

PROPOSED RULEMAKING

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CHS. 86 AND 89]

Bond Adjustment and Bituminous Mine Subsidence Control Standards

The Environmental Quality Board (Board) proposes to amend Chapters 86 and 89 (relating to surface and underground coal mining; general; and underground mining of coal and coal preparation facilities). The proposed rulemaking affects application requirements, bonding requirements and performance standards relating to the restoration of structures and water supplies affected by underground coal mining.

This proposal was adopted by the Board at its meeting of July 15, 2003.

A. *Effective Date*

The proposed rulemaking will become effective upon publication as a final-form rulemaking in the *Pennsylvania Bulletin*.

B. *Contact Persons*

For further information contact Joseph G. Pizarchik, Director, Bureau of Mining and Reclamation, P. O. Box 8461, Rachel Carson State Office Building, Harrisburg, PA 17105-8461, (717) 787-5103; or William Shakely, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Information regarding the submission of comments on this proposed rulemaking appears in Section I. Persons with a disability may use the AT&T Relay Service, (800) 654-5988 (voice users). This proposed rulemaking is available electronically through the Department of Environmental Protection's (Department) website (<http://www.dep.state.pa.us>).

C. *Statutory Authority*

The rulemaking is proposed under the authority of section 7 of The Bituminous Mine Subsidence and Land Conservation Act (BMSLCA) (52 P.S. § 1406.7) and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20). Additionally, the rulemaking is proposed under the BMSLCA (52 P.S. §§ 1406.1–1406.21), as amended, and as undergoing modification by a Federal rulemaking to supersede or "set aside" six sections of the BMSLCA through an action of the United States Secretary of the Interior. The Secretary's action, taken under section 505 of the Surface Mining Control and Reclamation Act (SMCRA) (30 U.S.C.A. § 1255), will supersede/set aside sections 5.1(b), 5.2(g)—(h), 5.4(a)(3) and (c) and 5.5(b) of the BMSLCA (52 P.S. §§ 1406.5a(b), 1406.5b(g)—(h), 1406.5d(a)(3) and (c) and 1406.5e(b)) to the extent these sections are inconsistent with the SMCRA.

Parts of the rulemaking, which affect bonding requirements for surface mining activities, coal preparation activities and coal refuse disposal, are proposed under the authority of section 5 of The Clean Streams Law (52 P.S. § 691.5), section 4.2 of the Surface Mining Conservation and Reclamation Act (52 P.S. § 1396.4b), section 3.2 of the Coal Refuse Disposal Control Act (52 P.S. § 30.53b) and section 1920-A of The Administrative Code of 1929.

D. *Background and Purpose*

The rulemaking is proposed to satisfy the conditions for maintaining a State primacy program under the SMCRA. To maintain primacy, the Commonwealth must maintain a regulatory program that is as effective as and not inconsistent with the Federal regulatory program. The Commonwealth first obtained primacy in 1982 and, since that time, has updated its regulations as necessary to track changes in Federal law and regulations. This proposed rulemaking is intended to address Federal program changes relating to the repair of subsidence damage to structures and the replacement of water supplies affected by underground bituminous coal mining operations. The following is a brief history of the actions leading up to this proposed rulemaking.

In 1992, the United States Congress enacted the Federal Energy Policy Act (EPACT) (P.L. 102-486, 106 Stat. 2776 (1992)), which amended several Federal statutes, including the SMCRA. The amendments to the SMCRA included the addition of section 720 (30 U.S.C.A. § 1309). Section 720 of the SMCRA was specific to effects on dwellings and related structures and noncommercial buildings and drinking, domestic and residential water supplies in place prior to the time of permit application. It became effective on October 24, 1992.

The General Assembly enacted amendments to the BMSLCA by the act of June 22, 1994 (P.L. 357, No. 54) (Act 54). Act 54 established requirements relating to the repair of structures damaged by mine subsidence and the replacement of water supplies affected by underground mining operations. The amended BMSLCA covered a wider range of structures and water supplies than EPACT and established specific procedures for the resolution of claims. EPACT did not include claim resolution procedures. The Commonwealth amendments were based on the recommendations of an independent mediation group that was convened in the late 1980s to negotiate the needs of landowners and mine operators in this Commonwealth. The Commonwealth amendments became effective on August 21, 1994.

On March 31, 1995, the United States Office of Surface Mining Reclamation and Enforcement (OSM) promulgated final regulations to implement the EPACT provisions. The Federal regulations (60 FR 16722) included broad program provisions, including information requirements, performance standards and bonding requirements to fully implement the provisions of section 720(a) of the SMCRA.

On July 28, 1995, OSM announced the implementation of a dual enforcement program in this Commonwealth. OSM recognized that the Commonwealth's law did not mirror the provisions of the 1995 Federal regulations in scope or effective date. Under dual enforcement, the Department enforced the provisions of the amended BMSLCA and OSM enforced section 720(a) of the SMCRA and the provisions of the 1995 Federal regulations in cases where damages were outside the scope of the BMSLCA. OSM enforcement activity focused primarily on damages that occurred between October 24, 1992 (the effective date of EPACT) and August 21, 1994 (the effective date of Act 54).

On March 17, 1998, the Board promulgated a final-form rulemaking, published at 28 Pa.B. 2761 (June 13, 1998), to codify the provisions of Act 54. The final-form rule-

making also included definitions and requirements to clarify the statutory provisions of Act 54 and to facilitate their implementation.

On July 29, 1998, the Department submitted the amended BMSLCA and the final-form rulemaking published at 28 Pa.B. 2761 to OSM for approval as part of the Commonwealth's approved primacy program. The submission was identified as PA-122 in the Federal tracking system.

On December 27, 2001, OSM published its findings regarding the Commonwealth's July 29, 1998, program amendment in the *Federal Register* at 66 FR 67010 (OSM Rule). The OSM Rule approved the Commonwealth's program amendment with the exception of 47 items that were found to be less effective than corresponding provisions of the Federal program. Twenty-two of the items related to provisions of the BMSCLA and 25 items related to the Commonwealth's regulations. The OSM Rule also directed the Commonwealth to amend its law and regulations to resolve the issues that were the basis for its disapproval. The revisions required by OSM are set forth in 30 CFR 938.16(hhhh)—(bbbbb).

On February 25, 2002, the Department submitted an informal proposal to OSM describing the changes it was prepared to make in regard to 15 of the 47 requirements in the OSM Rule. The proposal also identified those sections of the BMSLCA which the Department thought OSM must supersede/set-aside under section 505(b) of the SMCRA to accommodate the proscribed regulatory amendments.

On February 25, 2002, the Department also filed a Federal lawsuit challenging portions of the OSM Rule. The Pennsylvania Coal Association also filed a Federal lawsuit challenging the OSM Rule. The two cases were consolidated. Petitions to intervene were submitted by the Pennsylvania Coal Association and the Tri-States Citizens Mining Network. Active litigation was delayed pending the outcome of negotiations. The Department and OSM agreed that proposed solutions would be finalized through the completion of State and Federal rulemaking processes.

Between March 2002 and January 2003, the Department and OSM met in a series of discussions to resolve differences over issues raised by the OSM Rule. The Department and OSM also sought and received input on draft solutions from the Tri-States Citizens Mining Network and from the Pennsylvania Coal Association. As a result of these discussions, the Department and OSM reached agreement on proposed resolutions of all 47 items in the OSM Rule. The draft solutions would be finalized through State and Federal rulemakings. Eight issues are to be resolved without the need for statutory or regulatory amendments. The remaining 39 issues, including the 15 the Department had previously decided to change, are to be resolved through the proposed amendments to Commonwealth regulations shown in Annex A. The final resolution also provides for an action by the Secretary of the Interior to supersede/set aside six provisions of the BMSLCA to the extent that they conflict with the SMCRA. These provisions will be superseded/set aside through Federal rulemaking. Additional information regarding the resolution of issues identified in the OSM Rule is available in the Commonwealth's *Formal Amendment in Regard to 30 CFR 938.16(hhhh)—(bbbbb)* from the contact persons identified in Section B.

After this proposal was approved as proposed rulemaking by the Board, the Department formally submitted

a program amendment titled *Formal Amendment in Regard to 30 CFR 938.16(hhhh)—(bbbbb)* to OSM. This formal program amendment addresses all 47 items in the OSM Rule, including the amendments being proposed by this proposed rulemaking. OSM will publish notice of receipt of the formal amendment in the *Federal Register* and will begin the Federal approval process. OSM will also initiate a separate Federal rulemaking to supersede the previously mentioned six provisions of the BMSLCA to the extent they are inconsistent with Federal law. Parts of this proposed rulemaking are predicated upon completion of the Federal rulemaking to supersede portions of the BMSLCA. The two Federal rulemakings and this proposed rulemaking will proceed concurrently through their respective rulemaking procedures.

The public is encouraged to review and comment on the two Federal rulemakings and this proposed rulemaking. Information concerning the publication of the two Federal rulemakings in the *Federal Register* can be obtained from the previously identified contact persons. To simplify the process and to facilitate the public comment process the Board's two public hearings will be held on the same days as the OSM public hearings. The State public hearings and the Federal public hearings will be held sequentially—with one hearing following the other—and they will be held at the same location. The Board will consider the OSM hearing transcripts, written presentations, exhibits and copies of all comments submitted to OSM to allow for the Board to consider all comments pertinent to this proposed rulemaking.

The amendments proposed in this rulemaking represent the outcome of negotiations between the Department and OSM. The proposed rulemaking will make Commonwealth requirements relating to the repair of subsidence damage and replacement of water supplies at underground mining operations as effective as and not inconsistent with those of the Federal program in all respects. This proposed rulemaking is part of the Commonwealth's continuing effort to maintain primary enforcement responsibility over coal mining activities within this Commonwealth.

The proposed rulemaking was discussed with representatives of the underground coal mining industry on February 18, 2003, and with representatives of coalfield citizens' organizations on February 19, 2003. Both groups also provided input on a preliminary resolution document dated July 2002.

The proposed amendment to § 86.152(a) (relating to bond adjustments) was discussed with the Mining and Reclamation Advisory Board (MRAB) because the proposed amendment will affect bonding requirements of all types of coal mining activities, including surface coal mining. At its January 9, 2003, meeting, the MRAB asked the Department to modify its original proposal to conform more closely to the Federal counterpart in 30 CFR 800.15. The Department subsequently revised its proposal to comply with the MRAB's request. On April 24, 2003, the MRAB approved the revised proposal with the condition that the preamble to the proposed rulemaking include an explanation of how amended § 86.152(a) will apply to mine subsidence bonds. The approved version of § 86.152(a) and requested explanation are included in this proposed rulemaking. The other provisions of this proposed rulemaking were not presented to the MRAB because the MRAB's authority does not extend to underground mining.

E. Summary of Regulatory Requirements

§ 86.151(b)(2) (period of liability)

Under the proposed amendment to § 86.151(b)(2) (relating to period of liability), the undefined term "mining and reclamation operation" is deleted and replaced with "underground mining operations," which is defined in § 89.5 (relating to definitions). This amendment clarifies that the period of liability for which a subsidence bond is held is 10 years after completion of underground construction, operation and reclamation of shafts, adits, support facilities located underground, in situ processing and underground mining, hauling, storage and blasting. The period of liability for subsidence bonds is not connected to post closure mine pool maintenance. This amendment is being made to clarify that the amendments made to the definition of "underground mining activities" do not change the period of time the subsidence bond is held. "Underground mining activities" is being modified, as described later, to clarify that stabilization of the post-closure mine pool marks the beginning of the final 3-year period in which an operator remains liable for contamination, diminution or interruption of water supplies.

§ 86.152(a) (bond adjustments)

Under the proposed amendment to § 86.152(a), the first sentence of subsection (a) is deleted and replaced with language similar to 30 CFR 800.15(a) and a clarification is added to the last sentence. The first amendment clarifies that the Department is obligated to adjust the amount of bond when it determines that the area requiring bond coverage has increased or decreased or when the cost of future reclamation changes or where the projected subsidence damage repair liability changes. It also allows the Department to specify periodic times or to set a schedule for reevaluating and adjusting the bond amounts. For details on when subsidence bond for structure damage will be adjusted see Technical Guidance Document 563-2504-101. The second amendment clarifies that § 86.152(a) does not expand the types of liabilities the subsidence bond covers. The BMSLCA specifically identifies what the subsidence bond covers. See section 6(b) of the BMSLCA (52 P.S. § 1406.6(b)). Proposed § 86.152(a) does not authorize the subsidence bond to be adjusted to cover water supply replacement liability.

The proposed amendment to § 86.152(a) is included in this rulemaking to address two Federal requirements. First, the proposed rulemaking will affect adjustment of reclamation bonds for all coal mining activities. In doing so, it will satisfy an OSM requirement raised in regard to other aspects of the Commonwealth's coal mining regulatory program. In a letter dated September 22, 1999, OSM directed the Commonwealth to revise its bonding requirements to make bond adjustments mandatory for coal mining activities that were subject to full cost bonding. Since 1999, the Department has converted all active surface mining permits from an alternative bonding system to conventional bonding also known as full cost bonding. As a result, the requirement for mandatory bond adjustment now applies to reclamation bonds for all coal mining activities. The proposed amendments to § 86.152(a) will satisfy the requirement in the September 22, 1999, letter by requiring mandatory bond adjustments for all coal mining activities that are now bonded at the full cost of reclamation.

The proposed amendment also addresses the Federal requirement in 30 CFR 938.16(ccccc) (regarding bonds posted to ensure the repair of EPACT structures and the

replacement of EPACT water supplies. OSM had found the Commonwealth's bonding requirements to be less effective than Federal counterpart requirements because there was no requirement for operators to post additional bond when individual claims of subsidence damage or water supply impact were not resolved within 90 days. During discussions with OSM on this issue, the Department apprised OSM that the Commonwealth's subsidence bonding requirements, although different in approach, were no less effective than those of the Federal regulations with respect to ensuring the repair of structure damage because what the Department was now requiring was significantly different than what OSM had found to be less effective.

During the period of time OSM was considering the program amendments, the Department, in response to court decisions, changed its subsidence bond requirements. OSM was informed that instead of a minimum \$10,000 subsidence bond, operators are now required to post a subsidence bond in an amount which is based on the extent of anticipated subsidence damage and the value of surface property within the approved subsidence control plan area. The Department reevaluates the potential liability at each permit renewal and whenever the permit is amended to modify the subsidence control plan area or mining method. The subsidence bond must be posted prior to permit issuance rather than at the time of damage. Detailed procedures are described in Technical Guidance Document 563-2504-101. OSM has tentatively agreed that the Department's approach to calculating the required amount of subsidence bonds is no less effective than the approach described in the Federal regulations. OSM has, however, found that § 86.152(a) must be amended to clarify that the Department has a mandatory obligation to adjust the amount of a subsidence bond when periodic evaluation, performed in accordance with the Department's technical guidance, indicates a change in potential repair liability. The proposed amendment to § 86.152(a) accomplishes this objective by requiring an adjustment to the bond amount when a periodic evaluation indicates a change in the subsidence control plan area or a change in the extent of subsidence damage expected within that area. The proposed rulemaking will satisfy the Federal requirement in 30 CFR 938.16(ccccc) with respect to liability for subsidence damage to EPACT structures.

The proposed amendment does not address OSM's requirement in regard to bonds for water supply replacement. Section 6(b) of the BMSLCA is limited to bonds for structure damage and does not address bonds for purposes of ensuring the replacement of water supplies affected by underground mining operations. The Department will satisfy this aspect of 30 CFR 938.16(ccccc) by requiring operators to carry appropriate insurance coverage in accordance with § 86.168 (relating to terms and conditions for liability insurance) or by accepting other financial assurance instruments which meet the requirements of the law. Consequently, this rulemaking does not propose to add additional bonding requirements for water supply restoration or replacement.

§§ 86.1 and 89.5 (definitions of "underground mining activities" and "underground mining operations")

The proposed rulemaking includes a revised definition of the term "underground mining activities" in § 86.1 (relating to definitions) and § 89.5 and a revised definition of the term "underground mining operations" in § 89.5. These amendments are proposed to clarify the conditions that trigger certain regulatory requirements under existing and proposed regulations.

One proposed amendment amends the definition of "underground mining activities" to clarify that the management of the pool that develops in underground mine workings after mine closure is an underground mining activity. These pools may cause contamination of adjacent water supplies triggering the need for restoration and replacement. The BMSLCA requires mine operators to replace all water supplies affected by their underground mining activities and extends this requirement for 3 years after all mining activity has ceased. Since management of the postclosure pool will normally be the last activity involved in the reclamation of an underground mine, it is appropriate to clarify that this activity is within the scope of the definition. The Department has historically considered the management of the postclosure mine pool to be part of an underground mining activity and has held operators liable for the effects of the pool. The proposed amendment is intended to codify the Department's interpretation and, in addition, to demonstrate that the Commonwealth's regulations are as effective as the Federal regulations in regard to the scope and duration of liability for water supply effects.

Another proposed amendment amends the definition of "underground mining operations" to clarify that the term only includes those operations that take place in the subsurface parts of an underground mine. Within the definition, the term "underground support facilities" is replaced with "support facilities located underground." The proposed amendment eliminates the possibility that the underground mining operations could be construed to include operations at a surface support facility, such as a coal storage site, bathroom or mine drainage treatment plant located at the surface. This amendment is necessary to clarify the scope of the term "underground mining operations," which is inserted in many information and performance standards under this proposed rulemaking. A parallel change is proposed in subparagraph (ii) of the definition of "underground mining activities," which repeats the definition of "underground mining operations."

§ 89.5 (definition of "EPACT structures")

The proposed rulemaking includes the addition of the term "EPACT structures" and an associated definition in § 89.5. The term is used to identify structures covered under section 720(a) of the SMCRA and corresponding Federal regulations. It is used to facilitate reference to structures that are subject to minimum information and performance standards under the Federal regulations. The use of the term also indicates the basis for special requirements or restrictions that are derived from the Federal regulations.

The proposed definition includes all structures that fall within the scope of the Federal terms "occupied residential dwellings and structures related thereto" and "non-commercial buildings." These terms are used in section 720(a) of the SMCRA to define the scope of Federal subsidence damage repair and compensation requirements. Although these terms are not defined in the SMCRA, they are defined in 30 CFR 701.5.

The definition of "EPACT structures" draws on various terms that are currently defined in § 89.5 and 30 CFR 701.5. The definition incorporates the terms "dwelling" and "noncommercial building," which are defined separately in § 89.5. These terms effectively capture all structures that fall within the scope of the Federal terms "occupied residential dwellings" and "noncommercial buildings." The definition also includes structures that are adjunct to or used in conjunction with dwellings to capture those appurtenant structures that fall within the

scope of the Federal term "occupied residential dwellings and structures related thereto."

§ 89.5 (definition of "EPACT water supplies")

The proposed rulemaking includes the addition of the term "EPACT water supplies" and an associated definition in § 89.5. The term is used to identify water supplies covered under section 720(a) of the SMCRA and corresponding Federal regulations regarding water supply replacement. It is used to facilitate reference to water supplies that are subject to minimum information and performance standards under the Federal regulatory program. The use of the term also indicates the basis for special requirements or restrictions that are derived from the Federal regulations.

The proposed definition includes all drinking, domestic and residential water supplies from a well or spring in existence prior to the application for a permit, as specified in section 720(a) of the SMCRA. It further describes "drinking, domestic and residential water supplies" as wells and springs and the appurtenant delivery systems that provide water for direct human consumption or household use, drawing from the definition in 30 CFR 701.5. The definition specifically excludes wells and springs that serve only agricultural, commercial or industrial enterprises except to the extent the water supply is for direct human consumption or human sanitation or domestic use.

§ 89.5 (definition of "permanently affixed appurtenant structures")

The proposed rulemaking include several changes affecting the scope of the term "permanently affixed appurtenant structures." These amendments are in response to 30 CFR 938.16(f) of the OSM Rule, which requires the phrase "securely attached to the land surface" to be deleted from the existing definition in § 89.5. OSM reasoned that the phrase could be interpreted to exclude structures that would fall within the scope of the Federal term "occupied residential dwellings and structures related thereto." Under the Federal regulations, all "occupied residential dwellings and structures related thereto" are covered by damage repair and compensation requirements regardless of their attachment to the land surface.

The proposed rulemaking addresses the OSM requirement by deleting the existing term and definition in § 89.5 and incorporating descriptions of permanently affixed appurtenant structures in the performance standard under § 89.142a(f) (relating to subsidence control: performance standards). This approach allows permanently affixed appurtenant structures to be divided into two groups depending on whether they fall within or outside the scope of the Federal regulations. Permanently affixed appurtenant structures that qualify as EPACT structures, based on their relationship to a dwelling, are described in amended § 89.142a(f)(1)(iii). There is no requirement for these structures to be securely attached to the land surface. The second group of permanently affixed appurtenant structures is presented under amended § 89.142a(f)(1)(i). These permanently affixed appurtenant structures are eligible for repair and compensation provisions under the BMSLCA based on their relationship to a building that is accessible to the public. The permanently affixed appurtenant structures in this group are not EPACT structures and therefore remain subject to the qualification regarding secure attachment to the land surface.

The proposed rulemaking will satisfy the requirement of the OSM Rule while preserving the provisions of the

BMSLCA to the extent possible. Permanently affixed structures that are adjunct to or used in conjunction with dwellings need not be securely attached to the land surface to qualify for damage repair and compensation. Permanently affixed appurtenant structures that are adjunct to or used in conjunction with buildings that are accessible to the public must be securely attached to the land surface to qualify for damage repair and compensation.

§ 89.141(d) (plans for mining beneath EPACT structures)

The proposed rulemaking includes several amendments to § 89.141(d) (relating to subsidence control: application requirements), which affect the contents of subsidence control plans. The amendments involve the addition of paragraphs (9) and (10), which require descriptions of the measures the operator will take to protect EPACT structures. The new requirements reflect 30 CFR 784.20(b)(5) and (7).

Proposed subsection (d)(9) requires a description of the measures an operator will take to minimize damage to EPACT structures when using a mining method that results in planned subsidence. The description must address the measures the operator will take to comply with the corresponding performance standard in § 89.142a(d)(1)(i). The addition of this paragraph is proposed in response to 30 CFR 938.16(ggggg) of the OSM Rule.

Proposed subsection (d)(10) requires a description of the measures an operator will take to prevent damage to EPACT structures when using a mining method that does not result in planned subsidence. The description must address the measures the operator will take to comply with the corresponding performance standard in § 89.142a(d)(1)(ii). The addition of this paragraph is proposed in response to 30 CFR 938.16(hhhhh) of the OSM Rule. The effect of this proposed amendment will be minimal since operators are currently required to describe measures for maximizing mine stability in areas where the mining method does not result in planned subsidence.

§ 89.142a(c) (suspension of mining)

The proposed rulemaking includes an amendment to § 89.142a(c)(3), regarding protection of public buildings and facilities, churches, schools, hospitals, impoundments with storage capacities of 20 acre-feet or more, bodies of water with volume of 20 acre-feet or more and aquifers and bodies of water that serve as significant sources to public water supply systems. The proposed rulemaking authorizes the Department to suspend mining when an operator's measures fail to adequately protect one of the designated structures or features and to require the modification of subsidence control plans to prevent further damage. The proposed language mirrors the Federal requirement in 30 CFR 817.121(e). The amendment is proposed to satisfy the requirement in 30 CFR 938.16(iiiiii) of the OSM Rule.

§ 89.142a(d) (requirements for mining beneath EPACT structures)

The proposed rulemaking includes the addition of new requirements regarding the prevention or minimization of damage to EPACT structures. The requirements have been added to § 89.142a(d). The proposed amendments are based on the Federal requirements in 30 CFR 817.121(a) and apply to mining beneath all EPACT structures except for noncommercial buildings, such as public buildings, churches, schools and hospitals, which are subject to higher levels of protection under

§ 89.142a(c). The new requirements are in § 89.142a(d)(1). Paragraph (1) is further subdivided to specify requirements for different types of mining.

Paragraph (1)(i) addresses situations where EPACT structures are undermined using a mining technology that results in planned subsidence. Under the proposed rulemaking, if mining will result in the planned subsidence of an EPACT structure, the operator must take measures that are necessary and prudent, consistent with the mining method employed and technologically and economically feasible, to minimize material damage. There are two exceptions to this general requirement. One is where the structure owner consents, in writing, to allow the damage to occur. The other exception is where the operator determines that the costs of the measures would exceed the anticipated cost of repairs and the anticipated damage will not constitute a threat to health or safety.

Paragraph (1)(ii) describes a separate set of requirements that apply in situations where EPACT structures are undermined using a mining technology that does not result in planned subsidence. In these situations, mine operators must take measures consistent with known technology to prevent subsidence and subsidence-related damage to the extent technologically and economically feasible. Subparagraph (ii) includes a list of measures that may be applied to comply with the damage prevention requirement.

The proposed amendments are included in this rulemaking to satisfy the requirement in 30 CFR 938.16(jjjjj).

§ 89.142a(f)(1) (prompt response to structure damage claims)

Proposed amendments to § 89.142a(f)(1) include the addition of a requirement for "prompt" action in regard to an operator's obligation to rehabilitate, restore, replace or compensate for material damage to designated structures. This requirement is proposed in response to 30 CFR 938.16(tttt) and (kkkkk) of the OSM Rule and is based on the specific language of section 720(a)(1) of the SMCRA. The term "prompt" is not defined in the SMCRA or the Federal regulations. Federal preamble discussions indicate that decisions regarding "promptness" should take into account site conditions, potential repair and compensation alternatives and other relevant factors (66 FR 67023). Under amended § 89.142a(f)(1), decisions regarding promptness would be based on the same considerations.

§ 89.142a(f)(1) (requirements for dwellings, permanently affixed appurtenant structures and improvements to be in place on specific dates)

The proposed rulemaking also includes an amendment to § 89.142a(f)(1)(iii) which describes a subset of the structures covered by the Commonwealth's subsidence damage repair and compensation provisions. Subparagraph (iii) includes the group "dwellings, permanently affixed appurtenant structures and improvements." Under the proposed rulemaking, the phrase "in place on August 21, 1994, or on the date of first publication of the application for a coal mining activity permit or a 5-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in the application" is deleted. This amendment is in response to 30 CFR 938.16(uuuu) and (lllll) of the OSM Rule, which require the removal of this qualification.

Subparagraph (iii) is also amended to include a description of the structures that fall within the scope of the term "permanently affixed appurtenant structures." The

reasons for this amendment are addressed in a separate part of this preamble. In combination, the proposed amendments ensure that subparagraph (iii) includes all structures that fall within the scope of the Federal term "occupied residential dwellings and structures related thereto." These amendments effectively extend the subsidence damage repair and compensation provisions of § 89.142a(f) to all dwellings, permanently affixed appurtenant structures and improvements in place at the time of mining.

The proposed rulemaking requires a Federal action to supersede/set aside the language in section 5.4(a)(3) of the BMSLCA, which constitutes the basis for the exclusionary phrase in § 89.142a(f)(1)(iii). The Federal action is required under 30 CFR 938.16(uuuu) of the OSM Rule.

§ 89.143a(c) (filing structure damage claims)

Proposed amendments to § 89.143a(c) (relating to subsidence control: procedure for resolution of subsidence damage claims) include deletion of the phrase "within 6 months of the date that the building owner sent the operator notification of subsidence damage to the structure." The deletion of this phrase clarifies that owners of damaged structures may file claims with no minimum waiting period. The amendment is proposed in response to 30 CFR 938.16(xxxx) and (nnnnn) of the OSM Rule. The existing language was disapproved because it could interfere with the provision of "prompt" repair or compensation.

§ 89.143a(c) (statute of limitations for filing structure damage claims)

The proposed rulemaking also amends § 89.143a(c) to clarify the time frames in which landowners must file claims for structure damage with the Department. The proposed amendment deletes language that requires claims for EPACT structures to be filed within 2 years of the date of damage. This amendment clarifies that the 2-year deadline cannot serve as a statute of limitations for filing claims for damage to EPACT structures. This amendment is proposed to satisfy the requirements of 30 CFR 938.16(xxxx) and (nnnnn) of the OSM Rule. The deletion of this provision requires a Federal action to supercede/set aside section 5.5(b) of the BMSLCA to the extent it establishes a 2-year statute of limitations on filing subsidence damage claims for EPACT structures.

The proposed rulemaking also clarifies that a 2-year filing deadline still exists in regard to claims involving damage to non-EPACT structures. This reflects the provisions of section 5.5(b) of the BMSLCA which are beyond the scope of the Federal set aside action. Under this proposed rulemaking, the owner of a non-EPACT structure remains obligated to file a claim within 2 years of the date of damage.

§ 89.143a(d) (investigations and orders relating to the repair of structure damage)

Proposed amendments to § 89.143a also include an amendment to subsection (d). Subsection (d)(1), as amended, requires the Department to provide the results of its investigation to the property owner and mine operator within 10 days of completing the investigation. With this amendment, Commonwealth procedures for responding to citizen complaints will conform to Federal standards for timeliness. This amendment is proposed in response to 30 CFR 938.16(yyyy) of the OSM Rule.

Subsection (d)(3) also includes several proposed amendments that are intended to ensure prompt repair or the prompt provision of compensation for structure damage.

Subsection (d)(3) describes the actions the Department will take upon finding that an operator's underground mining operations caused damage to a structure. Proposed amendments include the addition of language expressly requiring prompt repair or compensation and the elimination of references to specific time periods. These amendments are proposed in response to 30 CFR 938.16(zzzz) and (ooooo), which prohibit the use of fixed periods as standards for prompt action.

§ 89.144a (denial of access for premining or postmining structure surveys)

The proposed amendments to § 89.144a (relating to subsidence control: relief from responsibility) limit the circumstances under which an operator may be relieved of liability for damage to an EPACT structure. Existing § 89.144a(1) provides relief of liability in cases where an operator is denied access to perform a premining or postmining survey of a structure after fulfilling all prescribed notification requirements. OSM found this provision to be inconsistent with the Federal regulations, which provide no similar release of liability. OSM directed the Commonwealth to remove this provision from its law and regulations to the extent the release would affect liability for damage to EPACT structures.

Proposed § 89.144a addresses the Federal requirement by creating an exception to the relief of liability that is created when a landowner denies an operator access to perform a premining or postmining survey of a structure. The exception, which is explained in proposed subsection (b), applies only to EPACT structures. Under the exception, the release of liability does not apply to damage that can be shown to be the result of an operator's underground mining operations. The liability established through this proof of causation cannot be overturned on the basis that access was denied to perform a premining or postmining survey.

The exception in proposed subsection (b) is only applicable to damages that can be shown to be the result of an operator's underground mining operations by a preponderance of evidence. The term "preponderance of evidence" is used to describe the level of proof needed to substantiate a finding of liability against the operator. It is the standard the Environmental Hearing Board would normally require in upholding a Department order to repair or compensate for subsidence damage. The term is specifically mentioned in the proposed rulemaking to clarify that the Department and the landowner incur additional obligations in cases where an operator is denied access to perform a premining or postmining survey. It also denotes the possibility that damage may go unrepaired or uncompensated if there is insufficient evidence to link the damage to a suspect underground mining operation. Although proposed subsection (b) provides relief to landowners who deny access for premining or postmining surveys, it is not intended to encourage denial of access. Premining and postmining surveys are the most reliable means of identifying damage caused by underground mining operations and ensuring that all mining-related damage is repaired or compensated.

The proposed amendments require a corresponding Federal action to supersede section 5.4(c) of the BMSLCA, which is the statutory basis for the relief of liability in § 89.144a(1). The Federal action will supersede section 5.4(c) of the BMSLCA to the extent it applies to EPACT structures. The relief of liability will still apply in situations where mine operators are denied access to perform premining or postmining surveys of non-EPACT structures.

The proposed amendments to § 89.144a will satisfy the Federal requirement in 30 CFR 938.16(ppppp) by removing the absolute relief of liability as it pertains to structures covered by Federal damage repair and compensation provisions.

§ 89.145a(a) (water supply survey requirements)

The proposal involves several changes to § 89.145a(a)(1) (relating to water supply replacement: performance standards) regarding the performance of premining water supply surveys. The requirement to conduct a premining survey prior to mining within 1,000 feet of a water supply is deleted and replaced with a requirement to conduct a survey prior to the time a water supply is susceptible to mining-related effects. This amendment ensures that premining information will be available for all water supplies prior to the time of impact and that the collection of survey information is not hampered by a fixed distance criterion. Under the amended requirement, the Department will determine an appropriate distance for individual mining operations based on local geologic and hydrologic conditions and the observed effects of previous mining. The requirement in subsection (a) represents the deadline by which operators must obtain premining survey information; however, as a general practice, the Department will require operators to provide water quality and quantity information at the time of permit application or permit renewal for all water supplies that are likely to suffer impacts during the succeeding permit term.

Another proposed amendment to subsection (a) amends the conditions under which the collection of some or all survey information may be waived. The existing regulation limits survey requirements to information that can be collected without extraordinary efforts or the expenditure of excessive sums of money. Under the amended language, an operator is only excused from collecting information if required collection measures pose an inconvenience to the landowner. This exception is intended to address situations where an operator would have to damage a building to gain access to a well or spring.

The proposed amendments in water supply survey requirements are in response to 30 CFR 938.16(qqqqq) of the OSM Rule.

§ 89.145a(b) (prompt replacement of water supplies)

The proposed rulemaking includes two amendments to § 89.145a(b) regarding an operator's obligation to replace water supplies that are affected by its underground mining operations. One amendment adds the requirement that replacement or restoration be done "promptly." This requirement is proposed to make the Commonwealth's standard for timeliness of action as effective as the Federal standard in section 720(a)(2) of the SMCRA and 30 CFR 817.41(j). The term "promptly" is not defined in the SMCRA or Federal regulations. Under the Federal program, promptness is evaluated on the basis of site-specific considerations. Under the amendment provision, the Department will also assess promptness of an operator's actions based on site-specific considerations. This amendment is proposed in response to 30 CFR 938.16(iiii) and (rrrrr) of the OSM Rule.

The second proposed amendment to § 89.145a(b) is in regard to the general standards for adequacy of replacement water supplies. The existing language suggests that an operator has an option to provide a replacement water supply that meets the premining uses of the original water supply or a replacement water supply that meets the reasonably foreseeable uses of the original water

supply. The revised language clarifies that an operator must consider both the premining uses and the reasonably foreseeable uses of the original water supply. This amendment is necessary to ensure that the Commonwealth's standards for replacement water supplies are no less effective than those of Federal regulations and is required by 30 CFR 938.16(rrrrr) of the OSM Rule.

§ 89.145a(e) (provision of temporary water)

The proposed rulemaking includes an amendment to § 89.145a(e) to address the provision of temporary water in cases where the rebuttable presumption is not applicable. The new provision, which is added as paragraph (2), requires the operator to promptly provide temporary water when either the operator or the Department finds that the operator's underground mining operations have caused contamination, diminution or interruption of a water supply. The existing regulation is silent in regard to the operator's obligations when effects occur outside the rebuttable presumption area or when the rebuttable presumption does not apply for other reasons. This amendment is required under 30 CFR 938.16(sssss) of the OSM Rule.

The proposed rulemaking also amends existing paragraph (2), which has been renumbered as paragraph (3), regarding the quantity of temporary water supplies. This amendment deletes the term "premining" in describing the needs that must be satisfied by a temporary water supply. Under the amended language, an operator is required to provide a temporary water supply that meets all needs that existed prior to impact and additional needs that arise between the time of impact and the time a permanent replacement water supply is established. In fulfilling this requirement, an operator is not expected to satisfy needs that exceed the capacity of the original water supply. This amendment is required under 30 CFR 938.16(ttttt) of the OSM Rule.

§ 89.145a(f) (compensation for increased cost of restored or replacement water supply)

This proposed rulemaking includes several amendments to § 89.145a(f), which establishes criteria for determining the adequacy of replacement water supplies. These amendments pertain to the operation and maintenance costs of replacement water supplies. Existing § 89.145a(f)(1)(v) requires that operation and maintenance costs for replacement water supplies may not exceed those of the previous water supply by more than a de minimis amount. It further provides that an operator must provide for the permanent payment of the increased costs if the amount of increase is more than de minimis. Under this proposed rulemaking, separate criteria are established for EPACT water supplies and other water supplies. Due to the complexity of this amendment, cost criteria are moved to new paragraph (5).

Proposed paragraph (5) requires that, in the case of an EPACT water supply, a restored or replacement water supply may cost no more to operate and maintain than the previous water supply. If the restored or replacement water supply costs more to operate than the previous water supply, the operator must make permanent arrangements to prevent the additional costs from being passed on to the landowner or water user. The revised provision uses the term "arrangements" to allow for various types of settlements, such as direct compensation to the landowner, a trust fund or an agreement with a public water supplier. This amendment is in response to the 30 CFR 938.16(ddddd) and (uuuuu) of the Federal Rule.

Proposed paragraph (5) retains the de minimis cost criterion for non-EPACT water supplies, since these water supplies are outside the scope of 30 CFR 938.16(ddddd) and (uuuuu). For non-EPACT water supplies, determinations of adequacy will continue to be based on the criteria specified in the definition of the term de minimis cost increase in § 89.5. In situations where cost increases are more than de minimis, the operator shall provide for the permanent payment of the increased costs to prevent the additional costs from being passed on to the landowner or water user.

§ 89.146a(c) (Department investigation of water supply claims)

The proposed rulemaking includes an amendment to § 89.146a(c)(2) (relating to water supply replacement: procedure for resolution of water supply damage claims) regarding Department investigations of water supply claims. A new provision is added which requires the Department to report its findings to the landowner and mine operator within 10 days of completing its investigation and reaching a determination regarding the cause of effects. This amendment is proposed to conform to Federal time frames for responding to citizen complaints and will satisfy the requirement in 30 CFR 938.16(wwwww).

§ 89.152 (special conditions relating to water supply replacement)

The proposed rulemaking includes an amendment to § 89.152 (relating to water supply replacement: special provisions) which establishes conditions under which a claim of water supply contamination, diminution or interruption may be addressed without the provision of a restored or replacement water supply. Subsection (a) is added to address special conditions that relate to EPACT water supplies. The provisions of existing subsection (a), which now apply to water supplies that do not qualify as EPACT water supplies, are moved to new subsection (b).

The proposal to amend subsection (a) also includes the addition of specific conditions that are applicable in cases involving EPACT water supplies. Two of these conditions narrow the range of circumstances under which a mine operator may satisfy its water supply replacement obligations for an affected EPACT water supply without providing an adequate replacement water supply. The first condition requires a Department determination that a replacement water supply meeting the criteria of § 89.145a(f) cannot be developed and requires compensation that is at least equal to the reduction in the fair market value of the affected property. The second condition requires an agreement between the mine operator and landowner waiving the development of a replacement water supply and a Department determination that an adequate replacement water supply could feasibly be developed.

New subsection (a) also contains a provision, drawn from existing subsection (a), which provides that an operator may not be required to restore or replace a water supply if it can demonstrate any one of three situations. One is that the contamination, diminution or interruption existed prior to the underground mining activities. Another is that the water supply was affected by underground mining activities that occurred 3 years prior to the impact. The third is that the water supply was affected by some cause other than the operator's underground mining activities. Unlike the existing regulation, new subsection (a) does not provide a 2-year statute of limitations on filing claims for EPACT water supplies.

Department determinations regarding the possibility of developing an adequate replacement water supply would be based on factors such as the replacement methods described in the permit application, the operator's efforts in attempting to replace the water supply, the means of replacing nearby water supplies, the hydrologic resources of the property, the availability of public water and the potential for extending public water service to the property. The Department would only consider replacement to be unachievable if the affected property could not be provided with a well or spring meeting the criteria in § 89.145a(f) or connected to a public water line for reasons of system limitations.

These amendments are proposed in response to 30 CFR 938.16(nnnn), (oooo), (qqqq) and (rrrr) of the OSM Rule.

Federal regulations require the replacement of all EPACT water supplies affected by underground mining.

An exception is allowed if the landowner expressly waives the development of replacement water supply and the operator demonstrates that a suitable alternative water source could feasibly be developed. The Federal regulations do not specifically identify the requirements that come into play when replacement cannot be achieved, but can be interpreted to require compensation equal to the reduction in fair market value of the property. The provisions of new subsection (a) are necessary to ensure that the Commonwealth's conditions for nonreplacement of EPACT water supplies are no broader than those of the Federal program.

Existing § 89.152 comes directly from the BMSLCA. There is a corresponding Federal action to supersede/set aside the conflicting provisions of the BMSLCA to the extent they are inconsistent with the Federal SMCRA. Sections 5.1(b) and 5.2(g) of the BMSLCA must be set aside to the extent that they would relieve an operator of liability to restore or replace an EPACT water supply. Section 5.2(h) of the BMSLCA must also be set aside to the extent that it would bar the Department from requiring the restoration or replacement of an EPACT water supply if the Department determined that an adequate water supply could be developed.

Other amendments to § 89.152 are proposed to accommodate new subsection (a). Additionally, the introductory statement to new subsection (b) is modified to clarify that the provisions of this subsection only apply to water supplies that do not qualify as EPACT water supplies.

Global changes relating to "underground mining operations"

The proposed rulemaking includes replacing the term "underground mining" with the term "underground mining operations" in various sections of the regulations governing information requirements and performance standards relating to the repair of subsidence damage. The term "underground mining operations" is defined in § 89.5 to include underground construction, operation and reclamation of shafts, adits, support facilities located underground, in situ processing and underground mining. In comparison, the term "underground mining" only includes the extraction of the coal. This amendment is proposed in response to 30 CFR 938.16(mmmmm) and (bbbbbb). Federal requirements regarding the repair of subsidence damage and replacement of water supplies apply to all effects arising from "underground mining operations" and not just effects arising from coal extraction. The proposed amendments affect §§ 89.141(d), (d)(9)—(11), 89.142a(a), (f)(1)—(2), (g)(1), (h)(1)—(2) and (i)(1) and 89.143a(a) and (d)(1)—(3).

Editorial changes

The proposed rulemaking includes several changes that are intended to support or clarify regulations amended by this rulemaking.

Section 89.141(d)(3) is amended to delete the list of measures that can be used to protect public buildings and facilities, churches, schools, hospitals, impoundments with storage capacities of 20 acre-feet or more, bodies of water with volume of 20 acre-ft or more and aquifers and bodies of water that serve as significant sources to public water supply systems. The measures in existing paragraph (3) are only a subset of a larger list of measures that may be used for protecting this group of structures and features. The complete list of measures appears in the performance standard, § 89.142a(c). To avoid confusion, the incomplete list of measures is deleted from § 89.141(d)(3), which is simply an information requirement.

In § 89.142a(c)(1), the term "surface features" is replaced with the term "features" to more accurately describe the types of features within the referenced group. The features described in paragraph (1) include aquifers, which are usually not regarded as "surface features."

New paragraph (3) is proposed under § 89.142a(d). The new paragraph reflects the provision in section 5(e) of the BMSLCA that "nothing in this subsection shall be construed to prohibit planned subsidence in a predictable and controlled manner or the standard method of room and pillar mining." The provision is included to more fully reflect the intent of paragraph 5(e), which serves as the statutory basis for the new damage prevention and minimization requirements in § 89.142a(d).

The titles of one section and one subsection are amended to more accurately reflect their revised content. The title of § 89.142a(d) is changed from "general measures to prevent or minimize subsidence" to "protection of EPACT structures and certain agricultural structures." The title of § 89.152 is changed from "water supply replacement: relief from responsibility" to "water supply replacement: special provisions."

In § 89.143a, the requirement for the Department to notify a mine operator of the receipt of a structure damage claim is moved from subsection (c) to subsection (d). The purpose of this amendment is to clarify and separate Department responsibilities from the responsibilities of landowners.

The proposed rulemaking also includes various stylistic changes that were made to conform to standards for drafting regulations.

*F. Benefits, Costs and Compliance**Benefits*

The proposed rulemaking will benefit the Commonwealth, the underground coal mining industry and coalfield residents by simplifying program requirements. Currently a dual enforcement program exists in this Commonwealth under which the Department enforces the BMSLCA and Chapter 89 and OSM enforces the Federal regulations when the Federal regulations provide more effective remedies than the BMSLCA and Chapter 89. The dual enforcement arrangement has, at times, created confusion regarding the obligations of mine operators, the remedies available to affected landowners and agency jurisdiction. The proposed rulemaking will eliminate the need for dual enforcement and consolidate all requirements relating to subsidence damage repair and compen-

sation and the replacement of water supplies affected by underground coal mining operations in Chapter 89.

The proposed rulemaking will also enable the Commonwealth to fulfill its primacy obligations and retain primary enforcement responsibility over underground coal mining operations.

Compliance Costs

The proposed rulemaking will slightly increase the costs of preparing permit applications and subsidence control plans. These additional costs will affect 28 companies that operate underground bituminous coal mines in this Commonwealth. No additional cost will be imposed on government entities or the public. The proposed rulemaking will simplify mine operators' obligations in regard to the repair of subsidence damage and replacement of affected water supplies.

Compliance Assistance Plan

The Department will provide written notification to all underground coal mine operators to inform them of the final promulgation of these regulatory changes. The Department will also hold roundtable meetings with mine operators and consultants to explain program changes and answer questions.

The Department will also conduct outreach to landowners in active mining areas to assist them in understanding their rights and obligations under the amended law and regulations. The Department will update its fact sheets explaining the remedies provided by the amended law and regulations and the procedures for obtaining those remedies and will distribute the revised fact sheets to landowners in active mining areas. The Department will continue to deploy surface subsidence agents to meet with affected landowners and assist them in obtaining the remedies provided by the amended law and regulations.

Paperwork Requirements

The proposed rulemaking will require the Department to update its fact sheets explaining the remedies provided by the amended law and regulations and the procedures for obtaining those remedies.

G. Sunset Review

The proposed rulemaking will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

H. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 2, 2003, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor of comments, recommendations or objections raised.

I. Public Comments

Written Comments—Interested persons are invited to submit comments, suggestions or objections regarding the proposed rulemaking to the Environmental Quality Board, P. O. Box 8477, Harrisburg, PA 17105-8477 (express mail: Rachel Carson State Office Building, 15th Floor, 400 Market Street, Harrisburg, PA 17101-2301). Comments submitted by facsimile will not be accepted. The Board must receive comments, suggestions or objections by November 12, 2003. Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by November 12, 2003. The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final regulation will be considered.

Electronic Comments—Comments may be submitted electronically to the Board at RegComments@state.pa.us and must also be received by November 12, 2003. A subject heading of the proposal and a return name and address must be included in each transmission.

The public is encouraged to review and comment on the two Federal rulemakings as well as this proposed rulemaking. Information concerning the publication of the two Federal rulemakings in the Federal Register can be obtained from the contact persons previously identified.

J. Public Hearings

The Board will hold two public hearings for the purpose of accepting comments on this proposal. Two sessions—one in the afternoon and one in the evening—will be provided for each hearing to accommodate the public. The public hearings will be held from 1 p.m. to 2:30 p.m. and 5 p.m. to 6:30 p.m. as follows:

October 15, 2003 Best Western University Inn
1545 Wayne Avenue
Indiana, PA 15701

October 16, 2003 Holiday Inn
Washington—Meadowlands
340 Racetrack Road
Washington, PA 15301

Persons wishing to present testimony at a Board hearing are requested to contact the Environmental Quality Board, P. O. Box 8477, Harrisburg, PA 17105-8477, (717) 787-4526 at least 1 week in advance of the hearing to reserve a time to present testimony. Oral testimony is limited to 10 minutes for each witness. Witnesses are requested to submit three written copies of their oral testimony to the hearing chairperson at the hearing. Organizations are limited to designating one witness to present testimony on their behalf at each hearing.

To facilitate the public comment process, the OSM public hearings will be held at the same locations and will immediately follow each of the Board's hearings.

Persons in need of accommodations as provided for in the Americans With Disabilities Act of 1990 should contact the Board at (717) 787-4526 or through the Pennsylvania AT&T Relay Service at (800) 654-5984 (TDD) to discuss how the Department may accommodate their needs.

KATHLEEN A. MCGINTY
Chairperson

Fiscal Note: 7-385. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION
PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE I. LAND RESOURCES

CHAPTER 86. SURFACE AND UNDERGROUND COAL MINING: GENERAL

Subchapter A. GENERAL PROVISIONS

§ 86.1. Definitions.

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

* * * * *

Underground mining activities—Includes the following:

* * * * *

(ii) Underground operations such as underground construction, operation and reclamation of shafts, adits, [underground] support facilities located underground, in situ processing and underground mining, hauling, storage and blasting.

(iii) Operation of a mine, including preparatory work in connection with the opening and reopening of a mine, backfilling, sealing and other closing procedures, postclosure mine pool maintenance and any other work done on land or water in connection with a mine.

* * * * *

Subchapter F. BONDING AND INSURANCE REQUIREMENTS
AMOUNT AND DURATION OF LIABILITY

§ 86.151. Period of liability.

* * * * *

(b) Liability under bonds posted for the surface effects of an underground mine, coal preparation activity or other long-term facility shall continue for the duration of the mining operation or use of the facility, its reclamation as provided in the acts, regulations adopted thereunder and the conditions of the permit, and for 5 years thereafter, except for:

* * * * *

(2) The risk of subsidence from bituminous underground mines for which liability under the bond shall continue for 10 years after completion of [the mining and reclamation operation] underground mining operations.

* * * * *

§ 86.152. Bond adjustments.

(a) [The Department may require a permittee to deposit additional bonding if the methods of mining or operation change, standards of reclamation change or the cost of reclamation, restoration or abatement work increases so that an additional amount of bond is necessary.] The amount of bond required and the terms of the acceptance of the applicant's bond will be adjusted by the Department from time to time as the area requiring bond coverage is increased or decreased, or when the cost of future reclamation changes, or when the

projected subsidence damage repair liability changes. The Department may specify periodic times or set a schedule for reevaluating and adjusting the bond amount to fulfill this requirement. This requirement shall only be binding upon the permittee and does not compel a third party, including surety companies, to provide additional bond coverage and does not extend the coverage of a subsidence bond beyond the requirements imposed by sections 5, 5.4, 5.5 and 5.6 of The Bituminous Mine Subsidence and Land Conservation Act.

* * * * *

CHAPTER 89. UNDERGROUND MINING OF COAL AND COAL PREPARATION FACILITIES

Subchapter A. EROSION AND SEDIMENTATION CONTROL GENERAL PROVISIONS

§ 89.5. Definitions.

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

* * * * *

EPACT structures—Structures that are subject to repair and compensation requirements under section 720(a) of the Surface Mining Control and Reclamation Act (30 U.S.C.A. § 1309a). The term includes:

- (i) Noncommercial buildings.
- (ii) Dwellings.
- (iii) Structures adjunct to or used in conjunction with dwellings, including, but not limited to:
 - (A) Garages.
 - (B) Storage sheds and barns.
 - (C) Greenhouses and related buildings.
 - (D) Customer-owned utilities and cables.
 - (E) Fences and other enclosures.
 - (F) Retaining walls.
 - (G) Paved or improved patios.
 - (H) Walks and driveways.
 - (I) Septic sewage treatment facilities.
 - (J) Inground swimming pools.
 - (K) Lot drainage and lawn and garden irrigation systems.

EPACT water supplies—

- (i) Water supplies that are subject to replacement under section 720(a) of the Surface Mining Control and Reclamation Act, including drinking, domestic or residential water supplies in existence prior to the date of permit application.
- (ii) The term includes water received from a well or spring and any appurtenant delivery system that provides water for direct human consumption or household use.
- (iii) The term does not include wells and springs that serve only agricultural, commercial or industrial enterprises except to the extent the water supply is for direct human consumption or human sanitation, or domestic use.

* * * * *

[**Permanently affixed appurtenant structures**—A structure or facility securely attached to the land surface if that structure or facility is adjunct to and used in connection with structures listed in § 89.142a(f)(1)(i) and (iii) (relating to subsidence control: performance standards). Examples of these structures include:

- (i) Garages.
- (ii) Storage sheds and barns.
- (iii) Greenhouses and related structures.
- (iv) Customer-owned utilities and cables.
- (v) Fences and other enclosures.
- (vi) Retaining walls.
- (vii) Paved or improved patios, walks and driveways.
- (viii) Septic treatment facilities.
- (ix) Inground swimming pools.
- (x) Lot drainage and lawn and garden irrigation systems.]

* * * * *

Underground mining activities—[**The term includes**] Includes the following:

- (i) Surface operations incident to underground extraction of coal or in situ processing, such as construction, use, maintenance and reclamation of roads, aboveground repair areas, storage areas, processing areas, shipping areas, areas upon which are sited support facilities, including hoist and ventilating ducts, areas used for the disposal and storage of waste[,] and areas on which materials incident to underground mining operations are placed.
- (ii) Underground operations such as underground construction, operation[,] and reclamation of shafts, adits, [**underground**] support facilities **located underground**, in situ processing[,] and underground mining, hauling, storage and blasting.
- (iii) Operation of [**the**] a mine including preparatory work in connection with the opening [**or**] and reopening of a mine, backfilling, sealing, and other closing procedures, **postclosure mine pool maintenance** and any other work done on land or water in connection with [**the**] a mine.

Underground mining operations—Underground construction, operation and reclamation of shafts, adits, [**underground**] support facilities **located underground**, in situ processing and underground mining, hauling, storage and blasting.

* * * * *

Subchapter F. SUBSIDENCE CONTROL AND WATER SUPPLY REPLACEMENT

§ 89.141. Subsidence control: application requirements.

* * * * *

(d) **Subsidence control plan.** The permit application shall include a subsidence control plan which describes the measures to be taken to control subsidence effects from the proposed underground mining **operations**. The plan shall address the area in which structures, facilities or features may be materially damaged by mine subsid-

ence. At a minimum, the plan shall address all areas within a 30° angle of draw of underground mining **operations** which will occur during the 5-year term of the permit. The subsidence control plan shall include the following information:

(1) A description of the method of coal removal, such as longwall mining, room and pillar mining, hydraulic mining or other extraction methods, including the size, sequence[,] and timing for the development of underground workings.

* * * * *

(3) For each structure and feature, or class of structures and features, described in § 89.142a(c) (relating to subsidence control: performance standards), a detailed description of the measures to be taken to ensure that subsidence will not cause material damage to, or reduce the reasonably foreseeable uses of the structures or features. **[The measures shall include one or more of the following:**

- (i) **Backfilling or backstowing of voids.**
- (ii) **Leaving support pillars of coal.**
- (iii) **Leaving areas in which no coal extraction will occur.**
- (iv) **Taking measures on the surface to prevent material damage or reduction of the reasonably foreseeable use of the structure or feature.**
- (v) **Other measures approved by the Department.]**

* * * * *

(9) For EPACT structures other than noncommercial buildings protected under § 89.142a(c), a description of the methods to be employed in areas of planned subsidence to minimize damage or otherwise comply with § 89.142a(d)(1)(i).

(10) For EPACT structures other than noncommercial buildings protected under § 89.142a(c), a description of the subsidence control measures to be taken under § 89.142a(d)(1)(ii) to prevent subsidence and subsidence-related damage in areas where underground mining operations are not projected to result in planned subsidence.

(11) A description of the measures which will be taken to maintain the value and foreseeable uses of perennial streams which may be impacted by underground mining **operations**. The description shall include a discussion of the effectiveness of the proposed measures as related to prior underground mining **operations** under similar conditions.

[(10)] (12) * * *

[(11)] (13) * * *

[(12)] (14) * * *

* * * * *

[(13)] (15) * * *

§ 89.142a. Subsidence control: performance standards.

(a) *General requirements.* Underground mining **operations** shall be planned and conducted in accordance with the following:

* * * * *

(c) *Restrictions on underground mining.*

(1) Unless the subsidence control plan demonstrates that subsidence will not cause material damage to, or reduce the reasonably foreseeable use of the structures and **[surface]** features listed in **[subparagraph] subparagraphs** (i)—(v), no underground mining **[shall]** may be conducted beneath or adjacent to:

* * * * *

(3) If the measures implemented by the operator cause material damage or reduce the reasonably foreseeable use of the structures or features listed in paragraph (1), the Department **[will impose additional measures to further minimize the potential for these effects]** may suspend mining under or adjacent to these structures or features until the subsidence control plan is modified to ensure prevention of further material damage to these facilities or features.

(d) **[General measures to prevent or minimize irreparable damage]** *Protection of certain EPACT structures and agricultural structures.*

(1) For EPACT structures other than noncommercial buildings protected under subsection (c):

(i) If an operator employs mining technology that provides for planned subsidence in a predictable and controlled manner, the operator shall take necessary and prudent measures, consistent with the mining method employed, to minimize material damage to the extent technologically and economically feasible to the structure, except where one of the following applies:

(A) The structure owner has consented, in writing, to allow material damage.

(B) The costs of these measures would exceed the anticipated cost of repairs and the anticipated damage will not constitute a threat to health or safety.

(ii) If an operator employs mining technology that does not result in planned subsidence in a predictable and controlled manner, the operator shall adopt measures consistent with known technology to prevent subsidence and subsidence-related damage to the extent technologically and economically feasible to the structure. Measures may include, but are not limited to:

(A) **Backstowing or backfilling of voids.**

(B) **Leaving support pillars of coal.**

(C) **Leaving areas in which no coal is removed, including a description of the overlying area to be protected by leaving coal in place.**

(D) **Taking measures on the surface to prevent or minimize material damage or diminution in value of the surface.**

(E) **Other measures approved by the Department.**

(2) If the Department determines and so notifies a mine operator that a proposed mining technique or extraction ratio will result in irreparable damage to a structure enumerated in subsection (f)(1)(iii)—(v), the operator may not use the technique or extraction ratio unless the building owner, prior to mining, consents to the mining or the operator, prior to mining, takes measures approved by the Department to minimize or reduce impacts resulting from subsidence to these structures.

(3) Nothing in paragraph (1) or (2) prohibits planned subsidence in a predictable and controlled manner or the standard method of room and pillar mining.

* * * * *

(f) *Repair of damage to structures.*

(1) *Repair or compensation for damage to certain structures.* Whenever underground mining **operations** conducted on or after August 21, 1994, [**causes**] **cause** damage to any of the structures listed in subparagraphs (i)–(v), the operator responsible for extracting the coal shall **promptly and** fully rehabilitate, restore, replace or compensate the owner for material damage to the structures resulting from the subsidence unless the operator demonstrates to the Department's satisfaction that one of the provisions of § 89.144a (relating to subsidence control: relief from responsibility) relieves the operator of responsibility.

(i) Buildings that are accessible to the public including, but not limited to, commercial, industrial and recreational buildings and all [**permanently affixed appurtenant**] structures [.] **that are securely attached to the land surface and adjunct to or used in conjunction with these buildings, including:**

- (A) **Garages.**
- (B) **Storage sheds and barns.**
- (C) **Greenhouses and related buildings.**
- (D) **Customer-owned utilities and cables.**
- (E) **Fences and other enclosures.**
- (F) **Retaining walls.**
- (G) **Paved or improved patios.**
- (H) **Walks and driveways.**
- (I) **Septic sewage treatment facilities.**
- (J) **Inground swimming pools.**
- (K) **Lot drainage and lawn and garden irrigation systems.**

* * * * *

(iii) Dwellings which are used for human habitation and permanently affixed appurtenant structures or improvements [**in place on August 21, 1994, or on the date of first publication of the application for a coal mining activity permit or a 5-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in the application**]. In the context of this paragraph, the phrase “**permanently affixed appurtenant structures and improvements**” includes, but is not limited to, structures adjunct to or used in conjunction with dwellings, such as:

- (A) **Garages.**
- (B) **Storage sheds and barns.**
- (C) **Greenhouses and related buildings.**
- (D) **Customer-owned utilities and cables.**
- (E) **Fences and other enclosures.**
- (F) **Retaining walls.**
- (G) **Paved or improved patios.**
- (H) **Walks and driveways.**
- (I) **Septic sewage treatment facilities.**

(J) **Inground swimming pools.**

(K) **Lot drainage and lawn and garden irrigation systems.**

* * * * *

(2) *Amount of compensation.*

(i) If, rather than repair the damage, the operator compensates the structure owner for damage caused by the operator's underground mining **operations**, the operator shall provide compensation equal to the reasonable cost of repairing the structure or, if the structure is determined to be irreparably damaged, the compensation shall be equal to the reasonable cost of its replacement except for an irreparably damaged agricultural structure identified in paragraph (1)(iv) or (v) which at the time of damage was being used for a different purpose than the purpose for which the structure was originally constructed. For such an irreparably damaged agricultural structure, the operator may provide for the reasonable cost to replace the damaged structure with a structure satisfying the functions and purposes served by the damaged structure before the damage occurred if the operator can affirmatively prove that the structure was being used for a different purpose than the purpose for which the structure was originally constructed.

* * * * *

(g) *Protection of utilities.*

(1) Underground mining **operations** shall be planned and conducted in a manner which minimizes damage, destruction or disruption in services provided by oil, gas and water wells; oil, gas and coal slurry pipelines; rail lines; electric and telephone lines; and water and sewerage lines which pass under, over, or through the permit area, unless otherwise approved by the owner of the facilities and the Department.

* * * * *

(h) *Perennial streams.*

(1) Underground mining **operations** shall be planned and conducted in a manner which maintains the value and reasonably foreseeable uses of perennial streams, such as aquatic life; water supply; and recreation, as they existed prior to coal extraction beneath streams.

(2) If the Department finds that the underground mining [**has**] **operations have** adversely affected a perennial stream, the operator shall mitigate the adverse effects to the extent technologically and economically feasible, and, if necessary, file revised plans or other data to demonstrate that future underground mining **operations** will meet the requirements of paragraph (1).

(i) *Prevention of hazards to human safety.*

(1) The Department will suspend underground mining **operations** beneath urbanized areas; cities; towns; and communities and adjacent to or beneath industrial or commercial buildings; lined solid and hazardous waste disposal areas; major impoundments of 20 acre-feet (2.47 hectare-meters) or more; or perennial streams, if the operations present an imminent danger to the public.

* * * * *

§ 89.143a. Subsidence control: procedure for resolution of subsidence damage claims.

(a) The owner of a structure enumerated in § 89.142a(f)(1) (relating to subsidence control: performance standards) who believes that underground mining **operations** caused mine subsidence resulting in damage

to the structure and who wishes to secure repair of the structure or compensation for the damage shall provide the operator responsible for the underground mining with notification of the damage to the structure.

* * * * *

(c) If [, within 6 months of the date that the building owner sent the operator notification of subsidence damage to the structure,] the parties are unable to agree as to the cause of the damage or the reasonable cost of repair or compensation for the structure, the owner of the structure may [within 2 years of the date damage to the structure occurred,] file a claim in writing with the Department. [The Department will send a copy of the claim to the operator.] The owner of a structure that is not an EPACT structure shall file the claim within 2 years of the date the structure was damaged.

(d) Upon receipt of the claim, the Department will send a copy of the claim to the operator and conduct an investigation in accordance with the following procedure:

(1) Within 30 days of receipt of the claim, the Department will conduct an investigation to determine whether underground mining operations caused the subsidence damage to the structure and provide the results of its investigation to the property owner and mine operator within 10 days of completing the investigation.

(2) Within 60 days of completion of the investigation, the Department will determine, and set forth in writing, whether the damage is attributable to subsidence caused by the operator's underground mining operations and, if so, the reasonable cost of repairing or replacing the damaged structure.

(3) If the Department finds that the operator's underground mining operations caused the damage to the structure, the Department will either issue a written order directing the operator to promptly compensate the structure owner or issue an order directing the operator to promptly repair the damaged structure [within 6 months of the date of issuance of the order]. The Department may [allow more than 6 months] extend the time for compliance with the order if the Department finds that further damage may occur to the same structure as a result of additional subsidence.

§ 89.144a. Subsidence control: relief from responsibility.

(a) [The] Except as provided in subsection (b), the operator will not be required to repair a structure or compensate a structure owner for damage to structures identified in § 89.142a(f)(1) (relating to subsidence control: performance standards) if the operator demonstrates to the Department's satisfaction that one or more of the following apply:

* * * * *

(b) The relief in subsection (a)(1) will not apply in the case of an EPACT structure if the landowner or the Department can show, by a preponderance of evidence, that the damage resulted from the operator's underground mining operations.

§ 89.145a. Water supply replacement: performance standards.

(a) Water supply surveys.

(1) The operator shall conduct a premining survey and may conduct a postmining survey of the quantity and quality of all water supplies within the permit and adjacent areas, except when the landowner denies the operator access to the site to conduct a survey and the operator has complied with the notice procedure in this section. Premining surveys shall be conducted prior to [mining within 1,000 feet (304.80 meters) of] the time a water supply [unless otherwise authorized or required by the Department based on site specific conditions] is susceptible to mining-related effects. Survey information shall include the following information to the extent that it can be collected without [extraordinary efforts or the expenditure of] excessive [sums of money] inconvenience to the landowner:

* * * * *

(b) Restoration or replacement of water supplies. When underground mining activities conducted on or after August 21, 1994, affect a public or private water supply by contamination, diminution or interruption, the operator shall promptly restore or replace the affected water supply with a permanent alternate source which adequately serves the premining uses of the water supply [or] and any reasonably foreseeable uses of the water supply. The operator shall be relieved of any responsibility under The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. §§ 1406.1—1406.21) to restore or replace a water supply if the operator demonstrates that one of the provisions of § 89.152 (relating to water supply replacement: relief from responsibility) relieves the operator of further responsibility. This subsection does not apply to water supplies affected by underground mining activities which are covered by Chapter 87 (relating to surface mining of coal).

* * * * *

(e) Temporary water supplies.

* * * * *

(2) An operator shall promptly provide a temporary water supply if the operator or the Department finds that the operator's underground mining activities have caused contamination, diminution or interruption of an EPACT water supply, and the landowner or water user is without a readily available alternate source of water. This requirement applies regardless of whether the water supply is located within, or outside of, the rebuttable presumption area.

(3) The temporary water supply provided under this subsection shall meet the requirements of [paragraph] subsection (f)(2) and provide a sufficient amount of water to meet the water supply user's [premining] needs.

(f) Adequacy of permanently restored or replaced water supply. A permanently restored or replaced water supply shall include any well, spring, municipal water supply system or other supply approved by the Department, which meets the criteria for adequacy as follows:

(1) Reliability. [cost,] maintenance and control. A restored or replaced water supply, at a minimum, shall:

* * * * *

[(v) Not result in more than a de minimis cost increase to operate and maintain. If the operating

and maintenance costs of the restored or replaced water supply are more than a de minimis cost increase, the operator shall provide for the permanent payment of the increased operating and maintenance costs of the restored or replaced water supply.]

* * * * *

(5) *Cost to landowner or water user.* A restored or replacement water supply shall meet the following cost criteria:

(i) The restored or replacement water supply for an affected EPACT water supply may not cost the landowner or water user more to operate and maintain than the previous water supply. Operation and maintenance costs of the replacement water supply which exceed the operation and maintenance costs of the previous water supply are the responsibility of the operator. Upon agreement by the operator and the landowner or water user, the obligation to pay these operation and maintenance costs may be satisfied by a one-time payment in an amount which covers the present worth of the increased annual operation and maintenance cost for a period agreed to by the operator and the landowner or water user.

(ii) The restored or replacement water supply for an affected water supply, which does not qualify as an EPACT water supply, may not have operation and maintenance costs that exceed those of the previous water supply by more than a de minimis cost increase. If the operation and maintenance costs of the restored or replacement water supply are more than a de minimis cost increase, the operator shall provide for the permanent payment of the increased operating and maintenance cost of the restored or replacement water supply.

§ 89.146a. Water supply replacement: procedure for resolution of water supply damage claims.

* * * * *

(c) If the affected water supply has not been restored or an alternate water supply has not been provided by the operator or if the operator provides and later discontinues an alternate source, the landowner or water supply user may so notify the Department and request that the Department conduct an investigation in accordance with the following procedure:

* * * * *

(2) Within 45 days of notification, the Department will make a determination of whether the contamination, diminution or interruption was caused by the operator's underground mining activities **[and]**. **The Department** will notify all affected parties of **[the Department's]** its determination **within 10 days of completing the investigation.**

* * * * *

§ 89.152. Water supply replacement: [relief from responsibility] special provisions.

(a) **[The]** In the case of an EPACT water supply, an operator may not be required to restore or replace the water supply if one of the following has occurred:

(1) The Department has determined that a replacement water supply meeting the criteria in

§ 89.145a(f) (relating to water supply replacement: performance standards) cannot be developed and the operator has purchased the property for a sum equal to the property's fair market value immediately prior to the time the water supply was affected or has made a one-time payment equal to the difference between the property's fair market value determined immediately prior to the time the water supply was affected and the fair market value determined at the time payment is made.

(2) The landowner and operator have entered into a valid voluntary agreement under section 5.3(a)(5) of The Bituminous Mine Subsidence and Land Conservation Act (52 P.S. § 1406.5c(a)(5)) which does not require restoration or replacement of the water supply and the Department has determined that an adequate replacement water supply could feasibly be developed.

(3) The operator can demonstrate one of the following:

(i) The contamination, diminution or interruption existed prior to the underground mining activities as determined by a premining survey, and the operator's underground mining activities did not worsen the preexisting contamination, diminution or interruption.

(ii) The contamination, diminution or interruption occurred more than 3 years after underground mining activities occurred.

(iii) The contamination, diminution or interruption occurred as the result of some cause other than the underground mining activities.

(b) In the case of a water supply other than an EPACT water supply, an operator will not be required to restore or replace a water supply if the operator can demonstrate one of the following:

* * * * *

[(b)] (c) * * *

[Pa.B. Doc. No. 03-1790. Filed for public inspection September 12, 2003, 9:00 a.m.]

[25 PA. CODE CH. 93]

[Correction]

Stream Redesignations (Brushy Meadow Creek, et al.)

An error occurred in Part I (Public Comments) of the preamble to the proposed rulemaking which appeared at 33 Pa.B. 4165, 4167 (August 23, 2003). The Environmental Quality Board will accept comments until October 7, 2003. The correct version of Part I is as follows:

I. Public Comments

Written Comments—Interested persons are invited to submit comments, suggestions or objections regarding the proposed amendments to the Environmental Quality Board, P. O. Box 8477, Harrisburg, PA 17105-8477 (express mail: Rachel Carson State Office Building, 15th Floor, 400 Market Street, Harrisburg, PA 17101-2301). Comments submitted by facsimile will not be accepted. Comments must be received by the Board by October 7, 2003. Interested persons may also submit a summary of their comments to the

Board. The summary may not exceed one page in length and must also be received by October 7, 2003. The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the proposed amendments will be considered. If sufficient interest is generated as a result of this publication, a public hearing will be scheduled at an appropriate location to receive additional comments.

Electronic Comments—Comments may be submitted electronically to the Board at RegComments@state.pa.us. A subject heading of the proposal and return name and address must be included in each transmission. Comments submitted electronically must also be received by the Board by October 7, 2003.

KATHLEEN A. MCGINTY,
Chairperson

[Pa.B. Doc. No. 03-1628. Filed for public inspection August 22, 2003, 9:00 a.m.]

STATE BOARD OF FUNERAL DIRECTORS

[49 PA. CODE CH. 13] Continuing Education

The State Board of Funeral Directors (Board) proposes to amend §§ 13.12 and 13.231 (relating to fees; and biennial registration; unregistered status and inactive status; failure to renew) and to add §§ 13.401—13.406 (relating to continuing education) to read as set forth in Annex A.

Effective date

The proposed rulemaking will be effective upon publication of the final-form rulemaking in the *Pennsylvania Bulletin*.

Statutory Authority

The proposed rulemaking is authorized under sections 10(b) and 16(a) of the Funeral Director Law (act) (63 P. S. §§ 479.10(b) and 479.16(a)).

Background and Need for the Proposed Rulemaking

The act of June 22, 2000 (P. L. 376, No. 48) required the Board to adopt regulations implementing continuing education for licensed funeral directors.

Description of the Proposed Rulemaking

The proposed rulemaking will require licensed funeral directors to successfully complete 6 hours of continuing education each biennial renewal period, beginning with the 2004-06 biennial renewal period. Upon application for renewal, each licensee will provide verification of successful completion of the required continuing education. The Board may require documentary proof of successful completion. The Board will not renew the license of a licensee who did not complete the required continuing education prior to the renewal date; upon completion of continuing education, the Board may then renew that license.

In addition, the proposed rulemaking provides for approval by the Board of providers of courses of continuing education, including limited approval for specific courses.

Without additional review, the Board will approve any provider currently approved by the Conference of Funeral Service Examining Boards or the American Board of Funeral Service Education or by the licensing authority of Delaware, Maryland, New Jersey, New York, Ohio or West Virginia. Approval of a provider is considered to include approval of each course offered by the provider. The Board may deny approval of any course whose provider has failed to or is unable to comply with the provider responsibilities of the proposed rulemaking and the Board may withdraw approval where the applicant has made material misstatements in the application.

The proposed rulemaking also provides for the payment of a fee for application for approval of a provider or course. Because the fees are set to enable the Board to recover the cost of providing the service of application review and approval, the fee for approval of a course or provider that is already approved by one or more of the identified bodies (\$50) is lower than the fee for full review (\$100). Additionally, provider or course approval registration is subject to biennial renewal and a fee (\$50) will be charged for renewal. In general, renewal fees are set at an amount sufficient to fund the entire operations of a licensing board and to spread that cost out over all licensees. However, providers of continuing education are not licensees, and the total cost of all Board operations cannot fairly be imposed on continuing education providers as well as funeral directors and other licensees. Because the Board has not previously required continuing education, there is no historical basis upon which the Board could estimate its total cost associated with continuing education. Therefore, the fee to renew registration of approval as a continuing education provider is set at the same amount as the lower fee for initial application for approval, which would also be consistent with the cost of processing the renewal.

Under the proposed rulemaking, each provider will be required to disclose to prospective attendees in advance the objective, content, teaching method and number of hours of continuing education credit, to open the course to licensees, to provide adequate physical facilities, to provide accurate instructional materials, to employ qualified instructors and to evaluate the program. Each provider will also be required to provide to each attendee a record of the continuing education, including the participant's name, the dates of the program, the name of the program, the provider's name and the number of continuing education credits.

The proposed rulemaking does not address the issue of a waiver of continuing education, because section 10(b)(4) of the act adequately addresses this issue.

Finally, the proposed rulemaking will permit demonstration of embalming techniques as part of a program of continuing education, so long as it is approved in advance by the Board and performed by a licensed funeral director.

Fiscal Impact and Paperwork Requirements

The Board will track compliance by licensees with the required continuing education. Also, the Board will review and approve providers of courses of continuing education. The proposed rulemaking will have no other adverse fiscal impact on the Commonwealth or its political subdivisions. The proposed rulemaking will impose no other additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

Sunset Date

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

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 3, 2003, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate Consumer Protection and Professional Licensure Committee and the House Professional Licensure Committee. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor of comments, recommendations or objections raised.

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed rulemaking to Michelle Smey, Administrative Officer, State Board of Funeral Directors, P. O. Box 2649, Harrisburg, PA 17105-2649 within 30 days of publication of this proposed rulemaking in the *Pennsylvania Bulletin*. Reference No. 16A-489 (Continuing Education) when submitting comments.

JAMES O. PINKERTON, FD,
Chairperson

Fiscal Note: 16A-489. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 13. STATE BOARD OF FUNERAL DIRECTORS

LICENSURE

§ 13.12. Fees.

Following is the schedule of fees charged by the Board:

* * * * *

Application for continuing education course with approval in other jurisdiction	\$50
Application for continuing education course without approval in other jurisdiction	\$100
Application for continuing education provider with approval in other jurisdiction	\$50
Application for continuing education provider without approval in other jurisdiction	\$100

Application for continuing education course with approval in other jurisdiction	\$50
Renewal of registration of continuing education provider or course registration	\$50

LICENSE RENEWAL

§ 13.231. Biennial registration; unregistered status and inactive status; failure to renew.

(a) A licensee shall register each biennial period to retain the right to practice. Initial registration shall automatically occur when a license is issued. Registration for a biennial period expires on the first day of February of every even numbered year. **The Board will grant an application for renewal of a funeral director license only when the licensee has certified that the licensee has completed the amount of continuing education required by § 13.401 (relating to credit hour requirements). If requested by the Board, an application for renewal shall also include the documentation required by § 13.402 (relating to reporting completion of continuing education).**

* * * * *

(d) A licensee whose licensure status has lapsed by failing to register biennially with the Board may apply to the Board for reactivation of licensure status by satisfying the requirements of paragraph (1) on forms prescribed by the Board. **An application for reactivation of an inactive or lapsed funeral director license shall also include the documentation required by § 13.402.**

* * * * *

CONTINUING EDUCATION

§ 13.401. Credit hour requirements.

(a) During each biennial renewal period, a licensed funeral director shall complete 6 hours of continuing education. This provision does not require a funeral director to complete continuing education during the renewal period in which the funeral director is first issued a license.

(b) A funeral director who has not completed the required continuing education during one or more renewal periods may complete the required continuing education subsequent to the applicable biennial renewal period. However, unless excused by the Board for good cause under section 10(b)(4) of the act (63 P. S. § 479.10(b)(4)), the Board will not renew or reactivate any funeral director license until all continuing education required prior to the current biennial renewal period has been successfully completed.

(c) The requirement of subsection (a) will take effect, beginning with the biennial renewal period of February 1, 2004—January 31, 2006.

§ 13.402. Reporting completion of continuing education.

(a) In general, proof of completion of a course of continuing education shall consist of a certified continuing education record, as defined in § 13.405(b) (relating to provider responsibilities).

(b) A licensed funeral director for whom the Board has not been provided certified continuing education records sufficient to comply with § 13.401 (relating to credit hour requirements) shall otherwise demonstrate completion of courses of continuing education.

§ 13.403. Credit for approved continuing education.

(a) Credit for continuing education will be granted only for courses that have been approved in advance by the Board.

(b) Approval will not extend to any course for which continuing education credit is precluded by section 10 of the act (63 P.S. § 479.10) (regarding expiration of licenses; renewal; continuing education).

(c) The Board will be deemed to have approved any course of continuing education provided by a provider of continuing education that is approved by the Board.

§ 13.404. Approval of continuing education courses or providers.

(a) Anyone, to include any college, university, school, association, professional society and organization, seeking approval to offer continuing education shall apply for approval on forms provided by the Board and shall fully provide the information required by those application forms for the Board to fulfill its duties under this section. The application shall include payment of the fee required under § 13.12 (relating to fees).

(b) The Board will approve without further review any course or provider of continuing education that is approved by one or more of the following:

- (1) Conference of Funeral Service Examining Boards.
- (2) Delaware Board of Funeral Services.
- (3) Maryland Board of Morticians.
- (4) State Board of Mortuary Science of New Jersey.
- (5) New York Department of Health, Bureau of Funeral Directors.
- (6) Ohio Board of Embalmers and Funeral Directors.
- (7) West Virginia Board of Embalmers and Funeral Directors.
- (8) American Board of Funeral Service Education.

(c) The Board will approve without further review any course or provider of continuing education that is approved by the appropriate licensing authority of one or more jurisdictions other than those listed in subsection (b). The Board will grant credit for a course of continuing education that has been approved under this subsection only for those licensees who are also licensed by the appropriate licensing authority in another jurisdiction that previously approved the course or provider.

(d) The Board may deny approval of a provider or course of continuing education when the applicant has previously failed or is not currently able to comply with § 13.405 (relating to provider responsibilities). The Board may approve in part and deny in part an application for approval of a provider or course.

(e) The Board may terminate its prior approval of a provider or program of continuing education when the applicant made one or more false or misleading material statements on the application.

The Board may also terminate in part or in whole its prior approval of a provider or program when it is later determined that the Board has grounds to deny approval in accordance with this section.

§ 13.405. Provider responsibilities.

(a) For each course of continuing education, the provider shall:

(1) Disclose in advance to prospective attendees the objectives, content, teaching method and number of hours of continuing education credit.

(2) Open each course to all licensees.

(3) Provide adequate physical facilities for the number of anticipated participants and the teaching methods to be used.

(4) Provide accurate instructional materials.

(5) Employ qualified instructors who are knowledgeable in the subject matter.

(6) Evaluate the program through the use of questionnaires of the participants and instructors.

(7) Issue a certified continuing education record to each participant.

(8) Retain attendance records, written outlines and a summary of evaluations for 5 years.

(b) Each continuing education record must include:

- (1) The name of the participant.
- (2) The dates of the program.
- (3) The name of the program.
- (4) The provider's name.
- (5) The number of hours of continuing education credit.

§ 13.406. Demonstration of embalming techniques.

(a) With prior approval of the Board, embalming of human remains to demonstrate techniques during a program of continuing education will not be considered to be the practice of funeral directing at an establishment not authorized by the Board.

(b) Only a licensed funeral director may demonstrate embalming techniques at a program of continuing education in this Commonwealth.

[Pa.B. Doc. No. 03-1791. Filed for public inspection September 12, 2003, 9:00 a.m.]

STATE REAL ESTATE COMMISSION

[49 PA. CODE CH. 35]
Education

The State Real Estate Commission (Commission) proposes to amend Chapter 35 to read as set forth in Annex A.

A. Effective Date

The proposed rulemaking will be effective upon publication of the final-form rulemaking in the *Pennsylvania Bulletin*.

B. Statutory Authority

The amendments are proposed under the authority of sections 402, 404, 404.1 and 513 of the Real Estate Licensing and Registration Act (RELRA) (63 P. S. §§ 455.402, 455.404, 455.404a and 455.513).

C. Purpose and Background

As part of its on-going review of its regulations, the Commission amended §§ 35.201—35.327 at 30 Pa.B. 5954 (November 18, 2000). This proposed rulemaking will amend and update the remaining regulations (§§ 35.252—35.392), many of which were last amended at 19 Pa.B. 781 (February 25, 1989) and 24 Pa.B. 2904 (June 11, 1994).

The Commission proposes to amend § 35.252 (relating to termination of business of deceased broker with sole proprietorship) and add §§ 35.253 and 35.254 (relating to replacement of broker of record due to death; and substitution of broker or broker of record due to illness or injury) to address practice when the broker or broker of record dies or is incapacitated for a significant time due to illness or injury. The Commission also proposes to address licensees' and applicants' desire to complete their prelicensure and continuing education requirements at a date, place and time most convenient to them. Under current regulations, these education requirements may only be satisfied in a traditional classroom setting. Given the importance of the Internet to real estate practice as well as the trend in other real estate licensing jurisdictions to permit distance education, the Commission proposes liberalizing the delivery system for real estate prelicensure and continuing education courses (§§ 35.201 and 35.358 (relating to definitions; and administration of curriculum)).

Lastly, the Commission proposes consolidating duplicative prelicensure and continuing education provisions and revising outdated, burdensome and unnecessary provider requirements (§§ 35.203, 35.228, 35.229, 35.271—35.273, 35.275, 35.341—35.344, 35.351—35.363 and 35.381—35.392).

D. Description of Proposed Amendments

1. Death or injury of broker/broker of record

Section 35.252 addresses the termination of a sole proprietorship when the broker dies. Subsection (b) contains the rules which must be followed by an appointed broker during the termination period. Paragraph (3) requires that all agreements of sale or lease pending at the time of the sole proprietor's death consummate within the 90-day period. Currently, pending agreements or leases that do not consummate within this time frame have to be terminated and transferred to another broker resulting in unreasonable delay for the parties in the transaction. To eliminate the delay and unnecessary paperwork, the Commission proposes permitting pending agreements of sale or lease to proceed to consummation beyond the 90-day termination period. Because paragraph (1) prohibits the appointed broker from entering into new agreements, the Commission believes that there will not be any harm, but rather convenience, to the public by extending the termination period.

New §§ 35.253 and 35.254 address the instances when the broker of record of a corporation or partnership dies or is incapacitated due to illness or injury. Both track the requirements of § 35.252(a) and do not require that the business be terminated. Rather, as in the case of a sole proprietorship, the proposed sections would require a partner or corporate officer to notify the Commission of

the broker of record's death, illness or injury and appoint another broker of record, in the case of death, or an interim broker, in the case of illness or injury.

2. Prelicensure and Continuing Education

Section 402 of the RELRA grants the Commission authority over real estate schools and the courses taught at the schools. In addition, section 404.1(c) of the RELRA grants the Commission authority over the courses, materials, locations and instructors for continuing education.

A. Consolidation

Currently, the regulations relating to real estate education are divided into two separate subchapters: Subchapter F (relating to real estate schools) addresses the prelicensure requirements and Subchapter H (relating to continuing education) addresses the continuing education requirements. Because many of the provisions are either substantially similar or redundant, the Commission proposes to consolidate these provisions into one subchapter and replace all references to real estate "schools" with real estate "education providers." The following chart outlines the consolidation.

<i>Current Section</i>	<i>Subject Matter</i>	<i>Consolidated Into</i>
§ 35.387	Administration of curriculum	§ 35.358
§ 35.388	Facilities	§ 35.352
§ 35.389	Instructors	§ 35.353
§ 35.390	Advertising, solicitation and promotion	§§ 35.354 and 35.355
§ 35.391	Course transcripts and certificates of instruction	§ 35.359
§ 35.392	Inspections	§ 35.362

Provisions specifically applicable only to continuing education remain in Subchapter H.

B. Simplify/Liberalize Processes

As part of this proposed rulemaking, the Commission proposes to streamline the approval process for educational providers, permit applicants for licensure and licensees to complete their educational requirements by traditional and distance education learning programs and liberalize the continuing education requirements for all licensees.

(i) Real Estate Education Providers

Section 35.341(5) (relating to approval of real estate school) requires providers to post a surety bond for the greater of \$10,000 or the maximum number of students expected to be enrolled on any one day in the first year of operation times the amount of the tuition. The Commission proposes eliminating the per-student calculation and simply requiring providers to post a \$10,000 bond. The Commission believes that this amount sufficiently protects the student's contractual rights.

Section 35.341(6)(i)(D) and (ii)(B) requires providers to provide the Commission with complete details about any criminal convictions on their applications for approval. Upon being notified of the conviction, the Commission requests certified copies of the conviction documents. To streamline the process, the Commission proposes requiring applicants to provide the conviction documents at the time of the application. Similarly, current paragraph (6)(vi)—(viii) and (xi) requires providers to attach copies of student enrollment agreements, transcripts, a statement of prerequisites and a photograph or sketch of the

sign with their application. Because the inspector reviews this information again during the inspection prior to licensure, the Commission proposes eliminating this duplicative requirement.

Section 35.342 (relating to approval of school director) addresses the approval of the director. The regulations are silent, however, on whether a provider may continue operation when the director dies, withdraws or is terminated. To provide guidance to providers on this issue, the Commission proposes adding subsection (d). This provision would permit an interim director, upon notice to the Commission, to operate for up to 90 days following the death, withdrawal or termination of the director. The interim director would not be permitted to make changes to the curriculum, testing or facilities. After 90 days, continued operation is contingent upon approval of a director under subsection (a) or (b).

The Commission also proposes technical amendments to § 35.344(b)(1) and (5) (relating to withdrawal of school or director approval). Rather than simply using the term "incompetency" to describe when the Commission may withdraw a director's approval, paragraph (1) would delineate that the conduct must demonstrate bad faith, dishonesty, untrustworthiness or incompetency. Similarly, rather than simply using the terms "involving moral turpitude," paragraph (5) would be modified to parallel the language in section 604(a)(14) of the RELRA (63 P. S. § 455.604(a)(14)), regarding convictions.

Current §§ 35.351 and 35.351a (relating to duty of school director; and assistant school director) address the requirements for a director and assistant director. In the proposed rulemaking, the Commission seeks to clarify the requirements of a director and eliminate the regulation governing assistant directors. The Commission believes that because the RELRA does not contain provisions delineating the qualifications or responsibilities for assistant directors, no regulation is necessary. In addition, since the director has the ultimate responsibility for the education provider, the director may decide which responsibilities to delegate to the assistant director.

The Commission also proposes to eliminate unnecessary facility requirements in § 35.352 (relating to location and facilities). So long as the location or facility is suitable for classroom space and does not share office, instruction or common space with a real estate franchise, network or organization, the Commission believes that it is unnecessary to regulate the amount of floor or air space mentioned in paragraphs (5) and (6). Similarly, the Commission proposes to remove the requirement in subsection (c) that a lease be in effect when the school is in session as this is a private contractual matter between the school and the landlord.

Current § 35.353 (relating to selection of instructors) assigns a complicated point system in the selection of instructors. The proposed rulemaking would eliminate the point system and the dual teaching and experience requirement and reduce the number of years of teaching or practical experience needed from 5 years to 3 years. The Commission believes that the current requirement is confusing, onerous and does not guarantee better instruction. The Commission is satisfied that an instructor who has an undergraduate, graduate or postgraduate degree or 3 years of practical or teaching experience in the subject matter of the course to be taught is sufficiently qualified.

The Commission also seeks to simplify the documentation that an instructor must provide to the Commission.

Current § 35.353(c) requires instructors to submit certified documents from educational institutions and real estate organizations attesting to the applicant's acquisition of diplomas, degrees and industry designations and completion of continuing education programs and courses as well as letters from teaching supervisors certifying the applicant's past satisfactory performance as an instructor. Since these documents are viewed during the educational provider's inspection, the Commission would amend this provision to simply require providers to maintain documentation substantiating education or experience rather than submit them to the Commission.

Current § 35.354(b) (relating to prohibited forms of advertising and solicitation) requires the educational provider to post a sign advising students that recruiting for employment opportunities is prohibited. However, the Commission understands that instruction often occurs in multiple locations. Therefore, the Commission proposes eliminating the sign requirement and instead requiring that students be provided with written documentation about this prohibition with the other course materials.

Current § 35.357 (relating to student enrollment agreements) sets forth a sample student enrollment agreement. To avoid private contractual matters between providers and students and because the agreement is exemplary and not mandatory, the Commission proposes deleting this section.

(ii) *Traditional and Distance Education*

In addition to consolidating the precensure and continuing education requirements, the Commission proposes increasing the types of programs that licensees and applicants may complete to meet their educational requirements. Currently, applicants and licensees may only complete these requirements by means of traditional methods—in a live classroom setting. This proposed rulemaking would permit applicants and licensees to learn by means of traditional and distance education learning programs.

Distance education is currently accepted in the majority of jurisdictions in the United States and Canada. In 39 of these jurisdictions, 34 within the United States, course content is reviewed and approved by the jurisdiction while the delivery system is reviewed and approved by the Association of Real Estate License Law Officials (ARELLO).

Like traditional learning programs, distance learning programs fall into two categories: instructor-led learning and independent learning. The distinction between the categories depends upon the amount of interactivity between instructors, students/learners and content in the learning process. Instructor-led learning provides significant ongoing interactive feedback from the instructor to the participant during the learning process, while independent learning permits the participant to learn a real estate subject with no contact with the instructor.

To account for the various learning methods, the Commission proposes amending § 35.358. Subsection (a)(1) would be amended to clarify that instructor-led learning may not exceed 7 1/2 hours of instruction per day. Subsection (a)(2), which permits home study and correspondence courses in Commission-permitted instances, would be deleted since these courses fall within distance learning. Subsection (a)(3) and (6) would be moved to new subsection (b), which deals exclusively with precensure requirements.

The Commission also proposes to add subsection (a)(4). Like the 39 other jurisdictions that permit distance

learning, the new provision would require that the course content comply with § 35.384 (relating to qualifying courses; required and elective topics) and that the delivery system be approved by ARELLO or another certifying body with similar approval standards approved by the Commission. Although there are currently no other certifying bodies, in drafting this proposed rulemaking, the Commission wants to ensure that if another acceptable certifying body becomes available the regulations would not have to be amended further.

(iii) *Continuing education.*

Current continuing education requirements are found in Subchapter H. Section 35.383 (relating to waiver of continuing education requirement) requires licensees seeking to renew their licenses, with the exception of those listed in § 35.383, to complete 14 hours of continuing education from an approved sponsor specified in current § 35.385 (relating to approved continuing education providers). The 14 hours are currently broken down into a 7 1/2-hour mandatory course developed by the Commission and a 7 1/2-hour elective described in § 35.384(b) and (c).

The Commission proposes to shorten the length of the continuing education programs. Under the current regulation, licensees are required to complete their continuing education in 7 1/2-hour increments. In this proposed rulemaking, the Commission proposes reducing the minimum hours in § 35.384(a) from 7 1/2 hours to 3 1/2 hours. The Commission believes that the reduced hours will enable licensees to learn more efficiently.

In addition, the Commission proposes to eliminate the mandatory course requirement in § 35.384(b) in all but prenotified instances and replace it with all elective courses. Except for instances where the RELRA or the regulations have been substantively modified or where, in the Commission's view, licensees require specific Commission-guidance, the Commission believes that licensees should be able to take continuing education in subjects that directly benefit their practice or interest.

Under current § 35.385, an applicant for a waiver of the continuing education requirement submits a request with the biennial renewal application. In the event that the Commission would deny the request, the applicant must cease practice until the continuing education is completed. The Commission proposes changing the deadline for submission of the waiver request to March 31, rather than at the time of the renewal. By adjusting the submission deadline, the Commission would be able to approve or deny the applications at its April meeting and advise each applicant in time for the applicant to complete the missing hours prior to the May 31 renewal deadline. The Commission believes that this time frame would be of assistance to applicants because they would be able to obtain the requisite hours without having to cease practice.

The Commission also proposes to expand the list of acceptable topics in § 35.384 to include real estate investment analysis, management of real estate brokerage operations, property development, real estate securities and syndication, real property exchange, broker courses encompassing supervisory duties and standards of conduct and practice contained in Subchapter E (relating to standards of conduct and practice), marketing promotion and advertising of real estate inventory and use of technology in delivering real estate services. The Commission believes that these courses are valuable given licensees' current practice.

E. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 3, 2003, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate Consumer Protection and Professional Licensure Committee and the House Professional Licensure Committee. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor of comments, recommendations or objections raised.

F. Fiscal Impact and Paperwork Requirements

The proposed rulemaking should have no fiscal impact on the Commonwealth, its political subdivisions or the public, that is, the regulated community. The proposed rulemaking should reduce the legal, accounting, reporting or other paperwork requirements on the regulated community.

G. Public Comment

Interested persons are invited to submit written comments, recommendations or objections regarding the proposed rulemaking to Judith Pachter Schulder, Counsel, State Real Estate Commission, 116 Pine Street, P. O. Box 2649, Harrisburg, PA 17105-2649 within 30 days following publication of this proposed rulemaking in the *Pennsylvania Bulletin*.

HELEN M. BILLAK,
Chairperson

Fiscal Note: 16A-561. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 35. STATE REAL ESTATE COMMISSION

Subchapter B. GENERAL PROVISIONS

§ 35.201. Definitions.

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

* * * * *

Distance education—Real estate instruction delivered in an independent or instructor-led format during which the student and the instruction are separated by distance and sometimes time.

* * * * *

Independent learning—An interactive educational program, including computer-based technology courses, that provides no contact with an instructor.

* * * * *

Instructor-led learning—An interactive educational program, including a classroom or simulated classroom, that provides significant ongoing contact from the instructor to the participant during the learning process.

* * * * *

Real estate [school] education provider—[An individual or entity that conducts classes in] A person or institution who offers real estate [subjects. The term does not include a college, university or institute] education regardless of whether the learning is instructor-led or independent, excluding colleges, universities or institutes of higher learning accredited by the Middle States Association of Colleges and Secondary Schools or equivalent accreditation.

* * * * *

§ 35.203. Fees.

The following fees are charged by the Commission:

* * * * *

Approval of real estate [school] education provider	\$120
Reinspection of real estate [school] education provider after first failure	\$65
Annual renewal of approval of real estate [school] education provider ...	\$250 plus \$10 for each satellite location, course and instructor
* * * * *	
Change of ownership or directorship of real estate [school] education provider	\$75
Change of name of real estate [school] education provider	\$45
Change of location of real estate [school] education provider	\$70
Addition of satellite location or instructor for real estate [school] education provider	\$20
Addition of course for real estate [school] education provider	\$25
* * * * *	

**Subchapter C. LICENSURE
LICENSURE REQUIREMENTS**

§ 35.228. Licensure as campground membership salesperson.

(a) An individual who wants to obtain a Pennsylvania campground membership salesperson's license shall:

* * * * *

(2) Have successfully completed the one-credit (15 hours), Commission-developed course titled Campground Membership Sales, provided the following conditions are met:

* * * * *

(ii) The course was taught at an accredited college, university or institute of higher learning in this Commonwealth or a real estate [school] education provider in this Commonwealth approved by the Commission.

* * * * *

§ 35.229. Licensure as time-share salesperson.

(a) An individual who wants to obtain a Pennsylvania time-share salesperson's license shall:

* * * * *

(2) Have successfully completed the two-credit (30 hours), Commission-developed course titled Time Share Sales, provided the following conditions are met:

* * * * *

(ii) The course was taught at an accredited college, university or institute of higher learning in this Commonwealth or a real estate [school] education provider in this Commonwealth approved by the Commission.

* * * * *

STATUS OF LICENSURE

§ 35.252. Termination of business of deceased broker with sole proprietorship.

(a) Within 15 days following the death of a broker with a sole proprietorship, the deceased broker's estate [may] shall notify the Commission that [it] the estate has appointed another licensed broker to supervise the termination of the deceased broker's business [for 90 days following the appointment]. The appointment is subject to verification that the appointed broker has a current license.

(b) The appointed broker shall observe the following rules during the [90-day] termination period:

* * * * *

(2) Unexpired listing agreements may be promoted unless the seller or lessor elects to cancel the agreement. Unexpired listings will expire automatically [at the conclusion of the 90-day termination period] 90 days after the broker dies and may not be renewed.

* * * * *

§ 35.253. Replacement of broker of record due to death.

Within 15 days following the death of a broker of record, a partner or corporate officer shall file an application with the Commission designating another individual to serve as broker of record.

§ 35.254. Substitution of broker or broker of record due to illness or injury.

If a broker with a sole proprietorship or broker of record is unable to act as a broker/broker of record due to illness or injury, the broker's attorney or another with power of attorney for the broker in a sole proprietorship, a corporate officer or partner shall notify the Commission within 15 days that it has appointed another licensed broker to act as the interim broker/broker of record for the corporation, partnership or sole proprietorship until the broker/broker of record is able to resume his responsibilities.

Subchapter D. LICENSING EXAMINATIONS

§ 35.271. Examination for broker's license.

* * * * *

(b) The Commission will apply the following standards in determining whether an examination candidate has met the education requirement of subsection (a)(4):

* * * * *

(3) To be counted toward the education requirement, a real estate course shall have been offered by:

* * * * *

(ii) A real estate [school] education provider in this Commonwealth approved by the Commission.

(iii) A real estate [school] education provider outside this Commonwealth that has been approved by the real estate licensing authority of the jurisdiction where the [school] provider is located. The course transcript or certificate of completion shall state that the course is approved by the licensing authority of the jurisdiction where the [school] provider is located.

* * * * *

(6) Two credits will be allowed for each year of active practice the candidate has had as a licensed broker in another jurisdiction during the 10-year period immediately preceding the submission of the examination application.

§ 35.272. Examination for salesperson's license.

* * * * *

(b) The Commission will apply the following standards in determining whether an examination candidate has met the education requirement of subsection (a)(2):

* * * * *

(2) Credits will be allowed for each of the Commission-developed real estate courses—Real Estate Fundamentals and Real Estate Practice—when offered by:

* * * * *

(ii) A real estate [school] education provider in this Commonwealth approved by the Commission.

(3) Credits will be allowed for acceptable basic real estate courses when offered by:

* * * * *

(ii) A real estate [school] education provider outside this Commonwealth that has been approved by the real estate licensing authority of the jurisdiction where the [school] provider is located.

* * * * *

§ 35.273. Examination for cemetery broker's license.

* * * * *

(b) The Commission will apply the following standards in determining whether an examination candidate has met the education requirement of subsection (a)(3):

* * * * *

(2) Credits will be allowed for each of the Commission-developed real estate courses—Real Estate Fundamentals and Real Estate Practice—when offered by:

* * * * *

(ii) A real estate [school] education provider approved by the Commission in this Commonwealth.

(3) Credits will be allowed for cemetery courses when offered by:

* * * * *

(ii) A real estate [school] education provider in this Commonwealth approved by the Commission.

(4) Credits will be allowed for acceptable basic real estate courses when offered by:

* * * * *

(ii) A real estate [school] education provider outside this Commonwealth that has been approved by the real estate licensing authority of the jurisdiction where the [school] provider is located.

* * * * *

§ 35.275. Examination for rental listing referral agent's license.

* * * * *

(b) The Commission will apply the following standards in determining whether an examination candidate has met the education requirement of subsection (a)(2):

* * * * *

(2) Credits will be allowed for each of the Commission-developed real estate courses—Real Estate Fundamentals and Real Estate Practice—when offered by:

* * * * *

(ii) A real estate [school] education provider in this Commonwealth approved by the Commission.

(3) Credits will be allowed for acceptable basic real estate courses when offered by:

* * * * *

(ii) A real estate [school] education provider outside this Commonwealth that has been approved by the real estate licensing authority of the jurisdiction where the [school] provider is located.

* * * * *

Subchapter F. REAL ESTATE [SCHOOLS] EDUCATION PROVIDERS APPROVAL OF [SCHOOLS AND SCHOOL DIRECTORS] EDUCATION PROVIDERS

§ 35.341. Approval of real estate [school] education provider.

A real estate [school] education provider shall obtain the Commission's approval before commencing operations in this Commonwealth. To obtain approval from the Commission, the [school] provider shall:

(1) Be owned by persons who [are 21 years of age or older and] possess [a] good moral character, or, if the owner is a corporation, have officers and directors who meet [these requirements] this requirement.

* * * * *

(3) Have a director of [school] operations who meets the requirements of § 35.342 (relating to approval of [school] director).

(4) Designate a person or entity [located in this Commonwealth] to serve as custodian of [school] records if the [school] provider were to terminate operations.

(5) Post a surety bond of \$10,000 to the Commonwealth for the protection of the contractual rights of the [school's] provider's students[, the amount of which shall be the greater of \$10,000 or the maxi-

mum number of students expected to be enrolled at any one day in the first year of operation times the amount of the tuition].

(6) Submit a completed [school] provider approval application to the Commission with:

(i) A completed [school] provider owner application with:

(A) A resume of the applicant's experience in owning, administrating or teaching in, a college[,] or university or as a real estate [school] education provider.

* * * * *

(C) [A notarized pro forma profit and loss statement and balance sheet.

(D) Complete details of] Certified copies of court documents related to a conviction of, or plea of guilty or nolo contendere to, a felony or misdemeanor and the sentence imposed.

(ii) A completed [school] provider director application with:

* * * * *

(B) [Complete details of] Certified copies of court documents related to conviction of, or plea of guilty or nolo contendere to, a felony or misdemeanor and the sentence imposed.

(iii) A fictitious name registration, if the [school] provider has a fictitious name.

(iv) A certificate of incorporation, if the [school] provider is a corporation.

* * * * *

(vi) [A copy of the student enrollment agreement.

(vii) A copy of the school transcript.

(viii) A statement of the prerequisites for admission.

(ix)] A statement of policy regarding refund of tuition and other fees.

[(x)] (vii) * * *

[(xi) For the main school location and each proposed satellite location, a sketch or photograph of the school sign.]

§ 35.342. Approval of [school] educational director.

(a) A real estate [school] education provider shall obtain the Commission's approval of its director before commencing operations in this Commonwealth. The applicant for director shall have a combination of experience in teaching, supervision and educational administration [to be able] which, in the opinion of the Commission, will enable the applicant to competently administer a real estate education program in areas that include, but are not limited to, the following: evaluation of instructor performance; evaluation of curriculum and specific course content; analysis of course examinations; and management of [school] records and [school] facilities.

* * * * *

(c) An approved [school] education provider shall obtain the Commission's approval before changing directors. The prospective director shall submit to the Com-

mission the information required by § 35.341(6)(ii) (relating to approval of real estate [school] education provider).

(d) If the director dies, withdraws or is terminated, an approved education provider will not lose its approved status, nor will it be required to terminate operations within this Commonwealth provided that:

(1) The provider shall submit the name of an interim director to the Commission within 15 days of the death, withdrawal or termination of the director.

(2) The interim director is authorized to operate for up to 90 days following the death, withdrawal or termination of the director. Thereafter, continued operation is contingent upon approval of a director under subsection (a) or (b).

(3) No changes may be made to the curriculum, testing or facilities until the new director is approved by the Commission.

§ 35.343. Renewal of [school] education provider approval.

An approved real estate [school] education provider shall renew its approval annually. To obtain renewal of approval, [a school] an education provider shall submit a completed renewal of approval application to the Commission with:

(1) A notarized certification of compliance with this chapter signed by the [school] director.

(2) A copy of the \$10,000 surety bond showing coverage for the upcoming renewal period[, the amount of which shall be the greater of \$10,000 or the maximum number of students enrolled at any one day during the previous year times the amount of the tuition].

* * * * *

§ 35.344. Withdrawal of [school] education provider or director approval.

(a) The Commission may, following notice and hearing under 2 Pa.C.S. §§ 501—508 (relating to practice and procedure of Commonwealth agencies), withdraw the approval of a real estate [school] education provider that it finds guilty of:

* * * * *

(2) Failing to maintain compliance with § 35.341 (relating to approval of real estate [school] education provider).

(3) Violating a requirement of §§ 35.351—35.363 (relating to administration of [schools] education providers).

(b) The Commission may, following notice and hearing under 2 Pa.C.S. §§ 501—508, withdraw the approval of a [school] director that it finds guilty of:

(1) [Incompetency] Any conduct in connection with the administration of an education provider which demonstrates bad faith, dishonesty, untrustworthiness or incompetency.

(2) Failing to [ensure the schools] maintain compliance with [the requirements of §§ 35.351—35.363] § 35.341 (relating to approval of real estate education provider).

* * * * *

(4) Having been convicted of, or having pled guilty or nolo contendere to [,] a felony [or].

(5) Having been convicted of, or having pled guilty or nolo contendere to a misdemeanor [involving moral turpitude] related to the practice of real estate, forgery, embezzlement, obtaining money under false pretenses, bribery, larceny, extortion, conspiracy to defraud or any similar offense.

ADMINISTRATION OF [SCHOOLS] EDUCATION PROVIDERS

§ 35.351. Duty of [school] director.

The director [of] for a real estate [school] education provider is responsible for [the] day-to-day administration [of the school], including [the school's] evaluation of instructor performance, evaluation of curriculum and specific course content, analysis of course examinations, management of records and facilities and otherwise assuring compliance with §§ 35.352—35.363.

§ 35.351a. [Assistant school director] (Reserved).

[(a) A school may, upon notification to the Commission, appoint an approved instructor under § 35.353 (relating to selection of instructors) to serve as assistant school director.

(b) An assistant school director may not become a school director without the Commission's approval under § 35.342 (relating to approval of school director).]

§ 35.352. Location and facilities.

(a) A real estate [school] education provider shall have a main location [within this Commonwealth] that contains its [administration] administrative offices, its records, and a telephone with a listed number for the [school's] provider's exclusive use. [Classes may be taught at the main location or at satellite locations.]

(b) The [main] location [and each satellite location] where classes are taught shall:

(1) Be [designed primarily for classroom purposes or, in the case of a meeting hall, convention hall or motel/hotel facility, be] suitable for classroom space.

(2) Not share office space, [classroom] instruction space or a common [entrance] space with a real estate franchise, network or organization. This paragraph does not apply to a real estate trade association.

* * * * *

[(4) Have adequate illumination on horizontal work surfaces in each classroom.

(5) Have 15 square feet of floor space per student in each classroom.

(6) Have 150 cubic feet of airspace per student in each classroom.

(c) If the school rents facilities for its main or satellite location, the lease agreement shall be in effect for the period when the school is in session at that location.]

§ 35.353. Selection of instructors.

(a) *Qualified instructors.*

[(1)] A real estate [school] education provider shall employ instructors who are qualified to teach the [curriculum] courses for which the instructors have been hired. The [school] provider may consider an individual qualified to teach a course if the individual satisfies one of the following criteria:

[(i) Has accumulated a minimum of 75 total points under the points system in subsection (b), with a minimum of 30 education points (including points in both formal and continuing education), three industry experience points and 20 teaching experience points.

(ii) Has accumulated a minimum of 53 total points under the points system in subsection (b), with a minimum of 30 education points (including points in both formal and continuing education) and three industry experience points.

(iii) [(1) Possesses an undergraduate, graduate or postgraduate degree [and has 2 years of practical experience] in the subject matter of the course to be taught. [The experience requirement does not apply when the individual holds a teaching certificate in the subject matter of the course to be taught.]

[(iv)] (2) Has [5] 3 years of [full-time] practical or teaching experience in a profession, trade or occupation directly related to the subject matter of the course to be taught.

[(2) If the school determines that an individual is qualified as an instructor under paragraph (1)(ii), the school shall require the individual to acquire at least 20 teaching experience points within 3 years after commencing employment as an instructor for the school.

(b) *Point system.* A school shall award points for education, industry experience and teaching experience as follows:

(1) *Education.* Education requirements are as follows:

(i) *Formal education.*

(A) High school or general equivalency diploma—five points.

(B) Degrees—only one degree may be considered for points:

(I) Associate's degree, or its equivalent, in any area—five points.

(II) Bachelor's or master's degree in any area—10 points.

(III) Bachelor's or master's degree in real estate—15 points.

(IV) Doctorate degree in any area—15 points.

(ii) *Industry designations.* Ten points for each industry-awarded designation earned in the area of study to be taught, up to a maximum of 30 points.

(iii) *Continuing education programs.* One point for each Continuing Education Unit/Program (CEUP) in the area of study to be taught. For purposes of this clause, a CEUP is defined as 10 hours of classroom participation as a student.

(iv) *Continuing education courses.* One point for each Continuing Education Unit/Course (CEUC) earned in the area of study to be taught. For purposes of this clause, a CEUC is defined as 10 hours of classroom participation as a student.

(2) *Industry experience.* One point for each year of industry-related experience in the area of study to be taught, up to a maximum of 15 years.

(3) *Teaching experience.* One point for each Continuing Teaching Unit (CTU) earned in the area of study to be taught. For purposes of this paragraph, a CTU is defined as 10 hours of classroom participation as an instructor in an industry-related curriculum.

(c)] (b) *Proof of qualifications.* [A school] An education provider shall [require an instructor applicant to prove qualifications by the submission of:] maintain documentation substantiating the instructor's education and experience.

[(1) Certified documents from educational institutions and real estate organizations attesting to the applicant's acquisition of diplomas, degrees and industry designations and completion of continuing education programs and courses.

(2) Letters from teaching supervisors certifying the applicant's past satisfactory performance as an instructor.]

§ 35.354. Prohibited forms of advertising and solicitation.

(a) A real estate [school] education provider may not:

(1) Hold itself out under a name other than the name approved for it by the Commission under § 35.341 (relating to approval of real estate [school] education provider).

(2) Hold itself out as being recommended or endorsed by the Commission, the Department of Education or other agency of the Commonwealth, except that the [school] education provider may advertise that it has been approved by the Commission to provide instruction in real estate courses and that credits earned in certain named courses will be accepted by the Commission toward fulfillment of the professional education prerequisite for taking the Pennsylvania real estate licensing examinations.

(3) Hold itself out to be an educational institution that conforms to the standards and requirements prescribed for colleges and universities by the Department of Education, unless the [school] education provider meets those standards and requirements.

* * * * *

(9) Permit an instructor or guest lecturer while on [school] the provider's premises to wear any identification relating to the name of the real estate licensee or a real estate organization, franchise or network.

* * * * *

(b) A [school] real estate education provider may not allow its main or satellite locations to be used by others for the solicitation or recruitment of students for employment or affiliation with a real estate licensee or a real estate organization, franchise or network. [The

following sign] Students shall be informed of this prohibition through a written statement which shall [be conspicuously displayed in each classroom whenever a class is in session] contain the following:

* * * * *

§ 35.355. Prospectus materials.

(a) A real estate [school] education provider shall provide copies of catalogs, bulletins, pamphlets and other prospectus materials to the Commission upon request. Prospectus materials shall state the following in clear and unambiguous terms:

* * * * *

§ 35.356. Tuition and other fees.

A real estate [school] education provider shall charge tuition that bears a reasonable relationship to the quality and quantity of instructional services rendered. If additional fees are charged for books, supplies and other materials needed for coursework, the [school] provider shall itemize the fees and the books, supplies and materials, upon payment therefor, shall become the property of the student.

§ 35.357. [Student enrollment agreements] (Reserved).

[(a) A real estate school shall require each of its students to enter into a student enrollment agreement that has been approved by the Commission. The agreement shall itemize the tuition and other fees and the services and materials to be received from them. The agreement also shall state the school's policy regarding the refund of tuition and fees if the student were to withdraw or be dismissed or if the school were to terminate operations before the end of the academic year. The agreement also shall contain the Bureau's toll-free telephone number, 1(800) 822-2113, that the student may call to obtain information about filing a complaint against the school.

(b) The following real estate school enrollment agreement is exemplary of the requirements of subsection (a):

REAL ESTATE SCHOOL STUDENT ENROLLMENT AGREEMENT

In consideration of (Name of School) (hereinafter the "School") accepting me as a student and giving me the instruction specified in its (Name of Course) (Fall or Spring Session) (Day or Evening Class) (Year) according to the curriculum of the School, I, (Name of Student) (hereinafter the "Student"), agree to pay the School tuition in the amount of \$ _____, \$ _____ of which shall be paid at the signing and execution of this agreement and the balance paid in (Weekly or Monthly) installments of \$ _____.

The School and the Student agree that the portion of the tuition paid at the time of the signing and execution of this agreement is nonrefundable. The Student agrees to acquire all books, tools and supplies required for the course, according to the current catalog, for which a fee of \$ _____ shall be paid at the signing and execution of this agreement.

The Student agrees to abide by the rules and regulations of the School as may be established from time to time in connection with the course.

The School shall have the right to cancel this agreement at any time if the student shall (i) violate a rule or regulation established by the School in connection with course; (ii) fail to advance satisfactorily in the course; or (iii) refuse to take the instruction offered. In the event of cancellation, the School shall refund the unearned portion of the tuition paid, in accordance with the refund schedule in the current catalog.

The School shall have the right to substitute any study or laboratory work in connection with the course when changing conditions in the field of study require such substitution in the School's judgment.

The School shall not be bound by any agreement or representation other than those specified in this contract and the current catalog.

IN WITNESS WHEREOF, I (We) have hereunto set my (our) hand(s) and seal(s) this (Date) day of (Month) (Year)

(Witness) (Name of Student)

(Date) (Parents or Guardian, if Student is a minor)

The (Name of School) herewith agrees to enroll (Name of Student) for the (Name of Course) (Fall or Spring Session) (Day or Evening Class) (Year).

(School Director)]

§ 35.358. Administration of curriculum.

(a) [A real] Real estate [school] education providers shall observe the following standards in the administration of [its] prelicensure and continuing education curriculum:

(1) [No day of the academic year] Instructor-led learning may not exceed 7 1/2 clock hours of instruction per day. For purposes of this section, a clock hour is defined as a 60-minute period comprising 50 minutes of [inspection] instruction and a 10-minute break. A student may not be required to attend class for more than 90 consecutive minutes without a break.

(2) [A correspondence or home study course may be offered to students whom the Commission certifies as being unable to attend classes.

(3) A course shall be assigned one credit for 15 clock hours, two credits for 30 clock hours, three credits for 45 clock hours or, if the course is a combination of Real Estate Fundamentals and Real Estate Practice, four credits for 60 clock hours.

(4)] The substantive content of the course, as evidenced by the course outline, text and other instructional materials, shall adequately reflect the stated purpose of the course, as evidenced by the course title and course description. [If the course purports to offer instruction] Instruction in a Commission[-developed] required course[, the course outline] shall [be substantially the same as] conform to the content or the outline developed by the Commission for the course.

[(5) If copyrighted test materials are to be used in a course that purports to be a review for a Pennsylvania real estate licensing examination, the

school shall obtain permission to use the materials from the Commission and the testing service that administers the examination.

(6) A course shall be graded by written examination, except when a student's handicap or disability would make grading by written examination impractical. In the case of a home study course, at least 50% of the student's grade shall be determined by the proctored written examination.

(7)] (3) Unless [enrolled in a correspondence or home study course] the course is taught by means of distance education, a student shall be physically present during at least 80% of the classroom instruction for a [pre-licensure] prelicensure course and during at least 90% of the classroom instruction for a continuing education course, [in order] to receive [a passing grade] credit. [A sign-in/sign-out attendance roster shall be maintained for each class session.] The provider shall be responsible for verifying student attendance.

[(8) Each class shall be taught via live presentation by the instructor. An instructor's live presentation may be augmented by the use of an audiotape, videotape or other audio/visual aid.]

(4) Courses delivered by distance education, in addition to meeting the content requirements in § 35.384 (relating to qualifying courses), shall be approved by the Association of Real Estate License Law Officials or another certifying body with similar approval standards approved by the Commission.

(b) In addition to the requirements in subsection (a), an education provider shall observe the following standards in the administration of its prelicensure curriculum:

(1) A prelicensure course shall be assigned one credit for every 15 clock hours of instruction.

(2) A prelicensure course shall be graded by written examination, except when a student's handicap or disability would make grading by written examination impractical.

§ 35.359. Course transcripts.

(a) *Prelicensure.* Within 30 days after a course has been taught, a real estate [school] education provider shall provide each student in the course with an official course transcript that contains the information in § 35.360(a)(5) (relating to records) and is signed by the [school] director.

(b) *Continuing education.* Effective with the renewal period commencing June 1, 2004, within 30 days after a continuing education course has ended, the continuing education provider shall provide the Commission with a roster in a format approved by the Commission, listing each licensee who satisfactorily completed/taught the course. Continuing education providers shall be required to issue course transcripts/certificates of instruction to students only upon request.

§ 35.360. Records.

(a) A real estate [school] education provider shall maintain complete and accurate records in the following areas:

(1) *Financial.* The [school's] provider's assets and liabilities and the sources and amounts of its income.

(2) *Physical plant.* For the main location and for each satellite location, the following:

(i) [A detailed floor plan depicting offices, classrooms, restrooms, entrances, halls, doors and windows, including the size and seating capacity of each classroom.

(ii) A certificate of occupancy issued by the Department of Labor and Industry under the act of April 27, 1927 (P. L. 465, No. 299), known as the Fire and Panic Act (35 P. S. §§ 1221—1235) or, if the location is in Philadelphia, Pittsburgh or Scranton, proof that the building being used by the school has been approved for fire safety by that city's Bureau of Fire Inspections.] Copies of documentation showing compliance with applicable building, fire safety and sanitary requirements imposed by state, county or municipal governments.

[(iii)] (ii) A copy of the lease or rental agreement, if the [school] provider does not own the building being used.

(3) *Personnel.* The [point] qualifications of each instructor and the documentary evidence of those qualifications. See § 35.353 (relating to selection of instructors).

(4) *Curriculum.* For each course the [school] provider has offered, the following:

* * * * *

(5) *Scholastic.* An academic transcript for each student [that includes the following information for each course taken by the student] which shall contain:

(i) The [school] provider's name and Commission approval number.

* * * * *

(v) [The semester in which the course was taught.

(vi)] The date that the student completed the course.

[(vii)] (vi) * * *

[(viii)] The number of sessions that the student was present and the number that he was absent, except for a home study course.]

[(ix)] (vii) The student's final grade in the course, if an examination is required for the course.

[(x)] (viii) * * *

[(xi)] (ix) * * *

[(xii)] The fact that the course will be accepted by the Commission towards fulfillment of the education requirement for either the real estate broker's examination or real estate salesperson's examination, as the case may be.]

(6) *Attendance.* [A daily attendance record for each student.]

(b) [A school] An education provider shall store its records at its main location. Upon termination of operations, a [school] provider shall transfer its records to the designated custodian of records. The

[school] provider shall notify the Commission whenever it changes the custodian of records.

(c) [A school] An education provider shall produce its records for examination by the Commission or its representatives upon written request or pursuant to an inspection under § 35.362 (relating to inspection of [school] education providers).

(d) [A school] An education provider shall make copies of a student's scholastic and attendance records available to the student upon request.

(e) [A school] An education provider shall retain attendance and scholastic records [pertaining to continuing] as follows:

(1) Continuing education records shall be maintained for 4 years [and all].

(2) All other [attendance and scholastic] records shall be retained for 10 years.

§ 35.361. Display of documents and approved name.

(a) A real estate [school's] education provider's certificate of approval shall be displayed prominently at the [school's] provider's main location. A copy of the certificate shall be displayed prominently at each satellite location.

(b) [A school's] An education provider's approved name shall be displayed prominently [outside] at each [school] location where courses are taught.

(c) The [school director's] education provider's letter of approval shall be displayed prominently at the [school's] provider's main location. A copy of the letter shall be displayed prominently at each satellite location.

(d) [An alphabetical list of all courses currently offered by the school, together with their instructors, shall be displayed prominently at each school location.

(e)] An alphabetical list of the [school's] education provider's satellite locations shall be displayed prominently at the [school's] provider's main location.

§ 35.362. [Inspection of school] Inspections.

(a) *Routine inspections.* No more than [4] four times a year while classes are in session, the Commission or its authorized representatives may conduct a routine inspection of the main location or satellite location of a real estate [school] education provider for the purpose of determining whether the [school] provider is in compliance with §§ 35.351—35.363 (relating to administration of [schools] education providers).

(b) *Special inspections.* In addition to the routine inspections authorized by subsection (a), the Commission or its authorized representatives may conduct a special inspection of [a school's] an education provider's main location or satellite location:

(1) Upon a complaint or reasonable belief that the [school] provider is not in compliance with §§ 35.351—35.363.

(2) As a follow-up to a previous inspection that revealed the [school's] provider's noncompliance with §§ 35.351—35.363.

(c) *Scope of inspection.* Prior to the start of a routine or special inspection, the Commission or its authorized representatives will advise the [school owner] education provider, [school] director or other person in charge at the time of the inspection that the inspection is being made under this section and is limited in scope by this section.

(d) During the course of a routine or special inspection or investigation, the Commission or its authorized representatives will be permitted to:

- (1) Examine [school] provider records.
- (2) Inspect all areas of the [school] provider's premises.

* * * * *

(4) Interview the [school owner] provider, [school] director and other administrative personnel, instructors and students.

§ 35.363. Termination of operations.

A real estate [school] education provider that desires to terminate operations shall submit to the Commission, within 60 days of the planned termination, a termination plan that includes the following:

* * * * *

(2) The date that [school] provider records will be transferred to the designated records custodian.

* * * * *

Subchapter H. CONTINUING EDUCATION

§ 35.381. [Purposes and goals] (Reserved).

[The purposes and goals of continuing education are to provide an education program through which a licensee may obtain the knowledge and skills to:

- (1) Maintain and Increase competency to engage in licensed real estate activities.
- (2) Keep a licensee abreast of changes in laws, regulations, practices and procedures that affect the real estate business.
- (3) Better ensure that the public is protected from incompetent practice by licensees.]

§ 35.382. Requirement.

(a) *Condition precedent to renewal of current license.* [Beginning with the 1994-1996 biennial license period and continuing with each biennial license period thereafter, a] A broker or salesperson who desires to renew a current license shall, as a condition precedent to renewal, complete 14 hours of Commission-approved continuing education during the preceding license period. **The continuing education shall be completed by the May 31 renewal deadline.**

(b) *Condition precedent to reactivation and renewal of noncurrent license.* [Effective March 1, 1994, a] A broker or salesperson who desires to reactivate and renew a noncurrent license shall, as a condition precedent to reactivation and renewal, complete 14 hours of Commission-approved continuing education during the 2-year period preceding the date of submission of the reactivation application. A broker or salesperson may not use the same continuing education coursework to satisfy the requirements of this subsection and subsection (a).

* * * * *

(d) Documentation. A licensee shall provide the Commission with information necessary to establish the licensee's compliance with this subchapter.

§ 35.383. Waiver of continuing education requirement.

(a) The Commission may waive all or part of the continuing education requirement of § 35.382 (relating to requirement) upon proof that the licensee seeking the waiver is unable to fulfill the requirement because of illness, emergency or hardship. [Subsections (b)—(d)] The following are examples of situations in which hardship waivers will be granted [. Hardship waivers will be granted in other situations for good cause shown.]:

[(b)] (1) * * *

[(c)] (2) * * *

[(d)] (3) A licensee who is a qualified continuing education instructor will be deemed eligible [, on the basis of hardship,] for the waiver of 1 hour of continuing education for each hour of actual classroom instruction in an approved continuing education topic [that the instructor is qualified to teach]. Duplicate hours of instruction in the same topic during the same biennial license period will not be considered for waiver purposes.

(b) Requests to waive the continuing education requirement shall be filed with the Commission on or before March 31 of the renewal year unless the applicant proves to the satisfaction of the Commission that it was impracticable to do so.

§ 35.384. Qualifying courses [; required and elective topics].

(a) [*Qualifying courses.* A] Except as provided in subsection (b), a licensee [may satisfy the continuing education requirement by doing one of the following:] shall complete 14 hours of continuing education in acceptable topics in a minimum of 3 1/2-hour increments.

[(1) Completing a 14-hour continuing education course comprising 5-to-8 hours in required topics and 6-to-9 hours in elective topics.

(2) Completing a 5-to-8 hour continuing education course in required topics and one of the following courses:

(i) A 6-to-9 hour continuing education course in elective topics.

(ii) A course approved by the Commission for broker licensure if 6-to-9 hours are in elective topics.]

(b) [*Required topics.* A minimum of 5 and a maximum of 8 hours shall be in required topics. A minimum of 2 hours shall be in the act and this chapter and a minimum of 3 hours shall be in fair housing laws and practices.] The Commission may, for a given biennial license period and with adequate notice to licensees, require [up to 3 hours] that all or part of the 14 hours be completed in [a topic that address a critical issue of current relevance to licensees] required topics.

(c) [*Elective topics.* The balance of the 14 hours shall be in elective topics that have significant intellectual and practical content to increase the competency of licensees. A minimum of 2 hours shall be in each elective topic. The elective topics may address either real estate specialties or matters of general interest to licensees.

(1)] Acceptable [**elective**] topics include:

[(i)] (1) * * *

[(ii) New laws] (2) Laws affecting real estate.

[(iii)] (3) Real estate financing and mathematics.

[(iv)] (4) * * *

[(v)] (5) * * *

[(vi)] (6) * * *

[(vii)] (7) * * *

[(viii)] (8) * * *

[(ix)] (9) * * *

[(x)] (10) * * *

[(xi)] (11) * * *

[(xii)] (12) * * *

[(xiii)] (13) * * *

[(xiv)] (14) * * *

[(xv)] (15) * * *

[(xvi)] (16) * * *

[(xvii)] (17) * * *

(18) Real estate investment analysis.

(19) Management of real estate brokerage operations.

(20) Property development.

(21) Real estate securities and syndication.

(22) Real property exchange.

(23) Broker courses encompassing supervisory duties and standards of conduct and practice contained in Subchapter E (relating to standards of conduct and practice).

(24) Marketing promotion and advertising of real estate inventory.

(25) Use of technology in delivering real estate services.

[(2)] (d) Unacceptable elective topics include:

[(i) Mechanical] mechanical office and business skills; for example, typing, speed writing, preparation of advertising copy, development of sales promotional devices, word processing, calculator and computer operation[.

(ii) Office] and office management and related internal operations procedures that do not have a bearing on the public interest.

[(iii) Real estate mathematics.]

§ 35.385. [**Approved continuing**] Continuing education providers.

The following providers [**are approved to**] may offer instruction for continuing education:

* * * * *

(2) A real estate [**school**] education provider in this Commonwealth approved by the Commission.

(3) A real estate [**school**] education provider outside this Commonwealth that has been approved by the real estate licensing authority of the jurisdiction where the [**school**] provider is located.

[(4) A real estate industry organization outside this Commonwealth, if the Commission has given its prior approval to the industry organization's continuing education curriculum.]

§ 35.386. [**Course content outlines and course titles**] (Reserved).

[(a) *Course outlines.* The Commission will develop content outlines for the required continuing education topics and make them available to continuing education providers within a reasonable time prior to the biennial license period during which the required topics are taught. Each continuing education provider is responsible for developing content outlines for the elective continuing education topics.

(b) *Course titles.* The Commission will specify the titles for continuing education courses authorized under § 35.384(a)(1) and (2)(i) (relating to qualifying courses; required and elective topics).]

§ 35.387. [**Administration of curriculum**] (Reserved).

[A continuing education provider shall comply with the requirements of § 35.358 (relating to administration of curriculum) except for paragraphs (3), (5) and (6).]

§ 35.388. [**Facilities**] (Reserved).

[A continuing education course shall be taught at a facility that conforms to § 35.352(b) (relating to location and facilities).]

§ 35.389. [**Instructors**] (Reserved).

[A continuing education course shall be taught by an instructor who meets the requirements of § 35.353 (relating to selection of instructors).]

§ 35.390. [**Advertising, solicitation and promotion**] (Reserved).

[A continuing education provider shall comply with the requirements in §§ 35.354 and 35.355 (relating to prohibited forms of advertising and solicitation; and prospectus materials).]

§ 35.391. [**Course transcripts and certificates of instruction**] (Reserved).

[(a) Within 30 days after a continuing education course has ended, the continuing education provider shall issue a course transcript to each licensee who satisfactorily completed the course and a certificate of instruction to the course instructor if

the instructor is also a licensee. The course transcript and certificate of instruction shall contain, to the extent applicable, the information in § 35.360(a)(5) (relating to records), as well as the licensee's license numbers.

(b) A continuing education provider shall retain attendance rosters, course transcripts and certificates of instruction for 4 years and shall issue a duplicate transcript or certificate to the licensee or the Commission upon request.

(c) A licensee shall provide the Commission with information necessary to establish the licensee's compliance with this subchapter.]

§ 35.392. [Investigations and inspections] (Reserved).

[(a) *Investigations.* Continuing education providers and licensees shall cooperate with investigations conducted by the Commission or its authorized representatives to ensure compliance with this subchapter.

(b) *Routine and special inspections.* No more than 4 times a year while classes are in session, the Commission or its authorized representatives may conduct a routine inspection of the facilities of a continuing education provider for the purpose of determining whether the provider or a licensee is in compliance with this subchapter. In addition to the routine inspections, the Commission or its authorized representatives may conduct a special in-

spection of the facilities of a provider upon a complaint or reasonable belief that the provider is not in compliance with this subchapter or as a follow-up to a previous inspection that revealed the provider's noncompliance with this subchapter.

(c) *Scope of inspection.* Prior to the start of a routine or special inspection, the Commission or its authorized representatives will advise the person in charge at the time of the inspection that the inspection is being made under this section and is limited in scope by this section. During the course of a routine or special inspection, the Commission or its authorized representatives will be permitted to:

- (1) Examine continuing education records.
- (2) Inspect all areas of the facility where continuing education courses are taught.
- (3) Monitor the performance of continuing education instructors in classrooms.
- (4) Interview the director of the continuing education program, the instructors and the students.

(d) *Combined inspections.* The Commission or its authorized representatives may combine an inspection under this section with an inspection under § 35.362 (relating to inspection of school).]

[Pa.B. Doc. No. 03-1792. Filed for public inspection September 12, 2003, 9:00 a.m.]