RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CHS. 121, 129 AND 145]

Small Sources of NO_x, Cement Kilns and Large Internal Combustion Engines

The Environmental Quality Board (Board) by this order amends Chapters 121, 129 and 145 (relating to general provisions; standards for sources; and interstate pollution transport reduction). The amendments establish ozone season nitrogen oxide (NO_x) emission limits for certain boilers, turbines and stationary internal combustion units that are small sources of NO_x in the Counties of Bucks, Chester, Delaware, Montgomery and Philadelphia. This final-form rulemaking also establishes ozone season NO_x emission limits for large stationary internal combustion engines and Portland cement kilns across this Commonwealth.

This order was adopted by the Board at its meeting of August 17, 2004.

A. *Effective Date*

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

B. *Contact Persons*

For further information contact J. Wick Havens, Chief, Division of Air Resource Management, Bureau of Air Quality, P. O. Box 8468, Rachel Carson State Office Building, Harrisburg, PA 17105-8468, (717) 787-9495; or Kristen M. Campfield, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available electronically through the Department of Environmental Protection's (Department) website at www.dep.state.pa.us.

C. *Statutory Authority*

This final-form rulemaking is being made under the authority of section 5 of the Air Pollution Control Act (APCA) (35 P. S. § 4005), which grants the Board the authority to adopt regulations for the prevention, control, reduction and abatement of air pollution.

D. *Background of the Amendments*

When ground-level ozone is present in concentrations in excess of the Federal health-based standards, public health is adversely affected. The Environmental Protection Agency (EPA) has concluded that there is an association between ambient ozone concentrations and increased hospital admissions for respiratory ailments, such as asthma. Further, although children, the elderly and those with respiratory problems are most at risk, even healthy individuals may experience increased respiratory ailments and other symptoms when they are exposed to ambient ozone while engaged in activity that involves physical exertion. Though these symptoms are often temporary, repeated exposure could result in permanent lung damage. The implementation of additional measures to address ozone air quality nonattainment in this Commonwealth is necessary to protect the public health.

The purpose of this final-form rulemaking is to reduce emissions of NO_x, so as to reduce levels of ground-level ozone. Ground-level ozone is not directly emitted by pollution sources, but is created as a result of the chemical reaction of NO_x and volatile organic compounds (VOC), in the presence of light and heat. The reduction of NO_x will also help protect the public health from high levels of fine particulates, of which NO_x is a precursor component. Fine particulates, as well as ozone, are health hazards. The reduction of NO_x also reduces visibility impairment and acid deposition. This final rulemaking is part of the Commonwealth's specific action plan and is part of a regional effort among the states in the Ozone Transport Region (OTR) to reduce transported ozone. The final-form regulation is necessary to satisfy the Commonwealth's commitments under the EPA-approved state implementation plan for the five-county Southeast Pennsylvania area (Philadelphia State Implementation Plan (SIP)) and establishes emission reductions that are integral to maintaining the EPA's approval of the attainment demonstration contained in the Philadelphia SIP. Full implementation of the reductions is required by May 1, 2005.

The amendments to Chapters 121 and 129 establish ozone season (May 1 through September 30) emission limits for NO_x from certain existing and new boilers, turbines and stationary internal combustion engines located at industrial, utility and commercial sites in the Counties of Bucks, Chester, Delaware, Montgomery and Philadelphia. These counties are in a severe nonattainment area for ozone. The amendments require the emission limits to be implemented by May 1, 2005. The amendments to Chapters 121 and 129 do not affect large sources that are regulated under Chapter 145. This final-form rulemaking is based on model rules developed by the Ozone Transport Commission (OTC), which was created to address ozone problems in the OTR. The Commonwealth is a member of the OTC. The final-form rulemaking is also consistent with the recommendations of the Southeast Pennsylvania Ozone Stakeholders Working Group.

In 1998, the EPA published its requirement that 22 eastern states and the District of Columbia submit revised SIPs (NO_x SIP Call) prohibiting those amounts of NO_x emissions that significantly contribute to ozone attainment problems in downwind states. In 2000, the Commonwealth promulgated Chapter 145, Subchapter A (relating to NO_x budget trading program), which contains the NO_x cap and trade program for fossil fuel-fired combustion units and electric generating units, to satisfy the first phase of the NO_x SIP Call. Subchapter A was published and adopted at 30 Pa.B. 4899 (September 30, 2000) and was approved by the EPA as a SIP revision on August 21, 2001 (66 FR 43795). In this final rulemaking, Chapter 145, Subchapters B and C (relating to emission of NO_x from stationary internal combustion engines; and emissions of NO_x from cement manufacturing) are needed to satisfy the Commonwealth's remaining obligation under the NO_x SIP Call.

Subchapters B and C in the final-form rulemaking establish ozone season emission requirements for NO_x from large stationary internal combustion engines that emitted or emit more than 153 tons of NO_x per ozone

season in 1995 or any ozone season thereafter, and from Portland cement kilns. Revisions pertaining to large stationary internal combustion engines and cement kilns were originally part of the 2000 proposal, but final action was deferred on them. The final-form rulemaking reflects further revisions made in response to comments received on the previous proposal and the current final rulemaking, and is based on EPA emission limits and control technologies published April 21, 2004 (69 FR 21604), and October 21, 1998 (63 FR 56394) (proposed).

Subchapter B will impact owners and operators of an estimated 14 large stationary internal combustion engines owned by four companies and institutions. Subchapter C will impact the owners and operators of cement kilns. There are presently 21 kilns in operation across the Commonwealth.

This final rulemaking also represents the Commonwealth's continuing commitment to do its fair share in reducing ozone transport both within this Commonwealth and throughout the northeast.

The Department worked with the Air Quality Technical Advisory Committee (AQTAC) in the development of this final rulemaking. The Department presented drafts of the final-form regulation to AQTAC on July 24, 2003, September 25, 2003, November 20, 2003, and February 27, 2004. The Department made numerous amendments to the final-form regulation in response to comments from AQTAC. At its April 27, 2004 meeting, AQTAC members expressed concern about the compliance deadline in the final-form rulemaking. The committee recommended that the Department present the final-form regulation to the Environmental Quality Board for adoption.

E. *Summary of Regulatory Requirements and Major Changes to the Proposed Rulemaking*

This final-form rulemaking adds definitions of "MWH," "ppmvd," "stationary internal combustion engine," "tradable renewable certificate" and "tradable renewable certificate issuing body" to § 121.1 (relating to definitions).

The final amendments to Chapter 129 apply during the ozone season (May 1 to September 30) to existing and new small sources of NO_x located in Bucks, Chester, Delaware, Montgomery or Philadelphia County (the five-county Philadelphia area). The final amendments establish methods for determining NO_x "allowable emissions" for certain boilers, stationary combustion turbines and stationary internal combustion engines located at industrial, utility and commercial sites in §§ 129.201—129.203 (relating to boilers; stationary combustion turbines; and stationary internal combustion engines). The owner or operator of a unit covered by these sections must calculate the difference between NO_x allowable emissions and NO_x actual emissions under § 129.204 (relating to emission accountability). Some boilers and turbines may demonstrate compliance through the opt-in provisions of §§ 145.80—145.88 (relating to opt-in process).

Section 129.204 establishes methods for calculating NO_x "actual emissions" for the units covered by §§ 129.201—129.203. Excess allowable emissions at a facility may be used to offset actual emissions at the owner or operator's other subject facilities in the five-county Philadelphia area. Section 129.204 requires surrender of NO_x allowances for actual emissions that exceed allowable emissions. Section 129.204 establishes a three-to-one NO_x allowance surrender requirement for failure to surrender NO_x allowances in accordance with this section.

Section 129.205 (relating to zero emission renewable energy production credit) authorizes NO_x credit in exchange for zero emission renewable energy production. Among other requirements, the zero emission renewable energy production must be certified in a tradable renewable certificate and generated in the five-county Philadelphia area.

Amended § 145.42 (relating to NO_x allowance allocations) provides that for each ton of NO_x deducted under § 129.205, the Department will retire one NO_x allowance from the new source set-aside governed by § 145.42(d).

New Subchapter B of Chapter 145 establishes allowable emissions for three categories of large existing and new stationary internal combustion engines listed in § 145.111 (relating to applicability). Section 145.112 (relating to definitions) defines terms that are used in Subchapter B: "CEMS—Continuous Emission Monitoring System," "diesel stationary internal combustion engine," "dual-fuel stationary internal combustion engine," "engine rating," "lean-burn stationary internal combustion engine," "rich-burn stationary internal combustion engine," "stationary internal combustion engine," "stoichiometric air/fuel ratio" and "unit." Section 145.113 (relating to standard requirements) establishes methods for calculating NO_x allowable and actual emissions. Section 145.113 requires surrender of NO_x allowances for actual emissions that exceed allowable emissions. Excess allowable emissions at a facility may be used to offset actual emissions at the owner or operator's other subject facilities in this Commonwealth. Section 145.113 establishes a three-to-one NO_x allowance surrender requirement for failure to surrender NO_x allowances in accordance with this section.

New Subchapter C of Chapter 145 applies to existing and new Portland cement kilns. See § 145.141 (relating to applicability). Section 145.142 (relating to definitions) defines the following terms for the purposes of this subchapter: "CEMS—Continuous Emission Monitoring System," "clinker," "Portland cement" and "Portland cement kiln." Section 145.143 (relating to standard requirements) establishes methods for calculating allowable and actual emissions. It requires surrender of NO_x allowances for actual emissions that exceed allowable emissions. Excess allowable emissions at a facility may be used to offset actual emissions at the owner or operator's other subject facilities in this Commmonwealth. Section 145.143 establishes a three-to-one NO_x allowance surrender requirement for failure to surrender NO_x allowances in accordance with this section.

The major changes that were made to the proposed rulemaking include the following: the proposed definitions of "emergency stationary internal combustion engine" and "fire-fighting stationary internal combustion engine" in § 121.1 are not included in the final-form regulation; the emission limits have been standardized in §§ 129.201—129.203, 145.113 and 145.143; the allowable emission rate of 1.5 grams per brake horsepower-hour in § 129.203 was changed to 3.0 grams to align it with the allowable rate for the same class of engines affected by the final-form regulation under § 145.113; the need to submit written requests for averaging has been eliminated from §§ 129.201—129.203 and 145.114; §§ 129.201—129.203 do not apply to Naval marine combustion units operated by the United States Navy for the purpose of testing and operational training; § 129.201 clarifies that it does not apply to units that combust municipal waste at a facility that is permitted as a resource recovery facility under Article VIII (relating to municipal waste) of the Department's regulations; NO_x emissions from stationary internal combustion engines that are or were replaced by an electric motor may be counted as allowable emissions

under §§ 129.203 and 129.204; § 129.204 has been added; §§ 129.204, 145.113 and 145.143 authorize compliance with NO_x emission limits in this final-form rulemaking through emission averaging or NO_x allowance surrender; emissions from fire-fighting turbines, fire-fighting stationary internal combustion engines, emergency gas turbines and emergency stationary internal combustion engines are not exempt from calculation of actual emissions under § 129.204; NO_x emission monitoring options are included in § 129.204; a zero emission renewable energy production credit provision has been added in § 129.205 and a corresponding reduction of NO_x allowances from the new source set-aside is included in amended § 145.42; § 145.113 allows for maintenance of records offsite and requires the owner or operator of a facility to provide records to the Department upon request; proposed §§ 145.114 and 145.115 (relating to compliance determination; reporting, monitoring and recordkeeping) have been deleted; additional NO_x emission monitoring options have been added to § 145.113; the proposed definitions of "low NO_x burner" and "mid-kiln firing" in § 145.142 have been deleted; the proposed control technologies in § 145.143 have been deleted; and proposed § 145.144 (relating to reporting, monitoring and recordkeeping) has been deleted.

The final-form rulemaking will be submitted to the EPA as an amendment to the SIP.

F. *Summary of Comments and Responses on the Proposed Rulemaking and Draft Final-Form Rulemaking*

The Board held three public hearings in Harrisburg, Pittsburgh and Conshohocken on November 18, 20 and 25, 2002, respectively during the 69-day comment period on the proposed rulemaking. (32 Pa.B. 5178 (October 19, 2002)). Comments were received from 31 commentators. As a result of those comments and input from AQTAC, the Department published an advance notice of final rulemaking (ANFR) in the *Pennsylvania Bulletin* for additional comment. (33 Pa.B. 6226 (December 20, 2003)). The Department had a 30-day public comment period on that draft final-form rulemaking which closed on January 19, 2004. Comments were received from 24 commentators.

Summary of Public Comments on the Proposed Rulemaking

Program Design—Averaging and Allowance Trading

Two commentators opposed allowing the use of both allowance trading and averaging to meet the emission limitations because of their concern that local adverse health effects may result. The Department disagrees that averaging and allowance trading will result in localized adverse health impacts because most of the averaging from multiple units is expected to occur at individual facilities. The expanded averaging program will achieve acceptable levels of emission reductions while minimizing compliance costs. This final-form rulemaking allows the use of allowances to demonstrate compliance and allows averaging within a facility and across facilities under common control.

One commentator opposed allowing source operators to achieve compliance through the use of allowances. The commentator was concerned that the surrender of allowances as a compliance option could allow emission increases to occur in the nonattainment area and said they should not be an option. The Department does not believe that the use of allowances will result in increased emissions in the area. Although owners or operators of some facilities may use allowances to avoid the installation of controls or implementation of other emission reduction measures, the Department anticipates that the program will result in the level of emission reductions necessary to satisfy the Commonwealth's obligations. These obligations are to achieve the emission reductions and budgets established by the NO_x SIP Call that are also integral to maintaining the EPA's approval of the 1-hour ozone attainment demonstration contained in the Philadelphia SIP. The final-form rulemaking allows the use of allowances to demonstrate compliance and allows averaging across facilities under common control.

One commentator strongly supported the opportunity for the use of averaging as a compliance option. The commentator suggested that the provisions should specify that averaging can extend over the entire ozone season, across facilities within the five-county Southeast Pennsylvania ozone nonattainment area, and at most be limited to a 30-day rolling average. The final-form rulemaking provides for the use of averaging throughout the ozone season and across facilities under common control. The final-form rulemaking does not contain provisions limiting averaging to a 30-day rolling average.

One commentator suggested that the final-form rulemaking should allow averaging between all classes of small affected sources—boilers, turbines, and engines in the nonattainment area. The final-form rulemaking does allow averaging between all classes of affected sources and among facilities under common control.

One commentator suggested that, inasmuch as decisions regarding what constitutes an acceptable averaging proposal affect industry and competitiveness, definitive standards need to be established in the final-form rulemaking. The commentator asked about the averaging time period, calculation methodologies, types of sources that may average together, ownership of sources allowed to average, and the geographical extent of the averaging area. The commentator stated that the proposed rulemaking concerning averaging lacked clarity and could have been applied inconsistently. In this regard, the commentator stated that the final-form rulemaking should specify the particular conditions and calculations for averaging emissions from multiple sources, define the review process, including appeal provisions and the opportunity for the applicant to make changes, and include time frames and deadlines related to Department determinations on averaging plans.

The final-form rulemaking addresses the commentator's issues regarding averaging. The requirement for source owners or operators to submit an averaging plan for approval prior to averaging has been deleted. The final-form rulemaking includes requirements related to the conditions and calculations required to demonstrate compliance based on an emissions average. Sections 129.201(b), 129.202(b), 129.203(b) and 145.143(d) of the final-form rulemaking specify the averaging period. Section 129.204(d) allows owners or operators of units subject to §§ 129.201—129.203 to average among the units at a facility throughout the ozone season and to average with other facilities subject to these provisions under their common ownership or operation within the five-county Southeast Pennsylvania ozone nonattainment area. Sections 145.113(e) and 145.143(e) contain similar provisions for large internal combustion engines and cement kilns, respectively, with a statewide geographic area. Ownership and the disposition of averaging credit is determined by the legal agreements and decisions made between owners. A similar type of issue has been successfully resolved by owners of units subject to acid rain

requirements, and the same principles apply here. As long as the credit is not double-counted, the owners or operators may distribute and utilize it as provided for in the final-form rulemaking. Since the requirement for an owner or operator to submit an averaging plan has been deleted from the final-form rulemaking, there is no need to define time frames for action and appeal procedures.

The same commentator questioned why the Board did not include an option for sources to comply by purchasing allowances. The final-form rulemaking contains this option.

One commentator stated that averaging and trading provide more flexibility and thereby enhance economic development without harming air quality. The commentator stated that they should be extended to Chapter 145 sources as well. The Chapter 145 provisions in the final-form rulemaking allow the use of averaging and the use of allowances to achieve compliance.

One commentator stated that the averaging provisions in §§ 129.201—129.203 imply that the Department will approve all proposals. The commentator suggested that if discretion is intended, the language should be changed to clarify that that is the case. The Department has deleted from the final-form rulemaking the provisions that require prior approval of averaging plans.

One commentator supported the provisions that allow a source owner or operator to use averaging to achieve compliance. The commentator said that the provisions allowing averaging should be retained and the Department should provide specific averaging guidance and acceptable means of demonstrating compliance. The Department responds that the final-form rulemaking specifies that a source owner or operator is to aggregate all of the allowable and all of the actual emissions from the affected units. The owner or operator then determines whether there are greater actual or allowable emissions. If the calculated allowable emissions exceed the actual emissions, the source is in compliance. If the actual emissions exceed the allowable emissions by greater than 0.50 ton, the owner or operator must obtain and surrender to the Department allowances equal to the excess actual emissions.

Two commentators suggested that all "alternative procedures" should be approved by the Department in writing and be transparent to the public. The commentators said that all records must be accessible and NO_x reductions claimed must be measurable, verifiable, permanent and enforceable. The Department deleted the "alternative procedures" provisions from the final-form rulemaking. Affected unit owners and operators, the Department, and the public can easily and readily determine compliance.

One commentator supported the Board's flexible "cap and trade" approach to achieving NO_x reductions in the Philadelphia area. The commentator said that it would provide effective, targeted reductions at the least possible cost. The requirements in the final-form rulemaking provide flexibility for owners and operators of affected sources by allowing limited averaging and the simultaneous use of allowances to demonstrate compliance. The final-form rulemaking is not a "cap and trade" regulation.

Program Design—Cost and Form of Emission Limits

One commentator stated that the Board should provide a detailed compliance cost analysis for each class of unit the rule affects and justify why control of these sources is the most cost effective alternative to achieve the National Ambient Air Quality Standards (NAAQS). The Department responds that the regulatory analysis form provides the Board's cost-benefit analysis and identifies the source of the cost data. Both the EPA and the Southeast Pennsylvania Ozone Stakeholder Working Group estimates were used. The Southeast Pennsylvania Ozone Stakeholder Working Group recommended these classes of sources for consideration for additional emission reductions. The classes of units covered by this final-form rulemaking are those which have high potential emission rates and which are generally controllable in a cost effective manner. Because the final-form rulemaking offers flexibility for sources to demonstrate compliance through the surrender of allowances and averaging and because of the diversity of sources covered by the this final-form rulemaking, precise estimation of the compliance costs is difficult. The flexibility for demonstrating compliance allows source owners and operators to implement the most cost effective compliance program for their operations.

One commentator stated that, historically, sources have frequently overstated the costs and technical difficulty of implementing new requirements. The commentator felt that, upon implementation, it is often found that more easily applied and less expensive solutions are identified. In the final-form rulemaking, the Department has included the compliance options of emissions averaging and allowance purchase to assure that the compliance costs and technical difficulty are minimized. These options allow owners and operators to implement cost-effective compliance programs.

Two commentators stated that the alternative compliance option that allows percentage reductions from 1990 levels creates the possibility that the rule will not achieve the target level of reductions. They suggested that this would occur as a result of age related deterioration bringing unit emission rates significantly higher than they were in 1990. In addition, they suggested that the measurement techniques used in 1990 were not necessarily very accurate. The commentators felt that well-controlled units would essentially be penalized by this option since they would have to make more reductions than dirtier units. For these reasons, the commentators said that more recent data should be used as the basis for making the reductions. The Department has removed this option from the final-form rulemaking.

One commentator said that the 1990 base year emission rate for determining the alternative reduction should also include the 1995 base year used to establish the NO_x Budget Program since 1990 may not be representative of normal operations and controlling to these levels will be more costly. The Department responds that the final-form rulemaking specifies straightforward emission limits for affected classes of sources. Requirements related to specification of base year emission are not necessary.

One commentator stated that given that large sources control on an ozone season basis, it is appropriate that small sources have the flexibility to do so as well. The commentator stated that this would still provide ozone season improvements. The Department agrees. The final-form rulemaking requires that sources affected by these regulations demonstrate compliance on an ozone season basis.

The same commentator stated that the rule as proposed will impose a relatively larger compliance cost on smaller NO_x sources than larger ones. The commentator stated that small sources cannot affordably "opt-in" to the NO_x Budget Program and that, therefore, the Department should allow them to purchase allowances from sources located in the nonattainment area as a compliance alter-

native. The final-form rulemaking authorizes the purchase of allowances as a compliance alternative.

Program Design—Area of Applicability

One commentator suggested that different control requirements are appropriate in attainment and nonattainment areas. The commentator stated that stricter controls are needed to attain the ozone standards in nonattainment areas but that the stricter standards would be an unnecessary burden if imposed in the attainment areas. The final-form rulemaking applies only to sources in the five-county Philadelphia ozone nonattainment area for small sources of NO_x.

Two commentators stated that the Chapter 129 requirements for the five-county Philadelphia area are reasonable and should apply Statewide. They said that Statewide application recognizes that NO_x transports over hundreds of miles. They said that the requirements should apply over the entire Ozone Transport Region (OTR). These commentators also pointed out that NO_x contributes year round to other air pollution problems in addition to ozone, including fine particulate, acid deposition, and visibility impairment. They suggested that the requirements should be enacted for no other reason than that the benefits outweigh the costs. The Department responds that the Chapter 129 provisions of the final-form rulemaking apply only to the five-county Southeast Pennsylvania ozone nonattainment area. The Department recognizes the adverse impacts of NO_x. In addition to being an ozone precursor, NO_x contributes to fine particulate, acid deposition and visibility impairment. However, the focus of the Chapter 129 portion of this rulemaking is to satisfy the Commonwealth's commitments under the EPA-approved state implementation plan for the five-county Southeast Pennsylvania area (Philadelphia SIP) and to establish emission reductions that are integral to maintaining the EPA's approval of the attainment demonstration contained in the Philadelphia SIP. Full implementation of the reductions is required by May 1, 2005.

Additional NO_x reductions may be necessary as part of the Commonwealth's initiatives to address the 8-hour ozone and PM 2.5 standards. This final-form rulemaking is based on an OTC model rule that serves as the basis for NO_x reductions, as needed, throughout the OTR.

One commentator asked how application of these standards Statewide and for the entire year would bring the Commonwealth into compliance for the ozone months. The Department responds that the final-form Chapter 129 regulations are limited to the five-county Philadelphia nonattainment area. The Chapter 145 final-form regulations are required Statewide to complete the Department's obligations under the NO_x SIP Call and to maintain the EPA's approval of the 1-hour ozone attainment demonstration contained in the Philadelphia SIP. Both chapters address ozone season emissions.

One commentator stated that the Chapter 129 rules are necessary to target local ozone attainment issues. The commentator said that Statewide, sizable reductions have been achieved: larger sources have existing controls under Chapter 145, and smaller sources are controlled under RACT. The Department responds that the Chapter 129 final-form rulemaking is designed to achieve NO_x emission reductions to address ozone nonattainment in the five-county Southeast Pennsylvania ozone nonattainment area. The Chapter 145 final-form regulations are required to complete the Department's obligations under the NO_x SIP Call and to maintain the EPA's approval of the 1-hour ozone attainment demonstration contained in the Philadelphia SIP.

Two commentators thought that extending the Chapter 129 requirements Statewide would exceed the Department's authority under the APCA because the reductions would not be useful toward attainment of the ozone air quality standard. The commentators said that the Department studied only the effects of reductions in the five-county Southeast Pennsylvania ozone nonattainment area in formulating this regulatory initiative. The commentators added that the small amount of reductions that this would achieve would not be beneficial. The final-form Chapter 129 regulations apply only to the five-county Southeast Pennsylvania ozone nonattainment area.

One commentator suggested that the SIP Call or Chapter 145 requirements should not be promulgated until upwind states impose similar regulations; otherwise, new sources will locate upwind and adversely impact Southwest Pennsylvania's air quality and economy. The Department responds that upwind states are also under the legal obligation to implement the NO_x SIP Call. The final-form rulemaking is necessary to satisfy the Commonwealth's commitments under the EPA-approved state implementation plan for the five-county Southeast Pennsylvania area (Philadelphia SIP) and establishes emission reductions that are integral to maintaining the EPA's approval of the attainment demonstration contained in the Philadelphia SIP. Full implementation of the reductions is required by May 1, 2005.

Program Design—Seasonal vs. Year-Round Limits

Several commentators suggested that year-round controls would not be necessary to achieve the stated purpose of the final-form rulemaking. Two commentators thought that year-round control would violate the APCA and would not provide ozone season benefits. Another commentator suggested that expanding this rulemaking to apply for the entire year is outside the stated purpose for this rulemaking. Another commentator thought that the final-form rulemaking should apply only during the ozone season because sources upwind of the five-county Southeast Pennsylvania ozone nonattainment area may impact the area and the additional emissions restrictions may represent a competitive disadvantage. Another commentator thought that annual requirements should not apply until it is shown that this is required to meet the 8-hour ozone standard. The final-form rulemaking addresses ozone season emissions.

Program Design—Timing and General Issues

One commentator said that 3 years are needed to plan and implement control strategies and suggested that the compliance date should be extended to provide this amount of time to comply with the control requirements. The final-form rulemaking provides a number of compliance options in addition to the option of implementing control programs. Because owners and operators of affected sources have the flexibility to average and use NO_x allowances, there is no need to extend the compliance deadline.

One commentator asked the Board to explain why the May 1, 2005 deadline is reasonable, feasible and necessary. The deadline is necessary to assure that the reductions occur to help ensure that the five-county Southeast Pennsylvania ozone nonattainment area achieves and maintains the 1-hour ozone standard by November 15, 2005, the attainment deadline in the Clean Air Act. The final-form rulemaking includes provisions that allow the use of averaging and allowances to demonstrate compliance. Implementation of these alternatives does not require long lead-time.

One commentator stated that the proposed NO_x reductions are vital remaining strategies for ozone attainment and public health. The Department agrees. The final-form rulemaking is necessary to satisfy the Commonwealth's commitments under the EPA-approved state implementation plan for the five-county Southeast Pennsylvania area (Philadelphia SIP) and establishes emission reductions that are integral to maintaining the EPA's approval of the attainment demonstration contained in the Philadelphia SIP. Full implementation of the reductions is required by May 1, 2005.

The commentator stated that emission reductions from municipal waste combustors (MWCs) are not needed for attainment since these reductions were not included in implementation plans. The final-form rulemaking clarifies that it does not apply to municipal waste combustors.

One commentator stated that the Board should consider either using a separate proposed rulemaking or publishing an Advance Notice of Final Rulemaking if it added any language to the final-form rulemaking in response to any comments. The Department published an Advance Notice of Final Rulemaking in the *Pennsylvania Bulletin* on December 20, 2003.

The same commentator noted that many commentators stated that controls have already been installed under other requirements or that the units typically operate only a few hours. These commentators argued that further requirements would yield minimal additional reductions. The final-form rulemaking requires units to be accountable for actual emissions and does not require control installation, ensuring that owners and operators have a cost effective compliance option under any operating scenario.

Two commentators suggested that the proposed rulemaking be amended to allow participation in the NO_x Budget Program on an individual basis in lieu of complying with the proposed rules. One commentator questioned, "Why didn't the Board include amendments in this rulemaking that would allow these other sources to 'opt-in'?" The Department responds that the NO_x Budget Program is specifically designed to support an emission control program for large boilers. Considerable technical and administrative issues would need to be resolved in order to support other types of units in the budget program that are beyond the scope of this rulemaking.

Boilers

One commentator said that the definition of boiler, which references the existing § 145.2 provision, should be amended to ensure it does not include process heaters. The interpretation of this definition generally follows the Federal applicability that does not include direct-fired process heaters.

Several commentators provided a technology and cost assessment, as requested by the Board. The commentators concluded that the rule should not require lower emission limits for Municipal Waste Combustors (MWCs) because Selective Catalytic Reduction (SCR) technology is not reliable enough or is too expensive. In addition, the commentators indicated that the EPA has set the limits for MACT higher, and SNCR, the only generally feasible MWC control technology, is not able to meet the 0.17 pound per million Btu limit in the proposed regulation. The final-form rulemaking clarifies that it does not apply to municipal waste combustors.

Another commentator asked the Board to explain why MWCs were chosen for further reductions and what equipment would work at MWCs to achieve compliance. The commentator asked the Board to provide the associated costs of installation and operation of the equipment and to demonstrate that technically feasible solutions are not cost prohibitive. The commentator made reference to some commentators' claims that the Board's requirements for MWCs are not technologically feasible and that the EPA has indicated that it does not intend to regulate MWCs further. The commentator said that some commentators argue that MWCs should be exempt from the requirements of this rulemaking for reasons including: the difficulty of predicting emissions due to the variability of fuel; the facilities have already implemented MACT; the limits set by this proposed rulemaking may not be achievable; and these facilities provide other environmental benefits. The final-form rulemaking clarifies that it does not apply to municipal waste combustors.

One commentator stated that neither the Department nor the OTC included MWCs in its cost or technical analyses, and that promulgating a rule in this instance is not legal. The final-form rulemaking clarifies that it does not apply to municipal waste combustors.

The Naval Surface Warfare Center Ship Systems Engineering Station located in Philadelphia recommended that naval units that are used to simulate shipboard conditions be exempted. This request was based on several rationales, including technical infeasibility and low utilization rates. Extensive technical data and analysis were provided. The final-form rulemaking does not apply to these units.

One commentator said that auxiliary boilers that serve larger electric generating units emit very little over the course of the year. The commentator stated that controls to meet the proposed regulatory limits would not achieve substantive reductions. The commentator recommended a cost effectiveness threshold of $3,000 per ton reduced. The Department responds that the final-form rulemaking allows source operators to use averaging and NO_x allowances to demonstrate compliance with the emission limits. Therefore, establishment of a cost-effectiveness level in the regulation is not necessary.

One commentator suggested that boilers greater than 250 MMBTU/hr should be afforded the 60% reduction option. The final-form rulemaking specifies straightforward emission limits for affected classes of sources. Requirements related to specification of base year emission are not necessary.

Combustion Turbines

One commentator stated that the control requirements of this rule for combustion turbines would not be cost-effective due to permit caps at 5% of annual capacity, high operating expenses and resultant low utilization rates of 1-2.5%. The commentator said that averaging would be useful for some of these units. The commentator stated that the combustion turbine portion of the rule would achieve about a 55% reduction, and that based on historical data, 25 to 45 tons would have been reduced in 2000 and 2002, respectively, from the 23 units the company operates. The commentator recommended that the following options be considered: de minimis or cost-effectiveness exemptions, or NO_x allowance surrender—which the commentator said should be an option in any event. The commentator felt that limiting allowances to the area of allocation does not make sense if this option is provided. The Department responds that the final-form rulemaking includes NO_x allowance surrender and averaging as compliance options. The inclusion in the final-form rulemaking of de minimis and cost-effectiveness exemptions is not necessary.

The same commentator stated that the rule, as it pertains to combustion turbines, should apply Statewide for competitive and environmental reasons. The commentator said that if the rule does not apply Statewide, peaking units located outside the five-county Southeast Pennsylvania ozone nonattainment area will be cheaper to run and will pick up the load from the units affected by this rule, the emissions will just occur in upwind areas and the benefits of the rule will be defeated. The Department does not expect the rule to result in load shifting because the control costs for existing combustion turbines are small in relation to operating expenses.

The Naval Surface Warfare Center Ship Systems Engineering Station located in Philadelphia recommended that naval units that are used to simulate shipboard conditions be exempted. This request was based on several rationales, including technical infeasibility and low utilization rates. Extensive technical data and analysis were provided. The final-form rulemaking does not apply to these units.

Internal Combustion (IC) Engines

The Naval Surface Warfare Center Ship Systems Engineering Station located in Philadelphia recommended that naval units that are used to simulate shipboard conditions be exempted. This request was based on several rationales, including technical infeasibility and low utilization rates. Extensive technical data and analysis were provided. The final-form rulemaking does not apply to these units.

One commentator stated that the final-form rulemaking should focus on sources where emission reductions can be achieved instead of infrequently used sources, where the cost of control of NO_x reduced can be very high—in one instance, $40,000—$400,000 per ton. The commentator stated that this is not a cost-effective way for the Commonwealth to achieve required emission reductions. The Department responds that the Chapter 145 provisions in the final-form rulemaking allow the use of averaging and allowances to achieve compliance. These provisions allow a source owner or operator to implement the most cost-effective strategy for the affected activities.

One commentator said that both the Chapter 129 and Chapter 145, Subchapter B provisions should include an exemption for emergency gas turbines and firefighting turbines, wet weather storm pumps, and any engine that is used infrequently or for emergencies. The final-form rulemaking exempts facilities that emit less than 0.50 tons of NO_x during the ozone season. In addition, the final-form rulemaking includes provisions that allow the use of averaging and allowances to demonstrate compliance. Exemptions for these specific classes of sources are not included in the final-form rulemaking.

One commentator supported exemptions for emergency equipment. The commentator said that the proposed Chapter 145 threshold of 1 ton per day effectively exempts emergency or back-up units that would have much lower control cost-effectiveness. In Chapter 145 of the final-form rulemaking the 1-ton per day threshold was not intended to exempt emergency or back up units. The threshold stems from EPA's NO_x SIP Call, which used this cutoff as a way to identify and control sources with enough emissions to reduce the interstate transport of ozone.

One commentator recommended that the Chapter 121 definition of "emergency stationary internal combustion engine" be amended to allow emergency equipment to run up to 100 hours for routine testing and maintenance. The Department responds that the final-form Chapter 129 regulations exempt facilities that emit less than 0.50 tons of NO_x during the ozone season. In addition, the final-form rulemaking includes provisions that allow the use of averaging and allowances to demonstrate compliance. Exemptions for specific classes of sources are not included in the final-form rulemaking.

One commentator recommended that the definition of "emergency stationary internal combustion engine" include specific language, as follows: "(ii) A stationary internal combustion engine located at a nuclear power plant that operates pursuant to Nuclear Regulatory Commission (NRC) requirements." The commentator said that these back-up IC engines are generally only operated for testing required by NRC, or during real emergencies. In the 2000 ozone season, NRC-required periodic testing resulted in a total of 9.5 tons of NO_x emissions. The commentator stated that an exemption was warranted because the nuclear generators typically produce thousands of megawatts of emission free electricity. The Department responds that the final-form rulemaking does not contain a definition of "emergency stationary internal combustion engine." Back-up IC engines, such as those at the commentator's nuclear facility, are not exempted in the final-form rulemaking. If the ozone season actual emissions from the units exceed the allowable emission requirements in the final-form rulemaking, the owner or operator will be required either to average emissions from other of the owner or operator's affected sources or to obtain allowances to demonstrate compliance. Exemption from the requirements in the final-form rulemaking for these types of sources is not warranted.

One commentator stated that subset engines should be exempted from the Chapter 129 emission limits because they could not afford to run. The commentator claimed that the Department's analysis fails to account for all of the benefits and factors bearing on the permitting and operation of these units, including emission displacement to higher emitting units, and adverse electric market impacts. The Department responds that the final-form Chapter 129 regulations exempt facilities that emit less than 0.50 tons of NO_x during the ozone season. In addition, the final-form rulemaking includes provisions that allow the use of averaging and allowances to demonstrate compliance. Exemptions for specific classes of sources are not included in the final-form rulemaking.

Two commentators said that general permits should not be issued for internal combustion engines. The commentators said that permits should contain requirements that are specific to the source to ensure compliance. The commentators explained that it is possible, for instance, that a source could be installed claiming to be for emergency use only, but then be used for non-emergencies. The final-form rulemaking does not exempt emergency use engines.

The same commentators said that the distinction between mobile and stationary can be false. The commentators said that mobile units can fulfill the functions of stationary units and should be covered by these regulations. The final-form rulemaking defines stationary internal combustion engines in a way that ensures that only those engine emissions that occur during operations as mobile air contamination sources are not covered.

One commentator suggested that the proposed IC engine definition should be amended from including engines remaining on one location for 30 days or more to only those engines that remain in one location for 12 months or more. The commentator said that states are precluded

by Clean Air Act section 209 from regulating engines that remain in one location for less than 12 months. The commentator suggested that amending the definition of nonroad engine to conform to 40 CFR 90 would remedy this problem. The Department responds that the final-form rulemaking specifies "in-use" measures, which are not preempted by the Clean Air Act. Additionally, the final-form rulemaking defines stationary internal combustion engines in a manner that ensures that those engine emissions that occur during operations as mobile air contamination sources, as defined under § 121.1, are not covered.

One commentator asked why the Board used 30 days in the stationary internal combustion engine definition. The intent in the proposed rulemaking was to mirror the OTC model rule. The rationale for eliminating the 30-day criterion in the final-form rulemaking is discussed in the preceding paragraph.

One commentator said that the Chapter 145 IC engine threshold, based on 1995 emissions or those occurring in the future, leaves operators uncertain about control obligations and should be changed to provide certainty. The commentator asked what the deadlines for newly affected engines would be. The final-form rulemaking clarifies that engines that become subject to Chapter 145, Subchapter B, in any year after 2004 must comply with Subchapter B by May 1 of the following calendar year.

Two commentators stated that the applicability criterion of § 145.111 (one-ton per day threshold) poses an unwarranted exemption from the control requirements. The commentators said that a lower threshold is warranted considering the contribution of these sources and the magnitude of the problems we are facing. The final-form rulemaking implements the Federal NO_x SIP Call, which uses the 1-ton per day threshold to determine the largest contributors to NO_x transport.

One commentator stated that the emission limits for large IC engines may not be feasible for every engine, and that the Department may want to review them in light of recent EPA re-examination of the issue. The commentator suggested that the allowance option would possibly resolve the issue. The Department responds that the final-form rulemaking contains the same level of reductions the EPA determined to be technically feasible, cost-effective, and achievable for lean burn engines and that were used to establish the Phase II NO_x SIP Call emission budgets. The final-form rulemaking also includes provisions that allow the use of averaging and allowances to demonstrate compliance.

One commentator suggested that the structure of the IC engine provisions in Chapters 129 and 145 should be amended to remove overlapping and conflicting requirements in a manner that achieves reductions where they are most needed. Specifically, the commentator suggested that the final-form rulemaking retain the 1000-2400 hp requirements in the nonattainment areas as proposed in Chapter 129 and contain separate standards for units above 2,400 hp. In addition, the commentator suggested that the final-form rulemaking establish less stringent standards for those 2,400 hp and above units located in attainment areas. The Department responds that the rules for attainment areas in the final-form rulemaking follow the NO_x SIP Call requirements. The rules do not overlap or conflict. The Chapter 129 provisions in the final-form rulemaking state that sources falling under the applicability thresholds of Chapter 129 but that are already subject to Chapter 145 are not covered by Chapter 129 requirements.

The same commentator supported the proposed Chapter 129 standards for IC engines, saying they are achievable with after-treatment technologies. The commentator said that for some older higher emitting engines, however, depending on the costs of local power, the economics may be unfavorable. The commentator said that maximum flexibility should be provided in meeting these limits because of this. The final-form rulemaking authorizes a range of compliance techniques that enables the owner or operator to choose the most cost effective option.

The same commentator said that the Chapter 145 emission limit requiring a 90% reduction from 1990 levels does not give credit for previous control efforts. The commentator said that catalysts, for instance, could have been installed, or rich burn engines replaced, with lower emitting lean burn engines. The commentator believed it may be technologically or economically infeasible to make further reductions, and suggested that specific emission limits would avoid this problem. The commentator said that available technologies can achieve the following: 1.5 g/bhp-hr for rich burn spark ignited engines; 0.9 gm/bhp-hr for lean burn spark ignited engines; and 2.3 gm/bhp-hr for compression ignition engines. The commentator suggested that engines located in attainment areas should have higher limits: 1.5 gm for lean burn and 4.8 for compression ignited (prevailing non-road engine standard). The Department responds that the final-form rulemaking is structured to provide credit for previous control efforts. The emission limits for each class of engine are based on control levels that have been determined to be achievable by the majority of the units in that class.

One commentator recommended that the Chapter 129 and Chapter 145 IC engine controls allow flexible compliance options in order to enable the maximum amount of reductions to be achieved and with more cost-effectiveness. The commentator suggested that more control technology vendors would be able to respond, which would also enhance the cost effectiveness. The final-form rulemaking authorizes a range of compliance techniques that enables the owner or operator to choose the most cost effective option.

Three commentators believed that the emission limitations are more stringent than Federal standards and therefore not permissible under the APCA. The limits in the final-form rulemaking are permissible. The final-form rulemaking is necessary to satisfy the Commonwealth's commitments under the EPA-approved state implementation plan for the five-county Southeast Pennsylvania area (Philadelphia SIP) and establishes emission reductions that are integral to maintaining the EPA's approval of the attainment demonstration contained in the Philadelphia SIP. Full implementation of the reductions is required by May 1, 2005.

One commentator stated that the § 129.203 limit could not be met on most lean-burn engines (1.5 gm/brake hp-hr) whereas a higher limit (3.0 gm/brake hp-hr) could be met. The final-form rulemaking contains the same level of reductions the EPA determined to be technically feasible, cost-effective, and achievable for lean burn engines and that were used to establish the Phase II NO_x SIP call emission budgets.

The same commentator stated that it would be difficult to comply with the May 1, 2005, compliance deadline because planning and installation of controls and monitors take from 1 1/2 to 3 years. The commentator stated that pipeline operators request a 2009 deadline because of permitting issues, and retrofit downtime prohibitions of

FERC and Pennsylvania Public Utility Commission. The final-form rulemaking retains the May 1, 2005, compliance deadline. The emission reductions and budgets established by the NO_x SIP call are also integral to maintaining the EPA's approval of the one-hour ozone attainment demonstration contained in the Philadelphia SIP. Full implementation of the NO_x SIP call reductions is required by May 1, 2005. The final-form rulemaking includes provisions that allow the use of averaging and allowances to demonstrate compliance. Implementation of these alternatives does not require long lead-time, and most of the controls needed to comply with this final-form rulemaking were already installed in response to the 1995 RACT regulation requirements.

One commentator said that the Board should explain how the lower § 129.203 limit on lean-burn engines (1.5 gm/brake hp-hr) could be met. The final-form rulemaking contains the same level of reductions the EPA determined to be technically feasible, cost-effective, and achievable for lean burn engines and that were used to establish the Phase II NO_x SIP Call emission budgets.

The same commentator noted that § 145.115 specifies that records must be maintained at the facility. The commentator asked the Board to explain the need for onsite recordkeeping requirements as opposed to allowing a source to keep records at a centralized location. The Department responds that the requirements for maintenance of records onsite have been deleted from the final-form rulemaking. The final-form rulemaking allows an owner or operator who is not required to use CEMS to use an alternative monitoring and recordkeeping procedure if the Department approves it in writing in advance. Depending on the proposal, onsite recordkeeping will not necessarily be required but the facility will be required to provide the records to the Department upon request.

One commentator noted that the Federal guidance on IC engine control has not been finalized and therefore the EPA does not know what level of control is required under the NO_x SIP Call. The commentator felt that the final-form rulemaking should be delayed for this reason. The commentator said that the EPA is preparing to issue a "Phase II" NO_x SIP Call rule that will likely require the current installed level of control. The commentator thought that the proposed rulemaking would violate the statutory regulatory policy by exceeding Federal requirements. The commentator said that Federal guidelines also allow the limits to be met on an average basis or with allowances rather than individual units as proposed in the regulation. The commentator suggested that, because the limits are based on average engine population, and because engines respond differently to control equipment, this flexibility option would allow operators to meet the limits. The commentator said that it is a key feature of the OTC model rule that makes it feasible and cost-effective. The commentator felt that averaging was not a useful option. The Department responds that the final-form rulemaking is consistent with the EPA's guidance on recommended achievable emission levels for large IC engines. The final-form rulemaking incorporates averaging and allowance surrender as compliance options.

The same commentator said that for lean burn IC engines under the Chapter 145 proposed rules, an 82% reduction is achievable, and has been implemented. The commentator said that the EPA docket supports this finding. The commentator noted that the Department was requiring a 91% reduction in the proposed rulemaking and said the justification for doing so relies on old EPA guidance as opposed to more recent findings. The commentator said that the EPA believes that SCR is not justified. The commentator said that other states have proposed less restrictive rules and as a result the delivery of gas to Pennsylvania may be hampered. The final-form rulemaking contains the same level of reductions the EPA determined to be technically feasible, cost-effective, and achievable for lean burn engines and that were used to establish the Phase II NO_x SIP call emission budgets.

The same commentator said that the final-form rulemaking is unnecessary because the pipeline industry has achieved the reductions called for under the proposed Chapter 129 IC engine regulations, and no further emission reduction will be achieved by the proposed rulemaking. The commentator said that increased NO_x control requirements for these engines would result in increased VOC emissions, something the commentator thought the Department had not considered. The Department responds that the level of additional control that might be needed to comply with the limits contained in the final-form rulemaking should not result in additional VOC emissions.

The same commentator requested an exemption from NSR for the pipeline industry per the EPA's recent pollution control project rules. The types of possible control project modifications needed to meet the revised emission limits in the final-form rulemaking should not result in emission increases above the NSR applicability thresholds.

One commentator said that Continuous Emission Monitoring Systems (CEMS) should not be required for smaller sources. The commentator said the Department should allow simplified procedures, including those using either the averaging or allowance purchase compliance options. The Department agrees and has incorporated various monitoring options that allow the owner or operator to choose the most efficient monitoring method.

Two commentators said that the CEMS requirement for large IC engines subject to Chapter 145, in conjunction with the control requirements, could render some installations cost-ineffective. The commentators suggested that parametric monitoring should be a specifically authorized alternative in the regulation, rather than requiring an approval process for alternative systems. The commentators felt that this alternative would be readily available and cost-effective. The final-form rulemaking allows alternative monitoring techniques.

One commentator asked whether the Board had considered further exemptions for units that are not run for many hours in the ozone season, such as electric generation peaking units, emergency back up generators and power generation sources used for research, development and testing purposes. The commentator asked how many tons of reductions these sources represented and what the cost per ton was for them to comply. The commentator said the Board should explain the need to regulate these sources and why this is cost effective. The Department responds that the final-form rulemaking does not exempt these units. The affected engines and turbines emit NO_x at rates from approximately 0.05 ton to over 1 ton per day. The emissions can quickly become highly significant. It is estimated that these units can emit from 60 to 100 tons per day during high electric demand days, which coincides with and contributes to ozone episodes. There are approximately 120 engines covered by the Chapter 129 regulations, which at the lowest emission rate, 0.05 ton per day, would emit well in excess of 3 tons of NO_x if operated for a day. This is equal to the entire amount of reductions this final-form rulemaking needs to achieve.

These units, if left uncontrolled, will negate the emission reductions achieved by the other affected sources. Therefore, it is not overall cost effective to exempt these units when they can contribute significant amounts of emissions. The applicability threshold of 0.5 tons for the ozone season ensures that only those operations with significant actual emissions during the ozone season are subject to emission limits. The final-form rulemaking will result in reduction of these emissions by an average of 80% or an equivalent surrender of NO_x allowances.

Cement Kilns

One commentator noted that some commentators indicate that low NO_x burners are infeasible and cost ineffective. The commentator said that the Board needs to demonstrate that compliance is possible and what equipment will be needed to comply. The commentator said that the Board also needs to demonstrate that technically feasible solutions are not cost prohibitive. The Department responds that controls, including selective noncatalytic reduction (SNCR), low NO_x burners, mid-kiln firing, and process controls are installed and operating on kilns in this Commonwealth to meet various requirements. While cost effective controls are available for every type of unit evaluated, some units may be inherently uneconomic even without controls. Some of these older kilns are being phased out of operation or the owners have plans for modification of the units. Adding controls may not be a good investment under such circumstances. In such cases, the allowance compliance option allows operation of such units without the need for controls.

Two commentators suggested that the Department should require the most effective control to be used instead of allowing cement kiln operators to choose from among alternative control technologies. The final-form rulemaking allows the owner or operator to choose the most cost effective control option.

Several commentators would like reinstatement of a single kiln-based emission limit expressed in pounds of NO_x per ton of clinker produced that the Department had proposed earlier as included in the Federal implementation plan (FIP) proposals. Some commentators also asked that this option also allow that it be achieved on an average basis across the facility as well as from uncontrolled 1990 levels rather than actual levels. The final-form rulemaking incorporates an emission limit and compliance options that provide the requested options.

One commentator stated that its kiln has not installed controls to comply with the 1996 RACT regulations, as presumed in the preamble. The commentator stated that the facility utilizes toxic wastes for some of its fuel and must retain high combustion temperatures to handle these wastes. The commentator said the proposed rulemaking would require substantial modification of the kiln. The final-form rulemaking does not require a source to be modified.

The same commentator stated that short wet kilns cost more per ton to control and, as a result, were not controlled by the proposed FIP. The commentator stated that this represents a cost inequity for short kilns and that because the Federal rules did not require this type of unit to be controlled it should be exempted. The Department responds that the EPA included all kilns in its cost analysis for the proposed FIP for the Commonwealth and included all of the kilns in the NO_x SIP Call budget. The emission limit in the final-form rulemaking is designed to protect the budget, as required by the NO_x SIP Call. The final-form rulemaking provides for averaging and trading to ensure that costs do not exceed a reasonable threshold. With cost effective compliance mechanisms available to all sources, exemptions would be unnecessary and would create an inequity among competitors.

One commentator asked the Department to change the definition of "Low NO_x Burner" to, "A type of kiln burner (a device that functions as an injector of fuel and combustion air into the kiln to produce a flame that burns as close as possible to the center line of the kiln) that has a series of channels or orifices that (1) allow for the adjustment of the volume, velocity, pressure, and direction of the air carrying the fuel (known as primary air) and the combustion air (secondary air) into the kiln, and (2) impart high momentum and turbulence to the fuel stream to facilitate mixing of the fuel and secondary air." The "Low NO_x Burner" definition is not needed in the final-form rulemaking and was eliminated.

The same commentator suggested that the final-form rulemaking should include definitions for malfunction, shutdown, and startup, as provided. The commentator also asked that the final-form rulemaking exempt emissions occurring during these periods. The Department disagrees that these emissions should be exempted. The final-form rulemaking requires the owner or operator to include all actual emissions from the units in the compliance calculations.

The same commentator asked that the final-form rulemaking provide exemptions based on case-by-case cost analysis using the EPA alternative control technology (ACT) document or for those undergoing NSR. The Department responds that the emission limits in the final-form rulemaking would readily be met by a source that applied the recommended controls in the ACT document, or underwent NSR, and was rebuilt to modern standards. The source owner or operator can choose alternative compliance mechanisms available to avoid installing controls if controls are deemed impractical or too expensive.

Two commentators stated that CEMS are not necessary to demonstrate compliance with the final-form rulemaking. The commentators said that monitors are too expensive, and monitors are not required by other states or by the FIP. The commentators said that alternatives to monitoring are allowed in other regulations for compliance demonstrations. The Department responds that the majority of Pennsylvania kilns have CEMS. Monitoring data from cement kilns with CEMS show that emission variability is large and unpredictable over both short and long time scales. It is also not possible to offer flexible compliance alternatives based on averaging or allowance trading without accurate monitoring.

One commentator asked why the Board foreclosed cement kilns from complying by using alternatives to CEMS. The Department responds that there are no sufficiently accurate alternatives for monitoring NO_x emissions from cement kilns. Monitoring data from cement kilns with CEMS show that emission variability is large and unpredictable over both short and long time scales. It is also not possible to offer flexible compliance alternatives based on averaging or allowance trading without accurate monitoring.

The same commentator asked why the Board used the actual 1990 emissions as the basis for calculation of emission reductions in the alternative control option of § 145.143(3). The commentator noted that some commentators believe the final-form rulemaking should allow an uncontrolled 1990 baseline. The final-form rulemaking does not include the alternative control option.

Summary of Public Comments on ANFR

Compliance Mechanism/Effectiveness of the Final-Form Rulemaking to Reduce Emissions

Several commentators stated that the draft final-form rulemaking provided adequate compliance and monitoring options to enable operators to comply cost effectively. The Department agrees.

One commentator stated that the regulations should not combine the emission requirements for all sources at a facility, and several commentators stated that the regulations should not absolutely require that allowances be surrendered when the overall facility emissions exceed the allowable rates. The commentators suggested that enforcement and a monetary penalty are appropriate for noncompliance. The Department responds that the final-form rulemaking requires combining of facility emissions to provide for a simple, standard, and accurate basis for averaging. The owner or operator of affected sources can avoid the need to obtain allowances by maintaining overall emissions below the specified limits, by controlling unit emissions, or by averaging with lower emitting units under the owner or operator's control in the five-county Southeast Pennsylvania ozone nonattainment area.

One commentator stated that sources should not be allowed to average as permitted in § 129.204(d) because it will make it more difficult to meet the ozone standards. The Department responds that averaging under § 129.204 is not expected to make meeting the ozone standards more difficult because averaging is only allowed among facilities within five-county Southeast Pennsylvania ozone nonattainment area.

Two commentators stated that the requirement to surrender allowances will create an undue demand for allowances causing allowance price increases that will harm both source operators and sources subject to the NO_x budget requirements. The Department responds that the NO_x budget contains more than 500,000 allowances per ozone season. The amount of emission reductions required by the final-form rulemaking is insignificant in comparison. Most of the NO_x SIP Call and Chapter 129 controls are already, or will be, in place by May 2005. The allowance demand will be very small in relation to the budget. The maximum number of allowances that would be used to comply with the final-form rulemaking is estimated to be fewer than several hundred allowances per ozone season. The Department does not anticipate that the increased level of demand for allowances that may result from the final-form rulemaking will negatively impact cost and availability of allowances.

Two commentators stated that cement kilns and other sources covered by these regulations are not allowed to participate in the NO_x Budget trading program and may be subject to high allowance prices. The Department responds that the final-form rulemaking provides options in addition to the use of allowances to demonstrate compliance. The final-form rulemaking does not require source owners or operators to use the allowance compliance option. An owner or operator may use averaging, install controls, or implement other programs to reduce emissions.

One commentator stated that the efforts made to develop a rule that achieves the level of control required by the NO_x SIP Call, while providing flexibility to the cement industry, is appreciated. The commentator supports the basic structure and concept of the rule. The Department concurs.

One commentator expressed support for the Department's efforts to reduce air pollution in the five-county Southeast Pennsylvania ozone nonattainment area from the sources subject to this proposed rule. The Department concurs.

Several commentators stated that the 3:1 compliance penalty for violations should be removed. They stated that it is highly punitive, could drain the market and increase compliance costs for everyone. The Department responds that this type and level of penalty are consistent with existing regulations that provide for compliance with emission limits through allowance surrender. The penalty has to be sufficient that a source owner or operator does not gain advantage by failing to comply. The 3:1 ratio is sufficient. The level of potential noncompliance and relatively small amount of emissions involved, along with the size of the allowance market, ensures the market will not see any discernible impact. Most of the NO_x SIP Call and Chapter 129 controls are already in place. The allowance demand will be very small in relation to the NO_x budget.

Two commentators stated that if the Department wants to regulate units not currently covered under the Chapter 145 budget program, then a market based regulation with its own budget, monitoring and reporting, and penalties should be developed for those units. The Department responds that a separate trading system for the smaller and more numerous sources covered by the final-form rulemaking is not feasible or cost-effective. The final-form rulemaking takes into account the fact that the population of Chapter 145 NO_x budget units has an enormous reserve capacity of available and low-cost allowances. Regulations such as this can draw from that capacity to everyone's benefit. This will provide additional incentive for NO_x budget sources, which can profit from their ability to control more cheaply and sell allowances. Owners and operators of sources affected by the final-form rulemaking can benefit by having a less expensive compliance option, if control costs are high or if averaging is not an option. Consumers will see lower prices as a result of the overall efficiency savings to the economy.

Two commentators stated that the 3:1 compliance penalty should be retained, as it is necessary to ensure compliance under a trading program. The Department agrees.

One commentator commended the Department for considering excess emissions as a separate violation for each day of the 153-day ozone season. The Department agrees this is a necessary component of a rule that allows allowances to be used for compliance. This provision is consistent with existing regulations.

Three commentators opposed the separate day of violation provision as unnecessarily punitive. The Department responds that the number of days may be reduced to the actual number of days during which the actual excess emissions occurred, upon satisfactory demonstration to the Department.

One commentator stated that the requirement to surrender only current and future year allowances is needed to ensure the best level of compliance. The Department agrees. The requirement for the surrender of only current and future year allowances is retained in the final-form rulemaking.

One commentator stated that emission limits are not very aggressive; however, given that old and new units must comply, the averages will still deliver significant improvements over the status quo. The Department agrees.

The State of New Jersey believes that the regulation is not as strict as the OTC model rule and with rules that New Jersey plans to promulgate. New Jersey requests that the stringency and applicability of the regulation be increased to the levels contained in the OTC model rule. The Department responds that the OTC model rule was intended to provide states with a common basis to regulate source emissions to assist owners, operators and states by having consistent requirements. The Department has followed the model rule sufficiently to accomplish this goal and to achieve the necessary level of reductions.

One commentator stated that this regulatory action is necessary to achieve and maintain the 1-hour ozone standard by May 15, 2005. The commentator stated that emission averaging, or other compliance method, endangers our ability to achieve the needed controls on time. The final- form rulemaking establishes emission reductions that are integral to maintaining the EPA's approval of the 1-hour ozone attainment demonstration contained in the Philadelphia SIP. Full implementation of the reductions is required by May 1, 2005. The ability to use allowances or averaging to demonstrate compliance assures that owners and operators that otherwise might need to install control equipment to meet the limits have additional compliance options.

Two commentators suggested that the Chapter 129 regulations should be year round and Statewide. The Department responds that the final-form rulemaking is needed to establish emission reductions that are integral to maintaining the EPA's approval of the 1-hour ozone attainment demonstration contained in the Philadelphia SIP. The attainment demonstration requires emission control from May 1 through September 30. Year round NO_x reductions would not assist in satisfying the attainment demonstration requirements. Additional NO_x reductions may be necessary as part of the Commonwealth's initiatives to address the 8-hour ozone and PM 2.5 standards.

One commentator suggested that output based emission limits should be used instead of heat input to encourage energy efficiency and pollution reductions. The Department responds that establishment of output-based limits is outside the scope of this rulemaking. Assessment of the cost impacts of an output-based approach requires data that is not readily available to the Department at this time.

Two commentators expressed support for the Chapter 129 regulations as necessary to the 1-hour ozone standards. The commentators said that the affected sources have long escaped control and should do their share. The commentators stated that the regulations afford adequate flexibility to achieve the emission reduction goals without undue economic hardship. The Department agrees.

One commentator stated that the effective date of the regulation does not provide enough time for implementation of compliance strategies. The commentator said that more time should be provided for operators to achieve compliance. The Department responds that the final-form regulation provides for a variety of compliance options, including averaging and use of allowances. If there is insufficient time to implement a control strategy, the source owner or operator may use allowances or averaging as an interim compliance measure.

One commentator stated that the definition of "stationary internal combustion engine" should be moved to one location with the other definitions. The definition is contained in § 121.1 of the final-form rulemaking.

Boilers

One commentator stated that some boilers cannot operate at their design capacity and that the Department should allow derating to avoid applicability of the regulation. The Department responds that the precise rate of boiler firing is not crucial to achieving the needed emission reductions, whereas the boiler rating is used to identify those units that have significant potential emissions. Allowing owners or operators to derate units to avoid regulation would defeat the emission reduction goals of the final-form rulemaking.

The same commentator stated that there should be emission limits for dual fuel use since the emission rates guaranteed by the vendor for the units are usually only at the higher rates. The Department responds that there is no need for dual-fuel limits since the allowable emissions are calculated in terms of the amount of BTU's combusted for each type of fuel. Although the fuels are burned together, the allowable emissions can be calculated separately.

Several commentators stated that the Department has indicated that the regulations do not include municipal waste combustors. The commentators stated, however, that the regulations are not clear on this point. The commentators recommend specific language. The final-form rulemaking clarifies that it does not apply to municipal waste combustors.

Combustion Turbines

Three commentators stated that an exemption for units that take a 5% capacity factor permit should be provided. They stated that in the past, these units have emitted 3 tons or less each during the ozone season. The Department responds that, because these units frequently operate during high ozone days and have high tons-per-day emission rates, they contribute to the ozone problem. Many of the units affected by the final-form rulemaking only emit a small fraction of a ton per day, but collectively their emissions are significant.

One commentator stated that units that take a 5% capacity limit should be exempted because the limit would ensure the emissions from these units would be adequately controlled. The Department responds that the suggestion would result in no emission reductions from these units.

Two commentators stated that the applicability rating for turbines in § 129.202 should be changed from 250 million Btu/hr to 25 MW to be consistent with Chapter 145 applicability. The Department responds that the applicability cutoffs need to be retained because the emission limits were established as achievable for units with the specified heat input ratings.

Internal Combustion (IC) Engines

One commentator stated that the definition of stationary internal combustion engine in § 129.204 may include engines exempt from state regulation under the Clean Air Act. The Department responds that the final-form rulemaking specifies "in-use" measures that are not preempted. Additionally, the final-form rulemaking defines internal combustion stationary engines in a manner that ensures that those engine emissions that occur during operations as mobile air contamination sources as defined under § 121.1 are not covered.

One commentator stated that the Chapter 145 requirement for monthly testing of large IC engines was too costly and unwarranted given the data showing that emissions do not vary significantly. Engines that operate

less than 500 hours should be exempt from testing. The Department responds that in order to allow averaging, the emission data must be representative of actual emissions. Data submitted to the Department shows that large emission rate variability still occurs with some engines. Some engines already have established data adequate to reduce the testing frequency. Because the amount of operating time is the critical factor in accurately determining the emissions and not simply the passage of time, the final-form rulemaking is amended to specify testing not less frequently than every 735 hours of operation instead of monthly. This frequency can also be reduced to one test per season with a demonstration of sufficiently consistent data. This can be accomplished before the final-form rulemaking becomes effective.

One commentator stated that monthly testing for large IC engines should be retained. The Department amended the final-form rulemaking to reduce the testing burden, as specified in the preceding paragraph, while assuring that the monitoring data adequately reflect actual emissions.

Several commentators stated that emergency and other infrequently used engines should be exempt because their emissions are insignificant and, in terms of technical and cost feasibility, the recordkeeping is an additional burden. The Department responds that stand-alone units with low emission rates will be excluded under the 0.5-ton per ozone season threshold allowed by the final-form rulemaking. The engines that are affected by the final-form rulemaking have high emission rates. The actual emissions in terms of tons per day place them among the very largest sources that are potential contributors to ozone. With the averaging, the 0.5-ton facility waiver, and the allowance compliance mechanism, there is insufficient rationale to exclude these units. The final-form rulemaking adds a minor addition to the existing recordkeeping and emission reporting requirements.

One commentator stated that it is a mistake to allow "peaking" units that operate during high electricity demand periods in the summer to rely on seasonal averaging to determine compliance. The commentator explained that this allows diesel units to run at capacity, emitting extremely high levels of NO_x and exacerbating unhealthy air on high electricity demand days that often coincide with high ozone days. The commentator urged an averaging scheme that encourages either control or a transition to less polluting peaking generation. The Department responds that in order to generate credit for averaging, units at a facility must run at reduced emission rates. Increased operation is more likely to occur during times of high energy demand for both the controlled and uncontrolled units. The overall effect of averaging, when measured across the entire population of affected sources, should provide sufficient overlap in control to provide a relatively continuous level of reductions. In addition, seasonal averaging is part of the rationale for eliminating "emergency" exemptions that could be used to avoid applicability to diesel peaking units. Averaging is preferable because the high dollar-per-ton costs make it difficult to justify outright control requirements on these units. By allowing averaging and including these units, the economics of being accountable for all emissions from them may provide an incentive to use of existing cleaner generation first and an eventual transition to lower emitting technologies.

Two commentators suggested that if the emergency exemption is not reinstated, one should be provided for those units that are integral to nuclear power plants. The commentators stated the impact of those units on air quality is negligible, their emissions cannot be controlled, their emissions were 9.5 tons during the 2000 ozone season, and the recordkeeping would be burdensome. The commentators added that given the large amount of emission free generation provided to the area, this is not a desirable public policy. The final-form rulemaking does not contain a definition of "emergency stationary internal combustion engine." Back-up IC engines, such as those at the commentator's nuclear facility, are not exempted in the final-form rulemaking. If the ozone season actual emissions from the units exceed the allowable emission requirements in the final-form rulemaking, the operator will be required either to average emissions from other of the owner or operator's affected sources or to obtain allowances to demonstrate compliance. Exemption from the requirements in the final-form rulemaking for these types of sources is not warranted.

One commentator stated that retaining the 1.5 grams per brake horsepower-hour emission limit would not be more stringent than the Clean Air Act. The commentator stated that the 1.5 grams per brake horsepower-hour limit should be retained in order to ensure attainment of the ozone standard. The Department responds that the overall level of control provided by the final-form rulemaking will provide a similar level of reductions as the proposed rulemaking.

One commentator stated that the change to 3 grams per brake horsepower for spark ignited engines is supported, and recommended that compression ignited engines be permitted the same rate. The Department responds that the limit for emissions from spark-ignited engines was changed to correspond with the limit selected for the same class of large IC engines. That limit was technically justified as more appropriate and achievable. The compression ignited engine limit is technically justified and was not changed.

The same commentator stated that the 3 grams per brake horsepower limit amendments in Chapters 129 and 145 are achievable, consistent with the anticipated Federal rules and supported. The Department agrees.

The same commentator stated that the additional monitoring options will allow the gas industry to use methods more appropriate to the gas transmission facilities. The Department agrees.

One commentator stated that the applicability requirements for IC engines under Chapter 145 are based on 1995 emissions or any year thereafter. The commentator stated that only units that operated in 1995 should be included because using later years is more stringent than the Federal requirements. The Department responds that this requirement is not more stringent than the Federal requirements. The Federal requirements are to achieve the emission budgets contained in the NO_x SIP Call. The budgets were established using 1995 as the base year; however, applying the rule only to units that operated in 1995 does not ensure the budget will be achieved in any year except 1995. The FIP is only a "stopgap" proposed rule that may not achieve the budgets if ever implemented. States that invoke the FIP remain obligated to adopt state rules that will achieve the SIP Call budgets.

Three commentators suggested that engines that are replaced with electrically powered equipment should be allowed to include these engines in their compliance determination. The Department agrees. The final-form rulemaking authorizes credit for such a replacement, based upon the difference between the actual emissions

that would have resulted from the utilization of the replaced engine and the emissions resulting from the generation of the electricity to power the motor. The electricity generation will be assumed at the nominal rate under the NO_x budget program of 1.5 lbs/MWH.

One commentator stated that engines subject to Chapter 145 that did not emit over 153 tons after 1995 could be subject to monitoring requirements, whereas the rule intends only to require monitoring for those that did. The commentator requests that the regulation specifically state this. The final-form rulemaking specifies that a unit that emitted 153 tons or more in any ozone season from 1995 through 2004 must comply with Subchapter B of Chapter 145, including the monitoring requirements, by May 1, 2005. Any unit that did not emit 153 tons or more in any ozone season since 1995, but does so after 2004, is not subject to Subchapter B until the following calendar year.

Emission Accountability

One commentator stated that § 129.204(b)(2)(ii) should include consideration for sources without final permits that are operating under plan approval and which may not have a short term limit (hourly limit) in the permit. The final-form regulation provides for sources operating under plan approval and those without express hourly emission limits.

One commentator stated that the emission monitoring methodology should be the most protective of public health. The commentator suggested that the rule specify that the most recent permit limits or best available control technology (BACT) or best available technology (BAT) limits be used. The Department responds that those lower limits continue to apply to the extent that there are units with permit limits lower than those in this final-form rulemaking. The imposition of BACT or BAT requirements on sources other than those already subject to the BACT or BAT requirements would not be cost-effective.

Several commentators suggested that the requirement in § 145.143(h) to notify the Department prior to May 1 each year if allowances will be used that season should be eliminated since it is difficult to predict if this will be the case. The provision has been deleted from the final-form rulemaking.

Two commentators stated that, based on experience with other facilities, 1 year is insufficient to install and certify a monitor. The commentators suggested that a more realistic date or schedule should be included in the regulations. The Department responds that most facilities are able to install and certify CEMS within 1 year. The regulated source owners and operators have been aware of the pending CEMS requirement since prior to October 2002.

One commentator stated that the CEMS requirements are more stringent than the Federal requirements and that stack tests would suffice. The Department responds that the CEMS requirements are necessary and permissible. There are no sufficiently accurate alternatives for monitoring NO_x emissions from cement kilns. The majority of Pennsylvania kilns have CEMS. Monitoring data from cement kilns with CEMS show that emission variability is large and unpredictable over both short and long time scales. It is also not possible to offer flexible compliance alternatives based on averaging or allowance trading without accurate monitoring.

The same commentator asked whether the data availability requirements in § 139.101(12) apply. All Chapter 139 requirements are applicable if the owner or operator elects to use a Chapter 139 monitor. If a Part 75 monitor is selected, the requirements of Part 75 apply.

Two commentators requested a clarification or more specific guidance in the regulations or CEMS manual regarding how to substitute missing data from CEMS to comply with these regulations. The commentators suggested using previous 24-hour data or ozone season averages. The final-form rulemaking specifies that invalidated (or missing) data must be substituted with data calculated using the unit's potential emissions. The owner or operator may request, in writing, to use any alternative that adequately reflects the actual emissions.

One commentator suggested that the rule specify that the CEMS requirement applies only during the ozone season. The only time period for which the final-form rulemaking requires NO_x emissions monitoring is the time period of May 1 through September 30 each year.

The same commentator asked whether the CEMS reports should be submitted on a calendar quarter basis and whether emission in lbs/hr should be reported. The final-form rulemaking specifies that CEMS reports must be submitted as required under Chapter 139 or 40 CFR Part 75, as applicable. Both require the submission of quarterly reports of emission rates in terms of the applicable standards.

Three commentators stated that emergency combustion turbines and engine units with 5% capacity factor limits should be exempt because they would be forced to run to do emission testing to comply. The commentators stated that these units do not have emission limits in their permits and the emissions are calculated using AP-42 emission factors. The final-form rulemaking allows the use of the permit limit in lieu of testing to calculate actual emissions. The final-form rulemaking specifically provides for the use of emission factors from AP-42 or the EPA's *"Factor Information Retrieval (Fire)" Data System* to determine emissions without the need for additional testing.

Renewable Energy

One commentator supported the ability to create credit from renewable power and suggested that it be expanded to the entire State, as is done in other states. The Department responds that the allowance provisions in the final-form rulemaking are different from the programs in other states. The reason the provisions do not provide for Statewide credit is to spur renewable generation within the five-county Southeast Pennsylvania ozone nonattainment area.

One commentator expressed strong support for the Zero Emission Reduction Credit provision. The commentator stated that the provision will have only a very small impact on other industries buying and selling NO_x allowances, but will have a positive impact on the ability of persons or companies to build renewable energy generation. The commentator stated that the credit is not a subsidy but a recognition of the improved air quality that the avoided NO_x represents to society. The Department agrees.

Two commentators stated that the definition of Tradable Renewable Credit (TRC) should clearly prohibit biomass, incineration, and hydro as renewable resources, and that the zero emission character should be retained. The Department responds that the qualifying renewable power is limited to zero emission generation and excludes hydropower from dams.

One commentator stated that the credit, if retained, should also be given for power generated by a dam since it has zero emissions. The commentator suggested that this should be the sole determinant. The Department responds that the goal of the final-form rulemaking is to reduce ozone. The zero emission credit provisions will reduce ozone by encouraging the installation of new zero emission renewable energy generation resources. Dams are not known to emit significant levels of NO_x, but can emit varying levels of other pollutants, including VOCs that contribute to ozone production. Non-zero emission renewable energy sources are not included because quantification of the overall air quality benefits must be done on an individual basis, entails a degree of uncertainty, and imposes costs and administrative requirements that are beyond the scope of this initiative.

One commentator stated that mobile sources should not be allowed to generate credits under these rules. The Department disagrees. In the event new zero emission mobile activities are developed to replace existing activities and the emission reduction benefits can be quantified, the opportunity for credit generation should be available. The mobile emission reductions would only be creditable if they were surplus, permanent, quantifiable, and Federally enforceable emission reductions.

Two commentators stated that the demand for allowances from the set-aside should be modest because the potential for wind is small in the five-county Southeast Pennsylvania ozone nonattainment area and the cost of the most likely source, photo-voltaics, is relatively high. The commentators stated that this pilot program is low risk and a worthwhile opportunity to explore market-driven renewable programs and should be retained. The Department agrees.

One commentator suggested that allowances should be deducted from the new source set-aside to create the credits for renewable energy. The commentator suggested that a 15% allocation to renewable energy generation is possible using the 5% set-aside and should be made available for this purpose. The Department disagrees. The final-form rulemaking authorizes deducting allowances from the set-aside only when a unit affected by an emissions limit in §§ 129.201—129.301 uses a renewable energy credit against its actual emissions that are in excess of those limits. The purpose is to provide a positive incentive to the owners and operators of these units to turn to renewable energy as an alternative to increasing output from NO_x emitting units.

One commentator expressed support for the zero emission renewable credit provisions. The commentator stated that fine particulate, ozone and NO_x will be reduced to the benefit of public health. The commentator stated that these pollutants result in increased health care costs, lost workdays, and cardiopulmonary effects that may result in hospitalization or even death. The Department agrees.

The same commentator stated that the zero emission renewable credit provisions are a welcome and appropriate catalyst for the renewable energy industry in this Commonwealth, and pose no undue hardship on other industries. The commentator stated that the Department is acting responsibly by including this encouragement to the development of pollution-reducing energy generation technology and is supported because of the benefits to public health now and in the future. The Department agrees.

Three commentators stated that the 1.5 pound per MWH set-aside retirement has the potential to significantly reduce the amount of allowances available for new service units. The commentators stated that the amount of credit is ten times higher than that for new generation resources. One of the commentators suggested that if the provision is retained, 0.2 lb/MWH is more appropriate. The commentators stated that renewable energy generation threatens the economic viability of critical standby generation and that there are better ways for the state to promote renewables such as purchasing more of it. The commentators asked that the provision be eliminated. The Department disagrees. This provision will not materially impact the new source set-aside. This provision is only one part of a broader Pennsylvania initiative to encourage more environmentally friendly power sources.

One commentator stated that they commended the Department on the renewable energy portion of this rule. The commentator stated that Pennsylvania must reduce the air pollution impact of its energy production, and increasing the production of renewable energy is one of the most effective means to this end. The Department agrees.

Cement Kilns

Two commentators stated that the proposed FIP should be the basis for the emission limits. The emission limit contained in the final-form rulemaking is based upon the least stringent FIP limit.

Three commentators requested inter-company trading or participation in the allowance program, since this would encourage additional reductions in the cement industry. The commentators suggested that the enforceability issue could be rectified with a requirement for agreements between companies. The Department responds that the ability to trade allowances between companies requires emission limits to be established for each facility, and the limits to be protective of the overall SIP Call budget for the state. A minority of the industry indicates support for the "opt-in" approach, and given the competitive nature of the cement industry, a consensus on these limits would be difficult to establish and would require a lengthy process. A lengthy negotiation was conducted previously with regard to including the units in the NO_x budget program. This negotiation led to no agreement among source operators.

One commentator suggested that the cement kiln emission limit should be lower than 6 pounds of NO_x per ton of clinker to better protect human health. The commentator stated that best available control technology (BACT) and best available technology (BAT) levels of two to three pounds are achievable for precalciner kilns. The Department responds that the kilns that are achieving these low emission rates are required to continue to meet their permit limits that require these rates. The 6-pound per ton of clinker limit will require units that have not recently undergone BACT or BAT analysis to maintain their emissions at or below 6 pounds of NO_x per ton of clinker.

One commentator stated that white cement kilns have different heat input and operating requirements than comparable kilns and should be given additional consideration regarding the emission limit in the rule. The commentator stated that the limit is inconsistent with the NO_x SIP Call and represents a competitive disadvantage. The commentator stated that control technology is the preferred option to an emission-based limit. The Department responds that the budget for the NO_x SIP Call includes controls for all kilns. The emission limit requires less control for the white cement kiln than that estab-

lished in the budget. However, in conjunction with changes that have occurred at other facilities since the budget was established, the limit is adequate to meet the budget. Emission test data for the only white cement kiln in this Commonwealth indicate that the operators of the kiln have a demonstrated ability to meet the 6 pounds of NO_x per ton of clinker limit.

One commentator stated that the limit of 6 pounds of NO_x per ton of clinker emission is in accordance with the FIP and is reasonable for wet process kilns. The Department agrees.

The same commentators stated that the rules should contain provisions that will streamline the RACT and emission limits in these regulations. The Department responds that the RACT emission limits are rate-based limits that are based on previously required controls or operating practices, or both. The final-form rulemaking does not authorize the removal of previously established requirements.

G. *Benefits, Costs and Compliance*

Benefits

Overall, the citizens of this Commonwealth will benefit from this final-form rulemaking because the changes will result in improved air quality by reducing ozone and fine particulate precursor emissions and encourage new technologies and practices, which will reduce emissions. The final-form rulemaking will also reduce visibility impairment and acid deposition. Financial savings resulting from the final-form rulemaking in terms of effects on mortality, hospital admissions, acute bronchitis, acute respiratory systems, worker productivity, crops and forests could exceed $16 million per year, based on the EPA estimates.

Compliance Costs

The boilers, turbines and stationary internal combustion engines subject to the final-form Chapter 129 amendments are expected to reduce NO_x emissions by approximately 3 tons per day in the Southeast Pennsylvania ozone nonattainment area. Emission reductions can be achieved through installation of control equipment, combustion unit modification or fuel switching. Cost to reduce emissions for these sources has been estimated to be $1,500 to $3,500 per ton of NO_x for boilers; $3,000 per ton of NO_x for turbines; and $1,700 to $4,400 per ton of NO_x for stationary internal combustion engines. Cost estimates for the boilers, turbines and stationary internal combustion engines in the Southeast Pennsylvania ozone nonattainment area are within the recommended control cost range suggested by the Southeast Pennsylvania Ozone Stakeholder Working Group. The enhanced and simplified averaging and allowance compliance mechanisms will reduce average costs well below these estimates for operators of multiple units. A single unit without averaging opportunities that relies on allowances would also likely encounter costs well below the maximum estimates by obtaining allowances at the 2005 projected allowance cost of $2,000 per ton.

Large stationary internal combustion engines regulated by the final-form Chapter 145 regulations may install control equipment to meet the emission reduction requirements. Controls are estimated to cost $1,500 to $2,000 per ton of NO_x reduced. Cement kilns may achieve emission reductions through improved fuel efficiency, resulting in a potential cost savings. The operators of three kilns will need to install continuous emission monitors at a cost of approximately $60,000 to $100,000 each.

Compliance Assistance Plan

The Department plans to educate and assist the regulated community and the public with understanding these new regulatory requirements through various means, including field inspector contacts, mailings and the Small Business Compliance Assistance Program.

Paperwork Requirements

Aside from electronic CEMS reports that will be required of the cement kiln owners or operators, the regulatory revisions will require a small amount of recordkeeping that is in addition to existing emission monitoring and reporting requirements, which includes the annual compliance calculations, test data generated (if any), and allowance transactions (if any).

H. *Pollution Prevention*

The Federal Pollution Prevention Act of 1990 established a National policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials, or the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. This final-form rulemaking has incorporated the following pollution prevention provisions and incentives:

Section 129.205 provides for zero emission renewable energy production credit. This provision is intended to encourage the installation and production of new renewable generation. Production of energy from the renewable energy types authorized in this provision creates dramatically lower multi-media impacts than traditional energy production.

The overall structure of the emission requirements and compliance mechanism provides an incentive for greater production from cleaner units and encourages innovative ways to minimize emissions. Operators are given credit for implementing emission reduction measures that go beyond the minimum requirements. The emission requirements and compliance mechanism in these regulations provide a simple and flexible averaging mechanism to give a strong incentive for greater production from cleaner units and at the same time, a guaranteed reward for superior emissions control efforts.

I. *Sunset Review*

These regulations 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.

J. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 29, 2004, the Department submitted a copy of the notice of proposed rulemaking, published at 32 Pa.B. 5178, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing

these final-form regulations, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act, on November 3, 2004, these final-form regulations were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 4, 2004, and approved the final-form rulemaking.

K. *Findings of the Board*

The Board finds that:

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

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

(3) These regulations do not enlarge the purpose of the proposal published at 32 Pa.B. 5278.

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

(5) These regulations are necessary for the Commonwealth to achieve and maintain ambient air quality standards and to satisfy related Federal Clean Air Act requirements.

(6) These regulations are necessary for the Commonwealth to avoid sanctions under the Federal Clean Air Act.

L. *Order*

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

(a) The regulations of the Department, 25 Pa. Code Chapters 121, 129 and 145, are amended by amending §§ 121.1 and 145.42 and adding §§ 129.201—129.205, 145.111—145.113 and 145.141—145.143 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

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

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

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

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

KATHLEEN A. MCGINTY
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 34 Pa.B. 6292 (November 20, 2004.))

Fiscal Note: Fiscal Note 7-378 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE III. AIR RESOURCES

CHAPTER 121. GENERAL PROVISIONS

§ 121.1. Definitions.

The definitions in section 3 of the act (35 P. S. § 4003) apply to this article. In addition, the following words and terms, when used in this article, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

MWH—Megawatt Hour

* * * * *

ppmvd—Parts per million dry volume.

* * * * *

Stationary internal combustion engine—For purposes of § 129.203 (relating to stationary internal combustion engines), an internal combustion engine of the reciprocating type that is either attached to a foundation at a facility or is designed to be capable of being carried or moved from one location to another and is not a mobile air contamination source.

* * * * *

Tradable renewable certificate—A certificate issued by a tradable renewable certificate issuing body in recognition of renewable energy generation. A certificate represents a specific amount of electricity or thermal power equivalent that was generated.

Tradable renewable certificate issuing body—An entity approved by the Department to issue and account for tradable renewable certificates in accordance with a protocol consistent with the laws and renewable energy programs of the Commonwealth.

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CHAPTER 129. STANDARDS FOR SOURCES

ADDITIONAL NO_x REQUIREMENTS

§ 129.201. Boilers.

(a) By May 1, 2005, and each year thereafter, the owner or operator of a boiler that meets the definition of a boiler in § 145.2 (relating to definitions) located in Bucks, Chester, Delaware, Montgomery or Philadelphia County shall comply with this section and § 129.204 (relating to emission accountability). This section does not apply to naval marine combustion units operated by the United States Navy for the purposes of testing and operational training or to units that combust municipal waste at a facility that is permitted as a resource recovery facility under Part I, Subpart D, Article VIII (relating to municipal waste).

(b) By October 31, 2005, and each year thereafter, the owner or operator of the boiler shall calculate the difference between the actual emissions from the unit for the period from May 1 through September 30 and the allowable emissions for that period.

(c) The owner or operator shall calculate allowable emissions by multiplying the unit's cumulative heat input for the period by the applicable emission rate set forth in paragraph (1) or (2).

(1) The emission rate for a boiler with a nameplate rated capacity of greater than 100 million Btu/hour but less than or equal to 250 million Btu/hour shall be as follows:

(i) For a boiler firing natural gas or a boiler firing a noncommercial gaseous fuel, 0.10 pounds NO_x per million Btu heat input.

(ii) For a boiler firing solid or liquid fuel, 0.20 pounds of NO_x per million Btu heat input.

(2) The emission rate for a boiler with a nameplate rated capacity of greater than 250 million Btu/hour that is not subject to §§ 145.1—145.7, 145.10—145.14, 145.30, 145.31, 145.40—145.43, 145.50—145.57, 145.60—145.62 and 145.70—145.76 shall be 0.17 pounds NO_x per million Btu heat input. The owner or operator of a boiler may demonstrate compliance with this paragraph through the provisions of §§ 145.80—145.88 (relating to opt-in process).

§ 129.202. Stationary combustion turbines.

(a) By May 1, 2005, and each year thereafter, the owner or operator of a stationary combustion turbine with a nameplate rated capacity of greater than 100 million Btu/hour located in Bucks, Chester, Delaware, Montgomery or Philadelphia County shall comply with this section and § 129.204 (relating to emission accountability). This section does not apply to naval marine stationary combustion turbines operated by the United States Navy for the purposes of testing and operational training.

(b) By October 31, 2005, and each year thereafter, the owner or operator of the stationary combustion turbine shall calculate the difference between the actual emissions from the unit for the period from May 1 through September 30 and the allowable emissions for that period.

(c) The owner or operator shall calculate allowable emissions by multiplying the unit's cumulative heat input for the period by the applicable emission rate set forth in paragraph (1) or (2).

(1) The emission rate for a stationary combustion turbine with a nameplate rated capacity of greater than 100 million Btu/hour but less than or equal to 250 million Btu/hour heat input shall be as follows:

(i) A combined cycle or regenerative cycle stationary combustion turbine:

(A) When firing natural gas or a noncommercial gaseous fuel, 0.17 lbs NO_x /MMBtu or 1.3 lbs NO_x/MWH.

(B) When firing oil, 0.26 lbs NO_x/MMBtu or 2 lbs NO_x/MWH.

(ii) A simple cycle stationary combustion turbine:

(A) When firing natural gas or a noncommercial gaseous fuel 0.20 lbs NO_x/MMBtu or 2.2 lbs NO_x/MWH.

(B) When firing oil, 0.30 lbs NO_x/MMBtu or 3 lbs NO_x/MWH.

(2) The emission rate for a stationary combustion turbine with a nameplate rated capacity of greater than 250 million Btu/hour heat input that is not subject to §§ 145.1—145.7, 145.10—145.14, 145.30, 145.31, 145.40—145.43, 145.50—145.57, 145.60—145.62 and 145.70—145.76 is 0.17 lb NO_x per million Btu heat input. The owner or operator of a stationary combustion turbine may demonstrate compliance with this paragraph through the provisions of §§ 145.80—145.88 (relating to opt-in process).

§ 129.203. Stationary internal combustion engines.

(a) By May 1, 2005, the owner or operator of a stationary internal combustion engine rated at greater than 1,000 horsepower and located in Bucks, Chester, Delaware, Montgomery or Philadelphia County shall comply with this section and § 129.204 (relating to emission accountability). This section does not apply to naval marine combustion units operated by the United States Navy for the purposes of testing and operational training or to stationary internal combustion engines regulated under Chapter 145, Subchapter B (relating to emissions of NO_x from stationary internal combustion engines).

(b) By October 31, 2005, and each year thereafter, the owner or operator of the stationary internal combustion engine shall calculate the difference between the actual emissions from the unit during the period from May 1 through September 30 and the allowable emissions for that period.

(c) The owner or operator shall calculate allowable emissions by multiplying the cumulative hours of operations for the unit for the period by the horsepower rating of the unit and by the applicable emission rate set forth in paragraph (1) or (2).

(1) For a spark-ignited engine, 3.0 grams of NO_x per brake horsepower-hour.

(2) For a compression ignition stationary internal combustion engine firing diesel fuel or a combination of diesel fuel and natural gas, 2.3 grams of NO_x per brake horsepower-hour.

(d) Emissions from a stationary internal combustion engine that has been or is replaced by an electric motor may be counted as allowable emissions for purposes of this section and § 129.204, as follows:

(1) For a replaced spark-ignited engine, 3.0 grams of NO_x per brake horsepower-hour of the replacement motor, less 1.5 pounds of NO_x per MWH of electricity consumed by the replacement motor.

(2) For a replaced compression ignition stationary internal combustion engine that fired diesel fuel or a combination of diesel fuel and natural gas, 2.3 grams of NO_x per brake horsepower-hour, less 1.5 pounds of NO_x per MWH of electricity consumed by the replacement motor.

§ 129.204. Emission accountability.

(a) This section applies to units described in §§ 129.201—129.203 (relating to boilers; stationary combustion turbines; and stationary internal combustion engines).

(b) The owner or operator shall determine actual emissions in accordance with one of the following:

(1) If the owner or operator of the unit is required to monitor NO_x emissions with a CEMS operated and maintained in accordance with a permit or State or Federal regulation, the CEMS data reported to the Department to comply with the monitoring and reporting requirements of this article shall be used. Any data invalidated under Chapter 139 (relating to sampling and testing) data shall be substituted with data calculated using the potential emission rate for the unit or, if approved by the Department in writing, an alternative amount of emissions that is more representative of actual emissions that occurred during the period of invalid data.

(2) If the owner or operator of the unit is not required to monitor NO_x emissions with a CEMS, one of the following shall be used to determine actual emissions of NO_x:

(i) The 1-year average emission rate calculated from the most recent permit emission limit compliance demonstration test data for NO_x.

(ii) The maximum hourly allowable NO_x emission rate contained in the permit or the higher of the following:

(A) The highest rate determined by use of the emission factor for the unit class contained in the most up-to date version of the EPA publication, *"AP-42 Compilation of Air Pollution Emission Factors."*

(B) The highest rate determined by use of the emission factor for the unit class contained in the most up-to date version of EPA'S "Factor Information Retrieval (FIRE)" data system.

(iii) CEMS data, if the owner or operator elects to monitor NO_x emissions with a CEMS. The owner or operator shall monitor emissions and report the data from the CEMS in accordance with Chapter 139 or Chapter 145 (relating to interstate pollution transport reduction). Any data invalidated under Chapter 139 shall be substituted with data calculated using the potential emission rate for the unit or, if approved by the Department in writing, an alternative amount of emissions that is more representative of actual emissions that occurred during the period of invalid data.

(iv) An alternate calculation and recordkeeping procedure based upon emissions testing and correlations with operating parameters. The operator of the unit shall demonstrate that the alternate procedure does not underestimate actual emissions throughout the allowable range of operating conditions. The alternate calculation and recordkeeping procedures must be approved by the Department, in writing, prior to implementation.

(c) The owner or operator of a unit subject to this section shall surrender to the Department one NO_x allowance, as defined in § 145.2 (relating to definitions), for each ton of NO_x by which the combined actual emissions exceed the allowable emissions of the units subject to this section at a facility from May 1 through September 30. The surrendered NO_x allowances shall be of current year vintage. For the purpose of determining the amount of allowances to surrender, any remaining fraction of a ton equal to or greater than 0.50 ton is deemed to equal 1 ton and any fraction of a ton less than 0.50 ton is deemed to equal zero tons.

(d) If the combined allowable emissions from units subject to this section at a facility from May 1 through September 30 exceed the combined actual emissions from units subject to this section at the facility during the same period, the owner or operator may deduct the difference or any portion of the difference from the amount of actual emissions from units subject to this section at the owner or operator's other facilities.

(e) By November 1, 2005, and by November 1 of each year thereafter, an owner or operator of a unit subject to this section shall surrender the required NO_x allowances to the Department's designated NO_x allowance tracking system account and provide to the Department, in writing, the following:

(1) The serial number of each NO_x allowance surrendered.

(2) The calculations used to determine the quantity of NO_x allowances required to be surrendered.

(f) If an owner or operator fails to comply with subsection (e), the owner or operator shall by December 31 surrender three NO_x allowances of the current or later year vintage for each NO_x allowance that was required to be surrendered by November 1 of that year.

(g) The surrender of NO_x allowances under subsection (f) does not affect the liability of the owner or operator of the unit for any fine, penalty or assessment, or an obligation to comply with any other remedy for the same violation, under the CAA or the act.

(1) For purposes of determining the number of days of violation, if a facility has excess emissions for the period May 1 through September 30, each day in that period (153 days) constitutes a day in violation unless the owner or operator of the unit demonstrates that a lesser number of days should be considered.

(2) Each ton of excess emissions is a separate violation.

§ 129.205. Zero emission renewable energy production credit.

In calculating actual emissions from a facility under § 129.204 (relating to emission accountability), the owner or operator may deduct 1.5 pounds of NO_x per MWH of electricity or thermal power equivalent for each MWH of zero emission renewable energy produced, if the following conditions are met:

(1) The zero emission renewable energy production is certified in a tradable renewable certificate.

(2) The zero emission renewable energy was generated by a power source that produced zero emissions and used 100% renewable energy, such as solar or wind power, in producing the renewable energy. For hydropower, the power must be generated without the use of a dam.

(3) The zero emission renewable energy power source was originally brought into production on or after December 11, 2004.

(4) The zero emission renewable energy power source is located in Bucks, Chester, Delaware, Montgomery or Philadelphia County.

(5) The owner or operator surrenders the renewable tradable certificate to the Department.

(6) The owner or operator certifies that the conditions of this section have been satisfied.

CHAPTER 145. INTERSTATE POLLUTION TRANSPORT REDUCTION

Subchapter A. NO_x BUDGET TRADING PROGRAM

NO_x ALLOWANCE ALLOCATIONS

§ 145.42. NO_x allowance allocations.

* * * * *

(d) For each control period specified in § 145.41(d), the Department will allocate NO_x allowances to NO_x budget units in a given State under § 145.4(a) (except for units exempt under § 145.4(b)) that commence operation, or are projected to commence operation, on or after May 1, 1997 (for control periods under § 145.41(a)); May 1, 2003 (for control periods under § 145.41(b)); and May 1 of the year 5 years before the beginning of the group of 5 years that includes the control period (for control periods under § 145.41(c)). The Department may also use this set-aside to address allocation revisions to units under subsections (a)—(c). For each ton of NO_x deducted under § 129.205 (relating to zero emission renewable energy production credit), the Department will retire one NO_x allowance

from the allowances in the set-aside for the subsequent control period. The Department will make the allocations under this subsection in accordance with the following procedures:

* * * * *

Subchapter B. EMISSIONS OF NO_x FROM STATIONARY INTERNAL COMBUSTION ENGINES

Sec.
145.111. Applicability.
145.112. Definitions.
145.113. Standard requirements.

§ 145.111. Applicability.

(a) An owner or operator of an engine described in subsection (c) that emitted 153 tons or more of NO_x from May 1 through September 30 in any year from 1995 through 2004 shall comply with this subchapter by May 1, 2005, and each year thereafter.

(b) An owner or operator of an engine described in subsection (c) that emits 153 tons or more of NO_x from May 1 through September 30 in any year after 2004 shall comply with this subchapter by May 1 of the following calendar year and each year thereafter.

(c) Subsections (a) and (b) apply to the following engines:

(1) A rich burn or lean burn stationary internal combustion engine with an engine rating equal to or greater than 2,400 brake horsepower.

(2) A diesel stationary internal combustion engine with an engine rating equal to or greater than 3,000 brake horsepower.

(3) A dual-fuel stationary internal combustion engine with an engine rating equal to or greater than 4,400 brake horsepower.

§ 145.112. Definitions.

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

CEMS—Continuous Emission Monitoring System—The equipment required under this subchapter or Chapter 139 (relating to sampling and testing) to sample, analyze, measure and provide, by readings taken at least every 15 minutes of the measured parameters, a permanent record of NO_x emissions.

Diesel stationary internal combustion engine—A compression-ignited two- or four-stroke engine in which liquid fuel injected into the combustion chamber ignites when the air charge has been compressed to a temperature sufficiently high for auto-ignition.

Dual-fuel stationary internal combustion engine—A compression-ignited stationary internal combustion engine that is burning liquid fuel and gaseous fuel simultaneously.

Engine rating—The output of an engine as determined by the engine manufacturer and listed on the nameplate of the unit, regardless of any derating.

Lean-burn stationary internal combustion engine—Any two- or four-stroke spark-ignited engine that is not a rich-burn stationary internal combustion engine.

Rich-burn stationary internal combustion engine—A two- or four-stroke spark-ignited engine where the manufacturer's original recommended operating air/fuel ratio divided by the stoichiometric air/fuel ratio is less than or equal to 1.1.

Stationary internal combustion engine—For the purposes of this subchapter, an internal combustion engine of the reciprocating type that is either attached to a foundation at a facility or is designed to be capable of being carried or moved from one location to another and is not a mobile air contamination source.

Stoichiometric air/fuel ratio—The air/fuel ratio where all fuel and all oxygen in the air/fuel mixture will be consumed.

Unit—An engine subject to this subchapter.

§ 145.113. Standard requirements.

(a) The owner or operator of a unit subject to this subchapter shall calculate the difference between the unit's actual emissions from May 1 through September 30 and the allowable emissions for that period by the following dates:

(1) For a unit described in § 145.111(a) (relating to applicability), by October 31, 2005, and each year thereafter.

(2) For a unit described in § 145.111(b), by October 31 of the calendar year following the year that this subchapter becomes applicable to the unit and each year thereafter.

(b) The owner or operator shall calculate allowable emissions by multiplying the unit's cumulative hours of operation for the period by the unit's horsepower rating and the unit's applicable emission rate set forth in paragraph (1), (2) or (3).

(1) The emission rate for a rich burn stationary internal combustion engine with an engine rating equal to or greater than 2,400 brake horsepower shall be 1.5 grams per brake horsepower-hour.

(2) The emission rate for a lean burn stationary internal combustion engine with an engine rating equal to or greater than 2,400 brake horsepower shall be 3.0 grams per brake horsepower-hour.

(3) The emission rate for a diesel stationary internal combustion engine with an engine rating equal to or greater than 3,000 brake horsepower, or a dual-fuel stationary internal combustion engine with an engine rating equal to or greater than 4,400 brake horsepower shall be 2.3 grams per brake horsepower-hour.

(c) The owner or operator shall determine actual emissions by using one of the following:

(1) If the owner or operator of the unit is required to monitor NO_x emissions with a CEMS operated and maintained in accordance with a permit or State or Federal regulation, data reported to the Department to comply with the monitoring and reporting requirements of this article. Any data invalidated under Chapter 139 (relating to sampling and testing) shall be substituted with data calculated using the potential emission rate for the unit or, if approved by the Department in writing, an alternative amount of emissions that is more representative of actual emissions that occurred during the period of invalid data.

(2) If the owner or operator of the unit is not required to monitor NO_x emissions with a CEMS, one of the following shall be used to determine actual emissions of NO_x:

(i) CEMS data, if the owner or operator elects to monitor NO_x emissions with a CEMS. The owner or operator shall monitor emissions and report the data from the CEMS in accordance with Chapter 139 or Chapter

145 (relating to interstate pollution transport reduction). Any data invalidated under Chapter 139 shall be substituted with data calculated using the potential emission rate for the unit or, if approved by the Department in writing, an alternative amount of emissions that is more representative of actual emissions that occurred during the period of invalid data.

(ii) An alternate calculation and recordkeeping procedure based upon emissions testing and correlations with operating parameters. The operator of the unit shall demonstrate that the alternate procedure does not underestimate actual emissions throughout the allowable range of operating conditions. The alternate calculation and recordkeeping procedures must be approved by the Department, in writing, prior to implementation.

(iii) The average emission rate calculated from test data from NO_x emission tests conducted from May 1 through September 30 of that year. The emissions tests must be conducted in accordance with the permit emission limit compliance monitoring procedures. Tests must be conducted at least once every 735 hours of operation. The Department may reduce the frequency of the emission testing for a unit based on the consistency of the data gathered from the testing. At least one test is required during the period of May 1 through September 30.

(d) The owner or operator of a unit subject to this section shall surrender to the Department one NO_x allowance, as defined in § 145.2 (relating to definitions), for each ton of NO_x by which the combined actual emissions exceed the allowable emissions of the units subject to this section at a facility from May 1 through September 30. The surrendered NO_x allowances shall be of current year vintage. For the purposes of determining the amount of allowances to surrender, any remaining fraction of a ton equal to or greater than 0.50 ton is deemed to equal 1 ton and any fraction of a ton less than 0.50 ton is deemed to equal zero tons.

(e) If the combined allowable emissions from units subject to this subchapter at a facility from May 1 through September 30 exceed the combined actual emissions from units subject to this subchapter at the facility during the same period, the owner or operator may deduct the difference or any portion of it from the amount of actual emissions from units subject to this subchapter at the owner or operator's other facilities located in this Commonwealth for that same period.

(f) By November 1 of each year, an owner or operator of a unit subject to this subchapter shall surrender the required NO_x allowances to the Department's designated NO_x allowance tracking system account, as defined in § 121.1 (relating to definitions), and shall provide in writing to the Department the following:

(1) The serial number of each NO_x allowance surrendered.

(2) The calculations used to determine the quantity of NO_x allowances required to be surrendered.

(g) If an owner or operator fails to comply with subsection (f), the owner or operator shall by December 31 surrender three NO_x allowances of the current or later year vintage for each nox allowance that was required to be surrendered by November 1.

(h) The surrender of NO_x allowances under subsection (g) does not affect the liability of the owner or operator of units for any fine, penalty or assessment, or other obligation to comply with any other remedy for the same violation, under the CAA or the act.

(1) For purposes of determining the number of days of violation, if a facility has excess emissions for the period May 1 through September 30, each day in that period (153 days) constitutes a day in violation unless the owner or operator of the unit demonstrates that a lesser number of days should be considered.

(2) Each ton of excess emissions is a separate violation.

Subchapter C. EMISSIONS OF NO_x FROM CEMENT MANUFACTURING

Sec.
145.141. Applicability.
145.142. Definitions.
145.143. Standard requirements.
145.144. Reporting, monitoring and recordkeeping.

§ 145.141. Applicability.

Beginning May 1, 2005, an owner or operator of a Portland cement kiln shall comply with this subchapter.

§ 145.142. Definitions.

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

CEMS—Continuous Emission Monitoring System—The equipment required under this subchapter or Chapter 139 (relating to sampling and testing) to sample, analyze, measure and provide, by readings taken at least every 15 minutes of the measured parameters, a permanent record of NO_x emissions.

Clinker—The product of a Portland cement kiln from which finished cement is manufactured by milling and grinding.

Portland cement—A hydraulic cement produced by pulverizing clinker consisting essentially of hydraulic calcium silicates, usually containing one or more of the forms of calcium sulfate as an interground addition.

Portland cement kiln—A system, including any solid, gaseous or liquid fuel combustion equipment, used to calcine and fuse raw materials, including limestone and clay, to produce Portland cement clinker.

§ 145.143. Standard requirements.

(a) By October 31, 2005, and each year thereafter, the owner or operator of a Portland cement kiln shall calculate the difference between the actual emissions from the unit during the period from May 1 through September 30 and the allowable emissions for that period.

(b) The owner or operator shall determine allowable emissions by multiplying the tons of clinker produced by the Portland cement kiln for the period by 6 pounds per ton of clinker produced.

(c) The owner or operator shall install and operate a CEMS, and shall report CEMS emissions data, in accordance with the CEMS requirements of either Chapters 139 or 145 (relating to sampling and testing; and interstate pollution transport reduction) and calculate actual emis-

sions using the CEMS data reported to the Department. Any data invali-dated under Chapter 139 shall besubstituted with data calculated using the potential emission rate for the unit or, if approved by the Department in writing, an alternative amount of emissions that is more representative of actual emissions that occurred during the period of invalid data.

(d) The owner or operator of a Portland cement kiln subject to this section shall surrender to the Department one NO_x allowance, as defined in § 145.2 (relating to definitions), for each ton of NO_x by which the combined actual emissions exceed the allowable emissions of the Portland cement kilns subject to this section at a facility from May 1 through September 30. The surrendered NO_x allowances shall be of current year vintage. For the purposes of determining the amount of allowances to surrender, any remaining fraction of a ton equal to or greater than 0.50 ton is deemed to equal 1 ton and any fraction of a ton less than 0.50 ton is deemed to equal zero tons.

(e) If the combined allowable emissions from Portland cement kilns at a facility from May 1 through September 30 exceed the combined actual emissions from Portland cement kilns subject to this section at the facility during the same period, the owner or operator may deduct the difference or any portion of the difference from the amount of actual emissions from Portland cement kilns at the owner or operator's other facilities located in this Commonwealth for that period.

(f) By November 1, 2005, and each year thereafter, an owner or operator subject to this subchapter shall surrender the required NO_x allowances to the Department's designated NO_x allowance tracking system account, as defined in § 121.1 (relating to definitions), and shall provide in writing to the Department, the following:

(1) The serial number of each NO_x allowance surrendered.

(2) The calculations used to determine the quantity of NO_x allowances required to be surrendered.

(g) If an owner or operator fails to comply with subsection (f), the owner or operator shall by December 31 surrender three NO_x allowances of the current or later year vintage for each NO_x allowance that was required to be surrendered by November 1.

(h) The surrender of NO_x allowances under subsection (g) does not affect the liability of the owner or operator of the Portland cement kiln for any fine, penalty or assessment, or an obligation to comply with any other remedy for the same violation, under the CAA or the act.

(1) For purposes of determining the number of days of violation, if a facility has excess emissions for the period May 1 through September 30, each day in that period (153 days) constitutes a day in violation unless the owner or operator of the Portland cement kiln demonstrates that a lesser number of days should be considered.

(2) Each ton of excess emissions is a separate violation.

[Pa.B. Doc. No. 04-2176. Filed for public inspection December 10, 2004, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE REAL ESTATE COMMISSION

[49 PA. CODE CH. 35]

Education

The State Real Estate Commission (Commission) amends Chapter 35 (relating to State Real Estate Commission) to read as set forth in Annex A. This final-form rulemaking addresses practice when the broker or broker of record dies or is incapacitated, liberalizes the delivery system for real estate prelicensure and continuing education courses, consolidates duplicative prelicensure and continuing education provisions and revises real estate education provider requirements.

Statutory Authority

This final-form rulemaking is authorized under 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).

Response to Public Comments and Regulatory Review and Amendments in the Final-Form Rulemaking

Notice of the proposed rulemaking was published at 33 Pa.B. 4571 (September 13, 2003). Publication was followed by a 30-day public comment period during which the Commission received comments from four real estate education providers. Following the close of the public comment period, the Commission received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC). The Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) did not comment.

Administration of Real Estate Education Providers

The HPLC questioned the mechanism by which the Commission will ensure compliance with the provider requirements by providers outside of this Commonwealth. Real estate education providers outside of this Commonwealth must be approved by the real estate licensing authority from the jurisdiction where the provider is located. The Commission relies upon those licensing authorities to police those real estate education providers. Compliance with Commission regulations concerning schools and continuing education is answered through applications and renewal procedures and processes irrespective of where the provider is located. In addition, the Commission investigates matters when complaints are filed by students and licensees. These investigations are conducted by the Bureau of Enforcement and Investigation in cooperation with the licensing authority of the jurisdiction where the provider does business.

Use of "real estate education provider" generally.

IRRC recommended that the Commission use the term "real estate education provider" throughout instead of "real estate education provider" "education provider" or "provider." The Commission believes that this recommendation is reasonable and has changed "education provider" or "provider" to "real estate education provider" throughout the regulations.

Section 35.341. Approval of real estate education provider.

In the proposed rulemaking, the Commission deleted the requirements that someone over the age of 21 own

the real estate education provider. The HPLC questioned why the Commission deleted this requirement. In response, the Commission believes that age is not a relevant factor in light of the other requirements, such as having a director of operations with a minimum experience level and a custodian of records, as well as the financial security requirements.

Paragraph (4) requires a real estate education provider to designate a person or entity to serve as custodian of records if the provider were to terminate operations. The HPLC questioned why the Commission has removed the requirement that the custodian be located within the Commonwealth. The Commission understands that applicants and licensees obtain their prelicensure and continuing education from providers within and outside of this Commonwealth. Sections 35.271(b)(3)(iii), 35.272(b)(2)(ii), 35.273(b)(4)(ii), 35.275(b)(3)(ii), 35.388(3) and 35,385(e) specifically allow real estate education providers outside of this Commonwealth to provide education in this Commonwealth provided that the provider is approved by the real estate education licensing in the jurisdiction where the provider is located. Because licensees will be able to obtain their education from providers outside of this Commonwealth, the Commission believes that the custodian of records could be located within or outside of this Commonwealth.

Paragraph (5) directs real estate education providers to post a $10,000 surety bond to the Commonwealth for the protection of the contractual rights of the students. The HPLC and IRRC asked the Commission to explain how the $10,000 would be sufficient in the event a real estate education provider fails to perform. Since the surety bond requirement was placed in the regulations, no real estate education providers have gone bankrupt or closed taking student moneys. Based upon this prior experience combined with the relatively low cost of real estate courses, the Commission believes that the $10,000 bond is sufficient to protect students in the event the provider abruptly terminates its services and does not reimburse students.

Paragraph (6) delineates the documents that must accompany a real estate education provider's application. In proposed form, the Commission deleted the requirement in paragraph (1)(i)(C) that required real estate education providers to provide a notarized pro forma profit and loss statement and balance sheet. The HPLC questioned why this documentation was removed. Pro forma profit and loss statements and balance sheets do not contain actual profit and loss figures. As projections, the Commission believes that these documents are unnecessary—especially in light of the surety bond.

In proposed rulemakaing, the Commission also deleted the requirement in subparagraph (vi) that the real estate education provider provide the Commission with copies of the student enrollment agreement, the school transcript, a statement of the prerequisites for admission, a statement of policy regarding refund of tuition and a sketch or photograph of the sign for each location. A public commentator suggested that the Board continue to require these documents. Additionally, IRRC suggested that the Commission retain the requirement of a student enrollment agreement. The Commission believes that these suggestions are reasonable and has reinserted these requirements on final form.

The Commission also retained subparagraphs (viii)—(ix) in final form. One commentator suggested that this list be retained, even in a separate document, as guidance for inspectors and real estate education providers. Rather than creating another regulatory document, the Commission reinserted these provisions as well.

Section 35.344. Withdrawal of Real Estate Education Provider or Director Approval.

Subsection (b)(5) authorizes the Commission to withdraw a real estate education provider's approval for having been convicted of, pled guilty or nolo contendere to a misdemeanor related to the practice of real estate, forgery, embezzlement, obtaining money under false pretenses, bribery, larceny, extortion, conspiracy to defraud or any similar offense. The HPLC questioned why the Commission replaced "moral turpitude" with enumerated offenses. The Commission modified this provision to parallel the language in section 604(a)(14) of the RELRA (63 P. S. § 455.604(a)(14)), regarding convictions.

Section 35.351a. Assistant school director.

The Commission has deleted all references to assistant school directors. One commentator suggested that by removing this provision, a program director would be prohibited from delegating responsibilities to assistant directors. The Commission does not agree that this amendment dilutes the authority of the director. As the Commission explained in the preamble of the proposed rulemaking, the sole reason the Commission has eliminated this provision was because the RELRA does not contain provisions delineating the qualifications or responsibilities for assistant directors. Under the RELRA, the director has the ultimate responsibility for the real estate education provider and has the discretion to delegate responsibilities to an assistant director.

Section 35.352. Location and facilities.

Subsection (b)(2) prohibits a real estate education provider from sharing office space, instruction space or common space with a real estate franchise, network or organization. IRRC and several commentators questioned whether this provision conflicts with the Commission's June 3, 2003, Guideline regarding the relationship between real estate education providers and real estate companies.

In its Guideline, the Commission explained that a real estate company/broker or group of companies/brokers may contract with a real estate education provider to provide an approved continuing education course at the provider's location or any other location that complies with § 35.352. Courses which are not approved for continuing education under § 35.384 (relating to qualifying courses) such as specific company policies or documents, may also be provided but will not receive continuing education credit.

The Commission does believe that the regulation and the Guideline conflict with one another. However, in order to clarify the Commission's position, in final form, the Commission has added another exclusion to subsection (b)(2) that would allow real estate licensees to contract with real estate education providers to provide continuing education courses. As is currently the rule, where an approved course would be presented at a location other than the real estate education provider's main location, the real estate education provider would have to obtain approval for a satellite location.

The Commission has chosen not to eliminate subsection (b)(2) as suggested by one commentator because it believes that the separation between real estate education providers and real estate companies is appropriate. At the same time, the Commission believes that allowing real

estate companies to contract with real estate education providers for continuing education courses does not breach that separation.

Current subsection (b)(4)—(6) delineates illumination, floor space and airspace requirements. In proposed form, the Commission recommended removing these provisions. The HPLC requested an explanation for the deletion of these provisions. Paragraph (3) requires conformance with applicable building, fire safety and sanitary standards. The Commission believes that the requirements in subsection (b)(4)—(6) fall within the gamet of paragraph (3) and as such, are redundant.

Current subsection (c) requires that where a real estate education provider rents facilities for a main or satellite location, the lease shall be in effect for the period when the real estate education provider is in session. The Commission has removed this provision. One commentator questioned whether deleting this provision conflicted with the requirement in § 35.360(a)(2)(ii) which requires that the lease be retained. The Commission does not believe that this revision creates a conflict. Former subsection (c) addressed the time frame when the lease was in effect. Section 35.360 (relating to records) addresses what documents a real estate education provider must retain.

Section 35.353. Selection of instructors.

Subsection (a)(2) decreased the number of years of experience an instructor must have from 5 to 3. One commentator suggested that instead of permitting "practical or teaching" experience for the reduced number of years, the requirement should be "practical and teaching experience." In addition, the commentator suggested that instructors be required to take a Commission-developed training course each biennium. Another commentator suggested that the Commission should develop additional instructor approval standards for use by directors.

The Commission has declined to implement any of the suggestions. The Commission believes that 3 years of practical and teaching experience is unnecessary to teach real estate courses. Further, decisions regarding instructors' capabilities rest with the director based upon the director's observations and student comments. Because the Commission does not license instructors, the Commission lacks the enforcement mechanism to assure that all instructors attend training. Nonetheless, directors may impose this requirement on their staff.

Section 35.357. Student enrollment agreements.

The Commission recommended eliminating the student enrollment agreement because it wanted to avoid involving itself in contractual matters between real estate education providers and students and because the agreement was exemplary and not mandatory. IRRC agreed that the form agreement should be removed from the regulation; however, it suggested that the requirement for an agreement as well as minimum provisions be added to the regulation. The Commission finds this suggestion warranted and has reinserted these provisions accordingly.

Section 35.358. Administration of curriculum.

Current subsection (a)(3) delineates course hour credit for Real Estate Fundamentals and Real Estate Practice. In the proposed rulemaking, the Commission moved this provision to new subsection (b). One commentator questioned if the Commission was changing its position regarding the course hour credit in the revision. The sole reason for the change was to segregate provisions that apply to prelicensure and continuing education from those that apply only to prelicensure. No other change is contemplated by this revision.

New subsection (a)(4) permits prelicensure and continuing education courses to be taught by distance education. As in 34 other states, the Commission retains authority over course content under § 35.384 (relating to qualifying courses). Distance education courses require additional review and approval of the delivery method by the Association of Real Estate License Law Officials (ARELLO) or another certifying body deemed acceptable to the Commission.

The HPLC and several commentators questioned the mechanics of ARELLO approval. Prior to submitting a prelicensure or continuing education course taught by distance education to the Commission for content approval, either the primary provider (the author of the course) or the secondary provider (the actual provider of the course) must obtain approval of the delivery method for courses from ARELLO.

The provider must provide ARELLO with a detailed description and implementation plan for the course and meet standards set forth in ARELLO's Distance Education Standards Manual. (The ARELLO approval process as well as a list of states requiring ARELLO approval can be obtained from ARELLO's web page at www.arello.org.) The delivery method may be, for example, the Internet, satellite, video, computer disc, audiotape or other remote instruction. Once approved, ARELLO issues an approval number which the provider must report to the Commission.

Several commentators also questioned the cost of ARELLO approval. Because the Commission is not requiring both primary and secondary ARELLO approval, the cost to the real estate education providers will be significantly reduced. Nonetheless, the Commission believes that the cost associated with ARELLO approval is necessary in order to assure that the delivery method is sufficient.

Subsection (b)(2) requires that prelicensure courses be graded by written examination. One commentator suggested that all examinations be proctored. After reviewing the distance examination requirements for other states' prelicensure courses, the Commission believes that this suggestion is worthwhile and has amended this provision to require that the prelicensure examinations be proctored.

Section 35.361. Display of documents and approved name.

Subsections (a) and (c) require that real estate education providers prominently display the certificate of approval and letter of approval at the main location and any satellite locations. One commentator suggested that the Commission eliminate subsection (c) and modify subsection (a) since the Commission acknowledged in the Preamble in proposed form that instruction occurs in multiple locations. The Commission concurs with this suggestion and has deleted subsection (c) and amended subsection (a) to reflect that the certificate of approval only be displayed at the main location. Because real estate education providers will still be required to register satellite locations, investigators will still be able to determine where all of the courses are being taught.

Section 35.381. Purposes and goals.

Section 35.381 sets out the three goals of continuing education. In proposed form, the Commission eliminated this provision. One commentator suggested that these

goals be maintained. While the Commission agrees with the commentator that these goals are appropriate, the Commission does not believe that the goals should be placed in regulations. Accordingly, the Commission has not reinserted this provision.

Section 35.383. Waiver of continuing education requirement.

New subsection (b) requires licensees seeking a waiver of the continuing education requirement to file the request by March 31 of the renewal year unless it is impracticable to do. One commentator suggested that the deadline for requests be set back to February 15th to give the Commission additional time to review the requests. For many years, licensees have been advised on the renewal form that waiver requests must be filed by March 31st. During that time, the Commission has not had any difficulty in reviewing these requests as the March 31st deadline gives the Commission two meetings to accomplish this task. The Commission has not amended this provision.

Section 35.384. Qualifying courses.

Subsection (a) instructs licensees that they may complete their 14-hour continuing education requirement in acceptable topics. Rather than referring to "acceptable courses," in proposed form, the Commission referred to "acceptable topics." In final-form, the Commission implemented the suggestion of a commentator who recommended that the word "courses" be substituted for "topics." Also in final-form the Commission reduced the minimum hour increment from 3 1/2 to 2 hours. The Commission believes that reducing the numbers of hours for each course will provide licensees with more flexibility in their course selection without eroding the educational content of the courses. Additionally, because 2 hour courses are standard in other states, Pennsylvania licensees will be also able to avail themselves of these courses.

Current subsection (b) requires licensees to complete a required course each biennium. In proposed form, the Commission removed this requirement in all but prenotified instances. Two commentators suggested that by eliminating the required course, licensees would not receive sufficient training in fair housing.

In determining whether to retain the required course, the Commission considered the frequency of amendments to the RELRA and the regulations as well as the number of fair housing disciplinary cases. The Commission determined that except in cases where the RELRA or regulations are substantially modified or where, in the Commission's view, licensees require specific Commission-guidance, licensees should be able to take continuing education in subjects that directly benefit their practice or interest. As part of its ongoing review of its regulations, however, the Commission intends to monitor trends in disciplinary proceedings. When the Commission finds an increase in specific violations, it will consider reinstituting a required course. As in the past, if a required course becomes necessary, the Commission will notify all licensees and real estate education providers at least 6 months prior to the end of the renewal period.

Subsection (c) lists acceptable topics for continuing education credit. New paragraph (19) adds "management of real estate brokerage operations." The HPLC opined that this paragraph conflicts with subsection (d) which precludes office management courses that do not have a bearing on the public interest. The course contemplated in paragraph (19) tracks the exclusion in section 404.1(c) of the RELRA for a broker's continuing education course involving the deposit and maintenance of escrow accounts, document preparation and retention, recordkeeping, conflicts of interest, disclosures to prospective sellers and buyers and the general ethical responsibilities of licensees.

Section 35.385. Continuing education providers.

Section 35.385 contains a list of providers that may offer continuing education courses: accredited colleges, universities and institutes of higher learning and real estate education providers in this Commonwealth and outside of this Commonwealth. One commentator suggested that this list of real estate education providers should apply to prelicensure as well as continuing education. The definition of "school" in section 201 of the RELRA (63 P. S. § 455.201) specifically excludes colleges, universities or institutes of higher learning accredited by the Middle States Association of Colleges and Secondary Schools or equivalent accreditation. As such, the Commission does not have jurisdiction over these prelicensure programs. Conversely, the Commission's authority over continuing education instruction is broad.

The commentator also suggested that in-State and out-of-State providers should be treated the same. The Commission concurs and requires approval for both in-State and out-of-State providers. In both the prelicensure and continuing education realm, all providers, other than those specifically exempted, must be approved either by this Commission or the appropriate licensing/regulatory authority in another jurisdiction where the provider is located. In addition, both must electronically transfer their continuing education rosters to the Commission.

Finally, another commentator questioned whether in-State providers would be given processing preference over out-of-State providers. The Commission does not anticipate that this regulation will cause a backlog in processing. The Commission staff will continue to process applications in the order in which they are received.

Sections 35.386 through 35.392

The Commission proposed to delete §§ 35.386—35.392. One commentator suggested that these provisions should be amended instead of deleted. In the preamble to the proposed rulemaking, the Commission explained that these provisions are being deleted because they mirror existing provisions. Former § 35.387 has been consolidated into § 35.358 (relating to administration of curriculum), former § 35.388 has been consolidated into § 35.352 (relating to location and facilities). Former § 35.390 has been consolidated into §§ 35.354 and 35.355 (relating to prohibited forms of advertising and solicitation; and prospectus material). Former § 35.391 has been consolidated into § 35.359 (relating to course transcripts) and former § 35.392 has been consolidated into § 35.362 (relating to inspection of real estate education providers). Accordingly, the Commission has not amended these provisions.

Fiscal Impact and Paperwork Requirements

This final-form rulemaking should have no fiscal impact on the Commonwealth, its political subdivisions or the public. This final-form rulemaking should have a positive fiscal impact on the regulated community because the amendments reduce the legal, accounting, reporting or other paperwork requirements on the regulated community.

Sunset Date

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

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 13, 2003, the Commission submitted a copy of the notice of proposed rulemaking, published at 33 Pa.B. 4571, to IRRC and the Chairpersons of the HPLC and the SCP/PLC for review and comment.

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

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on October 19, 2004, the final-form rulemaking was approved by the HPLC. On November 3, 2004, the final-form rulemaking was deemed approved by the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on November 4, 2004, and approved the final-form rulemaking.

Contact Person

Further information may be obtained by contacting Deborah Sopko, Administrative Assistant, State Real Estate Commission, P. O. Box 2649, Harrisburg, PA 17105-2649, www.state.pa.us/bpoa/recomm/mainpage.

Findings

The Commission finds that:

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

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

(3) This final-form rulemaking does not enlarge the purpose of proposed rulemaking published at 33 Pa.B. 4571.

(4) The final-form rulemaking is necessary and appropriate for administering and enforcing the RELRA identified in this preamble.

Order

The Commission, acting under its authorizing statutes, orders that:

(a) The regulations of the Commission, 49 Pa. Code Chapter 35, are amended by amending §§ 35.201, 35.203, 35.228, 35.229, 35.252, 35.271—35.273, 35.275, 35.341—35.344, 35.351, 35.352—35.363, and 35.382—35.385; by adding §§ 35.253 and 35.254; and by deleting §§ 35.351a, 35.381 and 35.386—35.392 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

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

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

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

JOSEPH J. MCGETTIGAN,
Chairperson

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission relating to this document, see 34 Pa.B. 6292 (November 20, 2004).)

Fiscal Note: Fiscal Note 16A-561 remains valid for the final adoption of the subject regulations.

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 education provider—A person or institution who offers real estate 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 education provider	$120
Reinspection of real estate education provider after first failure	$65
Annual renewal of approval of real estate education provider	$250 plus $10 for each satellite location, course and instructor

* * * * *

Change of ownership or directorship of real estate education provider	$75

Change of name of real estate education provider	$45
Change of location of real estate education provider	$70
Addition of satellite location or instructor for real estate education provider	$20
Addition of course for real estate 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:

(1) Be 18 years of age or older.

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

(i) The course was taken prior to onsite training.

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

(3) Have successfully completed 30 days of onsite training at a campground membership facility subject to the following conditions:

(i) The 30 days of onsite training shall be completed during a 90-day period within 3 years prior to the submission of a license application.

(ii) The trainee shall be actively supervised and trained by a broker.

(4) Submit a completed license application to the Commission with:

(i) An official transcript evidencing acquisition of the qualifying coursework or degree.

(ii) A sworn statement from the broker under whom the applicant received his onsite training certifying that he actively trained and supervised the applicant and providing other information regarding the onsite training as the Commission may require.

(b) An individual who sells campground memberships without a license may be subject to disciplinary action by the Commission for unlicensed practice as a campground membership salesperson under section 301 of the act (63 P. S. § 455.301).

§ 35.229. Licensure as time-share salesperson.

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

(1) Be at least 18 years of age.

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

(i) The course was taken prior to onsite training.

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

(3) Have successfully completed 30 days of onsite training at a time share facility subject to the following conditions:

(i) The 30 days of onsite training shall be completed during a 90-day period within 3 years prior to the submission of a license application.

(ii) The trainee shall be actively supervised and trained by a broker.

(4) Submit a completed license application to the Commission with:

(i) An official transcript evidencing acquisition of the qualifying coursework or degree.

(ii) A sworn statement from the broker under whom the applicant received his onsite training certifying that he actively trained and supervised the applicant and providing other information regarding the onsite training the Commission may require.

(b) An individual who sells time shares without a license may be subject to disciplinary action by the Commission for unlicensed practice as a time-share salesperson under section 301 of the act (63 P. S. § 455.301).

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 shall notify the Commission that the estate has appointed another licensed broker to supervise the termination of the deceased broker's business. 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 termination period:

(1) New listing agreements may not be entered into.

(2) Unexpired listing agreements may be promoted unless the seller or lessor elects to cancel the agreement. Unexpired listings will expire automatically 90 days after the broker dies and may not be renewed.

(3) Pending agreements of sale or lease may proceed to consummation.

(4) New licensees may not be hired.

§ 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.

(a) An individual who wants to take the broker's examination for a Pennsylvania broker's license shall:

(1) Be 21 years of age or older.

(2) Be a high school graduate or have passed a high school general education equivalency examination.

(3) Have worked at least 3 years as a licensed salesperson, with experience qualifications that the Commission considers adequate for practice as a broker, or possess at least 3 years of other experience, education, or both, that the Commission considers the equivalent of 3 years' experience as a licensed salesperson.

(4) Have acquired 16 credits, or 240 hours of instruction, in professional real estate education as determined by the Commission under subsection (b).

(5) Submit a completed examination application to the Commission or its designee with:

(i) Official transcripts evidencing the acquisition of course credits.

(ii) A detailed resume of real estate activities performed by the candidate while working as a salesperson and a sworn statement from the candidate's employing broker confirming that these activities were performed if the candidate is a licensed salesperson.

(iii) A complete description of work experience and education that the candidate considers relevant to the requirements of paragraph (3) if the candidate is not a licensed salesperson.

(iv) A certification from the real estate licensing authority of the jurisdiction in which the candidate is licensed stating that the candidate had an active license for each year that credits are claimed if the candidate is applying brokerage experience to satisfy the professional education requirement.

(v) The fee for review of the candidate's qualifications to take the examination prescribed in § 35.203 (relating to fees) and the fees for administration of the examination.

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

(1) A candidate who has obtained one of the following degrees will be deemed to have met the education requirement and will not be required to show completion of coursework in specific areas of study:

(i) A bachelor's degree with a major in real estate from an accredited college, university or institute of higher learning.

(ii) A bachelor's degree from an accredited college, university or institute of higher learning, having completed coursework equivalent to a major in real estate.

(iii) A juris doctor degree from an accredited law school.

(2) Except as provided in paragraph (6), 2 of the required 16 credits shall be in a Commission-developed or approved real estate office management course and 2 of the required 16 credits shall be in a Commission-developed or approved law course. At least 6 of the remaining 12 credits shall be in 3 or more of the Commission-developed courses listed in this paragraph. The remaining 6 credits shall be in real estate courses but not necessarily those listed in this paragraph. A candidate may not apply credits used to qualify for the salesperson's examination toward fulfillment of the broker education requirement.

(i) Real Estate Law.

(ii) Real Estate Finance.

(iii) Real Estate Investment.

(iv) Residential Property Management.

(v) Nonresidential Property Management.

(vi) Real Estate Sales.

(vii) Residential Construction.

(viii) Valuation of Residential Property.

(ix) Valuation of Income-Producing Property.

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

(i) An accredited college, university or institute of higher learning, whether in this Commonwealth or outside this Commonwealth.

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

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

(iv) A real estate industry organization outside this Commonwealth, if the course is approved by the licensing jurisdiction of another state. The course transcript or certificate of completion shall state that the course is approved by the licensing jurisdiction which has approved it.

(4) A maximum of four credits will be allowed for each real estate course. A maximum of four credits will be allowed for each area of real estate study listed in paragraph (2).

(5) Courses shall have been completed within 10 years prior to the date of successful completion of the licensing examination.

(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.

(a) An individual who wants to take the salesperson's examination for the purpose of obtaining a Pennsylvania salesperson's license shall:

(1) Be 18 years of age or older.

(2) Have successfully completed four credits, or 60 hours of instruction, in basic real estate courses as determined by the Commission under subsection (b).

(3) Submit a completed examination application to the Commission or its designee with the examination fee.

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

(1) A candidate who has obtained one of the following degrees will be deemed to have met the education requirement and will not be required to show completion of coursework in specific areas of study:

(i) A bachelor's degree with a major in real estate from an accredited college, university or institute of higher learning.

(ii) A bachelor's degree from an accredited college, university or institute of higher learning, having completed coursework equivalent to a major in real estate.

(iii) A juris doctor degree from an accredited law school.

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

(i) An accredited college, university or institution of higher learning located outside this Commonwealth.

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

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

(i) An accredited college, university or institution of higher learning located outside this Commonwealth.

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

(4) Courses shall have been completed within 10 years prior to the date of successful completion of the licensing examination.

§ 35.273. Examination for cemetery broker's license.

(a) An individual who wants to take the salesperson's examination for the purpose of obtaining a Pennsylvania cemetery broker's license shall:

(1) Be 21 years of age or older.

(2) Have worked at least 3 years as a licensed salesperson or cemetery salesperson, with experience qualifications that the Commission considers adequate for practice as a cemetery broker, or possess at least 3 years of other experience, education, or both, that the Commission considers the equivalent of 3 years' experience as a licensed salesperson or cemetery salesperson.

(3) Have successfully completed four credits, or 60 hours of instruction, in basic real estate courses as determined by the Commission under subsection (b).

(4) Submit a completed examination application to the Commission or its designee with:

(i) Official transcripts evidencing the acquisition of degrees or course credits.

(ii) A detailed resume of real estate activities performed by the candidate while working as a salesperson or cemetery salesperson, and a sworn statement from the candidate's employing broker confirming that these activities were performed if the candidate is a licensed salesperson or cemetery salesperson.

(iii) A complete description of work experience and education that the candidate considers relevant to the requirements of paragraph (2) if the candidate is not a licensed salesperson or cemetery salesperson.

(iv) The fee for review of the candidate's qualifications to take the examination prescribed in § 35.203 (relating to fees) and the fee for administration of the examination.

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

(1) A candidate who has obtained one of the following degrees will be deemed to have met the education requirement and will not be required to show completion of course work in specific areas of study:

(i) A bachelor's degree with a major in real estate from an accredited college, university or institute of higher learning.

(ii) A bachelor's degree from an accredited college, university or institute of higher learning, having completed course work equivalent to a major in real estate.

(iii) A juris doctor degree from an accredited law school.

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

(i) An accredited college, university or institute of higher learning in this Commonwealth.

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

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

(i) An accredited college, university or institute of higher learning in this Commonwealth.

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

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

(i) An accredited college, university or institute of higher learning located outside this Commonwealth.

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

(iii) A cemetery association outside this Commonwealth, if the course taught by the cemetery association is equivalent to a course taught by a real estate school in this Commonwealth approved by the Commission.

(5) Courses shall have been completed within 10 years prior to the date of successful completion of the licensing examination.

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

(a) An individual who wants to take the salesperson's examination for the purpose of obtaining a Pennsylvania rental listing referral agent's license shall:

(1) Be 18 years of age or older.

(2) Have successfully completed four credits, or 60 hours of instruction, in basic real estate courses as determined by the Commission under subsection (b).

(3) Submit a completed examination application to the Commission or its designee with the examination fee.

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

(1) A candidate who has obtained one of the following degrees will be deemed to have met the education requirement and will not be required to show completion of coursework in specific areas of study:

(i) A bachelor's degree with a major in real estate from an accredited college, university or institute of higher learning.

(ii) A bachelor's degree from an accredited college, university or institute of higher learning, having completed coursework equivalent to a major in real estate.

(iii) A juris doctor degree from an accredited law school.

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

(i) An accredited college, university or institute of higher learning in this Commonwealth.

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

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

(i) An accredited college, university or institute of higher learning in this Commonwealth.

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

(4) Courses shall have been completed within 10 years prior to the date of successful completion of the licensing examination.

Subchapter F. REAL ESTATE EDUCATION PROVIDERS

APPROVAL OF REAL ESTATE EDUCATION PROVIDERS

§ 35.341. Approval of real estate education provider.

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

(1) Be owned by persons who possess good moral character, or, if the owner is a corporation, have officers and directors who meet this requirement.

(2) Have a name that is acceptable to the Commission.

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

(4) Designate a person or entity to serve as custodian of records if the real estate education 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 real estate education provider's students.

(6) Submit a completed real estate education provider approval application to the Commission with:

(i) A completed real estate education 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 education provider.

(B) Two letters of reference from responsible persons relating to the applicant's integrity and to the applicant's previous experience, if any, in the administration of an educational program.

(C) 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 real estate education provider director application with:

(A) Credentials evidencing the qualifications required of the applicant under § 35.342.

(B) 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 real estate education provider has a fictitious name.

(iv) A certificate of incorporation, if the real estate education provider is a corporation.

(v) A copy of the surety bond required under paragraph (5).

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

(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) The approval fee prescribed in § 35.203 (relating to fees).

(xi) For the main school location and each proposed satellite location, a sketch or photograph of the real estate education provider's sign.

§ 35.342. Approval of real estate educational director.

(a) A real estate 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 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 records and facilities.

(b) The Commission may provisionally approve an otherwise qualified applicant for director who lacks sufficient background in teaching, supervision or educational administration. A provisionally approved director shall obtain the requisite qualifications in the time and manner prescribed by the Commission.

(c) An approved real estate education provider shall obtain the Commission's approval before changing directors. The prospective director shall submit to the Commission the information required by § 35.341(6)(ii) (relating to approval of real estate education provider).

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

(1) The real estate education 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 real estate education provider approval.

An approved real estate education provider shall renew its approval annually. To obtain renewal of approval, a real estate 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 director.

(2) A copy of the $10,000 surety bond showing coverage for the upcoming renewal period.

(3) The fee for renewal of approval prescribed in § 35.203 (relating to fees).

§ 35.344. Withdrawal of real estate 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 education provider that it finds guilty of:

(1) Having acquired the Commission's approval by misrepresentation.

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

(3) Violating a requirement of §§ 35.351—35.363 (relating to administration of real estate education providers).

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

(1) Any conduct in connection with the administration of a real estate education provider which demonstrates bad faith, dishonesty, untrustworthiness or incompetency.

(2) Failing to comply with § 35.341 (relating to approval of real estate education provider).

(3) Having had a real estate license revoked or suspended by the Commission or by a real estate licensing authority of another jurisdicition.

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

(5) Having been convicted of, or having pled guilty or nolo contendere to a misdemeanor 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 REAL ESTATE EDUCATION PROVIDERS

§ 35.351. Duty of director.

The director for a real estate education provider is responsible for day-to-day administration, including 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. (Reserved).

§ 35.352. Location and facilities.

(a) A real estate education provider shall have a main location that contains its administrative offices, its records, and a telephone with a listed number for the real estate education provider's exclusive use.

(b) The location where classes are taught must:

(1) Be suitable for classroom space.

(2) Not share office space, instruction space or a common space with a real estate franchise, network or organization. This paragraph does not apply to a real estate trade association or to a contractual arrangement between a real estate licensee and a real estate education provider to provide continuing education courses.

(3) Be in conformance with applicable building, fire safety and sanitary requirements imposed by State, county and municipal governments.

§ 35.353. Selection of instructors.

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

(1) Possesses an undergraduate, graduate or postgraduate degree in the subject matter of the course to be taught.

(2) Has 3 years of practical or teaching experience in a profession, trade or occupation directly related to the subject matter of the course to be taught.

(b) *Proof of qualifications.* A real estate education provider shall maintain documentation substantiating the instructor's education and experience.

§ 35.354. Prohibited forms of advertising and solicitation.

(a) A real estate 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 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 real estate 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 real estate education provider meets those standards and requirements.

(4) Make a guarantee of employment, conditional or unconditional, to a student or prospective student.

(5) Guarantee that successful completion of its curriculum will result in the student's passing a real estate licensing examination.

(6) Promote the business of a real estate licensee or a real estate organization, franchise or network.

(7) Recruit students for employment or affiliation with a real estate licensee or a real estate organization, franchise or network.

(8) Solicit students for membership in a real estate organization, franchise or network.

(9) Permit an instructor or guest lecturer while on the real estate education provider's premises to wear any

identification relating to the name of the real estate licensee or a real estate organization, franchise or network.

(10) Solicit enrollments by means of advertisements in the employment columns of newspapers and other publications.

(11) Engage in advertising that is false, misleading, deceptive or degrading to the dignity of the real estate profession.

(b) A 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. Students shall be informed of this prohibition through a written statement which shall contain the following:

"No recruiting for employment opportunities for any real estate brokerage firm is allowed in this class. Any recruiting should be promptly reported to the State Real Estate Commission by calling this number: 1-800-822-2113."

§ 35.355. Prospectus materials.

(a) A real estate 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:

(1) Admission requirements.

(2) Curriculum, including a specification of courses that meet the Commission's requirements for prelicensure education or continuing education.

(3) Tuition and other fees, and the refund policy in the event of cancellation.

(4) Completion requirements.

(b) Prospectus materials for courses shall be directed towards the general licensee population without regard to the licensees' affiliation with a particular educational institution or a particular real estate organization, franchise or network.

§ 35.356. Tuition and other fees.

A real estate 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 real estate education 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.

A real estate education provider shall require each of its students to enter into a student enrollment agreement. The agreement must:

(1) Itemize the tuition and other fees and the services and materials to be received from them.

(2) State the real estate education provider'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.

(3) Contain the Bureau's toll-free telephone number, (800) 822-2113, that the student may call to obtain information about filing a complaint against the real estate education provider.

§ 35.358. Administration of curriculum.

(a) Real estate education providers shall observe the following standards in the administration of prelicensure and continuing education curriculum:

(1) 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 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) 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. Instruction in a Commission required course shall conform to the content or the outline developed by the Commission for the course.

(3) Unless 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 prelicensure course and during at least 90% of the classroom instruction for a continuing education course, to receive credit. The real estate education provider shall be responsible for verifying student attendance.

(4) Courses delivered by distance education, in addition to meeting the content requirements in § 35.384 (relating to qualifying courses), must have the delivery method 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), a real estate education provider shall observe the following standards in the administration of its prelicensure curriculum:

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

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

§ 35.359. Course transcripts.

(a) *Prelicensure.* Within 30 days after a course has been taught, a real estate 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 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 education provider shall maintain complete and accurate records in the following areas:

(1) *Financial.* The real estate education 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) Copies of documentation showing compliance with applicable building, fire safety and sanitary requirements imposed by state, county or municipal governments.

(ii) A copy of the lease or rental agreement, if the real estate education provider does not own the building being used.

(3) *Personnel*. The 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 real estate education provider has offered, the following:

(i) The course title.

(ii) The course prerequisites.

(iii) The course objectives.

(iv) The course outline.

(v) The requirements for successful completion of the course.

(vi) Copies of texts and other instructional materials used in teaching the course.

(vii) The supplies required of students for the course.

(viii) The course schedule.

(ix) Copies of published descriptions of the course.

(x) The course instructor.

(5) *Scholastic*. An academic transcript for each student which must contain the following:

(i) The real estate education provider's name and Commission approval number.

(ii) The location at which the course was taught.

(iii) The name of the student.

(iv) The course title.

(v) The date that the student completed the course.

(vi) The number of hours of the course.

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

(viii) The date that the transcript was issued.

(ix) 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 care may be.

(6) *Attendance*.

(b) A real estate education provider shall store its records at its main location. Upon termination of operations, a real estate education provider shall transfer its records to the designated custodian of records. The real estate education provider shall notify the Commission whenever it changes the custodian of records.

(c) A real estate 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 real estate education providers).

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

(e) A real estate education provider must retain attendance and scholastic records as follows:

(1) Continuing education records must be maintained for 4 years.

(2) All other records must be retained for 10 years.

§ 35.361. Display of documents and approved name.

(a) A real estate education provider's certificate of approval shall be displayed prominently at the real estate education provider's main location.

(b) A real estate education provider's approved name must be displayed prominently at each location where courses are taught.

(c) An alphabetical list of the real estate education provider's satellite locations shall be displayed prominently at the real estate education provider's main location.

§ 35.362. Inspection of real estate education providers.

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

(1) Upon a complaint or reasonable belief that the real estate education provider is not in compliance with §§ 35.351—35.363.

(2) As a follow-up to a previous inspection that revealed the real estate education 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 real estate education provider, 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 real estate education provider records.

(2) Inspect all areas of the real estate education provider's premises.

(3) Monitor the performance of instructors in classrooms.

(4) Interview the real estate education provider, director and other administrative personnel, instructors and students.

§ 35.363. Termination of operations.

A real estate 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:

(1) The date of termination.

(2) The date that real estate education provider records will be transferred to the designated records custodian.

(3) The procedure for refunding tuition and allocating credits to currently enrolled students.

Subchapter H. CONTINUING EDUCATION

§ 35.381. (Reserved).

§ 35.382. Requirement.

(a) *Condition precedent to renewal of current license.* 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 must be completed by the May 31 renewal deadline.

(b) *Condition precedent to reactivation and renewal of noncurrent license.* 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).

(c) *Exception.* The continuing education requirement does not apply to cemetery brokers, cemetery salespersons, builder-owner salespersons, timeshare salespersons, campground membership salespersons and rental listing referral agents.

(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. The following are examples of situations in which hardship waivers will be granted.

(1) A licensee who seeks to renew a current license that was initially issued within 6 months of the biennial license period for which renewal is sought will be deemed eligible, on the basis of hardship, for a full waiver of the continuing education requirement.

(2) A licensee who seeks to renew a current license that was reactivated from noncurrent status within 6 months of the biennial license period for which renewal is sought will be deemed eligible, on the basis of hardship, for a full waiver of the continuing education requirement.

(3) A licensee who is a qualified continuing education instructor will be deemed eligible for the waiver of 1 hour of continuing education for each hour of actual classroom instruction in an approved continuing education topic. 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 must 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.

(a) Except as provided in subsection (b), a licensee shall complete 14 hours of continuing education in acceptable courses in a minimum of 2-hour increments.

(b) The Commission may, for a given biennial license period and with adequate notice to licensees, require that all or part of the 14 hours be completed in required topics.

(c) Acceptable courses include the following:

(1) Real estate ethics.

(2) Laws affecting real estate.

(3) Real estate financing and mathematics.

(4) Real estate valuation and evaluation.

(5) Property management.

(6) Land use and zoning.

(7) Income taxation as applied to real property.

(8) Ad valorem tax assessment and special assessments.

(9) Consumer protection and disclosures.

(10) Agency relationships.

(11) Landlord-tenant laws.

(12) Environmental issues in real estate.

(13) Antitrust issues in real estate.

(14) Current litigation related to real estate.

(15) Legal instruments related to real estate transactions.

(16) Legalities of real estate advertising.

(17) Developments in building construction techniques, materials and mechanical systems.

(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.

(d) Unacceptable courses include: 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 and office management and related internal operations procedures that do not have a bearing on the public interest.

§ 35.385. Continuing education providers.

The following providers may offer instruction for continuing education:

(1) An accredited college, university or institute of higher learning, whether in this Commonwealth or outside this Commonwealth.

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

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

§ 35.386. (Reserved).

§ 35.387. (Reserved).

§ 35.388. (Reserved).

§ 35.389. (Reserved).

§ 35.390. (Reserved).

§ 35.391. (Reserved).

§ 35.392. (Reserved).

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