

RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

DELAWARE RIVER BASIN COMMISSION

[25 PA. CODE CH. 901]

Amendment to the Water Quality Regulations, Water Code and Comprehensive Plan to Establish Pollutant Minimization Plan Requirements for Point and Nonpoint Source Discharges of Toxic Pollutants

At its May 18, 2005 business meeting, by Commission Resolution No. 2005-9, the Delaware River Basin Commission (Commission) amended its Water Quality Regulations, Water Code and Comprehensive Plan to establish pollutant minimization plan requirements for point and nonpoint source discharges of toxic pollutants following issuance of a total maximum daily load (TMDL) by either the United States Environmental Protection Agency (EPA) or a member state, or an assimilative capacity determination by the Delaware River Basin Commission. The final-form rulemaking fulfills a technical requirement of the Delaware River Basin Compact (32 P. S. § 815.101) that rules adopted by the Commission be filed in accordance with the laws of the signatory parties.

Effective Date

The final-form rulemaking is effective immediately.

Further Information, Contact

Additional information, including background on the need for a pollutant minimization plan regulation, and a section by section summary of the rule, can be found at 34 Pa.B. 5559 (October 9, 2004). Copies of the complete Water Quality Regulations as amended are available on the Commission's website, www.DRBC.net. Copies are also available upon request from the Delaware River Basin Commission, P. O. Box 7360, West Trenton, NJ 08628-0360. For further information, contact Pamela M. Bush, Commission Secretary and Assistant General Counsel, Delaware River Basin Commission, (609) 883-9500 (x203).

Supplemental Information

Content and Scope of the Rule

These amendments to the Water Code and Comprehensive Plan, approved on May 18, 2005, authorize the Commission to require classes of point or non-point dischargers or individual dischargers to prepare pollutant minimization plans (PMPs) to reduce or prevent releases of a toxic pollutant to Basin waters following either (a) a determination of assimilative capacity by the Commission for the toxic pollutant in accordance with Section 4.30.7 of the Commission's Water Quality Regulations, or (b) the issuance of a TMDL by the EPA or a member state for the toxic pollutant in accordance with Section 304(d)(1)(C) of the Clean Water Act. Upon issuance of a final new or renewed National Pollutant Discharge Elimination System (NPDES) permit by EPA or a member state after initiation of a PMP requirement in accordance with this final rule, the permit supersedes any provisions of the PMP that relate to the NPDES-permitted discharge.

The scope of the amendments is limited to toxic chemicals listed in Section A.1 of the rule. One class of such chemicals is initially listed—polychlorinated biphenyls (PCBs), for which the EPA issued a TMDL applicable to Zones 2 through 5 of the Delaware Estuary on December 15, 2003. Additional pollutants may be added to the rule only by amendment after notice and comment rulemaking.

Classes of dischargers or individual dischargers subject to the rule may be added by amendment or by a directive of the Commission's Executive Director, upon approval by the Commission. Two classes of PCB dischargers—both consisting of NPDES-permitted dischargers—are initially included in the rule: those listed in Group 1 of Tables 3-2 through 3-5 of Appendix 3 of the document, *U.S. Environmental Protection Agency Regions II and III, Total Maximum Daily Loads for Polychlorinated Biphenyls (PCBs) for Zones 2-5 of the Tidal Delaware River* (December 15, 2003) (hereinafter, "Delaware Estuary PCB TMDL Report"); and those listed in Group 2 of the same tables in the event that the presence of PCB congeners is confirmed through monitoring in accordance with the requirements set forth in Appendix 3 of the same document.

Because NPDES permits ordinarily are reissued only once every 5 years, with respect to some point source dischargers, the rule allows the Commission to impose PMP requirements earlier than the permitting authority could routinely do, ensuring that steps to improve the Estuary's water quality begin sooner.

No nonpoint source dischargers are initially subject to the rule. However, recognizing that contaminated sites without permitted discharges are significant contributors to the problem of toxic contamination in Basin waters, the Commission now has the authority to consider requiring PMPs for such sites in the future if the sites are not being addressed entirely through other state or Federal regulatory programs.

For PCBs, and possibly for other persistent bioaccumulative toxic chemicals, it may take many years for dischargers to achieve sufficient load reductions to achieve the water quality standards. The PMP rule is intended to accelerate improvements in water quality by authorizing the Commission to require point and nonpoint source dischargers to initiate load reduction efforts, without imposing numeric limits that the dischargers could not meet. The rule contains no numeric targets for pollutant reduction. Rather, it is based on concepts of pollution prevention and sustainability and a recognition that dischargers familiar with their own operations may be best situated to identify opportunities for achieving prompt loading reductions in a cost-effective manner.

Development of the Rule

In its Delaware Estuary PCB TMDL Report, EPA recommended that non-numeric rather than numeric water quality-based effluent limits (WQBELs) should be used in NPDES permits to ensure, in accordance with Clean Water Act requirements, that the permits would be consistent with the TMDL. In view of the need for uniformity in PMP requirements Basin-wide and the need for guidance to assist the regulated community and permit writers, respectively, in developing and evaluating PMPs, the Commission recognized the benefit of promulgating a basin-wide rule establishing the minimum elements of a PMP. It also recognized that such a rule could be of value in addressing toxic pollutants other than

PCBs, which also require TMDLs and for which the imposition of numeric WQBELs also might be impracticable, and it recognized that PMPs might be used to address contaminated sites with nonpoint source discharges when such sites were not addressed entirely through other state and Federal regulatory programs.

The Commission staff developed a draft rule in May 2004 and informally solicited comments from state and Federal agencies, municipal and industrial dischargers, and the environmental community on three successive versions of the draft—in May, July and September, 2004. The Commission made substantial modifications in response to the comments it received before resolving in September 2004 to initiate formal notice and comment rulemaking on the proposed rule, including an additional comment period and a formal public hearing. The proposed rule was posted on the Commission's website on September 22, 2004. Notice of proposed rulemaking appeared at 34 Pa. B. 5559 (October 9, 2004) and at 69 FR 57010 (September 23, 2004). A public hearing was held on October 27, 2004, and written comments were accepted through November 19, 2004. A comment and response document was prepared, recommending that additional changes be made in response to the comments received.

Changes from the Proposed Rule

The final-form rule reflects changes to the proposed rule that were made in response to comments submitted during the comment period. These changes, which did not alter the scope or operation of the rule, are summarized here.

In response to a request that the Commission clarify when a discharger would be relieved of its obligation to implement a PMP, a provision was added to the rule authorizing the Commission to relieve a discharger of its obligation to continue implementing a PMP (until such time, if any, as the NPDES permitting authority issues a permit consistent with the rule) if the discharger can demonstrate that it has both (a) achieved the maximum practicable reduction of releases of the pollutant to the air, soil or water in accordance with the rule, and (b) is not having or has ceased to have an adverse effect on the water resources of the Basin.

A "Purpose" section was added to signal to regulators and the regulated community that the purpose of the rule is to allow owners and operators who know their facilities best to think through creatively and systematically what can be done to limit PCB discharges. DRBC intends to exercise some flexibility in applying the rule, because it hopes to see different solutions undertaken throughout the Basin in order to learn which approaches are most effective.

A number of commentators recommended that key terms used in the rule be more clearly defined. In response, a "Definitions" section was added, including definitions of the terms "adverse effect," "maximum practicable reduction," "service area" and "toxic pollutant."

Members of the environmental community sought to have the Commission require a public hearing on every PMP; however, this was determined to be inconsistent with the gap-filling function that the Commission is performing with this rule. The process for Commission review of PMPs is unchanged. The rule authorizes the Commission to perform substantive reviews of PMPs submitted to it and to request more from a discharger if it determines that a PMP is inadequate. Upon issuance of an initial, renewed or modified NPDES permit by the state in which the discharger is located or by EPA, the

permitting agency may incorporate requirements to develop, submit to the permitting authority and implement a PMP consistent with the DRBC regulation. A public hearing may be available if requested in connection with issuance of the permit.

A number of comments focused on the required elements of a PMP. Several of these suggested that too much information was required to be included. In response, changes were made to limit the amount of extraneous information collected. Flexibility was introduced as to the methods that might be used by nonpoint source dischargers to establish a pollutant loading baseline and by both point and nonpoint source dischargers to estimate loading reductions. A provision requiring PCB monitoring with Method 1668A was retained, but the frequency of monitoring was changed from annually to biennially. The provision for annual reporting was preserved.

Amendments

The final-form rulemaking amends Article 4 of the Commission's Water Quality Regulations by the addition of the text below. It also adds an Article 4 to the Water Code, consisting of Sections 4.10 through 4.30.8, each marked "[Reserved]", followed by the text below:

4.30.9 Pollutant Minimization Plans for Toxic Pollutants

A. *Applicability.* Following either (i) a determination of assimilative capacity by the Commission for a toxic pollutant in accordance with Section 4.30.7 of these regulations or (ii) the issuance of a total maximum daily load (TMDL) by the U.S. Environmental Protection Agency or a Basin State for a toxic pollutant in accordance with Section 304(d)(1)(C) of the Clean Water Act, the Commission may add such pollutant to the list established at Section 4.30.9A.1, and in accordance with Section 4.30.9A.2, may require classes of point or nonpoint dischargers or individual dischargers to prepare pollutant minimization plans (PMPs) to reduce or prevent releases of the toxic pollutant to Basin waters.

1. In accordance with Section 5.2 of the *Delaware River Basin Compact*, the Commission has determined that the effectuation of the Comprehensive Plan requires control and abatement of the pollutants listed below, through the PMP requirements set forth herein.

(a) Total Polychlorinated Biphenyls (PCBs).

2. The following classes of dischargers or individual dischargers shall be subject to Section 4.30.9 of these Regulations and shall be so notified in writing by the Executive Director:

(a) any discharger to which the Commission has assigned an individual allocation for a pollutant listed at Section 4.30.9A.1., in accordance with an assimilative capacity determination issued under Section 4.30.7 of these Regulations

(b) any discharger that has received an individual wasteload allocation in a TMDL established by the U.S. Environmental Protection Agency or a Basin State for a pollutant listed at Section 4.30.9A.1.

Provided, however, that dischargers listed in Group 2 of Tables 3-2 through 3-5 of Appendix 3 of the document, *U.S. Environmental Protection Agency Regions II and III, Total Maximum Daily Loads for Polychlorinated Biphenyls (PCBs) for Zones 2-5 of the Tidal Delaware River* (December 15, 2003) ("Group 2 dischargers"), shall

only be subject to Section 4.30.9 in the event that the presence of PCB congeners is confirmed through monitoring in accordance with the requirements set forth in Appendix 3 of the same document.

(c) any discharger or class of dischargers of a pollutant listed at Section 4.30.9.A.1 that the Commission determines after public notice and a hearing, has an adverse effect on the water resources of the Basin

3. Until such time, if any, as the NPDES permitting authority issues a permit in accordance with Section I, the Commission may relieve a discharger of the requirements of Section 4.30.9 for a pollutant, effective upon written notice to the discharger, if the Commission determines, in consultation with the State in which the discharger is located, that the discharger has (a) achieved the maximum practicable reduction of releases of the pollutant to the air, soil or water in accordance with Section 4.30.9.E.9; and (b) is not having or has ceased to have an adverse effect on the water resources of the Basin. Notice of a determination in accordance with this section shall be published by the Commission in the applicable state register and on the Commission's website.

B. *Purpose.* For toxic pollutants listed in Section 4.30.9.A.1, implementation of a comprehensive set of measures, including trackdown studies, process modifications, materials substitutions, treatment technologies, best management practices and/or procedures tailored to the facility or site may be necessary to achieve required loading reductions. Owners and operators, who possess the greatest knowledge of their operations and site conditions, are in the best position to develop and implement such measures. The pollutant minimization plan requirements of Section 4.30.9 may be used to require owners and operators to perform a systematic analysis of their facilities and sites in order to locate pollutant sources and to design and implement measures to achieve the necessary reductions. The elements of a PMP set forth at Section 4.30.9.E of the rule are intended to ensure that similarly situated dischargers make comparable efforts, and that progress in implementing plans and reducing pollutant loadings is measured and reported. Within these constraints, creative approaches to pollutant trackdown and reduction are encouraged.

C. *Definitions.* For the purposes of Section 4.30.9 of these Regulations, key terms are defined as follows:

1. *Adverse Effect.* A point or non-point source of a toxic pollutant has an "adverse effect" on the water resources of the Basin if it is causing or contributing to a violation of applicable stream quality objectives or water quality standards in Basin waters for which, in accordance with Section 4.30.9.A., a TMDL or assimilative capacity determination has been established.

2. *Maximum Practicable Reduction.* The "maximum practicable reduction" of releases of a toxic pollutant is the maximum degree of reduction in releases of the pollutant to the air, soil and water (including elimination of such releases where achievable), taking into account economic and technological feasibility and any new environmental impacts that would result, that is achievable for a given site or facility through the application of equipment, technology, process or procedure modifications; reformation or redesign of products; substitution of raw materials; or changes in management practices, materials handling, inventory control, or other general operational phases of the site or facility, either alone or in combination. If the pollutant is present within a site or

facility but is contained, maximum practicable reduction includes the implementation of measures to prevent its future release. For municipal wastewater treatment plants, maximum practicable reduction shall include system trackdown and analysis and may include, among other things, reductions achieved through education and outreach and coordination with other local, state, and federal regulatory agencies.

3. *Service Area.* A "service area" is the area served by a municipal or industrial wastewater treatment plant. It includes the geographic area served by the plant's collection system, plus any sites or facilities outside the collection system that transport waste to the plant for treatment.

4. *Toxic pollutant.* A "toxic pollutant" is any pollutant defined as toxic in a federal or Basin state statute or a regulation issued by the Commission, the U.S. EPA or a Basin state.

D. *Procedures for Submission, Review, Implementation and Continuation of PMPs.* The following procedures shall apply to a discharger required to develop, submit and implement a PMP in accordance with Section 4.30.9, until such time, if any, as the NPDES permitting authority issues a permit in accordance with Section I:

1. *Time of Submission.* The discharger shall develop and submit the PMP to the Commission and the permitting agency (if any) within 90 days of receipt of notice from the Executive Director.

2. *Completeness Determination.* The Commission staff, in consultation with permitting agency staff (if applicable), shall review each PMP for completeness, and the Executive Director shall issue a completeness determination to the discharger, copied to the permitting agency, confirming that a PMP is complete or identifying deficiencies in the PMP. The completeness determination shall not be construed as a determination of the adequacy of the PMP to achieve the maximum practicable reduction of pollutant discharges to the air, soil or water in accordance with Section E.9.

3. *Cure of Deficiency.* Within 30 days of receipt of a completeness determination in accordance with Section 4.30.9.D.2., above, dischargers shall submit a PMP to the Commission and the State in which the discharger is located that reflects a good faith effort to cure any deficiency identified in the determination. If the revised PMP is satisfactory, the Executive Director shall issue a second determination of completeness stating that the deficiency has been cured. If the revised PMP is still incomplete, the Executive Director in her discretion may either grant the discharger additional time to cure the deficiency or commence an enforcement action and/or seek penalties against the discharger, unless for good cause shown the Executive Director grants a waiver in accordance with Section 4.30.9.E. The Executive Director may commence an enforcement action and/or seek penalties in accordance with Section 14.17 of the Compact and Section 4.30.9.D.9 below in the event of persistent or bad faith failure by the discharger to submit a complete PMP.

4. *Commencement of PMP Implementation.* The discharger shall commence implementation of its PMP as submitted, within 60 days of receipt of a determination of completeness under Section 4.30.9.D.2 or D.3.

5. *Initial Term of PMP.* Each PMP shall be designed for an initial term of five years.

6. *Additional Term of PMP.* The term of the PMP shall be reviewed by the Commission staff in consultation with the State in which the discharger is located prior to the expiration of the PMP, and an additional term shall be determined by the Executive Director.

7. *Plans Deemed Non-Compliant.* If the Commission determines at any time, upon the recommendation of the Executive Director, that a PMP being implemented or to be implemented in accordance with Section 4.30.9 is not likely to achieve the maximum practicable reduction of pollutant discharges to the air, soil and water, then the Commission may require the discharger to submit a revised PMP to more aggressively reduce pollutant loading. The discharger shall submit a revised PMP responsive to the Commission's request within 60 days of receipt of the request. The time periods provided in Sections 4.30.9.D.2 through D.4., with respect to curing a deficiency and commencing implementation, shall apply.

8. *Persistent or Bad Faith Failure to Comply.* The Executive Director is authorized to commence an enforcement action against a discharger in accordance with Article 7 of the Commission's *Rules of Practice and Procedure* for persistent or bad faith failure to submit a complete plan, to modify a plan deemed non-compliant, or to implement a plan.

E. *Plan Elements.* A PMP prepared in accordance with these regulations shall contain the following elements:

1. *Good Faith Commitment.* A signed and dated statement by the highest ranking official having day-to-day managerial and operational responsibilities for the facility, expressing the company's good faith commitment to reducing discharges of the target pollutant through the PMP process.

2. *Discharger Contact.* Name and contact information for an individual who will serve as the contact for information concerning the PMP.

3. *Description and Maps of Facility*

a. For Industrial Facilities:

- company and facility name and address;
- raw materials and industrial processes used, and products generated that either contain the pollutant or that may be related to the generation or release of the pollutant;
- for facilities accepting non-facility wastes, a description of all such wastes;
- a map of all point and nonpoint source releases from the facility or site and a description of such releases;
- all local, state and federal discharge permits and permit numbers for permits that relate to releases of the pollutant; and

—receiving stream for all discharges, including River Mile in instances where the receiving stream is the main stem Delaware River.

b. For Municipal Wastewater Treatment Plants (WWTPs):

- facility name and address;
- description and map of the facility's service area;
- description and map or schematic diagram of the collection system;
- description of any wastes accepted from outside the collection system (e.g., wastes trucked or transported by rail to the collection system for treatment);

—map of all point and nonpoint source releases from the facility or site and description of the nature of such releases;

—all local, state and federal permits and permit numbers for permits that relate to releases of the pollutant;

—receiving stream for all discharges, including River Mile in instances where the receiving stream is the main stem Delaware River; and

—a list of all known industrial users of the collection system and pretreatment permit numbers if any.

4. *Description and Map of Known Sources*

a. Description of all materials, equipment, processes, soil areas or sediment areas within a facility, site, or service area, from which the pollutant is released directly or indirectly into a wastewater treatment system, sewage collection system, stormwater collection system, stream or river, including a description of the pathways if known.

b. Site map or collection system map showing location of known sources and pathways.

5. *List of Potential Sources*

a. For industrial dischargers, identify any material, equipment, process, soil area, sediment area or facility on the site known to contain or generate the pollutant, but that is not deemed a source because it is not known to be releasing the pollutant or because no pathway to surface water or groundwater exists. Provide estimate of the mass of the pollutant present, if known.

b. For municipal WWTPs, identify any material, equipment, process, soil area, sediment area or facility that is part of the collection system or that is within the service area and that is known to contain the pollutant, but that is not deemed a source because no pathway to surface water or groundwater exists. Provide estimate of the mass of the pollutant present if known.

6. *Strategy for Identifying Unknown Sources of the Pollutant (Trackdown)*

a. For industrial dischargers, the strategy for identifying pollutant sources may include, but shall not be limited to, investigation of an industrial process used by the discharger that is similar to one known to have generated the pollutant elsewhere; investigation of historic activities on the site; or investigation of possible soil or sediment contamination or stormwater management system contamination as a result of historic or ongoing activities.

b. For municipal WWTPs, trackdown strategy may include, but shall not be limited to, identification, through screening, of any portions of the collection system containing higher concentrations or masses of the pollutant; identification of industrial users of the collection system that are likely to have used or generated the pollutant in the past; industrial processes known to be in use that could generate the pollutant; sites containing equipment that is likely contaminated with the pollutant, and sites that have been used to dispose of the pollutant.

c. Trackdown efforts may rely upon analytical methods other than those required under Section 4.30.9.E.13, below, for purposes of screening or identification of pollutant sources.

7. *Previous, Ongoing or Planned Minimization Activities Undertaken Voluntarily or Required by Other Regulatory Programs.* Previous, ongoing or planned pollutant minimization activities underway or to be undertaken voluntarily or in accordance with a federal or state requirement for the pollutant that is the subject of the PMP, including the level of pollutant reduction attained, level of pollutant reduction targeted, measures completed, measures underway, and the schedule for planned activities.

8. *For Municipal WWTPs Only, Recommendations for Action Under Other Regulatory Programs.* Based on information known at the time of PMP submission or identified during implementation of the PMP, recommendations for remediation activities to be undertaken under the auspices of other local, state or federal regulatory agencies or programs.

9. *Pollutant Minimization Measures.* A description of measures to be taken to achieve the maximum practicable reduction of discharges to the air, soil or water.

10. *Source Prioritization.* Prioritization of known and potential sources, either individually or in categories, from most to least significant, on the basis of available information. Factors to be considered in prioritizing known sources should include, but shall not be limited to, available information on pollutant mass (or volume of the discharge and concentration of the pollutant), and likelihood of release into Basin waters. Factors to be considered in prioritizing potential sources may include, but shall not be limited to, current or past industrial activity, presence and type of equipment containing the pollutant, waste management activities and overall condition of the site and facilities.

11. *Key Dates.* Date of submission of waste implementation plan; date by which initiation of plan activities is required; and schedule for implementation of each of the measures described in Section 4.30.9.E.9 above.

12. *Measurement of Progress*

a. *Loading Baseline and Reductions.* A PMP shall contain a loading baseline as set forth below, and shall provide for the measurement of mass loadings on a biennial basis using methods listed at Section 4.30.9.E.13. In addition to biennial monitoring using methods listed in Section 4.30.9.E.13, a PMP shall contain alternative methods for estimating loading reductions for all nonpoint sources and may contain such alternative methods for point sources.

Descriptions of the following shall be included in a PMP:

- for point sources, procedures and data obtained utilizing the appropriate method listed in Section 4.30.9.E.13 below, for establishing a loading baseline;

- for nonpoint sources, procedures and data to be used in establishing a loading baseline;

- procedures and data, in addition to biennial monitoring using methods listed in Section 4.30.9.E.13, to be used to estimate loading reductions. Such measures may include indirect effluent monitoring, direct and indirect monitoring of treatment plant influent, and/or engineering calculations.

b. *Additional Measures of Progress.* A PMP shall contain a description of the methods, other than measurement of loading reductions, to be used to measure and report progress toward achieving maximum practicable

reduction of the pollutant. Such measures shall reflect the approaches to be taken to achieve maximum practicable reduction of the pollutant.

13. *Sampling and Analytical Methods.* The following sampling and analytical methods shall be used to establish a loading baseline for point sources and to establish pollutant reductions for point and nonpoint sources, in accordance with section 4.30.9.E.12.a., above.

a. PCBs—EPA Method 1668, Revision A, including sampling and analytical requirements specified in the document entitled, *Delaware River Estuary Stage 2 PCB TMDL—Polychlorinated Biphenyls—EPA Method 1668A-Project Quality Control Requirements* (DRBC, 2004).

F. *Annual Report.* Each year, commencing one year from the date by which initiation of PMP activities is required to begin in accordance with Section 4.30.9.D.4 above, or such other date as may be specified in a NPDES permit issued in accordance with Section 4.30.9.I, and continuing through the fifth year of the plan, the discharger shall submit to the Commission and the State in which the discharger is located an annual report that:

1. describes any material modifications to the facility's operations, site boundary, service area, or waste streams in the course of the preceding year that might affect releases of the pollutant, along with appropriate revisions made to the PMP;

2. outlines measures under way and completed to achieve maximum practicable reduction of pollutant releases since the last report and since initiation of the PMP;

3. reports incremental and cumulative changes from the pollutant loading baseline established in accordance with Section 4.30.9.E.12.a., above; and

4. describes progress toward achieving maximum practicable reduction of the pollutant, using measures identified in accordance with Section 4.30.9.E.12.b., above.

G. *Waiver.* Until such time, if any, as the NPDES permitting authority issues a permit in accordance with Section I, the Executive Director, in consultation with the State in which the discharger is located, may modify any of the time requirements of Section 4.30.9.D for a PMP for good cause and may waive any of the plan element requirements of Section 4.30.9.E for a PMP, upon a showing that an element listed at Section 4.30.9.E is inapplicable to or inappropriate for the particular facility or site to which the PMP applies. Any discharger seeking such a waiver must submit such request to the Executive Director in writing.

H. *Guidance.* The Commission may develop guidance for the development of PMPs for specific pollutants consistent with the requirements set forth in Section 4.30.9.E.

I. *Relationship to NPDES Permit.* Upon issuance of an initial, renewed or modified NPDES permit by the State in which the discharger is located or the U.S. Environmental Protection Agency to a discharger that has been made subject to Section 4.30.9, which permit contains the requirements to develop, submit to the permitting authority and implement a PMP consistent with that Section, then as to that discharger:

1. the Commission shall cease to administer Section 4.30.9 with respect to the discharge of the pollutant to which the PMP requirements of the permit relate, upon the date such requirements become effective; and

2. the NPDES permitting authority shall apply the more stringent of Section 4.30.9 or other applicable state or federal requirements with respect to the discharge of the pollutant to which the PMP requirements of the permit relate.

J. *Reservation of Authority.* Nothing in this rule shall limit the authority of the Commission or the Executive Director under the *Compact* to control future pollution, abate existing pollution or require review of a project by the Commission under Section 3.8 of the *Compact*, including through the issuance of docket-specific PMP requirements or other methods.

PAMELA M. BUSH,
Secretary

Fiscal Note: Fiscal Note 68-44 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART V. DELAWARE RIVER BASIN COMMISSION

CHAPTER 901. GENERAL PROVISIONS

§ 901.2. Comprehensive Plan and water quality.

The Comprehensive Plan regulations as set forth in 18 CFR Part 401, Subpart A (2006) and the Water Code and Water Quality Standards as set forth in 18 CFR Part 410 (2006) are hereby incorporated by reference and made a part of this title.

[Pa.B. Doc. No. 06-865. Filed for public inspection May 19, 2006, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE BOARD OF NURSING

[49 PA. CODE CH. 21]

Licensed Dietitian-Nutritionists

The State Board of Nursing (Board) adopts Subchapter G (relating to dietitian-nutritionists) to read as set forth in Annex A.

Statutory Authority

Sections 2.1(k) and 11(c) of the Professional Nursing Law (act) (63 P.S. §§ 212(k) and 221(c)) authorize the Board to establish regulations regarding licensed dietitian-nutritionists (LDNs).

Background and Purpose

The final-form rulemaking implements the act of June 29, 2002 (P.L. 651, No. 99) (Act 99), which requires the Board to regulate the practice of dietetics and nutrition in this Commonwealth and provides for the licensing of dietitian-nutritionists by the Board.

Summary of Comments and Responses to Proposed Rule-making

Notice of proposed rulemaking was published at 35 Pa.B. 1213 (February 12, 2005). Publication was followed by a 30-day public comment period. The Board did not receive comments from the general public. On March 16, 2005, the House Professional Licensure Committee

(HPLC) submitted comments and suggestions and on April 13, 2005, the Independent Regulatory Review Commission (IRRC) submitted comments and suggestions.

§ 21.701 (relating to definitions)

The HPLC submitted several comments to this section. The HPLC suggested revisions to the definition of “sexual impropriety” because subparagraph (iii) did not prohibit touching a patient’s buttocks, subparagraph (iv) did not prohibit accepting a date from a patient and subparagraph (vi) allowed a licensee to provide certain information if asked by the patient. These subparagraphs were rewritten.

The HPLC asked the Board to clarify the subparagraphs in the definition of “sexual violation.” Specifically, the HPLC asked the Board to define the term “during the professional relationship.” IRRC also asked that the Board make this change. The Board has added the definition of “professional relationship” to § 21.701. The HPLC also asked that the Board make subparagraphs (ii) and (iii) in the definition of “sexual violation” more encompassing and suggested that the Board borrow from the Pennsylvania Crimes Code. The Board has adopted the suggestion and made appropriate amendments. Third, the HPLC asked the Board to define “sexual favors” as used in subparagraph (v) in the definition of “sexual violation.” The Board has amended the language to broadly encompass sexual activity.

The HPLC and IRRC pointed out that the Board uses the term “patient” and “client” and questioned whether this distinction was appropriate. Upon further review, the Board determined that the word “patient” should be used and that the term should encompass patients (hospitalized individuals), clients (nonhospitalized individuals) and family members. Therefore, the Board amended the definition of “patient.”

IRRC noted with confusion that the definition of “sexual impropriety” included discussing or commenting on “potential sexual history.” The Board has eliminated the word “potential.” In addition, IRRC recommended that the Board broaden the definition of “sexual impropriety.” The Board has done so.

§ 21.704 (relating to matters related to allegations of sexual impropriety or violation)

The HPLC suggested additions to § 21.704 to clearly prohibit sexual violations and sexual improprieties and to provide that this conduct constitutes unprofessional conduct. The Board has adopted these suggestions and added subsections (a) and (b) and renumbered the remaining subsections (c)—(e).

The HPLC asked the Board to clarify subsection (b), noting that the second sentence allowed the Board to consider a past sexual relationship between a licensee and a patient, while the first sentence provides that specific instances of a patient’s sexual conduct are inadmissible in proceedings before the Board. The Board intended to allow consideration of a past sexual relationship between a licensee and a patient. For example, if an LDN is involved with an individual prior to the individual becoming the LDN’s patient, the Board believes this information is relevant in determining whether the LDN committed misconduct. The Board has added language to clarify that evidence of specific instances of a patient’s sexual contact with individuals other than the licensee may not be presented in a disciplinary hearing.

§ 21.711 (relating to professional conduct)

The HPLC questioned whether subsection (a)(4) should apply to both a patient and a client. Because physicians prescribe patients diets, the Board originally intended subsection (a)(4) to apply only to clients, as patients do not have discretion in refusing to follow a prescribed diet. In a broader sense, however, a patient has the right to refuse any medial regimen. Therefore, the Board amended subsection (a)(4) to refer to a patient, as defined in § 21.701 (relating to definitions). In practice, however, an LDN would not tell a patient that the LDN disagreed with a prescribed diet. Instead, an LDN would discuss any concerns about a prescribed diet with the patient's physician.

The HPLC recommended that subsection (b)(8) apply to both patients and clients. Because the Board has redefined patient to include patients, clients and family members, the section does now apply to both patients and clients.

The HPLC noted a drafting error in § 21.711(b)(9), which has been corrected.

Final-form § 21.721 (relating to qualifications for licensure)

The HPLC recommended that § 21.721 include language regarding the statutory requirement of 900 hours of supervised experience. IRRC recommended that the Board add a section which sets forth all of the initial licensure requirements and the application process. The Board believes that if its regulations are to duplicate statutory provisions, they should not repeat only certain qualifications for licensure set forth in the act. The Board added § 21.721 to include all of the statutory requirements for licensure and renumbered the following sections accordingly. The Board declines to add a section regarding application procedures, as the procedure is simply to file an application as with all other licenses in the Bureau of Professional and Occupational Affairs.

IRRC also suggested that the final-form rulemaking include a cross-reference to section 6(c) of the act (63 P. S. § 216(c)), regarding the prohibition on licensing individuals convicted of a felony under The Controlled Substance, Drug, Device and Cosmetic Act (35 P. S. §§ 780-101—780-143). The Board does not find that it is necessary to duplicate this section of the act in the regulations.

§ 21.723 (proposed § 21.722) (relating to license renewal)

The HPLC suggested that the Board rewrite § 21.722(b), final-form § 21.723(b), to avoid giving licensees and members of the public the impression that LDNs will retain their licenses in spite of criminal convictions or other wrongful behavior. IRRC also noted that the subsection appeared to guarantee license renewal regardless of criminal convictions. Because the renewal of a license is a ministerial act and the Board cannot refuse to renew a license without adhering to the constitutional mandates of notice and hearing before deprivation of property, the subsection was technically correct as proposed. Nevertheless, the Board has amended the subsection.

IRRC also questioned the Board's statutory authority to require a licensee to disclose pending criminal charges. The Board has determined that this information is necessary in administering and enforcing section 14(a)(5) of the act (63 P. S. § 224(a)(5)) and that the Board is authorized to require this information under section 2.1(k) of the act.

§ 21.724 (proposed § 21.723) (relating to continuing education)

IRRC noted that the Pennsylvania Dietetic Association (PDA) provided comments directly to IRRC asserting that "there are other reputable groups which provide continuing professional education (CPE) but are not listed in the regulation." The list provided by the PDA (medical centers, Amerinet, and the like) are either already approved (medical centers) or American Dietetic Association (ADA) approved, and therefore Board-approved, or would qualify for ADA approval if they applied for ADA approval. The Board cannot list every possible existing and potential provider of CPE and declines to amend its list of preapproved providers.

IRRC next suggested that the Board insert in the regulations a process by which an organization or individual can apply to become a Board-approved CPE provider. Persons or entities may petition the Board at any time to amend its regulations to include it as a provider under 1 Pa. Code § 35.18 (relating to petitions for issuance, amendment, waiver or deletion of regulations). Given this process, the Board sees no need to include in its regulations a process or procedure by which it will hear these requests.

IRRC then suggested that subsection (b)(1) be amended to clearly state that an LDN may apply to the Board for CPE credit. The Board has made this amendment. IRRC then asked that the Board list the criteria the Board will use in deciding whether or not to grant CPE credits. The Board believes that the criteria for approval are sufficiently stated in final-form § 21.724 and declines to further specify the qualities of acceptable CPE.

Finally, IRRC asked by what authority the Board proposes waiver of CPE requirements in subsection (d). The Board relies upon the authority in section 2.1(k) of the act, which grants the Board authority to adopt regulations for the practice of dietetics-nutrition and for the administration of the act. Coincident with practice is the continuing education requirement of biennial renewal. In administering the act, the Board, through subsection (d), would recognize the hardship imposed on certain licensees who are unable to complete the required CPE. If the Board were not able to recognize a hardship waiver, a licensee would have to withdraw from employment or practice. If section 11(c) of the act were construed strictly as a statutory mandate, the Board would have neither the authority to grant a waiver nor the authority to extend the time for compliance. The Board does not believe the Legislature intended this harsh result.

Fiscal Impact and Paperwork Requirements

The final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The final-form rulemaking will impose no additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 12, 2005, the Board submitted a copy of the notice of proposed rulemaking, published at 35 Pa.B. 1213, to IRRC and the Chairpersons of the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) and the HPLC for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC, the SCP/PLC and the HPLC 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 Department has considered all comments from IRRC, the SCP/PLC, the HPLC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on March 14, 2006, the final-form rulemaking was approved by the HPLC and was deemed approved by the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on April 19, 2006, and approved the final-form rulemaking.

Additional Information

Further information can be obtained by contacting Ann Steffanic, Administrative Assistant, State Board of Nursing, P. O. Box 2649, Harrisburg, PA 17105-2649 or from the Department website: www.dos.state.pa.us.

Findings

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240), (45 P. S. §§ 1201 and 1202) and 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) The amendments to this final-form rulemaking do not enlarge the purpose of proposed rulemaking published at 35 Pa.B. 1213.

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

Order

The Board, acting under its authorizing statute, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 21, are amended by adding §§ 21.701—21.705, 21.711 and 21.721—21.725 to read as set forth in Annex A.

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

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

JOANNE SORENSEN, RN, MS,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 36 Pa.B. 2251 (May 6, 2006).)

Fiscal Note: Fiscal Note 16A-5120 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 49. PROFESSIONAL LICENSURE AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 21. STATE BOARD OF NURSING

Subchapter G. DIETITIAN-NUTRITIONISTS

GENERAL PROVISIONS

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LICENSURE REQUIREMENTS

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GENERAL PROVISIONS

§ 21.701. Definitions.

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

ACN—American College of Nutrition.

ADA—American Dietetic Association.

Act—The Professional Nursing Law (63 P. S. §§ 211—225), which provides for the licensing of Licensed Dietitian-Nutritionists.

Approved—Approved by the Board.

Approved program—Those educational programs accredited by the Commission on Accreditation for Dietetics Education or the American Council on Education for dietetics-nutrition education.

Board—The State Board of Nursing of the Commonwealth.

CADE—*Commission on Accreditation for Dietetics Education*—The organization recognized by the Council on Higher Education Accreditation and the United States Department of Education as the accrediting agency for education programs that prepare individuals for the practice of dietetics-nutrition.

CBNS—*Certification Board for Nutrition Specialists*—The certification body of the ACN.

CDR—*Commission on Dietetic Registration*—The credentialing agency for the ADA.

CNS—*Certified Nutrition Specialist*—The title given to individuals who meet the requirements of the CBNS.

CPE—Continuing professional education, required by the act for biennial license renewal.

Deviate sexual intercourse—The term as defined in 18 Pa.C.S. § 3101 (relating to definitions).

Indecent contact—The term as defined in 18 Pa.C.S. § 3101.

LDN—Licensed dietitian-nutritionist—A person holding a current license under this subchapter to practice dietetics-nutrition in this Commonwealth.

Patient—A person upon whom or with whom an LDN is practicing dietetics-nutrition, including a client. For purposes of § 21.704 (relating to matters related to allegations of sexual impropriety or violation), any conduct prohibited with a patient is also prohibited with an immediate family member or spouse of a patient.

Professional relationship—The relationship through which a licensed dietitian-nutritionist provides professional food and nutrition services to a patient. The relationship continues, for purposes of § 21.704, for 30 days after termination of professional services by either the licensed dietitian-nutritionist or the patient.

RD—Registered Dietitian—The title given to an individual who meets the requirements set forth by the CDR.

Registration Examination for Registered Dietitians—A written academic examination developed, prepared, administered and scored by the CDR.

Sexual impropriety—The term includes the following offenses:

- (i) Making sexually demeaning or sexually suggestive comments about or to a patient, including comments about a patient's body or undergarments.
- (ii) Exposing a patient's body or watching a patient dress or undress, unless the patient specifically requests assistance.
- (iii) Examining or touching the body of a patient except in the appropriate performance of the LDN's practice.
- (iv) Discussing or commenting on a patient's sexual history, preference or performance during consultation, except when the consultation is pertinent to the issue of sexual function or dysfunction or reproductive healthcare.
- (v) Soliciting or accepting a date from a patient.
- (vi) Discussing information about one's sexual problems, preferences or fantasies.

Sexual intercourse—The term as defined in 18 Pa.C.S. § 3101.

Sexual violation—The term includes the following offenses:

- (i) Engaging in sexual intercourse, indecent contact or deviate sexual intercourse with a patient during the professional relationship.
- (ii) Encouraging the patient to masturbate in the presence of the dietitian-nutritionist or masturbating while a patient is present.
- (iii) Providing or offering to provide drugs, herbs, nutritional supplements or treatment in exchange for indecent contact, sexual intercourse or deviate sexual intercourse.
- (iv) Using or causing the use of any herb, nutritional supplement or drug affecting consciousness for the purpose of engaging in conduct that would constitute a sexual impropriety or sexual violation.

§ 21.702. Scope.

In this subchapter the Board:

- (1) Provides for licensure of dietitian-nutritionists who meet the qualifications set forth in the act.
- (2) Administers the act by providing rules and regulations for the practice of dietetics-nutrition.

(3) Provides rules and regulations for the conduct of licensees.

(4) Regulates the practice of LDNs.

§ 21.703. Applicability of general rules.

The provisions of 1 Pa. Code Part II (relating to the General Rules of Administrative Practice and Procedure) apply to the activities of and proceedings before the Board.

§ 21.704. Matters related to allegations of sexual impropriety or violation.

(a) A licensee may not engage in conduct constituting a sexual violation or sexual impropriety.

(b) Engaging in conduct constituting a sexual violation or sexual impropriety is unprofessional conduct and will subject the licensee to disciplinary action under section 14 of the act (63 P. S. § 224).

(c) The consent of the patient to any sexual impropriety or sexual violation is not a defense to any disciplinary charge for violation of the act or this subchapter.

(d) Evidence of specific instances with individuals other than the licensee, opinion evidence or reputation evidence of a patient's past sexual conduct is not admissible in proceedings brought under § 21.711 (relating to professional conduct). The Board may consider sexual relationships between the dietitian-nutritionist and the patient occurring prior to the professional relationship.

(e) A dietitian-nutritionist who attempts to raise as a defense an argument that conduct prohibited as a sexual violation or sexual impropriety was necessary or appropriate to the treatment of a patient shall be required to demonstrate competency in practice which relates directly to the treatment of sexual function or dysfunction. This competence may be demonstrated through educational training and supervised clinical experience.

§ 21.705. Fees.

(a) The following fees are charged by the Board:

| | |
|--|------|
| Application for licensure..... | \$45 |
| Renewal fee | \$45 |
| Reactivation of inactive or lapsed license | \$50 |
| License verification fee | \$15 |
| License certification fee | \$25 |
| Restoration after suspension or revocation..... | \$50 |

(b) In addition to the application fee prescribed in subsection (a), which is payable directly to the Board, a candidate for the Registration Examination for Registered Dietitians will also pay an additional examination fee. A candidate may contact the Commission on Dietetic Registration, 216 West Jackson Blvd., Chicago, IL 60606-6995, www.cdrnet.org for more information regarding the examination and examination fee.

(c) In addition to the application fee prescribed in subsection (a), which is payable directly to the Board, a candidate for the Certification Board for Nutrition Specialists examination for Certified Nutrition Specialists will also pay an additional examination fee. A candidate may contact the Certification Board for Nutrition Specialists, 300 S. Duncan Avenue, Suite 225, Clearwater, FL 33755, www.cert-nutrition.org for more information regarding the examination and examination fee.

**RESPONSIBILITIES OF THE LICENSED
DIETITIAN-NUTRITIONIST**

§ 21.711. Professional conduct.

- (a) Licensed dietitian-nutritionists shall:
- (1) Conduct themselves with honesty, integrity and fairness.
 - (2) Practice dietetics based on scientific principles and current information.
 - (3) Present substantiated information and interpret controversial information without personal bias, recognizing that legitimate differences of opinion exist.
 - (4) Provide information which will enable patients to make their own informed decisions regarding nutrition and dietetic therapy, including:
 - (i) The purpose and nature of any evaluation, treatment, educational or training procedure.
 - (ii) The estimated cost of each stage of a procedure or of the entire treatment.
 - (iii) The reasonable expectations of the professional relationship.
 - (iv) The right to withdraw from treatment at any time.
 - (5) Safeguard the patient's dignity, the right to privacy and the confidentiality of patient information and make full disclosure about any limitations on the LDN's abilities to guarantee full confidentiality. This standard does not prohibit or affect reporting responsibilities under 23 Pa.C.S. Chapter 63 (relating to Child Protective Services Law), the Older Adults Protective Services Act (35 P. S. §§ 10211—10224) and other statutes which may mandate reporting of this information.
 - (6) Provide professional services with objectivity and with respect for the unique needs and values of individuals.
 - (7) Be alert to situations that might cause a conflict of interest or have the appearance of a conflict. The LDN shall provide full disclosure when a real or potential conflict of interest arises.
 - (8) Permit the use of their names for the purpose of certifying that dietetic services have been rendered only if they provided or supervised the provision of those services.
 - (9) Accurately present professional qualifications and credentials.
 - (i) Dietitian-nutritionists may use the title "Licensed Dietitian-Nutritionist" or abbreviation LDN only when they hold a current license issued by the Board.
 - (ii) LDNs are subject to disciplinary action for aiding another person in violating any Board requirement or aiding another person in representing himself as an LDN when that person is not currently licensed.
 - (iii) Document and maintain accurate records in accordance with the acceptable and prevailing standard of recordkeeping. Discussion of a patient's sexual practices, preferences and performance shall be fully documented in the patient's chart, when applicable.
 - (b) The licensed dietitian-nutritionist may not:
 - (1) Knowingly aid, abet or assist another person to violate or circumvent a law or Board regulation.
 - (2) Discriminate, while providing dietitian-nutritionist services, on the basis of age, marital status, gender,

sexual preferences, race, ethnicity, religion, diagnosis, socioeconomic status or disability.

- (3) Knowingly permit another individual to use his license for any purpose.
- (4) Misappropriate equipment, materials, property, drugs or money from an employer or patient.
- (5) Solicit, borrow or misappropriate money, materials or property from a patient.
- (6) Leave an assignment prior to the proper reporting and notification to the appropriate department head or personnel.
- (7) Falsify or knowingly make incorrect entries into the patient's record or other related documents.
- (8) Engage in conduct defined as a sexual violation or sexual impropriety in the course of a professional relationship.
- (9) Advertise in a false or misleading manner. Statements which qualify as false or misleading include the following:
 - (i) Statements containing a misrepresentation of facts.
 - (ii) Statements likely to mislead or deceive because in context the statements make only a partial disclosure of the relevant facts.
 - (iii) Statements intended to, or likely to, create false or unjustified expectations of favorable results.
 - (iv) Statements relating to fees without reasonable disclosure of all relevant variables so that the statements would be misunderstood by or would be deceptive to a layperson.
 - (v) Statements conveying the impression that the LDN could influence improperly any public body, official, corporation or person on behalf of the patient.
 - (vi) Statements containing a representation or implication that is likely to cause a reasonable person to misunderstand or to be deceived, or fail to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.
 - (vii) Statements containing representations that the LDN is willing to perform any procedure that is illegal under the laws or regulations of the Commonwealth or the United States.
- (10) Practice when:
 - (i) The LDN has engaged in any substance abuse that could affect the LDN's practice.
 - (ii) The LDN has been adjudged by a court to be mentally incompetent.
 - (iii) The LDN has an emotional or mental disability that affects his practice in a manner that could harm the patient.
- (11) Accept a client or patient for treatment or continue treatment unnecessarily, if benefit cannot reasonably be expected to accrue.
- (12) Accept or receive, or both, remuneration for making or accepting referrals.

LICENSURE REQUIREMENTS

§ 21.721. Qualifications for licensure.

- (a) An individual may apply for licensure as a dietitian-nutritionist by submitting a written application on forms provided by the Board and remitting the application fee set forth in § 21.705 (relating to fees).

(b) To obtain licensure, an applicant must meet the qualifications set forth in section 6(b)(1)—(4) of the act (63 P. S. § 216(b)(1)—(4)), which include:

- (1) Evidencing good moral character.
- (2) Receipt of a baccalaureate or higher degree from a Board-approved program or equivalent program as set forth in section 5(b) and (c) of the act (63 P. S. § 215(b) and (c)).
- (3) Completion of a planned continuous preprofessional experience of at least 900 hours under appropriate supervision.
- (4) Successful completion of one of the examinations specified in § 21.722 (relating to education and examination of applicants).

§ 21.722. Education and examination of applicants.

The Board approves educational programs that meet the requirements of section 6(b)(2) of the act (63 P. S. § 216(b)(2)) that are approved by CADE or the ACN. The Board approves the Registration Examination for Registered Dietitians and Examination of the Certification Board for Nutrition Specialists as the examinations which an applicant may complete to satisfy section 6(b)(4) of the act.

§ 21.723. License renewal.

(a) A license issued under section 5(e) of the act (63 P. S. § 215(e)) or under this subchapter will be valid from the date of issuance through September 30, 2006, following the issuance of the license. Each subsequent license renewal will be valid for 2 years from October 1 through September 30.

(b) When applying for renewal of licensure, an LDN shall:

- (1) Complete the renewal application, including disclosing a license to practice dietetics-nutrition in any other state, territory, possession or country.
- (2) Pay the required fee as set forth in § 21.705 (relating to fees).
- (3) Submit proof to the Board that the LDN has satisfactorily completed a minimum of 30 hours of CPE approved by the Board in accordance with § 21.724 (relating to continuing education) during the 2 calendar years immediately preceding the application for renewal.
- (4) Disclose any discipline imposed by a state licensing board in the previous biennial period or any criminal charges pending or criminal conviction, plea of guilty or nolo contendere, or admission into a probation without verdict or accelerated rehabilitative disposition program during the previous biennial period.

§ 21.724. Continuing education.

(a) *Prior to renewal.* One hour of CPE credit will be given for each 50-minute clock hour of CPE activity. Each LDN shall complete 30 CPE credits during the 2 calendar years immediately preceding the application for license renewal. If any activity overlaps two renewal periods, the date of completion of the activity determines the date in which the activity can be reported.

(b) *Board-approved continuing professional education.* The Board will accept for completion of the CPE requirement substantive learning experiences, subject to the limitations in paragraph (2) relating to the field of nutrition and dietetics which are not designed for the public and which are sponsored by the ADA, the ACN, by individual state dietetic associations, if the association is

a member of the ADA or ACN, by approved college or dietetic programs under § 21.722 (relating to education and examination of applicants) when a certificate of attendance is issued, and courses related to the practice of dietetics-nutrition offered by the Accreditation Council for Continuing Medical Education, the Accreditation Council on Pharmaceutical Education, the American Osteopathic Association and the American Medical Association.

(1) In addition to lecture-based CPE courses, LDNs may apply to the Board for approval of CPE credit and the Board may, upon review by the LDN Committee, grant credit for the following:

- (i) Case presentations, such as grand rounds or patient case studies.
- (ii) Academic coursework and research studies approved by an institutional review board.
- (iii) Interactive workshops.
- (iv) Lecturers and seminars.
- (v) Residency and Fellowship programs which are at the post baccalaureate level, and are sponsored by a United States regionally accredited college or university, or an institution accredited/approved by the Joint Committee on Accreditation of Healthcare Organizations or the National Committee for Quality Assurance.

(2) The Board will not accept for completion of the CPE requirement the following:

- (i) Academic coursework or programs on office management skills, or entrepreneurship, strategic business planning, computer skills, except courses directly related to the practice of dietetics-nutrition such as accessing nutrient analysis databases.
- (ii) Attendance at exhibits manned by detail personnel.
- (iii) Journal clubs.
- (iv) Professional leadership, such as holding an elective office in a dietetics or dietetics-related organization.
- (v) Professional reading for which there is no evaluative test submitted and no certificate of completion or CPE unit awarded.

(c) *Documentation.* The licensee shall retain documentation of completion of Board-approved continuing education (as set forth in subsection (b)) for at least 5 years and shall submit this documentation upon request of the Board.

(d) *Waiver.* An LDN who can demonstrate to the Board a verified hardship may request a waiver of CPE requirements for a single biennial period. It shall be the duty of each licensee seeking waiver to notify the Board in writing and request the waiver, at least 60 days prior to the end of the biennial renewal period, which will be granted, denied, or granted in part.

§ 21.726. Inactive status.

An LDN may request that his license be placed on inactive status. The licensee will not be required to remit the biennial renewal fee during the period when the license is on inactive status. In order to return to active status, the licensee shall submit proof of completion of a minimum of 30 hours of approved CPE in the biennial period preceding the request for reactivation and pay applicable fees. A person who requests an active status license who has been on inactive status for 5 consecutive years shall satisfy the requirements of section 6(b)(4) of the act (63 P. S. § 216(b)(4)), unless the person demon-

strates that he has an active license to practice in another state or has had an RD registration or a CNS certification for at least 2 out of the last 5 years.

[Pa.B. Doc. No. 06-866. Filed for public inspection May 19, 2006, 9:00 a.m.]

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STATE BOARD OF NURSING
[49 PA. CODE CH. 21]
Temporary Practice Permits

The State Board of Nursing (Board) adopts amendments to §§ 21.1, 21.7, 21.141 and 21.149 regarding temporary practice permits (TPPs) for professional nurses (RNs) and practical nurses (LPNs), to read as set forth in Annex A.

Notice of proposed rulemaking was published at 34 Pa.B. 4897 (September 4, 2004). Publication was followed by a 30-day public comment period during which the Board did not receive any comments from the public. On October 5, 2004, the House Professional Licensure Committee (HPLC) submitted 14 comments/recommendations. The Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) made no comments. On November 3, 2004, the Independent Regulatory Review Commission (IRRC) submitted numerous comments to the proposed rulemaking.

The Board submitted the final rulemaking package to the SCP/PLC, the HPLC and IRRC on November 28, 2005. On December 12, 2005, the Board withdrew the final rulemaking package to address a concern raised by IRRC.

Summary of Comments and Responses to Proposed Rulemaking

HPLC Comments

The HPLC recommended that the Board add definitions for the following terms: “graduate registered nurse,” “graduate practical nurse,” “Form 1” and “Form 2.” The Board has amended this final-form rulemaking to add definitions for the terms “graduate registered nurse” and “graduate practical nurse” in §§ 21.1 and 21.141 (relating to definitions). The Board has ceased using the terms “Form 1” and “Form 2” in favor of descriptive terms.

The HPLC commented that it believes that § 21.7(a) (relating to temporary practice permits) applies to graduates of Board-approved programs for registered nurses (RN). The HPLC asked whether it would be clearer for the Board to state in subsection (a) that the provisions apply to an individual who has graduated from a Board-approved educational program. Although the Board only approves programs in this Commonwealth, under section 4(4) of the Professional Nursing Law (act) (63 P.S. § 214(4)) a graduate RN may be the graduate of an approved program of professional nursing in this Commonwealth or another state. Therefore, the Board has amended the language in § 21.7(a)(1) to conform to the statutory language.

The HPLC asked “whether it would be clearer to state the rule that TPPs are only good for 1 year, expire if the applicant fails the licensing exam and can only be extended for illness or extreme hardship and to state that in one paragraph.” The Board has amended § 21.7(a) to adopt this recommendation.

The HPLC noted that “[i]t is the committee’s understanding that the board will waive the deadlines of 60 days and 90 days if the nurse cannot meet those deadlines due to illness or other hardship” and asked the Board to rewrite § 21.7(a)(4) for clarity. The Board intended § 21.7(a)(4) to be an absolute rule. If a nurse is so severely ill or disabled within the last 2 to 3 months prior to the expiration of the TPP that the nurse cannot submit a licensure application, the nurse will likely also be unable to practice nursing utilizing the TPP.

The HPLC recommended that § 21.7(b) should be rewritten to clarify that this subsection applies to currently-licensed nurses as defined in § 21.7(b)(1). The Board has adopted the suggestion.

The HPLC noted that § 21.7(b) was not clear with respect to the statutory rules regarding TPPs and suggested that the Board amend the section to restate the statutory provision. The Board has adopted the suggestion.

The HPLC asked the Board to review §§ 21.149 and 21.154 (relating to temporary practice permits; and unlicensed candidate) to ensure the sections did not conflict. Section 21.154 is merely a restatement of the statutory provision in section 3.1 of the Practical Nurse Law (63 P.S. § 653.1), which limits a TPP to 1 year, unless extended by the Board upon presentation of validating documentation. TPP holders are required to practice under supervision. The Board finds no conflict between the sections. Section 21.149 details the TPP application process and the requirements and documentation required if a TPP holder requests an extension of the TPP.

The HPLC’s comment regarding TPPs for LPNs is similar to its second comment regarding RNs. The Board has also amended § 21.149(a) and (b) to more clearly explain to whom this section applies.

The HPLC noted that §§ 21.7(a) and 21.149(a) were not parallel in language regarding extension due to illness or hardship. The Board has added this language to § 21.149(a).

The HPLC raised the same inquiry as its fourth comment in relation to § 21.149 regarding LPNs. The Board intended that any individual who failed to meet the requirements in § 21.149(a)(2) and (3) could not obtain an extension. As with RNs, the Board believes that if a nurse is so severely ill or disabled within the last 2 to 3 months prior to the expiration of the TPP that the nurse cannot submit a licensure application, the nurse will likely also be unable to practice nursing utilizing the TPP.

Finally, the HPLC pointed out several typographical and technical drafting errors, which the Board has corrected.

IRRC Comments

IRRC concurred with the comments of the HPLC. IRRC raised three concerns regarding adding definitions and practice by an unlicensed candidate. IRRC asked the Board to define “graduate registered nurse” and “graduate practical nurse.” As noted in the response to the HPLC comments, the Board has added these definitions.

IRRC asked that the Board review § 21.27 (relating to unlicensed candidate) and § 21.154 to determine whether these two existing provisions will be necessary when the final-form rulemaking is promulgated. These two sections were promulgated to permit a graduate nurse to practice for up to 1 year after completion of the nursing education program and before examination. Section 21.27 was pro-

mulgated at 13 Pa.B. 2829 (September 17, 1983). Section 21.154 was promulgated at 13 Pa.B. 2061 (July 1, 1983)). These sections were promulgated before the General Assembly provided for TPPs by enacting section 4.1 of the act (63 P. S. § 214.1) by the act of December 20, 1985 (P. L. 409, No. 109) and section 3.1 of the Practical Nurse Law (63 P. S. § 653.1) by the act of December 20, 1985 (P. L. 423, No. 110). To avoid any confusion that may arise regarding whether a graduate nurse must have a TPP to practice before obtaining a license, the Board will strike §§ 21.27 and 21.154. Paragraph (2) of each of those sections, which define the type of supervision under which a graduate nurse might practice, will be added to the final-form rulemaking by adding to §§ 21.7(a) and 21.149(a).

IRRC stated that the Board's regulation needs to address the fact that existing regulations require that unlicensed graduate nurses practice under the supervision of another nurse. The requirement that an unlicensed graduate nurse practice only under the supervision of another nurse is in section 4(4) of the act and section 3(5) of the Practical Nurse Law (63 P. S. § 653(5)), and is restated in the Board's regulation in § 21.154. The Board does not believe it is necessary to restate the statutory provision in another regulation. A graduate nurse may not practice without a TPP and may only practice utilizing a TPP under supervision.

IRRC asked the Board to replace "and" with "to the" in both subsections (a) to denote the period between completion of the educational program and notification of examination results. The Board has made this change.

IRRC asked the Board to explain why a graduate nurse would be allowed to practice for 9 months before needing to apply for the licensure examination. The Board is constrained by its authorizing legislation to permit individuals to practice prior to passing the licensure examination. The General Assembly, in 1985, added provisions to the act allowing an individual to practice with TPP for up to 1 year from the date of graduation to the date the individual receives results of the licensure examination and for up to 1 year from the date the individual applies for licensure by reciprocity. The Board has shortened the time to 9 months to allow time for processing of the licensure application to ensure a seamless transition in practice between the temporary permit and licensure.

IRRC raised two concerns with subsections (a)(3) and (b)(4) pertaining to both §§ 21.7 and 21.149. First, IRRC suggested that the Board should include a time limit for extensions or a statement that the Board will notify the applicant in writing of the time limit for each case. Second, IRRC asked what documentation would be required to evidence extreme hardship. The Board determines requests for extensions of TPPs on a case-by-case basis and has, for years, responded to requests for extension by letter addressed to the requestors. The Board either denies the request for extension or grants the extension for a specified period of time from the date of the request. The Board believes it is not necessary to state in the regulation that the Board will respond to requests for extension and that extensions, if granted, will be based on the individual circumstances of requestors, thus varying in length for each individual requestor. The Board cannot speculate on all of the types of documentation that might be submitted to demonstrate extreme hardship, and thus chose not to create a partial list. Documentation of extreme hardship might include military orders and discharge papers.

Regarding currently-licensed nurses, IRRC again questioned why individuals are allowed to practice for approximately 9 months before they are required to supply the necessary documentation for licensure. The Board is attempting to effectuate the statute in an efficient manner. The problem faced by the Board, and addressed by this final-form rulemaking, is that it had become commonplace for currently licensed nurses to request extensions of TPPs within 1 week of the date the TPPs were set to expire, without having submitted any supporting documentation for licensure. Prior to drafting this final-form rulemaking, the Board was reviewing 20 to 30 requests for extensions at each of its monthly meetings. The time limits in the final-form rulemaking correspond to the Board's processing time.

IRRC made several comments under a heading of miscellaneous clarifications. IRRC suggested that the final-form rulemaking be placed in the "Licensure" section of the Board's regulations rather than under "General Provisions." A TPP is not a form of a license; therefore, the Board believes the regulations are properly placed.

IRRC also noted inconsistencies in the Board's use of the term "physician" and "treating physician." The Board has chosen to use the term "treating physician." IRRC pointed out an incorrect reference to the fee section, which has also been corrected. IRRC noted that §§ 21.7(b)(7) and 21.149 incorrectly referenced paragraphs (2)—(5) instead of paragraphs (2)—(6), which has been corrected.

IRRC noted that §§ 21.7(b)(5) and 21.149(a)(3), unlike §§ 21.7(a)(3) and 21.149(b)(5), do not include the criteria for illness or extreme hardship and questioned whether this was an error. The Board intends that extensions only be granted because of illness or extreme hardship and has added this language where missing.

Similarly, IRRC noted a discrepancy with the use of "will" and "may" in §§ 21.7(b) and 21.149(b). The Board has conformed the sections and used the discretionary word "may."

Statutory Authority

The final-form rulemaking is authorized under section 2.1(k) of the act (63 P. S. § 212.1(k)) and 4.1 of the act and section 3.1 of the Practical Nurse Law and 17.6 of the Practical Nurse Law (63 P. S. § 667.6).

Fiscal Impact and Paperwork Requirements

The final-form rulemaking will have no adverse fiscal impact on the Commonwealth, its political subdivisions or the public. The final-form rulemaking will not impose additional paperwork requirements upon the Board, political subdivisions or the public.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 6, 2004, the Board submitted a copy of the notice of proposed rulemaking, published at 34 Pa.B. 4897, 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 Department 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 April 4, 2006, the final-form rule-making was approved by the HPLC and was deemed approved by the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on April 19, 2006, and approved the final-form rulemaking.

Additional Information

Additional information can be obtained by writing to Ann Steffanic, Board Administrator, State Board of Nursing, P. O. Box 2649, Harrisburg, PA 17105-2649.

Findings

The Board finds that:

(1) Public notice of intention to adopt these amendments has been 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 no comments were received.

(3) The amendments made to the final-form rule-making do not enlarge the original purpose of the proposed rulemaking as published at 34 Pa.B. 4897.

(4) This final-form rulemaking is necessary and appropriate for the administration of the act and the Practical Nurse Law.

Order

The Board orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 21, are amended by amending §§ 21.1, 21.7, 21.141 and 21.149 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

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

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

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

JOANNE SORENSEN, RN, MS,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 36 Pa.B. 2251 (May 6, 2006).)

Fiscal Note: Fiscal Note 16A-5121 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 49. PROFESSIONAL LICENSURE AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 21. STATE BOARD OF NURSING

Subchapter A. REGISTERED NURSES

GENERAL PROVISIONS

§ 21.1. Definitions.

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

* * * * *

Graduate registered nurse—An individual who has graduated from an approved program of professional nursing in this Commonwealth or a comparable program in another state.

* * * * *

§ 21.7. Temporary practice permits.

(a) A graduate registered nurse may only practice professional nursing under supervision and if the graduate registered nurse holds a current temporary practice permit. "Supervision" means that a licensed registered nurse is physically present in the area or unit where the graduate registered nurse is practicing. The Board may grant a temporary practice permit to a graduate registered nurse as follows:

(1) An individual who wishes to practice as a graduate registered nurse during the period from the date of completion of the educational program to the notification of the results of the licensing examination shall submit an application for a temporary practice permit for a graduate registered nurse on a form provided by the Board and remit the fee specified in § 21.5 (relating to fees). A temporary practice permit granted under this section is valid for up to 1 year from the date of issuance, unless extended under paragraphs (3) and (4), and immediately expires if the applicant fails the licensing examination.

(2) At least 90 days prior to the expiration date of the temporary practice permit, the graduate registered nurse shall:

(i) Submit an application for licensure by examination as a registered nurse.

(ii) Remit the fee specified in § 21.5.

(iii) Submit the licensure examination registration form and fee required to the professional testing organization.

(3) At least 60 days prior to the expiration date of the temporary practice permit, the graduate registered nurse who wishes to extend the expiration date of the temporary practice permit because of illness or extreme hardship shall:

(i) Submit an application for temporary practice permit extension on a form provided by the Board.

(ii) Remit the fee specified in § 21.5.

(iii) Provide a detailed, written explanation of the reason the extension is requested. If requesting an extension due to illness, the applicant shall provide certification of the illness from the applicant's treating physician.

(4) The Board will not grant an extension to an individual who fails to meet the requirements of paragraphs (2) and (3).

(b) The Board may grant a temporary practice permit to an individual who holds a current registered nurse license issued by another state, territory or possession of the United States or Canada (a currently-licensed registered nurse). The temporary practice permit will expire in 1 year, unless the individual fails the licensure examination, in which case the temporary practice permit will immediately expire. The Board may extend the temporary practice permit period in cases of illness or extreme hardship, as set forth in paragraph (5).

(1) A currently-licensed registered nurse who wishes to practice professional nursing during the period from the date of submission of the Applicant Data Sheet of the

application for licensure until the Board makes a determination on the application for licensure or 1 year, whichever comes first, shall:

(ii) Submit an application for temporary practice permit for a currently-licensed registered nurse on a form provided by the Board.

(iii) Remit the fee specified in § 21.5.

(2) An individual applying for a temporary practice permit for a currently-licensed registered nurse shall demonstrate proficiency in English by submitting proof that the individual's nursing education program was conducted in English or that the individual has received a passing score on a Board-approved English proficiency examination. A list of Board-approved English proficiency examinations is available upon request to the Board. This information must be submitted with the Applicant Data Sheet of the application for licensure.

(3) Within 45 days of the date the temporary practice permit is issued, an individual who has been granted a temporary practice permit for a currently-licensed registered nurse shall submit the Verification of Licensure Form of the application for licensure and shall:

(i) Request verification of licensure from the foreign jurisdiction and retain documentation of the submission of the request to provide to the Board upon request.

(ii) Request certification of the applicant's nursing education program from the licensing board or appropriate educational authorities. The certification of nursing education must be submitted to the Board in English directly from the appropriate educational authorities. The applicant shall retain documentation of the submission of the request to provide to the Board upon request.

(iii) Submit the Commission on Graduates of Foreign Nursing Schools (CGFNS) application if the applicant is required to meet CGFNS requirements in §§ 21.23(c) and 21.28(c) (relating to qualifications of applicant for examination; and licensure by endorsement) and retain documentation of the submission of the CGFNS application to provide to the Board upon request.

(iv) If the applicant is required to take the licensure examination, submit the licensure examination registration form and fee required to the professional testing organization and retain documentation of the submission of the application to take the examination to provide to the Board upon request.

(4) An individual who has been granted a temporary practice permit for a currently-licensed registered nurse shall ensure that all documentation in support of the application for licensure is received by the Board no later than 90 days prior to the expiration date of the temporary practice permit. An individual whose supporting documentation has not been received by the Board at least 90 days prior to the expiration date of the temporary practice permit shall submit, within 10 days of receiving notice of the deficiency from the Board, a detailed written explanation of why the supporting documentation has not been supplied to the Board in a timely manner.

(5) An individual who has been granted a temporary practice permit for a currently-licensed registered nurse and who has complied with paragraphs (2)—(4) may request an extension of the individual's temporary practice permit because of illness or extreme hardship by:

(i) Submitting a temporary practice permit extension application provided by the Board.

(ii) Remitting the fee specified in § 21.5.

(iii) Submitting a written, detailed explanation of the reasons the extension is requested. If requesting an extension due to illness, the applicant shall provide certification of the illness from the applicant's treating physician.

(iv) Providing proof of the timely request for verification of licensure referenced in paragraph (3)(i).

(6) The request for temporary practice permit extension must be submitted to the Board no less than 60 days prior to the expiration date of the temporary practice permit.

(7) The Board will not grant an extension to an individual who fails to meet the requirements of paragraphs (2)—(6).

**Subchapter B. PRACTICAL NURSES
GENERAL PROVISIONS**

§ 21.141. Definitions.

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

* * * * *

Graduate practical nurse—An individual who has graduated from an approved program of practical nursing in this Commonwealth or a comparable program in another state.

* * * * *

§ 21.149. Temporary practice permits.

(a) A graduate practical nurse may only practice practical nursing under supervision and if the graduate practical nurse holds a current temporary practice permit. "Supervision" means that a licensed registered nurse is physically present in the area or unit where the graduate practical nurse is practicing. The Board may grant a temporary practice permit to a graduate practical nurse as follows:

(1) An individual who wishes to practice as a graduate practical nurse during the period from the date of completion of the Board-approved educational program to the notification of the results of the licensing examination shall submit an application for temporary practice permit for a graduate practical nurse on a form provided by the Board and remit the fee specified in § 21.147 (relating to fees). A temporary practice permit granted under this section is valid for up to 1 year from the date of issuance unless extended under paragraphs (3) and (4), and immediately expires if the applicant fails the licensing examination.

(2) At least 90 days prior to the expiration date of the temporary practice permit, the graduate practical nurse shall:

(i) Submit an application for licensure by examination as a practical nurse.

(ii) Remit the fee specified in § 21.147.

(iii) Submit the licensure examination registration form and fee required to the professional testing organization.

(3) At least 60 days prior to the expiration date of the temporary practice permit, the graduate practical nurse who wishes to extend the expiration date of the temporary practice permit because of illness or extreme hardship shall:

(i) Submit an application for temporary practice permit extension on a form provided by the Board.

(ii) Remit the fee specified in § 21.147.

(iii) Provide a detailed, written explanation of the reasons the extension is requested. If requesting an extension due to illness, the applicant shall provide certification of the illness from the applicant's treating physician.

(4) The Board will not grant an extension to an individual who fails to meet the requirements of paragraphs (2) and (3).

(b) The Board may grant a temporary practice permit to an individual who holds a current practical nurse license issued by another state, territory or possession of the United States or Canada (a currently-licensed practical nurse). The temporary practice permit will expire in 1 year, unless the individual fails the licensure examination, in which case the temporary practice permit will immediately expire. The Board may extend the temporary practice permit in cases of illness or extreme hardship, as set forth in paragraph (5).

(1) A currently-licensed practical nurse who wishes to practice practical nursing during the period from the date of submission of the Applicant Data Sheet of the application for licensure until the Board makes a determination on the application for licensure or 1 year, whichever comes first, shall:

(i) Submit an application for temporary practice permit for a currently-licensed practical nurse on a form provided by the Board.

(ii) Remit the fee specified in § 21.147.

(2) An individual applying for a temporary practice permit for a currently-licensed practical nurse shall demonstrate proficiency in English by submitting proof that the individual's nursing education program was conducted in English or that the individual has received a passing score on a Board-approved English proficiency examination. A list of Board-approved English proficiency examinations is available upon request to the Board. This information shall be submitted with the Applicant Data Sheet of the application for licensure.

(3) Within 45 days of the date the temporary practice permit is issued, an individual who has been granted a temporary practice permit for a currently-licensed practical nurse shall submit the Verification of Licensure Form of the application for licensure and shall:

(i) Request verification of licensure from the foreign jurisdiction and retain documentation of submission of the request to provide to the Board upon request.

(ii) Request certification of the applicant's nursing education program from the licensing board or appropriate educational authorities. The certification of nursing education must be submitted to the Board in English directly from the appropriate educational authorities. The applicant shall retain documentation of submission of the request to submit to the Board upon request.

(iii) Submit the Commission on Graduates of Foreign Nursing Schools (CGFNS) application if the applicant is required to meet CGFNS requirements set forth in § 21.155(d) (relating to licensure by endorsement) and retain documentation of the submission of the CGFNS application to provide to the Board upon request.

(iv) If the applicant is required to take the licensure examination, submit the licensure examination registration form and fee required to the professional testing organization and retain documentation of the submission of the application to take the examination to provide to the Board upon request.

(4) An individual who has been granted a temporary practice permit for a currently-licensed practical nurse shall ensure that all documentation in support of the application for licensure is received by the Board at least 90 days prior to the expiration date of the temporary practice permit. An individual whose supporting documentation has not been received by the Board at least 90 days prior to the expiration date of the temporary practice permit shall submit, within 10 days of receiving notice of the deficiency from the Board, a detailed written explanation of why the supporting documentation has not been supplied to the Board in a timely manner.

(5) An individual who has been granted a temporary practice permit for a currently-licensed practical nurse and who has complied with paragraphs (2)—(4) may request an extension of the temporary practice permit because of illness or extreme hardship by:

(i) Submitting a temporary practice permit extension application on a form provided by the Board.

(ii) Remitting the fee specified in § 21.147.

(iii) Submitting a written, detailed explanation of the reasons the extension is requested. If requesting an extension due to illness, the applicant shall provide certification of the illness from the applicant's treating physician.

(v) Providing proof of the timely request for verification of licensure referenced in paragraph (3)(i).

(6) The request for temporary practice permit extension must be submitted to the Board at least 60 days prior to the expiration date of the temporary practice permit.

(7) The Board will not grant an extension to an individual who fails to meet the requirements of paragraphs (2)—(6).

[Pa.B. Doc. No. 06-867. Filed for public inspection May 19, 2006, 9:00 a.m.]

Title 61—REVENUE

DEPARTMENT OF REVENUE

[61 PA. CODE CH. 875]

Terminal-Based Lottery Games

The Secretary of Revenue (Secretary), under the authority in section 303 of the State Lottery Law (72 P. S. § 3761-303), adds Chapter 875 (relating to Terminal-Based Lottery Games) to read as set forth in Annex A.

Because of time constraints associated with the establishment, operation and administration of lottery games, the Department of Revenue (Department), under section 204 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1204), known as the Commonwealth Documents Law (CDL), and the regulation thereunder, 1 Pa. Code § 7.4 (relating to omission of notice of proposed rulemaking), finds that notice of proposed rulemaking is under the circumstances impracticable and, therefore, may be omitted.

The Department's justification for utilizing the final-omitted rulemaking process is based upon the time constraints associated with the establishment, operation and administration of lottery games. The efficient and successful operation of the Lottery requires that the Lottery implement the latest innovations and trends in

the lottery industry. The inability to adapt marketing strategies quickly may lead to a reduction in Lottery revenues. The necessity of the Lottery to react quickly to market forces has been recognized in the past as an appropriate justification for utilizing the final-omitted rulemaking process as evidenced by the approval of these types of regulations in the past.

Purpose of the Final-Omitted Rulemaking

Chapter 875 establishes and details the procedures that will be followed in operating and administering terminal-based lottery games.

Explanation of Regulatory Requirements

Chapter 875 establishes procedures for the creation of terminal-based lottery games, sales of tickets, validation of winners and payment of prizes for terminal-based lottery games conducted by the Pennsylvania State Lottery.

The purpose of a terminal-based lottery game is to determine winners from ticket holders matching a designated combination of numbers, letters, symbols or a specified combination thereof, with the winning numbers, letters or symbols randomly drawn as determined and publicly announced by the Secretary. Prior to the beginning of sales of a terminal-based lottery game, the Department will publish a notice in the *Pennsylvania Bulletin* with information as outlined in Chapter 875.

Fiscal Impact

The Department has determined that this final-omitted rulemaking will have no adverse fiscal impact on the Commonwealth and that the game described by the regulations could increase revenues available to older Pennsylvanians.

Paperwork

Chapter 875 will not generate substantial paperwork for the public or the Commonwealth.

Effectiveness/Sunset Date

This final-omitted rulemaking will become effective upon publication in the *Pennsylvania Bulletin*. The regulations are scheduled for review within 5 years of final publication. No sunset date has been assigned.

Contact Person

The contact person for an explanation of the regulations is Mary R. Sprunk, Office of Chief Counsel, Department of Revenue, Dept. 281061, Harrisburg, PA 17128-1061.

Regulatory Review

Under section 5.1(c) of the Regulatory Review Act (71 P. S. § 745.5a(c)), on April 5, 2006, the Department submitted a copy of the final-omitted rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Finance and the Senate Committee on Finance. A copy of this material is available to the public upon request. On the same date, the final-omitted rulemaking was submitted to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P. S. §§ 732-101—732-506).

Under section 5.1(j.1) of the Regulatory Review Act, on May 3, 2006, the final-omitted rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on May 4, 2006, and approved the final-omitted rulemaking.

Findings

The Department finds that the regulations are necessary and appropriate for the administration and enforcement of the authorizing statute. Under section 204 of the CDL, the Department also finds that the proposed rule-making procedures in sections 201 and 202 of the CDL (45 P. S. §§ 1201 and 1202) are unnecessary because of the time constraints associated with the establishment, operation and administration of lottery games.

Order

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

(a) The regulations of the Department, 61 Pa. Code, are amended by adding §§ 875.1—875.17 to read as set forth in Annex A.

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

(c) The Secretary 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 upon publication in the *Pennsylvania Bulletin*.

GREGORY C. FAJT,
Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 36 Pa.B. 2479 (May 20, 2006).)

Fiscal Note: 15-435. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 61. REVENUE

PART V. STATE LOTTERIES

CHAPTER 875. TERMINAL-BASED LOTTERY GAMES

| | |
|---------|--|
| Sec. | |
| 875.1. | Creation. |
| 875.2. | Purpose. |
| 875.3. | Definitions. |
| 875.4. | Notice of terminal-based lottery game rules. |
| 875.5. | Purchase price. |
| 875.6. | Terminal-based lottery game ticket sales. |
| 875.7. | Determination of prize-winning, terminal-based lottery game tickets. |
| 875.8. | Terminal-based lottery game purchase and terminal-based lottery game ticket characteristics. |
| 875.9. | Terminal-based lottery game ticket responsibility. |
| 875.10. | Terminal-based lottery game ticket validation and requirements. |
| 875.11. | Procedures for claiming and payment of prizes. |
| 875.12. | Funding for prizes. |
| 875.13. | Unclaimed prize money. |
| 875.14. | Withholding. |
| 875.15. | Purchase and prize restrictions. |
| 875.16. | Governing law. |
| 875.17. | Retailer promotion programs. |

§ 875.1. Creation.

Under the act and this part, there is created a category of lottery games, called terminal-based lottery games, which will commence at the discretion of the Secretary, and will continue until the Secretary publicly announces a suspension or termination date.

§ 875.2. Purpose.

(a) The purpose of a terminal-based lottery game is to determine winners from terminal-based lottery game ticket holders matching a designated combination of

numbers, letters, symbols, or a specified combination thereof, with the winning numbers, letters or symbols randomly drawn as determined and publicly announced by the Secretary.

(b) The object of the game is for a player to have selected the designated numbers, letters or symbols, as defined in the game notice for the particular game as published in the *Pennsylvania Bulletin*, which match all or a specified combination of the winning numbers, letters or symbols drawn in the game drawing in which the terminal-based lottery game ticket is participating.

(c) Correctly matching all or a designated combination of the winning numbers, letters or symbols drawn, and meeting the other validation criteria as defined in § 875.7 (relating to determination of prize-winning, terminal-based lottery game tickets), entitles the terminal-based lottery game ticket holder to a prize identified in the game notice for the particular game as published in the *Pennsylvania Bulletin*.

(d) This chapter establishes procedures for the creation of terminal-based lottery games, sales of terminal-based lottery game tickets, validation of winners and payment of prizes for terminal-based lottery games conducted by the Pennsylvania State Lottery.

§ 875.3. Definitions.

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

Apparent winning terminal-based lottery game ticket—A terminal-based lottery game ticket which has not yet been validated by the Lottery, bearing winning numbers, letters or symbols.

Bet slip—A preprinted game-specific form prepared by the Lottery upon which the player may mark or designate the numbers, letters or symbols which when processed through the Lottery terminal produces a terminal-based lottery game ticket with the numbers, letters or symbols constituting the player's selection.

Drawing—The process of selecting the winning numbers, letters or symbols that determine the winners for each designated prize for a particular terminal-based lottery game.

Lottery Central Computer System—The computer gaming system on which all Lottery bets are registered through a computer terminal located at a licensed Lottery retailer.

Lottery terminal—A device installed at a retail location by the Lottery for the purpose of selling and validating on-line and instant tickets, performing inventory functions, generating informational accounting reports and performing other functions at the discretion of the Lottery.

On-line retailer or retailer—A person who is properly licensed by the Lottery and has a valid agreement to sell terminal-based lottery game tickets issued through a Lottery terminal, also referred to as a Lottery retailer or licensed retailer.

Pay status—The Lottery central computer system designation into which a game is placed after the Lottery officials verify the accuracy of the game's drawing and which enables the validation and payment of winning terminal-based lottery game tickets.

Play—A chance to participate in a particular terminal-based lottery game drawing.

Prize—The item or money that can be won as specified by the notice for each terminal-based lottery game as published under § 875.4 (relating to notice of terminal-based lottery game rules).

Quick pick—The random selection through a Lottery terminal of the different numbers, letters or symbols that appear as a play in a particular terminal-based lottery game.

Secretary—The Secretary of Revenue of the Commonwealth.

Terminal-based lottery game—Any Lottery game, also referred to as an on-line game, for which a terminal-based lottery game ticket is generated through a computer connected to the Lottery central computer system.

Terminal-based lottery game ticket—A bearer instrument produced through a Lottery terminal that is the player's record of a wager for an on-line lottery game and sold by a licensed retailer in an authorized manner containing at a minimum the appropriate play data as published in the *Pennsylvania Bulletin* for that particular terminal-based lottery game, the drawing dates, amount bet, and validation data. A terminal-based lottery game ticket may contain one or more plays as prescribed in the notice of terminal-based lottery game rules.

Top prize—The highest prize available to be won as published in the *Pennsylvania Bulletin* for that particular terminal-based lottery game.

Winning numbers—The numbers, letters or symbols selected in a particular Lottery game drawing, which have been subsequently validated by the Lottery, and which shall be used to determine the winning plays as published in the *Pennsylvania Bulletin* for that particular terminal-based lottery game.

§ 875.4. Notice of terminal-based lottery game rules.

Prior to the commencement of sales of a terminal-based lottery game, the Department will publish a notice in the *Pennsylvania Bulletin* containing, at a minimum, the following information about the particular terminal-based lottery game:

- (1) The name of the terminal-based lottery game.
- (2) The purchase price of a terminal-based lottery game.
- (3) A description of the game.
- (4) Bet slip and terminal-based lottery game ticket characteristics.
- (5) The time, place and manner of conducting drawings.
- (6) Prizes available to be won and determination of prize winners.
- (7) Probability of winning and prize restrictions, if any.
- (8) Restrictions on procedures for claiming prizes, if any.
- (9) The existence of a finalist, grand prize, second-chance or other offering, if applicable, and the procedure for conducting the same, if applicable.
- (10) Other information necessary for the conduct of that terminal-based lottery game.

§ 875.5. Purchase price.

The Secretary will prescribe the purchase price of a terminal-based lottery game play or terminal-based lottery game ticket.

§ 875.6. Terminal-based lottery game ticket sales.

Terminal-based lottery game tickets may only be sold through Lottery retailers.

§ 875.7. Determination of prize-winning, terminal-based lottery game tickets.

(a) Terminal-based lottery game prize-winning plays will be determined under this part and specific terminal-based lottery game notifications published in the *Pennsylvania Bulletin* under § 875.4 (relating to notice of terminal-based lottery game rules).

(b) A prize shall be paid only if the terminal-based lottery game ticket meets the criteria established in § 875.10 (relating to terminal-based lottery game ticket validation and requirements).

§ 875.8. Terminal-based lottery game purchase and terminal-based lottery game ticket characteristics.

(a) To purchase a terminal-based lottery game ticket, the players shall request an on-line retailer to issue a terminal-based lottery game ticket. The terminal-based lottery game ticket, at a minimum, will contain appropriate play data as published in the *Pennsylvania Bulletin* for that particular terminal-based lottery game, the drawing dates, amount bet, and validation data. The terminal-based lottery game ticket shall be the only valid proof of the bet placed, and the only valid receipt for claiming a prize. The terminal-based lottery game ticket shall only be valid for the drawing dates printed on the terminal-based lottery game ticket.

(b) A terminal-based lottery game ticket may not be canceled or voided once printed by the Lottery terminal, even if the terminal-based lottery game ticket is printed in error.

(c) It is the sole responsibility of the terminal-based lottery game ticket holder to verify the accuracy and condition of data printed on the terminal-based lottery game ticket. The purchase of plays is at the player's own risk.

§ 875.9. Terminal-based lottery game ticket responsibility.

(a) A terminal-based lottery game ticket is a bearer document deemed to be owned by the person holding the terminal-based lottery game ticket, except that if a name is contained on the back of the terminal-based lottery game ticket, the person so named will, for all purposes, be considered the owner of the terminal-based lottery game ticket.

(b) The holder of a terminal-based lottery game ticket has the sole responsibility for checking the accuracy and condition of the data printed on the terminal-based lottery game ticket.

(c) The Commonwealth will not be responsible for a lost or stolen terminal-based lottery game ticket.

(d) The Commonwealth will not be responsible for a terminal-based lottery game ticket redeemed by a player in error.

(e) A prize shall be claimed within 1 year of the date of the terminal-based lottery drawing for which the terminal-based lottery game ticket was entered.

§ 875.10. Terminal-based lottery game ticket validation and requirements.

(a) *Valid terminal-based lottery game tickets.* To be a valid terminal-based lottery game ticket, the presented terminal-based lottery game ticket must meet the following conditions:

(1) The terminal-based lottery game ticket validation numbers shall be present in their entirety and correspond, using the Lottery's validation file, to the selected numbers, letters or symbols printed on the terminal-based lottery game ticket for the dates printed on the terminal-based lottery game ticket.

(2) The terminal-based lottery game ticket must be intact.

(3) The terminal-based lottery game ticket may not be mutilated, altered, reconstituted or tampered with.

(4) The terminal-based lottery game ticket may not be counterfeit or an exact duplicate of a winning ticket.

(5) The terminal-based lottery game ticket shall have been issued by the Lottery through a licensed retailer.

(6) The terminal-based lottery game ticket may not have been stolen.

(7) The terminal-based lottery game ticket shall be validated in accordance with § 875.11 (relating to procedures for claiming and payment of prizes).

(8) The terminal-based lottery game ticket data shall have been recorded on the Lottery's central computer system prior to the drawing and the terminal-based lottery game ticket data shall match this computer record in every respect.

(9) The player or computer-selected numbers, letters or symbols, the validation data and the drawing date of an apparent winning terminal-based lottery game ticket shall appear on the official file of winning terminal-based lottery game tickets. A terminal-based lottery game ticket with that exact data may not have been previously paid.

(10) The terminal-based lottery game ticket may not be misregistered, defectively printed, or printed or produced in error to an extent that it cannot be processed by the Lottery.

(11) The terminal-based lottery game ticket shall pass other confidential security checks of the Lottery.

(12) By submitting a terminal-based lottery game ticket for validation, the player agrees to abide by this chapter as determined by the Secretary.

(13) There may not be another breach of this part in relation to the terminal-based lottery game ticket which, in the opinion of the Secretary, justifies disqualification.

(b) *Invalid or defective terminal-based lottery game tickets/disputes.* A terminal-based lottery game ticket not passing the validation checks in subsection (a) will be considered invalid and will not be paid.

(1) In cases of doubt, the determination of the Secretary is final. The Secretary may replace an invalid terminal-based lottery game ticket with a terminal-based lottery game ticket of equivalent sale price from a current Lottery game.

(2) If a defective terminal-based lottery game ticket is purchased or if the Secretary determines to adjust an error, the sole and exclusive remedy will be the replacement of the defective or erroneous terminal-based lottery game ticket with a terminal-based lottery game ticket of equivalent sale price from a current Lottery game.

(3) If a terminal-based lottery game ticket is not paid by the Lottery and a dispute occurs as to whether the terminal-based lottery game ticket is a winning terminal-based lottery game ticket, the Lottery may replace the terminal-based lottery game ticket as provided in para-

graph (2). This is the sole and exclusive remedy of the holder of the terminal-based lottery game ticket.

§ 875.11. Procedures for claiming and payment of prizes.

(a) A prize shall be claimed only through a licensed on-line retailer as soon as that drawing is placed in pay status by the Lottery.

(b) An on-line retailer is authorized and required to make payment of a prize of \$2,500 or less, if the terminal-based lottery game ticket is presented within a designated time period as announced by the Secretary, on an individual winning terminal-based lottery game ticket, if the retailer has sufficient funds available for payment.

(c) The holder of an apparent winning terminal-based lottery game ticket representing a prize of \$2,500 or less will be paid by participating on-line retailers as provided in subsection (b), if the terminal-based lottery game ticket validation requirements in § 875.10 (relating to terminal-based lottery game ticket validation and requirements) have been met, a proper validation pay ticket has been issued by the retailer's computer terminal and other retailer procedures have been met.

(d) The holder of an apparent winning terminal-based lottery game ticket representing a prize in excess of \$2,500, with the exception of a top prize, shall present the terminal-based lottery game ticket to an on-line retailer or authorized claim center under Chapter 811 (relating to prizes).

(e) The holder of an apparent winning terminal-based lottery game ticket representing a top prize shall present, in person, the ticket to Lottery Headquarters or a Lottery area office.

(f) The payment of a prize to a person who dies before receiving a particular prize or to a person under 18 years of age will be paid under §§ 811.16 and 811.27 (relating to prizes payable after death of prize winner; and payment of prizes to persons under 18 years of age).

(g) The Commonwealth will be discharged of liability after payment of prizes as provided in § 811.26 (relating to discharge of State liability upon payment).

§ 875.12. Funding for prizes.

(a) Moneys will be drawn from the Lottery Fund, to the extent necessary, to fund the payment of prizes under this subsection.

(b) If the terminal-based lottery game is terminated for any cause, prize moneys remaining undistributed will

remain in the State Lottery Fund and used for purposes otherwise provided for by law.

§ 875.13. Unclaimed prize money.

Prize money on a winning terminal-based lottery game ticket may be retained by the Secretary for payment to the person entitled thereto. If no claim is made within 1 year of the date of the terminal-based lottery drawing for which the terminal-based lottery game ticket was entered, the right of a terminal-based lottery game ticket holder to claim the prize represented by that terminal-based lottery game ticket, if any, expires and the prize money will be paid into the State Lottery Fund and used for purposes otherwise provided for by statute.

§ 875.14. Withholding.

Federal withholding taxes will be withheld by the Lottery for prize payments in amounts required in accordance with applicable provisions of law.

§ 875.15. Purchase and prize restrictions.

A terminal-based lottery game ticket may not be purchased by, and a prize will not be paid to, an officer or employee of the Lottery, Lottery professional services contractors or subcontractors who are involved in the operation of the terminal-based lottery games system or its associated drawings, or to a spouse, child, brother, sister or parent residing in the same household of the officer, employee, contractor, or subcontractor.

§ 875.16. Governing law.

(a) In purchasing a ticket, the purchaser agrees to comply with and abide by applicable laws, this part, instructions, conditions and final decisions of the Secretary, and procedures established by the Secretary for the conduct of the terminal-based lottery game.

(b) Decisions made by the Secretary including the declaration of prizes and the payment thereof in interpretation of this part are final and binding on players and persons making a claim in respect thereof.

§ 875.17. Retailer promotion programs.

Retailer incentive and marketing promotion programs, including the use of unfunded free terminal-based lottery game tickets, may be implemented at the discretion of the Secretary. Funds for the programs, if needed, will be drawn from the Lottery Fund.

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