RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 252]

Environmental Laboratory Accreditation

The Environmental Quality Board (Board) amends Chapter 252 (relating to environmental laboratory accreditation) to read as set forth in Annex A. This final-form rulemaking clarifies existing requirements, deletes or amends overly restrictive and cost prohibitive requirements, and includes additional requirements necessary for laboratory accreditation. This final-form rulemaking also amends the fee structure in § 252.204 (relating to fees).

This final-form rulemaking was adopted by the Board at its meeting of April 18, 2017.

A. *Effective Date*

This final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*.

B. *Contact Persons*

For further information contact Aaren S. Alger, Chief, Laboratory Accreditation Program, P.O. Box 1467, Harrisburg, PA 17105-1467, (717) 346-8212; or William S. Cumings, Jr., 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 at (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection's (Department) web site at www.dep.pa.gov (select "Public Participation," then "Environmental Quality Board (EQB)").

C. *Statutory Authority*

This final-form rulemaking is being made under the authority of 27 Pa.C.S. § 4105(a) (relating to powers and duties of Environmental Quality Board), which directs the Board to adopt regulations as necessary to implement 27 Pa.C.S. Chapter 41 (relating to environmental laboratory accreditation), and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20), authorizing and directing the Board to adopt regulations necessary for the proper performance of the work of the Department.

D. *Background and Purpose*

The regulations governing environmental laboratory accreditation in Chapter 252 became effective on January 28, 2006, and were amended on April 10, 2010. While completing ongoing rounds of laboratory assessments under Chapter 252, the Laboratory Accreditation Program (Program) discovered various provisions that were unclear, where the regulations were lacking sufficient detail to ensure full compliance with the regulatory requirements or where the standards were overly restrictive and cost prohibitive. The Program also determined that several necessary standards for accreditation were lacking. This final-form rulemaking amends various citations within the scope of Chapter 252, but the applicable statutes within the scope of the regulations remain unchanged.

Under 27 Pa.C.S. § 4104(6) (relating to powers and duties), the accreditation fees must be "in an amount sufficient to pay the department's cost of implementing and administering the accreditation program." In addition, § 252.204(b) requires the Department to recommend to the Board regulatory changes to the accreditation fees every 3 years to address any disparity between Program income generated by the fees and Program costs. In accordance with this requirement, the Program compared the work necessary to perform the functions of the Program to evaluate the costs associated with the Program. Based on this analysis, the Department determined that the accreditation fees in § 252.204 were not sufficient to recover the Department's costs to implement the Program. This final-form rulemaking provides a new fee structure to cover the costs of the Program.

The Department worked with the Laboratory Accreditation Advisory Committee (LAAC) to amend Chapter 252 in a manner that ensures appropriate requirements for environmental laboratory accreditation. The Department, with the assistance of the LAAC, ensured that the interests, concerns and needs of the regulated community were considered and implemented appropriately. The LAAC met throughout 2014, 2015 and 2016 to review and comment on drafts of the proposed and final-form Chapter 252 amendments presented by the Department. The Department also discussed the written comments received during the public comment period during a meeting of the LAAC on December 7, 2016. On December 7, 2016, the LAAC unanimously voted to recommend the final-form Chapter 252 amendments for presentation to the Board.

E. *Summary of Changes to the Proposed Rulemaking*

Editorial corrections and revisions were made throughout this final-form rulemaking based on comments received during the public comment period and to ensure that this final-form rulemaking meets the requirements of the *Pennsylvania Code & Bulletin Style Manual*. For example, the term "but not limited to" was deleted throughout.

Subchapter A. General provisions

§ 252.3. Scope

The list of applicable statutes for which environmental testing shall be conducted by an accredited laboratory is amended to accurately reflect correct statute names and citations.

Subchapter B. Application, fees and supporting documents

§ 252.201. Application and supporting documents

§ 252.203. Accreditation renewal

In this final-form rulemaking, "on forms provided by the Department" is added in response to a comment by the Independent Regulatory Review Commission (IRRC) concerning the format and content of the application requirements that environmental laboratories shall submit. This final-form rulemaking adds additional language to § 252.203(d) (relating to accreditation renewal) at the suggestion of IRRC to add clarity to the written client notification requirements for laboratories when the laboratory's accreditation certificate expires. Laboratories are required to notify all affected customers of the loss or lapse in accreditation in writing within 48 hours of the certificate expiration. This additional language explains that the Department may choose to require the use of specific language or to require Department approval of the notice before issuance.

Subchapter C. General standards for accreditation

§ 252.304. Personnel requirements

The requirement for laboratory personnel to meet any more stringent qualification requirements established by method, regulation or program is added as subsection (a)(4) in response to comments received during the public comment period. The proposed rulemaking included this provision in the laboratory supervisor qualifications section, but, as noted by two commentators, this provision is also applicable to some laboratory personnel.

§ 252.306. Equipment, supplies and reference materials

The allowance for recertification of expired standards, reagents and media in subsection (h)(6) is deleted in this final-form rulemaking based on a comment received from the public. The Department added this provision in 2010. No laboratory has sought approval from the Department for approval to recertify expired laboratory materials. Therefore, removal of this provision does not negatively impact the regulated community and will ensure that laboratories use valid standards.

At the suggestion of several public comments, the provision for temperature distribution studies for microbiology incubators in subsection (j) is revised to exempt this requirement for circulating water baths. Circulating water baths ensure even temperature distribution throughout the incubator. Distribution studies are not necessary to ensure valid temperature distribution throughout the unit.

§ 252.307. Methodology

At the suggestion of a commentator, the Department deletes the requirement for a laboratory to develop the sample collection and preservation documents from subsection (j). The Department does not intend to require a laboratory to develop procedures that might already exist or be available from other organizations provided that the sample collection and preservation instructions meet the requirements of subsections (f) and (g).

Subchapter D. Quality assurance and quality control requirements

§ 252.401. Basic requirements

Significant public comment and discussion during public meetings of the LAAC resulted in the addition to subsection (f) requiring that environmental laboratories check and document the pH of every sample container received by a laboratory. Numerous comments and concerns were raised regarding the proposed language, the necessity of the requirements and the overall cost to the regulated community. After much discussion and consideration, this final-form rulemaking requires that the laboratory check the pH of each sample container for safe drinking water act compliance samples and whole effluent toxicity samples that are not collected by trained, accredited laboratory staff. The Safe Drinking Water (SDW) Program and the United States Environmental Protection Agency's (EPA) Office of Water consider an improperly preserved sample invalid for compliance purposes. Therefore, unless each sample container used for sample analysis is verified to be at the correct pH, it is not possible to determine if the sample is valid and appropriately collected. This compromise ensures protection of the public health for drinking water compliance samples but does not place an undue burden, financial or otherwise, on the regulated community testing nondrinking water samples.

§ 252.404. Essential quality control requirement—microbiology

This final-form rulemaking adds necessary clarification to subsection (g)(2) to more thoroughly explain that a reuseable membrane filtration funnel shall be checked for sterility with a sterility blank after every ten filtrations of a sample aliquot, not after every ten samples. A sample could include numerous dilutions and aliquots. Based on comments received, the Department deletes the proposed addition to subsection (h)(4) and (5) to allow for the recertification of expired positive and negative culture controls. As suggested by a commentator, the Department adds subsection (h)(7) in this final-form rulemaking to ensure that positive and negative controls are processed under the same conditions as routine environmental samples. "Department approved" was proposed to be added to subsection (h)(5) with the intention to require the laboratories to obtain approval for their documented procedures for maintaining culture controls. This statement was determined to be unnecessary because the regulation outlines the specific requirements for maintaining culture controls. Therefore, the additional language proposed by the Department is not adopted in this final-form rulemaking.

Subchapter F. Assessment requirements

§ 252.601. Assessment requirements

Subsection (h) is revised in this final-form rulemaking in response to a comment from IRRC regarding the Department's requirements for corrective action based on deficiencies found during an assessment conducted by the Program. This final-form rulemaking clarifies that unless otherwise required or approved by the Department, environmental laboratories shall correct all deficiencies within 120 calendar days of receipt of the assessment report. Assessments occur for various reasons, including onsite assessments, review of a laboratory's request to add fields of accreditation, change in ownership and laboratory supervisor notices, and the like. Laboratories are required to perform corrective actions and submit any requested evidence of correction to the Program to demonstrate compliance with the regulation. Subsection (h) clarifies that the Program can require the laboratory to correct the violation sooner than 120 days; a laboratory can be granted additional time for correction based on subsection (i).

Subchapter G. Miscellaneous provisions

§ 252.702. Revocation

§ 252.703. Suspension

§ 252.704. Voluntary relinquishment

This final-form rulemaking adds additional language to §§ 252.702(d), 252.703(e) and 252.704(c) (relating to revocation; suspension; and voluntary relinquishment) at the suggestion of IRRC to add clarity to the written client notification requirements for laboratories when a voluntary relinquishment, loss or lapse in accreditation occurs. Laboratories are required to notify all affected customers of the loss or lapse in accreditation in writing within 72 hours of the change in accreditation status. This additional language explains that the Department may choose to require the use of specific language or to require Department approval of the notice before issuance.

§ 252.706. Recordkeeping

Based on public comment, this final-form rulemaking deletes the signature requirement from subsection (c) to state that the name or initials must be included on the records. Subsection (b)(5) is corrected to note that the

results of chemical "or" thermal preservation verifications or adjustments, or both shall be documented. This final-form rulemaking more clearly explains the Department's requirements for historical reconstruction of laboratory activities in subsection (c)(2) when making changes to records. Specifically, the laboratory is expected to document the rationale for any nontypographical correction to records.

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

The Board approved publication of the proposed rulemaking at its May 17, 2016, meeting. The proposed rulemaking was published at 46 Pa.B. 5088 (August 20, 2016), with a 30-day public comment period. Comments were received from ten commentators, including IRRC.

The majority of the comments received during the public comment period related to requirements for microbiology incubation units, laboratory supervisor qualifications, sample acceptance and sample receipt, expired materials and a general request for technical guidance documents from the Department to describe and detail compliance options with the new requirements.

Several commentators noted that the Department's proposal to require temperature distribution studies for incubation units used for microbiology testing should be revised. These commentators noted that circulating water baths are equitably distributed by design and should be exempt from the distribution study. The Department agreed with these comments and added language to this final-form rulemaking to exempt circulating water baths from the temperature distribution study.

Commentators stated that it would be helpful to have the Department develop technical guidance for how the Department would recommend compliance with the requirements for microbiology incubators detailed in the proposed rulemaking. The Department plans to develop technical guidance documentation in collaboration with the LAAC. These technical guidance documents will provide more detailed examples and options for how a laboratory might achieve compliance with the regulatory requirements for microbiology incubators regarding temperature distribution studies and the daily temperature monitoring requirements.

Several commentators provided comment regarding the Department's proposal to amend the laboratory supervisor qualification requirements. Some of the commentators expressed concern that the proposed reduction in years of experience for inorganic nonmetals, basic water and wastewater, and basic microbiology might weaken the quality of results generated by accredited laboratories. Other commentators expressed support of the Department's proposal and suggested that it will be easier to find qualified laboratory supervisors with the reduction in years of experience. One commentator suggested that the Department should not reduce the years of experience, but should increase the years of experience and minimum number of college semester credit hours for all areas of supervision. The Department carefully considered these comments and determined that the language should remain the same in this final-form rulemaking regarding the qualifications for a laboratory supervisor. The methodologies and analytical technologies within the inorganic nonmetals, basic microbiology, and basic drinking water and wastewater areas of testing are less complicated and more easily mastered. One year of experience in these areas should be sufficient to obtain mastery in these technical disciplines and will also enable smaller laboratories to more easily comply with the accreditation regulations, thus reducing the burden on small businesses and publicly-owned laboratories. The Department's requirements for laboratory supervisor experience and education for the other areas of laboratory testing, organics, trace metals and complex microbiology are similar to those established by the National Environmental Laboratory Accreditation Program (NELAP) and the requirements of this final-form rulemaking are adequate to ensure proper experience and education of a laboratory supervisor.

Several commentators expressed concern that the Department's proposal to require that at least four of the minimum required college semester credits in biology shall be microbiology credits for a microbiology laboratory supervisor is too stringent and not necessary. During meetings of the LAAC, several members of the public in attendance as well as the LAAC members requested that the Department require, that in addition to four credits in microbiology, all laboratory supervisors shall have taken a microbiology laboratory course. After consideration of the public comments and after further discussion with the LAAC, the Department determined that requiring four credits of microbiology and not specifically requiring a laboratory course work is an acceptable compromise. Colleges and universities have many courses available online, and four microbiology credits can be obtained in a single course. An individual that proposes to supervise a microbiology laboratory needs the microbiology education obtained during a college-level microbiology course and four credits in microbiology. The techniques and methods included in the basic microbiology category are not limited to Colilert testing, as noted by several commentators. The basic microbiology category includes technologies such as membrane filtration, multiple tube fermentation and pour plate. These techniques require understanding and proficiency with sterile techniques, positive and negative controls, and specific media preparation and uses. The Department did not make changes in the microbiology supervisor sections from proposed rulemaking to final-form rulemaking.

Several commentators provided suggestions regarding the Department's proposal to require chemical preservation checks of all sample bottles received by the laboratory. The Department included this provision at the recommendation of the SDW Program and the EPA's instruction that an improperly collected sample is invalid and cannot be used for compliance purposes. Through discussions with the regulated community, the Department decided to limit the pH testing requirement to those samples that require a specific pH by method, regulation or permit, and all SDW compliance samples. This compromise will ensure the protection of the public health but reduce the financial burden for nondrinking water samples. The regulated community participating in the public meeting were amenable to the compromise. The Department also plans to develop technical guidance documents in collaboration with the LAAC to assist the regulated community in understanding the various options available to comply with the sample acceptance and handling requirements of the regulation.

Commentators also stated that the laboratory should not be required to develop sample handling, collection and preservation instructions if adequate documentation for these activities already exists. The Department agrees with these commentators and amends this final-form rulemaking to clarify that the laboratory shall maintain documentation of sample collection and preservation requirements. The laboratory may choose to develop its own or use currently published materials from another source.

A commentator asserted that the proposed language to segregate expired chemicals from unexpired chemicals should not be accepted and expired chemicals should be removed from the laboratory and discarded. The commentator also stated that the Department's allowance for recertification of expired chemicals, materials, and positive and negative controls should be deleted from §§ 252.306(h) and 252.404(h) (relating to equipment, supplies and reference materials; and essential quality control requirement—microbiology) because the use of expired materials does not improve the quality of the testing results. The proposed language for segregation of expired chemicals was a compromise made between the Department and the LAAC to allow laboratories to maintain expired chemicals for noncompliance purposes but to ensure that they could not be mistaken as acceptable for use for compliance testing. However, the Department agrees with the suggestion to delete the allowance for recertification of expired materials and deletes this provision from this final-form rulemaking.

G. *Benefits, Costs and Compliance*

Benefits

The most significant benefit of this final-form rulemaking is clear, concise and improved regulations for the regulated community. This final-form rulemaking will allow for better understanding and increased compliance with the requirements and thus result in an improvement in the overall quality of the data produced by environmental laboratories. All laboratories, particularly small laboratories, will benefit from allowing a laboratory supervisor to be absent for up to 21 days, rather than the current 16 days, and be replaced by a qualified staff member without requiring written notification to the Department. Several of the laboratory supervisor areas of experience qualifications were reduced from 2 years to 1 year. This final-form rulemaking deletes the requirement for the Department to conduct onsite assessments, thus allowing the Department to explore and employ advances in technology to perform offsite assessments which can substantially reduce overall costs to the Program and regulated laboratories.

This final-form rulemaking also adds some specific requirements for NELAP laboratories. The NELAC Institute (TNI) Standard, which NELAP laboratories shall meet, is silent or lacking in specific requirements for several necessary standards. Requiring that all NELAP laboratories adhere to these regulations will ensure that all laboratories performing testing or analysis of compliance samples for the Department are meeting the same minimum standard.

Improved data quality will allow the Department, the regulated community and the citizens of this Commonwealth to make better and more informed decisions concerning the protection of the environment and the protection of public health, safety and welfare. Accurate laboratory results are critical to achieving the goals of the environmental laws which are covered by the regulations.

Compliance costs

The direct costs of this final-form rulemaking is the payment of the accreditation fees. Chapter 41 of 27 Pa.C.S. requires that the fees be set in an amount sufficient to cover the cost of establishing and maintaining a laboratory accreditation program. These costs vary depending upon the type of testing and analyses that the environmental laboratory chooses to perform. Laboratories that require extensive staff time to accredit, such as large commercial laboratories and NELAP laboratories, will pay a higher accreditation fee.

The renewal fee for State accreditation is increased by $200 per year while the renewal fee for NELAP applicants is increased by $750 per year. Renewal application fees increase for all laboratories at a rate of approximately 30%. Each laboratory is also responsible for paying the appropriate category fee associated with its requested scope of accreditation, such as microbiology, trace metals, volatile organics, and the like. The total accreditation fee for each laboratory is the renewal application fee plus each appropriate category fee. Each category fee is increased by between $100—$200 depending on the complexity of each category. The fees for medium to large accredited laboratories are likely to increase by approximately 20%—30% depending on the requested scope of accreditation.

This final-form rulemaking includes a fee structure that is responsive to the needs of small laboratories. Specifically, increased accreditation costs for smaller laboratories will be minimal as the fees for the Basic Non-Potable Water and Basic Drinking Water fee categories increase by $300. The former annual fee paid by these environmental laboratories was $1,250, and the fee change will result in an annual fee of $1,550. Laboratories seeking accreditation for these two categories represent the majority of the applicant laboratories as well as the smallest of the regulated laboratories. In addition, the fee structure includes changes including separation of the microbiology category into "basic" and "complex" to ensure that laboratories that are performing more complex testing, which requires additional staff time and oversight, cover the costs of the accreditation. There were no public comments expressing objections to these increased fees.

Indirect costs will be related to the individual laboratory's implementation of the new requirements. Many in the regulated community are already in compliance with the additional requirements itemized in this final-form rulemaking and will not incur any additional costs for implementation. Others will be required to update or develop standard operating procedures and update recordkeeping procedures.

Cost savings will occur in the regulated community because the new and clarified requirements will enable laboratories to better understand the applicable requirements and should reduce the number of violations found during assessments, thus reducing the amount of time and money necessary to correct these violations.

Compliance assistance plan

Aside from the fee changes, the major changes that might require additional compliance assistance include the new requirements for sample collection instructions, sample receipt documentation and microbiology incubator temperature distribution studies. The Department plans to develop technical guidance in collaboration with the LAAC and the public. The other amendments in this final-form rulemaking are minor and in most cases clarify existing requirements or make former requirements less stringent. The Department does not believe that a compliance assistance plan tailored to these amendments is necessary. However, the Department will continue its ongoing compliance assistance efforts with mass e-mails, updates to its web site and other activities.

The ultimate goal of the compliance assistance effort will be improving an environmental laboratory's ability to produce valid and defensible data for use by the Department, the regulated community and the public. Several areas where compliance assistance is necessary are gen-

eral laboratory operation, correct performance of specific test procedures and documentation of laboratory activities. Compliance assistance in these areas has been made available to all environmental laboratories, regardless of size, throughout this Commonwealth.

Paperwork requirements

This final-form rulemaking does not include any additional forms, reports or other paperwork to be submitted.

H. *Pollution Prevention*

This is not applicable to this final-form rulemaking.

I. *Sunset Review*

The Board is not establishing a sunset date for these regulations since they are needed for the Department to carry out its statutory authority. The Department will continue to closely monitor these regulations for their effectiveness and recommend updates to the Board as necessary.

J. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on July 29, 2016, the Department submitted a copy of the notice of proposed rulemaking, published at 46 Pa.B. 5088, 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, the Department shall submit to IRRC and the House and Senate Committees copies of 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 and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on June 14, 2017, 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 June 15, 2017, 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) This final-form rulemaking does not enlarge the purpose of the proposed rulemaking published at 46 Pa.B. 5088.

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

L. *Order*

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

(a) The regulations of the Department, 25 Pa. Code Chapter 252, are amended by amending §§ 252.1, 252.3, 252.4—252.6, 252.201, 252.203—252.206, 252.301, 252.302, 252.304, 252.306, 252.307, 252.401, 252.402, 252.404, 252.501, 252.601, 252.701—252.706 and 252.708 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(*Editor's Note*: The amendments to § 252.365 were not included in the proposed rulemaking.)

(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 under the Regulatory Review Act (71 P.S. §§ 745.1—745.14).

(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 upon publication in the *Pennsylvania Bulletin*.

PATRICK McDONNELL,
Chairperson

(*Editor's Note*: See 47 Pa.B. 3672 (July 1, 2017) for IRRC's approval order.)

Fiscal Note: Fiscal Note 7-495 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 VI. GENERAL HEALTH AND SAFETY

CHAPTER 252. ENVIRONMENTAL LABORATORY ACCREDITATION

Subchapter A. GENERAL PROVISIONS

§ 252.1. Definitions.

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

* * * * *

NELAP accreditation body—An accreditation body that has been recognized as meeting the requirements of the NELAC Standard or the TNI Standard and has the authority to grant NELAP accreditation.

* * * * *

§ 252.3. Scope.

(a) *Environmental statutes.* This chapter applies to facilities that test or analyze environmental samples in the matrices listed in subsection (b) for the purpose of complying with the following environmental statutes:

(1) 58 Pa.C.S. Chapter 32 (relating to development).

(2) The Clean Streams Law (35 P.S. §§ 691.1—691.1001).

(3) The Hazardous Sites Cleanup Act (35 P.S. §§ 6020.101—6020.1305).

(4) The Land Recycling and Environmental Remediation Standards Act (35 P.S. §§ 6026.101—6026.908).

(5) The Pennsylvania Safe Drinking Water Act (35 P.S. §§ 721.1—721.17).

(6) The Solid Waste Management Act (35 P.S. §§ 6018.101—6018.1003).

(7) The Storage Tank and Spill Prevention Act (35 P.S. §§ 6021.101—6021.2104).

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

(9) The Surface Mining Conservation and Reclamation Act (52 P.S. §§ 1396.1—1396.19b).

(10) The Coal Refuse Disposal Control Act (52 P.S. §§ 30.51—30.66).

(11) The Bituminous Mine Subsidence and Land Conservation Act (52 P.S. §§ 1406.1—1406.21).

(12) The Noncoal Surface Mining Conservation and Reclamation Act (52 P.S. §§ 3301—3326).

(b) *Matrix*. The following matrices are included:

(1) Drinking water.

(2) Nonpotable water.

(3) Solid and chemical materials.

(c) *Exclusions.* The following testing and analysis are specifically excluded from the requirements of this chapter:

(1) Corrosion protection system testing or testing of a storage tank system for tightness or structural soundness under Chapter 245 (relating to administration of the storage tank and spill prevention program).

(2) Routine release detection monitoring under §§ 245.442—245.445, 245.543 and 245.613.

(3) Analyses to determine the acceptability of soils for protective, daily, intermediate and final cover material, subbase, clay liner, clay cap, attenuating soil base and liner system construction material under Chapters 260a, 261a, 262a, 263a, 264a, 265a, 266a, 266b, 268a, 269a, 270a, 271—273, 275, 277, 279, 281, 283—285, 287—289, 291, 293, 295 and 297—299.

(4) Testing or analysis of the physical, chemical, mechanical and thermal properties of liners, liner systems, leachate detection zones and barriers under Chapters 260a, 261a, 262a, 263a, 264a, 265a, 266a, 266b, 268a, 269a, 270a, 271—273, 275, 277, 279, 281, 283—285, 287—289, 291, 293, 295 and 297—299.

§ 252.4. General requirements.

(a) Testing or analysis of environmental samples within a matrix identified in § 252.3 (relating to scope) and to comply with a statute listed in § 252.3 shall be performed by an environmental laboratory accredited under this chapter.

(b) An environmental laboratory testing, analyzing or reporting results for environmental samples in a matrix identified in § 252.3 and required by a statute identified in § 252.3 shall be accredited and in compliance with this chapter to generate data and perform analysis used to comply with an environmental statute listed in § 252.3.

§ 252.5. NELAP equivalency.

(a) An environmental laboratory may apply to the Department for NELAP accreditation for the fields of accreditation for which the Department offers accreditation.

(b) An environmental laboratory seeking NELAP accreditation shall:

(1) Submit a complete application as provided in Subchapter B (relating to application, fees and supporting documents).

(2) Comply with Subchapter E (relating to proficiency test study requirements).

(3) Comply with Subchapter F (relating to assessment requirements).

(4) Comply with Subchapter G (relating to miscellaneous provisions).

(5) Comply with the current edition of the NELAC Standard or TNI Standard.

(6) Comply with § 252.307 (relating to methodology).

(7) Comply with § 252.401 (relating to basic requirements).

(c) An environmental laboratory receiving NELAP accreditation from the Department may apply for accreditation under the remainder of this chapter for the fields of accreditation that are not included in NELAP accreditation and for which the Department offers accreditation.

(d) An environmental laboratory receiving NELAP accreditation from the Department may only test or analyze environmental samples within the fields of accreditation authorized by the accreditation received from the Department.

§ 252.6. Accreditation-by-rule.

(a) *Purpose*. Environmental laboratories performing testing or analysis or reporting results described in this section will be deemed to have accreditation-by-rule if the following general requirements are met:

(1) The environmental laboratory registers with the Department in accordance with 27 Pa.C.S. § 4107(a) (relating to interim requirements).

(2) The environmental laboratory performs the testing or analysis in conformance with applicable State or Federal laws, regulations, promulgated methods, orders and permit conditions.

(3) The environmental laboratory assures that samples for testing or analysis are properly preserved, are in proper containers, do not exceed maximum holding times between collection and analysis, and are handled in accordance with applicable State or Federal laws, regulations, promulgated methods, orders and permit conditions.

(4) The environmental laboratory has the other necessary permits under the applicable environmental protection acts and is operating under the acts and regulations promulgated thereunder and the terms and conditions of permits.

(5) Records pertaining to the testing or analysis of environmental samples are retained onsite and in accordance with § 252.706 (relating to recordkeeping). Records shall be made available to the Department upon request.

(6) The environmental laboratory is reporting only the results of the testing or analysis of environmental samples specified in subsections (c) and (f) in conformance with the applicable State or Federal laws, regulations, orders or permit conditions.

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Subchapter B. APPLICATION, FEES AND SUPPORTING DOCUMENTS

§ 252.201. Application and supporting documents.

(a) An environmental laboratory seeking accreditation for one or more fields of accreditation within a matrix

described in § 252.3 (relating to scope) or that seeks to add a field of accreditation shall apply to the Department for accreditation on forms provided by the Department and in the format specified by the Department. The applicant shall provide other relevant material requested by the Department.

(b) An application for accreditation must include the appropriate application fee in accordance with § 252.204 (relating to fees.)

(c) Environmental laboratories maintained on separate premises shall maintain distinct accreditation. Separate accreditation is not required for environmental laboratories in different buildings on the same or adjoining grounds, provided the laboratories are operated under the same management.

(d) Separate accreditation is required for a mobile laboratory.

§ 252.203. Accreditation renewal.

(a) Applications for accreditation renewal shall be submitted annually to the Department at least 60 calendar days prior to the expiration date of the current certificate of accreditation in writing on forms provided by the Department and in the format specified by the Department.

(b) An application for accreditation renewal must include the appropriate application fee in accordance with § 252.204 (relating to fees).

(c) Failure to submit an application for renewal in accordance with this section will result in a lapse in accreditation if the Department has not approved the renewal application prior to the expiration of the current certificate of accreditation. If a lapse in accreditation occurs, the environmental laboratory shall cease all testing or analysis of environmental samples for the affected fields of accreditation.

(d) Within 48 hours of expiration of the certificate of accreditation, the laboratory shall notify each of its customers affected by the expiration of the certificate of accreditation in writing of the lapse in accreditation. The Department may choose to require the laboratory to use specific language in the written notice or to require Department approval of the notice before issuance.

§ 252.204. Fees.

(a) The appropriate fee in accordance with the following schedule must accompany an application for accreditation, renewal of accreditation, change of ownership, change in administrative information, addition of fields of accreditation or supplemental onsite assessment. A check must be payable to "Commonwealth of Pennsylvania." When the Department is able to accept credit card payments, an environmental laboratory may make payment by credit card and shall pay to the Commonwealth all service charges or other administrative fees in addition to the accreditation fees. The fees are as follows:

Category	*Fee*
Application fee—Initial Application for State Accreditation	$1,500
Application fee—Renewal Application for State Accreditation	$700
Application fee—Ownership Transfer or Change in Administrative Information	$150
Application fee—Initial Application for NELAP Accreditation	$3,500
Application fee—Renewal Application for NELAP Accreditation	$2,750
Application fee—Addition of Field of Accreditation	$350
Application fee—Supplemental Onsite Assessment	$500
Basic Drinking Water Category—Includes one method for each of the following: Total Coliform Bacteria, Fecal Coliform Bacteria, *E. coli* Bacteria, Heterotrophic Bacteria, Nitrate, Nitrite, Fluoride, Cyanide	$750
Basic Nonpotable Water Category—Includes one method for each of the following: Fecal Coliform Bacteria, BOD, CBOD, Nitrate, Ammonia, Total Nitrogen, Total Kjeldahl Nitrogen, Nitrite, Phosphorus, and one method for each type of residue including % Solids for land applied biosolids	$850
Asbestos—first matrix	$600
Basic Microbiology—includes fecal coliform, total coliform, *E. coli* and heterotrophic bacteria—first matrix	$700
Complex Microbiology—first matrix	$1,000
Trace Metal Category—first matrix	$750
Inorganic Nonmetal Category—first matrix	$850
Purgeable Volatile Organic Chemicals—first matrix	$850
Extractable and Semivolatile Organic Chemicals—first matrix	$1,750
Dioxin—first matrix	$850
Radiochemical Category—first matrix	$950
Whole Effluent Toxicity Testing—first matrix	$950
Asbestos—second matrix	$450
Basic Microbiology—includes fecal coliform, total coliform, *E. coli* and heterotrophic bacteria—second matrix	$600
Complex Microbiology—second matrix	$900
Trace Metal Category—second matrix	$600
Inorganic Nonmetal Category—second matrix	$700
Purgeable Volatile Organic Chemicals—second matrix	$700
Extractable and Semivolatile Organic Chemicals—second matrix	$1,600
Dioxin—second matrix	$700
Radiochemical Category—second matrix	$850
Asbestos—third matrix	$400
Basic Microbiology—includes fecal coliform, total coliform, *E. coli* and heterotrophic bacteria—third matrix	$500
Complex Microbiology—third matrix	$800
Trace Metal Category—third matrix	$550
Inorganic Nonmetal Category—third matrix	$650
Purgeable Volatile Organic Chemicals—third matrix	$600

Category	*Fee*
Extractable and Semivolatile Organic Chemicals—third matrix	$1,450
Dioxin—third matrix	$650
Radiochemical Category—third matrix	$750

(b) At least every 3 years, the Department will recommend regulatory changes to the fees in this section to the EQB to address any disparity between the program income generated by the fees and program costs. The regulatory amendment will be based upon an evaluation of the accreditation program fees income and the Department's costs of administering the accreditation program.

(c) An environmental laboratory owned or operated by a Commonwealth agency is exempt from this fee requirement, but shall apply for accreditation under this chapter.

(d) Fees are nonrefundable.

(e) In addition to the nonrefundable application fee, an out-of-State environmental laboratory shall reimburse the Department for the costs associated with onsite assessments necessitated by accreditation as specified in § 252.206 (relating to out-of-State onsite reimbursement).

§ 252.205. Out-of-State laboratories.

(a) Out-of-State environmental laboratories may apply for primary accreditation or secondary accreditation from the Department.

(1) *Primary accreditation.* Out-of-State environmental laboratories may apply to the Department for primary accreditation under this chapter.

(2) *Secondary accreditation.*

(i) The Department will recognize accreditation granted by a primary NELAP accreditation body for the same fields of accreditation for which the Department is a primary NELAP accreditation body provided the environmental laboratory meets the requirements of § 252.5 (relating to NELAP equivalency).

(ii) The Department may recognize the accreditation of an environmental laboratory by another state accreditation body if the standards for accreditation are substantially equivalent to those established under this chapter and the laboratory is physically located within the state granting accreditation.

(iii) An environmental laboratory seeking secondary accreditation from the Department shall:

(A) Submit a properly completed application on forms provided by the Department.

(B) Pay the appropriate fee.

(C) Submit a copy of a valid accreditation certificate from the primary accreditation body.

(D) Submit a copy of all onsite assessment reports conducted by the primary accreditation body within the last 3 years.

(E) Submit any other material relevant to accreditation, upon request of the Department.

(b) The Department may conduct an onsite assessment or require analysis of a proficiency test study by an out-of-State environmental laboratory seeking secondary accreditation for reasons which may include addressing complaints from the public or Department personnel, discrepancies with environmental sample results, onsite assessment deficiencies, frequent errors in reporting data to the Department and suspicions of fraud regarding data quality. If the Department determines that an onsite assessment is required, the environmental laboratory shall pay the Department's travel costs associated with the onsite assessment in accordance with § 252.206 (relating to out-of-State onsite reimbursement).

(c) If any portion of the out-of-State environmental laboratory's accreditation is denied, revoked or suspended by the primary accreditation body, the laboratory's authorization to perform testing or analysis is automatically revoked for the same fields of accreditation.

§ 252.206. Out-of-State onsite reimbursement.

In addition to the nonrefundable application fee, an out-of-State environmental laboratory shall reimburse the Department for the following costs associated with onsite assessments necessitated by accreditation:

(1) Transportation costs, including airfare, mileage, tolls, car rental, public transportation and parking.

(2) Meals and lodging.

(3) Travel time for each assessor at a rate of $75/hour.

Subchapter C. GENERAL STANDARDS FOR ACCREDITATION

§ 252.301. Laboratory supervisor.

(a) The Department will consider the laboratory supervisor of an environmental laboratory as the individual listed on the laboratory's application for accreditation for which the Department has reviewed and approved the individual's qualifications.

(b) Testing, analysis and reporting of data by an environmental laboratory shall be under the direct supervision of a laboratory supervisor.

(c) The laboratory supervisor shall certify that each test or analysis is accurate and valid and the test or analysis was performed in accordance with all conditions of accreditation. A laboratory supervisor may certify a test or analysis by signing the final laboratory report. A laboratory may use other mechanisms to certify a test or analysis, provided the mechanism is documented in the laboratory quality manual.

(d) The laboratory supervisor shall ensure that the records required by this chapter are maintained.

(e) The Department may disqualify a laboratory supervisor who is responsible for the submission of inaccurate test or analysis results.

(f) The Department will disqualify a laboratory supervisor convicted of any crime or offense related to violations of State or Federal laws or regulations related to the provision of environmental laboratory services or reimbursement for the services.

(g) An environmental laboratory may appoint one or more laboratory supervisors for the appropriate fields of accreditation for which they are seeking accreditation.

(h) An environmental laboratory shall designate another staff member meeting the qualifications of a laboratory supervisor and who is approved by the Department as described in subsection (a) to temporarily perform this function when a laboratory supervisor is absent for a period of time exceeding 21 consecutive calendar days. If this temporary absence exceeds 30 consecutive calendar days, the environmental laboratory shall notify the Department in writing under § 252.708 (relating to reporting and notification requirements).

(i) An individual may not be the laboratory supervisor of more than one environmental laboratory without au-

thorization from the Department. Circumstances to be considered in the decision to grant the authorization will include at least the following:

(1) The extent to which operating hours of the laboratories to be supervised overlap.

(2) The adequacy of supervision in each laboratory.

§ 252.302. Qualifications of the laboratory supervisor.

(a) A laboratory supervisor of an environmental laboratory engaged in chemical analysis of organics or metals, or both, shall have the following qualifications:

(1) A bachelor's degree in chemistry, biochemistry, physics, environmental science, biology, microbiology, physical sciences or engineering.

(2) At least 24-college semester credit hours in chemistry.

(3) At least 2 years of experience in the testing or analysis of environmental samples in representative inorganic and organic fields of accreditation for which the environmental laboratory seeks to obtain or to maintain accreditation. An earned master's or doctoral degree in chemistry, biochemistry, physics, environmental science, biology, microbiology, physical sciences or engineering may be substituted for 1 year of experience.

(b) A laboratory supervisor of an environmental laboratory engaged in inorganic nonmetals chemical analysis shall have the following qualifications:

(1) At least an earned associate's degree in chemistry, biochemistry, physics, environmental science, biology, microbiology, physical sciences or engineering, or 2 years of equivalent and successful college education.

(2) At least 16-college semester credit hours in chemistry.

(3) At least 1 year of experience in the testing or analysis of environmental samples in representative fields of accreditation for which the environmental laboratory seeks to obtain or to maintain accreditation.

(c) A laboratory supervisor of an environmental laboratory engaged in microbiological or biological analysis shall have the following qualifications:

(1) A bachelor's degree in chemistry, biochemistry, physics, environmental science, biology, microbiology, physical sciences or engineering.

(2) At least 16-college semester credit hours in biology. At least 4 of the 16-college semester credit hours must be in microbiology.

(3) At least 2 years of experience in the testing or analysis of environmental samples in representative microbiological or biological fields of accreditation for which the environmental laboratory seeks to obtain or to maintain accreditation. A master's or doctoral degree in chemistry, biochemistry, physics, environmental science, biology, microbiology, physical sciences or engineering may be substituted for 1 year of experience.

(d) A laboratory supervisor of an environmental laboratory engaged in microbiological analysis limited to fecal coliform, total coliform, *E. coli* and heterotrophic bacteria shall have the following qualifications:

(1) At least an associate's degree in chemistry, biochemistry, physics, environmental science, biology, microbiology, physical sciences or engineering.

(2) A minimum of 4-college semester credit hours in microbiology.

(3) At least 2 years of equivalent and successful college education, including a minimum of 4-college semester credit hours in microbiology may be substituted for the associate's degree.

(4) At least 1 year of experience in the testing or analysis of environmental samples in representative fields of accreditation for which the environmental laboratory seeks to obtain or to maintain accreditation.

(e) A laboratory supervisor of an environmental laboratory engaged in radiological analysis shall have the following qualifications:

(1) A bachelor's degree in chemistry, biochemistry, physics, environmental science, biology, microbiology, physical sciences or engineering.

(2) At least 24-college semester credit hours in chemistry or health physics.

(3) At least 2 years of experience in the testing or analysis of environmental samples in representative radiological fields of accreditation for which the environmental laboratory seeks to obtain or to maintain accreditation. An earned master's or doctoral degree in chemistry, biochemistry, physics, environmental science, biology, microbiology, physical sciences or engineering may be substituted for 1 year of experience.

(f) A laboratory supervisor of an environmental laboratory engaged in microscopic examination of asbestos or airborne fibers shall have the following qualifications:

(1) For procedures requiring the use of a transmission electron microscope, a bachelor's degree, successful completion of formal course work in the use of the instrument and 1 year of experience, under supervision, in the use of the instrument. The experience must include the identification of minerals.

(2) For procedures requiring the use of a polarized light microscope, an associate's degree or 2 years of college study, successful completion of formal coursework in polarized light microscopy and 1 year of experience, under supervision, in the use of the instrument. The experience must include the identification of minerals.

(3) For procedures requiring the use of a phase contrast microscope, an associate's degree or 1 year of college study, documentation of successful completion of formal coursework in phase contrast microscopy and 1 year of experience, under supervision, in the use of the instrument.

(g) Notwithstanding any other provision of this section, a laboratory supervisor of an environmental laboratory limited to the basic nonpotable water category or the basic drinking water category shall have the following qualifications:

(1) At least 16-college semester credit hours in chemistry, biochemistry, physics, environmental science, biology, microbiology, physical sciences or engineering.

(2) At least 1 year of experience in the testing or analysis of environmental samples in representative fields of accreditation for which the environmental laboratory seeks to obtain or to maintain accreditation.

(h) Notwithstanding any other provision of this section, an employee of a drinking water, wastewater or industrial waste treatment facility meeting the following requirements will be deemed qualified as a laboratory supervisor of an environmental laboratory:

(1) The employee holds a valid treatment plant operator's certificate under the Water and Wastewater Systems Operators' Certification Act (63 P.S. §§ 1001—1015.1) in the appropriate water or wastewater subclassification for the facility.

(2) The employee holds a valid certificate under the Water and Wastewater Systems Operators' Certification Act for laboratory supervisor in the appropriate water or wastewater subclassification.

(3) At least 1 year of experience in the testing or analysis of environmental samples in representative fields of accreditation for which the environmental laboratory seeks to obtain or maintain accreditation.

(i) Approval as a laboratory supervisor under subsection (h) will be limited to the fields of accreditation required by the scope of that facility's regulatory permit.

(j) A laboratory supervisor of an environmental laboratory engaged in whole effluent toxicity analysis shall have the following qualifications:

(1) At least an associate's degree in chemistry, biochemistry, physics, environmental science, biology, microbiology, physical sciences or engineering.

(2) A minimum of 4-college semester credit hours in biology.

(3) At least 2 years of equivalent and successful college education, including a minimum of 4-college semester credit hours in biology may be substituted for the associate's degree.

(4) At least 2 years of experience in the testing or analysis of environmental samples in representative fields of accreditation for which the environmental laboratory seeks to obtain or to maintain accreditation.

(k) College semester credit hours shall be obtained from an accredited college or university recognized by the United States Department of Education.

(l) Foreign transcripts must be translated into English and evaluated for United States semester credit hour equivalency by a credential evaluation agency accredited by the National Association of Credentials Evaluation Services or a Department of Education approved agency.

(m) If a method, regulation or program requires more stringent qualifications for education or experience, or both, the laboratory shall meet the more stringent requirement.

§ 252.304. Personnel requirements.

(a) *General requirements for technical staff.*

(1) An environmental laboratory shall have sufficient personnel with the necessary education, training, technical knowledge and experience for their assigned functions.

(2) Each member of the environmental laboratory technical staff shall be responsible for complying with quality assurance and quality control requirements that pertain to the member's organizational or technical function.

(3) Each environmental laboratory technical staff member shall have a combination of experience and education to adequately demonstrate a specific knowledge of the member's particular function and a general knowledge of laboratory operations, test methods, quality assurance and quality control procedures and records management.

(4) If a method, regulation or program requires more stringent qualifications for education or experience, or both, the laboratory technical staff shall meet the more stringent requirement.

(b) *Laboratory management responsibilities.* The environmental laboratory management shall be responsible for:

(1) Defining the minimal level of qualification, experience and skills necessary for all positions or work cells in the environmental laboratory.

(2) Ensuring and documenting that the environmental laboratory technical staff members or work cells have demonstrated capability in the activities for which they are responsible. This documentation must include:

(i) An identification of the analysts involved in the preparation or analysis, or both.

(ii) The sample matrix.

(iii) The analyte, class of analyte or measured parameter.

(iv) An identification of the test method performed.

(v) An identification of the laboratory-specific standard operating procedure used for analysis, including revision number and effective date.

(vi) The dates of preparation or analysis, or both.

(vii) The summary of analyses, including results.

(3) Ensuring and documenting that the training and competency of each member of the environmental laboratory technical staff is kept up to date by maintaining records demonstrating the following:

(i) That each employee has read, understood and is using the latest version of the environmental laboratory's quality manual that relates to each employee's job responsibilities.

(ii) That each employee has read, understood and is using the latest versions of the environmental laboratory's standard operating procedures that relate to each employee's job responsibilities.

(iii) Participation in training courses or workshops on specific equipment, analytical techniques or laboratory procedures that relate to each employee's job responsibilities.

(iv) Participation in training courses in ethical and legal responsibilities including the potential liabilities for improper, unethical or illegal actions.

(v) That each employee has read, understood and acknowledged his personal ethical and legal responsibilities including the potential punishments and penalties for improper, unethical or illegal actions.

(vi) An initial demonstration of capability for each method that relates to the employee's job responsibilities has been performed. The initial demonstration of capability requirements are as follows:

(A) An initial demonstration of capability is required prior to the use of any method.

(B) An initial demonstration of capability shall be completed each time there is a change in instrument type, personnel or method.

(C) An initial demonstration of capability must include all sample preparation and analytical steps contained in the method.

(D) If the method or State or Federal regulations specify a procedure for the initial demonstration of capability, that procedure shall be followed; otherwise, an initial demonstration of capability shall be performed as follows:

(I) The analyte shall be diluted in a volume of clean matrix sufficient to prepare four aliquots at the concentration specified in the method. If the method does not specify a concentration, the concentration must be in the lower half of the calibration range or at or below the maximum contaminant level for Safe Drinking Water Act compliance testing, whichever is lower.

(II) At least four aliquots of the quality control sample shall be prepared and analyzed consecutively according to the method. The preparation or analysis, or both, may occur on a single day or over the course of multiple days.

(III) Using all of the results, calculate the individual recovery, the mean recovery and the standard deviation of the mean recovery for the population sample in the same units used to report environmental samples. When it is not possible to determine mean and standard deviation, such as for presence-absence and logarithmic values, the environmental laboratory shall assess method performance using criteria from the method or other established and documented criteria.

(IV) Compare the information from subclause (III) to the corresponding acceptance criteria for precision and accuracy in the method. If the method or regulation does not specify acceptance limits, the % Relative Standard Deviation must be less than 20%. To be considered acceptable, an initial demonstration of capability must meet all acceptance criteria.

(E) When a method has been in use by an environmental laboratory prior to January 1, 2005, and there have been no changes in instrument type, personnel or method, the environmental laboratory shall have records on file to demonstrate that an initial demonstration of capability is not required.

(F) The laboratory shall retain all data necessary to reproduce the initial demonstration of capability.

(G) The work cell as a unit shall meet the following requirements:

(I) When a member of a work cell changes, the new work cell shall demonstrate capability by means of acceptable quality control performance checks on four consecutive batches. The acceptable performance shall be documented. If any quality control performance check within the four consecutive batches following the change in personnel fails to meet acceptance criteria, an initial demonstration of capability shall be completed.

(II) If the entire work cell is changed, an initial demonstration of capability shall be completed.

(vii) A demonstration of continued proficiency by at least one of the following every 12 months for each method that relates to the employee's job responsibilities:

(A) Another initial demonstration of capability.

(B) Acceptable performance of blind performance samples (single blind to the analyst).

(C) Successful analysis of blind proficiency test samples on a similar test method using the same technology (for example—GC/MS volatiles by purge and trap for EPA Methods 524.2, 624 or 5030/8260 would require documentation for only one of the test methods).

(D) At least four consecutive laboratory control samples with acceptable levels of precision and accuracy as required by the initial demonstration of capability described in subparagraph (vi).

(E) Analysis of at least ten authentic samples with results statistically indistinguishable from those obtained by another trained analyst. The samples must include samples free of the analyte of interest and samples containing the analyte of interest at measurable concentrations.

(4) Supervising personnel employed by the laboratory.

(5) Establishing and implementing procedures and processes for permitting departures from documented policies and procedures.

(6) Ensuring that sample acceptance criteria are verified and that samples are logged into the sample tracking system and properly labeled and stored.

(7) Developing a proactive program for prevention and detection of improper, unethical or illegal actions. Components of this program may include the following:

(i) Internal proficiency testing (single and double blind).

(ii) Postanalysis electronic data and magnetic tape audits or reviews.

(iii) Separate standard operating procedures identifying appropriate and inappropriate laboratory and instrument manipulation practices.

(c) An environmental laboratory shall maintain records on initial demonstrations of capability, demonstrations of continued proficiency, proficiency test samples for each laboratory method and the qualifications, training, skills and experience of the laboratory technical staff members.

§ 252.306. Equipment, supplies and reference materials.

(a) An environmental laboratory shall be furnished with all items of equipment, including reference materials, required for the correct performance of tests or analyses for which accreditation is sought.

(b) An environmental laboratory shall maintain records of each item of equipment significant to the testing or analysis performed. These records must include documentation on the following:

(1) The name of the item of equipment.

(2) The manufacturer's name, type identification, and serial number or other unique identification.

(3) The date received and date placed in service (if available).

(4) The current location, when appropriate.

(5) If available, condition when received (for example, new, used or reconditioned).

(6) A copy of the manufacturer's instructions, when available.

(7) The dates and results of calibrations or verifications.

(8) The manufacturer's instructions, if available, or reference their location.

(9) The details of maintenance performed.

(10) A history of damage, malfunction, modification or repair.

(c) An environmental laboratory shall assure that the test instruments and all equipment, supplies and reference materials consistently operate within and meet the specifications required of the application for which it is used.

(d) Equipment shall be properly maintained, inspected and cleaned.

(e) Any item of equipment that has been subjected to overloading, mishandling, gives suspect results or has otherwise been shown to be defective, shall be taken out of service and clearly identified until it has been repaired and shown by calibration, verification or test to perform satisfactorily. The laboratory shall examine the effect of this defect on previous testing or analysis.

(f) The following pieces of equipment shall be maintained according to this subsection.

(1) *Certified NIST-reference thermometer.*

(i) A certified NIST-reference thermometer must have appropriate graduations and a range that spans the requirements of the method.

(ii) The certified NIST-reference thermometer shall be recalibrated at least once every 5 years at the temperatures of use.

(iii) An environmental laboratory shall retain a certificate documenting traceability of the calibration to NIST standards.

(2) *Working thermometers.*

(i) Working thermometers must have appropriate graduations and a range that spans the requirements of the method.

(ii) Working thermometers may be glass, dial or electronic and shall be calibrated against a certified NIST-reference thermometer as follows:

(A) Glass, liquid filled thermometers shall be calibrated every 12 months at the temperature used.

(B) Dial and electronic thermometers shall be calibrated every 3 months at the temperature used. Electronic thermometers accompanied by a valid NIST traceable certificate of acceptance may be used for 12 months from the date of receipt before recalibration.

(C) An environmental laboratory shall maintain records in a laboratory notebook for each working thermometer that document the date of calibration, NIST reference thermometer identification, working thermometer identification, reference thermometer temperature reading, working thermometer temperature reading, correction factor and the initials of the individual conducting the calibration.

(D) Working thermometers shall be uniquely identified and labeled with the date of calibration and correction factor.

(iii) The fluid column in glass thermometers may not be separated.

(iv) A working thermometer that differs by more than 2.0°C from the reference thermometer may not be used.

(3) *ASTM class 1, 2 or 3 (Class S or S-1), or better certified reference weights.*

(i) The mass of ASTM class 1, 2 or 3 (Class S or S-1), or better certified reference weights shall be recertified at least once every 5 years.

(ii) An environmental laboratory shall retain a certificate documenting traceability of the calibration to ASTM standards.

(4) *Analytical or pan balances.*

(i) Analytical or pan balances must provide sufficient accuracy and sensitivity for the weighing needs of the method.

(ii) An environmental laboratory shall verify the calibration of a balance daily or before each use, whichever is less frequent.

(iii) A reference weight that is damaged or corroded may not be used for calibration of balances.

(iv) Balance calibration shall be verified using a minimum of three ASTM class 1, 2 or 3 (Class S or S-1) certified reference weights that bracket the effective range of the balance's use.

(v) An environmental laboratory shall maintain records in a laboratory notebook of balance calibrations and verifications that document the balance identification, date of calibration, date of verification, reference weights used, observed measurement and initials of the individual performing the calibration verification.

(vi) A qualified person shall service and calibrate analytical balances at least once per year.

(vii) Records of annual service shall be maintained and the service date shall be recorded on the balance.

(5) *pH meter.*

(i) A pH meter must be equipped with an appropriate electrode and have scale graduators and accuracy appropriate to the method.

(ii) An environmental laboratory shall utilize either a thermometer or a temperature sensor for automatic compensation to make corrections for pH measurements.

(iii) The pH meter shall be calibrated daily or before each use, whichever is less frequent, by one of the following:

(A) With at least three standard buffers which are at least three pH units apart.

(B) Use a pH 7.0 and either a pH 4.0 or 10.0 standard buffer, whichever range covers the desired pH range of use.

(iv) Aliquots of standard buffers may not be used for longer than 1 analysis day.

(v) Records of pH meter calibration shall be maintained in a laboratory notebook that document the date of calibration, calibration buffers used, results of the calibration, results of the calibration verification and initials of the individual conducting the calibration.

(6) *Conductivity meter.*

(i) A conductivity meter must have a probe of sufficient sensitivity for the method. The scale must have readability in appropriate units, for example micromhos or microsiemens per centimeter.

(ii) An in-line conductivity meter that cannot be calibrated may not be used.

(iii) An environmental laboratory shall calibrate the conductivity meter daily or before each use whichever is less frequent, by one of the following:

(A) With certified and traceable standard solutions within the range of interest.

(B) By determining the cell constant utilizing the method described in currently approved editions of *Standard Methods for the Examination of Water and Wastewater* (available from American Public Health Association, 1015 Fifteenth Street, NW, Washington, D.C. 20005.)

(iv) Records of conductivity meter calibrations shall be maintained in a laboratory notebook that documents the

date of calibration, standards used, results of calibration or cell constant determined and the initials of the individual conducting the calibration.

(7) *Refrigeration equipment and freezers.*

(i) An environmental laboratory shall maintain one thermometer immersed in liquid (except electronic thermometers) to the appropriate immersion line for each refrigerator or freezer. The thermometer must be graduated in increments no larger than 1°C.

(ii) Calibration-corrected temperatures for each refrigerator and freezer shall be recorded once a day for each working day in use for all laboratory activities. The date, refrigerator or freezer identification, calibration corrected temperature and initial of responsible individual shall be recorded.

(iii) Samples and standards shall be stored in separate refrigerators where the potential for cross-contamination exists.

(iv) Samples which require thermal preservation shall be stored at a temperature which is ± 2°C of the specified preservation temperature unless method specific criteria exist. For samples with a storage temperature of 4°C, storage at a temperature of 0.5°C to 6°C is acceptable.

(v) Freezer temperatures must be less than 0°C.

(8) *Incubators, water baths, heating blocks and ovens.*

(i) An environmental laboratory shall control and monitor the temperature of incubators, water baths, heating blocks and ovens in accordance with the method or as specified by regulations.

(ii) An environmental laboratory shall maintain a minimum of one thermometer per incubator, water bath, heating block or oven immersed in liquid or sand for ovens (except electronic thermometers) to the appropriate immersion line. When used as an incubation unit for microbiology, a minimum of one working thermometer shall be on the top and bottom shelf of the use area in each incubator.

(iii) When used as an incubation unit for microbiology, a water bath must be equipped with a gable cover and a pump or paddles to circulate the water.

(iv) Calibration-corrected temperatures for each incubator, water bath, heating block or oven shall be recorded once a day for each working day in use for all laboratory activities. When used as an incubation unit for microbiology, the calibration-corrected temperature shall be recorded at least twice per day each day the incubator is in use with the readings separated by at least 4 hours. The incubator, water bath, heating block or oven identification, date, time, calibration corrected temperature and the initials of the responsible individual shall be recorded.

(9) *Volumetric dispensing devices.*

(i) Except for Class A glassware and glass microliter syringes, volumetric dispensing devices, including graduated cylinders, pipettes and burettes, must be of sufficient sensitivity for the application and the environmental laboratory shall verify and document the accuracy of the volume of use for each lot or at least once per year, whichever is more frequent. Delivery volumes of mechanical volumetric dispensing devices such as mechanical pipettes, autopipetors and dilutors shall be checked at least once every 3 months.

(ii) Verification will be considered acceptable if the accuracy of the volumetric dispensing device is within 2.5% of expected values. Volumetric dispensing devices that do not meet this criterion may not be used.

(10) *Graduated sample containers.*

(i) Except for Class A glassware, when graduation marks on filter funnels, sample bottles or labware are used to measure sample volume or prepare standards or reagents, an environmental laboratory shall verify and document the accuracy of the volume of use for each lot or at least once per year, whichever is more frequent.

(ii) Verification will be considered acceptable if the accuracy of the graduated sample container is within 2.5% of expected values. Graduated sample containers that do not meet this criterion may not be used to measure sample volumes.

(g) An environmental laboratory shall maintain records for all reference materials, reagents, laboratory supplies that are essential to obtain analytical results and support services utilized by the laboratory for testing or analysis.

(h) Reference materials, reagents, media and laboratory supplies that are essential to obtain analytical results (such as filters, solid-phase extraction disks/cartridges, presterilized filtration units, certified precleaned laboratory supplies, disposable volumetric equipment, prepreserved sample containers) must meet the following minimum requirements:

(1) Analytical reagent grade chemicals or equivalent are acceptable, unless a method specifies other reagent purity grade requirements.

(2) Standard, reagent, media and laboratory supply receipt records shall be maintained. These records must include vendor, lot number, amount received, date of receipt, expiration date and certificates of analysis or purity, if available.

(3) Purchased chemicals, solutions, standards, media and laboratory supplies shall be labeled with date of receipt, expiration date and the date when the container is opened. Purchased chemicals, solutions and standards without an expiration date on the original container shall be discarded after 10 years from the date of receipt.

(4) An environmental laboratory shall maintain records of standard, reagent and media preparation. Standard, media and reagent preparation records must contain identification of the compound, manufacturer, lot number, concentration, amount prepared, date prepared, final pH if used for microbiology testing, initials of the individual preparing the solution and expiration date.

(5) Reagent, media and standard solution containers shall be labeled with identification of the compound, traceability to the preparation record, such as unique identifier, and expiration date.

(6) Standards, reagents and media may not be used past the date of expiration. Expired reagents, standards and media shall be segregated from unexpired laboratory materials in a manner that ensures they are not used for the testing of environmental samples.

(7) Reagents, standards and media shall be checked regularly for signs of decomposition and evaporation. Reagents, standards and media exhibiting signs of decomposition or evaporation shall be discarded.

(8) When reagents, standards and media are removed from a container, the amount removed shall be used entirely or the unused portion discarded.

(9) Compressed gases must be of commercial grade, unless a method specifies other requirements.

(i) Plastic and glassware shall be cleaned to meet the sensitivity of the test method. Any cleaning and storage procedures that are not specified by the method shall be documented in a laboratory standard operating procedure.

(j) Except for circulating water baths, the laboratory shall perform temperature distribution studies for incubators that are used as incubation units for microbiology. The laboratory shall perform a temperature distribution study for each incubator prior to first use, after repair and every 3 years by the following procedure:

(1) The laboratory shall develop a procedure to determine the temperature distribution and fluctuations within an incubator. The laboratory shall take into account the size of the incubator (height, width and depth), number of shelves and type of incubator when developing the procedure to perform the temperature distribution study.

(2) At a minimum, the laboratory shall monitor and record the temperature of each shelf.

(3) Incubators that do not maintain constant temperatures within the acceptable temperature range for the application may not be used. The laboratory may establish procedures to limit incubator use to specific shelves or areas of the incubator that can be verified to maintain acceptable temperature fluctuations.

§ 252.307. Methodology.

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(i) When a method specifies a validation procedure, the validation procedure shall be completed before environmental samples may be analyzed and reported. The results of this validation procedure shall be documented and kept on file for the duration of use of the method and for at least 5 years after the method is no longer in use.

(j) An environmental laboratory shall maintain instructions for sample collection and preservation that meet the requirements of subsections (f) and (g).

(1) The environmental laboratory's instructions must accurately reflect all aspects of the sample collection and preservation requirements for the particular analyses, including the following:

(i) Container type, size and number of containers or bottles.

(ii) Sample collection method, amount of sample required and explanation of other specific requirements for sample collection such as "zero headspace" and "first draw."

(iii) Chemical preservation, including type of preservation and the procedure used to preserve the sample.

(iv) Thermal preservation, including the temperature requirements and procedure used to preserve the sample.

(v) Field blank requirements.

(vi) Holding time.

(2) The environmental laboratory shall make the sample collection and preservation instructions available to all laboratory sample collection personnel and to customers and clients that collect samples.

Subchapter D. QUALITY ASSURANCE AND QUALITY CONTROL REQUIREMENTS

§ 252.401. Basic requirements.

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(f) An environmental laboratory shall establish procedures for handling environmental samples.

(1) The environmental laboratory shall implement procedures for checking and verifying the condition of the sample. The results of these checks shall be recorded. The environmental laboratory shall check:

(i) The sample container and the sample preservation, both thermal and chemical, of each sample.

(ii) The sample pH for all samples to be analyzed for whole effluent toxicity and safe drinking water chemistry fields of accreditation, unless the sample is collected by the environmental laboratory performing the analysis.

(iii) The sample for the presence of residual chlorine when the presence of residual chlorine will compromise the validity of the test.

(2) The laboratory shall utilize a recordkeeping system that meets the requirements of § 252.706 to document receipt of all sample containers. The recordkeeping system must include the following:

(i) The client/project name.

(ii) The date, time and location of sample collection, name of sample collector and field identification code.

(iii) The date and time of laboratory receipt and identification of the individual receiving the sample at the laboratory.

(iv) Any comments resulting from inspection for sample rejection shall be linked to the laboratory ID code.

(v) A unique laboratory ID code that corresponds to the information required by this paragraph.

(vi) An identification of the person making the entries.

(g) An environmental laboratory shall have a sample acceptance policy that clearly outlines the circumstances under which environmental samples will be accepted or rejected. The environmental sample acceptance policy must include the following areas:

(1) Sample identification, location, date and time of collection, collector's name, preservation type and sample type.

(2) Sample labeling.

(3) Use of appropriate containers and sample preservation method.

(4) Adherence to holding times specified in the regulation and when not specified by the regulation, adherence to the holding times specified by the method.

(5) Sufficient sample volume shall be available to perform the necessary testing and analysis, including any required quality control testing or analysis.

(6) Procedures to be used when samples show signs of damage, contamination or inadequate preservation.

(h) An environmental laboratory shall document the laboratory management's processes and procedures for permitting departures from the method, quality manual, established policies and procedures or standard operating procedures.

(i) An environmental laboratory shall establish procedures for detecting when departures from the method or quality manual have occurred. These procedures must include the following:

(1) Identify the individuals responsible for assessing each quality control type.

(2) Identify the individuals responsible for initiating or recommending, or both, corrective actions.

(3) Define how the analyst shall treat the results of testing or analysis of environmental samples if the associated quality control measures fail to meet the requirements of the method.

(4) Specify how out-of-control situations and subsequent corrective actions are to be documented.

(5) Specify procedures for the laboratory supervisor to review corrective action reports.

(j) An environmental laboratory shall develop procedures for reporting results of testing or analysis of environmental samples. Each test report must include at least the following information, except as specified in subsection (k).

(1) The name and address of the laboratory.

(2) The total number of pages in the report, including any addendums, in the format of Page x of y.

(3) The name and address of the client.

(4) An identification of the test method used.

(5) An identification of the samples including the client identification code.

(6) The date and time of sample collection.

(7) The date of sample analysis.

(8) The date and time of sample preparation or analysis, or both, if the holding time requirement for either activity is less than or equal to 72 hours.

(9) The test results and units of measurement.

(10) The quantitation limit.

(11) The names, functions and signatures of the persons authorizing the test report.

(12) An identification of results reported on a basis other than as received (for example, dry weight).

(13) An identification of testing or analysis results not covered by the laboratory's scope of accreditation.

(14) An identification of results that do not meet the requirements of this chapter.

(15) An identification of subcontracted results.

(16) A unique test report identifier code, such as a serial number or other unique code.

(17) An identification of amendments to the test report. The laboratory shall uniquely identify all amendments to a test report. The amended report shall be issued in the form of a further document, data transfer or completely new test report, which includes the statement "Amended" or "Revised" and the identification of the unique laboratory code that meets the requirements of paragraph (16).

(k) Tests performed by an environmental laboratory operated by a facility that provides results to the facility management for compliance purposes do not need to be reported under subsection (j) regarding procedures for reporting results, provided the information required by subsection (j) is maintained under § 252.706.

(l) An environmental laboratory shall implement procedures or practices to monitor the quality of the laboratory's analytical activities. Examples of the procedures or practices are:

(1) Internal quality control procedures using statistical techniques.

(2) Participation in proficiency testing, other interlaboratory comparisons or round robin testing.

(3) Analysis of split samples by different laboratories.

(4) Use of certified reference materials or in-house quality control using secondary reference materials, or both.

(5) Replicate testing using the same or different test methods.

(6) Retesting of retained samples.

(7) Correlation of results for different but related analysis of a sample (for example, total phosphorus should be greater than or equal to orthophosphate).

(m) To the extent possible, results of testing or analysis of environmental samples shall be reported only if all quality control, analytical testing and sample acceptance measures are acceptable. If a quality control, analytical testing or sample acceptance measure is found to be out of control and the results of the testing or analysis of environmental samples are to be reported, all environmental samples associated with the failed quality control measure shall be documented and the results flagged in an unambiguous manner on the sample analysis report with the appropriate data qualifiers.

(n) Policies, procedures, protocols and practices specified in this section must be in writing and be followed.

(o) The environmental laboratory shall clearly identify opinions and interpretations as opinions and interpretations on test reports. When test reports include opinions and interpretations, the laboratory shall include an explanation for the basis upon which the opinions and interpretations have been made.

§ 252.402. Essential quality control requirements—chemistry.

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(c) Initial calibration requirements are as follows:

(1) An environmental laboratory shall follow the initial calibration requirements of the method.

(2) The results of testing or analysis of environmental samples shall be determined from an initial calibration and may not be determined from any continuing calibration verification, unless otherwise required by regulation, method or program.

(3) The details of the initial calibration procedures including calculations, integrations, acceptance criteria and associated statistics shall be included or referenced in the laboratory's standard operating procedure.

(4) Raw data records shall be retained to permit reconstruction of the initial calibration, including identification or reference to the reagents, standards and supplies used, dates of analysis, instrument identification, results of the initial calibration, calibration criteria and analyst identification.

* * * * *

(f) Calibration verification requirements are as follows:

(1) A calibration verification standard shall be analyzed at the beginning and end of each analysis day. For

methods that use an internal standard, a calibration verification standard is not required at the end of the analysis day unless specified in the method, or State or Federal law or regulation.

(2) A calibration verification standard shall be analyzed after every ten samples, unless a different frequency is specified in the method.

(3) At a minimum, the laboratory shall verify the calibration curve of each analytical batch with calibration verification standards at a low and a high level.

(i) The concentration of the low calibration verification standard shall be within the lower 20% of the calibration curve and not more than five times the lowest quantitation level.

(ii) The concentration of the high calibration verification standard shall be within the upper 20% of the calibration curve.

(4) Details of the calibration verification procedure including calculations, integrations, acceptance criteria and associated statistics shall be included or referenced in the laboratory's standard operating procedure.

(5) Raw data records shall be retained to permit reconstruction of the calibration verification.

(6) Acceptance criteria for calibration verification standards in the method shall be followed. When there are no established criteria in the method, an environmental laboratory shall use the acceptance criteria described in an equivalent method for the same type of analysis. When an equivalent method is not available, the laboratory shall establish control charts in accordance with *Standard Methods for the Examination of Water and Wastewater* (available from the American Public Health Association, 800 I Street, NW, Washington, D.C. 20001) to determine internal criteria and document the procedure used to establish the acceptance limits.

(7) If a calibration verification standard fails the established acceptance criteria, an environmental laboratory shall initiate corrective actions. If the corrective actions fail to produce an immediate consecutive calibration verification standard within the acceptance criteria, a new calibration verification standard shall be prepared. If the freshly prepared calibration verification standard fails to produce a result within the established acceptance criteria, the environmental laboratory shall recalibrate the test or analysis according to the method or as set forth in subsection (c) and as set forth in either subsection (d) or (e).

(8) To the extent possible, and as provided by paragraph (1), environmental samples not bracketed by acceptable calibration verification standards shall be reanalyzed. If the calibration verification standard is found to be out of control, and the results of the testing or analysis of environmental samples are to be reported, all environmental samples associated with the failed calibration verification standard shall be documented and the results flagged in an unambiguous manner on the sample analysis report with the appropriate data qualifiers.

(g) Method blank requirements are as follows:

(1) A method blank must be processed along with and under the same conditions as the associated environmental samples including all steps of the analytical procedure.

(2) A method blank must be analyzed at a minimum of one per preparation batch. When no separate preparation method is used (example: volatiles in water), the batch shall be defined as no more than 20 environmental samples that are analyzed together using the same method, personnel and lots of reagents.

(3) A method blank must consist of a matrix that is similar to the associated environmental samples and is free of the analytes of interest. When a matrix that is similar to the associated environmental samples that is free of the analytes of interest is not available, reagent water or an artificial or simulated matrix may be used.

(4) A method blank is considered contaminated if one of the following applies:

(i) The concentration of a target analyte in the method blank is at or above the reporting limit established by the method, by the laboratory or by regulation.

(ii) The contamination in the method blank otherwise affects the environmental sample results as described in the method or in individual project data quality objectives.

(5) If a contaminant is detected in the method blank, the source of contamination shall be investigated and measures shall be taken to minimize or eliminate the problem.

(6) Raw data records shall be retained to permit reconstruction of the method blank.

(7) To the extent possible, any environmental samples associated with a contaminated method blank shall be reprocessed for analysis. If a contaminated method blank is found to be out of control, and the results of the testing or analysis of environmental samples are to be reported, all environmental samples associated with the contaminated method blank shall be documented and the results flagged in an unambiguous manner on the sample analysis report with the appropriate data qualifiers.

(h) Laboratory control sample requirements are as follows:

(1) A laboratory control sample must be processed along with and under the same conditions as the associated environmental samples, including all steps of the preparation and analytical procedure.

(2) A laboratory control sample must consist of a matrix that is similar to the associated environmental samples and is free of the analytes of interest. When a matrix that is similar to the associated environmental samples that is free of the analytes of interest is not available, reagent water or an artificial or simulated matrix may be used.

(3) An environmental laboratory shall analyze a laboratory control sample at a minimum of one per preparation batch. When no separate preparation method is used, for example volatiles in water, the batch shall be defined as no more than 20 environmental samples that are analyzed together with the same method, personnel and lots of reagents.

(4) All analyte concentrations in the laboratory control sample must be within the calibration range of the method and at or below the maximum contaminant level.

(5) The components to be spiked into the laboratory control sample must be as specified by the method or other regulatory requirement. In the absence of specified components, the environmental laboratory shall use the following:

(i) For those components that interfere with an accurate assessment, such as spiking simultaneously with technical chlordane, toxaphene and PCBs, the laboratory

control sample must represent the chemistries and elution patterns of the components to be reported.

(ii) For methods with more than ten analytes, a representative number may be chosen. The analytes selected shall be representative of all chemistries and analytes reported and shall be chosen using the following criteria:

(A) Targeted components shall be included in the laboratory control sample over a 2-year period.

(B) For methods that include one to ten components, the laboratory control sample must contain all components.

(C) For methods that include 11—20 components, the laboratory control sample must contain at least 10 components or 80%, whichever is greater.

(D) For methods with more than 20 components, the laboratory control samples must contain at least 16 components.

(6) Each individual laboratory control sample shall be compared to the acceptance criteria in the method. When there are no established criteria in the method, an environmental laboratory shall use the acceptance criteria described in an equivalent method for the same type of analysis. When an equivalent method is not available, the laboratory shall establish control charts in accordance with *Standard Methods for the Examination of Water and Wastewater* (available from the American Public Health Association, 800 I Street, NW, Washington, D.C. 20001) to determine internal criteria and document the procedure used to establish the limits.

(7) Raw data records shall be retained to permit reconstruction of the laboratory control sample.

(8) Environmental samples associated with an out of control laboratory control sample shall be reprocessed and reanalyzed from the beginning of the method or the results reported with the appropriate data qualifiers.

(i) Sample duplicate requirements are as follows:

(1) A sample duplicate or matrix spike duplicate must be processed along with and under the same conditions as the associated environmental samples, including all steps of the preparation and analytical procedure.

(2) A sample duplicate or matrix spike duplicate shall be analyzed at a minimum of one per preparation batch. When no separate preparation method is used, for example volatiles in water, the batch shall be defined as no more than 20 environmental samples that are analyzed together using the same method, personnel and lots of reagents.

(3) An environmental laboratory shall document the calculations used for determining the relative percent difference or other statistical method for evaluation of the duplicate pairs.

(4) Each duplicate relative percent difference shall be compared to the acceptance criteria in the method. When there are no established criteria in the method, an environmental laboratory shall use the acceptance criteria described in an equivalent method for the same type of analysis. When an equivalent method is not available, the laboratory shall establish control charts in accordance with *Standard Methods for the Examination of Water and Wastewater* (available from the American Public Health Association, 800 I Street, NW, Washington, D.C. 20001) to determine internal criteria and document the procedure used to establish the acceptance limits.

(5) For duplicate results outside established criteria, corrective action shall be documented and the data reported with appropriate data qualifiers.

(j) Surrogate spike requirements are as follows:

(1) Surrogate compounds, when commercially available, shall be added to all samples, standards and blanks for all organic chromatography test methods.

(2) Surrogate compounds shall be chosen to represent the various chemistries of the target analytes in the method.

(3) The results of the surrogate spike shall be compared to the acceptance criteria published in the method. When there are no established acceptance criteria for surrogate recovery in the method, the environmental laboratory shall use the acceptance criteria described in an equivalent method for the same type of analysis. When an equivalent method is not available, the laboratory shall establish control charts in accordance with *Standard Methods for the Examination of Water and Wastewater* (available from the American Public Health Association, 800 I Street, NW, Washington, D.C. 20001) to establish internal criteria and document the method used to establish the acceptance limits.

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§ 252.404. Essential quality control requirement—microbiology.

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(c) The following pieces of equipment shall be maintained according to this subsection:

(1) *Autoclave.*

(i) An environmental laboratory shall use autoclaves that meet specified temperature tolerances of the method. Pressure cookers may not be used.

* * * * *

(9) *Plastic and glassware washing procedure.*

(i) Prior to the initial use of a lot of detergent or washing procedure, an environmental laboratory shall perform an inhibitory residue test utilizing the method described in the currently approved editions of *Standard Methods for the Examination of Water and Wastewater* (available from the American Public Health Association, 800 I Street, NW, Washington, D.C. 20001). Records of inhibitory residue tests shall be maintained and include the detergent identification, date, calculations, results and initials of responsible individual.

(ii) Washed plastic and glassware shall be tested at least once each month for possible acid or alkaline residue by testing at least one piece of plastic and glassware with a suitable pH indicator such as 0.04% bromothymol blue. Records of pH tests shall be maintained and include the date, results and identification of the responsible individual.

(10) *Ultraviolet lamp.* An environmental laboratory shall use a 365-nm, 6-watt ultraviolet lamp in a darkened room to view sample fluorescence.

(11) *Quanti-Tray™ Sealer.*

(i) An environmental laboratory shall perform a sealer check on each Quanti-Tray Sealer once a month by adding a dye to a water sample and performing the sealing procedure.

(ii) Records of the sealer check shall be maintained and include the sealer identification, date, results and initials of responsible individual. If dye is observed outside the wells, the Quanti-Tray Sealer may not be used.

(d) The requirements for reagent water are as follows:

(1) An environmental laboratory shall use reagent water in the preparation of media, solutions and buffers.

(2) An environmental laboratory shall demonstrate that reagent water meets the following criteria on a monthly basis or whenever maintenance is performed on the water treatment system or at startup after a period of nonuse longer than 1 month:

(i) Total chlorine residual must be less than 0.1 mg/L.

(ii) Conductivity must be less than 2.0 µmhos/cm or resistance greater than 0.5 megohms at 25°C.

(iii) Heterotrophic plate count must be less than 500 CFU/mL.

(3) An environmental laboratory shall demonstrate that reagent water meets the following criteria every 12 months:

(i) The individual concentration of lead, cadmium, chromium, copper, nickel and zinc must be less than 0.05 mg/L.

(ii) The total concentration of lead, cadmium, chromium, copper, nickel and zinc must be less than 0.1 mg/L.

(iii) Except as provided in subsection (d)(6), the bacteriological water quality test ratio must be between 0.8 and 3.0. The bacteriological water quality test shall be performed according to the currently approved editions of *Standard Methods for the Examination of Water and Wastewater* (available from the American Public Health Association, 800 I Street, NW, Washington, D.C. 20001).

(4) The metals analyses may only be performed by an environmental laboratory accredited under this chapter for those fields of accreditation.

(5) Results of the monthly and annual reagent water analysis shall be maintained and include the date, type of test, results and initials of responsible individual. Reagent water that does not meet the required criteria may not be used.

(6) The bacteriological water quality test need not be performed if the environmental laboratory can supply documentation to show that their laboratory pure water or reagent water meets the criteria, as specified in section 1080 of the currently approved editions of *Standard Methods for the Examination of Water and Wastewater* (available from the American Public Health Association, 800 I Street, NW, Washington, D.C. 20001), for Type I (high-quality) or Type II (medium-quality) reagent water.

(7) The heterotrophic plate count and bacteriological water quality test ratio analyses described in paragraphs (2) and (3) shall be performed by an environmental laboratory accredited under this chapter for the appropriate field of accreditation.

(e) The requirements for dilution/rinse water are as follows:

(1) Stock buffer solution or peptone water shall be prepared as specified in the currently approved editions of *Standard Methods for the Examination of Water and Wastewater* (available from the American Public Health Association, 800 I Street, NW, Washington, D.C. 20001).

(2) Stock buffers shall be autoclaved or filter-sterilized. Stock buffers shall be refrigerated and must be free from turbidity.

(3) Dilution/rinse water solutions shall be prepared as specified in the currently approved editions of *Standard Methods for the Examination of Water and Wastewater* (available from the American Public Health Association, 800 I Street, NW, Washington, D.C. 20001).

(f) The requirements for media are as follows:

(1) An environmental laboratory shall use dehydrated or commercially manufactured prepared media. Dehydrated media shall be stored in a cool, dry location. Caked or discolored dehydrated media shall be discarded.

(2) An environmental laboratory that prepares media from dehydrated stock shall follow method specifications.

(3) Media may not be reautoclaved.

(4) After preparation, media shall be stored and maintained as follows:

(i) Stored away from sources of direct light.

(ii) Prepared plates shall be stored in sealed plastic bags or containers.

(iii) Each bag, container or rack of broth or agar media shall be labeled with the date prepared or expiration date.

(iv) Fermentation media stored in a refrigerator shall be brought to room temperature before use. Media that shows growth or false positive results may not be used.

(v) Prepared liquid media shall be discarded if evaporation exceeds 10% of the original volume.

(vi) Poured agar plates and broth in tubes, bottles or flasks with loose-fitting closures shall be discarded if not used within 2 weeks of sterilization unless otherwise specified by the method.

(vii) Broth in tightly closed screw-cap tubes, bottles or flasks shall be discarded if not used within 3 months of sterilization unless otherwise specified by the method.

(g) An environmental laboratory shall demonstrate that the filtration equipment and filters, sample containers, media and reagents have not been contaminated through improper handling or preparation, inadequate sterilization or environmental exposure as follows:

(1) A sterility blank shall be analyzed for each lot of preprepared, ready-to-use medium and for each batch of medium prepared in the laboratory prior to first use of the medium. Records shall be maintained and include media identification, date and time of the start and end of incubation, results and initials of the responsible individuals. If sterility blank indicates contamination, the media may not be used.

(i) For chromogenic/fluorogenic media, add single-strength media to sterile reagent water and incubate at the appropriate temperature and time.

(ii) For all other media, incubate uninoculated, single-strength at the appropriate temperature and time.

(2) For each reusable membrane filtration unit used during a filtration series, the laboratory shall prepare at least one sterility blank at the beginning and at the end of the series. A series is considered ended when more than 30 minutes elapses between filtrations. The laboratory shall insert a sterility blank after every ten sample aliquots filtered through each membrane filtration unit or sanitize filtration units by UV light after each sample filtration in addition to the regular rinsing procedure. Records of sterility blank results shall be maintained in the same manner as the associated sample and include the date and time of the start and end of the incubation, results and initials of the responsible individuals. If

sterility blanks indicate contamination, the laboratory must treat each affected sample according to program requirements.

(3) For presterilized single use filtration funnel units, a sterility check shall be performed on one funnel unit per lot.

(4) Sterility checks on sample containers shall be performed on at least one container for each lot of purchased, presterilized containers with an appropriate nonselective growth media. For containers prepared and sterilized in the laboratory, a sterility check shall be performed on one container per sterilized batch with an appropriate nonselective growth media. Results shall be maintained and include sample container identification, date and time of the start and end of incubation, results and initials of responsible individuals. If sample container sterility check indicates contamination, the affected sample container may not be used.

(5) A sterility blank shall be performed on each batch of dilution/rinse water prepared in the laboratory and on each batch of preprepared, ready-to-use dilution water with an appropriate nonselective growth media. The concentration of media shall be single strength after addition of dilution water. Results shall be maintained and include dilution/rinse water identification, date and time of the start and end of incubation, results and initials of the responsible individuals. If dilution/rinse water sterility check indicates contamination, the affected dilution water may not be used.

(6) At least one filter from each new lot of membrane filters shall be checked for sterility with an appropriate nonselective growth media. Results shall be maintained and include membrane filter identification, date and time of the start and end of incubation, results and initials of the responsible individuals. If the membrane filter sterility check indicates contamination, the affected membrane filters may not be used.

(7) Sterility checks on Quanti-Tray sample trays shall be performed on at least one sample tray for each lot of purchased presterilized sample trays with an appropriate nonselective growth media. Results shall be maintained and include sample tray identification, date and time of the start and end of incubation, results and initials of the responsible individuals. If the sample tray sterility check indicates contamination, the affected lot of sample trays may not be used.

(h) The requirements for positive and negative culture control checks are as follows:

(1) Each preprepared, ready-to-use lot of medium and each batch of medium prepared in the laboratory shall be tested by the laboratory with at least one pure culture of a known positive reaction prior to first use of the medium. Records shall be maintained and include the date and time of the start and end of incubation, media lot or batch number, type of media, positive culture control organism identification, results and initials of the responsible individuals. If positive culture control checks do not meet expected results, the affected media may not be used.

(2) Each preprepared, ready-to-use lot of selective medium and each batch of selective medium prepared in the laboratory shall be tested by the laboratory with at least one pure culture of a known negative reaction prior to first use of the medium. Records shall be maintained and include the date and time of the start and end of incubation, media lot or batch number, type of media, negative culture control organism identification, results and initials of the responsible individuals. If negative culture control checks do not meet expected results, the affected media may not be used.

(3) An environmental laboratory shall use stock positive and negative culture controls that are known and traceable to a recognized National collection. Documentation of traceability shall be maintained.

(4) Stock positive and negative culture controls shall be discarded after the manufacturer's expiration date.

(5) Culture controls may be single use or cultures maintained by the laboratory using a documented procedure that maintains the purity and viability of the organisms.

(6) For cultures maintained by the laboratory, the following criteria must be met:

(i) Reference control cultures may be revived and subcultured once to provide reference stocks.

(ii) Reference stocks shall be preserved using a method which maintains the characteristics of the organism strains. If reference stocks are thawed, they may not be refrozen and reused.

(iii) Working stocks shall be prepared from reference stocks for routine laboratory work.

(iv) If the laboratory sequentially cultures working stocks, the laboratory shall prepare a second working stock. Sequential culturing may not be performed from a working stock that has been used for routine laboratory work.

(v) Working stocks may not be used for more than 30 days.

(vi) Working stocks may not be sequentially cultured more than five times and may not be subcultured to replace reference stocks.

(vii) Secondary working stocks shall be used to prepare sequential working stocks.

(7) Positive and negative controls must be processed under the same conditions and using the same equipment as routine environmental samples, including all steps of the preparation and analytical procedure.

(i) For test methods that specify colony counts, duplicate counts shall be performed monthly on one positive sample for each month that the test is performed. If the laboratory has two or more analysts, each analyst shall count typical colonies on the same plate. Counts may not differ by more than 10%. In an environmental laboratory with only one analyst, the analyst shall count the same plate twice. Counts may not differ by more than 5%.

(j) Quality control checks, including sterility checks and positive and negative controls, shall be conducted after the laboratory receives the material or supply and before or during first use. These checks shall be performed by an environmental laboratory accredited under this chapter and utilizing the same supplies, reagents and media to be used during laboratory analysis of environmental samples. Certificates of analysis from a manufacturer may not be used to demonstrate compliance with the requirements of this subsection.

(k) Records of all equipment, reference materials, reagents, media and supplies shall be maintained in accordance with § 252.306 (relating to equipment, supplies and reference materials).

Subchapter E. PROFICIENCY TEST STUDY REQUIREMENTS

§ 252.501. Proficiency test study requirements.

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(o) An environmental laboratory shall evaluate and report the analytical result of each proficiency test study sample to the proficiency test reporting limit for each field of accreditation, when available, as outlined in subsection (a).

(p) The Department will invalidate a proficiency test study result that is not handled, managed, analyzed or reported in accordance with this section.

Subchapter F. ASSESSMENT REQUIREMENTS

§ 252.601. Assessment requirements.

(a) Prior to granting primary accreditation to an environmental laboratory, the Department will perform an onsite assessment of the laboratory.

(b) Prior to granting accreditation for an additional field of accreditation to an environmental laboratory, the Department may perform an onsite assessment of the laboratory.

(c) The Department may conduct announced or unannounced onsite assessments of an environmental laboratory to ensure compliance with the conditions of accreditation, this chapter or orders issued by the Department.

(d) The Department will provide the environmental laboratory with an assessment report documenting any deficiencies found by the Department. The Department may deny, suspend or revoke an environmental laboratory's accreditation in accordance with Subchapter G (relating to miscellaneous provisions) before issuing the assessment report or during the corrective action process.

(e) An environmental laboratory shall submit a corrective action report to the Department within 60 calendar days from receipt of an assessment report from the Department when the Department has found deficiencies. The corrective action report must:

(1) Document the corrective action taken by the laboratory to correct each deficiency and the time frame for completion.

(2) Include documentation demonstrating correction of the deficiencies as requested by the Department.

(f) An environmental laboratory seeking NELAP accreditation shall submit a corrective action report to the Department within 30 calendar days from receipt of the assessment report from the Department when the Department has found deficiencies. If TNI establishes a different time for submitting corrective action reports, the laboratory shall follow the time established by TNI. The corrective action report must document the corrective action taken by the laboratory to correct each deficiency.

(g) If any portion of the corrective action report is not acceptable, an environmental laboratory shall submit a revised written corrective action report within 30 calendar days from receipt of the Department's response. If the second corrective action report is not acceptable, the Department may revoke accreditation.

(h) Unless otherwise required or approved by the Department, deficiencies shall be corrected within 120 calendar days of receipt of the assessment report.

(i) The Department may extend the period of implementing corrective actions, for specific deficiencies, for a maximum of 30 calendar days upon receipt of the laboratory's written petition and corrective action report, when the laboratory must take one or more of the following actions:

(1) Purchase new equipment.

(2) Revise the quality manual.

(3) Replace significant laboratory personnel.

Subchapter G. MISCELLANEOUS PROVISIONS

§ 252.701. Denial of application.

(a) The Department will deny an application for accreditation, transfer of accreditation or application for renewal of accreditation under one or more of the following circumstances:

(1) The environmental laboratory is in continuing violation of or demonstrates an inability or lack of intention to comply with this chapter or other laws administered by the Department.

(2) The Department revoked the environmental laboratory's certificate of accreditation for all fields of accreditation for failure to correct deficiencies identified in an assessment report within the previous 6 months.

(b) The Department may deny an application for accreditation, transfer of accreditation or application for renewal of accreditation for one or more of the following reasons:

(1) Falsifying analyses.

(2) Failure to comply with the reporting and notification requirements as specified in § 252.708 (relating to reporting and notification requirements).

(3) Making misrepresentations to the Department.

(4) Engaging in unethical or fraudulent practices.

(5) Analysis of proficiency test studies by personnel other than the analysts associated with the routine analysis of environmental samples in the laboratory.

(6) Failure to submit a complete application.

(7) Failure to pay required fees.

(8) Failure of laboratory staff to meet the personnel qualifications of education, training and experience.

(9) Failure to successfully analyze and report proficiency test studies as required by this chapter.

(10) Failure to respond to an assessment report with a corrective action report within the required time frames.

(11) Failure to submit an acceptable corrective action report in response to an assessment report within the required time frames.

(12) Failure to implement the corrective actions detailed in the environmental laboratory's corrective action report within a time frame approved by the Department.

(13) Failure to implement a quality assurance program.

(14) Denial of entry to the Department during normal business hours for an onsite assessment.

(15) Violation of a statute, this chapter or an order of the Department.

(16) Failure to meet the requirements of this chapter.

(17) Failure to maintain test instruments, equipment, supplies and reference materials that meet the specifications required to produce valid analytical results.

§ 252.702. Revocation.

(a) The Department will revoke an environmental laboratory's accreditation for a field of accreditation when, after being suspended due to failure to participate in a required proficiency test study or due to failure to obtain an acceptable result for a proficiency test study, the laboratory's analysis of the next proficiency test study results in a failed proficiency test study for that field of accreditation.

(b) The Department may revoke an environmental laboratory's accreditation, in part or in total, for one or more of the following reasons:

(1) Failure to respond to an assessment report with a corrective action report within the required time frames.

(2) Failure to correct deficiencies identified during an assessment of the environmental laboratory.

(3) Failure to implement corrective action to correct violations or deficiencies found during an assessment.

(4) Failure of an environmental laboratory that has been suspended to correct all outstanding violations or deficiencies within 6 months of the effective date of the suspension.

(5) Failure to submit an acceptable corrective action report in response to an assessment report within the required time frames.

(6) Violation of a condition of accreditation.

(7) Violation of a statute, this chapter or an order of the Department.

(8) Falsifying analyses.

(9) Making misrepresentations to the Department.

(10) Engaging in unethical or fraudulent practices.

(11) Analysis of proficiency test studies by personnel, procedures, equipment, facilities, number of replicates and methods other than those associated with the routine analysis of environmental samples in the laboratory.

(12) Failure to implement a quality assurance program.

(13) Failure to participate in the proficiency test study program as required by this chapter.

(14) Denial of entry to the Department during normal business hours for an onsite assessment.

(15) Failure to comply with the reporting and notification requirements as specified in § 252.708 (relating to reporting and notification requirements).

(16) Failure to employ staff that meets the personnel qualifications for education, training and experience.

(17) Failure to meet the requirements of this chapter.

(18) Failure to maintain test instruments, equipment, supplies and reference materials that meet the specifications required to produce valid analytical results.

(c) The environmental laboratory may continue to test or analyze environmental samples for those fields of accreditation not revoked.

(d) Within 72 hours of receiving notice of the revocation of accreditation from the Department, the environmental laboratory shall notify each of its customers affected by the revocation in writing of the revocation. The Department may require the laboratory to use specific language in the written notice or require Department approval of the notice before issuance.

§ 252.703. Suspension.

(a) Denial of access to the Department during normal business hours will result in immediate suspension of accreditation for all fields of accreditation. Upon notice from the Department, the laboratory shall immediately cease testing or analysis of environmental samples.

(b) The Department will suspend an environmental laboratory's accreditation in total or in part for one or more of the following reasons:

(1) The Department finds that protection of the environment or the public health, safety or welfare requires emergency action.

(2) The environmental laboratory fails to successfully complete a proficiency test study within the previous 12 months.

(3) The environmental laboratory fails two consecutive proficiency test studies for a field of accreditation.

(c) The Department may suspend a laboratory's accreditation in total or in part for one or more of the following reasons:

(1) Failure to comply with the reporting and notification requirements.

(2) Failure to implement a quality assurance program.

(3) Failure to employ staff that meets the personnel qualifications for education, training and experience.

(4) Failure to submit an acceptable corrective action report in response to an assessment report within the required time frames.

(5) Failure to correct deficiencies identified during an assessment of the environmental laboratory.

(6) Failure to implement corrective action related to violations or deficiencies found during an assessment.

(7) Failure to maintain test instruments, equipment, supplies and reference materials that meet the specifications required to produce valid analytical results.

(8) Failure to analyze and report proficiency testing study results in accordance with § 252.501 (relating to proficiency test study requirements).

(d) A laboratory may continue to test or analyze environmental samples for those fields of accreditation not affected by the suspension.

(e) Within 72 hours of receiving notice of the suspension of accreditation from the Department, the environmental laboratory shall notify each of its customers affected by the suspension in writing of the suspension. The Department may require the laboratory to use specific language in the written notice or require Department approval of the notice before issuance.

§ 252.704. Voluntary relinquishment.

(a) An environmental laboratory wishing to voluntarily relinquish its certificate of accreditation or accreditation for fields of accreditation shall notify the Department in writing.

(b) An environmental laboratory that voluntarily relinquishes its certificate of accreditation shall ensure records are maintained in accordance with § 252.706 (relating to recordkeeping).

(c) Within 72 hours of voluntarily relinquishing its certificate of accreditation, the laboratory shall notify each of its customers affected by the voluntary relinquishment in writing of the relinquishment. The Department

may require the laboratory to use specific language in the written notice or require Department approval of the notice before issuance.

§ 252.705. Use of accreditation.

(a) Environmental laboratories accredited by the Department shall:

(1) Post or display their most recent certificate of accreditation in a prominent place in the laboratory.

(2) Make accurate statements concerning their accreditation status.

(3) Not use their certificate of accreditation, accreditation status or the Department's logo to imply endorsement by the Department.

(b) Environmental laboratories using the Department's name, making reference to its accreditation status or using the Department's logo in catalogs, advertising, business solicitations, proposals, quotations, laboratory analytical reports or other materials, shall:

(1) Distinguish between testing for which the laboratory is accredited and testing for which the laboratory is not accredited.

(2) Include the environmental laboratory's accreditation number.

(c) Upon expiration, suspension, revocation or voluntary relinquishment of accreditation, a laboratory shall:

(1) Discontinue use of all catalogs, advertising, business solicitations, proposals, quotations, laboratory analytical results or other materials that contain reference to the laboratory's past accreditation status.

(2) Discontinue use or display of the Department's logo.

(3) Return unexpired certificates of accreditation to the Department within 48 hours.

(d) NELAP accredited laboratories shall accompany the Department's name or the NELAP logo with the phrase "NELAP accredited" and the laboratory's accreditation number when using the Department's name or the NELAP logo on general literature such as catalogs, advertising, business solicitations, proposals, quotations, laboratory analytical reports or other materials.

(e) NELAP accredited laboratories may not use their NELAP certificate, NELAP accreditation status or NELAP logo to imply endorsement by the Department or NELAP.

§ 252.706. Recordkeeping.

(a) An environmental laboratory shall maintain records in an organized manner accessible by the Department.

(b) An environmental laboratory shall maintain records, including original handwritten data, that allow reconstruction of all laboratory activities associated with the testing or analysis of environmental samples, proficiency test studies, initial demonstration of capability or demonstration of continued proficiency. These records include the following:

(1) Start and end dates and times of incubations, drying cycles, digestion, distillations, and the like, when a minimum or maximum time is specified by method, regulation or permit.

(2) Unequivocal link between the laboratory's sample identification number to the results of all associated quality control.

(3) Instrument identification.

(4) Identification of, or reference to, the standards, reagents, media, supplies, and the like, used during sample preparation or analysis, or both.

(5) The results of chemical or thermal preservation verifications or adjustments, or both.

(6) Date of sample preparation or analysis, or both.

(7) Time of sample preparation or analysis, or both, if the holding time for either activity is less than or equal to 72 hours.

(8) Manual calculations.

(9) Test results.

(c) All records, except records generated by automated collection systems, shall be recorded promptly and legibly in permanent ink or in an electronic format.

(1) The individual generating the record must be identified by initials or name and the individual making the observation must be identified by initials or name if different from the individual generating the record.

(2) Changes to records shall be made so that the original entry remains visible. The individual making the change shall be identified by name or initials, date the correction and include the reason for the change unless correcting a typographical error. These criteria also apply to electronically maintained records.

(d) Records required under this chapter shall be maintained for a minimum of 5 years unless otherwise specified.

(e) An environmental laboratory shall have a written plan that specifies how records will be maintained or transferred if the laboratory transfers ownership or terminates operations.

§ 252.708. Reporting and notification requirements.

(a) An environmental laboratory conducting testing or analysis of drinking water under Chapter 109 (relating to safe drinking water) shall:

(1) Meet the reporting and notification requirements of that chapter.

(2) Review all sample analysis data within 24 hours of acquisition of the initial sample results for inorganic nonmetals and trace metals analyses. The 24-hour deadline may be extended to a maximum of 72 hours to accommodate a holiday or weekend when the laboratory is closed for business.

(3) For organic and radiochemical analyses, review all sample analysis data within 7 days of acquisition of the initial sample results for organic analysis.

(4) For microbiological results, read all sample results within 30 minutes of the end of the incubation period.

(5) Analyze the laboratory control sample at a concentration at or below the maximum contaminant level.

(6) Report to the Drinking Water Environmental Lab Reporting system only those analytical test results that meet the method, regulatory and permit requirements for sample collection, preservation, holding time, sample analysis and quality control performance, unless the Department has specifically approved that the result may be reported.

(b) An environmental laboratory shall notify the Department, in writing, within 20 calendar days of a permanent change in laboratory supervisor.

(c) An environmental laboratory shall notify the Department, in writing, within 30 calendar days of a change in the legal name of the laboratory.

(d) An environmental laboratory shall notify the Department, in writing, within 30 calendar days of a change in any item contained on the application for accreditation.

(e) An environmental laboratory shall notify the Department, in writing, if a change in the laboratory's capability to produce valid analytical results persists for more than 90 calendar days for any field of accreditation listed on the laboratory's scope of accreditation.

(f) An out-of-State environmental laboratory with either primary or secondary accreditation from the Department shall notify, in writing, the Department within 48 hours of any changes in the laboratory's accreditation status from any other primary accreditation body.

(g) The Department may require additional information or proof of continued capability to perform the testing or analysis for affected fields of accreditation upon receipt of notification under this subsection.

(h) The Department may require an onsite assessment under § 252.601 (relating to assessment requirements) upon receipt of notification under this subsection.

[Pa.B. Doc. No. 17-1248. Filed for public inspection July 28, 2017, 9:00 a.m.]

SUSQUEHANNA RIVER BASIN COMMISSION

[25 PA. CODE CH. 806]

Review and Approval of Projects

Summary: This document contains rules that would amend the regulations of the Susquehanna River Basin Commission (Commission) to clarify application requirements and standards for review of projects, add a subpart to provide for registration of grandfathered projects, and revise requirements dealing with hearings and enforcement actions. These rules are designed to enhance the Commission's existing authorities to manage the water resources of the basin and add regulatory clarity.

Dates: This rule is effective July 1, 2017, except for the amendments to § 806.4(a)(1)(iii) and (a)(2)(iv) and the addition of subpart E to part 806 which are effective January 1, 2018.

Addresses: Susquehanna River Basin Commission, 4423 N. Front Street, Harrisburg, PA 17110-1788.

For Further Information Contact: Jason E. Oyler, Esq., General Counsel, telephone: 717-238-0423, ext. 1312; fax: 717-238-2436; e-mail: joyler@srbc.net. Also, for further information on the final rulemaking, including the comment response document, visit the Commission's website at www.srbc.net.

Supplementary Information: Notice of proposed rulemaking was published in the *Federal Register* on September 21, 2016 (81 FR 64812); *New York Register* on October 5, 2016; *Pennsylvania Bulletin* on October 8, 2016; and *Maryland Register* on October 14, 2017. The Commission convened four public hearings: on November 3, 2016, in Harrisburg, Pennsylvania; on November 9, 2016, in Binghamton, New York; on November 10, 2016, in Williamsport, Pennsylvania; and on December 8, 2016, in Annapolis, Maryland. A written comment period was held open through January 30, 2017.

The Commission received 14 written public comments in addition to testimony received at the public hearings. The Commission has prepared a comment response document, which is available to the public at www.srbc.net. Comments that led to a change to the proposed rulemaking and their responses are discussed below.

Registration of Grandfathered Projects, Subpart E and § 806.4(a)(1)(iii) and (a)(2)(iv)

Comment: The Commission should allow projects to register a grandfathered amount previously determined by the Commission if it is not seeking a higher amount through the registration process.

Response: The Commission agrees that previous grandfathering determinations should be honored if the project wishes to register that amount. A new paragraph (c) is added in § 806.44 allowing the Executive Director to use past grandfathering determinations, and revisions are made to § 806.42(b) allowing the Commission to waive certain registration information if a project is relying on a past grandfathering determination.

Comment: Ongoing reporting requirements need to be linked to member jurisdiction reporting to avoid duplication of effort and confusion.

Response: The Commission agrees with the commenter that it is important to avoid unnecessary duplication of effort with state law requirements. Section 806.43(c) notes that if quantity reporting is required by the member jurisdiction where the project is located, the Commission may accept that reporting to satisfy the requirements of this paragraph. This evidences the Commission's intent to use its best efforts to accept state reporting requirements where appropriate. The Commission will add language to §§ 806.42(a)(6) and 806.43(c) to clarify its intention to rely on member jurisdiction reporting where it is able, and that any additional reporting required will be because it is not duplicated by the member jurisdiction. A new § 806.43(d) is added to emphasize the commitment of the Commission and its member jurisdiction to share all reporting data and to further the goal of creating a unified data set for all agencies involved.

Comment: The proposed rule at § 806.4(a)(1)(iii)(A) and (a)(2)(iv)(A) changes the current rule that allows a grandfathered consumptive use an additional increase of up to 20,000 gpd and a grandfathered withdrawal an additional increase of up to 100,000 gpd before review and approval of the grandfathered activity is triggered. This leeway should be restored for grandfathered projects.

Response: In most instances, the registration process will allow grandfathered projects sufficient margin for operational flexibility. However, the Commission agrees that the registration process should not put a project in jeopardy of needing review and approval subsequent to registration absent a change to the project. A new factor is added as § 806.44(b)(4) that allows the Executive Director to consider whether the grandfathered amount includes an operational margin of safety.

Comment: The proposed rule provides that the determination of the grandfathered quantity will be based on the most recent data. This may be too restrictive and projects should be allowed to submit more than the last five years of data and where such data is submitted, the Executive Director should base the determination under § 806.44 on the peak 30-day average for withdrawals and consumptive uses shown by the data.

Response: The Commission agrees that the factor as written could be clarified and the final rule reflects a

revision to § 806.44(b)(1) to allow more than a minimum of five years of data to be submitted and that the Executive Director will consider the withdrawal and use data and the peak consecutive 30-day average shown by all the data submitted.

Consumptive Use Mitigation, § 806.22

Comments: The Commission should not adopt the Consumptive Use Mitigation Policy and the changes to the Consumptive Use Mitigation Rule.

The Commission should not shift the responsibility for physical consumptive use mitigation to project sponsors because project sponsor based mitigation will be more balkanized and less effective and the Commission has powerful tools to set up projects to provide such mitigation from the Compact.

The mitigation plan proposal should be removed or smaller projects should be able to have an abbreviated consumptive use mitigation alternative analysis.

New consumptive use mitigation requirements should not be applied retroactively to existing projects upon renewal.

The proposed rule should be revised to allow greater use of groundwater storage and quarries and be more flexible with respect to the "no impacts" to surface water requirements for such mitigation.

The Commission should focus its mitigation requirements to the low flow period.

All references to water critical planning areas should be removed. Article 11 of the Compact provides for designation of protected areas. This concept appears to circumvent those procedures.

Water critical areas should not be based on member jurisdiction planning areas and it should not be a mechanism to require mitigation for pre-compact consumptive use.

Response: The Commission has reviewed the detailed comments regarding how the Commission requires consumptive use mitigation and the options of projects to provide such mitigation. The Commission will further examine and reevaluate its policies and procedures for consumptive use and consumptive use mitigation in a more comprehensive fashion. As a result, the Commission will not move forward with the changes to the Consumptive Use Mitigation Policy and the consumptive use mitigation rule as follows. The definition of "water critical area" in § 806.3 is removed and all references to water critical areas are removed from §§ 806.22 and 808.1. The reference and changes associated with a mitigation plan in § 806.22(b) are removed. The changes associated with amending the 90 day mitigation requirement to 45 days in § 806.22(b)(1)(i) and (ii) are removed and reserved for the reevaluation process for consumptive use mitigation described above.

Project Review Application Procedures and Standards for Review and Approval—18 CFR Part 806, Subparts B and C

Comment: The Commission should clarify how the alternatives analysis under § 806.14(b)(2)(v) differs from the previous provision in the current rules at § 806.14(b)(1)(iii) and specify what is expected from applicants.

Response: The purpose for this requirement is to document the project sponsor's consideration of alternatives during planning of the proposed project to include, but not be limited to, identification of reasonable alternatives to the proposed water withdrawal project, the extent of the project sponsor's economic and technical investigation, the adequacy of the source to meet the demand, an assessment of the potential environmental impact, and measures for avoidance or minimization of adverse impact of each alternative. Specifically, the alternatives analysis should include identification of reasonable alternative water sources and locations, including opportunities for uses of lesser quality waters; project footprint and infrastructure; opportunities for water conservation or water saving technology; requirements of the uses of the water as related to the proposed locations; the economic feasibility of the alternative(s) and technical opportunities or limitations identified in the evaluation of reasonable alternate sites. The Commission is preparing a draft policy to outline how alternative analyses should be conducted and evaluated, and will release it for public comment prior to consideration for Commission adoption. In addition, on final rulemaking, the Commission will adjust the language of § 806.14(b)(1)(v) to make clear that the analysis is needed only for new projects and for major modifications that seek to increase the surface water withdrawal.

Comment: The Commission should reconcile the application requirements in § 806.14 to recognize that the potential for waiver of the aquifer testing requirements in § 806.12.

Response: The Commission agrees and has revised § 806.14(b)(2)(i) and (d)(2)(i).

Comment: The Commission should clarify whether renewals that involve a major modification should be handled under the new application and major modification standards in § 806.14(a) and (b) or in the renewal standards in § 806.14(c) and (d).

Response: The Commission agrees that the rule should be clarified and proposes changes to § 806.14(c) and 806.14(d)(2), (4) and (6) to establish that renewal applications, with either minor or major modifications, are subject to § 806.14(c) and (d).

Comment: The Commission should accept other types of certified mail proof of delivery beyond the US Postal Service under § 806.15(g).

Response: The Commission agrees and § 806.15(g) is revised to include the verified return delivery receipt from a comparable delivery service to the U.S. Postal Service.

Comment: The Commission should revise § 806.15(b)(3) to clarify which property is subject to the notice requirements and should read "where the property *of such property owner* is served by a public water supply."

Response: The Commission agrees and the final rulemaking is revised accordingly.

Comment: The Commission should exempt AMD passive treatment systems from the requirements for mining and construction dewatering under §§ 806.14(b)(6) and (d)(6) and 806.23(b)(5).

Response: The Commission has not extended its review jurisdiction over *passive* AMD treatment facilities and nothing in the proposed rule was meant to alter that long standing determination. Accordingly, the final rule contains revisions to §§ 806.14(b)(6) and (d)(6) and 806.23(b)(5) to remove the word "gravity-drained" and clarify its application to "AMD facilities that qualify as a withdrawal."

Miscellaneous Changes

Comment: Including in § 808.2(a) that the 30 day appeal period can run from publication on the Commis-

sion's website creates issues, including knowing whether the appeal period runs from publication on the website or the *Federal Register* and the fact that it is not always clear when something is posted to a website or is easily found on the website.

Response: The final rule revises § 808.2(a) to remove this language. The 30-day appeal period for third party appeals will run from the date of publication in the *Federal Register*.

Comment: The addition of "or other fluids associated with the development of natural gas resources" to the definition of "production fluids" under § 806.3 is inaccurate and over-inclusive. The revised definition of production fluids would cause confusion with the member jurisdiction terminology. The commenter is supportive of the stated goal of this change and proposed additional language to be added in other parts of regulations.

Response: The final rule removes the change to the definition of "production fluid." The revision proposed by the commenter will be evaluated for inclusion in a future rulemaking.

Comment: The addition of "consumptive use" to the definition of "facility" in § 806.3 is unwarranted as the definition of "facility" matches the definition in the Compact.

Response: The final rule will remove the amendment to the definition of "facility". However, the definition of facility includes plants, structures, machinery and equipment acquired, constructed, operated or maintained for the beneficial use of water resources that includes the consumptive use of water.

The Commission also is making additional housekeeping changes on the final rulemaking:

1) § 806.6(b)(6) (related to transfers of approvals) was added to recognize registered grandfathered aspects of a project under subpart E.

2) The phrase "hydro report" in § 806.14(d)(2)(ii) was clarified to "hydrogeologic report".

3) The word "Commission's" is removed from § 806.41(c).

Transition Issues

As noted in the Dates section, this rule will take effect on July 1, 2017, with the exception of the adoption of subpart E (related to registration of grandfathered projects) and the corresponding changes to § 806.4(a)(1)(iii) and (a)(2)(iv), which take effect on January 1, 2018.

Coincident with the authorization to adopt this final rulemaking, the Commission also adopted a Regulatory Program Fee Schedule that sets forth the fee for registration for grandfathered projects. This fee schedule is available on the Commission's website at www.srbc.net/policies/policies.htm.

List of Subjects in 18 CFR Parts 806 and 808

Administrative practice and procedure, Water resources.

Accordingly, for the reasons set forth in the preamble, the Susquehanna River Basin Commission amends 18 CFR parts 806 and 808 as follows:

PART 806—REVIEW AND APPROVAL OF PROJECTS

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

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

2. Amend § 806.1 by revising paragraphs (a) and (f) to read as follows:

§ 806.1 Scope.

(a) This part establishes the scope and procedures for review and approval of projects under section 3.10 of the Susquehanna River Basin Compact, Pub.L. 91-575, 84 Stat. 1509, et seq., (the compact) and establishes special standards under section 3.4(2) of the compact governing water withdrawals, the consumptive use of water, and diversions. The special standards established pursuant to section 3.4(2) shall be applicable to all water withdrawals and consumptive uses in accordance with the terms of those standards, irrespective of whether such withdrawals and uses are also subject to project review under section 3.10. This part, and every other part of 18 CFR chapter VIII, shall also be incorporated into and made a part of the comprehensive plan.

* * * * *

(f) Any Commission forms or documents referenced in this part may be obtained from the Commission at 4423 North Front Street, Harrisburg, PA 17110, or from the Commission's website at www.srbc.net.

3. In § 806.3, add, in alphabetical order, a definition for "Wetlands" to read as follows:

§ 806.3 Definitions.

* * * * *

Wetlands. Those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

* * * * *

4. Amend § 806.4 by revising paragraphs (a) introductory text, (a)(1)(iii), (a)(2) introductory text, and (a)(2)(iv) and adding paragraph (a)(3)(vii) to read as follows:

§ 806.4 Projects requiring review and approval.

(a) Except for activities relating to site evaluation, to aquifer testing under § 806.12 or to those activities authorized under § 806.34, no person shall undertake any of the following projects without prior review and approval by the Commission. The project sponsor shall submit an application in accordance with subpart B of this part and shall be subject to the applicable standards in subpart C of this part.

(1) * * *

(iii) With respect to projects that existed prior to January 23, 1971, any project:

(A) Registered in accordance with subpart E of this part that increases its consumptive use by any amount over the quantity determined under § 806.44;

(B) Increasing its consumptive use to an average of 20,000 gpd or more in any consecutive 30-day period; or

(C) That fails to register its consumptive use in accordance with subpart E of this part.

* * * * *

(2) *Withdrawals*. Any project, including all of its sources, described below shall require an application to be submitted in accordance with § 806.13, and shall be subject to the standards set forth in §§ 806.21 and 806.23. Hydroelectric projects, except to the extent that such projects involve a withdrawal, shall be exempt from the requirements of this section regarding withdrawals; provided, however, that nothing in this paragraph (a)(2) shall be construed as exempting hydroelectric projects from review and approval under any other category of project requiring review and approval as set forth in this section, § 806.5, or part 801 of this chapter. The taking or removal of water by a public water supplier indirectly through another public water supply system or another water user's facilities shall constitute a withdrawal hereunder.

* * * * *

(iv) With respect to groundwater projects that existed prior to July 13, 1978, surface water projects that existed prior to November 11, 1995, or projects that existed prior to January 1, 2007, with multiple sources involving a withdrawal of a consecutive 30-day average of 100,000 gpd or more that did not require Commission review and approval, any project:

(A) Registered in accordance with subpart E of this part that increases its withdrawal by any amount over the quantity determined under § 806.44;

(B) Increasing its withdrawal individually or cumulatively from all sources to an average of 100,000 gpd or more in any consecutive 30-day period; or

(C) That fails to register its withdrawals in accordance with subpart E of this part.

* * * * *

(3) * * *

(vii) The diversion of any flowback or production fluids from hydrocarbon development projects located outside the basin to an in-basin treatment or disposal facility authorized under separate government approval to accept flowback or production fluids, shall not be subject to separate review and approval as a diversion under this paragraph (c)(3), provided the fluids are handled, transported and stored in compliance with all standards and requirements of the applicable member jurisdiction.

* * * * *

5. Amend § 806.6 by adding paragraph (b)(6) to read as follows:

§ 806.6 Transfer of approvals.

* * * * *

(b) * * *

(6) The project is registered under subpart E of this part.

* * * * *

6. Amend § 806.11 by revising paragraph (b) to read as follows:

§ 806.11 Preliminary consultations.

* * * * *

(b) Except for project sponsors of electric power generation projects under § 801.12(c)(2) of this chapter, preliminary consultation is optional for the project sponsor (except with respect to aquifer test plans under § 806.12) but shall not relieve the sponsor from complying with the requirements of the compact or with this part.

7. Amend § 806.12 by revising paragraph (a) and adding paragraph (f) to read as follows:

§ 806.12 Constant-rate aquifer testing.

(a) Prior to submission of an application pursuant to § 806.13, a project sponsor seeking approval for a new groundwater withdrawal, a renewal of an expiring groundwater withdrawal, or an increase of a groundwater withdrawal shall perform a constant-rate aquifer test in accordance with this section.

* * * * *

(f) Review of submittals under this section may be terminated by the Commission in accordance with the procedures set forth in § 806.16.

8. Revise § 806.14 to read as follows:

§ 806.14 Contents of application.

(a) Applications for a new project or a major modification to an existing approved project shall include, but not be limited to, the following information and, where applicable, shall be subject to the requirements in paragraph (b) of this section and submitted on forms and in the manner prescribed by the Commission.

(1) Identification of project sponsor including any and all proprietors, corporate officers or partners, the mailing address of the same, and the name of the individual authorized to act for the sponsor.

(2) Project location, including latitude and longitude coordinates in decimal degrees accurate to within 10 meters, the project location displayed on a map with a 7.5-minute USGS topographic base, and evidence of legal access to the property upon which the project is proposed.

(3) Project description, including: purpose, proposed quantity to be withdrawn or consumed, if applicable, and identification of all water sources related to the project including location and date of initiation of each source.

(4) Anticipated impact of the project, including impacts on existing water withdrawals, nearby surface waters, and threatened or endangered species and their habitats.

(5) The reasonably foreseeable need for the proposed quantity of water to be withdrawn or consumed, including supporting calculations, and the projected demand for the term of the approval.

(6) A metering plan that adheres to § 806.30.

(7) Evidence of coordination and compliance with member jurisdictions regarding all necessary permits or approvals required for the project from other federal, state or local government agencies having jurisdiction over the project.

(8) Project estimated completion date and estimated construction schedule.

(9) Draft notices required by § 806.15.

(10) The Commission may also require the following information as deemed necessary:

(i) Engineering feasibility.

(ii) Ability of the project sponsor to fund the project.

(b) Additional information is required for a new project or a major modification to an existing approved project as follows.

(1) *Surface water*. (i) Water use and availability.

(ii) Project setting, including surface water characteristics, identification of wetlands, and site development considerations.

(iii) Description and design of intake structure.

(iv) Anticipated impact of the proposed project on local flood risk, recreational uses, fish and wildlife, and natural environment features.

(v) For new projects and major modifications to increase a withdrawal, alternatives analysis for a withdrawal proposed in settings with a drainage area of 50 miles square or less, or in a waterway with exceptional water quality, or as required by the Commission.

(2) *Groundwater*—(i) With the exception of mining related withdrawals solely for the purpose of dewatering; construction dewatering withdrawals and withdrawals for the sole purpose of groundwater or below water table remediation generally which are addressed in paragraph (b)(6) of this section, the project sponsor shall provide an interpretative report that includes all monitoring and results of a constant-rate aquifer test consistent with § 806.12 and an updated groundwater availability estimate if changed from the aquifer test plan, unless a request for a waiver of the requirements of § 806.12 is granted. The project sponsor shall obtain Commission approval of the test procedures prior to initiation of the constant-rate aquifer test.

(ii) Water use and availability.

(iii) Project setting, including nearby surface water features.

(iv) Groundwater elevation monitoring plan for all production wells.

(v) Alternatives analysis as required by the Commission.

(3) *Consumptive use*. (i) Consumptive use calculations, and a mitigation plan consistent with § 806.22(b).

(ii) Water conservation methods, design or technology proposed or considered.

(iii) Alternatives analysis as required by the Commission.

(4) *Into basin diversions*. (i) Provide the necessary information to demonstrate that the proposed project will meet the standards in § 806.24(c).

(ii) Identification of the source and water quality characteristics of the water to be diverted.

(5) *Out of basin diversions*. (i) Provide the necessary information to demonstrate that the proposed project will meet the standards in § 806.24(b).

(ii) Project setting.

(6) *Other projects*. Other projects, including without limitation, mine dewatering, construction dewatering, water resources remediation projects, and AMD remediation facilities that qualify as a withdrawal.

(i) In lieu of aquifer testing, report(s) prepared for any other purpose or as required by other governmental regulatory agencies that provides a demonstration of the hydrogeologic and/or hydrologic effects and limits of said effects due to operation of the proposed project and effects on local water availability.

(ii) [Reserved]

(c) All applications for renewal of expiring approved projects, including those with minor or major modifications, shall include, but not be limited to, the following information, and, where applicable, shall be subject to the requirements in paragraph (d) of this section and submitted on forms and in the manner prescribed by the Commission.

(1) Identification of project sponsor including any and all proprietors, corporate officers or partners, the mailing address of the same, and the name of the individual authorized to act for the sponsor.

(2) Project location, including latitude and longitude coordinates in decimal degrees accurate to within 10 meters, the project location displayed on map with a 7.5-minute USGS topographic base, and evidence of legal access to the property upon which the project is located.

(3) Project description, to include, but not be limited to: purpose, proposed quantity to be withdrawn or consumed if applicable, identification of all water sources related to the project including location and date of initiation of each source, and any proposed project modifications.

(4) The reasonably foreseeable need for the requested renewal of the quantity of water to be withdrawn or consumed, including supporting calculations, and the projected demand for the term of the approval.

(5) An as-built and approved metering plan.

(6) Copies of permits from member jurisdictions regarding all necessary permits or approvals obtained for the project from other federal, state, or local government agencies having jurisdiction over the project.

(7) Copy of any approved mitigation or monitoring plan and any related as-built for the expiring project.

(8) Demonstration of registration of all withdrawals or consumptive uses in accordance with the applicable state requirements.

(9) Draft notices required by § 806.15.

(d) Additional information is required for the following applications for renewal of expiring approved projects.

(1) *Surface water*. (i) Historic water use quantities and timing of use.

(ii) Changes to stream flow or quality during the term of the expiring approval.

(iii) Changes to the facility design.

(iv) Any proposed changes to the previously authorized purpose.

(2) *Groundwater*—(i) The project sponsor shall provide an interpretative report that includes all monitoring and results of any constant-rate aquifer testing previously completed or submitted to support the original approval. In lieu of a testing report, historic operational data pumping and elevation data may be considered, as a request for waiver of the requirements of § 806.12. Those projects that did not have constant-rate aquifer testing completed for the original approval that was consistent with § 806.12 or sufficient historic operational pumping and groundwater elevation data may be required to complete constant-rate aquifer testing consistent with § 806.12, prepare and submit an interpretative report that includes all monitoring and results of any constant-rate aquifer test.

(ii) An interpretative report providing analysis and comparison of current and historic water withdrawal and groundwater elevation data with previously completed hydrogeologic report.

(iii) Current groundwater availability analysis assessing the availability of water during a 1-in-10 year recurrence interval under the existing conditions within the recharge area and predicted for term of renewal (i.e., other users, discharges, and land development within the groundwater recharge area).

(iv) Groundwater elevation monitoring plan for all production wells.

(v) Changes to the facility design.

(vi) Any proposed changes to the previously authorized purpose.

(3) *Consumptive use*. (i) Consumptive use calculations, and a copy of the approved plan or method for mitigation consistent with § 806.22.

(ii) Changes to the facility design.

(iii) Any proposed changes to the previously authorized purpose.

(4) *Into basin diversion*. (i) Provide the necessary information to demonstrate that the proposed project will meet the standards in § 806.24(c).

(ii) Identification of the source and water quality characteristics of the water to be diverted.

(iii) Changes to the facility design.

(iv) Any proposed changes to the previously authorized purpose.

(5) *Out of basin diversion*. (i) Historic water use quantities and timing of use.

(ii) Changes to stream flow or quality during the term of the expiring approval.

(iii) Changes to the facility design.

(iv) Any proposed changes to the previously authorized purpose,

(6) *Other projects.* Other projects, including without limitation, mine dewatering, water resources remediation projects, and AMD facilities that qualify as a withdrawal.

(i) Copy of approved report(s) prepared for any other purpose or as required by other governmental regulatory agencies that provides a demonstration of the hydrogeologic and/or hydrologic effects and limits of said effects due to operation of the project and effects on local water availability.

(ii) Any data or reports that demonstrate effects of the project are consistent with those reports provided in paragraph (d)(6)(i) of this section.

(iii) Demonstration of continued need for expiring approved water source and quantity.

(iv) Changes to the facility design.

(v) Any proposed changes to the previously authorized purpose.

(e) A report about the project prepared for any other purpose, or an application for approval prepared for submission to a member jurisdiction, may be accepted by the Commission provided the said report or application addresses all necessary items on the Commission's form or listed in this section, as appropriate.

(f) Applications for minor modifications must be complete and will be on a form and in a manner prescribed by the Commission. Applications for minor modifications must contain the following:

(1) Description of the project;

(2) Description of all sources, consumptive uses and diversions related to the project;

(3) Description of the requested modification;

(4) Statement of the need for the requested modification; and

(5) Demonstration that the anticipated impact of the requested modification will not adversely impact the water resources of the basin.

(g) For any applications, the Executive Director or Commission may require other information not otherwise listed in this section.

9. Amend § 806.15 by revising paragraph (a), adding paragraph (b)(3), and revising paragraph (g) to read as follows:

§ 806.15 Notice of application.

(a) Except with respect to paragraphs (h) and (i) of this section, any project sponsor submitting an application to the Commission shall provide notice thereof to the appropriate agency of the member State, each municipality in which the project is located, and the county and the appropriate county agencies in which the project is located. The project sponsor shall also publish notice of submission of the application at least once in a newspaper of general circulation serving the area in which the project is located. The project sponsor shall also meet any of the notice requirements set forth in paragraphs (b) through (f) of this section, if applicable. All notices required under this section shall be provided or published no later than 20 days after submission of the application to the Commission and shall contain a description of the project, its purpose, the requested quantity of water to be withdrawn, obtained from sources other than withdrawals, or consumptively used, and the address, electronic mail address, and phone number of the project sponsor and the Commission. All such notices shall be in a form and manner as prescribed by the Commission.

(b) * * *

(3) For groundwater withdrawal applications, the Commission or Executive Director may allow notification of property owners through alternate methods where the property of such property owner is served by a public water supply.

* * * * *

(g) The project sponsor shall provide the Commission with a copy of the United States Postal Service return receipt or the verified return receipt from a comparable delivery service for the notifications to agencies of member States, municipalities and appropriate county agencies required under paragraph (a) of this section. The project sponsor shall also provide certification on a form provided by the Commission that it has published the newspaper notice(s) required by this section and made the landowner notifications as required under paragraph (b) of this section, if applicable. Until these items are provided to the Commission, processing of the application will not proceed. The project sponsor shall maintain all proofs of publication and records of notices sent under this section for the duration of the approval related to such notices.

* * * * *

10. Amend § 806.21 by revising paragraphs (a) and (c)(1) to read as follows:

§ 806.21 General standards.

(a) A project shall be feasible and not be detrimental to the proper conservation, development, management, or control of the water resources of the basin.

* * * * *

(c) * * *

(1) The Commission may suspend the review of any application under this part if the project is subject to the lawful jurisdiction of any member jurisdiction or any political subdivision thereof, and such member jurisdiction or political subdivision has disapproved or denied the project. Where such disapproval or denial is reversed on appeal, the appeal is final, and the project sponsor provides the Commission with a certified copy of the decision, the Commission shall resume its review of the application. Where, however, an application has been suspended hereunder for a period greater than three years, the Commission may terminate its review. Thereupon, the Commission shall notify the project sponsor of such termination and that the application fee paid by the project sponsor is forfeited. The project sponsor may reactivate the terminated application by reapplying to the Commission, providing evidence of its receipt of all necessary governmental approvals and, at the discretion of the Commission, submitting new or updated information.

* * * * *

11. Amend § 806.22 by revising paragraphs (b) introductory text, (b)(3), (e), and (f)(3) and (9) to read as follows:

§ 806.22 Standards for consumptive use of water.

* * * * *

(b) *Mitigation*. All project sponsors whose consumptive use of water is subject to review and approval under § 806.4, § 806.5, § 806.6, or § 806.17 shall mitigate such consumptive use. Except to the extent that the project involves the diversion of the waters out of the basin, public water supplies shall be exempt from the requirements of this section regarding consumptive use; provided, however, that nothing in this section shall be construed to exempt individual consumptive users connected to any such public water supply from the requirements of this section. Mitigation may be provided by one or a combination of the following:

* * * * *

(3) Provide monetary payment to the Commission, for all water consumptively used over the course of a year, in an amount and manner prescribed by the Commission.

* * * * *

(e) *Approval by rule for consumptive uses*. (1) *General rule.* Except with respect to projects involving hydrocarbon development subject to the provisions of paragraph (f) of this section, any project who is solely supplied water for consumptive use by public water supply may be approved by the Executive Director under this paragraph (e) in accordance with the following, unless the Executive Director determines that the project cannot be adequately regulated under this approval by rule.

(2) *Notification of intent*. Prior to undertaking a project or increasing a previously approved quantity of consumptive use, the project sponsor shall submit a notice of intent (NOI) on forms prescribed by the Commission, and the appropriate application fee, along with any required attachments.

(3) *Time of notice.* Within 20 days after submittal of an NOI under paragraph (e)(2) of this section, the project sponsor shall satisfy the notice requirements set forth in § 806.15.

(4) *Metering, daily use monitoring, and quarterly reporting*. The project sponsor shall comply with metering, daily use monitoring, and quarterly reporting as specified in § 806.30.

(5) *Standard conditions*. The standard conditions set forth in § 806.21 shall apply to projects approved by rule.

(6) *Mitigation*. The project sponsor shall comply with mitigation in accordance with paragraph (b)(2) or (3) of this section.

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

(8) *Decision.* The Executive Director may grant, deny, suspend, revoke, modify or condition an approval to operate under this approval by rule, or renew an existing approval by rule previously granted hereunder, and will notify the project sponsor of such determination, including the quantity of consumptive use approved.

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

(f) * * *

(3) Within 20 days after submittal of an NOI under paragraph (f)(2) of this section, the project sponsor shall satisfy the notice requirements set forth in § 806.15.

* * * * *

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

* * * * *

12. Amend § 806.23 by revising paragraphs (b)(2) and (b)(3)(i) and adding paragraph (b)(5) to read as follows:

§ 806.23 Standards for water withdrawals.

* * * * *

(b) * * *

(2) The Commission may deny an application, limit or condition an approval to ensure that the withdrawal will not cause significant adverse impacts to the water resources of the basin. The Commission may consider, without limitation, the following in its consideration of adverse impacts: Lowering of groundwater or stream flow levels; groundwater and surface water availability, including cumulative uses; rendering competing supplies unreli-

able; affecting other water uses; causing water quality degradation that may be injurious to any existing or potential water use; affecting fish, wildlife or other living resources or their habitat; causing permanent loss of aquifer storage capacity; affecting wetlands; or affecting low flow of perennial or intermittent streams.

(3) * * *

(i) Limit the quantity, timing or rate of withdrawal or level of drawdown, including requiring a total system limit.

* * * * *

(5) For projects consisting of mine dewatering, water resources remediation, and AMD facilities that qualify as a withdrawal, review of adverse impacts will have limited consideration of groundwater availability, causing permanent loss of aquifer storage and lowering of groundwater levels provided these projects are operated in accordance with the laws and regulations of the member jurisdictions.

13. Amend § 806.30 by revising the introductory text and paragraph (a)(4) and adding paragraph (a)(8) to read as follows:

§ 806.30 Monitoring.

The Commission, as part of the project review, shall evaluate the proposed methodology for monitoring consumptive uses, water withdrawals and mitigating flows, including flow metering devices, stream gages, and other facilities used to measure the withdrawals or consumptive use of the project or the rate of stream flow. If the Commission determines that additional flow measuring, metering or monitoring devices are required, these shall be provided at the expense of the project sponsor, installed in accordance with a schedule set by the Commission, and installed per the specifications and recommendations of the manufacturer of the device, and shall be subject to inspection by the Commission at any time.

(a) * * *

(4) Measure groundwater levels in all approved production and other wells, as specified by the Commission.

* * * * *

(8) Perform other monitoring for impacts to water quantity, water quality and aquatic biological communities, as specified by the Commission.

* * * * *

14. Amend § 806.31 by revising paragraphs (d) and (e) to read as follows:

§ 806.31 Term of approvals.

* * * * *

(d) If the Commission determines that a project has been abandoned, by evidence of nonuse for a period of time and under such circumstances that an abandonment may be inferred, the Commission may revoke the approval for such withdrawal, diversion or consumptive use.

(e) If a project sponsor submits an application to the Commission no later than six months prior to the expiration of its existing Commission docket approval or no later than one month prior to the expiration of its existing ABR or NOI approval, the existing approval will be deemed extended until such time as the Commission renders a decision on the application, unless the existing approval or a notification in writing from the Commission provides otherwise.

15. Add subpart E to read as follows:

Subpart E—Registration of Grandfathered Projects

Sec.

§ 806.40 Applicability.

(a) This subpart is applicable to the following projects, which shall be known as grandfathered projects:

(1) The project has an associated average consumptive use of 20,000 gpd or more in any consecutive 30-day period all or part of which is a pre-compact consumptive use that has not been approved by the Commission pursuant to § 806.4.

(2) The project has an associated groundwater withdrawal average of 100,000 gpd or more in any consecutive 30-day period all or part of which was initiated prior to July 13, 1978, that has not been approved by the Commission pursuant to § 806.4.

(3) The project has an associated surface water withdrawal average of 100,000 gpd or more in any consecutive 30-day period all or part of which was initiated prior to November 11, 1995, that has not been approved by the Commission pursuant to § 806.4.

(4) The project (or an element of the project) has been approved by the Commission but has an associated consumptive use or water withdrawal that has not been approved by the Commission pursuant to § 806.4.

(5) Any project not included in paragraphs (a)(2) through (4) of this section that has a total withdrawal average of 100,000 gpd or more in any consecutive 30-day average from any combination of sources which was initiated prior to January 1, 2007, that has not been approved by the Commission pursuant to § 806.4.

(6) Any source associated with a project included in paragraphs (a)(2) through (5) of this section regardless of quantity.

(b) A project, including any source of the project, that can be determined to have been required to seek Commission review and approval under the pertinent regulations in place at the time is not eligible for registration as a grandfathered project.

§ 806.41 Registration and eligibility.

(a) Project sponsors of grandfathered projects identified in § 806.40 shall submit a registration to the Commission, on a form and in a manner prescribed by the Commission, by December 31, 2019.

(b) Any grandfathered project that fails to register under paragraph (a) of this section shall be subject to review and approval under § 806.4.

(c) Any project that is not eligible to register under paragraph (a) of this section shall be subject to review and approval under § 806.4.

(d) The Commission may establish fees for obtaining and maintaining registration in accordance with § 806.35.

(e) A registration under this subpart may be transferred pursuant to § 806.6.

§ 806.42 Registration requirements.

(a) Registrations shall include the following information:

(1) Identification of project sponsor including any and all proprietors, corporate officers or partners, the mailing address of the same, and the name of the individual authorized to act for the sponsor.

(2) Description of the project and site in terms of:

(i) Project location, including latitude and longitude coordinates in decimal degrees accurate to within 10 meters.

(ii) Project purpose.

(3) Identification of all sources of water, including the date the source was put into service, each source location (including latitude and longitude coordinates in decimal degrees accurate to within 10 meters), and if applicable, any approved docket numbers.

(4) Identification of current metering and monitoring methods for water withdrawal and consumptive use.

(5) Identification of current groundwater level or elevation monitoring methods at groundwater sources.

(6) All quantity data for water withdrawals and consumptive use for a minimum of the previous five calendar years. If the project sponsor registering submitted the water withdrawal and consumptive use data for the previous five calendar years to a member jurisdiction, that data will satisfy this requirement. A project sponsor registering may provide supplementary data related to water withdrawals and consumptive use quantities. If quantity data are not available, any information available upon which a determination of quantity could be made.

(7) For consumptive use, description of processes that use water, identification of water returned to the Basin, history of the use, including process changes, expansions and other actions that would have an impact on the amount of water consumptively used during the past five calendar years.

(8) Based on the data provided, the quantity of withdrawal for each individual source and consumptive use the project sponsor requests to be grandfathered by the Commission.

(9) Any ownership or name changes to the project since January 1, 2007.

(b) The Commission may require any other information it deems necessary for the registration process or waive any information required under paragraph (a) of this section for projects relying on a prior determination of the Commission.

§ 806.43 Metering and monitoring requirements.

(a) As a part of the registration process, the Commission shall review the current metering and monitoring for grandfathered withdrawals and consumptive uses.

(b) The Commission may require a metering and monitoring plan for the project sponsor to follow.

(c) Project sponsors, as an ongoing obligation of their registration, shall report to the Commission all information specified in the grandfathering determination under § 806.44 in a form and manner determined by the Commission. If water withdrawal and consumptive use quantity reporting is required by the member jurisdiction where the project is located, the Commission shall accept that reported quantity to satisfy the requirements of this paragraph (c), unless the Commission finds that additional data is needed that is not required by the member jurisdiction.

(d) Any data generated or collected under paragraph (c) of this section will be made available to the member jurisdictions in a manner and timeframe mutually agreeable to both the Commission and the jurisdiction.

§ 806.44 Determination of grandfathered quantities.

(a) For each registration submitted, the Executive Director shall determine the grandfathered quantity for each withdrawal source and consumptive use.

(b) In making a determination, the following factors should be considered:

(1) The withdrawal and use data and the peak consecutive 30-day average shown by the data;

(2) The reliability and accuracy of the data and/or the meters or measuring devices;

(3) Determination of reasonable and genuine usage of the project, including any anomalies in the usage;

(4) Whether the grandfathered amount includes an operational margin of safety; and

(5) Other relevant factors.

(c) The Executive Director, in lieu of a determination under paragraph (b) of this section, may accept a previous grandfathering determination by the Commission at the request of the project sponsor.

§ 806.45 Appeal of determination.

(a) A final determination of the grandfathered quantity by the Executive Director must be appealed to the Commission within 30 days from actual notice of the determination.

(b) The Commission shall appoint a hearing officer to preside over appeals under this section. Hearings shall be governed by the procedures set forth in part 808 of this chapter.

PART 808—HEARINGS AND ENFORCEMENT ACTIONS

16. The authority citation for part 808 continues to read as follows:

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

17. Revise § 808.1 to read as follows:

§ 808.1 Public hearings.

(a) *Required hearings.* A public hearing shall be conducted in the following instances:

(1) Addition of projects or adoption of amendments to the comprehensive plan, except as otherwise provided by section 14.1 of the compact.

(2) Review and approval of diversions.

(3) Imposition or modification of rates and charges.

(4) Determination of protected areas.

(5) Drought emergency declarations.

(6) Hearing requested by a member jurisdiction.

(7) As otherwise required by sections 3.5(4), 4.4, 5.2(e), 6.2(a), 8.4, and 10.4 of the compact.

(b) *Optional hearings.* A public hearing may be conducted by the Commission or the Executive Director in any form or style chosen by the Commission or Executive Director in the following instances:

(1) Proposed rulemaking.

(2) Consideration of projects, except projects approved pursuant to memoranda of understanding with member jurisdictions.

(3) Adoption of policies and technical guidance documents.

(4) When it is determined that a hearing is necessary to give adequate consideration to issues related to public health, safety and welfare, or protection of the environment, or to gather additional information for the record or consider new information on a matter before the Commission.

(c) *Notice of public hearing*. At least 20 days before any public hearing required by the compact, notices stating the date, time, place and purpose of the hearing including issues of interest to the Commission shall be published at least once in a newspaper of general circulation in the area affected. In all other cases, at least 20 days prior to the hearing, notice shall be posted on the Commission Web site, sent to the parties who, to the Commission's knowledge, will participate in the hearing, and sent to persons, organizations and news media who have made requests to the Commission for notices of hearings or of a particular hearing. With regard to rulemaking, hearing notices need only be forwarded to the directors of the *New York Register*, the *Pennsylvania Bulletin*, the *Maryland Register* and the *Federal Register*, and it is sufficient that this notice appear in the *Federal Register* at least 20 days prior to the hearing and in each individual state publication at least 10 days prior to any hearing scheduled in that state.

(d) *Standard public hearing procedure*. (1) Hearings shall be open to the public. Participants may be any person, including a project sponsor, wishing to appear at the hearing and make an oral or written statement. Statements shall be made a part of the record of the hearing, and written statements may be received up to and including the last day on which the hearing is held, or within 10 days or a reasonable time thereafter as may be specified by the presiding officer.

(2) Participants are encouraged to file with the Commission at its headquarters written notice of their intention to appear at the hearing. The notice should be filed at least three days prior to the opening of the hearing.

(e) *Representative capacity*. Participants wishing to be heard at a public hearing may appear in person or be represented by an attorney or other representative. A governmental authority may be represented by one of its officers, employees or by a designee of the governmental authority.

(f) *Description of project*. When notice of a public hearing is issued, there shall be available for inspection, consistent with the Commission's Access to Records Policy, all plans, summaries, maps, statements, orders or other supporting documents which explain, detail, amplify, or otherwise describe the project the Commission is considering. Instructions on where and how the documents may be obtained will be included in the notice.

(g) *Presiding officer*. A public hearing shall be presided over by the Commission chair, the Executive Director, or any member or designee of the Commission or Executive Director. The presiding officer shall have full authority to control the conduct of the hearing and make a record of the same.

(h) *Transcript*. Whenever a project involving a diversion of water is the subject of a public hearing, and at all other times deemed necessary by the Commission or the Executive Director, a written transcript of the hearing shall be made. A certified copy of the transcript and exhibits shall be available for review during business hours at the Commission's headquarters to anyone wishing to examine them. Persons wishing to obtain a copy of the transcript of any hearing shall make arrangements to obtain it directly from the recording stenographer at their expense.

(i) *Joint hearings.* The Commission may conduct any public hearings in concert with any other agency of a member jurisdiction.

18. Revise § 808.2 to read as follows:

§ 808.2 Administrative appeals.

(a) A project sponsor or other person aggrieved by a final action or decision of the Executive Director shall file a written appeal with the Commission within 30 days of the receipt of actual notice by the project sponsor or within 30 days of publication of the action in the *Federal Register*. Appeals shall be filed on a form and in a manner prescribed by the Commission and the petitioner shall have 20 days from the date of filing to amend the appeal. The following is a non-exclusive list of actions by the Executive Director that are subject to an appeal to the Commission:

(1) A determination that a project requires review and approval under § 806.5;

(2) An approval or denial of an application for transfer under § 806.6;

(3) An approval of a Notice of Intent under a general permit under § 806.17;

(4) An approval of a minor modification under § 806.18;

(5) A determination regarding an approval by rule under § 806.22(e) or (f);

(6) A determination regarding an emergency certificate under § 806.34;

(7) Enforcement orders issued under § 808.14;

(8) A finding regarding a civil penalty under § 808.15(c);

(9) A determination of grandfathered quantity under § 806.44;

(10) A decision to modify, suspend or revoke a previously granted approval; and

(11) A records access determination made pursuant to Commission policy.

(b) The appeal shall identify the specific action or decision being appealed, the date of the action or decision, the interest of the person requesting the hearing in the subject matter of the appeal, and a statement setting forth the basis for objecting to or seeking review of the action or decision.

(c) Any request not filed on or before the applicable deadline established in paragraph (a) of this section hereof will be deemed untimely and such request for a hearing shall be considered denied unless the Commission, upon written request and for good cause shown, grants leave to make such filing nunc pro tunc; the standard applicable to what constitutes good cause shown being the standard applicable in analogous cases under Federal law. Receipt of requests for hearings pursuant to

this section, whether timely filed or not, shall be submitted by the Executive Director to the commissioners for their information.

(d) Petitioners shall be limited to a single filing that shall set forth all matters and arguments in support thereof, including any ancillary motions or requests for relief. Issues not raised in this single filing shall be considered waived for purposes of the instant proceeding. Where the petitioner is appealing a final determination on a project application and is not the project sponsor, the petitioner shall serve a copy of the appeal upon the project sponsor within five days of its filing.

(e) The Commission will determine the manner in which it will hear the appeal. If a hearing is granted, the Commission shall serve notice thereof upon the petitioner and project sponsor and shall publish such notice in the *Federal Register*. The hearing shall not be held less than 20 days after publication of such notice. Hearings may be conducted by one or more members of the Commission, or by such other hearing officer as the Commission may designate.

(1) The petitioner may also request a stay of the action or decision giving rise to the appeal pending final disposition of the appeal, which stay may be granted or denied by the Executive Director after consultation with the Commission chair and the member from the affected member State. The decision of the Executive Director on the request for stay shall not be appealable to the Commission under this section and shall remain in full force and effect until the Commission acts on the appeal.

(2) In addition to the contents of the request itself, the Executive Director, in granting or denying the request for stay, will consider the following factors:

(i) Irreparable harm to the petitioner.

(ii) The likelihood that the petitioner will prevail.

(f) The Commission shall grant the hearing request pursuant to this section if it determines that an adequate record with regard to the action or decision is not available, or that the Commission has found that an administrative review is necessary or desirable. If the Commission denies any request for a hearing, the party seeking such hearing shall be limited to such remedies as may be provided by the compact or other applicable law or court rule. If a hearing is granted, the Commission shall refer the matter for hearing to be held in accordance with § 808.3, and appoint a hearing officer.

(g) If a hearing is not granted, the Commission may set a briefing schedule and decide the appeal based on the record before it. The Commission may, in its discretion, schedule and hear oral argument on an appeal.

(h)(1) A request for intervention may be filed with the Commission by persons other than the petitioner within 20 days of the publication of a notice of the granting of such hearing in the *Federal Register*. The request for intervention shall state the interest of the person filing such notice, and the specific grounds of objection to the action or decision or other grounds for appearance. The hearing officer(s) shall determine whether the person requesting intervention has standing in the matter that would justify their admission as an intervener to the proceedings in accordance with Federal case law.

(2) Interveners shall have the right to be represented by counsel, to present evidence and to examine and cross-examine witnesses.

(i) Where a request for an appeal is made, the 90-day appeal period set forth in section 3.10 (6) and Federal reservation (o) of the compact shall not commence until the Commission has either denied the request for or taken final action on an administrative appeal.

19. Revise § 808.11 to read as follows:

§ 808.11 Duty to comply.

It shall be the duty of any person to comply with any provision of the compact, or the Commission's rules, regulations, orders, approvals, docket conditions, staff directives or any other requirement of the Commission.

20. Revise § 808.14 to read as follows:

§ 808.14 Orders.

(a) Whether or not an NOV has been issued, the Executive Director may issue an order directing an alleged violator to cease and desist any action or activity to the extent such action or activity constitutes an alleged violation, or may issue any other order related to the prevention of further violations, or the abatement or remediation of harm caused by the action or activity.

(b) If the project sponsor fails to comply with any term or condition of a docket or other approval, the commissioners or Executive Director may issue an order suspending, modifying or revoking approval of the docket. The commissioners may also, in their discretion, suspend, modify or revoke a docket approval if the project sponsor fails to obtain or maintain other federal, state or local approvals.

(c) The commissioners or Executive Director may issue such other orders as may be necessary to enforce any provision of the compact, the Commission's rules or regulations, orders, approvals, docket conditions, or any other requirements of the Commission.

(d) It shall be the duty of any person to proceed diligently to comply with any order issued pursuant to this section.

(e) The Commission or Executive Director may enter into a Consent Order and Agreement with an alleged violator to resolve non-compliant operations and enforcement proceedings in conjunction with or separately from settlement agreements under § 808.18.

21. Revise § 808.15 to read as follows:

§ 808.15 Show cause proceeding.

(a) The Executive Director may issue an order requiring an alleged violator to show cause why a penalty should not be assessed in accordance with the provisions of this chapter and section 15.17 of the compact. The order to the alleged violator shall:

(1) Specify the nature and duration of violation(s) that is alleged to have occurred.

(2) Set forth the date by which the alleged violator must provide a written response to the order.

(3) Identify the civil penalty recommended by Commission staff.

(b) The written response by the project sponsor should include the following:

(1) A statement whether the project sponsor contests that the violations outlined in the Order occurred;

(2) If the project sponsor contests the violations, then a statement of the relevant facts and/or law providing the basis for the project sponsor's position;

(3) Any mitigating factors or explanation regarding the violations outlined in the Order; and

(4) A statement explaining what the appropriate civil penalty, if any, should be utilizing the factors at § 808.16.

(c) Based on the information presented and any relevant policies, guidelines or law, the Executive Director shall make a written finding affirming or modifying the civil penalty recommended by Commission staff.

22. Amend § 808.16 by revising paragraphs (a) introductory text and (a)(7), adding paragraph (a)(8), and revising paragraph (b) to read as follows:

§ 808.16 Civil penalty criteria.

(a) In determining the amount of any civil penalty or any settlement of a violation, the Commission and Executive Director shall consider:

* * * * *

(7) The length of time over which the violation occurred and the amount of water used, diverted or withdrawn during that time period.

(8) The punitive effect of a civil penalty.

(b) The Commission and/or Executive Director retains the right to waive any penalty or reduce the amount of the penalty recommended by the Commission staff under § 808.15(a)(3) should it be determined, after consideration of the factors in paragraph (a) of this section, that extenuating circumstances justify such action.

23. Revise § 808.17 to read as follows:

§ 808.17 Enforcement of penalties, abatement or remedial orders.

Any penalty imposed or abatement or remedial action ordered by the Commission or the Executive Director shall be paid or completed within such time period as shall be specified in the civil penalty assessment or order. The Executive Director and Commission counsel are authorized to take such additional action as may be necessary to assure compliance with this subpart. If a proceeding before a court becomes necessary, the penalty amount determined in accordance with this part shall constitute the penalty amount recommended by the Commission to be fixed by the court pursuant to section 15.17 of the compact.

24. Revise § 808.18 to read as follows:

§ 808.18 Settlement by agreement.

(a) An alleged violator may offer to settle an enforcement action by agreement. The Executive Director may enter into settlement agreements to resolve an enforcement action. The Commission may, by Resolution, require certain types of enforcement actions or settlements to be submitted to the Commission for action or approval.

(b) In the event the violator fails to carry out any of the terms of the settlement agreement, the Commission or Executive Director may reinstitute a civil penalty action and any other applicable enforcement action against the alleged violator.

Dated: June 21, 2017.

ANDREW D. DEHOFF,
Executive Director

Fiscal Note: Fiscal Note 72-13 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART IV. SUSQUEHANNA RIVER BASIN COMMISSION

CHAPTER 806. REVIEW AND APPROVAL OF PROJECTS

§ 806.1. Incorporation by reference.

The regulations and procedures for review of projects as set forth in 18 CFR Part 806 (2017) (relating to review and approval of projects) are incorporated by reference and made part of this title.

[Pa.B. Doc. No. 17-1249. Filed for public inspection July 28, 2017, 9:00 a.m.]

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 57]

[L-2015-2500632]

Electric Safety Regulations

The Pennsylvania Public Utility Commission, on April 20, 2017, adopted a final rulemaking order to amend and add electric safety regulations to 52 Pa. Code Chapter 57 (relating to electric service).

Executive Summary

Section 1501 of the Public Utility Code requires every public utility in Pennsylvania to "maintain adequate, efficient, safe, and reasonable service and facilities" and to "make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public." 66 Pa.C.S. § 1501. Pursuant to that authority and Section 501 of the Public Utility Code, 66 Pa.C.S. § 501, the Pennsylvania Public Utility Commission (Commission or PUC) proposes adding safety regulations with respect to the distribution facilities of electric utilities under the Commission's jurisdiction.

The Commission proposes these final regulations to facilitate safety inspections of electric utilities by the PUC's Electric Safety Division. The final regulations reference the national electric safety standards in the National Electrical Safety Code (Code) and require jurisdictional electric utilities to adhere to the Code. The final regulations clarify the applicable electric safety standards, record-keeping and reporting rules for electric utilities, and the obligations of utilities in regard to inspections and investigations. The final regulations also clarify the duties and responsibilities between the customer and the electric utility regarding maintenance of certain facilities and equipment.

Public Meeting held
April 20, 2017

Commissioners Present: Gladys M. Brown, Chairperson; Andrew G. Place, Vice Chairperson; John F. Coleman, Jr.; Robert F. Powelson; David W. Sweet

Electric Safety Regulations, 52 Pa. Code Chapter 57; Doc. No. L-2015-2500632

Final Rulemaking Order

By the Commission:

In accordance with Sections 501 and 1501 of the Public Utility Code, 66 Pa.C.S. §§ 501 and 1501, the Pennsylva-

nia Public Utility Commission (PUC or the Commission) formally commenced a rulemaking process to amend its existing regulations in Chapter 57, Subchapters A (General Provisions) and B (Service and Facilities) at 52 Pa. Code §§ 57.1 (Definitions) and 57.28 (Electric Safety Standards). On November 19, 2015, the Commission issued a Proposed Rulemaking Order to add a definition for "EDC" (electric distribution company) and to modify the definition of "service terminal" and replace that term with the new term "service point/point of delivery" in 52 Pa. Code § 57.1, and to add electric safety standards at 52 Pa. Code § 57.28.

Comments were filed by the Pennsylvania AFL-CIO Utility Caucus (AFL-CIO), PECO Energy Company (PECO), the Energy Association of Pennsylvania (EAP), the Office of Consumer Advocate (OCA), and the Duquesne Light Company (Duquesne). The Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, West Penn Power Company (collectively "the FE Companies") and PPL Electric Utilities Corporation (PPL Electric), also submitted comments and recommended revisions in response to the Proposed Rulemaking Order. Joint Comments were filed by Pennsylvania American Water Company (PAWC) and System Local 537, Utility Workers Union of America, AFL-CIO (Joint Commenters or PAWC). Finally, The Independent Regulatory Review Commission (IRRC) filed comments on April 6, 2016. IRRC's comments were not a formal approval or disapproval of the regulation but specify the regulatory review criteria that have allegedly not been met. The Commission reviewed the comments of these interested parties and issues this Final Rulemaking Order.

Background and Procedural History

The Commission first promulgated Section 57.1 (Definitions) in Subchapter A (General Provisions) of its Electric Service regulations in Chapter 57 of the Pennsylvania Code on February 25, 1946. See 52 Pa. Code § 57.1. Section 57.1 was later amended on May 20, 1978, 8 Pa.B. 1403, and on January 8, 1983, 13 Pa.B. 131.

On February 19, 2014, the Commission's then-Chairman Robert F. Powelson testified to the Pennsylvania House of Representatives Appropriations Committee that there is an average of 26 serious injuries or fatalities in Pennsylvania each year related to electric utility operations. Therefore, the Commission created the Electric Safety Division within the Commission's Bureau of Investigation & Enforcement (I&E) to ensure that more PUC staff would be dedicated to enforcing the National Electrical Safety Code and performing field audits and investigations.[1] Presently, the Electric Safety Division is a dedicated unit, consisting of four full-time staff: a Supervisor and field inspectors for Eastern Pennsylvania, Central Pennsylvania, and Western Pennsylvania. One attorney/prosecutor also provides part-time enforcement support.

The Commission's Gas Safety Division within I&E currently enforces gas safety standards and conducts gas safety inspections through the application of Section 59.33 (Safety) of the Commission's regulations in Chapter 59 pertaining to Gas Service. See 52 Pa. Code § 59.33. Section 59.33 clearly and straightforwardly lists the minimum gas safety standards by specifically citing to sections of the United States Code and the Code of Federal Regulations. See 52 Pa. Code § 59.33(b). In a similar vein, the Commission believes that the clear outlay of electric safety standards in one section in Chapter 57 of the Commission's regulations will clarify minimum industry standards and will assist the Electric Safety Division in enforcing those standards. Specifically, the Commission intended to reference the national electric safety standards in the National Electrical Safety Code (NESC) in order to remove doubt and minimize legal challenges as to the applicability of the NESC to jurisdictional Pennsylvania electric distribution companies (EDCs). In proposing these electric safety standards, the Commission also sought to clarify the duties and responsibilities between the customer and the electric utility. See Annex A, Section 57.28(a).

Legal Context

Under the Public Utility Code, an electric utility in Pennsylvania has a legal duty to maintain safe, adequate and reasonable service and facilities and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. 66 Pa.C.S. § 1501. Pursuant to its statutory powers, the Commission is authorized to adopt and enforce rules to ensure that electric utilities provide safe, adequate, and reliable service. 66 Pa.C.S. §§ 102, 501. The Commission must ensure that electric utilities adhere to established industry standards and practices, such as the national standards of the NESC, regarding the installation and maintenance of transmission and distribution facilities. 66 Pa.C.S. § 2804(1), § 2807(a); 52 Pa. Code § 57.198(b). Commission staff may initiate an investigation, or may do so upon complaint by an affected party, to determine whether an electric utility is providing utility service in accordance with those standards. See 52 Pa. Code § 57.194(b), § 57.197(a); see also 52 Pa. Code § 57.12. An electric utility that violates the Public Utility Code or Commission orders or regulations subjects that electric utility to a civil penalty of $1,000 per violation for every day of that violation's continuing offense. 66 Pa.C.S. § 3301(a)-(b).

The Commission embarked on this rulemaking proceeding in order to add (1) electric safety regulations to clarify the applicable electric safety standards, (2) electric utility record keeping and reporting rules, and (3) electric utility obligations in regard to inspections and investigations. The delineation and description of electric safety standards in a new subchapter of our regulations is in the public interest as these standards provide clearer, more transparent, and more specific guidance to the regulated community and the public than the Commission's existing regulations.

These regulations will empower the PUC's Electric Safety Division to enforce electric safety standards at jurisdictional electric distribution facilities to ensure public safety and protect the public interest. See 66 Pa.C.S. § 1501. Pursuant to this authority, the Commission's power to promulgate regulations, 66 Pa.C.S. § 501(b), and the Commonwealth Documents Law, 45 P.S. § 1201, the Commission proposed electric safety regulations governing the electric systems of jurisdictional electric companies in the Commonwealth of Pennsylvania. See Annex A, Section 57.28.

Comments to the Proposed Rulemaking Order

The AFL-CIO proposes that Service point/point of delivery instead be defined as "the point of connection between the facilities of the EDC and the customer's premises wiring." AFL-CIO contends that its definition is prefer-

[1] Prepared Testimony of Robert F. Powelson Before the Pennsylvania House of Representatives Appropriations Committee, at 9, available at http://www.puc.pa.gov/general/pdf/testimony/Powelson-House_Budget_021914.pdf.

able because it is based on the nature of the physical equipment, even where the utility has not "designated" a particular point of interconnection. Secondly, because the term "facilities" as defined by Section 102 of the Public Utility Code refers to physical plant and equipment, the AFL-CIO asserts that the use of the word "premises" when referring to the customer's property will eliminate any unnecessary confusion.

AFL-CIO also believes there are serious problems in the Commonwealth involving coordination between EDCs and field employees of water and wastewater providers. AFL-CIO offers additional language covering the duties of EDCs under Section 57.28 (a), with respect to this matter. Only the AFL-CIO and the Joint Commenters have raised and addressed this issue of inter-utility coordination for the protection of the public.

Regarding the Commission's proposal in Section 57.28(b)(2) to follow the NESC standards, the AFL-CIO recommends that the regulation expressly require EDC adherence to the most recent adopted version of the NESC because a new version of the NESC is published every five years and may reflect changes in standards.

Lastly, AFL-CIO suggests that Section 57.28(d) of the proposed rule be modified to make clear that an EDC is also required to maintain (and make available to the Commission) other safety-related records and reports that are required under other applicable state and federal laws and regulations.

The Joint Commenters generally supported the proposals in the Proposed Rulemaking Order but submitted comments in the interest of the safety of Pennsylvania-American's employees, customers, and contractors, who perform subsurface utility work on water and wastewater pipes and facilities located near exposed underground and overhead power lines. The Joint Commenters assert that in the absence of timely and appropriate actions by the EDC, these lines could potentially cause serious injuries or fatalities. Despite this safety issue, the Joint Commenters acknowledge that there is currently nothing in state or federal statutes or regulations that require EDCs to timely and appropriately coordinate with local water/wastewater utilities.

PAWC recommends a requirement that EDCs coordinate in a prompt and timely manner with water and wastewater utilities under the Commission's jurisdiction to ensure the safety of such workers during the course of their work whether the work is planned or emergent. PAWC requests that the Commission adopt the suggested general requirements of coordination and establish an inter-utility working group to develop the specifics on how cooperation between EDCs and water/wastewater utilities can be achieved.

EAP supports the revised definition of "service terminal" in Section 57.1 (Definitions) but recommends using only one term "service point" in order to eliminate any confusion springing from the use of two terms for one definition. EAP notes in support that the term "service point" is used in the NESC.

EAP also recommends renaming Paragraph (1) in Section 57.28(a) "Electric utility responsibility" in order to be more consistent with the succeeding Paragraph (2) "Customer responsibility." EAP also recommends removing "every" from Section 57.28(a)(1) because EAP believes it implies that the legal obligation exceeds a reasonable standard, which is clearly not the law. EAP asserts that "general public" should also be removed from this subsection because it is redundant and could be interpreted as creating a new liability risk for EDCs which is not adequately disclosed in the proposed rulemaking. EAP would also re-word the last phrase of the subsection to read "may be subjected to by reason of its equipment and facilities" to better align with the purpose of the proposed rule which was aimed at safety standards regarding facilities and equipment, not the broader provision of electric distribution service. Further, EAP suggests using the term "service point" in both subparagraphs.

EAP urges the Commission to delete all of the proposed paragraphs under Section 57.28(b) except Paragraph (b)(2) requiring adherence to the NESC standards. Explaining that safety is a primary objective of EAP and all its members, EAP points out that gas safety standards were established in Pennsylvania by the adoption of a single set of compliance obligations, i.e. 49 CFR Parts 191—193, 195 and 199. EAP also suggests that the proposed regulation explain that the NESC is to be applied pursuant to its terms and should account for the applicability of future revisions of editions of the NESC to the installation, operation, and maintenance of EDC equipment and facilities. EAP urges the Commission to follow a comparable path in limiting the electric safety code to the NESC.

EAP suggests striking Paragraph (b)(4) because EAP believes it again restates an existing obligation for EDCs under PA One Call, and further causes confusion by creating a compliance obligation through regulations subject to Commission enforcement for a statute which gives another agency enforcement power. EAP also notes that the pending legislation did not pass the house so any attempt to promulgate regulations in this area is premature.

EAP recommends the removal of Section 57.28(b)(3) as EAP believes the paragraph reflects overreaching by the Commission into the area of management of investor owned electric utilities for which the Commission lacks the authority.

In regards to Section 57.28(c), EAP recommends the Commission use the language found in the gas safety regulations found at Section 59.33(d) as EAP considers it more straightforward. EAP believes the direct use of the word "inspections" suffices, and that the addition of "investigation" in the proposed electric safety standards is duplicative, and may appear to merge the roles of the Electric Safety Division with that of I&E. EAP also contends that "raw data" should be removed from the regulation because use of such information which has not been vetted or verified by the utility may not demonstrate whether a company is complying with substantive safety standards and would likely lead to misinformation and misinterpretation. According to EAP, it does not believe that an additional on-the-spot reporting requirement is necessary since current regulation provides time for an electric utility to review, analyze and verify data compiled at an accident site and the utility is obligated to submit a written report following an initial thirty day period. See 52 Pa. Code § 57.11(e).

EAP further recommends the addition of the phrase "as it shall from time to time request" to provide clarity on when utilities are meant to submit such information to the Commission. EAP suggests that the Commission remove the second sentence from Section 57.28(d) as it is unnecessary to restate the existing obligations under Section 57.11.

EAP sent a separate letter (not part of its comments) to inform the Commission that while it hopes to work with

the Joint Commenters, EAP disagrees with the solutions offered by the Joint Commenters. EAP submits that the recommended coordination language suggested by the Joint Commenters and the AFL-CIO is beyond the scope of this Proposed Rulemaking Order.

PECO supports the comments made by EAP, but focuses its attention on eliminating two sections of the proposed rule: Section 57.28(b)(3) and Section 57.28(c). PECO submits that the language of Section 57.28(b)(3) that raises an internal company procedure to the level of a Commission-approved "safety code" conflicts with the Commission's intended role in setting standards. PECO also submits that the enforcement provision at Section 57.28(c) should not require utilities to provide the Commission with "raw data." For one reason, PECO asserts that the term "raw data" is confusing as it is not defined within the Commission's regulations nor does it have a uniform definition in common parlance. Thirdly, PECO is concerned that the Proposed Rulemaking Order does not contain any discussion of whether "raw data" provided to a Commission investigator would be subject to a third party Right-to-Know request.

The OCA asserts that the creation of the Electric Safety Division has been a substantial move forward in helping to address consumer questions and concerns as to potential electric safety issues. The OCA shares the Commission's goal of minimizing any potential disputes surrounding the applicability of these regulations, and ensuring that Electric Safety Division personnel have the necessary authority and access to electric facilities in order to adequately investigate potential electric safety concerns.

The OCA suggests that the Commission replace the term "Electric Distribution Company (EDC)" with the term "Public Utility" to ensure that the Commission does not limit its jurisdiction over the safety of electric facilities owned by public utilities but that do not fit squarely within the definition of EDCs under 66 Pa.C.S. § 2803. OCA points to examples like the Trans-Allegheny Interstate Line Company (TrAILCo) which is a Pennsylvania Public Utility that owns non-jurisdictional, interstate transmission lines and thus is not an EDC as currently defined. The Pennsylvania Public Utility Code defines EDC as a "public utility providing facilities for the jurisdictional transmission and distribution of electricity to retail customers, except building or facility owners/operators that manage the internal distribution system serving such building or facility and that supply electric power and other related electric power services to occupants of the building or facility." 66 Pa.C.S. § 2803. Therefore, OCA is concerned that as proposed, the rules could lead to a jurisdictional vacuum as the Electric Safety Division would only be authorized to enforce the regulation against EDCs and would not cover entities like TrAILCo.

The OCA submits that while Federal authorities like the Federal Energy Regulatory Commission (FERC), the North American Electric Reliability Corporation (NERC), and their instrumentalities are focused on maintaining and monitoring the reliability of the interstate grid, the enforcement of safety still lies with the States. The OCA explained that it has received a number of calls from concerned customers regarding the safety of transmission facilities such as the stability of a transmission tower, or that voltage is seeping through the ground in the area of an interstate transmission line. Thus, OCA suggests that the Electric Safety Division be given the authority to properly investigate potential safety matters armed with clear jurisdiction over such facilities in order to further the Commission's goal of providing clarity and minimizing the number of potential legal challenges.

Duquesne supports the Commission's overall objective in undertaking this rulemaking in order to remove the uncertainty of expectations and enforcement powers of the Electric Safety Division. Duquesne also supports the positions articulated in EAP's comments to the Commission. Therefore, in addition to seeking clarifications and revisions, Duquesne expressed some concern that the regulations, as proposed, inappropriately attempt to incorporate directives that are overreaching and unrelated to enforcement powers, as well as unnecessary in light of existing regulations.

Duquesne suggests that the term "point of delivery" should be removed from Section 57.1 as it is duplicative and unnecessary given that the NESC uses the term "service point." Further, Duquesne offers clarification to the Commission's citation to the NESC which states that "the exact physical location of the service point. . .is often located on the rooftop of a customer's premise or even underground," noting that overhead services generally terminate on the building but not necessarily the rooftop.

Duquesne suggests that only the NESC standards should be included in Section 57.28(b) as the minimum safety standards. Duquesne asserts that given the fact that the Energy Generation Customer Choice and Competition Act (Competition Act) and the Commission's own regulations already incorporate the NESC standards, the Commission should not attempt to include additional requirements as minimum safety standards. Duquesne points out that NESC standards have been referenced in Commission regulations since 1977 (Section 57.82), and have been incorporated into regulations codified after the Competition Act's effective date. See 52 Pa. Code §§ 57.193(a), 57.194(b) and 57.198(b). Therefore, Duquesne maintains that the Commission's Electric Safety Standards proposal attempts to include additional requirements as minimum electric safety standards that are neither included nor addressed in the Competition Act. Duquesne also objects to the crafting of the proposed safety standards as mainly reiterating existing obligations and adding unnecessary and duplicative requirements.

Additionally, because the records subsection of the regulation, Section 57.28(d), only requires information tied to compliance with the NESC, Duquesne asserts that it should follow that the NESC is the only minimum standard set forth in the rulemaking. Assuming that the NESC standards are kept as the minimum electric safety standards, Duquesne recommends that the Commission clarify that the NESC standards in place at the time of a unit or facility's installation will be the applicable standards to that unit or facility.

Duquesne submits that Paragraph (b)(1) should be deleted as it merely reiterates existing obligations. Duquesne submits that Paragraph (b)(3) should be deleted as internal procedures are not minimum standards, are not consistent across all EDCs as each service territory has specific needs, and are not the appropriate means to regulate the management of a utility. Duquesne submits that Paragraph (b)(4) is premature as the One Call law is not yet under the Commission's jurisdiction and thus should be removed from the proposed regulation. Duquesne further contends that Paragraph (b)(5) is too broad and ambiguous to offer EDCs a clear understanding of what is required for compliance. Duquesne seeks clarification as to why these additional standards

would be required for the electric industry but not for the gas industry as covered under Section 59.33.

Next, Duquesne advocates for the deletion of the word "investigation" from Section 57.28(c) because providing such access to the Commission deviates from the gas safety standards at Section 59.33 and is unnecessary given the Commission's ability to factor an entity's cooperation into its determinations of civil penalties and the ability of I&E to file a Motion to Compel. Duquesne also suggests that the Commission consider defining the word "inspection" under this same section to clarify that information gathered by the Commission via inspection is exempt from a Right-to-Know request. According to Duquesne, this clarification is consistent with Commonwealth Court case law, which has found that gas safety inspection materials are exempt from disclosure under § 708(b)(17), the noncriminal investigation exemption under the Right-to-Know law. *Pennsylvania Pub.Util. Comm'n v. Gilbert*, 40 A.3d 755, 762 (Pa. Cmwlth. 2012). Duquesne submits that the Court recognized that potential public disclosure of inspection materials could cause utilities to be less likely to cooperate with requests and therefore make it more difficult for the Commission to carry out its enforcement duties. Id. at 761. In order to avoid any confusion over the applicability of Right-to-Know law Section 708(b)(17), Duquesne suggests that the Commission consider defining the term "inspection" as part of the rulemaking by indicating that it is akin to a noncriminal investigation by the Commission.

Duquesne also points out that there is no "raw data" requirement included in the gas safety standards and suggests that its inclusion here could sweep non-safety related information into the regulation's purview since the term is undefined. Duquesne also seeks clarification on the scope of the facilities, books, and records that must be provided to the Electric Safety Division during inspections because, as Duquesne suggests, the current language is broad and could make the Commission susceptible to increased hacking efforts.

Duquesne recommends the term "adequate records" as used in Section 57.28(d) be clarified so that EDCs have a better understanding of the scope and time frame of information to be kept. Duquesne also suggests eliminating sentences two and three from this section as they are duplicative and unnecessary.

The FE Companies support the inclusion of the definition for EDC in the proposed rulemaking as well as replacing the term "service terminal." However, the FE Companies propose to further clarify the definitions section of the regulation by deleting "point of delivery" and strictly using the term "service point" as it is the term used by the NESC and EDCs' tariffs in Pennsylvania. The FE Companies believe including a second term in addition to this may cause confusion. The FE Companies also recommend minor language changes to Section 57.28(a)(1) and (2), namely, titling Paragraph (1) "Electric utility responsibility" instead of "Duties of electric utility" and use of the term "service point" instead of "point of delivery of electric supply" in Subparagraph (2)(ii). Further, the FE Companies would suggest a few minor language changes regarding customer responsibility.

The FE Companies contend that Section 57.28(b) is overly broad and redundant as it is unnecessary to state that EDCs must comply with Chapter 57, PA One Call, and all other state and federal laws and regulations, when such obligations exist with or without their restatement within the proposed rulemaking. Therefore, in the interests of streamlining the proposed rules for clarity and ease of application, the FE Companies propose that Paragraphs (b)(1), (4), and (5) be eliminated in any final proposed rulemaking. While the FE Companies agree with the adoption of the NESC as the minimum safety standards, it would suggest further clarification in the application of the NESC. Principally, the FE Companies submit that the Commission should make it clear that the applicable standard to a set of facilities installed is that standard which was effective at the date of installation since the NESC is updated more frequently than electric facilities are replaced. Further, the FE Companies would like the Commission to clarify the role of the grandfathering period, by ensuring that a grandfathering period is applied to the NESC revisions in determining which standards apply to a facility. The FE Companies believe this grandfathering period is appropriate and beneficial to ensuring consistent interpretation in the proposed rules. For these reasons, the FE Companies suggest the addition of the term "National Electric Safety Code (NESC)" to Section 57.1 so as to provide greater clarity when this term is referenced throughout Section 57.28 and the rest of the Commission's regulations:

> *National Electric Safety Code* or *NESC*—The current edition of the National Electric Safety Code (NESC) published by the Institute of Electrical and Electronic Engineers (IEEE) designated as the American National Standard (ANSI) C2 at the time of facility installation. The effective date of any edition of the NESC shall be 180 days after the publication date by the IEEE for application to new installations and extensions where both design and utility approval were started after the expiration of the 180 day period.

The FE Companies propose the addition of an exception to Section 57.28 so as to ensure the Commission does not create conflicting standards within its own regulations as there are other regulations that adopt certain editions of the NESC. According to the FE Companies, there are many points throughout the Pennsylvania Code which adopt the specific language of various editions of the NESC as the standard to measure utility operations.

The FE Companies also propose that Section 57.28(b)(3) be deleted from the regulation as the provision would create numerous unwanted practical and legal implications. The FE Companies submit that internal procedures are often meant as mere guidelines and to demand adherence to some practices would reduce EDC discretion. Additionally, the FE Companies warn that inclusion of such a provision could raise due process concerns as the regulation's language does not limit application to only those procedures which are related to safety and each EDC would be subjected to different compliance standards.

The FE Companies urge the Commission to clarify the term "raw data" and why it is needed as there is no equivalent requirement in the current gas safety standards. The FE Companies object to its inclusion if it is intended to require EDCs to provide unverified data on site at inspection. The FE Companies also believe it is unnecessary and inappropriate to additionally reference investigations within this provision, since "investigations" are initiated and administered by I&E attorneys via communications with the utilities' attorneys. The FE Companies also recommend replacing the words "an electric" with "each public" utility each time it appears in the enforcement provision of the proposed regulation. Lastly, the FE Companies recommend that the second sentence of Section 57.28(d) be deleted as it merely

restates an existing legal obligation and unnecessarily deviates from the language applied to the gas industry.

PPL suggests that the word "every" be deleted from Section 57.28(a)(1) as they believe it makes the requirements unclear as well as overly broad and burdensome. PPL would further like to see the category "the general public" eliminated from this same section as PPL submits that no such requirement exists for natural gas distribution companies. Thirdly, PPL is concerned about requiring an EDC to exercise reasonable care to reduce hazards in "its provision of electric distribution service." PPL Electric believes the quoted language is too broad and vague, and should be deleted.

PPL objects to the use of the word "minimum" in Section 57.28(b) because PPL believes the NESC should not be considered the minimum standard as it is the preeminent source for electrical safety standards, and use of the word minimum implies that other unspecified safety standards may apply. Additionally, PPL suggests that Section 57.28 (b)(3) be deleted from the regulation as such a standard does not exist for the gas industries and would create different minimum standards for all EDCs as internal procedures tend to vary from EDC to EDC. PPL contends that Section 57.28(b)(5) should also be deleted because it is unnecessary to restate that EDCs must comply with applicable laws and regulations. Alternatively, if the Commission chooses to keep the provision, PPL recommends the Commission clarify which standards it is incorporating.

PPL asserts that "raw data" should be deleted from Section 57.28(c) because such data is often incomplete and inaccurate, plus, there is no equivalent language found in the gas safety standards. PPL also suggests that the Commission clarify the circumstances under which an EDC will be required to provide information to the Commission by incorporating the language from Section 59.33 that provides, such information will be provided to the Commission "as it shall from time to time request." Finally, PPL proposes that the regulations be revised to specifically state that any information supplied to the Commission or its staff pursuant to these regulations will be protected as privileged and confidential and exempt from the Right-to-Know Law.

The IRRC recommends that the definition of EDC be limited to" electric distribution company" in order to eliminate any confusion the "or electric utility" portion may add. Further, the IRRC asserts that if the Commission can clearly establish that the Public Utility Code provides the Commission with jurisdiction over the safety of other "substantial electric facilities" situated in Pennsylvania that are owned by public utilities but do not fit neatly within the strict definition of an EDC, then another definition should be added that encompasses the safety of these other facilities. Additionally, the IRRC would like to see a definition added to the rule describing the National Electric Safety Code (NESC).

The IRRC asserts that the Commission should choose between the terms "service point" and "point of delivery" and define and use only one term. Referencing the comments by the AFL-CIO warning of situations where the utility may not have designated a point of interconnection, IRRC suggests that the Commission review the definition to ensure it encompasses as many circumstances as possible. Lastly on this point, IRRC recommends that the definition be modified to state that the location of this point of interconnection designated by the EDC should be established in the utility's Commission-approved tariff.

In Section 57.28(a), the IRRC suggests the removal of the word "effectively" from this subsection as IRRC asserts that it is unnecessary since the tariff is approved by the Commission. The IRRC also recommends the deletion of the word "every" in Section 57.28(a)(1) because it agrees with EAP comments that its inclusion implies that an EDC's legal obligations exceed a reasonable standard. The IRRC urges the Commission to review and amend the phrase ". . . by reason of its provision of electric distribution service and its associated equipment and facilities," to clarify whether the regulation applies to the safety of EDC services beyond its associated equipment and facilities. The IRRC also proposes that Paragraph (a)(2) be deleted in its entirety as the Preamble does not establish a statutory basis or justification for the Commission to regulate customers' maintenance of wiring and equipment beyond the service point.

The IRRC supports the position of EAP to delete all but Paragraph (2) from Section § 57.28(b). The IRRC asserts that Paragraphs (1) and (5) are unnecessary because they simply restate existing obligations. Paragraph (3) should be removed, the IRRC suggests, because it would allow an EDC to unilaterally write its own safety regulations through internal processes and to amend those regulations at its own discretion, thus bypassing the Commission and the procedures of the Regulatory Review Act. The IRRC agrees with EAP that Paragraph (b)(4) is premature and should be deleted until House Bill 445 is passed into law. In regards to the sole survivor, Paragraph (2), the IRRC submits that an implementation period should be included in the regulation and language should be added to clarify which NESC standards apply to existing facilities when the NESC is updated.

The IRRC seeks clarification of what is included within the term "raw data" within Section 57.28(c) and why this information is needed by the Commission. Additionally, the IRRC urges the Commission to revise the "adequate records" requirement as used in subsection (d) so as to clearly state what records are required for compliance. The IRRC contends that the second sentence of (d) is duplicative of requirements under Section 57.11 and should be deleted.

The IRRC suggests that the Commission consider adding an amendment to facilitate coordination between individual utility safety and reliability provisions in 66 Pa.C.S. § 1501 and the overall safety of those who work for the other utilities under its jurisdiction. The IRRC leaves it to the Commission to decide whether to address this concern here or in a separate proposed regulation. Lastly, the IRRC joins others in questioning why the electric safety requirements differ from the gas safety requirements and await the Commission's responses to these concerns.

Comments and Discussion to Specific Regulatory Provisions of the Proposed Rulemaking Order

§ 57.1. Definitions

EDC—Electric distribution company or electric utility—An electric distribution company as defined in 66 Pa.C.S. § 2803 (relating to definitions).

For clarification purposes, we proposed adding a definition for EDC—electric distribution company or electric utility. For purposes of consistency and deference, we referenced the definition of EDC in the Public Utility Code, which defines an EDC as the "public utility providing facilities for the jurisdictional transmission and distribution of electricity to retail customers, except building or facility owners/operators that manage the internal distri-

bution system serving such building or facility and that supply electric power and other related electric power services to occupants of the building or facility." See 66 Pa.C.S. § 2803. Similarly, EDC is also defined with reference to this definition in the Public Utility Code later in Chapter 57 of our regulations. See 52 Pa. Code § 57.192. We also added the synonymous term electric utility for clarity, as that term is used in common parlance and in the courts and we proposed using that term in describing the proposed safety standards.

In the Definitions section, the OCA recommends that the Commission replace the Section 2803 definition of "electric distribution company" or "EDC" with the Section 102 definition of the term "A public utility." The purpose of this change as explained by the OCA is to ensure that the Commission does not limit its jurisdiction over the safety of electric facilities owned by public utilities but that do not fit squarely within the definition of EDC under 66 Pa.C.S. § 2803.

By limiting the applicability of the regulations to EDCs, the OCA expressed concern that the Commission through the proposed regulation might be unnecessarily limiting its jurisdiction over the safety of electric facilities owned by public utilities. The OCA's concern with using the term "EDC" is that substantial electric facilities are situated in Pennsylvania that are owned by "public utilities," yet such entities may not be included within the definition of EDC as found in the proposed regulations.

More specifically, the OCA offers as an example the Trans-Allegheny Interstate Line Company (TrAILCo) which is a Pennsylvania Public Utility that owns non-jurisdictional, interstate transmission lines and thus is not an EDC as currently defined by Pennsylvania Law.[2] The OCA interprets the proposed regulations such that the Electric Safety Division's authority to enforce the safety regulations at issue here would be limited to only EDCs, and would not cover such entities as TrAILCo.

The OCA explains that the Commission has jurisdiction over all Pennsylvania public utilities as those entities are defined in Section 102 of the Public Utility Code. This jurisdiction, however, is not exclusive as the OCA further explains that the Federal Energy Regulatory Commission (FERC) also has jurisdiction over public utilities in Pennsylvania that own interstate electric transmission lines as to rates, rules, and regulations as found in the tariff filings of such utilities at FERC.[3]

The OCA submits that while Federal authorities like FERC, the North American Electric Reliability Corporation (NERC), and their instrumentalities are focused on maintaining and monitoring the reliability of the interstate grid, the enforcement of safety still lies with the States. The OCA states that it has received a number of calls from concerned customers regarding the safety of transmission facilities such as the stability of a transmission tower, or that voltage is seeping through the ground in the area of an interstate transmission line. Thus, OCA suggests that the Electric Safety Division be given the authority to properly investigate potential safety matters armed with clear jurisdiction over such facilities. The OCA believes that such an edict will further the Commission's goal of providing clarity and minimize the number of potential legal challenges.

IRRC also commented that if the Commission agrees with the OCA and can clearly establish that the Public Utility Code provides the Commission with jurisdiction over the safety of these other facilities, the Commission should provide that the regulation encompasses the safety of the other facilities.

Discussion

We submit that it was not our intent to limit the authority of the Electric Safety Division and the application of the proposed regulations. In addressing the jurisdictional status of a stand-alone transmission company, this Commission has agreed that it has "important public policy interests to protect by maintaining jurisdiction over electric transmission facilities located within the Commonwealth" and that "[g]ranting a certificate of public convenience to TrAILCo to function as a public utility in Pennsylvania will facilitate that continuing oversight."[4] Relying on ATSI's operation and use of its transmission facilities and the distribution facilities of Penn Power to serve Pennsylvania customers, the Commission found that ATSI was a public utility as defined in Section 102. In addition to granting TrAILCo's Certificate of Public Convenience (CPC) Application, and requiring ATSI to file a CPC application, the Commission has approved other stand-alone electric transmission company's applications to operate as Pennsylvania public utilities under 66 Pa.C.S. § 102.[5]

The OCA notes that our jurisdiction is not exclusive because the FERC has jurisdiction over public utilities in Pennsylvania that own interstate electric transmission lines as to rates, rules and regulations as found in FERC tariff filings.[6] Although transmission rates are regulated by FERC, States still exercise traditional authority with respect to safety and reliability of its transmission facilities. 16 U.S.C. § 824(o)(i)(3). Stand-alone transmission companies use facilities for "transmitting. . .electricity. . .for the production of light, heat, or power to or for the public for compensation," 66 Pa.C.S. § 102, and those facilities must meet established standards for safety and reliability. 52 Pa. Code § 57.191

FERC's position on the regulation and enforcement of safety for electric facilities is that it rests with the States. This position is clearly stated on FERC's website under the caption "Safety & Inspections" that:

> Once Electricity projects become operational, *safety is regulated, monitored and enforced by the state* in which the project resides, with the exception of hydropower projects, for which FERC retains jurisdiction when they are operational.[7]

Therefore, based on statutory authority, our regulations, and precedent, we do not believe that our jurisdiction over Pennsylvania public utilities that own interstate transmission lines is limited. For more clarity, however, we shall adopt the OCA's recommendation and make sure the regulation covers issues involving safety of electric transmission facilities in the Commonwealth. In fact, our statutory authority and obligation with respect to ensuring the continuation of safe and reliable electric service is clear since transmission and distribution facilities must

[2] See, In Re: Application of TrAILCo for approval for certificate of public convenience to offer, render, furnish or supply transmission service in the Commonwealth of Pennsylvania (TrAILCo), Docket No. A-110172 et al (Order entered December 12, 2008).

[3] See e.g., Application of Trans-Allegheny Interstate Line Company, Docket Nos. A-2010-2187540 and A-2010-2187542 at 16 (Order entered March 15, 2012).

[4] Petition of American Transmission Systems, Inc. (ATSI) for a Declaratory Order that it is not a Public Utility as defined in 66 Pa.C.S. § 102, Docket No. P-2013-2388149 (Order entered August 11, 2016) citing In Re: Application of Trans-Allegheny Interstate Line Company, Docket No. A-110172, et al., (April 13, 2007), at 15, ¶ 43.

[5] See e.g., Joint Application of Mid-Atlantic Interstate Transmission, LLC, Metropolitan Edison Company and Pennsylvania Electric Company, Docket No. A-2015-2488903, et al. (Order entered August 24, 2016).

[6] See e.g., Application of Trans-Allegheny Interstate Line Company, Docket Nos. A-2010-2187540 and A-2010-2187542 at 16 (Order entered March 15, 2012).

[7] See http://www.ferc.gov/industries/electric/safety.asp (emphasis added).

conform with established industry standards, including the National Electric Safety Code. 66 Pa.C.S. § 2804(i)(ii).

We shall adopt the language change in the definition recommended by the OCA, as follows:

Electric utility—A public utility as defined under 66 Pa.C.S. § 102 (relating to definitions).

In addition, we shall replace EDC with "electric utility" throughout the regulation.

Service point or *point of delivery*—The location designated by the EDC where the utility's service supply lines terminate and the customer's facilities for receiving service begin.

In this section, we proposed updating and modernizing the term and definition for Service terminal. Service terminal is currently defined as "[t]he point at which the service lines of the public utility terminate and the customer's facilities for receiving the service begin." 52 Pa. Code § 57.1. We explained that Service terminal is still an important term and concept, as it indicates the separation of duties between the customer and the utility. However, the term service terminal is not used as frequently as service point, the term used in the NESC, and point of delivery, a term used in Pennsylvania and PUC case law[8] to indicate the jurisdictional separation between the customer and the utility. Therefore, we proposed replacing the term service terminal with service point/point of delivery.[9]

We also proposed a new definition for Service point or Point of delivery as "the location designated by the electric utility where the utility's service supply lines terminate and the customer's facilities for receiving service begin." This definition still retains the same basic concept as the existing definition for service terminal, but also recognizes, in alignment with the NESC, that an electric utility designates the location of the service point in its tariff.[10] We noted that the exact physical location of the service point may differ between utilities and between customers, as the service point is often located on the rooftop of a customer's premises or even underground.[11]

The AFL-CIO proposed that Service point/point of delivery instead be defined as "the point of connection between the facilities of the EDC and the customer's premises wiring." AFL-CIO believes that this definition is preferable because it is based on the nature of the physical equipment, even where the utility has not "designated" a particular point of interconnection. Furthermore, because the term "facilities" as defined by the § 102 of the Public Utility Code refers to physical plant and equipment, the AFL-CIO asserts that the use of the word "premises" when referring to the customer's property will eliminate any unnecessary confusion.

EAP contends the use of one term "Service point" in relation to the revised definition would suffice and notes that the term "Service point" is used in the NESC. NESC, Section 2. Definitions of special terms at p. 15 (2012 Edition). EAP agrees that the exact physical location of the service point is to be determined by the EDC consistent with the NESC and as detailed in its tariff. Id. IRRC agrees with the use of one term for clarity and the reference to the electric utility's tariff. IRRC also recommends that the NESC should be defined in this section. FE also agrees with these recommendations.

Discussion

We shall not adopt the AFL-CIO recommendation to modify the definition. The title of Subchapter B is "Service and Facilities." The emphasis of Section 57.28 is on facilities of the electric utility and using the reference to the term "customer's facilities" is not confusing as it clearly denotes that those facilities are owned and controlled by the customer. The word "facilities" is a generic term and is not solely described as applying only to ownership and control by a public utility. In fact, the definition of "Customer's installation" in the same section uses the word "facilities" to identify all that is "necessary to bring the terminus of the wiring of a customer to a location where it may be connected to the service line." See 52 Pa. Code § 57.1. Definitions.

Also, we have not included a definition of the term "National Electric Safety Code", as was suggested in the comments. The title itself is descriptive, and its application we explain in the Safety code under Paragraph (b)(2), and addressed herein.

Finally, we believe that our proposed definition is sufficiently clear as to the service point interconnection but we will accept IRRC's recommendation to add clarity to the definition and be consistent with subsection 57.28(a) by including language identifying that the location of interconnection is to be designated by the electric utility in its Commission-approved tariff.

§ 57.28. Electric Safety Standards.

As discussed, the Commission believes that the clear outlay of electric safety standards in one section in Chapter 57 of the Commission's regulations will assist the Electric Safety Division in enforcing those standards. Compare 52 Pa. Code § 59.33 (providing gas safety standards). Specifically, the Commission wanted to reference the NESC to remove doubt and minimize legal challenges as to the applicability of the NESC to jurisdictional Pennsylvania electric distribution companies. In proposing these electric safety standards, the Commission also sought to clarify the duties and responsibilities between the customer and the electric utility.

Coordination of safety with other utilities—protection of the public health, safety and welfare

The AFL-CIO initially commended the Commission for proposing regulations to clarify the safety-related responsibilities of electric distribution companies. The AFL-CIO submits that it has members that include the International Brotherhood of Electrical Workers and the Utility Workers Union of America and workers from other Pennsylvania utilities including telecommunications, natural gas, water and wastewater providers, who often work in close proximity to EDC facilities. In addition to recommending a change to the definition of service point/point of delivery, that was addressed herein, the AFL-CIO raises an issue that there are two service problems in the Commonwealth involving coordination between EDCs and field employees of water and wastewater providers that creates safety hazards for these field workers.

First, AFL-CIO states that there are many instances around the Commonwealth where water and wastewater mains are buried in close proximity to energized EDC lines. When a water or wastewater main leaks or ruptures, AFL-CIO explains that a potentially hazardous situation arises where the water/wastewater employee may be standing in a trench filled with water and there is

[8] This case law is discussed below in the proposed Section 57.28(a).

[9] This definition name was then changed to "Service point or point of delivery" by the legislative reference bureau for publication.

[10] National Electrical Safety Code, at page 15. The Institute of Electrical and Electronics Engineers, Inc. (2012 Edition, Aug. 2011).

[11] Id. Duquesne responds that overhead services terminate on the building and not on the actual rooftop.

an energized electric line in the same trench. The AFL-CIO contends that coordination between the water or wastewater utility and the EDC is not clear, and water utility employees are directed to move energized electric lines, often without the proper equipment, training, or protective clothing. Also, the AFL-CIO believes that it is a common safety practice among EDC employees to refuse to enter a trench with an energized electric line, yet water utility workers are routinely told to do so.

Second, the AFL-CIO submits that it has been common practice for many decades to connect the ground for a home or business to the copper water service line and if an EDC's neutral becomes damaged, the water line then serves the function of the neutral and completes the circuit back to the EDC transformer. Under these circumstances, AFL-CIO believes water workers are in danger of receiving a severe electric shock and when a water worker severs a pipe to remove a defective section, or removes a water meter for repair or replacement, the current back to the transformer is interrupted and this can cause electronics in the home or business to be damaged or destroyed. The AFL-CIO maintains that EDCs do not cooperate and believe that as part of their public safety obligation, EDCs should be required to respond to the site and mitigate the hazard quickly so that the water workers can continue to restore service to customers without risking bodily harm or physical harm to the customer's electronics. Finally, the AFL-CIO maintains that the electric companies should be required to install permanent remedies like repairing a damaged neutral so that the next water worker will not be needlessly shocked.

In summary, AFL-CIO recommends that the duties of EDC's under Section 57.28(a) expressly include (1) responsibility for all EDC facilities within a common trench that is opened by any other utility or service provider that shares the underground space with the EDC, and (2) a duty of providing safety to water workers once an energized electric line has been identified in order to resolve the serious problems currently existing in the coordination between EDCs and field employees of water and wastewater providers.

The Joint Commenters generally support the proposals in the Proposed Rulemaking Order but submitted comments in the interest of the safety of PAWC's employees, customers, and contractors, who perform subsurface utility work on water and wastewater pipes and facilities located near exposed underground and overhead power lines. The Joint Commenters assert that in the absence of timely and appropriate actions by the EDC, these lines could potentially cause serious injuries or fatalities.

Based on Occupational Safety & Health Administration (OSHA) regulations, PAWC specifically explains that an employer is prohibited from permitting an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding it effectively by insulation or other means. 29 CFR 1926.416(a)(1). Because PAWC cannot take the steps necessary to actually de-energize a line or guard it with insulation all work must stop until an EDC responds to a water utility worker's call to de-energize or insulate an exposed power line in proximity to any work site of the water utility.

According to PAWC, it can only contact the EDC and request that the EDC send qualified company personnel to safely and appropriately address the situation—by either de-energizing the line or guarding it with insulation—just as the EDC would be required to do under the federal regulations for its own employees. Although PAWC asserts that its ability to provide, safe, adequate and reliable water supply service to its customers may be jeopardized if the EDC does not properly prioritize and respond to requests made by water and wastewater utilities, there is currently nothing in state or federal statutes or regulations that require EDCs to timely and appropriately coordinate with local water and wastewater utilities.

PAWC believes the duties listed in Section 57.28(a)(1), which include a duty to warn and protect the public from danger, covers other utility workers not employed by EDCs within the categories of "the general public" or "others." In any event, PAWC suggests that the Commission clarify the standards an EDC must meet to ensure the safety and protection of local water and wastewater utility workers and assist the Electric Safety Division in the enforcement of EDC duties to ensure the safety of local utility workers. Specifically, PAWC recommends a requirement that EDCs coordinate in a prompt and timely manner with water and wastewater utilities under the Commission's jurisdiction to ensure the safety of such workers during the course of their work whether the work is planned or emergent. The Joint Commenters would also like to see a requirement that EDCs use every reasonable effort in the assessment and operation of EDC equipment and facilities to prevent electric shock and injury to the employees of water and wastewater utilities, including, as appropriate, the de-energizing or insulation of EDC equipment or facilities. The Joint Commenters further suggest providing other utility workers with contact information of qualified, authorized EDC representatives who will serve as a point of contact for the coordination of a timely and appropriate response. Further, the Joint Commenters suggest requiring EDCs to formally assign priority status to responses to water and wastewater emergency repairs involving exposed power lines in close proximity with the work area.

Alternatively, if the Commission chooses to give additional consideration to the issue of greater inter-utility coordination for the protection of the public, and not take this opportunity within this proposed rulemaking to adopt regulations intended to address these safety issues, PAWC requests that the Commission adopt the suggested general requirements of coordination as set forth in PAWCs comments and establish an inter-utility working group to develop the specifics on how cooperation between EDCs and water and wastewater utilities can be achieved. Additionally, PAWC suggests requiring EDCs to then submit a report to the Commission by a certain set date explaining how each utility plans to comply with the coordination requirement.

The IRRC suggests that the Commission consider adding an amendment to facilitate coordination between individual utility safety and reliability provisions in 66 Pa.C.S. § 1501 and the overall safety of other utility workers. The IRRC leaves it to the Commission to decide whether to address this concern here or in a separate proposed regulation that would allow more opportunity for comment and to build a consensus on the language of the amendment to the regulation.

Discussion

Both the AFL-CIO and PAWC have offered extensive changes to the Section 57.28 electric safety standards by inclusion of additional regulatory requirements that will apply to duties and responsibilities of electric utility

companies. The AFL-CIO's proposed modifications add provisions that will apply to the electric utility, customers, and other utility service providers identified as natural gas, communications, and water or wastewater utility service providers. PAWC's changes address the standards an electric utility must meet to ensure the safety and protection of only local water and wastewater utility workers and assist the Electric Safety Division in the enforcement of electric utility duties to ensure the safety of local utility workers. However, the PAWC explained that since Section 57.28(a)(1) includes a duty to warn and protect the public from danger, this covers other utility workers not employed by the electric utility within the categories of "the general public" or "others." Therefore, PAWC reasons that these proposed revisions also apply to other utility service providers other than water and waste utility workers.

As indicated above, the language changes being proposed involve other utility service providers and these industries like gas and communications have not participated in this rulemaking. Given the topic of this rulemaking, electric safety, it is not surprising that utility companies in the gas, communications, and water and wastewater industries (only PAWC filed comments) did not participate as interested parties. Therefore, we shall adopt IRRC's suggestion that this matter not be addressed in this rulemaking. Clearly, these issues that involve OSHA regulations and very specific circumstances such as safety practices in trenches with energized electric lines and proper grounding are beyond the scope of this rulemaking. At this point, when we are about to issue a final rulemaking order, we have not had the opportunity to hear from all interested parties that want to be heard and fully develop the issues raised by these comments.[12]

Despite our disposition here to defer this matter to another possible rulemaking, we consider this a serious matter given the allegations made by AFL-CIO and the Joint Commenters. However, rather than grant PAWC's request to adopt the general requirements of coordination as set forth in its comments and establish an inter-utility working group to develop specifics and further require EDCs to then submit a report to the Commission to explain how each utility plans to comply with the coordination requirement, we shall direct PAWC to file a petition for issuance of a regulation pursuant to 52 Pa. Code § 5.43. Given the specific allegation made by the Joint Commenters and the regulatory language that has already been drafted, including the provisions proposed by the AFL-CIO, PAWC is in a better position to initiate this rulemaking and formulate the relevant issues. We shall order PAWC to file the subject petition within 30 days and provide for comments to the petition to be filed by interested parties within 30 days of the filing of the petition. The petition shall be served on all the parties to this rulemaking.

Section 57.28(a) Duties and Responsibilities

(a) *Duties and responsibilities*. The separation of duties and responsibilities between an EDC and a customer with respect to the facilities utilized for electric service shall be effectively described in the EDC's tariff that is filed with and approved by the Commission.

(1) *Duty of an EDC.* An EDC shall use every reasonable effort to properly warn and protect the public from danger, and shall exercise reasonable care to reduce the hazards to which employees, customers, the general public and others may be subjected to by reason of its provision of electric distribution service and its associated equipment and facilities.

(2) *Customer responsibility.*

(i) A customer is responsible for the ownership and maintenance of the customer's facilities beyond the service point.

(ii) A customer is responsible for maintaining and inspecting electrical wiring and electrical equipment beyond the point of delivery of electric supply.

Under Pennsylvania law, maintenance and inspection duties between the electric utility and the customer are generally divided at the service point or the point of delivery of electricity to the customer. *Alderwoods v. Duquesne Light Co.*, 106 A.3d 27, 38 (Pa. 2015); *Hineline v. Metro. Edison Co.*, 1990 Pa. PUC LEXIS 156, at *6 (Pa. P.U.C. 1990). The NESC explains that the service point is the point of demarcation between the serving electric utility and premises wiring of the customer.[13] The service point is also the jurisdictional line of demarcation between two national codes: (1) the NESC and (2) the National Electrical Code (NEC).[14] Beyond the service point, the customer owns and assumes the responsibility for the maintenance and security of the internal wiring. See *Hineline*, 1990 Pa. PUC LEXIS 156, at *6 (citing *Craft v. Pa. Elec. Co.*, 50 Pa. P.U.C. 1 (1976); see *Norbeck v. Pa. PUC*, 2011 Pa. Cmmw. Unpub. LEXIS 601, at *21-22 (Pa. Cmwlth. Ct. 2010) (explaining that the utility tariff did not require the utility to take ownership of customer-owned service lines). Accordingly, the electric utility does not have a freestanding duty to inspect customer-owned electric equipment. *Alderwoods*, 106 A.3d at 38; see *Norris v. Phila. Elec. Co.*, 5 A.2d 114, 116 (Pa. 1939).

Under this framework and legal guidance, we proposed Section 57.28(a) to clarify and explain the duties and responsibilities between the customer and the electric utility. As is current practice, the duties "shall be effectively described in the electric utility's tariff that is filed with and approved by the Commission." See Annex A, Section 57.28(a). Here, we explained that an electric utility shall use every reasonable effort to properly warn and protect the public from danger and to reduce hazards to the public due to its provision of electric distribution service and its associated equipment and facilities. See Annex A, Section 57.28(a)(1). We also explained that the customer is responsible for the ownership and maintenance of the customer's facilities beyond the service point and delivery of electric supply. See Annex A, Section 57.28(a)(2).

Discussion

EAP recommends that using a subparagraph title of "Electric utility responsibility" would be consistent with the paragraph "Customer responsibility" found at new Section 57.28(a)(2). However, since we will effectively be deleting Paragraph (a)(2) "Customer responsibility," as the subsection will now only cover electric utilities, we will change the title of subsection (a) to "Responsibilities" which is the terminology used in the Gas Safety regulation in Section 59.33(a), and it will not be necessary to have titles to Paragraphs (a)(1) and (a)(2) because the subsection title "Responsibilities" only applies to an elec-

[12] In fact, EAP filed a letter disagreeing with the claims made by the Joint Commenters and the AFL-CIO and reserved the right to file formal reply comments.

[13] NESC, at page 15. The revised 2012 Edition of the NESC clarifies the relative applicability of the NESC versus the NEC. See NESC, at Foreword, p. iii-vi.

[14] The NEC, which governs electricians and building contractors and not public utilities, provides standards for the safe installation of electrical wiring inside the premises (i.e., the premises wiring system owned by the customer).

tric utility. Furthermore, it is unnecessary to use both words, "duties and responsibilities," as they have a similar meaning, i.e., a moral or legal obligation. We shall also take out the reference to "duties" in the body of the provision. Moreover, we find merit with IRRC's recommendation that the word "effectively" be removed. In addition to it being essentially unclear in this context, the word is unnecessary because the provision already confirms that the separation of responsibilities is described in a tariff approved by the Commission. We shall also accept EAP's recommendation to strike "every" and the term "general public" from the proposed Section 57.28(a)(1) as neither of these terms are found in Section 59.33(a) and insertion of the modifier "every" implies that the legal obligation exceeds a reasonable standard. EAP contends that the addition of the term "the general public" to the language of Section 57.28(a) is redundant. PPL agrees and IRRC also comments that the word "every" is unclear as it fails to explain what additional standard is set by requiring "every reasonable effort." As we have indicated, we shall also accept the recommendation to remove the reference to the "general public." We agree that the word "general" is unclear but we shall retain the use of the word "public," which clearly is a category separate and apart from employees and customers, and not redundant.

Finally, in this paragraph EAP contends that the proposed rules are aimed at providing a standard for safety with respect to "facilities and equipment" and not to the broader provision of electric distribution service that is provided for under the proposed language. EAP submits that other provisions address reasonable and reliable service.

We disagree that this regulation does not apply to the safety of electric distribution services beyond its associated equipment and facilities. The location of this regulation is Subchapter B. SERVICE AND FACILITIES and electric safety does not just apply to facilities. Clearly, the practices and procedures of electric utility employees working on the facilities are relevant to safety. In other words, electric utility employees must follow reasonable and adequate procedures based on adequate and proper training. In response to IRRC's recommendation to clarify this phrase, we will make one modification - electric distribution will be removed and replaced with electric utility because the safety of electric utility service and facilities should not be limited to just electric distribution service but must also apply to transmission service as we explained in the definitions section.

With respect to Paragraph (2) "Customer responsibility," IRRC points out that as drafted the paragraph would establish Commission regulation and enforcement of all electric utility customers to safely maintain and inspect wiring and equipment beyond the service point. According to IRRC, the Preamble does not establish a statutory basis or justification for the Commission to regulate maintenance of wiring and equipment owned by the customer beyond the service point. IRRC asks the question whether it is mainly our intent to declare that an electric utility is not responsible for a customer's wiring and equipment. We agree that it is our intent to declare jurisdiction from the perspective of the electric utility and not the customer. Therefore, this disposition will delete most of the paragraph as we shall reword the paragraph to make this declaration of jurisdiction that the electric utility's responsibilities end at the service point.

Section 57.28(b) Safety Code

(b) *Safety code*. A jurisdictional EDC shall comply with all of the following minimum safety standards:

(1) This chapter.

(2) The standards established by the National Electrical Safety Code.

(3) The procedures established by the EDC and set forth in the EDC's internal company procedures.

(4) The standards established by sections 1—11 of the act of December 10, 1974 (73 P.S. §§ 176—186), known as the Underground Utility Line Protection Act, and Pennsylvania One Call.

(5) Other applicable and governing State and Federal laws and regulations.

In this section, the Commission establishes and explains the minimum safety standards to which all jurisdictional EDCs must comply. The electric utilities must adhere to Chapter 57 of the Commission's regulations governing electric service. 52 Pa. Code § 57 et seq.; see Annex A, Section 57.28(b)(1). As discussed, the electric utilities must adhere to the standards established by the National Electrical Safety Code. 66 Pa.C.S. § 2804(1), § 2807(a); see Annex A, Section 57.28(b)(2). We also propose to require that an electric utility comply with its own internal company procedures. See Annex A, Section 57.28(b)(3).

Additionally, we proposed to require electric utilities to adhere to the Underground Utility Line Protection Act (PA One Call). See 73 P.S. § 176; see Annex A, Section 57.28(b)(4). PA One Call requires underground facility owners, including public utilities, to become members of the One Call System, a Commonwealth-wide communication system that provides a single nationwide toll-free telephone number or 811 number for excavators, designers, or other persons covered by Act 287 to call facility owners and notify them of their intent to perform excavation, demolition, or similar work. 73 P.S. §§ 176-177. See Annex A, Section 57.28(b)(4). Finally, we inform EDCs as to their duty to adhere to any and all applicable and governing state and federal laws and regulations. See Annex A, Section 57.28(b)(5).

The proposed safety code paragraphs have drawn mostly negative comments. PECO supports the comments made by EAP, but focuses its attention on eliminating two sections of the proposed rule: Section 57.28(b)(3) and Section 57.28(c). PECO submits that the language of Section 57.28(b)(3) that raises an internal company procedure to the level of a Commission-approved "safety code" conflicts with the Commission's intended role in setting standards. PECO submits that internal company procedures were never intended to be externally imposed safety codes. The way it works, PECO explains, is that the Commission sets standards, utilities are then required to conform to those standards, but they are given significant latitude in the procedures they use to comply with the standard. In other words, each utility will have internal company procedures that are unique to its own operations, which may change over time based on the utility's operational experience.

By deeming internal company procedures as "safety codes" without examining evidence, taking comments, or evaluating the internal company procedures of the various utilities, PECO contends that the Commission cannot have performed its normal function of determining whether it is in the public interest to impose a certain procedure as a required standard. Further, PECO notes

that internal company procedures, by definition, are not rules of general applicability and submits inclusion of Section 57.28(b)(3) would cause a "balkanization of safety standards and enforcement" throughout the state. If the internal company standards are elevated to the role of Commission-approved safety codes, PECO argues that this would literally mean that an identical activity could be legal at some Pennsylvania utilities but a regulatory violation at other Pennsylvania utilities, depending solely upon whether the respective utilities had chosen to include the given activity in an internal operating procedure. Therefore, PECO suggests that converting these internal policies into Commission-approved safety codes would incentivize utilities to reduce the number and scope of internal procedures so as to minimize the number of safety codes they have to adhere to legally.

PECO also submits that the enforcement provision at Section 57.28(c) should not require utilities to provide the Commission with "raw data." For one reason, PECO asserts that the term "raw data" is confusing as it is not defined within the Commission's regulations nor does it have a uniform definition in common parlance. Secondly, PECO stresses that the Proposed Rulemaking Order (Page 9) states that the section is "not meant to include opinions or mental impressions." However, much of the information collected after a safety event will be collected as part of a litigation investigation and the utility will likely have valid reasons to maintain control over information that are not "opinions or mental impressions." PECO also notes that the proposed regulation itself does not contain the limitation on opinions or mental impressions which could cause some disagreement as to what is required. Thirdly, PECO is concerned that the Proposed Rulemaking Order does not contain any discussion of whether "raw data" provided to a Commission investigator would be subject to a third party Right-to-Know request. If the answer is yes, PECO asserts that the civil discovery process would be bypassed and the release of raw data to the Commission could prejudice the utility's position.

EAP would only keep Paragraph (2) and IRRC agrees with EAP's assessment. EAP contends that Paragraphs (1) and (5) are vague and unnecessary because they restate existing obligations. IRRC concurs and also, strongly agrees, with EAP's objection to Paragraph (3) that the Commission, by proposing that internal company procedures be included in the regulation as a substantive compliance standard, improperly infringes on a utility company's management discretion. EAP submits there is no authority for individual company procedures or rules forming the basis for compliance actions by the Commission. IRRC interprets this provision as if the Commission delegated its regulatory authority over safety procedures to the electric utility in its operating procedures. In other words, IRRC explains this would effectively allow the electric utility to write its own safety regulations independent of the Commission and outside the Regulatory Review Act process. IRRC also agrees with EAP's observation that Paragraph (4)(b) is premature because the legislation that would transfer enforcement authority over PA One Call has not been passed into law. Finally, IRRC agrees with EAP's suggestion to add a 180-day period after a new edition of the NESC takes effect to allow for training and implementation and requests that the Commission should consider adding language to clarify what standards apply to existing facilities when the NESC is updated.

Discussion

We shall accept most of the changes recommended by the Commenters and IRRC to simplify the safety code. The most important aspect of the safety code is to identify the minimum safety standards that an electric utility must comply with in providing electric utility service. In addition, it was our intent to list and provide notice of all the laws and regulations that are applicable in one section in Chapter 57 to assist the Electric Safety Division in enforcing these standards. In so doing, we recognize, as pointed out by IRRC, that the paragraphs may restate existing obligations, are overly broad, unpractical and premature. Based on these criticisms, we shall delete Paragraphs (1), (4), and (5).

However, we further recognize, as pointed out by EAP, that gas safety standards under Section 59.33 were established in Pennsylvania by the adoption and implementation of federal pipeline safety laws, "including all subsequent amendments thereto." The regulation notes that these are minimum safety standards for gas and we shall utilize the same terminology for electric by limiting the electric safety code to the NESC. We do not agree with PPL that the use of this term marginalizes the NESC. The utilization of the term and purpose is to create a threshold the electric utility must attain, not that the NESC has electrical safety standards that are inferior. The use of this term "minimum safety standards" for natural gas has not proven to cause any discrepancies with respect to implementation of the regulation. We shall keep the term "minimum," as it also used in the gas safety code. In addition, while we shall use the NESC safety standards, we shall not adopt the recommendations of EAP and IRRC with respect to the implementation period, and EAP's language as it applies to accepting the NESC standards and explanation as to which editions take effect.

The Commenters assert that it is important to clarify which edition of the NESC applies and explain how the effective date is determined. See NESC Section 1, Rule 016 at p. 6 (2012 Edition). In this regard, EAP suggested the following language as a new paragraph (b)(2): "New editions of the NESC shall take effect no sooner than 180 days following their publication, unless the Commission provides public notice and opportunity for public input to determine an alternative effective date."

However, upon further reflection, we do not believe that the language proposed by EAP captures the issues of design and approval lag time in construction or the explanation of the ability to immediately use the latest edition of the Code upon being published. Although we are not maintaining that it was necessarily the intent on the part of the EAP to condense the Rule, there is more substance to the Rule than this requirement. Moreover, the sentence could be interpreted incorrectly to imply that the general rule is that new editions cannot take effect less than 180 days from publication unless administrative action is taken. As provided for in the Note to the Rule: "There is neither an intention to require or imply that this edition be implemented before 180 days from the publication date, nor an intention to prohibit earlier implementation." The Note also states that utilities and regulatory authorities have not less than 180 days to take necessary action to comply. NESC Section 1, Rule 016 Handbook at p. 16 (2012 Edition). In fact, the general rule for determining the effective date is that the "edition may be used at any time on or after the publication date," and the edition "shall become effective no later than the first day of the month after 180 days have elapsed

following its publication date for application to new installations and extensions where both design and approval were started after the expiration of that period, unless otherwise stipulated by the administrative authority."

Rather than implement a regulatory provision that may be interpreted incorrectly or simply duplicate the provision in the regulation, we shall not include the sentence offered by EAP. Instead the subsection (b) Safety code will require compliance with the NESC and leave it to the electric utility to comply with the Rules of the NESC that apply to determining the effective date of the NESC edition. In other words, the Safety code requires that an electric utility shall comply with the minimum safety standards established by the NESC which includes rules for determining the effective date of the NESC edition.

We have also considered adding language to clarify what standards apply to existing facilities when the NESC is updated. IRRC noted that several commenters suggest adding language to clarify that the NESC standards in place at the time of a facility's installation should be the standards that apply to that facility. We agree with this analysis and also that it should be clarified what standards apply to existing installations and extensions. For example, under Rule 013, the current NESC rules "apply to all new installations and extensions, except that they may be waived or modified by the administrative authority." NESC Section 1, Rule 013 at p. 4 (2012 Edition). When that occurs, the rule provides that safety is to be provided in other ways. In addition, the general rule for existing installations is that "[w]here an existing installation meets, or is altered to meet, these rules, such installation is considered to be in compliance with this edition and is not required to comply with any previous edition." NESC Section 1, Rule 013 at p. 4 (2012 Edition). Rather than transcribe the entire four pages of Rule 013. Application, in this regulation, we believe that it is sufficient to again rely on the language of the subsection (b) Safety code that an electric utility shall comply with the minimum safety standards established by the NESC which includes rules for installations.

It was our intent by proposing Paragraph (3) that electric utility companies prepare and follow written procedures for conducting their activities. To satisfy the Section 1501 obligation to provide safe service, we would expect that Pennsylvania electric utilities prepare and follow written procedures for conducting their installations, operations, and maintenance activities. IRRC was especially concerned this paragraph would allow electric utilities to effectively write their own safety regulations, and bypass the Regulatory Review Act. However, the NESC under Part 4, Work Rule 410A does require that electric utility employers utilize positive procedures to secure compliance with the NESC safety rules. Furthermore, under Part 4, Work Rule 410A, the General Operating Routine requires supervisors to conduct job briefings before beginning each job and that should include work procedures, personal protective equipment requirements, energy source controls, hazards associated with the job, and special precautions. The NESC also provides for general operating routines to provide for control of access to the worksite and control of the work to be performed to ensure that the safety rules are observed. Handbook to Rule 421.

Therefore, since we expect that an electric utility would have a safe operating procedure for a certain activity, and that a worker would comply with their own internal procedures, and that NESC already requires formal work procedures, we shall not make the establishment of internal company procedures a specific regulatory requirement.

Section 57.28(c) Enforcement

> (c) *Enforcement*. An EDC is subject to inspections, investigations and enforcement actions as may be necessary to assure compliance with this section. The facilities, books and records of an EDC shall be accessible to the Commission and its staff for the inspections and investigations. An EDC shall provide the Commission or its staff the raw data, reports, supplemental data and information necessary for the administration and enforcement of this section.

On occasion, the Commission's I&E Bureau has had difficulty in obtaining certain information from electric utilities. Prior to the creation of the Electric Safety Division, I&E depended on utilities to provide information to assist I&E in carrying out investigations.[15] Even with the Electric Safety Division established, I&E still needs to be able to readily and easily acquire information from electric utilities. Since there are only three electric safety inspectors in the Commonwealth (East, Central, and West), an inspector may not be able to arrive at the scene of an incident while the evidence is still fresh and untouched. The Electric Safety Division has encountered some confusion and hesitance from utilities regarding the provision of information, including raw data, to Commission staff at the investigation site.

In order to alleviate any confusion on the part of the electric utilities as to what information must be provided to the Commission and to ensure that the Electric Safety Division can effectively carry out its inspections and investigation, we proposed Section 57.28(c) to require an EDC to make its books, facilities, and records available to staff of I&E and the Electric Safety Division during inspections and investigations. See 52 Pa. Code § 59.33(d) (similar enforcement section for gas safety). This was to include the raw data collected at the time of the initial incident investigation. The raw data is to be provided to the electric safety inspector as it is collected if a safety inspector is on site during the initial investigation. See Annex A, Section 57.28(c). Here, we emphasized that an EDC "shall provide the Commission or its staff the raw data, reports, supplemental data, and information necessary for the administration and enforcement of this section." See Annex A, Section 57.28(c). This section is not meant to include opinions or mental impressions.

PECO first notes with respect to this subsection that the term "raw data" is not defined and even in common parlance does not have a uniform definition which then raises the question which information utilities are required to provide to Commission staff after a safety incident. In addition, PECO submits that information that a utility collects may be collected as part of its litigation investigation chain of custody and has valid reasons for maintaining control. Finally, because of third party Right-to-know requests, PECO states that sharing raw data with Commission staff could effectively bypass the civil court discovery process which contains significant protections against the release of certain types of information.

EAP recommends using the language in the gas safety regulation at Section 59.33(d), as the addition of the word "investigation" is considered to be duplicative and unnecessary. Moreover, EAP believes use of the term "raw data"

[15] If a civil suit was also pending, then Plaintiffs' counsels often served as sources of information.

is overly broad and does not agree that utilities are or should be obligated to turn over "raw data" at an incident site.

EAP further believes that turning over "raw data" collected from a utility work site before it has been subject to internal vetting, evaluation and verification by the utility may not demonstrate whether a company is complying with substantive safety standards and would likely lead to misinformation and misinterpretation. EAP argues that § 57.11(e) provides the utility thirty (30) days to review, analyze and verify data before submitting a written report and, therefore, on-the-spot reporting is not required. In fact, EAP does not believe an additional on-the-spot reporting requirement is necessary.

EAP acknowledges that issues of process and protocol have arisen with respect to on-site investigations by the Electric Safety Division that are conducted simultaneously with the utilities internal investigation of a reportable accident or incident. EAP believes the thirty (30) day reporting requirement appears to have provided the proper balance between the staff need to timely evaluate incidents and the utilities need to ensure that the information reported is accurate and complete. EAP fears that the regulations could be interpreted to mean that the utilities would, on an ongoing basis or other frequency, be continually submitting all "reports, supplemental data, and information" pursuant to the Commission's administration and enforcement of the proposed safety standard.

Duquesne expressed concerned with the perceived broad verbiage of this proposed section because authorizing the Commission to have unrestricted access to EDC files could subject the Commission to an increase in hacking attempts.

The FE Companies question why there is a difference in language from the gas safety regulation as there has been no allegation of inadequacies identified in the gas safety regulation. The FE Companies are concerned that the "raw data" provision would require electric utilities to provide unverified, and in some cases unrecorded data on site at any inspection that the Commission's Electric Safety Division inspectors might be holding. According to the FE Companies, the data presented on site may be offered without verification, analysis and evaluation for accuracy and completion. The FE Companies submit that this "on the spot" data is not required to be submitted to other entities without a documented request. Moreover, the FE Companies contend the data may not be accurate and that EDCs should be allowed to perform their own investigations and confirm data. Finally, since the FE Companies maintain that legal process is already in place to enforce a utility's compliance with requests made by I&E during investigations, it is unnecessary and inappropriate to reference investigations within the provision. According to the FE Companies, to the extent it is contemplated that this information be shared with I&E by the Electric Safety Division, utilities should be given the due process right of attorney representation and review for any information that may find its way into the hands of Commission prosecutors with the intent of initiating an investigation.

PPL also has concerns over this subsection first noting that raw data may be incomplete or inaccurate and should not be provided to Commission staff while the electric utility is still investigating. Also, PPL proposes that the final sentence in the subsection should incorporate the language from Section 59.33(d) that such information will be provided to the Commission as it shall from "time to time request." Finally, PPL proposes that the regulations be revised to specifically state that any information supplied to the Commission or its staff pursuant to the regulations shall be protected as privileged and confidential and exempt from disclosure under 66 Pa.C.S. § 335(d).

IRRC determines that the Commission should further explain the need for this raw data and clarify the regulation to more clearly state what data is required. IRRC notes that these comments compare this proposed regulation to the existing language of the gas safety regulation at 52 Pa. Code § 59.33 and questions why the electric safety requirements should differ from the gas safety requirements.

Discussion

The "raw data" we are referring to is primarily up-to-date measurements of facilities and conductors, on the scene closest to the time of the incident as possible. Since weather conditions and load can suddenly change over a short amount of time after an incident, these measurements need to be recorded as soon as possible. The utilities are best equipped to safely obtain these measurements and we expect that these measurements would be taken. Furthermore, we would expect that this information be provided to our field inspector if the information is requested and if for some reason an issue develops as to the accuracy of the information, that matter can be raised in the written report of a reportable accident required under Section 57.11. We do not consider this a new category of information. Although this may be data not yet subject to analysis, we do not consider it information that would not be included in "reports, supplemental data, and information necessary for the administration and enforcement of this section." Therefore, we shall remove the term "raw data" which may appear to be too informal and not uniformly defined.

However, we shall not accept the recommendations to maintain the exact language utilized in the counterpart gas safety regulation with respect to enforcement. We do not agree that use of the word "investigations" with "inspections" is necessarily duplicative, since they do not have the same meaning. Certainly a general inspection of facilities is not the same as a specific informal investigation conducted by I&E pursuant to 52 Pa. Code § 3.113. Although EAP opines that it is unnecessary to include language that purports to establish the Commission's authority to bring enforcement actions, we believe that including the term "investigations" resolves any issues that may be raised questioning I&E's authority as Commission staff to make informal requests for documents and information. The regulation, as proposed, simply represents the compliance obligation of the electric utility.

In addition, although PPL argues that the term "investigations" is not utilized in the gas safety regulations at Section 59.33, we do not believe this is a sufficient reason to warrant removing a relevant term here since any future modification of the gas safety regulations may consider inclusion of the term. We do, however, find merit with PPL's concern that since agency records relating to a noncriminal investigation are exempt from the Pennsylvania Right-to-Know Law,[16] the proposed language could strip the information provided by the electric utility of this protection. As indicated above, to address this concern PPL proposes that the regulations be revised to specifically state than any information supplied to the Commission or its staff pursuant to the regulations shall be protected as privileged and confidential and exempt from disclosure under 66 Pa.C.S. § 335(d).

[16] *Pennsylvania Pub. Util. Comm'n v. Gilbert*, 40 A.3d 755, 762 (Pa. Cmwlth. 2012).

We are in agreement and shall apply this protection by amending the phrase to read "inspections and other types of noncriminal investigations." At the same time, we do not share the same concern with respect to removing the phrase "as it shall from time to time request," that is also contained in the gas safety regulations at Section 59.33. Without this qualifier, PPL and EAP believe there is no procedure for when or how the electric utility will provide information to the Commission or its staff and the regulation could be interpreted to mean that the utilities would, on an ongoing basis or other frequency, be continually submitting all "reports, supplemental data, and information" pursuant to the Commission's administration and enforcement of the proposed safety standard. Frankly, no interested parties have responded that this qualifier as written controls the number of requests for information made by staff. Therefore, we do not agree that removing this qualifier somehow will open the flood gates to numerous requests for information. Moreover, we do not believe that implementing the regulation without the qualifier will be imposing an additional burden on the electric utility.

Therefore, we shall not delete the word "investigations" in the first and second sentence, but we shall modify the subsection to read "inspections and other types of noncriminal investigations" in both sentences. However, we do find merit that the phrase "and enforcement actions" is unnecessary. Here, we agree with EAP's analysis that these words may be unnecessary as the Association acknowledges there is no need to include language that purports to establish the Commission's enforcement authority since neither EAP nor its members question the authority of the Commission to bring enforcement actions for alleged violations of the Public Utility Code or regulations promulgated thereunder.

Section 57.28(d) Records

> (d) *Records*. An EDC shall keep adequate records as required for compliance with the safety code set forth in subsection (b). An electric utility shall submit reports for each reportable accident under § 57.11 (relating to accidents). The records shall be accessible to the Commission and its staff.

As explained above, the Electric Safety Division has encountered confusion and resistance from utilities regarding the provision of information, including raw data, to Commission staff at the investigation site. By the same reasoning underlying the proposed Section 57.28(c), we proposed Section 57.28(d) requiring an electric utility to keep "adequate records" as required under the Commission's regulations and the National Electric Safety Code. See 52 Pa. Code § 59.33(e) (similar records section for gas safety). As these records will assist I&E in carrying out its investigations, we emphasize that these records must be "accessible to the Commission and its staff." See Annex A, Section 57.28(d).

Here, we also noted that Section 57.11 of the Commission's regulations requires an electric utility to submit a report of each reportable accident involving the facilities or operations to the Secretary of the Commission. 52 Pa. Code § 57.11(a).

EAP suggests that the proposed regulatory language describing the requirement for EDCs to keep adequate records relating to safety be revised such that the second sentence of the proposal be removed from the final rule. Since it is not necessary to restate the existing section 57.11 reporting requirement relating to accidents in this new regulatory section, Duquesne believes the subsection should be streamlined because of the duplicative reference to Section 57.11. Duquesne also believes the reference to "adequate records" should be clarified by the Commission. The FE Companies agree that the language of the provision is redundant.

IRRC considered the first sentence to be vague by requiring "adequate records as required for compliance with the safety code," since the view of what are "adequate records for compliance" could vary. Finally, IRRC points out that the second sentence merely restates an existing requirement that is established under Section 57.11.

Discussion

IRRC recommends that we review and amend this requirement to clearly state what records are required for compliance. We would agree that the subsection is vague only to extent that the records that would be required for compliance would depend on what provision of the safety code or the NESC was in issue or what aspect of service or facilities is involved. The Safety Rules record retention requirement in the NESC provides as follows for Overhead Lines (Rule 214(A)(4)) and Underground Lines (Rule 313(A)(4)): "Inspection Records: Any conditions or defects affecting compliance with this Code revealed by inspection or test, if not promptly corrected, shall be recorded; such records shall be maintained until the conditions or defects are corrected." In addition, the Safety Rules record retention requirement for Electric Supply Stations (Rule 121(A) Handbook) provides that defective conditions that are found should be recorded and a procedure should be in place to track such defects until they are remedied. These provisions clarify what inspection records are necessary to adequately record construction, operations, and maintenance activities undertaken pursuant to the NESC. Therefore, we would agree that the compliance record could vary because it would depend on what work was involved and again what provision of the NESC was involved. We believe that the rule as written provides sufficient notice that an electric utility must keep records that verify their compliance with the safety code. We further believe that if the provision would have merely required the electric utility to keep records, that would be vague, but the rule clearly requires "adequate" records just as the electric utility is required to furnish reasonable and adequate service under the Public Utility Code. 66 Pa.C.S. § 1501. However, based on vagueness concerns, we shall not adapt the AFL-CIO's recommendation that EDCs maintain other safety-related records that are required under other laws or regulations. Although it may be important to have access to reports of employee accidents, Section 57.11 already requires a public utility to make this report. Finally, we shall delete the second sentence in response to IRRC's comment that the requirement is redundant as Section 57.11 already independently establishes this reporting requirement.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on January 27, 2016, the Commission submitted a copy of the notice of proposed rulemaking, published at 46 Pa.B. 654 (February 6, 2016), to IRRC and the Chairpersons of the House Consumer Affairs Committee and the Senate Consumer Protection and Professional Licensure Committee for review and comment.

Under section 5(c) of the Regulatory Review Act, the Commission shall submit to IRRC and the House and Senate Committees copies of comments received during

the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Commission has considered all comments from IRRC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on June 14, 2017, 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 June 15, 2017, and approved the final-form rulemaking.

Conclusion

Accordingly, under 66 Pa.C.S. §§ 501 and 1501; 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 at 1 Pa. Code §§ 7.1, 7.2 and 7.5; section 204(b) of the Commonwealth Attorneys Act (71 P.S. § 732-204(b)); section 5 of the Regulatory Review Act (71 P.S. § 745.5); and section 612 of The Administrative Code of 1929 (71 P.S. § 232) and the regulations promulgated thereunder at 4 Pa. Code §§ 7.231—7.234, we are considering adopting the final regulations set forth in Annex A; *Therefore*,

It Is Ordered That:

1. The regulations of the Commission, 52 Pa. Code Chapter 57, are amended by adding § 57.28 and amending § 57.1 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

2. The Secretary's Bureau shall serve a copy of this Final Rulemaking Order and Annex A on all jurisdictional electric utility companies, the Office of Consumer Advocate, the Office of Small Business Advocate, the Energy Association of Pennsylvania and all other parties that filed comments at Docket No. L-2009-2107155. The Order and Annex A shall be posted and made available electronically on the Commission's web site.

3. The Law Bureau shall certify this Final Rulemaking Order and Annex A and shall deposit them with the Legislative Reference Bureau to be published in the *Pennsylvania Bulletin*.

4. The Law Bureau shall submit this Final Rulemaking Order and Annex A to the Office of Attorney General for approval as to legality.

5. The Law Bureau shall submit this Final Rulemaking Order and Annex A to the Governor's Budget Office for review of fiscal impact.

6. The Law Bureau shall submit this Final Rulemaking Order and Annex A for review by the designated standing committees of both houses of the General Assembly, and for review and approval by IRRC.

7. The final regulations become effective upon publication in the *Pennsylvania Bulletin*.

8. The contact person for this proposed rulemaking is Terrence J. Buda, Assistant Counsel, Law Bureau, (717) 787-5000. Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Alyson Zerbe, Regulatory Review Coordinator, Law Bureau, (717) 772-4597.

ROSEMARY CHIAVETTA,
Secretary

(*Editor's Note*: See 47 Pa.B. 3672 (July 1, 2017) for IRRC's approval order.)

Fiscal Note: Fiscal Note 57-313 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 57. ELECTRIC SERVICE

Subchapter A. GENERAL PROVISIONS

§ 57.1. Definitions.

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

* * * * *

Electric supply line—The wires or cables, with the necessary supporting or containing structures and appurtenances, used in connection with an overhead or underground system of a public utility, providing electric power, located on a public highway or utility right-of-way and used to transmit or distribute electric energy.

Electric utility—A public utility as defined in 66 Pa.C.S. § 102 (relating to definitions).

Eminent domain application—An application filed with the Commission by a public utility for a certificate of public convenience for approval of the exercise of the power of eminent domain to acquire rights-of-way for the construction, operation and maintenance of an aerial transmission line.

* * * * *

Service line—The wires or cables and appurtenances which connect the electric supply line of the public utility with the customer's installation and which comply with either of the following:

(i) If overhead-open-wire or cable-construction, the span, normally 100 feet, extending to a suitable support provided by the customer.

(ii) If the electric supply line is of underground construction, the underground facilities extending to but not exceeding 18 inches inside the property line of the customer.

Service point—The location of interconnection designated by the electric utility in its Commission-approved tariff where the utility's service supply lines terminate and the customer's facilities for receiving service begin.

Siting application—An application filed with the Commission by a public utility under § 57.71 (relating to application).

* * * * *

Subchapter B. SERVICE AND FACILITIES

§ 57.28. Electric safety standards.

(a) *Responsibilities*. The separation of responsibilities between an electric utility and a customer with respect to the facilities utilized for electric service shall be described in the electric utility's tariff that is filed with and approved by the Commission.

(1) An electric utility shall use reasonable effort to properly warn and protect the public from danger, and shall exercise reasonable care to reduce the hazards to which employees, customers, the public and others may be subjected to by reason of its provision of electric utility service and its associated equipment and facilities.

(2) An electric utility is not responsible for the ownership and maintenance of the customer's facilities beyond the service point.

(b) *Safety code*. An electric utility shall comply with the minimum safety standards established by the National Electric Safety Code pursuant to its terms of applicability.

(c) *Enforcement*. An electric utility is subject to inspections and other types of noncriminal investigations as may be necessary to assure compliance with this section. The facilities, books and records of an electric utility shall be accessible to the Commission and its staff for inspections and other types of noncriminal investigations. An electric utility shall provide to the Commission or its staff the reports, supplemental data and information necessary for the administration and enforcement of this section.

(d) *Records*. An electric utility shall keep adequate records as required for compliance with the safety code in subsection (b). The records shall be accessible to the Commission and its staff.

[Pa.B. Doc. No. 17-1250. Filed for public inspection July 28, 2017, 9:00 a.m.]