RULES AND REGULATIONS

Title 22—EDUCATION

DEPARTMENT OF EDUCATION

[22 PA. CODE CH. 403]

Compliance With the No Child Left Behind Act of 2001

The Department of Education (Department) adds Chapter 403 (relating to Compliance with the No Child Left Behind Act of 2001).

Contact Person

Questions regarding these standards should be directed to Dr. Frances Warkomski, Director of the Bureau of Special Education, Department of Education, 333 Market Street, Harrisburg, PA 17126-0333, (717) 783-2311.

Effective Date

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

Statutory Authority

The Department acts under the authority of section 2603-B(d)(10)(i) of the Public School Code of 1949 (24 P. S. § 26-2603-B(d)(10)(i)) (code), which was added by section 31 of the act of June 29, 2002 (P. L. 524, No. 88) (Act 88). Section 2603-B(d)(10)(i) of the code empowers the Department, with the approval of the State Board of Education (State Board), to adopt standards to comply with the provisions of the No Child Left Behind Act of 2001 (NCLB) (Pub. L. No. 107-110, 115 Stat. 1425) to maintain the eligibility of the Commonwealth to receive Federal funding for education programs. Under section 2603-B(d)(10)(i) of the code, the State Board must approve or disapprove the standards within the 30 days of submission to its office or at its next scheduled meeting, whichever is sooner. Failure of the State Board to approve or disapprove the standards within the time prescribed results in its deemed approval of the standards proposed by the Department.

Standards promulgated by the Department under section 2603-B(d)(10)(i) of the code must be deposited with the *Pennsylvania Bulletin* for publication, see section 2603-B(d)(10)(ii) of the code, but they are exempt from the following laws:

(a) Sections 201—205 of the act of July 31, 1968 (P. L. 769, No. 240) (71 P. S. §§ 1201—1205), known as the Commonwealth Documents Law.

(b) Section 204(b) of the Commonwealth Attorneys Act (71 P. S. § 732-204(b)).

(c) The Regulatory Review Act (71 P. S. §§ 745.1—745.15).

In light of these exemptions and the express approval of the State Board, the Department is depositing these standards for publication in final-form.

Description of Process

On September 18, 2002, the Department presented to the State Board two sets of proposed standards necessary to comply with NCLB. On September 18, 2002, the special committee of the State Board established to work with the Department in the development and review of standards necessary to comply with NCLB (the NCLB committee) conducted a public meeting to review and discuss the standards proposed by the Department and to receive public comment on the proposal.

At the regular business meeting of the State Board held September 19, 2002, the Secretary of Education made a detailed presentation explaining the proposed standards. At its September 19, 2002, meeting, the State Board publicly voted to approve the proposed standards presented by the Department. On September 26, 2002, the Chairperson of the State Board signed two resolutions delineating the standards. Those resolutions were published at 32 Pa.B. 5151 (October 12, 2002).

Background and Need for Standards

On January 8, 2002, President George W. Bush signed NCLB into law. The NCLB, inter alia, amends Titles I and III of the Elementary and Secondary Education Act of 1965 (ESEA) (Pub. L. 89-10, 79 Stat. 27) (Improving the Academic Achievement of the Disadvantaged) (20 U.S.C.A. §§ 6301—6578 and 6801—7014). The purpose of Title I is to ensure that all children have the opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State achievement standards and academic assessments. In furtherance of this purpose, Title I provides grants to State education agencies and sub-grants to local educational agencies. To remain eligible for funding under Title I, State and local educational agencies must comply with the NCLB.

Section 1111(b)(2)(A) of Title I, as added by NCLB (20 U.S.C.A. § 6311(b)(2)(A)), requires each state to demonstrate that it has developed and is implementing a single, statewide accountability system that will be of high quality, technically valid and reliable, aligned with the state's academic content and student achievement standards, and based upon the same content expectations for all children. It is further required, by section 1111 of NCLB, that the single, statewide accountability system be effective in ensuring that all Local Education Agencies (LEAs), public elementary schools and public secondary schools make adequate yearly progress (AYP), as defined in section 1111(b)(2)(C) of Title I.

In addition, section 1111(b)(3)(A) of Title I requires that, beginning no later than the 2005-06 school year, states assess all students in grades three through eight against the challenging State academic content standards in, at a minimum, math and reading or language arts and, beginning in the 2007-08 school year, in science for students in grades four, seven and ten.

Section 3121 of Title III of the ESEA, added by NCLB (20 U.S.C.A. § 6841), requires that each state approve evaluation measures that are designed to assess the progress of children in attaining English proficiency, including a child's level of comprehension, listening, speaking, reading and writing skills in English.

Description of Standards

The standards proposed by the Department and approved by the State Board provide for a single, Statewide accountability system. More specifically, the standards provide for the fulfillment of the NCLB's assessment requirements and the calculation of AYP.

Fiscal Impact

These standards are necessary to ensure that the State and its local educational agencies remain eligible to receive Federal funding under Titles I and III of the ESEA. The standards will not result in new costs to the

State, as the Department will continue to access State Title I funds. In addition, Title VI of the ESEA (Flexibility and Accountability), as amended by the NCLB (20 U.S.C.A. §§ 7301—7372), provides $11.6 million in funds to implement this program.

Since the standards as adopted allow the LEAs to choose from a list of commercially available assessments that are currently used as local assessments in grades four, six and seven, the fiscal impact to school districts is expected to be minimal. To the extent that funding is available, the Department expects to offset at least some of the costs that school districts may incur.

Paperwork Requirements

The additional paperwork requirements resulting from these standards are minimal and mandated by NCLB.

Regulatory Review

Under section 2603-B(d)(10(iii) of the code, these standards are exempt from the Regulatory Review Act.

Findings

The Department finds that:

(1) Proposed rulemaking in advance of the promulgation of standards is not required under section 2603-B(d)(10)(iii)(A) of the code added by section 31 of Act 88, which expressly provides that the standards are exempt from the requirements of sections 201—205 of the Commonwealth Documents Law.

(2) The State Board approved the proposed standards by public vote at its September 19, 2002, meeting.

(3) The promulgation of these standards is necessary for compliance with the NCLB.

Order

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

(a) The regulations of the Department, 22 Pa. Code, are amended by adding §§ 403.1—403.3 to read as set forth in Annex A.

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

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

CHARLES B. ZOGBY,
Secretary

Fiscal Note: 6-284. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 22. EDUCATION

PART XVI. STANDARDS

CHAPTER 403. COMPLIANCE WITH THE NO CHILD LEFT BEHIND ACT OF 2001

Sec.
403.1. Purpose and scope.
403.2. Definitions.
403.3. Single accountability system.

§ 403.1. Purpose and scope.

This chapter describes the standards of the Department, approved by the State Board, that have been adopted under section 2603-B(d)(10) of the Public School Code (24 P. S. § 26-2603-B(d)(10)) to facilitate compliance by the Commonwealth with the requirements of the No Child Left Behind Act of 2001 (Pub. L. No. 107-110, 115 Stat. 1425).

§ 403.2. Definitions.

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

AYP—Adequate yearly progress as defined by section 1111(b)(2)(C) of Title I (20 U.S.C.A. § 6311(b)(2)(C)), added by NCLB.

Department—The Department of Education of the Commonwealth.

ESEA—The Elementary and Secondary Education Act of 1965 (20 U.S.C.A. §§ 6301—7941), as amended by the NCLB.

LEA—A local educational agency.

NCLB—The No Child Left Behind Act of 2001 (Pub. L. No. 107—110, 115 Stat. 1425) (20 U.S.C.A. §§ 6053e, 6054b, 6055h, 6056a, 1041—1044, 3427 and 6052).

PSSA—The Pennsylvania System of State Assessment.

State Board—The State Board of Education of the Commonwealth.

Title I—Title I of the ESEA (20 U.S.C.A. §§ 6301—6578), as amended by NCLB.

§ 403.3. Single accountability system.

(a) *Requirement of NCLB.* Section 1111 of Title I, added by NCLB (20 U.S.C.A. § 6311), requires each state to develop and implement a single, statewide state accountability system that will be effective in ensuring that all LEAs, public elementary schools and public secondary schools make AYP as defined in section 1111(b)(2)(C) of Title I.

(b) *Proficiency as a measure of student progress.*

(1) As the starting point for calculating the AYP, the Department will use the proficient level of student performance, as adopted by the State Board on May 10, 2001. See 31 Pa.B. 2763 (May 26, 2001).

(2) Using data from the 2001-02 school year as the baseline, the Department will determine the number of students meeting or exceeding the proficient level of achievement on State assessments.

(c) *Adequate yearly progress.*

(1) The Department will calculate the AYP by using the "intermediate method" of calculation, involving "stepped goals."

(2) The Department will provide yearly targets to assist the LEAs in measuring progress within the intermediate method.

(3) The Department will use graduation rates as an additional indicator of the AYP for secondary schools and students.

(4) The Department will use child attendance rates as an additional indicator of the AYP for elementary schools and students.

(5) The Department will use 75 as the required number of students tested per building to form a group for the purposes of measuring the AYP of students with disabilities, limited English proficient students and students who are members of economically disadvantaged, major racial and ethnic groups.

(d) *Assessments.*

(1) Section 1111(b)(3)(A) of Title I specifically requires that, beginning no later than the 2005-06 school year, states must assess all students in grades three through eight against the challenging state academic content standards in, at a minimum, math and reading or language arts, or both. In addition, beginning in the 2007-08 school year, states must assess all students in grades four, seven and ten against the challenging state academic content standards for science.

(i) To accomplish the mandates described in paragraph (1), the LEAs shall continue to use the PSSA to assess students in grades three, five, eight and eleven in reading and mathematics and to assess students in grades six, nine and eleven in writing.

(ii) For determining the tests to be administered in grades four, six and seven, the Department will adhere to the following procedure:

(A) The Department will identify a limited number of commercially available assessments that are currently used as local assessments in grades four, six and seven as tests that may be used for compliance with the NCLB.

(B) The tests identified by the Department will be augmented, if necessary, for alignment with State academic standards.

(C) From these tests, each LEA shall choose the assessment that it will use to test students in grades four, six and seven.

(iii) The Value Added Assessment System shall be implemented as a component of the Commonwealth's assessment system to provide the LEAs with analyses and reports to offer valuable information for focused program improvement to increase performance.

(2) Section 3121 of Title III of the ESEA, added by the NCLB (20 U.S.C.A. § 6841), requires that each state approve evaluation measures that are designed to assess the progress of children in attaining English proficiency, including a child's level of comprehension, listening, speaking, reading and writing skills in English.

(i) To accomplish the mandates described in paragraph (2), the Commonwealth will serve as the leader in a consortium of states seeking to develop a language proficiency assessment that will meet the needs of the NCLB.

(ii) The Department will use the consortium's assessment to evaluate the progress of students in attaining English proficiency, including a child's level of comprehension, listening, reading and writing skills in English.

(iii) The Department will identify one or more commercially developed language proficiency assessments that the LEAs shall administer until the assessment developed by the consortium is available.

[Pa.B. Doc. No. 02-2219. Filed for public inspection December 13, 2002, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 93]

Great Lakes Initiative

The Environmental Quality Board (Board) is amending Chapter 93 (relating to water quality standards) to read as set forth in Annex A. The final-form rulemaking incorporates Federal requirements concerning prohibitions and phasing out of mixing zones for bioaccumulative chemicals of concern (BCCs) in waters of the Great Lakes System.

This notice is given under Board order at its meeting of September 17, 2002.

A. *Effective Date*

This final-form rulemaking is effective upon publication in the *Pennsylvania Bulletin*.

B. *Contact Persons*

For further information contact Edward R. Brezina, Chief, Division of Water Quality Assessment and Standards, Bureau of Water Supply and Wastewater Management, 11th Floor, Rachel Carson State Office Building, P. O. Box 8467, Harrisburg, PA 17105-8467, (717) 787-9637; or Michelle Moses, Assistant Counsel, Bureau of Regulatory Counsel, 9th Floor, Rachel Carson State Office Building, P. O. Box 8464, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users) and request that the call be relayed. This final-form rulemaking is available electronically through the Department of Environmental Protection (Department) website (http://www.dep.state.pa.us).

C. *Statutory Authority*

This final-form rulemaking is made under the authority of sections 5(b)(l) and 402 of The Clean Streams Law (35 P. S. §§ 691.5(b)(1) and 691.402), which authorize the Board to develop and adopt rules and regulations to implement the provisions of The Clean Streams Law and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), which grants the Board the power and duty to formulate, adopt and promulgate rules and regulations for the proper performance of the work of the Department.

D. *Background*

The Board approved the proposed rulemaking on November 20, 2001, and it was published at 32 Pa.B. 427 (January 26, 2002) with a provision for a 45-day public comment period that closed on March 12, 2002.

The purpose of this final-form rulemaking is to revise existing water quality regulations in Chapter 93. The Great Lakes Initiative (GLI) requirements were promulgated at 40 CFR Part 132 (relating to water quality guidance for the Great Lakes System) at 60 FR 15366 (March 23, 1995) to provide for consistent protection of the Great Lakes System. The Commonwealth promulgated the regulations for this Commonwealth waters in the Great Lakes System on December 27, 1997, and the Environmental Protection Agency (EPA) approved the regulations on March 17, 2000.

The EPA had promulgated a mixing zone prohibition provision as part of the regulation, but the provision was vacated by the United States Court of Appeals for the District of Columbia Circuit in the case of *American Iron & Steel Institute v. EPA*, 115 F.3d 979 (D.C. Cir. 1997), and was remanded to the EPA for further consideration. In response to the Court's remand, the EPA published a proposal on October 4, 1999, to amend the guidance to reinstate the provision to prohibit mixing zones for BCCs (64 FR 53632). The EPA promulgated the final rule to amend Appendix F, Procedure 3.C of 40 CFR Part 132 to prohibit mixing zones for BCCs in the Great Lakes System, subject to certain exceptions for existing dis-

charges, by publication in 65 FR 67638 (November 13, 2000). The regulatory amendment to Chapter 93 provides consistency with the Federal guidance for the Great Lakes System by eliminating opportunity for the use of mixing areas for discharges of toxic and persistent chemicals known as BCCs. Examples of BCCs are mercury and dioxin. BCCs in the waters of the Great Lakes are not flushed from the system but build up for long periods of time, allowing aquatic organisms to accumulate and magnify the pollutants. Animals and humans who consume the fish are subject to increased loadings of these toxic pollutants. This final-form rulemaking eliminates the use of mixing areas in calculating allowable discharge limits for BCCs, thereby lessening loadings to the Great Lakes System.

For existing discharges to waters of the Great Lakes System, the final-form rulemaking prohibits mixing zones for BCCs after November 15, 2010. New discharges of BCCs to waters of the Great Lakes System are subject to the mixing zone prohibition when the EPA approves the State's submission of the final-form rulemaking. The three Great Lakes states, the Commonwealth, Ohio and New York, which did not include the BCC mixing zone provision in their regulations, are required to submit amended regulations for the EPA approval by May 13, 2002. The Federal regulation provides for an extension to November 13, 2002, for states making progress toward adopting the provision.

On May 8, 2002, the Water Resources Advisory Committee approved the final draft recommendation for presentation to the Board.

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

A 45-day public comment period for the proposed rulemaking ended on March 12, 2002. Two comments were received. The first comment asked the Department to develop a compliance plan in case a BCC is found in an existing discharge at a later date by improved analytical methods. Because the Department addresses compliance on a case-by-case basis, no plan will be developed unless, and until, one is needed.

The other comment alleged that use of the word "subpart" in the proposed rulemaking was incorrect. After discussion with the Legislative Reference Bureau, "subpart" was replaced with a "." and corresponding changes were made to the final-form rulemaking. An editorial change was also made to the definition of "BCC," removing the word "subpart."

F. *Benefits, Costs and Compliance*

Executive Order 1996-1, "Regulatory Review and Promulgation" provides for a cost/benefit analysis of the final-form rulemaking.

Benefits

Overall, the citizens of this Commonwealth will benefit from the final-form rulemaking because it provides the appropriate level of protection of the waters in the Great Lakes System. The revision also assures compliance with the applicable Federal requirements.

Compliance Costs

The final-form rulemaking is not expected to impose any significant additional compliance costs on the regulated community. No current NPDES permits provide for discharges of BCCs to the Great Lakes System in this Commonwealth. For this reason, no costs associated with phase out of mixing provisions need to be addressed. New discharges would have to meet the requirement when discharging commences, but there is no way of knowing if or when discharges will be proposed.

Compliance Assistance Plan

The final-form rulemaking adds a requirement that, in practice, will only be applicable if there are new discharges of BCCs to waters of the Great Lakes System. The requirement is straightforward and will not require implementation guidance. Staff are available to assist regulated entities in complying with the regulatory requirements if any questions arise.

Paperwork Requirements

This final-form rulemaking should have no significant paperwork impact on the Commonwealth, its political subdivisions or the private sector.

G. *Pollution Prevention*

In keeping with Governor Schweiker's interest in encouraging pollution prevention solutions to environmental problems, this final-form rulemaking specifically provides for prevention of additional loadings of BCCs to the water environment by requiring that the addition of these substances be significantly limited, even beyond that necessary to meet water quality standards.

H. *Sunset Review*

The final-form rulemaking will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended. In addition, water quality standards are required to be reviewed by the Department at least once every 3 years, with the results of the review to be submitted to the EPA.

I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on January 11, 2002, the Department submitted a copy of the notice of proposed rulemaking published at 32 Pa.B. 427, to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing this final-form rulemaking, the Department has considered the comments received from IRRC, the Committees and the public.

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), on October 28, 2002, this final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 7, 2002, and approved the final-form rulemaking.

J. *Findings*

The Board finds that:

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

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

(3) This final-form rulemaking does not enlarge the purpose of the proposal published at 32 Pa.B. 427.

(4) This final-form rulemaking is necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

K. *Order*

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

(a) The regulations of the Department, 25 Pa. Code Chapter 93, are amended by amending § 93.8a to read as set forth in Annex A.

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

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

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

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

DAVID E. HESS,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 32 Pa.B. 5816 (November 23, 2002).)

Fiscal Note: Fiscal Note 7-374 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 93. WATER QUALITY STANDARDS

ANTIDEGRADATION REQUIREMENTS

§ 93.8a. Toxic substances.

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

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

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

(d) Nonthreshold carcinogenic effects of toxic substances, will be controlled to a risk management level of one excess case of cancer in a population of 1 million (1×10^{-6}) over a 70-year lifetime. Other nonthreshold effects of toxic substances will be controlled at a risk management level as determined by the Department.

(e) Water quality criteria for toxics shall be applied in accordance with Chapter 96 (relating to water quality standards implementation) and any other applicable State and Federal laws and regulations. For carcinogens, the design conditions shall result in a lifetime—70 years—average exposure corresponding to the risk management level specified in subsection (d).

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

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

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

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

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

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

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

BCC—Bioaccumulative Chemical of Concern—A chemical that has the potential to cause adverse effects which, upon entering the surface waters, by itself or its toxic transformation product, accumulates in aquatic organisms by a human health BAF greater than 1,000, after considering metabolism and other physiochemical properties that might enhance or inhibit bioaccumulation, under the methodology in 40 CFR Part 132 Appendix B (relating to Great Lakes Water Quality Initiative). Current BCCs are listed in 40 CFR 132.6, Table 6.A (relating to pollutants of initial focus in the Great Lakes Water Quality Initiative).

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

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

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

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

(4) If, for any BCC, the quality of the surface water exceeds the levels necessary to support the propagation of fish, shellfish and wildlife and recreation in and on the

waters, that quality shall be maintained and protected, unless the Department finds that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the surface water is located.

[Pa.B. Doc. No. 02-2220. Filed for public inspection December 13, 2002, 9:00 a.m.]

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 96]

Water Quality Standards Implementation—Chloride and Sulfate

The Environmental Quality Board (Board) is amending Chapter 96 (relating to water quality standards implementation) to read as set forth in Annex A.

This order was adopted by the Board at its meeting of September 17, 2002.

A. *Effective Date*

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

B. *Contact Persons*

For further information contact Edward R. Brezina, Chief, Division of Water Quality Assessment and Standards, Bureau of Water Supply and Wastewater Management, 11th Floor, Rachel Carson State Office Building, P. O. Box 8467, Harrisburg, PA 17105-8467, (717) 787-9637; or Michelle Moses, Assistant Counsel, Bureau of Regulatory Counsel, 9th Floor, Rachel Carson State Office Building, P. O. Box 8464, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users) and request that the call be relayed. This final-form rulemaking is available electronically through the Department of Environmental Protection's (Department) website (http://www.dep.state.pa.us).

C. *Statutory Authority*

This final-form rulemaking is being made under the authority of sections 5(b)(l) and 402 of The Clean Streams Law (35 P. S. §§ 691.5(b)(l) and 691.402), which authorize the Board to develop and adopt rules and regulations to implement the provisions of The Clean Streams Law, and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), which grants the Board the power and duty to formulate, adopt and promulgate rules and regulations for the proper performance of the work of the Department.

D. *Background and Summary*

The purpose of this final-form rulemaking is to revise existing water quality regulations in Chapter 96. This final-form rulemaking adds the sulfate and chloride criteria to the exceptions in § 96.3(d) (relating to water quality protection requirements). Section 96.3(d) provides for exception to the application of water quality criteria at all points instream after mixing for certain substances. The criteria for these substances, total dissolved solids (TDS), fluoride, nitrite-nitrate, phenolics, sulfate and chloride, are applicable at the point of all existing or planned surface potable water supply withdrawals, fully protecting the potable water supply use.

This final-form rulemaking will provide the appropriate level of protection for the potable water supply use. The current scientific information supports this final-form rulemaking because there are no adverse human health effects from the substances at the levels that the substances are regulated. Effluent limitations required for discharges of these substances are calculated using critical (or stringent) conditions that include a requirement that the criteria be met 99% of the time, even at the low-flow condition known as Q^{7-10} (that is, the lowest 7-day consecutive flow in a 10-year period), a condition that is seldom reached, even in drought conditions. This provides an additional margin of safety built into the effluent limitations to protect the potable water supplies, prior to withdrawal. In addition, other surface water uses will be protected by application of general criteria and other criteria listed in §§ 93.6 and 93.7 (relating to general water quality criteria; and specific water quality criteria).

The Board has considered all of the public comments received on its proposed rulemaking in preparing this final-form rulemaking. The draft final-form rulemaking was discussed with and approved by the Department's Water Resources Advisory Committee on May 8, 2002.

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

In the Preamble to the proposed rulemaking, the Department specifically sought information and comment on an appropriate health-based value for sulfate. Although some information was provided with comments, no new information was presented. The Department is not recommending a change to the sulfate water quality criterion.

Comments were received from one person who offered testimony at the public hearing and from nine other persons who provided written comments. All but one comment supported the proposed rulemaking. Some comments supported changing the sulfate and chloride criteria but there is not sufficient information on which to develop a change in the water quality criteria. The one opposing comment was concerned about protection of the esthetic use under the new rulemaking. The esthetic use, as well as the aquatic use, is protected by the osmotic pressure criterion and, if necessary, by the general narrative criteria in § 93.6.

F. *Benefits, Costs, and Compliance*

Executive Order 1996-1, "Regulatory Review and Promulgation" provides for a cost/benefit analysis of the final-form rulemaking.

Benefits

Overall, the citizens of this Commonwealth will benefit from the change because it provides the appropriate level of protection for the uses of the Commonwealth's surface waters.

Compliance Costs

The final-form rulemaking will reduce future compliance costs on the regulated community, when compared to the existing regulation. Effluent limitations for chloride and sulfate will be applied where needed to protect potable water supplies, which will preclude the need for costly advanced treatment technologies or source reduction techniques to reduce these substances from wastewater discharges. Because effluent limits are case-specific, there is no accurate way to predict the costs required or saved by a single discharger or all dischargers.

Compliance Assistance Plan

The final-form rulemaking will be implemented according to procedures already available for the substances currently included in § 96.3(d). The technical guidance, Implementation Guidance for Application of Section 93.5(e) (DEP 391-2000-019), will be amended to include sulfate and chloride and also to update the outdated section reference to reflect § 96.3(d). Staff members are available to assist regulated entities in complying with the regulatory requirements if any questions arise.

Paperwork Requirements

The final-form rulemaking should have no significant paperwork impact on the Commonwealth, its political subdivisions or the private sector.

G. *Pollution Prevention*

In keeping with Governor Schweiker's interest in encouraging pollution prevention solutions to environmental problems, this final-form rulemaking provides for controlling the discharge of the listed substances to the water environment to achieve or maintain water quality standards.

H. *Sunset Review*

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

I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on January 11, 2002, the Department submitted a copy of the notice of proposed rulemaking published at 32 Pa.B. 428 (January 26, 2002), to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing this final-form rulemaking, the Department has considered the comments received from IRRC, the Committees and the public.

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), on October 28, 2002, this final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 7, 2002, and approved the final-form rulemaking.

J. *Findings*

The Board finds that:

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

(2) A public comment period was provided as required by law. In addition, a Board hearing was held and all comments were considered.

(3) This regulation does not enlarge the purpose of the proposal published at 32 Pa.B. 428.

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

K. *Order*

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

(a) The regulations of the Department, 25 Pa. Code Chapter 96, are amended by amending § 96.3 to read as set forth at 32 Pa.B. 428.

(b) The Chairperson of the Board shall submit this order and 32 Pa.B. 428 to the Office of General Counsel and the Office of Attorney General for approval and review as to legality and form, as required by law.

(c) The Chairperson shall submit this order and 32 Pa.B. 428 to IRRC and the Senate and House Committees as required by the Regulatory Review Act.

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

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

DAVID E. HESS,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 32 Pa.B. 5816 (November 23, 2002).)

Fiscal Note: Fiscal Note 7-375 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 02-2221. Filed for public inspection December 13, 2002, 9:00 a.m.]

ENVIRONMENTAL QUALITY BOARD
[25 PA. CODE CHS. 260a—265a AND 270a]
Hazardous Waste Management

The Environmental Quality Board (Board) by this order amends Chapters 260a—265a and 270a to update the hazardous waste management program to read as set forth in Annex A.

This order was adopted by the Board at its meeting of September 17, 2002.

A. *Effective Date*

The final-form rulemaking will go into effect upon final-form publication in the *Pennsylvania Bulletin*.

B. *Contact Persons*

For further information, contact Rick Shipman, Division of Hazardous Waste Management, P. O. Box 8471, Rachel Carson State Office Building, Harrisburg, PA 17105-8471, (717) 787-6239; or Kurt Klapkowski, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available electronically through the Department of Environmental Protection's (Department) website (http://www.dep.state.pa.us).

C. *Statutory Authority*

The final-form rulemaking is being made under the authority of sections 105, 401—403 and 501 of the Solid Waste Management Act (SWMA) (35 P. S. §§ 6018.105, 6018.401—6018.403 and 6018.501); sections 105, 402 and 501 of The Clean Streams Law (35 P. S. §§ 691.105,

691.402 and 691.501); and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20). Under sections 105, 401—403 and 501 of the SWMA, the Board has the power and duty to adopt rules and regulations concerning the storage, treatment, disposal and transportation of hazardous waste that are necessary to protect the public's health, safety and welfare, and the environment of this Commonwealth. Sections 105, 402 and 501 of The Clean Streams Law grant the Board the authority to adopt regulations that are necessary to protect the waters of this Commonwealth from pollution. Section 1920-A of The Administrative Code of 1929 grants the Board the authority to promulgate rules and regulations that are necessary for the proper work of the Department.

D. *Background and Summary*

The hazardous waste management regulations were amended at 29 Pa.B. 2367 (May 1, 1999) in accordance with the Regulatory Basics Initiative (RBI) and Executive Order 1996-1, "Regulatory Review and Promulgation." Since that time, the Commonwealth's hazardous waste management program received final authorization for changes made to its hazardous waste program under the Resource Conservation and Recovery Act from the Environmental Protection Agency (65 FR 57734). This final-form rulemaking provides the opportunity to make the changes necessary to update that program authorization.

In addition, the Department now has over 3 years experience implementing these regulations. Several of the changes contained in this final-form rulemaking were developed to address issues raised since the RBI rulemaking and correct problems identified over the past 3 years.

On May 9, 2002, the Solid Waste Advisory Committee (SWAC) reviewed the draft final-form rulemaking and voted to submit it to the Board for consideration as a final-form rulemaking pending resolution of three issues. Two of the issues were resolved with minor wording changes to the final-form rulemaking. The third issue involves reporting of spills and discharges of hazardous waste by generators. The Department compared the final-form rulemaking with reporting requirements for discharges under the Federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Department of Transportation release reporting requirements and reporting requirements of other states. This review resulted in modification of the final-form rulemaking to ensure consistency with these other requirements.

A list of members of the SWAC may be obtained from the agency contacts identified in Section B of this order.

The final-form rulemaking generally falls into one of five categories: codification of SWMA requirements that differ from or are broader than the Federal requirements incorporated by reference; restoration of regulatory provisions that were inadvertently deleted in the RBI rulemaking; clarification of ambiguous requirements; clarification of manifesting requirements; and correction of typographical errors. The specific changes in these categories are summarized.

1. *Codification of statutory requirements*

The Department has a general policy not to duplicate statutory definitions or provisions in regulations unless a compelling reason exists to do so. The hazardous waste regulations contain provisions that incorporate by reference large portions of the Federal hazardous waste regulations. The controlling statutory authority in the Commonwealth is the SWMA. However, where the SWMA and the Federal regulations touch on the same subject, the SWMA governs that subject in this Commonwealth. As a result, the Commonwealth hazardous waste regulations contain some provisions that duplicate SWMA requirements where the Federal regulations vary from the commands of the SWMA. In addition, there are some subjects that the SWMA explicitly regulates, and on which the Federal regulations are silent. The final-form rulemaking duplicates the SWMA provisions in two instances. This duplication is necessary to eliminate confusion over the incorporation by reference of contradictory Federal regulations and to establish requirements where the Federal regulations are silent. The first instance is in § 260a.10 (relating to definitions) where the rulemaking adds the definition of "treatment." The term is defined differently in section 103 of the SWMA (35 P. S. § 6018.103) and 40 CFR 260.10. The definition follows the SWMA language.

The second instance is in § 263a.13(b)(4) and (j) (relating to licensing). In accordance with section 403(b) of the SWMA, the final-form rulemaking adds the requirement that a transporter of hazardous waste prepare and carry a preparedness, prevention and contingency plan (PPC plan) to address potential discharges or spills of hazardous waste. The incorporated Federal regulations do not contain this requirement.

2. *Restoration of provisions that were deleted in the May 1999 RBI rulemaking*

Several of the amendments reinstate requirements that were part of the Commonwealth hazardous waste program prior to the May 1999 RBI rulemaking. Because of the general approach of broadly incorporating the Federal hazardous waste regulations by reference, some existing regulations that helped to clarify how the program operates were inadvertently deleted. Generally speaking, these requirements remain in effect based on the requirements of the SWMA and the Department's interpretation of the hazardous waste regulations. Having them reinstated in the rulemaking serves to clarify the Department's approach to the hazardous waste program and inform the regulated community of proper compliance methods. In several cases the regulated community and regional Department staff have noted the problems caused by the absence of these long-standing provisions.

An excellent example of this category of changes is in § 261a.3 (relating to definition of "hazardous waste"). The final-form rulemaking reinstates the requirement to manage waste as hazardous until a waste determination is completed. Under 40 CFR 262.11 (relating to hazardous waste generation), generators of solid waste must make a determination as to whether or not the waste is hazardous. It is silent, however, on the issues of when the determination must be complete and management of the waste until the determination is complete. Reinstating this requirement in the regulation establishes a firm position to what would otherwise be an ambiguous provision in the regulations.

Another good example concerns when spills and discharges of hazardous waste must be reported. Section 403(b)(12) of the SWMA requires "any person or municipality who generates, transports, stores, treats or disposes of hazardous waste to . . . immediately notify the Department and the affected municipality or municipalities of any spill or accidental discharge" of hazardous waste. Section 262a.43 (relating to additional reporting) re-establishes the conditions, amounts, standards and procedures for reporting spills and discharges of hazardous waste. This section also restores the provision that a

Department official may authorize immediate removal of spilled hazardous wastes or materials if necessary to protect the health and safety of the public and the environment.

Reinstating the following provisions accomplishes similar goals: § 262a.11 (relating to hazardous waste determination) clarifies that the Department retains the independent authority to make a waste determination; § 262a.12(b)(1)(iv) (relating to EPA Identification numbers) requires subsequent notification when a generator's facility class changes; § 262a.12(b)(2) explicitly states that a generator is only allowed to offer hazardous waste to a Department-licensed transporter; § 263a.13(j) requires a copy of the contingency plan to be on a hazardous waste transport vehicle; § 263a.26(c) (relating to assessment of penalties) notes that the penalty for falsification is a minimum of $1,000 (rather than a flat $1,000); § 265a.13 (relating to general and generic waste analysis) clarifies that the report that must be submitted is a "Module I" report; and § 270a.60(a) (relating to permits-by-rule) notes that an owner or operator must give notice to the Department prior to operating under a permit-by-rule.

3. *Clarification of ambiguous requirements*

The third broad category of changes addresses ambiguous requirements identified during the implementation of the RBI regulations over the past 2 years. These changes do not, however, have pre-RBI counterparts that the Department can reinstate.

Several of the changes in this category relate to containment and contingency plans. Section 403(b) of the SWMA states:

> (b) It shall be unlawful for any person or municipality who generates, transports, stores, treats or disposes of hazardous waste to fail to:
>
> * * * * *
>
> (10) Develop and implement contingency plans for effective action to minimize and abate hazards from any treatment, storage, transportation or disposal of any hazardous waste.
>
> (11) Maintain such operation, train personnel, and assure financial responsibility for such storage, treatment or disposal operations to prevent adverse effects to the public health, safety and welfare and to the environment and to prevent public nuisances.
>
> (12) Immediately notify the department and the affected municipality or municipalities of any spill or accidental discharge of such waste in accordance with a contingency plan approved by the department and take immediate steps to contain and clean up the spill or discharge.

The Department has received several inquiries from regulated entities regarding compliance with these requirements. Therefore, this final-form rulemaking contains new language that clarifies how a person can comply with the containment and contingency plan requirements of the SWMA.

First, § 262a.34 (relating to accumulation time) is added to require secondary containment for generator storage of hazardous waste in containers. Second, § 263a.12 (relating to transfer facility requirements) adds requirements for PPC plan preparation for hazardous waste transfer facilities. The amendment accomplishes this through reference to § 263a.13(b)(4).

The amendment to § 264a.97 (relating to general groundwater monitoring requirements) specifies the frequency of the analyses required by that section. This final-form rulemaking eliminates setback requirements contained in § 264a.173(2) (relating to management of containers) for reactive or ignitable waste. This provision, which is not mandated, created an arbitrary distance requirement where safe management could allow a closer storage distance and duplicated certain fire safety requirements (see, for example, 37 Pa. Code § 13.1 (relating to relative location to property)).

The final-form rulemaking deletes § 265a.175 (relating to containment and collection system). This section is redundant since containment and collection system requirements are already incorporated by reference for interim status facilities in § 265a.179 (relating to containment).

The final-form rulemaking adjusts the fee schedule for permit modifications by amending § 270a.3 (relating to payment of fees). The section is amended because Class 2 permit modifications are generally much less complex than Class 3 modifications and therefore demand less time and resources from the Department for review. Appendix I to 40 CFR 270.42 (relating to permit modification at the request of the permittee) contains tables classifying the various types of permit modifications as Class 1, 2 or 3. These tables are incorporated by reference in § 270a.1(a) (relating to incorporation by reference, scope and applicability).

New language is added to § 270a.51 (relating to continuation of existing permits) to clarify when an expired permit continues in effect. This language is needed since the Federal counterpart in 40 CFR 270.51 (relating to continuation of expired permits) explicitly applies only to permits issued by the EPA. The language added matches the Federal regulation and clarifies this issue with regard to Department-issued permits.

Section 270a.60 is amended to eliminate the application of siting criteria for permit-by-rule facilities. These changes are contained in § 270a.60(b)(2)(ii), (3)(ii), (4)(ii) and (5)(ii). Permits-by-rule are generally intended to assure proper management of hazardous waste without causing overly burdensome regulation. If an issue arises regarding siting of a particular permit-by-rule facility, the Department retains the authority in § 270a.60(a) to require an owner or operator to obtain an individual permit for the facility. Under § 264a.18 (relating to location standards), the siting criteria would apply to that permit.

Finally, the incorporation by reference of 40 CFR Part 262, Subpart E (relating to exports of hazardous waste) in § 262a.10 (relating to incorporation by reference, purpose, scope and applicability) is simplified. The final-form rulemaking eliminates the separate exceptions to the "blanket substitution of terms" contained in §§ 262a.55—262a.57 (relating to exception report; annual reports; and recordkeeping) by deleting those sections and replacing them with a new § 262a.50 (relating to applicability) that contains the blanket exclusion of terms.

4. *Manifest completion requirements or clarifications*

The fourth category of changes in this final-form rulemaking addresses the administration of the manifest program for tracking the movement of hazardous waste in this Commonwealth. This is a series of changes designed to clarify ambiguous requirements for all parties involved, streamline the manifesting process and ensure that the Department receives proper notification in a timely fashion.

First, the amendment to § 262a.20(1) (relating to general requirements) clarifies that a generator does not need to send a generator copy of the manifest to the Department unless specifically required to do so. Section 262a.21 (relating to acquisition of manifests) requires Commonwealth generators of hazardous waste to use a Commonwealth manifest if the destination state for the hazardous waste does not require use of a manifest. This change is important for tracking the waste while it remains within this Commonwealth. Several changes are made to § 262a.23 (relating to use of the manifest). These changes require legible information on the manifest, clarify submission requirements for Commonwealth generators when the destination facility is out-of-State and prohibit alteration of the Manifest Tracking Number.

The amendment to § 263a.12(3) (relating to transfer facility requirements) clarifies the responsibilities of hazardous waste transporters when a shipment is transferred from one transporter to another at a transfer facility. This is another change identified as necessary through field implementation of the hazardous waste program.

The final-form rulemaking amends § 263a.20 (relating to manifest system) to give specific manifest handling guidance to subsequent transporters of hazardous waste. Section 263a.21 (relating to compliance with the manifest) is amended to require a transporter to accept only complete manifests from a hazardous waste generator and prohibits alteration of the Manifest Tracking Number. Finally, § 264a.71 (relating to use of the manifest system) requires use of a Commonwealth manifest, accounts for bulk shipment discrepancies and requires legible information by a permitted facility; the final-form rulemaking amends § 265a.71 (relating to use of the manifest system) to add the same requirements for an interim status facility.

5. *Typographical errors*

Finally, several sections of the 1999 RBI rulemaking contained minor typographical errors and omissions. Rather than submit a separate rulemaking for minor corrections, the Department decided to wait to make these minor changes until a broader rulemaking package was developed to update the hazardous waste program. These errors and omissions are corrected by this final-form rulemaking. The final-form rulemaking contains corrections in §§ 263a.24(b), 264a.83(a)(2) and (3), 270a.3(3), 270a.42, 270a.60(b)(1)(iv) and (5), 270a.62, 270a.66, 270a.81 and 270a.83.

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

This rulemaking was published as proposed 31 Pa.B. 6814 (December 15, 2001) with a 30-day comment period. The Department received 23 public comments from 6 commentators. The Department also received written comments from the Independent Regulatory Review Commission (IRRC). The major comments and responses, as well as any changes to the proposed rulemaking, are discussed in the following section.

1. *Section 261a.3*

Several public commentators requested deletion of the proposed rulemaking's requirement in § 261a.3 that solid waste be managed as hazardous waste until a proper waste determination is made. IRRC also questioned the necessity for this amendment. Among the concerns raised were that the requirement was overly prescriptive and unnecessary, imposed costs that do not result in any significant environmental benefits, was impractical because it would invoke other requirements such as requiring a hazardous waste label and code for an as yet unknown material and require materials such as contaminated soils from remedial activities to be managed as hazardous waste while the results of laboratory analyses are being performed.

The Department believes that the proposed rulemaking does not add new requirements to the regulations; it merely clarifies the existing requirement for a waste to be properly managed. "Properly managed" in this case means that if a waste is hazardous, it must be managed as a hazardous waste. Determining if a material is a hazardous waste does not always require laboratory analysis of the material. The existing regulation, 40 CFR 262.11, as incorporated in § 262a.10, allows a generator to apply "generator knowledge" to the waste or provides the option to test the waste to determine whether or not it is hazardous. Application of generator knowledge adds no new costs or time to a hazardous waste determination. Additionally, the environmental benefits associated with management of an "undetermined" waste as a hazardous waste are substantial. To improperly manage a hazardous waste stream can cause substantial harm to human health and the environment and add substantial costs to the generator if the waste must later be removed. The amendment is intended to affect newly generated waste and not waste in place subject to remediation activities; language was added to this subsection to clarify that intent.

2. *Section 262a.12(b)(1)(iv)*

Several commentators and IRRC raised concerns about the proposed rulemaking requiring notice to the Department when the generator's status changes. The existing State and Federal regulations provide for small quantity generators (SQG), conditionally exempt small quantity generators and large quantity generators (LQG). Generator status is based on the volume of waste produced by a generator during a single month, and the requirements placed on each category of generator vary accordingly. Primarily, the commentators were concerned about the clarity of this requirement and whether a temporary change in status would require notification to the Department.

The proposed rulemaking contained this provision to clarify that when a generator changes status (for example, SQG to LQG), they must submit a subsequent notification. This was not intended to require notification based on an "episodic" change. Examples of situations where notification was not intended to be required include where a SQG cleans out a tank once every several years and becomes a LQG for a single month, or where an LQG generates less than the LQG amount in a month. A subsequent notification is required, however, when a generator's status changes permanently. The final-form rulemaking clarifies this point in new subsection (b)(v).

3. *Section 262a.43*

The proposal to reinstate reporting requirements for spills and discharges of hazardous materials garnered the most comments during the public comment period. The commentators primarily focused on the proposed rulemaking's requirement that spills and discharges of hazardous materials be reported to the Department. The intent of the Department was to require reporting only of spills or discharges of hazardous wastes or of hazardous materials that become hazardous wastes when spilled or discharged. The final-form rulemaking clarifies that intent throughout the section.

Several commentators also commented on this provision from the standpoint of the relationship between State and Federal law on this issue. The commentators noted that the reporting provision was deleted as part of the changes made to implement the RBI and argued that nothing has occurred since those changes were made in 1999 that would warrant reversing those results. They further noted that the Federal hazardous waste program does not include the same type of reporting requirements as the proposed rulemaking. Instead, generators of hazardous waste are generally required to have in place emergency contingency plans that describe the steps that will be followed to minimize hazards from releases of hazardous wastes. In addition, the facility must maintain equipment to respond to emergencies involving releases of hazardous wastes.

As previously noted, section 403(b)(12) of the SWMA states that it "shall be unlawful for any person or municipality who generates, transports, stores, treats or disposes of hazardous waste to fail to immediately notify the department and the affected municipality or municipalities of any spill or accidental discharge" of hazardous waste. There have been many inquiries from the regulated community and Department regional staff regarding the absence of spill reporting requirements in the hazardous waste regulations. The Department agrees, in part, with the commentators' position that spill reporting requirements exist outside of the State hazardous waste regulations; however, those requirements are broader statutory provisions that have prompted uncertainty with respect to hazardous waste releases. To simplify the spill reporting requirements, several changes were made to § 262a.43 in the final-form rulemaking. Table 1 (Reporting Requirements and Hazard Codes) has been removed and the requirements for solids and liquids have been standardized. In addition, the final-form rulemaking establishes CERCLA reportable quantities as the notification limits, with the modification of including caps. The caps have been established to ensure that the Department receives notification of large spills or discharges of hazardous wastes, which might go unreported because of higher CERCLA requirements for reportable quantities. The Department believes that this notification is important for proper oversight of hazardous waste management in this Commonwealth. The notification provides the Department with basic information to determine whether the appropriate field office should follow up with a site visit. One of the reasons that the Federal regulations do not include this reporting requirement is because of an insufficient availability of Federal field investigators. Because of these factors, the Department believes that reinstatement of the provisions within the scope of the hazardous waste regulations, as modified, is warranted.

Finally, for clarity and consistency across program lines, the phrase "surface or groundwater" in § 262a.43(1) and (3) has been changed to "waters of this Commonwealth."

4. *Section 263a.12(3)*

The proposed requirement to add secondary containment at in-transit storage facilities where the hazardous waste would be moved off of the original vehicle to another vehicle or a loading area for temporary storage generated several comments. Generally, the commentators felt that this provision was redundant, unnecessary and beyond the scope of the Federal program given the other protective measures that are in place at in-transit storage facilities (for example, container requirements and PPC plans for both the transporter and the facility).

After consideration of these comments and recognizing the additional cost for in-transit storage facility owners to install secondary containment, the Department has deleted the secondary containment requirement from § 263a.12 in the final-form rulemaking.

5. *Section 264a.97(1)*

One commentator questioned the necessity of requiring groundwater monitoring at particular frequencies in the hazardous waste regulations as limiting flexibility to design an appropriate groundwater monitoring program.

The incorporated provisions in 40 CFR 264.97 authorize the monitoring and reporting requirements that were proposed in § 264a.97. The Federal regulations authorize these requirements through permit conditions rather than through a specific regulatory requirement. The Department believes that permit conditions are appropriate for requirements that are determined on a case-by-case basis rather than for requirements that are applicable to an entire class of facilities. In this case, the Commonwealth's seasonal, climatological and hydrological features, including a high water table, make it necessary to require all surface impoundments, land treatment units, landfills and in some cases waste piles operating in this Commonwealth to conduct the same type of groundwater monitoring and reporting. As a result, the Department believes that these requirements should be included in regulations rather than in permit conditions.

6. *Section 270a.60(a)(1)*

A commentator and IRRC raised concerns about those regulated entities who are operating under permits-by-rule on the effective date of the final-form rulemaking. While not opposing the concept of notification, they noted that it was unclear whether notification would be required for the facilities. If notification was required, the commentator recommended that the final-form rulemaking provide a transition period following the effective date of the amendments so that regulated entities are not faced with the need to submit notifications to the Department simultaneously with the publication of the final-form rulemaking in the *Pennsylvania Bulletin*.

The Department's intent was to receive notifications from existing facilities operating under permits-by-rule as well as from facilities that will operate under permits-by-rule in the future. The Department concedes the commentator's point regarding the need for a phase-in period for existing permit-by-rule facilities. The final rule establishes a 1-year phase-in period after the effective date of the final-form rulemaking for notification by existing permit-by-rule facilities.

F. *Benefits, Costs and Compliance*

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

Benefits

The final-form rulemaking clarifies ambiguous provisions and eliminates redundant provisions and typographical errors. The final-form rulemaking should help to minimize confusing aspects of a complex program, enabling regulated entities to understand and meet their regulatory obligations regarding hazardous waste management. The final-form rulemaking concerning release reporting will provide the Department with timely and accurate information regarding spills and releases of hazardous wastes, which will allow the Department to properly manage staff resources for release response. The clarification that certain manifest copies do not need to be submitted to the Department should also result in cost

savings to the regulated community. Finally, the Department believes that the provision that materials must be managed as hazardous waste until a proper determination is made will provide the benefit of avoiding improper management of waste.

Compliance Costs

Since the final-form rulemaking primarily clarifies and corrects the existing regulations, the Department believes that there should be no additional costs imposed on the regulated community. For example, the final-form rulemaking concerning release reporting merely clarifies an existing requirement in section 403(b)(12) of the SWMA to "immediately notify the department and the affected municipality or municipalities of any spill or accidental discharge" of hazardous waste.

Compliance Assistance Plan

As with previous hazardous waste management regulations, the Department's compliance assistance efforts will take three forms. Following promulgation as final-form rulemaking, the Department will prepare fact sheets specifically addressing certain changes made by this final-form rulemaking. The Department will also continue to work with the regulated community to explain impacts from the final-form rulemaking and any necessary operational changes to remain in compliance. Information concerning the final-form rulemaking and any necessary technical guidance documents will also be available on the Department's website.

Paperwork Requirements

This final-form rulemaking will result in a net reduction of paperwork requirements because of the clarifying provision that a hazardous waste generator is no longer required to submit generator copies of manifests to the Department. Section 262.93 does require additional reporting to the Department in response to certain releases; however, the Department feels that the situation of the spill or discharge of hazardous waste warrants the additional paperwork. The requirement in § 262a.12(b)(1)(iv) to notify the Department when generator status changes permanently and the requirement for notification to the Department when a facility seeks to operate under a permit-by-rule under § 270a.60(a)(1) also require minor amounts of paperwork to be submitted to the Department. Because of the importance of those issues in determining the proper regulatory requirements that apply to a facility, the Department believes that notification is necessary for it to fulfill its obligations under the SWMA. Other changes do not affect paperwork requirements.

G. *Sunset Review*

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

H. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on November 29, 2001, the Board submitted a copy of the notice of proposed rulemaking, published at 31 Pa.B. 6814, to IRRC and to the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing this final-form rulemaking, the Board has considered the comments received from IRRC, the Committees and the public.

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), on October 28, 2002, this final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 7, 2002, and approved the final-form rulemaking.

I. *Findings*

The Board finds that:

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

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

(3) The final-form rulemaking does not enlarge the purpose of the proposal published at 31 Pa.B. 6814.

(4) The final-form rulemaking is necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this Preamble.

J. *Order*

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

(a) The regulations of the Department, 25 Pa. Code Chapters 260a—265a and 270a, are amended by amending §§ 260a.10, 261a.3, 261a.5, 262a.12, 262a.20, 262a.21, 262a.23, 263a.12, 263a.13, 263a.20, 263a.21, 263a.24, 263a.26, 264a.71, 264a.83, 264a.97, 264a.173, 265a.13, 265a.71, 265a.173, 270a.3, 270a.42, 270a.51, 270a.60, 270a.62, 270a.66, 270a.81 and 270a.83; by adding §§ 262a.11, 262a.34, 262a.43, 262a.50; and by deleting §§ 262a.55—262a.57 and 265a.175 to read as set forth in Annex A with ellipses referring to the existing text of the regulations.

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

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

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

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

DAVID E. HESS,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 32 Pa.B. 5817 (November 23, 2002).)

Fiscal Note: Fiscal Note 7-364 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart D. ENVIRONMENTAL HEALTH AND SAFETY

ARTICLE VII. HAZARDOUS WASTE MANAGEMENT

CHAPTER 260a. HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

Subchapter B. DEFINITIONS

§ 260a.10. Definitions.

A term defined in this section replaces the definition of the term in 40 CFR 260.10, or, in situations for which no term exists in 40 CFR 260.10, the term shall be defined in accordance with this section. The substitution of terms in § 260a.3 (relating to terminology and citations related to Federal regulations) does not apply to the incorporated definition of "EPA region," "State," "United States," "Administrator" and "Regional Administrator."

* * * * *

Treatment—

(i) A method, technique or process, including neutralization, designed to change the physical, chemical or biological character or composition of waste to neutralize the waste or to render the waste nonhazardous, safer for transport, suitable for recovery, suitable for storage, or reduced in volume.

(ii) The term includes an activity or processing designed to change the physical form or chemical composition of waste to render it neutral or nonhazardous.

CHAPTER 261a. IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

Subchapter A. GENERAL

§ 261a.3. Definition of "hazardous waste."

(a) 40 CFR 261.3(c)(2)(ii)(C) (relating to certain nonwastewater residues such as slag resulting from HTMR processing of K061, K062 or F006 waste) is not incorporated by reference.

(b) In addition to the requirements incorporated by reference, except when the waste is contaminated media subject to remediation, when it is not promptly possible to determine if a material will be a hazardous waste, the material shall be managed as a hazardous waste until the determination is made that indicates it is not a hazardous waste.

§ 261a.5. Special requirements for hazardous waste generated by conditionally exempt small quantity generators.

(a) The reference to 40 CFR Part 279 in 40 CFR 261.5(c)(4) and (j) (relating to special requirements for hazardous waste generated by conditionally exempt small quantity generators) is replaced with Chapter 298 (relating to management of waste oil).

(b) In addition to the requirements incorporated by reference, a conditionally exempt small quantity generator may not dispose of hazardous waste in a municipal or residual waste landfill in this Commonwealth.

(c) A conditionally exempt small quantity generator complying with this subchapter and 40 CFR 261.5 is deemed to have a license for the transportation of those conditionally exempt small quantity generator wastes generated by the generator's own operation.

CHAPTER 262a. STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

Subchapter A. GENERAL

§ 262a.11. Hazardous waste determination.

In addition to the requirements incorporated by reference, a determination that a waste is not hazardous under 40 CFR 262.11 (relating to hazardous waste determination) does not preclude the Department from determining the waste to be hazardous, using the characteristics and testing methods set forth in 40 CFR Part 261 (relating to identification and listing of hazardous waste).

§ 262a.12. EPA identification numbers.

(a) Regarding the requirements incorporated by reference, the substitution of terms in § 260a.3 (relating to terminology and citations related to Federal regulations) does not apply to the incorporation by reference of 40 CFR 262.12 (relating to EPA identification numbers).

(b) In addition to the requirements incorporated by reference:

(1) A generator shall submit a subsequent notification to the Department if:

(i) The generator activity moves to another location.

(ii) The generator facility's designated contact person changes.

(iii) The ownership of the generator facility changes.

(iv) The type of regulated activity that takes place at the generator facility changes.

(v) The generator's facility class changes, except when the facility class change is temporary.

(2) A generator shall offer a shipment of hazardous waste only to a transporter with a valid license issued by the Department.

Subchapter B. MANIFEST

§ 262a.20. General requirements.

40 CFR 262.20 (b) and (c) (relating to general requirements) is not incorporated by reference. In addition to the requirements incorporated by reference, a generator shall:

(1) Complete the manifest form in its entirety and distribute manifest copies in accordance with the instructions for the manifest, except that generators need not submit copies of manifests to the Department unless required by § 262a.23(a)(2) (relating to use of the manifest).

(2) List no more than four waste streams on one manifest. If the generator is transporting or offering for transportation more than four different hazardous waste streams for offsite treatment, storage or disposal, the generator shall complete additional manifest forms for the remaining waste streams in the shipment, unless the waste stream is a lab pack.

(3) Complete a continuation sheet, EPA Form 8700-22a, when there are more than two transporters, or for lab packs with more than four different waste streams in one shipment.

(4) Ensure that the required information on all copies, including photocopies, of the manifest is legible to the Department, transporter and designated facility.

(5) A generator shall designate only one permitted facility to handle the waste described on the manifest.

§ 262a.21. Acquisition of manifests.

(a) The substitution of terms in § 260a.3(a)(5) (relating to terminology and citations related to Federal regulations) does not apply to 40 CFR 262.21 (relating to acquisition of manifests).

(b) In addition to the requirements incorporated by reference, a generator shipping hazardous waste to a facility in a state that does not require use of its own state manifest shall use the Department's manifest.

§ 262a.23. Use of the manifest.

(a) In addition to the requirements incorporated by reference:

(1) The generator shall print or type the generator's name and enter the date of shipment in the designated space on the manifest.

(2) If the out-of-State manifest does not include a generator-state copy to be submitted to the Department by the out-of-State designated facility, the generator shall submit a complete, legible copy, such as a photocopy, of the manifest as signed by the generator, all transporters and the designated facility. This copy shall be sent within 10 days of the generator's receipt of its signed copy from the designated facility.

(3) The generator shall obtain the printed or typed name of the transporter on the manifest.

(4) A generator may not use a hazardous waste manifest which has either a preprinted Manifest Document Number or preprinted Manifest Tracking Number that has been altered by anyone other than the printer of the manifest.

(b) The substitution of terms in § 260a.3(a)(5) (relating to terminology and citations related to Federal regulations) does not apply to 40 CFR 262.23(e) (relating to notification of shipments of hazardous waste to a facility in an authorized state which has not yet received authorization to regulate a newly designated hazardous waste).

Subchapter C. PRETRANSPORT REQUIREMENTS

§ 262a.34. Accumulation time.

In addition to the requirements incorporated by reference, a generator who accumulates hazardous waste onsite as specified in 40 CFR 262.34(a)(1)(i) (relating to accumulation time) shall also comply with Chapter 265a, Subchapter I (relating to use and management of containers).

Subchapter D. RECORDKEEPING AND REPORTING

§ 262a.43. Additional reporting.

In addition to the requirements incorporated by reference:

(1) Spills and discharges which are in amounts less than the reportable quantities, which do not result in discharges into waters of this Commonwealth, and which are managed according to an approved contingency plan, need not be reported.

(2) The reportable quantities are:

(i) Liquid hazardous waste or liquids that become hazardous waste when spilled or discharged shall be reported to the Department when the quantity spilled or discharged equals or exceeds the reportable quantity for the waste contained in 40 CFR 302.4 (relating to designation of hazardous substances) or 10 gallons, whichever is more stringent. Liquids are flowable substances which contain less than 20% solids by dry weight. Flowable refers to flow in the sense of pourable as a liquid.

(ii) Solid hazardous waste or solids that become hazardous wastes when spilled or discharged shall be reported to the Department when the quantity spilled or discharged equals or exceeds the reportable quantity for the waste contained in 40 CFR 302.4 or 500 pounds, whichever is more stringent.

(3) A discharge or spill into waters of this Commonwealth shall be reported regardless of quantity spilled or discharged.

(4) In the event of a discharge or spill equal to or greater than the reportable quantity of hazardous waste or material that becomes a hazardous waste when spilled or discharged, the generator shall take appropriate immediate action to protect the health and safety of the public and the environment and immediately notify the Department by telephone at (800) 541-2050 with the following information:

(i) The name of the person reporting the spill.

(ii) The name and identification number of the generator.

(iii) The phone number where the person reporting the spill can be reached.

(iv) The date, time and location of the spill.

(v) A brief description of the incident.

(vi) For each material involved in the spill:

(A) The shipping name, hazard class and U.N. Number.

(B) The estimated quantity of material spilled.

(vii) The extent of contamination of land, water or air, if known.

(5) If a discharge or spill of hazardous waste, or hazardous material that becomes a hazardous waste when spilled or discharged, occurs during onsite unloading, loading, storage or plan operation, and a Departmental official acting within the scope of his official responsibilities determines that immediate removal of the material is necessary to protect the health and safety of the public and the environment, that official may authorize in writing the removal of the material by transporters who do not have identification numbers or license and without the preparation of a manifest.

(6) A generator shall clean up a spill or discharge of hazardous waste, or material that becomes a hazardous waste when spilled or discharged, that occurs during onsite unloading, loading, storage or plan operation, and take actions that may be required or approved by the Department so that the discharge or spill no longer presents a hazard to the health and safety of the public or environment.

(7) In addition, the generator shall file a written report on a spill or discharge of a reportable hazardous waste or material that becomes a hazardous waste when spilled or discharged, with the Department within 15 days after the incident, and supply the Department with other information it may require or request that pertains to the discharge. The report on the spill or discharge shall be entitled "Hazardous Waste Spill Report" and shall contain the following information:

(i) The name, address and identification number of the generator and the date, time and location of the incident.

(ii) A brief description of the circumstances causing the incident.

(iii) A description of each of the hazardous wastes or materials that become hazardous wastes when spilled or discharged involved in the incident, including the estimated quantity spilled by weight or volume.

(iv) A legible copy of the manifest document, if applicable.

(v) A description of a contamination of land, water or air that has occurred due to the incident.

(vi) A description of the actions the generator intends to take to prevent a similar occurrence in the future.

Subchapter E. EXPORTS OF HAZARDOUS WASTE

§ 262a.50. Applicability.

Relative to the requirements incorporated by reference, the substitution of terms in § 260a.3 (relating to terminology and citations related to Federal regulations) does not apply to the incorporation by reference of 40 CFR Part 262, Subpart E (relating to exports of hazardous waste).

§ 262a.55—262a.57. (Reserved).

CHAPTER 263a. TRANSPORTERS OF HAZARDOUS WASTE

Subchapter A. GENERAL

§ 263a.12. Transfer facility requirements.

In addition to the requirements incorporated by reference:

(1) A transporter storing hazardous waste at a transfer facility for periods of not more than 10 days but greater than 3 days shall prepare an in-transit storage preparedness, prevention and contingency plan in addition to the transporter contingency plan as required by § 263a.13(b)(4) (relating to licensing). This plan shall be submitted under section 403(b)(10) of the act (35 P. S. § 6018.403(b)(10)) and approved in writing by the Department prior to the initiation of the storage.

(2) A transporter transferring hazardous waste from one vehicle to another at a transfer facility shall prepare an in-transit storage preparedness, prevention and contingency plan in addition to the transporter contingency plan as required by § 263a.13(b)(4). This plan shall be submitted under section 403(b)(10) of the act and shall be approved in writing by the Department.

(3) A transporter delivering hazardous waste to another transporter at a transfer facility shall do the following:

(i) Obtain the printed or typed name and signature of the subsequent transporter and the date of the transfer in the designated location on the manifest.

(ii) If the subsequent transporter is not present at the transfer facility while the delivering transporter is at the transfer facility, obtain the location address of the transfer facility, the printed or typed name and signature of the transfer facility operator, and the date of delivery to the transfer facility, assuring the information is entered in Item 15 of the manifest.

(iii) If neither the subsequent transporter nor a representative of the transfer facility is present, enter the location address of the transfer facility, the subsequent transporter's printed or typed name and signature, and the date of delivery to the transfer facility in Item 15 of the manifest.

(iv) Assure all the information required by subparagraphs (i)—(iii) is legible on remaining copies of the manifest.

§ 263a.13. Licensing.

(a) Except as otherwise provided in subsection (b), § 263a.30, § 261a.5(c), § 266a.70(1) or § 266b.50, a person or municipality may not transport hazardous waste within this Commonwealth without first obtaining a license from the Department.

(b) A person or municipality desiring to obtain a license to transport hazardous waste within this Commonwealth shall:

(1) Comply with 40 CFR 263.11 (relating to EPA identification number).

(2) File a hazardous waste transporter license application with the Department. The application shall be on a form provided by the Department and completed as required by the instructions supplied with the form.

(3) Deposit with the Department a collateral bond conditional upon compliance by the licensee with the act, this article, the terms and conditions of the license and a Department order issued to the licensee. The amount, duration, form, conditions and terms of the bond shall conform to § 263a.32 (relating to bonding).

(4) In accordance with the Department's guidelines for contingency plans, submit a transporter contingency plan for effective action to minimize and abate discharges or spills of hazardous waste from an incident while transporting hazardous waste.

(5) Supply the Department with relevant additional information it may require.

(c) Upon receiving the application and the information required in subsection (b), the Department evaluates the application for a license and other relevant information and issues or denies the license. If a license is denied, the Department will advise the applicant in writing of the reasons for denial.

(d) A license granted or renewed under this chapter is valid for 2 years unless the Department determines that circumstances justify issuing a license for less than 2 years. The expiration date will be set forth on the license.

(e) A license to transport hazardous wastes is nontransferable and nonassignable and usable only by the licensee and employees of the licensee.

(f) The Department may revoke or suspend a license in whole or in part for one or more of the following reasons:

(1) Violation of an applicable requirement of the act or a regulation promulgated under the act.

(2) Aiding or abetting the violation of the act or a regulation promulgated under the act.

(3) Misrepresentation of a fact either in the application for the license or renewal or in information required or requested by the Department.

(4) Failure to comply with the terms or conditions placed upon the license or renewal.

(5) Failure to comply with an order issued by the Department.

(6) Failure to maintain the required bond amount.

(g) The application for a license shall be accompanied by a check for $500 payable to the "Commonwealth of Pennsylvania." The application for license renewal shall

be accompanied by a check for $250 payable to the "Commonwealth of Pennsylvania."

(h) In addition to the fees required by subsection (g), the transporter shall submit a fee of $5 for each license card requested in excess of ten cards.

(i) The licensee shall notify the Department within 30 days of any change in the information contained in the license application.

(j) A copy of the transporter contingency plan approved at licensure or approved as amended shall be carried on the transport vehicle while transporting hazardous waste.

Subchapter B. COMPLIANCE WITH THE MANIFEST SYSTEM AND RECORDKEEPING

§ 263a.20. Manifest system.

(a) Relative to the requirements incorporated by reference, the substitution of terms in § 260a.3 (relating to terminology and citations related to Federal regulations) does not apply in 40 CFR 263.20 (relating to manifest system), as incorporated by reference into this chapter.

(b) In addition to the requirements incorporated by reference:

(1) A transporter shall print or type the transporter's name.

(2) The second and any subsequent highway transporter shall print or type their name, and sign and date the manifest or continuation sheet in the designated location.

(3) A transporter shall obtain the printed or typed name of the subsequent transporter or representative of the designated facility.

§ 263a.21. Compliance with the manifest.

In addition to the requirements incorporated by reference:

(1) A transporter may not accept or transport hazardous waste if the number or type of containers or quantity of waste to be transported does not correspond with the number, type or quantity stated on the manifest.

(2) A transporter may not accept a manifest from a generator unless it is completed in accordance with 40 CFR 262.20 and § 262a.20 (relating to general requirements).

(3) A transporter may not accept a hazardous waste manifest which has either a preprinted Manifest Document Number or preprinted Manifest Tracking Number that has been altered by anyone other than the printer of the manifest.

§ 263a.24. Documentation of hazardous waste transporter fee submission.

(a) A transporter receiving or delivering hazardous waste to or from a site in this Commonwealth shall submit specific information to the Department to document that the amount of fees submitted under § 263a.23 (relating to hazardous waste transportation fee) is accurate. This information shall be provided on forms provided or approved by the Department.

(1) A transporter who has transported hazardous waste during a quarter shall submit completed forms ER-WM-55G and ER-WM-55H, or their successor documents, with the appropriate fees.

(2) A transporter who has not transported hazardous waste during a quarter shall submit only form ER-WM-55G.

(b) The required forms shall be completed by the transporter in conformance with instructions provided.

(c) A transporter shall, upon request from the Department, provide additional information or documentation regarding its hazardous waste transportation activities necessary for the Department to assess the accuracy of the information contained on the required forms and the amount of fees due.

§ 263a.26. Assessment of penalties.

(a) Consistent with section 605 of the act (35 P. S. § 6018.605) and section 1104 of the Hazardous Sites Cleanup Act (35 P. S. § 6020.1104) and the regulations thereunder, this section sets forth civil penalties for certain violations. This section does not limit the Department's authority to assess a higher penalty for the violations identified in this section, or limit the Department's authority to proceed with appropriate criminal penalties.

(b) If a person or municipality fails to submit the hazardous waste transportation fees as required by § 263a.23(d) (relating to hazardous waste transportation fee), fails to submit properly completed documents required by § 263a.24 (relating to documentation of hazardous waste transporter fee submission) or fails to meet the time schedule for submission established by § 263a.23(e), the Department may assess a minimum civil penalty of $500 for submissions which are less than 15 days late, and $500 per day for each day thereafter.

(c) If a person or municipality falsifies information relating to hazardous waste transportation fees required by this chapter and the Hazardous Sites Cleanup Act (35 P. S. §§ 6020.101—6020.1305), the Department may assess a minimum civil penalty of $1,000.

(d) Failure to comply with the fee payment and documentation requirements of this chapter constitutes grounds for suspension or revocation of a hazardous waste transporter license, denial of issuance or renewal of a license, and for forfeiture of the hazardous waste transporter's collateral bond, in addition to civil penalties set forth in this section.

CHAPTER 264a. OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE AND DISPOSAL FACILITIES

Subchapter E. MANIFEST SYSTEM, RECORDKEEPING AND REPORTING

§ 264a.71. Use of the manifest system.

In addition to the requirements incorporated by reference:

(1) An owner or operator, or the agent of the owner or operator, may not accept hazardous waste for treatment, storage or disposal unless it is accompanied by the Department's manifest, unless a manifest is not required by 40 CFR 262.20(e) (relating to the manifest general requirements).

(2) Within 30 days of the delivery, the owner or operator or the agent of the owner or operator shall send the specified copies of the manifest to the Department and generator state, as required.

(3) The owner or operator or other agent of the designated facility shall state in the Discrepancy Indication Space on the respective manifest and continuation sheet the actual quantity received in bulk shipment.

(4) The name of the designated facility representative signing the manifest shall be printed or typed on the manifest.

§ 264a.83. Administration fees during closure.

(a) The owner or operator shall complete closure activities in accordance with the approved closure plan and within 180 days after receiving the final volume of wastes. The Department may approve a longer closure period if the owner or operator demonstrates that:

(1) The closure activities will, of necessity, take longer than 180 days to complete or the following:

(i) The facility has the capacity to receive additional wastes.

(ii) There is reasonable likelihood that a person other than the owner or operator will recommence operation of the site.

(iii) Closure of the facility would be incompatible with continued operation of the site.

(2) The owner or operator has taken and will continue to take all steps to prevent threats to human health and the environment from the unclosed but inactive facility. Under 40 CFR 264.112(d) (relating to closure plan; amendment of plan) and paragraph (1)(i), if operation of the site is recommenced, the Department may defer completion of closure activities until the new operation is terminated. The deferral shall be in writing.

(3) The demonstrations referred to in 40 CFR 264.112(d) and this section shall be made as follows:

(i) The demonstrations in 40 CFR 264.112(d) shall be made at least 30 days prior to the expiration of the 60-day period.

(ii) The demonstrations in this section shall be made at least 30 days prior to the expiration of the 180-day period.

(b) A nonrefundable administration fee in the form of a check payable to the "Commonwealth of Pennsylvania" shall be forwarded to the Department within 30 days after receiving the final volumes of waste, and on or before January 20th of each succeeding year until the requirements of § 264a.115 (relating to certification of closure) are met. The fee shall be:

(1) Land disposal facilities—$100.

(2) Impoundments—$100.

(3) All other facilities—$50.

Subchapter F. RELEASES FROM SOLID WASTE MANAGEMENT UNITS

§ 264a.97. General groundwater monitoring requirements.

In addition to the requirements incorporated by reference:

(1) The owner or operator shall keep records of analyses and evaluations of groundwater quality and surface elevations, which shall be conducted quarterly, and flow rate and direction determinations, which shall be conducted annually. These evaluations and determinations shall be conducted as required under 40 CFR Part 264, Subpart F (relating to releases from solid waste management units).

(2) The owner or operator shall report the following information in writing to the Department:

(i) During the first year when initial background concentrations are being established for the facility: concentrations or values of the parameters listed in 40 CFR 264.98(a) (relating to detection monitoring program) for an upgradient groundwater monitoring well within 15 days after completing a quarterly analysis and no later than 30 days after the end of a quarter.

(ii) Quarterly after the first year: concentrations or values of the parameters in 40 CFR 264.98(a) and required under 40 CFR 264.97(g) (relating to detection monitoring program), for each groundwater monitoring well, along with the required evaluations for these parameters under 40 CFR 264.97(h), within 15 days after completing a quarterly analysis and no later than 30 days after the end of a quarter.

(iii) Annually: concentrations or values of those parameters for each well which are specified by the facility's permit within 15 days of completing the annual analysis.

(iv) Annually: those determinations for the groundwater flow rate and direction specified in 40 CFR 264.99(e) (relating to compliance monitoring).

(3) The owner or operator shall report the groundwater quality required by paragraph (2) and 40 CFR 264.97 at a monitoring point established under 40 CFR 264.95 (relating to point of compliance) in a form necessary for the determination of statistically significant increases under 40 CFR 264.98 (relating to detection monitoring program).

Subchapter I. USE AND MANAGEMENT OF CONTAINERS

§ 264a.173. Management of containers.

In addition to the requirements incorporated by reference:

(1) For indoor storage of reactive or ignitable hazardous waste, the container height, width and depth of a group of containers shall provide a configuration and aisle spacing which insures safe management and access for purposes of inspection, containment and remedial action with emergency vehicles. The configuration shall be specified in the permit application.

(2) For outdoor storage of reactive or ignitable hazardous waste, the container height, width and depth of a group of containers shall provide a configuration and aisle spacing which insures safe management and access for purposes of inspection, containment and remedial action with emergency vehicles. The configuration shall be specified in the permit application.

(3) For indoor or outdoor storage of nonreactive or nonignitable hazardous waste, the container height, width and depth of a group of containers shall provide a configuration and aisle spacing which insures safe management and access for purposes of inspection, containment and remedial action with emergency vehicles. The configuration shall be specified in the permit application.

CHAPTER 265a. INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE AND DISPOSAL FACILITIES

Subchapter B. GENERAL FACILITY STANDARDS

§ 265a.13. General and generic waste analysis.

In addition to the requirements incorporated by reference:

(1) Except as provided in paragraphs (4) and (5), before an owner or operator treats, stores or disposes of a specific hazardous waste from a specific generator for the first time, the owner or operator shall submit to the Department for approval, on a form provided by the Department, or on a form approved by the Department, a

Module 1 report which the owner or operator shall retain for 3 years. The report shall include the following information:

(i) A detailed chemical and physical analysis of the waste.

(ii) A description of the waste and the process generating the waste.

(iii) The name and address of the hazardous waste management facility.

(iv) A description of the hazardous waste management facility's treatment, storage and disposal methods.

(v) Results of liner compatibility testing.

(vi) An assessment of the impact of the waste on the hazardous waste management facility.

(vii) Other information which the Department may prescribe for the Department to determine whether the waste will be treated, stored or disposed of in accordance with this chapter. The chemical and physical analysis of the waste shall be repeated under one or more of the following circumstances:

(A) When necessary to ensure that it is accurate and up-to-date.

(B) When the owner or operator is notified, or has reason to believe, that the process or operation that generates the hazardous waste has changed.

(C) For offsite facilities or onsite facilities receiving waste from offsite sources, when the results of the inspection or analysis, or both, of each hazardous waste indicates that the waste received at the facility does not match the description of the waste on the accompanying manifest or shipping paper.

(2) The owner or operator shall develop and follow a written waste analysis plan in compliance with 40 CFR 265.13 (relating to general waste analysis) which shall be submitted to the Department for approval at a time in the application process as the Department may prescribe. The plan shall be retained at the facility.

(3) The owner or operator of a facility utilizing a liner shall conduct an evaluation of the liner compatibility with the hazardous waste before accepting the waste for emplacement in a waste pile, surface impoundment or landfill unless the approval to accept the waste is granted in the facility's permit. The evaluation procedure shall meet the approval of the Department prior to its commencement. The evaluation of the liner shall consist of testing the liner in the presence of the waste for a minimum of 30 days or as otherwise approved by the Department. In lieu of actual testing, existing published or documented data on the hazardous waste or waste generated from similar processes proving the liner compatibility may be substituted if approved by the Department. The results of the evaluation of the liner compatibility shall be furnished to the Department for approval of the waste before acceptance by the facility.

(4) The Department may waive prior approval of the report specified in paragraph (1) for wastes that are in containers that are only to be stored at the facility. The Department may waive prior approval of the report only if:

(i) The Department determines that the waiver does not pose a potential threat to human health or the environment.

(ii) The management of the wastes is allowed in the permit for the facility and properly addressed in the approved waste analysis plan for the facility.

(iii) The report is submitted to the Department within 1 week of the arrival of the wastes at the facility and a copy of the report is maintained in the operating record onsite for 20 years.

(5) Prior Department approval of the report specified in paragraph (1) is not required for offsite reclamation facilities that, under a contractual agreement, supply raw material to a generator and accept the expended material from the generator for storage prior to reclamation.

(6) In lieu of the waste and generator specific report required by paragraphs (1)—(3), the Department may accept from the operator of a treatment, storage or disposal facility a Generic Module I application for similar wastes containing similar hazardous constituents from multiple generators.

(7) An application for a Generic Module I shall include:

(i) The information required by paragraph (1). Generator specific information shall be included for each generator identified in the application.

(ii) Criteria for determining whether the wastes have similar physical and chemical characteristics and contain similar hazardous constituents.

(8) Additional generators may be added to an approved Generic Module I if the operator of the treatment, storage or disposal facility demonstrates that the waste from the new generator is consistent with the waste already approved in the Generic Module I. At least 15 days prior to accepting a waste from a new generator, the operator of the treatment, storage or disposal facility shall submit to the Department in writing, the generator specific information required by paragraph (1). The Department will not add an additional generator to the Generic Module I if the Department finds that the operator of the treatment, storage or disposal facility has not demonstrated that the waste from the new generator is consistent with that approved under the Generic Module I.

(9) A permit modification and Generic Module I requested under this section shall be accompanied by a fee, as specified in § 270a.3 (relating to payment of fees).

Subchapter E. MANIFEST SYSTEM, RECORDKEEPING AND REPORTING

§ 265a.71. Use of the manifest system.

In addition to the requirements incorporated by reference:

(1) An owner or operator, or the agent of the owner or operator, may not accept hazardous waste for treatment, storage or disposal unless it is accompanied by the Department's manifest, unless a manifest is not required by 40 CFR 262.20(e) (relating to general requirements).

(2) Within 30 days of the delivery, the owner or operator or the agent of the owner or operator shall send the specified copies of the manifest to the Department and generator state, as required.

(3) The owner or operator or other agent of the designated facility shall state in the Discrepancy Indication Space on the respective manifest and continuation sheet the actual quantity received in bulk shipment.

(4) The name of the designated facility representative signing the manifest shall be printed or typed on the manifest.

Subchapter I. USE AND MANAGEMENT OF CONTAINERS

§ 265a.173. Management of containers.

In addition to the requirements incorporated by reference:

(1) For indoor storage of reactive or ignitable hazardous waste, the container height width and depth of a group of containers shall provide a configuration and aisle spacing which insures safe management and access for purposes of inspection, containment and remedial action with emergency vehicles.

(2) For outdoor storage of reactive or ignitable hazardous waste, the container height, width and depth of a group of containers shall provide a configuration and aisle spacing which insures safe management and access for purposes of inspection, containment and remedial action with emergency vehicles.

(3) For indoor or outdoor storage of nonreactive or nonignitable hazardous waste, the container height, width and depth of a group of containers shall provide a configuration and aisle spacing which insures safe management and access for purposes of inspection, containment and remedial action with emergency vehicles.

§ 265a.175. (Reserved).

CHAPTER 270a. HAZARDOUS WASTE PERMIT PROGRAM

Subchapter A. GENERAL INFORMATION

§ 270a.3. Payment of fees.

40 CFR 270.3 is not incorporated by reference, and the following fees are established:

(1) Applications for a permit for hazardous waste storage, treatment and disposal facilities shall be accompanied by a nonrefundable permit application fee in the form of a check payable to the "Commonwealth of Pennsylvania" according to the following schedule:

(i) Land disposal facilities—commercial—$125,000.

(ii) Land disposal facility—captive—$71,400.

(iii) Surface impoundments:

(A) Commercial—$36,000.

(B) Captive—$14,000.

(iv) Postclosure permits—$25,000.

(v) Treatment facilities:

(A) Commercial—$36,000.

(B) Captive—$14,000.

(vi) Storage facilities:

(A) Commercial—$36,000.

(B) Captive—$14,000.

(vii) Incinerators:

(A) Commercial—$93,000.

(B) Captive—$54,000.

(2) If more than one permitted activity is located at a site, or more than one activity occurs, the fees are cumulative.

(3) Module I applications and permit modification applications for a permit for hazardous waste storage, treatment and disposal facilities shall be accompanied by a nonrefundable permit application fee in the form of a check payable to the "Commonwealth of Pennsylvania" according to the following schedule:

(i) Module I and Generic Module I applications:

(A) Module I—$300.

(B) Generic Module I—$1,500.

(ii) Class 3 permit modifications—50% of fees listed in paragraph (1).

(iii) Class 1 and Class 2 permit modifications—$700.

Subchapter D. CHANGES TO PERMITS

§ 270a.42. Permit modification at the request of the permittee.

(a) Instead of complying with 40 CFR Part 124.10(c)(ix) (relating to public notice of permit actions and public comment period) the permittee shall send a notice to those persons in § 270a.80(d)(iv) (relating to public notice and comment requirements).

(b) Instead of the appeal procedure in 40 CFR 124.19 (relating to appeal of RCRA, UIC, NPDES, PSD permits), the Department's decision to grant or deny permit modifications may be appealed to the EHB under section 4 of the Environmental Hearing Board Act (35 P. S. § 7514).

(c) Applicants seeking a Class 3 permit modification shall comply with § 270a.83 (relating to preapplication public meeting and notice).

Subchapter E. EXPIRATION AND CONTINUATION OF PERMITS

§ 270a.51. Continuation of existing permits.

(a) 40 CFR 270.51 (relating to continuance of expiring permits) is not incorporated by reference.

(b) The conditions of an expired permit continue in force until the effective date of a new permit if the following conditions are met:

(1) The permittee has submitted a timely application which is a complete application for a new permit.

(2) The Department, through no fault of the permittee, does not issue a new permit with an effective date on or before the expiration date of the previous permit (for example, when issuance is impracticable due to time or resource constraints).

(c) Permits continued under this section remain fully effective and enforceable.

(d) When the permittee is not in compliance with the conditions of the expiring or expired permit, the Department may choose to do one or more of the following:

(1) Initiate enforcement action based upon the permit which has been continued.

(2) Issue a notice of intent to deny the new permit. If the permit is denied, the owner or operator would be required to cease activities authorized by the continued permit or be subject to enforcement action for operating without a permit.

(3) Issue a new permit with appropriate conditions.

(4) Take other actions authorized by these regulations.

Subchapter F. SPECIAL FORMS OF PERMITS

§ 270a.60. Permits-by-rule.

(a) Relative to the requirements incorporated by reference, the following are substituted for the introductory paragraph in 40 CFR 270.60 (relating to permits by rule):

(1) In addition to other provisions of this chapter, the activities listed in this section are deemed to have a hazardous waste management permit if the owner or operator gives prior notification to the Department on a form provided by the Department and the conditions listed are met. Existing permit-by-rule facilities shall comply with the notification requirements by December 8, 2003.

(2) The Department may require an owner or operator with a permit-by-rule under this section to apply for, and obtain, an individual permit when the facility is not in compliance with the applicable requirements or is engaged in an activity that harms or presents a threat of harm to the health, safety or welfare of the people or the environment of this Commonwealth.

(b) In addition to the requirements incorporated by reference, the following requirements apply:

(1) The owner or operator of an elementary neutralization unit or a wastewater treatment unit is deemed to have a permit-by-rule, if the owner or operator complies with the following requirements:

(i) The facility treats hazardous waste generated onsite.

(ii) The facility has an NPDES permit, if required, and complies with the conditions of that permit.

(iii) Section 264a.11 (relating to identification number and transporter license) and 40 CFR 264.11 (relating to identification number).

(iv) Chapter 264a, Subchapter D and 40 CFR Part 264 Subparts C and D (relating to preparedness and prevention; and contingency plan and emergency procedures).

(v) 40 CFR Part 265, Subpart Q (relating to chemical, physical and biological treatment), except for 40 CFR 265.400 (relating to applicability).

(vi) For the purposes of this subsection, the owner or operator of an elementary neutralization unit or wastewater treatment unit permit-by-rule facility may treat wastes generated at other facilities operated or owned by the same generator, if the generator provides prior written notice to the Department and the wastes are shipped under a manifest in compliance with § 262a.20 and 40 CFR 262.20 (relating to general requirements; and general requirements).

(vii) The Department may, under special circumstances, approve on a case-by-case basis the receipt and treatment of wastes generated offsite by a different generator for treatment at a facility regulated under this subsection without the treatment of the wastes resulting in the loss of permit-by-rule status under this subsection.

(2) A generator that treats its own hazardous waste in containers, tanks or containment buildings is deemed to have a permit-by-rule, if the owner or operator complies with the following requirements:

(i) The facility is a captive facility and the only waste treated is generated onsite.

(ii) The notification requirements of 40 CFR 264.11 (relating to notification of hazardous waste activities) and the applicable requirements of 40 CFR Part 264, Subparts A—D, I, J and DD and Chapter 264a, Subchapters A, B, D, I, J and DD, except for § 264a.18 (relating to location standards).

(iii) The applicable requirements of 40 CFR 262.34 (relating to accumulation).

(iv) Except for the characteristic of ignitability, the hazardous waste is not being rendered nonhazardous by means of dilution.

(v) A generator may mix waste oil with a waste which is hazardous solely because it exhibits the toxicity characteristic for benzene, arsenic, cadmium, chromium, lead or ignitability, provided that the resultant mixture does not exhibit any characteristic of hazardous waste under 40 CFR Part 261, Subpart C (relating to characteristics of hazardous waste) incorporated by reference in § 260a.1 (relating to incorporation by reference, purpose, scope and applicability) and that the mixture is managed in accordance with Chapter 298, Subchapter C (relating to waste oil generators).

(3) The owner or operator of a battery manufacturing facility reclaiming spent, lead-acid batteries is deemed to have a permit-by-rule for treatment prior to the reclamation of the spent, lead-acid batteries, if the owner or operator complies with the following requirements:

(i) The notification requirements of 40 CFR 264.11.

(ii) The applicable requirements of 40 CFR Part 264, Subparts A—E, I—L and DD and Chapter 264a, Subchapters A, B, D, E, I—L and DD, except for § 264a.18.

(4) The owner or operator of a facility that reclaims hazardous waste onsite, at the site where it is generated is deemed to have a permit-by-rule for treatment prior to the reclamation, if the owner or operator complies with the following requirements:

(i) The notification requirements of 40 CFR 264.11.

(ii) The applicable requirements of Chapter 262a and Chapter 264a, Subchapters A, B, D, E, I, J and DD, except for § 264a.18, and 40 CFR Parts 262 and 264, Subparts A—E and I, J and DD.

(iii) For the purposes of this subsection, onsite reclamation includes reclamation of materials generated at other facilities operated or owned by the same generator, if the generator provides prior written notice to the Department and the wastes are shipped under a manifest in compliance with § 262a.20 (relating to general requirements) and 40 CFR Part 262.20 (relating to general requirements).

(iv) The Department may, under special circumstances, approve on a case-by-case basis the receipt and reclamation of wastes generated offsite by a different generator for reclamation at a facility regulated under this subsection without the reclamation of the wastes resulting in the loss of onsite reclamation status under this subsection.

(5) The owner or operator of a facility that treats recyclable materials to make the materials suitable for reclamation of economically significant amounts of the precious metals identified in 40 CFR Part 266, Subpart F (relating to recyclable materials utilized for precious metal recovery) is deemed to have a permit-by-rule if the owner or operator complies with the following:

(i) The notification requirements of 40 CFR 264.11 (relating to identification number).

(ii) The applicable requirements of Chapter 264a, Subchapters A, B, D, E, I, J and DD, except for § 264a.18, and 40 CFR Part 264, Subparts A—D, I, J and DD.

(c) In addition to the requirements incorporated by reference:

(1) With respect to any permit-by-rule facility under subsection (b)(3)—(6), the Department may, upon written application from a person subject to these paragraphs, grant a variance from one or more specific provision of those paragraphs in accordance with this subsection.

(2) In granting a variance, the Department may impose specific conditions reasonably necessary to assure that the subject activity results in a level of protection of the environment and public health equivalent to that which would have resulted from compliance with the suspended provisions. Any variance granted under this section will be at least as stringent as the requirements of section 3010 of the RCRA (42 U.S.C.A. § 6930) and regulations adopted thereunder.

§ 270a.62. Hazardous waste incinerator permits.

Instead of the notification required by 40 CFR 124.10 (relating to public notice of permit actions and public comment period), the Department sends notice to all persons listed in § 270a.80 (d)(1) (relating to public notice and comment requirements).

§ 270a.66. Permits for boilers and industrial furnaces burning hazardous waste.

Instead of the notification required by 40 CFR 124.10 (relating to public notice of permit actions and public comment period), the Department sends notice to all persons listed in § 270a.80(d)(1) (relating to public notice and comment requirements).

Subchapter H. PUBLIC NOTICE AND HEARINGS

§ 270a.81. Public hearings.

(a) During the public comment period provided under § 270a.80 (relating to public notice and comment requirements), an interested person may submit written comments on the draft permit and may request a public hearing, if a hearing is not already scheduled. A request for a public hearing shall be in writing and state the nature of the issues proposed to be raised in the hearing. The Department considers comments in making its final decision and answers these comments as provided in § 270a.10(c) (relating to general application requirements and permit issuance procedures).

(b) The Department follows the following procedures in a public hearing held under this subchapter:

(1) The Department holds a public hearing whenever, on the basis of requests received under subsection (a), it determines that a significant degree of public interest in a draft permit exists.

(2) The Department may hold a public hearing whenever a hearing might clarify issues involved in the permit decision.

(3) The Department holds a public hearing whenever it receives written notice of opposition to a draft permit and a request for a hearing within 45 days of public notice, under § 270a.80.

(4) The Department schedules, when possible, a hearing under this section at a location convenient to the nearest population center to the proposed facility.

(5) The Department gives public notice of the hearing under § 270a.80 (relating to public notice and comment requirements).

(6) A person may submit oral or written statements and data concerning the draft permit before, during or after the public hearing, as long as the Department receives the statements and data during the public comment period. The Department may set reasonable limits upon the time allowed for oral statements and may require the submission of statements in writing. The public comment period under § 270a.80 is automatically extended to the close of a public hearing under this section. The Department's hearing officer may also extend the comment period by so stating at the hearing.

(7) The Department makes a tape recording or written transcript of the hearing available to the public.

§ 270a.83. Preapplication public meeting and notice.

(a) *Applicability.*

(1) This section applies to RCRA Part B applications seeking initial permits for hazardous waste management units over which the Department has permit issuance authority.

(2) This section also applies to RCRA Part B applications seeking renewal of permits for the units, if the renewal application is proposing a significant change in facility operations.

(3) For the purposes of this section, a "significant change" is a change that would qualify as a Class 2 or Class 3 permit modification under 40 CFR 270.42 (relating to permit modification at the request of the permittee) and § 270a.42 (relating to permit modification at the request of the permittee).

(4) This section does not apply to Class 1 or Class 2 permit modifications under 40 CFR 270.42 and § 270a.42 or to applications that are submitted for the sole purpose of conducting postclosure activities or postclosure activities and corrective action at a facility.

(b) Prior to the submission of a Part B RCRA permit application for a facility, the applicant shall hold at least one meeting with the public to solicit questions from the community and inform the community of proposed hazardous waste management activities. The applicant shall post a sign-in sheet or otherwise provide a voluntary opportunity for attendees to provide their names and addresses.

(c) The applicant shall submit a summary of the meeting, along with the list of attendees and their addresses developed under subsection (b), and copies of any written comments or materials submitted at the meeting, to the Department as a part of the Part B application, under 40 CFR 270.14(b) (relating to contents of Part B: general requirements).

(d) The applicant shall provide public notice of the preapplication meeting at least 30 days prior to the meeting. The applicant shall maintain, and provide to the Department upon request, documentation of the notice.

(1) The applicant shall provide public notice in the following forms:

(i) *Newspaper advertisement*. The applicant shall publish a notice, fulfilling the requirements in paragraph (2), in a newspaper of general circulation in the county or equivalent jurisdiction that hosts the proposed location of the facility. In addition, the Department will instruct the applicant to publish the notice in newspapers of general circulation in adjacent counties or equivalent jurisdictions, if the Department determines that the publication is necessary to inform the affected public. The notice shall be published as a display advertisement.

(ii) *Visible and accessible sign*. The applicant shall post a notice on a clearly marked sign at or near the facility, fulfilling the requirements in paragraph (2). If the applicant places the sign on the facility property, the sign shall

be large enough to be readable from the nearest point where the public would pass by the site.

(iii) *Broadcast media announcement.* The applicant shall broadcast a notice, fulfilling the requirements in paragraph (2), at least once on at least one local radio station or television station. The applicant may employ another medium with prior approval of the Department.

(iv) *Notice to the Department.* The applicant shall send a copy of the newspaper notice to the Department and to the appropriate units of State and local government.

(2) The notices required under paragraph (1) shall include the following:

(i) The date, time and location of the meeting.

(ii) A brief description of the purpose of the meeting.

(iii) A brief description of the facility and proposed operations, including the address or a map—for example, a sketched or copied street map—of the facility location.

(iv) A statement encouraging people to contact the facility at least 72 hours before the meeting if they need special access to participate in the meeting.

(v) The name, address and telephone number of a contact person for the applicant.

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Title 28—HEALTH AND SAFETY

DEPARTMENT OF HEALTH

[28 PA. CODE CHS. 1001, 1003, 1005, 1007 AND 1051]

Out-of-Hospital Do-Not-Resuscitate Orders

The Department of Health (Department) is adopting interim regulations to facilitate implementation of 20 Pa.C.S. Chapter 54 (relating to the Do-Not-Resuscitate Act) (DNR Act) enacted by the act of June 19, 2002 (P. L. 409, No. 59) (Act 59). Under the interim regulations, the Department is dividing Part VII (relating to emergency medical services) into Subparts A and B (relating to emergency medical services systems; and matters ancillary to emergency medical services systems). Subpart A contains regulations the Department has adopted under the Emergency Medical Services Act (35 P. S. §§ 6921—6938). Amendments are made in Subpart A to §§ 1001.1—1001.5, 1003.27, 1005.3, 1005.10 and 1007.7. Subpart B contains new Chapter 1051 (relating to out-of-hospital do-not-resuscitate orders). The amendments and additions are set forth in Annex A.

Purpose and Background

Act 59 requires that the Department adopt interim regulations by December 16, 2002, to facilitate its implementation. In developing the interim regulations, the Department has conferred with the State Advisory Council (Council) and Commonwealth agencies such as the Department of Aging, the Department of Education, the Department of Public Welfare and the Pennsylvania Emergency Management Agency. It also convened a public hearing on the interim regulations on September 12, 2002, prior to which it distributed a preliminary draft of the interim regulations to persons who requested the preliminary draft. Notice of the public hearing was published at 32 Pa.B. 4208 (August 24, 2002). In adopting the interim regulations, the Department has considered the comments of the Council, other Commonwealth agencies and other persons who have provided comments to the Department.

Section 6 of Act 59 exempts the interim regulations from review under the Regulatory Review Act (71 P. S. §§ 745.1—745.14). Act 59 does not exempt the regulations from the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1101—1611), know as the Commonwealth Documents Law (CDL). Act 59 went into effect on August 19, 2002, and requires that the interim regulations be adopted within 120 days thereafter, following at least one public hearing on the interim regulations. Based upon Act 59's requirement that the Department convene a public meeting on the interim regulations before adopting them, and the short period of time Act 59 gave the Department to adopt interim regulations, it appears that the General Assembly intended to exempt the Department from proposing regulations, as generally required by sections 201 and 202 of the CDL (45 P. S. §§ 1201 and 1202) for final regulations, before adopting the interim regulations. Assuming, however, that sections 201 and 202 of the CDL do apply to the interim regulations, the Department has determined to proceed with the interim regulations without prior proposed rulemaking, under section 204(3) of the CDL (45 P. S. § 1204(3)), on the grounds that following the procedures for proposed rulemaking would be impractical and contrary to the public interest.

It is impractical to proceed with proposed rulemaking before final adoption because of the very short time Act 59 gave the Department to adopt interim regulations, after the effective date of Act 59. Additionally, these regulations need to be adopted expeditiously so that the Department has time to ensure that curricula is revised in emergency medical services (EMS) training institutes to incorporate the requirements of these regulations before out-of-hospital DNR orders, bracelets and necklaces are made available by the Department. The DNR Act provides that these items are to be made available by February 14, 2003. It is also contrary to the public interest to proceed with proposed rulemaking because to do so would delay adoption of the regulations, which are being promulgated to promote the public interest, past the deadline directed by statute for the adoption of the interim regulations.

Act 59 also requires that following the Department's adoption of interim regulations the Department is to adopt final regulations in accordance with customary rulemaking procedures by February 18, 2004. The Department will propose regulations before adopting final regulations by that date.

Summary

Subpart A. Emergency Medical Services Systems

Section 1001.1. Purpose.

This section is amended to address the purpose of Subpart A rather than the purpose of Part VII.

Section 1001.2. Definitions.

This section is amended to provide that the definitions in the section apply throughout Subpart A. The regulation had read that the definitions in the section applied throughout Part VII. This is no longer practical since some of the terms defined in the section are given different definitions under the DNR Act and the definition section in Chapter 1051.

Section 1001.3. Applicability.

This section identified the persons who were affected by Part VII. It has been amended to identify persons affected by Subpart A.

Section 1001.4. Exceptions.

This section authorized persons to seek exceptions to regulations in Part VII that did not repeat statutory requirements. It has been amended to authorize persons to seek exceptions to regulations in Subpart A.

Section 1001.5. Investigations.

This section announced that the Department may investigate a possible violation of Part VII. It has been amended to announce that the Department may investigate a possible violation of Subpart A.

Section 1003.27. Disciplinary and corrective action.

This section addresses the Department's authority to discipline prehospital personnel. One of the grounds for discipline was violating a duty imposed by Part VII. Subsection (a)(20) has been amended to provide that discipline may be imposed for violating a duty imposed by Subpart A.

Section 1005.3. Right to enter, inspect and obtain records.

This section addressed the duty of a ground ambulance service to cooperate with the Department when the Department was investigating a violation of Part VII. It has been amended to substitute "Subpart A" for "Part VII." Under § 1007.1 (relating to general provisions), this amendment is also applicable to air ambulance services.

Section 1005.10. Licensure and general operating standards.

This section addresses the standards that an entity needs to satisfy to become licensed as a ground ambulance service and continue to operate as a ground ambulance service. It is amended to require a ground ambulance service to maintain written policies and procedures to implement the requirements of Chapter 1051.

Section 1007.7. Licensure and general operating standards.

This section addresses the standards that an entity needs to satisfy to become licensed as an air ambulance service and continue to operate as an air ambulance service. It is amended to require that an air ambulance service maintain written policies and procedures to implement the requirements of Chapter 1051.

Subpart B. Matters Ancillary to Emergency Medical Services Systems

Chapter 1051 is adopted to facilitate implementation of the DNR Act. In addition, it assists the implementation of an Act 59 amendment to 20 Pa.C.S. §§ 5401—5416 (relating to the Advance Directive for Health Care Act) that directs EMS providers to follow the procedures for implementing an out-of-hospital DNR order when a patient experiencing cardiac or respiratory arrest has both an advance declaration issued under the Advance Directive for Health Care Act and an out-of-hospital DNR order issued under the DNR Act.

There are significant procedural differences between the two processes. Under the Advance Directive for Health Care Act, if a patient has issued an advance declaration that directs that no CPR be provided in the event of the patient's cardiac or respiratory arrest, the EMS provider cannot follow that directive until the provider contacts a medical command physician, the medical command physician determines that the declaration is operative and the medical command physician directs the EMS provider to withhold or discontinue CPR. Under the DNR Act, the EMS provider is empowered to withhold CPR upon observing an out-of-hospital DNR order, bracelet or necklace displayed with the patient; the EMS provider is not required to contact a medical command physician to secure approval.

General Provisions

Section 1051.1. Purpose.

This section addresses the purposes of the chapter. While a primary purpose of the DNR Act and the chapter is to articulate standards for the issuance and revocation of out-of-hospital DNR orders, a component of the DNR Act deals with pregnant patients. That component sets forth specific rules for the administration of out-of-hospital DNR orders issued for pregnant patients. Also, it addresses other types of life-sustaining procedures, other types of orders and directives that address the withholding or withdrawing of life-sustaining procedures, and duties of health care providers when confronted with these orders. Consequently, this section announces that the chapter deals with these special provisions relating to pregnant patients in addition to the general rules applicable to the issuance, administration and revocation of out-of-hospital DNR orders.

Section 1051.2. Definitions.

This section provides definitions for terms used in the chapter. Requiring some discussion are the definitions of "attending physician," "EMS provider," "EMS personnel," "health care provider," "patient," "prehospital personnel" and "surrogate."

"Attending physician"

"Attending physician" is defined as it is defined in the DNR Act, except a sentence is added stating that a patient may have more than one attending physician. More than one physician may have primary responsibility for the medical care and treatment of a patient. For example, a patient may use a group practice in which multiple physicians handle the patient's medical care. Another example is that a patient who has cancer may see an oncologist on a regular basis in addition to a primary care physician.

Depending upon a variety of circumstances it may be difficult to conclude that one physician is the "exclusive" attending physician. Also, a physician may believe that the physician is the patient's attending physician based upon the information the patient or a surrogate provides to the physician, but some information may be forgotten, withheld or not known by the patient or surrogate.

A physician who is requested to issue an out-of-hospital DNR order for a patient needs to make a good faith judgment as to whether the physician is an attending physician of the patient based upon the medical care the physician provides the patient. If the physician determines that the circumstances of the physician-patient relationship do not enable the physician to make that determination, the physician should attempt to supplement that knowledge with information the physician secures after making reasonable inquiries of the patient or the patient's surrogate regarding the medical care the patient is receiving from other physicians.

"Health care provider," "EMS provider," "EMS personnel" and "prehospital personnel"

The DNR Act defines "[EMS] provider," "health care provider" and "person." The statutory definition of "health

care provider" uses the term "person" and includes "personnel recognized" under the EMS Act. The statute's definition of "person" is not limited to an individual. The Department construes the statute's definition of "health care provider" to include persons, not limited to individuals, who are licensed, certified or otherwise authorized under Commonwealth laws to administer health care in the ordinary course of their business or profession. Consequently, it interprets the statutory "health care provider" definition's reference to "personnel" recognized under the EMS Act, to serve as an example of health care providers and not as a limitation on the definition.

The DNR Act defines "[EMS] provider" to include each health care provider recognized under the EMS Act, and also an individual recognized to use automated external defibrillators (AEDs) under 42 Pa.C.S. § 8331.2 (relating to good Samaritan civil immunity for use of AEDs). Similar to the Department's interpretation of the statute's definition of "health care provider" the Department interprets the statute's definition of "[EMS] provider" to include a person, not limited to an individual, that provides EMS under authority granted by the EMS Act. The Department's definitions of "health care provider" and "EMS provider" in this section reflect these interpretations. Additionally, this section defines the terms "EMS personnel" and "prehospital personnel." It employs the term "prehospital personnel" in defining "EMS personnel," and it employs the term "EMS personnel" in defining "EMS provider."

"Prehospital personnel" is defined in § 1002.1 (relating to definitions) that the Department has adopted under the EMS Act, to include ambulance attendants, first responders, EMTs, EMT-paramedics (paramedics), prehospital registered nurses (PHRNs) and health professional physicians. That definition is included in this section. These individuals are authorized by the EMS Act to perform various services for ambulance companies. However, unlike the DNR Act's definition of "[EMS] provider," the definition of "prehospital personnel" does not include an individual who enjoys good Samaritan civil immunity to use an AED.

Some parts of Chapter 1051 address the responsibilities of prehospital personnel and good Samaritan users of AEDs, and other parts address the responsibilities of prehospital personnel exclusively. The latter provisions deal with the relationship between prehospital personnel and medical command physicians—a relationship that good Samaritan users of an AEDs do not share. To distinguish between provisions of the regulations that apply to prehospital personnel and good Samaritan users of AEDs, and those provisions that apply to prehospital personnel only, the Department has defined the term "EMS personnel" to include both types of personnel and uses that term in provisions that apply to both types of personnel. The Department uses the term "prehospital personnel" in provisions that apply to prehospital personnel, but do not apply to good Samaritan users of AEDs.

"Patient"

Act 59 defines "out-of-hospital do-not-resuscitate patient" to be an individual for whom an out-of-hospital DNR order has been issued. It defines "patient" to mean the same thing, unless the context indicates otherwise. As used in Act 59, "patient" and "out-of-hospital do-not-resuscitate patient" are not interchangeable. "Patient" is employed, for example, to refer to an individual who is qualified to receive an out-of-hospital DNR, but not, necessarily, for whom an out-of-hospital DNR order has been issued. This is the manner in which the term "patient" is defined in this section.

"Surrogate"

The DNR Act permits a patient's surrogate to request an out-of-hospital DNR order for the patient and to revoke that order. It does not define "surrogate." In the context in which this term is used in the statute, it means a person who has, or persons who jointly have, legal authority to request or revoke an out-of-hospital DNR order. That is how the Department defines the term in its regulations.

§ 1051.3. Applicability.

This section identifies the major categories of persons to which the chapter applies. It also clarifies that the chapter does not regulate the issuance or implementation of a DNR order executed or to be executed in a hospital, but that it does authorize compliance with an out-of-hospital DNR order in all other settings, including other health care facilities and facilities regulated by other Commonwealth agencies, such as personal care facilities regulated by the Department of Public Welfare. Additionally, it relates that even in a hospital an EMS provider may comply with an out-of-hospital DNR order if the hospital requests an ambulance service to provide EMS to a patient. Hospital requests for an ambulance service's assistance occasionally occur when an out-of-hospital DNR patient is receiving services at a hospital site that does not handle emergency patients.

Patient and Surrogate Rights and Responsibilities

§ 1005.11. Patient qualifications to request and revoke out-of-hospital DNR order.

The DNR Act identifies the types of patients who qualify to request an out-of-hospital DNR order for themselves. It also provides that even if the patient's surrogate requests the order, the patient may revoke it. This regulation incorporates that information.

§ 1005.12. Surrogate's authority to request and revoke out-of hospital DNR order.

The DNR Act provides that a patient's surrogate may request an out-of-hospital DNR order for the patient if the patient meets certain criteria, and then may later revoke the out-of-hospital DNR order. This section conveys that information. It also explains that the age or physical or mental condition of the patient does not impact the ability of a surrogate to act on the patient's behalf. The only patient conditions that are relevant are that a patient is in a terminal condition, or is permanently unconscious and has an operative advance declaration.

§ 1005.13. Person who loses authority to function as a surrogate.

The responsibilities of a person who loses the authority to function as a patient's surrogate are not addressed in the DNR Act. Subsection (a) emphasizes that the authority to request an out-of-hospital DNR order for another person, and to revoke that order, is not necessarily an authority that lasts a lifetime. For example a person may be appointed to act as the guardian of a patient and later be replaced as the patient's guardian.

Subsection (b) imposes upon a person who acted as a patient's surrogate when requesting an out-of-hospital DNR order for the patient, but who has since lost the authority to function as the patient's surrogate, to cooper-

ate with the physician who issued that order and who is seeking to locate the patient or the patient's surrogate. A physician may contact a surrogate who requested an out-of-hospital DNR to convey important information about the patient's condition, including that the physician misdiagnosed the patient's condition or made an error in determining that the condition was terminal or that the patient was permanently unconscious. This information needs to be conveyed to the patient if the patient is competent to make health care decisions for himself. If the patient is not competent to make those decisions, the information needs to be conveyed to the person who is the patient's current surrogate. The patient's former surrogate, when contacted by the patient's physician, is required to provide the physician information to locate the current surrogate if that information is possessed by the former surrogate.

Subsection (c) also imposes upon a person who has lost the authority to serve as a patient's surrogate, the duty to provide the patient or the patient's new surrogate, as appropriate, the name of the physician who issued the out-of-hospital DNR order for the patient and any other information the surrogate has to help the patient or replacement surrogate locate the physician who issued the out-of-hospital DNR order.

Attending Physician Responsibilities

§ 1051.21. Securing out-of-hospital DNR orders, bracelets and necklaces.

This section informs physicians about how they may secure out-of-hospital DNR orders, bracelets and necklaces. It provides that out-of-hospital DNR bracelets and necklaces are to be purchased from a vendor with which the Department has contracted. The Department will publish in the *Pennsylvania Bulletin* a notice identifying the name and address of the vendors. The section also relates that the Department will publish superseding notices in the *Pennsylvania Bulletin* if there is a vendor change.

§ 1051.22. Issuance of out-of-hospital DNR order.

This section relates that an attending physician may issue an out-of-hospital DNR order and specifies various duties the physician is required to perform before issuing the order.

§ 1051.23. Disclosures to patient requesting out-of-hospital DNR order.

This section identifies the information a patient's attending physician must disclose to the patient before issuing an out-of-hospital DNR order requested by the patient. The regulation does not require the physician to provide the required information verbally, but the physician is required to ensure that the patient has received and understands all of the required information before issuing an out-of-hospital DNR order for the patient that is requested by the patient.

§ 1051.24. Disclosures to surrogate requesting out-of-hospital DNR order.

This section identifies the information a patient's attending physician must disclose to the patient's surrogate before issuing an out-of-hospital DNR order requested for the patient by the surrogate.

§ 1051.25. Disclosures to patient when surrogate requests out-of-hospital DNR order.

This section specifies the process the patient's attending physician must follow in deciding the information the physician will provide to the patient when an out-of-hospital DNR order is requested by the patient's surrogate.

§ 1051.26. Physician refusal to issue an out-of-hospital DNR order.

This section prescribes the procedures an attending physician is to follow when the physician is not willing to issue an out-of-hospital DNR order for a patient who qualifies for the order.

§ 1051.27. Providing out-of-hospital DNR bracelet or necklace.

This section prohibits an attending physician's issuance of an out-of-hospital DNR bracelet or necklace without also issuing, or having previously issued, an out-of-hospital DNR order for the patient.

§ 1051.28. Documentation.

This section requires an attending physician to assert in an out-of-hospital DNR order whether the physician also provided an out-of-hospital DNR bracelet or necklace for the patient. It also requires the physician to maintain a copy of the order in the patient's medical record. If the physician issues an order and provides the bracelet or necklace at a later time, this section further requires the physician to document in the patient's record the physician's issuance of a bracelet or necklace for the patient.

§ 1051.29. Duty to contact patient or surrogate.

This section requires the attending physician to make a reasonable effort to contact the patient or the patient's surrogate, after having issued an out-of-hospital DNR order for the patient, if the physician discovers that the diagnosis of a terminal condition or permanent unconsciousness was in error.

§ 1051.30. Physician destruction of out-of-hospital DNR order, bracelet or necklace.

This section addresses a physician's responsibilities when a patient or the patient's surrogate returns or has been requested by the physician to return an out-of-hospital DNR order, bracelet or necklace because the physician has determined that a terminal condition or permanently unconscious diagnosis was in error.

EMS Provider Responsibilities

§ 1051.51. Implementation of out-of-hospital DNR order.

This section deals with EMS provider compliance with out-of-hospital DNR orders and the procedures the provider is to follow if uncertain as to whether an out-of-hospital DNR order is valid or has been revoked.

§ 1051.52. Procedure when both advance directive and out-of-hospital DNR order are present.

This section explains that when an EMS provider observes both an advance directive for health care directing that no CPR be provided in the event of the patient's cardiac or respiratory arrest, and an out-of-hospital DNR order, bracelet or necklace, the provider is to follow the procedure for complying with the out-of-hospital DNR order.

Pregnant Patients

§ 1051.61. Pregnant patients.

This section specifies preconditions to a health care provider complying with an order or direction to not

provide nutrition, hydration, CPR and other life-sustaining procedures to a pregnant woman.

Medical Command Physician Responsibilities

§ 1051.81. Medical command physician responsibilities.

This section addresses a medical command physician's responsibilities when communicating with an EMS provider who encounters an out-of-hospital DNR patient who is experiencing cardiac or respiratory arrest. Specific subsections address the medical command physician's responsibilities when the EMS provider communicates uncertainty as to whether an out-of-hospital DNR order has been revoked, and the medical command physician's responsibilities when the EMS provider advises that the provider has encountered a pregnant out-of-hospital DNR patient who is experiencing cardiac or respiratory arrest.

Orders, Bracelets and Necklaces from Other States

§ 1051.101. Recognition of other states' out-of-hospital DNR orders.

The DNR Act directs that EMS providers are to comply with out-of-hospital DNR orders issued in another state if that state's orders, bracelets and necklaces are issued in a manner consistent with the laws of the Commonwealth. This section repeats that responsibility and explains how the Department will apprise EMS providers of the orders, bracelets and necklaces issued in other states that are acceptable in this Commonwealth.

Effective Date

The amendments will go into effect on March 1, 2003. The effective date is postponed following the publication of the regulations for several reasons. First, the amendments to §§ 1005.10 and 1007.7 (relating to licensure and general operating standards; and licensure and general operating standards) require an ambulance service to have written policies and procedures relating to Chapter 1051. Ambulance services will need time to adopt those policies and procedures. Second, as a practical matter, the regulations cannot go into effect until the out-of-hospital DNR orders, bracelets and necklaces are available. They are not available at this time. Section 54A04 of the DNR Act (relating to orders, bracelets and necklaces) gives the Department 180 days after the effective date of that act, which is February 14, 2003, to make those items available. Third, section 4 of Act 59 requires the Department to develop and make available to health care providers materials relating to the DNR Act and the Department's regulations. Fourth, section 4 of Act 59 also requires that the curricula for securing prehospital personnel certifications and recognitions be modified to include the requirements of Act 59 and these regulations. Each of these tasks requires time to complete and dictates that the effective date of the regulations be postponed for a period of time following publication of the interim regulations in the *Pennsylvania Bulletin*.

Paperwork

The Department will need to develop an out-of-hospital DNR order form for attending physicians to issue for patients who qualify for those orders. The Department will need to develop a paper or electronic process for physicians to secure those orders from the Department or its designee.

Attending physicians will also need to follow a paper or electronic process to secure out-of-hospital DNR bracelets and necklaces from a vendor contracted by the Department to manufacturer those bracelets and necklaces. The Department will need to complete the paperwork required to contract with vendors to produce the bracelets and necklaces.

The Department will need to publish notices in the *Pennsylvania Bulletin* identifying vendors from which attending physicians may procure out-of-hospital DNR bracelets and necklaces. The Department will also need to publish notices in the *Pennsylvania Bulletin* identifying states that provide out-of-hospital DNR orders, bracelets and necklaces that EMS providers are to follow, and describing the acceptable out-of-hospital DNR items.

Physicians will need to maintain information in patient medical records regarding the issuance of out-of-hospital DNR items, and prepare the paperwork or electronic entries to secure and provide out-of-hospital DNR items for patients.

Financial Impact

The DNR Act and the regulations will save patients and their families, as well as insurers, the costs of paying for continued patient care when patients who are in a terminal condition or who are permanently unconscious receive unwanted but successful CPR that continues and perpetuates the patient's poor quality of life following a cardiac or respiratory arrest. These end of life costs can continue to burden the family for several years following a patient's death. While the purpose of the DNR Act and Chapter 1051 is to enable a patient in a terminal condition, or the patient's surrogate, to communicate a decision that directs EMS providers to permit the patient to die with dignity, significant health care cost-savings will often be a collateral benefit.

The average annual cost the DNR Act and Chapter 1051 impose over 5 years to the regulated community (attending physicians, patients and surrogates) is projected to be $65,000. This includes the cost of procuring DNR orders, bracelets and necklaces for distribution in attending physician offices. The average annual costs over 5 years for State government is projected to be $36,000, which includes development and printing costs for educational materials, training, outreach and travel needed to assist regional EMS councils and practitioners in the implementation of the statute and the regulations.

It is expected that the overall cost-savings in reducing expensive and undesired end-of-life care will offset other costs incurred in implementing the statute and regulations.

Statutory Authority

Section 6 of Act 59 provides that the Department publish interim regulations regarding implementation of the DNR Act.

Regulatory Review

Under section 6 of Act 59, the Department, upon completion of at least one public hearing, and within 120 days after the effective date of Act 59, is to publish interim regulations regarding implementation of the DNR Act. The interim regulations are not subject to the Regulatory Review Act. Under the same section of Act 59, the Department is to adopt final regulations within 18 months after the effective date of Act 59.

The Office of Attorney General has reviewed the interim regulations. The interim regulations were approved on December 2, 2002.

Contact Person

Interested persons are invited to submit comments, suggestions or objections to the interim regulations to

Margaret E. Trimble, Director of the Emergency Medical Services Office, Department of Health, 1032 Health and Welfare Building, P. O. Box 90, Harrisburg, PA 17108, (717) 787-8740, within 30 days after publication of this notice in the *Pennsylvania Bulletin*. Persons with a disability may also submit comments, suggestions or objections to Margaret Trimble in alternative formats, such as by audio, Braille or, for speech or hearing impaired persons, by using V/TT (717) 783-6514 or the Pennsylvania AT&T Relay Service at (800) 654-5984[TT]. Persons who require an alternative format of this document should contact Margaret Trimble so that necessary arrangements may be made. The Department will consider the comments it receives in developing proposed regulations that will be published in advance of the Department adopting final regulations by February 18, 2004.

Findings

The Department finds that:

(1) Proposed rulemaking in advance of the interim regulations is not required under section 6 of Act 59, or, if the proposed rulemaking requirements of sections 201 and 202 of the CDL are applicable, the interim regulations are exempt from those requirements under section 204(3) of the CDL because publishing proposed rulemaking in advance of the interim regulations would be impractical and contrary to the public interest.

(2) A public hearing was held prior to the adoption of the interim regulations as required by section 6 of Act 59 and all comments received by the Department were considered.

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

Order

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

(a) The regulations of the Department, 28 Pa. Code Part VII, are amended by amending §§ 1001.1—1001.5, 1003.27, 1005.3, 1005.10 and 1007.7; and by adding §§ 1051.1—1051.3, 1051.11—1051.13, 1051.21—1051.30, 1051.51, 1051.52, 1051.61, 1051.81 and 1051.101 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

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

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

(d) The final-omitted rulemaking shall take effect March 1, 2003.

ROBERT S. ZIMMERMAN, Jr.,
Secretary

Fiscal Note: 10-171 (1) General Fund; (2) Implementing Year 2002-03 is $10,000; (3) 1st Succeeding Year 2003-04 is $36,000; 2nd Succeeding Year 2004-05 is $36,000; 3rd Succeeding Year 2005-06 is $36,000; 4th Succeeding Year 2006-07 is $36,000; 5th Succeeding Year 2007-08 is $36,000; (4) 2001-02 Program—$29,353,000; 2000-01 Program—$27,453,000; 1999-00 Program—$24,250,000; (7) General Government Operations; (8) recommends adoption. The costs, reflected above, implement the requirements of Act 59 of 2002. These figures are included in the Governor's Executive Budget.

Annex A

TITLE 28. HEALTH AND SAFETY

PART VII. EMERGENCY MEDICAL SERVICES

Subpart A. EMERGENCY MEDICAL SERVICES SYSTEM

CHAPTER 1001. ADMINISTRATION OF THE EMS SYSTEM

Subchapter A. GENERAL PROVISIONS

GENERAL INFORMATION

§ 1001.1. Purpose.

The purpose of this subpart is to plan, guide, assist and coordinate the development of regional EMS systems into a unified Statewide system and to coordinate the system with similar systems in neighboring states, and to otherwise implement the Department's responsibilities under the act consistent with the Department's rulemaking authority

§ 1001.2. Definitions.

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

* * * * *

§ 1001.3. Applicability.

This subpart affects regional EMS councils, the Council, other entities desiring to receive funding from the Department or the regional EMS councils for the provision of EMS, ALS and BLS ambulance services, QRSs, instructors and institutes involved in the training of prehospital personnel including EMTs, EMT-paramedics, first responders, ambulance attendants and health professionals, and trauma centers and local governments involved in the administration and support of EMS.

§ 1001.4. Exceptions.

(a) The Department may grant exceptions to, and departures from, this subpart when the policy objectives and intentions of this subpart are otherwise met or when compliance would create an unreasonable hardship, but would not impair the health, safety or welfare of the public. No exceptions or departures from this subpart will be granted if compliance with the standard is required by statute.

(b) Requests for exceptions to this subpart shall be made in writing to the Department. The requests, whether approved or not approved, will be documented and retained on file by the Department. Approved requests shall be retained on file by the applicant during the period the exception remains in effect.

(c) A granted request will specify the period during which the exception is operative. Exceptions may be reviewed or extended if the reasons for the original exception continue.

(d) An exception granted may be revoked by the Department for just cause. Just cause includes, but is not limited to, failure to meet the conditions for the exception. Notice of the revocation will be in writing and will include the reason for the action of the Department and a specific date upon which the exception will be terminated.

(e) In revoking an exception, the Department will provide for a reasonable time between the date of the written notice or revocation and the date of termination of an exception for the holder of the exception to come

into compliance with this subpart. Failure to comply after the specified date may result in enforcement proceedings.

(f) The Department may, on its own initiative, grant an exception to this subpart if the requirements of subsection (a) are satisfied.

§ 1001.5. Investigation.

The Department may investigate any person, entity or activity for compliance with the act and this subpart.

CHAPTER 1003. PERSONNEL

Subchapter B. PREHOSPITAL EMS PERSONNEL

§ 1003.27. Disciplinary and corrective action.

(a) The Department may, upon investigation, hearing and disposition, impose upon prehospital personnel who are certified or recognized by the Department one or more of the disciplinary or corrective measures in subsection (c) for one or more of the following reasons:

* * * * *

(20) Violating a duty imposed by the act, this subpart or an order of the Department previously entered in a disciplinary proceeding.

* * * * *

CHAPTER 1005. LICENSING OF BLS AND ALS GROUND AMBULANCE SERVICES

§ 1005.3. Right to enter, inspect and obtain records.

(a) Upon the request of an employee or agent of the Department during regular and usual business hours, or at other times when that person possesses a reasonable belief that violations of this subpart may exist, a licensee shall:

(1) Produce for inspection records maintained under § 1001.41 (relating to data and information requirements for ambulance services).

(2) Produce for inspection, permit copying, and provide within a reasonable period of time, records that pertain to personnel and their qualifications, staffing, equipment, supplies, and policies and procedures required under § 1005.10 (relating to licensure and general operating standards).

(3) Permit the person to examine vehicles, required equipment and supplies and security facilities.

(b) The Department's representative shall advise the licensee that the inspection is being conducted under section 12(k) of the act (35 P. S. § 6932(k)) and this chapter.

(c) Failure of a licensee to produce records or to permit an examination as required by this section constitutes misconduct in operating the ambulance service and shall be grounds for disciplinary sanctions or denial of license.

§ 1005.10. Licensure and general operating standards.

* * * * *

(l) *Policies and procedures.* An ambulance service shall maintain written policies and procedures addressing each of the requirements imposed by this section, as well as the requirements imposed by §§ 1001.41, 1001.42, 1001.65, 1005.11 and Chapter 1051 (relating to out-of-hospital do-not-resuscitate orders), and shall also maintain written policies and procedures addressing infection control, management of personnel safety, substance abuse in the workplace, and the placement and operation of its ambulances.

CHAPTER 1007. LICENSING OF AIR AMBULANCE SERVICES—ROTORCRAFT

§ 1007.7. Licensure and general operating standards.

* * * * *

(n) *Policies and procedures.* An air ambulance service shall maintain written policies and procedures addressing each of the requirements imposed by this section, as well as the requirements imposed by §§ 1001.41, 1001.42, 1001.65 (relating to data and information requirements for ambulance services; dissemination of information; and cooperation) and Chapter 1051 (relating to out-of-hospital do-not-resuscitate orders) and shall also maintain written policies and procedures addressing infection control, management of personnel safety, substance abuse in the workplace, and the placement and operation of its air ambulances.

Subpart B. MATTERS ANCILIARY TO EMERGENCY MEDICAL SERVICES SYSTEMS

CHAPTER 1051. OUT-OF-HOSPITAL DO-NOT-RECUSCITATE ORDERS

GENERAL PROVISIONS

Sec.
1051.1. Purpose.
1051.2. Definitions.
1051.3. Applicability.

PATIENT AND SURROGATE RIGHTS AND RESPONSIBILITIES

1051.11. Patient qualifications to request and revoke out-of-hospital DNR order.
1051.12. Surrogate's authority to request and revoke out-of-hospital DNR order.
1051.13. Person who loses authority to function as a surrogate.

ATTENDING PHYSICIAL RESPONSIBILITIES

1051.21. Securing out-of-hospital DNR orders, bracelets and necklaces.
1051.22. Issuance of out-of-hospital DNR order.
1051.23. Disclosures to patient requesting out-of-hospital DNR order.
1051.24. Disclosures to surrogate requesting out-of-hospital DNR order.
1051.25. Disclosures to patient when surrogate requests out-of-hospital DNR order.
1051.26. Physician refusal to issue an out-of-hospital DNR order.
1051.27. Providing out-of-hospital DNR bracelet or necklace.
1051.28. Documentation.
1051.29. Duty to contact patient or surrogate.
1051.30. Physician destruction of out-of-hospital DNR order, bracelet or necklace.

EMS PROVIDER RESPONSIBILITIES

1051.51. Implementation of out-of-hospital DNR order.
1051.52. Procedure when both advance directive and out-of-hospital DNR order are present.

PREGNANT PATIENTS

1051.61. Pregnant patients.

MEDICAL COMMAND PHYSICIAN RESPONSIBILITIES

1051.81. Medical command physician responsibilities.

ORDERS, BRACELETS AND NECKLACES FROM OTHER STATES

1051.101. Recognition of other states' out-of-hospital DNR orders.

GENERAL PROVISIONS

§ 1051.1. Purpose.

This chapter provides standards for the issuance and revocation of out-of-hospital DNR orders and compliance with those orders. An additional purpose of this chapter is to address how health care providers are to deal with orders or directions to not provide life-sustaining treatment, CPR, nutrition or hydration to a pregnant woman.

§ 1051.2. Definitions.

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

Advance directive—A directive for health care in a declaration issued under 20 Pa.C.S. Chapter 54 (relating to the Advance Directive for Health Care Act).

Attending physician—A physician who has primary responsibility for the medical care and treatment of a patient. A patient may have more than one attending physician.

CPR—Cardiopulmonary resuscitation—Cardiac compression, invasive airway techniques, artificial ventilation, defibrillation and other related procedures used to resuscitate a patient or to prolong the life of a patient.

Declarant—As defined in 20 Pa.C.S. § 5403 (relating to definitions).

Declaration—As defined in 20 Pa.C.S. § 5403.

Department—The Department of Health of the Commonwealth.

DNR—Do not resuscitate.

EMS personnel—Emergency medical services personnel—Prehospital personnel and individuals given good Samaritan civil immunity protection when using an automated external defibrillator under 42 Pa.C.S. § 8331.2 (relating to good Samaritan civil immunity for use of automated external defibrillators).

EMS provider—Emergency medical services provider—EMS personnel, a medical command physician and, as defined in § 1001.2 (relating to definitions), an advance life support service medical director, medical command facility medical director, medical command facility, ambulance service and quick response service.

Health care provider—A person who is licensed, certified or otherwise authorized to administer health care in the ordinary course of a business or practice of a profession. The term includes EMS providers.

Invasive airway technique—Any advanced airway technique, including endotracheal intubation.

Life-sustaining treatment—

(i) A medical procedure or intervention that, when administered to a patient, will serve only to prolong the process of dying or to maintain the patient in a state of permanent unconsciousness.

(ii) The term includes nutrition and hydration administered by gastric tube or intraveneously or any other artificial or invasive means if the order of the patient so specifically provides.

Medical command physician—A physician who is approved by a regional emergency medical services council to provide medical command.

Out-of-hospital DNR bracelet—A bracelet which signifies that an out-of-hospital DNR order has been issued.

Out-of-hospital DNR necklace—A necklace which signifies that an out-of-hospital DNR order has been issued.

Out-of-hospital DNR order—A written order, the form for which is supplied by the Department or its designee under this chapter, that is issued by an attending physician and directs EMS providers to withhold CPR from the patient in the event of cardiac or respiratory arrest.

Out-of-hospital DNR patient—A patient for whom an attending physician has issued an out-of-hospital DNR order.

Patient—One of the following:

(i) An individual who is in a terminal condition.

(ii) A declarant whose declaration has become operative under 20 Pa.C.S. § 5405(2) (relating to when declaration becomes operative) and which provides that no CPR be provided in the event of the declarant's cardiac or respiratory arrest if the declarant becomes permanently unconscious, or designates a surrogate to make that decision under those circumstances

Permanently unconscious—

(i) A medical condition that has been diagnosed in accordance with currently accepted medical standards and with reasonable medical certainty as total and irreversible loss of consciousness and capacity for interaction with the environment.

(ii) The term includes, without limitation, a persistent vegetative state or irreversible coma.

Person—An individual, corporation, partnership, association or Federal, State or local government or governmental agency.

Physician—An individual who has a currently registered license to practice medicine or osteopathic medicine in this Commonwealth.

Prehospital personnel—The term includes any of the following prehospital practitioners:

(i) Ambulance attendants.

(ii) First responders.

(iii) Emergency medical technicians (EMTs).

(iv) EMT-paramedics.

(v) Prehospital registered nurses.

(vi) Health professional physicians.

Surrogate—An individual who has, or individuals who collectively have, legal authority to request an out-of-hospital DNR order for another individual or to revoke that order.

Terminal condition—An incurable and irreversible medical condition in an advanced state caused by injury, disease or physical illness which will, in the opinion of the attending physician, to a reasonable degree of medical certainty, result in death regardless of the continued application of life-sustaining treatment.

§ 1051.3. Applicability.

(a) This chapter applies to the following:

(1) Health care providers.

(2) Attending physicians.

(3) Patients.

(4) Surrogates.

(b) This chapter neither compels nor prohibits health care provider compliance with an out-of-hospital DNR order in a hospital. In a hospital, an EMS provider shall comply with an out-of-hospital DNR order only if responding on behalf of an ambulance service to a call the hospital makes for ambulance service assistance.

(c) This chapter does not regulate the issuance of or compliance with a DNR order issued in a hospital to be followed in that hospital.

(d) This chapter permits EMS providers to comply with out-of-hospital DNR orders in all settings other than a hospital, except as set forth in subsection (b), including personal care facilities and all other health care facilities.

PATIENT AND SURROGATE RIGHTS AND RESPONSIBILITIES

§ 1051.11. Patient qualifications to request and revoke out-of-hospital DNR order.

(a) *Patient requesting an out-of-hospital DNR order.* A patient may request and receive an out-of-hospital DNR order from the patient's attending physician if the patient has a terminal condition and the patient is at least 18 years of age, has graduated from high school, has married or is emancipated.

(b) *Patient revoking an out-of-hospital DNR order.* An out-of-hospital DNR patient, regardless of age or physical or mental condition, may revoke an out-of-hospital DNR order issued for the out-of-hospital DNR patient whether the order was issued pursuant to the request of the patient or the patient's surrogate.

§ 1051.12. Surrogate's authority to request and revoke out-of-hospital DNR order.

(a) *Surrogate requesting an out-of-hospital DNR order.* The surrogate of a patient may request and receive from the patient's attending physician an out-of-hospital DNR order for the patient, regardless of the patient's age or other physical or mental condition.

(b) *Surrogate revoking an out-of-hospital DNR order.* A patient's surrogate may revoke an out-of-hospital DNR order for the patient if the out-of-hospital DNR order was issued at the request of a surrogate.

§ 1051.13. Person who loses authority to function as a surrogate.

(a) *No authority to revoke out-of-hospital DNR order.* A person who acted as a patient's surrogate when requesting an out-of-hospital DNR order for the patient may not revoke the out-of-hospital DNR order if the person loses the legal authority to serve as the patient's surrogate.

(b) *Duty when contacted by physician.* If a person who acted as the patient's surrogate when the out-of-hospital DNR order was issued for the patient, is not qualified to act as the patient's surrogate when a physician contacts that person under § 1051.30(b) (relating to physician destruction of out-of-state DNR order, bracelet or necklace), the person shall apprise the physician that the person is no longer the patient's surrogate and provide the physician any information the person has to help the physician locate the patient.

(c) *Duty when person loses surrogate status.* A person who loses the authority to act as a patient's surrogate after the person obtained an out-of-hospital DNR order for the patient shall make a reasonable effort to apprise the physician who issued the out-of-hospital DNR order of the change in that person's status, as well as the name of the person, if any, who replaced that person as the patient's surrogate. A person who loses the authority to act as a patient's surrogate shall also provide to the patient if the patient is no longer represented by a surrogate, or to the replacement surrogate if there is one, the name of the physician who issued the out-of-hospital DNR order and any information the person has to help the patient or the patient's surrogate locate the physician.

ATTENDING PHYSICIAN RESPONSIBILITIES

§ 1051.21. Securing out-of-hospital DNR orders, bracelets and necklaces.

(a) *Securing order forms.* A physician or the physician's agent may secure out-of-hospital DNR order forms from the Department unless the Department has contracted with a vendor to provide the order forms, in which case the physician shall secure the order forms from the contracted vendor.

(b) *Securing bracelets and necklaces.* A physician may secure out-of-hospital DNR bracelets and necklaces by purchasing them from the vendor with which the Department has contracted to produce the bracelets and necklaces.

(c) *Vendors.* The Department will publish in a *Pennsylvania Bulletin* notice the name and address of the vendors with which it has contracted under this section and publish superseding *Pennsylvania Bulletin* notices when there are vendor changes.

§ 1051.22. Issuance of out-of-hospital DNR order.

(a) *Authority to issue.* A patient's attending physician shall issue an out-of-hospital DNR order for the patient if the patient who is qualified to request the order under § 1051.11(a) (relating to patient qualifications to request and revoke out-of-hospital DNR order) or the patient's surrogate requests the attending physician to issue an out-of-hospital DNR order for the patient and the attending physician determines that the patient has a terminal condition or is permanently unconscious.

(b) *Review of order before signing.* Before completing, signing and dating an out-of-hospital DNR order, a patient's attending physician shall ensure that the patient is identified in the order, that all other provisions of the order have been completed, and that the patient or the patient's surrogate, as applicable, has signed the order.

(c) *Order form.* A patient's attending physician shall issue an out-of-hospital DNR order for the patient only on a form provided by the Department or its designee.

§ 1051.23. Disclosures to patient requesting out-of-hospital DNR order.

When a patient qualified under § 1051.11(a) (relating to patient qualifications to request and revoke out-of-hospital DNR order) requests an out-of-hospital DNR order, the attending physician shall disclose the following information to the patient before issuing an out-of-hospital DNR order for the patient:

(1) The diagnosed condition is a terminal condition.

(2) An out-of-hospital DNR order directs an EMS provider to withhold providing CPR to the patient in the event of the patient's cardiac or respiratory arrest.

(3) The attending physician may also issue an out-of-hospital DNR bracelet or necklace for the patient, and that the necklace and bracelet also direct an EMS provider to withhold providing CPR in the event of the patient's cardiac or respiratory arrest.

(4) An out-of-hospital DNR order, bracelet or necklace requested by a patient is effective only when the patient possesses and displays the order, bracelet or necklace.

(5) An out-of-hospital DNR order is not effective when the patient is in a hospital, unless an EMS provider has been dispatched to provide EMS to the patient in the hospital, but a DNR order may be issued for the patient in a hospital in accordance with other procedures.

(6) The patient may revoke the out-of-hospital DNR order; the patient may do so without the physician's approval or knowledge; revocation may be accomplished by destroying or not displaying the order, bracelet or necklace, or by conveying the decision to revoke the out-of-hospital DNR order verbally or otherwise at the

time the patient experiences respiratory or cardiac arrest; and neither the patient's physical nor mental condition will be considered to void the patient's decision to revoke the out-of-hospital DNR order if that decision is clearly communicated in some manner.

(7) The possibility exists that the EMS provider may administer CPR in the event of the patient's cardiac or respiratory arrest if an EMS provider is uncertain regarding the validity or applicability of the out-of-hospital DNR order, bracelet or necklace.

(8) An EMS provider who complies with the patient's out-of-hospital DNR order may provide other medical interventions to the patient to provide comfort or alleviate pain.

(9) The physician will attempt to contact the patient to ask the patient to return the out-of-hospital DNR order, bracelet and necklace to the physician, for destruction by the physician, if the physician discovers that the diagnosis of the terminal condition was in error.

(10) If the patient is female, there are additional procedures that an EMS provider will need to follow to implement an out-of-hospital DNR order if the patient is pregnant at the time of cardiac or respiratory arrest. If the patient is pregnant or requests information regarding the additional procedures, the physician shall explain the requirements of § 1051.61 (relating to pregnant patients).

§ 1051.24. Disclosures to surrogate requesting out-of-hospital DNR order.

Before issuing an out-of-hospital DNR order for a patient that is requested by the patient's surrogate, the attending physician shall disclose the following information to the surrogate:

(1) The diagnosed condition is a terminal condition or that the physician has diagnosed the patient to be permanently unconscious.

(2) The disclosures required by § 1051.23(2), (3), (5), (7) and (8) (relating to disclosures to patient requesting out-of-hospital DNR order).

(3) An out-of-hospital DNR order, bracelet or necklace requested by the surrogate is effective only when the order, bracelet or necklace is displayed with the patient or the surrogate presents the order to the health care provider at the time the patient experiences cardiac or respiratory arrest.

(4) The patient or surrogate may revoke the out-of-hospital DNR order; the patient or surrogate may do so without the physician's approval or knowledge; revocation may be accomplished by destroying or not displaying the order, bracelet or necklace, or by conveying the decision to revoke the out-of-hospital DNR order verbally or otherwise at the time the patient experiences cardiac or respiratory arrest; and neither the physical nor mental condition of the patient will be considered to void the decision of the patient or surrogate to revoke the out-of-hospital DNR order if that decision is clearly communicated in some manner. The physician shall also apprise the surrogate, if it seems appropriate under the circumstances, that the power of the surrogate to revoke the out-of hospital DNR order for the patient will terminate if the surrogate loses the legal authority to make that decision.

(5) The physician will attempt to contact the surrogate to ask the surrogate to return the out-of-hospital DNR order, bracelet and necklace to the physician, for destruction by the physician, if the physician discovers that the diagnosis of the terminal condition or that the patient is permanently unconscious was in error.

(6) If the patient is female, there are additional procedures that an EMS provider will need to follow to implement an out-of-hospital DNR order if the patient is pregnant at the time of cardiac or respiratory arrest. If the patient is pregnant or the patient's surrogate requests information regarding the additional procedures, the physician shall explain the requirements of § 1051.61 (relating to pregnant patients).

§ 1051.25. Disclosures to patient when surrogate requests out-of-hospital DNR order.

Before issuing an out-of-hospital DNR order for a patient that is requested by the patient's surrogate, the attending physician shall disclose to the patient the information in § 1051.23 (relating to disclosures to patient requesting out-of-hospital DNR order) that the physician in good faith believes the patient needs to have to make a future decision to revoke or not revoke the order. In making this assessment, the physician shall consult with the patient's surrogate and consider factors such as the reason the patient is not able to request an out-of-hospital DNR order, the patient's ability to comprehend and retain the information, and the patient's age and maturity. The attending physician shall refuse to issue the order if the physician and surrogate cannot agree to the information that is to be disclosed to the patient by the physician.

§ 1051.26. Physician refusal to issue an out-of-hospital DNR order.

An attending physician who is not willing to issue an out-of-hospital DNR order for a reason other than described in § 1051.25 (relating to disclosures to patient when surrogate requests out-of-hospital DNR order) shall explain the reason to the patient or the patient's surrogate, as appropriate.

(1) The physician shall also explain that an out-of-hospital DNR order may be issued only by a physician who has primary responsibility for the treatment and care of a patient.

(2) The physician shall offer to assist the patient or surrogate to secure the services of another physician who is willing to issue an out-of-hospital DNR order for the patient and who will undertake primary responsibility for the treatment and care of the patient in addition to or instead of the attending physician, as the patient or surrogate chooses.

§ 1051.27. Providing out-of-hospital DNR bracelet or necklace.

(a) *Bracelet and necklace.* A patient's attending physician may provide to the patient, or to the patient's surrogate for the patient, an out-of-hospital DNR bracelet or necklace, or both, if the physician has issued or is issuing an out-of-hospital DNR order for the patient and the patient or the surrogate requests the item.

(b) *Order also required.* A patient's attending physician may not provide an out-of-hospital DNR bracelet or necklace for the patient without also issuing, or having issued, an out-of-hospital DNR order for the patient.

(c) *Department vendor.* A patient's attending physician may provide to or for the patient only an out-of-hospital DNR bracelet or necklace produced by a vendor with which the Department has contracted to produce the bracelet or necklace.

§ 1051.28. Documentation.

An attending physician who issues an out-of-hospital DNR order for a patient shall maintain a copy of that order in the patient's medical record and shall document in that order whether the physician also provided an out-of-hospital DNR bracelet or necklace, or both. If the attending physician provides an out-of-hospital DNR bracelet or necklace after issuing the out-of-hospital DNR order, the physician shall document the patient's medical record to reflect that the bracelet or necklace was also provided for the patient.

§ 1051.29. Duty to contact patient or surrogate.

If a physician who issued an out-of-hospital DNR order for the patient, subsequently determines that the diagnosis that the patient is in a terminal condition or is permanently unconscious was in error, the physician shall make a good faith effort to promptly contact the patient or the patient's surrogate to disclose the error. The physician shall also request the return of the order, and the bracelet and necklace if the physician provided those items.

§ 1051.30. Physician destruction of out-of-hospital DNR order, bracelet or necklace.

(a) *Destruction of order, bracelet and necklace.* A physician shall destroy an out-of-hospital DNR order, bracelet or necklace returned to the physician under § 1051.29 (relating to duty to contact patient or surrogate), as follows:

(1) The physician shall shred or otherwise destroy beyond identification the original order and mark all copies of the order in the physician's possession as having been revoked.

(2) The physician shall cut the bracelet or necklace pendant in half or take other action that renders the bracelet or necklace incapable of being again used as an out-of-hospital DNR bracelet or necklace.

(b) *Documentation of order when items not destroyed.* A physician who requests the return of an out-of-hospital DNR order, bracelet or necklace under § 1051.29 may not mark copies of the order in the physician's possession as having been revoked without having destroyed or confirmed the destruction of the original out-of-hospital DNR order and any out-of-hospital DNR bracelet or necklace the physician provided for the patient.

EMS PROVIDER RESPONSIBILITIES

§ 1051.51. Implementation of out-of-hospital DNR order.

(a) *Display of order, bracelet or necklace.* An EMS provider may not provide CPR to a patient who is experiencing cardiac or respiratory arrest if an out-of-hospital DNR order, bracelet or necklace is displayed with the patient or the patient's surrogate presents the EMS provider with an out-of-hospital DNR order for the patient, and neither the patient nor the patient's surrogate acts to revoke the order at that time. When an EMS provider observes an out-of-hospital DNR order without also observing an out-of-hospital DNR bracelet or necklace, the EMS provider shall implement the out-of-hospital DNR order only if it contains original signatures.

(b) *Discovery after CPR initiated.* If after initiating CPR an EMS provider becomes aware of an out-of-hospital DNR order that is effective under subsection (a), the EMS provider shall discontinue CPR.

(c) *Prehospital practitioner uncertainty.* If a prehospital practitioner is uncertain as to whether an out-of-hospital DNR order has been revoked for a patient who is experiencing cardiac or respiratory arrest, the prehospital practitioner shall provide CPR to the patient subject to the following:

(1) If the prehospital practitioner is in contact with a medical command physician prior to initiating CPR, the prehospital practitioner shall initiate or not initiate CPR as directed by the medical command physician.

(2) If the prehospital practitioner is in contact with a medical command physician after initiating CPR, the prehospital practitioner shall continue or not continue CPR as directed by the medical command physician.

(d) *Discontinuation of CPR not initiated by prehospital practitioner.* If CPR had been initiated for the patient before a prehospital practitioner arrived at the scene, and the prehospital practitioner determines that an out-of-hospital DNR order is effective under subsection (a), the prehospital practitioner may not discontinue the CPR without being directed to do so by a medical command physician.

(e) *AED good Samaritan.* If an individual who is given good Samaritan civil immunity protection when using an automated external defibrillator (AED) under 42 Pa.C.S. § 8331.2 (relating to good Samaritan civil immunity for use of automated external defibrillators) is uncertain as to whether an out-of-hospital DNR order has been revoked for a patient who is experiencing cardiac arrest, the individual may provide CPR to the patient as permitted by 42 Pa.C.S. § 8331.2, but shall discontinue CPR if directed by a medical command physician directly or as relayed by a prehospital practitioner.

(f) *Providing comfort and alleviating pain.* When a prehospital practitioner complies with an out-of-hospital DNR order, the prehospital practitioner, within the practitioner's scope of practice, shall provide other medical interventions necessary and appropriate to provide comfort to the patient and alleviate the patient's pain, unless otherwise directed by the patient or the prehospital practitioner's medical command physician.

§ 1051.52. Procedure when both advance directive and out-of-hospital DNR order are present.

If a patient with cardiac or respiratory arrest has both an advance directive directing that no CPR be provided and an out-of-hospital DNR order, an EMS provider shall comply with the out-of-hospital DNR order as set forth in § 1051.51 (relating to compliance with an out-of-hospital DNR order).

PREGNANT PATIENTS

§ 1051.61. Pregnant patients.

Notwithstanding the existence of an order or direction to the contrary, life-sustaining treatment, CPR, nutrition and hydration shall be provided to a pregnant patient by a health care provider unless, to a reasonable degree of medical certainty as certified on the patient's medical record by the patient's attending physician and a second physician who is an obstetrician who has examined the patient, life-sustaining treatment, nutrition and hydration will have one of the following consequences:

(1) They will not maintain the pregnant patient in such a way as to permit the continuing development and live birth of the unborn child.

(2) They will be physically harmful to the pregnant patient.

(3) They will cause pain to the pregnant patient which cannot be alleviated by medication.

MEDICAL COMMAND PHYSICIAN RESPONSIBILITIES

§ 1051.81. Medical command physician responsibilities.

(a) *Compliance with out-of-hospital DNR order.* If a medical command physician is in contact with a prehospital practitioner when the prehospital practitioner is attending to a patient in cardiac or respiratory arrest and the prehospital practitioner is made aware of an out-of-hospital DNR order for the patient by examining an out-of-hospital DNR order, bracelet or necklace, the medical command physician shall honor the out-of-hospital DNR order. If appropriate, the medical command physician shall direct the prehospital practitioner to provide other medical interventions within the practitioner's scope of practice to provide comfort to the patient and alleviate the patient's pain, unless the prehospital practitioner is otherwise directed by the patient.

(b) *Prehospital practitioner uncertainty.* If a medical command physician is in contact with a prehospital practitioner when the prehospital practitioner is attending to a patient in cardiac or respiratory arrest and the prehospital practitioner communicates uncertainty as to whether an out-of-hospital DNR order for the patient has been revoked, the medical command physician shall ask the prehospital practitioner to explain the reason for the uncertainty. Based upon the information provided, the medical command physician shall make a good faith assessment of whether the described circumstances constitute a revocation, and then direct the prehospital practitioner to withdraw or continue CPR based upon whether the physician determines that the out-of-hospital DNR order has been revoked or not revoked.

(c) *Pregnant patient.* If a medical command physician is in contact with a prehospital practitioner when the prehospital practitioner is attending to a pregnant patient in cardiac or respiratory arrest, and the prehospital practitioner is made aware of an out-of-hospital DNR order for the pregnant patient by examining an out-of-hospital DNR order, bracelet or necklace for the patient, and apprises the medical command physician of the out-of-hospital DNR order, the medical command physician shall direct the prehospital practitioner to ignore the out-of-hospital DNR order unless the medical command physician has knowledge that the patient's attending physician and a second physician who is an obstetrician had examined the patient, and both certified in the patient's medical record that, to a reasonable degree of medical certainty, life-sustaining treatment, nutrition, hydration and CPR will have one of the following consequences:

(1) They will not maintain the pregnant patient in such a way as to permit the continuing development and live birth of the unborn child.

(2) They will be physically harmful to the pregnant patient.

(3) They will cause pain to the pregnant patient which cannot be alleviated by medication.

(d) *Inconsistencies.* Subsections (a) and (b) apply when the patient is a pregnant patient, except to the extent they are inconsistent with subsection (c).

ORDERS, BRACELETS AND NECKLACES FROM OTHER STATES

§ 1051.101. Recognition of other states' out-of-hospital DNR orders.

(a) *Validity of orders, bracelets and necklaces from other states.* An out-of-hospital DNR order, bracelet or necklace valid in a state other than this Commonwealth is effective in this Commonwealth to the extent the order, bracelet or necklace is consistent with the laws of this Commonwealth.

(b) *Department acceptance.* The Department will review the applicable laws of other states, and the out-of-hospital DNR orders, bracelets and necklaces provided in other states, and list in a notice in the *Pennsylvania Bulletin* the states that provide out-of-hospital DNR orders, bracelets and necklaces that are consistent with the laws of the Commonwealth. The notice will also include, for each state listed, a description of the out-of-hospital DNR order, bracelet and necklace the state issues consistent with the laws of the Commonwealth. The Department will update the list and descriptions, as needed, in a superseding notice in the *Pennsylvania Bulletin*.

(c) *Compliance by EMS providers.* An EMS provider shall comply with §§ 1051.51, 1051.52, 1051.61 and 1051.81 when encountering a patient with an apparently valid out-of-hospital DNR order, bracelet or necklace issued by another state listed in a notice in the *Pennsylvania Bulletin* issued under subsection (b).

[Pa.B. Doc. No. 02-2223. Filed for public inspection December 13, 2002, 9:00 a.m.]

Title 31—INSURANCE

INSURANCE DEPARTMENT

[31 PA. CODE CH. 89b]

Policies and Forms; General Filing Requirements and General Contents of Forms

The Insurance Department has renumbered the final-form rulemaking which appeared at 32 Pa.B. 5747 (November 23, 2002). The sections affected are as follows:

CHAPTER 89b. APPROVAL FOR LIFE INSURANCE, ACCIDENT AND HEALTH INSURANCE AND PROPERTY AND CASUALTY INSURANCE FILING AND FORM

Old Number	*Title*	*New Number*
§ 89a.1	Definitions.	§ 89b.1
§ 89a.2	Purpose.	§ 89b.2
§ 89a.3	Form filings.	§ 89b.3
§ 89a.4	General filing procedure.	§ 89b.4
§ 89a.5	Letter of submission.	§ 89b.5
§ 89a.11	General contents of forms.	§ 89b.11

[Pa.B. Doc. No. 02-2224. Filed for public inspection December 13, 2002, 9:00 a.m.]

Title 58—RECREATION

FISH AND BOAT COMMISSION

[58 PA. CODE CH. 53]

Corrective Amendment to 58 Pa. Code § 53.27

The Fish and Boat Commission has discovered a discrepancy between the agency text of 58 Pa. Code § 53.27 (relating to use permits for unpowered boats), as deposited with the Legislative Reference Bureau, and the official text published at 32 Pa.B. 4484 (September 14,

2002), and the text which appeared in the *Pennsylvania Code Reporter* (Master Transmittal Sheet No. 336), and as currently appears in the *Pennsylvania Code*. When the amendments to § 53.27 were codified, the text of subsections (c)—(f) were inadvertently omitted.

Therefore, under 45 Pa.C.S. § 901: The Fish and Boat Commission has deposited with the Legislative Reference Bureau a corrective amendment to 58 Pa. Code § 53.27. The corrective amendment to 58 Pa. Code § 53.27 is effective as of September 14, 2002, the date the defective official text was published in the *Pennsylvania Bulletin*.

The correct version of 58 Pa. Code § 53.27 appears in Annex A.

Annex A

TITLE 58. RECREATION

PART II. FISH AND BOAT COMMISSION

Subpart A. GENERAL PROVISIONS

CHAPTER 53. COMMISSION PROPERTY

§ 57.27. Use permits for unpowered boats.

(a) The Commission and issuing agents designated by the Commission will issue use permits for unpowered boats when their owners choose not to register them to use Commission lakes and access areas.

(b) Use permits will be issued in the form of decals, showing the expiration date. Decals shall be clearly displayed on both sides of the hull amidships below the gunwale. For low-volume boats, such as kayaks, decals shall be placed on both sides of the deck amidships.

(c) An applicant for a use permit shall provide the following information:

(1) The name, address and telephone number of the applicant.

(2) A description of the boat (make, model, year).

(3) The Hull Identification Number (HIN) of the boat (if readily available).

(d) A use permit is issued for a specific boat. It is unlawful to transfer a use permit issued for a specific boat to another boat. A use permit remains effective for the boat for which it is issued even if ownership of the boat is changed during the term of the permit.

(e) Use permits are be valid for 1 or 2 years. The expiration date of a 1-year use permit is December 31 of the year for which it is issued. The expiration date of a 2-year use permit is December 31 of the second year for which it was issued.

(f) The initial fees for the use permits are $10 for a 1-year permit and $18 for a 2-year permit. The Executive Director may, by notice published in the *Pennsylvania Bulletin*, adjust these fees so that they remain the same as the resident price for 1-year and 2-year boat launching permits as established in the schedule of fees published, and from time-to-time revised, by the Department of Conservation and Natural Resources for State parks and forests. Whenever a use permit authorized by this section is issued by an issuing agent other than the Commission or the Department of Conservation and Natural Resources, the issuing agent may charge an issuing agent fee not to exceed $1 per transaction for issuing the permit.

[Pa.B. Doc. No. 02-2225. Filed for public inspection December 13, 2002, 9:00 a.m.]