

PROPOSED RULEMAKING

DEPARTMENT OF AGRICULTURE

[7 PA. CODE CH. 130b] Nutrient Management Certification

The Department of Agriculture (Department), under section 7(a) and (b) of the Nutrient Management Act (act) (3 P. S. § 1707(a) and (b)), proposes to amend Chapter 130b (relating to nutrient management certification). Section 7(a) of the act, charges the Department of Agriculture (Department) in consultation with the State Conservation Commission (Commission) with the duty of, "...establishing a nutrient management certification program for the purpose of certifying individuals who have demonstrated the competency necessary to develop nutrient management plans." The Department was required to promulgate nutrient management certification regulations to, "...establish such fees and terms and conditions of certification as it deems appropriate and establish individual, commercial and public certification categories, including a certification category for farmers to develop and certify nutrient management plans for their own agricultural operations." The current chapter sets forth those criteria and establish criteria for interim certification as required by section 7(b) of the act.

This proposed rulemaking is required to bring the Nutrient Management Certification Program (NMCP), into compliance with changes in the industry and pending changes to the nutrient management regulations in 25 Pa. Code Chapter 83, Subchapter D (relating to nutrient management). This proposed rulemaking will add new definitions to provide clarity, streamline and redefine the certification process and make other changes in response to problems, concerns and input from those administering the NMCP over the past 8 years and from persons currently certified under this chapter. This proposed rulemaking also deletes the section setting forth interim certification requirements, since interim certification is no longer necessary.

Summary of Major Features

Section 130b.2. Definitions

New definitions have been included for the terms "designee," "individual nutrient management specialist," "commercial nutrient management specialist," "nutrient management regulation," and "public nutrient management specialist." The definitions of "BMP," "nutrient," "nutrient management plan," "provisional certification" and "recertification training" have also been amended. The definitions were added or revised to provide clarification based on implementation of existing regulations over the past several years.

Section 130b.3. Fees

Language has been added to allow the Department to change certification and examination fees in any given year and publish those fees in the *Pennsylvania Bulletin*.

Section 130b.4. Interim certification

This section has been rescinded as there is no longer a need for an interim certification program.

Section 130b.5. Certification authority

Language has been added to clarify the authority under each nutrient management specialist certification cat-

egory: "individual," "commercial" and "public." New categories have been added to further define and establish specific roles under the public nutrient management specialist category: "public review specialist" and "public dual specialist."

Section 130b.11. Determination of competence

Language has been added to clarify the training and certification requirements for each category of nutrient management specialist certification. In addition, two new categories and the training and certification requirements for those categories have been added for a public nutrient management specialist certification. In addition, language has been added to clarify the authority of the Department to determine mandatory courses. Furthermore, language was revised to change the provisional certification expiration to now end on the last day of the month on the third year from the date of issuance of the provisional certification.

Revisions were made to clarify the final certification requirements for "commercial nutrient management specialist" and "public nutrient management specialist."

Language was added to delineate that nutrient management plans required for final certification had to be approved nutrient management plans.

Finally, language was added to establish the procedures for a final certified nutrient management specialist to add or gain certification in an additional nutrient management specialist category.

Section 130b.12. Final certification

The heading of this section was revised for clarity. This section had previously been entitled "eligibility."

Language in this section was revised to reduce the time period for filing and submitting the fee for final certification from 180 days to 120 days.

Section 130b.21. Determination of competence

Language in this section was revised to reflect the name change from precertification training to orientation training. Language was added to the regulations to allow the Department to determine additional courses that would be needed to meet nutrient management certification requirements.

Section 130b.22. Final certification

The heading of this section was revised for clarity. This section had previously been entitled "eligibility."

Language in this section was revised to reduce the time period for filing and submitting the fee for final certification from 180 days to 120 days.

Section 130b.31. Recertification

The language of this section was amended to remove the ability of provisionally certified nutrient management specialists to earn continuing education credits. The new language will allow only final certified nutrient management specialists to receive continuing education credits.

Language was added to increase the amount of continuing education credits needed for recertification from 10 to 20 credits for commercial and public nutrient management specialists. Language was also added to establish that 5 of those 20 continuing education credits needed to be obtained through Department or Commission con-

ducted courses to allow the Department better oversight of the type of courses specialists receive for certification.

Language was added to suspend a nutrient management specialist's final certification if the nutrient management specialist fails to obtain the appropriate number and type of continuing education credits necessary for recertification.

Section 130b.41. General

Language was added to address the new nutrient management categories under public specialists—"public review specialist" and "public dual specialist"—which were created by amendments to previous sections of the chapter.

Section 130b.51. Denial, suspension and revocation of certificates

Language was added to establish criteria for the denial, suspension or revocation of a nutrient management specialist's certification.

Fiscal Impact

Commonwealth

The proposed amendments will impose no additional fiscal impacts upon the Commonwealth. The proposed amendments will not require the Department to commit any additional amount of time and manpower to review of applications or the certification process.

Political Subdivisions

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

Private Sector

The proposed amendments will impose no significant costs on the private sector. The only additional costs to the regulated community may be in increased fees necessary to administer the NMCP.

General Public

The proposed amendments will impose no costs and have no fiscal impact on the general public.

Paperwork Requirements

The proposed amendments will not result in a substantial increase of paperwork. The Department will not have to develop new application forms or review procedures.

Public Comment Period

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

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 30, 2005, the Department submitted a copy of the proposed amendments to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Agriculture and Rural Affairs Committee and the Senate Agriculture and Rural Affairs Committee (Committees). In addition to submitting the proposed amendments, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form. A copy of this material is available to the public upon request.

If IRRC has an objection to any portion of the proposed amendments, it will notify the Department within 30 days after the close of the public comment period. The

notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the regulations, by the Department, the General Assembly and the Governor of objections raised.

Contact Person

Further information is available by contacting the Department of Agriculture, Nutrient Management Certification Program, 2301 North Cameron Street, Harrisburg, PA 17110-9408; Attn: Johan Berger (717) 772-4189.

Effective Date

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

DENNIS C WOLFF,
Secretary

Fiscal Note: 2-147. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 7. AGRICULTURE

PART V. BUREAU OF PLANT INDUSTRY

**CHAPTER 130b. NUTRIENT MANAGEMENT
CERTIFICATION**

Subchapter A. GENERAL PROVISIONS

§ 130b.2. Definitions.

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

* * * * *

BMP—Best management practice—A practice or combination of practices determined by the Commission to be effective and practicable (given technological, economic and institutional considerations) to manage nutrients to protect surface and groundwater taking into account applicable nutrient requirements for crop utilization. The term includes:

* * * * *

(ix) Practices set forth in the nutrient management regulations.

* * * * *

Designee—A person chosen or appointed by the Secretary of Agriculture to carry out the Secretary's duties under this chapter.

[Interim certification—A temporary designation by the Department issued to persons who meet the qualifications in section 7(b) of the act (3 P. S. § 1707(b)).]

Nutrient—A substance or recognized plant nutrient, element or compound which is used or sold for its plant nutritive content or its claimed nutritive value. The term includes livestock and poultry manures, compost as fertilizer, commercially manufactured chemical fertilizers, [**sewage sludge**] **bio-solids** or combinations thereof.

Nutrient management plan—A written site-specific plan which [**incorporates BMPs to manage the use of plant nutrients for crop production and water quality protection consistent with the criteria**] meets the requirements in sections 4 and 6 of the act (3 P. S. §§ 1704 and 1706) and in **25 Pa. Code Chapter 83, Subchapter D (relating to nutrient management)**.

Nutrient management regulations—The regulations set forth in 25 Pa. Code Chapter 83, Subchapter D (relating to nutrient management).

Nutrient management specialist—

(i) **Individual**—A person certified to develop nutrient management plans for his agricultural operation.

(ii) **Commercial**—A private sector person [who develops] certified to develop nutrient management plans for another [whether employed in the private or public sector] person's agricultural operation.

[(ii) **Individual**—A person who develops nutrient management plans for that person's own agricultural operation.]

(iii) **Public**—A State [or], Federal [employee,] or other public [employee who reviews nutrient management plans, or recommends approval to a conservation district or the Commission] employee certified to develop or review or both, nutrient management plans and make recommendations for approval or denial of nutrient management plans to a conservation district or the State Conservation Commission, or both.

(A) **Review specialist.** A public nutrient management specialist certified to review nutrient management plans and make recommendations for approval or denial of nutrient management plans.

(B) **Dual specialist.** A public nutrient management specialist certified to review and develop nutrient management plans for another person's agricultural operation and make recommendations for approval or denial of nutrient management plans which the specialist has not personally written or developed.

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Provisional certification—[An] The level of certification obtained by a nutrient management specialist applicant [for commercial or public nutrient management specialist] who has successfully completed the precertification training and [has] passed the written examination, but has not yet [to prepare,] developed or [review three] reviewed, or both, the required number of nutrient management plans.

Recertification training—The [successful] completion [by a currently certified nutrient management specialist] of continuing education and training requirements [contained] in § 130b.31 (relating to recertification).

§ 130b.3. Fees.

(a) [**Commercial nutrient management specialist certificate.** The triennial fee for a commercial certificate is \$100.

(b) **Public nutrient management specialist certificate.** The triennial fee for a public certificate is \$10.

(c) **Individual nutrient management specialist certificate.** The triennial fee for an individual certificate is \$10.]

Certification fees. Certification fees are nonrefundable. The Department will establish certifica-

tion fees for each level of nutrient management specialist. Notice of the fees or any changes to the fees in subsequent years will be published in the *Pennsylvania Bulletin*. The published fees will be effective for at least 1 calendar year. Fees will be based on the cost of administering and enforcing this chapter.

(b) **Examination [fee] fees.** Examination fees are nonrefundable. The Department will establish examination fees for each level of nutrient management specialist. Notice of the fees or any changes to the fees in subsequent years will be published in the *Pennsylvania Bulletin*. The published fees will be effective for at least 1 calendar year. Fees will be based on the cost of developing, amending and administering the tests and enforcing this chapter. [The following examination fees, with payment made in advance, will be charged:

(1) **Commercial/public nutrient management specialist examination**—\$50.

(2) **Individual nutrient management specialist examination**—no charge.]

§ 130b.4. [*Interim certification*] (Reserved).

[A person who has interim certification as of September 28, 1996, will be provided written notice, within 30 days, by first class mail, that the Department has completed development of finalized regulations and is beginning to implement the official nutrient management certification program. This notice shall also inform recipients that upon receipt, their interim status shall cease and is no longer valid. An application and instructions to apply for certification will accompany the notification.]

§ 130b.5. Certification authority.

(a) **Individual certification authority.** A person certified under this chapter as an individual nutrient management specialist is authorized to develop nutrient management plans for his own agricultural operation. An individual nutrient management specialist has no authority to develop a nutrient management plan for another person or review and recommend action on a nutrient management plan.

(b) **Commercial certification authority.** A person certified under this chapter as a commercial nutrient management specialist is authorized to develop nutrient management plans for another person's agricultural operation. A commercial nutrient management specialist has no authority to review or recommend action on a nutrient management plan.

(c) **Public certification authority.** A public employee certified as a public nutrient management specialist has authority to review and recommend action or develop a nutrient management plan for another person, or both, dependent on the certification requirements he has successfully completed.

(1) **Public nutrient management review specialist.** A person certified under this chapter as a public nutrient management review specialist is authorized to review nutrient management plans and make recommendations for approval or denial of nutrient management plans.

(2) *Public nutrient management dual specialist.* A person certified under this chapter as a public nutrient management dual specialist is authorized to review and develop nutrient management plans for another person's agricultural operation and make recommendations for approval or denial of nutrient management plans which the specialist has not personally developed.

Subchapter B. CERTIFICATION

COMMERCIAL AND PUBLIC NUTRIENT MANAGEMENT SPECIALISTS

§ 130b.11. Determination of competence.

(a) *Commercial nutrient management specialist.* Determination of competence for a commercial nutrient management [specialists] specialist shall be based on [a precertification] the successful completion of precertification training and examinations as set forth in this section. Precertification requirements for a commercial nutrient management specialist shall include an orientation training course, [a written examination approved by the Department and the development of three nutrient management plans] a nutrient management plan writing course, a written examination approved by the Department and the development of three approved nutrient management plans. It may also include other course work related to requirements in the nutrient management regulations, which are determined by the Department to be necessary and appropriate. Nutrient management plans developed under this subsection will be determined to be adequate by the Department or its designee.

(b) *Public nutrient management specialist.* Determination of competence for a public nutrient management [specialists] specialist shall be based on [a precertification training course, a written examination approved by the Department and the development of one plan and review of two plans] the level of certification sought to be attained. [All prepared plans and plan reviews completed under this subsection shall be determined to be adequate by the Commission or its designee.]

(1) *Public nutrient management review specialist.* To be certified as a public nutrient management review specialist, the applicant shall successfully complete precertification training and examinations as set forth in this section. The precertification requirements for a public nutrient management review specialist must include an orientation training course, a nutrient management plan review course, a nutrient management plan writing course, a written examination approved by the Department, the successful review of two nutrient management plans and development of one approved nutrient management plan. It may also include other course work related to requirements set forth in the nutrient management regulations determined by the Department to be necessary and appropriate. Nutrient management plan reviews completed and nutrient management plans developed under this subsection will be determined to be adequate by the Department or its designee.

(2) *Public nutrient management dual specialist.* To be certified as a public nutrient management dual specialist, the applicant shall successfully

complete precertification training and examinations as set forth in this section. The precertification requirements for a public nutrient management dual specialist must include an orientation training course, a nutrient management plan review course, a nutrient management plan writing course, a written examination approved by the Department, the successful review of two nutrient management plans and the development of two approved nutrient management plans. It may also include other course work related to requirements set forth in the nutrient management regulations determined by the Department to be necessary and appropriate. Nutrient management plan reviews completed and nutrient management plans developed under this subsection will be determined to be adequate by the Department or its designee.

[(b)] (c) *Precertification.* The precertification training [course shall] must, at a minimum, consist of the following areas of nutrient management planning:

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(6) Proper nutrient management plan review procedures (public nutrient management specialists only).

(7) Proper nutrient management plan writing procedures (commercial, public nutrient management specialists only).

(8) Other areas and course work related to requirements in the nutrient management regulations, as determined appropriate by the Department.

[(c)] (d) *Examination.* The written examination will be proctored by the Department or its designee. The Department will administer the examination at least twice per year, or more often as deemed necessary by the Department. At a minimum, the successful completion of the examination will demonstrate an examinee's technical knowledge relating to nutrient management planning and nutrient management plan development in the following areas:

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(9) Other areas related to requirements in the nutrient management regulations, as determined appropriate by the Department.

[(d)] (e) *Other examinations.* The Department may approve the use of written examinations other than the Pennsylvania nutrient management examination, if the written examinations meet the requirements in subsection [(c)] (d).

[(e)] (f) *Provisional certification.* Upon the successful completion of the requirements in subsections [(b)] (c) and [(c)] (d), the applicant for certification as a commercial or public nutrient management specialist will be issued the appropriate provisional certification. The holder of a provisional certification is qualified, dependant on the type of provisional certification attained, to develop or review, or both, nutrient management plans [as provided in subsection (f).] for the purpose of satisfying the requirements of this section regarding final certification. Provisional certification is valid for 3 years ending on the last day of the month from the date of issuance.

[(f)] (g) *Final certification requirements.* Once provisional certification has been granted, [a] the pro-

visionally certified specialist shall complete one of the following dependent on the type of provisional certification granted and final certification sought.

(1) *Commercial nutrient management specialist.* To attain final certification, a provisionally certified commercial nutrient management specialist shall develop three approved nutrient management plans which meet the requirements of section 6(e) of the act (3 P. S. § 1706(e)). Nutrient management plans developed by the applicant shall be submitted to the Department or its designee for approval.

(2) *Public nutrient management specialist.* To attain final certification, a provisionally certified public nutrient management specialist shall do one of the following, dependent upon the level of provisional certification attained and the level of final certification sought:

(i) *Public nutrient management review specialist.* [A] To attain final certification, a provisionally certified public nutrient management review specialist shall [develop one plan and] successfully review two nutrient management plans [in accordance with] and develop one approved nutrient management plan which meets the requirements of section 6(e) of the act. [Commercial specialists shall submit, to the Department, evidence that the Commission or its designee has actually reviewed and approved the three plans. Public specialists shall submit to the Department, evidence that the Commission or its designee has actually reviewed and approved one prepared plan and determined the public specialist's review of two plans to be adequate.] Nutrient management plan reviews completed and nutrient management plans developed by the applicant shall be submitted to the Department or its designee for approval.

(ii) *Public nutrient management dual specialist.* To attain final certification, a provisionally certified public nutrient management dual specialist shall successfully review two nutrient management plans and develop two approved nutrient management plans in accordance with section 6(e) of the act. Nutrient management plan reviews completed and nutrient management plans developed by the applicant shall be submitted to the Department or its designee for approval.

[(g) Upon completion of all the requirements of this section, a commercial nutrient management specialist may apply for certification to develop nutrient management plans and a public nutrient management specialist may apply for certification to review nutrient management plans. The appropriate fee shall accompany the specialist's application for certification.]

(h) *Public nutrient management specialist to commercial nutrient management specialist.* [A currently] When the Department or the Commission with the consent of the Department determines it is necessary or appropriate, a certified public nutrient management specialist [who wishes to] may obtain certification as a commercial nutrient management specialist. To attain the certification, a certified public nutrient management review specialist shall develop two approved nutrient management plans or a certified public nutrient management dual spe-

cialist shall develop [two] one approved nutrient management [plans] plan in accordance with section 6(e) of the act. The certified public nutrient management specialist seeking the certification shall submit the nutrient management plans or plan to the Department[, evidence that the Commission or its designee has actually reviewed and approved the plans] or its designee for review and approval.

(i) *Public nutrient management review specialist to public nutrient management dual specialist.* A certified public nutrient management review specialist may obtain certification as a public nutrient management dual specialist. To attain the certification, the certified public nutrient management review specialist shall develop one approved nutrient management plan in accordance with section 6(e) of the act. The applicant seeking to attain the certification shall submit the nutrient management plan to the Department or its designee for review and approval.

(j) *Commercial nutrient management specialist to public nutrient management specialist.* A [currently] certified commercial nutrient management specialist who wishes to obtain certification as a public nutrient management specialist [certification] shall complete a [precertification] nutrient management plan review course covering proper nutrient management plan review procedures and shall successfully review two nutrient managements plans in accordance with section 6(e) of the act. The [commercial nutrient management specialist] applicant seeking to attain the certification shall submit[,] the nutrient management plan reviews to the Department[, evidence that the Commission] or its designee [has actually reviewed and determined the specialist's review of the two plans to be adequate] for review and approval.

§ 130b.12. [Eligibility] Final certification.

(a) *Application for final certification.* Upon completion of all the requirements of this chapter, a commercial nutrient management specialist or a public nutrient management specialist may submit an application to the Department for final certification. The appropriate fee shall accompany the application for final certification.

(b) *Eligibility for final certification.* A person is eligible to apply for final certification as a commercial or public nutrient management specialist upon fulfilling the applicable requirements established under § 130b.11 (relating to determination of competence). An application for final certification may be obtained from the Department.

[(b)] (c) *Time period for filing application.* An application for final certification shall be filed with the Department within [180] 120-calendar days of notification by the Department of meeting the appropriate requirements in § 130b.11 [(f)]. If the applicant fails to file an application with the Department within the prescribed [180] 120-calendar days, that person shall again satisfy the appropriate competency requirements as provided in § 130b.11 [(a)—(f)].

[(c)] (d) *Time period final certification is valid.* A final [certificate] certification is valid for 3 years

ending on December 31 of the third year following the date of **final** certification. However, the Department will authorize an additional year when the [**certificate**] **certification** is issued during the last 2 months of the initial certificate year.

INDIVIDUAL NUTRIENT MANAGEMENT SPECIALISTS

§ 130b.21. Determination of competence.

(a) Determination of competence for an individual nutrient management specialist shall be based on [**a precertification**] **the completion of precertification training which includes an orientation** training course and a written examination approved by the Department.

(b) The [**precertification**] **orientation** training course shall at a minimum consist of the same requirements as in § 130b.11[(b)] (c) (relating to determination of competence).

(c) The written examination shall be proctored by the Department or its designee. The Department will administer the examination [**at least twice per year, or more often as deemed necessary by the Department**] **on an as needed basis, which will be determined by the number of requests for the testing.** At a minimum, the successful completion of the examination will demonstrate an examinee's technical knowledge relating to nutrient management planning and **nutrient management** plan development in the following areas:

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(9) **Other areas and coursework related to the requirements set forth in the nutrient management regulations as determined appropriate by the Department.**

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§ 130b.22. [Eligibility] Final certification.

(a) A person is eligible to apply for **final** certification as an individual nutrient management specialist upon fulfilling the requirements under § 130b.21 (relating to determination of competence). An application for certification may be obtained from the Department. The appropriate fee shall accompany the specialist's application for certification.

(b) An application for certification shall be filed with the Department no later than [**180**] **120**-calendar days after the applicant's completion of the competency requirements. If the applicant fails to file an application with the Department within the prescribed [**180**] **120**-calendar days, that person shall again satisfy the competency requirements as provided in § 130b.21(a)–(d).

(c) A certificate is valid for 3 years ending on December 31 of the third year following the date of certification. However, the Department will authorize an additional year when the [**certificate**] **certification** is issued during the last 2 months of the initial certificate year.

RECERTIFICATION

§ 130b.31. Recertification.

(a) At intervals of 3 years, [**provisionally certified or**] **final** certified commercial, public or individual nutrient management specialists shall provide written documentation of having received continuing education and training in Department-approved training courses in nu-

trient management planning **and nutrient management** plan development. Training shall address the specific areas in § 130b.11[(b)] (c) and [(c)] (d) (relating to determination of competence) for commercial and public specialists and § 130b.21(b) and (c) (relating to determination of competence) for individual specialists.

(b) Recertification credits approved by the Department will be given on the basis of attendance at approved training sessions, as provided in subsection (a). The Department will evaluate the training and assign the appropriate credits. Commercial and public specialists are required to obtain [**ten**] **20** credits [**and individual**] **with one quarter or five of those credits being obtained through Department or Commission conducted courses.** Individual specialists are required to obtain six credits during the recertification interval. The Department may, if deemed necessary, require specific training for certified nutrient management specialists, in addition to the required training in §§ 130b.11 and 130b.21. The Department will provide written notification to the certified nutrient management specialists of required specific training.

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(e) A recertification training course will be approved if at a minimum it consists of the same requirements as set forth in § 130b.11[(b)] (c) and [(c)] (d) and is conducted or sponsored by an educational institution, an association, a business, a governmental agency or other qualified source. Preapproval of recertification courses is vested solely with the Department.

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(g) If the Department or its designee is unable to monitor the training, the sponsor shall be responsible for verifying attendance and shall compile a list of Pennsylvania certified specialists in attendance. The list shall be returned to the Department within 10 working days following the training date and shall include the name of each person attending and their [**certificate**] **certification** number.

(h) If [**the**] **a nutrient management specialist allows his final certification [of a nutrient management specialist is allowed]** to expire and **does not obtain** recertification [**credits are due, recertification of that specialist shall first require completion of**] **in accordance with this chapter, his final certification shall be suspended and the specialist shall refrain from all duties relating to his certification until all delinquent recertification credits are acquired** as described in subsection (b).

(i) If a nutrient management specialist **whose final certification has been suspended as set forth in subsection (h)** fails to complete delinquent recertification credits within 1 year from the **expiration date of his final certification [expiration date], his final certification shall be revoked** and that person shall again satisfy the requirements of § 130b.11 and § 130b.12 (relating to eligibility) for commercial and public specialists, and § 130b.21 and § 130b.22 (relating to eligibility) for individual specialist.

RECIPROCITY

§ 130b.41. General.

(a) A person who has a valid certificate or license from another state may obtain certification in this Commonwealth if:

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(2) The applicant satisfies the required precertification training as set forth in § 130b.11 [(b)] (c) (relating to determination of competence). The applicant will not be required to take a written examination to determine competence if the applicant satisfies the requirements of this subsection.

(b) Upon the successful completion of the requirements in subsection (a), the applicant for certification as a commercial or public nutrient management specialist will be issued provisional certification and shall complete the requirements in § 130b.11 [(f)] (g). Provisional certification is valid for 3 years **ending on the last day of the month** from the date of issuance.

(c) In addition to the requirements in subsection (a), if the applicant is a commercial nutrient management specialist, that **[person shall submit written evidence to the Department, that the Commission or its designee has reviewed and approved three plans as provided in section 6(e) of the act (3 P. S. § 1706(e))] person shall develop three approved nutrient management plans which meet the requirements of section 6(e) of the act (3 P. S. § 1706(e)).** If the applicant is a public nutrient management review specialist, **[that person shall submit to the Department, evidence that the Commission or its designee has reviewed and approved one prepared plan and determined the public specialist's review of two plans to be adequate], that person shall successfully review two nutrient management plans and develop one approved nutrient management plan which meets the requirements of section 6(e) of the act. If the applicant is a public nutrient management dual specialist, that person shall successfully review two nutrient management plans and develop two approved nutrient management plans which meet the requirements of section 6(e) of the act. Nutrient management plan reviews completed and nutrient management plans developed by the applicant shall be submitted to the Department or its designee for approval.**

DENIAL, SUSPENSION AND REVOCATION OF CERTIFICATES

§ 130b.51. Denial, suspension and revocation of certificates.

(a) The Department may, after notice, including a statement of the reasons therefore, **[and opportunity for a hearing,]** deny, suspend or revoke a commercial, public or individual nutrient management specialist's certification for **[a] any of the following:**

- (1) Any violation of the act or [its resulting regulations] this chapter.**
- (2) Failure to obtain the required recertification credits.**
- (3) Inconsistency and demonstration of a lack of knowledge of nutrient management plan writing and review skills.**
- (4) Three or more occurrences within a 3-year period of delay or noncommunication with landowner or review agency during plan development or review.**
- (5) Falsifying information.**

(6) Misrepresentation of the Nutrient Management Act Program.

(7) Any violation of program policy established by the Department, its designee or the State Conservation Commission.

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[Pa.B. Doc. No. 05-650. Filed for public inspection April 8, 2005, 9:00 a.m.]

ENVIRONMENTAL HEARING BOARD

**[25 PA. CODE CH. 1021]
Practice and Procedure**

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

The proposed procedural rules have the following objectives:

- (1) To provide the regulated community and the Department of Environmental Protection (Department) and other potential litigants with more specific guidance on how to represent their interests before the EHB.
- (2) To improve the rules of practice and procedure before the EHB.

I. Statutory Authority for Proposed Revisions

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

II. Description of Proposed Revisions

The proposed revisions are modifications to provisions of the rules to improve practice and procedure before the EHB. These proposed revisions are based on the recommendations of the EHB Rules Committee (Rules Committee), a nine member advisory committee created by section 5 of the act to make recommendations to the EHB on its rules of practice and procedure. The EHB may promulgate proposed regulations based in whole or in part on the recommendations of the Rules Committee.

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

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

The proposed rulemaking can be divided into five categories: 1) renumbering of certain rules; 2) adoption of a new rule; 3) substantive amendments to existing rules; 4) adoption of comments to certain rules; and 5) correction of typographical errors.

1. *Renumbering of certain rules*

The EHB recommends making subsection (f) of Rule 1021.51 (relating to commencement, form and account) a separate rule with its own number. Subsection (f) addresses nunc pro tunc appeals. This subsection has been moved to create a new rule in 1021.53a entitled "Nunc pro tunc appeals." There has been no substantive change to the language of this section.

A correction has been made in Rule 1021.141, dealing with termination of proceedings, to reflect the appropriate subsection being referenced.

2. *Definitions (Rule 1021.2)*

The EHB has proposed amending the definition of "Department" in Rule 1021.2 from "Department of Environmental Resources" to "Department of Environmental Protection or other boards, commissions or agencies whose decisions are appealable to the Environmental Hearing Board" to reflect the Department's name change and the fact that the Board has jurisdiction over appeals from certain other agencies, boards and commissions.

3. *Filing (Rule 1021.32(a))*

The current rule in 1021.32(a) allows filing only at the Board's Harrisburg office. The proposed rule change would allow filing at either the Board's headquarters in Harrisburg or at its Pittsburgh office.

4. *Service by a party (Rule 1021.34(b))*

The proposed rule change in 1021.34(b) would require service to opposing parties by overnight delivery when a document is filed with the Board by either personal service or overnight delivery.

5. *Commencement, form and content [of an appeal] (Rule 1021.51)*

Subsection (e). The proposed rule change deletes the last two sentences of this subsection dealing with amendment of appeals for "good cause." This change is necessitated by the proposed revisions to Rule 1021.53, dealing with amendments to appeals.

Subsection (h). Subsection (g) requires that the "recipient of the action" be served with a copy of the notice of appeal in a third party appeal. A new subsection (h) has been proposed to define "recipient of an action" as the following: (1) a recipient of a permit, license, approval or certification; (2) a municipality or municipal authority in appeals under section 5 or 7 of the Sewage Facilities Act (35 P. S. §§ 750.5 and 750.7); (3) a mining company in appeals involving a claim of subsidence or water loss under the Bituminous Mine Subsidence and Land Conservation Act (52 P. S. §§ 1406.1—1406.21); (4) a well operator in appeals involving a claim of pollution or diminution of water supply under section 208 of the Oil and Gas Act (58 P. S. § 601.208); (5) an owner or operator of a storage tank in appeals involving a claim of an affected water supply under section 1303 of the Storage Tank and Spill Prevention Act (35 P. S. § 6021.1303); and (6) other interested parties as ordered by the Board.

Subsection (i). The content of former subsection (h) has been moved to create a new subsection (i) and has been revised to read that service of a notice of appeal on a recipient of a permit, license, approval or certification would subject the recipient to the jurisdiction of the Board and would cause the recipient to be added as a party to a third-party appeal without the need to file a petition for intervention. This does not constitute a substantive change from the Board's existing rules.

Subsection (j). A new subsection (j) has been added to allow other recipients of an action in a third-party appeal, as set forth in proposed subsection (h)(2)—(5), to intervene as of course by simply filing an entry of appearance within 30 days of service of the notice of appeal.

Subsection (k). The current rule set forth in subsection (j) stating that this rule supersedes the General Rules of Administrative Practice and Procedure has been moved to a new subsection (k).

Comment. A comment has been added to this rule stating that with regard to subsections (i) and (j), parties are required to abide by Rules 1021.21 and 1021.22, dealing with representation of parties and entry of appearance.

6. *Amendments to appeals and complaints (Rule 1021.53)*

Caption. The rule in 1021.53 has been revised to deal with amendments to both appeals and complaints. The Board's rules previously had no rules dealing with the amendment of complaints. The criteria for nunc pro tunc appeals has been moved to a separate rule. The caption has been amended accordingly.

Subsection (a). Subsection (a) has been amended to state that an appeal or complaint may be amended as of right within 20 days after the filing thereof.

Subsection (b). This subsection has been amended to create a more liberal standard for allowing the amendment of appeals and complaints after the 20-day amendment as of right period. Rather than setting forth three particular circumstances under which appeals and complaints may be amended after the 20-day amendment as of right period, the rule allows amendment when no undue prejudice will result to the opposing parties.

Subsection (c). Subsection (c), stating that an appellant may not request leave to amend a notice of appeal after the Board has decided any dispositive motions or the case has been assigned for hearing, whichever is later, has been eliminated as a result of the revision to subsection (b).

Subsection (f). Subsection (f), dealing with nunc pro tunc appeals, has been moved to create a separate rule in Rule 1021.53a dealing only with nunc pro tunc appeals.

Comment. A comment has been added to Rule 1021.54 clarifying that a nunc pro tunc standard is not the appropriate standard for determining whether to grant leave for amendment of an appeal, contrary to the holding in *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986).

7. *Dispositive motions (Rules 1021.91 and 1021.94)*

Rule 1021.91 (General). The prior rule stated that it applied to all motions except dispositive motions and those made during the course of a hearing. The rule has been revised to say that it applies to all motions except summary judgment motions and those made during the course of a hearing. A separate rule has been created for summary judgment motions.

Rule 1021.94 (Dispositive motions). This rule has been revised to delete subsections (a) and (b) and will apply generally to dispositive motions.

Rule 1021.94a (Summary judgment motions). A new rule has been created to deal specifically with summary judgment motions. The rule requires that a summary judgment record contain a motion, supporting brief, evidentiary materials and proposed order and defines what is required for each. A comment to the rule clarifies

that the statement of material facts in the brief should be limited to facts that are material to the disposition of the motion and should not include lengthy recitations of undisputed background facts.

8. *Prehearing procedure* (Rule 1021.101(a))

Rule 1021.101(a) has been revised to require that the discovery period for both expert and nonexpert discovery run concurrently. Under the old rule, the initial period for discovery ran for 90 days. During this time, all requests for discovery—both expert and nonexpert—were to be served; however, response times differed depending on whether the request was for expert or nonexpert discovery. Nonexpert discovery followed the Pennsylvania Rules of Civil Procedure and required answers to be served within 30 days of service of the discovery request. Responses to expert discovery were not required to be served until 150 days after issuance of Pre-Hearing Order No. 1. Under the revised rule, answers to all discovery will be due 30 days after service of the discovery request; there will be no special timeframe for responding to expert discovery. This revision has been adopted in response to complaints from appellants that they have been unable to obtain information regarding the basis for the DEP’s action in the early stages of discovery because it may fall into the category of expert discovery. The rule change allows this information to be obtained earlier in the discovery process. (The rule change does not interfere with a party’s right or duty to supplement its answers to discovery.)

To provide parties with sufficient time to secure an expert, the discovery period has been extended from 90 days to 180 days; however, whereas the prior rule said that discovery was to be served within the requisite time frame, the rule now requires discovery to be completed within this time frame. (The rule change does not affect the parties’ ability to seek an extension of the discovery period.)

The rule has also been amended to allow all dispositive motions to be filed within 210 days of the prehearing order regardless of whether there will be expert testimony. Finally, the time period for filing a joint proposed case management order has been extended from 45 days to 60 days.

9. *Prehearing memorandum* (Rule 1021.104)

Rule 1021.104 has been revised to require that copies of exhibits be attached to the prehearing memorandum, as well as “such other information as the Board may require.” In addition, a comment has been added, explaining that there is an administrative agreement between the Board and the Department allowing the prepayment of penalties to be transmitted to the Commonwealth to an appropriate escrow account.

10. *Termination of proceedings* (Rule 1021.141)

The reference in subsection (c) has been corrected to read “(b)(3).”

The EHB concurred with the recommendations set forth in this Preamble.

III. *Fiscal Impact of the Proposed Revisions*

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

IV. *Paperwork Requirements for Proposed Revisions*

The proposed revisions may require only minor changes to the EHB’s standard orders.

V. *Public Meeting on Proposed Rules*

In accordance with 65 Pa.C.S. § 704 (relating to open meetings), a quorum of the members of the EHB voted to adopt the proposed rules at public meetings held on October 13, 2004, and November 15, 2004, at the EHB’s Harrisburg office, Hearing Room 2, Second Floor, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA.

VI. *Government Reviews of Proposed Revisions*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 29, 2005, the EHB submitted copies of the proposed revisions to the Independent Regulatory Review Commission (IRRC) and the Senate and House Standing Committees on Environmental Resources and Energy. The EHB also provided IRRC and the Committees with copies of a Regulatory Analysis Form prepared by the EHB. Copies of the Regulatory Analysis Form are available to the public upon request.

If IRRC has objections to any of the proposed revisions, it will notify the EHB within 30 days of the close of the public comment period, specifying the regulatory review criteria that have not been met. The Regulatory Review Act sets forth procedures for review, prior to final publication of the proposed revisions, by the EHB, the General Assembly and the Governor of objections raised.

VII. *Public Comment Regarding Proposed Revisions*

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

MICHAEL L. KRANCER,
Chief Judge and Chairperson

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

Annex A

**TITLE 25. ENVIRONMENTAL PROTECTION
PART IX. ENVIRONMENTAL HEARING BOARD
CHAPTER 1021. PRACTICE AND PROCEDURE
PRELIMINARY PROVISIONS**

GENERAL

§ 1021.2. Definitions

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

* * * * *

Department—The Department of Environmental [**Resources or its successor agencies**] **Protection or other boards, commissions or agencies whose decisions are appealable to the Board.**

* * * * *

DOCUMENTARY FILINGS

SIGNING, FILING AND SERVICE OF DOCUMENTS

§ 1021.32. Filing.

(a) Documents filed with the Board shall be filed at [**its**] **either of the following offices:**

(1) Its headquarters—2nd Floor, Rachel Carson State Office Building, 400 Market Street, Post Office Box 8457, Harrisburg, Pennsylvania 17105-8457.

(2) Its Pittsburgh office—1507 State Office Building, 300 Liberty Avenue, Pittsburgh, Pennsylvania 15222.

* * * * *

§ 1021.34. Service by a party.

* * * * *

(b) When a document is filed with the Board by overnight delivery or personal service, it shall be served by overnight delivery on the parties.

(c) In matters involving requests for expedited disposition, service shall be made within the ensuing 24 hours of the time of filing with the Board. For purposes of this subsection, service means actual receipt by the opposing party.

[(c)] (d) * * *

[(d)] (e) * * *

FORMAL PROCEEDINGS

APPEALS

§ 1021.51. Commencement, form and content.

* * * * *

(e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal. [An objection not raised by the appeal or an amendment thereto under § 1021.53 (relating to amendments to appeal; nunc pro tunc appeals) shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.]

* * * * *

(h) For purposes of this section, the term “recipient of the action” includes the following:

(1) The recipient of a permit, license, approval or certification.

(2) Any affected municipality, its municipal authority, and the proponent of the decision, when applicable, in appeals involving a decision under section 5 or 7 of the Sewage Facilities Act (35 P. S. §§ 750.5 and 750.7).

(3) The mining company in appeals involving a claim of subsidence damage or water loss under the Bituminous Mine Subsidence and Land Conservation Act (52 P. S. §§ 1406.1—1406.21).

(4) The well operator in appeals involving a claim of pollution or diminution of a water supply under section 208 of the Oil and Gas Act (58 P. S. § 601.208).

(5) The owner or operator of a storage tank in appeals involving a claim of an affected water supply under section 1303 of the Storage Tank and Spill Prevention Act (35 P. S. § 6021.1303).

(6) Other interested parties as ordered by the Board.

(i) The service upon the recipient of [an action] a permit, license, approval or certification, as required by [this section] subsection (h)(1), shall subject the recipient to the jurisdiction of the Board [as a party], and the recipient shall be added as a party to the third-party appeal without the necessity of filing a petition for leave to intervene under § 1021.81 (relating to intervention).

(j) Other recipients of an action appealed by a third party, served as required by subsections (h)(2), (3), (4) or (5), may intervene as of course in the appeal by filing an entry of appearance within 30 days of service of the notice of appeal in accordance with §§ 1021.21 and 1021.22 (relating to representation; and notice of appearance), without the necessity of filing a petition for leave to intervene under § 1021.81.

[(i)] (k) Appellant shall provide satisfactory proof that service has been made as required by this section.

[(j)] (l) Subsections (a)—[(i)] (k) supersede 1 Pa. Code §§ 35.5—35.7 and 35.9—35.11 (relating to informal complaints; and formal complaints).

Comment: With regard to subsections (i)—(j), parties are required to abide by the rules set forth in §§ 1021.21 and 1021.22 (relating to representation of parties; and notice of appearance.)

§ 1021.53. Amendments to appeal or complaint [; nunc pro tunc appeals].

(a) An appeal or complaint may be amended as of right within 20 days after the filing thereof.

(b) After the 20-day period for amendment as of right, the Board, upon motion by the appellant or complainant, may grant leave for further amendment of the appeal or complaint. This leave may be granted if no undue prejudice will result to the opposing parties. [appellant establishes that the requested amendment satisfies one of the following conditions:

(1) It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Department employees.

(2) It is based upon facts, identified in the motion, that were discovered during preparation of appellant’s case, that the appellant, exercising due diligence, could not have previously discovered.

(3) It includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor.

(c) An appellant may not request leave to amend a notice of appeal after the Board has decided any dispositive motions or the case has been assigned for hearing, whichever is later.

(d)] (c) * * *

[(e)] (d) * * *

[(f) The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc, the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.]

[(g)] (e) Subsections **(a)**—**[(f)] (d)** supersede 1 Pa. Code §§ 35.5—35.7 and 35.9—35.11 (relating to informal complaints; and formal complaints).

Comment: In addition to establishing a new standard for assessing requests for leave to amend an appeal, this rule clarifies that a nunc pro tunc standard is not the appropriate standard to be applied in determining whether to grant leave for amendment of an appeal, contrary to the apparent holding in *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986), affirmed, 555 A.2d 812 (1989).

§ 1021.53a. Nunc pro tunc appeals.

The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.

§ 1021.54. Prepayment of penalties.

* * * * *

Comment: There is an administrative agreement between the Department and the Board which allows the prepayment of penalties to be transmitted to the Commonwealth to an appropriate escrow account.

MOTIONS

§ 1021.91. General.

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

* * * * *

(g) The moving party may not file a reply to a response to **[(its motion,)] procedural, discovery or miscellaneous motions** unless the Board orders otherwise.

* * * * *

§ 1021.94. Dispositive motions other than summary judgment motions.

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

(b) **Motions for summary judgment or partial summary judgment and responses shall conform to Pa.R.C.P. 1035.1—1035.5 (relating to motion for summary judgment).**

(c) **[(Dispositive motions, responses and replies shall be in writing, signed by a party or its attorney and served on the opposing party in accordance with § 1021.34 (relating to service). Dispositive motions shall be accompanied by a supporting memorandum of law or brief. The Board may deny a dispositive motion if a party fails to file a supporting memorandum of law or brief.)]**

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

[(e)] (c) A reply to a response to a dispositive motion may be filed within 15 days of the date of service of the response, and may be accompanied by a supporting

memorandum of law or brief. Reply briefs or memoranda of law shall be as concise as possible and may not exceed 25 pages. Longer briefs or memoranda of law may be permitted at the discretion of the presiding administrative law judge.

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

[(g)] (e) Subsection **[(c)] (a)** supersedes 1 Pa. Code § 35.177 (relating to the scope and content of motions). Subsection **[(d)] (b)** supersedes 1 Pa. Code § 35.179 (relating to objecting to motions).

§ 1021.94a. Summary judgment motions.

(a) **Summary judgment motion record.**

(1) A summary judgment motion record shall contain the following separate items:

- (i) A motion prepared in accordance with subsection (b).
- (ii) A supporting brief prepared in accordance with subsection (c).
- (iii) The evidentiary materials relied upon by the movant.
- (iv) A proposed order.

(2) Motions and responses shall be in writing, signed by a party or its attorney, and served on the opposing party in accordance with § 1021.34 (relating to service).

(b) **Motion.** A motion for summary judgment shall contain only a concise statement of the relief requested and the reasons for granting that relief. The motion should not include any recitation of the facts and should not exceed two pages in length.

(c) **Supporting brief.** The motion for summary judgment shall be accompanied by a brief containing an introduction and summary of the case, a statement of material facts and a discussion of the legal argument supporting the motion. The statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation shall identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on.

(d) **Evidentiary materials.** All affidavits, deposition transcripts or other documents relied upon in support of a motion for summary judgment shall accompany the motion and brief. Affidavits shall conform to Pa.R.C.P. 76 and 1035.4 (relating to definitions; and affidavits).

(e) **Proposed order.** The motion shall be accompanied by a proposed order.

(f) **Party opposing motion.** Within 30 days of the date of service of the motion, a party opposing the motion shall file a brief containing a responding statement either admitting or denying or disputing each of the facts in the movant's statement and a discussion of the legal argument in opposition to the motion. All material facts in the movant's state-

ment which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of subsection (c) demonstrating existence of a genuine issue as to the fact disputed. An opposing party may also include in the responding statement additional facts the party contends are material and as to which there exists a genuine issue. Each fact shall be stated in separately numbered paragraphs together with citations to the motion record. Affidavits, deposition transcripts or other documents relied upon in support of a response to a motion for summary judgment, which are not already a part of the motion record, shall accompany the responding brief.

(g) *Reply brief.* A concise reply brief may be filed by the movant within 15 days of the date of service of the response. Additional briefing may be permitted at the discretion of the presiding administrative law judge.

(h) *Adverse party.* When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for hearing. If the adverse party does not so respond, summary judgment may be entered against the adverse party. Summary judgment may be entered against a party who fails to respond to a summary judgment motion.

(i) *Judgment sought.* The judgment sought shall be rendered forthwith if the motion record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Comment: The statement of material facts in the briefs should be limited to those facts which are material to disposition of the summary judgment motion and should not include lengthy recitations of undisputed background facts or legal context. The evidentiary materials relied upon should not be attached to the motion or the brief but should be bound as a separate item and labeled as exhibits to facilitate reference.

PREHEARING PROCEDURES AND PREHEARING CONFERENCES

§ 1021.101. Prehearing procedure.

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

(1) All discovery [, including any discovery of expert witnesses,] shall be [served] completed no later than [90] 180 days from the date of the prehearing order.

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

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

(4) The parties may, within [45] 60 days of the date of the prehearing order, submit a Joint Proposed Case Management Order to the Board.

§ 1021.104. Prehearing memorandum.

(a) A prehearing memorandum shall contain the following:

* * * * *

(7) A list of the exhibits the party seeks to introduce into evidence and a statement indicating whether the opposing party will object to their introduction. A copy of each exhibit shall be attached.

* * * * *

(9) Other information as may be required by the Board's prehearing orders.

* * * * *

TERMINATION OF PROCEEDINGS

§ 1021.141. Termination of proceedings.

* * * * *

(c) When a proceeding is sought to be terminated by the parties pursuant to a consent adjudication, all parties shall submit the proposed consent adjudication to the Board for approval. No proposed consent adjudication will be approved by the Board unless it contains the agreement of all parties to the action. The Board may refuse to approve a proposed consent adjudication if any of its provisions are contrary to law or constitute, in the discretion of the Board, overreaching or bad faith by any party. Prior to approval, the Board will publish the major substantive provisions of the consent adjudication in the manner indicated in subsection [(c)] (b)(3). In addition, the notice shall provide a comment period of at least 30 days for comments to be provided by the public. When comments are received from the public the parties to the consent adjudication shall respond to the comments. The Board may schedule a hearing prior to taking action on the consent adjudication. Any appeal from a consent adjudication shall lie to the Commonwealth Court, and shall, when taken by an aggrieved person not a party to the action, be taken within 30 days of the date of the Board's action.

* * * * *

[Pa.B. Doc. No. 05-651. Filed for public inspection April 8, 2005, 9:00 a.m.]

LIQUOR CONTROL BOARD

[40 PA. CODE CHS. 5, 11, 13 AND 17]

Revisions to Codify Practices and Procedures Resulting from Legislative Amendments

The Liquor Control Board (Board), under the authority of section 207(i) of the Liquor Code (Code) (47 P.S. § 2-207(i)), proposes to amend Chapters 5, 11, 13 and 17.

Summary

The proposed rulemaking codifies practices and procedures of the Board and further explains various legislative changes to the Code (47 P. S. §§ 1-101—8-803). The following is a summary:

1. The proposed rulemaking explains conditions under which minors without a parent, guardian or proper supervisor may be present in those licensed premises that primarily serve food.
2. It prohibits purchases or redemption of the Board's gift cards by minors.
3. It explains qualifications for obtaining Sunday sales permits by licensees.
4. It explains the process of renewing Sunday sales permits by licensees.
5. It establishes requirements for the Board to participate in wine events.
6. It codifies established practices regarding limits on point-of-sale incentive programs for malt or brewed beverages.
7. It explains the procedure for intervention by interested parties where a municipality has requested leave to enforce its own noise ordinance in lieu of the Board's regulations on amplified music.

Affected Parties

The proposed rulemaking will affect existing licensees, and parties interested in municipal noise ordinance proceedings.

Paperwork Requirements

The proposed rulemaking will not significantly increase paperwork for the Board or the regulated community.

Fiscal Impact

Because the proposed rulemaking primarily codifies and organizes existing practices or obligations under the Code, it will not have a fiscal impact on the licensees of the Board, applicants for licenses or the Board itself.

Effective Date

These proposed amendments will become effective upon publication in final-form in the *Pennsylvania Bulletin*.

Public Comment/Contact Person

Written comments, suggestions or objections will be accepted for 30 days after the publication of the proposed rulemaking in the *Pennsylvania Bulletin*. Comments should be addressed to James F. Maher, Assistant Counsel, Office of Chief Counsel, Pennsylvania Liquor Control Board, Room 401, Northwest Office Building, Harrisburg, PA 17124-0001.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 17, 2005, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairperson of the House Liquor Control Committee and Senate Committee on Law and Justice. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory

review criteria that have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final-form publication of the regulations, by the Board, the General Assembly and the Governor of comments, recommendations or objections raised.

JONATHAN H. NEWMAN,
Chairperson

Fiscal Note: 54-61. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 40. LIQUOR

PART I. LIQUOR CONTROL BOARD

CHAPTER 5. DUTIES AND RIGHTS OF LICENSEE

Subchapter J. MINORS ON LICENSED PREMISES

Sec.
5.121. Service in establishments primarily serving food.

§ 5.121. Service in establishments primarily serving food.

(a) Section 494(14) of the Liquor Code (47 P. S. § 4-494(14)) creates several exceptions to the general prohibition of minors being present in licensed premises. One of these exceptions, known as the "Pizza Hut" exception, permits a minor to be present in a restaurant, hotel or retail dispenser (but not a club) licensed premises that has gross sales of food and nonalcoholic beverages equal to at least 50% of its combined gross sales of both food and alcoholic beverages.

(b) Licensees qualifying for this exception will not be cited for unlawfully allowing minors to frequent the licensed premises.

(c) To qualify for this exception, a licensee shall assure that:

(1) Minors are not permitted to sit at the bar counter of the premises.

(2) Alcoholic beverages are not served to any adult at the table or booth where the minor is seated, unless the minor is also there with a parent, legal guardian or proper supervisor.

(3) Sales of food and nonalcoholic beverages at the licensed premises during the preceding 12-month licensing year are at least 50% of the combined gross sales of both food and alcoholic beverages.

CHAPTER 11. PURCHASES AND SALES

Subchapter A. GENERAL PROVISIONS

§ 11.13. Gift card transactions by minors prohibited.

Gift cards authorized by section 305 of the Liquor Code (47 P. S. § 3-305) for sale and redemption by the Board may not be purchased or redeemed by minors.

Subchapter I. SALE OF ALCOHOLIC BEVERAGES ON SUNDAY

§ 11.172. Application for a new Sunday sales permit.

(a) A licensee who wishes to make Sunday sales of alcoholic beverages shall file an application in the form as may be prescribed by the Board for a Sunday sales permit. The application for a Sunday sales permit shall contain:

* * * * *

(4) Information [to support the application's assertion] that for at least 90 consecutive days during the 12 months immediately preceding the date of application, sales of food and nonalcoholic beverages by the applicant at the licensed premises were [equal to or exceed] at least 30% of the combined gross [sale] sales of both food and alcoholic beverages.

(b) [The licensee shall be strictly liable for the accuracy of the information contained in the application and any inaccuracy shall be cause to show why the license should not be suspended or revoked or a fine imposed.] Inaccuracy in the application shall be sufficient cause for citation of a licensee under section 471 of the Liquor Code (47 P. S. § 4-471).

(c) Sunday sales permits are specific to the named licensee and not subject to transfer of ownership.

§ 11.176. Renewal.

(a) Renewals of Sunday sales permits shall be accomplished as set forth in § 11.172 (relating to application for a new Sunday sales permit), except that the information required by § 11.172(a)(4) shall be for the consecutive 12-month period [or portion thereof] immediately preceding the date of the application for renewal.

(b) If a licensee does not qualify for renewal of its Sunday sales permit, it may not apply for a new permit until at least 120 days after the expiration of its previous permit. The application will then be considered an application for a new Sunday sales permit.

(c) When the licensee delays its renewal application, sales during the prior Sunday sales permit may not be used to qualify the applicant for a new Sunday sales permit.

Example: A license and Sunday sales permit expire on February 28, 2004. The licensee applies for renewal on November 30, 2003. During the 12 consecutive months preceding the renewal application (November 1, 2002, through October 31, 2003) the licensee's ratio of sales of food and nonalcoholic beverages to its sales of food and alcoholic beverages is 25%. Therefore, the licensee's Sunday sales permit is not renewable. The licensee waits the required 120 days, and on July 1, 2004, it applies for a new Sunday sales permit. Its ratio is then at 35% for 90 consecutive days. It is issued a new Sunday sales permit that is valid until February 28, 2005. If the licensee's ratio stays above 30%, the Sunday sales permit will be validated and be in force at least until March 1, 2006.

CHAPTER 13. PROMOTIONS

Subchapter A. ADVERTISING

WINE

§ 13.27. Board participation in wine events.

(a) Section 215(e) of the Liquor Code (47 § 2-215 (e)) authorizes the Board to sponsor or participate in wine events.

(b) Persons seeking Board participation shall submit a request in writing to the Board at least 60 days prior to the first day of the wine event.

(c) If the event is approved, the Board will issue a letter of authority to the event organizer. The Board's letter will describe the premises upon which the wine event will be held.

(d) If the event is not approved, the Board's decision is final, and may not be appealed.

(e) Wine to be used in a wine event that the Board has chosen to sponsor or participate in may be acquired and possessed in accordance with the following:

(1) Wine donated for the event may be shipped directly to the wine event organizer or its agents.

(i) Records showing the amount, types and brands of all wine received, the identity of the donors and the dates received, and documents evidencing payment of all necessary taxes shall be forwarded to the Board prior to the wine event.

(ii) Wine obtained for the wine event that is not used at the wine event shall be returned to the donor, donated to a nonprofit, charitable organization registered with the Pennsylvania Department of State or destroyed and may not be sold.

(2) Wine may also be obtained for the wine event through the Board's wine and spirits stores.

(f) The Board's letter of authority authorizes the event organizer or its agents to possess and transport wine for the wine event.

(g) Participation in the wine event, including the service and consumption of wine, may be conditioned on the purchase of a ticket to the wine event. The event organizer, its agents or the Board may sell tickets. Sale of tickets by the event organizer or its agents does not constitute the unlawful sale of alcohol.

(h) The event organizer shall appoint a manager who shall be present on the premises at all times during the wine event.

(i) The Board may sell wine for off-premises consumption in an area it designates at the wine event. The Board will comply with the provisions of the Liquor Code governing retail sales at wine and spirits stores, except that advance advertisement or notice posting by the Board of the location of the designated sales area is not required and provisions granting a right of protest will not be applicable.

(j) If the premises where the wine event is to occur is licensed by the Board, the licensee will not be cited under the Liquor Code for conduct occurring on the licensed premises during the wine event, so long as the licensee, its employees or agents are not directly involved in the violation and are not participating in the operation or management of the wine event.

GIVING AND ACCEPTING THINGS OF VALUE

§ 13.51. General prohibition.

(a) Except as [provided in subsections (b), (c) and § 13.52 (relating to advertising novelties)] otherwise permitted, no in-State or out-of-State manufacturer, licensee or group of licensees, their servants, agents or employees, may directly or indirectly, in person, individually or through a trade organization, contribute to or accept from another licensee or group of licensees of a different class, their servants, agents or employees or a

trade organization of licensees of a different class, anything of value by means of advertisements, contributions, purchase, sale of tickets, donations or by any device, for any purpose.

* * * * *

§ 13.54. Point of sale (POS) incentive programs—defined.

A POS incentive program provides prizes for non-licensed buyers to purchase and for distributors/importing distributors to promote the sale of a brand of malt or brewed beverages. These promotions feature displays or advertisements at the location where a sale is made.

§ 13.56. Permissible point of sale (POS) incentive programs.

(a) A POS incentive program must be sponsored by a manufacturer or importing distributor of malt or brewed beverages.

(b) The composite value of prizes available to nonlicensed buyers must be at least three times the value of prizes available to distributors/importing distributors.

(c) Associated display and novelty items must be directed at and available for nonlicensed buyers.

(d) A prize may not be given to every participant.

(e) The value of a prize for a nonlicensed buyer may not exceed \$1,500.

(f) The POS incentive program may not incorporate a payment to licensees based on the number of cases displayed.

(g) The POS incentive program must be approved in advance by the Office of Chief Counsel, Pennsylvania Liquor Control Board.

CHAPTER 17. SPECIAL RULES OF PRACTICE AND PROCEDURE REGARDING MATTERS BEFORE THE OFFICDE OF ADMINISRATIVE LAW JUDGE

Subchapter A. GENERAL

§ 17.1. Purpose.

This chapter supplements 1 Pa. Code Part II (relating to general rules of administrative practice and procedure)

and governs the practice and procedure before the Board regarding license applications, appeals from ALJ decisions, applications for supersedeas [and], divestiture and noise exemption petitions.

Subchapter B. LICENSE APPLICATION

§ 17.15. Intervention in noise exemption petitions.

(a) Petitions to intervene may be filed when a municipality has petitioned the Board for exemption from the Board's regulation regarding the sound of amplified music or other entertainment, or the advertisement thereof, being heard outside of licensed premises.

(b) The deadline for filing a petition to intervene is 7 calendar days before the hearing. In extraordinary circumstances and for good cause, a petition to intervene may be accepted by the Board after the deadline, but not after the hearing begins.

(c) A petition to intervene will present proof that the petitioner has a substantial, direct and immediate interest in the outcome of the proceeding. For an interest to be substantial, it means that there is some discernible adverse effect to the petitioner's individual interest. For the petitioner to have a direct interest, it means that the person claiming to be aggrieved must show the harm to his interest would be caused by the municipality's enforcement of its own noise ordinance. An immediate interest means that there is a close causal connection between the alleged injury and the grant of the exemption.

(d) The Board may allow petitioners to become interveners if the petition also shows the petitioner has an interest of such a nature that intervention is necessary or appropriate to administration of the Liquor Code and this title. The Board will also consider whether or not the interest asserted in the petition to intervene is adequately represented by existing parties.

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