

RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CHS. 109 AND 110]

Water Resources Planning

The Environmental Quality Board (Board) by this order amends Chapter 109 (relating to safe drinking water) and adds Chapter 110 (relating to water resources planning). The amendments add a new chapter establishing the requirements for registration of water users and recordkeeping and reporting of water withdrawal and use information, as required by 27 Pa.C.S. Chapter 31 (relating to Water Resources Planning Act) (act). These regulations specify who is required to register, keep records and report information related to withdrawals of water in this Commonwealth and details the information that is to be recorded and reported to the Department of Environmental Protection (Department). The information collected under these regulations is essential to development of the State Water Plan, which is mandated by the act.

This order was adopted by the Board at its meeting of August 19, 2008.

A. *Effective Date*

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

B. *Contact Persons*

For further information contact Susan K. Weaver, Chief, Division of Water Use Planning, P. O. Box 8555, Rachel Carson State Office Building, Harrisburg, PA 17105-8555, (717) 783-8055, or Pamela G. Bishop, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This proposal is available electronically through the Department web site at www.depweb.state.pa.us.

C. *Statutory Authority*

The final-form regulations are being made under the authority of section 4 of the Pennsylvania Safe Drinking Water Act (35 P. S. § 721.4) and section 3118 of the act (relating to water use registration and reporting), which directs the Board to adopt regulations pertaining to reporting by public water suppliers and establishing requirements for the registration, periodic reporting and recordkeeping of water withdrawals and uses and under the authority of section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), authorizing and directing the Board to adopt regulations necessary for the proper performance of the work of the Department.

D. *Background of the Amendments*

The act requires the Department to complete a State Water Plan and establishes a water withdrawal registration program to collect data necessary to support the planning process. The Department does not currently know how much water is used, needed or available in this Commonwealth. The regulations will provide the data necessary to help answer those questions. The State Water Plan will provide a framework for managing this

Commonwealth's water resources to most effectively provide for public health and safety, while protecting aquatic resources. All citizens will benefit from the development of a State Water Plan, which will provide decision-makers a valuable tool to guide investment, development and land use management in a manner that is sustainable and will avoid water shortages and concomitant dislocation. The data collected by these regulations will help create economic opportunity by assisting State and local decision makers to identify water resources available to support sustainable development and will help to avoid unwise investments.

The regulations will require each public water supply agency and each hydropower facility, irrespective of the amount of withdrawal, and each person whose total withdrawal from one or more points of withdrawal within a watershed operated as a system either concurrently or sequentially exceeds an average rate of 10,000 gallons of water a day in a 30-day period to register, periodically report and keep records of their water use. In addition, each person who obtains water through interconnection with another person in an amount that exceeds an average rate of 100,000 gallons per day in any 30-day period will be required to register, periodically report and keep records of his water use. To avoid duplication of reporting requirements, the proposal recommends amending one section of Chapter 109 to indicate that compliance by public water supply agencies with Chapter 110 will fulfill compliance with the Chapter 109 annual water supply reporting requirements.

The act establishes a Statewide Water Resources Committee (Statewide Committee) to assist the Department in developing the State Water Plan. The Statewide Committee is also charged with reviewing and commenting on regulations proposed by the Department under the act. The Statewide Committee considered the final-form regulations at their public meeting on April 18, 2008, at which time there were no public comments on the final-form regulations. There were several minor comments from the Statewide Committee on the final-form regulations, including two that identified a typographical error and a dated citation of the Right-To-Know Law. The Statewide Committee has recommended moving these final-form regulations to the Board for consideration and has indicated in writing their support of the regulatory package.

Under 27 Pa.C.S. Chapter 7 (relating to Agricultural Advisory Board), the Department presented the final-form regulations to the Agricultural Advisory Board at that Board's meeting on April 16, 2008. The Agricultural Advisory Board was satisfied with the Department's presentation of the final-form regulations and presented no issues of concern regarding the final-form regulations.

The proposed regulations were published at 36 Pa.B. 7260 (December 2, 2006) with a 30-day comment period. No public meetings or hearings were held on the proposed regulations. During the 30-day public comment period, comments were received from eight commentators, including the Independent Regulatory Review Commission (IRRC).

E. *Summary of Changes to the Proposed Rulemaking*

No companion Federal regulations exist.

*Chapter 109**§ 109.701 (Reporting and recordkeeping)*

This section explains the reporting and recordkeeping requirements for community water systems.

Chapter 110

There were several comments of a general nature regarding enforcement and form content. One commentator suggested elaborating on enforcement provisions in the regulations. Since sections 3133 and 3134 of the act (relating to enforcement orders; and civil remedies) address these issues, they have not been repeated in the regulations. One commentator questioned the location of the referenced forms. The forms will be available on the Department's web site or by request from the Department at (717) 772-4048.

*Subchapter A. General Provisions**§ 110.1 (relating to definitions).*

Several commentators requested clarification of terms used in the proposed rulemaking and requested consistency in referencing definitions from the act. The section has been revised by adding several new definitions and revising proposed definitions to aid in clarifying the intent of the regulations. In addition, the definitions have been revised to consistently reference the definitions in section 3102 of the act (relating to definitions).

§ 110.2 (relating to purpose)

One commentator stated that if all customers of public water suppliers are to register and report, the requirement should be added to the purpose and general requirements sections. This section has been revised to clearly state the purpose without the duplicating registration requirement language that is contained in § 110.201 (relating to registration requirement). This section explains that the chapter establishes registration, monitoring, recordkeeping and reporting requirements for purposes of obtaining accurate information for water resources planning.

§ 110.3 (relating confidential information)

Several commentators suggested that criteria and a process would aid in the determination of confidential information. Section 110.3 has been modified to indicate that the Department will use its established protocols and procedures for submission and protection of confidential information and processing challenges to the designations. The procedures are outlined in the Department's "Confidential Security Information Guidance" document, which can be accessed on the Department's web site. The heading of the section has been modified to more accurately reflect the content of the section.

§ 110.4 (relating to inspection authorization)

Several commentators requested clarification of the circumstances when the Department would ask for records and access. The section has been modified to indicate that the Department will ask for records and access to determine compliance with the act as well as the regulations, in accordance with section 3131(c) of the act (relating to administration). While the Department may make the request in writing, the act does not require written notice of an inspection. Both the act and this section of the regulations require that the Department conducts the inspection during reasonable hours and upon reasonable notice.

§ 110.5 (relating to coordination with other water use reports)

Several commentators requested clarification on how the Department intends to avoid duplication of efforts for reporting. This section requires persons subject to § 110.201 to cooperate with the Department in its coordination of the submission of reports under this chapter with water use reports required by the Department and Compact Basin Commissions. There is additional language in section 3118(b)(4) of the act that indicates reports submitted under other applicable statutes and regulations may satisfy reporting under the act "to the extent that the reports provide the required information." Information on Discharge Monitoring Reports (DMRs) is not sufficient to comply with the data requirements of the regulations. Furthermore, few withdrawers are required to submit DMRs. Joint reporting forms have been developed to avoid duplication of reporting among the Department, Compact Basin Commissions, and other Federal and State agencies and to reduce costs to the submitter. Section 110.5 requires the regulated community to cooperate with coordinated submission of information in accordance with those forms. There were no existing reports that fulfilled all the reporting requirements.

§ 110.6 (relating to effect of registration)

One commentator questioned the appropriateness of the narrative statement description of potential benefits of registration and reporting water use. The Department agrees and subsection (a) has been deleted. This section explains that registration of a withdrawal or use under this chapter will not be construed as either a determination of a person's water rights or approval of a withdrawal or use by the Department, another agency of the Commonwealth or a Compact Basin Commission.

*Subchapter B. Registration**§ 110.201 (relating to registration requirements)*

Several commentators questioned the authority to collect withdrawal use information of those who obtain water through interconnections as well as the potential double-counting that may occur with the collection of the water use information. The terms "withdrawal" and "withdrawal use" both appear in section 3118 of the act and specifically, section 3118(a) and (b) of the act, both require persons to report their "withdrawal or withdrawal use." Taken together, the act's definitions of "withdrawal" and "withdrawal use" clearly indicate that withdrawal uses include use of water that is withdrawn by another entity and transferred through interconnections. The definition of "withdrawal" includes the phrase "whether or not returned to the water source," which implies that water not returned to the source but purveyed or transferred to another entity and consumed remains "water that is withdrawn." The term "withdrawal use" is defined as "any use of water that is withdrawn," which would then logically include water purveyed through a public water supply system. Section 3118(b) of the act requires all users subject to the registration requirement to report the amount of "consumptive use." The act defines "consumptive use" to include "such water that is purveyed through a public water supply system." Section 3118(b) of the act requires those users to register and report directly to the Department.

When implementing the interim registration provisions of Act 220, the Department did not require the registration of large users of water who obtained all their water from public water suppliers; however, that was not in-

tended to, nor does it, indicate that the act exempted the users from the registration and reporting requirements. At the time of interim registration, the information was not essential to the early stages of Statewide water resources planning and water use assessment. However, collection of the information from large water users who obtain water through interconnection is necessary for water use planning. In particular, the consumptive and nonconsumptive use information applicable to large users on public water supply systems may be of significant value in assessing potential critical water planning areas and in the development of critical area resource plans. The statute authorizes the registrations of those who obtain water through interconnection with a public water supply agency.

The analyses done for the State Water Plan, including the water budget process, are designed to account for the uses and to avoid redundancy and double-counting. Changes have been made to § 110.201 to clarify that only those persons who obtain more than 100,000 gallons per day of water through interconnection with another person are required to register, rather than only those with a consumptive use greater than 100,000 gallons per day. This revision captures a larger group of users, however, by eliminating the consumptive use requirement, it will be easier to calculate.

§ 110.202 (relating to submission of registrations)

One commentator requested the removal of the March 16, 2004, deadline. The act established the deadline of March 16, 2004, for the interim registration for then-existing withdrawals. The act also established a 30-day period for submission of registration applicable to all withdrawals and uses initiated after March 16, 2004. The final-form regulations have been revised to conform to the act's 30-day requirement.

§ 110.203 (relating to content of registration)

Several commentators questioned the level of detail required, in particular the amounts of consumptive and nonconsumptive uses and water returned. In addition, several commentators stated that source location should be considered confidential security information under the Public Utility Confidential Security Information Disclosure Protection Act (Act 156).

This section has been modified to delete the requirement to provide information in the registration related to consumptive and nonconsumptive uses and water returned and discharged, and the term "as appropriate" has been similarly deleted. The obligation to report those items has been added to § 110.304 (relating to general content of reports). The effect of these revisions is to simplify and clarify the registration contents.

Section 3118(b)(1) of the act requires water users subject to the registration requirements to monitor, maintain records and submit to the Department periodic reports that include the amount of consumptive and nonconsumptive uses. The information is essential for water resources planning. These items have appropriately been moved to § 110.304 and included in the content of the annual reports.

The act requires registrants to provide location information. The Department follows its sensitive information policy with regard to not disclosing location of a public water supplier's intake. As stated in response to comments in § 110.3, the Department will follow its established protocols and procedures for submission and protection of confidential information. This section has been modified to delete subsection (c) because the subject

matter is covered by § 110.3. This section establishes the required content of a registration, including registrant identification and description information; and for each source the name, description, location and amount.

§ 110.204 (relating to voluntary registration)

This section provides for voluntary registration by persons not subject to the regulation and minor revisions were made to clarify.

§ 110.205 (relating to transfer of registration)

This section provides for transfers of registrations and establishes the prerequisites for transfers and there were no revisions made to this section.

§ 110.206 (relating to termination of registration)

One commentator stated that sources may not be used for long periods of time and owners could face a burden of reregistering. This section provides for termination of registrations and establishes the prerequisites for termination.

To properly plan for water resources, it is essential to have accurate reliable databases, reflecting current water uses. The Department recognizes some sources may not be used for a certain period of time, which will be reflected on the reporting form. The regulation assigns a reasonable period of 7 years to keep the records and requires termination of a registration after this period. It is the responsibility of registrants to reregister a source when its use is resumed. Reregistration is not a burden on the registrant.

Subchapter C. Reporting

§ 110.301 (relating to reporting requirements)

This section establishes the requirement for reporting. One commentator requested clarification on whether an annual report must be submitted if the registered user does not exceed the threshold 10,000 gallon per day during the reporting year.

For clarity, § 110.301 has been modified to state that a report is required irrespective of the quantity of withdrawal or use during the reporting year.

§ 110.302 (relating to submission of reports)

This section establishes the dates for required submission of reports to the Department.

One commentator questioned under what circumstances that reporting would be less frequent than annual and whether the phrase "other user" is necessary when the term "including" is used.

As a result of the commentator's suggestion, the phrase "or less frequently as may be prescribed by the Department" has been deleted from § 110.302 and § 110.603 (relating to reporting). In addition, the words "other user" have been deleted in paragraph (2)(viii).

§ 110.303 (relating to reporting period)

This section establishes the reporting period for reports required to be submitted to the Department and no revisions were made.

§ 110.304 (relating to general content of reports)

This section prescribes the general contents of reports and was revised to include the information previously requested under § 110.203.

§ 110.305 (relating to user-specific contents of report)

This section prescribes user-specific contents of reports.

Several commentators stated that the term “storage” was vague and misleading. Two commentators questioned the statutory authority and water resources planning benefit of collecting employment data, as well as other details such as storage and irrigation information. One commentator suggested that the well construction information was not relevant to water resources planning.

The Department has added the word “water” before the word “storage” in § 110.305 in response to commentator’s concern. In accordance with section 3114(c)(4) of the act (relating to Statewide Water Resources Committee), the draft proposed rulemaking was presented to the Statewide Committee for review and comment. The drafts of the regulations contained considerable detail on the data requirements for reporting contained in § 110.305. The Department received comments questioning the level of detail being required. Upon consideration of the comments, the proposed regulation was revised to eliminate the details and to incorporate the concept that the specific data requirements would be in accordance with forms prescribed by the Department. The forms will be developed in consultation with the Statewide Committee, with provision for public comment.

Water resources planning is based upon knowledge of when and how much water is being withdrawn and discharged. It is essential to know whether water is being returned or not returned to the watershed from which it was withdrawn. The Department agrees that the level of detail can be reduced and these forms are being revised to address this comment.

The information referenced in the question regarding well construction and pumping capacity is required by the Susquehanna River Basin Commission (SRBC) and Delaware River Basin Commission (DRBC) as part of their registration programs. The Compact Basin Commissions have authority to delegate to the Department their registration and reporting programs. To eliminate redundancy of registration and reporting programs, the rulemaking has been designed to accommodate the Compact Basin Commission requirements, thereby making the Department a one-stop registration and reporting agency. See § 110.5. The Department and the Commissions need water well, meter, and disposal information for water resources planning purposes.

Employment data is central to projections of water use in certain water use sectors, and thus is of significant use to water resources planning. This section has been modified to exclude the information that is not needed for water planning purposes. The statutory language quoted by the commentator authorizes collection of information “including” which term means “but not limited to” only the source, location and amount. The introductory language to section 3118(b) of the act indicates that the purpose for adopting regulations and establishing requirements for reporting is “to provide accurate information for water resources planning.” The information requested in § 110.305 is necessary to make “an assessment and projection of existing and future withdrawal use demand and nonwithdrawal use needs” as required under section 3112 of the act (relating to plan contents).

Subchapter D. Recordkeeping

§ 110.401 (relating to recordkeeping requirement)

This section establishes the requirements for recordkeeping and a minor revision was made to clarify the language.

§ 110.402 (relating to retention of records)

This section establishes the requirement for retention of records and supporting data to be a period of at least 5 years. One commentator requested clarification on the format to be used for maintaining records. Section 110.402 has been modified to clarify that records shall be kept “in any format that allows the reproduction of the record.”

Subchapter E. Monitoring

§ 110.501 (relating to metering and measuring requirement)

This section establishes the requirements for metering and measuring. Several commentators requested clarification on the 5% accuracy requirement.

Section 110.501(c) has been revised to indicate that only persons whose withdrawals equal or exceed 50,000 gallons per day and persons who obtain water through interconnection in excess of 100,000 gallons per day shall measure or calculate their withdrawals and purchased water by meter or other method, accurate to within 5% of actual flow and their consumptive use, by methods accurate to within 10% of actual flow.

Two commentators requested clarification on the alternate methods used for quantifying water use.

Section 3118(b)(1) of the act requires the regulations to “allow for use of the alternative methods to obtain a reasonable estimate or indirect calculation of such . . .” There is no requirement in the act to identify alternative methods. Section 110.501(e) has been revised to recognize methods based upon “established scientific principles, design or manufacturer’s product specification, or research results.”

One commentator expressed concern that the Department is applying more stringent requirements to those water users in river basin commissions.

Proposed § 110.501(e) has been deleted.

One commentator suggested to require a meter on an individual point of withdrawal that uses less than 50,000 gallons per day solely because it is part of a larger system is burdensome and unnecessary.

Section 110.501(c) has been revised and does not require meters on each point of withdrawal. Revised § 110.501(c) allows for measuring or calculating withdrawals by means of a meter “or other method.”

One commentator expressed support for the inclusion of a provision for granting exceptions to the 5% accuracy standard if maintenance of the standard is not technically feasible or economically practicable.

§ 110.502 (relating to recording frequency)

This section establishes the recording frequency of withdrawals and withdrawal uses subject to the regulation.

Several commentators requested clarification on recording and recordkeeping frequencies for withdrawals and uses, as well as including provisions acknowledging river basin requirements.

The regulations have been modified to provide for monthly recording of consumptive uses and clarify the requirements.

One commentator suggested annual reporting for nonconsumptive and consumptive use be made on a facility basis, rather than by source.

The Department agrees and the annual reporting forms request facility-based reporting of uses.

§ 110.503 (relating to measuring requirement in critical water planning area)

This section provides the Department authority to require more accurate measurement of withdrawals or withdrawal uses in critical water planning areas and establishes the criteria for imposing the requirements.

Two commentators questioned the Department's authority for imposing additional requirements within critical water planning areas.

Section 3118(b) of the act authorizes the adoption of the regulations, establishing the requirements for reporting and recordkeeping to obtain accurate information for water resources planning. Section 110.503 has been revised and now provides that in a critical water planning area, the Department may require registrants in those areas to use more accurate measuring methods and to record measurements more frequently only when the Department issues a written notice including the explanation of the basis for determination that more accurate and frequent measurements are necessary to develop a critical area resource plan.

Subchapter F. Water Conservation

§ 110.601 (relating to registration)

This section provides that a person who has implemented a water conservation project or practice may register the project or practice with the Department and no revisions were made.

§ 110.602 (relating to registration information)

This section establishes the required information for registration of water conservation projects or practices. The act defines one term but uses both terms and this section was revised to incorporate the use of both terms.

§ 110.603 (relating to reporting)

This section requires each person who has registered a water conservation project or practice to submit annual reports to the Department documenting the continuing effectiveness of the project or practice. The term "or less frequently" was removed.

§ 110.604 (relating to Water Resources Technical Assistance Center)

This section requires the Department establish a water resources technical assistance center to promote voluntary water conservation and to provide technical assistance on water resources uses issues. This section was revised to reflect the correct citation of the act.

F. Benefits, Costs and Compliance

Benefits

Citizens of this Commonwealth will benefit from the development of a State Water Plan, which will provide decision-makers a valuable tool to guide investment, development and land use management in a manner that is sustainable and will avoid water shortages and concomitant dislocation. The data collected under this regulation is necessary to development of the State Water Plan.

These final-form regulations will help create economic opportunity by assisting decision makers in identifying water resources available to support sustainable development and will help to avoid unwise investment in unsustainable resources. The Commonwealth does not currently know how much water is used, needed or

available. The regulations will provide the data necessary to help answer those questions.

Compliance Costs

Persons who withdraw or use 10,000 gallons of water or more per day and all public water suppliers and hydropower facilities will be required to register and report under the regulations. One-time metering costs, for meter equipment, for a limited number of public water suppliers who don't currently meter their sources, may range from \$50 to \$2,000 per registered source. Annual costs for recordkeeping and reporting may range from 1 to 12 work-days per year per registrant. Many users, including most that are currently regulated by either the Department or the SRBC or the DRBC, already have the necessary recordkeeping and reporting processes in place and should incur no additional costs. Consolidation of reporting requirements may result in reduced costs for some of those users.

Compliance Assistance Plan

Registration workshops were held across this Commonwealth in 2004 to assist in the initial registration required by the act. No additional workshops are planned.

Paperwork Requirements

Persons subject to these regulations will be required to submit an initial registration form for each source of water withdrawal, describing the location and quantity of withdrawal and type of use. Annually, thereafter, they will be required to submit a report of their monthly total withdrawals from each source and their total monthly water use. Under the regulations, the registration and reporting requirements of the Department, including the Annual Water Supply Report under the Pennsylvania Safe Drinking Water Act (35 P. S. §§ 721.1—721.17), and the SRBC and the DRBC will be consolidated in single registration and reporting forms to be submitted solely to the Department.

G. Pollution Prevention

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

Water conservation practices encouraged and fostered by these regulations will result in decreased withdrawals of water and discharges of wastewater. Reduced energy consumption and chemical use will also be realized. Less diminution of stream flows, particularly during periods of low flows is pollution prevention as recognized by the courts. In addition, reductions in wastewater discharges will reduce pollution of our water resources.

H. Sunset Review

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

I. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Department submitted a copy of the notice of proposed rulemaking, published at 36 Pa.B. 7260 to IRRC and the Chairpersons of the House and Senate Environmental Resources and Energy Committees (Committees) for review and comment.

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

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on October 1, 2008, these final-form regulations were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on October 2, 2008, and approved the final-form regulations.

J. Findings

The Board finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and regulations promulgated thereunder in 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law, and all comments were considered.
- (3) These regulations do not enlarge the purpose of the proposal published at 36 Pa.B. 7260.
- (4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

K. Order

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

- (1) The regulations of the Department of Environmental Protection, 25 Pa. Code Chapters 109 and 110, are amended by amending § 109.701 and by adding §§ 110.1—110.6, 110.201—110.206, 110.301—110.305, 110.401, 110.402, 110.501—110.503 and 110.601—110.604, to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.
- (2) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.
- (3) The Chairperson of the Board shall submit this order and Annex A to IRRC and the Committees as required by the Regulatory Review Act.
- (4) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.
- (5) This order shall take effect immediately upon publication.

JOHN HANGER,
Acting Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 38 Pa.B. 5818 (October 18, 2008).)

Fiscal Note: Fiscal Note 7-403 remains valid for the final adoption of the subject regulations.

Annex A

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

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 109. SAFE DRINKING WATER

Subchapter G. SYSTEM MANAGEMENT RESPONSIBILITIES

§ 109.701. Reporting and recordkeeping.

* * * * *

(b) *Reporting requirements for community water systems.* In addition to the reporting requirements for a public water system, a community water supplier shall comply with the following requirements:

- (1) The water supplier shall prepare a monthly operational report on forms provided by the Department or in a form acceptable to the Department. The report shall be maintained on file by the operator for at least 2 years and submitted upon request of the Department. The report must include at least the following:
 - (i) The water produced daily.
 - (ii) The chemical added daily.
 - (iii) The physical and chemical determinations taken daily.
 - (iv) Water-level monitoring data for supply and any associated monitoring wells.
 - (v) The maintenance performed.
 - (vi) Operational problems.

(2) The water supplier shall comply with the applicable requirements of registration, reporting, recordkeeping and monitoring in Chapter 110, Subchapters B—E, regarding registration, reporting, recordkeeping and monitoring.

(3) The water supplier shall keep a record of complaints received from consumers related to the act or this chapter on forms provided by the Department or in a form acceptable to the Department. Water suppliers complying with the Pennsylvania Public Utility Commission (PUC) complaint recordkeeping requirements under 52 Pa. Code § 65.3 (relating to complaints) shall be in compliance with this subsection if the complaints related to the act or this chapter are cross referenced within the PUC required records in a manner to make them readily available. The records shall be maintained on file by the operator for at least 3 years and submitted upon request of the Department.

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CHAPTER 110. WATER RESOURCES PLANNING

(Editor's Note: Chapter 110 is new and is printed in regular type to enhance readability.)

- Subchap.**
- A. GENERAL PROVISIONS**
 - B. REGISTRATION**
 - C. REPORTING**
 - D. RECORDKEEPING**
 - E. MONITORING**
 - F. WATER CONSERVATION**

Subchapter A. GENERAL PROVISIONS

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110.2.	Purpose.
110.3.	Confidential information.
110.4.	Inspection authorization.
110.5.	Coordination with other water use reports.
110.6.	Effect of registration.

§ 110.1. Definitions.

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

Act—27 Pa.C.S. Chapter 31 (relating to water resources planning).

Average rate—Total quantity in gallons of water withdrawn or used during a period of time divided by the number of days in the period.

Basin—As defined in section 3102 of the act (relating to definitions).

Calculate or *calculation*—Mathematical computations, or the act of computing, for the purposes of water use registration or reporting, or both, usually based on pump intake rate and duration of pumping or similar factors.

Compact basin commission—An interstate commission having jurisdiction with respect to the planning, development or regulation of water resources within a basin in this Commonwealth, created by interstate compact or Federal-interstate compact.

Confidential information—

(i) As defined in section 3102 of the act.

(ii) The term also includes confidential security information, as defined in the Public Utility Confidential Security Information Disclosure Protection Act, which has been designated by a public utility in accordance with that act.

Consumptive use—As defined in section 3102 of the act.

Critical area resource plan—As defined in section 3102 of the act.

Critical water planning area—As defined in section 3102 of the act.

Deep well injection—As defined in section 3102 of the act.

Groundwater—As defined in section 3102 of the act.

Hydropower facility—A facility that produces electricity by the action of water, not including steam, passing through a turbine.

Nonconsumptive use—As defined in section 3102 of the act.

Nonwithdrawal use—As defined in section 3102 of the act.

Person—As defined in section 3102 of the act.

Public Utility Confidential Security Information Disclosure Protection Act—36 P. S. §§ 2141.1—2141.6.

Public water supply agency—As defined in section 3102 of the act.

Source—

(i) The point of withdrawal.

(ii) The term includes point of interconnection through which water is obtained.

Statewide Committee—The Statewide Water Resources Committee established under section 3114(a) of the act (relating to Statewide Water Resources Committee).

Surface water—As defined in section 3102 of the act.

System—Two or more points of withdrawal that are adjacent or geographically proximate to each other, operated concurrently or sequentially for use in a common operation.

Use—The term may include withdrawal use, nonwithdrawal use, consumptive use or nonconsumptive use, or a combination of any of these.

Water conservation project or practice—

(i) As defined in section 3102 of the act, as “water conservation practices and measures.”

(ii) The term includes those projects and practices identified in section 3112(a)(11) of the act (relating to plan contents).

Water resource—As defined in section 3102 of the act.

Watershed—As defined in section 3102 of the act.

Withdrawal—As defined in section 3102 of the act.

Withdrawal use—As defined in section 3102 of the act.

§ 110.2. Purpose.

This chapter establishes the registration, monitoring, recordkeeping and reporting requirements for purposes of obtaining accurate information for water resources planning.

§ 110.3. Confidential information.

(a) Except as provided in subsection (b), information required to be submitted to the Department under this chapter shall be subject to the Right-to-Know Law (65 P. S. §§ 67.101—67.3104).

(b) Each person who submits information under this chapter that the person claims is confidential information under either the act or the Public Utility Confidentiality Security Information Disclosure Protection Act, shall identify or designate the confidential information and provide a justification for its confidential nature, in accordance with protocols and procedures for submitting confidential information and addressing challenges to the designations as established by the Department.

§ 110.4. Inspection authorization.

The Department, its employees and authorized agents are authorized, during reasonable hours and upon reasonable notice, to make inspections and conduct tests or sampling, or examine books, papers and records, including electronic records, pertinent to a matter under investigation, to determine compliance with the act and this chapter, as it deems necessary. The persons subject to § 110.201 (relating to registration requirement) shall grant access to, and make available upon request of, the Department, its employees and authorized agents, the facilities and records necessary for conducting the inspections, tests, sampling or examinations.

§ 110.5. Coordination with other water use reports.

(a) The persons subject to § 110.201 (relating to registration requirement) shall cooperate with the Department in its coordination of the submission of reports under this chapter with water use reports required by the Department and compact basin commissions.

(b) The persons subject to § 110.201 shall submit information in accordance with joint reporting forms developed by the Department to facilitate the submission

of water use information required by the Department and compact basin commissions, to reduce duplicate and repetitious reporting requirements. The joint forms shall be used in lieu of individual forms for the required reports.

§ 110.6. Effect of registration.

Registration under this chapter will not be construed as either a determination of a person's water rights or approval of a withdrawal or use by the Department, another agency of the Commonwealth or a compact basin commission.

Subchapter B. REGISTRATION

- Sec.
- 110.201. Registration requirement.
- 110.202. Submission of registrations.
- 110.203. Content of registration.
- 110.204. Voluntary registration.
- 110.205. Transfer of registration.
- 110.206. Termination of registration.

§ 110.201. Registration requirement.

The following persons shall register the information specified in § 110.203 (relating to content of registration) with the Department:

- (1) Each owner of a public water supply agency.
- (2) Each owner of a hydropower facility.
- (3) Each person whose total withdrawal from a point of withdrawal, or from multiple points of withdrawal operated as a system either concurrently or sequentially, within a watershed exceeds an average rate of 10,000 gallons per day in any 30-day period.
- (4) Each person who obtains water through interconnection with another person in an amount that exceeds an average rate of 100,000 gallons per day in any 30-day period.
- (5) Within an area designated as a critical water planning area, each person who obtains water through interconnection with another person in an amount that exceeds an average rate of 10,000 gallons per day in any 30-day period.

§ 110.202. Submission of registrations.

Registrations shall be submitted to the Department by March 16, 2004, or 30 days following initiation of a water withdrawal or withdrawal use subject to § 110.201 (relating to registration requirement), whichever is later.

§ 110.203. Content of registration.

A registrant shall provide information, on forms prescribed by the Department and developed in consultation with the Statewide Committee, including:

- (1) Registrant identification and description information.
- (2) For each source:
 - (i) Name, description and location.
 - (ii) Amount of water withdrawn or obtained through interconnection with another person, or instream hydropower use.

§ 110.204. Voluntary registration.

(a) A person, not subject to § 110.201 (relating to registration requirement), may voluntarily register with the Department the water withdrawal or withdrawal use, in accordance with the registration provisions of this subchapter.

(b) Notwithstanding §§ 110.301 and 110.401 (relating to reporting requirement; and recordkeeping requirement), voluntary registrants shall monitor, maintain records and report to the Department in accordance with the other provisions of Subchapters C—E (relating to reporting; recordkeeping; and monitoring).

§ 110.205. Transfer of registration.

The Department will transfer a registration, if the following conditions are met:

- (1) The registrant and transferee are in compliance with this chapter.
- (2) No later than 30 days subsequent to the transfer, the transferee submits the following to the Department:
 - (i) A request for transfer of the registration, on a form prescribed by the Department.
 - (ii) A written statement signed by the registrant and the transferee, containing the date of the transfer of registration and acknowledging the transferee's recordkeeping and reporting responsibilities.

§ 110.206. Termination of registration.

(a) Except for a public water supply agency or hydropower facility, when a person's combined withdrawals from all sources decrease for a 12-month period so that the person is no longer subject to § 110.201 (relating to registration requirement), the person may file with the Department, on forms provided by the Department, a written notice of reduction and request for termination of registration.

(b) When a registered withdrawal for a source or use over a 12-month period is zero, or if a withdrawal or use has been terminated, the person responsible for the withdrawal or use may file with the Department, on forms provided by the Department, a written notice of termination and request for termination of registration related to that source or use.

(c) Upon receipt of proper written request for termination, the Department will terminate the registration and notify the registrant.

(d) When a registered withdrawal or use over seven consecutive 12-month periods is zero, based upon reports submitted in accordance with Subchapter C (relating to reporting), the Department will terminate the registration and notify the registrant.

Subchapter C. REPORTING

- Sec.
- 110.301. Reporting requirement.
- 110.302. Submission of reports.
- 110.303. Reporting period.
- 110.304. General contents of report.
- 110.305. User-specific contents of report.

§ 110.301. Reporting requirement.

Each person subject to § 110.201 (relating to registration requirement), irrespective of the quantity of withdrawal or use during the reporting year, shall submit reports to the Department in accordance with this subchapter, regarding the withdrawal and use, unless the registration has been terminated in accordance with § 110.206 (relating to termination of registration).

§ 110.302. Submission of reports.

Reports shall be submitted annually to the Department, on forms prescribed by the Department and developed in consultation with the Statewide Committee, no later than:

- (1) March 31—Public water supply agency.
- (2) June 30—Any user except a public water supply agency, including:
 - (i) Power generation facility.
 - (ii) Manufacturing industry user.
 - (iii) Mineral industry user.
 - (iv) Bulk, vended, retail and bottled water systems.
 - (v) Agricultural user.
 - (vi) Golf course user.
 - (vii) Ski resort.

§ 110.303. Reporting period.

Reports must provide information for the calendar year preceding the date of submission.

§ 110.304. General contents of report.

A report must include the following:

- (1) Items under § 110.203 (relating to content of registration).
- (2) Amount of consumptive and nonconsumptive uses.
- (3) Locations and amounts of any waters returned or discharged.
- (4) Amounts of water transferred between public water supply agencies by means of interconnections.

§ 110.305. User-specific contents of report.

In addition to the contents specified in § 110.203 (relating to content of registration), registrants shall submit user-specific information, including:

- (1) *Public water supply agency.*
 - (i) Connections and water transfers.
 - (ii) Service area map.
 - (iii) Metering.
 - (iv) Water storage information.
 - (v) Customer type information.
- (2) *Power generation facility including hydropower and thermo-electric.*
 - (i) Generating capacities.
 - (ii) Generating units.
 - (iii) Water storage information.
- (3) *Manufacturing industry.*
 - (i) Employment.
 - (ii) Water storage information.
- (4) *Mineral industry.*
 - (i) Types of operations.
 - (ii) Employment.
 - (iii) Water storage information.
- (5) *Bulk, vended, retail and bottled water.*
 - (i) Employment.
 - (ii) Water storage information.
- (6) *Agriculture.*
 - (i) Irrigation water use.
 - (ii) Animal water use.
 - (iii) Water storage information.
- (7) *Golf course.*

(i) Irrigated areas and water use by tees, greens, fairways and other land coverages.

- (ii) Irrigation system information.
 - (iii) Employment.
 - (iv) Water storage information.
- (8) *Ski resort.*
- (i) Snowmaking acreage.
 - (ii) Employment.
 - (iii) Water storage information.

Subchapter D. RECORDKEEPING

Sec.

- 110.401. Recordkeeping requirement.
- 110.402. Retention of records.

§ 110.401. Recordkeeping requirement.

A person subject to § 110.201 (relating to registration requirement) shall make and maintain a record of the items required under Subchapters B and C (relating to registration; and reporting), including supporting data, unless the registration has been terminated in accordance with § 110.206 (relating to termination of registration).

§ 110.402. Retention of records.

Records required to be maintained under § 110.401 (relating to recordkeeping requirement), including supporting data, shall be kept for at least 5 years in any format that allows reproduction of the record.

Subchapter E. MONITORING

Sec.

- 110.501. Metering and measuring requirement.
- 110.502. Recording frequency.
- 110.503. Measuring requirement in critical water planning areas.

§ 110.501. Metering and measuring requirement.

(a) Each public water supply agency shall measure its withdrawals and water transferred through interconnection with another public water supply agency by means of a continuous-recording device or flow meter, accurate to within 5% of actual flow.

(b) Each hydropower facility shall measure its withdrawal and instream hydropower use by means of a continuous-recording device or flow meter or shall calculate its withdrawal and use based upon electrical generation or turbine flow rates or other method, accurate to within 5% of actual flow.

(c) Each person whose total withdrawal from a point of withdrawal, or from multiple points of withdrawal operated as a system either concurrently or sequentially, within a watershed equals or exceeds an average rate of 50,000 gallons per day in any 30-day period and each person who obtains water through interconnection with another person in an amount that exceeds an average rate of 100,000 gallons per day in any 30-day period shall measure or calculate:

(1) Withdrawals, and water obtained through interconnection with another person by means of a continuous-recording device or flow meter or other method, accurate to within 5% of actual flow.

(2) Consumptive uses by a means or method accurate to within 10% of actual flow.

(d) Upon written request from a registrant, the Department may grant exceptions to the 5% or 10% performance standards, if maintenance of the standard is not technically feasible or economically practicable.

(e) A person who is subject to § 110.204(b) (relating to voluntary registration) or § 110.301 (relating to reporting requirement) but is not subject to subsections (a)—(c) shall measure or calculate the withdrawals or uses by a means or method, which is based upon established scientific principles, design or manufacturer's product specifications, or research results.

§ 110.502. Recording frequency.

Withdrawals and uses subject to § 110.501(a) and (b) (relating to metering and measuring requirement) shall be recorded on a daily basis. Withdrawals and water obtained through interconnection with another person subject to § 110.501(c) shall be recorded on a weekly basis. Uses subject to § 110.501(c) shall be recorded monthly. Withdrawals and uses subject to § 110.501(e) shall be recorded monthly.

§ 110.503. Measuring requirement in critical water planning areas.

(a) The Department may require persons subject to § 110.201 (relating to registration requirement) located within a critical water planning area to measure or calculate their withdrawals and uses by means of a more accurate measuring method (but not more accurate than 5%) and record the measurements on a more frequent basis (not to exceed daily) than required in accordance with §§ 110.501 and 110.502 (relating to metering and measuring requirement; and recording frequency), if the Department determines that more accurate data is required for the development of a critical area resource plan in a watershed within a critical water planning area. Upon receipt of written notice from the Department, including an explanation of the basis for the determination, those persons shall begin the measurements or calculations within 180 days.

(b) In making the determination, the Department will consider the necessity of requiring more accurate data and having it recorded more frequently than required by §§ 110.501 and 110.502, from various categories of water users, for effective critical area resource planning in the specific watershed and the costs to registrants of providing the accuracy and frequency.

Subchapter F. WATER CONSERVATION

- Sec.
- 110.601. Registration.
- 110.602. Registration information.
- 110.603. Reporting.
- 110.604. Water Resources Technical Assistance Center.

§ 110.601. Registration.

A person who has implemented a water conservation project or practice may register the project or practice with the Department.

§ 110.602. Registration information.

Registration of water conservation projects or practices must be on forms, prescribed by the Department, containing information including the following:

- (1) The registrant name and address.
- (2) A 7.5-minute United States Geological Survey Quadrangle map, or acceptable substitute, showing the location of the project or practice.
- (3) A description of the project or practice, including information detailing a description of:
 - (i) Project or practice prior and subsequent to implementation of a water conservation program.

(ii) Quantity of demand and withdrawal prior and subsequent to implementation of a water conservation program, showing a reduction in demand or withdrawal.

(iii) Quantity of consumptive use prior and subsequent to implementation of a water conservation program, showing a reduction in consumptive use.

(iv) Improvements in water use efficiency, including plumbing retrofit programs.

(v) Reduction of water leakage, loss and waste.

(vi) Improvement in reuse and recycling of water.

(vii) Increase of supply or storage of water.

(viii) Improvements in land management practices to conserve water or to preserve or increase groundwater recharge.

(ix) Conservation-based rate structure.

(x) Water provided to offset water use during drought periods.

§ 110.603. Reporting.

Each person who has registered a water conservation project or practice in accordance with this subchapter shall submit annually to the Department, on forms prescribed by the Department and developed in consultation with the Statewide Committee, a report documenting the continuing effectiveness of the project or practice.

§ 110.604. Water Resources Technical Assistance Center.

The Department will establish a Water Resources Technical Assistance Center to promote voluntary water conservation and to provide technical assistance on water resources use issues, including programs identified in section 3120(a) of the act (relating to water conservation).

[Pa.B. Doc. No. 08-2057. Filed for public inspection November 14, 2008, 9:00 a.m.]

**ENVIRONMENTAL QUALITY BOARD
[25 PA. CODE CHS. 218 AND 240]**

Radiological Health and Radon Certification Fees

The Environmental Quality Board (Board) by this order amends 25 Pa. Code Chapters 218 and 240 (relating to fees; and radon certification). These regulations revise the fees associated with Article V (relating to radiological health) programs including permits for radiation-producing machines, radioactive materials and radon certification. Appendix A of Chapter 218, dealing with radioactive material license fee categories, has been revised to better reflect the license categories covered under Pennsylvania's Agreement State status with the United States Nuclear Regulatory Commission. The radon certification fees in Chapter 240 have been organized into a new table designated as Appendix A and named the Radon Certification Fee Schedule. The Radon Certification Fee Schedule also includes new fees for certification of course providers, primary testing devices and additional testing employees within a firm as well as new fees for late submission of applications and late submission of required reports.

This order was adopted by the Board at its meeting of August 19, 2008.

A. *Effective Date*

These amendments are effective on January 1, 2009.

B. *Contact Persons*

For further information, contact Louis Ray Urciuolo, Chief, Division of Radiation Control, P. O. Box 8469, Rachel Carson State Office Building, Harrisburg, PA 17105-8469, (717) 787-3720 or Richard Morrison, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This proposal is available electronically through the Department of Environmental Protection's (Department) web site at www.depweb.state.pa.us.

C. *Statutory Authority*

These final-form regulations are being made under the authority of sections 301, 302 and 401 of the Radiation Protection Act (act) (35 P. S. §§ 7110.301, 7110.302 and 7110.401), which, respectively, direct the Department to develop and conduct comprehensive programs for the registration, licensing, control, management, regulation and inspection of radiation sources and radiation source users; collect reasonable annual fees in an amount at least sufficient to cover the Department's costs in administering programs; and delegates to the Board the power to adopt the regulations of the Department to implement the act.

These final-form regulations are also made under section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), which authorizes and directs the Board to adopt regulations necessary for the proper performance of the work of the Department, and under the Radon Certification Act (63 P. S. §§ 2001—2014), which directs the Department to establish, by regulation, a fee schedule to cover the costs of radon certification programs. See 63 P. S. § 2008.

D. *Background of the Regulations*

The Radiation Control Act (35 P. S. §§ 7110.101—7110.604) requires the Department to establish fees in amounts at least sufficient to cover the costs of the radiation protection program mandated by that act. Similarly, the Radon Certification Act requires the Department establish fees for its certification activities. In 1991, the Board created fees in Chapter 240 (relating to radon certification). These fees were published at 21 Pa.B. 317 (January 19, 1991) and have not been adjusted since then. In 2001, the Board last updated Chapter 218 of the radiological health regulations to revise fees associated with programs for radiation-producing machines and radioactive materials. This update was published at 31 Pa.B. 6280 (November 17, 2001). In recent years, receipts from registrations, licenses and certifications have fallen short of the costs to operate those programs primarily due to contract labor increases for personnel and the cumulative effect of inflation.

The Department presented its Radiation Protection Advisory Committee (RPAC) with proposed amendments for fees in Chapters 218 and 240 at its meeting on August 21, 2007. The RPAC recommended by letter of the Chairperson dated September 12, 2007, that the proposal be forwarded, unchanged, to the Board for approval and publication as proposed rulemaking. The RPAC also recommended that due to the small and fragile nature of the radon industry, the Department evaluate the possibility of phasing in radon fees or scale fees, or both, to

business size. The RPAC also asked the Department to consider indexing fees to inflation to help avoid significant future fee increases. The Board reviewed the proposed amendments at its meeting on December 18, 2007. The proposed amendments were published at 38 Pa.B. 1246 (March 15, 2008) with a 30-day comment period. No public meetings were held. Two commentators filed responses to the proposed rulemaking, both of which were from the regulated community regarding radon fees. The Board received no comments from the Independent Regulatory Review Commission (IRRC) or the legislative oversight committees concerning the proposed rulemaking.

As requested by the RPAC, the Department considered indexing fees to inflation. However, at this time it is the Department's policy not to introduce the administrative complexity of indexing fees. The regulated community should find fiscal planning easier knowing that fees will be fixed for the next 4 years or so. The Department also considered phasing in the change in radon fees, but could not further delay increasing revenues since the certification process is already spread over a 2-year period. In response to the RPAC's request to evaluate scaling radon fees to business size, the Department determined that the regulation already effectively did that. The Department therefore returned to the RPAC on May 29, 2008, with a draft of the final-form regulations that was unchanged from proposed and discussed the Department's intended response to the commentators. By letter from the RPAC Chairperson dated May 30, 2008, the RPAC recommended the draft final-form regulations be forwarded unchanged to the Board for approval as final-form regulations.

E. *Summary of Changes to the Proposed Rulemaking*

The final-form regulations presented are unchanged from proposed except for a housekeeping change to correct an omission in § 240.123 (relating to radon laboratory application contents). When the fees in the individual sections of Chapter 240 were moved, updated and consolidated into Appendix A (relating radon certification fee schedule), the preamble to the proposed rule failed to show the deletion of the fee in § 240.123 that was moved to Appendix A. This was corrected in the final-form regulations using the same formatting as applied to the fees in other sections that were moved to Appendix A.

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

Comments were concerned with the impact of fees on the radon service industry, which is comprised of small businesses of varying size. From the start, the Department has tried to minimize that impact and still meet its statutory obligations. IRRC reviewed the proposed amendments and all comments received on it. IRRC did not comment, other than to say the final-form regulations would be deemed approved if presented unchanged from proposed.

A general comment was made that the radon industry derives no real benefit from the fees. The Department emphasizes that the fees are primarily used to protect the general public from potential harm from poor radon services. This is accomplished through the certification process for which costs must be recovered through the fees. The Department will review application materials, maintain databases on those certifications, answer questions from the public regarding radon service providers, and the like. Through this, the radon service industry does benefit indirectly. The Department engages in outreach to the general public on the dangers of radon and

the need to test and mitigate with certified testers and mitigators, respectively. Certification revenues are not used for public outreach; however, the Department's efforts to promote public awareness of potential radon problems in homes, coupled with the maintenance of lists of certified service providers and a toll free radon hot line, promotes business for the radon service industry. It reduces advertising costs and helps to minimize competitive pressure by excluding uncertified individuals.

Another general comment was received that the radon fee increases are exorbitant. The Department has not increased radon certification fees for over 16 years. One reason costs have been contained is that the Department's radon certification program maintains a minimum number of staff. The Department looked at the fee increase for an average radon laboratory, testing and mitigation firm and determined that the fee increase was no more than inflation, even though the Department's costs have risen from inflation and contracted labor costs for personnel. The current labor union contract will result in an additional 20% increase in salary, benefits and operational costs over the next 4 years.

Another commentator felt the regulated community had no control over the imposition of radon fees or their amount. The Department is reminded of the statutory requirement that certification fees be set at a level sufficient to recover the cost of the certification program. While the regulated community may not have a part in determining the overall cost of the program, it does have input in the way the costs are proportioned among the regulated community, because fees must be promulgated through this rulemaking process. This rulemaking process includes input from the RPAC and opportunities for public input through the formal public comment periods associated with regulation development.

The RPAC and the regulated community both expressed a desire to have radon fees scaled to business size. Apparently, it was not recognized that the radon fees are essentially scaled. The Department had considered three ways to scale radon certification fees to business size. One was to establish a small business fee based on gross receipts, similar to the method used with radioactive material license fees. This was not appropriate since using that standard would result in all radon service providers being categorized as small businesses. The second approach involved scaling fees according to the volume of radon services provided. This was not practical based on experience from other states that employ this approach. Volume-based scaling would significantly increase administrative overhead necessary to track and verify the volume of services provided. The Department instead chose the fairest alternative, which is to scale fees based on the number of certifications that a firm requires. This led to the creation of new fees for certification of primary testing devices, additional testing firm employees, certification of course providers, and the like. In effect, the more services a firm requests to have certified, the greater the cost because the Department would have to expend more effort. However, to balance that, it is expected the firm would be able to provide more services, do more business and be better able to afford the extra fees.

Comments were received questioning why there are fees for certification of additional testing employees and not mitigation employees. The Department noted that there are fewer individuals engaged in mitigation, less time is needed to review applications for mitigation, and certification is not as crucial in ensuring proper delivery

of mitigation services because warranty and liability factors also help ensure that services are done correctly.

A commentator asserted that the Department should allow approved annual conferences to meet the full 16 hours of continuing education requirements. The Department currently allows for 2 hours of conference attendance to qualify for 1 credit hour of continuing education, with no limitations. However, the Department-approved courses allow for improved quality control and oversight, thus ensuring that credible information is presented and retained through the administration of preapproved course materials, tests and quizzes.

A commentator suggested that the work of the radon section could be done by the regions, thus removing central office positions from the payroll. The Department's regional radon staff primarily carries out inspections, while the central office staff deals with registrations, certifications, fee collection, licensing, database management, outreach activities, the Radon Hotline and various other duties. These duties are most appropriately maintained in a centralized location. Inspection duties are better suited for dispersed, regionally-located staff.

G. Benefits, Costs and Compliance

Benefits

The Department is the main State agency charged with protecting the public and environment from radiation sources. The general public benefits in that user fees will continue to support the radiation protection program at a level adequate to accomplish its mission. The community of radioactive material users benefits by the Commonwealth being able to maintain a program that helps ensure that Pennsylvania's status as an NRC Agreement State is maintained. Under Agreement State, radioactive material license fees are generally lower than comparable Federal fees and the Department endeavors to be more responsive to its licensees than the NRC. Fees for the radon service industry will be apportioned more fairly. Instead of flat fees, the total cost of certification fees will be scaled based on the number of services and individuals requiring certification.

Compliance Costs

Compliance costs are directly related to either an increase in existing fees or imposition of new fees. In the case of radon certification fees, new fees were introduced to reduce the magnitude of the increase needed in the existing base fees. By diversifying the fee categories, the Department is minimizing the cost increase of each individual fee category. Fees in Chapter 218 for radiation-producing machines were increased across the board an average of about 40% and rounded off. This is expected to generate an increase in annual revenue of about \$1.2 million dollars from approximately 11,000 registrants and licensees. Chapter 218 fees for radioactive material licenses were increased an average of 30%. In addition, no individual radioactive material license category is more than the NRC fee category Pennsylvania licenses would have been under had the Commonwealth not become an NRC Agreement State. The increase in radioactive material license fees is expected to generate approximately an additional \$950,000 per year from about 927 licenses. The radon fee amendments are expected to generate an additional \$82,000 per year from about 750 certificate holders. The increase in all program fees is equivalent to an annual increase in fees of less than 3.7% per year which is comparable to inflation.

Compliance Assistance Plan

The radioactive material license fee categories include reduced fees for small businesses. The radon certification table was derived assuming all categories were small business. No additional assistance is planned in helping the regulated community pay the required fees.

Paperwork Requirements

No additional paperwork is involved in paying the amended fees. The reporting requirement contained in § 240.303 (relating to reporting of information) has been extended to include reporting periods of null activity. Since a report of no activity involves only a transmittal letter, the requirement will be of negligible impact unless noncompliance triggers the new \$100 late report fee in Chapter 240, Appendix A.

H. Sunset Review

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

I. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on May 14, 2008, the Department submitted a copy of the proposed rulemaking, published at 38 Pa.B. 1246 to IRRC and the Chairpersons of the House and Senate Environmental Resources and Energy Committees (Committees) for review and comment. In addition to submitting the proposed amendments, the Department provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department. A copy of this material is available to the public upon request.

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

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on October 1, 2008, these final-form regulations were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on October 2, 2008, and approved the final-form regulations.

J. Findings

The Board finds that:

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

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

(3) These regulations do not enlarge the purpose of the proposal published at 38 Pa.B. 1246.

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

K. Order

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

(a) The regulations of the Department, 25 Pa. Code Chapters 218 and 240, are amended by amending § 218.11, Chapter 218 Appendix A, §§ 240.3, 240.102—240.104, 240.113, 240.124, 240.303 and 240.306 and by adding Chapter 240, Appendix A to read as set forth at 38 Pa.B. 1246; and by amending § 240.123 to read as set forth in Annex A.

(b) The Chairperson of the Board shall submit this order, 38 Pa.B. 1246 and Annex A to the Office of General Counsel and the Office of the Attorney General for review and approval as to legality and form, as required by law.

(c) The Chairperson shall submit this order, 38 Pa.B. 1246 and Annex A to IRRC and the Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this order, 38 Pa.B. 1246 and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(e) This order shall take effect January 1, 2009.

(Editor's Note: The amendment of § 240.123 was not included in the proposed rulemaking at 38 Pa.B. 1246.)

JOHN HANGER,
Acting Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 38 Pa.B. 5818 (October 18, 2008).)

Fiscal Note: Fiscal Note 7-423 remains valid for the final adoption of the subject regulations.

Annex A**TITLE 25. ENVIRONMENTAL PROTECTION****PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION****Subpart D. ENVIRONMENTAL HEALTH AND SAFETY****ARTICLE V. RADIOLOGICAL HEALTH****CHAPTER 240. RADON CERTIFICATION****Subchapter B. CERTIFICATION****CERTIFICATION FOR RADON LABORATORY****§ 240.123. Radon laboratory application contents.**

An application for radon laboratory certification shall be submitted to the Department in writing on forms provided by the Department and must contain:

(1) Evidence that the applicant has the certification prerequisites contained in § 240.122 (relating to prerequisites for radon laboratory certification), including the services offered and experience in each. If the applicant is a firm, the applicant shall also include the duties assigned to the certified individual.

(2) A nonrefundable fee as set forth in Appendix A (relating to radon certification fee schedule).

(3) The applicant's name, address and telephone number. It must also indicate if the applicant is an individual, partnership, limited partnership, corporation or other entity. The application must include, when appropriate, the name and address of every officer, general and limited partner, director, principal shareholder, parent corporation and certified person within the applicant's organization.

(4) Compliance information, including descriptions of notices of violation, administrative orders, civil penalty

assessments and actions for violations of the act, this chapter or a term or condition of a certification.

(5) Other information the Department may require related to an applicant's qualifications or technical or administrative information related to laboratory analysis of radon samples.

(6) A verification by a responsible official of the applicant that the information contained in the application is correct to the best of the official's information and belief.

[Pa.B. Doc. No. 08-2058. Filed for public inspection November 14, 2008, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE BOARD OF DENTISTRY

[49 PA. CODE CH. 33]

Sexual Misconduct

The State Board of Dentistry (Board) hereby amends § 33.1 (relating to definitions) and adopts § 33.211a (relating to sexual misconduct), to read as set forth in Annex A.

Effective Date

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

Statutory Authority

Under section 3(c), (d), (d.1) and (o) of the Dental Law, (63 P.S. § 122(c), (d), (d.1) and (o)), the Board has authority to establish standards of professional conduct for Board-regulated practitioners under its jurisdiction. These individuals include dentists, dental hygienists, public health dental hygiene practitioners and expanded function dental assistants. These regulations define sexual misconduct and provide that sexual misconduct with a current patient is subject to disciplinary action under sections 4.1(a)(8) and 10.1 of the Dental Law (63 P.S. §§ 123.1(a)(8) and 129.1).

Background and Purpose

It should be axiomatic that it is unprofessional conduct for Board-regulated practitioners to engage in sexual misconduct with their patients. Past decisions of the Board, the Code of Professional Conduct of the American Dental Association and responsible professional publications addressing the issue denounce sexual exploitation of a patient by a practitioner. These regulations are intended to make it clear that sexual misconduct with a current patient constitutes unprofessional conduct and will subject a practitioner to disciplinary action.

The final-form regulations also provide that Board-regulated practitioners who engage in prohibited sexual conduct with patients will not be eligible for placement in the Board's impaired professional program in lieu of disciplinary or corrective actions. The impaired professional program is unable to effectively monitor Board-regulated practitioners who have engaged in sexual misconduct.

The final-form regulations also provide that patient consent will not be considered a defense to disciplinary action in these cases and provides an exception for conduct between a Board-regulated practitioner and that Board-regulated practitioner's spouse or person cohabitating with the Board-regulated practitioner.

Summary of Comments to Proposed Rulemaking and Responses to Comments

Notice of proposed rulemaking was published at 36 Pa.B. 6409 (October 21, 2006). During the public comment period, the Board received comments from the Pennsylvania Dental Association (PDA). In addition, as part of their review under the Regulatory Review Act, the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC) submitted comments. Subsequently, the Pennsylvania Dental Hygienists' Association (PDHA) submitted a letter responding to IRRC's comments. The following represents a summary of the comments received and the Board's response.

Comments from the Pennsylvania Dental Association:

The PDA suggested that these regulations "would drastically change the supervisory responsibilities a dentist must have over a hygienist or expanded function dental assistant (EFDA)." The PDA's position is that these regulations would force a dentist to supervise the private relationships of his auxiliary and that dentists may be forced to terminate an employee and risk legal action in response, or terminate the patient, which may result in abandonment or other ethical issues. Further, PDA opined that there does not appear to be a legitimate rationale for including the auxiliary personnel in this prohibition and strongly recommended that the regulations for sexual misconduct do not include auxiliary staff.

The Board does not believe the final-form regulations would impose any additional burden on dentists with regard to supervising the private relationships of staff. The final-form regulations, as drafted, state that the Board-regulated practitioner would be subject to discipline for his own conduct. There is nothing in the final-form regulations that make the dentist responsible for the conduct of his staff in this regard. The final-form regulations are not intended to "force" dentists to take any particular action if a staff member is found in violation. The Board believes that any dental professional regulated by the Board should be subject to these final-form regulations. However, in the amendments to the final-form rulemaking, the Board has eliminated "auxiliary staff" from the definition of "Board-regulated practitioner" so that the regulations would only apply to those persons holding a license or certificate issued by the Board.

The PDA also objected to the clause that eliminates consent as a defense to a disciplinary proceeding under this section. In its place, the PDA would prefer a provision that requires a higher standard of proof to show that the relationship was undertaken with consent from both parties. In addition, the PDA believes that a clause eliminating consent as a consideration potentially violates the Board-regulated practitioner's and patient's constitutional rights to free association. Finally, the PDA points out that while it could be argued that a licensed professional may waive this right as a requirement for his license, the patient does not waive this right, and therefore should not be denied the right to a consensual relationship.

The Board notes that most of the regulations relating to sexual misconduct by a health-care practitioner pro-

mulgated by other health-related boards within the Bureau of Professional and Occupational Affairs contain a provision eliminating consent as a defense. See, for example regulations of the State Board of Medicine; State Board of Osteopathic Medicine; State Board of Physical Therapy; State Board of Psychology and State Board of Social Workers, Marriage and Family Therapists and Professional Counselors in 49 Pa. Code §§ 16.110(e), 25.216(e), 40.302(a), 41.84(a), 47.64(b), 48.24(b) and 49.24(b). To date, none of these regulations have been challenged on this basis. The Board does not believe that this provision would necessarily violate anyone's constitutional right to free association. If a Board-regulated practitioner and a current patient want to engage in a consensual sexual relationship, the practitioner-patient relationship must end. Either the patient finds another dental practice, with or without the assistance of the Board-regulated practitioner, or they simply end the practitioner-patient relationship and after 3 months, by definition, the person is no longer considered a "current patient." The Board is of the opinion that sexual relationships with current patients could impair Board-regulated practitioners' professional judgment or risk the possibility of exploiting the confidence placed in them by a patient. Therefore, it is a reasonable exercise of the Board's authority to prohibit sexual misconduct.

The PDA also complained that the regulations, if enacted, may leave a practitioner liable for patient abandonment. The PDA points out that the Board's regulation in § 33.211(a)(4) (relating to unprofessional conduct) provides that it is unprofessional conduct to "withdraw dental services after a dentist-patient relationship has been established so that the patient is unable to obtain necessary dental care in a timely manner." Thus, the PDA opined that if a dentist refers a patient to another practitioner because of a consensual relationship, or if the dentist refuses to treat the patient altogether, it is not unreasonable to expect a vindictive patient to accuse the dentist of unprofessional conduct for patient abandonment. Therefore, the PDA believes that these two provisions, one prohibiting sexual conduct with a current patient, and one prohibiting patient abandonment, are contradictory.

The Board does not find these two provisions inherently contradictory. Again, if a Board-regulated practitioner wishes to engage in a consensual sexual relationship with a patient, the professional relationship must end. But it must end in a manner to assure that the patient is not "unable to obtain necessary dental care in a timely manner." That is, the patient must be referred to another dental practice where the patient may obtain necessary dental care. In addition, the fact that vindictive patients may file complaints against Board-regulated practitioners is another good reason not to engage in sexual relations with patients.

The PDA also pointed out that while it may be relatively easy for a dentist in a heavily populated area to refer a patient to a colleague in the immediate vicinity, it may be "nearly impossible" for a dentist in rural Pennsylvania to refer. In those areas of the State, PDA stated, it is not uncommon for the nearest dentist to be located over 50 miles away. The Board acknowledges that there are some underserved areas in this Commonwealth. However, the fact remains that the Board does not believe dentists or other Board-regulated professionals should be engaging in sexual relations with current patients, with the exception of a spouse or person with whom the Board-regulated practitioner is cohabitating. The rule applies equally to dentists in heavily populated areas as

well as those in rural areas. It is possible for a dentist in a rural area to comply with the rulemaking. If it is truly "impossible" to arrange for alternate care, the dentist must refrain from engaging in sexual conduct with his patient.

Finally, the PDA asked that the requirement to transfer care to another dental office be clarified because as written, it is unclear whether dentists who practice through separate corporate structures, but share office space would constitute a permissible transfer. The Board is less concerned with physical office space than it is with the potential for exploitation of patients. However, to address this concern, the Board amended the final-form rulemaking to provide that a practitioner-patient relationship may be terminated by transferring the patient to another dental practice.

Comments of the House Professional Licensure Committee

The HPLC thanked the Board for its efforts to address sexual misconduct on the part of dentists, dental hygienists and expanded function dental assistants because in the HPLC's opinion, "sexual conduct between a patient and a health care practitioner is per se exploitative." However, the HPLC submitted a number of comments for the Board's consideration.

The HPLC asked the Board to address the issue of "significant others," which the HPLC believes is not fully addressed. The Board's rulemaking provides a rule that the Board believes is enforceable. In general, that rule is: A Board-regulated practitioner may not engage in sexual conduct with a current patient, unless that patient is a spouse or person with which the Board-regulated practitioner cohabitates. The Board did not address other types of relationships because the Board determined that if the regulations excluded more casual relationships, it would weaken the regulation and make it more difficult to enforce. Marriage and cohabitation are capable of objective proof. The Board intended only to exclude sexual relations between persons who are married or living together in an intimate relationship. To that degree, the Board believes it has addressed the HPLC's concerns about "significant others."

The HPLC also asked the Board again to consider whether to define sexual misconduct by providing specific examples of prohibited conduct. The HPLC refers the Board to regulations of the State Board of Social Workers, Marriage and Family Therapists and Professional Counselors and the regulations of the Board of Dental Examiners in Maryland, which both provide specific examples of prohibited conduct, such as sexual intercourse, or any touching of the sexual or intimate parts of the person for the purpose of arousing or gratifying sexual desire in either person; nontherapeutic verbal communication or inappropriate nonverbal communication of a sexual or romantic nature; masturbating in front of a patient; sexual invitations; taking photographs or videotapes of a patient for sexual purposes; and the use of a drug on a patient for the purpose of sexual behavior. The HPLC feared that the Board's definition of sexual misconduct lacks specificity and may not put practitioners on notice of what conduct is prohibited, as due process requires. Respectfully, the Board disagrees. The rule contained in the regulations is a simple one: do not engage in sexual conduct with a current patient. It also acknowledges that there is a continuum of sexual conduct that may consist of words, gestures, expressions or actions. The Board believes the standard provided by the final-form rulemaking is sufficient to provide adequate notice to comport to the requirements of due process. The Board declines to

attempt to draft a “laundry list” of examples that constitute “sexual misconduct.” It has been the Board’s experience that courts construing those lists often find behaviors not expressly contained in the list to be acceptable. The Board does not wish to inadvertently approve sexual misconduct by omission. It would be virtually impossible to write regulations for sexual misconduct that define every possible prohibited behavior; or to exclude every possible innocent behavior. The Board believes that any of the examples provided previously would clearly be considered sexual misconduct under the regulations, without the need to specifically enumerate them. The Board believes the proposed rulemaking is flexible enough to cover most situations, without being overly burdensome.

The HPLC asked the Board to consider placing the definitions in § 33.1 (relating to definitions) and to consider using the defined term “Board-regulated practitioner” throughout the regulations. Further, the HPLC noted that the definition of “Board-regulated practitioner” includes auxiliary personnel and asks whether the regulations should extend to auxiliary personnel. The Board has responded by moving the definitions to § 33.1, utilizing the term “Board-regulated practitioner” throughout the final-form rulemaking and by deleting the reference to auxiliary personnel from the definition. In addition, the Board has added “public health dental hygiene practitioner” to the definition of “Board-regulated practitioner” in response to Act 51 of 2007, which created a new category of dental professional regulated by the Board.

The HPLC pointed out that the Board already has existing regulations prohibiting “sexual abuse” of a patient and asked the Board to harmonize this rulemaking with the existing regulations. While sexual abuse of a patient would always constitute sexual misconduct, sexual misconduct would not necessarily always rise to the level of sexual abuse. The Board determined not to amend the existing regulations to provide the prosecutors the flexibility to charge sexual abuse as a separate, more serious, violation in those cases where it is merited.

The HPLC asked the Board to consider adding language which would speak to the inadmissibility of the patient’s past sexual conduct as evidence in disciplinary proceedings, noting the existence of that language in the regulations of the State Board of Psychology. The Board considered this comment and declined to add the language to the regulations. The Board notes that the Pennsylvania Rules of Evidence do not contain a provision making evidence of sexual conduct generally inadmissible in civil proceedings, but that where objectionable on other grounds, such evidence may be excluded.

Comments from the Independent Regulatory Review Commission

IRRC raised four concerns with the proposed rulemaking. First, like the HPLC, IRRC noted that the definitions should be moved to § 33.1. The Board has made this revision. Second, IRRC noted that the definition of “sexual misconduct” included two variations of the same word. The Board has addressed this comment by amending the definition of “sexual misconduct” to mean any conduct with a current patient, including words, gestures or expressions, actions or any combination thereof, which is sexual in nature or which may be construed by a reasonable person as sexual in nature. Next, IRRC also objected to the use of the term “practitioner” throughout the rulemaking instead of the defined term “Board-regulated practitioner.” The Board has amended the final-form rulemaking to use the defined term throughout. Finally, IRRC asked whether the Board

intended the rulemaking to apply to auxiliary personnel. As noted previously, the Board has addressed this comment by amending the definition of “Board-regulated practitioner” to exclude auxiliary personnel.

Comments from the Pennsylvania Dental Hygienists’ Association

In light of IRRC’s comment regarding whether the rulemaking is intended to apply to auxiliary personnel, PDHA recommended that the Board amend the definition of “Board-regulated practitioner” to exclude auxiliary personnel noting that the Board does not issue licenses or permits to auxiliary personnel and has no statutory authority to discipline auxiliary personnel. As noted previously, the Board has made this amendment to the final-form rulemaking.

Fiscal Impact and Paperwork Requirements

The amendments should have no fiscal impact on the Commonwealth or its political subdivisions. Likewise, the amendments should not necessitate any legal, accounting, reporting or other paperwork requirements.

Sunset Date

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

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Board submitted a copy of the notice of proposed rulemaking, published at 36 Pa.B. 6409, to IRRC, the SCP/PLC and the HPLC for review and comment.

In compliance with section 5(c) of the Regulatory Review Act, the Board also provided IRRC, the SCP/PLC and the HPLC with copies of comments received as well as other documents when requested. In preparing the final-form regulations, the Board has considered the comments received from IRRC, the HPLC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), the final-form regulations were approved by the HPLC on September 17, 2008, and deemed approved by the SCP/PLC on October 15, 2008. Under section 5.1(e) of the Regulatory Review Act, IRRC met on October 16, 2008, and approved the final-form regulations.

Contact Person

Further information may be obtained by contacting Christopher Grovich, Board Counsel, State Board of Dentistry, P. O. Box 2649, Harrisburg, PA 17105-2649.

Findings

The State Board of Dentistry 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 the final-form rulemaking do not enlarge the purpose of proposed rulemaking published at 36 Pa.B. 6409.

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

Order

The State Board of Dentistry, acting under its authorizing statutes, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 33, are amended by amending § 33.1 and adding § 33.211a to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(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 on publication in the *Pennsylvania Bulletin*.

JOHN V. REITZ, D.D.S.,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 38 Pa.B. 6123 (November 1, 2008).)

Fiscal Note: Fiscal Note 16A-4618 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 33. STATE BOARD OF DENTISTRY

Subchapter A. GENERAL PROVISIONS

§ 33.1. Definitions.

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

* * * * *

Board-regulated practitioner—A dentist, dental hygienist, public health dental hygiene practitioner or expanded function dental assistant.

* * * * *

Current patient—

(i) A person that is in the process of dental treatment with a Board-regulated practitioner or who has been treated by the Board-regulated practitioner within the previous 3 months.

(ii) The term does not include a patient who has terminated the Board-regulated practitioner/patient relationship by being accepted as a patient of record at another dental practice.

* * * * *

Sexual misconduct—Any conduct with a current patient, including words, gestures or expressions, actions or any combination thereof, which is sexual in nature, or which may be construed by a reasonable person as sexual in nature.

Subchapter C. MINIMUM STANDARDS OF CONDUCT AND PRACTICE

§ 33.211a. Sexual misconduct.

(a) *Disciplinary action authorized.* Unprofessional conduct, as defined in section 4.1(a)(8) of the act (63 P.S.

§ 123.1(a)(8)), includes sexual misconduct by a dentist, a dental hygienist, a public health dental hygiene practitioner or an expanded function dental assistant (EFDA), and subjects the Board-regulated practitioner to disciplinary action under section 4.1(a)(8) and section 10.1 of the act (63 P.S. § 129.1).

(b) *Impaired professional program.* A Board-regulated practitioner who engages in conduct prohibited by this section will not be eligible for placement into an impaired professional program in lieu of disciplinary action or correction.

(c) *Consent.* Consent is not a defense to conduct prohibited by this section.

(d) *Exclusion.* This section does not apply to conduct between a Board-regulated practitioner and the Board-regulated practitioner's spouse or a person cohabitating with the Board-regulated practitioner.

[Pa.B. Doc. No. 08-2059. Filed for public inspection November 14, 2008, 9:00 a.m.]

STATE REAL ESTATE COMMISSION

[49 PA. CODE CH. 35]

Consumer Notice

The State Real Estate Commission (Commission) amends §§ 35.201 and 35.336 (relating to definitions; and disclosure summary for the purchase or sale of residential or commercial real estate or for the lease of residential or commercial real estate when the licensee is working on behalf of the tenant) to read as set forth in Annex A.

Statutory Authority

The amendments are authorized under section 608 of the Real Estate Licensing and Registration Act (RELRA) (63 P.S. § 455.608).

Response to Public Comments and Regulatory Review and Description of Amendments to the Final-Form Rule-making

Notice of proposed rulemaking was published at 37 Pa.B. 1499 (April 7, 2007). Publication was followed by a 30-day public comment period during which the Commission received comments from the Pennsylvania Association of Realtors (PAR). Following the close of the public comment period, the Commission received comments from the House Professional Licensure Committee (HPLC). The Independent Regulatory Review Commission (IRRC) and the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) did not comment.

The following is a discussion of the comments received and the Commission's response:

§ 35.336—General Comments

PAR asked that the Commission explain whether the Commission intends to prescribe the "shape and size" of the Consumer Notice or merely the content in its requirement in subsection (c) that the Consumer Notice be in the "format available from the Commission." While the Commission has no preference whether the Consumer Notice is printed in portrait or landscape, the Commission's intention is for the Consumer Notice to not only contain the content required by § 35.336, but also the exact language in the order found in § 35.336.

The HPLC recommended that the Commission include the cautionary language about not disclosing confidential

information until after a business relationship agreement is signed at the beginning and end of the Consumer Notice for heightened impact. In proposed form, the Commission moved this cautionary language from the beginning of the Notice to immediately above the consumer's signature. In the Commission's experience, it has found that consumers pay more attention to bolded language located immediately above a signature than to language at the beginning of the document. As a result, it has not reinserted the cautionary language at the beginning of the Consumer Notice as recommended.

§ 35.336(c)—Seller Agent/Buyer Agent

The HPLC questioned why the Commission eliminated the duty that seller agents make a continuous and good faith effort to find a buyer for the property except while the property is subject to an existing agreement and that buyer agents make a continuous and good faith effort to find a property for the buyer/tenant. The Commission concurs with the HPLC and has reinserted this language under both seller agent and buyer agent.

PAR commented that the statement that licensees must reveal known material defects about the property is repeated in the specific sections for seller agent, buyer agent and again under the duties for all licensees. PAR suggested that to streamline the form, the requirement to disclose all material defects should be included under the duties of all licensees only. The Commission has not made this change because it wants to assure that consumers know about the disclosure requirement within each relationship.

§ 35.336(c)—Dual agent/Designated Agent

The HPLC questioned why the Commission eliminated the duty of the broker to take responsibility to direct and supervise the business activities of the licensees who represent the buyers and sellers without taking any action that is adverse or detrimental to either party's interest in the transaction. While the bullet that contained this information in the current Consumer Notice has been eliminated in the revised form, the Commission has not eliminated this requirement. Instead, it is found in part in the dual agent section and in part in the designated agent section. Under the designated agent section, the Consumer Notice advises, "Because the broker supervises all of the licensees, the broker automatically serves as a dual agent." Under the dual agent section, the Consumer Notice advises, "A dual agent may not take any action that is adverse or detrimental to either party."

§ 35.336(c)—Transaction licensee

PAR recommended that the section on transaction licensee be formatted similar to seller agent, buyer agent, dual agent and designated agent. Unlike the other relationships mentioned, transaction licensees do not have an agency relationship with the consumer. As such, the Commission cannot include transaction licensees under the categories of agency relationships that licensees may enter into with consumers.

§ 35.336(c)—Duty owed to all consumers

The HPLC questioned why the Commission deleted the phrase "which meets the practice standards required by the act" from the requirement that licensees exercise reasonable skill and care in the first bullet. Upon further reflection, the Commission has reinserted this language.

PAR recommended that the Commission change the fourth bullet to "Real Estate Seller Disclosure Law" rather than "Act." The Commission concurs and has made that change.

§ 35.336(c)—Negotiable terms

The HPLC recommended that the Commission substitute the phrase "the sharing of fees" in the fourth bullet for "compensation to other brokers." The Commission concurs with this suggestion, and since the broker may cooperate and share fees with other brokers, has revised the bullet to read "The broker's cooperation and sharing of fees with other brokers."

§ 35.336(c)—Acknowledgement

Finally, the HPLC recommended that the Commission add to the signature line for the licensee a space for the licensee's printed name and the date signed, as well as the license number to clearly identify the licensee. The Commission concurs and has made the recommended change to the form in the final-form regulations.

Other Amendments to the Final-Form Regulations

In the proposed rulemaking, the Commission intended to retain the requirements previously espoused in section 608 of the RELRA (63 P.S. § 455.608) that licensees retain a copy of the signed or refused acknowledgement for 6 months and that licensees provide the consumer a copy of the entire disclosure summary. However, this language was inadvertently replaced with the language that appeared in subsection (b) of the proposed rulemaking as published, which is identical to the first paragraph of the Consumer Notice. In the final-form rulemaking, the Commission is deleting the redundant language and is inserting the intended language as subsection (b).

Fiscal Impact and Paperwork Requirements

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

Sunset Date

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

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on March 28, 2007, the Commission submitted a copy of the notice of proposed rulemaking, published at 37 Pa.B. 1499, to IRRC, 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. In preparing the final-form regulations, the Commission has considered all comments from the HPLC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on September 17, 2008, the final-form regulations were approved by the HPLC. On October 15, 2008, the final-form regulations were deemed approved by SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on October 16, 2008, and approved the final-form regulations.

Contact Person

Further information may be obtained by contacting Patricia A. Ridley, Administrative Assistant, State Real

Estate Commission, P. O. Box 2649, Harrisburg, PA 17105-2649, www.state.pa.us/bpoa/recomm/mainpage.

Findings

The Commission finds that:

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

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

(3) The amendments to the final-form rulemaking do not enlarge the purpose of proposed rulemaking published at 37 Pa.B. 1499.

(4) The final-form regulations are necessary and appropriate for administering and enforcing the authorizing act identified in this Preamble.

Order

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

(a) The regulations of the Commission, 49 Pa. Code Chapter 35, are amended by amending §§ 35.201 and 35.336 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

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

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

(d) The amendments will be effective December 15, 2008; however, licensees will have until June 15, 2009, to begin using the new Consumer Notice form.

ANNIE HANNA CESTRA, Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 38 Pa.B. 6123 (November 1, 2008).)

Fiscal Note: Fiscal Note 16A-5614 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 35. STATE REAL ESTATE COMMISSION

Subchapter B. GENERAL PROVISIONS

§ 35.201. Definitions.

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

* * * * *

Initial interview—The first substantive discussion between a licensee and a consumer about the consumer's real estate needs.

* * * * *

Subchapter E. STANDARDS OF CONDUCT AND PRACTICE

REAL ESTATE DOCUMENTS

§ 35.336. Disclosure summary for the purchase or sale of residential or commercial real estate or for the lease of residential or commercial real estate when the licensee is working on behalf of the tenant.

(a) Licensees shall provide the consumer with the Consumer Notice at their initial interview.

(b) Licensees shall retain a copy of the signed/refused acknowledgement for 6 months and provide the consumer a copy of the entire disclosure summary.

(c) The Disclosure Summary must be entitled "Consumer Notice" and must be in the following format available from the Commission office upon request by phone, fax or internet:

CONSUMER NOTICE

THIS IS NOT A CONTRACT

In an effort to enable consumers of real estate services to make informed decisions about the business relationships they may have with real estate brokers and salespersons (licensees), the Real Estate Licensing and Registration Act (RELRA) requires that consumers be provided with this Notice at the initial interview.

• Licensees may enter into the following agency relationships with consumers:

Seller Agent

As a seller agent, the licensee and the licensee's company works exclusively for the seller/landlord and must act in the seller's/landlord's best interest, including making a continuous and good faith effort to find a buyer/tenant except while the property is subject to an existing agreement. All confidential information relayed by the seller/landlord must be kept confidential except that a licensee must reveal known material defects about the property. A subagent has the same duties and obligations as the seller agent.

Buyer Agent

As a buyer agent, the licensee and the licensee's company work exclusively for the buyer/tenant even if paid by the seller/landlord. The buyer agent must act in the buyer/tenant's best interest, including making a continuous and good faith effort to find a property for the buyer/tenant, except while the buyer is subject to an existing contract, and must keep all confidential information, other than known material defects about the property, confidential.

Dual Agent

As a dual agent, the licensee works for both the seller/landlord and the buyer/tenant. A dual agent may not take any action that is adverse or detrimental to either party but must disclose known material defects about the property. A licensee must have the written consent of both parties before acting as a dual agent.

Designated Agent

As a designated agent, the broker of the selected real estate company designates certain licensees within the company to act exclusively as the seller/landlord agent and other licensees within the company to act exclusively as the buyer/tenant agent in the transaction. Because the broker supervises all of the licensees, the broker automatically serves as a dual agent. Each of the designated

