

RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL HEARING BOARD

[25 PA. CODE CH. 1021]

Practice and Procedures

The Environmental Hearing Board (Board) by this order amends Chapter 1021 (relating to practice and procedures) to read as set forth in Annex A. The amendments modify the rules of practice and procedure before the Board by adding or correcting terminology relating to the Board and implementing improvements in practice and procedure.

The Board approved the final-form regulations at its May 26, 1998, meeting.

Effective Date

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

Contact Person

For further information, contact William T. Phillipy, IV, Secretary to the Board, 2nd Floor, Rachel Carson State Office Building, P. O. Box 8457, Harrisburg, PA 17105-8457, (717) 787-3483. If information concerning this notice is required in an alternative form, William Phillipy may be contacted at the above number. TDD users may telephone the Board through the AT&T Pennsylvania relay center at (800) 654-5984.

Statutory Authority

The amendments are promulgated under the authority of section 5 of the Environmental Hearing Board Act (35 P. S. § 7515) which empowers the Board to adopt regulations pertaining to practice and procedure before the Board.

Comments and Revisions to Proposed Rulemaking

The Board received comments on the proposed revisions from the Independent Regulatory Review Commission (IRRC); Joel R. Burcat, Esq., John P. Krill, Jr., Esq. and R. Timothy Weston, Esq. of Kirkpatrick & Lockhart; and the Pennsylvania Coal Association (PCA). The commentators had specific comments which will be addressed on a section-by-section basis. Comments and recommendations will be addressed as a group only when the commentators have the same comments and recommendations. However, comments and recommendations which have only been raised by one of the commentators will be separately addressed.

§ 1021.2 Definitions

The final rulemaking incorporates revisions to several definitions. The revisions were made to simplify the definitions and to have them conform to the Board's rules.

One commentator agreed that the definitions needed to be revised but recommended that the Board consider using the definitions in 1 Pa. Code Part I (relating to General Rules of Administrative Practice and Procedure) rather than developing new definitions.

The Board has considered this suggestion and it will continue to have its own set of definitions because they were drafted to be very specific to the Board and the

matters which come before it. Accordingly, this section of the final rulemaking has not been modified.

§ 1021.51 Commencement, form and contents

One commentator stated that the proposed amendment to § 1021.51(f) requiring service of the appeal on the same day is unfair. The commentator noted that the revision will be burdensome and unfair to many appellants since the appellant or appellant's counsel has very little time to prepare the appeal and suggested that the Board allow 10 days to serve a copy.

The Board wants to prevent the delay of service upon persons after the notice has been filed with the Board and to streamline the appeal process. The Board sees no burden with the final rulemaking requiring service of the notice of appeal by mailing the notice of appeal to the Department and any affected permittee on the same day. Accordingly, § 1021.51(f) of the final rulemaking has not been modified.

§ 1021.52 Timeliness of appeal

Regarding § 1021.52(a)(2) one commentator suggested: 1) that the language "whichever occurs first" should be added; and 2) delete "if there is no notice of the action published in the *Pennsylvania Bulletin*" in subparagraph (ii). IRRC recommended that the colon after the word "*Bulletin*" in subsection (a)(2)(i) be replaced with a semicolon and the word "or." After further consideration IRRC recommended that the Board should have the first line of (a)(2) read as follows: "Any other person aggrieved by an action of the Department shall file its appeal with the Board within;" and subparagraph (ii) should be written to read, "(ii) Thirty days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin*."

The Board has considered IRRC's recommendations and has decided the recommendations would clarify the proposal and has adopted the changes in the final rulemaking.

One commentator suggested that the Board retain the practice of "skeleton" appeals with a mandatory 30-day perfection or revision period following the filing of the appeals.

The Board has retained the proposal as published. The Board decided to do away with the skeletal appeal as it believes those provisions to be unnecessary in view of the provisions of § 1021.53 (relating to amendments to appeal; nunc pro tunc appeals) which now permit the filing of amendments to the appeal under certain conditions and time limitations. Those provisions should govern the right to make a substantive change to the appeal. If the appeal should fail to meet some formal requirement of § 1021.51, the appellant may remedy the failure following notice of the Board's request or as a result of a motion filed by an opposing party. Of course, failure to effect or provide proof of service on the Department would be ground for dismissal of the appeal.

Another commentator recommended that the rule should include a third category of persons who could file an appeal within 30 days of receipt of written notice. The third category would include a person who has participated in the administrative process leading to action and who has received a written notice of the action but was not the person to whom the action of the Department was directed or issued. IRRC staff did not suggest that the

change be made, but recommended that the Board consider adding a third category in subsection (a)(2) to address constructive notice to unincorporated association members.

The Board has decided not to adopt these suggestions. The Board believes that the grant of additional time provided to third party appellants provided by starting the 30-day period for appeal with publication of notice of the Department's action in the *Pennsylvania Bulletin* is, in absence of a contrary Legislative directive, appropriate. Even though third parties may have participated in the administrative process leading to the Department's action, they ordinarily cannot afford to participate with the full assistance of counsel and experts as can be done by the permittee. After the Department takes action, these third party appellants ordinarily need time to consult counsel, experts and others in the affected community to prepare a proper appeal. The Board views a special rule of constructive notice for unincorporated associations to be unnecessary. The Board will continue to apply a rule of constructive notice to bar late appeals from members of an association when the officers of the association would have been bound to appeal within 30 days of the Department's action or the publication of notice in the *Pennsylvania Bulletin*. Because other circumstances may also require the application of the rule of constructive notice, the Board prefers to act on a case-by-case basis rather than to adopt a special rule now for the unincorporated associations. The special rule might be used in other circumstances to argue that the special rule for unincorporated associations is the limit of the application of a rule of constructive notice.

§ 1021.81 Prehearing Procedures

One commentator noted that the proposal would be unfair to many appellants because it provides unnecessary additional burdens on private appellants since a private appellant must obtain counsel, prepare a case, conduct discovery, obtain expert witnesses and prepare for trial. In addition, the commentator stated that the proposed requirement of serving expert reports within 120 days of the date of the prehearing order is also an unfair burden. Furthermore, the commentator noted that the proposed rule would limit or preclude opinions from experts engaged after the filing of an appeal who may be unable to form an opinion until discovery has closed and all discovered data are evaluated since this type of expert may not have gathered any data himself and may not have access to data outside of discovery. In addition, expert opinions based not just on data known at the close of discovery but also on tests or models using the data would be foreclosed by the rule. Finally, the commentator suggested that the rule should recognize that expert opinions given at the hearing must be based on the evidence in the record.

The Board believes that the final rulemaking is not unduly burdensome on private appellants. The Board's practice is to be liberal in granting extensions of time for meeting prehearing requirements such as completing discovery and the filing of dispositive motions. The same practice will be followed in the case of meeting the deadline for the identification of, and filing of reports from, experts. In addition, the parties are encouraged to agree upon their own case management order so that the steps necessary to prepare for the hearing on the merits may be tailored by the parties to meet the individual needs of the case. The Board's experience is that many experts are retained well before the completion of discovery, and that necessary tests may be conducted and

demonstrative evidence may be developed outside the discovery process so that there is little likelihood that a party will be prejudiced by the Board's application of this rule. The Board will not adopt a rule permitting expert testimony only on the basis of evidence introduced at the hearing. The Pennsylvania Rules of Evidence effective on October 1, 1998, in Rule 703 permit experts to rely on facts or data of a type reasonably relied upon by experts in the field and does not require that those facts be admissible in evidence. The Board believes this to be a statement of existing Pennsylvania law and intends to continue to apply this principle in connection with expert testimony.

§ 1021.101 Burden of Proceeding and Burden of Proof

A commentator recommended that the Board amend subsection (b)(3) by adding the words "modifies or suspends" after the word "revokes." IRRC concurred with the suggestion stating that the additional language improves the clarity of the provision. The Board agrees the rule should be modified. The final rule will read, "... revokes or suspends" Upon consideration of the suggestions, the Board omitted the term "modifies" since modifications may arise under different situations and depending on the situation at hand the burden may be either on the Department or on the appellant. Thus, including "modifies" would only create confusion rather than clarity. The Board solicited its Rules Committee's opinion on this matter and the Committee agreed that for clarity the term "modifies" should be omitted.

The Board has determined that proposed Rule 1021.101(c)(1) needed to be revised to place the burden of proof on the appellant when the Department either denies or refuses to modify a permit. Accordingly, the Board has decided to modify (c)(1) as follows: "When the Department denies or refuses to modify a license, permit approval or certification."

One commentator recommended that in subsection (c)(2) the Board replace "recipient" with "addressee" since addressee is more accurate because in many instances the recipient is not necessarily the party who has a direct interest in the matter or who would properly be a party in an appeal. IRRC questioned whether the language "recipient of action" and "the person to whom the action is directed or issued" are synonymous and if they are then the Board should use "recipient of action" throughout the regulation.

One commentator had the following comments regarding subsection (c)(3): 1) the proposed rule as written appears to place the burden on both the Department and the party appealing the action since "action" is defined to include "order;" and 2) the proposed rule is internally inconsistent because an "action" is issued it is not "modified." IRRC recommended that "action" in this subsection be deleted and replaced with "permit, approval or certification" to clarify what "action" refers to and to establish consistency within the section.

After consideration of the comments, the Board plans to modify the final rule. The Board will delete "who is the recipient of an action" and substitute the following language "to whom a permit approval or certification is issued." Thus, the modified final rule will read, "When a party to whom a permit approval or certification is issued protests one or more aspects of its issuance or modification." The Board concurs a change to the language in subsection (c)(3) is necessary to avoid apparent inconsistency created by the use of "action" in that subsection. The use of "action" in subsection (c)(3) along with the

language in subsection (b) appears to place the burden of proof on both the appellant and the Department in many appeals which is not the result the Board intended with the revision. The Board will modify the rule.

Other Proposed Changes

The Board did not receive any comments on proposed changes to §§ 1021.109, 1021.120 and 1021.161.

Sunset Date

A sunset date has not been established for these regulations. The effectiveness of the regulations will be evaluated on an ongoing basis by the Board and the Board's Rules Committee.

Regulatory Review

Under section 5.1(a) of the Regulatory Review Act (71 P. S. § 745.5a(a)), on February 4, 1998, the Board submitted copies of the proposed revisions, which were published at 28 Pa.B. 807 (February 14, 1998), to IRRC and the Senate and House Environmental Resources and Energy Committees for review and comment. The Board, in accordance with section 5(b.1) of the Regulatory Review Act (71 P. S. § 745.5(b.1)), also provided IRRC and the Committees with the Regulatory Analysis Form prepared in compliance with Executive Order 1996-2 (relating to regulatory review and promulgation) and copies of all comments received.

In preparing these final-form regulations, the Board has considered all comments received from the public and IRRC. No comments on the proposed amendments were received from either of the Legislative committees.

These final-form regulations were approved by the House and Senate Committees on August 14, 1998. IRRC met on August 27, 1998, and approved the final-form regulations under section 5(c) of the Regulatory Review Act.

Findings

The Board finds that:

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

(2) These regulations are necessary and appropriate for administration of the Environmental Hearing Board Act.

Order

The Board orders that:

(a) The regulations of the Board, 25 Pa. Code Chapter 1021, are amended by amending §§ 1021.2, 1021.51, 1021.52, 1021.62, 1021.73, 1021.81, 1021.101, 1021.109, 1021.120 and 1021.161 to read as set forth in Annex A.

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

(c) The Chairperson of the Board shall submit this order and Annex A to the House Environmental Resources and Energy Committee, the Senate Environmental Resources and Energy Committee and IRRC, as required by law.

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

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

GEORGE J. MILLER,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 28 Pa.B. 4683 (September 12, 1998).)

Fiscal Note: Fiscal Note 106-3 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART IX. ENVIRONMENTAL HEARING BOARD

CHAPTER 1021. PRACTICE AND PROCEDURES

Subchapter A. PRELIMINARY PROVISIONS

GENERAL

§ 1021.2. Definitions.

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

Act—The Environmental Hearing Board Act (35 P. S. §§ 7511—7516).

Action—An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person, including, but not limited to, a permit, license, approval or certification.

Board—The Environmental Hearing Board, consisting of its Chairperson and four members, all of whom are administrative law judges appointed by the Governor to hear appeals from actions of the Department.

Costs Act—The act of December 13, 1982 (P. L. 1127, No. 257) (71 P. S. §§ 2031—2035), known as the Commonwealth Agency Adjudicatory Expenses Award Law.

Department—The Department of Environmental Resources or its successor agencies.

Dispositive motion—A motion that seeks to resolve the issues in an appeal without the need for hearing or further hearing. The term includes a motion to quash appeal, a motion to dismiss, a motion for summary judgment, and a motion for partial summary judgment, but not a motion in limine.

Hearing examiner—A person other than a Board member designated by the Board to preside at hearings or conferences.

Intervenor—A person who has been permitted to intervene by the Board, as provided by § 1021.62 (relating to intervention).

Party—An appellant, appellee, plaintiff, defendant, permittee or intervenor.

Permittee—The recipient of a permit, license, approval or certification in a third-party appeal.

Person—An individual, partnership, association, corporation, political subdivision, municipal authority or other entity.

Supersedeas—A suspension of the effect of an action of the Department pending proceedings before the Board.

Third party appeal—The appeal of an action by a person who is not the recipient of the action.

(b) Subsection (a) supplements 1 Pa. Code § 31.3 (relating to definitions).

APPEALS

§ 1021.51. Commencement, form and content.

(a) An appeal from an action of the Department shall commence with the filing of a written notice of appeal with the Board.

(b) The caption of an appeal shall be in the following form:

ENVIRONMENTAL HEARING BOARD
2nd Floor, Rachel Carson State Office Building
400 Market Street, Post Office Box 8457
Harrisburg, Pennsylvania 17105-8457

JOHN DOE, Appellant
234 Main Street, Smithtown,
Jones County, Pennsylvania 15555
(Telephone (123) 456-7890)

v. Docket No. _____

Commonwealth of Pennsylvania
Department of _____, Appellee

(c) The appeal shall set forth name, address, and telephone number of appellant.

(d) If the appellant has received written notification of an action of the Department, a copy of the action shall be attached to the appeal.

(e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal. An objection not raised by the appeal or an amendment thereto under § 1021.53 (relating to amendments to appeal; nunc pro tunc appeals) shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

(f) Concurrent with the filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:

(1) The office of the Department issuing the notice of Departmental action.

(2) The Office of Chief Counsel of the Department or agency taking the action appealed.

(3) In a third party appeal, the recipient of the action.

(g) The service upon the recipient of an action as required by this section, shall subject the recipient to the jurisdiction of the Board as a party.

(h) Upon order of the Board, the appellant shall provide satisfactory proof that service has been made as required by this section.

(i) Subsections (a)—(h) supersede 1 Pa. Code §§ 35.5—35.7 and §§ 35.9—35.11 (relating to informal complaints; and formal complaints).

§ 1021.52. Timeliness of appeal.

(a) Except as specifically provided in § 1021.53 (relating to appeal nunc pro tunc), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows, unless a different time is provided by statute:

(1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.

(2) Any other person aggrieved by an action of the Department shall file its appeal with the Board within the following:

(i) Thirty days after the notice of the action has been published in the *Pennsylvania Bulletin*.

(ii) Thirty days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin*.

(b) Subsection (a) supersedes 1 Pa. Code §§ 35.5—35.7 and 35.9—35.11 (relating to informal complaints; and formal complaints).

Comment: The language “person to whom the action of the Department is issued or directed” is intended to include, but not be limited to, the recipient of: an order, a permit or license issuance or denial, a civil penalty assessment, or certification. See section 4(a) and (c) of the act (35 P. S. § 7514(a) and (c)).

INTERVENTION

§ 1021.62. Intervention.

(a) A person may petition the Board to intervene in any pending matter prior to the initial presentation of evidence.

(b) A petition to intervene shall be verified, and shall contain sufficient factual averments and legal assertions to establish the following:

(1) The reasons the petitioner seeks to intervene.

(2) The basis for asserting that the identified interest is greater than that of the general public.

(3) The manner in which that interest will be affected by the Board’s adjudication.

(4) The specific issues upon which the petitioner will offer evidence or legal argument.

(c) A copy of the petition shall be served upon the parties to the proceedings.

(d) A party may file an answer to the petition. An answer shall be verified and filed within 15 days after service of the petition, unless a shorter time is ordered by the Board.

(e) The Board will deny the petition if it fails to include sufficient legal grounds or verified factual averments to establish the right to intervene.

(f) If the Board grants the petition, the order may specify the issues as to which intervention is allowed. An order granting intervention allows the intervenor to participate in the proceedings remaining at the time of the order granting intervention.

(g) Subsections (a)—(d) supersede 1 Pa. Code §§ 35.27—35.32 and 35.36 (relating to intervention; and answers to petitions to intervene).

MOTIONS

§ 1021.73. Dispositive motions.

(a) This section applies to dispositive motions.

(b) Motions for summary judgment or partial summary judgment and responses shall conform to Pa.R.C.P. 1035.1—1035.5 (relating to motion for summary judgment) except for the provision of the 30-day period in which to file a response.

(c) Dispositive motions shall be accompanied by a supporting memorandum of law. The Board may deny a dispositive motion if a party fails to file a supporting memorandum of law.

(d) A response to a dispositive motion may be filed within 25 days of the date of service of the motion, and may be accompanied by a supporting memorandum of law.

(e) A reply to a response to a dispositive motion may be filed within 20 days of the date of service of the response, and may be accompanied by a supporting memorandum of law.

(f) An affidavit or other document relied upon in support of a dispositive motion, response or reply, that is not already a part of the record, shall be attached to the motion, response or reply or it will not be considered by the Board in ruling thereon.

(g) Subsection (c) supplements 1 Pa. Code § 35.177 (relating to the scope and content of motions). Subsection (d) supersedes 1 Pa. Code § 35.179 (relating to objections to motions).

Comment: Subsection (d) supersedes the filing of a response within 30 days set forth in Pa.R.C.P. No. 1035.3(a).

PREHEARING CONFERENCES AND PREHEARING PROCEDURES

§ 1021.81. Prehearing procedure.

(a) Upon the filing of an appeal, the Board will issue a prehearing order providing that:

(1) Discovery shall be concluded within 90 days of the date of the prehearing order.

(2) The party with the burden of proof shall serve its expert reports and answers to all expert interrogatories within 120 days of the date of the prehearing order. The opposing party shall serve its expert reports and answers to all expert interrogatories within 30 days after receipt of the expert reports and interrogatories from the party with the burden of proof.

(3) Dispositive motions in a case requiring expert testimony shall be filed within 180 days of the date of the prehearing order. If neither party plans to call an expert witness, dispositive motions shall be filed within 150 days after the filing of the appeal unless otherwise ordered by the Board.

(4) The parties may, within 45 days of the date of the prehearing order, submit a Joint Proposed Case Management Order to the Board.

(b) A Joint Proposed Case Management Order shall, inter alia, propose alternate dates for the conclusion of discovery, the service of expert or supplemental reports, and the filing of dispositive motions. The Board may issue subsequent prehearing orders incorporating the alternate dates proposed by the parties or other dates the Board deems appropriate.

(c) After the Board resolves all dispositive motions, it will establish a hearing date for the remaining issues. The Board may also direct that the parties meet prior to the hearing to stipulate to uncontested facts, the qualifications of experts and the admissibility of exhibits.

(d) The parties shall file their prehearing memoranda at least 20 days before the scheduled hearing date.

(e) Subsection (d) supplements 1 Pa. Code § 35.121 (relating to initiation of hearings).

BURDEN OF PROCEEDING AND BURDEN OF PROOF

§ 1021.101. Burden of proceeding and burden of proof.

(a) In proceedings before the Board, the burden of proceeding and the burden of proof shall be the same as at common law in that the burden shall normally rest with the party asserting the affirmative of an issue. It shall generally be the burden of the party asserting the affirmative of the issue to establish it by a preponderance of the evidence. In cases where a party has the burden of proof to establish the party's case by a preponderance of the evidence, the Board may nonetheless require the other party to assume the burden of proceeding with the evidence in whole or in part if that party is in possession of facts or should have knowledge of facts relevant to the issue.

(b) The Department has the burden of proof in the following cases:

(1) When it assesses or files a complaint for a civil penalty.

(2) When it files a complaint for any other purpose.

(3) When it revokes or suspends a license, permit, approval or certification.

(4) When it issues an order.

(c) A party appealing an action of the Department shall have the burden of proof in the following cases:

(1) When the Department denies a license, permit, approval or certification.

(2) When a party who is not the recipient of an action by the Department protests the action.

(3) When a party to whom a permit approval or certification is issued protests one or more aspects of its issuance or modification.

(4) When a party appeals or objects to a settlement of a matter between the Department and a private party.

OFFICIAL NOTICE

§ 1021.109. Official notice of facts.

(a) The Board may take official notice of the following:

(1) Matters which may be judicially noticed by the courts of the Commonwealth.

(2) Facts which are not in dispute.

(3) Record facts reflected in the official docket of the Board as referenced in § 1021.41(a) (relating to docket).

(b) Any party shall, on timely request, be afforded an opportunity to show why the Board should not take official notice of items listed in subsection (a).

(c) A party requesting the taking of official notice after the conclusion of the hearing shall do so in accordance with § 1021.122 (relating to reopening of record prior to adjudication).

TERMINATION OF PROCEEDINGS

§ 1021.120. Termination of proceedings.

(a) A proceeding before the Board may be terminated by one of the following:

(1) Withdrawal of the appeal prior to adjudication.

(2) Settlement agreement.

(3) Consent adjudication.

(b) When a proceeding is withdrawn prior to adjudication, withdrawal shall be with prejudice as to all matters which have preceded the action unless otherwise indicated by the Board.

(c) When a proceeding is sought to be terminated by the parties as a result of a settlement agreement, the form of the settlement agreement may be a consent order, a consent assessment of civil penalties, a permit modification, or any other basis for settling an action as permitted by law. If the settlement includes any action of the Department which would have to be published if taken independently of the settlement, that action shall be published by the Department as required by law. Appealable actions of the Department contained in the settlement may be appealed to the Board by an aggrieved person not a party to the settlement in the manner provided by law. A party to the settlement may appeal only to the extent permitted by the terms of the agreement. After the parties have agreed upon a settlement they may do one of the following:

(1) Notify the Board that the case has been settled and request that the docket be marked settled.

(2) Notify the Board that the case has been settled, provide the Board with a copy of the settlement agreement for inclusion in the record of the case, and request that the docket be marked settled.

(3) Notify the Board that the case has been settled, provide the Board with a copy of the settlement agreement for inclusion in the record, request the notice of the settlement be published in the *Pennsylvania Bulletin* and request that the case be marked as settled.

The notice of publication shall be in substantially the following form:

RE: (Case and Docket Number)

The Commonwealth of Pennsylvania (Department of _____) and (parties) have agreed to a settlement of the above matter. The Commonwealth had ordered under date of _____, the party (party or parties) to:

(Summarize order or appeal describing other action of the Commonwealth from which appeal was taken).

The parties have agreed to a settlement, the major provisions of which include:

(Summarize major substantive provisions of settlement agreement.)

Copies of the full agreement are in the hands of:

(Names, addresses of counsel and telephone numbers) and at the office of the Environmental Hearing Board, and may be reviewed by any interested party on request during normal business hours.

(d) When a proceeding is sought to be terminated by the parties pursuant to a consent adjudication, all parties shall submit the proposed consent adjudication to the Board for approval. No proposed consent adjudication will be approved by the Board unless it contains the agreement of all parties to the action. The Board may refuse to approve a proposed consent adjudication if any of its provision are contrary to law or constitute, in the discretion of the Board, overreaching or bad faith by any party. Prior to approval, the Board will publish the major substantive provisions of the consent adjudication in the manner indicated in subsection (c)(3). In addition, the notice shall provide a comment period of at least 30 days for comments to be provided by the public. When comments are received from the public the parties to the

consent adjudication shall respond to the comments. The Board may schedule a hearing prior to taking action on the consent adjudication. Any appeal from a consent adjudication shall lie to the Commonwealth Court, and shall, when taken by an aggrieved person not a party to the action, be taken within 30 days of the date of the Board's action.

§ 1021.161. Composition of the certified record on appeal to Commonwealth Court.

(a) Unless the parties file a stipulation with the Board providing otherwise, within 20 days of the filing of the petition for review, the Board will certify the record in accordance with Pa.R.A.P. No. 1951 (relating to record below in proceedings on petition for review) and the record shall consist of:

(1) A list of the docket entries.

(2) The notice of appeal and the Department action appealed to the Board, or, if the proceedings before the Board were initiated with a complaint, the complaint.

(b) In addition to items listed in subsection (a), for appeals of Board adjudications, the record shall also include:

(1) The Board's adjudication and order.

(2) The notes of testimony from the hearing, all exhibits admitted into evidence.

(3) The parties' posthearing memoranda, including requested findings of fact and conclusions of law.

(4) Petitions for reconsideration or to reopen the record, answers and accompanying exhibits.

(5) Other documents which formed the basis of the Board's adjudication.

(c) In addition to items listed in subsection (a), for appeals of Board opinions and orders, the record shall also include:

(1) The Board's opinion and order.

(2) The motion or petition which was the subject of the Board's opinion and order, together with responses, answers, and replies, and accompanying exhibits.

(3) Petitions for reconsideration of the Board's opinion and order, responses, answers, and replies, and accompanying exhibits.

(4) Other documents which formed the basis of the Board's opinion and order.

[Pa.B. Doc. No. 98-1519. Filed for public inspection September 18, 1998, 9:00 a.m.]

Title 37—LAW

DEPARTMENT OF CORRECTIONS

[37 PA. CODE CHS. 91 AND 93]

Administration and State Correctional Institutions and Facilities

The Department of Corrections (Department) acting under the authority conferred upon it by The Administrative Code of 1929 (71 P. S. §§ 51—720.13) and Executive Order 1996-1 (4 Pa. Code §§ 1.371—1.382) and as required by 45 P. S. § 1201, hereby deletes its media relations regulations contained in § 91.5 (relating to media relations) and amends its regulations in § 93.3 (relating to inmate visiting privileges).

Background and Need for the Deletion and Amendments

The Department's current media relations regulation establishes procedures that members of the news media must follow to interview inmates housed in State correctional institutions or community corrections centers. These procedures are more cumbersome than the procedures individual members of the public must follow to visit with inmates. For example, the current regulation requires members of the news media to explain the purpose of a proposed interview. Institutional superintendents then determine whether to permit the interview. The Department believes that review is inappropriate, unnecessary and potentially unconstitutional.

The Department has grown tremendously since the media relations regulation was promulgated. This growth has made it increasingly difficult to have the media relations regulation applied uniformly among institutions. This inconsistency makes it difficult for members of the media to know the standards the Department will apply in a particular situation. Conversely, the Department finds that its inmate visitation policies are applied consistently. Accordingly, the Department now deletes its media relations regulation and amends its inmate visiting privileges regulation to enable members of the news media to communicate and visit with inmates under the same visitation policies which govern inmate communications with other members of the public.

Amendment of the regulations is consistent with the provisions of Executive Order 1996-1. Specifically, the amendments are intended to improve the internal management of the Department in regard to inmate visitation and are not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the Commonwealth, its agencies, its officers or any person. See 4 Pa. Code § 1.380(b) (relating to applicability).

Fiscal Impact

Amendment of the media relations regulations is not expected to have any negative fiscal impact upon the Commonwealth, its political subdivisions or the general public.

Paperwork Requirements

Amendment of the media relations regulations is expected to reduce paperwork for the Commonwealth and the general public. The Department does not expect the amendment to have any effect on the paperwork requirements of the Commonwealth's political subdivisions.

Regulatory Review

Under section 5.1(a) of the Regulatory Review Act (71 P. S. §§ 745.5a(a)), on September 10, 1997, the Department submitted a copy of notice of proposed rulemaking, published at 27 Pa.B. 4832 (September 20, 1997) to the Independent Regulatory Review Commission (IRRC) the Chairpersons of the House and Senate Judiciary Committees for review and comment.

The Department submitted a copy of the final-form regulations to IRRC and the Chairpersons of the Senate and House Judiciary Committees on June 22, 1998. In addition, the Department has provided IRRC and the Committees with a copy of a Regulatory Analysis Form prepared in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available upon request.

In preparing these final-form regulations, the Department has considered the comments received from IRRC. The Department did not receive any comments from the public or the Committees, except for comments from Senator Michael A. O'Pake. A Comment Response Document is available from the Department upon request.

The final-form regulations were deemed approved by the House and Senate Committees on July 13, 1998. IRRC met on July 30, 1998, and approved the final-form regulation in accordance with section 5.1(e) of the Regulatory Review Act (71 P. S. § 745.5a(e)). The Office of General Counsel and the Office of Attorney General approved the final-form regulations.

Statutory Authority

The Department's authority to delete and amend regulations is contained in section 506 of The Administrative Code of 1929 (71 P. S. § 186).

Effective Date

The deletion of the media relations regulation and the amendment of the inmate visiting privileges regulation shall be effective upon final publication in the *Pennsylvania Bulletin*.

Contact Person

Interested persons are invited to submit written questions regarding the deletion and the amendment to Press Secretary Roger Baumgarten, Department of Corrections, 2520 Lisburn Road, P. O. Box 598, Camp Hill, PA 17001-0598.

Findings

The Department finds that:

(1) Notice of proposed rulemaking was published at 27 Pa.B. 4832, as required by sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and no public comments were received by the Department for consideration.

(3) The adoption of this deletion and amendments in the manner provided by this order is necessary and appropriate for the administration of the Department.

Order

The Department orders that:

(a) The regulations of the Department, 37 Pa. Code Chapters 91 and 93, are amended by deleting § 91.5 and amending § 93.3 to read as set forth in Annex A, with ellipses referring to the existing text of the regulation.

(b) The Department shall submit this order 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 Corrections shall certify this order and Annex A and deposit them with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin* as required by law.

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

MARTIN F. HORN,
Secretary

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission relating to this document, see 28 Pa.B. 4007 (August 15, 1998).)

Fiscal Note: Fiscal Note 19-2 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 37. LAW

PART III. AGENCIES AND OFFICES

Subpart B. DEPARTMENT OF CORRECTIONS

CHAPTER 91. ADMINISTRATION

§ 91.5. (Reserved).

CHAPTER 93. STATE CORRECTIONAL INSTITUTIONS AND FACILITIES

Subchapter A. RIGHTS AND PRIVILEGES

§ 93.3. Inmate visiting privileges.

* * * * *

(j) *Media representatives.* Media representatives will have the same visiting privileges as visitors on an inmate's approved list of visitors as described in Department of Corrections' (Department) policy concerning inmate visitation. A media representative will not be in addition to the names on the approved list and will be counted against the total of 20.

(1) Upon request, media representatives will be provided with a copy of the Department's policy regarding inmate visitation.

(2) Media representatives and inmates will abide by all applicable rules, regulations and policies of the Department while on State correctional institution property. Violations of any rules, regulations or policies of the Department may result in the visit being denied, termination of the visit, suspension of visiting privileges or revocation of visiting privileges.

(3) Visits with media representatives shall be subject to the frequency of visit limitations contained in subsection (h)(4).

(4) For inmates under a sentence of death and prior to the Governor's warrant being issued, media representatives will only be permitted to have noncontact visits with an inmate. After the Governor's warrant has been issued, noncontact visits will only be entertained if the media representative has obtained an order of court of competent jurisdiction granting the relief and has properly served the Department with the court documents seeking or requesting the relief prior to obtaining the order.

(5) Media representatives for the purpose of this section include representatives of general circulation newspapers, magazines of general circulation sold through newsstands or mail subscriptions to the general public; National/international news services or radio/television stations holding a Federal Communications Commission license.

[Pa.B. Doc. No. 98-1520. Filed for public inspection September 18, 1998, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE BOARD OF MEDICINE

[49 PA. CODE CH. 16]

Licensure, Certification, Examination and Registration Fees

The State Board of Medicine (Board) amends § 16.13 (relating to licensure, certification, examination and registration fees), by raising the renewal fees to read as set forth in Annex A.

A. Effective Date

The amendment will be effective upon publication in the *Pennsylvania Bulletin*.

B. Statutory Authority

Section 6 of the Medical Practice Act (63 P. S. § 422.6), requires the Board to establish fees by regulation. The same provision requires the Board to increase fees to meet or exceed projected expenditures if the revenues raised by fees, fines and civil penalties are not sufficient to meet expenditures.

C. Background and Purpose

As fully described in the Board's proposed amendment, this fee increase is necessary for the Board to meet projected expenditures as required by the statute. Without the fee increase, it is projected that the Board's revenues will be significantly overtaken in Fiscal Year 1999-2000 (a nonrenewal year) with a resulting \$1.3 million deficit.

D. Summary of Comments and Responses on Proposed Rulemaking

Notice of proposed rulemaking was published at 28 Pa.B. 814 (February 14, 1998). The Board received no comments from the public in opposition to this rulemaking. The House Professional Licensure Committee noted a discrepancy in the Board's Annex and Preamble pertaining to drugless therapists. This discrepancy was also noted by the Independent Regulatory Review Commission (IRRC) in its comments. The discrepancy for the fee increase for drugless therapists was the result of a transcription error in the annex. As discussed in the Preamble to the proposed amendment, the fee for drugless therapists will increase to \$35. This \$35 fee is reflected in this final-form regulation. IRRC also suggested that the Board identify that graduate training licenses are issued annually. The Board has adopted this suggestion.

The House Committee also requested the Board provide an itemization of projected increases. The Board has provided that information as an attachment to the fee report form.

Lastly, IRRC questioned whether the increase is needed at this time. In its comments, IRRC stated that the figures provided by the Board do not substantiate the need to increase professional fees for the 1997-1999 renewal cycle. The Board notes, in fact, that neither the proposed amendment nor this final-form regulation increases fees for that biennium. Rather, the fee increase

applies to the 1999-2000 renewal cycle. Fees for the 1997-1999 period were paid by the licensee population by the December 31, 1996, renewal deadline.

IRRC's question pertaining to the need to increase fees at this time is based on a misapprehension of the timing of the renewal cycle. Renewal fees must be collected prospectively to meet budgeted expenditures, not after the fact, as IRRC incorrectly surmises. Fees which are due by the end of 1998, cover the costs of operating the Board for the period beginning January 1, 1999, through December 31, 2000. Without the fee increase at this time, the Board will sustain an operating deficit in FY 1999-2000. In fact, while questioning the import of fiscal data submitted by the Board, IRRC recommended that the Board delay increasing fees until the 1999-2000 renewal cycle. This increase is, in fact, accomplished by this final-form regulation. As IRRC noted, the increase would allow the Board to meet its statutory obligations. As proposed and as adopted in this final-form regulation, the fee increase will apply to the Board's operations in the 1999-2000 renewal cycle, as recommended by IRRC in its comments. Accordingly, to ensure that the services the Board renders to the public are not disrupted, the Board has determined to increase its fees to read as set forth in Annex A.

E. Fiscal Impact

The amendment will increase biennial renewal fees for licensees of the Board, but should have no other fiscal impact on the private sector, the general public or political subdivisions.

G. Paperwork Requirements

The amendment will require the Board to alter some of its forms to reflect the new biennial renewal fees; however, the amendment should not create additional paperwork for the private sector.

H. Regulatory Review

Under section 5.1(a) of the Regulatory Review Act (71 P. S. § 745.5a(a)), on February 14, 1998, the Board submitted a copy of the notice of proposed rulemaking published at 28 Pa.B. 814, to IRRC and the Chairpersons of the House Professional Licensure Committee and the Senate Consumer Protection and Professional Licensure Committee for review and comment. In compliance with section 5(c) of the Regulatory Review Act (71 P. S. § 745.5(c)), the Board also provided IRRC and the Committees with copies of all comments received, as well as other documentation.

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

This final-form regulation was approved by the House and Senate Committees on June 18, 1998. IRRC met on July 9, 1998, and approved the final-form regulation in accordance with section 5(e) of the Regulatory Review Act.

H. Public Information

Interested persons may obtain information regarding the amendments by writing to Cindy L. Warner, Board Administrator, State Board of Medicine, P. O. Box 2649, Harrisburg, PA 17105-2649.

I. Findings

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 the 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) This amendment does not enlarge the purpose of the proposed rulemaking published at 28 Pa.B. 814.

(4) This amendment is necessary and appropriate for the administration and enforcement of the authorizing act identified in Part B of this Preamble.

J. Order

The Board acting under its authorizing statutes, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 16, are amended by amending § 16.13 to read as set forth in Annex A, with ellipses referring to the existing text of the regulation.

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

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

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

DANIEL B. KIMBALL, Jr., M.D.,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 28 Pa.B. 3558 (July 25, 1998).)

Fiscal Note: Fiscal Note 16A-498 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 16. STATE BOARD OF MEDICINE—GENERAL PROVISIONS

Subchapter B. GENERAL LICENSE, CERTIFICATION AND REGISTRATION PROVISIONS

§ 16.13. Licensure, certification, examination and registration fees.

* * * * *

(b) The fee for a license without restriction for a graduate of an accredited medical college is \$20. The fee for a license without restriction for a graduate of an unaccredited medical college is \$80. The biennial registration fee for a license without restriction is \$125.

* * * * *

(e) The fee for a graduate license for a graduate of an accredited medical college is \$15. The fee for a graduate license for a graduate of an unaccredited medical college is \$80. The annual fee to renew a graduate license is \$15.

* * * * *

(h) The fee for a midwife license is \$20. The biennial registration fee for a midwife license is \$40.

(i) The fee for a physician assistant certificate is \$15. The biennial registration fee for a physician assistant certificate is \$40.

* * * * *

(m) The fee for an acupuncturist registration is \$15. The biennial registration fee for an acupuncturist registration is \$40.

* * * * *

(o) The biennial registration fee for a drugless therapist license is \$35.

[Pa.B. Doc. No. 98-1521. Filed for public inspection September 18, 1998, 9:00 a.m.]
