

# RULES AND REGULATIONS

## Title 25—ENVIRONMENTAL PROTECTION

### BOARD OF COAL MINE SAFETY

[ 25 PA. CODE CH. 208 ]

#### Underground Coal Mine Safety

The Board of Coal Mine Safety (Board) adds Chapter 208 (relating to underground coal mine safety). These regulations establish safety standards regarding the following: belt conveyor flammability; the design and installation of mine seals; escapeways; emergency response; and self-contained self-rescue devices. These regulations principally incorporate by reference safety standards adopted by the United States Department of Labor, Mine Safety and Health Administration (MSHA) in 30 CFR Part 75 (relating to mandatory safety standards—underground coal mines). The MSHA regulations/standards incorporated by reference implement the Mine Improvement and New Emergency Response Act of 2006 (Pub. L. No. 109-236) (MINER Act), which amended various provisions of the Federal Mine Safety and Health Act of 1977 (Mine Safety Act) (30 U.S.C.A. §§ 801—965).

This order was adopted by the Board at its meeting of June 14, 2011.

#### A. *Effective Date*

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

#### B. *Contact Persons*

For further information, contact Joseph Sbaffoni, Director, Bureau of Mine Safety, Fayette County Health Center, 100 New Salem Road, Room 167, Uniontown PA 15401, (724) 439-7469; or Richard S. Morrison, Assistant Director, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available through the Department of Environmental Protection (Department) web site at [www.depweb.state.pa.us](http://www.depweb.state.pa.us).

#### C. *Statutory Authority*

These regulations are being promulgated under the authority of sections 106, 106.1 and 106.2 of the Bituminous Coal Mine Safety Act (BCMSA) (52 P. S. §§ 690-106, 690-106.1 and 690-106.2) and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20).

#### D. *Background and Purpose*

At the National level, the MSHA regulates mine safety under the authority of the Mine Safety Act. In 2006, the United States Congress amended the Mine Safety Act by enacting the MINER Act. The MINER Act addresses safety issues that were raised by fatal mine accidents at the Sago and Alma Mines in West Virginia, and the Darby Mine in Kentucky. The Mine Safety Act directed the MSHA to develop regulations implementing its provisions. In addition, when adopting the Consolidated Appropriations Act of 2008 (Pub. L. No. 110-161), Congress included a provision directing the MSHA to adopt new flame-resistance standards for belt conveyors. In accordance with these statutory mandates, the MSHA promul-

gated regulations addressing the flammability of belt conveyors, the strength of seals, escapeways, refuge alternatives, post-accident breathable air, communications, tracking and mine rescue teams. The MSHA regulations are in 30 CFR Parts 1—199 and the operating requirements for underground coal mines are in 30 CFR Part 75.

Section 506 of the Mine Safety Act (30 U.S.C.A. § 955) preempts state laws or regulations that are less stringent than or conflict with MSHA standards. Unlike with some other Federal statutes, a state cannot obtain primary authority to enforce the Mine Safety Act within the state's jurisdiction. As a result, a number of states have maintained an independent underground coal mine safety program which implements the state's mine safety laws, particularly states like Pennsylvania with a long history of underground coal mining. The Commonwealth has been regulating safety at underground bituminous coal mines since 1889. See the act of May 9, 1889 (P. L. 154, No. 171), regarding the recovery of the bodies of workmen. In 2008, the General Assembly enacted the BCMSA, which constitutes the first significant update of the Commonwealth's underground bituminous coal mine safety laws since 1961. A fundamental purpose of the BCMSA is to establish and promulgate improved mandatory health and safety standards to protect the health and safety of miners and others in and about underground coal mines located in this Commonwealth. See section 103 of the BCMSA (52 P. S. § 690-103).

One of the significant changes made by the BCMSA is to establish a rulemaking process that will enable the expeditious updating of the interim mandatory health and safety standards in the BCMSA and otherwise help to protect the health, safety and welfare of miners and others in and about mines going forward. The General Assembly established the Board to promulgate regulations implementing the BCMSA. The seven-member Board consists of the Secretary of the Department, who serves as the Chairperson, and six Board members—three representing the viewpoint of mine workers and three representing the viewpoint of underground bituminous coal mine operators. See section 106 of the BCMSA.

In adopting the BCMSA, the General Assembly recognized that the Pennsylvania Bituminous Coal Mine Act had become outdated and lacked an effective mechanism to modify existing standards or to adopt new safety standards to address changes in technology or recognized hazards. To rectify this problem, the BCMSA establishes broad authority in the Board (and the Department) to adopt regulations to either modernize safety standards in the BCMSA or adopt new safety standards not in the BCMSA. See section 106 of the BCMSA. The Board was directed by the General Assembly in the BCMSA to consider adopting Federal mine safety standards not included as interim mandatory safety standards in the BCMSA. See section 106.1 of the BCMSA. Of particular concern is the adoption of regulations implementing safety standards established by the MINER Act and the MSHA regulations implementing the MINER Act. The General Assembly expressly authorized the Board to promulgate regulations the Board deems appropriate to implement Federal standards adopted by the MINER Act. See section 106.1(h) of the BCMSA.

In accordance with section 106 of the BCMSA, this final-form rulemaking promulgates as regulations Federal mine safety standards not included as interim mandatory

safety standards in the BCMSA. The final-form rule-making also addresses safety standards established by the MINER Act. To a great extent, this final-form rule-making incorporates by reference applicable MSHA regulations. However, there are a few instances when the MINER Act regulations needed to be strengthened or clarified and this final-form rulemaking promulgates regulations accordingly to assure the safety of miners in this Commonwealth. Adopting the MSHA regulations by reference when applicable will enhance safety at underground coal mines because the potential for confusion by operators as to the appropriate safety standard is minimized. Moreover, future changes in an MSHA regulation that has been fully incorporated by reference will take immediate effect in this Commonwealth. As a result, these regulations will remain current with the MSHA regulations.

The proposed rulemaking was published at 40 Pa.B. 3836 (July 10, 2010) with a 60-day public comment period. The Board received 24 comments from 4 commentators.

*E. Summary of Changes to the Proposed Rulemaking*

*§ 208.1. Definitions*

The final-form rulemaking makes a minor edit to the definition of “overpressure” to delete a superfluous reference to a section of the Federal regulations and to delete the adjective “highest” for purposes of clarity.

*§ 208.3. Access to material*

Some minor editorial changes were made to this section for purposes of textual clarity.

*§ 208.11. Seals*

The final-form rulemaking is revised to limit its scope to the incorporation of the MSHA standards in 30 CFR 75.335(c) (relating to seal strengths, design applications, and installation).

*§ 208.13. Construction and repair of seals*

This section was revised to provide that welding, cutting or soldering within 150 feet of a seal shall be performed in accordance with the MSHA approval.

*§ 208.41. Emergency evacuation*

Subsection (b) is revised to make clear that an individual designated by the mine operator who is adequately trained and is capable of initiating the emergency response plan shall be located on the surface in the event that the designated responsible person is not available. The proposed regulation required that a designated individual with the same training in emergency procedures as the responsible person had to be located on the surface during all shifts. Comments pointed out that this requirement would lead to unnecessary redundancy and potential confusion. The revision clarifies the intent of the regulation, which is to assure that a person capable of initiating the emergency response plan is located on the surface in the event the designated responsible person is not available to conduct the emergency response procedures.

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

*Access to material*

Section 208.3 (relating to access to material) authorizes the Department to obtain copies of the material an operator submits to the MSHA under the regulations incorporated by reference in this chapter. One commenter questioned the need for this regulation since the BCMSA

contains provisions regarding materials that shall be provided to the Department and to miner representatives. For the most part, the Department will be accepting the MSHA’s approval of seals and equipment. There are instances when the Department will need copies of this information to approve a plan or to raise concerns to the MSHA for its consideration as part of its review of the requested approval. The Department will provide this information to an official representative of the miners as requested, unless specified otherwise in the chapter.

*Seal strength*

The Board received several comments concerning the elimination in the proposed rulemaking of the MSHA option of a 50 psi seal standard if the operator monitors the atmosphere in the abandoned area and the atmosphere remains inert. The proposed regulations would have required mine operators to design, construct and maintain seals to withstand an overpressure of at least 120 psi.

In response to comments, the Board determined to limit the scope of the final-form rulemaking to the incorporation of MSHA standards in 30 CFR 75.335(c) concerning the design and installation of seals.

*Construction and repair of seals*

Section 208.13 (relating to construction and repair of seals) incorporates by reference 30 CFR 75.337 (relating to construction and repair of seals), the MSHA’s standards for approving the installation and repair of seals. One commenter questioned the need for this section.

The incorporation by reference ensures that the Department and the MSHA will be enforcing the same standards to ensure the safe installation and repair of seals. The only difference between this regulation and the MSHA regulation is that a copy of the information to justify welding, cutting or soldering within 150 feet of a seal is to be submitted to the representative of the miners. This enables the persons who could be placed at risk by the welding, cutting or soldering activity to have an opportunity to comment on the adequacy of the operator’s proposal.

*Training*

Section 208.14 (relating to training) establishes the training requirements for persons involved in the installation or repair of seals. It incorporates by reference 30 CFR 75.338 (relating to training). A commenter noted that the MSHA rule concerning the training of senior management is ambiguous and is not clear as to who shall be trained and when the individual shall be trained. The commenter suggested that some consideration be given to clarifying this aspect of the regulation.

To eliminate confusion, the Department will use the MSHA guidance policy on who shall be trained and when they shall be trained.

*Escapeways*

The Board received several comments pertaining to escapeways which disagreed with the distinction made in proposed § 208.21(a) (relating to escapeways) and the MSHA regulation. The proposed regulation did not incorporate the language in 30 CFR 75.380(c) (relating to escapeways; bituminous and lignite mines) allowing the two escapeways to end in one multiple compartment shaft or slope separated by walls.

Section 274 of the BCMSA (52 P. S. § 690-274) directly addresses mine openings or outlets. The BCMSA specifically requires that the two intake openings or outlets to

the surface may not be at a common shaft, slope or drift opening. The BCMSA also states that the openings or outlets must have a distinct means of egress available for use by the employees. For this reason, § 208.21(a) does not incorporate by reference the language in 30 CFR 75.380(c) that allows two escapeways to end in one multiple compartment shaft or slope separated by walls. The regulations adhere to the statutory requirement in the BCMSA. Both State law and the Federal regulations require at least two intake openings or outlets to the surface from every seam of coal being worked. The Department will apply escapeway requirements in accordance with MSHA regulations to primary and secondary escapeways designated by mine operators.

#### *Belts*

Section 208.32(a) (relating to maintenance of belt conveyors and belt conveyor entries) incorporates by reference 30 CFR 75.1731 (relating to maintenance of belt conveyors and belt conveyor entries) so that the Department will be using the MSHA belt and belt entry maintenance requirements. Subsection (b) makes it clear that the belt conveyor preshift and fixed interval inspections address compliance with these maintenance requirements. One commentator does not believe this provision is necessary. However, these requirements are common sense actions that will minimize the risk of a conveyor belt fire.

#### *Emergencies*

Section 208.41(a) (relating to emergency evacuation) incorporates by reference 30 CFR 75.1501 (relating to emergency evacuations). The proposed regulation required that a designated individual with the same training in emergency procedures as the responsible person had to be located on the surface during all shifts. The Board received several comments on this section which pointed out that this requirement would lead to unnecessary redundancy and potential confusion.

The Board agrees with the commentators that this section should be revised to express the intent more clearly. Subsection (b) of this section has been revised to make clear that an individual designated by the mine operator who is adequately trained and is capable of initiating the emergency response plan shall be located on the surface in the event that the designated responsible person is not available. The change clarifies the intent of the regulation, which is to assure that a person capable of initiating the emergency response plan is located on the surface in the event the designated responsible person is not available to conduct the emergency response procedures.

#### *G. Benefits, Costs and Compliance*

##### *Benefits*

The final-form rulemaking enhances mine safety by ensuring that abandoned areas are isolated from the working mine, by reducing the possibility of belt conveyor fires and by enhancing the miners' ability to survive a mine fire, cave-in or the inundation of a mine by gas or water. The Department will be enforcing the MSHA requirements concerning emergency response and emergency response training, escapeways, self-contained self-rescue devices and refuge alternative requirements.

##### *Compliance Costs*

This final-form rulemaking does not impose new compliance costs. For the most part, this final-form rulemaking imposes standards already imposed by the MSHA.

#### *Compliance Assistance Plan*

The Department will work with the Pennsylvania Coal Association to assist coal mine operators in complying with these regulations. In addition, compliance assistance will be provided by the mine inspectors as part of their inspections of mines.

#### *Paperwork Requirements*

The only new paperwork requirement imposed by this final-form rulemaking is that operators will be required to submit to the Department applications to conduct welding, cutting or soldering within 150 feet of a seal.

#### *H. Pollution Prevention*

The 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 June 30, 2010, the Department submitted a copy of the notice of proposed rulemaking, published at 40 Pa.B. 3836, to the Independent Regulatory Review Commission (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 August 24, 2011, 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 August 25, 2011, 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, notice was submitted to the operator of each mine and, when applicable, the representative of the miners at the mine as required by law. All comments were considered.

(3) These regulations do not enlarge the purpose of the proposed rulemaking published at 40 Pa.B. 3836.

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

#### *L. Order*

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

(a) The regulations of the Department, 25 Pa. Code, are amended by adding §§ 208.1—208.3, 208.11—208.15, 208.21, 208.31, 208.32, 208.41—208.48, 208.51 and 208.61—208.69 to read as set forth in Annex A.

(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 takes effect immediately.

MICHAEL L. KRANCER,  
Chairperson

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 41 Pa.B. 4923 (September 10, 2011).)*

**Fiscal Note:** Fiscal Note 7-455 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 IV. OCCUPATIONAL HEALTH AND SAFETY**

**CHAPTER 208. UNDERGROUND COAL MINE SAFETY**

**GENERAL PROVISIONS**

- Sec. 208.1. Definitions.
- 208.2. Scope.
- 208.3. Access to material.

**SEALS**

- 208.11. Seals.
- 208.12. Sampling and monitoring requirements.
- 208.13. Construction and repair of seals.
- 208.14. Training.
- 208.15. Seals records.

**ESCAPEWAYS**

- 208.21. Escapeways.

**BELTS**

- 208.31. Approval of conveyor belts.
- 208.32. Maintenance of belt conveyors and belt conveyor entries.

**EMERGENCIES**

- 208.41. Emergency evacuation.
- 208.42. Emergency evacuation and firefighting program of instruction.
- 208.43. Use of fire suppression equipment.
- 208.44. Mine emergency evacuation training and drills.
- 208.45. Escapeway maps.
- 208.46. Refuge alternatives.
- 208.47. Emergency response plan; refuge alternatives.
- 208.48. Training and records for examination, maintenance and repair of refuge alternatives and components.

**COMMUNICATIONS**

- 208.51. Communications facilities for refuge alternatives.

**SELF-CONTAINED SELF-RESCUE DEVICES**

- 208.61. Availability of approved self-contained self-rescue devices; instruction in use and location.
- 208.62. Approved self-contained self-rescue devices.
- 208.63. Self-contained self-rescue devices; use and location requirements.
- 208.64. Self-contained self-rescue devices; inspection, testing, maintenance, repair, and recordkeeping.
- 208.65. Additional self-contained self-rescue devices.
- 208.66. Map locations.
- 208.67. Emergency tethers.
- 208.68. Multi-gas detectors.
- 208.69. Reporting SCSR inventory, malfunctions and retention.

**GENERAL PROVISIONS**

**§ 208.1. Definitions.**

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

*Act*—The Bituminous Coal Mine Safety Act (52 P. S. §§ 690-101—690-708).

*Approval or approved*—The term as defined in section 104 of the act (52 P. S. § 690-104).

*MSHA*—The term as defined in section 104 of the act.

*Miner*—The term as defined in section 104 of the act.

*NIOSH*—The term as defined in section 104 of the act.

*Operator*—The term as defined in section 104 of the act.

*Overpressure*—The pressure over the background atmospheric pressure that could result from an explosion, which includes the impact of the pressure wave on an object.

*psi*—Pounds per square inch.

*Representative of the miners*—The term as defined in section 104 of the act.

*SCSR—Self-contained self-rescue device*—A type of closed-circuit, self-contained breathing apparatus approved by MSHA and NIOSH under 42 CFR Part 84 (relating to approval of respiratory protective devices) for escape only from underground mines.

*Underground bituminous coal mine or mine*—The term as defined in section 104 of the act.

**§ 208.2. Scope.**

The safety standards and procedures in this chapter apply to all underground bituminous coal mines, operators and miners subject to the act.

**§ 208.3. Access to material.**

Upon request from the Department, or as required under this chapter, an operator shall submit to the Department a copy of any application, report, plan or other material submitted to MSHA pursuant to a regulation adopted by reference in this chapter. Upon request from the authorized representative of the miners, the Department will provide to the representative of the miners copies of an application, report, plan or other material submitted by an operator to MSHA pursuant to a regulation adopted by reference in this chapter.

**SEALS**

**§ 208.11. Seals.**

(a) *Seal installation.* The provisions of 30 CFR 75.335(c) (relating to seal strengths, design applications, and installation) are incorporated by reference.

(b) *Seal Strength greater than 120 psi.* The provisions of 30 CFR 75.335(a)(3) shall be used for determining when the strength of a seal shall exceed 120 psi.

(c) *Seal installation approval.* The operator shall submit an application to install the MSHA-approved seal design to the Department for its review and approval concerning seal installation. An approved application to install the seal shall be made part of the abandoned area ventilation plan required under section 235 of the act (52 P. S. § 690-235) regarding unused and abandoned parts of mines and follow 30 CFR 75.335(c).

(1) The operator shall provide the representative of the miners, if applicable, the approved seal design installation application at the same time the operator submits the application to the Department.

(2) Any individual installing the seal shall do so in accordance with the approved abandoned area ventilation plan.

**§ 208.12. Sampling and monitoring requirements.**

The provisions of 30 CFR 75.336 (relating to sampling and monitoring requirements) are incorporated by reference.

**§ 208.13. Construction and repair of seals.**

(a) *General.* The provisions of 30 CFR 75.337 (relating to construction and repair of seals) are incorporated by reference.

(b) *Welding, cutting and soldering.* The operator shall submit to the Department and the representative of the miners the same information submitted to MSHA under 30 CFR 75.337(f). Any welding, cutting or soldering within 150 feet of a seal shall be performed in accordance with the MSHA approval.

**§ 208.14. Training.**

The provisions of 30 CFR 75.338 (relating to training) are incorporated by reference.

**§ 208.15. Seals records.**

(a) *General.* The provisions of 30 CFR 75.339 (relating to seals records) are incorporated by reference.

(b) *Access to records.* Upon request from the Department, or from the authorized representative of the miners, mine operators shall provide access to any record required by this section.

**ESCAPEWAYS**

**§ 208.21. Escapeways.**

(a) *Bituminous and lignite mines.* The provisions of 30 CFR 75.380 (relating to escapeways; bituminous and lignite mines) are incorporated by reference except that the language in 30 CFR 75.380(c) allowing the two escapeways to end in one multiple compartment shaft or slope separated by walls is not incorporated by reference.

(b) *Mechanical and escape facilities.* The provisions of 30 CFR 75.382 (relating to mechanical escape facilities) are incorporated by reference.

(c) *Longwall and shortwall travelways.* The provisions of 30 CFR 75.384 (relating to longwall and shortwall travelways) are incorporated by reference. If a roof fall or other blockage occurs that prevents travel in the travelway, the mine operator shall notify the Department.

**BELTS**

**§ 208.31. Approval of conveyor belts.**

The provisions of 30 CFR 75.1108(b) and (c) (relating to approved conveyor belts) are incorporated by reference.

**§ 208.32. Maintenance of belt conveyors and belt conveyor entries.**

(a) *Maintenance standards.* The provisions of 30 CFR 75.1731 (relating to maintenance of belt conveyors and belt conveyor entries) are incorporated by reference.

(b) *Inspections.* Individuals conducting inspections of belt conveyors required under sections 218 and 218.1 of the act (52 P. S. §§ 690-218 and 690-218.1) regarding preshift examination at fixed intervals and supplemental inspection shall address compliance with this section's maintenance requirements.

**EMERGENCIES**

**§ 208.41. Emergency evacuation.**

(a) *Emergency evacuation.* The provisions of 30 CFR 75.1501 (relating to emergency evacuations) are incorporated by reference.

(b) *Individual located on the surface.* An individual designated by the mine operator who is adequately trained and is capable of initiating the emergency response plan shall be located on the surface in the event the designated responsible person is not available.

**§ 208.42. Emergency evacuation and firefighting program of instruction.**

The provisions of 30 CFR 75.1502 (relating to mine emergency evacuation and firefighting program of instruction) are incorporated by reference.

**§ 208.43. Use of fire suppression equipment.**

The provisions of 30 CFR 75.1503 (relating to use of fire suppression equipment) are incorporated by reference.

**§ 208.44. Mine emergency evacuation training and drills.**

The provisions of 30 CFR 75.1504 (relating to mine emergency evacuation training and drills) are incorporated by reference.

**§ 208.45. Escapeway maps.**

The provisions of 30 CFR 75.1505 (relating to escapeway maps) are incorporated by reference.

**§ 208.46. Refuge alternatives.**

The provisions of 30 CFR 75.1506 (relating to refuge alternatives) are incorporated by reference.

**§ 208.47. Emergency response plan; refuge alternatives.**

The provisions of 30 CFR 75.1507 (relating to Emergency Response Plan; refuge alternatives) are incorporated by reference.

**§ 208.48. Training and records for examination, maintenance and repair of refuge alternatives and components.**

The provisions of 30 CFR 75.1508 (relating to training and records for examination, maintenance and repair of refuge alternatives and components) are incorporated by reference.

**COMMUNICATIONS**

**§ 208.51. Communications facilities for refuge alternatives.**

The provisions of 30 CFR 75.1600-3 (relating to communications facilities; refuge alternatives) are incorporated by reference.

**SELF-CONTAINED SELF-RESCUE DEVICES**

**§ 208.61. Availability of approved self-contained self-rescue devices; instruction in use and location.**

The provisions of 30 CFR 75.1714 (relating to availability of approved self-rescue devices; instruction in use and location) are incorporated by reference.

**§ 208.62. Approved self-contained self-rescue devices.**

The provisions of 30 CFR 75.1714-1 (relating to approved self-rescue devices) are incorporated by reference.

**§ 208.63. Self-contained self-rescue devices; use and location requirements.**

The provisions of 30 CFR 75.1714-2 (relating to self-rescue devices; use and location requirements) are incorporated by reference.

**§ 208.64. Self-contained self-rescue devices; inspection, testing, maintenance, repair, and record-keeping.**

The provisions of 30 CFR 75.1714-3 (relating to self-rescue devices; inspection, testing, maintenance, repair, and recordkeeping) are incorporated by reference.

**§ 208.65. Additional self-contained self-rescue devices.**

The provisions of 30 CFR 75.1714-4 (relating to additional self-contained self-rescuers (SCSRs)) are incorporated by reference.

**§ 208.66. Map locations.**

The provisions of 30 CFR 75.1714-5 (relating to map locations of self-contained self-rescuers (SCSR)) are incorporated by reference.

**§ 208.67. Emergency tethers.**

The provisions of 30 CFR 75.1714-6 (relating to emergency tethers) are incorporated by reference.

**§ 208.68. Multi-gas detectors.**

The provisions of 30 CFR 75.1714-7 (relating to multi-gas detectors) are incorporated by reference.

**§ 208.69. Reporting SCSR inventory, malfunctions and retention.**

The provisions of 30 CFR 75.1714-8 (relating to reporting SCSR inventory and malfunctions; retention of SCSR) are incorporated by reference.

[Pa.B. Doc. No. 11-1724. Filed for public inspection October 7, 2011, 9:00 a.m.]

**Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS**

**STATE BOARD OF PHARMACY**

**[ 49 PA. CODE CH. 27 ]**

**Corrective Amendment to 49 Pa. Code § 27.1**

The State Board of Pharmacy has discovered a discrepancy between the agency text of 49 Pa. Code § 27.1, as deposited with the Legislative Reference Bureau, and

published at 36 Pa.B. 2518 (May 27, 2006) and the official text as currently appearing in the *Pennsylvania Code*. The word “electronic” was omitted from the definition of “prescription.”

Therefore, under 45 Pa.C.S. § 901: The State Board of Pharmacy has deposited with the Legislative Reference Bureau a corrective amendment to 49 Pa. Code § 27.1. The corrective amendment to 49 Pa. Code § 27.1 is effective as of August 5, 2006, the date the defective official text was announced in the *Pennsylvania Bulletin*.

The correct version of 49 Pa. Code § 27.1 appears in Annex A, with ellipses referring to the existing text.

**Annex A**

**TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS**

**PART I. DEPARTMENT OF STATE**

**Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS**

**CHAPTER 27. STATE BOARD OF PHARMACY**

**GENERAL PROVISIONS**

**§ 27.1. Definitions.**

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

\* \* \* \* \*

*Prescription*—A written, electronic or oral order issued by a licensed medical practitioner in the course of professional practice for a controlled substance, other drug or device or medication which is dispensed for use by a consumer.

\* \* \* \* \*

[Pa.B. Doc. No. 11-1725. Filed for public inspection October 7, 2011, 9:00 a.m.]

**Title 58—RECREATION**

**FISH AND BOAT COMMISSION**

**[ 58 PA. CODE CHS. 61 AND 63 ]**

**Fishing**

The Fish and Boat Commission (Commission) amends Chapters 61 and 63 (relating to seasons, sizes and creel limits; and general fishing regulations). The Commission is publishing this final-form rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code). The amendments modify and update the Commission’s fishing regulations.

*A. Effective Date*

The final-form rulemaking will go into effect on January 1, 2012.

*B. Contact Person*

For further information on the final-form rulemaking, contact Wayne Melnick, Esq., P. O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7810. This final-form rulemaking is available on the Commission’s web site at [www.fish.state.pa.us](http://www.fish.state.pa.us).

### C. Statutory Authority

The amendments to §§ 61.1, 61.2, 61.4, 61.7 and 61.8 and the addition of § 63.55 (relating to saltwater angler registration) are published under the statutory authority of section 2102 of the code (relating to rules and regulations).

### D. Purpose and Background

The final-form rulemaking is designed to improve, enhance and update the Commission's fishing regulations. The specific purpose of the final-form rulemaking is described in more detail under the summary of changes.

### E. Summary of Changes

(1) Since the mid-1980s, the daily creel limit for river herring, a term applied collectively to blueback herring and alewife, in the Delaware River and Estuary was a total of 35 fish. There was no minimum size limit and the season was open year-round. Beginning in 2010, the Commission adopted an amendment in coordination with New Jersey and later coordinated with New York reducing the daily creel limit from the historic limit to a limit of ten river herring from the confluence of the East and West Branches downriver to the Commodore Barry Bridge. The remaining 2.9 river miles below the Commodore Barry Bridge remained at the historic daily limit of 35 herring, in cooperation with New Jersey's Marine Council. The State of Delaware was already managing the fishery with a ten herring creel limit.

River herring are popular with striped bass anglers who use them either as live or cut bait. Principally, this fishery exists during the spring when river herring and striped bass are migrating into the Delaware River and estuarine waters. Traditionally, anglers jig for river herring at the onset of a trip but are often seen jigging with one rod while another is being passively fished for striped bass.

Amendment 2 to the Atlantic States Marine Fisheries Commission (ASMFC) Interstate Fishery Management Plan for Shad and River Herring states that river herring abundance has declined since the mid-1990s and currently remains at a depressed level along the Atlantic Coast. Amendment 2 calls for closure of river herring fisheries that cannot be demonstrated to be sustainable. Considering the coastwide declines in river herring and the lack of data to support that the fishery is sustainable, the Commonwealth has been coordinating a proposed total closure for the Delaware River river herring fishery with the other three basin states (that is, New Jersey, New York and Delaware) through the Delaware River Fish and Wildlife Management Cooperative. This amendment will apply to the entire Delaware River and Delaware Estuary inclusive of both tidal and nontidal reaches to the Pennsylvania/Delaware state line.

In light of this amendment, changes were also necessary in the Lehigh River, the Schuylkill River and their tributaries in § 61.8 (relating to Lehigh River, Schuylkill River and tributaries) and in the Conowingo Reservoir in § 61.4 (relating to Conowingo Reservoir). The Lehigh and Schuylkill Rivers flow into the Delaware River and are thus inhabited by a portion of the anadromous river herring populations that enter the Delaware River. The Conowingo Reservoir is the first portion of the Susquehanna River inhabitable by anadromous river herring that migrate up the Susquehanna River. Harvest of the anadromous populations of river herring is already prohibited in the portions of the Susquehanna River and its tributaries upstream of Conowingo Reservoir under § 61.7 (relating to Susquehanna River and tributaries).

The more liberal regulations in the other inland waters of the Commonwealth in § 61.1 (relating to Commonwealth inland waters) are acceptable in that these populations are landlocked and thus distinct from the anadromous populations addressed by the ASMFC and intended to be addressed by the final-form rulemaking.

Finally, in addition to the changes previously mentioned, some housekeeping changes were needed to make the terminology for river herring consistent throughout Chapter 61.

The Commission therefore amended §§ 61.1, 61.2, 61.4, 61.7 and 61.8 to read as set forth in the proposed rulemaking.

(2) Under 50 CFR Part 600, Subpart P (relating to marine recreational fisheries of the United States), anglers who target or catch shad, striped bass and river herring from the Delaware River below Trenton Falls or in the Delaware Estuary are required to register with the National Saltwater Angler Registry Program administered by the National Oceanic and Atmospheric Administration (NOAA). In 2010, the registration was free and a \$15 fee has been instituted for 2011. See [www.countmyfish.noaa.gov](http://www.countmyfish.noaa.gov).

Anglers are not required to register with NOAA if they hold a valid fishing license issued by an "exempted state." For NOAA to designate a state as an "exempted state," the state must agree to provide certain data to NOAA that can be used to assist in completing marine recreational fisheries statistical surveys or evaluating the effects of proposed conservation and management measures for marine recreational fisheries. To that end, the Commission already has entered into a Memorandum of Agreement (MOA) with NOAA that obligates the Commission to create a system for collecting and annually sharing angler data with NOAA. The MOA further exempts anglers in this Commonwealth from the National registration requirement and the associated fee. To meet the terms of the MOA, the Commission proposed a new regulation that requires all applicable anglers to register either with the Commission or NOAA.

Upon review of the proposed regulation, the Commission determined that it is appropriate to add language to clarify that an angler is also in compliance if he meets the saltwater angler registration requirements of another state. This will allow compliance by anglers who otherwise meet NOAA's requirements through the purchase of a marine license or registration in another state. The Commission adopts the regulation as set forth in Annex A.

The Commission will create a free online registration tool through which anglers may register and receive a registration number rather than registering with NOAA and incurring the Federal fee. The Commission has been awarded a grant from the ASMFC to fund the development of the online tool. Registered anglers must still possess a valid State fishing license.

### F. Paperwork

The final-form rulemaking will not increase paperwork and will not create new paperwork requirements.

### G. Fiscal Impact

The final-form rulemaking will not have adverse fiscal impact on the Commonwealth or its political subdivisions. The final-form rulemaking will not impose new costs on the private sector or the general public.

H. *Public Involvement*

Notice of proposed rulemaking was published at 41 Pa.B. 2444 (May 14, 2011). The Commission did not receive public comments.

*Findings*

The Commission finds that:

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

(2) A public comment period was provided and no public comments were received.

(3) The adoption of the amendments of the Commission in the manner provided in this order is necessary and appropriate for administration and enforcement of the authorizing statutes.

*Order*

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

(a) The regulations of the Commission, 58 Pa. Code Chapters 61 and 63, are amended by amending §§ 61.1, 61.2, 61.4, 61.7 and 61.8 to read as set forth at 41 Pa.B. 2444 and by adding § 63.55 to read as set forth in Annex A.

(b) The Executive Director will submit this order, 41 Pa.B. 2444 and Annex A to the Office of Attorney General for approval as to legality and form as required by law.

(c) The Executive Director shall certify this order, 41 Pa.B. 2444 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order takes effect on January 1, 2012.

JOHN A. ARWAY,  
*Executive Director*

**Fiscal Note:** Fiscal Note 48A-225 remains valid for the final adoption of the subject regulations.

**Annex A**

**TITLE 58. RECREATION**

**PART II. FISH AND BOAT COMMISSION**

**Subpart B. FISHING**

**CHAPTER 63. GENERAL FISHING REGULATIONS**

**§ 63.55. Saltwater angler registration.**

It is unlawful for a person required under 30 Pa.C.S. Chapter 27 (relating to fishing licenses) to procure a resident fishing license, a nonresident fishing license, a senior resident lifetime fishing license or an annual senior resident fishing license to fish for shad, striped bass or river herring in the Delaware River below Trenton Falls or in the Delaware Estuary unless that person has obtained a saltwater angler registration from the Commission, has registered with the National Saltwater Angler Registry Program administered by the National Oceanic and Atmospheric Administration or has met the saltwater angler registration requirements of another state.

[Pa.B. Doc. No. 11-1726. Filed for public inspection October 7, 2011, 9:00 a.m.]

**FISH AND BOAT COMMISSION**

**[ 58 PA. CODE CH. 65 ]**

**Fishing; Special Fishing Regulations**

The Fish and Boat Commission (Commission) amends Chapter 65 (relating to special fishing regulations). The Commission is publishing this final-form rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code).

**A. Effective Date**

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

**B. Contact Person**

For further information on the final-form rulemaking, contact Wayne Melnick, Esq., P. O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7810. This final-form rulemaking is available on the Commission's web site at [www.fish.state.pa.us](http://www.fish.state.pa.us).

**C. Statutory Authority**

The amendment to § 65.24 (relating to miscellaneous special regulations) is published under the statutory authority of section 2307 of the code (relating to waters limited to specific purposes).

**D. Purpose and Background**

The final-form rulemaking is designed to improve, enhance and update the Commission's fishing regulations. The specific purpose of the amendment is described in more detail under the summary of change.

**E. Summary of Change**

Leaser Lake is a 117-acre Commission-owned impoundment in the rural northwestern corner of Lehigh County in the Ontelaunee/Maiden Creek drainage basin situated approximately 20 miles directly northwest of center city Allentown. Leaser Lake was subjected to a complete drawdown in fall 2008 following a partial drawdown to a safe level of 40 acres that was maintained for a number of years. The final drawdown was necessary to carry out extensive repairs to the leaking dam. Leaser Lake provided fishing for resident warm/coolwater fish populations as well as a seasonal catchable trout fishery with many individuals traveling from the Lehigh Valley metropolitan area (Allentown-Bethlehem-Easton) to fish in Leaser Lake's scenic setting.

The Commission proposed a 5-year moratorium on fishing at Leaser Lake to enable the development of a high quality warm and coolwater fishery through the stocking of fingerling of select fish species. Specifically, the Commission proposed that Leaser Lake be closed to all fishing until June 18, 2016.

On final-form rulemaking, the Commission determined that it should not institute a complete moratorium on fishing but instead delay the stocking of adult trout until 2014. This approach is necessary to facilitate development of a self sustaining shiner population required to maintain the desired high quality warm/coolwater fishery. The Commission will allow for the harvest of trout under the Commonwealth's inland seasons, sizes and creel limits and has imposed catch and release fishing for other fish species. The Commission believes that this approach will allow the fishery to develop under protective regulations while offering acceptable levels of recreational angling opportunities. The special regulation will remain in effect



until the opening day of bass season on June 18, 2016. The Commission amended § 65.24 to read as set forth in Annex A.

The positive aspect of this amendment is that it will provide anglers the opportunity to fish for adult trout beginning 2 years following refilling and immediate angling opportunities for warm and cool water fish populations as they grow and reach acceptable lengths for angling. The 2-year loss of recreational angling opportunities for adult stocked trout is a negative aspect of this restoration plan. However, the Commission believes that the benefits outweigh the short-term loss of recreation.

Commission staff will monitor the fish populations and recommend appropriate special regulations prior to 2016 if the fish populations develop quicker than anticipated. Leaser Lake was formerly in the Panfish Enhancement Program regulated under § 65.11 (relating to panfish enhancement special regulation).

With respect to the catchable trout program, there are numerous alternative stream fishing opportunities throughout the Lehigh Valley, northwestern Lehigh County and nearby northeastern Berks County. These locations include 14 miles of nearby Ontelaunee and Maiden Creeks.

*F. Paperwork*

The final-form rulemaking will not increase paperwork and will not create new paperwork requirements.

*G. Fiscal Impact*

The final-form rulemaking will not have adverse fiscal impact on the Commonwealth or its political subdivisions. The final-form rulemaking will not impose new costs on the private sector or the general public.

*H. Public Involvement*

Notice of proposed rulemaking was published at 41 Pa.B. 2447 (May 14, 2011). The Commission did not receive public comments regarding the proposed rulemaking.

*Findings*

The Commission finds that:

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

(2) A public comment period was provided and all public comments received were considered.

(3) The adoption of the amendment of the Commission in the manner provided in this order is necessary and appropriate for administration and enforcement of the authorizing statutes.

*Order*

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

(a) The regulations of the Commission, 58 Pa. Code Chapter 65, are amended by amending § 65.24 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

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

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

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

JOHN A. ARWAY,  
*Executive Director*

**Fiscal Note:** Fiscal Note 48A-226 remains valid for the final adoption of the subject regulation.

**Annex A**

**TITLE 58. RECREATION**

**PART II. FISH AND BOAT COMMISSION**

**Subpart B. FISHING**

**CHAPTER 65. SPECIAL FISHING REGULATIONS**

**§ 65.24. Miscellaneous special regulations.**

The following waters are subject to the following miscellaneous special regulations:

<i>County</i>	<i>Name of Water</i>	<i>Special Regulations</i>
		* * * * *
Lehigh	Leaser Lake	All species except trout—Catch and release/no harvest; it is unlawful to take, kill or possess any fish except trout. All fish caught other than trout shall be immediately returned unharmed. Trout—Inland regulations apply. See § 61.1 (relating to Commonwealth inland waters). This miscellaneous special regulation will remain in effect until June 18, 2016.
		* * * * *

[Pa.B. Doc. No. 11-1727. Filed for public inspection October 7, 2011, 9:00 a.m.]

**PENNSYLVANIA GAMING CONTROL BOARD**

**[ 58 PA. CODE CHS. 401a AND 405a ]**

**Preliminary Provisions; Bureau of Investigations and Enforcement**

The Pennsylvania Gaming Control Board (Board), under the general authority in 4 Pa.C.S. § 1202(b)(25) (relating to general and specific powers) and the specific authority in 4 Pa.C.S. §§ 1202.1 and 1516.1 (relating to code of conduct; and prosecutorial and adjudicatory functions) amends Chapters 401a and 405a (relating to preliminary provisions; and Bureau of Investigations and Enforcement) to read as set forth in Annex A.

*Purpose of the Final-Form Rulemaking*

In accordance with revisions made to 4 Pa.C.S. Part II (relating to gaming) as part of the act of January 7, 2010 (P. L. 1, No. 1) (Act 1), the Board amends Chapters 401a and 405a regarding ex parte communications and the separation of the adjudicatory functions of the Board or a presiding officer of the Board from the investigatory and prosecutorial functions of the Office of Enforcement Counsel (OEC) and the Bureau of Investigations and Enforcement (Bureau).

*Explanation of Chapter 401a*

Section 401a.3 (relating to definitions) amends the definition of “ex parte communication” for consistency with 4 Pa.C.S. Part II.

Section 401a.5 (relating to adjudicatory function of the Board; ex parte communications) was added to specify that the adjudicatory capacity of the Board or presiding officer may not be commingled with the prosecutorial or investigatory functions of the Bureau or the OEC.

This section also addresses the prohibition on a Board member, presiding officer or an attorney from the Office of Chief Counsel who is advising the Board from engaging in ex parte communications with any person including an applicant, licensee, the Bureau or an attorney for the OEC. If a Board member, presiding officer or attorney from the Office of Chief Counsel does engage in an ex parte communication, the communication shall be documented and notification of the communication and an opportunity to respond shall be given to all parties. In addition to documenting the ex parte communication in a log, a member or presiding officer may be required to recuse himself. Section 401a.5(e) addresses the procedure for recusal of a presiding officer or Board member who engages in an ex parte communication that creates substantial reasonable doubt as to the individual’s ability to act objectively, independently or impartially.

*Explanation of Chapter 405a*

Section 405a.1 (relating to general duties and powers) is amended to reiterate that the Bureau is independent of the Board, the Office of Hearings and Appeals and the Office of Chief Counsel and that the Bureau alone will dictate the scope and course of a background investigation without direction or limitation by the Executive Director or the Chief Counsel of the Board.

Section 405a.3(a)(7) (relating to Office of Enforcement Counsel) is added to reflect the additional authority given to the OEC to petition the Board for the appointment of a trustee in accordance with 4 Pa.C.S. § 1332 (relating to appointment of trustee).

*Comment and Response Summary*

Notice of proposed rulemaking was published at 41 Pa.B. 1018 (February 26, 2011).

During the comment period, the Board received a joint letter from Downs Racing, L.P. d/b/a Mohegan Sun at Pocono Downs (Downs) and Greenwood Gaming and Entertainment, Inc. d/b/a Parx Casino (Greenwood) and a letter from the Independent Regulatory Review Commission (IRRC) providing comment on the proposed rulemaking.

In § 401a.5(a), Greenwood, Downs and IRRC commented that on-the-record proceedings are not the only context in which an agency acts in an adjudicatory capacity. IRRC suggests distinguishing between on-the-record and off-the-record proceedings. The Board does agree that the language could be clearer by specifying that the Board acts in an adjudicatory capacity not only during an on-the-record proceeding but also in matters relating to the on-the-record proceeding. The Board has therefore added a definition of “on-the-record proceeding” in § 401a.3 to include matters that come to the Board by way of application, complaint, motion, petition, exception, appeal of staff decision regarding a licensing, disciplinary or other matter. Additional language was also added in § 401a.5(a) stating that the Board acts in an adjudicatory capacity when considering matters presented for a decision by the Board in relation to the on-the-record proceeding.

Greenwood, Downs and IRRC also commented that the language in § 401a.5(d) requiring that notice and an opportunity to respond to an ex parte communication be provided to all parties directly affected by the anticipated vote of the Board should be amended to provide parties with notice and an opportunity to respond without the need for the qualitative assessment of participation.

In response to the suggestion, the Board has amended this section so that parties to a hearing or other proceeding which is the subject of the ex parte communication will be provided with notice and an opportunity to respond.

IRRC pointed out a grammatical error in § 405a.1(a) which has been corrected in the final-form rulemaking.

IRRC also requested clarity on what was meant by the “exerting influence” language in § 405a.4(b) (relating to conduct). The Board amended this provision for consistency with the provisions which separate the adjudicatory functions of the Board from the prosecutorial and investigatory functions of the Bureau and the OEC. The provision now mandates that the Board, presiding officer, an attorney advising the Board and the Chief Counsel may not direct, restrict or influence any employee of the Bureau or the Board with respect to the conduct and scope of an enforcement proceeding or hearing with which the employee is involved.

*Additional Revisions*

Language was added in §§ 405a.3 and 405a.4 for consistency with the revisions made to 4 Pa.C.S. Part II with the passage of Act 1. Specifically, in 4 Pa.C.S. § 1517 (relating to investigations and enforcement), the OEC was tasked with preparing the final background investigation report (BIR) for inclusion in an applicant’s suitability report to the Board and a portion of a background investigation may not be disclosed until the OEC prepares the final BIR. The content and scope of the information included in the BIR is solely within the OEC’s discretion in accordance with law. The language in §§ 405a.3(a)(8) and (9) and 405a.4(d) was added to reflect these changes.

*Affected Parties*

This final-form rulemaking affects presiding officers and members of the Board, the Office of Chief Counsel advising the Board as well as employees of the Bureau or the OEC.

*Fiscal Impact*

*Commonwealth.* It is not anticipated that this final-form rulemaking will have a fiscal impact on the Board.

*Political subdivisions.* This final-form rulemaking will not have fiscal impact on political subdivisions of this Commonwealth.

*Private sector.* This final-form rulemaking will not have fiscal impact on the private sector.

*General public.* This final-form rulemaking will not have fiscal impact on the general public.

*Paperwork Requirements*

There are no paperwork requirements associated with this final-form rulemaking.

*Effective Date*

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

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on July 21, 2011, the Board submitted a copy of the notice of proposed rulemaking, published at 41 Pa.B. 1018, to IRRC and the Chairpersons of the House Gaming Oversight Committee and the Senate Community, Economic and Recreational Development Committee 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 Board 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 August 24, 2011, 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 August 25, 2011, and approved the final-form rulemaking.

*Findings*

The Board finds that:

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

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

*Order*

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

(a) The regulations of the Board, 58 Pa. Code Chapters 401a and 405a, are amended by adding § 401a.5 and by amending §§ 401a.3, 405a.1, 405a.3 and 405a.4 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

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

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

GREGORY C. FAJT,  
*Chairperson*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 41 Pa.B. 4923 (September 10, 2011).)*

**Fiscal Note:** Fiscal Note 125-141 remains valid for the final adoption of the subject regulations.

**Annex A**

**TITLE 58. RECREATION**

**PART VII. GAMING CONTROL BOARD**

**Subpart A. GENERAL PROVISIONS**

**CHAPTER 401a. PRELIMINARY PROVISIONS**

**§ 401a.3. Definitions.**

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

\* \* \* \* \*

*Ex parte communication—*

(i) Any off-the-record communication engaged in or received by a member or presiding officer of the Board regarding the merits of or any fact in issue relating to a pending matter before the Board or presiding officer or which may reasonably be expected to come before the Board or presiding officer in a contested on-the-record proceeding.

(ii) The term does not include the following:

(A) Off-the-record communications by or between a member or presiding officer of the Board, the Department, the Pennsylvania State Police, the Attorney General or other law enforcement official prior to the beginning of the proceeding solely for the purpose of seeking clarification or correction to evidentiary materials intended for use in the proceedings.

(B) Communications between the Board or a member and the Office of Chief Counsel.

\* \* \* \* \*

*On-the-record proceeding—*A matter that comes before the Board or a presiding officer by way of application, complaint, petition, exception, appeal of staff decision, consent agreement or other motion relating to a licensing, disciplinary or other proceeding for which a formal record is maintained and upon which the Board bases its order and adjudication.

\* \* \* \* \*

**§ 401a.5. Adjudicatory function of the Board; ex parte communications.**

(a) The Board or a presiding officer acts in an adjudicatory capacity when considering any matter presented for a decision by the Board or presiding officer in relation to an on-the-record proceeding. To ensure the integrity and impartiality of the Board or presiding officer acting in an adjudicatory capacity, there will be no commingling of the adjudicatory functions of the Board or presiding officer and the investigatory or prosecutorial functions of the Bureau or Office of Enforcement Counsel.

(b) When acting in an adjudicatory capacity regarding the facts at issue or merits of a matter pending before the Board or presiding officer, or which may reasonably be expected to come before the Board or presiding officer in a contested on-the-record proceeding, a member or presiding officer of the Board or an attorney from the Office of Chief Counsel who is advising the Board on the matter may not engage in an ex parte communication with any person including the Bureau or the Office of Enforcement Counsel.

(c) An ex parte communication received or engaged in by a member or presiding officer of the Board will be recorded in a log which will be available for public inspection at the Board's office during normal business hours and will be posted on the Board's web site. The log must include:

- (1) The name of the individual documenting the ex parte communication.
- (2) The date and time of the ex parte communication.
- (3) The names of all individuals involved in the ex parte communication.
- (4) The subject discussed.

(d) In addition to documenting an ex parte communication in accordance with subsection (c), notification of the substance of the communication and an opportunity to

respond will be provided to all parties to the hearing or other proceeding that is the subject of the ex parte communication.

(e) A member or presiding officer of the Board may be required to recuse himself if substantial reasonable doubt exists as to the individual's ability to act objectively, independently or impartially in a hearing or proceeding as follows:

(1) A member or presiding officer of the Board who engaged in or received an ex parte communication will recuse himself from any hearing or other proceeding related to the ex parte communication if the context and substance of the ex parte communication creates substantial reasonable doubt as to the individual's ability to act objectively, independently or impartially.

(2) A member or presiding officer of the Board who engaged in or received an ex parte communication who elects not to recuse himself from a hearing or other proceeding will state his reasons for not recusing himself on the record prior to the commencement of the hearing or proceeding.

(3) A member or presiding officer of the Board who has identified any other reason which creates substantial reasonable doubt as to the individual's ability to act objectively, independently or impartially will recuse himself from any hearing or other proceeding related thereto.

(4) If a legislative appointee recuses himself from any hearing or other proceeding under this section, any qualified majority vote required under this part will consist of all of the remaining legislative appointees and at least two gubernatorial appointees.

(5) Failure of a presiding officer, for whom substantial reasonable doubt as to the individual's ability to act objectively, independently or impartially exists, to recuse himself from a hearing or other proceeding when required under paragraph (1) shall be grounds for appeal to the Board.

(6) Failure of a member, for whom substantial reasonable doubt as to the individual's ability to act objectively, independently or impartially exists, to recuse himself from a hearing or other proceeding when required shall be grounds for appeal to a court of competent jurisdiction if the Board action being appealed could not have occurred without the participation of the member.

(f) Nothing in this subsection will preclude a member of the Board from consulting with other members individually if the consultation complies with 65 Pa.C.S. §§ 701—716 (relating to Sunshine Act) or with employees or independent contractors whose functions are to assist the Board in carrying out its adjudicative functions.

**CHAPTER 405a. BUREAU OF INVESTIGATIONS AND ENFORCEMENT**

**§ 405a.1. General duties and powers.**

(a) Except for administrative purposes, the Bureau is a distinct entity, independent of the Board, the Office of Chief Counsel and the Office of Hearings and Appeals.

(b) The Bureau has the powers and duties set forth in section 1517 of the act (relating to investigations and enforcement) including:

(1) The investigation and review of applicants seeking a license, permit, certification or registration.

(2) The investigation of licensees, permittees, registrants, certified gaming service providers and other per-

sons for potential violations of the act, including potential violations referred to the Bureau by the Board or other persons.

(3) The monitoring of slot machine operations to ensure compliance with the act, this part and the integrity of gaming, including internal controls, exclusion list enforcement, underage gaming and drinking, individual complaints, information systems, integrity and security issues.

(4) The inspection and examination of all premises where slot machine operations are conducted, gaming devices or equipment are manufactured, sold, distributed or serviced or where records of these activities are prepared or maintained as provided in section 1517(e) of the act. Inspections may include the review and reproduction of any document or record.

(5) The conduct of audits of slot machine operations as necessary to ensure compliance with the act and this part. An audit may include, but is not limited to, reviews, examinations and inspections of:

(i) Accounting, administrative and financial records and procedures utilized by the licensed entity.

(ii) Internal control procedures and management control procedures.

(iii) Security and surveillance departments.

(iv) Corrective action taken by the licensee to resolve reported deficiencies.

(v) Reports issued by an independent certified public accountant or independently registered public accounting firm pertaining to the adequacy of the licensee's system of internal controls over financial reporting.

(vi) The licensee's responses, if any, to the reports noted in paragraph (v).

(vii) Other matters required by the Board or the Bureau.

(6) The referral of possible criminal violations under the act to the Pennsylvania State Police.

(7) Being a criminal justice agency under 18 Pa.C.S. Chapter 91 (relating to criminal history record information).

(c) The Bureau will determine the scope of a background investigation, which may not be directed or limited by the Executive Director or Chief Counsel of the Board.

**§ 405a.3. Office of Enforcement Counsel.**

(a) The Office of Enforcement Counsel within the Bureau has the following powers and duties:

(1) Advise the Bureau on all matters, including the granting of licenses, permits, certifications or registrations, the conduct of background investigations, audits and inspections and the investigation of potential violations of the act or this part.

(2) Make recommendations and objections relating to the issuance of licenses, permits, certifications and registrations.

(3) Initiate, in its sole discretion, proceedings for violations of the act or this part by filing a complaint or other pleading with the Board seeking civil fines or penalties, the imposition of conditions on a license, permit, certification or registration, or the suspension or revocation of a license, permit, certification or registration.

(4) Act as the prosecutor in enforcement actions under the act.

(5) Seek a settlement that may include fines, penalties or other actions subject to approval by the Board.

(6) Appear at administrative hearings and other proceedings before the Board.

(7) Petition the Board for the appointment of a trustee under section 1332 of the act (relating to appointment of trustee).

(8) Review all information discovered during an investigation relating to an applicant's suitability and eligibility for a license, permit, certification or registration and, in accordance with law, independently determine the content and scope of that information to be included in the final background investigation report.

(9) Prepare a final background investigation report for inclusion in the applicant's suitability report to the Board relating to an applicant's suitability and eligibility for a license, permit, certification or registration.

(b) The Chief Enforcement Counsel will report to the Executive Director of the Board on administrative matters.

(c) The Chief Enforcement Counsel may be removed by the Board only for good cause shown.

**§ 405a.4. Conduct.**

(a) As provided in section 1202.1(c.1) of the act (relating to code of conduct), an attorney representing the Bureau or Office of Enforcement Counsel, or an employee

involved in the hearing process, may not engage in an ex parte communication with a member or presiding officer of the Board, the Chief Counsel or an attorney from the Office of Chief Counsel who is advising the Board in relation to that matter.

(b) A member or presiding officer of the Board, the Chief Counsel or an attorney from the Office of Chief Counsel who advises the Board may not direct, restrict or influence any employee of the Board or Bureau with respect to the conduct and scope of an enforcement proceeding or hearing with which the employee is involved.

(c) If it becomes necessary for the Chief Counsel or an attorney from the Office of Chief Counsel or a Board member to become involved on behalf of the Board in any enforcement proceeding, the Chief Counsel or the attorney from the Office of Chief Counsel or the Board member involved shall be prohibited from participating in the adjudication of that matter.

(d) The Bureau may not disclose any portion of a background investigation report to a member of the Board, the Chief Counsel or an attorney from the Office of Chief Counsel who is advising the Board, prior to the Office of Enforcement Counsel's submission to the Board of the final background investigation report relating to an applicant's suitability and eligibility for a license, permit, certification or registration.

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