PROPOSED RULEMAKING

DEPARTMENT OF AGRICULTURE

[7 PA. CODE CH. 130d]

Application of Soil and Groundwater Contaminated with Agricultural Chemicals to Agricultural Lands

The Department of Agriculture (Department), under the specific authority conferred by section 904(d) of the Land Recycling and Environmental Remediation Standards Act (act) (35 P. S. § 6026.904(d)), proposes to establish Chapter 130d (relating to application of soil and groundwater contaminated with agricultural chemicals to agricultural lands). Section 904(d) of the act delineates the duties of the Department and directs the Department to "... promulgate regulations providing for the option of safely reusing soil and groundwater contaminated with agricultural chemicals generated as a result of remediation activities at agricultural chemical facilities through the land application of these materials on agricultural lands." The regulations are required to "... provide for the appropriate application rates of such materials, either alone or in the combination with other agricultural chemicals, and prescribe appropriate operations controls and practices to protect the public health, safety and welfare and the environment at the site of land application."

The proposed regulations specify general procedures and rules for persons who solicit or receive approval from the Department to apply soil or groundwater contaminated with agricultural chemicals, generated as a result of remediation activities at agricultural chemical facilities, to agricultural land. These proposed regulations apply only to the application of soil or groundwater contaminated with agricultural chemicals, generated as a result of remediation activities, at agricultural chemical facilities and applied to agricultural lands. The Department has no power to issue final approval for the land application of contaminated soil or groundwater generated as the result of remediation activities that were undertaken at an agricultural chemical facility, where the soil or groundwater is contaminated with chemicals or substances other than agricultural chemicals. The Department will not approve the land application of soil or groundwater contaminated with chemicals other than agricultural chemicals. Where the contaminated soil or groundwater contains chemicals or substances other than agricultural chemicals, the applicant must receive approval for land application of chemicals or substances from the appropriate regulatory agency or must proceed under the alternative provisions of the act, which include holding the soil and groundwater onsite under the regulations regarding onsite storage of waste or processing the soil and groundwater in a manner consistent with the type of waste contained in the soil pile or groundwater. The applicant is responsible for obtaining any additional permits or approvals necessary for the application of the contaminated media. The Department has no power to issue final approval for the land application of contaminated soil or groundwater that was generated as the result of remediation activities that were not undertaken at an agricultural chemical facility or where the contaminated soil or groundwater will be applied to land other than agricultural land.

Background

The act requires the Department to promulgate regulations providing for the option of safely reusing soil and groundwater contaminated with agricultural chemicals generated as a result of remediation activities at agricultural chemical facilities through the land application of these materials on agricultural lands. The Department takes very seriously its duty to protect the health and safety of the general public and to preserve the quality and productivity of agricultural lands in this Commonwealth. These proposed regulations are intended to address the safety of the application of soil and groundwater contaminated agricultural chemicals and to protect and assure the productivity and viability of the agricultural lands to which this media is applied.

In addition, the Department of Environmental Protection, under the Solid Waste Management Act (35 P. S. §§ 6018.101—6018.1003) has regulations in place concerning the land application of residual waste in 25 Pa. Code Chapter 291 (relating to land application of residual waste), including regulations specifically regarding application to agricultural land in 25 Pa. Code Chapter 291, Subchapter D (relating to additional requirements for the agricultural utilization of residual waste). "Residual waste" as defined by the Solid Waste Management Act includes agricultural waste. The act does not exempt the application of soil and groundwater contaminated with agricultural chemicals to agricultural lands, from the regulations promulgated under the Solid Waste Management Act. Therefore, the Department has endeavored to assure these regulations are consistent with the residual waste regulations pertaining to application of residual waste to agricultural land.

In the interest of carrying out its statutory duties and providing a safe alternative use for soil and groundwater contaminated with agricultural chemicals the Department has promulgated these proposed regulations. The regulations are intended to establish safe standards, criteria and procedures for the application of the contaminated media to agricultural lands.

Summary of Major Features

Section 130d.1 (relating to definitions) defines various terms to add clarity to the regulations. Although many of the terms are also defined in the act and the Pennsylvania Pesticide Control Act of 1973 (3 P. S. §§ 111.21—111.61), the Department included them in the proposed regulations to provide the regulated community and interested persons with easy and immediate access to definitions which clarify the regulations.

Section 130d.2 (relating to scope) details the narrow scope of the Department's authority, sets forth the Department's powers and duties and clarifies the type of contaminated material eligible for consideration to be applied to farm lands under the act and the proposed regulations.

Section 130d.3 (relating to continuing authority) delineates the intent that these proposed regulations do not amend, repeal or modify the provisions of any other act or the regulations promulgated thereunder and denotes the continuing authority of the Department to take regulatory action under those statutes.

Section 130d.11 (relating to scope) sets forth the requirement that persons receiving approval to apply soil and groundwater contaminated with agricultural chemicals shall comply with the act, the regulations and the environmental protection acts.

Section 130d.12 (relating to reports) establishes the duty of applicators to file annual and final reports with the Department and sets forth the information which shall be contained in the reports.

Section 130d.13 (relating to chemical analysis of waste) creates the requirement for the detailed chemical analysis of soil and groundwater taken from the agricultural chemical facility and sought to be applied to agricultural lands. It defines the type of analysis that shall be done and sets forth testing requirements and protocols.

Section 130d.14 (relating to waste analysis plan) delineates the requirements for a waste analysis plan and what shall be included in that plan.

Section 130d.15 (relating to application site analysis) establishes the requirement for an application site analysis and sets forth the criteria for and procedures to be used in analyzing the site.

Section 130d.16 (relating to retained recordkeeping) details which records shall be retained and the retention time for the records.

Section 130d.17 (relating to public notice by applicant) denotes the requirement to comply with the notice provisions of the Pennsylvania Pesticide Control Act.

Section 130d.21 (relating to general requirements for land application proposal form) sets forth the requirements for submittal and delineates the documentation, information and affirmations which shall be contained in the application proposal.

Section 130d.22 (relating to insurance) establishes the insurance requirements for persons seeking to apply soil and groundwater contaminated with agricultural chemicals to agricultural lands.

Section 130d.23 (relating to right of entry and agreement with landowner) sets forth the requirements that the person seeking to apply soil and groundwater contaminated with agricultural chemicals to agricultural lands shall submit documents establishing their right to enter onto the land upon which the agricultural chemicals will be applied and a signed consent agreement. In addition, the landowner shall sign a form, prepared by the Department, authorizing the Department or its agents to enter onto the land.

Section 130d.24 (relating to identification of interest) details the type of information pertaining to the applicant which shall be contained in the land application proposal.

Section 130d.25 (relating to compliance information) the land application proposal shall contain proof that the proposed application will comply with the applicable Federal, State and local laws and regulations.

Section 130d.26 (relating to environmental assessment) sets forth the requirement for an environmental assessment to be included in the land application proposal. It delineates the criteria for the environmental assessment, including detailing the potential impact of the application of the soil and groundwater contaminated agricultural chemicals to the application site, potential harmful effects of the application and a mitigation plan.

Section 130d.31 (relating to criteria for approval and denial) establishes the criteria the Department will use and follow in evaluating a land application proposal.

Section 130d.32 (relating to receipt of land application proposal and completeness review) delineates the criteria to determine date of receipt and completeness of a land application proposal.

Section 130d.33 (relating to review period) establishes a time period for Department review of an administratively complete land application proposal and sets forth the procedures and process to be followed upon receipt of an incomplete land application proposal.

Section 130d.34 (relating to review process) sets forth the process which the Department will follow in reviewing land application proposals.

Section 130d.41 (relating to general) details terms, conditions and criteria which shall be met before, during and subsequent to land application of soil and groundwater contaminated with agricultural chemicals.

Section 130d.42 (relating to operating plan) sets forth the information which shall be included in the operating plan.

Section 130d.43 (relating to maps and related information) delineates the type of maps which shall be included in the land application proposal and the information which those maps shall contain.

Section 130d.51 (relating to general requirements) sets forth the general requirements for applying to the Department to use groundwater contaminated with agricultural chemicals as tank mix. It establishes the review procedures and delineates ongoing testing and cancellation requirements.

Section 130d.52 (relating to general exceptions) establishes the standards the Department will follow in determining whether groundwater contaminated with agricultural chemicals can be utilized as tank mix. In addition, delineates the Department's authority to waive certain other provisions of the proposed regulations, when the Department determines the groundwater contaminated with agricultural chemicals can be used as tank mix. It also sets forth certain provisions of the proposed regulations that will not be waived by the Department.

Section 130d.61 (relating to general provisions) sets forth the overall compliance criteria for application of the soil and groundwater contaminated with agricultural chemicals.

Section 130d.62 (relating to standards for land application of soil and groundwater contaminated with agricultural chemicals) delineates the general criteria and standards that shall be accounted for and complied with when applying soil and groundwater contaminated with agricultural chemicals to agricultural lands.

Section 130d.63 (relating to land application rates and procedures) establishes application rates and procedures which shall be followed when applying soil and groundwater contaminated with agricultural chemicals to agricultural lands.

Section 130d.64 (relating to additional application requirements) sets forth some additional information that shall be contained in the operating plan, such as a projected 3-year crop rotation plan and information regarding any additional pesticides or fertilizers that will be placed on the application site.

Section 130d.65 (relating to limitations on land application of soil and groundwater contaminated with agricultural chemicals) delineates criteria and factors which shall be included in and accounted for in the applicant's operating plan. The Department will consider these crite-

ria and factors in its review of the applicant's land application proposal. These criteria and factors establish limitations on how soil and groundwater contaminated with agricultural chemicals shall be applied to agricultural lands.

Section 130d.66 (relating to prohibited applications) establishes prohibitions on the application of soil and groundwater contaminated with agricultural chemicals to agricultural lands.

Section 130d.67 (relating to nuisance minimization and control) establishes requirement for an approved applicant to minimize potential nuisances.

Section 130d.68 (relating to daily operational records) establishes the requirement to keep daily operational records during the application of the soil and groundwater contaminated with agricultural chemicals to agricultural lands and defines the information which shall be included in those records.

Section 130d.69 (relating to annual operational report) establishes the requirement to produce an annual operational report and defines the information which shall be included in that report.

Section 130d.71 (relating to site closure plan) establishes the requirement for a site closure plan and delineates what that plan shall include.

Section 130d.72 (relating to final report) establishes the requirement for a final report and the criteria for what shall be included in that report.

Fiscal Impact

Commonwealth

The proposed regulations will impose additional administrative costs and have some fiscal impact upon the Commonwealth. The proposed regulations will require the Department to commit a substantial amount of time and manpower to review of applications and inspections of application sites.

Political Subdivisions

The proposed regulations will impose no costs and have no fiscal impact upon political subdivisions. The proposed regulations do not impose any additional burden of enforcement of review on political subdivisions.

Private Sector

For the most part the proposed regulations will impose minimal or no costs on the private sector. Companies wishing to apply soil and groundwater contaminated with agricultural chemicals, generated as the result of remediation activities undertaken at an agricultural facility, to agricultural lands will have to bear the costs of testing imposed by the regulations and the time and manpower costs of preparing the land application proposal. However, proceeding under the proposed regulations is not mandatory. The industry has other approved methods of disposing of soil and groundwater contaminated with agricultural chemicals, all of which impose costs on the industry. The industry seeking to proceed under the alternative presented by the act and these proposed regulations will have to determine whether or not it is the least cost alternative or is the best approach for them. The private sector will benefit through an alternative means of disposal, the liability protections for the remediated site in the act and the ability to utilize the land at the remediated site.

General Public

The proposed regulations will impose no costs and have no fiscal impact on the general public. The general public will benefit through an alternative means of disposal of contaminated soil and groundwater and the ability to utilize what was once a contaminated "brownfields" site. The owner of the agricultural land upon which the contaminated soil and groundwater will be applied will have to weigh the benefits offered by the company seeking to apply the contaminated soil and groundwater against any potential harm the application could pose to the productivity of the agricultural land.

Paperwork Requirements

The proposed regulations may result in a substantial increase of paperwork. The Department will have to develop application forms and review complicated proposals. The review and approval will have to be done by experienced Department staff and Department chiefs with expertise in the fields covered by the regulations.

Public Comment Period

Interested persons are invited to submit written comments regarding the proposed regulations within 30 days following publication in the *Pennsylvania Bulletin*.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 10, 2002, the Department submitted a copy of this proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Agriculture and Rural Affairs Committee and the Senate Agriculture and Rural Affairs Committee. In addition to submitting the proposed rulemaking, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRC has objections to any portion of the proposed rulemaking, it will notify the Department within 30 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria that have not been met by the portion of the proposed rulemaking to which an objection is made. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor of objections raised.

Contact Person

Further information is available by contacting the Department of Agriculture, Land Recycling and Environmental Remediation Standards Program, 2301 North Cameron Street, Harrisburg, PA 17110-9408; Attn: John Tacelosky, (717) 772-5217.

Effective Date

This proposed regulations will be effective upon final-form publication in the *Pennsylvania Bulletin*.

SAMUEL E. HAYES, Jr.,
Secretary

Fiscal Note: 2-116. (1) General Fund; (2) Implementing Year 2001-02 is $0; (3) 1st Succeeding Year 2002-03 is $50,000; 2nd Succeeding Year 2003-04 is $53,000; 3rd Succeeding Year 2004-05 is $55,000; 4th Succeeding Year 2005-06 is $57,000; 5th Succeeding Year 2006-07 is

$60,000; (4) 2000-01 Program—$n/a; 1999-00 Program—$n/a; 1998-99—$n/a; (7) General Government Operations; (8) recommends adoption.

Annex A

TITLE 7. AGRICULTURE

PART V. BUREAU OF PLANT INDUSTRY

CHAPTER 130d. APPLICATION OF SOIL AND GROUNDWATER CONTAMINATED WITH AGRICULTURAL CHEMICALS TO AGRICULTURAL LANDS

Subchapter A. GENERAL PROVISIONS

§ 130d.1. Definitions.

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

Act—The Land Recycling and Environmental Remediation Standards Act (35 P. S. §§ 6026.101—6026.908).

Active ingredient—

(i) In the case of a pesticide other than a plant regulator, defoliant or desiccant, an ingredient which will prevent, destroy, repel or mitigate any pest.

(ii) In the case of a plant regulator, an ingredient which, through physiological action, will accelerate or retard the rate of growth or rate of maturation or otherwise alter the behavior of ornamental or crop plants or the product thereof.

(iii) In the case of a defoliant, an ingredient which will cause the leaves or foliage to drop from a plant.

(iv) In the case of a desiccant, an ingredient which will artificially accelerate the drying of plant tissue.

Agricultural chemical—A substance defined as a fertilizer, soil conditioner or plant growth substance under 3 Pa.C.S. Chapter 67 (relating to fertilizer) or a substance regulated under the Pennsylvania Pesticide Control Act of 1973 (3 P. S. §§ 111.21—111.60).

Agricultural chemical facility—A facility where agricultural chemicals are held, stored, blended, formulated, sold or distributed. The term does not include facilities identified by SIC 2879 (available from the Department of Agriculture, Bureau of Market Development, 2301 N. Cameron St., Harrisburg, PA 17110, (717) 787-6041) where agricultural chemicals are manufactured.

Agricultural land or farmland—Land in this Commonwealth that is capable of supporting the commercial production of agricultural crops, livestock or livestock products, poultry products, milk or dairy products, fruit or other horticultural products.

Animal—All vertebrate and invertebrate species, including man and other mammals, birds, fish and shellfish.

Application site—The farmland area approved to receive an application of soil or groundwater contaminated with agricultural chemicals and delineated in a final plan containing and detailing the exact location of the farmland upon which the soil or groundwater contaminated with the agricultural chemicals is to be applied, including the property boundaries of the farmland and each field upon which the contaminated soil or groundwater will be applied.

Applicator—A certified applicator, private applicator, commercial applicator or public applicator.

(i) *Certified applicator.* An individual who is certified under section 16.1, 17 or 17.1 of the Pennsylvania Pesticide Control Act of 1973 (3 P. S. §§ 111.36a, 111.37 and 111.37a) as competent to use or supervise the use or application of any pesticide.

(ii) *Private applicator.* A certified applicator who uses or supervises the use of any pesticide which is classified for restricted use for purposes of producing any agricultural commodity on property owned or rented by him or his employer or, if applied without compensation other than trading of personal services between producers of agricultural commodities, on the property of another person.

(iii) *Commercial applicator.*

(A) A certified applicator (whether or not the applicator is a private applicator with respect to some uses) who uses or supervises the use of any pesticide on the property or premises of another, or on easements granted under State law.

(B) An applicator who uses or supervises the use of any restricted use pesticide on property owned or rented by him or his employer, when not for purposes of producing an agricultural product.

(C) The Secretary may by regulation deem certain types of applicators using any pesticide on their own property or that of his employer as commercial applicators.

(iv) *Public applicator.* A certified applicator who applies pesticides as an employee of the State or its instrumentalities or any local agency.

(v) *Pesticide application technician.* An individual employed by a commercial applicator or governmental agency who, having met the competency requirements of section 16.1 of the Pennsylvania Pesticide Control Act of 1973 is registered by the Secretary to apply pesticides under the direct supervision of a certified applicator.

Background—The concentration of a regulated substance determined by appropriate statistical methods that is present at the site, but is not related to the release of regulated substances at the site.

Cleanup or remediation—To clean up, mitigate, correct, abate, minimize, eliminate, control or prevent a release of a regulated substance into the environment to protect the present or future public health, safety, welfare or the environment, including preliminary actions to study or assess the release.

Contaminated media—Soil and groundwater contaminated with agricultural chemicals and regulated substances or other chemicals generated as a result of remediation activities at agricultural chemical facilities.

DEP—The Department of Environmental Protection of the Commonwealth.

Defoliant—A substance or mixture of substances intended for causing the leaves or foliage to drop from a plant, with or without causing abscission.

Department—The Department of Agriculture of the Commonwealth.

Desiccant—Any substance or mixture of substances intended for artificially accelerating the drying of plant tissue.

Environment—Includes water, air, land and all plants and man and other animals living therein, and the interrelationships which exist among these.

Environmental protection acts—Includes:

(i) The Clean Streams Law (35 P. S. §§ 691.1—691.1001).

(ii) The Municipal Waste Planning, Recycling and Waste Reduction Act (53 P. S. §§ 4001.101—4001.1904).

(iii) The Hazardous Sites Cleanup Act (35 P. S. §§ 6020.101—6020.1305).

(iv) The Low-Level Radioactive Waste Disposal Act (35 P. S. §§ 7130.101—7130.906).

(v) The act of July 13, 1988 (35 P. S. §§ 6019.1—6019.6), known as the Infectious and Chemotherapeutic Waste Disposal Law.

(vi) The Air Pollution Control Act (35 P. S. §§ 4001—4015).

(vii) The Surface Mining Conservation and Reclamation Act (52 P. S. §§ 1396.1—1396.31).

(viii) The Noncoal Surface Mining Conservation and Reclamation Act (35 P. S. §§ 3301—3326).

(ix) The Dam Safety and Encroachments Act (32 P. S. §§ 693.1—693.27).

(x) The Solid Waste Management Act (35 P. S. §§ 6018.101—6018.1003).

(xi) The Nutrient Management Act (3 P. S. §§ 1701—1718).

(xii) 3 Pa.C.S. §§ 6701—6725 (relating to Fertilizer Act).

(xiii) The Pennsylvania Pesticide Control Act of 1973 (3 P. S. §§ 111.21—111.61).

(xiv) The Federal Insecticide, Fungicide and Rodenticide Act of 1947 (7 U.S.C.A. §§ 136—136y).

(xv) The Resource Conservation and Recovery Act of 1976 (42 U.S.C.A. §§ 6901—6986)

(xvi) Other State or Federal statutes relating to environmental protection or the protection of public health.

Equipment—

(i) Any type of ground, water or aerial equipment or contrivance using motorized, mechanical or pressurized power and used to apply any agricultural chemical on land and anything that may be growing, habituating or stored on or in the land.

(ii) The term does not include any pressurized hand-sized household apparatus used to apply any agricultural chemical or any equipment or contrivance of which the person who is applying the agricultural chemical is the source of power or energy in pesticide application.

General use pesticides—A pesticide not classified as a restricted use pesticide.

Groundwater—Water below the land surface in a zone of saturation.

HAL—Health Advisory Level.

Habitats of concern—A habitat defined as one of the following:

(i) Typical wetlands with identifiable function and value, except for exceptional value wetlands as defined in 25 Pa. Code § 105.17 (relating to wetlands).

(ii) Breeding areas for species of concern.

(iii) Migratory stopover areas for species of concern.

(iv) Wintering areas for species of concern.

(v) Habitat for State endangered plant and animal species.

(vi) Areas otherwise designated as critical or of concern by the Game Commission, the Fish and Boat Commission or the Department of Conservation and Natural Resources.

Incorporation—Plowing or injecting contaminated media to a depth of up to 6 inches in a manner that ensures a uniform mixture of top soil and contaminated media.

Label—The written, printed or graphic matter on, or attached to the pesticide, agricultural chemical or device or any of its containers or wrappers.

Labeling—Pertaining to pesticide or other agricultural chemicals means all labels and all other written, printed or graphic matter which includes one of the following:

(i) That which accompanies the pesticide, agricultural chemical or device at any time.

(ii) To which reference is made on the label or in literature accompanying the pesticide, agricultural chemical or device, except to current official publications of the Federal Environmental Protection Agency, the United States Departments of Agriculture and Interior, the Departments of Health and Human Services and Education, State experiment stations, State agricultural colleges and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides or agricultural chemicals.

Land application proposal—An application for permission to apply soil and groundwater contaminated with agricultural chemicals, generated as a result of remediation activities carried out at an agricultural facility, to agricultural land.

MCL—Maximum contaminant level.

Person—An individual, firm, corporation, association, partnership, consortium joint venture, commercial entity, authority, nonprofit corporation, interstate body or other legal entity which is recognized by law as the subject of rights and duties. The term includes the Federal government, State government, political subdivisions and Commonwealth instrumentalities.

Pesticide—A substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest, and any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant.

Plant regulator—

(i) A substance or mixture of substances intended, through physiological action, for accelerating or retarding the rate of growth or rate of maturation, or for otherwise altering the behavior of plants or the produce thereof, but does not include substances to the extent that they are intended as plant nutrients, trace elements, nutritional chemicals, plant inoculants and soil amendments.

(ii) The term does not include any of those nutrient mixtures or soil amendments as are commonly known as vitamin-hormone horticultural products, intended for improvement, maintenance, survival, health and propagation of plants and are not for pest destruction and are nontoxic and nonpoisonous in the undiluted packaged concentration.

Prime farmland—Those lands which are defined by the Secretary of the United States Department of Agriculture in 7 CFR 657 (relating to prime and unique farmlands), and which have been historically used for cropland.

Secretary—The Secretary of the Department.

Tank mix or *spray mix*—A mixture of one or more agricultural chemicals which is diluted with water prior to the time of application.

Treatment—The term shall have the same meaning as given to this term in section 103 of the Hazardous Sites Cleanup Act (35 P. S. § 6020.103).

Under the direct supervision of a certified commercial or public applicator—Unless otherwise prescribed by labeling, means application by a registered pesticide application technician acting under the instructions and control of a certified applicator who is available if and when needed, even though the certified applicator is not physically present at the time and place the pesticide is applied, or application by a crew of noncertified or nonregistered employees working under the instruction and control of a certified commercial or public applicator who is physically present at the job site.

Unreasonable adverse effects on the environment—Any unreasonable risk to man, animal or the environment, taking into account the economic, social and environmental costs and benefits for the use of any pesticide or agricultural chemical.

§ 130d.2. Scope.

(a) The Department has the powers and the duties set forth under section 904(d) of the act (35 P. S. § 6026.904(d)).

(b) This chapter specifies general procedures and rules for persons who solicit or receive approval from the Department to apply soil or groundwater contaminated with agricultural chemicals, generated as a result of remediation activities at agricultural chemical facilities, to agricultural land.

(c) This chapter applies only to the application of soil or groundwater contaminated with agricultural chemicals, generated as a result of remediation activities, at agricultural chemical facilities and applied to agricultural lands. The Department has no power to issue final approval for the land application of contaminated soil or groundwater generated as the result of remediation activities as follows:

(1) That were undertaken at an agricultural chemical facility, where the soil or groundwater is contaminated with chemicals or substances other than agricultural chemicals.

(i) The Department will not approve the land application of soil or groundwater contaminated with chemicals other than agricultural chemicals.

(ii) Where the contaminated soil or groundwater contains chemicals or substances other than agricultural chemicals, the applicant shall receive prior approval for land application of the chemicals or substances from the appropriate regulatory agency or shall proceed under the alternative provisions of the act, which include holding the soil and groundwater onsite under the regulations regarding onsite storage of waste or processing the soil and groundwater in a manner consistent with the type of waste contained in the soil pile or groundwater.

(iii) The applicant is responsible for obtaining any additional permits or approvals necessary for the application of the contaminated media.

(2) That were not undertaken at an agricultural chemical facility.

(3) Where the contaminated soil or groundwater will be applied to land other than agricultural land.

§ 130d.3. Continuing authority.

Nothing in this chapter may be construed to amend, modify, repeal or otherwise alter any provision of any act cited and the regulations pertaining thereto, relating to civil and criminal penalties or enforcement actions and remedies available to the Department or in any way to amend, modify, repeal or alter the authority of the Department to take appropriate civil and criminal action under those statutes.

Subchapter B. DUTIES OF APPLICATORS

Sec.
130d.11. Scope.
130d.12. Reports.
130d.13. Chemical analysis of waste.
130d.14. Waste analysis plan.
130d.15. Application site analysis.
130d.16. Retained recordkeeping.
130d.17. Public notice by applicant.

§ 130d.11. Scope.

A person who solicits or receives approval from the Department to apply soil or groundwater contaminated with agricultural chemicals, generated as a result of remediation activities at agricultural chemical facilities, to agricultural land shall comply with the act, this chapter and the environmental protection acts.

§ 130d.12. Reports.

(a) A person who solicits or receives approval from the Department to apply soil or groundwater contaminated with agricultural chemicals, generated as a result of remediation activities at agricultural chemical facilities, to agricultural land shall file an annual report and a final report with the Department. The annual report and the final report may be combined when the application of the contaminated soil or groundwater is completed in less than 1 year.

(b) The reports shall be submitted on forms prepared by the Department and shall contain the following:

(1) The name, mailing address, county and telephone number of the person applying the contaminated soil or groundwater.

(2) The name, mailing address, county and telephone number of the owner of the agricultural land upon which the contaminated soil or groundwater is being or has been applied.

(3) A copy of the daily and annual records required by this chapter.

(4) A spread sheet on each soil pile or quantity of groundwater applied documenting the following:

(i) The chemical analysis of each soil pile or quantity of groundwater applied.

(ii) The chemical analysis of each field or plot upon which a soil pile or quantity of groundwater was applied.

(iii) The specific field or plot upon which each soil pile or quantity of groundwater was applied.

(iv) The application method used for each soil pile or quantity of groundwater.

(v) The date of incorporation and depth of incorporation of each soil pile.

§ 130d.13. Chemical analysis of waste.

(a) A person who seeks to apply soil or groundwater generated as a result of remediation activities at an agricultural chemical facility, to agricultural land shall perform a detailed analysis of the soil or groundwater that fully characterizes the physical properties and chemical composition of each type of waste that may have been generated at the remediation site.

(b) The analysis of the soil or groundwater sought to be applied to agricultural land shall encompass all types of wastes that are likely to be contained in the soil or groundwater at the remediation site. This includes wastes generated as the result of operations, manufacturing, mixing, storage, distribution and facility or machinery maintenance carried out at the remediation site. The types of wastes likely to be contained in the soil and groundwater shall be gleaned from information available regarding the person or facility at which the remediation activities are taking place and the remediation site including the following:

(1) Records, including sales records, memorandums, invoices, repair and maintenance documents and historical data, of the type of products produced, used and stored by the person or facility being remediated and at the remediation site.

(2) Material safety data sheets or similar sources that may help characterize the types of waste generated.

(3) Notices of past violations or contamination, if applicable.

(4) Information regarding any by-product or chemical produced during or as a result of the manufacturing processes, mixing, storage or distribution of materials by the person or facility being remediated and at the site being remediated.

(5) A copy of the source reduction strategy of the person or facility at which remediation activities are taking place, if applicable.

(c) The person proposing to land apply the contaminated soil or groundwater shall test for all agricultural chemicals and the by-products or derivatives thereof that were ever held, stored, formulated, sold or distributed by the agricultural chemical facility being remediated.

(1) In addition, the person proposing to land apply the contaminated media shall test for any other chemicals or contaminants, such as petroleum products or manufacturing or cleaning solvents which are likely to be in soil or groundwater at the agricultural chemical facility being remediated.

(2) The tests shall be predicated on the manufacturing processes or business carried on by the agricultural facility being remediated and records obtained from that facility.

(3) A verified copy or synopsis of the records, a history of the products and manufacturing processes carried on by the agricultural facility being remediated and the final soil or groundwater, or both, test results shall be attached to and made part of the land application proposal submitted to the Department.

(d) Soil or groundwater, or both, samples from each soil pile or quantity of groundwater sought to be applied to agricultural land shall be tested at a laboratory approved by the Department and shall be done on a parts per million basis. A copy of the test results and a record of laboratory quality control procedures and the use of those procedures shall be submitted to the Department and to the owner of the agricultural land on which the contaminated soil and groundwater is sought to be applied. The submittal of quality control procedures and procedure information may be waived by the Department if the information has been previously submitted to the Department.

(e) The chemical analysis of waste shall include the following:

(1) A waste sampling plan, including quality assurance and quality control procedures. The plan shall ensure an accurate and representative sampling of the contaminated soil or groundwater, or both, the person seeks to apply to agricultural land.

(2) An evaluation of the ability of the agricultural chemicals and constituents contained in the soil or groundwater to leach into the environment.

(3) A demonstration that the contaminated soil or groundwater can be land applied to agricultural land without negatively affecting the productivity of the agricultural land or causing harm to the environment.

§ 130d.14. Waste analysis plan.

The applicant shall develop a waste analysis plan. The waste analysis plan shall cover each chemical, nutrient or constituent proposed to be applied to the agricultural land. The plan shall take into account the chemical analysis required by § 130d.13 (relating to chemical analysis of waste). At a minimum, the plan shall include:

(1) The type of chemicals, nutrients and constituents for which each soil pile or quantity of groundwater will be analyzed and the rationale for the selection of those chemicals, nutrients and constituents.

(2) The test methods that will be used to test for these chemicals, nutrients and constituents.

(3) An explanation of the sampling methods that will be used to obtain an accurate and representative sample of the contaminated soil and groundwater to be analyzed, including quality assurance and quality control procedures. The sampling method used shall assure at least one representative sample is taken from each soil pile or quantity of groundwater proposed to be applied to agricultural land.

(4) Individual soil piles and quantities of groundwater may contain different types and concentrations of chemicals, nutrients and constituents. Therefore, the plan shall include a method for labeling and managing the soil piles and quantities of groundwater to assure they are applied at the proper rates and to the proper areas once they reach the application site.

§ 130d.15. Application site analysis.

The applicant shall develop an application site analysis plan. The application site analysis plan shall cover soil samples taken from the proposed application site. The soil samples taken from the proposed application site shall be tested for each chemical, nutrient or constituent found in the soil or groundwater at the remediated sites that are proposed to be applied to the application site. In addition, the application site analysis shall delineate the soil types found within the proposed application area. The plan shall take into account the chemical analysis of waste required by § 130d.13 (relating to chemical analysis of waste) and the waste analysis required by § 130d.14 (relating to waste analysis plan). At a minimum, the application site analysis plan shall include:

(1) A chemical, nutrient and constituent analysis of each field or plot upon which a soil pile or quantity of groundwater from the remediated agricultural facility is to be applied.

(2) The test results from soil samples taken from each field at the proposed application sight where the contaminated media is to be applied.

(3) The person proposing to land apply the contaminated soil or groundwater shall test for all agricultural chemicals, the by-products or derivatives thereof, and each chemical, nutrient or constituent that was found to be present in the contaminated soil or groundwater, or both, at the agricultural chemical facility being remediated which are to be applied at the proposed application site.

(4) Soil samples from each field or plot upon which the contaminated soil or groundwater, or both, from the remediated agricultural facility is to be applied shall be tested at a laboratory approved by the Department and shall be done on a parts per million basis. A copy of the test results and a record of laboratory quality control procedures and the use of those procedures shall be submitted to the Department and to the owner of the agricultural land on which the contaminated soil and groundwater is sought to be applied. The submittal of quality control procedures and procedure information may be waived by the Department if the information has been previously submitted to the Department.

(5) Documentation of the soil types found within the proposed application area.

§ 130d.16. Retained recordkeeping.

(a) *General.* An applicant receiving permission to apply soil or groundwater contaminated with agricultural chemicals to agricultural land, shall maintain the following records:

(1) The daily operation records required by § 130d.68 (relating to daily operational records).

(2) The annual operation records required by § 130d.69 (relating to annual operational report).

(3) The signed agreement between the person responsible for the land application and the owner of the land upon which the soil or groundwater contaminated with agricultural chemicals will be applied.

(4) The right of entry agreement.

(b) *Inspection and audit.* The records and documents shall be available for inspection or audit at reasonable times by the Department or its authorized agents.

(c) *Retention time period.* The records and documents shall be retained by the person responsible for the application of the soil and groundwater for 5 years after the date on which the site closure plan and final report were submitted and approved by the Department.

§ 130d.17. Public notice by applicant.

The applicant shall comply with the notice requirements established by the Pennsylvania Pesticide Control Act of 1973 (3 P. S. §§ 111.21—111.61) and the regulations in Chapter 128 (relating to pesticides).

Subchapter C. GENERAL REQUIREMENTS FOR PERMISSION TO APPLY SOIL AND GROUNDWATER CONTAMINATED WITH AGRICULTURAL CHEMICALS TO AGRICULTURAL LAND

Sec.
130d.21. General requirements for land application proposal form.
130d.22. Insurance.
130d.23. Right of entry and agreement with landowner.
130d.24. Identification of interest.
130d.25. Compliance information.
130d.26. Environmental assessment.

§ 130d.21. General requirements for land application proposal form.

(a) *Submittal.* Land application proposals shall be submitted in writing, on forms provided by the Department. Persons submitting land application proposals shall submit them to the Department at the address on the land application proposal form developed by the Department.

(b) *Documentation.* Each land application proposal shall include and have attached thereto, information, maps, plans, specifications, designs, analyses, test reports and other data as may be required by the Department to determine compliance with this chapter.

(c) *Information.* Information in the land application proposal shall be current, presented clearly and concisely and supported by appropriate references to technical and other written material made available to the Department.

(d) *Affirmation of chemical analysis and waste analysis plan.* The chemical analysis of waste and the waste analysis plan shall be supported by an affirmation of sworn statement, signed by the applicant, affirming that all known and likely chemicals, nutrients and constituents at the remediation site were tested for and the tests were performed in accordance with the procedures and protocols in the land application proposal.

(e) *Affirmation of operation plan.* The operating plan, setting forth the parameters, rates of application and methods to be employed for the land application of the soil or groundwater contaminated with agricultural chemicals, shall be affirmed by an appropriate certified applicator.

§ 130d.22. Insurance.

The applicant shall comply with the insurance requirements established by the Pennsylvania Pesticide Control Act of 1973 (3 P. S. §§ 111.21—111.61) and its regulations in Chapter 128 (relating to pesticides). The insurance policy shall be effective prior to the initiation of the application of the soil or groundwater contaminated with agricultural chemicals to the agricultural land and shall remain effective until final approval and implementation of the approved applicant's closure plan. See Subchapter H (relating to closure).

§ 130d.23. Right of entry and agreement with landowner.

(a) Each land application proposal shall contain a description of the documents upon which the applicant bases his legal right to enter onto, operate on and apply

soil and groundwater contaminated with agricultural chemicals on the proposed application site.

(b) The land application proposal shall provide one of the following:

(1) A copy of a signed consent agreement between the applicant and the current owner of the land upon which the soil or groundwater contaminated with agricultural chemicals will be applied.

(2) A copy of the document of conveyance that expressly grants or reserves the applicant the right to enter onto, operate on and apply soil and groundwater contaminated with agricultural chemicals on the current land owner's property and an abstract of title relating the documents to the current landowner.

(c) Each land application proposal shall contain, upon a form prepared and furnished by the Department, the irrevocable written consent of the landowner to the Commonwealth and its authorized agents to enter the proposed application site. The consent shall be applicable prior to the initiation of operations, for the duration of operations at the application site, and for up to 3 years after final closure for the purpose of inspection and monitoring and maintenance or abatement measures deemed necessary and ordered by the Department to carry out the purposes of the act and this chapter.

§ 130d.24. Identification of interest.

(a) Each land application proposal shall contain the following information:

(1) The legal names, addresses and telephone numbers of:

(i) The applicant.

(ii) The certified applicator.

(iii) Any contractor, if the contractor is a person other than the applicant.

(2) The name, address and telephone number of the current owner of record of the agricultural land on which the applicant intends to apply the soil and groundwater contaminated with agricultural chemicals.

(b) Each land application proposal shall contain a statement of whether the applicant is an individual, corporation, partnership, limited partnership, limited liability company, proprietorship, municipality, syndicate, joint venture or other association or entity. For applicants other than sole proprietorships, the land application proposal shall contain the following information, if applicable:

(1) The name and address of every officer, general and limited partner, director and other persons performing a function similar to a director of the applicant.

(2) For corporations, the names and addresses of the principal shareholders.

(3) For corporations, the names, principal places of business and the Internal Revenue Service tax identification numbers of the applicant corporation, United States parent corporations of the applicant, including ultimate parent corporations, and all United States subsidiary corporations of the applicant and the applicant's parent corporations.

(4) The names and addresses of other persons or entities having or exercising control over any aspect of the land application of the soil and groundwater contaminated with agricultural chemicals, including associates and agents. This shall include a description of the duties and responsibilities and the control to be exercised by these persons.

(c) Each land application proposal shall list the additional permits or approvals necessary for the land application of the contaminated soil and groundwater to the proposed application site. The land application proposal shall set forth the status of those permits or approvals.

(d) Each land application proposal shall set forth any previous experience of the applicant with regard to land application of agricultural waste or soil or groundwater contaminated with agricultural or other chemicals. The applicant shall identify the location of the sites, the type of operation undertaken and the ultimate outcome of the operations.

§ 130d.25. Compliance information.

The land application proposal shall contain proof that the proposed land application will comply with all other Federal, State and local laws, rules and ordinances.

§ 130d.26. Environmental assessment.

(a) *Impacts.* The land application proposal shall include an environmental assessment setting forth a detailed analysis of the potential impact of the application of the soil and groundwater contaminated with agricultural chemicals to the proposed agricultural site. The analysis shall consider the potential impact on the site itself, water uses and land uses, contiguous land, the environment and public health and safety. The applicant shall consider environmental features such as streams, wells, local parks, special protected watersheds, wetlands and habitats of concern.

(b) *Harms.* The land application proposal shall include an environmental assessment detailing known and potential environmental harms of the proposed land application including any short-term or long-term effects or degradation to the fertility or quality of the agricultural land upon which the soil or groundwater contaminated with agricultural chemicals will be applied. The applicant shall consider drift and leaching of the agricultural chemicals to be applied.

(c) *Mitigation.* The land application proposal shall include a mitigation plan. The mitigation plan shall delineate the steps the applicant will take in the event the application of the soil or groundwater contaminated with agricultural chemicals has a negative impact on the application site or the environment or causes harm or degradation to the application site.

(d) *Review.* The Department will review the environmental assessment and mitigation plans and determine whether there are additional harms and whether all known environmental harms have been assessed and will be mitigated. The Department will evaluate each mitigation measure and will collectively review mitigation measures to insure that individually and collectively they adequately protect the farmland to which the soil and groundwater contaminated with agricultural chemicals is being applied, the environment and the public health and safety.

Subchapter D. LAND PROPOSAL REVIEW PROCEDURES

Sec.
130d.31. Criteria for approval or denial.
130d.32. Receipt of land application proposal and completeness review.
130d.33. Review period.
130d.34. Review process.

§ 130d.31. Criteria for approval or denial.

(a) *Acceptance, approval, denial, modification and rescission.* In accordance with the authority in section 904(b) of the act (35 P. S. § 6026.904(b)), the Department will accept and review only those proposals which seek to apply soil of groundwater contaminated with agricultural chemicals, generated as a result of remediation activities at agricultural chemical facilities, that are to be applied to agricultural land.

(1) To carry out the duties in section 904(d) of the act, the Department will exercise its power to approve, deny or request modification of any proposal to apply soil or groundwater contaminated with agricultural chemicals generated as a result of remediation activities at agricultural chemical facilities that is to be applied to agricultural land.

(2) The Department may rescind an approval of a land application proposal if the person applying the contaminated soil or groundwater violates any provision of the act or this chapter or if it discovers a mistake or falsification made in the land application proposal, the test results, the sampling techniques or any part of the operation and actual application of the soil or groundwater to the agricultural land.

(b) *Affirmation of facts.* A land application proposal will not be approved unless the applicant affirmatively demonstrates to the Department's satisfaction that the following conditions are met:

(1) The land application proposal is complete, accurate and meets the standards established by the act and this chapter.

(2) The land application of the soil and groundwater contaminated with agricultural chemicals detailed in the land application proposal can be feasibly accomplished, under the techniques and facts set forth therein and as required by the act and this chapter.

(3) The land application of the soil and groundwater contaminated with agricultural chemicals detailed in the land application proposal will not cause harm to the environment, the health, safety and welfare of the general public, or degrade or pollute the agricultural land to which it will be applied.

(4) The land application of the soil and groundwater contaminated with agricultural chemicals detailed in the land application proposal will not violate the Pennsylvania Pesticide Control Act of 1973 (3 P. S. §§ 111.21—111.61), 3 Pa.C.S. §§ 6701—6725 (relating to Fertilizer Act), the Nutrient Management Act (3 P. S. §§ 1701—1718) or the Federal Insecticide, Fungicide and Rodenticide Act of 1947 (7 U.S.C.A. §§ 136—136y).

(c) Soil or groundwater containing contaminants other than agricultural chemicals. Where the soil or groundwater sought to be applied contains chemicals other than agricultural chemicals, the Department may approve the land application proposal contingent upon the applicant obtaining the necessary approvals or permits (when applicable) to land apply those chemicals from the appropriate agency.

§ 130d.32. Receipt of land application proposal and completeness review.

(a) *Receipt of land application proposal and completeness review.* After receipt of a land application proposal, the Department will determine whether the land application proposal is administratively complete.

(b) *Receipt.* For purposes of this section, "receipt of application" does not occur until the land application proposal is deemed administratively complete.

(c) *Administratively complete land application proposal.* A land application proposal is administratively complete if it contains all the necessary information, approvals, maps and other documents required by this chapter.

§ 130d.33. Review period.

(a) *Administratively complete land application proposal.* If the land application proposal is administratively complete, the Department will, within 60 days of receiving the administratively complete land application proposal, render a decision to approve, approve with modifications or deny the land application proposal. The Department will mail the applicant a written notice of approval or disapproval. A notice of disapproval will state the reasons for the Department's disapproval of the land application proposal.

(b) *Incomplete land application proposal.* When the land application proposal is not complete, the Department will send a written notice and a request for additional information and documentation to the applicant. When additional information and documentation is requested, the Department's review and consideration of the land application proposal will cease until the requested material is received. Upon receipt of all the additional information and documentation requested, the Department's 60-day review period begins. The Department will deny the land application proposal if the applicant fails to provide the additional information and documentation within 90 days of mailing of the request for additional information and documentation.

(c) *Failure of Department to comply with review period.* Failure by the Department to comply with the timetable established in this section will not be construed or understood to constitute grounds for an automatic approval of a land application proposal.

§ 130d.34. Review process.

(a) The Department will review all proposals for land application of soil or groundwater contaminated with agricultural chemicals, generated as the result of remediation activities at agricultural chemical facilities, to be applied to agricultural land.

(1) The Department will review all land application proposals with regard to the land application of agricultural chemicals only.

(2) If the laboratory chemical and waste analysis (required by §§ 130d.13 and 130d.14 (relating to chemical analysis of waste; and waste analysis plan)) results reveal the presence of chemicals other than agricultural chemicals, the Department will review the land application proposal (in accordance with this chapter) with respect to the approval or denial of the application of the agricultural chemicals contained in the soil or groundwater sought to be applied, but will not give final approval to the land application proposal.

(3) The Department will issue a written notice and request for additional information and documentation. The notice will contain an opinion with regard to the application of the agricultural chemicals contained in the soil and groundwater sought to be land applied. The request for additional information and documentation will require the applicant to obtain documentation of the permits and approvals necessary for the land application of the chemicals other than the agricultural chemicals before the Department will issue a final approval of the land application proposal.

(b) The decision of the Department to approve or deny a land application proposal is final with regard to that portion of the proposal that deals with application of the soil or groundwater contaminated with agricultural chemicals.

Subchapter E. GENERAL REQUIREMENTS FOR LAND APPLICATION OF SOIL AND GROUNDWATER CONTAMINATED WITH AGRICULTURAL CHEMICALS

Sec.
130d.41. General.
130d.42. Operating plan.
130d.43. Maps and related information.

§ 130d.41. General.

Soil or groundwater contaminated with agricultural chemicals may be land applied under the following terms and conditions:

(1) Written authorization from the Department.

(2) The soil and groundwater sought to be applied to agricultural land are contaminated with agricultural chemicals and result from the remediation of an agricultural chemical facility as defined under the act.

(3) A signed agreement between the person responsible for the land application and the owner of the land upon which the soil or groundwater contaminated with agricultural chemicals will be applied. When the person responsible for the land application of the soil or groundwater contaminated with agricultural chemicals is the land owner, an agreement is not required.

(4) Proper right of entry authorization.

(5) Compliance with this subchapter.

(6) Compliance with Subchapter B (relating to duties of applicators).

(7) Compliance with Subchapter C (relating to general requirements for permission to apply soil and groundwater contaminated with agricultural chemicals to agricultural land).

(8) Compliance with Subchapter D (relating to land proposal review procedures).

(9) Submission of an operating plan complying with the standards in this subchapter.

(10) Submission of all maps and related information required by this subchapter.

(11) Compliance with the operating requirements established by Subchapter G (relating to general operating requirements for land application of soil and groundwater contaminated with agricultural chemicals).

(12) Compliance with the closure requirements delineated in Subchapter H (relating to closure).

§ 130d.42. Operating plan.

The land application proposal shall contain an operating plan setting forth the following information:

(1) The address and a description of the remediation site from which the contaminated soil or groundwater to be applied to the agricultural land originated or was generated.

(2) The address and a description of the agricultural site to which the contaminated soil or groundwater will be applied.

(3) The general operating plan for the proposed operation, including the proposed life of the operation, the origin and chemical, nutrient and constituent make up of each soil pile or quantity of groundwater to be applied.

(4) The proposed application rate per acre, which shall be consistent with standards established by this chapter, including standards established by the Solid Waste Management Act (35 P. S. §§ 6018.101—6018.1003), Nutrient Management Act (3 P. S. §§ 1701—1718), 3 Pa.C.S. §§ 6701—6725 (relating to Fertilizer Act), Pennsylvania Pesticide Control Act of 1973 (3 P. S. §§ 111.21—111.61) and the Federal Insecticide, Fungicide and Rodenticide Act of 1947 (7 U.S.C.A. §§ 136—136y).

(5) The proposed methods, techniques and types of applications, which shall be consistent with standards established by this chapter, including standard established by the Solid Waste Management Act, Nutrient Management Act, Fertilizer Act, Pennsylvania Pesticide Control Act of 1973, Federal Insecticide, Fungicide and Rodenticide Act of 1947 and the Federal Food, Drug, and Cosmetic Act (21 U.S.C.A. §§ 301—392).

(6) The proposed dates of application.

(7) The equipment to be used for site preparation, land application of the contaminated soil and groundwater and incorporation of the contaminated soil.

(8) The use that will be made of the proposed application area and the crops that will be planted on each application plot for 3 years following the application.

(9) A plan to control drift or migration of the chemicals, nutrients and constituents in the soil and groundwater being applied.

(10) Information necessary to show compliance with Subchapter G (relating to general operating requirements for land application of soil and groundwater contaminated with agricultural chemicals).

§ 130d.43. Maps and related information.

(a) *Boundary map.* A land application proposal shall contain a detailed map including necessary narrative descriptions, which show the following:

(1) The boundaries and the names of the present owners of record of the land constituting the proposed application site and a description of all title, deed or usage restrictions, including easements, right-of-way, covenants and other property interests, affecting the proposed application site.

(2) The boundaries of the land where soil and groundwater contaminated with agricultural chemicals will be applied over the estimated total life of the proposed application, including the boundaries of land that will be affected in each sequence of land application activity.

(3) The map shall contain a grid showing the exact field or location where each soil pile or quantity of groundwater contaminated with agricultural chemicals will be applied.

(4) The location and name of public and private water supplies and wells within the proposed application site and adjacent areas that are within the setback requirements in Subchapter G (relating to general operating requirements for land application of soil or groundwater containing agricultural chemicals).

(b) *Soils map.* A land application proposal shall contain a United States Department of Agriculture Soil Conservation Service soils map or other reliable data if current soils maps are unavailable, which shows the location and types of soils within the proposed application area.

Subchapter F. GENERAL REQUIREMENTS AND EXCEPTIONS FOR USE AND APPLICATION OF GROUNDWATER CONTAMINATED WITH AGRICULTURAL CHEMICALS AS TANK MIX

Sec.
130d.51. General requirements.
130d.52. General exceptions.

§ 130d.51. General requirements.

(a) *Special land application proposal form.* A person seeking approval to utilize and apply groundwater contaminated with agricultural chemicals generated as a result of remediation activities at an agricultural chemical facility as tank mix, shall apply in writing on a special land application proposal form prepared by the Department. The person seeking permission shall attach the chemical and waste analysis required by this chapter to the special land application proposal form.

(b) *Approval of special land application proposal form.* When the Department permits groundwater contaminated agricultural chemicals, generated as a result of remediation activities at an agricultural chemical facility, to be applied to agricultural land, the applicant shall comply with this chapter except those expressly waived by the Department in its letter of approval.

(c) *Denial of special land application proposal form.* When the Department denies a request to utilize and apply groundwater contaminated with agricultural chemicals as tank mix, the person seeking approval may still submit a land application proposal form under the standard provisions of this chapter. The Department's letter of denial will set forth the reasons for the denial.

(d) *Ongoing testing and monitoring requirement.* When the Department approves the utilization and application of groundwater contaminated with agricultural chemicals, the approved applicant shall be required to conduct ongoing testing and monitoring of the groundwater and to submit chemical and waste analysis plans on an annual basis, unless testing is required by the Department on a more regular basis, until a final closure plan has been submitted to the Department and pumping and application of the groundwater contaminated with agricultural chemicals has ceased. This requirement applies to each well or other source at the site being remediated, from which the groundwater contaminated with agricultural chemicals to be utilized as tank mix is being drawn or pumped.

(e) *Cancellation of approval to utilize and apply groundwater contaminated with agricultural chemicals as tank mix.* The Department will cancel the approval to utilize and apply groundwater contaminated with agricultural chemicals as tank mix if the groundwater contamination levels rise above the Environmental Protection Agency (EPA) published MCL and HAL standards or new contaminants are found. The utilization and land application of the contaminated groundwater as tank mix shall immediately cease. The previously approved applicant/applicator will no longer fall under the exception established by this subchapter and delineated in the Department's letter of approval. The applicant/applicator shall be required to comply with the standard land application requirements of this chapter. Land application of the groundwater contaminated with agricultural chemicals may not resume until the applicant/applicator can demonstrate compliance with this chapter.

§ 130d.52. General exceptions.

(a) When the chemical and waste analysis results manifest that the types and concentrations levels of agricultural chemicals contained in the quantity of groundwater, generated as a result of remediation activities at an agricultural chemical facility, sought to be land applied are at levels below Environmental Protection Agency (EPA) published MCL and HAL standards, the Department may allow the groundwater to be utilized as tank mix.

(b) When the Department permits groundwater contaminated with agricultural chemicals to be utilized as tank mix, the Department may waive certain provisions of this chapter. The Department will set forth the waivers specifically in its letter of approval.

(c) The Department will not waive the following provisions:

(1) Section 130d.13 (relating to chemical analysis of waste).

(2) Section 130d.14 (relating to waste analysis plan).

(3) Section 130d.21 (relating to general requirements for land application proposal form).

(4) Section 130d.22 (relating to insurance).

(5) Section 130d.23 (relating to right of entry and agreement with landowner).

(6) Section 130d.24 (relating to identification of interest).

(7) Section 130d.25 (relating to compliance information).

(8) The provisions in Subchapter D (relating to land proposal review procedures).

(9) Section 130d.61 (relating to general provisions).

(10) Section 130d.62 (relating to standards for land application of soil and groundwater contaminated with agricultural chemicals).

(11) Section 130d.66 (relating to prohibited applications).

Subchapter G. GENERAL OPERATING REQUIREMENTS FOR LAND APPLICATION OF SOIL AND GROUNDWATER CONTAMINATED WITH AGRICULTURAL CHEMICALS

Sec.
130d.61. General provisions.
130d.62. Standards for land application of soil and groundwater contaminated with agricultural chemicals.
130d.63. Land application rates and procedures.
130d.64. Additional application requirements.
130d.65. Limitations on land application of soil and groundwater contaminated with agricultural chemicals.
130d.66. Prohibited applications.
130d.67. Nuisance minimization and control.
130d.68. Daily operational records.
130d.69. Annual operational report.

§ 130d.61. General provisions.

An approved applicant shall comply with the act and this chapter and shall comply with the land application standards, rates, procedures limitations and prohibitions in this subchapter and the applicant's approved land application proposal.

§ 130d.62. Standards for land application of soil and groundwater contaminated with agricultural chemicals.

Persons seeking to apply soil or groundwater contaminated with agricultural chemicals resulting from the remediation of an agricultural facility to agricultural land shall comply with the following:

(1) The land application and application rate shall be consistent with labeling requirements for all pesticide active ingredients found in the soil or groundwater being land applied and the Department may require a safety factor of one-half the label application rate. With regard to fertilizer found in the soil or groundwater being land applied, the application shall be consistent with labeling and standards established by the *Pennsylvania Agronomy Guide.*

(2) The cumulative effect of all pesticides applied may not exceed the labeling rate for any of the pesticides contained in the soil pile or quantity of groundwater contaminated with agricultural chemicals.

(3) The cumulative effect of all fertilizer found in the soil or groundwater being land applied shall be consistent with and not exceed the standards established by the *Pennsylvania Agronomy Guide.*

(4) Proper application techniques (as suggested by the manufacturer and as set forth in this subchapter) shall be set forth in the applicant's operational plan and followed.

(5) Consultants or other individuals directing land application activities shall be certified in the appropriate use category to apply pesticides. A certified applicator is required to be onsite at all times during the application of pesticide contaminated soils.

(6) The landowner shall account for the amount of nutrients being applied to the land as set forth in the *Pennsylvania Agronomy Guide.*

(7) Individual soil piles and groundwater contaminated with agricultural chemicals may not be consolidated for application without prior written approval from the Department and the landowner.

(8) The Department may approve the application of minor amounts of additional agricultural chemicals, not found in background levels at the proposed application site, to the proposed application site in cases where the application rate will not result in crop injury, illegal crop residues, polluting or fouling of the agricultural land or cause unreasonable adverse effects on the environment. The Department will not approve an application of contaminated soil or groundwater where the application is likely to result in crop injury, illegal crop residues, polluting or fouling of the agricultural land or cause unreasonable adverse affects on the environment.

(9) The application of agricultural chemicals shall be in compliance with the Pennsylvania Pesticide Control Act of 1973 (3 P. S. §§ 111.21—111.61), the Federal Insecticide, Fungicide and Rodenticide Act of 1947 (7 U.S.C.A. §§ 136—136y), the *Pennsylvania Agronomy Guide* and any applicable nutrient management plan.

(10) With regard to the approval or denial of the land application of agricultural chemicals which have been banned, cancelled or suspended, the Department will follow the criteria and rules and regulations established under the Pennsylvania Pesticide Control Act of 1973, the Federal Insecticide, Fungicide and Rodenticide Act of 1947 and the Resource Conservation and Recovery Act of 1976 (42 U.S.C.A. §§ 6901—6986).

(11) Land application of incompatible agricultural chemicals is prohibited as required by the Pennsylvania Pesticide Control Act and the Federal Insecticide, Fungicide and Rodenticide Act.

(12) The person responsible for the land application of the soil and groundwater contaminated with agricultural chemicals shall attest that all local ordinances and issues have been complied with and resolved before the Department will issue its approval of the land application.

(13) Upon completion of an approved land application project, a final report, containing information required by this chapter, shall be submitted to the Department.

§ 130d.63. Land application rates and procedures.

(a) *General provisions for application rate.* When reviewing a land application proposal to determine if the applicant properly calculated the application rate and acreage needed to properly apply soil and groundwater contaminated with agricultural chemicals, the Department will consider the following, which shall be addressed in the applicant's operation plan:

(1) The type and concentration of each agricultural chemical contained in each soil pile or quantity of groundwater reported by the applicant in the land application proposal submitted to the Department.

(2) The excavated soil type indicated by the applicant in the land application proposal submitted to the Department.

(3) The total volume of excavated soil or contaminated groundwater in each individual soil pile or quantity.

(4) The proposed application site crop for the upcoming growing season and a projected 3 year crop rotation plan including the use of the land, type of crop to be grown and the use of the crops. The same crop may be planted year after year with the approval of the Department.

(5) The concentration, in parts per million, of the active ingredients in each soil pile or quantity of groundwater contaminated with agricultural chemicals.

(6) The application rate for the selected site and crop based on the current labeling for each pesticide found. If fertilizers are being applied, the Department will follow the recommendations for fertilizer applications for specific crops listed in the latest edition of the *Pennsylvania Agronomy Guide.*

(7) A conversion factor (37,000) shall be used. The calculation considers the concentration of parts per million and the conversion of ft^3 to yd^3.

$$(3ft)^3/yd^3 \div 1{,}000{,}000 = 1/37037.037$$

The result of the calculation is the total acreage required for land application for each individual agricultural chemical. A safety factor included in this calculation considers the cumulative effect of all the pesticides detected in the soil pile or quantity of groundwater. The acres required for each individual contaminant found in each soil pile or quantity of groundwater contaminated with agricultural chemicals are summed. This value is the uniform soil application rate. Soil application rate (Volume of excavated soil or contaminated groundwater ÷ Total acres required) (Yds^3/Acre).

(8) The application credits that shall be taken and the additive loading effect of the soil or groundwater contaminated with agricultural chemicals. The rate will be calculated using the following formula. (Land required for an individual contaminant × Total acres required) ÷ Product label rate = Active ingredient application credit (lbs/Acres)).

(b) *Application rate considerations and procedures.* The following shall be addressed in the applicant's operation plan and will be considered by the Department when reviewing all land application proposals:

(1) *Application rate.* The application rate as compared to the label rates of the various compounds present in

each soil pile or quantity of groundwater contaminated with agricultural chemicals shall adhere to and not exceed the labeling rate for each compound present.

(2) *Total loading.* All pesticides detected in a single soil pile or quantity of groundwater contaminated with agricultural chemicals shall be considered when developing soil application rates. The cumulative effect of all the pesticides can be considered by summing the acreage needed for each individual pesticide to develop the total acreage required. Where more than one pesticide is present in a soil pile or quantity of groundwater the soil pile or groundwater shall be applied at the most restrictive labeling rate. Nutrients shall be considered separately from pesticides when developing soil application rates.

(3) *Incorporation.* The soil and groundwater contaminated with agricultural chemicals shall be applied in a manner that assures an even distribution of agricultural chemicals within the soil pile or quantity of groundwater and ensures the application rate will be uniform across the field application site. In addition, where incorporation is necessary, the incorporation techniques used for soil piles contaminated with agricultural chemicals shall achieve a mixture of top soil and contaminated media and shall ensure the contaminated media is incorporated to a depth of up to 6 inches.

(4) *Top soil considerations.* The applicant shall set forth procedures to assure that valuable topsoil will not be lost, stripped off the land or buried under the contaminated soil to be applied.

(5) *Uniform application rate.* The applicant shall set forth procedures to assure the application rate will be uniform across the field application area or as close to uniform as is possible given the current technology, machinery and application techniques available.

(6) *Multiple applications of pesticides.* The sum of pesticide active ingredient applied through any land application activities and other applications in the same season (or following season, in the case of fall or postharvest land applications) may not exceed labeling rate restrictions for any pesticide applied.

(7) *Multiple applications of nutrients.* The total amount of nutrients applied through the land application plus other commercial fertilizers, manure and nutrient applications shall be set forth in the operation plan in the land application proposal. In addition, if the nutrients are being applied to an agricultural site that is required to have a nutrient management plan, under the Nutrient Management Act (3 P. S. §§ 1701—1718) the applicant shall attest that the application of the additional nutrients contained in the soil piles or groundwater to be applied conform with and do not violate the standards established in the applicant's nutrient management plan. If the application requires a revision to the nutrient management plan, the applicant must attach a notification from the State Conservation Commission attesting to the fact the nutrient management plan has been revised to account for the additional nutrients and the revised plan has received final approval.

(c) *Timetable for land application of soil and groundwater contaminated with agricultural chemicals.* Land application of soil and groundwater contaminated with agricultural chemicals must be applied between April 1 and September 30 of each year, unless otherwise approved in writing by the Department.

(d) *FIFRA and Pennsylvania Pesticide Control Act of 1973.* Application, application rates and application techniques used to land apply soil piles and quantities of groundwater contaminated with agricultural chemicals may not violate the Federal Insecticide, Fungicide and Rodenticide Act of 1947 (7 U.S.C.A. §§ 136—136y) or the Pennsylvania Pesticide Control Act of 1973 (3 P. S. §§ 111.21—111.61).

§ 130d.64. Additional application requirements.

In addition to the application requirements in §§ 130d.62 and 130d.63 (relating to standards for land application of soil and groundwater contaminated with agricultural chemicals; and land application rates and procedures) the operating plan shall include the following:

(1) A projected 3-year crop rotation plan for each field or plot upon which soil or groundwater contaminated with agricultural chemicals is to be applied, including type of crop to be grown, planting sequence, crop planting technique to be used, crop and land management and use of crops grown.

(2) A nutrient and pesticide management plan for the site, including:

(i) A description of the kind and amount of fertilizer, soil conditioner or pesticide that will be placed on the site in addition to the soil or groundwater contaminated with agricultural chemicals.

(ii) The number and kind of animals on the farm or property and the total nutrient value of the manure produced by those animals, and the location (field or plot) where the manure is to be placed.

(iii) An explanation and analysis of the effect on the soil and crops from the additional nutrients, soil conditioners or pesticides that would be supplied by the soil and groundwater contaminated with agricultural chemicals.

(iv) The benefit to the soil, crops or farming operation that the soil and groundwater contaminated with agricultural chemicals would provide.

§ 130d.65. Limitations on land application of soil and groundwater contaminated with agricultural chemicals.

When reviewing a land application proposal the Department will consider the following which shall be addressed in the applicant's operation plan:

(1) *Labeling rates.* Pesticide contaminated soil and groundwater shall be applied to a site or crop, or both, in a manner consistent with labeling directions and requirements for that pesticide.

(2) *Annual crops.* In the case of annual crops, the crop shall be grown on the application area during the season that the application is made.

(3) *Postharvest application.* If land application is conducted in the fall or postharvest, the crop following the application must be suitable for the labeling requirements of the agricultural chemicals contained in the soil and groundwater to be land applied.

(4) *Site suitability.* Site suitability will be based on the land application proposal. The results of the reports contained within the land application proposal will be combined and shall evidence that the rates of application of the soil and groundwater contaminated with agricultural chemicals will comply with labeling requirements, will not exceed labeling rates, will not exceed additivity requirements and will not cause damage to the proposed application site or adjacent land or water. General slope, drainage characteristics, presence of shallow groundwa-

ter, distance to surface waters and suitability for agricultural purposes are some of the characteristics that will be considered.

(5) *Application of soil piles.* To allow for proper incorporation of contaminated soil piles, the soil piles may not be applied overtop of the soil at the application site at a thickness greater than 1/2 inch. The soil piles shall be incorporated into the soil at the application site to a depth of up to 6 inches, unless otherwise authorized by the Department.

(6) *Application techniques.* Soil and groundwater contaminated with agricultural chemicals may not be applied by any type of spray irrigation equipment or by aerial equipment or any other technique that may cause or lead to excessive drift of the agricultural chemicals contained in the soil or groundwater unless the person has demonstrated in the land application proposal the equipment or technique will not cause aerosol transport offsite or onto a field that will contain an incompatible crop, and the Department has approved the machinery or technique.

(7) *Ponding and standing accumulations.* Soil and groundwater contaminated with agricultural chemicals shall be applied to the soil surface and incorporated in a manner that prevents ponding or standing accumulations of contaminated soil overtop of the topsoil at the application site.

(8) *Pasturing or grazing.* Livestock may not be pastured or allowed to graze on areas where soil and groundwater contaminated with agricultural chemicals has been applied 5 years subsequent to the application, unless otherwise approved by the Department in writing.

(9) *Land use and crops.* The use that will be made of the proposed application area and the crops that will be grown on the site subsequent to the application of the soil and groundwater contaminated with agricultural chemicals, shall be consistent with the labeling requirements of the pesticides contained in the soil piles or groundwater to be applied.

§ 130d.66. Prohibited applications.

(a) *General.* The following applications of soil or groundwater contaminated with agricultural chemicals are prohibited, unless specifically authorized by the Department in writing:

(1) An application which would violate any provisions of act, environmental protection acts or this chapter.

(2) An application to any "preserved farmland" as defined in 4 Pa. Code Chapter 7, Subchapter W (relating to agricultural land preservation policy).

(3) An application to soil designated as "prime farmland" as defined under 7 CFR 657 (relating to prime and unique farmland).

(4) An application which would render the farmland unusable for agricultural purposes or would cause unreasonable adverse effects on the environment.

(5) An application which would cause the total annual application amounts of an agricultural chemical to exceed the respective labeling application rate on any application site.

(6) An application that does not comply with existing laws and regulations.

(7) An application where the soil or groundwater contaminated with agricultural chemicals contains a constituent in such high concentrations that it requires a loading rate which would give the media little or no nutrient or soil conditioning value or little or no pesticide value when applied to the proposed application site.

(b) *Setback areas where land application is prohibited.* The operation plan shall address how the applicant intends to comply with this subsection. Soil and groundwater contaminated with agricultural chemicals may not be applied in the following areas:

(1) Within 100 feet of an intermittent, ephemeral or perennial stream.

(2) Within 300 feet of a water source unless the current owner of the water source has provided a written waiver consenting to the activities closer than 300 feet.

(3) Within 100 feet of a sinkhole or diversion ditch.

(4) Within 100 feet of an exceptional value wetland.

(5) Within 100 feet measured horizontally from an occupied dwelling, unless the current owner thereof has provided a written waiver consenting to the activities closer than 100 feet. The waiver shall be knowingly made and separate from a lease or deed unless the lease or deed contains and explicit waiver from the owner.

§ 130d.67. Nuisance minimization and control.

The approved applicant shall control and minimize conditions not otherwise prohibited by this chapter that are harmful to the environment or public health, or which create safety hazards, odors, dust, noise, unsightliness and other public nuisances.

§ 130d.68. Daily operational records.

(a) *General.* The applicant approved to apply soil and groundwater contaminated with agricultural chemicals to agricultural land shall make and maintain an operational record for each day that the contaminated soil or groundwater is applied. These records shall be maintained according to generally accepted principles.

(b) *Contents of daily operational record.* The daily operational record shall include the following:

(1) The specific soil piles or quantities of groundwater contaminated with agricultural chemicals applied that day, including weight or volume and types and levels of pesticides, fertilizers, soil conditioners nutrients and other chemicals in each soil pile or quantity of groundwater applied.

(2) The technique and equipment used to apply and incorporate each soil pile or quantity of groundwater contaminated with agricultural chemicals.

(3) The application rate and calculations evidencing the application rate for each soil pile or quantity of groundwater contaminated with agricultural chemicals are in compliance with this chapter.

(4) The specific location of the application of each soil pile or quantity of groundwater contaminated with agricultural chemicals.

(5) The name, mailing address, county and State of each generator of the contaminated media.

(6) A record of any deviations from the land application proposal operating plan.

(7) The general weather conditions during application.

(8) A record of actions taken to correct deviations from the operating plan or violations of the acts the environmental protection acts and this chapter.

(c) *Retention.* Daily operational records shall be maintained and retained until final approval of the site closure

plan (required by Subchapter H (relating to closure)) by the Department. These records shall be available to the Department upon request.

§ 130d.69. Annual operational report.

(a) *General.* The applicant approved to apply soil and groundwater contaminated with agricultural chemicals to agricultural land shall make and maintain an annual operational record. These records shall be maintained according to generally accepted principles.

(b) *Contents of annual operational report.* The annual operational record shall be a compilation of the daily records made and maintained by the approved applicant. The annual operational record shall be a synopsis of the daily records and shall include the following:

(1) A synopsis of the weight or volume and types and levels of pesticides, fertilizers, soil conditioners nutrients and other chemicals applied to each field or plot at the application site.

(2) A synopsis of the techniques and equipment used to apply and incorporate each soil pile or quantity of groundwater contaminated with agricultural chemicals to each field or plot at the application site.

(3) A synopsis of the application rate and calculations evidencing the application rate to each field or plot for each soil pile or quantity of groundwater contaminated with agricultural chemicals are in compliance with this chapter.

(4) A final list containing the name, mailing address, county and state of each generator of contaminated media that was applied to the site. This list shall identify each soil pile and quantity of groundwater received from each generator.

(5) A final list, including dates, of any deviations from the land application proposal operating plan.

(6) A final list, including dates, of actions taken to correct deviations from the operating plan or violations of the act, the environmental protection acts and this chapter.

(7) A current certificate of insurance, as specified in § 130d.22 (relating to insurance), evidencing continuous coverage for comprehensive general liability insurance.

(8) A map of the same scale and type required by § 130d.43 (relating to maps and related information), showing the field boundaries where soil and groundwater contaminated with agricultural chemicals was applied, and the volume and type of agricultural chemicals and contaminated media applied to each field or other approved application area.

Subchapter H. CLOSURE

Sec.
130d.71. Site closure plan.
130d.72. Final report.

§ 130d.71. Site closure plan.

(a) *General.* The parties involved in the land application of soil and groundwater contaminated with agricultural chemicals shall report the results of the land application activity to the Department upon completion of the application and treatment.

(b) *Contents of plan.* The site closure plan shall include the following:

(1) A proposed postapplication field soil sampling and analysis plan which shall be consistent with the procedures for soil sampling and analysis in §§ 130d.13—130d.15 (relating to chemical analysis of waste; waste analysis plan; and application site analysis).

(2) The compounds to be analyzed for and the methods of analysis. This should be consistent with the initial background components analyzed and the methods used.

(3) A discussion of any problems encountered during the project and actions taken to correct any problems or violations.

(4) The analytical results of both the original application site analysis and the field closure soil sampling plan.

§ 130d.72. Final report.

The final report shall contain the final results of the site closure plan, a narrative describing both positive and negative results of the land application and the following information:

(1) The name of the persons supervising the application.

(2) The total acreage on which the soil or groundwater, or both, contaminated with agricultural chemicals was applied.

(3) The dates of each application.

(4) The start and stop time of each application.

(5) The weather conditions during each application.

(6) The calibration measures used.

(7) The type of equipment used.

(8) The type of incorporation method used and the date of incorporation.

(9) The types and concentrations of agricultural chemicals present in each soil pile or quantity of groundwater and the specific field to which each soil pile or quantity of groundwater, or both, was applied.

(10) A discussion of any problems that occurred and actions taken to correct the problems.

[Pa.B. Doc. No. 02-619. Filed for public inspection April 19, 2002, 9:00 a.m.]

ENVIRONMENTAL HEARING BOARD

[25 PA. CODE CH. 1021]

Practice and Procedure

The Environmental Hearing Board (Board) proposes to revise Chapter 1021 (relating to practice and procedures) by adding new procedural rules to read as set forth in Annex A.

The proposed procedural rules have several objectives:

(1) To provide the regulated community and the Department of Environmental Protection (Department) and other potential litigants with more specific guidance on how to represent their interests before the Board.

(2) To improve the rules of practice and procedure before the Board.

(*Editor's Note*: The Board published a cross reference table of current section numbers to proposed section numbers at 32 Pa.B. 6156, 6158 and 6159 (November 10,

2001). That proposed rulemaking has not been adopted as final-form. This document represents a change from that document.)

I. *Statutory Authority for Proposed Revisions*

The Board has the authority under section 5 of the Environmental Hearing Board Act (act) (35 P. S. § 7515) to adopt regulations pertaining to practice and procedure before the Board.

II. *Description of Proposed Revisions*

The proposed revisions are modifications to provisions of the rules to improve practice and procedure before the Board. These proposed revisions are based on the recommendations of the Board Rules Committee, a nine member advisory committee created by section 5 of the act to make recommendations to the Board on its rules of practice and procedure. For the recommendations to be promulgated as regulations, a majority of the Board members must approve the recommendations.

This summary provides a description of: (1) the existing rules of practice and procedure when relevant to proposed revisions; (2) the Board's proposed revisions; and (3) how the proposal differs from the Board Rules Committee's recommendations.

Some of the recommendations of the Board Rules Committee were not in proper legislative style and format, so they have been modified, where necessary, to conform to those requirements. Similarly, some of the recommendations did not contain proper cross references to 1 Pa. Code Part II (relating to the General Rules of Administrative Practice and Procedure) (GRAPP), so references to those rules have been added.

The proposed rulemaking adds three new rules and substantively or technically, or both, amends certain existing rules. The following new rules are added: (1) § 1021.31 (relating to signing); (2) § 1021.72 (relating to complaints filed by other persons); and (3) § 1021.73 (relating to transferred matters). The following rules are substantively amended: (1) § 1021.2 Definition of "pleading"; (2) § 1021.56(a) and (b) (relating to complaints filed by the Department) proposed to be renumbered as § 1021.71; (3) § 1021.70 (relating to general) proposed to be renumbered as § 1021.91; (4) § 1021.73 (relating to dispositive motions) proposed to be renumbered as § 1021.94; (5) § 1021.81 (relating to prehearing procedure) proposed to be renumbered as § 1021.101; (6) § 1021.82(a)(5) (relating to prehearing memorandum) proposed to be renumbered as § 1021.104; (7) § 1021.120(b) (relating to termination of proceedings) proposed to be renumbered as § 1021.141; (8) § 1021.142 (relating to application for cost and fees) proposed to be renumbered as § 1021.182; (9) § 1021.143 (relating to response to application) proposed to be renumbered as § 1021.183; and (10) § 1021.171 (relating to composition of the certified record on appeal to Commonwealth Court) proposed to be renumbered as § 1021.201. The following rules are technically amended only for the purpose of superseding GRAPP: (1) § 1021.70 (relating to general) proposed to be renumbered as § 1021.91; (2) § 1021.71 (relating to procedural motions) proposed to be renumbered as § 1021.92; (3) § 1021.72 (relating to discovery motions) proposed to be renumbered as § 1021.93; (4) § 1021.73 (relating to dispositive motions) proposed to be renumbered as § 1021.94; and (5) § 1021.74 (relating to miscellaneous motions) proposed to be renumbered as § 1021.95.

1. *Definitions*

The definition of "pleading" has been amended to include complaints or answers filed by other persons against the Department under the Board's amended rules on special actions in §§ 1021.72 and 1021.73 and § 1021.57 (relating to answers to complaints filed by the Department) proposed to be renumbered as § 1021.74.

2. *Signing*

The Board's rules do not contain a provision with respect to the signing of documents filed with the Board; however, both the Pennsylvania and Federal Rules of Civil Procedure contain such a rule. See Pa.R.C.P. 1023; Fed. R. Civ. P. 11. Signature rules are important because they guarantee that documents filed with the Board are authentic and bonafide, and require counsel or the party to attest that the documents are filed in good faith.

When drafting this new section, the Committee referenced and borrowed from Pa.R.C.P. 1023 and Fed. R. Civ. P. 11. Subsection (a) requires the signature of at least one attorney of record or if a party is proceeding pro se then a party to the litigation, and the address and phone number of the attorney or party filing the document. Subsections (b) and (c) require counsel or the party to represent that the document is being filed in good faith. This rule will also enable the Board to impose sanctions on those who file documents in bad faith. "Good faith" is defined in accordance with Pa.R.C.P. 1023.

The Committee recommends that this section be renamed "Signing, Filing and Service of Documents," that the proposed rule on signing be inserted at § 1021.31, and all other rules in this section be moved up one number starting with existing § 1021.31 (relating to filing).

The Board concurs with the Committee's recommendations.

3. *Special Actions*

The Board's rules do not contain provisions for complaints filed against the Department under statutory authorization, such as section 505(f) of the Hazardous Sites Cleanup Act (35 P. S. § 6020.505(f)) or matters transferred to the Board from courts in this Commonwealth, for example, courts have referred claims of regulatory takings in violation of due process to the Board for a decision on whether such a taking has occured. The rules in §§ 1021.56 (proposed to be renumbered §§ 1021.71) 1021.72, 1021.73, 1021.57 (proposed to be renumbered as § 1021.74) and 1021.58 (proposed to be renumbered as § 1021.75) will provide regulatory guidance to practitioners in theses and similar cases.

The Committee proposes adding two new sections titled "Complaints filed by other persons," to § 1021.72, and "Transferred matters," to § 1021.73. The Committee also noted that in Pennsylvania civil practice, filing a document commences an action, which conflicts with Board § 1021.56 (proposed to be renumbered as § 1021.71(b)) requiring both filing and service to commence an action with the Board. Therefore, the Committee recommends deleting the existing language in § 1021.56(b) relating to commencement of actions, and moving the commencement of action language to § 1021.56(a), stating that filing the complaint commences the action. In addition, the Committee proposes tracking the language in the Pa.R.C.P. to the greatest extent possible. Accordingly, in § 1021.56(a) the Committee deleted "initiate" and replaced it with "commence." Finally, the Committee pro-

poses revising the rules on service of these complaints to conform § 1021.56(b) to Pa.R.C.P. 403 governing service of original process.

The Board concurs with the Committee's recommendations.

4. *Dispositive Motions*

The Board's existing regulation in § 1021.70 (proposed to be renumbered as § 1021.91) applies generally to all motions filed with the Board except those made during a hearing. Specifically, § 1021.70(a) and (d) require litigants to file dispositive motions setting forth, in numbered paragraphs, the facts in support of the motion and the relief requested. The Committee reviewed the practical effect that § 1021.70 has on dispositive motions filed with the Board. It noted that motions, and their corresponding responses and replies, are unnecessarily long because litigants feel compelled to include both background and material facts. The Committee determined that this results in a needless burden on litigants because counsels' time and effort developing and responding to facts, bearing little materiality to the relief requested in the motion, is disproportionate to the value it creates for the Board in rendering its decision. Another problem the Committee identified with § 1021.70 is that the motion and its supporting memorandum of law or brief are repetitive because of the numbered paragraph requirement for the motion. The Committee also noted that the rules of civil procedure for Federal and Pennsylvania practice do not require the exhaustive numbered paragraph approach employed in § 1021.70. Therefore, the Committee recommends making the rules for dispositive motions more manageable and meaningful by eliminating extraneous information in the motion, abolishing the requirement for filing lengthy motions and their corresponding responses, and allowing background information and nonmaterial facts to appear in the supporting memorandum of law or brief.

The proposed rule would change to require the motion to contain a concise statement of the relief requested, the reasons for granting that relief, and, when necessary, the material facts that support the relief sought. Second, the Committee recommends that dispositive motions be excluded from the purview of § 1021.70, which now requires the numbered paragraph approach.

The Board concurs with the Committee's recommendations.

5. *Motions*

The Board's rules regulating motions supplement GRAPP, and therefore require practitioners to cross reference GRAPP with the Board's regulations. The Committee believes that cross referencing GRAPP is unnecessary and inefficient where the Board's rules have incorporated GRAPP or when GRAPP does not apply to the Board. Accordingly, under those circumstances, after reviewing the Board's rules on motions and GRAPP, the Committee recommends superseding GRAPP in the following sections: §§ 1021.70(h), 1021.71(h), 1021.72(e), 1021.73(g) 1021.74(e) (proposed to be renumbered as §§ 1021.91(h), 1021.92(h), 1021.93(e), 1021.94(g) and 1021.95(e)).

The Board concurs with the Committee's recommendation.

6. *Prehearing Procedure, Expert Reports and Prehearing Memoranda*

Section 1021.81(a)(1) (proposed to be renumbered as § 1021.101) has been amended to clarify that discovery must be served, as opposed to concluded, within 90 days of the date of the prehearing order in accordance with existing Board practice, as well as practice under the Pa.RCP. The deadlines in subsection (a)(2) and (3) for responding to expert interrogatories and filing dispositive motions have been modified accordingly. The change with respect to the service of discovery removes the ambiguity with respect to the time for completion of discovery by specifying that service of the discovery is the key point rather than the receipt of answers to written discovery or the conclusion of all depositions. This gives needed flexibility to counsel in concluding discovery without unnecessary intervention of the Board.

Subsection (a)(2) has been revised so that a party may respond to expert interrogatories by either answering the interrogatories or by serving an expert report along with a statement of qualifications. Section 1021.82(a)(5) (proposed to be renumbered as § 1021.104) has been revised so that a party may file with his prehearing memorandum an expert report or answers to expert interrogatories or, if no report or answers exist, a summary of the testimony of each expert witness he intends to call at the hearing. The change with respect to expert reports was adopted to give the parties flexibility as to when they need to incur the expense of an expert's fee for preparing a written opinion and whether a written opinion should be prepared in advance of the time for filing prehearing memoranda with the Board. At the same time, it requires disclosure of the opinions and qualifications of any expert by way of answers to interrogatories and in the prehearing memorandum to avoid surprise at the hearing on the merits.

The Board concurs with the Committee's recommendation.

7. *Termination of Proceedings*

In § 1021.120(b) (proposed to be renumbered as § 1021.141) governing the withdrawal of appeals, the default presumption that a matter is withdrawn with prejudice unless otherwise indicated by the Board. This provision presents a problem for many practitioners because such a withdrawal may bar, unwittingly, a party from raising similar issues in a subsequent proceeding even though the Board has not substantively ruled on those issues. The problem typically occurs during settlement negotiations because the litigants often face the obstacle of negotiating the withdrawal of their appeal without prejudice, to avoid the preclusive effect of § 1021.120(b). The Committee determined that the rule is not desirable because it presents an unnecessary barrier to settlement. Under almost all circumstances, the 30-day requirement for filing an appeal will act as a bar against subsequent untimely appeals. The Board recommended the deletion of the section in favor of determining the effect of the withdrawal of an appeal on a case-by-case basis, and the Committee agrees. Despite this change, practitioners must still consider if administrative finality might bar litigation of a similar issue in a subsequent appeal.

The Board concurs with the Committee's recommendations.

8. *Application for cost and fees*

The General Assembly passed the act of December 20, 2000 (P. L. 980, No. 138) (Act 138), which sets forth new standards for the award of attorney's fees and costs in mining appeals. Act 138 repealed the attorney's fee provisions of Pennsylvania's mining statutes and replaced them with new provisions found at 27 Pa.C.S. §§ 7707 and 7708 (relating to participation in environmental law

or regulation; and costs for mining proceedings). The Committee reviewed Act 138 and the Board's rules on awarding attorneys fees and costs, §§ 1021.141—1021.144 (proposed to be renumbered as §§ 1021.181—1021.184), and determined that the Board's regulations needed to be revised to make them uniform with Act 138. Therefore, the Committee proposes amending Board §§ 1021.142 and 1021.143, to make them consistent with Act 138.

The Board concurs with the Committee's recommendation.

9. *Composition of certified record on appeal to Commonwealth Court*

The Board recently initiated an elective electronic filing system for those practitioners who choose to file and accept service of documents electronically. The Board's § 1021.171 (proposed to be renumbered as § 1021.201), does not specifically provide for the composition of a certified record for those Board cases taking part in the electronic filing program. Therefore, the Committee proposes § 1021.171(d), which provides for the procedure for certifying to Commonwealth Court those documents electronically filed with the Board.

In addition, the Committee noted that § 1021.171(a) improperly referred to a posthearing memorandum instead of posthearing brief; therefore, the Committee recommends amending subsection (a) to replace posthearing memorandum with posthearing brief.

The Board concurs with the Committee's recommendations.

III. *Fiscal Impact of the Proposed Revisions*

The proposed amendments will have no measurable fiscal impact on the Commonwealth, political subdivisions or the private sector. The amendments may have a favorable economic impact in that they may eliminate potential litigation over existing uncertainties in Board procedures, authority and requirements.

IV. *Paperwork Requirements for Proposed Revisions*

The proposed revisions will not require the Board to modify its standard orders.

V. *Public Meeting on Proposed Rules*

In accordance with 65 Pa.C.S. § 704 (relating to open meetings), a quorum of the members of the Board voted to adopt the proposed amendments at public meetings held on January 9, 2002, and February 5, 2002, at the Board's Harrisburg office, Hearing Room 2, Second Floor, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA.

VI. *Government Reviews of Proposed Revisions*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 10, 2002, the Board submitted copies of the proposed revisions to the Independent Regulatory Review Commission (IRRC) and the Senate and House Standing Committees on Environmental Resources and Energy. The Board also provided IRRC and the Committees with copies of a Regulatory Analysis Form prepared by the Board in compliance with Executive Order 1996-1 (relating to improving government regulations). Copies of the Regulatory Analysis Form are available to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRC has objections to any of the proposed revisions, it will notify the Board within 10 days of the close of the Committees' review period, specifying the regulatory review criteria that have not been met. The Regulatory Review Act sets forth procedures for review, prior to final publication of the proposed revisions, by the Board, the General Assembly and the Governor of objections raised.

VII. *Public Comment Regarding Proposed Revisions*

The Board invites interested persons to submit written comments, suggestions or objections regarding the proposed revisions to William T. Phillipy, IV Secretary to the Environmental Hearing Board, 2nd Floor, Rachel Carson State Office Building, P. O. Box 8457, Harrisburg, PA 17105-8457, within 30 days of this publication.

GEORGE J. MILLER,
Chairperson

Fiscal Note: 106-7. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART IX. ENVIRONMENTAL HEARING BOARD

CHAPTER 1021. PRACTICE AND PROCEDURE

PRELIMINARY PROVISIONS

GENERAL

§ 1021.2. Definitions.

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

* * * * *

Pleading—A complaint filed under § **[1021.56]** § 1021.71, **§ 1021.72 or § 1021.73** (relating to complaints filed by the Department**; complaints filed by other persons; and transferred matters)** or answer filed under § **[1021.57] 1021.74 (relating to answers to complaints [filed by the Department]**). Documents filed in appeals, including the notice of appeal, are not pleadings.

* * * * *

DOCUMENTARY FILINGS

SIGNING, FILING AND SERVICE OF DOCUMENTS

§ 1021.31. Signing.

(a) Every notice of appeal, motion, legal document or other paper directed to the Board and every discovery request or response of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, or if a party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number.

(b) The signature to a document described in subsection (a) constitutes a certification that the person signing, or otherwise presenting it to the Board, has read it, that to the best of his knowledge or information and belief there is good ground to support it, and that it is submitted in good faith and not for any improper purpose such as to harass, cause unnecessary delay, or needless increase in the cost of litigation. There is good ground to support the document if the signer or presenter has a reasonable belief that existing law supports the document or that there is a good faith argument for the extension, modification or reversal of existing law.

(c) The Board may impose an appropriate sanction for a bad faith violation of subsection (b).

§ **[1021.30] 1021.32**. Filing.

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§ **[1021.31] 1021.33**. Service by the Board.

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§ [1021.32] 1021.34. Service by a party.

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§ **[1021.33] 1021.35**. Date of service.

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§ **[1021.34] 1021.36**. Certificate of service.

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§ **[1021.35] 1021.37**. Number of copies.

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§ **[1021.36] 1021.38**. Publication of notice.

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§ [1021.41] 1021.39. Docket.

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SPECIAL ACTIONS

§ **[1021.56] 1021.71**. Complaints filed by the Department.

(a) When authorized by statute**,** the Department may **[initiate] commence** the action by filing a complaint or petition**[, together with a certificate of service]** and a notice of a right to respond. **The action is commenced when the complaint or petition is filed with the Board.**

(b) **[This action shall commence when the complaint is filed and service of the complaint and a notice of a right to respond is made upon the defendant.] Service of the complaint or petition shall be by personal service or by any form of mail requiring a receipt signed by the party or the party's authorized agent. In the instance of mail, service shall be complete upon delivery. Service of all other documents shall be made in accordance with § 1021.34 (relating to service by party).**

* * * * *

§ 1021.72. Complaints filed by other persons.

(a) When authorized by statute, a person may institute an action against the Department by filing a complaint.

(b) Service of the complaint or petition shall be by personal service or by any form of mail requiring a receipt signed by the party or the party's authorized agent. In the instance of mail, service shall be complete upon delivery. Service of all other documents shall be made in accordance with § 1021.34 (relating to service by party).

(c) The complaint shall set forth the statutory authority under which the Board is authorized to act and shall set forth in separate numbered paragraphs the specific facts and circumstances upon which the request for action is based.

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

§ 1021.73. Transferred matters.

(a) This rule addresses matters transferred to the Board from a court.

(b) Within the time period directed to do so by the Board, the party who initiated the transferred action shall file a complaint with the Board.

(c) Service of the complaint or petition shall be by personal service or by any form of mail requiring a receipt signed by the party or the party's authorized agent. In the instance of mail, service shall be complete upon delivery. Service of all other documents shall be made in accordance with § 1021.34 (relating to service by party.

(d) The complaint shall set forth in separate numbered paragraphs the specific facts and circumstances upon which the request for relief is based.

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

§ **[1021.57] 1021.74**. Answers to complaints **[filed by the Department]**.

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§ **[1021.58] 1021.75**. Procedure after an answer is filed.

* * * * *

MOTIONS

§ **[1021.70] 1021.91**. General.

(a) This section applies to all motions except **dispositive motions and** those made during the course of a hearing.

* * * * *

(c) A copy of the motion or response shall be served on the opposing party. **[The motion or response shall include a certificate of service indicating the date and manner of service on the opposing party.]**

* * * * *

(e) A response to a motion shall set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the motion. Material facts set forth in a motion**[, other than a motion for summary judgment or partial summary judgment,]** that are not denied may be deemed admitted for the purposes of deciding the motion.

(f) **[Except in the case of motions for summary judgment or partial summary judgment, for] For** purposes of the relief sought by a motion, the Board will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion.

(g) **[Except as provided in § 1021.73(e) (relating to dispositive motions), the] The** moving party may not file a reply to a response to its motion unless the Board orders otherwise.

(h) Subsection (b) supplements 1 Pa. Code § **[§]** 33.11 **[and 35.178]** (relating to execution **[; and presentation of motions]**) and **supersedes 1 Pa. Code**

§ 35.178 (relating to presentation of motions). Subsection (c) **[supplements] supersedes** 1 Pa. Code §§ 33.32**, [(relating to service by a participant) and supersedes 1 Pa. Code §]** 33.35 and 33.36 (relating to **service by a participant;** proof of service; and form of certificate of service). Subsections (d)—(f) **[supplement] supersede** 1 Pa. Code §§ 35.177 and 35.178 (relating to scope and content of motions; and presentation of motions).

§ **[1021.71] 1021.92**. Procedural motions.

* * * * *

(h) Subsection (b) **[supplements] supersedes** 1 Pa. Code § 33.12 (relating to verfication). Subsections (c) and (e) **[supplement] supersede** 1 Pa. Code § 35.177 (relating to scope and contents of motions). Subsection (d) **[supplements] supersedes** 1 Pa. Code § 35.179 (relating to objections to motions).

§ **[1021.72] 1021.93**. Discovery motions.

* * * * *

(e) Subsection (b) **[supplements] supersedes** 1 Pa. Code § 33.12 (relating to verification). Subsections (b) and (d) **[supplement] supersede** 1 Pa. Code § 35.177 (relating to scope and contents of motions). Subsection (c) supersedes 1 Pa. Code § 35.179 (relating to objections to motions).

§ **[1021.73] 1021.94**. Dispositive motions.

(a) This section applies to dispositive motions. **Dispositive motions shall contain a concise statement of the relief requested, the reasons for granting that relief, and, when necessary, the material facts that support the relief sought**.

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

(c) Dispositive motions**, responses and replies** shall be **in writing, signed by a party or its attorney and served on the opposing party. Dispositive motions shall be** accompanied by a supporting memorandum of law **or brief**. The Board may deny a dispositive motion if a party fails to file a supporting memorandum of law **or brief**.

(d) A response to a dispositive motion may be filed within **[25] 30** days of the date of service of the motion, and **[may] shall** be accompanied by a supporting memorandum of law **or brief**.

(e) A reply to a response to a dispositive motion may be filed within **[20] 15** days of the date of service of the response, and may be accompanied by a supporting memorandum of law **or brief**. **Reply briefs or memoranda of law shall be as concise as possible and may not exceed 25 pages. Longer briefs or memoranda of law may be permitted at the discretion of the presiding administrative law judge**.

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

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

[Comment: Subsection (d) supersedes the filing of a response within 30 days set forth in Pa.R.C.P. 1035.3(a).]

§ **[1021.74] 1021.95**. Miscellaneous motions.

* * * * *

(e) Subsection (b) **[supplements] supersedes** 1 Pa. Code § 33.12 (relating to verification).

PREHEARING PROCEDURES AND PREHEARING CONFERENCES

§ **[1021.81] 1021.101**. Prehearing procedure.

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

(1) **[Discovery,] All discovery, including any discovery of expert witnesses,** shall be **[concluded within] served no later than** 90 days of the date of the prehearing order.

(2) The party with the burden of proof shall serve its **[expert reports and]** answers to all expert interrogatories within **[120] 150** days of the date of the prehearing order. The opposing party shall serve its **[expert reports and]** answers to all expert interrogatories within 30 days after receipt of the **[expert reports and]** answers to all expert interrogatories from the party with the burden of proof. **The service of a report of an expert together with a statement of qualifications may be substituted for an answer to interrogatories.**

(3) Dispositive motions in a case requiring expert testimony shall be filed within **[180] 210** days of the date of the prehearing order. If neither party plans to call an expert witness, dispositive motions shall be filed within **[150] 180** days after the filing of the appeal unless otherwise ordered by the Board.

* * * * *

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

§ [1021.82] 1021.104. Prehearing memorandum.

(a) A prehearing memorandum shall contain the following:

* * * * *

(5) **[A] For each expert witness a party intends to call at the hearing, answers to expert interrogatories and a copy of any expert report provided under § 1021.101(a)(2) (relating to prehearing procedure). In the absence of answers to expert interrogatories or an expert report, a** summary of the testimony of each expert witness.

* * * * *

TERMINATION OF PROCEEDINGS

§ **[1021.120] 1021.141**. Termination of proceedings.

* * * * *

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

(c)] **(b)** * * *

[(d)] **(c)** * * *

Comment: The prior rule in § 1021.120(b) authorizing dismissal with and without prejudice was deleted because the Board thought it more appropriate to determine this matter by case law rather than by rule.

ATTORNEY FEES AND COSTS AUTHORIZED BY STATUTE OTHER THAN THE COSTS ACT

§ **[1021.142] 1021.182**. Application for costs and fees.

(a) **[A request for costs and fees shall be by verified application, setting forth sufficient grounds to justify the award, including the following:] A request for costs and fees shall conform to any requirements set forth in the statute under which costs are being sought.**

[(1) A copy of the order of the Board in the proceedings in which the applicant seeks costs and attorney fees.

(2) A statement of the basis upon which the applicant claims to be entitled to costs and attorney fees.

(3) A detailed listing of the costs and attorney fees incurred in the proceedings.]

(b) **[An applicant shall file an application with the Board within 30 days of the date of a final order of the Board. An applicant shall serve a copy of the application upon the other parties to the proceeding.] A request for costs and fees shall be by verified application, setting forth sufficient grounds to justify the award, including the following:**

(1) A copy of the order of the Board in the proceedings in which the applicant seeks costs and attorney fees.

(2) A statement of the basis upon which the applicant claims to be entitled to costs and attorney fees.

(3) An affidavit setting forth in detail all reasonable costs and fees incurred for or in connection with the party's participation in the proceeding, including receipts or other evidence of the costs and fees.

(4) When attorney fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area and the experience, reputation and ability of the individual or individuals performing the services.

(5) The name of the party from whom costs and fees are sought.

* * * * *

(d) The Board may deny an application sua sponte if it fails to provide all the information required by this section in sufficient detail to enable the Board to grant the relief requested.

§ **[1021.143] 1021.183**. Response to application.

A response to an application shall be filed within **[15] 30** days of service. A factual basis for the response shall be verified by affidavit.

APPELLATE MATTERS

§ **[1021.171] 1021.201**. Composition of the **[Certified Record] certified record** on appeal to Commonwealth Court.

* * * * *

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

* * * * *

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

* * * * *

(d) In the event that a legal document was electronically filed, a paper copy of the electronic filing will be submitted to the Commonwealth Court as part of the certified record in accordance with this rule, notwithstanding the provisions of § 1021.39(c) (relating to docket) that the official copy of an electronically filed document shall be that appearing on the Board's website.

[Pa.B. Doc. No. 02-620. Filed for public inspection April 19, 2002, 9:00 a.m.]

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 63]

[L-00990141]

Generic Competitive Safeguards

The Pennsylvania Public Utility Commission (Commission) on November 30, 2001, adopted a proposed rulemaking order which establishes competitive safeguards to assure the provision of adequate and nondiscriminatory access by incumbent local exchange carriers (ILEC) to competitive local exchange carriers (CLEC) and to prevent cross subsidization and unfair competition. The contact persons are Gary Wagner, Bureau of Fixed Utility Services, (717) 783-6175 and Carl S. Hisiro, Law Bureau, (717) 783-2812.

Executive Summary

Section 3005(b) and (g)(2) of the Public Utility Code (code) (66 Pa.C.S. § 3005(b) and (g)(2)) require the Commission to establish regulations to prevent unfair competition, discriminatory access and the subsidization of competitive services through revenues earned from noncompetitive services. On March 23, 1999, the Commission issued an Advance Notice of Proposed Rulemaking to solicit comments from jurisdictional telecommunication utilities and other interested parties regarding the development of generic competitive safeguards under Chapter 30 of the code (66 Pa.C.S. §§ 3001—3009).

The proposed regulations establish competitive safeguards in furtherance of Chapter 30's mandate to encour-

age and promote competition in the provision of telecommunications products and services throughout this Commonwealth. The proposed regulations also require incumbent carriers with more than 1 million access lines to maintain a functionally separate wholesale organization with its own direct line of management and separate business records which will be subject to review by the Commission.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 11, 2002, the Commission submitted a copy of this proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Committees. In addition to submitting the proposed rulemaking, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Commission in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRC has objections to any portion of the proposed rulemaking, it will notify the Commission within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria that have not been met by the portion of the proposed rulemaking to which an objection is made. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Commission, the General Assembly and the governor of objections raised.

Proposed Rulemaking Order

Public Meeting held
November 30, 2001

Commissioners present: Glen R. Thomas, Chairperson, statement follows; Robert K. Bloom, Vice Chairperson; Aaron Wilson, Jr.; Terrance J. Fitzpatrick, statement follows

By the Commission:

This proposed rulemaking establishes competitive safeguards in furtherance of the provisions of Chapter 30 of the code and Chapter 30's mandate to encourage and promote competition in the provision of telecommunications products and services throughout this Commonwealth.

A. Background and Procedural History

At the Public Meeting of March 18, 1999, the Commission entered an order directing that an Advance Notice of Proposed Rulemaking be issued to solicit comments regarding the development of generic competitive safeguards under section 3005(b) and (g)(2) of the code. That order also directed that the matter of imputation[1] with regard to the provision of intraLATA service by local exchange carriers (LECs) be consolidated with the rulemaking proceeding. The Advance Notice was published at 29 Pa.B. 1895 (April 10, 1999) and comments and reply comments on these issues were thereafter received from a number of interested parties.

Section 3005(b) and (g)(2) of the code require the Commission to establish regulations to protect competition by preventing the subsidization of competitive services through revenues earned from noncompetitive services. Specifically, section 3005(b) of the code requires regulations aimed at preventing unfair competition and ensuring that LECs provide reasonable nondiscriminatory access to their services and facilities by competitors. Section 3005(g)(2) of the code requires regulations governing the allocation of costs for telephone services to prevent subsidization or support for competitive services with revenues earned or expenses incurred in conjunction with noncompetitive services.

The issue of competitive safeguards,[2] including the establishment of Competitive Safeguards Regulations,[3] was initially addressed by this Commission in its June 28, 1994, Final Order at Docket No. P-00930715 disposing of the Bell Atlantic-Pennsylvania, Inc. (now known as Verizon Pennsylvania Inc.) (BA-PA) Petition for Alternative Regulation filed under Chapter 30.[4] The Bell Chapter 30 Order, however, referred the issue of establishing Competitive Safeguard Regulations to the Office of Administrative Law Judge (OALJ) and instructed the OALJ to use the Commission's Alternative Dispute Resolution process to address and resolve several issues.[5]

The issues referred to the OALJ in that order were cost allocation, unbundling and imputation associated with competitive safeguards. We also directed that a separate proceeding be established to promulgate generic regulations applicable for all LECs filing for alternative rate regulation under Chapter 30. Consistent with these instructions, the OALJ opened a Competitive Safeguards Proceeding at M-00940587.

Following the publication of a Notice of Investigation Into Competitive Safeguards, the Commission received comments and reply comments from a number of interested parties. On August 6, 1996, we entered a final order in the Competitive Safeguards proceeding that was limited to Bell-specific competitive safeguards.[6] The competitive safeguards approved by the Commission were submitted by BA-PA as part of its Chapter 30 competitive services deregulation plan, as modified by the Competitive Safeguards Order.

On September 9, 1996, in a separate proceeding, we entered an order regarding implementation of the Federal Telecommunications Act of 1996 (TA-96).[7] The TA-96 Implementation Order addressed intraLATA services by BA-PA, but did not resolve the question of imputation for the delivery of intraLATA services by LECs other than BA-PA.

B. Rulemaking Issues and Associated Comments

As already noted, we opened the instant rulemaking at the March 18, 1999, Public Meeting via issuance of an Advance Notice of Proposed Rulemaking. The purpose of this Notice was to provide all LECs and other interested parties an opportunity to provide comments and reply comments on the need for developing generic competitive safeguards. We specifically asked for comments on cost

[1] "Imputation" is a term of art. The term generally refers to those requirements necessary to ensure that an ILEC incorporates in its cost-of-service calculations the same access charges on itself as it imposes on other competitors for the delivery of any service function that both the ILEC and its competitors need to deliver a service.

[2] The term "Competitive Safeguards" is a generic term referring to the multiple protections needed to foster competition in any specific industry that was previously regulated.

[3] The term "Competitive Safeguard Regulations" refers to the regulations required by section 3005(b) and (g)(2) of the code.

[4] *In Re Bell Atlantic—Pennsylvania, Inc.'s Petition and Plan for Alternative Form of Regulation Under Chapter 30*, Dkt. No. P-00930715 (Order entered June 28, 1994) (Bell Chapter 30 Order).

[5] Id. at 113-14.

[6] *Investigation Pursuant to Section 3005 of the Public Utility Code to Establish Standards for Competitive Services*, Dkt. No. M-00940587 (Order entered August 6, 1996) (Competitive Safeguards Order).

[7] *Implementation of the Telecommunications Act of 1996*, Dkt. No. M-00960799 (Order on Reconsideration entered September 9, 1996) (TA-96 Implementation Order). This Order modified in certain respects an earlier order entered on June 3, 1996, to implement TA-96. The June 3, 1996, Order found, inter alia, that all noncompetitive intraLATA toll services provided by any LEC should be subject to an imputation requirement. The September 9, 1996, Order suspended the imputation requirement as applied to all LECs other than BA-PA.

allocation, unbundling, imputation and on any other issues the parties thought would be appropriate in developing Competitive Safeguard Regulations under Chapter 30. We also invited parties to submit proposed regulatory language for consideration.

On or about May 25, 1999, the Commission received initial comments from Verizon Pennsylvania, Inc. (formerly Bell Atlantic-Pennsylvania, Inc) (Verizon-PA)[8], AT&T Communications of Pennsylvania, Inc. (AT&T), The United Telephone Company of Pennsylvania and Sprint Communications Company, LP (Sprint), GTE North Incorporated, the Pennsylvania Telephone Association (PTA) and the Telecommunications Resellers Association. Reply comments were thereafter filed on or about June 24, 1999, by Verizon-PA, AT&T, Sprint, PTA and the Office of Trial Staff. These comments are discussed in the Comments and Responses Document.

C. Proceeding to Consider Global Resolution of Telecommunications Issues

At the Public Meeting following our decision in this proceeding to issue an Advance Notice of Proposed Rulemaking, we agreed to consolidate two competing petitions that attempted to resolve various significant and complicated telecommunications proceedings then pending before us.[9] Among the issues raised in that consolidated proceeding that are relevant to the instant rulemaking proceeding are the following: 1) what network elements Verizon-PA must unbundle and provide to competitors; 2) how intraLATA toll imputation should be calculated for Verizon-PA; and 3) what standards of conduct should be included in a Code of Conduct to prevent unfair competition and to ensure nondiscriminatory access to Verizon-PA's services and facilities by competitors.

We resolved the consolidated proceeding, including the previous three issues, by motion adopted at the August 26, 1999, Public Meeting, which motion was subsequently incorporated into an order entered September 30, 1999 (Global Order) at P-00991648 and P-00991649. In addition to addressing these, and other significant, telecommunications issues, the Global Order also ordered Verizon-PA to structurally separate its retail and wholesale operations in this Commonwealth and directed the opening of a separate proceeding to implement structural separation.[10]

D. First Proposed Rulemaking Order and April 11, 2001 Order in Structural Separation Proceeding

Following the issuance of the Global Order, the Commission entered a Proposed Rulemaking Order in the instant proceeding on November 30, 1999. This proposed rulemaking contained a set of regulations in the form of a generic "Code of Conduct" that would be applicable to all ILECs to prevent unfair competition and cross-subsidization in any local exchange market within this Commonwealth. The proposed regulations were modeled after a similar "Code of Conduct" adopted for Verizon-PA in the Global Order, and were supplemental to the competitive safeguards embodied in the structural separation of Verizon-PA's retail and wholesale operations directed in the Global Order.

Subsequently, the Commission twice extended the date for filing comments to the proposed rulemaking because of the uncertainty surrounding the pending appeals relating to the Global Order and the relevance their resolution may bear on the proposed rulemaking. Following the Commonwealth Court's decision affirming the Global Order, the Commission directed by Secretarial Letter dated January 3, 2001, that comments be filed by February 23, 2001. Comments were thereafter filed by Verizon-PA and Verizon North Inc., AT&T, the PTA, Sprint, OCA and several other interested parties, including several legislative members, on or about February 23, 2001. These comments are discussed in the Comments and Responses Document.

In summary, most of the commenting parties agreed there should be a Code of Conduct, but there were many disagreements on what provisions should be included in the rulemaking. Several of the parties, Sprint, PTA and ALLTEL Pennsylvania, Inc., argued that functional separation should not be imposed on ILECs with less than one million access lines without due process rights being accorded to the ILEC. Others, such as AT&T and Verizon-PA, suggested modifications or additions to the proposed rulemaking. Finally, the Association for Local Telecommunications Services, Covad Communications Company, ACSI Local Switched Services, Inc. d/b/a e.spire and Rhythms Links Inc. (collectively ACER) submitted a set of comprehensive Code of Conduct provisions with its comments. These provisions attempt to more fully address the discriminatory and competitive concerns that are the focus of our rulemaking in this proceeding.

By letter dated March 22, 2001, to the Chairperson of the Independent Regulatory Review Commission, however, the Commission thereafter withdrew the proposed rulemaking by operation of the sine die rule contained in 71 P. S. § 745.5. Moreover, on this same date at Public Meeting, the Commission approved a motion in its separate structural separation proceeding at M-00001353, offering Verizon-PA a functional, rather than a structural, separation of its retail and wholesale operations and a structural separation of its advanced data services. In return for this change, Verizon-PA had to agree to several market-opening conditions and to termination of all litigation challenging the Global Order. One of these conditions was that the instant rulemaking proceeding would be reopened for the purpose of issuing a Second Proposed Rulemaking Order addressing the appropriate generic Code of Conduct to be promulgated under section 3005(b) and (g)(2) of the code. Verizon-PA also had to agree that it would comply with this Code of Conduct.

On April 11, 2001, the Commission entered an order in the structural separation proceeding incorporating the terms of this March 22, 2001, motion.[11] Specifically, the order directed that the record in the instant competitive safeguards rulemaking proceeding was to be reopened and that the record from the underlying structural separation proceeding was to be incorporated into the instant proceeding to aid in the development of a new proposed rulemaking. In addition, the order directed the Law Bureau to review the Code of Conduct provisions proposed by ACER in the structural separation proceeding (which were the same as ACER proposed in its February comments in the instant proceeding) as to their appropriateness for inclusion in the proposed rulemaking.[12] On April 20, 2001, Verizon-PA notified the Commission that

[8] After the issuance of the Global Order, BA-PA changed its name to Verizon Pennsylvania Inc. when its parent company, Bell Atlantic Corporation, acquired GTE Corporation last year and formed Verizon Corporation (Verizon). For the sake of consistency, we shall use Verizon-PA throughout the remainder of this Order to refer to BA-PA and its successor company, Verizon Pennsylvania Inc.

[9] *Joint Petition of Nextlink Pennsylvania, Inc., et al. for Adoption of Partial Settlement Resolving Pending Telecommunications Issues*, Dkt. No. P-00991648; and *Joint Petition of Bell Atlantic—Pennsylvania, Inc., et al. for Global Resolution of Telecommunications Proceedings*, Dkt. No. P-00991649 (Order entered April 2, 1999, consolidating the two proceedings).

[10] 10 On October 25, 2000, the Pennsylvania Commonwealth Court, in a unanimous en banc decision, upheld the Commission's Global Order.

[11] *Re: Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, Dkt. No. M-00001353 (Order entered April 11, 2001) (Functional/Structural Separation Order).

[12] Functional/Structural Separation Order at ordering paragraph nos. 4—6.

it was accepting the conditions offered in the April 11, 2001, Order in exchange for the Commission removing its earlier structural separation directive contained in the Global Order.[13]

E. Discussion

These proposed regulations require ILECs with more than 1 million access lines to maintain a functionally separate wholesale organization for providing certain services to CLECs and impose a general code of conduct, applicable to all LECs, to prevent unfair competition and ensure nondiscriminatory access to an ILEC's services and facilities by competitors as mandated by Chapter 30. These proposed regulations reflect our consideration of all of the comments filed to date in this proceeding. They also reflect our consideration of the record developed in the structural separation proceeding at Docket No. M-00001353. We appreciate and thank all the commenting parties who provided worthwhile suggestions to aid the Commission in the development of its proposed regulations.

1. *Functional Separation of Retail and Wholesale Operations*

Consistent with the Functional/Structural Separation Order entered April 11, 2001, at Docket No. M-00001353, this proposed rulemaking provides for the State's largest ILECs (those with one million or more access lines[14]) to maintain a functionally separate wholesale organization to provide preordering, ordering and the processing and transmission of instructions to field forces for the provisioning of services, network elements or facilities to CLECs necessary to provide competitive and noncompetitive telecommunications services to consumers. We find that the recommended approach will enable the Commission to monitor and prevent discriminatory conduct through the use of accounting rules and other business record keeping. Moreover, in adopting this more limited functional separation approach, the Commission believes that the imposition of "full" functional separation, which involves the reorganization and separation of all employees and facilities of the affected ILEC along wholesale/retail lines, is unnecessary. There are several reasons why we conclude that full functional separation is unnecessary.

First, and most importantly, full functional separation is an intrusive remedy designed to fix a problem that has not been shown to exit. Less than 6 months ago, the Commission concluded in Verizon-PA's section 271 proceeding under TA-96 that Verizon-PA's local telecommunications market had been irreversibly opened to competition.[15] Specifically, the Commission concluded that Verizon-PA was providing wholesale services to CLECs in a nondiscriminatory fashion. The Federal Communications Commission agreed and granted Verizon-PA's application to provide long-distance service under section 271 of TA-96.[16] This action followed a third-party test of Verizon-PA's operations support systems (OSS) by our third-party consultant, KPMG Consulting, which concluded that Verizon-PA had remedied any major problems with the OSS.

Secondly, as part of the section 271 approval process, Verizon-PA agreed to withdraw court appeals from the Commission's earlier adoption of a performance assurance plan (PAP).[17] The PAP contains detailed standards for Verizon-PA's wholesale services to CLECs, and also contains self-executing penalties for Verizon-PA's failure to meet these standards. Verizon-PA could pay roughly up to $183 million per year for failure to meet the performance standards in the PAP.[18] These standards and penalties are in addition to the Commission's normal enforcement processes and penalties. Finally, full functional separation is likely to result in significant additional costs and duplication of resources, while the benefits to competition are speculative.

The proposed regulation sets forth the required business record keeping rules necessary to implement this form of functional separation. The proposed regulation will also permit the sharing of common resources, so long as the costs thereof are properly allocated between the ILEC's wholesale operating unit and the ILEC's other relevant operations. The Commission does not anticipate that the imposition of a functionally separate wholesale organization will require any significant changes to the manner in which the ILEC must conduct its business, other than to maintain separate business records that account for tariffed and nontariffed transactions between the wholesale operating unit and the rest of the ILEC's operations. The ILEC was and will continue to be under an obligation to provide nondiscriminatory wholesale services to CLECs when measured against the wholesale services it provides to its own retail operations.

Finally, we find it unnecessary to include any language in the proposed rulemaking relating to the Commission's ability to order further safeguards not expressly delineated herein to protect against unfair competition and to ensure nondiscriminatory access to the ILEC's services and facilities. The Commission clearly has the ability and authority to adopt new safeguards as the need arises. For example, if functional separation, as proposed herein, does not create the level playing field that is the focus of Chapter 30's competitive provisions, then the Commission has the authority to require the ILEC to provide the affected competitive service through a separate corporate affiliate. See section 3005(h). of the code.

2. *Unbundling of Basic Service Functions*

Chapter 30 is clear on its face that LECs must:

> . . . unbundle each basic service function on which the competitive service depends and shall make the basic service functions separately available to any customer under nondiscriminatory tariffed terms and conditions, including price, that are identical to those

[13] The Commission subsequently issued a clarification order of its Functional/Structural Separation Order. *Re: Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, Dkt. No. M-00001353 (Order entered May 24, 2001 (FSS Clarification Order).

[14] 14 In determining whether an ILEC has met the one million access-line threshold, the proposed rulemaking has defined "ILEC" as broadly as possible to include any of the company's "affiliates, subsidiaries, divisions, or other corporate sub-units that provide local exchange service." Thus, for example, if an ILEC merges or acquires another LEC and creates a separate subsidiary to house the acquired company's local exchange business, the access lines acquired by the ILEC would be counted with its pre-existing access lines to determine if the one million access-line threshold has been met. In addition, if the threshold is met, then the competitive safeguard regulation in question would apply to all affiliates or subsidiaries created by the transaction, even if the particular affiliate or subsidiary has less than one million access lines. Applying this definition of ILEC to Bell Atlantic's recent acquisition of GTE Corporation, for instance, results in the competitive safeguard regulation applicable only to ILECs with more than one million access lines being applicable to both Verizon-PA (the old BA-Pennsylvania) and Verizon North Inc. (the old GTE North). Both entities are subsidiaries of Verizon.

[15] *Re: Application of Verizon Pennsylvania, Inc., et al. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the Commonwealth of Pennsylvania*, CC Docket No. 01-138 (Consultative Report of the Pennsylvania Public Utility Commission, filed June 25, 2001).

[16] *Re: Application of Verizon Pennsylvania, Inc., et al. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the Commonwealth of Pennsylvania*, CC Docket No. 01-138 (Memorandum Opinion and Order, rel. Sept. 19, 2001).

[17] Letter dated June 7, 2001, from Julia Conover, Vice President and General Counsel, Verizon Pennsylvania Inc., to James J. McNulty, Secretary, Pennsylvania Public Utility Commission.

[18] *Re: Performance Measures Remedies*, Docket No. M-00011468, at 32 (Recommended Decision, entered Sept. 28, 2001).

used by the local exchange telecommunications company and its affiliates in providing the competitive service.

See section 3005(e)(1) of the code. Under section 3002 of the code (66 Pa.C.S. § 3002), "basic service functions" are defined as those basic components of the LEC's network that are "necessary to provide a telecommunications service and which represent the smallest feasible level of unbundling capable of being tariffed and offered as a service." Thus, whenever a LEC obtains competitive classification of any of its local services under Chapter 30, the LEC must unbundle the "basic service functions" used to provide that local service.

As the statutory language is clear on this point, there is no further need to create a regulation mandating this result. Verizon-PA's attempt, therefore, to impose the same "necessary and impair" standard that is imposed by TA-96 for unbundling network elements must be rejected in applying Chapter 30's own unbundling requirement. This conclusion is also consistent with this Commission's prior pronouncements on this issue. Global Order at 67-68; Competitive Safeguards Order at 158.

3. *Imputation for IntraLATA Toll Services*

Similarly, we are satisfied that no additional rulemaking is required at this time on the issue of imputation. In the recent Global Order, we held, with respect to service level imputation, that Verizon-PA's total toll revenues must exceed total imputed switched access and carrier charges on an aggregated toll services level. Consolidated Global Order at 240-42. The Global Order, which closed the docket at M-00960799, as well as our earlier TA-96 Implementation Order, however, did not address the question of imputation for the delivery of intraLATA services by ILECs other than Verizon-PA.

In addressing this issue now, we agree with the PTA that there is no evidence that interexchange carriers (IXCs) are unable to compete today with the ILECs in the intraLATA toll market. Further, we take administrative notice of the fact that the toll market is subject to increasingly intense price competition as many IXCs are setting their rates on a National level using flat rates that have no relationship with the access rates of any specific ILEC.[19] Finally, we know of no evidence to refute AT&T's own witness that predatory pricing is extremely unlikely to occur;[20] and, even if predatory pricing does occur, the Federal antitrust laws are already available to address this type of conduct. Frankly, we are wary of taking any regulatory action that may discourage the aggressive pricing of toll services by any and all competitors, including ILECs, in that market. We also note that we can always revisit this issue at a later date if there is evidence that ILECs are engaging in predatory pricing in intraLATA toll markets in this Commonwealth.

4. *Unfair Competition and Cross Subsidization Issues*

We are proposing today a set of regulations in the form of a generic "Code of Conduct" in § 63.144 that will be applicable to all LECs to prevent unfair competition and cross-subsidization in any local exchange market within this Commonwealth.[21] We believe these proposed regulations, in providing a comprehensive set of competitive safeguard rules under section 3005(b) of the code, are necessary to prevent unfair competition, discrimination, cross subsidies and other market power abuses by LECs in their local exchange markets, and are, therefore, in the public interest.

We note that parts of the proposed regulations are modeled after similar provisions contained in the "Code of Conduct" adopted for Verizon-PA in the Global Order and other provisions are modeled after the ACER Code of Conduct offered in the structural separation proceeding. In addition, as with the competitive safeguard regulations adopted for this Commonwealth's electric industry,[22] the instant regulations are directed not only at ILECs as the entities with market power, but at CLECs as well in specific circumstances to prevent unfair methods of competition.

In this regard, we cannot fully accept Verizon-PA's position that any regulation should be equally imposed on all LECs and not just incumbents under the doctrine of regulatory parity. The Commission also recognizes that at least some CLECs have name recognition and sizable financial resources. However, without market power, CLECs cannot curb the entry of new providers by their control of bottleneck facilities, set prices above competitive levels, or engage in unlawful predatory pricing to eliminate competition.

We recently took this same approach in adopting streamlined tariff filing regulations for the telecommunications industry, noting that " 'regulatory parity' with respect to rate regulation between ILECs and CLECs is not appropriate until the playing field for specific services or business activities becomes more competitive/level." *Rulemaking Re Updating and Revising Existing Filing Requirement Regulations 52 Pa. Code §§ 53.52—53.53—Telecommunication Utilities*, Dkt. No. L-00940095, at 13 n.7 (Proposed Rulemaking Order entered September 30, 1999) (Streamlined Tariff Filing Proceeding).[23] The transition to competition in the local exchange markets requires the development of sufficient competitive safeguards to ensure that new entrants will have a fair and equal opportunity to compete for customers that previously belonged solely to the incumbent provider. However, in those instances where the proposed standard of conduct does not rely on the LEC having market power to be effective, the standard is drafted so that it is equally applicable to ILECs and CLECs.

In developing our proposed competitive safeguard regulations, we have not prescribed rules that will restrict joint marketing activities because we are not convinced that a restriction is necessary to foster competition in the local exchange markets. Additionally, we reject Verizon-PA's request that informational tariffs for competitive services should be eliminated, as this issue was part of our rulemaking proceeding relating to streamlining tariff filing requirements.[24] We also reject AT&T's request that the Commission expand the type of information required in a notice an ILEC uses to request "competitive" status classification under section 3005(a) of the code as both unnecessary and contrary to the plain language requirements mandated in customer notices.

[19] Sprint, for example, has implemented a "Sprint Simple Seven" plan that offers intrastate, intraLATA long distance to residential and business customers at a flat rate of 7 cents per minute and the payment of a monthly service charge. The other national IXCs, AT&T and MCI, have similar long distance plans in effect.

[20] A survey of recent court cases that involved predatory pricing claims, for example, found that the defendant prevailed in every case because the plaintiff was unable to prove one or more elements necessary to make out a successful claim.

[21] In issuing these proposed regulations, the Commission recognizes that it has adjudicated many of the same issues herein in other proceedings. The Commission does not intend to disturb those earlier rulings, such as its findings and holding in the Competitive Safeguards Order, through these regulations, but instead the proposed rulemaking is intended to build upon that foundation.

[22] 52 Pa. Code §§ 54.121—54.122. We also note that the proposed regulations herein are modeled in part from Code of Conduct provisions adopted for the electric industry.

[23] This rulemaking was finalized by order entered June 2, 2000, at the same docket.

[24] In the final regulations adopted in the Streamlined Tariff Filing Proceeding, CLECs and ILECs offering competitive services must continue to file informational tariffs and price lists. 52 Pa. Code § 53.58(d). We should note that in the Streamlined Tariff Filing Proceeding, Verizon-PA supported the proposed regulations, including the provision relating to the filing of informational tariffs for competitive services.

Finally, we agree with Verizon-PA and Verizon North Inc. on two specific issues raised in the companies' February 2001 comments. First, we agree that a total prohibition of certain advertising claims, such as claims of superiority, may violate the First Amendment. The United States Supreme Court has held that states may not place an absolute bar on certain types of potentially misleading information if it may be presented in a way that is not deceptive. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); see also In re RMJ, 455 U.S. 191 (1982). The Court stated the preferred remedy is not a complete prohibition but a requirement of disclaimers or explanation to assure that the consumer is not misled. *Bates*, 433 U.S. at 384. We have, therefore, added the phrase, "unless the statement can be factually substantiated" to the advertising restrictions contained in § 63.144(3)(ii) and (iii) of the proposed Code of Conduct.[25]

The second issue relates to whether the proposed Code of Conduct, when it becomes final, should supersede and replace any other Codes of Conduct, such as the Code of Conduct adopted in the Global Order for Verizon-PA, in effect for any LEC in this Commonwealth. We agree that having two or more Codes of Conduct in existence may be confusing and make compliance and enforcement more difficult. The proposed Code of Conduct that is contained in § 63.144, therefore, should supersede and replace any existing Codes of Conduct when it becomes final.

As this is a proposed rulemaking, we invite all interested parties to comment on whether they believe that these proposed competitive safeguard regulations go far enough to protect competition. In the absence of proof that the quality of Verizon-PA's (as the State's only ILEC with more than one million access lines) wholesale services has deteriorated; however, we believe the focus of the comments should be on the Code of Conduct provisions rather than the form of functional separation this Commission should impose on the state's largest ILECs.

Accordingly, under 66 Pa.C.S. §§ 501, 1501 and 3005(b) and (g)(2); 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, 7.2 and 7.5; section 204(b) of the Commonwealth Attorneys Act (71 P. S. § 732.204(b)); section 5 of the Regulatory Review Act (71 P. S. § 745.5); and section 612 of The Administrative Code of 1929 (71 P. S. § 232) and the regulations promulgated thereunder in 4 Pa. Code §§ 7.251—7.235, we are considering adopting the proposed regulations set forth in Annex A; *Therefore,*

It is Ordered That:

1. The proposed rulemaking at L-00990141 will consider the regulations set forth in Annex A.

2. The Secretary shall submit this Order and Annex A to the Office of Attorney General for review as to form and legality and to the Governor's Budget Office for review of fiscal impact.

3. The Secretary shall submit this Order and Annex A for review and comment to the Independent Regulatory Review Commission and the Legislative Standing Committees.

4. The Secretary shall certify this Order and Annex A, and deposit them with the Legislative Reference Bureau to be published in the *Pennsylvania Bulletin*. The Secretary shall specify publication of the Order in accordance with 45 Pa.C.S. § 727.

5. An original and 15 copies of any comments referencing the docket number of the proposed regulations be submitted within 30 days of publication in the *Pennsylvania Bulletin* to the Pennsylvania Public Utility Commission, Attn.: Secretary, P. O. Box 3265, Harrisburg, PA 17105-3265. Reply comments will be due 15 days from the last date of the 30-day comment period.

6. Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Coordinator, Law Bureau 717-772-4579.

7. A copy of this Order and Annex A shall be served upon the Pennsylvania Telephone Association, the Telecommunications Resellers Association, all jurisdictional telecommunication utilities, the Office of Trial Staff, the Office of Consumer Advocate and the Small Business Advocate.

JAMES J. MCNULTY,
Secretary

Fiscal Note: 57-224. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 63. TELEPHONE SERVICE

Subchapter K. COMPETITIVE SAFEGUARDS

Sec.
63.141. Statement of purpose and policy.
63.142. Definitions.
63.143. Accounting and audit procedures for large ILECs.
63.144. Code of conduct.
63.145. Remedies.

§ 63.141. Statement of purpose and policy.

(a) This subchapter establishes competitive safeguards to:

(1) Assure the provision of adequate and nondiscriminatory access by ILECs to competitive LECs for all services and facilities ILECs are obligated to provide LECs under any applicable Federal or State law.

(2) Prevent the unlawful cross subsidization or support for competitive services from noncompetitive services by ILECs.

(3) Prevent LECs from engaging in unfair competition.

(b) These competitive safeguards are intended to promote the Commonwealth's policy of establishing and maintaining an effective and vibrant competitive market for all telecommunications services.

(c) The code of conduct contained in § 63.144 (relating to code of conduct) supersedes and replaces any other codes of conduct applicable to any LEC.

§ 63.142. Definitions.

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

CLEC—Competitive local exchange carrier—

(i) A telecommunications company that has been certificated by the Commission as a CLEC under the Commission's procedures implementing the Telecommuni-

[25] Proposed advertising bans on superiority claims by professional licensing boards have attracted the attention of the Federal Trade Commission and the Office of Attorney General in the past. Both agencies have routinely opposed complete bans on superiority claims on First Amendment grounds. In 1985, the Office of Attorney General advocated the use of disclaimers or other qualifying language that protects truthful advertising claims of superiority to the State Dental Council and Examining Board, which board adopted this recommendation at 49 Pa. Code § 33.203(a)(3).

cations Act of 1996, the act of February 8, 1996 (Pub. L. No. 104-104, 110 Stat. 56) or under the relevant provisions in 66 Pa.C.S. § 3009(a) (relating to additional powers and duties) and its successors and assigns.

(ii) The term includes any of the CLEC's affiliates, subsidiaries, divisions or other corporate subunits that provide local exchange service.

Competitive service—A service or business activity offered by an incumbent or CLEC that has been classified as competitive by the Commission under the relevant provisions of 66 Pa.C.S. § 3005 (relating to competitive services).

ILEC—Incumbent local exchange carrier—

(i) A telecommunications company deemed to be an ILEC under section 101(h) of the Telecommunications Act of 1996 (47 U.S.C.A. § 251(h)), and its successors and assigns.

(ii) The term includes any of the ILEC's affiliates, subsidiaries, divisions or other corporate subunits that provide local exchange service.

LEC—Local exchange carrier—A local telephone company that provides telecommunications service within a specified service area. LECs encompass both ILECs and CLECs.

Market price—Prices set at market-determined rates.

Noncompetitive service—Any protected telephone service as defined in 66 Pa.C.S. § 3002 (relating to definitions), or a service that has been determined by the Commission as not a competitive service.

Subscription activities—The activities conducted by an ILEC to formalize the acquisition of a customer or to maintain the provision of a customer's telecommunications services. The activities include all conduct relating to the provision of information to prospective customers regarding the ILEC's services and the enrollment of individuals or businesses as customers.

Telecommunications service—A utility service, involving the transmission of signaling, data and messages, which is subject to the Commission's jurisdiction.

§ 63.143. Accounting and audit procedures for large ILECs.

Any ILEC with more than 1 million access lines shall maintain a functionally separate wholesale organization (the "wholesale operating unit") and shall be subject to the following requirements:

(1) The wholesale operating unit of the ILEC shall consist of employees and other resources necessary to perform the following wholesale functions: preordering, ordering and the processing and transmission of instructions to field forces for the provisioning of services, network elements (as defined under section 3(19) of the Communications Act of 1934 (47 U.S.C.A. § 153(29)), or facilities to CLECs necessary to provide competitive or noncompetitive services to consumers.

(2) The wholesale operating unit of the ILEC shall have its own direct line of management and shall keep separate accounting and business records which shall be subject to review by the Commission in accordance with 66 Pa.C.S. § 506 (relating to inspection of facilities and records). The ILEC shall keep its separate accounting and business records, and other books, memoranda and documents that support the entries in the separate records so as to be able to furnish readily full information as to any item included in any of those records.

(3) The wholesale operating unit of the ILEC may not engage in any marketing, sales, advertising or subscription activities directed at retail customers.

(4) Employees or agents of the ILEC's wholesale operating unit may not be shared with any of the ILEC's other operations. The costs associated with any shared resources shall be fully allocated and accounted for between the ILEC's wholesale operating unit and its other relevant operations based on the proportionate use of those facilities. The costs of any other employees, assets and other resources associated with performing the wholesale functions described in paragraph (1) shall be allocated using appropriate allocation factors.

(5) Any employee of the ILEC wholesale operating unit may transfer to the ILEC's other operations, provided the transfer is not used as a means to circumvent this subchapter. An employee of the ILEC wholesale operating unit may not provide information to the ILEC's retail operations that it would otherwise be precluded from having under this subchapter.

(6) An employee or agent of the ILEC wholesale operating unit may not promote any retail service of the ILEC or any other LEC's retail services. The referrals made by employees or agents of the ILEC's wholesale operating unit shall identify all available providers of service on an equal and nondiscriminatory basis.

(7) The ILEC shall maintain contemporaneous records documenting all tariffed and nontariffed transactions between its wholesale operating unit and its other operations. The records shall be available for public inspection during normal business hours.

(8) An independent compliance review may be conducted every calendar year to ascertain and verify the ILEC's compliance with this subchapter as directed by the Commission on an as-needed basis.

(i) The ILEC will retain, subject to Commission approval, an independent consultant to conduct this compliance review.

(ii) The ILEC shall select the independent consultant through a competitive bid process.

(iii) To help ensure the objectivity of the results, Commission staff will monitor the ILEC's consultant selection process, the scope of the compliance review, the progress of the consultant's work, and the report preparation process.

(iv) An original and ten copies of the final report as well as an electronic version will be submitted to the Commission by March 31, following the calendar year covered in the report.

(v) The consultant's final report, to include recommendations for change when necessary, will be made available for public inspection during normal business hours.

(9) Nothing in this section prohibits the ILEC from providing any competitive service through a separate corporate division or affiliate; however, the competitive safeguards imposed by this subchapter will continue to be fully applicable to the ILEC and its division or affiliate.

§ 63.144. Code of conduct.

All LECs, unless otherwise noted, shall comply with the following requirements:

(1) *Nondiscrimination.*

(i) An ILEC may not give itself, including any local exchange affiliate, division or other corporate subunit, or any CLEC any preference or advantage over any other

CLEC in the preordering, ordering, provisioning, or repair and maintenance of any goods, services, network elements (as defined under section 3(29) of the Communications Act of 1934 (47 U.S.C.A. § 153(29)), or facilities unless expressly permitted by State or Federal law.

(ii) An ILEC may not condition the sale, lease or use of any noncompetitive service on the purchase, lease or use of any other goods or services offered by the ILEC or on a direct or indirect commitment not to deal with any CLEC. Nothing in this paragraph prohibits an ILEC from bundling noncompetitive services with other noncompetitive services or with competitive services so long as the ILEC continues to offer any noncompetitive service contained in the bundle on an individual basis.

(2) *Employee conduct.*

(i) An LEC employee while engaged in the installation of equipment or the rendering of services to any end-user on behalf of a competitor may not disparage the service of the competitor or promote any service of the LEC to the end-user.

(ii) An LEC employee while processing an order for the repair or restoration of service or engaged in the actual repair or restoration of service on behalf of a competitor may not either directly or indirectly represent to any end-user that the repair or restoration of service would have occurred sooner if the end-user had obtained service from the LEC.

(3) *Corporate advertising and marketing.*

(i) An LEC may not engage in false or deceptive advertising with respect to the offering of any telecommunications service in this Commonwealth.

(ii) An LEC may not state or imply that the services provided by the LEC are inherently superior when purchased from the LEC unless the statement can be factually substantiated.

(iii) An LEC may not state or imply that the services rendered by a competitor may not be reliably rendered or is otherwise of a substandard nature unless the statement can be factually substantiated.

(iv) An ILEC may not state or imply that the continuation of any service from the ILEC is contingent upon taking other services offered by the ILEC.

(4) *Cross subsidization.*

(i) An ILEC may not use revenues earned or expenses incurred in conjunction with noncompetitive services to subsidize or support any competitive services. An ILEC may not provide any assets, goods or services to its competitive local exchange affiliate, division or other corporate subunit at a price below the ILEC's cost, market price or tariffed rate for the goods or services, whichever is higher. An ILEC may not purchase any assets, goods or services from its competitive affiliate, division or other corporate subunit at a price above the market price or tariffed rate for the goods or services.

(5) *Information sharing and disclosure.*

(i) An ILEC's employees, including its wholesale employees, shall use CLEC proprietary information (that is not otherwise available to the ILEC) received in the preordering, ordering, provisioning, billing, maintenance or repairing of any telecommunications services provided to the CLEC solely for the purpose of providing the services to the CLEC. ILEC employees may not disclose the CLEC proprietary information to other employees engaged in the marketing or sales of retail telecommunications services unless the CLEC provides prior written consent to the disclosure. This provision does not restrict the use of aggregated CLEC data in a manner that does not disclose proprietary information of any particular CLEC.

(ii) Subject to customer privacy or confidentiality constraints, an LEC employee may not disclose, directly or indirectly, any customer proprietary information to the LEC's affiliated or nonaffiliated entities unless authorized by the customer under § 63.135 (relating to customer information).

(6) *Adoption and dissemination.* Every LEC shall formally adopt and implement the applicable code of conduct provisions as company policy or modify its existing company policy as needed to be consistent with the applicable code of conduct provisions. Every LEC shall also disseminate the applicable code of conduct provisions to its employees and take appropriate steps to train and instruct its employees in their content and application.

§ 63.145. Remedies.

(a) A violation of this subchapter allegedly harming a party may be adjudicated using the Commission's *Interim Guidelines for Abbreviated Dispute Resolution Process*, at Docket Nos. P-00991648 and P-00991649, which were published at 30 Pa.B. 3808 (July 28, 2000), or any successor Commission alternative dispute resolution process, to resolve the dispute. This action, however, does not preclude or limit additional available remedies or civil action, including the filing of a complaint concerning the dispute or alleged violations with the Commission under relevant provisions of 66 Pa.C.S. (relating to the Public Utility Code).

(b) The Commission may also, when appropriate, impose penalties under 66 Pa.C.S. § 3301 (relating to civil penalties for violations) or refer violations of the code of conduct provisions in this subchapter to the Pennsylvania Office of Attorney General, the Federal Communications Commission or the United States Department of Justice.

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