protection Agency under Section 301 of the Clean Water Act which reflect the best available treatment technology.

6. *Harmonic Mean Flow.* The flow value corresponding to the number of daily flow measurements divided by the sum of the reciprocals of the flows.

7. *Background Concentration.* The concentration of a toxic pollutant at any point in the Estuary that results from loadings from tributaries, sediments (if applicable), and any point or non-point sources not subject to control in the current allocation or reallocation.

8. *Phase 1 Continuous Point Source Discharge.* A discharge of wastewater other than non-contact cooling water, permitted under the National Pollutant Discharge Elimination System (NPDES) which occurs without interruption during the operating hours of a facility except for infrequent shutdowns, and is not primarily dependent on precipitation-induced flows.

9. *Long-term Average Concentration.* The mean concentration of a toxic pollutant in the effluent that represents the desired performance of a wastewater treatment plant.

10. *Minimum Performance Standards.* The long-term average concentration for a parameter for which stream quality objectives have been established under Section 3.10.3.C. or D.

a. For volatile and non-volatile organic chemicals, the standard is the maximum for a monthly average specified in the effluent guideline limitations for the Organic Chemicals, Plastics, and Synthetic Fibers (OCPSF) industrial category, or the highest reported effluent value for activated sludge treatment specified in the U.S. EPA's Water Engineering Research Laboratory data base.

b. For chlorinated pesticides and polychlorinated biphenyls, the standard is the Practical Quantitation Limit (PQL) for the compound.

c. For metals and indicator parameters, the standard is the average concentration of the parameter in industrial or municipal treatment plant discharges to the Estuary.

11. *Initial Loading.* The concentration or mass of a pollutant that is initially assigned to a discharge that meets the criteria specified in Section 4.30.7.B.2.c.3). during the baseline analysis portion of a wasteload allocation exercise.

3. Interpretive Guideline No. 1 of the Administrative Manual - Part III Water Quality Regulations is hereby amended as follows:

a. Subsection A.(1)a. is revised to read as follows:

a. *Toxic Substances.* The following limits shall apply in Basin waters other than Zones 2, 3, 4 and 5.

b. Subsection B.(2)b. is revised to read as follows:

b. *Toxicity.* The following requirements shall apply in Basin waters other than Zones 2, 3, 4 and 5.

4. a. This resolution shall become effective January 1, 1997 except as otherwise provided in Subsection b. below.

b. The Commission may extend the time within which the provisions of the resolution are effective as to 1) any applications now pending before the Commission or any signatory party or 2) any existing docket conditions which require compliance with the resolution.

Delaware River Basin Compact, 75 Stat. 688

SUSAN M. WEISMAN,
Secretary

Fiscal Note: Fiscal Note 68-33 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART V. DELAWARE RIVER BASIN COMMISSION

CHAPTER 901. GENERAL PROVISIONS

§ 901.2. Comprehensive Plan and water quality

The Comprehensive Plan regulations as set forth in 18 CFR Part 401, Subpart A (1996) and the Water code and Water Quality Standards as set forth in 18 CFR Part 410 (1996) are hereby incorporated by reference and made a part of this title.

[Pa.B. Doc. No. 96-2092. Filed for public inspection December 13, 1996, 9:00 a.m.]

Title 61—REVENUE

DEPARTMENT OF REVENUE

[61 PA. CODE CHS. 855, 862, 863 AND 866]

Termination of Instant Lottery Games

The following instant games were terminated by public announcement by the Executive Director of the Lottery and are being deleted from the *Pennsylvania Code*:

Sections 855.1—855.22, Pennsylvania Instant Slots ('93) Instant Lottery (see § 855.22 (relating to termination of chapter)). June 27, 1994.

Sections 862.1—862.22, Pennsylvania Money, Movies and Music Instant Lottery (see § 862.22 (relating to termination of chapter)). September 26, 1994.

Sections 863.1—863.22, Pennsylvania Winner Wonderland '93 Instant Lottery (see § 863.22 (relating to termination of chapter)). June 27, 1994.

Sections 866.1—866.22, Pennsylvania Dozen Roses Instant Lottery (see § 866.22 (relating to termination of chapter)). June 27, 1994.

ROBERT A. JUDGE, Sr.,
Secretary

CHARLES W. KLINE,
Executive Director

[Pa.B. Doc. No. 96-2093. Filed for public inspection December 13, 1996, 9:00 a.m.]
