RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CHS. 91, 97 AND 101]

Wastewater Management

The Environmental Quality Board (Board), by this order, amends Chapters 91 and 97 (relating to general provisions; and industrial wastes) and deletes Chapter 101 (relating to special water pollution regulations). As part of the proposal and an advance notice of final rulemaking (ANFR), certain provisions of Chapters 97 and 101 were proposed to be transferred to Chapter 91. A notice of proposed rulemaking regarding these amendments was published at 27 Pa.B. 4343 (August 23, 1997) and an ANFR was published at 29 Pa.B. 2145 (April 24, 1999).

This order was adopted by the Board at its meeting of September 21, 1999.

A. *Effective Date*

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

B. *Contact Persons*

For further information contact Milt Lauch, Chief, Division of Wastewater Management, P. O. Box 8465, Rachel Carson State Office Building, Harrisburg, PA 17105-8465, (717) 787-8184, or William S. Cumings, Jr., Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, 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 final rulemaking is available electronically through the Department's Web site (http://www.dep.state.pa.us).

C. *Statutory Authority*

This final-form rulemaking is being made under the authority of section 5 of The Clean Streams Law (35 P. S. § 691.5), which provides for the promulgation of rules and regulations for the implementation of The Clean Streams Law, and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510.20), which provides for the promulgation of rules and regulations of the Department of Environmental Protection (Department) by the Board.

D. *Background and Summary*

At a meeting held on June 17, 1997, the Board adopted a proposal to amend Chapter 91, delete portions of Chapter 97 and to delete Chapter 101. As part of that regulatory proposal, certain provisions of Chapters 97 and 101 were proposed to be transferred to Chapter 91.

The purpose of the proposed amendments was to support the Department's pollution prevention strategies, make the application of new green technologies easier and eliminate obsolete regulations. The changes outlined in the proposed rulemaking were designed to assist industries and individuals proposing new or innovative ways to prevent pollution through modifications to waste streams or wastewater processes and those proposing new technologies to treat wastewater by eliminating regulatory barriers to these activities. The elimination of obsolete regulations simplifies and clarifies the existing regulations for those applying for permits for wastewater treatment facilities. The consolidation of Chapter 101 into Chapter 91 and the transfer of several sections of Chapter 97 to Chapter 91 provide a single source of regulations regarding related wastewater issues. A notice of proposed rulemaking regarding these amendments was published at 27 Pa.B. 4343.

Subsequent to the publication of the notice of proposed rulemaking, the Department undertook an initiative to control the water quality impacts of manure from agricultural operations mandated by the concentrated animal feeding operation (CAFO) requirements of the Federal Clean Water Act. The Department convened a stakeholder group consisting of representatives from various groups to assist in developing a CAFO strategy.

At 28 Pa.B. 2728 (June 16, 1998), a notice was published regarding the development of a proposed strategy and related permit documents to regulate CAFOs within this Commonwealth. Following publication of the notice of the proposed CAFO Strategy, the Department held four public meetings/hearings throughout this Commonwealth. Over 125 people attended the public meetings/hearings. In addition, the Department received written comments from over 100 commentators on the proposed CAFO Strategy. In response to the comments, the Department made a number of revisions to the proposed CAFO Strategy. These revisions were outlined, further revised and adopted at a meeting of the stakeholders held on February 4, 1999. A notice of the availability of the "Final Strategy for Meeting Federal Requirements for Controlling the Water Quality Impacts of Concentrated Animal Feeding Operations" (the CAFO Strategy) was published at 29 Pa.B 1439 (March 13, 1999).

The intent of the CAFO Strategy "is to ensure that all concentrated animal feeding operations are constructed and managed in an environmentally sound manner, while ensuring agricultural producers an opportunity to pursue agricultural production which is profitable, economically feasible and based on sound technology and practical production techniques." (See, CAFO Strategy p. 1).

With respect to the construction and operation of animal manure storage facilities, the CAFO Strategy outlines a requirement for a Part II Water Quality Management Permit for facilities where a CAFO of more than 1,000 animal equivalent units is proposed. Animal equivalent units are calculated in accordance with the Nutrient Management Act (3 P. S. §§ 1701—1718) and the regulations promulgated thereto in Chapter 83 (relating to State Conservation Commission). It was specifically acknowledged in the CAFO Strategy that some elements of the strategy would ". . . . require new regulations to create Water Quality Management Part II permit . . . . requirements."

Accordingly, the Department prepared an ANFR to provide the public an opportunity to comment on revisions to the proposed rulemaking necessary to implement the CAFO Strategy, particularly with respect to wastewater impoundments at agricultural operations. The ANFR also invited comment on certain proposed pollution prevention measures and other changes resulting from comments and suggestions submitted during the public com-

ment period for the proposed amendments to Chapter 91. Notice of the ANFR was published at 29 Pa.B. 2145.

A draft of the ANFR was reviewed and approved by the Water Resources Advisory Committee (Committee) at a meeting held on May 12, 1999. A draft of the ANFR was also reviewed by the Agricultural Advisory Board at a meeting held on April 21, 1999. Comments made by these groups at these and other meetings resulted in several amendments which were incorporated into the final-form regulations.

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

Section 91.1 (relating to definitions).

This section of the proposal outlined new or revised definitions related to the Department's wastewater program intended to clarify previously undefined terms used in Chapter 91.

The Board received a number of comments on the proposed definitions of "industrial waste" and "sewage." The commentators believe that the proposed definitions are inconsistent with the terms as defined in The Clean Streams Law. To avoid confusion, terms defined in The Clean Streams Law have been deleted in the final rulemaking. Thus, the definitions of "industrial waste," "person," "sewage" and "waters of this Commonwealth" have been deleted.

As noted in section D of this Preamble, the ANFR outlined proposed amendments related to wastewater impoundments at agricultural operations and pollution prevention measures in certain sections of the regulations. Appropriate definitions are being added to complement those amendments. Thus, the terms "agricultural operations," "animal equivalent unit" and "manure storage facility" were added. These definitions are based on definitions of those terms as defined in the Nutrient Management Act and the regulations promulgated thereto. In addition, definitions of the terms "pollution prevention" and "pollution prevention measures" are added.

The proposal included a definition of "NPDES Permit." Two commentators suggested that the proposed definition was unclear because it did not explain what the term "requirements" as used in the definition connotes. Since the phrase "NPDES Permit" is not used elsewhere in this final-form rulemaking, the definition has been deleted.

The ANFR outlined requirements applicable to wastewater impoundments at agricultural operations. Section 91.35 (relating to wastewater impoundments) outlines certain requirements related to freeboard. One commentator suggested that the term be defined. This term is defined in the "Pennsylvania Technical Guide" published by the Natural Resources Conservation Service of the United States Department of Agriculture. Since the term is defined therein, the Board does not believe it is necessary to define the term in this final-form rulemaking.

The proposed definition of "stormwater" defined that term as "stormwater runoff, snow melt runoff and surface runoff and drainage." It was suggested that this definition was somewhat circuitous and not very useful. The definition has been revised to read "runoff from precipitation, snow melt runoff and surface runoff and drainage."

The proposal contained a definition of "wastewater impoundment." The Board received comments on this definition which indicated that the definition describes what an impoundment is, but does not address the wastewater component of the term being defined. The definition has been clarified by adding a phrase at the end of the definition to indicate that it applies to a depression, excavation or facility "used to store wastewater including sewage, animal waste or industrial waste."

The definition of "water quality management permit" has been slightly modified in response to a concern that the location of a reference to "Part II permit" in the proposal created an ambiguity. The phrase "or requirements" was also deleted to eliminate uncertainty as to its meaning.

Section 91.6 (relating to pollution prevention).

The proposal noted that the language of existing § 97.14 (relating to measures to be used) was proposed to be moved to this section with slight modification. The ANFR indicated language of this section was proposed to be revised to include a tie-in to the definitions of "pollution prevention" and "pollution prevention measures" outlined in the ANFR. The ANFR also outlined a hierachy of pollution prevention measures for environmental management to be considered by a permittee. In addition, the identity of persons doing the pollution prevention such as the permittee or the industrial discharger to a publicly owned treatment works (POTW) would be indicated. The practice involving "segregation of strong wastes" where the strong waste is then treated is not true pollution prevention. If, however, the strong waste is separated for reuse within a process, then it is pollution prevention. Finally, the ANFR indicated that the last part of the existing section, which provides that the " . . . term 'practical' is not limited to that which is profitable or economical" might actually hinder pollution prevention efforts and would, therefore, be deleted.

This final-form rulemaking has been revised to provide that the Department will encourage pollution prevention by providing assistance to permittees and users of the permittee's facilities in the consideration of pollution prevention measures. The Department will encourage the consideration of the following measures, in descending order of preference, for the environmental management of wastes: reuse, recycling, treatment and disposal.

The Department received comments regarding other pollution prevention provisions in the ANFR. One commentator suggested that the Department provide some basis for the statement in the ANFR that the sentence referring to the term "practical" would actually hinder pollution prevention efforts. The Department believes that the sentence limits the scope of considerations regarding pollution prevention. There are pollution prevention remedies that are implemented through modified housekeeping practices that may result in little or no economic consequences, but have positive environmental ones.

One commentator noted that the ANFR added language listing the preferred order in which measures for waste management should be considered. The commentator further stated the new language also states that "pollution prevention measures used currently or proposed shall be encouraged and acknowledged in the water quality management permit applications." It is asserted the new provisions are not written in regulatory language and would be more appropriately placed in a guidance document or policy statement. One commentator suggested that the use of the words "considered" and "encouraged" lack force and, therefore, is a "waste of words." The commentator believes the language should be rewritten to give it force.

The Department does not agree with these comments. As noted previously, the language has been revised to indicate the Department will be encouraging and providing assistance in the consideration of pollution prevention measures. It is the Department's policy to achieve integration of pollution prevention and resource recovery practices through a voluntary effort and not by mandating controls through regulatory requirements. The Department believes that by approaching pollution prevention in this manner, the regulated community will strive to go beyond compliance, thereby resulting in greater benefit to the public and the environment. The provision providing that information regarding pollution prevention measures is to be submitted with the water quality management permit application has been deleted.

Section 91.11 (relating to compliance conferences).

This section provides, in part, that the Department will provide advice and suggestions to those required to abate pollution of the waters of this Commonwealth. Among other things, the advice may include measures for the treatment or prevention of pollution. The ANFR clarified this section to provide a tie-in to the definition of "pollution prevention measures." Thus, this portion of the regulation provides that the Department will provide advice regarding possible means for abatement of the pollution in question through pollution prevention measures or treating the waste if prevention is not possible.

Section 91.15 (relating to basin-wide compliance).

This section, as proposed by the Board, provided that the Department would require sources of pollutants in a basin, watershed or surface water to concurrently comply with the standards in Chapters 93 and 95 (relating to water quality standards; and wastewater treatment requirements) as well as the statement of policy outlined in Chapter 16 (relating to water quality toxics management strategy—statement of policy). Some commentators did not believe the reference to the statement of policy was clear enough to indicate that the statement of policy is nonbinding. The ANFR added language making it clear that Chapter 16 relates to a statement of policy and not a regulation. That language has been retained in this final-form rulemaking in a slightly modified form. Statements of policy are by their very nature nonbinding.

Section 91.27 (relating to general permits).

The proposal outlined requirements applicable to water quality management general permits. One commentator provided extensive comments challenging the legal and policy basis for the issuance of these permits. The commentator asserted that The Clean Streams Law provides no authority for the issuance of water quality management general permits; unlike certain other laws administered by the Department which contain specific authority for the issuance of general permits, The Clean Streams Law has no such provision; the general permit provisions do not provide adequate opportunity for public review and participation; the provisions are lacking in detail as to the terms and conditions of the permit; the review of notices of intent is inadequate; and the compliance history review provisions are allegedly inadequate. The commentator's comments are outlined in more detail in the Comment and Response Document prepared for this rulemaking and are available upon request.

The Board and the Department believe The Clean Streams Law provides authority for the issuance of water quality management general permits. Section 5(b)(1) of The Clean Streams Law (35 P. S. § 691.5(b)(1)), provides authority for the Board to "formulate, adopt, promulgate and repeal such rules and regulations . . . as are necessary to implement the provisions of [The Clean Streams Law]." This authority is sufficiently broad to authorize the issuance of general permits. The NPDES general permit program was established under the authority of this section of The Clean Streams Law.

With respect to opportunity for public comment, § 91.27(b)(1) clearly requires public notice and an opportunity to comment. That section provides that the Department will publish a notice in the *Pennsylvania Bulletin* of its intent to issue or amend a general permit. Interested persons are given an opportunity to provide written comments on the proposed general permit.

Insofar as the terms and conditions of the permit are concerned, they must be activity specific. It is not possible to outline the terms and conditions applicable to every water quality management general permit. The public will be provided an opportunity to give comments and suggestions on a general permit proposed to be issued by the Department.

The provisions regarding commencement of coverage in subsection (b)(3) have been substantially revised. The proposal outlined four scenarios for the commencement of coverage under a general permit. Subparagraphs (ii) and (iv), which would have authorized commencement of coverage on a date specified in the general permit or upon receipt of a notice of intent by the Department, have been deleted in the final rule. Subparagraph (i) of the proposal would have provided that coverage could begin after a waiting period specified in the general permit. This language has been revised to provide that coverage could begin "after a waiting period following receipt of the notice of intent by the Department as specified in the general permit." The language of proposed subparagraph (iii), which provides that coverage could begin upon receipt of notification of coverage by the Department is being retained in this final-form rulemaking, but renumbered as subparagraph (ii).

Subsection (b)(4) of the proposal was entitled "Coverage Under a General Permit." One commentator suggested that the title be clarified to make it clear that the subsection applies to notices of intent for coverage under a general permit. This suggestion has been incorporated into this final-form rulemaking. The commentator also questioned why there was qualifying language at the end of the subsection which appeared to provide an exception for notices of intent since the qualification related to criteria for denial of coverage. The qualifying language has been deleted from the final rule.

The proposal also indicated the Department would review the information provided in a notice of intent to determine if the wastewater treatment facility qualified under the provisions of the general permit. This language has been revised in this final-form rulemaking to indicate the Department will review the information for completeness or to determine whether a facility qualifies under the provisions of the general permit.

Subsection (c) of the proposal provided that coverage under a general permit could be denied if certain conditions were met. Subsection (c)(2) of the proposal provided that coverage under a general permit may be denied if an applicant has not first obtained NPDES permits required by Chapter 92. One commentator suggested that the requirement that an applicant for a general permit "first" obtain an NPDES permit be revised to provide, at a minimum, for concurrent submittal of an NPDES permit application. This suggestion has been incorporated into

the regulation by deleting the word "first." In addition, the reference to "NPDES" has been deleted while still retaining the reference to permits required under Chapter 92. Finally, a phrase has been added at the end of the subsection to indicate that this subsection applies when NPDES permits are required. This change is intended to allow the issuance of water quality management general permits when an NPDES permit is not required.

Subsection (c)(4) of the proposal provided that coverage would be denied if an applicant has a "significant history of noncompliance with a prior permit issued by the Department." Some commentators questioned the meaning of "significant history of noncompliance." To ensure that the compliance review criterion is consistent with the standard in section 609(2) of The Clean Streams Law (35 P. S. § 691.609(2)), the language has been revised in this final-form rulemaking to provide that coverage under a general permit may be denied if the applicant "has failed and continues to fail to comply or has shown a lack of ability or intention to comply with a prior permit issued by the Department."

It was suggested that publishing notices of applications for general permits in local newspapers and the *Pennsylvania Bulletin* would help to ensure that affected parties are aware of and have the opportunity to comment on a pending general permit. One commentator suggested that the Board explain why it is not in the public interest to require this notice if it chooses not to adopt the recommendation.

The Board does not believe it would be helpful to require publication of all applications for general permits in the *Bulletin* and in local newspapers as suggested by the commentators. To adopt the suggestion made by the commentators would affect all other general permits administered by the Department. Wastewater facilities which would qualify for coverage under a general permit are expected to have little or no impact on the environment. For example, the construction of a small flow treatment facility to repair a malfunctioning onlot sewage system would improve environmental quality and have no measurable impact on the receiving stream. Imposing additional costs and delays for local newspaper publication would exacerbate an environmental problem which needs to be corrected. However, the Department will publish notices of actions by the Department regarding general permit applications in the *Pennsylvania Bulletin*. Actions of the Department granting or denying coverage under a general permit will be published, thus providing an opportunity to appeal these actions.

Subsection (e) of the proposal was entitled "Termination of general permit." One commentator noted that the subsection describes when the applicability of a general permit to a specific facility is terminated and suggested that the title be changed to reflect this. Accordingly, the title has been revised to read "termination of coverage under a general permit."

Section 91.34 (relating to activities utilizing pollutants).

This section requires persons engaged in an activity involving the use of a pollutant to submit a report or plan to the Department outlining measures to be taken to prevent the pollutant from reaching waters of this Commonwealth upon notice from the Department. The ANFR clarified this section to suggest that the use of pollution prevention measures is preferable to treatment. The language proposed in the ANFR is clarified in this final-form rulemaking. Thus, subsection (b) provides that the Department may require a person to submit a report or plan for activities such as the impoundment, production, processing, transportation, storage, use, application or disposal of polluting substances to prevent pollutants from reaching the waters of this Commonwealth. Subsection (b) has also been clarified to provide that the Department will encourage the use of pollution prevention measures in much the same manner as provided in § 91.6 and outlines a hierarchy for the consideration of the environmental management of wastes consisting of reuse, recycling, treatment and disposal.

One commentator asserted that these provisions are not written in regulatory language and would be more appropriately placed in a policy statement or guidance document. It is the Department's policy to achieve integration of pollution prevention and source recovery practices through a voluntary effort and not by mandating controls through regulatory requirements. It is believed that by approaching pollution prevention in this manner that the regulated community will strive to go beyond compliance, thereby resulting in greater benefit to the public at large and the environment.

Subsection (b) of the proposal also indicated that reports submitted to the Department regarding pollution prevention measures are to include other information such as the Department may require. One commentator asserted that the meaning of "other information the Department may require" is unclear. The quoted language has been deleted in this final-form rulemaking.

Section 91.35 (relating to wastewater impoundments).

The proposal indicated that the Department's regulations relating to wastewater impoundments, currently found in § 101.4 (relating to impoundments), would be transferred to this section, with slight editorial changes. Section 101.4 regulates the proper operation, maintenance and use of impoundments used for the production, processing, storage, treatment or disposal of polluting substances.

As indicated elsewhere in this Preamble, subsequent to the publication of the proposed rulemaking, the Department developed a "Final Strategy for Meeting Federal Requirements for Controlling Water Quality Impacts of Concentrated Animal Feeding Operations." It was specifically acknowledged in the CAFO Strategy that some elements of that strategy would require new regulations regarding water quality management part II permits. In light of the CAFO Strategy and comments concerning the original proposal, the ANFR outlined new requirements applicable to wastewater impoundments at certain agricultural operations concerning freeboards for waste storage ponds and waste structures.

The ANFR outlined a proposed revision to subsection (c) relating to a requirement for a Water Quality Management Permit for an impoundment at a new or expanded manure storage facility at an agricultural operation with more than 1,000 animal equivalent units, regardless of the capacity of the impoundment. This requirement is retained in this final-form rulemaking.

The language proposed in subsection (d) of the ANFR provided that if an agricultural operation contains less than 1,001 animal equivalent units, the operation is not subject to the reporting or permit requirements of § 91.35(b) or (c), but must provide either a 12-inch freeboard for all waste storage ponds or a 6-inch freeboard for all waste storage structures. One commentator suggested that imposing the 2-foot freeboard requirement outlined in § 91.35(a) would be an unfair economic burden if there are no problems with overtopping at the

facility since the facility was constructed in accordance with standards in effect at the time of construction. In light of this comment, a change has been made to subsection (d) exempting facilities in existence prior to the effective date of the regulations and in compliance with the "Pennsylvania Technical Guide" from the permitting requirements. Thus, subsection (d) is amended to provide that an agricultural operation which contains less than 1,001 animal equivalent units or an agricultural operation in existence prior to the effective date of the final rule and designed in accordance with the "Pennsylvania Technical Guide" is not subject to the requirements of subsection (b) or (c) or the freeboard requirements of subsection (a), but shall provide a 12-inch freeboard for all waste storage ponds and a 6-inch freeboard for all waste storage structures (as defined in the "Pennsylvania Technical Guide") at all times. Proposed subsection (d) is renumbered as subsection (e).

As was the case with the provisions relating to general permits, one commentator provided extensive comments asserting that the proposal to require water quality management permits for some animal manure storage facilities and not others fails to comply with The Clean Streams Law. The commentator also asserts that the proposed permit exemption for impoundments or facilities at agricultural operations with less than 1,001 animal equivalent units is unreasonable because it is asserted the Department requires other types of facilities of similar size to obtain a permit from the Department.

Section 5(b)(1) of The Clean Streams Law provides authority for the Board to "formulate, adopt, promulgate and repeal such rules and regulations . . . as are necessary to implement the provisions of [The Clean Streams Law]." This authority is sufficiently broad to allow promulgation of appropriate rules and regulations of the Department. In addition, a representative of the commentator was a member of, and actively participated in, the stakeholder's group which formulated the CAFO Strategy. That group reached a consensus that a Water Quality Management permit should not be required for smaller agricultural operations. This consensus was based, in part, on the track record of the agricultural community in meeting the Natural Resources Conservation Service standards and the proper operation of these facilities.

Section 91.36 (relating to pollution control and prevention at agricultural operations).

The proposed amendments provided for the transfer of the regulations relating to pollution control and prevention at agricultural operations currently outlined in § 101.8 to this section with minor changes. The proposal also proposed language to better identify the relationship between this section and the regulations in Chapter 83.

The Department adopted a CAFO Strategy. That strategy contained three elements which necessitated revisions to proposed § 91.36. These revisions were outlined in the ANFR. First, all manure storage facilities are to be designed in a manner consistent with the publications entitled "Manure Management for Environmental Protection" and the "Pennsylvania Technical Guide" and § 83.351 (relating to minimum standards for the design, construction, location, operation, maintenance and removal from service of manure storage facilities), when applicable. Section 83.351 outlines minimum standards for the design, construction, location, operation, maintenance and removal from service of manure storage facilities. Second, all manure storage facilities are to be designed to prevent any discharges to surface waters during a storm event of less than a 25-year/24-hour storm. Finally, an engineer's certification would be required for all existing facilities with greater than 1,000 animal equivalent units. These requirements are retained in this final-form rulemaking.

One commentator agreed with the intent of the provision of subsection (a) related to engineer certification of the adequacy of existing manure storage facilities on agricultural operations with over 1,000 animal equivalent units. However, the commentator believes the requirement for consistency with the "Pennsylvania Technical Guide" raises the question of whether the freeboard criteria outlined in the Guide or the 2-foot freeboard requirement in § 91.35(a) applies. The commentator believes imposing the 2-foot freeboard requirement on existing facilities would be an unfair economic burden. As noted, § 91.35(d) has been revised to address this concern. If these facilities are permitted under a CAFO NPDES permit, the permit requirement will assure proper operation and maintenance of the existing facility within the design specifications under which it was constructed.

A number of commentators suggested that the "Manure Management Manual for Environmental Protection" is outdated. Some commentators also suggested that that manual does not reflect the more recently updated guidelines in the "Pennsylvania Technical Guide." The comments are valid. The "Manure Management Manual for Environmental Protection" is currently being revised and updated to, among other things, ensure consistency with the "Pennsylvania Technical Guide." It is anticipated that a draft of the revised manual will be distributed for public comment in the near future and will be placed on the Department's website.

One commentator noted that subsection (a)(2) in the ANFR outlines requirements for a permit in the event a person chooses to design a manure storage facility using criteria other than those described in the "Manure Management Manual for Environmental Protection" or the "Pennsylvania Technical Guide." The commentator noted that the use of the word "or" in that subsection was inconsistent with subsection (a) which refers to design standards meeting the requirements of both documents. The word "and" has been added to replace "or."

One commentator noted that the Manure Management Manual and its supplements are currently undergoing revision to incorporate requirements outlined in the CAFO Strategy. The commentator believes that the field application supplement to the Manual indicates that nutrient management is to be based on phosphorous. The commentator believes it appears to conflict with section 4 of the Nutrient Management Act (3 P. S. § 1704) which indicates that "there shall be a presumption that nitrogen is the nutrient of primary concern."

The Board does not believe there is a conflict with the Nutrient Management Act. The intent of the *Manure Management Manual* and the field application supplement is to provide guidance addressing manure related water pollution concerns. These guidelines are designed to assist farmers in their efforts to minimize water pollution which will assist them in meeting the requirements of The Clean Streams Law. It is the Department's intent to make the guidelines in the Manual consistent with the "Pennsylvania Technical Guide," the CAFO Strategy and the requirements of the Nutrient Management Act. The Chapter 91 permit requirements for land application of manure apply only when there is a pollution incident directly related to polluting surface or groundwater.

One commentator asserted the Department cannot exclude land application of manure from the permit requirements of The Clean Streams Law for the same reasons the commentator objects to the provisions authorizing general permits and those relating to impoundments. As noted in response to comments raised by the commentator regarding those issues, The Clean Streams Law provides sufficient authority for the Board to exercise some discretion in establishing permitting requirements by regulation. Moreover, the existing permit exemption for the land application of manure, as outlined in existing § 101.8(b), has been in effect since at least 1990. Finally, land application of manure is regulated under the Nutrient Management Act. The Board does not believe it is necessary to complicate the Nutrient Management Act requirements with a second layer of regulations for farmers.

The ANFR noted that an engineer's certification would be required for all existing facilities with over 1,000 animal equivalent units. The Department sought comment on whether there should be a lower threshold of animal equivalent units for new facilities located in special protection waters to precipitate the requirement for a water quality management permit. The Department received one comment in response to this issue. The commentator did not agree with establishing this threshold because he believed it went beyond the consensus of the CAFO stakeholders' group. The commentator suggested, however, that requiring an engineer's certification of existing manure storage facilities on concentrated animal operations with more than 300 animal equivalent units in special protection waters would be appropriate.

The Board believes the Natural Resources Conservation Service provides appropriate engineering supervision for the siting, design and installation of manure storage facilities at smaller agricultural operations. To require a second certification for existing facilities appears to be duplicative and an unnecessary expense for the agricultural community. Therefore, a lower threshold has not been established in this final-form rulemaking.

Section 91.37 (relating to private projects).

The language of this section, currently found in § 91.32, describes the Department's policy in reviewing permit applications in that it will look with disfavor upon private sewerage projects in built-up areas. One commentator suggested that it would be more appropriate to provide regulatory language. Accordingly, regulatory language has been added to subsection (a) providing that the Department will not approve applications for private sewerage projects in built-up areas unless the applicant can demonstrate a compelling public need for the project. Subsection (b) has been clarified to reflect this change. Subsection (b) contained a reference to "proper" private sewerage projects. The reference to "proper" has been deleted in this final-form rulemaking.

Section 91.51 and 91.52 (relating to underground disposal).

The proposed amendments adopted by the Board would have deleted the provisions of existing §§ 97.71—97.76 relating to underground disposal of wastes such as discharges into mines, abandoned wells, underground horizons and new wells and replace these provisions with a provision in proposed § 91.32 requiring compliance with 40 CFR Part 144 relating to underground injection control. The Department has not accepted delegation from the Environmental Protection Agency (EPA) for the administration of the underground injection control program. Subsequent to the proposal the Department received comments indicating that the Federal underground injection control program might be inadequate to address situations unique to this Commonwealth, particularly with respect to underground disposal to abandoned mines and abandoned wells. Accordingly, it was proposed in the ANFR to reinstate the provisions and requirements of existing §§ 97.71—91.76. These requirements are in new §§ 91.51 and 91.52. In addition, the ANFR indicated proposed § 91.32 would be deleted and reserved. This final-form rulemaking deletes § 91.32 as proposed in the ANFR.

F. *Benefits, Costs and Compliance*

Executive Order 1996-1 requires a cost/benefit analysis of this final-form rulemaking. It also requires a statement of the need for, and a description of, forms, reports or other paperwork required as a result of this final-form rulemaking.

This final-form rulemaking is necessary to implement the Department's Regulatory Basics Initiative and the goals of Executive Order 1996-1. The amendments will result in the promotion of pollution prevention strategies, eliminate regulations which inhibit the application of green technologies and eliminate obsolete regulations.

Benefits

Individuals, consultants, sewage treatment plant permittees and the public will benefit from the final amendments without reductions in protection of public health or the environment. The amendments will allow the Department staff more flexibility to recommend innovative remediation measures to attain compliance. In addition, the provisions regarding pollution prevention will provide new options when considering sewage treatment operational alternatives to achieve compliance. The amendments to § 91.25 regarding experimental projects will allow the consideration of new innovative technologies used in other states for use in this Commonwealth. In addition, the incorporation of appropriate provisions of Chapter 101 into Chapter 91 eliminates confusion among the regulated community as to which regulations are applicable. There are about 75 orders issued to treatment plant operators each year. It is estimated that about 1/4 of these facilities will choose to pursue pollution prevention as an option to the preparation of detailed plans. The cost associated for each of these facilities would be about $15,000. The cost savings for all facilities choosing pollution prevention as outlined in the final rule is estimated to be approximately $2,812,500 per year.

Compliance Costs

Except for § 91.35 relating to wastewater impoundments at agricultural operations, the amendments do not create any substantive new regulatory requirements. Rather, they eliminate unnecessary existing requirements, combine related regulations from several different chapters into one chapter and clarify existing text.

With respect to the provisions relating to wastewater impoundments at agricultural operations with over 1,000 animal equivalent units, it is estimated that the cost of compliance will be $77,500 per year. Agricultural operations proposing manure storage facilities to serve CAFOs with greater than 1,000 AEUs will experience a cost increase of $15,500 per facility. The $15,000 is an estimate that was provided by an industry representative as the additional cost of excavation and liners for additional 1-foot of freeboard required by the new regulations. The $500 is the permit review fee charged by the Department.

There have only been five proposals this year for this type of CAFO. The actual number of applicants per year is unknown.

Compliance Assistance Plan

The Department is developing a compliance assistance plan for CAFOs to bring existing operations into compliance with the Department's CAFO Strategy. A draft of this compliance plan will be published for public comment prior to finalization.

Paperwork Requirements

The paperwork requirements might be reduced for activities which would be covered by general permits which could be issued under the provisions of § 91.27. Additional paperwork might be required in the case of applicants for a water quality management permit being required to submit information regarding pollution prevention activities under § 91.6. A new CAFO water quality management part II permit has been developed for new or modified CAFOs housing more than 1,000 AEUs. It is estimated that less than 10 facilities per year would use these forms. A copy of this document is available from the contact persons listed in Section B of this Preamble.

G. *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 the 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 environmental management hierarchy that promotes pollution prevention as the preferred means 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 the economy of this Commonwealth depends on clean air, pure water and the preservation of the natural, scenic, historic and aesthetic values of the environment. The Commonwealth spends 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 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 can also 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 incorporated the following provisions and incentives to meet that goal:

Definitions of "pollution prevention" and "pollution prevention measures" were added to § 91.1.

Regulations currently in § 97.14 (relating to measure to be used) were transferred to new § 91.6 and was renamed "pollution prevention" to more clearly identify its intent. In addition, language was added to provide some guidance regarding the consideration of pollution prevention measures.

Section 91.11 was revised to include a discussion of pollution prevention as an alternative to treating wastes.

Section 91.13 was revised to emphasize that pollution prevention is a key factor to be used when options to abate pollution are being considered by a permittee.

Section 91.34 requires any person engaged in an activity involving the use of a pollutant to submit a report or plan describing the nature of the preventative measures to be taken to keep these pollutants from the waters of this Commonwealth. It also provides management for the use of pollution prevention measures.

H. *Sunset Review*

This final-form rulemaking 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 August 12, 1997, the Department submitted a copy of the proposed amendment to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the Senate and House Environmental Resources and Energy Committees. In compliance with section 5(c) 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 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 Environmental Resources and Energy Committee on October 12, 1999, and were deemed approved by the Senate Environmental Resources and Energy Committee on October 21, 1999. IRRC met on October 21, 1999, and approved the final-form regulations in accordance with section 5.1(e) of the Regulatory Review Act (71 P. S. § 745.5a(e)).

J. *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 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 received during the public comment period for the proposed rulemaking were considered.

(3) These regulations do not enlarge the purpose of the proposal published at 27 Pa.B. 4343.

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

K. *Order*

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

(a) The regulations of the Department, 25 Pa. Code Chapters 91, 97 and 101, are amended by amending §§ 91.1, 91.11—91.15, 91.21, 91.22, 91.25, 91.27, 91.31—91.33; adding §§ 91.6, 91.27, 91.34—91.38 and 91.51 and 91.52 and deleting §§ 97.14, 97.61, 97.71—97.76, 101.1—101.6 and 101.8 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 General Counsel and the Office of the 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 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.

JAMES M. SEIF,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 29 Pa.B. 5777 (November 6, 1999).)

Fiscal Note: Fiscal Note 7-323 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25 ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subject C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 91. GENERAL PROVISIONS

GENERAL

§ 91.1. Definitions.

The definitions in section 1 of the act of June 22, 1937 (P. L. 187, No. 394) (35 P. S. § 691.1) 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:

Act—The Clean Streams Law (35 P. S. §§ 691.1—691.801).

Agricultural operations—The management and use of farming resources for the production of crops, livestock or poultry as defined in section 3 of the Nutrient Management Act (3. P. S. § 1703).

Animal equivalent unit—One thousand pounds live weight of livestock or poultry animals, regardless of the actual number of individual animals comprising the unit, as defined in section 3 of the Nutrient Management Act.

Application—The Department's form for requesting approval to construct and operate a wastewater collection, conveyance or treatment facility under a new water quality management permit, or the modification, revision or transfer of an existing water quality management permit.

Facility—A structure built to collect, convey or treat wastewater which requires coverage under a water quality management permit.

Federal Act—The Federal Water Pollution Control Act (33 U.S.C.A. §§ 1251—1387).

General water quality management permit or *general permit*—A water quality management permit that is issued for a clearly described category of wastewater treatment facilities, which are substantially similar in nature.

Manure storage facility—A permanent structure or facility or a portion of a structure or facility, utilized for the purpose of containing manure as defined in § 83.201 (relating to definitions).

NOI—Notice of Intent—A complete form submitted as a request for general water quality management permit coverage.

Operator—A person or other legal entity responsible for the operation or maintenance of a facility or activity subject to this chapter.

Owner—The person or other legal entity holding legal title to a facility or activity subject to this chapter.

Pollutant—A contaminant or other alteration of the physical, chemical or biological properties of surface water which causes or has the potential to cause pollution as defined in section 1 of the act (35 P. S. § 691.1).

Pollution prevention—Source reduction and other practices (for example, direct reuse or in-process recycling) that reduce or eliminate the creation of pollutants through increased efficiency in the use of raw materials, energy, water or other resources, or protection of natural resources by conservation.

Pollution prevention measures—Practices that reduce the use of hazardous materials, energy, water or other resources and that protect natural resources and human health through conservation, more efficient use, or effective pollutant release minimization prior to reuse, recycling, treatment or disposal.

Schedule of compliance—A schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with effluent limitations, other limitations, prohibitions or standards.

Single residence sewage treatment plant—A system of piping, tanks or other facilities serving a single family residence located on a single family residential lot which collects, disposes and treats solely direct or indirect sewage discharges from the residences into waters of this Commonwealth.

Stormwater—Runoff from precipitation, snow melt runoff and surface runoff and drainage.

Wastewater impoundment—A depression, excavation or facility situated in or upon the ground, whether natural or artificial and whether lined or unlined, used to store wastewater including sewage, animal waste or industrial waste.

Water quality management permit—A permit or equivalent document (Part II Permit) issued by the Department to authorize one of the following:

(i) The construction, erection and location of a wastewater collection, conveyance or treatment facility.

(ii) A discharge of wastewater to groundwaters of this Commonwealth.

§ 91.6. Pollution prevention.

The Department will encourage pollution prevention by providing assistance to the permittee and users of the permittee's facilities in the consideration of pollution prevention measures such as process changes, materials substitution, reduction in volume of water use, in-process recycling and reuse of water, and by general measures of "good housekeeping" within the plant or facility. The Department will encourage consideration of the following measures, in descending order of preference, for environmental management of wastes: reuse, recycling, treatment and disposal.

ADMINISTRATION AND ENFORCEMENT

§ 91.11. Compliance conferences.

(a) The Department will confer with the representatives of organizations required to abate their pollution of the waters of this Commonwealth and offer advice and suggestions regarding possible means for abatement of the pollution in question through pollution prevention measures or treating the waste if pollution prevention is not possible.

(b) One or more conferences will be held in the interests of attaining a better understanding of the pollution problems involved and of expediting solutions to specific pollution problems. If applicable, the conferences will be held prior to the preparation of plans.

§ 91.12. Conference procedure.

(a) Employes of the Department may not act as consulting engineers for a party or recommend the employment of a particular consultant, gather the data for the design of his treatment plant, prepare plans or act as an inspector on the construction of the project.

(b) Employes of the Department will not guarantee directly or by implication the efficacy of a proposed method of pollution abatement.

(c) Employes of the Department shall exercise their best judgment in assisting the party and his engineers, but the responsibility for abating pollution shall rest entirely upon the one causing the pollution.

§ 91.13. Abatement or treatment required.

The Department will require either abatement of the pollution or the submission of a plan and schedule for bringing the source's pollutants into compliance through pollution prevention measures, treatment or other means by a specific date, and shall require progress reports thereon, usually at monthly or bimonthly intervals as the Department will deem appropriate.

§ 91.14. Time for constructing treatment works.

(a) If, in lieu of abatement, a notified party elects to provide waste treatment works and submits plans therefore, the Department, upon approving the plans will set a time within which the treatment works shall be constructed and placed in operation or will notify the party to be prepared to construct the plant upon notice from the Department, depending upon the status of the Department's program of construction for the basin in which the receiving stream lies as specified in § 91.15 (relating to basin-wide compliance).

(b) In some cases, time may be required within which to prepare plans and construct treatment works by a party responsible for stream pollution before abatement can be consummated. The Department, upon application by the party and when in its judgment the public interest warrants, may grant a limited extension of time during which the discharge of waste shall be permitted, if the party responsible therefor continues work on corrective measures.

§ 91.15. Basin-wide compliance.

(a) In general, the Department will require sources of pollutants in a basin, watershed or surface waters as defined in Chapter 93 (relating to water quality standards) to concurrently comply with the water quality standards and protection levels in Chapters 16, 93 and 95 (relating to water quality toxics management strategy—statement of policy; water quality standards; and wastewater treatment requirements).

(b) Notwithstanding subsection (a), if certain sources of pollutants especially affect the public interests, the Department may act to require the abatement of the sources of pollution individually in the general order of degree of adverse effect upon the public interest.

(c) It is the policy of the Department to require concurrent similar action by all parties in the same category with respect to stream pollution.

(d) Each case of pollution will be considered by itself, without reference to other alleged or actual polluters.

APPLICATIONS AND PERMITS

§ 91.21. Applications for permits.

(a) Applications for approval of projects by the Department shall be made upon the appropriate form, which will be supplied upon request without charge.

(b) Applications shall be in triplicate, one copy of which shall be attested by a notary public, justice of the peace, alderman or district justice. The Department may require additional copies of applications to be filed.

(c) Applications and their accompanying papers shall be submitted to the Department's regional office covering the area where the project will be located.

(d) To qualify for coverage under a general water quality management permit under this chapter, an administratively complete NOI shall be submitted to and approved by the Department in accordance with § 91.27 (relating to general water quality management permit).

§ 91.22. Fees.

(a) Applications for water quality management permits from parties except agencies of the Commonwealth shall be accompanied by a check payable to "Commonwealth of Pennsylvania," in the following amounts:

(1) For applications for single residence sewage treatment plant permits—$25.

(2) For applications for sewer extension permits—$100.

(3) For applications for other water quality management permits—$500.

(b) An NOI for coverage under a general water quality management permit shall be accompanied by a check payable to the "Commonwealth of Pennsylvania," in the amount no greater than $500 as set forth in the public notice for the general water quality management permit as described in § 91.27(b)(1) (relating to general water quality management permit).

§ 91.25. Experimental projects.

If the suitability of a proposed device or method of treatment has not been demonstrated by actual field use in this Commonwealth or another state with similar climatic conditions, only conditional approval will be given to it until the effectiveness of the device or treatment has been demonstrated to the satisfaction of the Department by ample field experience.

§ 91.27. General water quality management permit.

(a) *Coverage and purpose.* The Department may issue a general water quality management permit, in lieu of issuing individual water quality management permits, for a specific category of wastewater treatment facilities if the wastewater treatment facilities meet the following:

(1) Involve the same, or substantially similar, type of operations.

(2) Treat the same types of wastes.

(3) Require the same operating conditions.

(4) Are, in the judgment of the Department, more appropriately managed under a general permit than under individual permits.

(b) *Administration of general permits.*

(1) *Proposed general permits and amendments.* The Department will publish a notice in the *Pennsylvania Bulletin* of its intent to issue or amend a general permit, including the text of the proposed general permit or amendment, proposed review fees and an opportunity for interested persons to provide written comments on the proposed general permit or amendment in accordance with § 91.16 (relating to notification of actions).

(2) *Issuance of general permits.* General permits, subsequently issued, will be published in the *Pennsylvania Bulletin* and include the effective date of the general permit and review fees.

(3) *Effective date of a general permit.* The Department will specify in the general permit that an applicant who has submitted a timely and complete notice of intent for coverage is authorized to construct, erect and locate a wastewater treatment facility or discharge to groundwaters of this Commonwealth, in accordance with the terms and conditions of the general permit. Coverage under the general permit shall become effective:

(i) After a waiting period following receipt of the notice of intent by the Department as specified in the general permit.

(ii) Upon receipt of notification of coverage by the Department.

(4) *Notice of intent for coverage under a general permit.* A person who desires to have a wastewater treatment facility covered under a general permit shall submit a notice of intent to the Department in accordance with §§ 91.21 and 91.22 (relating to applications for permits; and fees) and the written instructions of the notice of intent. The Department will review the information provided in the notice of intent for completeness or to determine if the wastewater treatment facility qualifies under the provisions of the general permit except as provided in subsection (c)(1), (2) or (5).

(c) *Denial of coverage.* The Department may deny coverage under the general permit when one or more of the following conditions exist:

(1) The NOI is not complete or timely.

(2) The applicant has not obtained permits required by Chapter 92 (relating to National Pollutant Discharge Elimination System) when required.

(3) The applicant is not, or will not be, in compliance with one or more of the conditions of the general permit.

(4) The applicant has failed and continues to fail to comply or has shown a lack of ability or intention to comply with a prior permit issued by the Department.

(5) The treatment facility proposed for coverage under the general permit is not capable of treating wastewater to a degree which will result in compliance with applicable effluent limitations and water quality standards as described in Chapter 93 (relating to water quality standards).

(6) The Department determines that the action is necessary to ensure compliance with the Federal Act, the act or this title.

(d) *Requiring an individual permit.* The Department may revoke, or suspend coverage under a general water quality management permit, and require that an individual water quality management permit be obtained when the permittee has violated one or more of the conditions of the general permit or has violated a provision of this title. Upon notification by the Department that an individual water quality management permit is required for the facility, the owner shall submit a complete water quality management permit application, in conformance with this chapter, within 90 days of receipt of the notification, unless the owner is already in possession of a valid individual water quality management permit for the applicable functions. Failure to submit the application within 90 days shall result in automatic termination of coverage under the general permit. Timely submission of a complete application shall result in continuation of coverage of the applicable facilities under the general permit, when the facility demonstrates that it has undertaken efforts to address the reasons for the revocation or suspension of coverage, until the Department takes final action on the pending individual permit application.

(e) *Termination of coverage under a general permit.* When an individual water quality management permit is issued for a facility which is covered under a general water quality management permit, the applicability of the general permit to that facility is automatically terminated on the effective date of the individual permit.

MANAGEMENT OF OTHER WASTES

§ 91.31. Wells other than oil and gas.

(a) Each well-drilling operation shall have a sump or other receptacle large enough to receive all drill cuttings, sand bailings, water having a turbidity in excess of 1,000 nephelometric turbidity units (NTU) or other pollutant resulting from the well drilling operations.

(b) Surface water shall be excluded from the sump or receptacle by means of diversion ditches on the uphill sides, or by other appropriate measures.

(c) After completion of the well, the sump or receptacle shall be covered over or otherwise protected or the contents of the receptacle disposed of, so that the contents will not be washed into the waters of this Commonwealth.

(d) Waste oil, coal, spent materials or other pollutants shall be disposed of so that they will not be washed into the waters of this Commonwealth.

§ 91.32. (Reserved).

§ 91.33. Incidents causing or threatening pollution.

(a) If, because of an accident or other activity or incident, a toxic substance or another substance which would endanger downstream users of the waters of this Commonwealth, would otherwise result in pollution or create a danger of pollution of the waters, or would damage property, is discharged into these waters—including sewers, drains, ditches or other channels of conveyance into the waters—or is placed so that it might discharge, flow, be washed or fall into them, it is the responsibility of the person at the time in charge of the substance or owning or in possession of the premises, facility, vehicle or vessel from or on which the substance is discharged or placed to immediately notify the Department by telephone of the location and nature of the danger and, if reasonably possible to do so, to notify known downstream users of the waters.

(b) In addition to the notices in subsection (a), a person shall immediately take or cause to be taken steps necessary to prevent injury to property and downstream users of the waters from pollution or a danger of pollution and, in addition thereto, within 15 days from the incident, shall remove from the ground and from the affected waters of this Commonwealth to the extent required by this title the residual substances contained thereon or therein.

(c) Compliance with this section does not affect the civil or criminal liability to which the person or municipality may be subject as a result of an activity or incident under the act, 30 Pa.C.S. (relating to the Fish and Boat Code) or another statute, ordinance or regulation.

§ 91.34. Activities utilizing pollutants.

(a) Persons engaged in an activity which includes the impoundment, production, processing, transportation, storage, use, application or disposal of pollutants shall take necessary measures to prevent the substances from directly or indirectly reaching waters of this Commonwealth, through accident, carelessness, maliciousness, hazards of weather or from another cause.

(b) The Department may require a person to submit a report or plan for activities described in subsection (a). Upon notice from the Department and within the time specified in the notice, the person shall submit to the Department the report or plan setting forth the nature of the activity and the nature of the preventative measures taken to comply with subsection (a). The Department will encourage the use of pollution prevention measures that minimize or eliminate the generation of the pollutant over measures which involve pollutant handling or treatment. The Department will encourage consideration of the following pollution prevention measures, in descending order of preference, for environmental management of wastes: reuse, recycling, treatment and disposal.

§ 91.35. Wastewater impoundments.

(a) Except as otherwise provided under subsections (c)—(e), a person may not operate, maintain or use or permit the operation, maintenance or use of a wastewater impoundment for the production, processing, storage, treatment or disposal of pollutants unless the wastewater impoundment is structurally sound, impermeable, protected from unauthorized acts of third parties, and is maintained so that a freeboard of at least 2 feet remains at all times. The person owning, operating or possessing a wastewater impoundment has the burden of satisfying the Department that the wastewater impoundment complies with these requirements.

(b) A person owning, operating or in possession of an existing wastewater impoundment containing pollutants, or intending to construct or use a wastewater impoundment, shall promptly submit to the Department a report or plan setting forth the location, size, construction and contents of the wastewater impoundment and other information as the Department may require.

(c) Except when a wastewater impoundment is already approved under an existing permit from the Department, a permit from the Department is required approving the location, construction, use, operation and maintenance of a wastewater impoundment subject to subsection (a) in the following cases:

(1) If a variance is requested from the requirements in subsection (a).

(2) If the capacity of one wastewater impoundment or of two or more interconnected wastewater impoundments exceeds 250,000 gallons.

(3) If the total capacity of polluting substances contained in wastewater impoundments on one tract or related tracts of land exceeds 500,000 gallons.

(4) If the impoundment is a new or expanded manure storage facility at an agricultural operation with more than 1,000 animal equivalent units, regardless of the capacity of the impoundment.

(5) If the Department determines that a permit is necessary for effective regulation to insure that pollution will not result from the use, operation or maintenance of the wastewater impoundment.

(d) The following types of agricultural operations are not subject to subsections (b) and (c) or the freeboard requirements of subsection (a), but shall provide a 12-inch freeboard for all waste storage ponds as defined in the "Pennsylvania Technical Guide" and a 6-inch freeboard for all waste storage structures at all times:

(1) An agricultural operation which contains less than 1,001 animal equivalent units.

(2) An agricultural operation in existence prior to January 29, 2000, and designed in accordance with the "Pennsylvania Technical Guide" and addenda or amendments thereto.

(e) This section does not apply to residual waste processing, disposal, treatment, collection, storage or transportation.

§ 91.36. Pollution control and prevention at agricultural operations.

(a) *Animal manure storage facilities.* Except as provided in paragraphs (1) and (2), animal manure storage facilities do not require a water quality management permit from the Department if the design and operation of the storage facilities are in accordance with the Department approved manure management practices as described in the publication entitled "Manure Management for Environmental Protection" and addenda or amendments thereto prepared by the Department, "The Pennsylvania Technical Guide" and addenda and amendments thereto, and when applicable, § 83.351 (relating to minimum standards for the design, construction, location, operation, maintenance and removal from service of manure storage facilities) and each animal manure storage

facility is designed to prevent discharges to surface waters during a storm event of less than a 25-year/24-hour storm. In addition, in the case of animal manure storage facilities located at animal operations with over 1,000 animal equivalent units on or before January 29, 2000, a water quality management permit is not required if a registered professional engineer certifies that the design and construction of each manure storage facility is consistent with the "Pennsylvania Technical Guide."

(1) A permit is required under § 91.35 (relating to wastewater impoundments) for the design, construction and operation of any new or expanded animal manure storage facility at an agricultural operation with more than 1,000 animal equivalent units. In addition to the requirements of § 91.35, the permit shall incorporate the requirements of this section.

(2) If a person chooses to design or construct manure storage facilities using criteria other than those described in "Manure Management for Environmental Protection" prepared by the Department and the "Pennsylvania Technical Guide" and addenda or amendments to those publications, approval of the Department or a permit under § 91.35 will be required. Operations which are required to or volunteer to submit nutrient management plans shall comply with the nutrient management regulations in Chapter 83 (relating to State Conservation Commission).

(b) *Land application of animal manure.* The land application of animal manures does not require a permit from the Department if the land application of manure is in accordance with the Department approved manure management practices as described in the publication entitled "Manure Management for Environmental Protection" and addenda or amendments thereto prepared by the Department. If a person chooses to apply animal manure using criteria other than those described in "Manure Management for Environmental Protection" and addenda or amendments thereto prepared by the Department, approval of the Department or a permit will be required. Operations which are required to or volunteer to submit nutrient management plans shall comply with Chapter 83.

§ 91.37. Private projects.

(a) The Department will not approve applications for sewerage permits for private sewerage projects to be located within the built-up parts of cities, boroughs and first and second-class townships unless the applicant can demonstrate a compelling public need for the project.

(b) Issuance of the sewerage permits will be limited to private sewerage projects located in the rural parts of first and second class townships, and for which areas there appears to be no present necessity for public sewerage.

§ 91.38. Algicides, herbicides and fish control chemicals.

Except when the use of an algicide, herbicide or fish control chemical would be in violation of a specific order or permit, the use is authorized only in the following instances:

(1) Copper sulfate required to control algae in a source of public water supply when the use is under and in accordance with approval given by the Department.

(2) Chemicals required to control aquatic plants in surface waters and chemicals required for the management of fish populations where the use is under and in accordance with joint approval given by the Department and the Fish and Boat Commission.

UNDERGROUND DISPOSAL

§ 91.51. Potential pollution resulting from underground disposal.

(a) The Department will, except as otherwise provided in this section, consider the disposal of wastes, including stormwater runoff, into the underground as potential pollution, unless the disposal is close enough to the surface so that the wastes will be absorbed in the soil mantle and be acted upon by the bacteria naturally present in the mantle before reaching the underground or surface waters.

(b) The following underground discharges are prohibited:

(1) Discharge of inadequately treated wastes, except coal fines, into the underground workings of active or abandoned mines.

(2) Discharge of wastes into abandoned wells.

(3) Disposal of wastes into underground horizons unless the disposal is for an abatement of pollution and the applicant can show by the log of the strata penetrated and by the stratigraphic structure of the region that it is improbable that the disposal would be prejudicial to the public interest and is acceptable to the Department. Acceptances by the Department do not relieve the applicant of responsibility for any pollution of the waters of this Commonwealth which might occur. If pollution occurs, the disposal operations shall be stopped immediately.

(c) New wells constructed for waste disposal shall be subject to this section.

§ 91.52. Procedural requirements for underground disposal.

A permit issued under § 91.51 (relating to potential pollution resulting from underground disposal) shall be issued in accordance with the requirements of Chapter 92 (relating to National pollutant discharge elimination system) when applicable.

CHAPTER 97. INDUSTRIAL WASTES

§ 97.14. (Reserved).

§ 97.61. (Reserved).

§§ 97.71—97.76. (Reserved).

CHAPTER 101. (Reserved).

§§ 101.1—101.6. (Reserved).

§ 101.8. (Reserved).

[Pa.B. Doc. No. 00-166. Filed for public inspection January 28, 2000, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

DEPARTMENT OF ENVIRONMENTAL PROTECTION

[25 PA. CODE CH. 139]

Corrective Amendment to 25 Pa. Code § 139.101(12)(ii)

The Department of Environmental Protection (Department) has discovered a discrepancy between the agency text of 25 Pa. Code § 139.101(12)(ii) (relating to general requirements) as deposited with the Legislative Reference Bureau and published at 27 Pa.B. 6804 (December 27, 1997) and the official text as published in the *Pennsylvania Code Reporter* (Master Transmittal Sheet No. 280) and as currently appearing in the *Pennsylvania Code*. The amendment adopted at 27 Pa.B. 6804 was never codified.

Therefore, under 45 Pa.C.S. § 901: the Department has deposited with the Legislative Reference Bureau a corrective amendment to 25 Pa. Code § 139.101(12)(ii). The corrective amendment to 25 Pa. Code § 139.101(12)(ii) is effective as of March 7, 1998, the date the defective official text was announced in the *Pennsylvania Bulletin*.

The correct version of 25 Pa. Code § 139.101(12)(ii) appears in Annex A, with ellipses referring to the existing text of the regulation.

ANNEX A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE III. AIR RESOURCES

CHAPTER 139. SAMPLING AND TESTING

Subchapter C. REQUIREMENTS FOR SOURCE MONITORING FOR STATIONARY SOURCES

§ 139.101. General requirements.

This section applies to monitoring systems as defined in the manual referenced in § 139.102(3) (relating to references), installations required or approved under Chapters 122, 124, 127 and 129 or in an order issued under section 4 of the act (35 P. S. § 4004).

* * * * *

(12) Required monitoring shall meet at least one of the following minimum data availability requirements unless other data availability requirements are stipulated elsewhere in this title, in a plan approval or permit condition under Chapter 127 (relating to construction, modification, reactivation and operation of sources), or in an order issued under section 4 of the act. For purposes of calculating data availability, "process down" time, as specified in the manual referenced in § 139.102(3), shall be considered valid time.

* * * * *

(ii) In each calendar quarter, at least 95% of the hours shall be valid as set forth in the quality assurance section of the manual referenced in § 139.102(3).

* * * * *

[Pa.B. Doc. No. 00-167. Filed for public inspection January 28, 2000, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE BOARD OF OSTEOPATHIC MEDICINE

[49 PA. CODE CH. 25]

Application Fees

The State Board of Osteopathic Medicine (Board) amends §§ 25.231 and 25.503 (relating to schedule of fees; and fees) by revising those fees which are not related to license renewals but rather to applications and specific services so as to accurately reflect the cost of processing applications and providing services.

A. *Effective Date*

The amendments take effect upon publication in the *Pennsylvania Bulletin*.

B. *Statutory Authority*

Section 13.1(a) of the Osteopathic Medical Practice Act (63 P. S. § 271.13a(a)), 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*

Expenses of the Board which are related to processing individual applications or providing certain services directly to individual licensees or applicants are funded through fees which are based on the cost of providing the service. The fee is charged to the person requesting the service.

A recent systems audit within the Bureau of Professional and Occupational Affairs (Bureau) determined that the application and service fees did not accurately reflect the actual cost of processing the applications and performing the services. A detailed explanation of the background of these fees as well as a description of the fees was published at 29 Pa.B. 1613 (March 27, 1999).

D. *Summary of Comments and Responses on Proposed Rulemaking*

Following publication of proposed rulemaking at 29 Pa.B. 1613, the Board did not receive comments from the general public. The Boards received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC). The following is the Board's response to those comments.

Certification and Verification Fee

The HPLC questioned under what circumstances the Board certifies an examination score. The HPLC and IRRC also requested an explanation of the difference between a verification and certification and an explanation of what accounts for the differential in fees.

The certification of a score is made at the request of a licensee when the licensee is seeking to obtain a license in another state based upon a license in this Commonwealth which had been issued on the basis of a uniform National or regional examination which was taken in this Commonwealth. Generally the state of the original license is the only source of the score of the licensee, as testing agencies do not maintain this information. The licensing laws of many states include provisions that licensure by reciprocity or endorsement based on a license in another state will be granted only if the board or agency determines that the qualification are the same or substantially similar. Many state agencies have interpreted this provision to require that licensees have attained a score equal to or exceeding the passing rate in that jurisdiction at the time of original licensure. For this reason, these states require that the Board and other licensing boards certify the examination score the applicant achieved on the licensure examination.

As noted in proposed rulemaking the difference between the verification and certification fees is the amount of time required to produce the document requested by the licensee. States request different information when making a determination as to whether to grant a license based on reciprocity or endorsement from another state. The Bureau has been able to create two documents from its records that will meet all of the needs of the requesting state. The licensee, when the applicant applies to the other state, receives information as to what documentation and form is acceptable in the requesting state. The Bureau then advises the licensee of the type of document the Bureau can provide and the fee. In the case of a "verification" the staff produces the requested documentation by a letter, usually computer generated, which contains the license number, date of original issuance and current expiration date and status of the license. The letter is printed from the Bureau's central computer records and sent to the Board staff responsible for handling the licensees application. The letter is sealed, folded and mailed in accordance with the directions of the requestor. The Bureau estimates the average time to prepare this document to be 5 minutes. The Bureau uses the term "certification fee" to describe the fee for a request for a document, again generally to support reciprocity or endorsement applications to other states, territories or countries, or for employment of training in another state. A certification document contains information specific to the individual requestor. It may include dates or location where examinations were taken, or scores achieved or hours and location of training. The information is entered onto a document which is usually supplied by the requestor. The average time to prepare a certification is 45 minutes. This is because a number of resources, such as files, microfilm and rosters must be retrieved and consulted in order to provide the information requested. The Board staff then seals and issues this document.

Administrative Overhead

IRRC requested that the Board and the Bureau thoroughly examine its cost allocation methodology for administrative overhead and itemize the overhead costs to be recouped by these fees. IRRC commented that although the methodology is reasonable, there is no indication that the fees will recover the actual overhead costs because there is no relationship to the service covered by the fees and because the costs are based upon past expenditures rather than projected expenditures. IRRC expressed the view that there is no certainty that the projected revenues of the new fee will meet or exceed projected expenditures as required under the licensing boards' enabling statutes.

As IRRC noted, the adoption of a Bureau-wide averaged overhead for similar services was made when the fees were established in 1988 rulemaking. This methodology was approved by the House and Senate oversight Committees as well as IRRC. Legislative reviewers expressed a preference to "cost out" both user fees and operating revenue fees based upon actual, documented and verifiable factors as opposed to projected expenses or budgets that may never materialize. Thus, the Bureau has recommended and licensing boards have adopted fee schedules which are based upon actual expenditures. Legislative reviewers at that time felt that a procedure for "rounding up" actual fees would be a sufficient cushion to provide necessary surplus in nonbiennial revenue years and prior to the biennial reconciliation required under Board statutes. The Bureau and the licensing boards have used this methodology over 5 biennial reconciliation periods and have discovered this methodology results in relatively stable and reasonable fees.

The Bureau did consider a suggestion that the Bureau look into other methods of distributing administrative overhead expenses. Results obtained by applying a time factor were compared with the current methodology. The current method recouped 22% of the administrative overhead expenses versus 25% using a ratio based on a time factor. Board staff time varies between 23 and 28% to process a request for services for which user fees are charged. When this time factor calculation is combined with the licensee population the result is wildly varying costs for different licensees who are receiving the same services. For example, using that method to produce a verification letter would cost $34.58 for a landscape architect as compared with a cost of $10.18 for a cosmetologist. Based upon this analysis the licensing Boards concurred in the Bureau's recommendation that the use of a Bureau-wide average administrative overhead charge of $9.76 applied to verifications and certifications represented a fair allocation because the work product is essentially the same and because documented experience supports the charge.

IRRC requested that the Bureau and the licensing boards (1) itemize the overhead cost to be recouped by the fees and (2) reexamine the method that is used to determine the administrative overhead factor for each fee.

IRRC commented that although the Bureau's method was reasonable, there was no assurance that the fees would recover the actual overhead cost because the charge was not related to the service, and because the charge was based on the actual rather than the projected expenditures. IRRC also commented that there was no certainty that the projected revenues would meet or exceed projected expenditures, as required under the licensing boards' enabling statutes.

In computing overhead charges, the licensing boards and the Bureau include expenses resulting from service of support staff operations, equipment, technology initiatives or upgrades, leased office space and other sources not directly attributable to a specific licensing board. Once determined, the Bureau's total administrative charge is apportioned to each licensing board based upon that licensing board's share of the total active licensee population. In turn, the licensing board's administrative charge is divided by the number of active licensees to calculate a "per application" charge which is added to direct personnel cost to establish the cost of processing. The adminis-

trative charge is consistently applied to every application regardless of how much time the staff spends processing the application.

This method of calculating administrative overhead to be apportioned to fees for services was first included in the biennial reconciliation of fees and expenses conducted in 1988-89. In accordance with the regulatory review, the method was approved by the Senate and House Standing Committees and IRRC as reasonable and consistent with the legislative intent of statutory provisions which require the Board to establish fees which meet or exceed expenses.

IRRC suggested that within each licensing board, the administrative charge should be determined by the amount of time required to process each application. For example, an application requiring 1/2 hour of processing time would pay 1/2 as much overhead charge as an application requiring 1 hour of processing time. The Bureau concurs with IRRC that by adopting this methodology the Bureau and the licensing boards would more nearly and accurately accomplish their objective of setting fees that cover the cost of the service. Therefore, in accordance with IRRC's suggestions, the Bureau conducted a test to compare the resulting overhead of charge obtained by applying IRRC suggested time factor versus the current method. This review of a licensing boards' operation showed that approximately 25% of staff time was devoted to providing services described in the regulations. The current method recouped 22% to 28% of the administrative overhead charges versus the 25% recouped using a ratio-based time factor. However, when the time factor is combined with the licensing population for each licensing board, the resulting fees vary widely even though different licensees may receive the same services. For example, using the time-factor method to issue a verification of licensure would cost $34.58 for a landscape architect as compared with a cost of $10.18 for a cosmetologist. Conversely, under the Bureau's method the administrative overhead charge of $9.76 represents the cost of processing a verification application for all licensees in the Bureau. Also, the Bureau found that employing a time factor in the computation of administrative overhead would result in a different amount of overhead charge being made for each fee proposed.

With regard to IRRC's suggestions concerning projected versus actual expenses, the licensing boards note that the computation of projected expenditures based on amounts actually expended has been the basis for biennial reconciliations for the past 10 years. During these 5 biennial cycles, the experience of both the licensing boards and the Bureau has been that established and verifiable data which can be substantiated by collective bargaining agreements, pay scales and cost benefit factors. This method has provided a reliable basis for fees. Also, the fees are kept at a minimum for licensees, but appear adequate to sustain the operations of the licensing boards over an extended period. Similarly, accounting, record keeping and swift processing of applications, renewals and other fees were the primary basis for "rounding up" the actual costs to establish a fee. This rounding up process has in effect resulted in the necessary but minimal cushion or surplus to accommodate unexpected needs and expenditures.

For these reasons, the licensing boards have not made changes in the method by which they allocate administrative expenditures and the resulting fees will remain as proposed.

Other Comments

IRRC called attention to an apparent inconsistency in the text of the proposed rulemaking and the fee report, the document generated by the Bureau in support of the fee changes. The proposed rulemaking referred to a fee for certification of license, examination grades or hours. The fee report form referred only to a fee for certification of scores or hours. The proposed rulemaking was correct. The omission of the word "license" from the fee report was an oversight. A revised fee report has been prepared.

The HPLC requested information on how the proposed rulemaking would compare with regulations of other states and whether this Commonwealth would be placed at a competitive disadvantage as a result of this rulemaking. The fees for applications for a physician license and for application for physician assistant certificate are being reduced. Information received from the Ohio, Maryland and New Jersey licensing boards indicates the application fee for a physician license in those states is $335, $450 and $325, respectively, significantly above the current and proposed fees. New York charges $10 for verifying a license, but $50 for certifying exam scores. Ohio does not charge a fee for verifying a license, but charges a fee of $50 if the document must be signed by the executive director of the licensing board. The Board does not believe that the Commonwealth will be put at a competitive disadvantage by this rulemaking or that this rulemaking will have any impact on a practitioner's decision to practice in this Commonwelath.

E. *Fiscal Impact and Paperwork Requirements*

These final-form regulations will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The fees will have a modest fiscal impact on those members of the private sector who apply for services from the Board. The amendments will not impose additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

F. *Sunset Date*

The Board continuously monitors the cost effectiveness of its regulations. Therefore, no sunset date has been assigned.

G. *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 29 Pa.B. 1613, to IRRC and to the Chairpersons of the HPLC and the Senate Consumer Protection and Professional Licensure Committee for review and comment. In compliance with section 5(c) 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 the comments received from IRRC, the Committees and the public.

These final-form regulations were approved by the House and Senate Committee on December 7, 1999. IRRC met on January 6, 2000, and deemed approved the amendments in accordance with section 5.1(e) of the Regulatory Review Act (71 P. S. § 745.5a(e)).

H. *Contact Person*

Further information may be obtained by contacting Gina Bittner, Administrative Assistant, State Board of Osteopathic Medicine, P. O. Box 2649, Harrisburg, PA 17105-2649, (717) 783-4858.

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) These amendments do not enlarge the purpose of proposed rulemaking published at 29 Pa.B. 1613.

(4) These amendments are necessary and appropriate for administration and enforcement of the authorizing acts 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 25, are amended by amending §§ 25.231 and 25.503 to read as set forth at 29 Pa.B. 1613.

(b) The Board shall submit this order and 29 Pa.B. 1613 to the Office of General Counsel and to the Office of Attorney General as required by law.

(c) The Board shall certify this order and 29 Pa.B. 1613 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 D. DOWD, Jr., D.O.,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 30 Pa.B. 465 (January 22, 2000).)

Fiscal Note: Fiscal Note 16A-5310 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 00-168. Filed for public inspection January 28, 2000, 9:00 a.m.]

STATE BOARD OF PSYCHOLOGY
[49 PA. CODE CH. 41]
Application Fees

The State Board of Psychology (Board) amends § 41.12 (relating to fees) by revising certain application fees.

This rulemaking amends reapplication and certification fees and creates verification and fictitious/corporate name registration fees to reflect the Board's actual cost of providing the services.

Notice of proposed rulemaking was published at 29 Pa.B. 2145 (April 24, 1999). Publication was followed by a 30-day public comment period during which the Board received no public comments. Following the close of the public comment period, the Board received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC). The Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) did not comment.

The following is a response to the comments.

Certification and Verification Fee

The HPLC questioned under what circumstances the Board "certifies" an examination score. The HPLC and IRRC also requested an explanation of the difference between a verification and certification and an explanation of what accounts for the differential in fees.

The certification of a score is made at the request of a licensee when the licensee is seeking to obtain licensure in another state based upon licensure in this Commonwealth which was issued on the basis of a uniform National or regional examination which was taken in this Commonwealth. Generally the state of original licensure is the only source of the score of the licensee as testing agencies do not maintain this information. The licensure laws of many states include provisions that licensure by reciprocity or endorsement based on licensure in another state will be granted only if the Board or agency determines that the qualification are the same or substantially similar. Many state agencies have interpreted this provision to require that licensees have attained a score equal to or exceeding the passing rate in that jurisdiction at the time of original licensure. For this reason, these states require that the Board and other licensing boards certify the examination score the applicant achieved on the licensure examination.

As noted in proposed rulemaking, the difference between the verification and certification fees is the amount of time required to produce the document requested by the licensee. States request different information when making a determination as to whether to grant licensure based on reciprocity or endorsement from another state. The Bureau of Professional and Occupational Affairs (Bureau) has been able to create two documents from its records that will meet all of the needs of the requesting state. The licensee, when the applicant applies to the other state, receives information as to what documentation and form is acceptable in the requesting state. The Bureau then advises the licensee of the type of document the Bureau can provide and the fee. In the case of a "verification" the staff produces the requested documentation by a letter, usually computer generated, which contains the license number, date of original issuance and current expiration date, and status of the license. The letters are printed from the Bureau's central computer records and sent to the Board staff responsible for handling the licensees application. The letters are sealed, folded and mailed in accordance with the directions of the requestor. The Bureau estimates the average time to prepare this document to be 5 minutes. The Bureau uses the term "certification fee" to describe the fee for a request for a document, again generally to support reciprocity or endorsement applications to other states, territories or countries, or for employment of training in another state. A certification document contains information specific to the individual requestor. It may include dates or location where examinations were taken, or scores achieved or hours and location of training. The information is entered onto a document which is usually supplied by the requestor. The average time to prepare a certification is 45 minutes. This is because a number of resources, such as files, microfilm and rosters must be retrieved and consulted to provide the information requested. The Board staff then seals and issues this document.

Administrative Overhead

IRRC requested that the Bureau and the boards: (1) itemize the overhead cost to be recouped by the fees; and

(2) reexamine the method that is used to determine the administrative overhead factor for each fee.

IRRC commented that although the Bureau's method was reasonable, there was no assurance that the fees would recover the actual overhead cost because the charge was not related to the service, and because the charge was based on the actual rather than the projected expenditures. IRRC also commented that there was no certainty that the projected revenues would meet or exceed projected expenditures, as required under the licensing boards enabling statutes.

In computing overhead charges, the licensing boards and the Bureau include expenses resulting from service of support staff operations, equipment, technology initiatives or upgrades, leased office space and other sources not directly attributable to a specific board. Once determined, the Bureau's total administrative charge is apportioned to each board based upon that licensing boards share of the total active licensee population. In turn, the board's administrative charge is divided by the number of active licensees to calculate a "per application" charge which is added to direct personnel cost to establish the cost of processing. The administrative charge is consistently applied to every application regardless of how much time the staff spends processing the application.

This method of calculating administrative overhead to be apportioned to fees for services was first included in the biennial reconciliation of fees and expenses conducted in 1988-89. In accordance with the regulatory review, the method was approved by the HPLC and SCP/PLC and IRRC as reasonable and consistent with the legislative intent of statutory provisions which require the Board to establish fees which meet or exceed expenses.

IRRC suggested that within each licensing board, the administrative charge should be determined by the amount of time required to process each application. For example, an application requiring ½ hour of processing time would pay ½ as much overhead charge as an application requiring 1 hour of processing time. The Bureau concurs with IRRC that by adopting this methodology the Bureau and the licensing boards would more nearly and accurately accomplish their objective of setting fees that cover the cost of the service. Therefore, in accordance with IRRC's suggestions, the Bureau conducted a test to compare the resulting overhead of charge obtained by applying the IRRC suggested time factor versus the current method. This review of a licensing board's operation showed that approximately 25% of staff time was devoted to providing services described in the regulations. The current method recouped 22% to 28% of the administrative overhead charges versus the 25% recouped using a ratio-based time factor. However, when the time factor is combined with the licensing population for each licensing board, the resulting fees vary widely even though different licensees may receive the same services. For example, using the time-factor method to issue a verification of licensure would cost $34.58 for a landscape architect as compared with a cost of $10.18 for a cosmetologist. Conversely, under the Bureau method the administrative overhead charge of $9.76 represents the cost of processing a verification application for all licensees in the Bureau. Also, the Bureau found that employing a time factor in the computation of administrative overhead would result in a different amount of overhead charge being made for each fee proposed.

With regard to IRRC's suggestions concerning projected versus actual expenses, the Boards note that the computation of projected expenditures based on amounts actually expended has been the basis for biennial reconciliations for the past 10 years. During these 5 biennial cycles, the experience of both the Boards and the Bureau has been that established and verifiable data which can be substantiated by collective bargaining agreements, pay scales and cost benefit factors. This method has provided a reliable basis for fees. Also, the fees are kept at a minimum for licensees, but appear adequate to sustain the operations of the Boards over an extended period. Similarly, accounting, recordkeeping and swift processing of applications, renewals and other fees were the primary basis for "rounding up" the actual costs to establish a fee. This rounding up process has in effect resulted in the necessary but minimal cushion or surplus to accommodate unexpected needs and expenditures.

For these reasons, the licensing boards have not made changes in the method by which they allocate administrative expenditures and the resulting fees will remain as proposed.

Compliance with Executive Order 1996-1, Regulatory Review and Promulgation

The Board reviewed this rulemaking and considered its purpose and likely impact upon the public and the regulated population under the directives of Executive Order 1996-1, Regulatory Review and Promulgation. The final-form regulation addresses a compelling public interest as described in this Preamble and otherwise complies with Executive Order 1996-1.

Fiscal Impact and Paperwork Requirements

The final-form regulation will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The fees will have a modest fiscal impact on those members of the private sector who apply for services from the Board. The final-form regulations will impose no additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

Statutory Authority

The final-form regulation is authorized under section 3.3(d) of the Professional Psychologists Practice Act (act), (63 P. S. § 1203.3(d)).

Sunset Date

The Board continually monitors the effectiveness of its regulations through communications with the regulated population; accordingly, no sunset date has been set.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 24, 1999, the Board submitted a copy of the notice of proposed rulemaking, published at 29 Pa.B. 2145, to IRRC and the Chairpersons of the HPLC and the SCP/PLC for review and comment. In compliance with section 5(c) 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 this final-form regulation the Board has considered the comments received from the Committees, IRRC and the public.

This final-form regulation was approved by the HPLC on December 7, 1999, and deemed approved by the SCP/PLC on December 20, 1999. IRRC met on January 6, 2000, and approved the regulation in accordance with section 5.1(e) of the Regulatory Review Act (71 P. S. § 745.5a(e)).

Contact Person

Further information may be obtained by contacting Melissa Wilson, Administrative Assistant, State Board of Psychology, P. O. Box 2649, Harrisburg, PA 17105-2649; (717) 783-7155.

Findings

(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 proposed rulemaking published at 29 Pa.B. 2145.

(4) This amendment is necessary and appropriate for administration and enforcement of the Board's authorizing statute.

Order

The Board, acting under its authorizing statute, orders that:

(1) The regulations of the Board, 49 Pa. Code Chapter 41, are amended by amending § 41.12 to read as set forth at 29 Pa.B. 2145.

(2) The Board shall submit this order and 29 Pa.B. 2145 to the Office of General Counsel and to the Office of Attorney General as required by law.

(3) The Board shall certify this order and 29 Pa.B. 2145 and deposit them with the Legislative Reference Bureau as required by law.

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

YVONNE E. KEAIRNS, Ph.D.,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 30 Pa.B. 465 (January 22, 2000).)

Fiscal Note: Fiscal Note 16A-636 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 00-169. Filed for public inspection January 28, 2000, 9:00 a.m.]