

RULES AND REGULATIONS

Title 22—EDUCATION

STATE BOARD OF EDUCATION

[22 PA. CODE CH. 14]

Disciplinary Placements

The State Board of Education (Board) has amended § 14.143 (relating to disciplinary placements) to read as set forth in Annex A.

Public notice of the intention to adopt this final-omitted form rulemaking under the procedures specified in sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (CDL) (45 P. S. §§ 1201 and 1202), has been omitted as authorized under section 204(3) of the CDL (45 P. S. § 1204(3)), because the Board finds that these procedures are, under the circumstances, unnecessary. Public comment is unnecessary because the Consent Decree resolving the litigation captioned *Pennsylvania Association of Retarded Citizens v. Com. of Pennsylvania (PARC)*, C.A. No. 71-42 (E.D. Pa.), as more fully articulated in Attorney General Official Opinion No. 35, 1973 Pa. AG LEXIS 35 (April 23, 1973), requires that certain protections attach to students with mental retardation limiting the circumstances under which they may be excluded from their educational placements without predeprivation due process protections.

Persons affected by this amendment have been given actual notice of the Board's intention to amend § 14.143 in advance of final-omitted form rulemaking under section 204(2) of the CDL. Specifically, all local educational agencies (LEAs) will receive electronic notice by means of PENN LINK transmission. Organizations representing students with disabilities and their parents will be notified in writing.

Statutory Authority

The Board acts under the authority of sections 1372 and 2603-B of the Public School Code of 1949 (24 P. S. §§ 13-1372 and 26-2603-B).

Background

Section 14.143(b) addresses the requirements originally established by the Consent Decree issued in *PARC*. Entered initially on October 7, 1971, and amended February 14, 1972, the *PARC* Consent Decree establishes that any disciplinary removal of a student with mental retardation is a change in educational placement requiring predeprivation due process protections unless extraordinary circumstances are present—specifically, a student cannot be removed unless the student with mental retardation presents a danger to himself or others. Both the version of § 14.143 finally promulgated at 31 Pa.B. 3021, 3029 (June 9, 2001) and the more recent version finally promulgated at 38 Pa.B. 3575, 3586 and 3587 (June 28, 2008), reference certain circumstances under which LEAs would have the authority to suspend students with mental retardation for disciplinary reasons. The 1999 Federal regulation adopted by reference in the 2001 version of § 14.143 describing these circumstances were found in 34 CFR 300.520(a)(2)(i) and (ii) (relating to authority of school personnel), and specifically provided that an LEA may place the child for up to 45 days in an interim alternative educational setting—even if the parents disagree—when a child carries a weapon to school or knowingly possesses or uses drugs or sells or solicits the

sale of a controlled substance on school premises. In the 2004 Federal regulations, the section that contains these “special circumstances” is found in 34 CFR 300.530(g)(1)—(3) (relating to special circumstances) and permits an LEA to place a child in an interim educational setting for up to 45 school days for weapon and drugs infractions (as identified in the 2001 version of § 14.143), as well as for the infliction of a serious bodily injury—even if the parents disagree.

The conflict with the *PARC Consent Decree* in the current configuration of § 14.143(b) arises from the citation to the Federal regulations that were incorporated into § 14.143. Rather than properly referencing specifically 34 CFR 300.530(g)(1)—(3), which describes the special circumstances that were adopted by reference in the 2001 version of § 14.143 and are consistent with the *PARC Consent Decree*, the version of § 14.143(b) finally promulgated on June 28, 2008, references “34 CFR 300.530—300.535 (relating to authority of school personnel; determination of setting; appeal; placement during appeals; protections for children not determined eligible for special education and related services; referral to and action by law enforcement; and judicial authorities).” This broad, six-section citation to and purported incorporation of Federal regulations encompasses the whole *Discipline Procedures* part of the Federal regulations, not just the special circumstances section. That clearly was not the Board's intent, and the citation was a production error.

This all-inclusive reference to Federal regulations governing discipline procedures would suggest that all of the Federal disciplinary procedures apply to students with mental retardation—thus allowing local educational agencies to apply the same disciplinary rules to the *PARC*-protected students that apply to all children with disabilities eligible under the IDEA. However, application of all of these procedures would be inconsistent with the *PARC* Consent Decree, which is binding throughout this Commonwealth. The Board emphatically did not intend to render § 14.143 incompatible with the *PARC* Consent Decree. Thus, it is clear that the reference in § 14.143(b) to the entire Federal regulatory framework governing discipline procedures was clearly a mistake in the production of the regulation and did not accurately reflect the Board's intent.

Since it has at no time indicated the intention to depart from the requirements and limitations of the *PARC* Consent Decree in amending § 14.143, the Board through this final-omitted rulemaking amends § 14.143(b) governing the procedures for the disciplinary exclusion of students with mental retardation to correct the error and to make it facially compatible with the *PARC* Consent Decree. Consistent with the intention of the Board to incorporate by reference only the limited exceptions to the disciplinary exclusion of students with mental retardation found in 34 CFR 300.530(g)(1)—(3), which would be consistent with the *PARC* Consent Decree, this amendment to § 14.143(b) will make subsection consistent with both its predecessor version adopted in 2001 and the provisions of the *PARC* Consent Decree.

A summary of substantive changes is provided as follows:

§ 14.143. Disciplinary placements.

The reference to 34 CFR 300.530—300.535 is deleted. Reference to 34 CFR 300.530(g)(1)—(3) is added in replacement of the deleted language. This change makes

the regulation consistent with the clear intent of the Board to maintain § 14.143(b) in harmony with the *PARC* Consent Decree, as was the previous version of § 14.143(b).

The revised language clarifies that any disciplinary exclusion from school of a student with mental retardation requires predeprivation due process protections except in the special circumstances articulated in 34 CFR 300.530(g)(1)—(3). These special circumstances exist if the student: (1) carries a weapon to or possesses a weapon at school, on school premises or to or at a school function under the jurisdiction of an SEA or an LEA; (2) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or (3) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

Fiscal Impact and Paperwork Requirements

The amendment will have no fiscal impact on the Commonwealth or its political subdivisions because the change will simply continue the requirements that were contained since 2001 in § 14.143(b) relating to disciplinary placements and the exclusion of students with mental retardation.

Effective Date

The final-omitted rulemaking will become effective upon publication in the *Pennsylvania Bulletin*. However, based on the *PARC* Consent Decree, the substance of the final-omitted rulemaking is binding now and has been since § 14.143 was promulgated.

Sunset Date

In accordance with its policy and practice regarding regulations, the Board will review the effectiveness of these regulation after 4 years. Therefore, no sunset date is necessary.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on October 27, 2008, a copy of the final-omitted regulation was submitted to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Committees (Committees) on Education for review and comment. A copy of the final-omitted regulation was submitted on the same date to the Attorney General for review and comment under the Commonwealth Attorneys Act (71 P. S. §§ 732-101—732-506).

Under section 5.1(j.1) of the Regulatory Review Act (71 P. S. § 745.5a(j.1)), the final-omitted regulation was deemed approved by the Committees when the General Assembly adjourned sine die. Under section 5.1(e) of the Regulatory Review Act, on December 18, 2008, IRRC met and approved the final-omitted regulation.

Contact Person

The official responsible for information on this final-form rulemaking is Jim Buckheit, Executive Director, State Board of Education, 333 Market Street, Harrisburg, PA 17126-0333, (717) 787-3787, TDD (717) 787-7367.

Findings

The Board finds that:

(1) Public notice of the intention to amend its regulation as adopted by this order under the procedures specified in sections 201 and 202 of the CDL has been

omitted under the authority contained in sections 204(3) of the CDL, because the Board has, for good cause, found that the procedures specified in sections 201 and 202 of the CDL are, in this circumstance, unnecessary because of the Commonwealth's obligations articulated in the *PARC* Consent Decree, as more fully articulated in Attorney General Official Opinion 39 (April 23, 1973).

(2) The amendment of the regulation of the Board in the manner provided in this order is necessary and appropriate for administration of the *Pennsylvania Code* and the Commonwealth's obligations established by the *PARC* Consent Decree.

Order

The Board, acting under authorizing statute, orders that:

(a) The regulations of the Board, 22 Pa. Code Chapter 14, are amended by amending § 14.143 to read as set forth in Annex A.

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

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

(d) This order is effective upon publication in the *Pennsylvania Bulletin*.

JIM BUCKHEIT,
Executive Director

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 104 (January 3, 2009).)

Fiscal Note: 6-315. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 22. EDUCATION

PART I. STATE BOARD OF EDUCATION

Subpart A. MISCELLANEOUS PROVISIONS

CHAPTER 14. SPECIAL EDUCATION AND PROGRAMS

EDUCATIONAL PLACEMENT

§ 14.143. Disciplinary placements.

(a) Notwithstanding the requirements incorporated by reference in 34 CFR 300.530(b) and 300.536 (relating to authority of school personnel; and change of placement because of disciplinary removals), a disciplinary exclusion of a student with a disability for more than 15 cumulative school days in a school year will be considered a pattern so as to be deemed a change in educational placement.

(b) A removal from school is a change of placement for a student who is identified with mental retardation, except if the student's actions are consistent with 34 CFR 300.530(g)(1)—(3) (relating to authority of school personnel).

[Pa.B. Doc. No. 09-7. Filed for public inspection January 2, 2009, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

SUSQUEHANNA RIVER BASIN COMMISSION

[25 PA. CODE CH. 806]

Review and Approval of Projects

This document contains amendments to the project review regulations of the Susquehanna River Basin Commission (Commission) requiring review and approval of any natural gas well development project targeting the Marcellus or Utica shale formations and involving the withdrawal, diversion or consumptive use of waters of the Susquehanna River Basin, adding a provision providing for a specific approval by rule process for consumptive water use associated with such projects, and modifying the definitions of "construction" and "project." In addition, editorial changes are made to the existing approval by rule provision related to the consumptive use of water withdrawn from public water supply systems to make that provision consistent with the new approval by rule provision for natural gas well development projects.

Dates: These rules are effective on January 15, 2009.

Address: Susquehanna River Basin Commission, 1721 North Front Street, Harrisburg, PA 17102-2391.

For Further Information Contact: Richard A. Cairo, General Counsel, (717) 238-0423; fax (717) 238-2436; rcairo@srbc.net. Also, for further information on the final-form rulemaking, visit the Commission's web site at www.srbc.net.

Supplementary Information

Background and Purpose of Amendments

As a result of advances in hydraulic fracturing and higher natural gas prices, natural gas well development activity in the Susquehanna River Basin has increased dramatically in the past year, resulting in a large number of project applications being filed with the Commission seeking approval for the withdrawal and consumptive use of water for that activity. The Commission is hereby adopting a final-form rulemaking action to handle the large and immediate influx of project applications, and to avoid adverse, cumulative adverse or interstate effects to the water resources of the basin.

The final-form rulemaking modifies the definitions of "construction" and "project" for purposes of natural gas well development; requires review and approval of any natural gas well development project involving the withdrawal, diversion, or consumptive use of water; and adds a specific approval by rule process associated with the consumptive use of water by such projects. The Commission's current approval by rule process is available for use only if the sole source of water is a public water supply system. Under this rule change, the new approval by rule process will allow for the consumptive use of wastewater, acid mine water, and other sources of water for natural gas well development projects. The final-form rulemaking will not change the current process used to review groundwater or surface water withdrawals.

In addition, editorial changes are made to the existing approval by rule provision relating to the consumptive use of water withdrawn from public water supply systems to make that provision consistent with the new approval by rule provision for natural gas well development projects.

The Commission convened public hearings on October 21, 2008, in Williamsport, PA and on October 22, 2008, in Binghamton, NY. A written comment period was held open until October 31, 2008. Comments were received at both the hearings and during the comment period, one set coming mainly from the environmental community or those concerned about environmental issues, and another set coming from industry representatives.

Comments from the environmental community expressed concern that an approval by rule process applying to gas well drilling projects would not provide sufficient protection to environmental resources such as aquifers and streams. There was a concern that the approval by rule process would somehow supersede or short cut all other forms of review conducted by the Commission. However, full review and approval will continue to be required for all withdrawals by well drilling projects. To make this point clear, the Commission is adding language to § 806.22(f)(9) of the final-form rulemaking stating that the issuance of an approval by rule for a consumptive use shall not be construed to waive or exempt the project sponsor from obtaining Commission approval for any water withdrawals or diversions subject to review under § 806.4(a).

Several citizens were also concerned that chemicals added to water used for hydro-fracturing will not be treated properly and could somehow cause pollution of aquifers and streams. The Commission does not presently regulate water quality; however, the Commission's member jurisdictions regulate the treatment and disposal of flowback fluids or produced brines from well drilling operations. The Commission is therefore including a provision in § 806.22(f)(8) that requires gas well applicants to certify to the Commission that all such flowback fluids will be treated and disposed of in accordance with applicable State and Federal law. In addition, project sponsors are required under § 806.22(f)(7) to obtain all necessary permits and approvals that are required for the project from other Federal, State or local government agencies having jurisdiction.

Industry comments pointed to various sections of the proposed regulations felt to be either unnecessary or burdensome. While not agreeing with all such comments, the Commission has made the following changes to the final-form rulemaking, which it believes responds adequately to industry concerns:

1. The requirement for approval by rule of natural gas drilling projects in § 806.4(a)(8) is limited to those projects targeting the Marcellus or Utica Shale Formations, unless additional shale formations are identified by the executive director of the Commission in a formal determination under § 806.5. The reference to "other shale formations" in the proposed rulemaking has been deleted.

2. The requirement to submit a Notice of Intent (NOI) "at least 60 days" prior to undertaking a project or increasing a previously approved quantity under § 806.22(f)(2) is removed. Applicants will only be required to submit the NOI prior to such undertaking.

3. In § 806.22(f)(8), project sponsors are required to "certify" that all flowback fluids have been treated and disposed of in accordance with applicable law, instead of having to "demonstrate to the satisfaction of the Commission" that this has been done. Concern was raised that the term "demonstrate" was overly vague. Certification would be subject to laws relating to unsworn falsification to authorities.

4. In § 806.22(f)(10), it is made clear that an approval by rule does not rescind, but merely supersedes any previous consumptive use approval.

5. The provision contained in the proposed rulemaking prohibiting the transfer of § 806.22(f) approvals is deleted, allowing such approvals to be transferred in accordance with the rules applying to any project approval under § 806.6.

In response to a comment from the Commission's member jurisdictions, the term "Executive Director" replaces the term "Commission" in § 806.22(f)(7), (9) and (10) as the entity responsible for issuing an approval by rule and exercising oversight on that approval. Similar changes have been made in § 806.22(e)(1), (6) and (7) to be consistent with this change and to clarify current Commission practice. In response to another comment from member jurisdictions, the notice requirements in § 806.22(f)(3) have been modified to reference the notice requirements contained in § 806.15 that apply to all projects generally, and to require applicants to copy the appropriate agencies of the member state with any NOI submitted under the rule. A final change made in response to the Commission's member jurisdictions was to clarify the language in § 806.22(f)(11) related to the process for obtaining authorization to utilize additional sources of water subsequent to the issuance of an approval by rule.

List of Subjects in 18 CFR Part 806

Administrative practice and procedure, Water resources.

Accordingly, for the reasons set forth in the preamble, 18 CFR part 806 is amended as follows:

PART 806—REVIEW AND APPROVAL OF PROJECTS

1. The authority citation for part 806 continues to read as follows:

Authority: Secs. 3.4, 3.5 (5), 3.8, 3.10 and 15.2, Pub. L. 91-575, 84 Stat. 1509 et seq.

2. In § 806.3, revise the definitions of "construction" and "project" to read as follows:

§ 806.3 Definitions.

* * * * *

Construction. To physically initiate assemblage, installation, erection or fabrication of any facility, involving or intended for the withdrawal, conveyance, storage or consumptive use of the waters of the basin. For purposes of natural gas well development projects subject to review and approval pursuant to § 806.4(a)(8), initiation of construction shall be deemed to commence upon the drilling (spudding) of a gas well, or the initiation of construction of any water impoundment or other water-related facility to serve the project, whichever comes first.

* * * * *

Project. Any work, service, activity, or facility undertaken, which is separately planned, financed or identified by the Commission, or any separate facility undertaken or to be undertaken by the Commission or otherwise within a specified area, for the conservation, utilization, control, development, or management of water resources, which can be established and utilized independently, or as an addition to an existing facility, and can be considered as a separate entity for purposes of evaluation. For purposes of natural gas well development activity, the project shall be considered to be the drilling pad upon which one or more exploratory or production wells are

undertaken, and all water-related appurtenant facilities and activities related thereto.

* * * * *

3. In § 806.4, amend paragraph (a) by adding paragraph (a)(8) to read as follows:

§ 806.4 Projects requiring review and approval.

(a) * * *

* * * * *

(8) Any natural gas well development project in the basin targeting the Marcellus or Utica shale formations, or any other formation identified in a determination issued by the Executive Director pursuant to § 806.5, for exploration or production of natural gas involving a withdrawal, diversion or consumptive use, regardless of the quantity.

* * * * *

4. In § 806.22, revise paragraph (e)(1) introductory text, (e)(1)(ii), (e)(6), (e)(7) and add a new paragraph (f) to read as follows:

§ 806.22 Standards for consumptive uses of water.

* * * * *

(e) * * *

(1) Except with respect to projects involving natural gas well development subject to the provision of paragraph (f) of this section, any project whose sole source of water for consumptive use is a public water supply withdrawal, may be approved by the Executive Director under this paragraph (e) in accordance with the following, unless the Executive Director determines that the project cannot be adequately regulated under this approval by rule:

(i) * * *

(ii) Within 10 days after submittal of an NOI under paragraph (e)(1)(i) of this section, the project sponsor shall submit to the Commission proof of publication in a newspaper of general circulation in the location of the project, a notice of its intent to operate under this approval by rule, which contains a sufficient description of the project, its purposes and its location. This notice shall also contain the address, electronic mail address and telephone number of the Commission.

* * * * *

(6) The Executive Director will grant or deny approval to operate under this approval by rule and will notify the project sponsor of such determination, including the quantity of consumptive use approved.

(7) Approval by rule shall be effective upon written notification from the Executive Director to the project sponsor, shall expire 15 years from the date of such notification, and shall be deemed to rescind any previous consumptive use approvals.

(f) Approval by rule for consumptive use related to natural gas well development.

(1) Any project involving the development of natural gas wells subject to review and approval under §§ 806.4, 806.5, or 806.6 of this part shall be subject to review and approval by the Executive Director under this paragraph (f) regardless of the source or sources of water being used consumptively.

(2) *Notification of Intent:* Prior to undertaking a project or increasing a previously approved quantity of consumptive use, the project sponsor shall submit a Notice of

Intent (NOI) on forms prescribed by the Commission, and the appropriate application fee, along with any required attachments.

(3) Within 10 days after submittal of an NOI under (2) above, the project sponsor shall satisfy the notice requirements set forth in § 806.15 and send a copy of the NOI to the appropriate agencies of the member state.

(4) The project sponsor shall comply with metering, daily use monitoring and quarterly reporting as specified in § 806.30, or as otherwise required by the approval by rule. Daily use monitoring shall include amounts delivered or withdrawn per source, per day, and amounts used per gas well, per day, for well drilling, hydrofracture stimulation, hydrostatic testing, and dust control. The foregoing shall apply to all water and fluids, including additives, flowback and brines, utilized by the project.

(5) The project sponsor shall comply with the mitigation requirements set forth in § 806.22 (b).

(6) Any flowback fluids or produced brines utilized by the project sponsor for hydrofracture stimulation undertaken at the project shall be separately accounted for, but shall not be included in the daily consumptive use amount calculated for the project, or be subject to the mitigation requirements of § 806.22 (b).

(7) The project sponsor shall obtain all necessary permits or approvals required for the project from other federal, state, or local government agencies having jurisdiction over the project. The Executive Director reserves the right to modify, suspend or revoke any approval under this paragraph (f) if the project sponsor fails to obtain or maintain such approvals.

(8) The project sponsor shall certify to the Commission that all flowback and produced fluids, including brines, have been treated and disposed of in accordance with applicable state and federal law.

(9) The Executive Director may grant or deny or condition an approval to operate under this approval by rule and will notify the project sponsor of such determination, including the sources and quantity of consumptive use approved. The issuance of any such approval shall not be construed to waive or exempt the project sponsor from obtaining Commission approval for any water withdrawals or diversions subject to review pursuant to § 806.4 (a).

(10) Approval by rule shall be effective upon written notification from the Executive Director to the project sponsor, shall expire five years from the date of such notification, and supersede any previous consumptive use approvals to the extent applicable to the project.

(11) Subsequent to the issuance of an approval by rule pursuant to paragraph (f)(9) above, authorization to utilize additional sources of water for the project other than those identified in the approval by rule may be obtained as follows:

(i) Water withdrawals or diversions requiring and receiving approval by the Commission pursuant to § 806.4 (a), provided such withdrawal source is approved for such use and is registered with the Commission at least 10 days prior to use on a form and in a manner as prescribed by the Commission.

(ii) Sources of water other than those subject to paragraph (f)(11)(i) of this section, including, but not limited to, public water supply, wastewater discharge or other reclaimed waters, provided such sources are approved prior to use as a modification to the approval by rule. Any

request to modify an approval by rule to utilize such source(s) shall be submitted on a form and in a manner as prescribed by the Commission, and shall be subject to review pursuant to the standards set forth in Subpart C.

Dated: December 11, 2008.

THOMAS W. BEAUDUY,
Deputy Director

Fiscal Note: Fiscal Note 72-6 remains valid for the final adoption of the subject regulation.

(Editor's Note: The regulations of the Commission, 25 Pa. Code Chapter 806, are amended by amending § 806.1 to read as set forth in Annex A.)

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART IV. SUSQUEHANNA RIVER BASIN COMMISSION

CHAPTER 806. REVIEW AND APPROVAL OF PROJECTS

§ 806.1. Incorporation by reference.

The regulations and procedures for review of projects as set forth 18 CFR Part 806 (2009) (relating to review and approval of projects) are incorporated by reference and made part of this title.

[Pa.B. Doc. No. 09-8. Filed for public inspection January 2, 2009, 9:00 a.m.]

Title 58—RECREATION

PENNSYLVANIA GAMING CONTROL BOARD

[58 PA. CODE CH. 443a]

Trusteeship

The Pennsylvania Gaming Control Board (Board), under the general authority in 4 Pa.C.S. § 1202(b)(30) (relating to general and specific powers) and specific authority contained in 4 Pa.C.S. §§ 1102(1), (3), (5), (8) and (11) and 1202(a)(1) and (b)(12), (14) and (15) (relating to legislative intent) adds Chapter 443a (relating to trusteeship) to read as set forth in Annex A.

Purpose of the Final-form Rulemaking

This final-form rulemaking adds a new chapter outlining the circumstances under which the Board may appoint a trustee and the obligations, powers and duties of the trustee.

Explanation of Chapter 443a

Section 443a.1 (relating to definitions) defines the terms "trustee" and "trusteeship action" which are used in this chapter.

Section 443a.2 (relating to appointment of trustees) provides that the Board may appoint a trustee in the event of the failure to renew, revocation or suspension of a slot machine licensee's license or a principal's license when the principal controls the slot machine licensee.

Section 443a.3 (relating to qualifications of trustees) requires trustees to obtain a principal license and authorizes the Board to issue a trustee a temporary principal credential under § 435a.8 (relating to temporary credentials for principals and key employees).

Section 443a.4 (relating to bonding of trustees) requires a trustee to obtain a performance bond payable to the Board. The cost of that bond shall be paid by the former or suspended licensee.

Section 443a.5 (relating to effect of the trusteeship on slot machine and principal licensees) bars the former or suspended licensee from exercising any control over the licensed facility or being involved in the financial matters of the licensed facility without prior approval of the Board during the period of the trusteeship.

Section 443a.6 (relating to powers and duties of trustees) sets forth the powers and duties of a trustee that the Board may include in the order appointing the trustee. These powers and duties are typical of what would be necessary to allow a trustee to continue the operation of a licensed facility and allow the Board to maintain effective oversight of the trustee. While the Board anticipates that most or all of these powers and duties will be included in an order appointing a trustee, the Board also recognizes that each trusteeship action will be unique. Therefore, the powers and duties of any trustee will be tailored by the Board order to fit the particular circumstances of the specific situation.

Section 443a.7 (relating to compensation of trustees and payment of costs associated with the trusteeship) establishes that the compensation of a trustee will be set by the Board and that all expenses related to the trusteeship will be reviewed and approved by the Board. Payment of all costs approved by the Board will be the responsibility of the former or suspended licensee.

Section 443a.8 (relating to required reports of the trustees) requires a trustee to file periodic reports with the Board as required by the Board's order. While these reports may contain confidential or proprietary information, this section also provides that copies or portions of these reports may be sent to creditors and that the Board may make summaries of these reports available to the public and post them on the Board's web site.

Section 443a.9 (relating to review of actions of the trustees) allows creditors or parties in interest to file a petition with the Board using the procedures established in § 493a.4 (relating to petitions generally) if they are aggrieved by an alleged breach of a delegated power or duty by the trustee. The petition must provide the relevant facts and the reason why the trustee's actions constitute a breach of the trustee's duties. The Board will review these petitions and take whatever action is determined to be appropriate.

Section 443a.10 (relating to disposition of net earnings during the period of trusteeship) requires that the trustee establish an escrow account into which all net earnings will be deposited during the trusteeship. Payments may not be made from this account without prior approval of the Board. This section also allows the former or suspended licensee to petition the Board for distribution of all or a portion of the net earnings.

Section 443a.11 (relating to payments following a bulk sale) mandates that in the event of the sale or other disposition of all of the property subject to the trusteeship, the Board will conduct a hearing to determine the distribution of the assets remaining after all obligations to this Commonwealth, political subdivisions and other funds set forth in the act have been satisfied.

Section 443a.12 (relating to discontinuation of trusteeship) specifies the circumstances under which a trusteeship may be discontinued.

Comment and Response Summary

Notice of proposed rulemaking was published at 38 Pa.B. 3820 (July 12, 2008).

The Board received comments from HSP Gaming, LP (HSP) during the public comment period. By letter dated September 10, 2008, the Independent Regulatory Review Commission (IRRC) also submitted comments. All of these comments were reviewed by the Board and are discussed in the following paragraphs.

HSP suggested numerous changes, the bulk of which would provide greater clarity in the regulations. The Board agrees with most of the suggestions and has incorporated them into the final-form rulemaking. Examples of these changes include replacing "trustees" with "trustee" in many sections of the regulation to reflect the fact that in most instances only a single trustee will be appointed and adding specific language in § 443a.6(b) requiring the trustee to conserve and preserve the assets of the slot machine licensee.

In a few sections, the Board has not incorporated all of HSP's suggestions. In § 443a.2(a), the Board did not include "has sole control" because there could be a circumstance when there is more than one individual with significant ownership interests, but when only one individual actually has been exercising control over the licensed facility. In § 443a.7(a), most of the suggested revisions were not included because they were not necessary and repeated requirements that appear in subsection (b). In § 443a.10(a), the phrase "during the period of the trusteeship" was not added at the end of the sentence because it appears at the beginning of the sentence.

In its comments, IRRC noted that the citation in § 443a.7(b) appeared to be incorrect.

The Board agrees and has corrected the citation in the final-form regulations.

Additional Revisions

The Board has also made a few additional minor wording changes to improve the clarity of the final-form regulations and for consistency with the revisions made in response to the comments received.

Affected Parties

These final-form regulations will affect any slot machine licensee or principal that controls a slot machine licensee whose license has expired or has been suspended or revoked.

Fiscal Impact

Commonwealth

There will be no new costs or savings to the Board or other Commonwealth agencies as a result of these final-form regulations.

Political Subdivisions

These final-form regulations will have no fiscal impact on political subdivisions of this Commonwealth.

Private Sector

Affected slot machine or principal licensees will be responsible for paying all of the costs associated with the trusteeship. The amount of these costs will vary depending on the size of the licensed facility and the length of the trusteeship.

General Public

These final-form regulations will have no fiscal impact on the general public.

Paperwork Requirements

A trustee will have to complete an application for a principal license, will have to apply for and obtain a performance bond and will have to submit periodic reports to the Board as ordered by the Board.

Effective Date

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

Contact Person

The contact person for questions about this final-form rulemaking is Richard Sandusky, Director of Regulatory Review, at (717) 214-8111.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on June 25, 2008, the Board submitted a copy of the proposed rulemaking, published at 38 Pa.B. 3820, and a copy of the Regulatory Analysis Form to IRRC and the Chairpersons of the House Gaming Oversight Committee and the Senate Committee on Community, Economic and Recreational Development (Committees).

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 the final-form rulemaking, the Board has considered all comments received 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)), the final-form rulemaking was deemed approved by the Committees on November 19, 2008. Under section 5.1(e) of the Regulatory Review Act (71 P. S. § 745.5a(e)), IRRC met on November 20, 2008, and approved the final-form rulemaking.

Findings

The Board finds that:

(1) Public notice of intention to adopt these regulations 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 thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The final-form rulemaking is necessary and appropriate for the administration and enforcement of 4 Pa.C.S. Part II (relating to gaming).

Order

The Board, acting under 4 Pa.C.S. Part II, orders that:

(a) The regulations of the Board, 58 Pa. Code, are amended by adding §§ 443a.1—443a.12 to read as set forth in Annex A.

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

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

MARY DIGIACOMO COLINS,
Chairperson

Fiscal Note: Fiscal Note 125-87 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 58. RECREATION

PART VII. GAMING CONTROL BOARD

Subpart C. SLOT MACHINE LICENSING

CHAPTER 443a. TRUSTEESHIP

- Sec.
- 443a.1. Definitions.
- 443a.2. Appointment of trustees.
- 443a.3. Qualifications of trustees.
- 443a.4. Bonding of trustees.
- 443a.5. Effect of the trusteeship on slot machine and principal licenses.
- 443a.6. Powers and duties of trustees.
- 443a.7. Compensation of trustees and payment of costs associated with the trusteeship.
- 443a.8. Required reports of the trustees.
- 443a.9. Review of actions of the trustees.
- 443a.10. Disposition of net earnings during the period of trusteeship.
- 443a.11. Payments following a bulk sale.
- 443a.12. Discontinuation of trusteeship.

§ 443a.1. Definitions.

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

Trustee—A fiduciary appointed by the Board for the purpose of preserving the viability of a licensed gaming entity, and the integrity of gaming in this Commonwealth.

Trusteeship action—An action brought before the Board for the appointment of a trustee.

§ 443a.2. Appointment of trustees.

(a) Upon the revocation or suspension of a slot machine license or a principal license of an individual who the Board has determined controls a slot machine licensee, the Board may appoint a trustee to assure compliance with the act, this part, and any conditions imposed upon the slot machine license under § 423a.6 (relating to license, permit, registration and certification issuance and statement of conditions).

(b) Upon the failure to renew a slot machine license or a principal license of an individual who the Board has determined controls a slot machine licensee, the Board may appoint a trustee who shall have all of the power and duties granted by the Board until the discontinuation of trusteeship as provided in § 443a.12 (relating to discontinuation of trusteeship).

(c) The Board will have the power to appoint and remove one or more trustees as necessary.

§ 443a.3. Qualifications of trustees.

(a) A trustee shall be required to file an application for and obtain a principal license.

(b) The Board may appoint a trustee and award the trustee a temporary principal credential under § 435a.8 (relating to temporary credentials for principals and key employees) when necessary.

§ 443a.4. Bonding of trustees.

(a) Before assuming duties, a trustee shall execute and file a bond for the faithful performance of the trustee's duties.

(b) The bond required under subsection (a) must be payable to the Board with sureties and in the amount and form as required by Board order.

(c) The cost of the bond required under subsection (a) shall be paid by the former or suspended licensee.

§ 443a.5. Effect of the trusteeship on slot machine and principal licensees.

After the adoption of a trusteeship action, the former or suspended slot machine or principal licensee may not exercise any of its privileges, collect or receive any debts and pay out, sell, assign or transfer any of its property to anyone without prior approval of the Board.

§ 443a.6. Powers and duties of trustees.

(a) The Board's order appointing a trustee will set forth the powers, duties and responsibilities of the trustee. The trustee shall exercise only those powers and perform those duties expressly conferred on the trustee by the Board or this chapter.

(b) A trustee shall have the duty to conserve and preserve the assets of the slot machine licensee.

(c) Subject to the direct supervision of the Board, the written order of the Board described in subsection (a) may vest a trustee with the following powers:

(1) Maintaining and operating the licensed facility in a manner that complies with the act, this part, the slot machine licensee's statement of conditions and the Board's order appointing the trustee.

(2) Maintaining and operating the licensed facility consistent with the measures generally taken in the ordinary course of business including:

(i) Entering into contracts.

(ii) Borrowing money.

(iii) Pledging, mortgaging or otherwise encumbering the slot machine licensee's property; provided that power shall be subject to any provisions and restrictions in any existing credit documents.

(iv) Hiring, firing and disciplining employees.

(v) Settling or compromising with any debtor or creditor of the former or suspended licensee, including any taxing authority.

(3) Exercising the rights and obligations of the former or suspended licensee.

(4) Taking possession of all of the property of the former or suspended licensee, including its books, records and papers.

(5) Establishing accounts with financial institutions, which are not affiliated, owned or otherwise influenced by the former or suspended licensee, to carry out the business of the former or suspended licensee.

(6) Meeting with the former or suspended licensee.

(7) Meeting with principals and key employees at the licensed facility.

(8) Meeting with the independent audit committee, if there is one.

(9) Meeting with the Board's Executive Director and keeping the Board's Executive Director apprised of actions taken and the trustee's plans and goals for the future.

(10) Hiring legal counsel, accountants or other consultants or assistants, with approval of the Board, as necessary to carry out the trustee's duties and responsibilities.

(11) Reviewing outstanding agreements to which the former or suspended licensee is a party and advising the Board as to which, if any, of the agreements should be the subject of scrutiny, examination or investigation by the Board.

(12) Obtaining Board approval prior to any sale, change of ownership, change of control, financial status, restructuring, transfer of assets, execution of a contract or any other action taken outside of the ordinary course of business.

(13) Obtaining Board approval for any payments outside of those in the ordinary course of business.

§ 443a.7. Compensation of trustees and payment of costs associated with the trusteeship.

(a) The Board will establish the compensation of the trustee.

(b) The Board will review and approve reasonable costs and expenses of the trustee, the legal counsel, accountants, or other consultants or assistants hired by the trustee under § 443a.6(a)(10) (relating to powers and duties of trustees) and other persons the Board may appoint in connection with the trusteeship action.

(c) The costs in subsections (a) and (b) shall be paid by the former or suspended licensee.

§ 443a.8. Required reports of the trustees.

(a) A trustee shall file reports with regard to the administration of the trusteeship with the Board in the form and at intervals as the Board orders.

(b) The Board may direct that copies or portions of the trustee's reports be mailed to creditors or other parties in interest and make summaries of the reports available to the public and post them on the Board's web site www.pgcb.state.pa.us.

§ 443a.9. Review of actions of the trustees.

(a) A creditor or party in interest aggrieved by any alleged breach of a delegated power or duty of a trustee in the discharge of the trustee's duties may request a review of the trustee's action or inaction by filing a petition in accordance with § 493a.4 (relating to petitions generally).

(b) The petition must set forth in detail the pertinent facts and the reasons why the facts constitute the alleged breach.

(c) The Board will review any petition filed under this section and take whatever action, if any, it deems appropriate.

§ 443a.10. Disposition of net earnings during the period of trusteeship.

(a) During the period of trusteeship, net earnings, if any, shall be deposited in an escrow account maintained for that purpose.

(b) Distributions of net earnings during the period of trusteeship may not be made by the trustee without the prior approval of the Board.

(c) A suspended or former principal or slot machine licensee may request a distribution of all or a portion of the net earnings during the period of trusteeship by filing a petition in accordance with § 493a.4 (relating to petitions generally). The suspended or former principal or slot machine licensee shall have the burden of demonstrating good cause for the distribution of the net earnings requested.

§ 443a.11. Payments following a bulk sale.

Following the sale, assignment, conveyance or other disposition in bulk of all the property subject to a trusteeship and the payment of all obligations to the Commonwealth and political subdivisions and other funds

set forth in the act, the Board will conduct a hearing to determine the distribution of the remaining assets.

§ 443a.12. Discontinuation of trusteeship.

(a) The Board may direct the discontinuation of a trusteeship when:

(1) The Board determines that the cause for which the trusteeship action was instituted no longer exists.

(2) The trustee has, with the prior approval of the Board, consummated the sale, assignment, conveyance or other disposition in bulk of all the property of the former principal or slot machine licensee relating to the slot machine license.

(b) Upon the discontinuation of the trusteeship and with the approval of the Board, the trustee shall take steps as may be necessary to affect an orderly transfer of the property of the former or suspended principal or slot machine licensee.

[Pa.B. Doc. No. 09-9. Filed for public inspection January 2, 2009, 9:00 a.m.]
