# RULES AND REGULATIONS

## Title 7—AGRICULTURE

### DEPARTMENT OF AGRICULTURE

### [ 7 PA. CODE CH. 128 ]

### Pesticides

The Department of Agriculture (Department) amends Chapter 128 (relating to pesticides) to read as set forth in Annex A. This final-form rulemaking is adopted under the specific authority in section 7(b)(2) of the Pennsylvania Pesticide Control Act of 1973 (act) (3 P. S. § 111.27(b)(2)) to promulgate appropriate regulations for the safe handling, transportation, use, storage, display, distribution and disposal of pesticides.

*Purpose*

The final-form rulemaking clarifies, updates and, in some instances, deletes the existing pesticide regulations to ensure the regulated community has a better understanding of the regulatory requirements and to maintain the Department's statutory mandate to protect the public health and welfare. Some of the amendments were also included to make the regulations gender neutral, bring the existing requirements into compliance with changes in Commonwealth law and comply with additional restrictions put forth by the United States Environmental Protection Agency (EPA). Additional requirements are included for State registration of EPA accepted pesticides, especially in the areas regarding sales of restricted use pesticides (RUP) and the identification of individuals seeking to sell or receive RUPs. These amendments were added to address homeland security issues.

The Department also rescinded several sections to ease the requirements on applicators and provide substantial cost savings to the Commonwealth and commercial and public pesticide application business. As a result of years of public and pesticide industry input, the Department incorporated many of the suggested comments and other changes to the regulations. The industry's input has been vital in producing reasonable and prudent regulations designed to protect the public health and welfare of the citizens of this Commonwealth.

*Comments and Responses*

Notice of proposed rulemaking was published at 39 Pa.B. 5564 (September 26, 2009), affording the public, the General Assembly and the Independent Regulatory Review Commission (IRRC) the opportunity to offer comments. Comments were received from IRRC, the Pennsylvania State University (PSU) and PennAg Industries Association (PennAg). A summary of those comments and the Department's response follows.

*Comment 1.* PennAg and its associated agribusinesses offered its general support for the proposed rulemaking. Based upon its input, review and discussions with various stakeholders throughout the industry, PennAg believes the final-form rulemaking to be fair and equitable to all parties involved.

*Response.* The Department acknowledges these comments and agrees that with the final-form rulemaking, the Department will be able to continue its regulatory oversight of the Pesticide Program.

*Comment 2.* IRRC expressed several concerns regarding the statutory and regulatory provisions regarding a pesticide dealer and the Department's proposed regulations creating the new licensure category for a pesticide dealer manager. Specifically, IRRC questioned whether the creation of the pesticide dealer manager's licensure category in §§ 128.2, 128.3(a)(1), 128.10 and 128.12 was consistent with the act.

*Response.* There is no doubt that the General Assembly vested the Secretary of Agriculture with substantial statutory and regulatory authority to regulate, among other things, the distribution of pesticides. See section 7(b)(2) of the act. Given the heighted Federal and State level of concern with terroristic activity, one main area of regulatory deficiency the Department wanted to address in this final-form rulemaking was the possible illicit distribution and use of certain pesticides, especially the illicit use of RUPs which pose a substantially greater threat to human health. In its broad statutory authority to adopt appropriate regulations for carrying out the act, the Department believes that the language provides ample authority to create a subcategory of licensure under the pesticide dealer license. In fact, in section 12(e) of the act (3 P. S. § 111.32(e)), the General Assembly contemplated that a pesticide dealer would have an agent or employee and that pesticide dealer would be "responsible for the acts of each person employed by him in the solicitation and sale of pesticides and all claims and recommendations for use of pesticides."

Presently, to purchase RUPs, an individual needs to be a certified applicator or a pesticide dealer. In accordance with existing regulations, a certified applicator shall successfully complete a written examination demonstrating competence in the use and handling of pesticides. However, in stark contrast, a pesticide dealer's license may be easily obtained by simply completing a form and paying the necessary fee. Therefore, the Department determined, with the concurrence of the industry, to place an additional requirement on pesticide dealer licensees, that is, employment of a pesticide dealer manager. This new requirement serves two purposes: 1) it introduces the written examination component into the pesticide dealer license process; and 2) it assures the Department that a person employed by a pesticide dealer has demonstrated an understanding of the distribution, use and safe handling of pesticides.

The Department agrees with IRRC that use of the term "license" in connection with a pesticide dealer manager might be confusing in that there is already a license requirement for pesticide dealers. Accordingly, the Department decided to replace "license" with "certificate" in this final-form rulemaking.

*Comment 3.* IRRC questioned why the $15 annual fee for a pesticide dealer manager exceeds the $10 annual fee for a pesticide dealer in section 12(b) of the act.

*Response.* As described in comment 2, the pesticide dealer manager annual certification will involve more administrative costs to the Department in processing applications, administering and verifying the successful completion of a written examination and overseeing other eligibility requirements. The Department believes that the imposition of a $15 annual fee to defray the administrative costs to the Commonwealth is reasonable.

*Comment 4.* While PSU supported the vast majority of the Department's proposed regulations, it nevertheless specifically questioned the Department's proposed amendments to § 128.41(a)(1) (relating to requirements for

certification), which include the use of a pesticide exempted from Federal registration. PSU also expressed concern that, by its own interpretation, since it uses pesticides in educational and research programs, all of its employees who use pesticides would be required to be public applicators. Finally, PSU expressed concern with what it perceived as inconsistent prior notification language regarding five types of applications in § 128.85a(a)(1) (relating to ornamental or turf application notification).

*Response.* As to the Federal exemption issue, the Department believes that its regulation serves as a clarification, not a change to the existing regulations. Pesticides classified by the EPA as so-called "25(b)" products are still by their very definition "pesticides" in that those products are marketed to kill, control, eradicate or otherwise mitigate pests. The Federal 25(b) exemption is for Federal registration only. The Commonwealth, along with 38 other states, currently requires State registration of these same pesticides/products as the Department believes it is vital to the health and safety of the citizens of this Commonwealth, especially individuals on the Hypersensitivity List, for the Department to maintain regulatory control over these types of pesticides. The Department does not agree with PSU's interpretation that all of its employees would be required to be public applicators under the proposed amendment since campus housing or food service do not fall within parameters of pesticide use in its educational and research programs. Accordingly, the Department declines to delete the language at this time. The Department is, of course, willing to revisit the issue at a later date should the need arise.

As to the inconsistency of the prior notification language, the Department agrees and made the appropriate changes to the final-form rulemaking.

*Comment 5.* With respect to proposed § 128.53(b) (relating to recordkeeping), IRRC asked the Department to explain the purpose of requiring pesticide application businesses to keep and maintain copies of personal identification records. IRRC also requested the Department clarify how the records must be secured and whose records are required to be maintained and secured.

*Response.* The recordkeeping requirements in § 128.53 are meant to pertain to registered pesticide application technicians who are employed by a pesticide application business. The Department added language in subsection (b) to clarify this. The purpose of verifying, documenting and maintaining personal identification records of an employee's (technician) identity is to prevent or at least minimize the potential for misrepresentation of identity in an attempt to gain access to pesticides for illicit purposes. Given the heightened security issues at the Federal and State levels, the Department does not believe that requiring the pesticide business to document and secure its technician's personal information is either burdensome or onerous.

As there are numerous methods to maintain and secure documents, the Department has allowed the pesticide application business to decide for itself the best method to secure those documents within the scope of its business practice. The Department added a provision to require the pesticide application business to secure the identification documents against identity theft. This change has been made to the final-form rulemaking.

*Comment 6.* With respect to proposed § 128.85a, IRRC raised five separate concerns with multiple questions regarding the provision's clarity. IRRC recommend that the Department "review Subsection (a) so that it provides a logical notice process and sufficient notice to neighbors who may be concerned about the application of a pesticide near their dwelling." IRRC's comments were broken out in three distinct categories (notification, mutual border/contiguous lands and Request for notification shall expire on December 31), which the Department will address as follows in this order.

*Response.* The Department agrees with IRRC's concerns regarding the clarity of § 128.85a(a) and the applicable subparagraphs. When applicable, the Department amended final-form subsection (a).

*Notification*

*Comment 7.* IRRC noted that the written request for notification process in subsection (a)(1) was not clear. In its comment, IRRC posed several questions regarding this paragraph, which the Department answers as follows.

*Response.* As to § 128.85a(a)(1), the term "person" includes any resident who wishes to be notified of future pesticide applications to lawn, turf, ornamental or shade trees on neighboring property. There is no responsibility on the pesticide application business to provide notice if a request is not made. A pesticide application business, which has been requested to provide notification, can make the application, but if it has not properly notified the requester, the pesticide application business has run afoul of the Department's pesticide regulations.

*Comment 8.* IRRC stated that the proposed language in subsection (a)(1)(i) as to whom notice should be given was confusing. IRRC queried how the pesticide business would know or verify that the list provided was complete or accurate.

*Response.* Regarding § 128.85a(a)(1)(i), the list of properties need only include those properties that the requester is concerned about. It does not have to be a complete list of all neighboring properties.

*Comment 9.* IRRC questioned what was implied by "The notification requirement becomes effective 7 days following receipt of the request. . . ."

*Response.* Regarding § 128.85a(a)(1)(ii), it is the "requirement to notify" which becomes effective 7 days following receipt of the written request. The general notification requirement, as part of the regulation, is always in effect. The 7 days can be construed as a grace period to afford companies to continue operations while putting their notification mechanism in place.

*Comment 10.* Subsection (a)(2) only requires a 12-hour notice "upon receiving a written request at least 7 days prior to the application date." IRRC inquired whether the 12-hour notice would be required if a written request was received less than 7 days before the date of application.

*Response.* Regarding § 128.85a(a)(2), the person requesting notification shall submit the written request for notification at least 7 days prior to the pesticide application. This allows time for the pesticide application business to identify the location of its customers in relation to the neighboring properties of the requester. For a request to be valid, the requester only has to make the request once a year for each neighboring property where notification is desired. If the request is received less than 7 days prior to the pesticide application, the pesticide application business is not required to notify the requester of that application. Any valid request for notification shall be honored and provided to the requester at least 12 hours prior to the pesticide application. This allows the re-

quester time to make any preparations necessary prior to the actual pesticide application.

*Comment 11.* IRRC questioned the sufficiency of the 10-day period within which the pesticide application business has to provide copies of the pesticide labels.

*Response.* Regarding § 128.85a (a)(3), the requirement to provide a pesticide label within 10 days of a written request is consistent with the standard within the industry and consistent with other sections of the Department's pesticide regulations, for example, § 128.112(a)(2)(iv) (relating to notification of hypersensitive individuals). The information provided as part of the notification process, at least 12 hours prior to the application, including the brand name of the pesticide and EPA registration number, is sufficient for a requester to obtain information regarding potential effects from exposure to the particular pesticides. The type of information regarding effects on pregnancies, children, well water and pets would not necessarily be expressly stated on the pesticide label. Therefore, the 10-day time period would have no effect on the information.

*Mutual border/contiguous lands*

Comment 12. IRRC and PSU offered the same comment regarding the proposed language about the written request for notification to list the "premises sharing a mutual border."

*Response.* Regarding § 128.85a(a)(1)(i), the Department agrees with IRRC's observation that there is not a distance limitation between the requesters property line and the application site. The language has been amended to set a distance of 100 feet consistent with other notification requirements in the regulations.

*Comment 13.* IRRC recommends that the Department use only one clearly defined term regarding contiguous lands.

*Response.* The Department agrees with IRRC's recommendation. The Department deleted the term "contiguous lands" from § 128.85a(a)(2) in this final-form rulemaking.

*Request for notification shall expire on December 31*

*Comment 14.* IRRC questioned the practicality of the December 31 deadline for the expiration of the request for notification. IRRC recommended the Department consider a different method of expiration.

*Response.* Regarding § 128.85a(b), the Department believes that a December 31 expiration for all notification requests is reasonable and necessary for efficient administration of the notification process by pesticide application businesses. Allowing random 12-month expiration dates would place an unreasonable bookkeeping requirement on pesticide application businesses. Moreover, there are virtually no pesticide applications that fall under this notification requirement (ornamental and turf) made during the winter months. Accordingly, the Department declines to implement this recommendation.

*Summary of Technical Changes to the Final-Form Rulemaking*

During its review of public comments, the Department noticed that § 128.42(14)—(25) (relating to categories of commercial and public applicators) had been renumbered by the *Pennsylvania Code* and *Bulletin* staff in the proposed rulemaking. In its proposed rulemaking, the Department specifically deleted existing category No. 14 and reserved that number to maintain other numbered categories in proper sequence. The Department understands that subsections are not normally reserved in rulemakings. However, the renumbering of those paragraphs would have a significant negative administrative and recordkeeping impact on the Department's applications, written examinations and other licensing information, as the Department would have to change its records to reflect the new category numbers. The Department discussed the resolution of this matter with representatives of the *Pennsylvania Code* and *Bulletin* staff. With their cooperation, the Department would like to maintain the numbering of § 128.42 as proposed by the Department.

The Department discovered a typographical error in proposed § 128.102(a)(2) (relating to protected designated areas). The Department incorrectly referenced 58 Pa. Code § 75.2 (relating to threatened species) as "endangered" species, when it should have been "threatened" species. The Department made that technical change to the final-form rulemaking at the recommendation of the *Pennsylvania Code* and *Bulletin* staff.

*Fiscal Impact*

*Commonwealth*

The Department has determined that the final-form rulemaking will have little or no adverse financial impact on the Commonwealth since all funds budgeted for the Pesticide Program are derived from the Pesticide Restricted Account. The funds in the Pesticide Restricted Account are obtained from licensing, permitting and registration fees and civil penalties placed upon pesticide manufacturers, dealers and applicators doing business in this Commonwealth.

There will, however, be some cost savings in the amount of time needed to review and process Hypersensitivity Registries as a result of the reduced number of times the registry is published.

*Political subdivisions*

The final-form rulemaking will not impose costs and will not have adverse fiscal impact on political subdivisions.

*Private sector*

The final-form rulemaking will have a direct fiscal impact on the private sector. Specifically, pesticide manufacturers will have increased fees for the registration of their pesticide product. Pesticide dealers will also have an increased fee. The final-form rulemaking will, however, provide some cost savings to the private sector by raising the insurance deductible levels.

*General public*

The final-form rulemaking will not have fiscal impact on the general public.

*Paperwork Requirements*

The final-form rulemaking will not appreciably increase the paperwork burden of the Department or other government units or citizens, including the regulated community, since there are already paperwork recordkeeping requirements in the existing regulations.

*Effective Date*

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

*Contact Person*

Individuals who need information about the final-form rulemaking should contact the Department of Agriculture, Bureau of Plant Industry, 2301 North Cameron Street, Harrisburg, PA 17110-9408, Attention: David Scott.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 15, 2009, the Department submitted a copy of the notice of proposed rulemaking, published at 39 Pa.B. 5564, to IRRC and the Chairpersons of the House and Senate Committees on Agriculture and Rural Affairs for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate 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 Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on October 6, 2010, the final-form rulemaking was approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on October 7, 2010, and approved the final-form rulemaking.

*Findings*

The Department finds that:

(1) Public notice of intention to amend the regulations has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

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

(3) The amendments that were made to this final-form rulemaking in response to comments received do not enlarge the purpose of the proposed rulemaking published at 39 Pa.B. 5564.

(4) The adoption of the final-form rulemaking in the manner provided in this order is necessary and appropriate for the administration of the authorizing statute.

*Order*

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

(a) The regulations of the Department, 7 Pa. Code Chapter 128, are amended by deleting §§ 128.83, 128.85, 128.86 and 128.87; by adding §§ 128.10, 128.12, 128.13, 128.83a, 128.85a and 128.107; and by amending §§ 128.2, 128.3, 128.11, 128.24, 128.31—128.35, 128.41—128.45, 128.51—128.53, 128.61—128.65, 128.71, 128.72, 128.81, 128.82, 128.84, 128.88, 128.91, 128.101—128.104, 128.106, 128.111 and 128.112 to read as set forth in Annex A.

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

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

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

RUSSELL C. REDDING,
*Secretary*

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 40 Pa.B. 6226 (October 23, 2010).)

**Fiscal Note:** Fiscal Note 2-149 remains valid for the final adoption of the subject regulations.

**Annex A**

**TITLE 7. AGRICULTURE**

**PART V. BUREAU OF PLANT INDUSTRY**

**CHAPTER 128. PESTICIDES**

**Subchapter A. GENERAL PROVISIONS**

**§ 128.2. Definitions.**

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

*Act*—The Pennsylvania Pesticide Control Act of 1973 (3 P. S. §§ 111.21—111.61).

*Application site*—The specific location where a pesticide is applied.

*Applicator certificate*—A form issued by the Department to a commercial or public applicator following the successful completion of a certification examination or other certification requirements.

*Area-wide application*—A nonagricultural pesticide application to areas of 25 or more contiguous acres or a nonagricultural pesticide application made by or at the direction of a governmental entity to properties of more than one person.

*Available if and when needed*—The ability of a certified applicator to communicate with a person applying pesticides under his supervision so that the certified applicator can provide instructions and exercise control over the application and can be at the application site within 5 hours of receiving notification that his physical presence is necessary.

*Business*—A governmental entity or commercial establishment for profit or not-for-profit. For a pesticide application business having more than one place of business or operating under more than one name within this Commonwealth, each place of business and each name shall be considered a separate business. For a State or Federal entity, each district or region will be considered a separate business.

*Common access area*—The areas within a school building where students/attendees normally congregate, assemble or frequent during normal academic instruction or extracurricular activities. The term does not include areas such as kitchens, boiler rooms, utility/maintenance rooms and areas which are physically blocked or restricted from student/attendee access.

*Constructive notification*—A person shall be deemed to have received notification if an adult residing in the same dwelling unit is so notified; orally, or by certified mail, or by a message left on an answering device activated by contacting the residence, including electronic mail or facsimile.

*Current registry*—The Pesticide Hypersensitivity Registry with the most recent effective date.

*Department*—The Department of Agriculture of the Commonwealth.

*Dosage* or *rate of application*—The concentration of each pesticide, such as, a percent, ounces or quarts per gallon, pounds per 100 gallons, applied to a specific application site or target such as a crop, ornamental, cut stump, weed, animal, utility pole, reported as gallons per

acre, pounds per 1,000 square feet, ounces per linear foot, ounces per cubic foot or ounces per animal.

*EPA*—The United States Environmental Protection Agency.

*FIFRA*—Federal Insecticide, Fungicide, and Rodenticide Act of 1947 (7 U.S.C.A. §§ 136—136y).

*Fumigant*—A pesticide that when released forms a gas.

*General use pesticide*—A pesticide not classified for restricted use.

*Governmental entity*—An executive or independent agency or unit of the Commonwealth, or local agency, including a county, a city, a borough, town, township, school district, municipal authority or political subdivision thereof.

*Integrated pest management*—The managed use of combined pest control alternatives, including cultural, mechanical, biological and chemical, to most effectively prevent or reduce to acceptable levels damage caused by pests.

*Land contiguous to a restricted use pesticide application site*—Premises which share a mutual border with the premises upon which the application site is located. The term does not include premises located more than 100 feet from the application site.

*Perimeter treatment*—

(i) The application of pesticide to the exterior of a structure to a maximum distance of 10 feet from the structure, unless the pesticide label clearly states otherwise, to prevent pests from invading the structure.

(ii) The term excludes tamper resistant bait stations.

*Person*—An individual, partnership, association, corporation or any organized group of persons whether incorporated or not.

*Pesticide dealer manager*—An owner or individual employed by a licensed pesticide dealer who is responsible for storage and distribution of restricted use pesticides.

*Pesticide end-use dilution*—Pesticide material resulting from the dilution of a registered pesticide according to label direction.

*Pesticide hypersensitivity*—Excessive or abnormal sensitivity to pesticides.

*Primary residence*—An individual's legal residence.

*Prior notification*—

(i) Notification of a proposed application of pesticides given not more than 45 days and not less than 14 days prior to the date of application which contains the following information:

(A) The proposed date of application.

(B) The municipalities where the proposed application sites are located.

(C) The name, address and telephone number of the pesticide application business to whom requests for additional information should be directed.

(ii) A request for prior notification shall expire on December 31 in the year in which it is made.

*Private park*—Privately owned outdoor real estate which includes a recreational area for use by the public, including an area with restricted access.

*Production of an agricultural commodity*—The term includes activities involved in the raising of plants or animals and their products. The term does not include the protection or maintenance of harvested crops, slaughtered livestock or plant and animal products unless the protection or maintenance is carried out by the original producer of the agricultural commodity, who is a private applicator, or another private applicator.

*Public park*—Publicly owned outdoor real estate which includes a recreational area for use by the public, including an area with restricted access.

*Recreational area*—An outdoor place of relaxation, play or exercise.

*Restricted use pesticide*—The term includes the following:

(i) A pesticide classified for restricted use under section 3(d) of FIFRA (7 U.S.C.A. § 136(d)).

(ii) A pesticide designated by the Secretary for restricted use under section 7(b)(6) of the act (3 P. S. § 111.27(b)(6)).

*School*—A public, nonpublic or licensed private elementary or secondary school wherein a resident of this Commonwealth may fulfill the compulsory school attendance requirements and which meets the applicable requirements of Title IV of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000c) (Public Law 88-352, 78 Stat. 241). The term also includes a kindergarten or preschool program operated by a school and a child day care center operating under a certificate of compliance issued by the Department of Public Welfare.

*Secondary location*—An address where an individual may be located other than the individual's primary residence, limited to the following:

(i) Place of employment.

(ii) School.

(iii) Vacation home.

*Secretary*—The Secretary of the Department.

*Service container*—A container other than the original labeled container of a registered pesticide used for the purpose of holding, storing or transporting an original registered pesticide material or a pesticide end-use dilution.

*Specific site application*—A nonagricultural pesticide application made by or at the direction of a person to property owned or rented by that person.

*Swimming pool*—An outdoor or indoor place used for bathing or for amateur, professional or recreational swimming, excluding single-family residential pools.

*Therapeutic swimming pool*—An indoor swimming pool or spa with a water temperature above 85° F used solely for the rehabilitation or medically recommended treatment.

*Under the direct supervision of*—The term includes the following:

(i) For a commercial or public certified applicator, the application of a pesticide by a registered pesticide application technician acting with the instructions and under the control of a certified applicator who is responsible for the actions of the technician and who is available when needed; or the application of a pesticide by a nonregistered or noncertified person acting with the instructions and under the continuous voice and visual control of a certified applicator who is responsible for the actions of the person and physically present at the application site. The supervising applicator shall be certified in the appropriate category relating to the application.

(ii) For a private certified applicator, the application of a restricted use pesticide by a noncertified person acting under the instructions and control of a certified applicator who is responsible for the actions of that person and who is available when needed.

*Upon written request*—The term includes a notice of inspection issued by the Department.

*Use, or cause to be used, a pesticide inconsistent with its labeling*—The use of a pesticide in a manner not permitted by its labeling. This phrase does not include:

(i) Applying a pesticide at a dosage, concentration or frequency less than that specified on its labeling.

(ii) Applying a pesticide against a target pest not specified on the labeling if the application is to the crop, animal or site specified on the labeling unless the labeling specifically states that the pesticide may only be used for the pests specified on the labeling.

(iii) Employing a method of application not prohibited by the labeling.

(iv) Mixing a pesticide with a fertilizer where the mixture is not prohibited by the labeling.

*Worker Protection Standard*—Includes all provisions of the Federal Worker Protection Standard as set forth in 40 CFR Part 170 (relating to worker protection standard).

**§ 128.3. Fees.**

(a) *Pesticide dealer's license.* The annual fee for a pesticide dealer's license is $10 per location. The fee for a duplicate pesticide dealer's license is $3.

(1) The annual fee for a pesticide dealer manager's certificate is $15 per individual.

(2) The fee for a duplicate pesticide dealer manager's certificate is $3.

(b) *Pest management consultant's license.* The annual fee for a pest management consultant's license is $25. The fee for a duplicate pest management consultant license is $8.

(c) *Pesticide application business' license.* The annual fee for a pesticide application business' license is $35. The fee for a duplicate pesticide application business license is $8.

(d) *Commercial applicator's certificate.* The annual fee for the commercial applicator's certificate is $40. When the initial certification requires examination, no fee will be charged. The fee for a duplicate commercial applicator's certificate is $10. If an applicator is employed by more than one pesticide application business, a separate certificate and fee is required.

(e) *Public applicator's certificate.* The triennial fee for a public applicator's certificate is $10. A fee is not required when the initial certification requires examination. The fee for a duplicate public applicator's certificate is $3.

(f) *Examination fees.* Examination fees are nonrefundable. The following examination fees, with payment made in advance, will be charged:

(1) Commercial/public applicator's core examination—$50.

(2) Commercial/public applicator's category examination—$10.

(3) Pesticide dealer manager's examination—$50.

(4) Private applicator's examination—no charge.

(5) Pest management consultant's examination—no charge except that a fee of $5 will be charged if an examination is requested on other than a regularly scheduled examination date.

(g) *Registration fee for a pesticide application technician.*

(1) *Commercial pesticide application technician.* An annual registration fee of $30 will be charged to register a commercial pesticide application technician with the Department. The fee for a duplicate technician registration is $7.

(2) *Public pesticide application technician.* An annual registration fee of $20 will be charged to register a public pesticide application technician with the Department. The fee for a duplicate technician registration is $7.

(h) *Private applicator's permit.* The triennial fee for a private applicator's permit is $10. The fee for a duplicate private applicator's permit is $3. A fee will not be charged for a special permit which may be issued in conjunction with the private applicator's permit.

(i) *Product registration.* The annual fee to register a pesticide is $250.

## Subchapter B. LICENSES, CERTIFICATES AND PERMITS

### PESTICIDE DEALERS

**§ 128.10. Licensing requirements for pesticide dealer.**

(a) A person may not purchase or attempt to purchase a restricted use pesticide for resale or distribution unless the person has a current and valid pesticide dealer license.

(b) Each pesticide dealer shall, at all times, employ at least one individual who possesses a valid pesticide dealer manager certificate.

(1) A licensed pesticide dealer shall notify the Department in writing within 15 days of a change in its license information including the employment status of its pesticide dealer manager certificate holder.

(2) A licensed pesticide dealer shall return to the Department within 15 days the voided pesticide dealer manager's certificate of an employee that is no longer employed by the pesticide dealer. If the pesticide dealer manager's certificate issued by the Department is not available, the pesticide dealer shall notify the Department in writing within 15 days of the employee's termination and provide an explanation of why the certificate is unavailable and the last known home address for the individual.

(c) A pesticide dealer may not distribute a restricted use pesticide unless the receiver provides proof of appropriate valid certification or license and proof of personal identification by presenting a photo identification document issued by an agency of the United States Government or affiliated jurisdiction (that is, state or territory), such as a driver license, valid passport, military identification card or an immigration card; or at least two nonphoto identification documents one of which must be a United States Government issued document bearing the person's signature, such as a Social Security card. The other nonphoto identification documents must identify the holder by name and address.

**§ 128.11. Recordkeeping.**

(a) A pesticide dealer shall keep for each distribution of a restricted use pesticide a record containing the following information:

(1) The name and address of the customer and his applicator's certificate number or business or dealer's license number.

(2) The brand name of the restricted use pesticide.

(3) The EPA registration number of the restricted use pesticide.

(4) The amount of the restricted use pesticide.

(5) The date of the distribution.

(6) Signature and identification information of the individual accepting delivery.

(b) A record required to be kept under this section shall be completed within 24 hours of the distribution in written or printable form, maintained for at least 3 years and shall be made immediately available to the Department upon request or immediately available to medical personnel in an emergency.

**§ 128.12. Issuance of a pesticide dealer manager certificate.**

(a) The Department will issue a pesticide dealer manager certificate to an applicant 18 years of age or older, upon verification of passing a written competency examination and payment of the appropriate fee. Renewal of the dealer manager certificate will be based on receipt by the Department of an application accompanied by the appropriate fee.

(b) If a pesticide dealer manager fails to renew the certificate for a period of 1 or more years, the pesticide dealer manager shall reestablish eligibility as described in § 128.13 (relating to determination of competence).

(c) The certificate for a pesticide dealer manager will expire on December 31st of each year.

(d) For currently licensed pesticide dealer locations, the requirements for employment of a pesticide dealer manager certificate holder will become effective December 11, 2011. Initial examination fee will be waived until December 11, 2011. The requirements for a pesticide dealer manager certificate holder will be immediately effective for pesticide dealer locations licensed on or after December 11, 2010.

(e) The pesticide dealer manager certificate is only valid when the certificate holder is employed by the licensed pesticide dealer indicated on the certificate. A new certificate will be issued without charge if the certificate holder is subsequently employed by a different licensed pesticide dealer and has not lost eligibility as set forth in subsections (b) and (c).

**§ 128.13. Determination of competence.**

(a) At least one individual at each pesticide dealer location shall show competence in the storage and distribution requirements for restricted use pesticides. Competence will be determined on the basis of a written examination. The examination will include the following:

(1) Safety.

(2) Labeling and label comprehension.

(3) Storage and security.

(4) Spill control.

(5) Transportation.

(6) Pesticide disposal.

(7) Recognition of pesticide poisoning symptoms and first aid.

(b) An application to take an examination shall be filed along with the appropriate fee with the Department at least 10 working days prior to the date of the examination.

(c) The examination will be proctored. Successful completion of the examination will entitle a person to hold a pesticide dealer managers certificate. An opportunity will be provided to retake an examination if a passing grade has not been achieved.

(d) The applicant shall provide to the proctor proof of personal identification by presenting a photo identification document issued by an agency of the United States Government or affiliated jurisdiction (that is, state or territory), such as a driver license, valid passport, military identification card or an immigration card; or at least two nonphoto identification documents one of which must be a United States Government issued document bearing the person's signature, such as a Social Security card. The other nonphoto identification documents must identify the holder by name and address.

(e) A person may not use reference materials during an examination unless approved by the Department or its designated agents.

(f) An application for a new pesticide dealer manager's certificate will be accepted throughout the calendar year. A full year's license fee will be required for a portion of a year, except that the Department may issue a certificate for an additional year when a new application is filed during the last 2 months of the certificate year.

## PEST MANAGEMENT CONSULTANTS

**§ 128.24. Recordkeeping.**

(a) A pest management consultant shall keep for each instance in which he provides technical advice, supervision or aid or makes a recommendation to the user of a restricted use pesticide, the following information:

(1) The name and address of the person for whom this service was provided.

(2) The brand name of the pesticides recommended to be used.

(3) The amount of the pesticides recommended to be used.

(4) The dosage or rate of the pesticides recommended to be used.

(5) The date on which this service was provided.

(b) A record required to be kept under this section shall be maintained for at least 3 years and shall be made immediately available to the Department upon request or to medical personnel in an emergency.

## PESTICIDE APPLICATION BUSINESSES

**§ 128.31. Licensing requirements.**

(a) A pesticide application business may not be operated without first obtaining a pesticide application business license.

(b) The license period shall end on December 31 each year, except that the Department may issue a license for the following year when an initial license application is filed during the last 2 months of a licensing year.

(c) A pesticide application business shall prominently display on every vehicle involved in the pesticide application phase of its business the license number assigned by the Department. The number must be in figures at least

3 inches high and be located on both sides of the vehicle at a readily visible location in a contrasting color.

(d) A licensed business shall notify the Department in writing within 15 days of a change in information in its application for licensing, or if it is no longer engaged in the application of pesticides.

(1) A licensed pesticide application business shall return to the Department within 15 days the voided applicator certification or register technician card of an employee that is no longer employed by the pesticide application business.

(2) If the certification or registered technician card issued by the Department is not available, the pesticide application business shall notify the Department in writing within 15 days of the employee termination and provide an explanation of why the card is unavailable and the last known home address for the individual.

(e) A business that meets the definition of a commercial applicator as defined in section 4(6)(C) of the act (3 P. S. § 111.24(6)(C)) may not apply a pesticide without having a valid certified applicator physically present at the application site unless all application personnel on site are valid registered technicians.

(f) If the application business includes aerial applications, the applicant shall provide proof of compliance with the Federal Aviation Administration regulations as described in 14 CFR Part 137 (relating to agricultural aircraft operations).

**§ 128.32. Categories of business licenses.**

A commercial or public business shall identify in its application those business categories in which it desires to operate. A business shall employ for each business category in which it makes a pesticide application at least one applicator who is certified in a specific applicator category recognized under the general business category and shall limit its applications to those applicator categories in which it employs at least one certified applicator. The business categories are listed in paragraphs (1)—(10). The applicator categories recognized under a particular business category are listed under that business category.

(1) *Category (A)*—Agricultural Plant Pest Control.

01 Agronomic Crops

02 Fruits and Nuts

03 Vegetable Crops

05 Forest Pest Control

08 Seed Treatment

(2) *Category (B)*—Agricultural Animal Pest Control.

04 Agricultural Animals

(3) *Category (C)*—Ornamental and Turf Pest Control.

06 Ornamental and Shade Trees

07 Lawn and Turf

22 Interior Plantscape

(4) *Category (D)*—Aquatic Pest Control.

09 Aquatic Pest Control

24 Swimming Pools

26 Sewer Root Control

(5) *Category (E)*—Right-of-Way Pest Control.

10 Right-of-Way and Weeds

(6) *Category (F)*—Industrial, Institutional, Structural and Health Related.

11 Household and Health Related

12 Wood Destroying Pests

14 (Reserved)

15 Public Health Vertebrate Pest Control

16 Public Health Invertebrate Pest Control

19 Wood Preservation

23 Park or school Pest Control

(7) *Category (G)*—Fumigation.

13 Structural Fumigation

20 Commodity and Space Fumigation

21 Soil Fumigation

(8) *Category (H)*—Demonstration and Research.

18 Demonstration and Research Pest Control

(9) *Category (I)*—Regulatory.

17 Regulatory Pest Control

(10) *Category (J)*—Aerial Applicator.

25 Aerial Applicator

**§ 128.33. Assignment of work.**

A pesticide application business may not allow an individual to make a pesticide application in an applicator category in which the individual has not been certified as an applicator or trained and registered as a technician.

**§ 128.34. Financial responsibility.**

(a) The Department will consider a certificate of insurance from an insurer or surety to be evidence of financial responsibility if the insurer or surety is licensed to do business under section 1605 of the Insurance Company Law of 1921 (40 P. S. § 991.1605), or otherwise permitted by Federal law or the Insurance Department to do business in this Commonwealth, if the following conditions are met:

(1) The certificate of insurance includes the name of the insurance company, policy number, insurance amount, type of coverage afforded and exclusions relating to damage arising from the use of pesticides and expiration date of the policy.

(2) The minimum comprehensive general liability insurance provided is $100,000 for each occurrence of bodily injury liability and $100,000 for each occurrence of property damage liability. A policy may be written with combined limits if the limits equal or exceed the sum of the individual limits.

(3) The certificate indicates coverage for completed operations and includes a statement indicating that the coverage applies to pesticide application.

(4) The maximum deductible amount does not exceed $2,500 of the combined policy limits. If a pesticide application business has not satisfied the deductible amount in a prior claim, the policy may not contain a deductible amount.

(5) A current certificate of insurance is forwarded to the Department at each insurance renewal date which sets forth the same information specified in paragraphs (1)—(4).

(b) A pesticide application business desiring to qualify as a self-insurer may submit a written proposal of self-insurance to the Department for approval.

(1) The proposal shall include the following:

(i) A master self-insurance and security agreement.

(ii) A balance sheet and income statement which shall reflect the actual financial condition of the business as of the last complete calendar or fiscal year preceding the date of the proposal. These documents shall be prepared in accordance with generally accepted accounting principles and shall be certified by a certified public accountant.

(2) A business will not be approved as a self-insurer unless it posts certain collateral with the Department. This paragraph does not apply to government agencies or authorities.

(3) The minimum required security that shall be furnished to the Department is $500,000.

(4) Only the following will be accepted as valid collateral for self-insurance purposes:

(i) United States currency, including United States Treasury bills, United States Treasury notes or other negotiable obligations of the United State Government. United States Savings Bonds are not negotiable.

(ii) Evidence of escrow deposits in Federal or State banks, credit unions or savings and loan associations if Federally insured. Escrow deposits shall be established for the sole purpose of providing security to meet the duties of a self-insurer.

(iii) Irrevocable letters of credit issued by a bank in this Commonwealth or another bank as approved by the Department.

(iv) Surety bonds issued by insurers authorized or eligible to do business in this Commonwealth.

(v) Bonds or other negotiable obligations issued by a state, subdivision or instrumentality of a state in the United States, if not in default as to principal or interest.

(vi) Corporate bonds, issued by an entity other than the proposed self-insurer, rated A or better by Moody's Bond Record, Moody's Investors Service, Inc.

(vii) Other security approved upon petition to the Department.

(5) The Department will hold the collateral furnished for the benefit of the persons to whom the self-insurer is obligated.

(i) The self-insurer shall pay for obligations incurred under the act by assets readily reduced to liquid assets, such as demand deposits, time deposits, negotiable instruments and other assets which may be readily reduced to liquid form.

(ii) If the self-insurer is not able to discharge its obligations, the self-insurer may petition the Department to release the collateral posted as is necessary to satisfy the obligations of the self-insurer.

(iii) If withdrawals from collateral are required, the self-insurer shall replace the security within 72 hours from the date of withdrawal, to retain its certificate as a self-insurer.

(6) A self-insurer shall annually furnish to the Department a report of claims incurred during the preceding calendar year.

(7) Upon approval by the Department of a self-insurance proposal, a self-insurance certificate will be issued to the self-insurer. The certificate shall be renewed annually, after review that the Department deems appropriate.

(c) If the evidence of financial responsibility furnished by a pesticide application business no longer complies with this section, the business shall immediately provide other evidence of financial responsibility which complies with this section. If it fails to do so, the Secretary may revoke its license.

**§ 128.35. Recordkeeping.**

(a) A pesticide application business shall keep for every application of a pesticide a record containing the following information:

(1) The date of application. For a pesticide requiring a reentry time, the date of application must include the hour completed. For continuous applications, such as swimming pools and chemigation, the record must include start and finish dates and the total amount of pesticide products used during that time period. For each addition of a pesticide to the system, an entry to the record is required.

(2) The name and address of the customer and the address and location of the application site if different from the address of the customer.

(3) The brand name of the pesticides used.

(4) The EPA product registration number.

(5) The total amount of every pesticide used in pounds, ounces, gallons, liters, applied to a treated area.

(6) The dosage or rate of application, of every pesticide used.

(7) The names and the certification or technician's registration number of each person making or supervising the application. When applicable the names of noncertified/nonregistered persons involved in the application.

(8) The identification of the application site, including the specific field or land area and the crop and size of the area treated for pesticides used in the production of an agricultural commodity.

(b) When a restricted use pesticide is used in the production of an agricultural commodity, a copy of the record required under this section shall be provided by the application business to the customer within 30 days of the pesticide application.

(c) Pesticide product and application information shall be made immediately available to medical personnel in an emergency.

(d) A pesticide application record must be completed in written or printable form no later than 24 hours after the application date and made immediately available to the Department upon request.

(e) A record required to be kept under this section shall be maintained for at least 3 years.

## COMMERCIAL AND PUBLIC APPLICATORS

**§ 128.41. Requirements for certification.**

(a) A person is deemed to be a commercial or public applicator and required to be certified if one or more of the following criteria are met:

(1) A person who applies or supervises the application of a pesticide on an easement or on the property or premises of another (other than his employer). This

includes the use of a pesticide exempted from Federal registration under § 128.91 (relating to EPA approval required).

(2) A person who applies or supervises the use of a restricted use pesticide on property owned by him or his employer when not applied for the purpose of producing an agricultural product.

(3) A person who applies or supervises the application of a pesticide to the following locations or who is involved in the following types of application:

(i) *Fumigation*—Includes a person who uses fumigants except a person who meets the definition of a private applicator.

(ii) *Golf courses*—Includes a person who uses pesticides in the establishment and maintenance of a golf course.

(iii) *Public and private parks*—Includes a person who uses a pesticide in a recreational or campground area of a public or private park.

(iv) *Educational and research institutions*—Includes a person employed by a public or private educational and research facility that uses pesticides in its educational or research programs.

(v) *Playgrounds and athletic fields*—Includes a person who applies a pesticide to a public playground or an athletic field.

(vi) *Apartment dwellings*—Includes an owner of an apartment building or an employee of an owner who applies a pesticide other than a disinfectant to an apartment structure of four or more units. Commercial certification is not required if the owner or employee resides in the apartment structure and applies general use pesticides to the unit in which he resides.

(vii) *Schools*—Includes a person who uses a pesticide on school property, except for the use of disinfectants and sanitizers within the school building.

(viii) *Swimming pools*—Includes a person who uses a pesticide in the care and maintenance of swimming pools or water recreation facilities associated with a public or private park, excluding lakes, ponds, rivers or streams.

(b) The following are exceptions to subsection (a)(3)(viii):

(1) Disinfectants and sanitizers not used for water treatment.

(2) The use of general use pesticides in the care and maintenance of a swimming pool at a private single-family residence.

(3) The use of a general use pesticide by an owner or employee in the care or maintenance of a swimming pool used solely as a therapeutic swimming pool.

### § 128.42. Categories of commercial and public applicators.

A commercial or public applicator applying or supervising the application of a pesticide shall be certified in one or more of the following applicator categories:

(1) *Agronomic crops*—The use of a pesticide in the production of an agricultural crop, including tobacco, grain, soybeans and forages and the application of a pesticide to noncrop agricultural land.

(2) *Fruits and nuts*—The use of a pesticide in the production of tree fruits, nuts and berries.

(3) *Vegetable crops*—The use of a pesticide in the production of vegetables, including, tomatoes, cabbage and celery.

(4) *Agricultural animals*—The use of a pesticide on animals, including beef cattle, dairy cattle, swine, sheep, horses, goats, poultry or other livestock and to premises where these animals are confined.

(5) *Forest pest control*—The use of a pesticide in a forest, forest nursery or forest seed producing area.

(6) *Ornamental and shade trees*—The use of a pesticide in the maintenance of an ornamental tree, shrub, flower or other ornamental.

(7) *Lawn and turf*—The use of a pesticide in the maintenance or production of lawn and turf.

(8) *Seed treatment*—The use of a pesticide on seed.

(9) *Aquatic pest control*—The use of a pesticide on standing or running water, excluding the use of a pesticide in a public health-related activity described in paragraph (16).

(10) *Right-of-way and weeds*—The use of a pesticide to maintain a public road, an electrical power line, a pipeline, a railway right-of-way or a similar type of area or to control vegetation around a structure, such as an oil tank, utility sub stations, an industrial railway siding, an airport, a parking lot, a fence or an industrial building or for the control of an invasive weed species in other areas.

(11) *Household and health related*—The use of a pesticide in, on or around a food handling establishment, a human or nonagricultural animal dwelling, an institution such as a school or hospital, an industrial establishment, a warehouse, a grain elevator and other types of structures whether public or private. The application of a pesticide to protect a stored, processed or manufactured product is also included. The use of a rodenticide or avicide is permitted in this category. The use of a pesticide in outdoor perimeter treatments to control pests, which may infest the structure, is included.

(12) *Wood destroying pests*—The use of a pesticide to control or prevent termites, powder post beetles or other wood destroying pests infesting a residence, school, hospital, store, warehouse or other structures or structural components, including wooden objects contained in or associated with the structure and the area adjacent to those structures.

(13) *Structural fumigation*—The use of a fumigant in or to a structure for the control of pests affecting the structure or its fixtures or inhabitants.

(14) (Reserved).

(15) *Public health vertebrate pest control*—The use of a pesticide to manage and control a vertebrate pest such as rodents or birds, affecting public health.

(16) *Public health invertebrate pest control*—The use of a pesticide to manage and control an invertebrate pest affecting public health.

(17) *Regulatory pest control*—The use of a pesticide to control an organism designated by the Commonwealth or the Federal government to be a pest requiring regulatory restrictions or control procedures to protect man or the environment.

(18) *Demonstration and research pest control*—The use of a pesticide to demonstrate to the public the proper method of application for a pesticide and the use of a

pesticide in research such as that undertaken by an extension specialist, county agent or vocational agriculture teacher.

(19) *Wood preservation*—The use of a pesticide in wood impregnation to control or prevent fungi, insects, bacteria, marine borers and other wood destroying pests and includes pole treating or restoration and the use of a fumigant for in-place treatment of utility poles.

(20) *Commodity and space fumigation*—The use of a fumigant in or to a structure, trailer, railcar, onboard ship, or in any type of fumigation chamber, such as under a tarpaulin for the control of pests in stored or in-transit commodities.

(21) *Soil fumigation*—The application of a fumigant to a soil environment.

(22) *Interior plantscape*—The use of a pesticide to control plant pests when the soil or plant to be treated is located within an enclosed structure.

(23) *Park or school pest control*—The use of a pesticide in a campground or recreational area of a public or private park or on school property.

(24) *Swimming pools*—The use of a pesticide in the care and maintenance of swimming pools.

(25) *Aerial applicator*—The use of a pesticide applied by aircraft to any crop or land area. Applicators in this category shall comply with § 128.85 (relating to ornamental or turf application) when making ornamental or turf applications.

(26) *Sewer root control*—The use of a pesticide to control vegetative growth in public and private sewage collection and distribution lines.

**§ 128.43. Determination of competence.**

(a) For each of the categories listed in § 128.42 (relating to categories of commercial and public applicators), competence in the use and handling of pesticides shall be determined on the basis of a written examination. The examination will include the following:

(1) Areas of knowledge and competence set forth in section 16.1 of the act (3 P. S. § 111.36a).

(i) Identification of pests to be controlled and the damages caused by pests.

(ii) The appropriate control measures to be used, including pesticides.

(iii) The hazards that may be involved in applying pesticides, to protect people and the environment.

(iv) The proper use of pesticide application equipment, including calibration and dosage calculations.

(v) Protective clothing and respiratory equipment required during application and handling of pesticides.

(vi) General precautions to be followed in cleaning and maintaining equipment used.

(vii) Transportation, storage, security and disposal of pesticides.

(viii) Applicable Federal and State pesticide laws and regulations.

(2) Safety.

(3) Labeling and label comprehension.

(b) An examination for certification will consist of two parts:

(1) One part of the examination, the core area, will be based on general information required of commercial and public applicators.

(2) The second part of the examination will be based on information related to the specific categories of commercial and public applicators.

(c) An examination will be proctored. The applicant shall provide to the proctor proof of personal identification by presenting a photo identification document issued by an agency of the United States Government or affiliated jurisdiction (that is, state or territory), such as a driver license, valid passport, military identification card or an immigration card; or at least two nonphoto identification documents one of which must be a United States Government issued document bearing the person's signature, such as a Social Security card. The other nonphoto identification documents must identify the holder by name and address. Only reference materials approved by the Department may be used during the examination. Successful completion of the core area and successful completion of part two of the examination in a specific category will entitle a person to certification in that category. A person desiring certification for additional categories will be required to be examined for each additional category. An opportunity will be provided to retake an examination when a passing grade has not been achieved.

(d) If a person successfully completes only one part of the two-part examination, successful completion of the remaining part of the examination shall be obtained within 1 year from the date the initial part of the examination was successfully completed.

(e) An application to take an examination shall be filed along with the appropriate fee with the Department at least 10 working days prior to the date of the examination.

(f) A person may not use a reference source during an examination unless approved by the Department or its designated agents.

**§ 128.44. Eligibility.**

(a) A person is eligible for certification upon reaching 18 years of age and fulfilling the requirements under §§ 128.41—128.43 (relating to requirements for certification; categories of commercial and public applicators; and determination of competence). In addition to the requirements for a commercial applicator's certification, an aerial applicator shall have a current commercial agricultural aircraft operator's certificate issued by the Federal Aviation Administration or show evidence of compliance with 14 CFR Part 137 (relating to agricultural aircraft operations).

(b) Within 12 months of becoming eligible to be certified as a commercial applicator, a person shall file with the Department an application for certification. A person who fails to file an application within this 12-month period will lose certification eligibility and shall again establish eligibility in accordance with §§ 128.41—128.43 (relating to requirements for certification; categories of commercial and public applicators; and determination of competence). An application for initial certification will be accepted from an eligible person throughout the year. A certificate will expire on September 30 following the date of application, except that the Department may issue a certificate for an additional year when an application is initially filed during the last 2 months of the certification year.

(c) Once a certification has expired, no further use of pesticides as allowed by the certification will be permitted. Eligibility for certification shall remain under subsection (b).

(d) If a person allows his certification to expire in the triennial year in which recertification credits are due, recertification shall require completion of delinquent recertification credits as described in § 128.45 (relating to recertification) and satisfaction of the requirements for eligibility of subsection (b).

(e) If a person fails to complete delinquent recertification credits within 1 year from the triennial certification expiration date or fails to renew the certification for any reason during that time period, the person is required to reestablish eligibility by meeting the requirements in § 128.3 (relating to fees), § 128.43 and this section.

**§ 128.45. Recertification.**

(a) At intervals of 3 years, a certified commercial or public applicator shall provide evidence of having received current update training in technology relating to pesticides in the specific categories in which the applicator is certified to maintain certification. Training will be divided into core and category specific areas as follows:

(1) *Core.*

(i) Safety and health.

(ii) Labeling and label comprehension.

(iii) Environmental protection.

(iv) Equipment use, calibration and dosage calculations.

(v) Protective clothing and respirator equipment.

(vi) Cleaning and maintaining equipment.

(vii) Transportation, storage, security and disposal.

(viii) Applicable State and Federal laws.

(2) *Category specific.*

(i) Identification of pests.

(ii) Appropriate control measures.

(iii) Integrated pest management.

(b) Recertification credits will be given on the basis of attendance at courses or other appropriate training approved by the Department. Training will be evaluated by the Department and assigned credits. A person is required to meet the credit requirements in the "Pennsylvania State Plan for Certification of Pesticide Applicators." This plan has been filed with and approved by the EPA in accordance with FIFRA. Records of training will be maintained by the Department and a yearly statement will be sent to each certified commercial or public applicator describing credits obtained and credits due to meet recertification standards.

(c) Training will be approved based on the following criteria:

(1) Training shall be conducted or sponsored by an educational institution, an individual, an association, a business or a governmental agency.

(2) Training shall be approved for recertification credits at the rate of 1 credit per 30 minutes of applicable instruction, exclusive of coffee breaks, lunches, visits to exhibits, and the like.

(3) Sponsors of recertification training shall submit a written request for course approval to the Department's regional office for the region in which the meeting will be held. A request to approve out-of-State training shall be submitted to the Department of Agriculture, Bureau of Plant Industry, Health and Safety Division, 2301 North Cameron Street, Harrisburg, Pennsylvania 17110-9408. A request shall be submitted at least 15 working days prior to the training date.

(4) A request for training approval must include the following information:

(i) The name, address and phone number of the contact person who is coordinating the meeting.

(ii) The specific location of the meeting.

(iii) The date and time of the meeting.

(iv) A listing of the trainers, subject matter and time allotted to each subject.

(v) The trainer has at least 3 years experience as a certified applicator in the appropriate category or has submitted documentation of other qualifications to serve as a trainer such as educational background.

(vi) A statement of whether the meeting is opened to the public and if there is a charge to attend.

(5) Statements made in a request to approve training shall be supported by oath or affirmation or made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

(6) Credits will be assigned to each training meeting based upon the subjects covered and the amount of time expended on each subject.

(7) If an employee of the Department is unable to monitor the training, the meeting coordinator is responsible for authenticating attendance and shall compile an approved list of Pennsylvania certified applicators in attendance. The lists shall be returned to the Department within 10-working days following the meeting date and shall include the name of each individual attending and his applicator's certificate number.

(8) Credits assigned may be modified if either the content or time of the actual meeting differs from the original written request for approval.

(9) Falsification by a pesticide business or other course sponsor of information required under this subsection may result in a warning, a fine, suspension and the withdrawal of course approvals as set forth in this section.

(10) A person may not falsify attendance or that of another person's attendance at a recertification meeting. Falsification of attendance at a recertification course by a person may result in a warning, a fine or suspension or revocation of the applicator's certification and require recertification as required under §§ 128.3 and 128.61 (relating to fees; and determination of competence).

**PESTICIDE APPLICATION TECHNICIANS**

**§ 128.51. Training program.**

(a) A pesticide application technician shall obtain instruction in, and possess adequate knowledge of, the proper use and handling of pesticides. The training program must include:

(1) Those areas of knowledge described in section 16.2 of the act (3 P. S. § 111.36b).

(i) Identification of pests relative to job responsibility.

(ii) The proper use of pesticides and use of application equipment, including calibration and maintenance equipment used on the job.

(iii) Protective clothing and respiratory equipment required during the application and handling of pesticides.

(iv) Transportation and disposal of pesticides used in and around the workplace.

(v) Applicable State and Federal regulations as they affect the work assignments.

(2) Spill handling.

(3) Human health and environmental effects.

(4) Safety and security.

(b) The technician training program shall include a sufficient level of on-the-job training to allow the technician to competently perform the functions associated with an application of pesticides in which the technician is anticipated to be involved.

(c) A technician is not permitted to make a pesticide application using techniques, pesticides or equipment not included in his training.

(d) A technician shall undergo annual training to assure that his knowledge is adequate for satisfactory completion of his work related duties.

(e) A certified applicator with at least 1 year experience in the categories in which the technician is to be trained shall be responsible for administering the training program. This person shall develop a training program which includes the appropriate level of training needed by the technician to satisfactorily complete work related duties subject to disapproval by the Department.

**§ 128.52. Registration.**

(a) A business shall submit to the Department a list of persons it intends to register as technicians. The postmarked date or date of receipt will indicate the beginning of a training period to consist of at least 30 calendar days of training.

(b) At the completion of training, the business shall file with the Department an application to register the technician. The application shall be signed by the certified applicator responsible for administering the training program and the technician verifying satisfactory completion of the training program. The annual registration fee shall be submitted with the application.

(c) A registration expires on February 28 each year.

(d) An application for a new registration will be accepted throughout the calendar year. A full year's registration fee will be required for a portion of a year, except that the Department may issue a registration for an additional year when an application is initially filed during the last 2 months of the registration year.

(e) A pesticide application business shall register a technician annually with the Department and shall submit evidence of training, as required by the Department, in addition to the registration fee.

(f) A technician's registration may not be transferred from one business to another.

(g) A technician must be 16 years of age or older at the time of application for registration.

**§ 128.53. Recordkeeping.**

(a) A pesticide application business employing a technician shall keep records of training provided to meet the requirements of § 128.51 (relating to training program).

(b) The pesticide application business shall keep as part of its records proof of personal identification for all technicians by retaining copies of a photo identification document issued by an agency of the United States Government or affiliated jurisdiction (that is, state or territory), such as a driver's license, valid passport, military identification card or an immigration card; or at least two nonphoto identification documents one of which must be a United States Government issued document bearing the person's signature, such as a Social Security card. The other nonphoto identification documents must identify the holder by name and address. All copies of identification documents must be secured in a manner to prevent identity theft or unauthorized access.

(c) A record required to be kept under this section shall be maintained for at least 3 years and completed in written or printable form no later than 24 hours after the training and shall be made immediately available to the Department upon request.

**PRIVATE APPLICATORS**

**§ 128.61. Determination of competence.**

(a) Competency in the use and handling of restricted use pesticides by a private applicator will be determined on the basis of a proctored written examination. The examination will include the following:

(1) Areas of knowledge described in section 17.2 of the act (3 P. S. § 111.37b).

(i) Labeling and label comprehension.

(ii) Safety and health.

(iii) Environmental protection.

(iv) Pests.

(v) Pesticides.

(vi) Integrated pest management.

(vii) Equipment.

(viii) Application techniques and technology.

(ix) Laws and regulations.

(2) Transportation, storage, security and disposal.

(b) An opportunity will be provided to retake an examination if a passing grade has not been achieved.

(c) Only reference materials approved by the Department may be used during the examination.

(d) The applicant shall provide to the proctor proof of personal identification by presenting a photo identification document issued by an agency of the United States Government or affiliated jurisdiction (that is, state or territory), such as a driver license, valid passport, military identification card or an immigration card; or at least two nonphoto identification documents one of which must be a United States Government issued document bearing the person's signature, such as a Social Security card. The other nonphoto identification documents must identify the holder by name and address.

**§ 128.62. Eligibility.**

(a) A private applicator will be eligible for a permit upon reaching 16 years of age and fulfilling the requirements of § 128.61 (relating to determination of competence) and subsection (b).

(b) Within 1 year of fulfilling the requirements of § 128.61, a private applicator shall file with the Department an application for a permit accompanied by the appropriate fee. A person who fails to file within this 1 year period shall again establish eligibility under § 128.61.

(c) A private applicator will be issued a numbered permit which shall be used by the applicator when purchasing a restricted use pesticide.

(d) A private applicator with an expired permit may not make an application of a restricted use pesticide (unless the individual is working under the direct supervision of a certified applicator).

**§ 128.63. Recertification.**

(a) At intervals of 3 years, a private applicator shall have accumulated credits as a result of having received update training approved by the Department in technology relating to the proper and safe use of pesticides to continue as a permitted private pesticide applicator. Training will be divided into core and category specific areas as specified in § 128.45(a) (relating to recertification).

(1) *Core.*

(i) Safety and health.

(ii) Labeling and label comprehension.

(iii) Environmental protection.

(iv) Equipment use, calibration and dosage calculations.

(v) Protective clothing and respirator equipment.

(vi) Cleaning and maintaining equipment.

(vii) Transportation, storage, security and disposal.

(viii) Applicable State and Federal laws.

(2) *Category specific.*

(i) Identification of pests.

(ii) Appropriate control measures.

(iii) Integrated pest management.

(b) Recertification credits will be given on the basis of attendance at meetings or other appropriate training approved by the Department. Training will be evaluated by the Department and assigned credits. A person is required to meet the credit requirements in the *Pennsylvania State Plan for Certification of Pesticide Applicators*. This plan has been filed with and approved by the EPA under FIFRA. Records of training will be maintained by the Department and a yearly statement will be sent to each private applicator describing credits obtained and credits due to meet recertification standards. Training will be approved as described under § 128.45(c).

(c) If a private applicator fails to renew his permit by the date of expiration, renewal requires the following:

(1) Completion of due recertification credits as described in subsections (a) and (b).

(2) Completion of the examination requirements as described in §§ 128.3, 128.61 and 128.62 (relating to fees; determination of competence; and eligibility) by the applicator if the due recertification credits are not completed within 1 year from the expiration date of the permit or the permit is expired for more than 1 year for any reason.

(d) Falsification by a pesticide business or other course sponsor of information required under this subsection may result in a warning, fine and suspension or the withdrawal of course approvals as set forth in § 128.45 and this section.

(e) A person may not falsify his attendance or that of another person's attendance at a recertification meeting. Falsification of attendance at a recertification course by a person may result in a warning, fine or suspension or revocation of the applicator's certification and require recertification as required under § 128.61.

**§ 128.64. Fumigation by a private applicator.**

(a) A private applicator shall hold a permit in the proper fumigation category to purchase or attempt to purchase or use a restricted use fumigant product.

(b) In addition to the requirements in § 128.61 (relating to determination of competence), a private applicator using commodity and space, or soil fumigants shall demonstrate competence in the proper and safe use of these pesticides. Competency shall be demonstrated by passing a proctored written examination specifically relating to each type of fumigant the applicator intends to use. Only reference materials approved by the Department may be used during the examination. The applicant shall provide to the proctor proof of personal identification by presenting a photo identification document issued by an agency of the United States Government or affiliated jurisdiction (that is, state or territory), such as a driver license, valid passport, military identification card or an immigration card; or at least two nonphoto identification documents one of which must be a United States Government issued document bearing the person's signature, such as a Social Security card. The other nonphoto identification documents must identify the holder by name and address.

(c) A special permit will be issued, relating to fumigation, and will be valid for a 3-year period. A fee will not be charged for this special permit. A special permit will not be issued for the use of a fumigant unless the applicant has a private applicator's permit.

(d) Recertification requirements shall be met through attendance at approved meetings and consist of at least two credits of category specific education relating to the appropriate area of fumigation in which the applicator is certified. The credits obtained by a private applicator to meet the requirements of this subsection may also be used to meet the requirements of § 128.63 (relating to recertification).

**§ 128.65. Recordkeeping.**

(a) A private applicator shall keep for each application of a restricted use pesticide a record containing the following information:

(1) The date of application. For a restricted use pesticide requiring a reentry time, the date of application must include the hour completed.

(2) The place of application including the name and address of the farm and the specific field or land area and the crop treated.

(3) The size of the area treated.

(4) The brand name of every restricted use pesticide used.

(5) The EPA product registration number.

(6) The total amount of every restricted use pesticide used in pounds, ounces, gallons, liters, applied to a treated area.

(7) The dosage or rate of application of every restricted use pesticide used.

(8) The names and the permit or certification numbers of the persons making or supervising the application. When applicable, the names of the noncertified applicators acting under the direct supervision of the private applicator shall be recorded.

(b) A record required to be kept under this section shall be maintained for at least 3 years.

(c) Pesticide product and application information shall be made immediately available to medical personnel in an emergency.

(d) A restricted use pesticide application record must be completed in written or printable form no later than 24 hours after the application date and made immediately available to the Department upon request.

## RECIPROCITY

### § 128.71. General.

A person who is not a resident of this Commonwealth, but who has a valid license, certificate or permit from another state, may obtain an appropriate Pennsylvania license, certificate or permit if the state in which the person is licensed has a reciprocal agreement with the Commonwealth under section 22 of the act (3 P. S. § 111.42). A license, certificate or permit will be issued under this section only for the initial period of issuance for that eligible category.

### § 128.72. Procedure.

A person desiring a license under § 128.71 (relating to general) shall submit to the Department a properly completed application, the appropriate fee and evidence of financial responsibility as required along with a copy of the person's current license, certificate or permit, proof of having reached the 18 years of age, out-of-State residency and proof of personal identification by presenting a photo identification document issued by an agency of the United States Government or affiliated jurisdiction (that is, state or territory), such as a driver license, valid passport, military identification card or an immigration card; or at least two nonphoto identification documents one of which must be a United States Government issued document bearing the person's signature, such as a Social Security card. The other nonphoto identification documents must identify the holder by name and address.

## Subchapter C. PRIOR NOTIFICATION

### § 128.81. Right-of-way application.

(a) *Prior notification required.* A commercial/public applicator may not apply a restricted use pesticide to a right-of-way without first giving prior notification in the form of a notice published in two newspapers of general circulation in the affected area.

(b) *Alternative form of notification.* In lieu of the notification requirements described in subsection (a), an applicator may give prior notification by constructive notification to a person residing in every dwelling unit on land contiguous to the restricted use pesticide application site.

(c) *Additional information.*

(1) At least 7 days prior to the proposed application date, a person residing in a dwelling on land contiguous to the application site may request additional information from the pesticide application business. Upon the request, the pesticide application business shall make constructive notification and provide the following additional information at least 12 hours prior to the time of application:

(i) The proposed date and time of the application.

(ii) The brand name of every restricted use pesticide to be applied including the EPA registration number.

(2) Upon written request, the pesticide application business shall, within 10 days of receiving a request under this subsection, provide a copy of the label for every restricted use pesticide used or to be used.

(d) *Exceptions.* The following types of ground application do not require prior notification:

(1) Injections internal to utility poles and trees.

(2) Ground line applications to utility poles.

### § 128.82. Nonagricultural specific site application.

(a) *Prior notification required.* A commercial/public applicator may not make a specific site application of a restricted use pesticide without first giving prior notification by constructive notification to a person residing in every dwelling unit on land contiguous to the application site.

(b) *Additional information.*

(1) At least 7 days prior to the proposed application date, a person residing in a dwelling on land contiguous to the application site may request additional information from the pesticide application business. Upon the request, the pesticide application business shall make constructive notification and provide the following additional information at least 12 hours prior to the time of application:

(i) The proposed date and time of application.

(ii) The brand name of every restricted use pesticide to be applied including the EPA registration number.

(2) Upon written request, the pesticide application business shall within 10 days of receiving a request under this subsection provide a copy of the label for every restricted use pesticide used or to be used.

(c) *Exceptions.* The following types of application do not require prior notification:

(1) An application of a restricted use pesticide within a detached structure.

(2) An application of a restricted use pesticide where applied directly below the soil surface, except where a well or spring is located within 25 feet of the application site or where a soil fumigant is used.

(3) An application of a restricted use pesticide in a tamper resistant bait tray or placed in a rodent burrow which is inaccessible to children or pets.

(4) An application of a restricted use pesticide that is injected into trees or utility poles.

### § 128.83. (Reserved).

### § 128.83a. Agricultural application.

(a) *Prior notification required.* A commercial/public applicator may not apply a restricted use pesticide for an agricultural purpose without first giving prior notification in the form of a notice published in two newspapers of general circulation in the affected area.

(b) *Additional information.*

(1) At least 7 days prior to the proposed application date, a person residing in a dwelling on land contiguous to the restricted use pesticide application site may request additional information from the pesticide application business. Upon the request, the pesticide application business shall make constructive notification at least 12 hours prior to the time of application, and provide the following additional information:

(i) The proposed date and time of application.

(ii) The brand name of every restricted use pesticide to be applied including the EPA registration number.

(iii) The business name, address and phone number.

(2) The person making a request under this subsection shall identify in the request the name and address of every person operating agricultural land which shares a common border with property resided on by the person making the request.

(3) Upon written request, the pesticide application business shall, within 10 days of receiving a request under this subsection, provide a copy of the label for every restricted use pesticide used or to be used.

(c) *Alternate forms of notification.*

(1) In lieu of requirements in subsection (a), a pesticide application business may give constructive notification to a person residing in every dwelling unit on land contiguous to the restricted use pesticide application site at least 18 hours prior to the time of application. The pesticide application business shall provide the proposed date and location of the application, the brand name of every restricted use pesticide to be applied including the EPA registration number and the business name, address and phone number.

(2) In lieu of requirements in subsection (a), an applicator may post placards at usual points of entry to the application site and at the borders with adjoining properties owners at least 18 hours prior to the time of application. This placard must remain posted until the conclusion of any restricted reentry time listed on the pesticide label. The placards must be at least 8 1/2 inches by 11 inches in size and be printed with "Public Notice of Pesticide Application" and contain the pesticide application business's name, address, phone number and the brand name of every restricted use pesticide to be applied including the EPA registration number.

(d) *Exceptions.* An application of a restricted use pesticide does not require prior notification where applied directly below the soil surface, except where a well or spring is located within 25 feet of the application site or a soil fumigant is used.

**§ 128.84. Nonagricultural area-wide application.**

(a) *Prior notification required.* A commercial/public applicator may not make an area-wide application of a restricted use pesticide without first giving prior notification in the form of a notice published in two newspapers of general circulation in the affected area.

(b) *Additional information.*

(1) At least 7 days prior to the proposed application date, a person residing in a dwelling on land contiguous to the application site may request additional information from the pesticide application business. Upon the request, the pesticide application business shall make constructive notification and provide the following information at least 12 hours prior to the time of application.

(i) The proposed date and time of application.

(ii) The brand name of every restricted use pesticide to be applied including the EPA registration number.

(iii) The business name, address and phone number.

(2) Upon written request, the pesticide application business shall, within 10 days of receiving a request under this subsection, provide a copy of the label for every restricted use pesticide used or to be used.

**§ 128.85. (Reserved).**

**§ 128.85a. Ornamental or turf application notification.**

(a) *Notification.*

(1) A person who wishes to be notified of future pesticide applications to lawn, turf, ornamental or shade trees on neighboring property shall submit a written request to the licensed pesticide application business that will be making the pesticide application. This notification is limited to applications made by pesticide application businesses operating under pesticide applicator Category 06 or 07 (relating to ornamental and shade trees; and lawn and turf) as described in § 128.32 (relating to categories of business licenses) and limited to neighboring property sharing a mutual property border within 100 feet of the pesticide application site.

(i) This written request for notification must provide the neighboring property owner's name and street address for each neighboring property where a pesticide application may occur and notification is desired.

(ii) The requirement to notify becomes effective 7 days following receipt of the request by the pesticide application business.

(2) Upon receiving a written request for notification at least 7 days prior to the application date, a pesticide application business shall make constructive notification to the requester at least 12 hours prior to the application and provide the following information:

(i) The proposed date and time of application.

(ii) The brand name of every pesticide to be applied including the EPA registration number.

(iii) The business name, address and phone number.

(3) If specifically requested in writing, the pesticide application business shall, within 10 days of receiving a request, provide a copy of the labels for every pesticide used or to be used.

(b) *Expiration of request.* A request for notification made under this subchapter shall expire on December 31 in the year in which it is made.

(c) *Records.* The pesticide application business shall keep records of all requests for notification and records of notifications made for 3 years.

(d) *Exceptions.* An application of a pesticide to a tree by means of injection is not subject to notification.

**§ 128.86. (Reserved).**

**§ 128.87. (Reserved).**

**§ 128.88. Recordkeeping for prior notification.**

(a) The pesticide application business shall keep, for each occasion in which prior notification is required, a record containing the following information:

(1) A copy of the newspaper advertisement or a statement describing other methods of prior notification that this chapter authorizes.

(2) The name and address of every person requesting additional information.

(3) The date and time of individual notification.

(4) A copy of correspondence relating to prior notification or additional information.

(b) A record required to be kept under this section shall be completed in written or printable form no later than

24 hours after the application date, maintained for at least 3 years and be made immediately available to the Department upon request.

## Subchapter D. REGISTRATION OF PESTICIDES

### § 128.91. EPA approval required.

(a) Only pesticides which have been approved by the EPA for registration under section 3 of FIFRA (7 U.S.C.A. § 136a) or are permitted to be distributed under a Federal exemption under section 18 or 25(b) of FIFRA (7 U.S.C.A. §§ 136p and 136w(b)) may be registered by the State.

(b) State registration of products sold only under an emergency exemption approved under section 18 of FIFRA will remain in effect only for the period specified by the EPA in granting approval of an exemption, and will require the registrant to provide to the State all information required under 40 CFR 166.32 (relating to reporting and recordkeeping requirements for specific, quarantine and public health exemptions).

(c) Pesticide registration is required for all pesticides exempted from regulation under FIFRA under 40 CFR 152.25(f) (relating to exemptions for pesticides of a character not requiring FIFRA regulation). State registration of products under this exemption will be permitted only when the product labeling, composition, efficacy and risks are consistent with the terms for Federal exemption.

## Subchapter E. MISCELLANEOUS

### § 128.101. Reporting of pesticide significant accidents or incidents.

(a) The Secretary has designated the Department as the State agency to which significant pesticide accidents or incidents shall be reported.

(b) A person after becoming aware of a significant pesticide accident or incident or who has knowledge of a significant pesticide accident or incident shall immediately report it to the Department.

(c) As used in this section, the term "significant pesticide accident or incident" means an accident or incident involving a pesticide which requires a person to obtain medical treatment, results in illness requiring veterinary treatment of any wild or domestic animal, results in the unintended death of a human or animal, pollutes the waters of this Commonwealth or causes damage which results in an economic loss of plants, organisms, structures or stored commodities.

(d) A regulated person who following a pesticide application becomes aware of an unexpected adverse effect resulting from the pesticide product when applied in a manner consistent with the label directions shall contact the Department and provide information on the application and its effects.

(e) This section does not supersede the reporting procedures of other statutes or the regulations promulgated thereunder.

### § 128.102. Protected designated areas.

(a) An application of a restricted use pesticide within 100 feet of certain publicly-owned or designated lands will not be permitted unless a waiver is granted by the Secretary. Lands affected by this restriction include:

(1) State forest land designated as a Conservation Area under 17 Pa. Code Chapter 44 (relating to conservation areas) or as a Natural Area or Wild Area under 17 Pa. Code Chapter 27 (relating to State Forest Natural Areas—statement of policy) and State park land designated as a Conservation Area under 17 Pa. Code Chapter 44 or as a Natural Area under 17 Pa. Code Chapter 17 (relating to State Parks Natural Areas—statement of policy).

(2) Areas containing endangered or threatened plant or animal species. These species are listed in 17 Pa. Code §§ 45.12 and 45.13 (relating to Pennsylvania endangered; and Pennsylvania threatened); fish identified in 58 Pa. Code §§ 75.1 and 75.2 (relating to endangered species; and threatened species); and 58 Pa. Code §§ 133.21 and 133.41 (relating to classification of birds; and classification of mammals).

(b) A person may file a request with the Secretary for a waiver of the prohibition contained in subsection (a). The request will contain the following information:

(1) A general statement relating to the purpose and need for the pesticide application.

(2) Specific evaluation of possible detrimental effects on water quality, air quality, groundwater, public health and safety, nontarget plants and animals, habitat diversity and interspersion and biological productivity.

(3) Specific evaluation of expected benefits.

(4) Additional information which may be requested by the Secretary.

(c) A request for a waiver shall be submitted at least 90 days prior to the proposed date of pesticide application.

(d) The Secretary will approve or deny the application within 60 days of receipt of the application.

### § 128.103. Handling, transportation, storage, use and disposal of pesticides.

(a) A person may not use, handle, transport, store, dispose, display or distribute a pesticide in a manner that endangers man or the environment or contaminates food, feed, feed supplements, medications, fertilizers, seed or other products that may be handled, transported, stored, displayed or distributed with the pesticides or otherwise is in conflict with State or Federal laws or regulations.

(b) A person may not use, or cause to be used, a pesticide inconsistent with its labeling (as defined in § 128.2 (relating to definitions)). A pesticide label containing an advisory instruction concerning the use of the pesticide being an environmental hazard shall be considered by the Secretary as a further restriction on the pesticide's use.

(c) An application of a pesticide may not be made where weather conditions are such that it can be expected that the pesticide will move off of the proposed application site.

(d) A person may not dispose of, store or receive for disposal or storage a pesticide, pesticide container or pesticide container residue in a manner that does one or more of the following:

(1) Is inconsistent with its label or labeling.

(2) Causes or allows dumping of pesticides in sewers or surface waters of this Commonwealth, except in conformance with permits issued by the Department of Environmental Protection, the Fish and Boat Commission or other Commonwealth agencies having jurisdiction regarding water pollution.

(3) Violates an applicable State or Federal act or regulation.

(4) Causes or allows the open dumping of pesticides or pesticide containers. All pesticide containers shall be triple rinsed or equivalent pressure rinsed and free of all visible pesticide residues, empty and punctured prior to disposal. Plastic pesticide containers should be offered for recycling or reconditioning where programs are available. If not, they may be disposed of in a permitted sanitary landfill or a permitted commercial incinerator.

(e) A person may not use, or cause to be used, a pesticide inconsistent with its labeling. A pesticide containing an advisory instruction concerning the use of the pesticide subject to the Federal Worker Protection Standard (see 40 CFR Part 170 (relating to worker protection standard)) shall be considered by the Secretary as a further restriction on the pesticide's use.

(f) A business may not directly apply pesticides to the property of another without first obtaining permission of the owner, or occupant having care, custody or control of the property to do so, except in the case of easements or right-of-ways or when done under the direction of a governmental entity to protect the health and welfare of the public.

(g) A person may not use a pesticide in a manner which results in unwanted residues on the property of another, except in the case of easements or right-of-ways or when done under the direction of a governmental entity to protect the health and welfare of the public.

(h) A person may not apply a pesticide unless it has been registered by the Department or it is used under the provisions of an experimental use permit or research conducted under an exemption from an experimental use permit.

(i) A person may not store, transport or otherwise possess a pesticide in a service container unless the service container is legibly marked to indicate the name and percentage of active ingredients and is accompanied by a readily available copy of the registered label that represents the pesticides contained therein. The following exceptions apply:

(1) Service containers containing pesticide end-use dilutions when the containers are used as application devices.

(2) Service containers containing pesticide end-use dilutions which are required by other regulations to have pesticide label information accompany them.

(3) Service containers containing pesticide end-use dilutions when the containers are used as nurse tanks (with a capacity greater than 55 gallons) in the production of an agricultural commodity.

(j) A person may not place or keep a pesticide in a container which has been labeled for food or drink.

### § 128.104. Experimental use permits.

The Department shall be notified by the registrant prior to the use in this Commonwealth of a pesticide with an approved EPA experimental use permit. Notification must include copies of the EPA approval letter, a properly completed product label as defined in 40 CFR 172.6 (relating to labeling) and a list of the participants and cooperators involved in the program.

### § 128.106. Additional responsibilities relating to schools.

(a) *General.* A pesticide may not be applied in a common access area within a school building or on school grounds when students are expected to be in the common access area for normal academic instruction or organized extracurricular activities within 7 hours following the application. The applicator shall also comply with reentry time restrictions contained on the pesticide label, whichever is greater and the requirements in section 772.2 of the Public School Code of 1949 (24 P. S. § 7.772.2), regarding notification of pesticide treatments at schools.

(b) *Exemptions.* The following type of pesticide applications are exempt from this section.

(1) Disinfectants and Sanitizers.

(2) Self-containerized baits placed in areas not accessible to students.

(3) Gel type baits placed in cracks, crevices or voids.

(4) Swimming pool maintenance chemicals used in the care and maintenance of a swimming pool.

### § 128.107. Providing information upon request.

(a) A producer, distributor or other person shall maintain all books and records as required under section 8 of FIFRA (7 U.S.C.A. § 136f). The records shall be made available for inspection and reproduction when requested by the Department.

(b) Pesticide application business, pesticide dealer or person who handles, distributes, stores, transports or applies any pesticide shall upon request provide to the Department, information about the pesticides including brand name, EPA registration number and active ingredients.

(c) Pesticide application business, pesticide dealer or person who handles, distributes, stores, transports or applies any pesticide shall in an emergency upon request immediately provide to medical personnel information about the pesticides involved including brand name, EPA registration number and active ingredients.

## Subchapter F. PESTICIDE HYPERSENSITIVITY REGISTRY

### § 128.111. Registry.

(a) The Department will maintain a list of individuals who have been verified as being hypersensitive to pesticides. The list will be referred to as the Pesticide Hypersensitivity Registry.

(b) Individuals who want to be included on the registry shall have their hypersensitivity to pesticides verified by a physician, and are solely responsible for providing written verification to the Department.

(c) Pesticide-hypersensitive individuals who want to be on the registry shall provide to the Department their name and primary residence including street address, city, state, zip code, county, daytime telephone number and nighttime telephone number. Each individual shall also provide an alternate telephone number where notification information can be conveyed. Individuals may also provide secondary locations, addresses and associated telephone numbers to be maintained as part of their listing. An individual submitting a request for listing less than 2 months preceding the effective date, as described in subsection (e), may not be included on the current registry with that effective date, but will be included in the next registry.

(d) To remain on the registry, an individual shall notify the Department annually during the month of October of the individual's intent to remain on the registry for the next 12 months. Medical verification will not be required for this renewal.

(e) The Department will distribute the current registry to each licensed commercial and public pesticide application business on or before the effective dates of March 1 and July 15 of each year. Individuals will not be considered officially included on the registry unless their names appear on the current registry.

**§ 128.112. Notification of hypersensitive individuals.**

(a) *General.* Prior to a pesticide application being made by a commercial or public pesticide application business the following conditions shall be met:

(1) Each individual listed on the current registry whose primary residence or secondary locations property line is within 500 feet of the application site shall be notified of the pesticide application.

(2) Notification shall consist of providing the following information to the individual on the registry:

(i) Date, location (application site), earliest possible start time and latest possible finish time of application. The range between start and finish times may be no greater than 24 hours.

(ii) Brand name, EPA number and active ingredient common name (if on the label) of the pesticide products which may be used.

(iii) The name, telephone number and pesticide business license number of the pesticide application business.

(iv) A copy of the label for every pesticide used within 10 days of a written request.

(3) Notification shall be made between 12 hours and 72 hours prior to the pesticide application.

(4) Notification shall be made by telephone, personal contact or certified mail or, if available, electronic mail or facsimile.

(i) Notification requirements are met through constructive notification by contacting the hypersensitive person's daytime or nighttime listings in the register or if the information is given to an adult contacted by dialing the alternate telephone number.

(ii) If notification cannot be made after at least two telephone contact attempts, notification may be made by placing the written notification information on the front door of the listed residence or secondary location listed in the registry within 500 feet of the application site 12 to 72 hours prior to the application.

(iii) A record shall be kept of every contact and contact attempt made under this paragraph.

(b) *Exceptions.* The following types of application do not require notification under this section:

(1) An application of a pesticide within a detached structure not listed as a secondary location.

(2) An application of a pesticide directly below the soil surface.

(3) An application of a pesticide in a tamper-resistant bait station.

(4) An application of a pesticide to a tree or utility pole by means of injection.

(5) An application of a disinfectant or sanitizer.

(6) Application of a pesticide in the care and maintenance of a swimming pool.

(c) *Recordkeeping.* A record of the notification information required under this section, including the time and method of notification, shall be made within 24 hours following the application and maintained for at least 3 years and shall be made immediately available to the Department upon request.

[Pa.B. Doc. No. 10-2358. Filed for public inspection December 10, 2010, 9:00 a.m.]

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# Title 25—ENVIRONMENTAL PROTECTION

## ENVIRONMENTAL QUALITY BOARD

## [ 25 PA. CODE CHS. 287, 290 AND 299 ]

## Beneficial Use of Coal Ash

The Environmental Quality Board (Board) amends Chapters 287 and 299 (relating to residual waste management—general provisions; and storage and transportation of residual waste) and adds Chapter 290 (relating to beneficial use of coal ash) to read as set forth in Annex A. The regulations pertaining to beneficial use of coal ash in Chapter 287, Subchapter H (relating to beneficial use) are rescinded and moved to Chapter 290. Chapter 290 includes requirements for coal ash beneficial use, coal ash certification, water quality monitoring and storage.

This order was adopted by the Board at its meeting of August 30, 2010.

A. *Effective Date*

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

B. *Contact Persons*

For further information, contact Stephen Socash, Chief, Division of Municipal and Residual Waste, P. O. Box 8472, Rachel Carson State Office Building, Harrisburg, PA 17105-8472, (717) 787-3436; or Susan Seighman, 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 Pennsylvania AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available electronically through the Department of Environmental Protection's (Department) web site at www.dep.state.pa.us.

C. *Statutory Authority*

This final-form rulemaking is authorized under the following statutes:

The Solid Waste Management Act (SWMA) (35 P. S. §§ 6018.101—6018.1003), under section 105(a) (35 P. S. § 6018.105(a)), grants the Board the power and the duty to adopt the rules and regulations of the Department to accomplish the purposes and carry out the provisions of the SWMA. Sections 102(4) and 104(6) of the SWMA (35 P. S. §§ 6018.102 and 6018.104) provide the Department with the power and duty to regulate the storage, collection, transportation, processing, treatment and disposal of solid waste to protect the public health, safety and welfare. Section 508 of the SWMA (35 P. S. § 6018.508) provides the Department with the authority to regulate the beneficial use of coal ash, including establishing siting criteria and design and operating standards governing the storage of coal ash prior to beneficial use and the use and certification of coal ash as structural fill, soil substitutes and soil additives.

The Clean Streams Law (CSL) (35 P. S. §§ 691.1—691.1001), under section 5 (35 P. S. § 691.5(b)), grants the Department the authority to formulate, adopt, promulgate and repeal the rules and regulations that are necessary to implement the CSL. Section 402 of CSL (35 P. S. § 691.402) grants the Department the authority to adopt rules and regulations that require permits or conditions under which an activity shall be conducted when an activity creates a danger of pollution to waters of this Commonwealth or regulation of an activity is necessary to avoid pollution.

Section 4.2(a) of the Surface Mining Conservation and Reclamation Act (SMCRA), (52 P. S. § 1396.4b(a)), authorizes the Board to adopt regulations the Department deems necessary to fulfill the purposes and provisions of the SMCRA. Section 4(a) of the SMCRA (52 P. S. § 1396.4(a)) authorizes the Department to charge and collect a reasonable filing fee from persons submitting applications for a surface mining permit to cover the costs of reviewing and administering permits. Section 3.2 of the Coal Refuse Disposal Control Act (CRDCA) (52 P. S. § 30.53b), grants the Board the power and duty to adopt regulations to accomplish the purposes of the CRDCA. Section 5(b) of the CRDCA (52 P. S. § 30.55(b)) authorizes the Department to charge and collect a reasonable filing fee from persons submitting applications for a coal refuse disposal permit.

Section 1917-A of The Administrative Code of 1929 (71 P. S. § 510-17) authorizes and requires the Department to protect the people of this Commonwealth from unsanitary conditions and other nuisances, including any condition that is declared to be a nuisance by any law administered by the Department. Section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20) grants the Board the power and duty to formulate, adopt and promulgate rules and regulations as may be determined by the Board for the proper performance of the work of the Department.

D. *Background of the Final-Form Rulemaking*

This final-form rulemaking incorporates the key provisions of the Department's policies and procedures on the beneficial use of coal ash. The key provisions address the general and specific operating requirements for beneficial use, which include certification guidelines for the chemical and physical properties of coal ash beneficially used at active and abandoned mine sites. These provisions also relate to water quality monitoring and the storage of coal ash in piles and surface impoundments. This final-form rulemaking also adopts recommendations by the National Academy of Sciences in their 2006 report entitled *Managing Coal Combustion Residues in Mines*.

There are hundreds of thousands of acres of mine lands in this Commonwealth that need to be reclaimed. These lands contain many dangerous pits and highwalls that have caused the deaths of numerous citizens over the years. The use of coal ash to reclaim these mines eliminates the dangers associated with the open pits and highwalls and restores a safe environment. Reclamation also restores positive drainage to watersheds by allowing rain water to flow on the surface to streams, rather than infiltrating into spoil or deep mines from which it discharges as acid mine drainage. Reclamation of these lands cannot be accomplished fully through Federal and State funds that are currently available for this purpose. Therefore, a program that allows for the beneficial use of coal ash for mine reclamation in an environmentally responsible manner will allow for the continued reclamation of mine sites and protect the public health and safety and the environment.

The Department has been involved successfully with mine reclamation using coal ash for approximately 25 years. Information on several mine reclamation projects is in the 2006 report entitled *Coal Ash Beneficial Use in Mine Reclamation and Drainage Remediation in Pennsylvania*, which was a collaborative effort between the Department and the Materials Research Institute at the Pennsylvania State University.

In addition to unreclaimed mines, more than 2 billion tons of waste coal piles are scattered across the anthracite and bituminous coal regions in this Commonwealth. These piles can cause several different types and degrees of adverse impacts on the environment. Waste coal piles produce some of the most severe mine drainage in this Commonwealth, often having a pH less than 3.0 and acidity in the hundreds to thousands of milligrams per liter, and are also a troublesome source of sediment that has impacted hundreds of miles of stream. Stormwater runoff from waste coal piles also carries large loads of metals including iron, manganese, zinc, nickel, arsenic and cadmium. Finally, waste coal piles can catch fire and produce noxious fumes.

The use of waste coal to fuel power plants has assisted in the elimination of these waste coal piles and remedied the potentially harmful conditions resulting from the continued existence of the piles. To date, 145 million tons of waste coal have been used to fuel power plants. Annually, 10% of power in this Commonwealth is produced from power plants burning waste coal. The ash that is generated from the waste coal has been used to reclaim thousands of acres of abandoned mines. The Anthracite Region Independent Power Producer's Association (ARIPPA), an association of independent power producers, places a value of at least $90 million worth of reclamation that has been achieved at abandoned mine sites by the coal and power industries through the burning of waste coal and subsequent reclamation with the coal ash that was generated. Additionally, the Department has observed numerous instances where removal of the piles and reclamation has significantly reduced pollutant loads for metals, such as arsenic, zinc, nickel, iron and manganese.

Prior to this final-form rulemaking, the beneficial use of coal ash, including abandoned and active mine reclamation, was managed through existing residual waste regulations and Department technical guidance. In 2008, the Department proposed amendments to the technical guidance documents "Mine Site Approval for the Beneficial Use of Coal Ash," Document No. 563-2112-225, and "Certification Guidelines for the Chemical and Physical Properties of Coal Ash Beneficially Used at Mines," Document No. 563-2112-224. The most frequent comment received during the public comment period on these amendments was that the content of the technical guidance should be placed in regulations rather than Department technical guidance. The Board agreed with the commentators and included the key provisions of the technical guidance in this final-form rulemaking and further enhanced the existing residual waste regulations regarding the beneficial use of coal ash.

The citizens of this Commonwealth will be better served by this final-form rulemaking, which is summarized as follows: increased coal ash monitoring to ensure coal ash meets qualification criteria; increased water quality monitoring for a longer duration to create a robust dataset to facilitate the evaluation and documentation of water quality at sites where coal ash is beneficially used; a requirement for minimum number of moni-

toring wells to characterize the groundwater or other water quality points; a requirement for recording a landowner consent for placement of coal ash for beneficial use; improved reporting requirements to track volumes and location of sites where coal ash is beneficially used; consistent operational and monitoring standards for all types of beneficial use; a centralized process to qualify coal ash for beneficial use at mine sites; an annual fee payable to the Department to offset some of its costs for coal ash and water quality sampling and testing at mine sites where coal ash is beneficially used; and requirements for the storage of coal ash including provisions for design and operations.

Persons who generate coal ash with the intention of qualifying it for beneficial use and persons who utilize that ash will be required to comply with this final-form rulemaking. Currently, there are about 50 mine sites across this Commonwealth that are actively using ash under the beneficial use provisions. At any given time, there can be as many as 60 approved ash sources. Sources include large multiunit pulverized coal power plants and fluidized bed combustion (FBC) power plants that can produce hundreds of thousands of tons of ash per year and small industrial power plants that may produce less than 10,000 tons per year. The FBC plants, which burn waste coal, have traditionally used 100% of their ash for mine reclamation. A stated goal of the 43 coal-fired electricity producers in this Commonwealth is to find more ways to beneficially use the coal ash produced at their facilities.

For each of the past several years, about 11 million tons of coal ash has been used for mine reclamation. To date, approximately 20 surface mine sites have been reclaimed using coal ash. In 2008, approximately 11 projects, other than mine reclamation, used coal ash structural fill to construct roadways, an airport runway in Snyder County and a golf course in York County. Many municipalities in this Commonwealth beneficially use bottom ash as antiskid material in the winter months. Currently, eight facilities qualify under a general permit to beneficially use the coal ash produced at that facility as construction material at sites other than mine sites.

The Bureaus of Waste Management, Mining and Reclamation, District Mining Operations and Abandoned Mine Reclamation collaborated to produce this final-form rulemaking. The Bureau of Mining and Reclamation met with industry groups in 2008 representing both the corporate energy facilities and the independent power producers, including Reliant Energy, PPL and ARIPPA, and individually with various plant operators by request. The Department also provided information to the Pennsylvania Coal Association and the Pennsylvania Anthracite Council. The Department typically maintains discussions with the American Coal Ash Association and had several meetings with citizens representing Earthjustice and the Environmental Integrity Project. The concepts in this final-form rulemaking, in the form of technical guidance, were presented to the Mining and Reclamation Advisory Board and published at 38 Pa.B. 5228 (September 20, 2008). Comments received from industry, citizenry and Department staff were used in the development of this final-form rulemaking. Finally, this final-form rulemaking was presented to the Solid Waste Advisory Committee in May 2010. Draft final regulations were also presented to the Citizens Advisory Council in June 2010.

E. *Summary of Regulatory Requirements*

*§ 287.1*

The final-form rulemaking amends the definitions of "coal ash," "solid waste" and "structural fill" to provide clarity.

The proposed definition of "water table" was moved to Chapter 290 since the term is only used in that chapter.

*§§ 287.661—287.666*

The final-form rulemaking rescinds §§ 287.661—287.666. Chapter 290, Subchapter B (relating to beneficial use of coal ash) replaces these sections.

*Subchapter A. General*

*Final-form § 290.1*

The definition of "temporary coal ash storage pile" was added to the final-form rulemaking to allow relief from siting restrictions for storage piles that only exist for periods of less than 2 weeks.

*Final-form § 290.2*

Subsection (a) establishes that this chapter applies to the beneficial use of coal ash. It also establishes that fly ash, bottom ash or boiler slag that does not meet the beneficial use requirements (including the performance standards) of this chapter is a residual waste.

Subsection (b) specifies that beneficial use of coal ash mixed with residual waste will be authorized by a residual waste permit and meet the requirements of this chapter. The requirements for ash produced by co-firing coal and alternative fuels was moved to subsection (c) and revised to not require a residual waste permit in all cases.

Subsection (c) was added to the final-form regulation to allow ash produced by co-firing an alternative fuel with coal or waste coal as if it were coal ash, provided the alternative fuel is less than 20% of the total fuel and contributes less than 10% to the total quantity of ash. This change was made to encourage use of alternative fuels and may help offset some of the increased cost to industry due to additional analysis and monitoring required in the final-form rulemaking.

Subsection (d) specifies that beneficial use of coal ash mixed with construction and demolition waste will be authorized by a municipal waste permit and meet the requirements of this chapter.

Subsection (e) specifies that coal ash mixed with municipal waste, other than construction and demolition waste, must not be beneficially used by direct placement into the environment. Other beneficial uses may be authorized by a municipal waste permit.

Subsection (f) establishes that beneficial use of coal ash under this chapter does not require a disposal permit.

*Subchapter B. Beneficial Use of Coal Ash*

*Final-form § 290.101*

Subsection (a) establishes that use of coal ash under this chapter does not require a disposal permit.

Subsection (b) in the final-form regulation identifies the beneficial use that requires a chemical analysis of the coal ash.

Subsection (c) specifies that the physical characteristics required for certification for the intended beneficial use of the coal ash in Chapter 290, Subchapter C (relating to coal ash certification) must be met.

Subsection (d) establishes that a water quality monitoring plan is required for any structural fill, use at a mining activity site or use at an abandoned surface coal mine site involving use of more than 10,000 tons of coal ash per acre or more than 100,000 tons in total per site. The final-form regulation allows the Department to require a water quality monitoring plan where lesser amounts of coal ash are to be beneficially used or coal ash is used for other beneficial uses.

Subsection (e) specifies that coal ash may not be placed within 8 feet of the water table. The final-form regulation has been revised to limit placement within 8 feet of the water table when coal ash is used for mine subsidence control, mine fire control and mine sealing.

Subsection (f) specifies that coal ash may not be used in ways that may cause water pollution.

*Final-form § 290.102*

Subsection (a) establishes the requirements for a written proposal for coal ash to be used as structural fill. The term was modified in the final-form regulation from "written notification" to "written proposal" to avoid confusion with public notice requirements. This written proposal includes a description of the project, including maps, estimated project starting and completion dates, construction plans, estimated volume of coal ash to be utilized, chemical analysis and landowner consent. The landowner consent is a recordable document for projects involving use of more than 100,000 tons in total per site or 10,000 tons of coal ash per acre. The 100,000 tons per project trigger for a written proposal was added in the final-form regulation to be consistent with other sections of this chapter.

Subsection (b) specifies that public notices in local newspapers must be published for coal ash structural fill projects involving use of more than 10,000 tons of coal ash per acre or more than 100,000 tons in total per site. The notice must include name and business address, a brief description of location and scope of the project and the Departmental office location where the request was sent. Notification to the local municipality has been added to the final-form regulation.

Subsection (c) allows the Department to require public notice for projects less than 10,000 tons per acre and less than 100,000 tons per project when there is significant public interest or site conditions warrant notification.

Subsection (d) establishes that the Department will publish a notice in the *Pennsylvania Bulletin* of each written proposal received for use of coal ash as structural fill.

Subsection (e) establishes that the Department will respond in writing to the notifier as to whether their final-form use is consistent with this section.

Subsection (f) establishes additional requirements for coal ash used as structural fill, including compaction and layer thickness, runoff minimization and stormwater management, surface water diversion, cover, minimum compaction and dust minimization. The final-form regulation has been revised to indicate that the pH must be 7.0 or above for coal ash used as structural fill to be consistent with other sections in Chapter 290. In addition, the upper pH limit for use as structural fill only applies when public access is not restricted during storage or placement. The requirement that the Proctor Test be conducted by a certified lab has been dropped because the Department was unable to find an organization that certifies labs for that procedure.

Subsection (g) establishes siting restrictions for structural fill, including distances from streams, water sources, bedrock outcrops, sinkholes and areas draining into sinkholes, floodplains and wetlands. A siting restriction of 300 feet from exceptional value waters and high quality waters was added to protect these special protection waters.

Subsection (h) establishes annual reports required for projects involving use of more than 10,000 tons of coal ash per acre. The report must include contact information, site location, identity of each source of coal ash and the volume and weight of coal ash from each source. The final-form regulation also requires this report for projects involving more than 100,000 tons of coal ash in total per site to be consistent with the requirements in other sections.

Subsection (i) was added to the final-form regulation to require the person beneficially using coal ash as structural fill to notify the Department within 72 hours of any evidence that the coal ash may not meet the chemical limits or physical property requirements in § 290.201 (relating to coal ash certification). This requirement was moved from Chapter 290, Subchapter C to Chapter 290, Subchapter B to clarify that it applies to the end user. The time frame was added to clarify that this notification should occur quickly after the evidence is discovered by the end user.

*Final-form § 290.103*

Proposed subsection (a), which established that coal ash may be beneficially used as a soil substitute or soil amendment without a permit if the user complies with this section, was deleted in the final-form regulation because it is addressed in § 290.101(a) (relating to general requirements for beneficial use).

Subsection (a) establishes the written proposal requirements for coal ash to be used as a soil substitute or soil amendment. This written proposal includes a description of the project, including maps, estimated project starting and completion dates, construction plans, estimated volume of coal ash to be utilized, chemical analysis of the coal ash and soil at placement site, an analysis showing the coal ash will be beneficial to productivity or soil properties and landowner consent.

Subsection (b) establishes that the Department will respond to the notifier in writing as to whether their final-form use is consistent with this section.

Subsection (c) establishes additional requirements for coal ash used as a soil substitute or soil amendment, including coal ash and soil pH, calcium carbonate equivalency, surface runoff minimization and stormwater management, surface water diversion, application rate, protection of biota and dust minimization. It specifies that coal ash must be either incorporated within 24 hours or stored in accordance with Chapter 290, Subchapter E (relating to coal ash storage).

Subsection (d) establishes siting restrictions for coal ash used as a soil substitute or soil amendment, including distances from streams, water sources, occupied dwellings, sinkholes and areas draining into sinkholes and wetlands. A siting restriction of 300 feet from exceptional value waters and high quality waters was added to protect these special protection waters.

Subsection (e) establishes cumulative contaminant loading rates for coal ash used as a soil substitute or soil amendment.

Subsection (f) adds recordkeeping requirements to the final-form regulation. The items subject to recordkeeping include chemical analysis and quantity of coal ash utilized, which are necessary to determine cumulative loading rates, as well as source of the coal ash and placement location.

Subsection (g) was added to the final-form regulation to require the person beneficially using coal ash as a soil amendment or soil substitute to notify the Department within 72 hours of any evidence that the coal ash may not meet the chemical limits or physical property requirements in § 290.201. This requirement was moved from Chapter 290, Subchapter C to Chapter 290, Subchapter B to clarify that it applies to the end user. The time frame was added to clarify that this notification should occur quickly after the evidence is discovered by the end user.

*Final-form § 290.104*

Subsection (a) establishes the laws and regulations upon which this section is based.

Subsection (b) establishes the procedures for requesting beneficial use of certified coal ash at a specific mine site.

Subsection (c) establishes the amount of the permit filing fee for permits that will be beneficially using coal ash and where the money will be deposited. This fee was reduced from $2,000 to $1,000 per year after final placement of coal ash at the site. The costs to monitor sites incurred by the Department after completion of coal ash placement are expected to be less than the costs during active placement.

Subsection (d) establishes a requirement for public notice.

Subsection (e) establishes appropriate beneficial uses for coal ash at active coal mine sites.

Subsection (f) establishes operational requirements for beneficial use of coal ash at active coal mines. The final-form regulation allows a greater quantity of ash to be beneficially used at a site if the operator can demonstrate that the greater quantity will enhance the reclamation or improve water quality. In addition, the greater quantity may be utilized at a site that is part of a multiple-site project involving multiple coal refuse reprocessing sites. The requirement to run the Proctor Test on each source of coal ash was dropped from the final-form regulation. The requirement that the Proctor Test be conducted by a certified lab was also dropped in the final-form regulation because the Department was unable to find an organization that certifies labs for that procedure.

Subsection (g) establishes operational requirements for beneficial use of coal ash when used as a soil substitute or soil additive.

Subsection (h) establishes operational requirements for the beneficial use of coal ash at coal refuse disposal sites.

Subsection (i) establishes the requirement for mine site monitoring of coal ash. The final-form regulation allows for a reduced coal ash sampling frequency for end users where the coal ash being utilized is from a single source and the source is close to the placement area.

Subsection (j) establishes annual reporting requirements pertaining to the amount and sources of ash used at a mine site.

Subsection (k) was added to the final-form regulation to require the person beneficially using the coal ash at a mining activity site to notify the Department within 72 hours of any evidence that the coal ash may not meet the certification requirements in § 290.201. This requirement was moved from Chapter 290, Subchapter C to Chapter 290, Subchapter B to clarify that it applies to the end user. The time frame was added to clarify that this notification should occur quickly after the evidence is discovered by the end user.

*Final-form § 290.105*

The term "abandoned coal surface mine" has been changed to "abandoned mine lands" to provide clarity. "Abandoned mine lands" is defined in § 86.252 (relating to definitions).

Subsection (a) establishes procedures and requirements for the use of coal ash at abandoned mine lands. The final-form regulation requires the approval to be under a contract with the Department. The Department does not have the authority to issue approvals without a contract for reclamation of abandoned mine lands.

Subsection (b) establishes the elements required in a contract proposal to use coal ash at abandoned mine lands.

Subsection (c) includes a requirement to publish a public notice in local newspapers of the final-form use of coal ash at abandoned mine lands involving use of more than 10,000 tons of coal ash per acre or more than 100,000 tons in total at any site. The final-form regulation also includes notification to the local municipalities.

Subsection (d) establishes that the Department will publish a notice in the *Pennsylvania Bulletin* of each approved use of coal ash at abandoned mine lands.

Subsection (e) establishes additional requirements for coal ash used at abandoned mine lands including: maximum slope of the reclaimed area; compaction and layer thickness; runoff minimization and stormwater management; surface water diversion; cover; minimum compaction; dust minimization; minimum distances for ash placement from streams, water sources, sinkholes and areas draining into sinkholes; floodplains; and requirements for the beneficial use of coal ash as a soil substitute or soil additive at abandoned mine lands. The pH range was dropped in the final-form regulation as it conflicted with the pH limitation in § 290.201.

Subsection (f) establishes the annual reporting requirements pertaining to the amount and sources of coal ash used at abandoned mine lands.

Subsection (g) was added to the final-form regulation to require the person beneficially using coal ash at abandoned mine lands to notify the Department within 72 hours of any evidence that the coal ash may not meet the certification requirements in § 290.201(a). This requirement was moved from Chapter 290, Subchapter C to Chapter 290, Subchapter B to clarify that it applies to the end user. The time frame was added to clarify that this notification should occur quickly after the evidence is discovered by the end user.

*Final-form § 290.106*

Proposed subsection (a), which established that coal ash may be beneficially used as a soil substitute or soil amendment without a permit if the user complies with this section, was deleted from the final-form regulation, since it is addressed in § 290.101(a).

Subsection (a) identifies specific other uses of coal ash and requirements for storage and use. These other uses of coal ash include use in concrete, extraction or recovery of materials and chemicals from coal ash, use of fly ash as a stabilized product, use of bottom ash or boiler slag as

antiskid or surface preparation material, use of coal ash as a raw material for a product with commercial value, use as pipe bedding and use for mine subsidence control, mine fire control and mine sealing. The final-form regulation adds use in cement and use of coal ash as fuel to the other beneficial uses.

The use as a stabilized product has been modified in the final-form regulation to indicate that if the stabilized product is used as structural fill or as a soil amendment or soil substitute, it must also meet the requirements in §§ 290.102 or 209.103 (relating to use as structural fill; and use as a soil substitute or soil additive), respectively. The use of coal ash as drainage material has been deleted from the final-form regulation since this involves contact with water and the intent with the final-form regulation is to minimize contact with water.

The use of coal ash for mine subsidence control, mine fire control and mine sealing in the final-form regulation requires the person beneficially using coal ash to demonstrate that its use will not cause groundwater contamination. Since these particular uses may be within 8 feet of the water table, the final-form regulation requires the coal ash to undergo cementitious reaction after placement.

The final-form regulations allow beneficial use of coal ash with a minimum heating value of 5,000 Btu per pound as a fuel.

Subsection (b) was added to the final-form regulation to require the person beneficially using coal ash for these other beneficial uses to notify the Department within 72 hours of any evidence that the coal ash may not meet the appropriate chemical standards or physical property requirements in § 290.201(a). This requirement was moved from Chapter 290, Subchapter C to Chapter 290, Subchapter B to clarify that it applies to the end user. The time frame was added to clarify that this notification should occur quickly after the evidence is discovered by the end user.

*Final-form § 290.107*

Subsection (a) requires persons beneficially using coal ash to provide documentation and information to demonstrate compliance with this subchapter upon the Department's request.

Subsection (b) establishes that failure to have documentation of compliance with this subchapter may lead to a presumption that the person is disposing residual waste without a permit.

*Subchapter C. Coal Ash Certification*

*Final-form § 290.201*

Subsection (a) establishes the chemical and physical certification standards for coal ash to meet beneficial use requirements. Chemical leaching standards are established. Low permeability standards are established for ashes that will be used as low permeability material. The final-form regulation allows addition of cement or lime to meet the standards and require disclosure of their addition in the certification request. Minimum calcium carbonate equivalence standards are established for ashes that will be used for alkaline addition. The final-form regulation has lowered the standard for selenium due to an indication from monitoring data that selenium leachability is higher than predicted based on the modeling used to develop standards for other species. Monitoring data has not indicated that there is environmental harm from sulfate when coal ash is beneficially used; therefore, the sulfate standard has been increased in the final-form regulation. The standard for fluoride has been dropped in the final-form regulation, as the Department has insufficient data to determine what an appropriate fluoride standard should be or if it is even necessary. Fluoride determinations in the coal ash and water quality monitoring remain a requirement of these regulations and the data generated will allow the Department to address this issue in a future rulemaking, if necessary.

Proposed subsection (b), establishing certification exceptions for ashes that meet primary Maximum Contaminant Level (MCL) parameters, but fail to meet a secondary MCL parameter, has been deleted in the final-form rulemaking. The exceptions require a site-specific evaluation and are not appropriate for Statewide certification.

Subsection (b) in the final-form rulemaking establishes informational requirements to be provided by the coal combustion waste generator, including sampling and analysis of the ash. The final-form regulation clarifies that it is the generator that can request certification and that only the pollution control devices that can impact the chemical or physical properties of the ash need to be identified in the request. The final-form regulation allows the Department to require a different leaching procedure than the specified EPA Method 1312 if other leaching procedures become available that more accurately predict the leaching behavior of coal ash.

Subsection (c) establishes that the Department will provide written notification to the generator of the Department's decision on whether the generator's coal combustion waste is certified. If the certification requirements are met, the Department will provide a certification identifier. The term was changed from "certification identification number" to "certification identifier" in the final-form regulation because the identifier is alphanumeric.

Subsection (d) establishes coal combustion waste monitoring requirements. The final-form regulation clarifies that reanalysis is required when a change in the fuel source exists that could alter the chemical characteristic or physical properties of the coal combustion waste that could adversely impact beneficial use.

Subsection (e) requires the generator of the coal combustion waste to notify the Department of any changes that may affect the coal ash certification. In the final-form regulation, notification by the person beneficially using the coal ash to has been moved to the individual beneficial uses in Chapter 290, Subchapter B, since Chapter 290, Subchapter C applies to generators.

*Final-form § 290.202*

Subsection (a) establishes procedures for revoking coal ash certification for coal combustion waste that fails to meet certification requirements. The final-form regulation clarifies that certification will be revoked if the generator fails to demonstrate that any exceedence was due to laboratory error or an anomalous result.

Subsection (b) establishes that coal combustion waste with a revoked certification cannot be used at mine sites.

Subsection (c) establishes the procedures for recertifying a revoked coal combustion waste, including resampling and establishing adequacy of chemical and physical properties.

*Final-form § 290.203*

This section establishes procedures when exceedances of certification standards occur. The final-form regulation requires the generator to submit documentation within 30

days to demonstrate that any exceedence was due to laboratory error or an anomalous result.

*Subchapter D. Water Quality Monitoring*

*Final-form § 290.301*

Subsection (a) establishes that water quality monitoring plans must be submitted to the Department for approval. The specific citations to when a plan is required have been replaced by the more general reference to Chapter 290.

Subsection (b) establishes the content of water quality monitoring plans, including the location and design of upgradient and downgradient monitoring points, provisions for background sampling prior to placement of coal ash and quarterly sampling after approval. The final-form regulation does not allow the Department to reduce the number of monitoring points or the frequency of water quality monitoring.

Subsection (c) establishes sources of quality assurance/quality control procedures for sampling and in the laboratory.

Subsection (d) establishes sources of analytical methods used for water quality monitoring and that the laboratory must be accredited.

Subsection (e) specifies the nonmetal parameters to be determined in water monitoring samples. The final-form regulation requires measurement of pH in both the field and laboratory.

Subsection (f) specifies the metal parameters to be determined in water monitoring samples and that water elevation at monitoring point be recorded.

Subsection (g) gives the Department the ability to require additional parameters based on site conditions. The final-form regulation also gives the Department the ability to require additional parameters based on characteristics of the coal ash.

Subsection (h) specifies the minimum frequency and duration of water quality monitoring and allows the Department to require more frequent or longer water quality monitoring if results indicate contamination may be occurring.

Subsection (i) specifies the frequency that water quality monitoring data is to be submitted to the Department. The final-form regulation indicates that this data must be submitted quarterly until 5 years after final placement when the frequency is reduced to annually for 5 additional years.

Subsection (j) establishes that attainment with groundwater remediation standards must be demonstrated if there is water degradation due to placement of coal ash.

*Final-form § 290.302*

Subsection (a) establishes parameters for the location and number of upgradient and downgradient groundwater monitoring points and that surface water monitoring points must be approved by the Department. The final-form regulation allows the Department to require upstream surface water monitoring where downstream surface water monitoring is required.

Subsection (b) establishes that the number, location and depth of monitoring points must be representative of water quality and located so as not to interfere with site operations. The subsection also specifies the maximum distance from the coal ash placement site. The final-form regulation allows the maximum distance to be measured from the coal ash placement site or the mining activity area since the maximum distance from the placement area could be in the active mining area. It would be difficult to maintain the integrity of a monitoring well in an area where active mining is occurring. The final-form regulation allows the Department to approve monitoring points at greater distances if their locations are better for water quality monitoring purposes.

Subsection (c) establishes that upgradient monitoring points be located where they will not be affected by coal ash placement.

Subsection (d) establishes that downgradient monitoring points be located where they will not be affected by coal ash placement.

Subsection (e) establishes that well drillers shall be licensed.

Subsection (f) specifies that well construction materials be decontaminated prior to installation.

*Final-form § 290.303*

Subsection (a) establishes well standards, including casing, diameter, screening, filter packing, visibility above ground, and annular space sealing and must be designed to prevent cross contamination. The section also allows alternative casing designs for wells located in stable formations. The final-form regulation allows the Department to approve alternatives to the filter packing requirements since filter packing is not possible when the monitoring well is within a mine void. The requirement for the monitoring wells to be clearly visible due to concerns with vandalism has been deleted in the final-form regulation.

Subsection (b) establishes standards for protective casings around well casings, including strength, length above and below surface of ground, collar and grouting, labeling, protrusion above well casing, locked cap and material of construction. The requirement for the monitoring wells to be painted in a highly visible color due to concerns with vandalism has been deleted in the final-form regulation.

*Final-form § 290.304*

Subsection (a) establishes when an assessment plan is to be submitted based on monitoring data or data from public or private water supplies. The final-form regulation clarifies that the changes in water quality that trigger the requirement for an assessment must be statistically significant degradation, not just any change. The methods for determining whether a change is statistically significant are specified by incorporating 40 CFR 258.53(g) and (h) (relating to ground-water sampling and analysis requirements) by reference.

Proposed subsection (b) indicated an assessment is not required if resampling shows degradation is not occurring or if degradation is a result of seasonal variation or activities unrelated to coal ash placement. In the final-form regulation, the assessment is limited to data and a supporting narrative if it can be demonstrated that the degradation is a result of one of those reasons.

Subsection (c) establishes the elements of an assessment plan, including monitoring point location, design and construction information, sampling and analytical methods to be used, an implementation schedule and identification of the abatement standard. The final-form regulation gives the Department the ability to require biological assessment of surface water as part of the assessment plan.

Subsection (d) establishes Department approval and notification of public and private water supplies.

Subsection (e) establishes report contents, including data, analysis and recommendations.

Subsection (f) establishes procedures for submission of a revised water quality monitoring plan when an abatement plan is not required.

Subsection (g) establishes that the Department may require abatement or water supply replacement prior to or concurrent with the assessment.

*Final-form § 290.305*

Subsection (a) requires that an abatement plan be submitted to the Department when certain conditions exist. An abatement plan is required when an assessment indicates groundwater or surface water degradation and the analysis under subsection (c) indicates that an abatement standard will not be met at the compliance points. A plan is also required when data from the Department or other person from one or more compliance points indicates an abatement standard has been exceeded. The final-form regulation also requires abatement if a biological assessment of surface water indicates a detrimental effect on biota.

Subsection (b) establishes the elements of an abatement plan, including identification of the specific methods or techniques to be used to abate degradation and to prevent future degradation and an implementation schedule.

Subsection (c) establishes standards for abatement. In the final-form regulation, "permitted" was deleted from "permitted coal ash placement area" because only coal ash placement at mining activity sites require a permit. The guidelines used to assess health risk have been clarified in the final-form regulation by referencing the Department's Land Recycling Program Technical Guidance Manual. Flexibility has been built in by allowing use of other standard procedures commonly used in the environmental field.

Subsection (d) allows a compliance point to be set for secondary contaminants beyond 500 feet on land owned by the owner of the coal ash placement area.

Subsection (e) establishes a time limit for completion and submittal of abatement plans.

Subsection (f) establishes that the Department may modify inadequate plans.

Subsection (g) establishes a time frame for implementation of the abatement plan after approval.

Subsection (h) establishes orders that may be issued by the Department if an abatement plan is found to be inadequate after approval or implementation.

*Final-form § 290.306*

This section establishes recordkeeping requirements for water quality monitoring data.

*Final-form § 290.307*

This section is new in the final-form rulemaking. Paragraph (1) establishes water quality monitoring requirements and transition times for sites where coal ash has been and will continue to be beneficially used or stored that were previously not subject to water quality monitoring.

Paragraph (2) establishes water quality monitoring requirements and transition times for sites where coal ash has been and will continue to be beneficially used or stored that were previously subject to water quality monitoring.

*Subchapter E. Coal Ash Storage*

*Final-form § 290.401*

Subsection (a) establishes that best engineering design and construction practices are to be used for all phases of construction and operation.

Subsection (b) specifies that coal ash storage is not to exceed the design capacity of the storage facility.

Subsection (c) specifies that the Department may require a water quality monitoring system to be installed if coal ash storage has the potential to cause groundwater degradation.

Subsection (d) specifies that the person storing coal ash shall periodically inspect the storage facility for evidence of failure and take any necessary immediate corrective actions. Records of inspections and corrective actions are to be maintained for 3 years.

*Final-form § 290.402*

Subsection (a) specifies general maximum storage time limits. The final-form regulation clarifies what is meant by "previous year" by adding that the year begins on January 1st. In the final-form regulation, proposed subsection (c) is incorporated into this subsection.

Proposed subsection (b), which specified a maximum storage time limit for bottom ash, was deleted from the final-form regulation.

Subsection (b) in the final-form rulemaking establishes that a person storing coal ash in a manner contrary to subsection (a) is presumed to be operating a disposal facility.

Subsection (c) establishes operational record storage retention to overcome the presumption of disposal in subsection (a) or (b).

Proposed subsection (f) was deleted as being unnecessary.

*Final-form § 290.403*

Subsection (a) specifies minimization of surface water runoff from storage areas and stormwater management.

Subsection (b) specifies minimization of surface water run-on to storage areas.

Subsection (c) specifies that coal ash is not to be stored in a manner to cause degradation of groundwater. The final-form regulation expands this to include surface water protection.

*Final-form § 290.404*

Subsection (a) establishes siting restrictions for coal ash storage other than in surface impoundments. Restrictions include distances from streams, water sources, bedrock outcrops, sinkholes and areas draining into sinkholes, and wetlands. Siting restrictions for exceptional value waters and high quality waters have been added in the final-form regulation since these are considered special protection waters. These siting restrictions do not apply when coal ash storage is totally enclosed and on an impermeable floor.

Subsection (b) establishes siting restrictions for coal ash storage in surface impoundments. Restrictions include distances from floodplains, streams, water sources, bedrock outcrops, occupied dwellings, property lines, sinkholes and areas draining into sinkholes, wetlands, schools, parks and playgrounds and areas underlain by limestone or carbonate formations or areas serving as habitat for endangered or threatened flora or fauna.

Siting restrictions for exceptional value waters and high quality waters have been added, since these are considered special protection waters. The provision for waiver of the siting restriction from public or private water sources by the owner of the water supply in the proposed regulation has been revised to only allow the waiver for private water sources in the final-form regulation. The waiver language for the distance from a school building, park or playground was deleted from the final-form regulation.

Subsection (c) has been added to the final-form regulation to establish siting restrictions for temporary coal ash storage piles (less than 2 weeks in duration). Restrictions include distances from streams and wetlands.

*Final-form § 290.405*

Subsection (a) establishes a requirement to minimize dispersion of coal ash from storage piles.

Subsection (b) establishes separation distance from the water table for coal ash stored in piles.

Subsection (c) establishes a requirement for berms around storage piles, collection of runoff and leachate, and, when necessary, treatment of runoff and leachate. The final-form regulation does not require berms for temporary coal ash storage piles due to the short existence of these piles.

Subsection (d) establishes that the Department may require groundwater monitoring for coal ash storage piles without liner systems or pads.

*Final-form § 290.406*

Subsection (a) establishes that this section applies to storage of coal ash on liners or pads.

Subsection (b) establishes performance and design criteria for the liner or pad related to leachate and runoff construction materials and construction standards that address the integrity and permiability of the liner or pad and any adverse effects from coal ash. Inspections must be performed during construction and installation. Subsection (c) provides for a monitoring system to determine whether coal ash or leachate has penetrated the liner or pad, if required by the Department.

*Final-form § 290.407*

Subsection (a) establishes that storage piles with a pad or liner system must have leachate and runoff collection and a leachate storage system. The final-form regulation clarifies that the leachate and runoff can be directly sent to a treatment system instead of a leachate storage system.

Subsection (b) establishes design requirements for the leachate storage system that must consist of tanks or impoundments. The requirements address sizing, chemical compatibility, strength, cleanouts and sealing.

Subsection (c) establishes that leachate treatment or disposal must be in accordance with the CSL.

*Final-form § 290.408*

Subsection (a) establishes that this section and §§ 290.409—290.415 apply to surface impoundments used to store coal ash prior to beneficial use. The citations in the final-form regulation were expanded to include the sections for interim requirements.

Subsection (b) establishes that this section and §§ 290.409—290.415 apply to surface impoundments used to store only stormwater. The citations in the final-form regulation were corrected and expanded to include the sections for interim requirements.

Subsection (c) establishes a definition of stormwater for this section.

*Final-form § 290.409*

This section establishes that a coal ash surface impoundment must be permitted under the CSL and comply with requirements in Chapter 105 (relating to dam safety and waterway management).

*Final-form § 290.410*

This section establishes design criteria for coal ash storage impoundments. The criteria include the liner system, subbase location in relation to water table, subbase performance criteria, leachate detection zone, liner performance criteria, protective cover performance criteria, leachate collection system performance criteria, leachate storage system, leachate collection and handling, and design, construction, operation and maintenance.

*Final-form § 290.411*

Subsection (a) establishes minimum distance to be maintained between the bottom of the liner system's subbase and the water table.

Subsection (b) specifies marking the edge of the liner.

Subsection (c) establishes that a fence or barrier be maintained around the impoundment and the leachate collection and treatment system.

Subsection (d) establishes fugitive air containment control measures for impoundments.

Subsection (e) establishes that water quality monitoring is required for impoundments.

Subsection (f) establishes coal ash removal performance requirements for impoundments and includes removal without damage to the impoundment, liner inspection, providing for the beneficial use of removed coal ash and ensuring coal ash is not accumulated speculatively.

*Final-form § 290.412*

Subsection (a) establishes procedures and Department notification if impoundment fails.

Subsection (b) establishes procedures to restore to service impoundments that have failed.

Subsection (c) establishes closure for failed impoundments that cannot be cleaned up in a manner satisfactory to the Department.

*Final-form § 290.413*

This section establishes that the Department will inspect coal ash storage impoundments.

*Final-form § 290.414*

This section establishes closure of storage areas, including removal of coal ash and, if required by the Department, regrading and revegetation. The final-form regulation also requires removal of other materials as part of closure.

*Final-form § 290.415*

This section is new and provides 1 year for storage sites previously meeting the requirements in rescinded § 299.153 to meet the new storage requirements unless they are able to demonstrate that the existing storage is protective.

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

The Board received 285 comments regarding the proposed beneficial use of coal ash regulations during the public hearings and public comment period. The comments were received from over 1,100 commentators, including 13 industry organizations, 7 environmental groups, the Pennsylvania Chamber of Business and Industry and the Independent Regulatory Review Commission (IRRC). The commentators ranged from those who consider the current regulations to be sufficient to those who believe the beneficial use of coal ash should be stopped. Most commentators' opinions fell between these two views and many of their comments led to changes in the final-form rulemaking.

Many commentators noted that after decades of reclamation projects using ash, there have not been negative impacts to the environment. Therefore, implementation of additional requirements is unnecessary and burdensome to industry and may prevent further beneficial use. As stated in the purpose for this final-form rulemaking, the Board saw that there was a need to codify policy into enforceable regulations. The Board also considered the improvements in water quality monitoring and coal ash characterization suggested by the National Academy of Sciences' study and public interest. The final-form rulemaking meets the stated purpose. Changes have been made to lessen the impact on industry. In § 290.2(c) (relating to scope), ash from co-firing alternative fuels with coal can be managed as coal ash. Section 290.104(f) (relating to beneficial use at coal mining activity sites) provides flexibility for the management of ash from multiple small waste coal piles and the reclamation of those sites. Finally, the permit filing fee in § 290.104(c) has been reduced after coal ash placement is completed.

Some commentators see any requirement that may be waived or modified as a loophole and want them all eliminated. Others want the Department to have the ability to waive or modify more of the regulatory requirements. Some ability to waive or modify specific requirements based on site conditions is necessary, as a "one-size fits all" approach will not be appropriate in all situations. However, the commentators raised some valid points that resulted in elimination, modification or the addition of waiver language. Examples include the following: elimination of the waiver in § 290.404(b)(10) (relating to areas where coal ash storage is prohibited) of the siting restriction for distance to a public water supply for a coal ash storage impoundment; change from being able to modify the length of background water quality monitoring to only being able to require a longer period in § 290.301(b)(2) (relating to water quality monitoring); and addition of the ability to waive well filter-packing requirements in § 290.303(a)(4) (relating to standards for wells and casing of wells).

Some commentators believe that limiting the amount of coal ash to the amount of coal, coal refuse, culm or silt in proposed § 290.104(f) and water quality monitoring requirements in proposed § 290.301 will cause remediation of small piles to cease due to costs associated with water quality monitoring. The final-form rulemaking allows a greater quantity of ash to be beneficially used at a site if the site is part of a multiple-site project involving multiple coal refuse reprocessing sites. By allowing a greater quantity to be placed at one location of a multiple-site project, the water quality monitoring requirements can be limited to one site, rather than every small pile in the multisite project.

Several commentators thought the definition of "coal ash" should be revised in the final-form regulations to allow ash produced by co-combustion of coal with alternative fuels to be considered to be coal ash. However, changing the definition of "coal ash" to include ash when alternative fuels are used would broaden its definition beyond the definition of "coal ash" in the SWMA. To accommodate the use of alternative fuels, the final-form rulemaking makes allowances in § 290.2(c) for the beneficial use of coal ash produced from co-firing coal with alternative fuels.

Many commentators said that the 8-foot separation to groundwater should never be waived. While the Department had success with a demonstration project in which coal ash was placed directly into a water-filled surface mine, the National Academy of Sciences recommended that coal ash be kept out of direct contact with water. The Board agreed with this recommendation and removed the waiver language in final-form § 290.101(e). The 8-foot separation does not apply when coal ash is used for mine subsidence control, mine fire control or mine sealing in the final-form regulation, since the coal ash is required to undergo cementitious reactions for these uses, which will greatly reduce the leachability of the coal ash.

Several commentators suggested replacing leach testing using EPA Method 1312 (Synthetic Precipitation Leaching Procedure) (SPLP) in proposed § 290.201(c)(5)(i) with a more costly (estimated by the United States Environmental Protection Agency (EPA) to be $10,000 to $15,000 per sample) leaching procedure developed by Kosson at Vanderbilt University. The EPA is currently working on developing this new procedure, which they call the "framework," into a standard procedure. Difficulties in adopting this "framework" procedure include the following: it has not been accepted as an approved, standard method; interpretation of the results is unclear; and it is a very costly procedure that would replace an inexpensive procedure that has proven itself to be protective. The Board recognizes that improved leaching procedures based on the "framework" or on other research could be developed in the future. The final-form rulemaking specifies use of SPLP, but provides the option for the Department to require a different procedure if and when available.

There were many comments on what triggers the need for an assessment plan under § 290.304 (relating to assessment plan). Some commentators indicated a plan should be required when any increase above background occurs. Others indicated that a plan should be required only after an abatement standard is exceeded. Finally, others indicated that a plan should be required only when statistically significant degradation occurs. Some changes that may exceed background levels are actually beneficial, such as an increase in alkalinity at a site impacted by acid mine drainage, and should not trigger an assessment. Abatement standards may already be exceeded prior to coal ash placement at mine sites. The final-form rulemaking indicates that an assessment plan is required when statistically significant degradation occurs. A citation to the methods that may be used to determine what is statistically significant has been added.

Some commentators thought liners should be required for any area where coal ash is placed. Coal ash meeting the strict chemical leaching standards for beneficial use in § 290.201 have not negatively affected ground or surface water resources. Liners are not required in the final-form rulemaking for sites where coal ash is to be beneficially used.

Many commentators indicated that financial assurance should be required for all sites where coal ash is to be beneficially used and that the financial assurance should be adequate upfront to cover the cost of corrective action. Since by statutory definition, beneficially-used coal ash is not solid waste, the Department's ability to require bonding upfront is limited to permitted mine sites. It also has been the Department's position not to require bonding to cover corrective action when problems are not expected to occur, which is the case with beneficial use. The Department does have the ability when degradation occurs to then require financial assurances to cover the Commonwealth's costs for corrective action in case the responsible party does not take sufficient corrective measures. The requested change was not made in the final-form rulemaking.

Since many of the requirements in the final-form rulemaking are new, some commentators requested grandfathering existing requirements or a timeline for complying with new requirements. Interim requirements have been added in §§ 290.307 and 290.415 (relating to interim water quality monitoring requirements; and interim requirements for sites where coal ash has been stored) for water quality monitoring and storage requirements. Many of the new requirements in these regulations, such as coal ash certification, have already been implemented under Departmental policies, so transition provisions in these areas are unnecessary.

IRRC requested an explanation as to why the time frames in § 290.301 are appropriate and how the requirements will work with other Department regulations. There are three time frames for water quality monitoring in § 290.301: background sampling; sampling during coal ash placement; and sampling during post-placement.

Twelve months of background samples allow for the collection of a complete year of data, which will reflect seasonal variations. This approach allows for comparison with future monitoring results. This approach has worked well for establishing baseline conditions in the Remining Program (Chapter 87, Subchapter F and Chapter 88, Subchapter G (relating to surface coal mines: minimum requirements for remining areas with pollutional discharges; and anthracite surface mining activities and anthracite bank removal and reclamation activities: minimum requirements for remining areas with pollutional discharges)).

Quarterly sampling during active placement is designed to capture seasonal variations while limiting the cost of sampling. This has been the Bureau of Mining and Reclamation's standard monitoring approach for other aspects of the Commonwealth's mining program, and it has worked effectively.

Regarding the 10 years of post-placement monitoring, comments received ranged from there should be no regulations (and presumably no monitoring) to suggesting that 30 years should be required. The length of post-placement monitoring is based on Department observations and experience with groundwater systems in coal-bearing rocks and coal mine settings.

G. *Benefits, Costs and Compliance*

*Benefits*

The citizens of this Commonwealth will be better served by this final-form rulemaking, which is summarized as follows: increased coal ash monitoring to ensure coal ash meets certification criteria; increased water quality monitoring for a longer duration to create a robust data set to facilitate the evaluation and documentation of water quality at sites where coal ash is beneficially used; a requirement for minimum number of monitoring wells to characterize the groundwater or other water quality points; a requirement for recording a landowner consent for placement of coal ash for beneficial use; improved reporting requirements to track volumes and location of sites where coal ash is beneficially used; consistent operational and monitoring standards for all types of beneficial use; a centralized process to certify coal ash for beneficial use at mine sites; an annual fee payable to the Department to offset its costs for coal ash and water quality sampling and testing at mine sites where coal ash is beneficially used; and requirements for the storage of coal ash including provisions for design and operations.

Most of the coal ash beneficially used in this Commonwealth for mine reclamation is used in areas that have existing ground and surface water contamination due to mine drainage. The use of coal ash at these sites is intended to prevent further degradation and, when site conditions are conducive, to provide an overall improvement in groundwater quality. Generally, coal ash is not beneficially used in areas with high quality groundwater, except in special circumstances. For instance, coal ash may be mixed with Portland cement, sand and aggregate to create a grout material and injected into mine voids as a remediation measure for mine subsidence.

*Compliance Costs*

The Department has already implemented many of the measures that would be required in the final-form rulemaking. Guidance documents have implemented the increased monitoring requirements, including sampling frequency, additional chemical parameters to be tested and additional pre-ash placement and post-ash placement monitoring. Thus, most costs that would be associated with the final-form rulemaking are already part of the Department's program.

The regulated community will be required to complete four water samples per year for each monitoring point. Typically, two to four monitoring points exist for each site resulting in a water monitoring cost of $2,400 to $4,800 per year. Four ash dry weight/leachate samples are required every year from the generation site. This results in a cost of approximately $2,000 per source. Compaction tests for use of coal ash as a structural fill and for mine reclamation must be conducted two times per year at a cost of approximately $150 per test.

The final-form rulemaking imposes an annual assessment of a permit filing fee of $2,000 during coal ash placement and $1,000 post placement. This fee is required to assure that the Department has funds to conduct comparative sampling of the coal ash and water quality regarding individual coal ash beneficial use sites. This fee amount covers the cost of one ash sample (approximately $500) and five water samples (approximately $300 x 5) per year.

Sampling requirements have increased from the previous regulations and the filing fee adds these additional costs. These costs are justified to assure protection of human health and aquatic life and to ensure operational and performance standards for beneficial use of coal ash.

More than 11 million tons of coal ash has been beneficially used for mine reclamation each of the past several years. The estimated cost of disposing this material at a landfill would be at least $275 million per year. Costs of placement at mine sites are on the order of $55 million per year. Use of coal ash at mine sites as opposed

to land filling the material is a savings to the industry of at least $220 million per year.

*Compliance Assistance Plan*

The public will be informed through Department publications, the Internet and other mass media.

*Paperwork Requirements*

The Department has developed standard forms for applying for beneficial use at a mine site and for requesting certification of coal ash sources for beneficial use. The operators and coal ash generators use these forms to report all monitoring.

A person beneficially using the coal ash is expected to retain documentation to show that the coal ash used at the approved site was a source that was certified by the Department. Annual reports are required for use as structural fill, abandoned coal surface mine sites and at mining activity sites.

H. *Pollution Prevention*

The Pollution Prevention Act of 1990 (42 U.S.C.A. §§ 13101—13109) establishes a National policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials or the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. This final-form rulemaking will not modify the pollution prevention approach by the regulated community and maintains the multimedia pollution prevention approach of existing requirements in 25 Pa. Code (relating to environmental protection).

I. *Sunset Review*

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

J. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on October 28, 2009, the Department submitted a copy of the notice of proposed rulemaking, published at 39 Pa.B. 6429 (November 7, 2009), to IRRC and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate 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 Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on October 20, 2010, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on October 21, 2010, and approved the final-form rulemaking.

K. *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, 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 proposed rulemaking published at 39 Pa.B. 6429.

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

L. *Order*

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

(a) The regulations of the Department, 25 Pa. Code, are amended by amending §§ 287.1, 287.101 and 287.601, deleting §§ 287.661—287.666 and 299.153 and adding §§ 290.1, 290.2, 290.101—290.107, 290.201—290.203, 290.301—290.307 and 290.401—290.415 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(*Editor's Note*: The addition of §§ 290.1, 290.307 and 290.415 and the deletion of § 299.153 were not included in the proposed rulemaking published at 39 Pa.B. 6429.)

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

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

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

(e) This order shall take effect immediately.

JOHN HANGER,
*Chairperson*

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 40 Pa.B. 6487 (November 6, 2010).)

**Fiscal Note:** Fiscal Note 7-442 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 IX. RESIDUAL WASTE MANAGEMENT

## CHAPTER 287. RESIDUAL WASTE MANAGEMENT—GENERAL PROVISIONS

### Subchapter A. GENERAL

### § 287.1. Definitions.

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

* * * * *

*Coal ash*—For purposes of Chapters 287 and 290, fly ash, bottom ash or boiler slag resulting from the combustion of coal, that is or has been beneficially used, reused or reclaimed for a commercial, industrial or governmental purpose. The term includes such materials that are stored, processed, transported or sold for beneficial use, reuse or reclamation. For purposes of Chapter 288 (relating to residual waste landfills), the term also includes fly ash, bottom ash or boiler slag resulting from the combustion of coal, that is not and has not been beneficially used, reused or reclaimed for a commercial, industrial or governmental purpose.

* * * * *

*Solid waste*—Waste, including, but not limited to, municipal, residual or hazardous waste, including solid, liquid, semisolid or contained gaseous materials. The term does not include coal ash that is beneficially used under Chapter 290 (relating to beneficial use of coal ash) or drill cuttings.

* * * * *

*Structural fill*—The engineered use of coal ash as a base or foundation for a construction activity that is completed promptly after the placement of the coal ash, including the use of coal ash as backfill for retaining walls, foundations, ramps or other structures. The term does not include valley fills or the use of solid waste to fill open pits from coal or noncoal mining.

* * * * *

## Subchapter C. GENERAL REQUIREMENTS FOR PERMITS AND PERMIT APPLICATIONS

### GENERAL

### § 287.101. General requirements for permit.

* * * * *

(b) A person or municipality is not required to obtain a permit under this article, comply with the bonding or insurance requirements of Subchapter E (relating to bonding and insurance requirements) or comply with Subchapter B (relating to duties of generators) for one or more of the following:

* * * * *

(3) The beneficial use of coal ash under Chapter 290 (relating to beneficial use of coal ash).

## Subchapter H. BENEFICIAL USE

### SCOPE

### § 287.601. Scope.

(a) This subchapter sets forth requirements for the processing and beneficial use of residual waste. Sections 287.611, 287.612, 287.621—287.625, 287.631, 287.632, 287.641—287.643, 287.651 and 287.652 establish procedures and standards for general permits for the beneficial use or processing of residual waste.

* * * * *

### §§ 287.661—287.666. (Reserved).

# CHAPTER 290. BENEFICIAL USE OF COAL ASH

Subch.



## Subchapter A. GENERAL

Sec.



### § 290.1. Definitions.

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

*Temporary coal ash storage pile*—A pile in which coal ash is stored for not more than 2 weeks.

*Water table*—

(i) The top of the saturated zone.

(ii) The term includes the regional groundwater table, perched water tables, seasonal high water table and mine pools.

### § 290.2. Scope.

(a) This chapter sets forth requirements for beneficial use of coal ash. Fly ash, bottom ash or boiler slag resulting from the combustion of coal that is not beneficially used in accordance with this chapter is a residual waste and is subject to regulation under other chapters in this article.

(b) If coal ash is mixed with residual waste, the beneficial use must be authorized by a permit issued under Chapter 287, Subchapter H (relating to beneficial use) and the requirements of this chapter must be met.

(c) If coal ash is produced by co-firing coal or waste coal with an alternative fuel:

(1) Beneficial use of that material is regulated under this chapter as coal ash if the alternative fuel is less than 20% by weight of the total fuel mixture, as burned, and contributes less than 10% by weight of total ash quantity.

(2) Beneficial use must be authorized by a permit issued under Chapter 287, Subchapter H and the requirements of this chapter must be met if the alternative fuel is equal to or greater than 20% by weight of the total fuel mixture, as burned, or contributes equal to or greater than 10% by weight of total ash quantity.

(d) If coal ash is mixed with construction and demolition waste, the beneficial use must be authorized under a permit issued under Article VIII (relating to municipal waste) and the requirements of this chapter must be met.

(e) Coal ash mixed with municipal waste, other than construction and demolition waste, may not be beneficially used by direct placement into the environment. Other types of beneficial use of coal ash mixed with municipal waste may be authorized by a permit issued under Article VIII and any applicable requirements of this chapter must be met.

(f) Beneficial use activities that are subject to and meet the requirements of this chapter are not required to obtain an individual disposal permit under this article.

## Subchapter B. BENEFICIAL USE OF COAL ASH

Sec.

**§ 290.101. General requirements for beneficial use.**

(a) Coal ash may be beneficially used without a permit from the Department under the act if the person proposing the use complies with this chapter.

(b) Chemical analysis must demonstrate that the coal ash does not exceed any of the maximum acceptable leachate levels in § 290.201(a) (relating to coal ash certification) when coal ash is proposed to be used under §§ 290.102—290.105 or § 290.106(a)(3) or (7). The minimum sampling and analysis procedures must satisfy the requirements in § 290.201(b) and (d).

(c) The coal ash must satisfy the physical characteristics for the intended use in § 290.201(a).

(d) A water quality monitoring plan in accordance with § 290.301 (relating to water quality monitoring) and, if applicable, Chapters 86—90 shall be developed and implemented if either more than 10,000 tons of coal ash per acre or more than 100,000 tons of coal ash in total will be used as structural fill at a coal mining activity site or at an abandoned mine land site. Contiguous projects will be considered a single project for purposes of this section. The Department may require a water quality monitoring plan for projects involving lesser quantities of coal ash or for other beneficial uses of coal ash where site conditions warrant.

(e) Coal ash may not be placed within 8 feet of the water table, except where coal ash is used for mine subsidence control, mine fire control or mine sealing under § 290.106(a)(7) (relating to other beneficial uses).

(f) Coal ash may not be used in a way that causes water pollution.

**§ 290.102. Use as structural fill.**

(a) At least 60 days before using coal ash as structural fill, the person proposing the use shall submit a written proposal to the Department. The written proposal must contain, at a minimum, the following information:

(1) A description of the nature, purpose and location of the project, including a topographic map showing the project and available soils maps of the area of the project.

(2) The estimated beginning and ending dates for the project.

(3) Construction plans for the structural fill, including a stability analysis when necessary, which shall be prepared by a licensed professional engineer in accordance with sound engineering practices and which shall be signed and sealed by the engineer.

(4) An estimate of the volume of coal ash to be used for the project.

(5) A total chemical and leaching analysis under § 290.201(a)(1) and (2) (relating to coal ash certification) for the coal ash to be used in the project. If the coal ash was generated at a facility for which the Department has previously approved a chemical and leaching analysis and the analysis is not older than 1 year, the person may submit a copy of the analysis that was approved.

(6) A signed statement by the owner of the land on which the structural fill is to be placed, acknowledging and consenting to the beneficial use of coal ash as structural fill.

(7) The statement by the landowner in paragraph (6) shall be a recordable document for any project, or set of contiguous projects involving placement of more than 10,000 tons of coal ash per acre or more than 100,000 tons of coal ash in total per project. Prior to beneficial use of more than 10,000 tons of coal ash per acre or more than 100,000 tons of coal ash in total per project under this section, the statement by the landowner shall be recorded at the office of the recorder of deeds in the county in which the proposed coal ash beneficial use will take place.

(b) A person proposing to use coal ash as structural fill where more than 10,000 tons of coal ash per acre will be used on a project or more than 100,000 tons of coal ash in total will be used at a project shall place, at the time of filing a written proposal with the Department, a public notice in a local newspaper of general circulation in the locality of the proposed coal ash beneficial use activities at least once a week for 3 consecutive weeks. Contiguous projects will be considered a single project for purposes of this section. A copy of the public notice shall be provided to the local municipality and proof of public notice shall be submitted to the Department. At a minimum, the public notice must contain the following information:

(1) The name and business address of the person proposing to beneficially use coal ash.

(2) A brief description of the location and scope of the proposed beneficial use.

(3) The location of the Department office where a copy of the written proposal submitted to the Department is available for public inspection.

(c) The Department may require public notice for projects involving less than 10,000 tons of coal ash per acre or less than 100,000 tons of coal ash in total if the Department determines that the proposed beneficial use activities are of significant interest to the public or site conditions warrant.

(d) The Department will publish a summary of each written proposal in the *Pennsylvania Bulletin*.

(e) After receiving the information required under subsection (a), the Department will inform, in writing, the person that provided the information whether the proposed use of coal ash as structural fill is consistent with this section.

(f) For coal ash being beneficially used as a structural fill, the following additional requirements must be satisfied:

(1) The pH of the coal ash as placed must be 7.0 or above, unless otherwise approved by the Department. Lime may be added to raise pH. The pH of the coal ash may not be above 9.0 during placement and storage at the site of placement unless public access is restricted.

(2) The slope of a structural fill may not be greater than 2.5 horizontal to 1.0 vertical. The Department may approve a greater slope based on a demonstration of structural stability.

(3) Coal ash shall be spread uniformly and compacted in layers not exceeding 2 feet in thickness. The coal ash shall be spread and compacted within 24 hours of its delivery to the site unless stored in accordance with Subchapter E (relating to coal ash storage).

(4) Surface runoff from the fill area shall be minimized during filling and construction activity. Stormwater shall be managed in accordance with The Clean Streams Law (35 P. S. §§ 691.1—691.1001) and the regulations promulgated thereunder.

(5) Surface water shall be diverted away from the disturbed area during filling and construction activity.

(6) Coal ash shall be covered with 12 inches of soil, unless infiltration is prevented by other cover material.

(7) Coal ash must achieve a minimum compaction of 90% of the maximum dry density as determined by the Modified Proctor Test, or 95% of the maximum dry density as determined by the Standard Proctor Test.

(8) The offsite dispersion of dust from coal ash and other materials shall be minimized.

(g) Coal ash used as structural fill may not be located:

(1) Within 100 feet of an intermittent or perennial stream or within 300 feet of exceptional value or high quality waters as defined in § 93.1 (relating to definitions), unless the structural fill is otherwise protected by a properly engineered diversion or structure that is permitted by the Department under the Dam Safety and Encroachments Act (32 P. S. §§ 693.1—693.27).

(2) Within 300 feet of a water supply unless the person obtains, in a form acceptable to the Department, a written waiver from the owner of the water supply, allowing for another distance.

(3) Within 25 feet of a bedrock outcrop, unless the outcrop is properly treated to minimize infiltration into fractured zones or otherwise approved by the Department.

(4) Within 100 feet of a sinkhole or area draining into a sinkhole.

(5) Within a 100-year floodplain of a water of this Commonwealth, unless a properly engineered dike, levee or other structure that can protect the structural fill from a 100-year flood is permitted by the Department in a manner that is consistent with the Flood Plain Management Act (32 P. S. §§ 679.101—679.601), the Storm Water Management Act (32 P. S. §§ 680.1—680.17) and the Dam Safety and Encroachments Act.

(6) In or within 100 feet of a wetland, other than an exceptional value wetland.

(7) In or within 300 feet of an exceptional value wetland.

(h) A person that proposed more than 10,000 tons of coal ash per acre or more than 100,000 tons of coal ash in total at any project or contiguous projects shall submit to the Department prior to January 31 an annual report for the previous calendar year that includes contact information, the location of the site where the coal ash was utilized, the identity of each source of coal ash, and the volume in cubic yards and the weight in dry tons for each source.

(i) A person beneficially using coal ash under this section shall notify the Department within 72 hours of any evidence that the material does not meet the chemical standards or physical property requirements in § 290.201.

**§ 290.103. Use as a soil substitute or soil additive.**

(a) At least 60 days before using coal ash as a soil substitute or soil additive, the person proposing the use shall submit a written proposal to the Department. The written proposal must contain, at a minimum, the following information:

(1) A description of the nature, purpose and location of the project, including a topographic map showing the project area and available soils maps of the project area. The description must include an explanation of how coal ash will be stored prior to use, how the soil will be prepared for the application of coal ash, how coal ash will be spread and, when necessary, how coal ash will be incorporated into the soil.

(2) The estimated beginning and ending dates for the project.

(3) An estimate of the volume of coal ash to be used for the project, the proposed application rate and a justification for the proposed application rate.

(4) A total chemical and leaching analysis and pH under § 290.201(a)(1) and (2) (relating to coal ash certification) for the coal ash to be used in the project. If the coal ash was generated at a facility for which the Department has previously approved a chemical and leaching analysis and the analysis is not older than 1 year, the person may submit a copy of the analysis that was approved.

(5) A chemical analysis for constituents listed in subsection (e) of the soil on which the coal ash is proposed to be placed.

(6) An analysis showing how the application of coal ash will be beneficial to the productivity or properties of the soil to which it is proposed to be applied. The analysis shall be prepared and signed by an expert in soil science.

(7) A signed statement by the owner of the land on which the coal ash is to be placed, acknowledging and consenting to the use of coal ash as a soil substitute or soil additive.

(b) After receiving the information required by subsection (a), the Department will inform, in writing, the person that provided the information whether the proposed use of coal ash as a soil substitute or soil additive is consistent with this section.

(c) Coal ash used as a soil substitute or soil additive may not be considered a beneficial use unless the following requirements are met:

(1) The pH of the coal ash and the pH of the soil must be in the range of 6.5 to 8.0 when mixed together in the manner required by the project, as shown by field and laboratory testing. Lime may be added to raise pH.

(2) Chemical analysis demonstrates the coal ash satisfies the minimum calcium carbonate equivalency requirement in § 290.201(a).

(3) Surface runoff from the project area shall be controlled during the project. Stormwater shall be managed in accordance with The Clean Streams Law (35 P. S. §§ 691.1—691.1001) and the regulations promulgated thereunder.

(4) Coal ash shall be incorporated into the soil within 48 hours of application, unless otherwise approved by the Department. The coal ash shall be incorporated into the top 1-foot layer of surface soil. If 1 foot of surface soil is not present, coal ash may be combined with the surface soil that is present until the layer of combined surface soil and coal ash is 1 foot. The coal ash required for the beneficial use is limited to the amount necessary to enhance soil properties or plant growth.

(5) Coal ash shall be applied at a rate per acre that will protect public health, public safety and the environment.

(6) Coal ash may not be applied to soil being used for agriculture where the soil pH is less than 5.5.

(7) Coal ash may not be applied if resultant chemical or physical soil conditions would be detrimental to biota.

(8) The offsite dispersion of dust from coal ash and other materials shall be minimized.

(d) Coal ash may not be used as a soil substitute or soil additive:

(1) Within 100 feet of an intermittent or perennial stream, other than exceptional value or high quality waters as defined in § 93.1 (relating to definitions), or a wetland other than an exceptional value wetland.

(2) In or within 300 feet of an exceptional value wetland, or of exceptional value or high quality waters as defined in § 93.1.

(3) Within 300 feet of a water supply unless the person obtains, in a form acceptable to the Department, a written waiver from the owner of the water supply, allowing for another distance.

(4) Within 100 feet of a sinkhole or area draining into a sinkhole.

(5) Within 300 feet measured horizontally from an occupied dwelling, unless the current owner has provided a written waiver consenting to the activities closer than 300 feet. The waiver shall be knowingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver from the current owner.

(e) Coal ash may not be used as a soil substitute or soil amendment in amounts that exceed the following maximum cumulative loading rates:

| *Constituent* | *Cumulative Loading Rate* |
|---|---|
| arsenic | 36 lbs/acre (41 kg/hectare) |
| boron | 60 lbs/acre (67.2 kg/hectare) |
| cadmium | 34 lbs/acre (38 kg/hectare) |
| chromium | 2,672 lbs/acre (3,104 kg/hectare) |
| copper | 1,320 lbs/acre (1,490 kg/hectare) |
| lead | 264 lbs/acre (296 kg/hectare) |
| mercury | 15 lbs/acre (17 kg/hectare) |
| molybdenum | 16 lbs/acre (18 kg/hectare) |
| nickel | 370 lbs/acre (420 kg/hectare) |
| selenium | 88 lbs/acre (99 kg/hectare) |
| zinc | 2,464 lbs/acre (2,780 kg/hectare) |

(f) A person subject to the requirements of this section shall retain records of chemical and physical analyses, the quantity of coal ash utilized, the location of placement and the sources of coal ash for a minimum of 3 years after the beneficial use has ceased. The records shall be made available to the Department upon request.

(g) A person beneficially using coal ash under this section shall notify the Department within 72 hours of any evidence that the material does not meet the chemical standards or physical property requirements in § 290.201.

**§ 290.104. Beneficial use at coal mining activity sites.**

(a) *Coal ash approval at coal mining activity sites.* Approval for the beneficial use of coal ash at coal mining activity sites as defined in § 86.1 (relating to definitions) will, at a minimum, be based on the following:

(1) Compliance with this section, The Clean Streams Law (35 P. S. §§ 691.1—691.1001) and the regulations promulgated thereunder, the Surface Mining Conservation and Reclamation Act (52 P. S. §§ 1396.1—1396.19a), the Coal Refuse Disposal Control Act (52 P. S. §§ 30.51—30.66), the applicable provisions of Chapters 86—90 (relating to surface and underground coal mining: general, surface mining of coal, anthracite coal, underground mining of coal and coal preparation facilities, and coal refuse disposal), and other applicable environmental statutes and regulations promulgated thereunder.

(2) Certification under § 290.201 (relating to coal ash certification) by the Department for the intended beneficial uses.

(3) Approval of a request submitted pursuant to subsection (b).

(b) *Request.* A person shall submit to the Department a request to beneficially use the certified coal ash at a specific coal mining activity site as part of the reclamation plan under the mining permit. This request must contain the permit filing fee in subsection (c) and, at a minimum, the following:

(1) A narrative description of the project, including an explanation of how coal ash will be placed, where and how coal ash will be stored prior to placement, identification of the sources of coal ash and an estimate of the cubic yards of coal ash to be used. For the beneficial use of coal ash as a soil substitute or additive, the proposed application rate and justification for the application rate shall also be included.

(2) Information demonstrating that the coal ash has been certified for its intended use in accordance with § 290.201, including the identity of the generator and the Department-assigned certification identifier, as described in § 290.201(c).

(3) A signed statement by the owner of the land on which the coal ash is to be placed, acknowledging and consenting to the placement of coal ash. This statement by the landowner shall be a recordable document. Prior to beneficial use of coal ash under this section, the statement by the landowner shall be recorded at the office of the recorder of deeds in the county in which the proposed beneficial use of coal ash will take place.

(4) A monitoring plan that meets the requirements of Subchapter D (relating to water quality monitoring).

(c) *Permit filing fee.*

(1) A nonrefundable permit filing fee payable to the "Commonwealth of Pennsylvania" for the beneficial use of coal ash at a coal mining activity site is to be paid annually in the amount of:

(i) $2,000 for each coal mining activity site approved to use coal ash until the year following final placement of coal ash at the site.

(ii) $1,000 from the year following final placement of coal ash until final bond release has been issued for the coal mining activity site.

(2) Money received from the permit filing fee for the beneficial use of coal ash will be deposited in the Surface Mining Conservation and Reclamation Fund and will be used by the Department for the cost of reviewing, administering and enforcing the requirements of the authorization for beneficial use of coal ash under the coal mining activity permit.

(3) The Department will review the adequacy of the fees established in this section at least once every 3 years and provide a written report to the EQB. The report will identify any disparity between the amount of program income generated by the fees and the costs to administer these programs, and it shall contain recommendations to adjust fees to eliminate the disparity, including recommendations for regulatory amendments to adjust program fees.

(d) *Public notice.* A person proposing to use coal ash at coal mining activity sites shall provide public notice under § 86.31 or § 86.54 (relating to public notices of filing of permit applications; and public notice of permit revision).

(e) *Operating requirements.* The beneficial use of coal ash for reclamation purposes at a coal mining activity site shall be designed to achieve an overall improvement in water quality or shall be designed to prevent the degradation of water quality. Coal ash shall only be beneficially used for reclamation at the following locations:

(1) The pit or area from which coal is extracted under a surface coal mining permit.

(2) Abandoned mine lands located within the surface coal mining permit area.

(3) Coal refuse disposal sites and coal refuse reprocessing sites.

(4) Areas where other beneficial uses that are part of the approved reclamation plan at the coal mining activity site are being conducted.

(f) *Additional operating requirements for the placement of coal ash at permitted coal surface mining activity sites.* Placement of coal ash at coal surface mining activity sites must comply with the following additional requirements:

(1) The volume of coal ash placed at the site may not exceed the volume of coal, coal refuse, culm or silt removed from the site by the active mining operation on a cubic yard basis unless otherwise approved by the Department. The Department may authorize a greater volume of coal ash where the mine operator demonstrates that reclamation will be enhanced or water quality will be improved by the additional coal ash.

(2) Placement of coal ash shall be accomplished by mixing with spoil material or by spreading in horizontal layers no greater than 2 feet thick unless otherwise approved by the Department. The reclamation plan of the approved mining permit must address the placement of the coal ash.

(3) The coal ash shall be spread and compacted within 24 hours of its delivery to the site unless stored in accordance with Subchapter E (relating to coal ash storage).

(4) Where placement of coal ash is not being accomplished by mixing with spoil, the placed coal ash must achieve a minimum compaction of 90% of the maximum dry density as determined by the Modified Proctor Test, or 95% of the maximum dry density as determined by the Standard Proctor Test. The Proctor Test shall be conducted on a semiannual basis unless the Department requires more frequent testing.

(5) For a project involving multiple refuse reprocessing sites, the Department may allow a greater volume of coal ash to be placed at an individual site than the volume of coal refuse removed from that site if the following conditions are met:

(i) The multiple sites are a project involving the coordinated use of multiple coal refuse reprocessing sites.

(ii) A reclamation plan is approved for each of the sites and each plan identifies the total cubic yards of coal ash that may be placed at each site.

(iii) The total cubic yards of coal ash placed on the sites is less than the total cubic yards of refuse, culm or silt removed from the combined sites.

(iv) The project shall be designed to achieve an overall improvement of surface water or groundwater quality at each site, where acid mine drainage is evident. If acid mine drainage is not evident, the project shall be designed to prevent degradation of the surface or groundwater quality.

(v) Only coal ash from the project can be used.

(vi) The project shall be accomplished in a manner that blends into the general surface configuration and complements the surface drainage pattern of the surrounding landscape.

(6) The person shall maintain information identifying the sources and the volume in cubic yards and the weight in dry tons of coal ash used.

(7) The site shall be monitored in accordance with the requirements of Subchapter D (relating to water quality monitoring) and any additional hydrologic tests specified by the Department.

(8) The offsite dispersion of dust from coal ash and other materials shall be minimized.

(g) *Additional operating requirements for the beneficial use of coal ash as a soil substitute or soil additive.* The following apply to the beneficial use of coal ash as a soil substitute or soil additive:

(1) Coal ash shall be applied at a rate per acre that will protect public health, public safety and the environment.

(2) The coal ash that is applied will be part of the approved reclamation plan of the coal mining activity in order to increase the productivity or properties of the soil.

(3) The coal ash is not used in amounts that exceed the maximum cumulative loading rates in § 290.103(e) (relating to use as a soil substitute or soil additive).

(4) The offsite dispersion of dust from coal ash and other materials shall be minimized.

(h) *Additional operating requirements for the beneficial use of coal ash at coal refuse disposal sites.* The following apply to the beneficial use of coal ash at coal refuse disposal sites:

(1) Placement of coal ash as part of coal refuse disposal operations permitted under Chapters 86—90 must meet the following:

(i) The cubic yards of coal ash does not exceed the total cubic yards of coal refuse to be disposed based on uncompacted volumes of materials received at the site.

(ii) The coal ash has physical and chemical characteristics that meet the following requirements:

(A) Improve compaction and stability within the fill.

(B) Reduce infiltration of water into coal refuse.

(C) Improve the quality of leachate generated by the coal refuse.

(2) The offsite dispersion of dust from coal ash and other materials shall be minimized.

(i) *Additional coal ash sampling.* A person using coal ash at a coal mining activity site shall, each quarter that coal ash is being used at the site, sample the coal ash after it has been placed at the site and such sample shall be analyzed in accordance with § 290.201. The results of the analysis shall be submitted quarterly to and in the format required by the Department. A reduced frequency may be approved by the Department where a coal mining

activity site is receiving coal ash from only one source and is located at one of the following:

(1) On the same tract of land where the coal ash was generated.

(2) On a tract of land contiguous to the tract where the coal ash was generated.

(3) On a tract of land connected to the tract where the coal ash was generated by a right-of-way controlled by the generator and to which the public does not have access.

(4) On a tract of land separated from the tract where the coal ash was generated by only a public or private right-of-way and access between the two tracts is by crossing rather than traveling along the right-of-way.

(j) *Annual report.* Prior to January 31, the permittee of a coal mining activity site where coal ash was placed in the previous calendar year shall submit a report for the previous calendar year to the Department that includes permit number, mining company contact information, the identity of each source of coal ash and its Department-assigned certification identifier, and the volume in cubic yards and the weight in dry tons for each source of coal ash that was placed at the site.

(k) *Notification to Department.* A person beneficially using coal ash under this section shall notify the Department within 72 hours of any evidence that the material does not meet the certification requirements in § 290.201.

**§ 290.105. Beneficial use at abandoned mine lands.**

(a) *Reclamation contract with the Department*. Coal ash may be beneficially used for the purposes of reclamation at abandoned mine lands, as defined in § 86.252 (relating to definitions), only if the reclamation work is performed pursuant to a contract with the Department. The beneficial use of coal ash at abandoned mine lands will, at a minimum, be based on the following:

(1) Compliance with this section and the applicable environmental statutes and regulations promulgated thereunder.

(2) Certification under § 290.201 (relating to coal ash certification) by the Department for the intended use.

(3) Approval of a contract proposal submitted under subsection (b).

(b) *Contract proposal.* A proposal for the use of coal ash at abandoned mine lands must contain the following:

(1) A narrative description of the project, including an estimated beginning date and ending date for the project, an explanation of how coal ash will be placed, where and how coal ash will be stored prior to placement, identification of the sources of coal ash and an estimate of the cubic yards of coal ash to be used. For the beneficial use of coal ash as a soil substitute or additive, the proposed application rate and justification for the application rate shall also be included.

(2) Information demonstrating that the coal ash has been certified for its intended use in accordance with § 290.201, including the identity of the generator and the Department-assigned certification identifier, as described in § 290.201(c).

(3) Reclamation plans, including a stability analysis, when necessary, prepared by a licensed professional engineer in accordance with sound engineering practice and signed and sealed by the engineer.

(4) A signed statement by the owner of the land on which the coal ash is to be placed, acknowledging and consenting to the placement of coal ash. This statement by the landowner shall be a recordable document. Prior to beneficial use of coal ash under this section, the statement by the landowner shall be recorded at the office of the recorder of deeds in the county in which the proposed coal ash beneficial use will take place.

(5) A water quality monitoring plan consistent with the requirements in § 290.101(d) (relating to general requirements for beneficial use).

(c) *Public notice.* As a condition of contract award, a person proposing to use coal ash for reclamation involving use of more than 10,000 tons of coal ash per acre on a project or more than 100,000 tons of coal ash in total at any project shall place an advertisement in a local newspaper of general circulation in the locality of the proposed coal ash beneficial use activities at least once a week for 3 consecutive weeks. Contiguous projects will be considered a single project for purposes of this section. The Department may require public notice for projects involving lesser amounts of coal ash if the Department determines that the proposed beneficial use activities are of significant interest to the public or site conditions warrant. If public notice is required, a copy shall be provided to the local municipality and proof of notice shall be submitted to the Department. At a minimum, the notice must contain the following information:

(1) The name and business address of the person proposing to beneficially use coal ash.

(2) A brief description of the location and scope of the proposed beneficial use.

(3) The location of the public office where a copy of the contract proposal submitted to the Department is available for public inspection.

(d) *Department notification.* The Department will publish a summary of each contract in the *Pennsylvania Bulletin*.

(e) *Operating requirements.* The use of coal ash as part of the reclamation activity at abandoned mine lands must satisfy the following additional requirements:

(1) The slope of the reclaimed area may not be greater than 2.5 horizontal to 1.0 vertical. The Department may approve a greater slope based on a demonstration of stability.

(2) Coal ash shall be spread uniformly and compacted in layers not exceeding 2 feet in thickness unless otherwise approved by the Department. The coal ash shall be spread and compacted within 24 hours of its delivery to the site unless stored in accordance with Subchapter E (relating to coal ash storage).

(3) Surface runoff from the reclamation area shall be minimized during construction activity. Stormwater shall be managed in accordance with The Clean Streams Law (35 P. S. §§ 691.1—691.1001) and the regulations promulgated thereunder.

(4) Surface water shall be diverted away from the disturbed area during construction activity.

(5) Coal ash shall be covered with 12 inches of soil, unless infiltration is prevented by other cover material.

(6) Coal ash must achieve a minimum compaction of 90% of the maximum dry density as determined by the Modified Proctor Test, or 95% of the maximum dry density as determined by the Standard Proctor Test. Ash from each source shall be tested individually.

(7) The offsite dispersion of dust from coal ash and other materials shall be minimized.

(8) Coal ash used for reclamation may not be placed:

(i) Within 100 feet of an existing intermittent or perennial stream, unless the person demonstrates to the Department's satisfaction that ash placement within 100 feet of the stream is necessary to remediate abandoned mine features located within 100 feet of the stream.

(ii) Within 300 feet of exceptional value or high quality waters as defined in § 93.1 (relating to definitions), unless the person demonstrates to the Department's satisfaction that ash placement within 300 feet of the waters is necessary to remediate abandoned mine features located within 300 feet of the waters.

(iii) Within 300 feet of a water supply unless the person obtains, in a form acceptable to the Department, a written waiver from the owner of the water supply, allowing for another distance.

(iv) Within 100 feet of a sinkhole or area draining into a sinkhole.

(v) Within a 100-year floodplain of a water of this Commonwealth, unless a properly engineered dike, levee or other structure that can protect the reclamation area from a 100-year flood is permitted by the Department in a manner that is consistent with the Flood Plain Management Act (32 P. S. §§ 679.101—679.601), the Storm Water Management Act (32 P. S. §§ 680.1—680.17) and the Dam Safety and Encroachments Act.

(vi) In or within 100 feet of a wetland, other than an exceptional value wetland.

(vii) In or within 300 feet of an exceptional value wetland.

(9) The following apply to the beneficial use of coal ash as a soil substitute or soil additive:

(i) Coal ash shall be applied at a rate per acre that will protect public health, public safety and the environment.

(ii) The coal ash that is applied will be part of the approved reclamation plan in order to increase the productivity or properties of the soil.

(iii) The coal ash is not used in amounts that exceed the maximum cumulative loading rates in § 290.103(e).

(f) *Annual report.* Prior to January 31, any person that placed coal ash at an abandoned mine land site in the previous calendar year shall submit a report for the previous calendar year to the Department that includes company contact information, the identity of the reclamation contract with the Department, the identity of each source of coal ash and its Department-assigned certification identifier, and the volume in cubic yards and the weight in dry tons for each source of coal ash that was placed at the site.

(g) *Notification to Department.* A person beneficially using coal ash under this section must notify the Department within 72 hours of any evidence that the material does not meet the certification requirements in § 290.201.

**§ 290.106. Other beneficial uses.**

(a) The following uses of coal ash are deemed to be beneficial and do not require a permit from the Department under the act provided the uses are consistent with the requirements of this section:

(1) The use of coal ash in the manufacture of concrete or cement. The coal ash shall be utilized within 24 hours of its delivery to the site unless stored in accordance with Subchapter E (relating to coal ash storage).

(2) The extraction or recovery of one or more materials and compounds contained within the coal ash if the following conditions are met:

(i) Storage of coal ash before and after extraction or recovery shall be subject to Subchapter E.

(ii) Disposal of the unrecovered fraction of coal ash shall be subject to the applicable requirements for residual waste.

(3) The use of fly ash as a stabilized product. Other uses of fly ash in which physical or chemical characteristics are altered prior to use or during placement will be considered a beneficial use under this section if the following conditions are met:

(i) The person proposing the use has first given advance written notice to the Department.

(ii) The fly ash is not mixed with solid waste, unless otherwise approved, in writing, by the Department prior to the use.

(iii) The use of the fly ash results in a demonstrated reduction of the potential of the material to leach constituents into the environment.

(iv) If fly ash is used as structural fill, the requirements of § 290.102 (relating to use as structural fill) must be met.

(v) If fly ash is used as a soil amendment, the requirements of § 290.103 (relating to use as a soil substitute or soil additive) must be met.

(4) The use of bottom ash or boiler slag as an antiskid material or road surface preparation material, if the use is consistent with Department of Transportation specifications or other applicable specifications. The use of fly ash as an antiskid material or road surface preparation material is not deemed to be a beneficial use.

(5) The use of coal ash as raw material for a product with commercial value, including the use of bottom ash in construction aggregate. Storage of coal ash prior to processing is subject to Subchapter E.

(6) The use of coal ash as pipe bedding, if the person proposing the use has first given advance written notice to the Department, and has provided to the Department an evaluation of the pH of the coal ash and a chemical analysis of the coal ash.

(7) The use of coal ash for mine subsidence control, mine fire control and mine sealing, if the following requirements are met:

(i) The person proposing the use gives advance written notice to the Department.

(ii) If a project is funded by or through the Department, use of the coal ash shall be consistent with applicable Departmental requirements and contracts.

(iii) The coal ash shall be utilized within 24 hours of its delivery to the site unless stored in accordance with Subchapter E.

(iv) The coal ash will undergo cementitious reactions after placement.

(8) The use of coal ash as a fuel, provided it has a minimum heating value of 5,000 Btu/lb. Storage of coal ash prior to use as a fuel is subject to Subchapter E.

(b) A person beneficially using coal ash under this section shall notify the Department within 72 hours of

any evidence that the material does not meet appropriate chemical standards or physical property requirements in § 290.201 (relating to coal ash certification).

(c) A person subject to the requirements of this section shall retain records of chemical and physical analyses, the quantity of coal ash utilized, the location of placement and the sources of coal ash for a minimum of 3 years after the beneficial use has ceased. The records shall be made available to the Department upon request.

**§ 290.107. Requests for information.**

(a) The Department may request documents and other information from a person to demonstrate that the person is conducting or proposing to use coal ash in a manner that is compliant with this subchapter and the person shall make the documents and information available to the Department upon request.

(b) Failure to have documentation of compliance with this subchapter may lead to a presumption that the person is disposing residual waste without a permit.

## Subchapter C. COAL ASH CERTIFICATION

Sec.
290.201. Coal ash certification.
290.202. Revocation of certification.
290.203. Exceedance of certification requirements.

**§ 290.201. Coal ash certification.**

(a) Certification standards are as follows:

(1) Maximum acceptable leachate levels for certification:

(i) For metals and other cations other than selenium, 25 times the waste classification standard for a contaminant.

(ii) For selenium, 10 times the waste classification standard.

(iii) For nonmetals and anions other than sulfate and fluoride, the waste classification standard for a contaminant.

(iv) For sulfate, 10 times the waste classification standard.

(2) The pH of coal ash must be 7.0 or above.

(3) For coal ash used as an alkaline additive, the calcium carbonate equivalency, as determined by the Neutralization Potential Test in the Department's *Overburden Sampling and Testing Manual* (Noll, et al., 1988) or other method approved by the Department, must be a minimum of 100 parts per thousand (10% by weight).

(4) For coal ash used as a low permeability material, the hydraulic conductivity of the coal ash must be 1.0 x $10^{-6}$ cm/sec or less based on hydraulic conductivity testing using ASTM D 5084 (Standard Test Method for Measurement of Hydraulic Conductivity of Saturated Porous Materials Using a Flexible Wall Perimeter) or other method approved by the Department. Hydraulic conductivity testing should use compaction and other preparation techniques that will duplicate the expected conditions at the mine site.

(5) The Department may approve the addition of lime or cement to coal ash to achieve the requirements of this subsection. Use of these conditioners must be designated as part of the request in subsection (b).

(b) A request by the generator for coal ash certification must contain the following information on a form provided by the Department:

(1) The name and location of the generator of the coal ash.

(2) A designation of the beneficial use or uses for which certification is requested.

(3) A description of the generation process specific to the generator, including the combustion process, and pollution control processes that impact the chemical characteristics or physical properties of the coal ash, the fuel sources utilized, and the expected percentages of coal ash derived from different processes that will be incorporated into the final coal ash stream to be delivered to the beneficial use site.

(4) A description of the physical properties and chemical characteristics of any material mixed with the coal ash, the extent of mixing, and the mixing methods used.

(5) A detailed chemical analysis on at least four representative samples spaced throughout a 2 to 6-month sampling period within the last year that fully characterizes the composition of the coal ash. The chemical analysis must include:

(i) Total concentrations for aluminum, antimony, arsenic, barium, beryllium, boron, cadmium, calcium, chromium, cobalt, copper, iron, lead, magnesium, manganese, mercury, molybdenum, nickel, potassium, selenium, silver, sodium, sulfur, thallium, vanadium and zinc using methods found in EPA's "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (EPA Publication No. SW-846) or comparable methods approved by the Department.

(ii) Leachable concentrations for aluminum, ammonia, antimony, arsenic, barium, beryllium, boron, cadmium, calcium, chloride, chromium, cobalt, copper, fluoride, iron, lead, magnesium, manganese, mercury, molybdenum, nickel, nitrate, nitrite, potassium, selenium, silver, sodium, sulfate, thallium, vanadium and zinc using methods found in EPA's "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (EPA Publication No. SW-846) or comparable methods approved by the Department. Leachate concentrations must be determined using EPA Method 1312, the synthetic precipitation leaching procedure, unless another leaching procedure is required by the Department.

(iii) pH using the soil and waste pH method found in EPA's "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (EPA Publication No. SW-846) or comparable methods approved by the Department.

(iv) Information to show that the laboratory making a chemical analysis for the application is in compliance with 27 Pa.C.S. Chapter 41 (relating to environmental laboratory accreditation).

(6) A laboratory analysis for optimum moisture content and dry density (Standard or Modified Proctor Test).

(7) An analysis of hydraulic conductivity reported in cm/sec.

(8) A determination of neutralization potential as determined by the Neutralization Potential Test in the Department's *Overburden Sampling and Testing Manual* (Noll, et al., 1988) or other method approved by the Department.

(9) A detailed description of the sampling methodology used, date the samples were taken, and name and contact information of the person performing the sampling.

(10) Other physical or chemical testing results, if required for the particular beneficial uses being proposed.

(c) The Department will review the certification request and notify the generator in writing of the Department-assigned certification identifier or the reason that the source was not certified for beneficial use.

(d) If the coal ash is certified, the generator shall submit regular monitoring information to demonstrate that the coal ash continues to meet the requirements for certification. This information shall be submitted on dates specified by and on forms provided by the Department. At a minimum, monitoring requirements shall consist of the following:

(1) At least one representative sample analysis of the coal ash submitted every 3 months.

(2) Collection of a representative sample for analysis whenever there is a change in operation of the combustion unit generating the coal ash or a change in the fuel source that could result in a significant increase in a coal ash chemical parameter or a change in physical properties that could adversely impact slope stability, compaction characteristics or site hydrology.

(3) Prior to January 31, a yearly report that includes the weight in dry tons of coal ash produced for beneficial use in the previous calendar year, an estimate of the volume in cubic yards and the locations, such as mine sites, where the coal ash was delivered.

(e) The coal ash generator shall notify the Department of any changes to the information filed in the certification application or of any evidence that the coal ash may not meet certification requirements.

### § 290.202. Revocation of certification.

(a) The Department will revoke certification for a source of coal ash if any of the following occur:

(1) The generator fails to comply with monitoring requirements as described in § 290.201(d) (relating to coal ash certification).

(2) The coal ash exceeds certification standards and the generator fails to make an acceptable demonstration as described in § 290.203 (relating to exceedance of certification requirements).

(3) There are physical or chemical characteristics that make the coal ash unsuitable for beneficial use.

(b) If certification is revoked, the coal ash cannot be used at a coal mining activity site or an abandoned mine land site in this Commonwealth unless the generator requests recertification under subsection (c) and the coal ash is recertified by the Department.

(c) The generator of coal ash that had its certification revoked may request recertification. For certification to be reinstated, the generator shall demonstrate to the Department's satisfaction that:

(1) A detailed chemical analysis on three recent monthly representative samples establish that the coal ash meets the certification requirements.

(2) There are no other physical or chemical characteristics that make the coal ash unsuitable for beneficial use.

### § 290.203. Exceedance of certification requirements.

(a) If the coal ash sample analysis results exceed any certification standard, the generator shall submit to the Department within 30 days of receiving the results of exceedance the following:

(1) In the case of laboratory error, documentation and an explanation from the laboratory of the type of error. This information shall be accompanied by a corrected sample analysis or additional sample results demonstrating that the coal ash meets the requirements in § 290.201(a) (relating to coal ash certification).

(2) A demonstration that the sample analysis is anomalous by providing the following:

(i) A comparison of the anomalous sample with prior coal ash samples.

(ii) Additional sample results demonstrating that the coal ash meets the criteria.

(iii) A plan for temporary increase in coal ash monitoring.

(iv) An explanation of the cause of the exceedance and how further exceedances will be avoided.

(b) If the generator demonstrates to the satisfaction of the Department that the exceedance is an anomaly, the coal ash may continue to be beneficially used. Failure to provide this demonstration will result in revocation of beneficial use certification for the source.

## Subchapter D. WATER QUALITY MONITORING

Sec.


### § 290.301. Water quality monitoring.

(a) A water quality monitoring plan shall be submitted to the Department for approval prior to placement or storage of coal ash when required under this chapter.

(b) At a minimum, the water quality monitoring plan must include the following information:

(1) The location and design of downgradient and upgradient monitoring points.

(2) A minimum of 12 background samples from each monitoring point taken at monthly intervals prior to placement of coal ash, unless a greater number or frequency is required by the Department.

(3) The samples to be taken quarterly after approval from each monitoring point, unless a greater number or frequency is required by the Department.

(c) The person taking the samples and the laboratory performing the analysis required under this seciton shall employ the quality assurance/quality control procedures described in the EPA's "Handbook for Analytical Quality Control in Water and Wastewater Laboratories" (EPA 600/4-79-019) or "Test Methods for Evaluating Solid Waste" (SW-846).

(d) The analytical methodologies used to meet the requirements of this section must be those in the most recent edition of the EPA's "Test Methods for Evaluating Solid Waste" (SW-846), "Methods for Chemical Analysis of Water and Wastes" (EPA 600/4-79-020), "Standard Methods for Examination of Water and Wastewater," prepared and published jointly by the American Public Health Association, American Waterworks Association, and Water Pollution Control Federation or a comparable method approved by the EPA or the Department. The laboratory making any chemical analysis for water quality monitoring must be in compliance with 27 Pa.C.S. Chapter 41 (relating to environmental laboratory accreditation).

(e) Samples shall be analyzed for pH (determined in the field and in the laboratory), temperature (determined

in the field), specific conductance (at 25° C; determined in the field), alkalinity, acidity, sulfate, chloride, fluoride, nitrate, nitrite, ammonia, and total suspended solids without filtration.

(f) Samples shall be analyzed for total and dissolved aluminum, antimony, arsenic, barium, beryllium, boron, cadmium, calcium, chromium, cobalt, copper, iron, lead, magnesium, manganese, mercury, molybdenum, nickel, potassium, selenium, silver, sodium, thallium, vanadium, and zinc. In addition, the static water elevation for monitoring wells and the flow for springs, seeps and mine discharges must be measured.

(g) Additional parameters may be required by the Department based on conditions at the site and the specific characteristics of the coal ash being beneficially used.

(h) Water quality monitoring shall continue quarterly for a minimum of 5 years after final placement or storage of coal ash at the site, and annually thereafter from the end of year 5 through 10 years after final placement or storage of coal ash at the site. The Department may require more frequent or longer water quality monitoring if the results of water quality monitoring indicate that contamination may be occurring.

(i) Water quality monitoring data shall be submitted quarterly to and in the format required by the Department. Water quality monitoring data shall be submitted to the Department annually from the end of year 5 through 10 years after final placement or storage of coal ash at the site.

(j) The person required to develop and implement a water quality monitoring plan in accordance with § 290.101(d) (relating to general requirements for beneficial use) shall demonstrate attainment with applicable groundwater or surface water remediation standards as required in the event of groundwater or surface water degradation attributable to the placement of the coal ash. The applicable groundwater remediation standards are identified in §§ 290.304 and 290.305 (relating to assessment plan; and abatement plan).

**§ 290.302. Number, location and depth of monitoring points.**

(a) The water quality monitoring system shall accurately characterize groundwater and surface water flow, groundwater and surface water chemistry and flow systems on the site and adjacent area. The system must consist of the following:

(1) At least one monitoring point at a position hydraulically upgradient from the coal ash placement area in the direction of increasing static head that is capable of providing representative data of groundwater not affected by placement of coal ash, except when the coal ash placement area occupies the most upgradient position in the flow system. In that case, sufficient downgradient monitoring points shall be placed to determine the extent of adverse effects on groundwater from the coal ash placement.

(2) At least three groundwater monitoring points hydraulically downgradient in the direction of decreasing static head from the area in which coal ash has been or will be placed. The Department at its discretion may accept two downgradient monitoring points on small sites that can be well represented by two points. The Department may allow one or more springs, seeps and mine discharges to substitute for wells if these points are hydraulically downgradient from the area in which coal ash has been or will be placed and if these points will be as effective or more effective at monitoring the coal ash placement area than wells. Downgradient monitoring points must be hydrologically connected to the area of coal ash placement, and must be located and constructed so as to detect any chemical influence of the coal ash placement area. The downgradient points must be proximate enough to detect contaminants within the life of the placement operation. All monitoring points must be developed and protected in a manner approved by the Department.

(3) Surface water monitoring points where surface water monitoring is likely to show any chemical influence that the coal ash placement area may have on the hydrologic regime.

(b) The upgradient and downgradient monitoring points shall be:

(1) Sufficient in number, location and depth to be representative of water quality.

(2) Located so as not to interfere with routine operations at the site.

(3) Located within 200 feet of the coal ash placement area or mining activity area, except as necessary to comply with subsections (c) and (d). The Department may approve location at a greater distance based on the hydrology of the coal ash placement and adjacent areas.

(c) In addition to the requirements of subsection (b), upgradient monitoring points shall be located so that they will not be affected by effects on groundwater or surface water from the coal ash placement area.

(d) In addition to the requirements of subsection (b), downgradient monitoring points shall be located so that they will provide early detection of effects on groundwater or surface water from the coal ash placement area.

(e) Wells drilled under this section shall be drilled by drillers licensed under the Water Well Drillers License Act (32 P. S. §§ 645.1—645.13).

(f) The well materials shall be decontaminated prior to installation.

**§ 290.303. Standards for wells and casing of wells.**

(a) A monitoring well shall be cased as follows:

(1) The casing must maintain the integrity of the monitoring well borehole and be constructed of material that will not react with the groundwater being monitored.

(2) The minimum casing diameter must be 4 inches unless otherwise approved by the Department in writing.

(3) The well must be constructed with a screen that meets the following requirements:

(i) The screen must be factory-made.

(ii) The screen may not react with the groundwater being monitored.

(iii) The screen must maximize open area to minimize entrance velocities and allow rapid sample recovery.

(4) The well must be filter-packed with chemically inert clean quartz sand, silica or glass beads, unless otherwise approved by the Department. The material must be well-rounded and dimensionally stable.

(5) The casing must extend at least 1 foot aboveground, unless the Department has approved flush mount wells.

(6) The annular space above the sampling depth must be sealed to prevent contamination of samples and the groundwater.

(7) The casing must be designed and constructed to prevent cross contamination between surface water and groundwater.

(8) Alternative casing designs for wells in stable formations may be approved by the Department.

(b) Monitoring well casings must be enclosed in a protective casing that must:

(1) Be of sufficient strength to protect the well from damage by heavy equipment and vandalism.

(2) Be installed for at least the upper 10 feet of the monitoring well, as measured from the well cap, with a maximum stick up of 3 feet, unless otherwise approved by the Department in writing.

(3) Be grouted and placed with a concrete collar at least 3 feet deep to hold it firmly in position.

(4) Be numbered for identification with a label capable of withstanding field conditions.

(5) Protrude above the monitoring well casing.

(6) Have a locked cap.

(7) Be made of steel or other material of equivalent strength.

**§ 290.304. Assessment plan.**

(a) A person shall prepare and submit to the Department an assessment plan within 60 days after one of the following occurs:

(1) Data obtained from water quality monitoring by the Department or the person indicates statistically significant degradation. Statistical evaluation of water quality monitoring data shall be made using one or more of the methods in 40 CFR 258.53(g) and (h) (relating to groundwater sampling and analysis requirements).

(2) Laboratory analysis of one or more public or private water supplies indicates groundwater or surface water contamination is occurring that could reasonably be attributed to the coal ash placement.

(b) An assessment under this section must consist of chemical data and a supporting narrative, if one of the following applies:

(1) Within 10 working days after receipt of sample results indicating groundwater or surface water degradation, the person resamples the affected monitoring points and analysis from resampling shows, to the Department's satisfaction, that groundwater or surface water degradation has not occurred.

(2) Within 20 working days after receipt of sample results indicating groundwater or surface water degradation, the person demonstrates that the degradation was caused by seasonal variations or activities unrelated to coal ash placement.

(c) The assessment plan must specify the manner in which the person will determine the existence, quality, quantity, areal extent and depth of groundwater or surface water degradation and the rate and direction of migration of contaminants. An assessment plan shall be prepared and sealed by a professional geologist licensed to practice in this Commonwealth. The plan must contain the following information:

(1) For wells, lysimeters, borings, pits, piezometers, springs, seeps, mine discharges and other assessment structures or devices, the number, location, size, casing type and depth, as appropriate. If the assessment points are wells, they shall be constructed in accordance with §§ 290.302 and 290.303 (relating to number, location and depth of monitoring points; and standards for wells and casing of wells).

(2) The sampling and analytical methods for the parameters to be evaluated.

(3) The evaluation procedures, including the use of previously gathered groundwater or surface water quality and quantity information, to determine the concentration, rate and extent of groundwater or surface water degradation from the facility.

(4) A biological assessment of surface water, if required by the Department.

(5) An implementation schedule.

(6) Identification of the abatement standard that will be met.

(d) The assessment plan shall be implemented upon approval by the Department in accordance with the approved implementation schedule, and shall be completed in a reasonable time not to exceed 6 months, unless otherwise approved by the Department. If the Department determines that the proposed plan is inadequate, it may modify the plan and approve the plan as modified. If the groundwater or surface water assessment indicates that contamination is leaving the coal ash placement site, the person shall notify, in writing, each owner of a private or public water supply that is located within 1/2-mile downgradient of the coal ash placement area that an assessment has been initiated.

(e) Within 45 days after the completion of the assessment plan, the person shall submit a report containing the new data collected, analysis of the data and recommendations on the necessity for abatement.

(f) If the Department determines after review of the assessment report that implementation of an abatement plan is not required under § 290.305 (relating to abatement plan), the person shall submit a revised water quality monitoring plan to the Department for approval that contains any necessary changes to the plan and an application for permit modification, if applicable. The person shall implement the modifications within 30 days of the Department's approval.

(g) This section does not prevent the Department from requiring or the person from conducting abatement or water supply replacement concurrently with or prior to implementation of the assessment.

**§ 290.305. Abatement plan.**

(a) The person that is required to conduct water quality monitoring as part of coal ash beneficial use or storage shall prepare and submit to the Department an abatement plan whenever one of the following occurs:

(1) The assessment plan prepared and implemented under § 290.304 (relating to assessment plan) shows the presence of groundwater or surface water degradation for one or more contaminants at one or more monitoring points and the analysis indicates that an abatement standard will not be met at the compliance points.

(2) Monitoring by the Department or person shows the presence of an abatement standard exceedance from one or more compliance points even if an assessment plan has not been completed. The person is not required to implement an abatement plan under this paragraph if the following apply:

(i) Within 10 days after receipt of sample results showing an exceedance of an abatement standard at a point of compliance, the person resamples the affected monitoring points.

(ii) Analysis from resampling shows to the Department's satisfaction that an exceedance of an abatement standard has not occurred.

(3) A biological assessment of surface water implemented under § 290.304(c)(4) shows a detrimental effect on biota is occurring.

(b) An abatement plan shall be prepared and sealed by a professional geologist licensed to practice in this Commonwealth. The plan must contain the following information:

(1) The specific methods or techniques to be used to abate groundwater or surface water degradation at the facility.

(2) The specific methods or techniques to be used to prevent further groundwater or surface water degradation from the facility.

(3) A schedule for implementation.

(c) If abatement is required in accordance with subsection (a), the person shall demonstrate compliance with one or more of the following standards at the identified compliance points:

(1) For constituents for which Statewide health standards exist, the Statewide health standard for that constituent at and beyond 500 feet of the perimeter of the coal ash placement area or at and beyond the property boundary, whichever is closer.

(2) The background standard for constituents at and beyond 500 feet of the perimeter of the coal ash placement area or at and beyond the property boundary, whichever is closer. Load-based standards at groundwater discharge points are acceptable if a permit was issued under Chapter 87, Subchapter F or Chapter 88, Subchapter G (relating to surface coal mines: minimum requirements for remining areas with pollutional discharges; and anthracite surface mining activities and anthracite bank removal and reclamation activities: minimum requirements for remining areas with pollutional discharges).

(3) For constituents for which no primary MCLs under the Federal and State Safe Drinking Water Acts (42 U.S.C.A. §§ 300f—300j-18; and 35 P. S. §§ 721.1—721.17) exist, the risk-based standard at and beyond 500 feet of the perimeter of the coal ash placement area or at and beyond the property boundary, whichever is closer, if the following conditions are met:

(i) The risk assessment used to establish the standard assumes that human receptors exist at the property boundary.

(ii) The level is derived in a manner consistent with the health risk assessment portions of the Department's *Land Recycling Program Technical Guidance Manual* (253-0300-100) or other standard procedures commonly used in the environmental field for assessing the health risks of environmental pollutants.

(iii) The level is based on scientifically valid studies conducted in accordance with good laboratory practice standards (40 CFR Part 792 (relating to good laboratory practice standards)) promulgated under the Toxic Substances Control Act (15 U.S.C.A. §§ 2601—2692) or other scientifically valid studies approved by the Department.

(iv) For carcinogens, the level represents a concentration associated with an excess lifetime cancer risk level of $1 \times 10^{-5}$ at the property boundary.

(d) For measuring compliance with secondary contaminants under subsection (c)(1) or (3), the Department may approve a compliance point beyond 500 feet on land owned by the owner of the coal ash placement area.

(e) The abatement plan shall be completed and submitted to the Department for approval within 90 days of the time the obligation arises under this section unless the date is otherwise modified, in writing, by the Department.

(f) If the Department determines that the proposed plan is inadequate, the Department may modify the plan and approve the plan as modified or require the submission of an approvable modification.

(g) The abatement plan shall be implemented within 60 days of approval by the Department in accordance with the approved implementation schedule.

(h) If, after plan approval or implementation, the Department finds that the plan is incapable of achieving the groundwater or surface water protection contemplated in the approval, the Department may issue one or more of the following:

(1) An order requiring the person to submit proposed modifications to the abatement plan.

(2) An order requiring the person to implement the abatement plan as modified by the Department.

(3) Another order the Department deems necessary to aid in the enforcement of the acts.

**§ 290.306. Recordkeeping.**

A person subject to the requirements of this subchapter shall retain records of analyses and evaluations of monitoring data and groundwater elevations required under this subchapter for a minimum of 3 years after water quality monitoring ceases and make the records available to the Department upon request.

**§ 290.307. Interim water quality monitoring requirements.**

This section applies to sites where coal ash has been stored or placed for beneficial use prior to December 11, 2010, and continues to be stored or placed for beneficial use following December 11, 2010.

(1) For sites not previously subject to water quality monitoring requirements:

(i) A water quality monitoring plan meeting the requirements of § 290.301(b)(1) and (3) (relating to water quality monitoring) shall be submitted to the Department by December 12, 2011.

(ii) The water quality monitoring plan shall be implemented within 1 year of the Department's approval of the plan.

(2) For sites previously subject to water quality monitoring requirements:

(i) New monitoring points and replacement wells constructed after December 11, 2010, must comply with the requirements in §§ 290.302(b)—(f) and 290.303 (relating to number, location and depth of monitoring points; and standards for wells and casing of wells).

(ii) All water quality monitoring after March 11, 2011, must include the parameters in § 290.301(e) and (f) and any parameters added by the Department based onsite conditions in accordance with § 290.301(g).

## Subchapter E. COAL ASH STORAGE

Sec.


### § 290.401. Design and operation.

(a) A person storing coal ash shall employ best engineering design and construction practices for all phases of construction and operation.

(b) A person may not store coal ash in a manner that exceeds the design capacity of the storage facility.

(c) The Department may require a person to install a water quality monitoring system in accordance with Subchapter D (relating to water quality monitoring) if storage of the coal ash has the potential to cause groundwater degradation.

(d) A person storing coal ash shall routinely inspect the facility, its equipment and the surrounding area for evidence of failure and shall immediately take necessary corrective actions. The person shall maintain records of inspections and corrective actions that were taken for a minimum of 3 years, and make the records available to the Department upon request.

### § 290.402. Duration of storage.

(a) Coal ash may not be stored as follows:

(1) For more than 1 year unless a minimum of 75% of the volume of the coal ash being stored is used or processed for beneficial use in the previous calendar year commencing on January 1st.

(2) For more than 90 days unless it is stored on an impermeable floor or pad and either in an enclosed facility or in an area where runoff is collected and treated. The Department may waive or modify, in writing, this requirement if there is no runoff from the storage.

(b) The Department will presume that a person storing coal ash contrary to subsection (a) is operating a waste disposal facility and is subject to the applicable requirements of the act and regulations thereunder for waste disposal.

(c) A person that stores coal ash shall maintain for a minimum of 3 years accurate operational records that are sufficiently detailed to demonstrate to the Department that coal ash is being stored under subsection (a). The records shall be made available to the Department upon request. The presumption in subsection (b) may be overcome by the operational records required by this subsection.

### § 290.403. Surface and groundwater protection.

(a) Surface water runoff from storage areas shall be minimized. Stormwater shall be managed in accordance with The Clean Streams Law (35 P. S. §§ 691.1—691.1001) and the regulations promulgated thereunder.

(b) Surface water run-on to storage areas shall be minimized.

(c) Coal ash may not be stored in a manner that causes groundwater or surface water degradation.

### § 290.404. Areas where coal ash storage is prohibited.

(a) Coal ash storage areas, other than areas where the coal ash is totally enclosed and stored on an impermeable floor, temporary coal ash storage piles or storage impoundments, may not be operated as follows, unless otherwise authorized by the Department in writing:

(1) Within 100 feet of an intermittent or perennial stream, other than exceptional value or high quality waters as defined in § 93.1 (relating to definitions).

(2) Within 300 feet of exceptional value or high quality waters as defined in § 93.1.

(3) Within 300 feet of a groundwater water source.

(4) Within 1,000 feet upgradient of a surface drinking water source.

(5) Within 25 feet of a bedrock outcrop, unless the outcrop is properly treated to minimize infiltration into fractured zones.

(6) Within 100 feet of a sinkhole or area draining into a sinkhole.

(7) Within 100 feet of a wetland, other than an exceptional value wetland.

(8) In or within 300 feet of an exceptional value wetland.

(b) Coal ash storage impoundments may not be operated as follows:

(1) In the 100-year floodplain of waters of this Commonwealth.

(2) In or within 100 feet of a wetland other than an exceptional value wetland.

(3) In or within 300 feet of an exceptional value wetland.

(4) In an area where the operation would result in the elimination, pollution or destruction of a portion of an intermittent stream or perennial stream.

(5) Within 100 feet of an intermittent stream or perennial stream, other than exceptional value or high quality waters as defined in § 93.1.

(6) Within 300 feet of exceptional value or high quality waters as defined in § 93.1.

(7) In areas underlain by limestone or carbonate formations, where the formations are greater than 5 feet thick and present at the topmost geologic unit. These areas include areas mapped by the "Pennsylvania Geological Survey" as underlain by these formations, unless competent geologic studies certified by a professional geologist licensed to practice in this Commonwealth demonstrate the absence of limestone and carbonate formations under the site.

(8) Within 900 feet measured horizontally from an occupied dwelling, unless the owner of the dwelling has provided a written waiver consenting to the coal ash storage impoundment being closer than 900 feet. A waiver shall be knowingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver from the owner. A closed coal ash storage impoundment that submits an application to reopen and expand shall also be subject to this paragraph.

(9) Within 100 feet of a property line, unless the current owner has provided a written consent to the coal

ash storage impoundment being closer than 100 feet. The waiver shall be knowingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver from the current owner.

(10) Within 1/4 mile upgradient, and within 300 feet downgradient, of a private or public water source, except that the Department may waive or modify the isolation distances to a private water source if the person demonstrates and the Department finds, in writing, that the following conditions have been met:

(i) The owners of the private water sources in the isolation area have consented, in writing, to the location of the proposed the coal ash storage impoundment.

(ii) The person storing coal ash and each water source owner have agreed, in writing, that the person will construct and maintain at the person's expense a permanent alternative water supply of like quantity and quality at no additional cost to the water source owner if the existing source is adversely affected by the coal ash storage impoundment.

(iii) The person storing coal ash has demonstrated that a replacement water source is technically and economically feasible and readily available for every private water source in the isolation area.

(11) Within 900 feet of the following:

(i) A building that is owned by a school district or school and used for instructional purposes.

(ii) A park.

(iii) A playground.

(12) In areas that serve as habitat for fauna or flora listed as "threatened" or "endangered" under the Endangered Species Act of 1973 (7 U.S.C.A. § 136; 16 U.S.C.A. §§ 4601-9, 460k-1, 668dd, 715i, 715a, 1362, 1371, 1372, 1402 and 1531—1543), the Wild Resource Conservation Act (32 P. S. §§ 5301—5314), 30 Pa.C.S. (relating to the Fish and Boat Code) or 34 Pa.C.S. (relating to the Game and Wildlife Code), unless the applicant demonstrates compliance with applicable Federal and State requirements that would allow operations in those areas.

(c) Temporary coal ash storage piles may not be operated as follows:

(1) Within 100 feet of an intermittent or perennial stream, other than exceptional value or high quality waters as defined in § 93.1.

(2) Within 300 feet of exceptional value or high quality waters as defined in § 93.1.

(3) Within 100 feet of a wetland, other than an exceptional value wetland.

(4) In or within 300 feet of an exceptional value wetland.

**§ 290.405. Storage piles—general requirements.**

(a) A person storing coal ash in piles shall minimize the dispersal of coal ash by wind or water erosion.

(b) The coal ash being stored shall be separated from the water table by at least 4 feet without the use of a groundwater pumping system. The Department may waive, in writing, this requirement.

(c) A person storing coal ash in a pile, other than a temporary coal ash storage pile, shall design, install and maintain berms around the storage area and other structures or facilities to collect and, when necessary, treat runoff or leachate, or both, from the storage area. The Department may waive, in writing, the berm requirement when other collection methods are in place.

(d) For storage piles without a liner system or storage pad, the Department may require the person to install and implement water quality monitoring in accordance with Subchapter D (relating to water quality monitoring) where site conditions warrant.

**§ 290.406. Storage piles—storage pad or liner system.**

(a) A person that installs a storage pad or liner system to prevent groundwater degradation shall meet the requirements of this section. This section does not preclude a person from using other means to prevent groundwater degradation, such as enclosure in a building.

(b) The storage pad or liner system must meet the following requirements:

(1) Prevent the migration of leachate through the storage pad or liner system.

(2) May not be adversely affected by the physical or chemical characteristics of coal ash, coal ash constituents or leachate from the coal ash storage piles.

(3) Be designed, constructed and maintained to protect the integrity of the pad or liner during the storage of coal ash.

(4) Be designed to collect leachate and runoff.

(5) Be constructed of nonsolid waste and noncoal ash material.

(6) Be no less permeable than $1 \times 10^{-7}$ cm/sec., as demonstrated by field and laboratory testing.

(7) Be inspected for uniformity, damage and imperfections during construction and installation.

(c) The person shall install and operate a monitoring system capable of verifying whether coal ash or leachate has penetrated the pad or liner, if required by the Department.

(d) Coal ash may not be stored where continuous or intermittent contact could occur between the coal ash and groundwater or surface water.

**§ 290.407. Storage piles—leachate and runoff control.**

(a) A person that installs a storage pad or liner system shall collect leachate and runoff from the coal ash pile and divert it into a leachate storage or treatment system.

(b) A leachate storage system must consist of a collection tank or surface impoundment. The tank or impoundment must be:

(1) Sized for the anticipated leachate and runoff flow, including a 30-day reserve capacity.

(2) Chemically compatible with the leachate.

(3) Of sufficient strength to withstand expected loads.

(4) Equipped with cleanouts, if necessary.

(5) Sealed to prevent the loss of leachate and runoff.

(c) Collected leachate shall be treated or disposed in a manner that complies with the act, The Clean Streams Law (35 P. S. §§ 691.1—691.1001), and the regulations promulgated thereunder.

**§ 290.408. Storage impoundments—scope.**

(a) This section and §§ 290.409—290.415 apply to persons that store coal ash in surface impoundments prior to beneficial use.

(b) This section and §§ 290.409—290.415 do not apply to the storage impoundments that are designed for the express purpose of storing stormwater runoff and that store runoff composed entirely of stormwater. Impoundments that store stormwater runoff must comply with the applicable requirements of The Clean Streams Law (35 P. S. §§ 691.1—691.1001), section 13 of the Stormwater Management Act (32 P. S. § 680.13) and Chapters 92a, 102 and 105 (relating to national pollutant discharge elimination system permitting, monitoring and compliance; erosion and sediment control; and dam safety and waterway management).

(c) For purposes of this section, "stormwater" means drainage runoff from the surface of the land resulting from precipitation or snow or ice melt.

**§ 290.409. Storage impoundments—general requirements.**

A person that operates a storage impoundment to hold coal ash shall meet the following conditions:

(1) Hold a valid permit from the Department for the storage under sections 308 and 402 and other applicable provisions of The Clean Streams Law (35 P. S. §§ 691.1—691.1001), Chapter 91 (relating to general provisions) and other applicable regulations promulgated thereunder, and shall comply with the permit.

(2) Comply with Chapter 105 (relating to dam safety and waterway management).

**§ 290.410. Storage impoundments—design requirements.**

Impoundments used to store coal ash must meet the following minimum design criteria:

(1) The liner system for a coal ash storage impoundment must include the following elements:

(i) The subbase, which is the prepared layer of soil or earthen material upon which the remainder of the liner system is constructed.

(ii) The leachate detection zone, which is a prepared layer placed on top of the subbase and upon which the liner is placed, and in which a leachate detection system is located.

(iii) The composite liner, which is a continuous layer of synthetic material over earthen material, placed on the leachate detection zone. The upper component is no more permeable than $1.0 \times 10^{-7}$ cm/sec. based on laboratory testing. The composite component is no more permeable than $1.0 \times 10^{-6}$ cm/sec., based on laboratory testing and field testing.

(iv) The protective cover and leachate collection zone, which is a prepared layer placed over the liner in which a leachate collection system is located.

(2) The bottom of the subbase of the liner system cannot be in contact with the water table without the use of groundwater pumping systems.

(3) The subbase must meet the following performance standards. The subbase must:

(i) Bear the weight of the liner system, coal ash, and equipment operating on the coal ash storage impoundment without causing or allowing a failure of the liner system.

(ii) Accommodate potential settlement without damage to the liner system.

(iii) Be a barrier to the transmission of liquids.

(iv) Cover the bottom and sidewalls of the coal ash storage impoundment.

(4) The leachate detection zone must meet the following performance standards. The leachate detection zone must:

(i) Rapidly detect and collect liquid entering the leachate detection zone, and rapidly transmit the liquid to the leachate treatment system.

(ii) Withstand chemical attack from coal ash or leachate.

(iii) Withstand anticipated loads, stresses and disturbances from overlying coal ash and equipment operation.

(iv) Function without clogging.

(v) Prevent the liner from puncturing, cracking, tearing, stretching or otherwise losing its physical integrity.

(vi) Cover the bottom and sidewalls of the coal ash storage impoundment.

(5) The liner must meet the following standards of performance:

(i) The liner must prevent the migration of leachate through the liner to the greatest degree that is technologically possible.

(ii) The effectiveness of the liner in preventing the migration of leachate may not be adversely affected by the physical or chemical characteristics of the coal ash or leachate from the coal ash storage impoundment.

(iii) The liner must be resistant to physical failure, chemical failure, and other failure.

(iv) The liner must cover the bottom and sidewalls of the coal ash storage impoundment.

(6) The protective cover must meet the following performance standards. The protective cover must:

(i) Protect the primary liner from physical damage from stresses and disturbances from overlying coal ash and equipment operation.

(ii) Protect the leachate collection system within the protective cover from stresses and disturbances from overlying coal ash and equipment operation.

(iii) Allow the continuous and free flow of leachate into the leachate collection system within the protective cover.

(iv) Cover the bottom and sidewalls of the coal ash storage impoundment.

(7) The leachate collection system within the protective cover must meet the following performance standards. The leachate collection system must:

(i) Ensure that free flowing liquids and leachate will drain continuously from the protective cover to the leachate treatment system.

(ii) Withstand chemical attack from leachate.

(iii) Withstand anticipated loads, stresses and disturbances from overlying coal ash and equipment operation.

(iv) Function without clogging.

(v) Cover the bottom and sidewalls of the coal ash storage impoundment.

(8) An onsite leachate storage system shall be part of each leachate treatment method used by the person. The storage system must contain impoundments or tanks for storage of leachate. The tanks or impoundments must have a storage capacity at least equal to the maximum expected production of leachate for a 30-day period. No

more than 25% of the total leachate storage capacity may be used for flow equalization on a regular basis. Leachate storage capacity may not be considered to include leachate that may have collected in or on the liner system.

(9) Leachate may be collected and handled by one of the following:

(i) Onsite treatment and discharged into a receiving stream under a permit issued by the Department under The Clean Streams Law (35 P. S. §§ 691.1—691.1001) and regulations thereunder, if the Department approves this method in the permit.

(ii) Direct discharge into a permitted publicly-owned treatment works, following pretreatment, if pretreatment is required by Federal, State or local law or by discharge into another permitted treatment facility.

(iii) Transport to an offsite treatment facility that is operating in compliance with The Clean Streams Law (35 P. S. §§ 691.1—691.1001) and regulations thereunder, and is otherwise capable of accepting and treating leachate from the coal ash storage impoundment.

(10) Impoundments must be designed, constructed, operated and maintained in accordance with the following:

(i) An impoundment must have sufficient freeboard to prevent overtopping, including overtopping caused by the 24-hour precipitation event in inches to be expected once in 25 years. The freeboard may not be less than 2 feet.

(ii) The dike must have sufficient structural integrity to prevent failure. The liner system of the impoundment may not be considered in determining the structural integrity of the dike.

(iii) The inside slope shall be designed and constructed with sufficient protective cover to prevent wind and water erosion, and to preserve the structural integrity of the dike.

(iv) The dike must be capable of withstanding anticipated static and dynamic loadings with a minimum safety factor for the most critical failure surface of 1.5 for static loading and 1.2 for dynamic loading.

(v) The outside slopes of the dike may not exceed 25% unless the following requirements are met:

(A) A horizontal terrace with a minimum width of 10 feet is constructed at each 20-foot vertical rise of the slope, or the Department approves in the permit a terrace with different dimensions.

(B) Surface water on the terrace is collected and discharged so that it does not erode or otherwise adversely affect the stability of the dike.

(C) The final slope does not exceed 50%.

(vi) Dikes and berms must be free of burrowing mammals and plants with root systems capable of displacing earthen materials upon which the structural integrity of the dikes or berms is dependent.

(vii) An impoundment must be surrounded by structures sufficient to prevent surface runoff from a 25-year, 24-hour precipitation event from entering the impoundment.

**§ 290.411. Storage impoundments—operating requirements.**

(a) At least 8 feet shall be maintained between the bottom of the subbase of the liner system and the top of the confining layer or the shallowest level below the bottom of the subbase where groundwater occurs as a result of upward leakage from natural or other preexisting causes. The integrity of the confining layer may not be compromised by excavation.

(b) The edge of the liner shall be clearly marked.

(c) A fence or other suitable barrier shall be maintained around the coal ash storage area, including impoundments, leachate collection and treatment systems sufficient to prevent unauthorized access, unless the Department approves, in the permit, an alternative means of protecting access to the area that afford an equivalent degree of protection.

(d) The person shall implement fugitive air contaminant control measures and otherwise prevent and control air pollution in accordance with the Air Pollution Control Act (35 P. S. §§ 4001—4015); Article III (relating to air resources) and § 289.228 (relating to nuisance minimization and control). Minimization and control measures must include the following:

(1) Ensuring that operation of the coal ash storage impoundment will not cause or contribute to an exceedance of an ambient air quality standard under § 131.3 (relating to ambient air quality standards).

(2) Minimizing the generation of fugitive dust emissions from the coal ash storage impoundment.

(e) The person shall implement water quality monitoring, as required under Subchapter D (relating to quality monitoring).

(f) A person that stores coal ash in a coal ash storage impoundment shall remove coal ash from the impoundment as follows:

(1) Without damage to the impoundment.

(2) Inspect the liner to ensure its integrity, and make necessary repairs prior to returning the impoundment to service.

(3) Provide for the beneficial use of the removed coal ash in accordance with this chapter.

(4) Removal from the impoundment shall be sufficient such that the coal ash is not accumulated speculatively.

**§ 290.412. Storage impoundments—failure.**

(a) If a coal ash storage impoundment fails, the person storing coal ash shall immediately:

(1) Stop adding coal ash to the impoundment.

(2) Contain any discharge that has occurred or is occurring.

(3) Empty the impoundment in a manner approved by the Department, if leaks cannot be stopped.

(4) Notify the Department of the failure of the impoundment and the measures taken to remedy the failure.

(b) A coal ash storage impoundment that has been removed from service due to failure may not be restored to service unless the following conditions are met:

(1) The impoundment has been repaired.

(2) The repair has been certified to the Department, in writing, by a registered professional engineer.

(3) The Department has approved, in writing, the restoration of the impoundment to service.

(c) If a storage impoundment fails and the impoundment or surrounding area cannot be cleaned up in a

manner that is satisfactory to the Department, the impoundment shall be closed in accordance with this section.

**§ 290.413. Storage impoundments—inspections.**

The Department will inspect storage impoundments in accordance with the Dam Safety and Encroachments Act (32 P. S. §§ 693.1—693.27).

**§ 290.414. Storage areas—closure.**

Upon cessation of coal ash storage, the person storing coal ash shall remove coal ash and materials containing coal ash, and provide for the beneficial use or disposal of the coal ash and materials under the act and the regulations promulgated thereunder. The person shall also regrade and revegetate the site as required by the Department.

**§ 290.415. Interim requirements for sites where coal ash has been stored.**

For storage sites previously subject to rescinded § 299.153, which pertained to storage and containment of coal ash, the requirements of this subchapter must be met by December 12, 2011, unless the person storing the coal ash demonstrates to the Department's satisfaction through water quality monitoring data that the existing storage is protective of public health, safety and the environment.

(*Editor's Note*: The rescinded version of § 299.153 (relating to storage and containment of coal ash) appears at *Pennsylvania Code* pages 299-18 and 299-19 (serial pages (273866) and (273867)).

**CHAPTER 299. STORAGE AND TRANSPORTATION OF RESIDUAL WASTE**

**Subchapter A. STANDARDS FOR STORAGE OF RESIDUAL WASTE**

**TYPES OF WASTE**

**§ 299.153. (Reserved).**

[Pa.B. Doc. No. 10-2359. Filed for public inspection December 10, 2010, 9:00 a.m.]

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# Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

## STATE BOARD OF BARBER EXAMINERS

## [ 49 PA. CODE CH. 3 ]

## Student Records and Curriculum

The State Board of Barber Examiners (Board) adopts § 3.71a (relating to notification) and amends §§ 3.72, 3.87, 3.90 and 3.103, regarding student records in barbershops and barber schools to read as set forth in Annex A.

*Effective Date*

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

*Statutory Authority*

This final-form rulemaking is authorized under section 15-A.4(b) of the act of June 19, 1931 (P. L. 589, No. 202) (63 P. S. § 566.4(b)), known as the Barbers' License Law (act).

*Background, Purpose and Description of Final-Form Rulemaking*

Under section 3(a) of the act (63 P. S. § 553), prior to taking the barber's license examination, an applicant is required to have completed a barbering study and training period of at least 1,250 hours in not less than 9 months in either a licensed barbershop under the instruction of a licensed teacher or a licensed manager-barber, or in a licensed barber school under the instruction of a licensed teacher. Section 5 of the act (63 P. S. § 555) requires barbershops and barber schools to keep a daily record of the attendance of each student. The Board's existing regulations require barbershops and barber schools to maintain student records for inspection by the Board. As of May 2010, there were 16 licensed barber schools in this Commonwealth as compared to 2,134 barbershops. Currently, the Board is not notified that a student is training in a barbershop. Due to the large number of barbershops, it is not feasible for the Board to inspect all barbershops to determine whether a student is training in a shop at any given point in time. If the Board cannot determine whether a student is training in a shop, then the Board cannot ensure that the shop is keeping proper records and that either a barber-manager or barber-teacher is instructing the student. To remedy this situation, § 3.71a is being added to require the barbershop owner or shop owner's designee to notify the Board, on a form provided by the Board, of each student to be trained in the shop before the student begins training. It also makes it clear that the shop owner is responsible for ensuring that the Board is properly notified of each student to be trained in the shop and for maintaining student records in a file available for inspection.

Section 5 of the act was amended on June 28, 2002, to eliminate the requirement for barbershops and barber schools to keep a record of blood test results. Currently, §§ 3.72(a) and 3.87(a) (relating to student's records) require barbershops and barber schools to keep a student's blood test results on file. The final-form rulemaking deletes this requirement to be consistent with the amendments to the act.

Currently, § 3.72(b) requires a manager-barber or barber-teacher who is training a student in a barbershop to keep quarterly reports of the hours earned by the student. Likewise, § 3.87(b) requires barber schools to keep quarterly reports of the hours earned by the student. It is not feasible for the Board to inspect every barbershop and barber school on a quarterly basis to determine whether they are maintaining the quarterly hours as required. In addition, barbershops and barber schools are currently required to maintain student records for a 5-year period and to forward the student's file to the Board if the shop or school closes within the 5-year period. Situations have arisen in which a barbershop or barber school has closed without forwarding its records to the Board, in which case some students have been unable to document that they had completed the training period required to take the barber's license examination. Therefore, §§ 3.72 and 3.87 are amended to require barbershops and barber schools, respectively, to submit quarterly reports of student hours to the Board so that the Board can ensure that the quarterly reports required under these sections are being properly maintained and that students would not be adversely affected if a barbershop or barber school failed to preserve its records for a 5-year period as required. The final-form rulemaking also amends § 3.72 to clarify that the barbershop owner is responsible for keeping a student's records in a file.

On December 22, 2005, section 12(b) of the act (63 P. S. § 562(b)) was amended to delete the requirement that class and instruction hours in barber schools have to be not less than 7 hours nor more than 8 hours per day. Consistent with this statutory amendment, the final-form rulemaking deleted the language that was deleted from the act. In its previous form, § 3.90 (relating to student curriculum) did not address part-time work by students. The amendments to § 3.90 provide for part-time study by permitting a student to earn credit for the number of hours per day that the student is in attendance, up to a maximum of 8 hours of credit per day and 40 hours of credit per week. By permitting part-time study in barber schools, students who cannot attend barber school on a full-time basis will still have the opportunity to become barbers. In addition, the requirement that each student shall have an opportunity to devote at least 5 hours per day to practical work has been amended to provide that each student shall have an opportunity to devote at least 60% of class time to practical work.

The Board's existing regulations provide that a student may request a transfer of credits for hours or months of study between a barbershop and a barber school if the student passes a test that is based on the number of hours attended and the subjects pursued and the test is devised by the shop or school to place him in the appropriate courses. However, the regulations do not specify whether credits can be transferred from out-of-State barbershops and barber schools, nor do they provide for transfers of credits between barbershops. Therefore, § 3.90 is being amended to permit a student to request a transfer of credits for hours or months of study between barbershops, regardless of whether the barbershop is in-State or out-of-State and to clarify that credits can be transferred between a barbershop and a barber school, regardless of whether the barbershop or barber school is in-State or out-of State.

Finally, § 3.103 (relating to fees) is amended by adding a fee of $30 for certification of student status or student training hours. This fee will cover the administrative cost of providing the certification upon request.

*Summary of Comments and the Board's Response*

The Board published the proposed rulemaking at 38 Pa.B. 5759 (October 18, 2008) requesting public comments within 30 days. No public comments were received. On November 17, 2008, the House Professional Licensure Committee (HPLC) met and voted not to take formal action on the proposed rulemaking until the final regulation is promulgated and to submit one comment to the Board. The Board did not receive comments from the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC). On December 17, 2008, the Board received a letter from the Independent Regulatory Review Commission (IRRC) indicating that they did not have objections, comments or recommendations to offer on the proposed rulemaking.

The HPLC asked whether a student can request a transfer of credit hours between barber schools regardless of the in-State or out-of State location, as well as between barbershops and between barbershops and barber schools. The Board is aware that the transfer of credits between barber schools is complicated by the fact that some of the barber schools licensed by the Board are private licensed schools, some are community colleges, some are vocational-technical schools; and others are part of the Department of Corrections offered through the State correctional institutions. The Board prefers to leave questions regarding transfer of credits between two barber schools (whether in-State or out-of State) to the schools themselves because individual school transfer policies are often linked to accreditation standards, host institution policies, articulation agreements between schools, the rules and regulations of other states and other factors. However, given that the goal of this final-form rulemaking is to expand opportunities for barber students to complete their education and be able to freely transfer credits whenever possible, the Board would encourage barber schools to consider the most expansive transfer policy possible within these constraints.

The Board has elected to make no changes to the final-form rulemaking based on the comment received.

*Fiscal Impact and Paperwork Requirements*

The Board is unable to determine the specific costs associated with the final-form rulemaking. It is anticipated that there will be some administrative costs to barbershops and schools in complying with the notification, recordkeeping and reporting requirements regarding students.

The final-form rulemaking will impose additional paperwork requirements upon the Commonwealth with respect to maintaining records of students being trained in barbershops and with maintaining quarterly reports. The final-form rulemaking will impose a minimal paperwork requirement upon the private sector by requiring shop owners to notify the Board, on a form provided by the Board, of each student to be trained in the shop. Barbershops and barber schools are already required to keep quarterly reports of the hours earned by a student. The regulation requiring barbershops and barber schools to submit the quarterly reports to the Board will not create additional paperwork; it will only require them to provide reports that should already exist.

*Sunset Date*

The Board continuously monitors the cost effectiveness of its regulations. Therefore, a sunset date has not been assigned.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on October 3, 2008, the Board submitted a copy of the notice of proposed rulemaking, published at 38 Pa.B. 5759, to IRRC and the Chairpersons of the HPLC and the SCP/PLC for review and comment.

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

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on November 3, 2010, this final-form rulemaking was deemed approved by the HPLC and the SCP/PLC. Under section 5(g) of the Regulatory Review Act, this final-form rulemaking was deemed approved by IRRC, effective November 3, 2010.

*Contact Person*

Further information may be obtained by contacting Kelly Diller, Board Administrator, State Board of Barber Examiners, P. O. Box 2649, Harrisburg, PA 17105-2649.

*Findings*

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968

(P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and no public comments were received.

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

*Order*

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

(a) The regulations of the Board, 49 Pa. Code Chapter 3, are amended by adding § 3.71a and amending §§ 3.72, 3.87, 3.90 and 3.103 to read as set forth in Annex A.

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

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

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

L. ANTHONY SPOSSEY,
*Chairperson*

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 40 Pa.B. 6752 (November 20, 2010).)

**Fiscal Note:** Fiscal Note 16A-427 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 3. STATE BOARD OF BARBER EXAMINERS

### STUDY IN BARBER SHOPS

**§ 3.71a. Notification.**

(a) The shop owner or the shop owner's designee shall notify the Board, on a form provided by the Board, of each student to be trained in the shop. Notification shall be provided to the Board before the student begins training.

(b) The shop owner is responsible for ensuring that proper notification is provided to the Board under subsection (a).

**§ 3.72. Student's records.**

(a) The shop owner shall keep, at all times and for inspection by the Board's representative, a file of each student which includes proofs of age, education, daily attendance and progress. The file shall be provided to the student at the student's request. The file shall be maintained for at least 5 years, beginning with the date when the student studies in the shop. If the shop is closed within this 5-year period, the student's file shall be forwarded to the Board and the student shall be so notified by the shop.

(b) A manager-barber or barber-teacher who is training a student under subsection (a) shall keep quarterly reports of the hours earned by the student. The quarterly reports shall be provided to the student upon request.

(c) The shop owner is responsible for ensuring that the quarterly reports required under subsection (b) are properly maintained by the manager-barber or barber-teacher.

(d) The shop owner shall submit to the Board, on a form provided by the Board, a quarterly report of the hours earned by each student trained in the shop. The quarterly reports shall be submitted to the Board by the following dates—April 15, July 15, October 15 and January 15—for the preceding quarter. Each quarterly report must include the name and license number of the manager-barber or barber-teacher instructing the student and be personally signed by the shop owner and the student.

### SCHOOLS OF BARBERING

**§ 3.87. Student's records.**

(a) Each school shall keep, at all times and for inspection by the Board's representative, a file of each student regarding proofs of age, education, daily attendance and progress. The file shall be provided to the student at the student's request. The file shall be maintained for at least 5 years, beginning with the date when the student attends the school. If the school is closed within this 5-year period, the student's files shall be forwarded to the Board and the students shall be so notified by the school.

(b) Each school shall keep quarterly reports of the hours earned by the student. The quarterly reports shall be provided to the student upon request.

(c) Each school shall submit to the Board, on a form provided by the Board, a quarterly report of the hours attended by each student. The quarterly reports shall be submitted by the following dates—April 15, July 15, October 15 and January 15—for the preceding quarter. Each quarterly report must include the names and license numbers of teachers employed by the school and be personally signed by the owner and supervisor of the school.

**§ 3.90. Student curriculum.**

(a) Each school shall post schedules showing the schedules of classes in theory and practical work. Each student shall have an opportunity to devote at least 60% of class time to practical work. For each of these class periods the teacher in charge shall keep an accurate daily record of attendance and progress of each student.

(b) A student may earn credit for the number of hours per day that the student is in attendance.

(c) A student may earn a maximum of 8 hours of credit per day and a maximum of 40 hours of credit per week.

(d) A student may not be given credit for hours attended unless the student is in actual attendance. Hours credited to a student should be devoted to the studying of barbering. Duty work may not exceed more than 10 minutes of the student instruction time. Duty work must consist only of the tidying and cleaning naturally performed by an operator around the operator's own chair at the conclusion of the barber process. It may not include menial work ordinarily performed by a maid or janitor.

(e) Every barber school is required to instruct students in barber science as follows:

| *Subject* | *Approximate Hours* |
|---|---|
| Honing and stropping | 25 |
| Shaving and various uses of the straight razor | 240 |
| Haircutting, hairstyling and hairpieces | 535 |
| Shampoo and scalp massages | 25 |
| Haircoloring | 25 |
| Massaging (facials) | 25 |
| Hairwaving or curling (perms), straightening | 25 |
| Scalp and skin disease | 50 |
| State barber law and rules and regulations | 50 |
| Physiology | 50 |
| Sterilization and sanitation | 50 |
| Hygiene | 25 |
| Bacteriology | 25 |
| Electricity (ultraviolet, high frequency, infrared, curling irons) | 25 |
| Professional ethics and barbershop demeanor | 25 |
| Manager-barber instruction, instruments, shop management, orientation and preparation for related examination | 50 |
| Total minimum hours required | 1,250 |

(f) A student who has commenced training under the previous curriculum before January 25, 1992, is not affected by subsection (c).

(g) A student may not receive credit for time spent in the barber school until registration or renewal licenses for the schools have been obtained from the Board.

(h) Whenever a student at the time of enrolling is entitled to credits previously earned at an out-of-State or in-State school, the school enrolling the student shall carefully evaluate the credits. A mere statement that the applicant for certification of entrance credits has pursued work elsewhere will not be accepted as sufficient evidence. The statement shall be documentary evidence showing attendance at a given school, and if possible, the number of hours attended and the subjects pursued.

(i) A student may request a transfer of credits for hours or months of study between a barbershop and a barber school or between shops, whether the barbershop or barber school is in-State or out-of State, if the student passes a test which is based on the number of hours attended and the subjects pursued and is devised by the shop or the school to place the student in the appropriate courses.

(j) The Board reserves the right to reject an examination application of a student whose credits have been improperly given or evaluated.

**§ 3.103. Fees.**

The schedule of fees charged by the Board is as follows:

| | |
|---|---|
| Licensure of barber, barber shop manager or barber teacher | $10 |
| Licensure of barber by reciprocity | $20 |
| Licensure of barber shop | $55 |
| Licensure of barber school | $280 |
| Biennial renewal of barber license | $42 |
| Biennial renewal of barber shop manager license | $62 |
| Biennial renewal of barber teacher license | $67 |
| Biennial renewal of barber shop license | $72 |
| Biennial renewal of barber school license | $112 |
| Change in barber shop—inspection required | $55 |
| Change in barber shop—no inspection required | $15 |
| Reinspection after first fail—new or change (shop or school) | $40 |
| Verify license/permit/registration | $15 |
| Certification of student status or student training hours | $30 |

[Pa.B. Doc. No. 10-2360. Filed for public inspection December 10, 2010, 9:00 a.m.]

# Title 61—REVENUE

## DEPARTMENT OF REVENUE

## [ 61 PA. CODE CH. 119 ]

### Personal Income Tax—Innocent Spouse Relief

The Department of Revenue (Department), under the authority in section 212 of the Taxpayers' Bill of Rights (act) (72 P. S. § 3310-212), regarding innocent spouse relief, adopts § 119.30 (relating to innocent spouse relief).

*Purpose of this Final-Form Rulemaking*

This final-form rulemaking clarifies the Department's policy on innocent spouse relief for Pennsylvania Personal Income Tax as enacted under section 212 of the act. In addition, the final-form rulemaking provides clear instructions for taxpayers regarding elections filed with the Taxpayers' Rights Advocate seeking relief from tax liability of Pennsylvania Personal Income Tax.

*Explanation of Regulatory Requirements*

Section 119.30 provides uniformity and guidance to this Commonwealth's taxpayers seeking innocent spouse relief under section 207 of the act (72 P. S. § 3310-207). Several examples are included in this new section.

Subsection (a) contains definitions for "collection activity," "disqualified asset," "electing spouse," "nonelecting spouse," "rebate," "Taxpayers' Rights Advocate" and "understatement."

Subsection (b) provides general information on relief from joint and several liability for understated tax and unpaid tax.

Subsection (c) provides qualifications for relief from liability applicable to joint filers for understatement of tax. In addition, knowledge or reason to know of an understatement and apportionment of relief are explained. This subsection also includes an example.

Subsection (d) details qualifications for separation of liability relief applicable to taxpayers no longer married or taxpayers legally separated or not living together. Individuals eligible to make elections, elections not valid with respect to certain deficiencies and disqualified asset

transfers are explained in this subsection. Several examples are included in this subsection.

Subsection (e) explains the factors the Taxpayers' Rights Advocate will consider in determining granting unpaid tax relief and relief from liability for a deficiency if relief is unavailable under subsections (c) and (d). In addition, this subsection includes several examples.

Subsection (f) explains the election procedure and timing of election for requesting innocent spouse relief.

Subsection (g) explains the Taxpayers' Rights Advocate's procedures for an invalid election, spousal notification, relief determination, notification of relief and appeal rights.

Subsection (h) explains relief for penalties, interest and other charges. An example is also illustrated.

*Affected Parties*

This Commonwealth's taxpayers and tax practitioners may be affected by the final-form rulemaking.

*Comment and Response Summary*

Notice of proposed rulemaking was published at 40 Pa.B. 1916 (April 10, 2010). No amendments have been made to the proposed rulemaking.

The Department has prepared a comment and response document that is available to interested parties by contacting Mary R. Sprunk, Office of Chief Counsel, Department of Revenue, P. O. Box 281061, Harrisburg, PA 17128-1061.

The Department received comments from one organization, the Pennsylvania Coalition Against Domestic Violence, during the public comment period. Representative Samuel Rohrer, Republican Chairperson of the House Finance Committee submitted a letter to the Independent Regulatory Review Commission (IRRC), dated April 19, 2010, regarding the time frame of the regulation and issues with Department policy. Specific recommendations for revisions to the regulation were not provided by the Republican House Finance Committee. No comments were received by the Senate Finance Committee. IRRC submitted no specific recommendations for the proposed rulemaking. IRRC requested that the Department provide a detailed response to the April 19, 2010, letter submitted by Representative Samuel Rohrer to IRRC.

*Fiscal Impact*

The Department has determined that the final-form rulemaking creates no foreseeable revenue impact on the Commonwealth.

*Paperwork*

The final-form rulemaking will not create additional paperwork for the public or the Commonwealth.

*Effectiveness/Sunset Date*

The final-form rulemaking will become effective upon final publication in the *Pennsylvania Bulletin*. The regulation is scheduled for review within 5 years of final publication. A sunset date has not been assigned.

*Contact Person*

The contact person for an explanation of the final-form rulemaking is Mary R. Sprunk, Office of Chief Counsel, Department of Revenue, P. O. Box 281061, Harrisburg, PA 17128-1061.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 29, 2010, the Department submitted a copy of the notice of proposed rulemaking, published at 40 Pa.B. 1916, to IRRC and the Chairpersons of the Chairpersons of the House Committee on Finance and the Senate Committee on Finance for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate 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 Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on October 20, 2010, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on October 21, 2010, and approved the final-form rulemaking.

*Findings*

The Department finds that:

(1) Public notice of intention to amend the regulations has been duly 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 the authorizing statute.

*Order*

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

(a) The regulations of the Department, 61 Pa. Code Chapter 119, are amended by adding § 119.30 to read as set forth at 40 Pa.B. 1916.

(b) The Secretary of the Department shall submit this order and 40 Pa.B. 1916 to the Office of General Counsel and the Office of Attorney General for approval as to form and legality as required by law.

(c) The Secretary of the Department shall certify this order and 40 Pa.B. 1916 and deposit them with the Legislative Reference Bureau as required by law.

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

C. DANIEL HASSELL,
*Secretary*

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 40 Pa.B. 6487 (November 6, 2010).)

**Fiscal Note:** Fiscal Note 15-448 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 10-2361. Filed for public inspection December 10, 2010, 9:00 a.m.]