RULES AND REGULATIONS

Title 7—AGRICULTURE

DEPARTMENT OF AGRICULTURE

[7 PA. CODE CH. 138e]

Agricultural Conservation Easement Purchase Program

The Department of Agriculture (Department), Bureau of Farmland Protection, amends Chapter 138e (relating to agricultural conservation easement purchase program).

The amendments are offered under authority of section 15 of the Agricultural Area Security Law (act) (3 P. S. § 915), which requires the Department to promulgate regulations necessary for the efficient, uniform and Statewide enforcement of the act. That same section allows for the use of interim guidelines by the Department until no later than December 31, 1997, by which time the Department is to have regulations in place to supplant the interim guidelines.

The interim guidelines permitted under section 15 of the act were published at 25 Pa.B. 5253 (November 25, 1995) as the "Interim Guidelines for Implementation of the Agricultural Area Security Law" (Interim Guidelines), and have been used by the Department to effectively implement various provisions of the act with respect to which there were no attendant regulations or with respect to which regulations had been rendered inadequate as a result of statutory amendment.

These final-form regulations accomplish two objectives: 1) They supplant the various provisions of the Interim Guidelines with identical regulatory provisions; and 2) They accomplish an updating and streamlining of the Interim Guidelines to reflect the experience of the Department in administering the Agricultural Conservation Easement Purchase Program to date.

Comments

Notice of proposed rulemaking was published at 27 Pa.B. 3751 (July 26, 1997) and provided for a 30-day public comment period.

Comments were received from the House Agriculture and Rural Affairs Committee (House Committee), the Minority Chairperson of the House Committee (Minority Chairperson), the Independent Regulatory Review Commission (IRRC) and the Pennsylvania Builders Association (PBA).

Comment: The House Committee suggested that § 138e.3 (relating to definitions) be revised to include the definition of "agricultural security area" from section 3 of the act (3 P. S. § 903). IRRC also raised this comment, noting the use of this term in § 138e.16(a)(1) (relating to minimum criteria for applications).

Response: The Department has made the suggested addition in the final-form regulations.

Comment: The House Committee expressed concern over the definition of "conservation plan" in § 138e.3. The primary concern was with the requirement that the plan have a "nutrient management component." The House Committee noted there is no authority in the act to require the implementation of a nutrient management plan as a prerequisite to the sale of an agricultural conservation easement. A separate statute, the Nutrient Management Act (3 P. S. §§ 1701—1718), sets forth the circumstances under which a nutrient management plan is required. The House Committee believed the requirement of a nutrient management component in a conservation plan might be interpreted as requiring a landowner to develop a nutrient management plan that would not otherwise have been required under the Nutrient Management Act.

The House Committee also noted references to "nutrient management" in proposed §§ 138e.15(e)(4)(iii), 138e.61(b)(9), 138e.70(b)(6) and 138e.241, and suggested consideration be given to modifying the definition of "nutrient management plan" or deleting references to nutrient management.

Response: Section 14.1(d)(1)(iii) of the act (3 P. S. § 914.1(d)(1)(iii)) requires consideration be given to nutrient management practices in assessing the stewardship of the land with respect to which an agricultural conservation easement purchase is proposed. In light of this requirement, the Department declines to remove the references to nutrient management described in the two preceding paragraphs. The Department agrees the regulations should not require a landowner to develop a nutrient management plan if the plan is not required under the Nutrient Management Act. Rather than deleting references to "nutrient management" in the final-form regulations, though, the Department has revised the definition of "conservation plan" in § 138e.3 of the final-form regulations to describe the required nutrient management component of the plan.

Comment: The House Committee suggested § 138e.3 be revised so the term "farmland tract" reads "farmland tract or tract." IRRC concurred with this comment.

Response: The Department has implemented the House Committee's suggestion in the final-form regulations.

Comment: Proposed § 138e.14(4) (relating to county statement of purpose) provided that one of the purposes of a county agricultural land preservation program (county program) is to protect normal farming operations from complaints of public nuisance against normal farming operations. The House Committee noted this regulatory requirement predated the proposed rulemaking, but questioned whether it is appropriate or legal to impose this requirement on county programs. Although the House Committee noted section 11(b) of the act (3 P. S. § 911(b)) imposes a similar restriction with respect to public nuisance ordinances enacted by municipalities or political subdivisions, it did not feel this statutory provision justified the referenced regulatory language.

Response: The Department declines to revise or delete the requirement in § 138e.14(4). Section 15 of the act (3 P. S. § 915) grants the Department authority to adopt regulations necessary to promote the "efficient, uniform and Statewide" administration of the act. Section 11(b) of the act requires that political subdivisions protect normal farming operations in agricultural security areas from being legally defined as public nuisances. A county program is a creation of the county governing body. The requirement that a county program protect normal farming operations from complaints of public nuisance is consistent with the duty placed upon counties by section 11(b) of the act.

Comment: IRRC recommended deleting the comma that appeared in proposed § 138e.15(a) (relating to farmland ranking system).

Response: The Department implemented this recommendation in the final-form regulations.

Comment: IRRC noted the acronym "LESA" is used only once—in proposed § 138e.15(c)—and suggested deleting it and using only full words in its place.

Response: The acronym "LESA" is a well-known acronym used throughout this Commonwealth. Although the term "Land Evaluation and Site Assessment" is used only once, the Department believes the insertion of the acronym "LESA" following that term adds clarity for the benefit of those county program personnel who are affected by the final-form regulations. For this reason the Department declined to implement IRRC's suggestion.

Comment: IRRC recommended adding the phrase "site assessment" beneath "clustering potential" in the chart in proposed § 138e.15(c). This would be consistent with the other entries on that chart.

Response: The Department agrees the chart in proposed § 138e.15(c) is unclear. The ambiguity was the result of the format of the chart as it was published in the proposed rulemaking, rather than its substantive content. This chart has been revised in the final-form regulations, without adding or deleting language, to make it identical to the chart which appeared in the corresponding subsection of the Interim Guidelines, and which the Department submitted to the Legislative Reference Bureau for publication in the proposed rulemaking.

Comment: IRRC suggested the headings of proposed §§ 138e.15(d), (d)(4), (e)(1)(i)—(iii), (e)(3) and (4)—(6) be revised to include both the complete term and the acronym, as is done at proposed § 138e.15(c).

Response: The Department accepts IRRC's suggestion and has implemented it in the final-form regulations.

Comment: IRRC recommended deleting the word "total" from where it first appears in proposed § 138e.15(d)(3), for the reason this would add clarity to that paragraph.

Response: The Department believes the use of the word "total" is appropriate in each of the two instances it is used in this paragraph, and that implementing IRRC's suggestion would not add clarity. In addition, the Department has not encountered any confusion over the use of this word in this paragraph in the nearly 2 years it has administered the Interim Guidelines. For these reasons, the Department declined to implement IRRC's suggestion.

Comment: Both IRRC and the House Committee noted the use of the term "commercial agriculture" in proposed § 138e.15(e)(1)(iii) and (5)(iii), and suggested that term either be defined or replaced with the term "normal farming operation."

Response: The Department accepted the commentators' suggestion, and has replaced the term "commercial agriculture" with "normal farming operations"—a term that is defined in § 138e.3 of the final-form regulations.

Comment: The PBA reviewed proposed § 138e.15 (e)(3)(ii) and (iv), and questioned the appropriateness of assigning a higher ranking to farmland in an area which has or will have access to public water and sewer, and assigning a higher ranking to farmland adjoining or in the area of nonagricultural uses. The PBA opined that the agricultural conservation easement purchase program should not be used as a tool to halt growth and economic development by purchasing easements in growth areas.

Response: Section 14.1(d)(1)(ii) of the act requires a county program to consider the likelihood that farmland will be converted to nonagricultural use in assessing whether to recommend the purchase of an agricultural conservation easement with respect to that farmland. The market for nonfarm use or development of the farmland is relevant in this consideration.

The farmland ranking system in § 138e.15 provides a county program with a basic framework addressing all of the topics which the act requires a county program to consider in determining whether to recommend the purchase of a particular agricultural conservation easement. A county program is then free to customize its county program to give greater proportional emphasis to those areas it feels are the most important. Although a county program must rank farmland on a 100 point scale, it has a great deal of flexibility in determining the emphasis it will put on land evaluation (between 40% and 70%), development potential (between 10% and 40%), farmland potential (between 10% and 40%) and clustering potential (between 10% and 40%). In addition, a county program is free to develop additional factors under each of the foregoing categories.

In § 138e.15, the least amount of emphasis a county program could put on a farmland tract's proximity to sewer and water lines, or its proximity to nonagricultural uses, in arriving at a numerical ranking for that tract would be 1%. This would occur if a county program contained 10 development potential factors (as it is permitted to do under § 138e.15(e)(3)(i)) and afforded only 10% of its overall ranking score to development potential (as it is permitted to do under § 138e.15(c)). Each of the 10 development potential factors would then account for 1% of the overall numerical ranking score.

Under § 138e.15, the greatest amount of emphasis a county program could put on a farmland tract's proximity to sewer and water lines, or its proximity to nonagricultural uses, in arriving at a numerical ranking for that tract would be 13.33%. This would occur if a county program contained only three development potential factors (the minimum required under § 138e.15(e)(3)(i)) and afforded 40% of its overall ranking score to development potential (as it is permitted to do under § 138e.15(c)). Each of the three development potential factors would then account for 13.33% of the overall numerical ranking score.

The Department believes proximity of a farmland tract to sewer and water lines and proximity of a farmland tract to nonagricultural uses are two good indicators—but certainly not the only indicators—of the development potential of that tract. The act requires a county program to give consideration to development potential in assessing whether to recommend the purchase of an agricultural conservation easement with respect to that tract. The Department believes § 138e.15 of the final-form regulations strikes a reasonable balance: it requires a county program to consider all of the factors prescribed by the act, but allows a county program to give the greatest emphasis to those factors which the county board determines are most important in that particular county. In light of the foregoing, the Department declines to revise this numerical ranking system in response to PBA's comment.

Comment: Both IRRC and the Minority Chairperson noted the use of the term "productive farmland" in proposed § 138e.15(e)(4)(ii), and asked whether that term refers to the capability of the land or its actual use. Both commentators requested this term be clearly defined.

Response: The term "productive farmland" refers to the actual use to which land is put—and not its potential. The Department believes the term is sufficiently clear in the context within which it is used. The term is followed by the clarifying phrase "—harvested cropland, pasture and grazing land—." "Harvested cropland" is defined in § 138e.3, and relates to the use to which land is being put. Although the term "pasture and grazing land" is not defined, the Department is satisfied the term is commonly accepted as referring to the present use of land, rather than its potential use. In light of the foregoing, the Department declined to further define this term.

Comment: The House Committee noted that § 14.1(d)(1)(iii) of the act requires a county program consider the extent to which best land management practices are used in its evaluation of a prospective agricultural conservation easement purchase. In light of this statutory language, both IRRC and the House Committee recommended the word "best" precede "land management practices" in § 138e.15(e)(4)(iii).

Response: The Department agreed the recommended revision is consistent with the act, and has implemented it in the final-form regulations.

Comment: Both IRRC and the House Committee suggested the term "optimum acreage" be defined or otherwise clarified. This term is used in § 138e.15(e)(4)(iv).

Response: The Department accepted this suggestion and has deleted the term "optimum acreage" from § 138e.15(e)(4)(iv) of the final-form regulations and clarified that a county program must consider the acreage of a tract in determining its farmland potential under the farmland ranking system.

Comment: IRRC and the House Committee suggested the semicolon in § 138e.15(e)(5)(ii) be removed.

Response: The referenced semicolon has been removed from the final-form regulations.

Comment: Proposed § 138e.15(e)(5)(iii) required a county program consider—in evaluating the proposed easement purchase—the proximity of the proposed easement purchase to other lands already subject to the easements. Although that subparagraph addressed the possibility that nearby easements might be owned by the State, county, joint State/county or nonprofit land conservation organization, it did not address the possibility an agricultural conservation easement might be held by a unit of local government. This is provided for in the definition of "agricultural conservation easement" in section 3 of the act. The House Committee recommended § 138e.15(e)(5)(iii) be revised to address the possibility a unit of local government might own an agricultural conservation easement.

Response: The recommended revision has been implemented in the final-form regulations.

Comment: IRRC recommended the example in proposed § 138e.15(e)(6) be reworked from a narrative format into a tabular format.

Response: The Department declined to implement this recommendation. Although the Department agreed the table proposed by IRRC was clear and easy to follow, it believed the current narrative example more clearly describes the process by which an SA score is to be calculated.

Comment: The Minority Chairperson suggested that proposed § 138e.17 (relating to planing and development map) be revised to require that the map be an officially adopted map, to preclude the possibility that a farmland tract would be rejected from consideration for agricultural conservation easement purchase on the basis of a temporary or pending map that had not yet been adopted as the official map.

Response: The Department accepted this suggestion and has revised § 138e.17(a) of the final-form regulations accordingly.

Comment: IRRC noted that proposed § 138e.61(d) (relating to application) would require a color-coded soils map of the farmland tract being offered for agricultural conservation easement purchase, while proposed § 138e.91(1)(vi) (relating to recommendation for purchase) would require an uncolored soils map. IRRC recommended the Department review these two sections to determine whether they should be modified so that one soils map could meet the requirements of both sections.

Response: The Department declined to revise the separate requirements of the sections referenced in the comment. The referenced soils maps are required in two separate contexts. The color-coded map is required in the context of county board review of an agricultural conservation easement purchase application. The uncolored map is required in the context of State Board review of an easement purchase recommendation. The Department noted the section heading of proposed § 138e.91, "application for review," erroneously described the function of the State Board and might cause a reader to confuse that section with the "application" referenced in § 138e.61. For this reason, the Department has retitled and revised § 138e.91, and revised § 138e.92 (relating to review and decision), to more accurately describe the function of the State Board.

Comment: Both IRRC and the House Committee noted the erroneous insertion of a comma in proposed § 138e.62 (relating to evaluation of application) and suggested it be removed.

Response: The Department has implemented this suggestion in the final-form regulations.

Comment: IRRC recommended revising the second sentence of proposed § 138e.66(a)(3) (relating to offer of purchase by county board) to delete language that also appears in the first sentence and add a beginning such as "An example would be the landowner...". IRRC believed this revision would add clarity.

Response: The Department declined to implement this suggested revision. Although the Department agrees the language of the second sentence restates language appearing in the first sentence, this repetition is by design, and should preclude any confusion.

Comment: The House Committee concluded proposed § 138e.67(f)(1) and (2) (relating to requirements of the agricultural conservation easement deed) did not belong within the context of the other material in that section, and suggested the substance of those paragraphs be set forth elsewhere in the final-form regulations.

Response: The Department accepted this suggestion and has set forth the substance of the referenced paragraphs in a new § 138e.72 (relating to transactions affecting ownership of easement).

Comment: In the context of its comment with respect to proposed § 138e.67, the House Committee suggested language be added to the final-form regulations to require that money restored to the Agricultural Conservation Easement Purchase Fund as a result of condemnation of

an agricultural conservation easement be redirected to easement purchases in the county in which the condemnation occurred.

Response: The Department does not believe the act provides adequate legal authority for the Department to earmark funds returned to the Agricultural Conservation Easement Purchase Fund as the result of the condemnation of an agricultural conservation easement for expenditure for easement purchases in the county in which the condemnation occurred. For this reason, the Department declined to implement the House Committee's suggestion.

Comment: IRRC recommended paragraph (8) under proposed § 138e.70(c) (relating to summary report) be deleted and that § 138e.70(c) be revised to characterize the items listed in paragraphs (1)—(7) as comprising the minimum information to be included in the appendix of the summary report.

Response: The Department accepted this recommendation, and has implemented it in the final-form regulations.

Comment: IRRC recommended § 138e.71 (relating to notification of owners of land adjoining proposed easement purchase) be revised to specify a deadline by which a county board must notify owners of land adjoining a proposed agricultural conservation easement purchase of the State Board meeting at which the easement purchase is to be considered. IRRC also suggested the Department consider the same 14-day advance notice requirement § 138e.226(9) (relating to procedure for review of request to subdivide restricted land).

Response: The Department declined to implement these suggestions in the final-form regulations. Although § 138e.91(5) (relating to recommendation for purchase) of the final-form regulations requires a county board certify it has provided adjoining landowners adequate notice of the State Board meeting, the Department believes a measure of flexibility should be afforded a county board as to the appropriate time frame for this notice.

Comment: IRRC noted that proposed § 138e.91(1)(ii) required a "narrative summary report" as part of the summary report. IRRC could not discern whether the summary report referenced in this section is the same report which is described in detail in § 138e.70. If it is, IRRC recommended a cross reference to § 138e.70 so the county board will know what information to provide.

Response: The Department has deleted the term "report" from "narrative summary report" in § 138e.91(l)(ii) to clarify the summary is not intended to be the same "summary report" described in § 138e.70.

Comment: IRRC suggested proposed § 138e.91(1)(iii) be revised to clarify that the USGS map referenced in that section be a "currently applicable" USGS map that "clearly and legibly" shows the items specified.

Response: The Department accepted this suggestion, and has implemented it in the final-form regulations.

Comment: The House Committee suggested the phrase "the approval or disapproval of" be deleted from § 138e.226(9) (relating to procedure for review of request to subdivide restricted land). IRRC added the recommendation that, in the event the Department adopts the House Committee's suggestion, it also include language addressing whether the notice described in that provision would be required if the State Board intended to table consideration of the agricultural conservation easement purchase recommendation.

Response: The Department accepted the House Committee's suggestion, and has revised the final-form regulations accordingly. The Department declined to implement IRRC's suggested revision.

The Department believes § 138e.226(9) clearly states the degree of State Board consideration of an easement purchase recommendation which would trigger the requirement of advance notice: consideration of the approval or disapproval of the recommendation. In the few instances the State Board has tabled its consideration of an easement purchase recommendation, that action has not been a planned action on the meeting agenda. Notice that the State Board plans to consider a particular easement purchase at a particular meeting always leaves open the possibility that consideration will be tabled at that meeting. As a practical matter, if there is some mistake, deficiency, question or objection with respect to a particular easement purchase recommendation, Department personnel routinely raise and resolve that mistake, deficiency, question or objection with the county program before the recommendation is placed on the agenda for the State Board's consideration.

Comment: IRRC suggested § 138e.226(9) be revised to contain a provision requiring notification of owners of lands adjoining farmland under an agricultural conservation easement in the event the State Board intends to consider approving a subdivision of that restricted farmland.

Response: The Department declined to implement this suggestion. The State Board's approval of the subdivision of restricted land is but one of several approvals that would be required in order for the restricted farmland to be subdivided. The Department is satisfied the concerns of adjoining landowners regarding subdivision are more properly addressed before the local authorities charged with reviewing and approving or disapproving subdivision plans. In addition, adjoining landowners have the opportunity to appear before the State Board at the time that body considers the initial easement purchase recommendation. The Department is not inclined to extend, by regulation, the requirements imposed upon it by the Commonwealth Court's decision in *Lenzi v. Agricultural Land Preservation Board*, 602 A.2d 396 (1992) any further than are set forth in that decision.

Comment: The House Committee forwarded several general comments it received from Committee members and other Legislators. Suggestions were made that the Agricultural Conservation Easement Purchase Program place greater emphasis on the preservation of farm buildings, that it not allow restricted farmland to lie idle and that it compel landowners to use the money they receive from the sale of an agricultural conservation easement for purposes related to agricultural production in this Commonwealth.

Response: Although the Department will consider these comments from the Legislature as it administers the Agricultural Conservation Easement Purchase Program, it declines to attempt to implement any of the suggested changes in the final-form regulations. Each of the suggestions represents a pronounced change from the way the Department has administered the Program to date. In addition, the Department may be without statutory authority to implement these changes. On balance, the Department believes it advisable to consider these comments outside of the context of this final-form regulations.

On its own initiative, the Department modified several provisions in the final-form regulations to add clarity

without enlarging the purpose of the proposed amendments. These revisions are described as follows:

The definition of "applicant" in § 138e.3 was revised to reflect the possibility an applicant might wish to donate an agricultural conservation easement.

Section 138e.64(a) (relating to appraisal) was revised to clarify that a county board may ordinarily expect to be reimbursed for the costs of appraising an agricultural conservation easement that is ultimately purchased.

Section 138e.70(b)(2) has been revised to make appropriate reference to "soils available for agricultural production"—as the term is defined in § 138e.3.

Section 138e.70(c)(4) and (5) has been revised to reflect the Department's current practice of not requiring a crop report or livestock report unless the report is required under the county program.

Statement of Need

These final-form regulations are needed for the Department to comply with the statutory requirement that it supplant the Interim Guidelines with regulations by December 31, 1997, to update its regulatory authority to reflect changes to the act and to further the efficient, uniform and Statewide administration of the act. The final-form regulations are consistent with Executive Order 1996-1 (relating to regulatory review and promulgation).

Fiscal Impact

Commonwealth

The final-form regulations will impose no costs and will have no fiscal impact upon the Commonwealth.

Political Subdivisions

The final-form regulations will impose no costs and will have no fiscal impact upon political subdivisions.

Private Sector

The final-form regulations will impose no costs and will have no fiscal impact on the private sector.

General Public

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

Paperwork Requirements

The regulations are not expected to result in an appreciable increase in paperwork.

Contact Person

Further information is available by contacting the Department of Agriculture, Attention: Raymond C. Pickering, Director, Bureau of Farmland Protection, Pennsylvania Department of Agriculture, 2301 North Cameron Street, Harrisburg, PA 17110-9408.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on July 16, 1997, the Department submitted a copy of the notice of proposed rulemaking published at 27 Pa.B. 3751 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 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 and Senate Committees on November 13, 1997, and were approved by IRRC on November 20, 1997, in accordance with section 5(c) of the Regulatory Review Act.

Findings

The Department of Agriculture finds that:

(1) Public notice of intention to adopt the 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) Public comment period was provided as required by law and that the comments received were considered.

(3) The modifications that were made to these regulations in response to comments received do not enlarge the purpose of the proposal published at 27 Pa.B. 3751.

(4) The adoption of the final-form regulations in the manner provided in this order is necessary and appropriate for the administration of the authorizing statute.

Order

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

(a) The regulations of the Department, 7 Pa. Code Chapter 138e, are amended by amending §§ 138e.1, 138e.2, 138e.11—138e.14, 138e.16, 138e.18—138e.20, 138e.41—138e.43, 138e.61, 138e.63, 138e.65, 138e.66, 138e.68, 138e.69, 138e.101—138e.103, 138e.201—1383.206, 138e.221—138e.225, 138e.241 and Appendix A; and by adding §§ 138e.21, 138e.44, 138e.71, 138e.104, 138e.207, 138e.227 and Appendix B to read as set forth that 27 Pa.B. 3751; and by amending §§ 138e.3, 138e.15, 138e.17, 138e.62, 138e.64, 138e.67, 138e.91, 138e.92 and 138e.226; and by adding §§ 138e.70 and 138e.72 to read as set forth in Annex A.

(b) The Secretary of the Department shall submit this order, 27 Pa.B. 3751 and Annex A to the Office of General Counsel and to the Office of Attorney General for approval as required by law.

(c) The Secretary of Agriculture shall certify this order, 27 Pa.B. 3751 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*.

SAMUEL E. HAYES, JR.
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 27 Pa.B. 6385 (December 6, 1997).)

Fiscal Note: Fiscal Note 2-97 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 7. AGRICULTURE

PART V-C. FARMLAND AND FOREST LAND

CHAPTER 138e. AGRICULTURAL CONSERVATION EASEMENT PURCHASE PROGRAM

GENERAL

§ 138e.3. Definitions.

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

Act—The Agricultural Area Security Law (3 P. S. §§ 901—915).

Agreement or *agreement of sale*—A document executed by a landowner and the county board to purchase a specific agricultural conservation easement as part of the county board's recommendation for purchase, and that includes all of the materials referenced and incorporated into the agreement, in accordance with section 14.1(h)(8.2) of the act (3 P. S. § 914.1(h)(8.2)).

Agricultural conservation easement or *easement*—An interest in land, less than fee simple, which interest represents the right to prevent the development or improvement of the land for a purpose other than agricultural production. The easement may be granted by the owner of the fee simple to a third party or to the Commonwealth, to a county governing body or to a unit of local government. It shall be granted in perpetuity, as the equivalent of covenants running with the land. The exercise or failure to exercise any right granted by the easement will not be deemed to be management or control of activities at the site for purposes of enforcement of the Hazardous Sites Cleanup Act (35 P. S. §§ 6020.101—6020.1305).

Agricultural production—The production for commercial purposes of crops, livestock and livestock products, including the processing or retail marketing of the crops, livestock or livestock products if more than 50% of the processed or merchandised products are produced by the farm operator.

Agricultural security area—A unit of 250 or more acres of land used for the agricultural production of crops, livestock and livestock products under the ownership of one or more persons and designated as such by the procedures in the act or designated as such under the act of January 19, 1968 (1967 P. L. 992, No. 442) (32 P. S. §§ 5001—5012) prior to the February 12, 1989 effective date of the act of December 14, 1988 (P. L. 1202, No. 149), by the governing body of the county or governing body of the municipality in which the agricultural land is located on the basis of criteria and procedures which predate February 12, 1989: provided that an owner of land designated as such under the authority of the act of January 19, 1968 (1967 P. L. 1992, No. 442) may withdraw the land from an agricultural security area by providing written notice of withdrawal to the county governing body or governing body of the municipality in which the land is located within 180 days of February 12, 1989.

Agricultural value—The sum of the following:

(i) The farmland value determined by the applicant's appraisal.

(ii) One-half of the difference between the farmland value determined by the State or county board's appraiser and the farmland value determined by the applicant's appraiser if the farmland value determined by the State or county board's appraiser exceeds the farmland value determined by the applicant's appraiser.

Allocation—The State Board's designation of funds to eligible counties under section 14.1 of the act. An allocation is an accounting procedure only and does not involve certifying, reserving, encumbering, transferring or paying funds to eligible counties.

Annual easement purchase threshold—An amount annually determined by the State Board which equals at least $10 million to be allocated among eligible counties.

Applicant—A person offering to convey an easement on a farmland tract.

Appropriation—The irrevocable commitment of a specific amount of money by the county governing body exclusively for the purchase of easements.

Comparable sales—Market sales of similar land. In locating comparable sales, first priority will be given to farms within the same municipality as the subject land. The second priority will be farms located within other municipalities in the same county as the subject land. The lowest priority will be given to farms located outside the same county as the subject land.

Conservation plan—A plan describing land management practices which, when completely implemented, will improve and maintain the soil, water and related plant and animal resources of the land. A conservation plan shall include the following:

(i) An installation schedule.

(ii) A maintenance program.

(iii) A nutrient management component consisting of a statement of whether a nutrient management plan required under the Nutrient Management Act (3 P. S. §§ 1701—1718) and, if required, confirmation that a plan is in place or will be in place prior to conveyance of the agricultural conservation easement. If a nutrient management plan is not required under the Nutrient Management Act, the nutrient management component shall consist of a description of the amounts and types of nutrients generated on the farmland tract and a description of any current and planned measures or procedures for containment, use, disposal or other disposition of the nutrients described.

Contiguous acreage—All portions of one operational unit as described in the deed whether or not the portions redivided by streams, public roads, bridges, and whether or not described as multiple tax parcels, tracts, purparts, or other property identifiers. The term includes supportive lands such as unpaved field access roads, drainage areas, border strips, hedgerows, submerged lands, marshes, ponds and streams.

Contract of sale—A legally enforceable agreement in a form provided by the State Board obligating the landowner to sell, and the Commonwealth or a county, or both, to purchase an agricultural conservation easement on a specified farmland tract.

County board—The county agricultural land preservation board as appointed by the county governing body under the act.

County fiscal year—The period from January 1 through December 31 of a particular calendar year.

County governing body—The county board of commissioners or, under home rule charters, another designated council of representatives.

County matching funds—Money appropriated by the county governing body for the purchase of easements.

County program—A county agricultural land preservation program for the purchase of easements authorized and approved by the county governing body, and approved by the State Board under section 14.1(a)(3)(xi) and (xiv) of the act.

Crops, livestock and livestock products—The term includes:

(i) Field crops, including corn, wheat, oats, rye, barley, hay, potatoes and dry beans.

(ii) Fruits, including apples, peaches, grapes, cherries and berries.

(iii) Vegetables, including tomatoes, snap beans, cabbage, carrots, beets, onions and mushrooms.

(iv) Horticultural specialties, including nursery stock ornamental shrubs, ornamental trees and flowers.

(v) Livestock and livestock products, including cattle, sheep, hogs, goats, horses, poultry, furbearing animals, milk, eggs and furs.

(vi) Timber, wood and other wood products derived from trees.

(vii) Aquatic plants and animals and their by-products.

Crops unique to the area—The term includes crops which historically have been grown or have been grown within the last 5 years in the region, and which are used for agricultural production in the region. For example, orchard or vineyard crops that have historically been produced in a particular county might be considered crops unique to the area.

Curtilage—The area surrounding a residential structure used for a yard, driveway, onlot sewerage system or other nonagricultural purposes.

Department—The Department of Agriculture of the Commonwealth.

Easement value—The difference between the nonagricultural value and agricultural value of a farm. If solely the county or State appraisal is used, nonagricultural value and agricultural value are equal to market value and farmland value, respectively. If the landowner obtains an independent appraisal, nonagricultural value and agricultural value shall be calculated according to section 14.1(f) of the act.

Economic viability of farmland for agricultural production—The capability of a particular tract of restricted land, other than a tract of 2 acres or less upon which construction and use of the landowner's principal residence or housing for seasonal or full-time farm employes is permitted under section 14.1(c)(6)(iv) of the act, to meet the criteria in § 138e.16(a) (relating to minimum criteria for applications).

Eligible counties—Counties whose county programs have been approved by the State Board. For the purpose of annual allocations, an eligible county shall have its county program approved by the State Board by January 1 of the year in which the annual allocation is made. Counties of the first class are not eligible under any circumstances.

Encumber—The reservation by the Commonwealth or a county of previously-allocated funds to pay all or part of the costs of purchasing a specific easement under a specific agreement of sale.

Farm—Land in this Commonwealth which is being used for agricultural production as defined in the act.

Farmland tract or *tract*—Land constituting all or part of a farm with respect to which easement purchase is proposed. A farmland tract may consist of multiple tracts of land that are identifiable by separate tax parcel numbers, separate deeds or other methods of property identification.

Farmland value—The price as of the valuation date for property used for normal farming operations which a willing and informed seller who is not obligated to sell would accept for the property, and which a willing and informed buyer who is not obligated to buy would pay for the property.

Fund—The Agricultural Conservation Easement Purchase Fund established by section 7.2 of the act of June 15, 1982 (P. L. 549, No. 159) (3 P. S. § 1207.2).

Grant funds—Funds allocated to a county by the State Board under section 14.1(h)(2) and (5)(ii) of the act, the expenditure of which is not contingent upon the appropriation and expenditure of county matching funds.

Grantee—The person or entity to whom an easement is conveyed under the act.

Grazing or *pasture land*—Land, other than land enrolled in the USDA Conservation Reserve Program, used primarily for the growing of grasses and legumes which are consumed by livestock in the field and at least 90% of which is clear of trees, shrubs, vines or other woody growth not consumed by livestock.

Harm the economic viability of the farmland for agricultural production—To cause a particular tract of restricted land to fail to meet the criteria in § 138e.16(a) or to create, through subdivision, a tract of restricted land, other than a tract of 2 acres or less upon which construction and use of the landowner's principal residence or housing for seasonal or full-time farm employes is permitted under section 14.1(c)(6)(iv) of the act, that would fail to meet the criteria in § 138e.16(a).

Harvested cropland—Land, other than land enrolled in the USDA Conservation Reserve Program, used for the commercial production of field crops, fruit crops, vegetables and horticultural specialties, such as Christmas trees, flowers, nursery stock, ornamentals, greenhouse products and sod. The term does not include land devoted to production of timber and wood products.

Immediate family member—A brother, sister, son, daughter, stepson, stepdaughter, grandson, granddaughter, father or mother of the landowner.

LCC—Land Capability Class—A group of soils designated by either the county soil survey, as published by USDA-NRCS in cooperation with the Pennsylvania State University and the Department, or the Soil and Water Conservation Technical Guide maintained and updated by USDA-NRCS.

Land development—One of the following activities:

(i) The improvement of one lot or two or more contiguous lots, tracts or parcels of land for any purpose involving a group of two or more residential buildings, whether proposed initially or cumulatively.

(ii) A subdivision of land.

Land which has been devoted primarily to agricultural use—Acreage which is a part of restricted land and is harvested cropland, grazing or pasture land, land used for the production of timber and wood products, land contain-

ing nonresidential structures used for agricultural production, or other acreage immediately available for agricultural production, and which excludes any acreage upon which immediate agricultural production is impracticable due to residential structures and their curtilages, wetlands, soil quality, topography or other natural or manmade features, and which further excludes any tract of 2 acres or less designated as the site upon which the landowner's principal residence or housing for seasonal or full-time employes is permitted under section 14.1(c)(6)(iv) of the act.

Landowner—The person holding legal title to a particular farmland tract.

Market value—The price as of the valuation date for the highest and best use of the property which a willing and informed seller who is not obligated to sell would accept for the property, and which a willing and informed buyer who is not obligated to buy would pay for the property.

Nonagricultural value—The sum of the following:

(i) The market value determined by the State or county board's appraiser.

(ii) One-half of the difference between the market value determined by the applicant's appraiser and the market value determined by the State or county board's appraiser, if the market value determined by the applicant's appraiser exceeds the market value determined by the State or county board's appraiser.

Nonprofit land conservation organization—A nonprofit organization dedicated to land conservation purposes recognized by the Internal Revenue Service as a tax-exempt organization under the Internal Revenue Code (26 U.S.C.A. §§ 1—7872).

Normal farming operations—The customary and generally accepted activities, practices and procedures that farmers adopt, use or engage in year after year in the production and preparation for market of crops, livestock and livestock products and in the production and harvesting of agricultural, agronomic, horticultural, silvicultural, and aquacultural crops and commodities. The term includes the storage and utilization of agricultural and food processing wastes for animal feed and the disposal of manure, other agricultural waste and food processing waste on land where the materials will improve the condition of the soil or the growth of crops or will aid in the restoration of the land for the same purposes.

Nutrient management plan—A written site-specific plan which incorporates best management practices to manage the use of plant nutrients for crop production and water quality protection consistent with the Nutrient Management Act.

Pennsylvania Municipalities Planning Code—53 P. S. §§ 10101—11201.

Person—A corporation, partnership, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person.

Restricted land—Land which is subject to the terms of an agricultural conservation easement acquired under the act.

Secretary—The Secretary of the Department.

Soils available for agricultural production—Soils on land that is harvested cropland, pasture or grazing land, or land upon which no structure, easement, roadway, curtilage or natural or manmade feature would impede the use of that soil for agricultural production.

Soils report—A report which identifies and sets forth the amount of each land capability class found on a farm land tract.

State Board—The State Agricultural Land Preservation Board.

State matching funds—Funds allocated to a county by the State Board under section 14.1(h)(3), (4) or (5)(i) of the act, the expenditure of which is contingent upon the appropriation and expenditure of county matching funds.

State-certified general real estate appraiser—A person who holds a current general appraiser's certificate issued under the Real Estate Appraisers Certification Act (63 P. S. §§ 457.1—457.19).

Subdivision—The division or redivision of a lot, tract or parcel of land by any means into two or more lots, tracts, parcels or other divisions of land including changes in existing lot lines for the purpose, whether immediate or future, of lease, partition by the court for distribution to heirs or devisees, transfer of ownership or building or lot development.

Title report—A report prepared by a person authorized by the Insurance Department to engage in the sale of title insurance or an attorney setting forth the existence of any liens, restrictions or other encumbrances on a farmland tract. The term does not include the title search, but does include the title binder or the title commitment, or both.

USDA—The United States Department of Agriculture.

USDA-NRCS—The Natural Resources Conservation Service of the USDA. This entity was formerly known as the Soil Conservation Service.

REQUIREMENTS FOR CERTIFICATION OF COUNTY PROGRAM

§ 138e.15. Farmland ranking system.

(a) *System required.* The county board shall adopt a farmland ranking system meeting the requirements of this section for use in prioritizing applications for the appraisal of properties meeting the minimum criteria in § 138e.16 (relating to minimum criteria for applications). This farmland ranking system may include additional or substitute criteria as approved by the State Board.

(b) *Review and approval of system.* The county board shall set forth its farmland ranking system in its county program and submit the county program to the State Board for review and approval in accordance with the act.

(c) *Land Evaluation and Site Assessment (LESA) system.* The farmland ranking system shall evaluate tracts being considered for appraisal on a 100-point scale, using the two-part LESA system described in this section. The weighted Land Evaluation (LE) score shall be calculated in accordance with subsection (d). The weighted Site Assessment (SA) score shall be calculated in accordance with subsection (e). The total of the weighted LE and weighted SA scores equals the farmland ranking score. The county board shall establish in the county program the weighted values to be given the LE score and the SA score, as well as the weighted values to be given the three general categories—development potential (DP), farmland potential (FP) and clustering potential (CP)—of factors to be considered in calculating the SA score. The weighted values set forth in the county program shall total 100%, and shall be within the following ranges:

	Minimum Weighted Value	*Maximum Weighted Value*
Land Evaluation (LE).....	40%	70%
Site Assessment (SA) Developmental Potential .	10%	40%
Site Assessment Farmland Potential.....	10%	40%
Site Assessment Clustering Potential	10%	40%

A flow chart summarizing the farmland ranking system is set forth at Appendix A.

(d) *Land Evaluation (LE).*

(1) *Source of soils data.* A farmland ranking system shall designate either or both of the following as the source of the soils data used in LE:

(i) The county soil survey, as published by the USDA-NRCS in cooperation with the Pennsylvania State University and the Department.

(ii) *The Soil and Water Conservation Technical Guide* published and updated by the USDA-NRCS.

(2) *Relative value of soil.* The county program shall set forth a relative value for each soil mapping unit in the county. The relative value shall be on a 100-point-scale—with 100 points assigned to the best soils for agricultural production and all other soils assigned relative values of less than 100 points.

(3) *Calculation of average relative value.* The average relative value of the soils on a tract being considered for appraisal shall be calculated by multiplying the relative value of each soil mapping unit within the tract by the total acreage of the soil mapping unit within the tract, adding these products and then dividing that sum by the total acreage of the tract.

Example: A 60-acre tract has 10 acres within soil mapping units with relative values of 95, 20 acres within soil mapping units with relative values of 90 and 30 acres within soil mapping units with relative values of 80. The sum of the relative values is calculated as follows:

10 acres x 95 = 950 acres
20 acres x 90 = 1,800 acres
30 acres x 80 = 2,400 acres
Total 5,150 acres

The 5,150 acre sum is then divided by the total acreage of the tract (60 acres) to determine the average relative value:

5,150 acres divided by 60 acres = 85.83

In this example, the average relative value of the soils on the tract is 85.83.

(4) *Calculation of weighted LE score.* The weighted LE score of a tract being considered for appraisal shall be the product of the average relative value of the soils on the tract multiplied by the weighted value assigned to the LE score under the county program.

Example. The average relative value of the soils on the tract described in the example in paragraph (3) is 85.83. The county program assigns a weighted value to the LE score of 60% (.60) of the farmland ranking score. The weighted LE score for this tract would be 51.5, calculated as follows:

85.83 x .60 = 51.5

(e) *Site Assessment (SA).*

(1) *General categories of factors.* The county programs shall require the evaluation of three general categories of factors in determining the SA score, and shall specify the individual factors to be considered under each of these general categories. These categories are as follows:

(i) *Development Potential (DP) factors.* Factors that identify the extent to which development pressures are likely to cause conversion of agricultural land to nonagricultural uses.

(ii) *Farmland Potential (FP) factors.* Factors that measure the potential agricultural productivity and farmland stewardship practiced on a tract.

(iii) *Clustering Potential (CP) factors.* Factors that emphasize the importance of preserving blocks of farmland to support normal farming operations and help to shield the agricultural community from conflicts with incompatible land uses.

(2) *Scoring scale.* The county program shall require that each of the three general categories of factors described in paragraph (1) ranks tracts on a 100-point scale. The total combined maximum score under these categories shall be 300 points.

(3) *Development Potential (DP) factors.*

(i) *Number.* The county program shall specify no less than 3 and no more than 10 factors to be considered in scoring the DP of a tract being evaluated for appraisal. Three of these factors shall be the factors described in subparagraphs (ii)—(iv), unless substitute factors are approved by the State Board in accordance with subparagraph (v).

(ii) *Required factor: availability of sanitary sewer and public water.* The county program shall require that the availability of sanitary sewer and public water to a tract be considered in scoring its DP. A farmland tract is more likely to be surrounded by incompatible land uses or be converted to nonagricultural use if it is in an area which is suitable for onlot sewage disposal or if it is in an area which has access to public sewer and water service or is expected to have access to the service within 20 years. The tract shall receive a relatively higher score than a tract that does not have sanitary sewer and public water.

(iii) *Required factor: road frontage.* The county program shall require that the public road frontage of a tract be considered in scoring DP. Frontage on public roads increases the suitability of a tract for subdivision or development, and is a measure of the capability of a tract to be developed or improved for nonagricultural use. A tract with extensive road frontage shall receive a relatively higher score than a tract with less public road frontage.

(iv) *Required factor: extent of nonagricultural use in area.* The county program shall require that the extent of nonagricultural use adjoining or in the area of a tract be considered in scoring DP. Consideration shall be given to whether adjacent land uses affect normal farming operations and whether surrounding, but not necessarily adjoining, land uses affect the ability of the landowner to conduct normal farming operations on the tract, or whether the impacts are likely to occur within the next 20 years. Urban uses are generally considered incompatible with agricultural uses. A tract with extensive nonagricultural uses in the area shall receive a relatively higher score than a tract that is more distant from the nonagricultural uses.

Example: A county program may require that the percentage of adjacent land in nonagricultural use or the distance to urban centers or growth areas, or both, be considered in scoring DP.

(v) *Substitute or additional factors.* Subparagraphs (ii)—(iv) notwithstanding, a county program may set forth substitute or additional factors to be considered in scoring development potential, if the factors are reviewed and approved by the State Board.

(vi) *Weight of individual factors.* The county board shall establish and set forth in its county program the number of points that may be awarded under any individual factor in scoring DP. The number of points may vary from factor to factor.

(4) *Farmland Potential (FP) factors.*

(i) *Number.* The county program shall specify no less than 4 and no more than 10 factors to be considered in scoring the FP of a tract being evaluated for appraisal. Four of these factors shall be the factors described in subparagraphs (ii)—(v), unless substitute factors are approved by the State Board in accordance with subparagraph (vi).

(ii) *Required factor: percentage of certain types of land.* The county program shall require that the percentage of harvested cropland, pasture and grazing land on a tract be considered in scoring FP. Large amounts of productive farmland—harvested cropland, pasture and grazing land—make a farm more viable. If a large percentage of a tract is not used as productive farmland, the tract should receive a lower farmland potential score.

(iii) *Required factor: stewardship of land.* The county program shall require that the stewardship of the land and the use of conservation practices and best land management practices be considered in scoring the FP of a tract. A score will not be awarded under this factor unless sound soil and water conservation practices are in place with respect to at least 50% of the tract. The implementation of soil erosion control, sedimentation control, nutrient management and other practices demonstrating good stewardship of the tract shall be considered under this factor.

(iv) *Required factor: size of tract on application.* The county program shall require that the size of a tract described in the easement purchase application be considered in scoring the FP of the tract. In general, a farmland tract with higher acreage should be assigned a relatively higher value than a tract having less acreage.

(v) *Required factor: historic, scenic and environmental qualities.* The county program shall require that the designation or listing of a tract by local/State/Federal authorities as an historically or culturally-significant location, or a scenic area or open space be considered in scoring the FP of a tract. Tracts adjoining designated protected areas such as flood plains, wildlife habitat, parks, forests and educational sites shall also be considered under this factor. The county program shall specify whether a tract shall receive a relatively higher or relatively lower score based upon its historic, scenic or environmental qualities.

(vi) *Substitute or additional factors.* Subparagraphs (ii)—(v) notwithstanding, a county program may set forth substitute or additional factors to be considered in scoring FP, if the factors are reviewed and approved by the State Board. The additional factors may include a factor that awards points based upon the landowner's offer to sell the easement at a reduced price.

(vii) *Weight of individual factors.* The county board shall establish and set forth in its county program the number of points that may be awarded under any individual factor in scoring FP. The number of points may vary from factor to factor.

(5) *Clustering Potential (CP) factors.*

(i) *Number.* The county program shall specify no less than three and no more than ten factors to be considered in scoring the CP of a tract being evaluated for appraisal. Three of these factors shall be the factors described in subparagraphs (ii)—(iv), unless substitute factors are approved by the State Board in accordance with subparagraph (v).

(ii) *Required factor: consistency with planning map.* The county program shall require that the location of a tract with respect to those areas of the county identified as important agricultural areas of the county in the planning map described in § 138e.17 (relating to planning and development map) be considered in scoring the CP of the tract. A tract that is within an identified important agricultural area shall receive a higher score than tracts that are distant from these areas. Tracts located within the designated areas are more viable for agricultural use and are more likely to be compatible with county and local comprehensive plans.

(iii) *Required factor: proximity to restricted land.* The county program shall require that the proximity of a tract to land already under agricultural conservation easement—whether held by a county, the State, jointly by the county and State, a unit of local government, or by a nonprofit land conservation organization—be considered in scoring the CP of the tract. A tract that is close to the restricted land shall receive a higher score than tracts that are more distant from the restricted land. Clustering easement purchases will develop a mass of farmland which supports normal farming operations and reduces conflicts with incompatible land uses.

(iv) *Required factor: percentage of adjoining land in an agricultural security area.* The county program shall require that the percentage of a tract's boundary that adjoins land in an agricultural security area be considered in scoring the CP of the tract. The higher the percentage, the higher the score shall be. Areas where agriculture has been given protection by the municipality, at the request of the landowners, provides an environment conducive to farming.

(v) *Substitute or additional factors.* Subparagraphs (ii)—(iv) notwithstanding, a county program may set forth substitute or additional factors to be considered in scoring clustering potential, if the factors are reviewed and approved by the State Board. The additional factors may include a factor that awards points for the establishment of new clustering areas.

(vi) *Weight of individual factors.* The county board shall establish and set forth in its county program the number of points that may be awarded under any individual factor in scoring CP. The number of points may vary from factor to factor.

(6) *Calculation of weighted Site Assessment (SA) score.* The SA score of a tract being considered for appraisal shall be calculated as follows: The product of the DP score multiplied by the weighted value for that category is the weighted DP score. The product of the FP score multiplied by the weighted value for that category is the weighted FP score. The product of the CP score multiplied

by the weighted value for that category is the weighted CP score. The sum of these three weighted scores is the weighted SA score.

Example: A county program assigns weighted values of 10% to DP, 20% to FP and 30% to CP. The DP, FP and CP scores for a particular tract are 92, 85 and 80, respectively. The weighted DP score equals the DP score (92) multiplied by its weighted value (10%): 9.2. The weighted FP score equals the FP score (85) multiplied by its weighted value (20%): 17. The weighted CP score equals the CP score (80) multiplied by its weighted value (30%): 24. The weighted SA score is the sum of these three weighted scores (9.2 + 17 + 24): 50.2.

(f) *Calculation of farmland ranking score.* The sum of the weighted LE score and the weighted SA score equals the farmland ranking score.

(g) *Use of farmland ranking score.* The farmland ranking score shall determine the order in which tracts are selected by the county board for appraisal. Selection for appraisal shall be made in descending order of farmland ranking score.

§ 138e.17. Planning and development map.

(a) The county board shall, in consultation with the county planning commission, prepare and adopt a map identifying the important agricultural areas of the county. The scale of the map shall be such that it can be used to locate specific land proposed for easement purchase.

(b) The county board shall encourage the formation of agricultural security areas in the important agricultural areas identified in the map described in subsection (a).

(c) The planning and development map shall identify areas in the county devoted primarily to agricultural use where development is occurring or is likely to occur in the next 20 years. The identification of these areas shall be made in consultation with the county planning commission, and any other body the county board deems appropriate.

PROCEDURE FOR PURCHASING AN EASEMENT

§ 138e.62. Evaluation of application.

(a) The county board shall review the application to determine if it is complete and meets the minimum criteria in §§ 138e.11—138e.21 (relating to requirements for certification of county program).

(b) If the application is complete and the minimum criteria are met, an agent or member of the county board shall view the farmland tract and discuss the county program with the applicant.

(c) The county board shall evaluate timely applications which meet the minimum criteria and rank them according to the county farmland ranking system.

§ 138e.64. Appraisal.

(a) An offer to purchase an easement shall be based upon one or more appraisal reports which estimate the market value and the farmland value of the farmland tract, as those terms are defined in § 138e.3 (relating to definitions). The initial appraisal shall be at the county board's expense. This expense may be reimbursed as a cost incident to easement purchase in accordance with section 14.1(h)(6) of the act (3 P. S. § 914.1(h)(6)) and § 138e.68 (relating to title insurance).

(b) An appraisal of market value and farmland value shall be based on an analysis of comparable sales, and shall be conducted in accordance with standards in the most recent edition of the *Uniform Standards of Professional Appraisal Practice*, published by the Appraisal Standards Board of the Appraisal Foundation. If an appraiser cannot practicably conduct an appraisal based on an analysis of comparable sales, the appraiser may conduct an appraisal using another methodology only if that methodology is an acceptable methodology under the *Uniform Standards of Professional Appraisal Practice* and the appraisal report clearly describes the information considered, the appraisal procedures followed and the reasoning that supports the analyses, opinions and conclusions.

(c) The value of a building or other improvement on the farmland tract will not be considered in determining the easement value.

(d) The appraiser shall be a State-certified general real estate appraiser who is qualified to appraise a property for easement purchase. An appraiser shall be selected by a county board on the basis of experience, expertise and professional qualifications.

(e) The appraiser shall supply a minimum of three copies of a narrative report which contains the following information and is in the following format:

(1) *Introduction.*

(i) A letter of transmittal.

(ii) The appraiser's certificate of value as to market value, farmland value and easement value.

(iii) A table of contents.

(iv) A summary of salient facts and conclusions.

(v) The purpose of the appraisal.

(vi) The definitions, including definitions of market value, farmland value and easement value.

(2) *Description of property.*

(i) A brief area of neighborhood description.

(ii) A description of appraised property.

(A) A legal description.

(B) Property data and zoning.

(C) A brief description of improvements.

(D) Color photos of subject property's fields and improvements.

(E) Tax map or official map used for tax assessment purposes showing the subject property and its relationship to neighboring properties.

(F) A legible sketch or aerial photograph of subject property showing boundaries, roads, driveways, building locations, rights of way and land use.

(G) A location map showing the location of the subject farmland tract in a county or municipality.

(H) Soils map showing property boundaries.

(3) *Analyses and conclusions.*

(i) An analysis of highest and best use.

(ii) The valuation methodology market value.

(A) Comparable sales data.

(B) An adjustment grid.

(C) A locational map of comparable sales showing the location of the subject farmland tract with respect to the comparables. A single locational map shall be submitted with respect to each county from which comparable sales are drawn.

(iii) The market value estimate.

(iv) The valuation methodology: farmland value.

(A) Comparable sales data.

(B) An adjustment grid.

(C) A locational map of comparable sales showing the location of the subject farmland tract with respect to the comparables. A single locational map shall be submitted with respect to each county from which comparable sales are drawn.

(v) A farmland value estimate.

(vi) The easement value.

(vii) An appendix containing a brief statement of the appraiser's professional qualifications and a copy of the appraiser's current certification issued in accordance with the Real Estate Appraisers Certification Act (63 P. S. §§ 457.1—457.19).

(f) The appraiser shall supply information concerning comparable sales as follows:

(1) At least three comparable sales shall be used for estimating market value and at least three comparable sales shall be used for estimating farmland value in an appraisal. If the appraiser cannot obtain sufficient comparable sales data within the same county as the subject farmland tract, the appraiser may use comparable sales from other counties, with the approval of the county board. The use of comparable sales which require adjustment of 50% or more is permitted only with the approval of the county board.

(2) Pertinent data for each comparable sale used in the preparation of the appraisal shall be stated in the appraisal report, including the date of sale, the purchase price, zoning, road frontage in feet (for determining market value) and soil mapping units (for determining farmland value). The appraisal shall include an analysis comparing the pertinent data for each comparable sale to the subject farmland tract. This analysis shall be in the form of a narrative statement of the information considered and the reasoning that supports the analyses, opinions and conclusions, and an adjustment grid assigning, when practicable and within the Uniform Standards of Professional Appraisal Practice referenced in subsection (b), approximate dollar values to adjustment shown on the adjustment grid.

(3) The location of each market value comparable sale used in the appraisal report shall be shown accurately on a comparable sales map depicting the entire county in which the comparable sale is located, and shall be sufficiently identified and described so it may be located easily. If the comparable sales map depicts the county in which the property that is the subject of the appraisal is located, that property shall also be sufficiently identified and described so it may be located easily.

(4) The location of each farmland value comparable sale used in the appraisal report shall be shown accurately on a comparable sales map depicting the entire county in which the comparable sale is located, and shall be sufficiently identified and described so it may be located easily. If the comparable sales map depicts the county in which the property that is the subject of the appraisal is located, that property shall also be sufficiently identified and described so it may be located easily. If a farmland value comparable sales map and a market value comparable sales map would depict the same county, they may be combined in a single map.

(5) For comparable sales used to estimate the farmland value, the appraiser may use sales of land that are confined to agricultural use because of agricultural conservation easements or other legal restrictions or physical impairments that make the land valuable only for agricultural use. Comparable sales shall be in primarily agricultural use. Data may also be gathered from farm real estate markets when farms have no apparent developmental value.

(6) The appraiser shall set forth the reasons the farmland comparable sales are confined primarily to agricultural use. Examples of these reasons include:

(i) The farmland tract has public or private land use restrictions.

(ii) The farmland tract is within a flood plain or a wetland (in whole or in part).

(iii) The farmland tract is landlocked, subject to additional easements, subject to restrictive zoning or has other physical attributes which limit its developmental capability.

(7) The appraiser shall provide at least one original and two copies of each report to the county board. The original of each report and all copies shall be bound with rigid covers.

(8) The appraisal shall include the entire acreage offered for easement sale. If, following completion of the appraisal, acreage is added to or deleted from the proposed easement sale for any reason, the appraisal shall be revised accordingly or the appraiser shall agree in writing to the use of a per acre value to account for the change in easement value resulting from such a change in acreage.

(9) If acreage is voluntarily withheld from the easement sale by the landowner through subdivision accomplished in accordance with the Pennsylvania Municipalities Planning Code, the appraiser shall, in making the estimate of agricultural conservation easement value, take into account any increase in the value of the subdivided acreage because of the placement of the easement on the remaining farmland.

§ 138e.67. Requirements of the agricultural conservation easement deed.

(a) The owners of the subject farmland tract shall execute a deed conveying the easement. This deed shall include the provisions of § 138e.241 (relating to deed clauses).

(b) The deed shall be in recordable form and contain:

(1) A legal description setting forth the metes and bounds of the farmland tract subject to the easement.

(2) At least one course and distance referencing affixed marker or monument of a type commonly placed in the field by a surveyor. Fixed markers may include iron pins, pk nails, spikes, concrete monuments or stones.

(c) The legal description may not contain a closure error greater than 1 foot per 200 linear feet in the survey.

(d) The farmland tract on which an easement is to be purchased shall be surveyed unless the legal description contained in the deed recorded in the land records of the county in which the farmland tract is located satisfies the requirements of subsections (b) and (c). A survey required by this paragraph shall comply with the boundary survey measurement standards for a Class A-2 survey as published by the Pennsylvania Society of Land Surveyors.

(e) For purchases made entirely with State funds, the Commonwealth shall be the sole grantee.

(f) For purchases made using a combination of State and county funds, the grantees shall be the Commonwealth and the county providing the funds under joint ownership as defined in the act.

(g) A copy of the proposed deed shall be submitted to the State Board for approval prior to execution and delivery.

§ 138e.70. Summary report.

(a) *General.* A recommendation by the county board for the purchase of an easement shall be accompanied by a summary report consisting of a narrative report and appendix as described in subsections (b) and (c).

(b) *Narrative report.* The narrative report shall consist of the following:

(1) A description of the farm, including the name of all landowners, location in relation to the nearest town, number of acres proposed for purchase and type of agricultural production on the farm.

(2) A description of the quality of the farmland tract, including the soil capability classes of the soils available for agricultural production.

(3) The farmland ranking score, including a statement of the relative ranking of the farmland tract among other tracts considered by the county in the same round of applications.

(4) A description of the likelihood of conversion to other uses if the easement is not purchased.

(5) A description of the nature and scope of developmental pressure in the municipality or area.

(6) A description of the nature and scope of conservation practices and best land management practices, including soil erosion and sedimentation control and nutrient management.

(7) A discussion of the purchase price summarizing the appraisals, including the agricultural and nonagricultural value, negotiations for purchase and the percentage of the appraised easement value accepted by the landowner.

(8) A statement of costs as described in § 138e.69 (relating to statement of costs).

(9) A certification by the county board that the information presented to the State Board is true and correct.

(c) *Appendix.* The appendix of the summary report shall, at a minimum, consist of the following:

(1) The application form.

(2) Locational maps, including tax, topographic and soils maps.

(3) A soils report.

(4) Any crop report required by the county program.

(5) Any livestock report required by the county program.

(6) An evaluation of the farmland ranking score, showing how the farm scored in comparison to other farms.

(7) A quitclaim deed, or a subordination, release or letter approving the purchase from a mortgagee, lienholder or owner of rights in surface mineable coal.

§ 138e.72. Transactions affecting ownership of easement.

(a) *General prohibition.* Neither the Commonwealth nor the county may sell, convey, extinguish, lease, encumber or restrict in whole or in part its interest in an agricultural conservation easement for 25 years from the date of the purchase of the easement. This prohibition will not be construed to prevent a public entity, authority or political subdivision from exercising the power of eminent domain and condemning restricted land in accordance with section 14.1(c)(5) of the act (3 P. S. § 914.1(c)(5)).

(b) *Disposition of proceeds.* Upon the sale, conveyance, extinguishment, lease, encumbrance or other disposition of the easement, the Commonwealth and the county shall receive a pro rata share of the proceeds based upon their respective contributions to the purchase price.

STATE BOARD REVIEW OF A PURCHASE RECOMMENDATION

§ 138e.91. Recommendation for purchase.

A county board shall make its recommendation for purchase of an easement by submitting the following documents to the Director, Bureau of Farmland Protection, Department of Agriculture, 2301 North Cameron Street, Harrisburg, Pennsylvania 17110-9408:

(1) Twenty-two copies of the summary report prepared in accordance with § 138e.70 (relating to summary report), including the following items:

(i) A cover letter from the county (optional).

(ii) A narrative summary.

(iii) A current United States Geological Survey (USGS) topographical map that clearly and legibly shows the subject property location and boundaries, location of neighboring easements and exclusions withheld from the subject property.

(iv) The Soil Report Form "C" (a form provided by the Department), both pages. See Appendix B (relating to Form C Soils Report).

(v) The list of soil mapping unit names, symbols and land capability classes on the subject property.

(vi) A legible, uncolored soil map of the subject property.

(vii) A tax map showing the subject property location and boundaries, exclusions withheld from the subject property, utility rights-of-way and access road rights-of-way.

(viii) A summary table showing the individual farmland ranking scores by category for applications selected for county appraisal, including an indication of the easement purchase status of higher-ranking applicants.

(ix) A copy of Exhibit B from the agreement of sale, modified to include interest, total acres and per acre easement cost.

(x) The 22 copies submitted shall be individually collated and three-hole punched, but not stapled.

(2) The appraisal reports.

(3) The signed agreement of sale, including the proposed legal description, a statement of cost, the proposed deed of agricultural conservation easement, a contract or integrity clause and a nondiscrimination clause.

(4) The title insurance report or commitment.

(5) A letter certifying that the adjoining landowners were provided with notice and opportunity to be heard in a manner consistent with administrative agency law with respect to the proposed easement purchase, including one copy of the notification letter required under § 138e.71 (relating to notification of owners of land adjoining proposed easement purchase) and a list of the adjoining landowners.

(6) A completed and signed IRS Form W-9, Request for Taxpayer Identification Number and Certification for individual grantors.

(7) A letter from the grantors stating the percent of ownership of each grantor for the purpose of issuing IRS Form 1099.

(8) A copy of the approved soil conservation plan that is required to be in place with respect to the land under § 138e.241(2) (relating to deed clauses).

(9) A copy of the nutrient management plan that has been developed, certified, reviewed and approved in accordance with the Nutrient Management Act (3 P. S. §§ 1701—1718), if the nutrient management plan is required under the Nutrient Management Act for any portion of the property that is the subject of the recommendation for purchase.

§ 138e.92. Review and decision.

(a) The State Board will acknowledge receipt of the recommendation for purchase of an easement. The State Board will notify the county board if the recommendation for purchase is incomplete or incorrect and request that additional necessary clarification, information or documentation be supplied.

(b) Within 60 days of receipt of a complete recommendation for purchase, the State Board may approve, disapprove or table the purchase. The State Board may delay its action on a recommendation for purchase beyond this 60-day deadline if any of the conditions excusing the delay, as set forth in section 14.1(e)(2) of the act (3 P. S. § 914.1(e)(2)), occur. If State Board action is delayed as a result of any of these conditions, the 60-day period shall be extended until applicable issues in section 14.1(e)(2) of the act are resolved to the satisfaction of the State Board, whereupon the State Board will act on the recommendation of the county board at its next scheduled meeting.

(1) If the recommendation for purchase is approved, the State Board will execute the agreement of sale.

(2) If the recommendation for purchase is disapproved or tabled, the State Board will notify the county board in writing of the reasons for disapproval or tabling. The State Board will mail this written notification within 10 days of the disapproval or tabling. If the recommendation for purchase has been disapproved, the county board may resubmit the recommendation if the purchase recommendation has been revised to address the State Board's reasons for disapproval. The resubmittal shall be treated as a new recommendation for purchase.

(3) The county board may withdraw its recommendation for purchase from the State Board prior to action by the State Board. The county board may resubmit the recommendation for consideration. The resubmittal will be treated as a new recommendation for purchase.

(4) Failure of the State Board to act on a recommendation for purchase within 60 days of its receipt constitutes approval by the State Board.

(c) Following the end of each 7-year period within which recertification of a county program is required under section 14.1(b)(4) of the act, the State Board will not approve a county board's recommendation for purchase until the county program has been approved for recertification in accordance with that section and the procedure described in § 138e.44 (relating to periodic recertification of county programs). The State Board may postpone the deadline for recertification of any county's program by up to 12 months and during the period of postponement, may approve a county board's recommendation for purchase.

(d) A decision of the State Board to disapprove a purchase shall be an adjudication subject to 2 Pa.C.S. §§ 501—508 and 701—704 (relating to the Administrative Agency Law). The owner of the farmland tract proposed for easement purchase or the county board may appeal a decision of the State Board to disapprove the purchase of an easement. An appeal shall be made to the Secretary and shall be filed in writing within 30 days of the State Board's action. An appeal from the decision of the State Board shall be governed by 1 Pa. Code Part II (relating to general rules of administrative practice and procedure).

RESPONSIBILITY OF OWNER

§ 138e.226. Procedure for review of request to subdivide restricted land.

A landowner may obtain review of a request for approval to subdivide a tract of restricted land in accordance with the following procedure:

(1) The landowner shall submit an application to the county board, in a form and manner prescribed by the county board, requesting review and approval of the subdivision of a tract of restricted land.

(2) The county board shall note the date upon which the application is received.

(3) Upon receipt of the application, the county board shall forward written notice of the application to the county zoning office (if such an office exists), county planning office and county farmland preservation office. For purposes of this subsection, the foregoing offices shall be referred to as the "reviewing agencies."

(4) The county board shall note the date upon which each reviewing agency receives the written notice described in paragraph (3).

(5) Each reviewing agency shall have 60 days from receipt of the written notice described in paragraph (3) within which to review, comment and make recommendations on the proposed application to the county board. The county board may not consider comments and recommendations received beyond this deadline unless the landowner agrees in writing.

(6) The county board shall have 120 days from receipt of the application for approval to subdivide within which to review the application, review comments and recommendations submitted by the reviewing agencies and approve or reject the application. This 120-day deadline may be extended by the mutual agreement of the landowner and the reviewing agencies. If the county board fails to approve or reject an application within the 120-day deadline or an extension thereof, the application shall be deemed approved.

(7) If the application is rejected by the county board, the county board shall return the application and a written statement of the reasons for the rejection to the landowner. Within 30 days after receipt of the statement of rejection, the landowner may appeal the rejection in accordance with 2 Pa.C.S. Chapter 5 Subchapter B

(relating to practice and procedure of local agencies) and Chapter 7 Subchapter B (relating to judicial review of local agency action.)

(8) If the application is approved by the county board, the county board shall promptly forward a copy of the application and the comments and recommendations of the reviewing agencies to the State Board for review and approval or disapproval.

(9) The State Board will provide the county board and the landowner with written notice of the date, time and location of the meeting at which the State Board shall review and consider the application. This notice will be forwarded by regular mail at least 14 days in advance of the State Board meeting.

(10) In its review of an application requesting approval of the subdivision of a tract of restricted land, the State Board will consider only whether the application complies with the conditions under which subdivisions are permitted by the county program.

(11) The State Board will provide both the county board and the landowner with written notice of its decision regarding the application for approval of the subdivision of a tract of restricted land. If the application is disapproved, the notice shall contain a statement of the reasons the application does not comply with the conditions under which subdivisions are permitted by the county program.

[Pa.B. Doc. No. 97-2077. Filed for public inspection December 26, 1997, 9:00 a.m.]

Title 10—BANKS AND BANKING

DEPARTMENT OF BANKING

[10 PA. CODE CHS. 61, 63, 65 AND 67]

Pawnbrokers License

The Department of Banking (Department), under the act of December 28, 1994 (P. L. 1402, No. 163) (Act 163) which amends the Pawnbrokers License Act (act) (63 P. S. §§ 281-1—281-32) and the authority of the Department to promulgate regulations in section 8 of the act, will impose procedures for initial pawnbroker license application hearings, minimum capital requirements, restrictions on usage of the name "pawn" or "pawnbroker" in this Commonwealth, assessment by licensees of a $1 charge for governmental reporting costs and license changes of licensees' office location.

Purpose

The purpose of the amendments is to implement Act 163, which amended sections 2, 4, 4.1, 5.1, 6, 8 and 12 of the act (63 P. S. §§ 281-2, 281-4, 281-4.1, 281-5.1, 281-6, 281-8 and 281-12) the Secretary of the Department (Secretary) is authorized by section 8 of the act to issue regulations as may be necessary for the protection of the public and to insure the proper conduct of the pawnbroker business and enforcement of the act. The purposes of the rulemaking are consistent with the requirements of Act 163 and the authority of the Secretary to issue regulations.

Explanation of Regulatory Requirements

The amendments to the existing regulations provide procedures for initial pawnbroker license applications, including posting a notice of initial application and hearing at the proposed pawnbroker location, and publishing notice of the hearing in a newspaper of general circulation. The amendments also require a newspaper notice of renewal application to be published in a newspaper of general circulation by an applicant for renewal of a pawnbroker license. A change of place of business by a licensed pawnbroker could not be implemented until a notice of proposed relocation had been posted at the proposed new office location. Use of the formal name or fictitious name "pawn" or "pawnbroker" would not be permissible unless the entity using the formal name or fictitious name was a licensed pawnbroker under the act. Use of the terms "pawn" or "pawnbroker" would not be permissible in any advertisement unless the person or entity using the name was a licensed pawnbroker. A $1 charge per pledge could be assessed by a licensee to cover only governmental reporting costs pertaining to reports required to be issued by a licensee to the local or State Police pertaining to a particular pledge, or as otherwise permitted by the Secretary. The minimum start-up and ongoing capital requirement applicable to an initial applicant or renewal applicant for a pawnbroker license would be $10,000 per licensed pawnbroker office. The licensee would be required to report counterfeit pawn tickets to local police authorities. Interest and charges would be amended consistent with the statutory amendments to permit 3% per month aggregate interest and charges on the entire principal amount.

Entities Affected

The number of entities that will be affected by these amendments is as follows: an estimated five to ten initial applicants for pawnbroker licenses per annum regarding the hearing requirements applicable to initial applicants; all of the approximately 77 licensed pawnbrokers in this Commonwealth regarding the minimum capital requirements; all of the approximately 77 licensed pawnbrokers regarding the $1 charge per pledge that may be assessed by a licensee to cover governmental reporting costs; all of the approximately 77 licensed pawnbrokers regarding the newspaper notice of renewal application to be published in a newspaper of general circulation; an estimated one or two licensed pawnbrokers per annum who might seek to relocate their licensed offices would have to post at the proposed new office location a notice of proposed relocation; and an estimated two or three unlicensed entities per annum would be restricted from utilizing the word "pawn" or "pawnbroker" in any advertisement or in their name or fictitious name unless licensed as a pawnbroker under the act.

Cost and Paperwork Requirements

These amendments will impose paperwork requirements on the Department to process initial pawnbroker license application hearings, and the notices of license application applicable to initial applicants and renewal applicants respectively. The amendments will not impose any paperwork requirements on any political subdivision and will not affect the costs of any political subdivision of this Commonwealth. All costs of hearing shall be paid by the initial applicant, including all costs for stenographer services, transcript printing costs and Department expenses for providing a designee of the Secretary to preside at the public hearing.

Effectiveness/Sunset Date

A sunset date is inapplicable as the statute imposes an ongoing requirement for the licensing and regulation of pawnbrokers.

Summary of Comments and Responses on the Proposed Rulemaking

Notice of proposed rulemaking was published at 27 Pa.B. 1809 (April 12, 1997).

During the public comment period, the only written comments received by the Department were from the Pennsylvania Pawnbrokers Association, City of Philadelphia Police Department and the Independent Regulatory Review Commission (IRRC).

Comments received from the Pennsylvania Pawnbrokers Association and the City of Philadelphia Police Department regarding the Pawnbrokers Act were favorable.

The Department considered the written comments received in formulating the final-form regulations. The Department has completed a review of the comments and has prepared a Comment and Response Document that addresses each comment on the proposed amendments.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on January 31, 1997, the Department submitted a copy of the proposed rulemaking to IRRC, and the Chairperson of the Senate Committee on Banking and Insurance and the Chairperson of the House Committee on Business and Economic Development. 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 as well as other documentation.

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

Findings

The Department 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. 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 all comments were considered.

(3) These amendments do not enlarge the purpose of the proposal published at 27 Pa.B. 1809.

Order

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

(a) The regulations of the Department, 10 Pa. Code Chapters 61, 63, 65 and 67, are amended by amending §§ 61.5, 61.6, 63.1, 65.9 and 67.2 to read as set forth at 27 Pa.B. 1809 and by amending §§ 61.1—61.4 and by adding § 63.5 to read as set forth in Annex A.

(b) The Secretary of the Department shall submit this order, 27 Pa.B. 1809 and Annex A to the Office of General Counsel and the Office of the Attorney General for review and approval as to legality and form, as required by law.

(c) The Secretary of the Department shall submit this order, 27 Pa.B. 1809 and Annex A to IRRC and the Senate Committee on Banking and Insurance and House Committee on Business and Economic Development as required by the Regulatory Review Act.

(d) The Secretary of the Department of Banking shall certify this order, 27 Pa.B. 1809 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*.

RICHARD C. RISHEL,
Secretary

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 27 Pa.B. 6385 (December 6, 1997).)

Fiscal Note: Fiscal Note 3-33 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 10. BANKS AND BANKING

PART V. PAWNBROKERS

CHAPTER 61. GENERAL PROVISIONS

§ 61.1. Definitions.

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

Act—The Pawnbrokers License Act (63 P. S. § 281-1—281-32).

Capital—Tangible net worth which shall be maintained at all times by the licensee.

Charges—The aggregate total of interest, fees for storage, insurance, investigation and other services rendered by pawnbrokers licensed under the statutes of the Commonwealth.

Department—The Department of Banking of the Commonwealth.

Initial applicant—An individual, partnership, association, business corporation, nonprofit corporation, common law trust, joint-stock company or any group of individuals however organized applying for a license under the act or any person appearing as owner, partner, officer, director, trustee or other official of a partnership, association, business corporation, nonprofit corporation, common law trust, joint-stock company or any group of individuals however organized, on the application for license under the act. This applicant for license does not possess a license for the license term that expires immediately prior to the term being applied for regarding the proposed license location.

License—A license issued by the Secretary under the act that permits an initial applicant or renewal applicant to engage in the pawnbroker business at a particular business location to the extent provided in the license's terms.

Licensee—A pawnbroker licensed by the Department to do business under this part.

Month—The period elapsing between a certain date in 1 calendar month, to and including the same date in the next succeeding month.

Municipality—The term includes a city, town, borough or township.

Newspaper notice of renewal application—A written notice in a form prescribed by the Department. This notice shall be advertised in a newspaper of general circulation by a renewal applicant for a pawnbroker's renewal license. The advertisement shall be in a form prescribed by the Department.

Newspaper of general circulation—A newspaper issued daily, or not less than once per week, intended for general distribution and circulation, sold at fixed prices per day or week, published in the English language, which satisfies the requirements of 45 Pa.C.S. Part I (relating to preliminary provisions).

(i) The newspaper shall be:

(A) A newspaper which is one of general circulation in the county and is published in the city, borough or township in which the pawnbroker's office is to be located or already is located.

(B) If there is no newspaper as described in clause (A), a newspaper of general circulation in the county, published at the county seat.

(C) If there is no newspaper as described in clause (B), a newspaper of general circulation published in the county at the place nearest such city, borough or township.

(D) If there is no newspaper as described in clause (C), the newspaper of general circulation published at the place nearest the city, borough or township in an adjoining county.

(ii) The newspaper publications required by the act and this part shall be at the cost of the applicant for license.

Newspaper notice of hearing—The written notice in a form prescribed by the Department. The notice shall be published in a newspaper of general circulation by an initial applicant for a new pawnbroker's license.

Notice of initial application and hearing—The written notice in a form prescribed by the Department. The notice is shall be posted by an initial applicant for a new pawnbroker's license at the proposed pawnbroker's business location, as further specified in this part.

Renewal applicant—The definition of "initial applicant" shall be applied, except that this applicant for license does possess a license for the license term that expires immediately prior to the renewal term being applied for regarding the licensed location.

Resident—A person as defined in section 2 of the act (63 P. S. § 281-2) residing or operating at an address within 500 feet of an initial applicant's proposed new pawnbroker's business location.

Secretary—The Secretary of the Department or a person designated by the Secretary. This definition contemplates, among other things, that a designee of the Secretary may preside over a hearing required by the act.

§ 61.2. License applications, public notice, hearings and capital requirements.

(a) Blank forms of application and bond will be supplied by the Department upon request. Payment of a new license fee is required.

(b) Licenses shall be issued on the basis of information set forth in the application for license. Changes in title, place of business, office manager, owner, partner or corporate officials occurring during a license year shall require prior written approval of the Department.

(c) Every initial applicant for a license shall post a notice of initial application and hearing for at least 30 days beginning with the day the application is accepted as filed with the Secretary, in a conspicuous place at the proposed location for which the initial applicant has applied for a license, unless another location for posting the notice of initial application and hearing is approved by the Secretary. The notice of initial application and hearing shall be in the form prescribed by the Secretary. The conspicuous place of posting the notice of initial application and hearing shall face to the outside of the proposed location for which the initial applicant is applying, so that persons observing the normal main window or facade of the proposed location may readily see and read the notice of initial application and hearing, unless otherwise permitted by the Secretary due to the circumstances of the proposed pawnbroker location. At the end of at least 30 days continual posting of the notice of initial application and hearing, an initial applicant shall deliver to the Department an affidavit in a completed form as prescribed by the Department certifying that the notice of initial application and hearing has been properly posted for the required 30-day time period. A photocopy of the completed notice of the initial application and hearing also shall be provided by initial applicant to the Department as part of the initial application.

(d) A public hearing shall be held regarding any pawnbroker's license application submitted by an initial applicant. The public hearing is a fact-gathering mechanism to assist the Department in its review of the initial applicant's pawnbroker's license application while providing an opportunity for interested residents to testify regarding matters relevant to the Secretary's consideration of whether to approve the initial applicant's license application for the proposed location.

(1) *General.*

(i) A hearing regarding an initial applicant's license application may not be held by the Department until after the Department has accepted as complete a license application from the initial applicant. An initial applicant shall provide the affidavit required in subsection (e) certifying to the posting of the notice of initial application and hearing for the requisite 30-day time period, and a proof of publication of a newspaper notice of hearing.

(ii) The separate newspaper notice of hearing shall be published at least once in a newspaper of general circulation at least 10 days prior to the hearing date. An initial applicant shall cause proof of publication of the newspaper notice of hearing to be provided to the Department in a written form issued and executed by a representative of the newspaper.

(iii) The hearing shall occur at a date, time and place as deemed appropriate in the sole reasonable discretion of the Secretary.

(2) *Hearing rules.* The Secretary will preside over the hearing. The hearing rules in 1 Pa. Code Part II (relating to general rules of administrative practice and procedures) and Chapter 3 (relating to hearings and conferences) do not apply to hearings regarding an initial applicant, as described in this section, because of the fact-gathering nature of these hearings. Formal rules of evidence do not apply to these hearings. The Secretary has the authority to swear witnesses at a hearing. Procedural issues regarding any hearing will be determined by the Secretary.

(3) *Witness testimony.* Witness testimony may be limited as to time by the Secretary. The initial applicant may testify once after all witnesses, if any, have testified. Residents attending the hearing and seeking to testify will be permitted to testify. The number of witnesses including resident witnesses may be restricted in the sole discretion of the Secretary, including circumstances in which the Secretary determines that witnesses seek to offer similar testimony or to facilitate completion of the hearing within a reasonable time period. Witnesses other

than residents may be permitted to testify at the hearing, in the sole discretion of the Secretary.

(4) *Costs of the hearing.* The costs of the hearing shall be paid by the initial applicant, including all costs for stenographer services, transcript printing costs and Department expenses for providing a designee of the Secretary to preside at the public hearing. Two copies of the hearing transcript shall be provided to the Department. If there is no testimony at the hearing, the transcript requirement will be waived by the Secretary.

(e) A license expires on October 1 of each year. An application for renewal shall be filed with the Department at least 30 days before the end of the license year. Applications for renewal shall be accompanied by a new bond and a check or money order payable to the Commonwealth of Pennsylvania. A renewal applicant shall have a newspaper notice of renewal application to be published once, in a form prescribed by the Department at least 30 days prior to license renewal. A renewal applicant shall have proof of publication provided to the Department in a written form issued and executed by a representative of the newspaper of general circulation. The Secretary will consider any written comments timely received after publication of the newspaper notice of renewal application.

(f) The minimum start-up capital requirement applicable to an initial applicant for a license is $10,000 per licensed pawnbroker office. The ongoing capital requirement applicable to a renewal applicant is $10,000 per licensed pawnbroker office. If multiple licensed offices are held by the same licensee, the maximum total capital requirement for the offices is $100,000. The minimum capitalization shall be maintained as permanent capital which may not be distributed to any stockholder or owner of licensee or be purchased by a licensee without the prior written approval of the Secretary. A licensee holding a valid license on December 27, 1997, shall meet the minimum capitalization requirements listed in this subsection by December 27, 1999.

(g) An applicant for a pawnbroker's license shall demonstrate that the proposed pawnbroker's location shall contain security measures and devices, such as a vault for the storage of pledge items, for the conduct of a pawnbroker's business under the circumstances of that location. An initial applicant shall demonstrate to the Department's satisfaction that the initial applicant has the requisite experience or knowledge, or both, to conduct the business of a pawnbroker under the act and this part. The knowledge or experience may include, but not necessarily be limited to, retaining an office manager with at least 1 year of knowledge and experience in the pawnbroker business or other business experience determined to be relevant in the Department's discretion. Renewal applicants shall demonstrate to the Department's satisfaction that the renewal applicant continues to have the requisite experience or knowledge to conduct the business of a pawnbroker under the act and this part.

(h) The license certificate shall be posted in a conspicuous place in the office of the pawnbroker so that it will be in full view of the public at all times.

§ 61.3. Change of place of business.

(a) If a licensed pawnbroker seeks to retain its current license upon the relocation of its business, the relocation shall be within the same municipality where its currently licensed office is located. Any change of place of business of a licensed pawnbroker within the same municipality requires prior approval of the Department, which will be granted upon the Department being satisfied that the requirements of this section have been met.

(b) The new place of business shall be in the same municipality for which the license was originally issued.

(c) A licensee who wishes to change the place of business to a municipality other than that indicated on the current license shall obtain a new license by filing a new application and bond and paying the license fee.

(d) Application for approval of a change of address shall be filed in writing with the Department at least 15 days prior to the intended date of change. Leases for new quarters may not be signed until the Department has approved the change of address. The Department will act on the application within 14 days. Failure of the Department to act on the application within 14 days constitutes approval, unless the Department requests additional information, which stops the 14-day review period from proceeding until the information requested by the Department is received from the licensee.

(e) The current license certificate should be forwarded to the Department with any request for approval of a proposed change in the place of business.

§ 61.4. Partnerships.

(a) A license issued to a partnership shall automatically expire when one of the partners dies or withdraws from the partnership. A new license shall be obtained immediately by the surviving partners desiring to continue the business which had been conducted under the expired license. A new license shall also be required when one or more new partners are admitted to a partnership.

(b) Any change in a partnership occurring during a license year and requiring a new license shall require the payment of a new license fee.

CHAPTER 63. CHARGES, PAYMENT AND RECORDS

§ 63.5. Charge for reports to police.

A $1 charge per pledge may be assessed and collected by a licensee to cover only those governmental reporting costs pertaining to reports required to be issued by a licensee to the local or State police pertaining to that pledge, or as otherwise permitted by the Secretary. The $1 fee may be collected at the time the loan is made, or may be financed as part of the loan, in which latter case interest and charges on the $1 may be made by the licensee consistent with the act.

[Pa.B. Doc. No. 97-2078. Filed for public inspection December 26, 1997, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 93]

Great Lakes Initiative (GLI)

The Environmental Quality Board (Board) by this order amends Chapter 93 (relating to water quality standards) to read as set forth in Annex A. These regulatory changes incorporate requirements of the Great Lakes Water Quality Guidance (GLI) into the water quality standards regulation.

This notice is given under Board order at its meeting of September 16, 1997.

A. *Effective Date*

These amendments are effective upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. *Contact Persons*

For further information, contact Edward R. Brezina, Chief, Division of Water Quality Assessment and Standards, Bureau of Watershed Conservation, 10th Floor, Rachel Carson State Office Building, P.O. Box 8555, 400 Market Street, Harrisburg, PA 17105-8555, (717) 787-9637 or William J. Gerlach, 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). This proposal is available electronically through the Department of Environmental Protection's (Department) Web site (http://www.dep.state.pa.us).

C. *Statutory Authority*

The final rulemaking is promulgated under the authority of the following acts: sections 5(b)(1) and 402 of The Clean Streams Law (act) (35 P. S. §§ 691.5(b)(1) and 691.402); and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), which grant to the Board the authority to develop and adopt rules and regulations to implement the provisions of the act.

D. *Background of the Amendment*

The Commonwealth's Water Quality Standards, which are set forth in part in Chapter 93, implement the provisions of sections 5 and 402 of the act and section 303 of the Federal Clean Water Act (33 U.S.C.A. § 1313). Water quality standards consist of the designated uses of the surface waters of this Commonwealth and the specific numeric and narrative criteria necessary to achieve and maintain those uses.

The GLI requirements, promulgated at 40 CFR Part 132 on March 23, 1995 (60 F.R. 15366), provide for consistent protection for fish and shellfish in the Great Lakes System and the people and wildlife who consume them. The GLI focuses on long-lasting pollutants called bioaccumulative chemicals of concern (BCCs) that accumulate in the food web of large lakes. The major elements of the GLI are: water quality criteria to protect human health, aquatic life and wildlife; methodologies for criteria development; procedures for developing effluent limits for point sources; and antidegradation policies and procedures. States are required to adopt water quality standards, antidegradation policies and implementation procedures "as protective as" the GLI.

The Commonwealth's strategy for complying with the GLI has two major objectives. The first objective is, wherever possible, to provide Statewide consistency, so that unequal requirements are not focused on specific regions of this Commonwealth. The second objective is to provide special protection to the unique resource known as the Great Lakes System in this Commonwealth. To meet these objectives, these amendments apply scientifically sound methodologies from both current practice and as identified in the GLI, Statewide. Exceptions to Statewide procedures are made when the unique character of the Great Lakes System demands special consideration. For example, BCCs pose a particular threat to the Great Lakes because of the long retention of pollutants in the Great Lakes, which contrasts with the ability of streams to flush out those pollutants by means of their flow. For this reason, application of procedures for BCCs is different for the Great Lakes than in other waters of this Commonwealth.

The Department held several public meetings, met with technical and advisory committees, and made the proposed strategy available for review and comment prior to formally submitting proposed rulemaking to the Board. A public meeting was held in Erie on the requirements of the GLI on September 5, 1995. In February 1996, the Commonwealth's proposed strategy was made available on the world wide web for public comment. Two meetings were also held on June 5, 1996, one with an ad hoc Great Lakes Technical Committee and the second with the public, to discuss the proposed strategy. In addition, the Department has met on several occasions with the Water Subcommittee of the Air and Water Quality Technical Advisory Committee (AWQTAC) to discuss the GLI strategy, and has sent representatives to participate in meetings with the Council of Great Lakes Governors Working Group and Technical Subcommittee, which provides a forum for the states to discuss how each is addressing the GLI requirements. Particular issues were raised and responded to at these meetings.

In addition to these final-form regulations, the Department is incorporating numerous GLI provisions into the statement of policy in Chapter 16 (relating to water quality toxics management strategy). The proposed amendments to the statement of policy were published in the *Pennsylvania Bulletin* on December 28, 1996. The amendments to Chapter 16 are being finalized concurrent with this regulation and are published at 27 Pa.B. 6817 (December 27, 1997).

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

The proposed amendments were approved by the Board at its February 18, 1997, meeting, and notice of the proposed rulemaking was published at 27 Pa.B. 1561 (March 29, 1997). The proposal included provisions for a 45-day public comment period and a public hearing to receive additional written and oral testimony on these GLI regulatory amendments. The public hearing was held on May 13, 1997, at the Rachel Carson State Office Building in Harrisburg, but no witnesses came forward to provide testimony. The Board received comments from three commentators during the public comment period the United States Environmental Protection Agency (EPA), Region 3; GENCO, GPU Generation, Inc; and the Independent Regulatory Review Commission (IRRC).

The major comments and responses are summarized as follows: Comments were received concerning definitions for terms included in the regulatory proposal. One commentator stated that the proposed definition for "BCCs" is incomplete because it does not include the specific methodologies for BAFs. The definition has been amended to include reference to the methodologies for BAFs, and has also been moved to § 93.8a(k)(1). Another comment stated that the Department must incorporate the definitions found in 40 CFR 132.2 when state provisions reference GLI requirements. In response, except where a term is defined otherwise in Commonwealth law or regulation, the definitions of terms defined in 40 CFR 132.2 will be utilized in applying Appendix F, Procedure 3.D., and all subparts referenced in that procedure, except when these definitions reference the vacated Procedure 3.C., in which case they will not be used.

As noted by a commentator, there are several water quality regulation amendments under development at

this time. Specific language concerning protection of threatened and endangered species is contained in the antidegradation regulation proposed at 27 Pa.B. 1459. One commentator recommended that, if the entire GLI antidegradation language in Appendix E to 40 CFR Part 132 were not adopted by reference, the Board should explain that position in this order. In accordance with that recommendation, notice is given that implementation measures for the GLI antidegradation provisions will be included in separate guidance documents.

Several comments and recommendations were received concerning Total Maximum Daily Loads (TMDLs) and mixing zones. On June 6, 1997, the United States Court of Appeals for the District of Columbia ruled in *American Iron and Steel Institute v. EPA*, 115 F.3d 979 (1997) that portions of the EPA GLI regulation were invalid. The proposed regulation has been amended accordingly to reflect the court decision. See Part F of this Preamble for details.

The Department has responded to these comments by making appropriate revisions to the proposal as described in Section F of this Preamble. The Department will also develop separate implementation guidance for the GLI provisions.

F. *Summary of Changes to the Proposed Rulemaking*

Based upon questions raised during the public comment period, the development of this final-form rulemaking, and subsequent case law, the Department has revised portions of the proposed regulatory amendments to provide clarification and consistency with the requirements of the GLI provisions as they are to apply in this Commonwealth.

Some of the changes resulted from a court decision. On June 6, 1997, the United States Court of Appeals for the District of Columbia ruled in *American Iron and Steel Institute v. EPA*, that portions of the EPA GLI regulation were invalid. Specifically, the Court vacated: (1) the procedure in Appendix F, Procedure 8.D, insofar as it would impose point source water quality based effluent limitations upon a facility's internal waste streams; (2) the proposed human health and wildlife criteria for polychlorinated biphenyls (PCBs); and (3) Appendix F, Procedure 3.C, and remanded the rule to EPA for further cost-benefit analysis on the effects of eliminating mixing zones for dischargers of BCCs to the Great Lakes Basin.

In light of the *AISI* decision, several changes have been made to the proposed regulation. First, the proposed § 93.8a(k)(1) (relating to development of site-specific water quality criteria) has been eliminated. That section had provided that dischargers of BCCs to waters of the Great Lakes System had to comply with the mixing zone procedures of Appendix F, Procedure 3.C. This change assures that the dischargers are not compelled to follow procedures, including phasing out their mixing zones for BCCs in their discharge by 2007, which have been invalidated. Second, proposed § 93.8a(k)(2) has been modified to provide that TMDLs for Open Waters of the Great Lakes shall be derived following the procedures at Appendix F, Procedure 3.D., including all other subparts referenced in subpart D except Procedure 3.C. This change assures that TMDLs will be derived based on Procedure 3.D, and all subparts referenced in that procedure, except the subpart (3.C) which has been vacated and remanded to EPA for further action.

The revisions from the proposed rulemaking are summarized as follows:

Section	*Description of Recommended Revision from Proposed to Final Rulemaking*
93.1	*Definitions*: Definitions for "BAF—bioaccumulation factor," "BCC—bioaccumulative chemicals of concern," "Great Lakes System," and "Open Waters of the Great Lakes" are moved from this section to § 93.8a(k)(1) since they apply specifically to the Great Lakes System. Moreover, except where a term is defined otherwise in Commonwealth law or regulation, the definitions of terms defined in 40 CFR Section 132.2 will be utilized in applying Appendix F, Procedure 3.D., and all subparts referenced in that Procedure, for the derivation of TMDLs in the Open Waters of the Great Lakes System, except when the definitions reference the vacated Procedure 3.C, in which case they will not be used.
93.8	*Development of site-specific water quality criteria:*
(b)	This paragraph is updated to reference the current version of the EPA Water Quality Standards Handbook (1994).
(f)	For consistency with other revisions, the term "aquatic life" is being deleted from this section which describes site-specific criteria.
93.8a	*Toxic substances:*
(k)(1)	The new subsection (k), relating to requirements for discharges to the Great Lakes System, is revised by inserting a new § 93.8a(k)(1) adopting the definitions proposed at § 93.1 relating to protection of the Great Lakes System. As a result, the previously proposed paragraphs are renumbered. Proposed (k)(1) is deleted because of new case law.
(k)(2)	A statement is inserted which describes that all other subparts referenced in Subpart D of 40 CFR Part 132, Appendix F, Procedure 3, except Subpart C, shall be followed to derive TMDLs for Open Waters of the Great Lakes System.
(k)(4)	The language relating to economic or social benefits outweighing water quality degradation has been deleted to be consistent with the GLI.

G. *Benefits, Costs and Compliance*

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

1. *Benefits*—Overall, the citizens of this Commonwealth will benefit from these recommended changes because they will provide appropriate protection of surface waters in the Great Lakes System, including concerns specific to this Commonwealth.

2. *Compliance Costs*—Discharges to the Great Lakes System, especially to the Open Waters of the Great Lakes, may require alternate disposal methods and the installation of additional technology to meet any more stringent effluent limitations which may result from application of these final-form regulations. Compliance costs may be higher for discharges to these waters, if more stringent effluent limits are needed.

The changes may have some fiscal impact on or create additional compliance costs for the Commonwealth, political subdivisions, local governments and the private sector with wastewater discharges to the Great Lakes System. The number of affected discharges depends on the types and amounts of substances they discharge (whether or

not they are BCCs). Currently, no permitted discharge to the Great Lakes System is known to be discharging BCCs and, therefore, no discharge currently has any effluent limitations for any BCCs.

3. *Compliance Assistance Plan*—The Department plans to educate and assist the affected public with understanding the revised requirements and how to comply with them by developing guidance. Regional Office permitting staff will work with dischargers, where necessary, to assist them in meeting any additional requirements imposed by the GLI. Based on currently available information, significant changes to permit limits and compliance levels are not expected.

4. *Paperwork Requirements*—The regulatory revisions should not have any additional paperwork impacts on the Commonwealth, its political subdivisions and the private sector.

H. *Pollution Prevention*

Pollution prevention approaches to environmental management often provide environmentally sound and longer-term solutions to environmental protection because pollution is prevented at the source. Pollution prevention is defined by the EPA as measures taken to avoid or reduce generation of all types of pollution—solid/hazardous waste, wastewater discharges and air emissions—at their point of origin; however, it does not include activities undertaken to treat, control or dispose of pollution once it is created. The Federal Pollution Prevention Act of 1990 established a National policy and an environmental management hierarchy that promotes pollution prevention as the preferred manner for achieving state environmental protection goals. The hierarchy is as follows:

a. Pollution should be prevented or reduced at the source.

b. Pollution that cannot be prevented should be recycled in an environmentally safe manner whenever feasible.

c. Pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible to render it less hazardous, toxic or harmful to the environment.

d. Disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner.

The short- and long-term health of this Commonwealth's economy depends on clean air, pure water and the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvanians spend over $1 billion per year in efforts to control pollutants through regulation of both industrial point discharges and nonpoint sources. To meet the Commonwealth's economic development and environmental protection goals successfully, the Commonwealth needs to adopt programs like pollution prevention that not only protect the environment but also significantly reduce costs and increase the competitiveness of the regulated community. When pollution is prevented up front, it can reduce a company's bottom-line costs and overall environmental liabilities often by getting the company out of the regulatory loop. It also can get the Department out of the business of regulating pollution that may not need to be generated in the first place.

In keeping with Governor Ridge's interest in encouraging pollution prevention solutions to environmental problems, these final-form regulations have incorporated the following provisions and incentives to meet that goal:

These final-form regulations are consistent with the GLI provisions that encourage pollution prevention by promoting the development of pollution prevention analysis and activities in the level of detection, mixing procedures and antidegradation. Also, special provisions for BCCs reduce the discharge of these pollutants in the future, and therefore aid in preventing pollution.

I. *Sunset Review*

These final-form 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. In addition, these final-form regulations are water quality standards which will be reviewed at least triennially, as required by Federal regulations.

J. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 17, 1997, the Department submitted a copy of the proposed rulemaking to IRRC and the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment. The notice was published at 27 Pa.B. 1561 (March 29, 1997). In compliance with section 5(b.1) of the Regulatory Review Act, the Board also provided IRRC and the Committees with copies of the comments received as well as other documentation.

In preparing these final-form regulations, the Board has considered all comments received from IRRC and the public. The Committees did not provide comments on the proposed rulemaking.

These final-form regulations were deemed approved by the House and Senate Committees on October 27, 1997. IRRC met on November 6, 1997, and approved the regulations in accordance with section 5(c) of the Regulatory Review Act.

K. *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. 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 all comments were considered.

(3) These final-form regulations do not enlarge the purpose of the proposal published at 27 Pa.B. 1561.

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

L. *Order of the Board*

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

(a) The regulations of the Department of Environmental Protection, 25 Pa. Code Chapter 93, are amended by amending §§ 93.1, 93.8, and 93.8a 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 immediately 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 27 Pa.B. 6128 (November 22, 1997).)

Fiscal Note: Fiscal Note 7-312 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 93. WATER QUALITY STANDARDS

§ 93.1. Definitions.

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

* * * * *

Surface waters—Perennial and intermittent streams, rivers, lakes, reservoirs, ponds, wetlands, springs, natural seeps and estuaries, excluding water at facilities approved for wastewater treatment such as wastewater treatment impoundments, cooling water ponds, and constructed wetlands used as part of a wastewater treatment process.

* * * * *

§ 93.8. Development of site-specific water quality criteria.

(a) The Department will consider a request for site-specific criteria for protection of aquatic life, human health or wildlife when a person demonstrates that there exist site-specific biological or chemical conditions of receiving waters or exposure factors which differ from conditions upon which the water quality criteria were based. Site specific criteria may be developed for use only in place of current Statewide or regional (such as the Great Lakes System) criteria. The request for site specific criteria shall include the results of scientific studies for the purpose of:

(1) Defining the areal boundaries for application of the site-specific criteria which will include the potentially affected wastewater dischargers identified by the Department, through various means, including, but not limited to, water quality modeling, the wasteload allocation process or biological assessments.

(2) Developing site-specific criteria which protect its existing use and designated use.

(b) Scientific studies shall be performed in accordance with the procedures and guidance in the Water Quality Standards Handbook (EPA 1994), as amended and updated, guidance provided by the Department or other scientifically defensible methodologies approved by the Department.

(c) This section applies to the criteria in regulations adopted by the EQB, including § 93.5(f) (relating to application of total residual chlorine criteria); § 93.7, Table 3 (relating to specific water quality criteria) or in the statement of policy implementing § 93.8a (relating to toxic substances) set forth at § 16.51 (relating to table) and § 16.61 (relating to water quality criteria for the Great Lakes System); or otherwise forming the basis for effluent limitations established under § 93.7(f). These provisions include criteria developed by the EPA under section 304(a) of the Water Pollution Control Act (33 U.S.C.A. § 1314(a)), and adopted in their original or modified form, and criteria developed by the Department.

(d) Prior to conducting studies specified in subsections (a) and (b), a proposed plan of study shall be submitted to and approved by the Department.

(e) Signed copies of all reports including toxicity test data shall be submitted to the Department within 30 days of completion of the tests.

(f) If as a result of its review of the report submitted, the Department determines that a site-specific criterion is appropriate, the Department will, for site-specific changes to criteria in § 93.5(f) or § 93.7, prepare a recommendation to the EQB in the form of proposed rulemaking, incorporating that criterion for the water body segment. The site-specific changes to the criteria will become effective for the water body segment following adoption by the EQB as final rulemaking and publication in the *Pennsylvania Bulletin*.

(g) A person challenging a Department action under this section shall have the burden of proof to demonstrate that the Department's action does not meet the requirements of this section.

§ 93.8a. Toxic substances.

(a) The waters of this Commonwealth may not contain toxic substances attributable to point or nonpoint source waste discharges in concentrations or amounts that are inimical to the water uses to be protected.

(b) Water quality criteria for toxic substances shall be established under Chapter 16 (relating to water quality toxics management strategy—statement of policy) wherein the criteria and analytical procedures will also be listed. Chapter 16 along with changes made to it is hereby specifically incorporated by reference.

(c) Water quality criteria for toxics substances which exhibit threshold effects will be established by application of margins of safety to the results of toxicity testing to prevent the occurrence of a threshold effect.

(d) Nonthreshold carcinogenic effects of toxic substances, will be controlled to a risk management level of one excess case of cancer in a population of one million ($1x10^{-6}$) over a 70-year lifetime. Other nonthreshold effects of toxic substances will be controlled at a risk management level as determined by the Department.

(e) Design conditions for toxics shall be determined under § 93.5(b) (relating to application of water quality criteria to discharge of pollutants), except that for carcinogens, the design stream flow shall be that which results in a lifetime—70 years—average exposure corresponding to the risk management level specified in subsection (d).

(f) The Department will consider both the acute and chronic toxic impacts to aquatic life and human health.

(g) The Department may consider synergistic, antagonistic and additive toxic impacts.

(h) The Department may require effluent toxicity testing as a basis for limiting the addition of toxic substances to waters of this Commonwealth, and may establish water quality based effluent limitations based on the results of effluent toxicity testing.

(i) At intervals not exceeding 1 year, the Department will publish a new or revised water quality criteria for toxic substances, and revised procedures for criteria development in the *Pennsylvania Bulletin*.

(j) A person challenging criteria established by the Department under this section shall have the burden of proof to demonstrate that the criteria does not meet the requirements of this section. In addition, a person who proposes an alternative site-specific criterion shall have the burden of proof to demonstrate that the site specific criterion meets the requirements of this section.

(k) The requirements for discharges to and antidegradation requirements for the Great Lakes System are as follows.

(1) *Definitions*. The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

BAF—Bioaccumulation Factor—The ratio in liters per kilogram of a substance's concentration in tissues of an aquatic organism to its concentration in the ambient water, when both the organism and its food are exposed and the ratio does not change substantially over time.

BCC—Bioaccumulative Chemical of Concern—A chemical that has the potential to cause adverse effects which, upon entering the surface waters, by itself or its toxic transformation product, accumulates in aquatic organisms by a human health BAF greater than 1000, after considering metabolism and other physiochemical properties that might enhance or inhibit bioaccumulation, under the methodology in 40 CFR Part 132 Appendix B (relating to Great Lakes Water Quality Initiative). Current BCCs are listed in 40 CFR 132.6, Table 6, Subpart A (relating to pollutants of initial focus in the Great Lakes Water Quality Initiative).

Great Lakes System—The streams, rivers, lakes and other bodies of surface water within the drainage basin of the Great Lakes in this Commonwealth.

Open Waters of the Great Lakes—The waters within the Great Lakes in this Commonwealth lakeward from a line drawn across the mouth of the tributaries to the lakes, including the waters enclosed by constructed breakwaters, but not including the connecting channels.

(2) *Total Maximum Daily Loads (TMDLs).* TMDLs for Open Waters of the Great Lakes shall be derived following the procedures in 40 CFR Part 132, Appendix F, Procedure 3, Subpart D (relating to Great Lakes Water Quality Initiative implementation procedures), including all other subparts referenced in Subpart D, except Subpart C.

(3) Statewide antidegradation requirements in Chapters 93 and 95 (relating to water quality standards; and wastewater treatment requirements) and in the Federal regulation in 40 CFR 131.32(a) (relating to Pennsylvania) as applicable, apply to all surface waters of the Great Lakes System.

(4) If, for any BCC, the Quality of the surface water exceeds the levels necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the waters, that quality shall be maintained and protected, unless the Department finds that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the surface water is located.

[Pa.B. Doc. No. 97-2079. Filed for public inspection December 26, 1997, 9:00 a.m.]

ENVIRONMENTAL QUALITY BOARD
[25 PA. CODE CHS. 121—123, 137 AND 139]
Air Quality-RBI 1

The Environmental Quality Board (Board) by this order amends Chapters 121—123, 137 and 139.

The changes to § 121.1 (relating to definitions) conform the definitions related to coke ovens, "major modification," "modification," "potential to emit," "responsible official" and "secondary emissions" to the Federal definitions of these terms. The changes to Chapter 122 (relating to National standards of performance for new sationary sources) incorporate by reference the new source performance standard guidelines established under section 111(d) of the Clean Air Act (42 U.S.C.A. § 7411(d)). The changes to Chapter 123 (relating to standards for contaminants) make this chapter consistent with the maximum achievable control technology (MACT) standards for coke ovens promulgated by the Environmental Protection Agency (EPA) under the Clean Air Act. The change to Chapter 137 (relating to air pollution episodes) eliminates the mandatory requirement for submission of standby plans to address air pollution episodes. The changes to Chapter 139 (relating to sampling and testing) make the provisions for particulate matter testing and monitoring of coke oven emissions consistent with Federal requirements. The changes to Chapter 139 also establish consistent data availability requirements for all continuous emission monitoring systems (CEMS) sources and extend the monitoring provisions applicable to municipal waste incinerators to hospital waste incinerators.

This order was adopted by the Board at its meeting of September 16, 1997.

A. *Effective Date*

These amendments will be effective upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. *Contact Persons*

For further information, contact Terry Black, Chief, Regulation and Policy Development Section, Division of Compliance and Enforcement, Bureau of Air Quality, 12th Floor Rachel Carson State Office Building, P.O. Box 8468, Harrisburg, PA 17105-8468, (717) 787-1663, or M. Dukes Pepper, Jr., Assistant Counsel, Bureau of Regulatory Counsel, Office of Chief Counsel, 9th Floor Rachel Carson State Office Building, P.O. Box 8464, Harrisburg, PA 17105-8464, (717) 787-7060.

C. *Statutory Authority*

This action is being taken under the authority of section 5(a)(1) of the Air Pollution Control Act (35 P. S. § 4005(a)(1)), which grants to the Board the authority to

adopt regulations for the prevention, control, reduction and abatement of air pollution.

D. *Background and Summary*

The Regulatory Basics Initiative (RBI) was announced in August 1995 as an overall review of the Department of Environmental Protection's (Department) regulations and policies. The Department solicited public comments in August of 1995 by giving the regulated community, local governments, environmental interests and the general public the opportunity to identify specific regulations which are either more stringent than Federal standards, serve as barriers to innovation, or are obsolete or unnecessary, or which impose costs beyond reasonable environmental benefits or serve as barriers to adopting new environmental technologies, recycling and pollution prevention.

In February 1996, Governor Ridge executed Executive Order 1996-1 (Regulatory Review and Promulgation) establishing standards for the review, development and promulgation of regulations. The Department's RBI review is consistent with the directions and standards in Executive Order 1996-1. These amendments meet the requirements of Executive Order 1996-1.

These final-form regulations are the first in a series of regulatory proposals implementing changes to the Department's air resource regulations resulting from the RBI. In general, these final changes make the Department's regulations consistent with Federal requirements, delete obsolete and unnecessary provisions and apply the Department's monitoring requirements in a consistent fashion for all affected sources.

The Department worked with the Air Quality Technical Advisory Committee (AQTAC) in the development of these final-form regulations. At its July 21, 1997, meeting, AQTAC recommended adoption of the final-form amendments.

The Department is modifying the definitions of "coke oven battery," "coke oven gas collector main," "door area," "major modification," "modification," "potential to emit," "responsible official" and "secondary emissions." In each case, the changes make the definitions consistent with Federal definitions of these terms promulgated under the Clean Air Act. The definition of "major modification" does not include the Federal exclusion for combustion of municipal waste and is, therefore, more stringent than the Federal definition. Because of the public concern about municipal waste combustion, the Department is retaining authority to evaluate municipal waste combustion on a case-by-case basis. These final-form regulations also retain the cross reference to § 127.203 for determining what emissions increases are considered significant.

Section § 122.3 (relating to adoption of standards) adopt by reference the Federal new source performance standards promulgated under section 111(b) of the Clean Air Act. The Department is amending § 122.3 to incorporate all Federal standards established under section 111 of the Clean Air Act. The existing language does not incorporate by reference emission guidelines established under section 111(d) of the Clean Air Act. However, Chapter 121 already defines section 111(d) guidelines to be "applicable requirements." The Department's permitting regulations in §§ 127.12(a)(4) and 127.411(a)(5) (relating to content of applications) require permit applicants to demonstrate that they meet all applicable requirements. Consequently, the regulatory modification will simply codify in § 122.3 the Department's existing regulatory requirement. The final-form regulations make clear that portions of section 111 of the Clean Air Act are applicable to existing air contamination sources.

The amendments to § 123.44 make this regulation consistent with MACT for coke ovens promulgated by the EPA under the Clean Air Act.

The amendments to § 137.4 (relating to standby plans) change the provisions for standby plans to address air pollution episodes. Specifically, in subsection (b), the Department is classifying each county as an area requiring a standby plan based on monitored exceedances of any National ambient air quality standard (NAAQS). The existing regulation lists each pollutant along with its ambient concentration. The Department is referencing the NAAQS as the reference point for determining counties subject to the standby plan requirements. In addition, subsection (c) is being modified to only require standby plans when requested by the Department. This provision will conform § 137.4 to the existing requirements in § 127.411(a)(8). Finally, subsection (f) is being modified to make clear that the standby plan shall be provided to the Department by an individual responsible for the entire facility.

Chapter 139 is being modified in five ways. First, § 139.12 (relating to emissions of particulate matter) deletes a portion of the requirements for particulate matter sampling because the provision is more stringent than the applicable Federal requirement and provides little environmental benefit. Second, §§ 139.61 and 139.62 (relating to requirements; and waiver of certain monitoring requirements) are being deleted. These provisions establish monitoring standards for coke ovens which have been superseded by the promulgation of the coke oven MACT standard by the EPA. This change will make the Commonwealth's regulations consistent with Federal requirements. Third, § 139.101 (relating to general requirements) changes the requirements related to data availability for data captured by a continuous emissions monitor. A general data availability requirement in § 139.101 was adopted in 1990, and CEMS covered in § 139.104 (relating to sulfur dioxide and nitrogen oxides monitoring requirements for combustion sources) were grandfathered. With deletion of § 139.104, the general data availability standard in § 139.101 would apply. CEMS would be required to meet the following minimum data availability requirements: (1) in each calendar month, at least 90% of the time periods for which an emission standard or an operational parameter applies shall be valid; or (2) in each calendar quarter, at least 95% of the hours during which the monitored source is operating shall be valid. Fourth, the Department is deleting the requirements of § 139.104 and establishing these monitoring requirements under the general provisions of § 139.101. Finally, the Department is modifying § 139.111 (relating to waste incinerator monitoring requirements) to apply to hospital waste incinerators as well as municipal waste incinerators. These incinerators, generally, are similar in nature and the monitoring requirements are applicable to both. Section 139.111 also changes the data availability requirements to be consistent with the other proposed changes for continuous emission monitors described previously.

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

The Department received a comment based on section 415 of the Clean Air Act (42 U.S.C.A. § 7651n). The commentator requested a change in the proposed definition of "modification," which is used for purposes of the new source review program, to make the definition

consistent with section 415 of the Clean Air Act. The commentator asserted that under section 415(c) the reactivation of very clean units was exempt from Federal new source review requirements. Section 415 only exempts these units from the new source performance standards (42 U.S.C.A. § 7411) and the requirements for the prevention of significant deterioration contained in Part C of Subchapter I of the Clean Air Act. Section 415 contains no exemption from the new source review requirements of Part D of Subchapter I of the Clean Air Act. In addition, the final rule is consistent with the Federal definition of "major modification."

Another commentator suggested adding a definition of "very clean units." Because there is no corresponding Federal definition, the Department is not making this change. The Department will implement this provision on a case-by-case basis in a manner consistent with Federal guidance developed under the Clean Air Act.

Another commentator recommended changes to § 123.23. The Department's proposal was to implement the MACT standard promulgated by the EPA related to coke oven batteries. The comment received relates to a section of the regulation that was not proposed for amendment; the comment is not required by implementation of the MACT standard for coke oven batteries and relates to pollutants not regulated by the MACT standard. The Department believes this comment enlarges the purpose of the regulatory proposal and cannot be considered at this time. In addition, the Department does not support the change proposed by the commentator because it would allow increased emissions of sulfur oxides from the affected sources. To relax the emission limitations, it would be necessary to submit a revision to the sulfur oxide SIP for the area, including a full modeling demonstration of continued attainment. The commentator has not demonstrated that the increased emissions of sulfur oxides will not jeopardize maintenance of the ambient air quality in the area.

Two commentators suggested modifying the definition of "potential to emit" to include language which would make it clear that secondary emissions are not to be included in the determination of a facility's potential to emit. This change has been made to make the Commonwealth's definition consistent with the Federal definition. One of these commentators also suggested a change to the definition of "fugitive air contaminant." The suggested change would allow fugitive air contaminants if the fugitive emissions did not cause air pollution. The present provisions of § 123.1 (relating to prohibition of certain fugitive emissions) provide for a source operator to obtain an exemption from the prohibition against fugitive emissions if the operator shows that the emissions are not causing air pollution. This proposed change would place the burden on the Commonwealth to prove that fugitive emissions are causing air pollution before action could be taken to require reduction of emissions. The proposed change is not in the best interest of the Commonwealth because it would require excessive resources for the Department to conduct an analysis of each fugitive situation encountered and would eliminate an effective enforcement tool.

One commentator generally supported the revisions, but expressed concerns about elimination of the separate monitoring requirements for NO_x and SO_x from combustion sources and about the practical implications of the proposed revisions to the data availability requirements. The Department believes these revisions are appropriate and has not made modifications to the final-form regulations.

One commentator expressed concern about the Air Pollution Episode Strategy (APES) revisions which would require the submission of plans only at the request of the Department. Presently, essentially all significant sources must develop and maintain plans. Although the requirements for these plans have been in effect for 20 to 25 years, there has not been a need to implement them because of high pollutant levels. The Department believes that there is no compelling reason for requiring the development and submission of plans for facilities in areas for which there is essentially no possibility of ambient pollutant levels exceeding the plan implementation trigger levels. Another commentator pointed out that the Department failed to delete the ozone standard from the APES revisions. The final-form regulations corrects this oversight.

F. *Pollution Prevention*

The revisions to the definition of "major modification" contained in § 121.1 encourage and support pollution prevention. Under this definition, environmentally beneficial pollution prevention projects do not have to meet Federal requirements related to new source review.

G. *Benefits, Costs and Compliance*

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

Benefits

Overall, the citizens of this Commonwealth will benefit from these changes because they will make the Department's air quality program consistent with Federal requirements and apply monitoring provisions for affected sources in a consistent manner. These provisions reduce unnecessary paperwork while continuing to provide the appropriate level of air quality protection.

The revisions to the data availability requirements will result in an estimated savings in penalties to the regulated community of approximately $70,000 per year (1996 data were used). This would be the result of sources under § 139.104 complying with § 139.101. Data from 3rd quarter 1995 through 2nd quarter 1996 were used to estimate savings in penalties.

The revisions to Chapter 122 National standards of performance for new stationary sources provisions are anticipated to result in no additional costs for the regulated community. Savings estimated at $150,000 to $250,000/year can be expected after Chapter 122 is revised.

The additional annual cost to coke oven battery operators for providing daily readings to satisfy both current State and Federal regulations is approximately $190,000. The revisions to the coke oven requirements in §§ 123.44, 139.61 and 139.62 are anticipated to reduce costs to coke oven operators by approximately $190,000 annually.

The revisions to the particulate sampling requirements in § 139.12 are anticipated to result in annual savings to the regulated community of approximately $345,000.

The revisions to the APES requirements in Chapter 137 are estimated to reduce costs to the regulated community by approximately $250,000 annually.

No additional costs or cost savings are predicted to result from the revision of the § 121.1 definitions.

Compliance Costs

These final-form regulations will, in general, reduce compliance costs by deleting unnecessary monitoring, recordkeeping and permitting requirements.

Compliance Assistance Plan

The Department plans to educate and assist the public with understanding the newly revised requirements and how to comply with them. This will be accomplished through the Department's ongoing regional compliance assistance program.

Paperwork Requirements

The regulatory revisions delete unnecessary paperwork requirements related to permitting standby plans and monitoring.

H. *Sunset Review*

These final-form 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.

I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 1, 1997, the Department submitted a copy of the proposed amendments to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees. 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 as well as other documentation.

In preparing these final-form regulations, the Department has considered the comments received from IRRC and the public. These comments are addressed in the comment and response document and Section E of this Preamble. The Committees did not provide comments on the proposed rulemaking.

These final-form regulations were deemed approved by the House and Senate Committees on October 27, 1997. IRRC met on November 6, 1997, and approved the final-form regulations in accordance with section 5(c) of the Regulatory Review Act.

J. *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. 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 and public hearings were provided as required by law and all comments were considered.

(3) These final-form regulations do not enlarge the purpose of the proposal published at 27 Pa.B. 1822.

(4) These final-form regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this Preamble and are reasonably necessary to achieve and maintain the National ambient air quality standards.

K. *Order of the Board*

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

(a) The regulations of the Department, 25 Pa. Code Chapters 121—123, 137 and 139, are amended by amending §§ 123.44, 139.12, 139.101 and 139.111 and deleting §§ 139.61, 139.62 and 139.104 to read as set forth at 27 Pa. B. 1822 and by amending § 121.1, 122.3 and 137.4 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 review and approval 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 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.

JAMES M. SEIF,
Chairperson

(*Editor's Note:* Amendments to § 121.1, which is amended in this document appeared at 27 Pa.B. 5601 (November 1, 1997) and 27 Pa.B. 5683 (November 1, 1997). These amendments will be codified in MTS 278 (January, 1998).)

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission relating to this document, see 27 Pa.B. 6128 (November 22, 1997).)

Fiscal Note: Fiscal Note 7-313 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE III. AIR RESOURCES

CHAPTER 121. GENERAL PROVISIONS

§ 121.1. Definitions.

The definitions in section 3 of the act (35 P. S. § 4003) apply to this article. In addition, the following words and terms, when used in this article, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Coke oven battery—A process consisting of a jointly operated group of slot-type coke ovens, the operation of which results in the destructive distillation of coal by the indirect application of heat to separate the gaseous and liquid distillates from the carbon residue and includes coal preparation, coal charging, coking, separation and cleaning of the distillate, coke pushing, hot coke transfer and coke quenching. A coke oven battery is a single source for the purpose of this article and shall include, but not be limited to, the following, when present: the ovens; coal preheaters; underfiring systems; waste heat stack; offtake piping; flues; closed charging systems; door hoods; and operating equipment including larry cars, jumper pipes, pusher machines, door machines, mud trucks and quench cars associated with the operation of a battery. Existing batteries are identified as follows:

Operator	*Plant*	*Identifying Symbol*
Bethlehem Steel	Bethlehem	"2A" (includes batteries #2 and #3), "A"
Erie Coke Corporation	Erie	#1
Koppers Industries	Monessen	#1B, #2 (operated as one battery for purposes of meeting the charging standard)

Coke oven gas collector main—The pipes or ducts by which the gaseous byproducts of coking are transported from the offtake piping of coke ovens to the byproduct plant.

* * * * *

Door area—The vertical face of a coke oven between the bench and the top of the battery and between two adjacent buckstays.

* * * * *

Major modification—

(i) A physical change or change in the method of operation of a major facility that would result in an increase in emissions equal to or exceeding an emission rate threshold or significance level specified in § 127.203.

(ii) A net emissions increase that is significant for VOCs or NO_x will be considered significant for ozone.

(iii) A physical change or change in the method of operation does not include:

(A) Routine maintenance, repair and replacement.

(B) The use of an alternative fuel or raw material by reason of any order under section 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (ESECA) (15 U.S.C.A. § 79(a) and (b)) (or any superseding legislation) or by reason of a natural gas curtailment plan under the Federal Power Act (16 U.S.C.A. §§ 792—825r).

(C) The use of an alternative fuel by reason of an order or rule under section 125 of the Clean Air Act (42 U.S.C.A. § 7425).

(D) The use of an alternative fuel or raw material by a stationary source which meets one of the following conditions:

(I) The source was capable of accommodating before January 6, 1975, unless the change would be prohibited under an operating permit condition.

(II) The source is approved to use under an operating permit.

(E) An increase in the hours of operation or in the production rate, authorized under the conditions of an operating permit.

(F) Any change in ownership at a stationary source.

(G) The addition, replacement or use of a pollution control project at an existing source, unless the Department determines that the addition, replacement or use renders the source less environmentally beneficial, or except when the following apply:

(I) The Department has reason to believe that the pollution control project would result in a significant net increase in representative actual annual emission of any criteria pollutant, VOC or NO_x over levels used for that facility in the most recent air quality impact analysis in the area conducted for the purpose of Title I of the Clean Air Act, if any (42 U.S.C.A. §§ 7401—7515).

(II) The Department determines that the increase will cause or contribute to a violation of any National ambient air quality standard or PSD increment, or visibility limitation.

(H) The installation, operation, cessation or removal of a temporary clean coal technology demonstration project, if the project complies with the following:

(I) The SIP.

(II) Other requirements necessary to attain and maintain the National ambient air quality standards during the project and after it is terminated.

(I) The installation or operation of a permanent clean coal technology demonstration project that constitutes repowering, if the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the source. This exemption applies on a pollutant-by-pollutant basis.

(J) The reactivation of a very clean coal-fired electric utility system generating source.

* * * * *

Modification—A physical change in a source or a change in the method of operation of a source which would increase the amount of an air contaminant emitted by the source or which would result in the emission of an air contaminant not previously emitted, except that routine maintenance, repair and replacement are not considered physical changes. An increase in the hours of operation is not considered a modification if the increase in the hours of operation has been authorized in a way that is Federally enforceable or legally and practicably enforceable by an operating permit condition.

* * * * *

Potential to emit—The maximum capacity of a source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and limitations on hours of operation or on the type or amount of material combusted, stored or processed shall be treated as part of the design if the limitation or the effect it would have on emissions is Federally enforceable or legally and practicably enforceable by an operating permit condition. The term does not include secondary emission from an offsite facility.

* * * * *

Responsible official—An individual who is:

(i) For a corporation: a president, secretary, treasurer or vice president of the corporation in charge of a principal business function, or another person who performs similar policy or decision making functions for the corporation, or an authorized representative of the person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for, or subject to, a permit and one of the following applies:

* * * * *

(B) The delegation of authority to the representative is approved, in advance, in writing, by the Department.

* * * * *

(iv) For affected sources:

* * * * *

(B) The designated representative or a person meeting provisions of subparagraphs (i)—(iii) for any other purpose under 40 CFR Part 70 (relating to operating permit programs) or Chapter 127 (relating to construction, modification, reactivation and operation of sources).

* * * * *

Secondary emissions—Emissions which occur as a result of the construction or operation of a major stationary source or major modification of a major stationary source, but do not come from the major stationary source or facility or major modification itself. The secondary emissions shall be specific, well defined, quantifiable and impact the same general area as the stationary source or modification which causes secondary emissions. The term includes emissions from an offsite support facility which would not be constructed or increase its emissions except as a result of the construction or operation of the major stationary source or major modification. The term does not include emissions which come directly from a mobile source regulated under Title II of the Clean Air Act (42 U.S.C.A. §§ 7521—7589).

* * * * *

CHAPTER 122. NATIONAL STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

§ 122.3. Adoption of standards.

Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources, promulgated in 40 CFR Part 60 (relating to standards of performance for new stationary sources) by the Administrator of the EPA under section 111 of the Clean Air Act (42 U.S.C.A. § 7411) are adopted in their entirety by the Department and incorporated herein by reference.

CHAPTER 137. AIR POLLUTION EPISODES

GENERAL

§ 137.4. Standby plans.

(a) This section applies to the following classes of sources located in the counties identified in subsection (b):

(1) Coal or oil-fired electric generating facilities.

(2) Coal or oil-fired steam generating facilities rated at more than 100 million Btu per hour of heat input.

(3) Manufacturing industries of the following classifications which employ more than 20 employes at any one location:

(i) Primary and secondary metals industries.

(ii) Petroleum refining and related industries.

(iii) Chemical and allied products industries.

(iv) Paper and allied products industries.

(v) Glass, clay and concrete products industries.

(4) Municipal and commercial refuse disposal and salvage operations other than incinerators rated at less than 1,000 pounds per hour or refuse.

(5) Other sources determined to be of significance by the Department. The persons responsible for the sources will be so advised by the Department.

(b) The Department will annually classify each county as an area requiring a standby plan based on monitored exceedance of any of the NAAQS.

(c) Any person responsible for the operation of a facility in subsection (a) and located in a county classified in subsection (b) as requiring a standby plan shall submit standby plans for reducing the emission of air contaminants from that facility during alert, warning and emergency levels to the Department within 90 days of the Department's request. The plans shall be designed to reduce or eliminate the emissions of air contaminants in accordance with the objectives in §§ 137.11—137.14 (relating to level actions). The plans shall be in writing on forms published and distributed by the Department and shall identify the approximate amount of reduction of various air contaminants and a description of the manner in which the reductions will be achieved.

(d) If the Department determines that a standby plan does not provide for effectively achieving the objectives in §§ 137.11—137.14, the Department may disapprove the plan, state its reasons for the disapproval and either order the preparation of an amended plan within a time period specified in the order or issue, by order, a plan to replace the disapproved plan.

(e) The Department may amend or otherwise change a standby plan if it determines that good cause exists for the action. An amendment or change will be in writing and will be accompanied by a notice of sufficient cause for the action.

(f) For facilities required to submit standby plans under subsection (e), during a forecast, alert, warning or emergency level, the standby plan shall be made available by the person responsible for the facility to employes of the Department on the premises of the source.

[Pa.B. Doc. No. 97-2080. Filed for public inspection December 26, 1997, 9:00 a.m.]

Title 34—LABOR AND INDUSTRY

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW

[34 PA. CODE CH. 101]

General Requirements

The Unemployment Compensation Board of Review (Board) amends Chapter 101 (relating to general requirements) under the authority of sections 203 and 505 of the Unemployment Compensation Law (law) (43 P. S. §§ 763(d) and 825). These regulations provide guidelines and standards for scheduling and conducting appeal hearings in whole, or in part, by means of telephone.

Purpose of Amendments

The former regulations governing hearings conducted by means of telephone (Subchapter E) expired on April 8, 1994, but telephone hearings continued to be conducted when the parties agreed to be bound by the expired regulations. In addition, minor problems of interpretation were noted in the former regulations. These problems of

interpretation stemmed primarily from minor ambiguities in the regulations that occasionally caused difficulty in application for the parties or the tribunal. These telephone amendments are designed to address these problems by providing clarification and conformity to the *Pennsylvania Code & Bulletin Style Manual*, and, primarily, by improving organization to ensure that telephone hearings are conducted in a uniform manner. The ultimate purpose is to provide fundamental fairness to all parties involved in the appeal process.

Comment and Response Summary

Notice of proposed rulemaking was published at 26 Pa.B. 1141 (March 16, 1996) and afforded a 30-day comment period. Written public comments were received by the Board during the comment period from Carolyn L. Carter, Esquire, of Legal Services, Inc., Lisa Sauder, Esquire, representing various Employment and Security Bureaus of the Department of Labor and Industry (Department), Lea S. Judson (Judson), Irwin W. Aronson on behalf of the Pennsylvania AFL-CIO (AFL-CIO) and Sharon Dietrich, Esquire, of Community Legal Services (CLS). Comments from several unemployment compensation referees (referees) were received outside of the comment period and these were also considered by the Board and the Independent Regulatory Review Commission (IRRC).

The major concerns of the commentators included: (1) out-of-State parties would be scheduled for testimony by telephone even if they were less than 50 miles from the hearing location; (2) the 14-day requirement of notice of a telephone hearing was unnecessarily long; (3) providing stenographic recording of testimony in the event a party objected to their testimony being tape recorded was unnecessary; (4) representation of parties by telephone without approval would be abused by the parties and difficult for the tribunal to administer; (5) the elimination of the sunset and data maintenance provisions might lead to unremedied abuses; and (6) the use of the word "normally" in § 101.127 (relating to purpose and scope) could lead to more telephone hearings.

The final-form regulations were submitted to the standing committees, IRRC and the commentators on or about January 28, 1997. In response to these final-form regulations, comments were received from Carolyn Carter, Lisa Sauder, Lea Judson, Sharon Dietrich and Robert E. Belfanti, Jr. The Board then conferred with IRRC on the points raised by it and the commentators. The major concerns of the commentators for the final-form regulations included: (1) the 7-day requirement of notice of a telephone hearing was too short; and (2) providing an opportunity to waive receipt of the telephone regulations or consent to holding the hearing would be unfair to parties unfamilar with the telephone hearings.

§ 101.127(a)

The AFL-CIO and IRRC commented that the word "normally" should be deleted from the regulation because there should be an unqualified, regulatory preference for in-person testimony. The AFL-CIO also commented that since the word "compelling" was deleted from the proposed amendments, the word "normally" should also be removed to balance the equation.

The Board retains the word "normally" in this subsection for several reasons as follows: (1) the use of the word "normally" is consistent with the expired regulation and the Board is not aware of any problems associated with its use; (2) the word "normally" is neither a reciprocal nor a balance to the word "compelling," which has been deleted from the regulation; (3) in-person testimony is normally preferable to telephone testimony, but there can be circumstances, such as those addressed by the regulations, when telephone testimony is entirely appropriate; and (4) these are procedural regulations and rigid policy statements are neither consistent with their purpose nor necessary to their implementation and enforcement.

§ 101.128(a) (relating to scheduling of telephone testimony)

Judson, the AFL-CIO, the CLS and IRRC commented on this subsection. Although very similar to the sunsetted regulation at § 101.122(a), there was concern that the 50-mile limit would not be applied to parties or witnesses that were located just across the State line, and that these parties or witnesses would be permitted to testify by telephone solely because they were located outside of this Commonwealth.

Although the Board does not believe that this "situation" has occurred, or would occur in the future, it has elected to add clarifying language to this subsection. It now provides: "The tribunal may schedule, on its own motion, testimony by telephone of a party or witness when it appears from the record that the party or witness is located at least 50 miles from the location at which the tribunal will conduct the hearing, without regard to State boundaries."

The Board believes that its language is less complex than that suggested by IRRC, yet accomplishes the intent behind the commentators' concern.

The CLS and IRRC also suggested that the Board amend § 101.86 (relating to appeal hearings) to make the regulations more internally consistent. Section 101.86 addresses appeal hearings in general following an appeal from a decision of the Department (Job Center). The Board elects to make no changes to § 101.86 for the following reasons: (1) the Board is reluctant to make unnecessary changes to any regulations outside of those already examined in this rulemaking process; (2) the Board perceives no inconsistency between §§ 101.86 and 101.128(a). Section 101.86 applies to hearings in general. However, if any of the criteria in § 101.128 are inconsistent with § 101.86, the former will control. Therefore, there is no inconsistency between these regulations (See § 101.127(b)); and (3) the Board believes that the language suggested by the CLS would be inconsistent with section 505a of the law (43 P. S. § 825.1), which governs the place of the hearing.

§ 101.128(b)(2)

Judson, the AFL-CIO, some referees and IRRC commented on subsection (b)(2). The major concern of the commentators appears to be that any employment, transportation or medical reason cited by a party or witness would be compelling.

In the final-form regulations submitted by the Board, it amended this subsection to address this perceived ambiguity.

In response to the concerns regarding ambiguity, the Board amended paragraph (2). It now states: "The party or witness is reasonably unable to testify in person due to a compelling employment, transportation, or health reason, or other compelling problem." By modifying the specific problems with the word compelling and "other problems" with the word compelling, it is now clear that any problem must be compelling. The other minor changes to the language were for grammatical purposes.

§ 101.128(c)

Commentators Judson and the AFL-CIO suggested that this subsection requires clarifying language to indicate that only those parties or witnesses scheduled to testify by telephone or identified prior to the taking of testimony may testify by telephone.

The Board added language to clarify this subsection in response to this comment. It now provides: "Only a party or witness scheduled to testify by telephone, or identified prior to the taking of testimony in accordance with § 101.131(f) (relating to conduct of a telephone hearing), may testify by telephone, and the testimony of each other party or witness shall be received in person."

§ 101.128(d)

This was formerly § 101.122(d). The CLS commented that it should be improved and supplemented because in its past experience, the regulation was seldom followed by the referees.

In response, the Board has revised this subsection, utilizing a portion of CLS' proposed language. The subsection now requires the tribunal to promptly rule on a request for telephone testimony after a reasonable attempt has been made to inform the parties of the request, the basis for the request, the regulations under which telephone testimony can be taken, and the right of a party to object. This information and the referee's ruling must also be documented in the record.

§ 101.129(a) (relating to procedures subsequent to scheduling)

The AFL-CIO commented on the changes in wording of this subsection. Although it does not find the change of the word "shall" to "will" objectionable, it is concerned that the word "only" has been deleted. The Board has not made any changes to this subsection in light of this comment, because it does not believe that deleting the word "only" has changed the meaning or purpose of this subsection.

§ 101.130(a) (relating to notice of testimony by telephone and use of documents).

Varying comments were received concerning this subsection. Judson commented that she strongly supports this subsection as proposed. The AFL-CIO commented that the requirement in paragraph (2) is superfluous. Some referees and IRRC commented that the 14-day notice of hearing requirement is too long and unduly delays hearings, and suggested a shorter notice period.

After final-form submission, many commentors expressed the opinion that a 7-day notice period was too short, especially because the regulations require that parties submitting documents must do so 5 days before the hearing.

First, addressing the AFL-CIO's comment, the Board does not agree that having the hearing notice indicate the names of counsel, authorized agents, parties, and witnesses, if known, who are scheduled to appear or testify by telephone is superfluous. Informing parties of information that is known is beneficial to all involved and the Board declines to eliminate this part of the subsection.

With regard to the comments concerning the length of the notice period, after considering the arguments for a 14-day notice period and the arguments for a shorter notice period, the Board has chosen to retain the 14-day notice period as proposed.

Although the Board believes that a shorter notice period could be workable in most cases, after reviewing comments and speaking with IRRC, it realizes that in a small number of instances, 14 days may be needed for mailing the notice. To ensure that parties in all cases receive adequate notice, the Board has reluctantly reinstated the 14-day notice period.

In addition to these comments, some of the referees also indicated that identifying all relevant time zones could prove problematic in that errors can occur in attempting to identify times in other states.

The Board has retained this provision in the regulation but, at the suggestion of IRRC, has rewritten it to require that the hearing notice indicate "the date and time of the hearing in prevailing Eastern time." This revision has been made to address the referees' concerns and to ensure that there will be less confusion on the part of parties and witnesses as to what time they will be contacted to testify by telephone.

The Board has also added two new provisions to this subsection at the suggestion of IRRC. Section 101.130(a)(3), revised since the first submission of final-form regulations, indicates that the notice of hearing will indicate the deadline by which the tribunal is to receive documents, if any, from all parties. Although this information has been a part of the notice of hearing in the past, it will now be a required part of the notice of hearing. The change in language from the first final-form submission is for clarification purposes.

Section 101.130(a)(4) indicates that the notice of hearing will state that the hearing will be tape recorded. This will ensure that all parties will be aware that their telephone testimony will be recorded, before the hearing begins. The Board has declined to include IRRC's suggestion that the regulation should include a statement that a written transcript would be prepared, because a written transcript of a hearing is prepared only if a timely appeal is taken from the referee's decision.

§ 101.130(b)

Judson commented that she strongly supported this subsection as written in the proposed regulations. The AFL-CIO commented that, as written, this subsection provides the referees with discretion to exclude testimony and evidence from consideration if a copy of this subchapter has not been provided to the parties or their counsel/agent, if known. It does not, however, provide any standards by which this discretion is to be exercised.

In an attempt to remedy this problem, the Board had rewritten the second sentence, stating: "If a copy of this subchapter has not been provided to the parties and/or their counsel or authorized agent, if known, in advance of the hearing, testimony and evidence given or taken at the hearing will be excluded from consideration, unless the parties consent or the issue has been waived, and a new hearing in compliance with this subchapter will be scheduled." This final form language gave rise to comments that conveyed a concern that uninformed parties would waive rights of which they were not aware. In an effort to address these concerns, the Board has rewritten this section, which now states: "When testimony by telephone is to be taken, the tribunal will send a copy of this subchapter with the notice of hearing. If the tribunal finds that an unrepresented party has not received a copy of this subchapter, a copy will be provided and the hearing will be rescheduled."

This language will ensure that the unrepresented parties the commentators are concerned about will not be

permitted to waive any rights or give uninformed consent. Those unrepresented parties will be provided a copy of the regulations and another hearing will be scheduled.

§ 101.130(c)

Judson commented that she strongly supports this subsection. Legal Services, Inc. questioned whether "in advance of the beginning of the hearing" was intended to mean the same as "before the beginning of testimony" found in § 101.131(f) (relating to conduct of a telephone hearing), and whether these provisions should be parallel.

"[I]n advance of the beginning of the hearing" is not intended to mean the same thing as "before the beginning of testimony" found in § 101.131(f). The purpose of this subsection, and the language requiring that the parties intending to provide telephone testimony supply the tribunal with those names, locations and telephone numbers "in advance of the beginning of the hearing," is to ensure that the referee will have the names and telephone numbers necessary to make all of the required telephone connections at or shortly before the hearing is scheduled to begin. Without this information in advance, the referee will not know whom to contact, important testimony may be missed, and unnecessary delays may result.

IRRC suggested that this language is intended to prevent surprise and possible prejudice. This is not the case. This position is more accurate in describing the reasoning for the language used in § 101.131(f) See explanation for § 101.131(f).

IRRC also suggested that a minimum time period should be set in advance of the beginning of the hearing in which parties must supply this information. The Board declines to create any arbitrary minimum time period. There are few, if any, problems of parties failing to supply the needed information in reasonable time. Setting an arbitrary time period may create problems where none exist. Therefore, the Board makes no changes to this subsection. See also comments to § 101.131(f).

§ 101.130(d)

Judson and the AFL-CIO commented on this subsection. The AFL-CIO noted that the subsection should state that copies of the documents upon which the initial determination was based should also be sent to the parties' counsel or authorized agent, if known. The Board agrees and has added the necessary language to the end of the second sentence of the subsection. This makes this subsection consistent with the other subsections in this subchapter that require that notification or documents be sent to counsel or authorized agents, if known.

Judson commented that this subsection should clarify that copies of the documents will accompany the notice of hearing whether a party is appearing in person or by telephone.

The subsection provides that copies of the documents will accompany the notices of hearing to all parties. The Board is of the opinion that "all parties" clearly indicates that, regardless of whether parties will appear by telephone or in person, they will receive the documents. Additional language would be redundant.

§ 101.130(e)

The CLS, Judson, the AFL-CIO and IRRC commented on this subsection.

The AFL-CIO commented that by requiring all parties appearing in person to provide documents before the hearing cured a fundamental unfairness. Judson concurred.

The CLS commented that it found the subsection to be confusing as to whether it covers hearing exhibits. The CLS also commented that the subsection is unfair for persons appearing in person to be required to provide documents in advance of the hearing. During a discussion with IRRC after the first final-form submission, it also expressed concern about this language.

Addressing both the comment that the subsection is confusing and IRRC's concerns, the Board has again reworded the regulation in an attempt to clarify and implement its intent. It now states: "When any testimony will be given from or with the aid of a document not previously distributed to the parties by the tribunal, the party expecting to introduce the document shall deliver it to the tribunal, and the tribunal shall distribute it to each other party and, if known, counsel or authorized agent, before or at the beginning of the testimony. The tribunal may require that the documents be delivered up to 5 days in advance of the hearing."

Addressing the fairness of the requirement that all parties be required to provide documents in advance of the hearing, the Board is of the opinion that requiring only the party testifying by telephone to provide documents early would unfairly prejudice that party by denying it access to the in-person party's documents. Clearly, this is not the intent of the telephone regulations.

The Board has provided a notice provision in § 101.130(a), at the suggestion of IRRC, so that all parties will be aware of the document distribution requirement.

The Board has also changed the word "request" in the proposed subsection, to the word "require," which is the word used in sunsetted § 101.124(d). The Board has changed this word to give the tribunal more authority to ensure that the documents are delivered for distribution to all of the parties.

§ 101.131(a)

Commentator Judson suggested additional language for improved clarity. The Board agrees with IRRC that the suggested, additional language is unnecessary and redundant. Therefore, no changes have been made to this subsection.

§ 101.131(b)

The AFL-CIO commented, and IRRC agreed, that in this subsection, if an objection to telephone testimony is sustained, it would be inappropriate to allow another telephone hearing to take place after sustaining the original objection. The Board does not agree with this assessment for the following reasons.

Just because an objection to telephone testimony is sustained, the scheduling of another telephone hearing is not automatically precluded. There are many possible objections. The facts or defects leading to those objections could well be cured and a new telephone hearing scheduled. Examples include: (1) If a party does not receive notice in the required time period, when brought to the attention of the tribunal, a new notice can be sent within the required time; (2) If documents to be used at the hearing were not properly distributed before the hearing, the documents can then be distributed properly. If the problem giving rise to the objection cannot be cured, the regulation, as written, does provide that the hearing can be scheduled in person.

The Board has added, as was suggested in IRRC's comments, the language "in accordance with this subchapter," at the end of this subsection. This was added for clarification purposes.

§ 101.131(c)

Some referees commented that this subsection is time-consuming and should be the subject of an internal procedure.

The purpose of this subsection is to create a clear record of the attempts by the tribunal to complete the telephone contact in an effort to decrease the number of remand hearings due to parties alleging that they were available for the hearing, but did not receive a call from the tribunal.

The Board declines to eliminate this provision from the regulations in light of its stated purpose.

§ 101.131(d)

Comments to this subsection were received from the AFL-CIO, Judson, CLS, the referees and IRRC. The comments addressed the provision for stenographic recording of the hearing if a party or witness objects to having its testimony tape recorded and the objection is sustained by the tribunal, and the fact that the parties and witnesses do not know that their testimony will be tape recorded until the hearing starts since the hearing notice does not provide the information.

Addressing the comment concerning the notice of hearing, the Board has provided in § 101.130(a) that the notice of hearing will now indicate that the hearing will be tape recorded.

IRRC also suggested that the Board retain only the first two proposed sentences of this subsection and delete the remainder, which addresses the tribunal's response to objections and provides stenographic recording as an alternative to tape recording. The Board is in agreement with IRRC's comments concerning the Commonwealth's wiretap statute and its inapplicability to the taping of telephone testimony. Therefore, the Board will delete all but the first two sentences of this proposed subsection.

§ 101.131(f)

Comments were received from Legal Services, Inc., the Department, Judson and the AFL-CIO. Judson supported this subsection and Legal Services, Inc.'s comment was the same as was discussed in § 101.130(c). For the reasons stated therein, the Board declines language changes.

The Department commented that this subsection, as proposed, precludes the possibility of a party reacting to facts provided at the hearing and obtaining a witness for rebuttal.

The hearing notice contains instructions to the parties that they should produce all witnesses with firsthand testimony. In the event that facts of which a party was not aware first surface at a hearing, and the opposing party has not brought those witnesses to rebut the facts, the opposing party may request a continuance to provide or subpoena those witnesses. If the referee denies a continuance and that party receives an unfavorable decision, the aggrieved party can request a remand hearing from the Board. This is the same remedy available for in-person hearings.

For these reasons, the Board declines to make any exceptions to this regulation as suggested by this commentator.

The AFL-CIO expressed concerns that there is no reference to counsel or representatives. This subsection discusses only witnesses and parties, because it addresses situations where testimony is taken from unidentified witnesses or parties. Since counsel and representatives do not provide testimony, this subsection does not apply to them.

§ 101.131(g)

Judson and the AFL-CIO both asked if, in the absence of any objection from a party, the tribunal would fail to exclude testimony taken in violation of this subsection.

The Board has changed the subsection for clarification. It now states: "No person may prompt or direct the testimony of a witness testifying by telephone. Testimony taken or given in violation of this subsection may be excluded from consideration, with or without an objection from a party."

This change has been made so that it is clear that the tribunal may exclude testimony in violation of this subsection even without an objection from a party.

§ 101.131(h)

The AFL-CIO commented that if testimony taken from a document in violation of the regulations is excluded from consideration, the document from which the testimony is taken should also be excluded, but that the proposed regulation does not so state.

To remedy this deficiency, the Board has added "as will be the document" to the end of the second sentence of this subsection. The subsection now provides that the document from which excluded testimony was taken will itself also be excluded. It is not the intent to exclude otherwise admissible documents.

In addition, the Board, has removed the words "or writing" from this subsection to avoid redundancy.

§ 101.131(i)

In response to the proposed regulations, the AFL-CIO and the Department commented that this subsection seems to require all witnesses to take an oath prior to providing testimony, and that this may prove troublesome to persons who will not or are not permitted to take oaths. In addition, IRRC questioned the use of the word "special."

In response to the submission of final-form regulations, the Department raised the issue that the truthfulness of the testimony should be included in the regulations.

After reviewing the subsection and the various comments, the subsection now states: "The oath or affirmation administered to parties or witnesses testifying by telephone shall indicate that the parties or witnesses will not testify from documents that are not in the record and that their testimony will not be prompted or directed during the hearing by any other person."

An oath or affirmation is administered by the referee at the beginning of every hearing under sections 201, 203 and 506 of the law (43 P. S. §§ 761, 763 and 826). In the instance of a telephone hearing, in addition to the oath or affirmation always being administered, the referee will now include language that the parties or witnesses will not testify from documents not in the record and will not have their testimony prompted or directed by another person. This additional language is to emphasize the restrictions on anyone testifying by telephone and to help ensure that they will comply with the restrictions.

The change in language from the first final-form submission has occurred because, after much consideration, the Board concluded that it was very reluctant to require people to swear or affirm under oath that they would

comply with procedural regulations that are subject to interpretation. The new language now requires people to specifically swear or affirm that they will follow these two specific requirements while testifying by telephone.

In response to IRRC's suggestion that the word "special" be deleted, the Board has done so as it does not find the word "special" necessary.

In response to the comment that some people cannot or will not take an oath, the words "or affirmation" have been added.

In response to the comment that the truthfulness of testimony should be included, the Board again declines to include that in this subsection. The oath administered at every hearing includes a provision that the witnesses will tell the truth. This specific subsection only addresses what needs to be added in the case of a telephone hearing. To add a truthfulness provision would be redundant.

§ 101.132 (relating to representation by telephone)

The AFL-CIO, Judson, CLS, the referees and IRRC were concerned that allowing representation by telephone with no restrictions and for the convenience of the representatives might allow abuse of the use of the telephone hearings for representation, increase costs, increase delays in holding hearings, cause more disruptions and unduly burden the referees in the scheduling and conducting of telephone hearings.

In response to these concerns, the Board has deleted proposed § 101.132 in its entirety, and has replaced it with sunsetted § 101.122(f), which states: "The counsel or authorized agent of a party may appear at a hearing by telephone, with the approval of the tribunal." Thus, approval of the tribunal will be required before a party is permitted to be represented by telephone.

§ 101.133 (relating to data maintenance requirement)

The CLS commented that it opposed the elimination of the data maintenance requirement and the sunset provision because of the potential for abuses in telephone hearings and because of the revisions in the proposed amendments.

IRRC agreed that the Board should continue to maintain data concerning telephone hearings, but stated that it believed the sunset provision to be unnecessary given the fact that these regulations have worked reasonably well in the past and are now being fine-tuned.

In response to IRRC's comments, the Board has added § 101.133 to the final-form regulations. This added section requires the Board to compile and maintain data concerning telephone hearings. The mechanisms for this data gathering are already in place. Nevertheless, the Board rejects the assumption that abuse will occur absent there being regulatory checks in place.

Production of documents under subpoena in a telephone hearing.

The AFL-CIO commented that the regulations do not address the situation where documents are subpoenaed through a subpoena duces tecum, and how these documents should be distributed when a telephone hearing has been scheduled. The AFL-CIO suggested that a regulation is needed to address this situation. IRRC believed the AFL-CIO's comment had merit.

The Board declines to add a regulation addressing this comment for several reasons. First, the Board is aware of no more than a few instances where this situation has presented a problem. Second, in response to those few instances, administrative steps were taken to cure the problem, that is, including typed instructions on the subpoena itself informing the parties and witnesses that the subpoenaed documents must be delivered to the tribunal in advance of the hearing, for distribution to all parties. It is the Board's opinion that these administrative steps have cured this minor problem and a regulation is not necessary. Regulations that address every potential eventuality would be cumbersome.

Who is Affected by the Final-Form Regulations

Unemployment compensation claimants, employers and their respective representatives (attorneys, paralegals, union representatives, tax consultants, and the like), the Department, and witnesses who participate in appeal hearings where testimony or representation will occur by means of a telephone will be affected. Telephone hearings constitute approximately 6.5% of all hearings conducted.

The final-form regulations will ensure that parties involved in a hearing where testimony is received by means of a telephone will have a fair hearing.

Cost and Paperwork Requirement

There will be negligible cost to the agency to revise the existing regulations and a small number of forms. There will be no costs to local government, the private sector or the general public. Parties who appear by telephone can potentially save money in travel costs and time because their presence at a central location will not always be required.

Sunset Date

The effectiveness of the amendments will be reviewed periodically by the Board. Thus, no sunset date is necessary.

Contact Persons

The contact persons are Clifford F. Blaze, Esq. (717) 783-1232 or Linda S. Lloyd, Esq. (717) 787-8510, Room 1623 Labor and Industry Building Seventh and Forster Streets, Harrisburg, PA 17121.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Board submitted a copy of the notice of proposed rulemaking, published at 26 Pa.B. 1144 to IRRC and the Chairperson of the House Labor Relations Committee and the Senate Labor and Industry Committee for review and comment. In compliance with section 5 (b.a) of the Regulatory Review Act, the Board also provided and the Committees with copies of the comments received.

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

These final-form regulations were deemed approved by the House and Senate Committees on November 20, 1997. IRRC met on November 20, 1997, and approved the regulations in accordance with section 5(c) of the Regulatory Review Act.

Order

The Board orders that:

(a) The regulations of the Board, 34 Pa. Code Chapter 101, are amended by deleting §§ 101.121—101.126 and by adding §§ 101.127—101.133 to read as set forth in Annex A.

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

(c) This order and Annex A shall be certified and deposited with the legislative Reference Bureau as required by law.

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

WILLIAM A. HAWKINS,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 27 Pa.B. 6385 (December 6, 1997).)

Fiscal Note: Fiscal Note 12-43 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 34. LABOR AND INDUSTRY

PART VI. UNEMPLOYMENT COMPENSATION

CHAPTER 101. GENERAL REQUIREMENTS

Subchapter E. TELEPHONE HEARINGS

§§ 101.121—101.126. (Reserved).

§ 101.127. Purpose and scope.

(a) In-person testimony is normally preferable to testimony by telephone; however, there can be reasons to justify receiving testimony by telephone. This subchapter is promulgated to provide the conditions under which testimony by telephone will be scheduled and received, to safeguard the due process rights of the parties, and to ensure that testimony by telephone is received under uniformly applied rules. Testimony by telephone may be received only if specifically authorized by this subchapter.

(b) When the general rules of this chapter conflict with this subchapter, this subchapter controls.

§ 101.128. Scheduling of telephone testimony.

(a) The tribunal may schedule, on its own motion, testimony by telephone of a party or witness when it appears from the record that the party or witness is located at least 50 miles from the location at which the tribunal will conduct the hearing, without regard to State boundaries.

(b) The tribunal may schedule testimony by telephone of a party or witness, at the request of one or more parties, when one of the following applies:

(1) The parties consent to the receipt of testimony by telephone.

(2) The party or witness is reasonably unable to testify in person due to a compelling employment, transportation, or health reason, or other compelling problem.

(c) Only a party or witness scheduled to testify by telephone, or identified prior to the taking of testimony in accordance with § 101.131(f) (relating to conduct of a telephone hearing), may testify by telephone, and the testimony of each other party or witness shall be received in person.

(d) The tribunal will promptly rule on a request that testimony be taken by telephone after a reasonable attempt has been made to inform the parties of the request, the basis for the request, the regulations under which telephone testimony can be taken, and the right of a party to object. The basis for the request, the position of the parties, if known, and the ruling will be documented on the record.

(e) A party or witness scheduled to testify by telephone will be permitted to testify in person.

§ 101.129. Procedures subsequent to scheduling.

(a) If a party moves to withdraw consent to the receipt of testimony by telephone prior to the taking of testimony, the tribunal will allow the withdrawal if it is found that the consent was not freely and knowingly given.

(b) An objection to the receipt of testimony by telephone shall set forth the reasons in support thereof and shall be promptly communicated to the tribunal, but may not be asserted subsequent to the taking of testimony.

(c) The tribunal will promptly rule on objections to testimony by telephone after a reasonable attempt to obtain the position of the other party. The basis for the objection, the position of the other party, if known, and the ruling will be documented on the record.

§ 101.130. Notice of testimony by telephone and use of documents.

(a) When testimony by telephone is to be taken, the tribunal will mail the notice of hearing to the parties and, if known, to their counsel or authorized agent at least 14 days in advance of the hearing. The hearing notice will indicate:

(1) The date and time of the hearing in prevailing Eastern time.

(2) The names of counsel, authorized agent, parties, and witnesses, if known, who are scheduled to appear or testify by telephone.

(3) The deadline by which the tribunal is to receive documents, if any, from all parties.

(4) The hearing will be tape recorded.

(b) When testimony by telephone is to be taken, the tribunal will send a copy of this subchapter with the notice of hearing. If the tribunal finds that an unrepresented party has not received a copy of this subchapter, a copy will be provided and the hearing will be rescheduled.

(c) A party intending to testify, to offer the testimony of witnesses, or to be represented by telephone, shall, in advance of the beginning of the hearing, supply the tribunal with the name, location and telephone number of the persons who will so appear.

(d) When scheduling a telephone hearing, the tribunal will enclose with the notice of hearing copies of the documents upon which the initial determination was based. These copies will accompany the notices of hearing to all parties, and their counsel or authorized agent, if known.

(e) When any testimony will be given from or with the aid of a document not previously distributed to the parties by the tribunal, the party expecting to introduce the document shall deliver it to the tribunal, and the tribunal shall distribute it to each other party and, if known, counsel or authorized agent before or at the beginning of the testimony. The tribunal may require that the documents be delivered up to 5 days in advance of the hearing. See § 101.131(h) (relating to conduct of a telephone hearing).

§ 101.131. Conduct of a telephone hearing.

(a) Before testimony is received, the tribunal will advise all parties of the right to object to telephone testimony and to request an in-person hearing in compliance with Subchapter B (relating to provisions governing hearings before the Department or referee).

(b) A party may pursue an objection to telephone testimony at the hearing and shall set forth reasons in support thereof. If the objection is sustained, the tribunal will reschedule the hearing at a later date, either in person or by telephone, in accordance with Subchapter B or this subchapter. If the objection is not sustained, the tribunal may proceed with the hearing in accordance with this subchapter.

(c) At the start of the hearing, the tribunal will state on the record the time and telephone numbers at which the tribunal initiates the contact with any party, witness, legal counsel or authorized agent who is to testify or appear by telephone.

(d) The proceedings of the hearing will be tape recorded to preserve the record. A person testifying or appearing by telephone will be advised by the tribunal that the proceedings are being tape recorded.

(e) The tribunal will permit parties a reasonable opportunity to question other parties or witnesses testifying by telephone for the purpose of verifying the identity of the parties or witnesses. Falsification of identity may subject the parties or witnesses to prosecution and punishment.

(f) A party or witness not identified to the tribunal and all other parties before the beginning of the testimony will not be permitted to testify by telephone. Testimony taken or given in violation of this subsection will be excluded from consideration.

(g) A person may not prompt or direct the testimony of a witness testifying by telephone. Testimony taken or given in violation of this subsection may be excluded from consideration by the tribunal, with or without an objection from a party.

(h) A document not provided as required by § 101.130(e) (relating to notice of testimony by telephone and use of documents) may not be admitted nor testimony given or taken from it unless consent has been requested from and given by all parties. Testimony taken or given in violation of this subsection will be excluded from consideration, as will the document.

(i) The oath or affirmation administered to parties or witnesses testifying by telephone shall indicate that the parties or witnesses will not testify from documents that are not in the record and that their testimony will not be prompted or directed during the hearing by any other person.

§ 101.132. Representation by telephone.

The counsel or authorized agent of a party may appear at a hearing by telephone, with the approval of the tribunal.

§ 101.133. Data maintenance requirement.

The Board will compile and maintain data on the scheduling and receipt of testimony by telephone.

[Pa.B. Doc. No. 97-2081. Filed for public inspection December 26, 1997, 9:00 a.m.]