

# RULES AND REGULATIONS

## Title 25—ENVIRONMENTAL PROTECTION

### DELAWARE RIVER BASIN COMMISSION

[ 25 PA. CODE CHS. 901—903 ]

#### Comprehensive Plan and Special Regulations with Respect to High Volume Hydraulic Fracturing; Rules of Practice and Procedure Regarding Proj- ect Review Classifications and Fees

*Proposed:* *Pennsylvania Bulletin* (48 Pa.B. 255 (January 13, 2018)).

*Adopted:* February 25, 2021, by the Delaware River Basin Commission, Pamela M. Bush, Esq., Commission Secretary.

*Filed:* April 16, 2021 as a final regulation.

*Effective:* May 31, 2021 (thirty days after publication in the *Federal Register*, which occurred on April 21, 2021).

*Summary:* By Resolution No. 2021-01 on February 25, 2021, the Delaware River Basin Commission (“DRBC” or “Commission”) amended its Comprehensive Plan and adopted new regulations to prohibit high volume hydraulic fracturing in hydrocarbon-bearing rock formations within the Delaware River Basin. The Commission simultaneously adopted unrelated amendments to its rules concerning the classification of projects for review under Section 3.8 of the Compact and regulatory program fees.

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*Supplementary Information:* The Delaware River Basin Commission (“DRBC” or “Commission”) is a Federal-interstate compact agency charged with managing the water resources of the Delaware River Basin on a regional basis without regard to political boundaries. Its members are the governors of the four basin states—Delaware, New Jersey, New York and Pennsylvania—and the North Atlantic Division Commander of the U.S. Army Corps of Engineers, representing the Federal Government.

*Background.* When the potential for developing natural gas from tight shale formations within the Basin using high volume hydraulic fracturing (“HVHF”) and horizontal drilling techniques and the risks to water resources posed by such activities became known to the Commission, Commission staff undertook a scientific, technical, regulatory, and policy analysis to determine the appropriate response in light of the Commission’s statutory mission and Comprehensive Plan.

An important milestone occurred on September 13, 2017, when the DRBC Commissioners by a Resolution for the Minutes directed the Executive Director to prepare and publish for public comment a revised set of draft regulations, to include, among other things, “prohibitions relating to the production of natural gas utilizing horizontal drilling and hydraulic fracturing within the basin.” In accordance with the Commissioners’ directive, the Commission proposed amendments to its Comprehensive Plan and to its Special Regulations at 18 CFR part 440, including a prohibition on HVHF within the Basin. The Commission simultaneously proposed amendments to its

Administrative Manual—Rules of Practice and Procedure, 18 CFR part 401, concerning the classification of projects for review under Section 3.8 of the Compact (§ 401.35) and regulatory program fees (§ 401.43). See 83 FR 1586, January 12, 2018. Also see, 21 DE Reg. 526, January 1, 2018; 50 N.J.R. 717, February 5, 2018; NYS Register, January 3, 2018 p. 5; and 48 Pa.B. 255, January 13, 2018. Some of the proposed amendments to part 401 were related to the new part 440 and others were not; however, only the changes unrelated to part 440 are being adopted as final rules.

The changes unrelated to HVHF do not substantively alter Commission requirements or fees, but better align the rules with the Commission’s practices, eliminate unnecessary language, clarify language that has been misconstrued, and in instances replace the discretion of the Executive Director with that of the Commission. The changes to project review classifications: 1) retain Commission review of alterations to wetlands of less than 25 acres where a state or a federal level review and permit system is not in effect, while eliminating additional triggers for such review; 2) remove the provision for review of regional wastewater treatment plans developed pursuant to the Federal Water Pollution Control Act because the basin states have effective programs for the transparent development and implementation of such plans; 3) replace the discretion of the Executive Director with that of the Commission to require review under Section 3.8 of the Compact of any project having a potential substantial water quality impact on waters classified as Special Protection Waters; and 4) clarify that the Commission as a whole, not merely any single agency of a signatory party, may determine that a project in an excluded classification is required to be submitted for review under Section 3.8 of the Compact. The changes to regulatory program fees replace the term “docket application fee” with the more accurate term “application fee,” because project review does not always involve a “docket.”

Extensive opportunity for public input on the proposed rules was provided during the public comment period that took place from November 30, 2017 to March 30, 2018. In addition to accepting written comments, the Commission accepted oral comment at six public hearings, one of which was conducted through an operator-assisted toll-free teleconference to avoid the need for travel to a hearing location. During the comment period, the Commission received a total of 8,903 comment submissions (8,680 in writing and 223 at public hearings). In many cases, a single comment submission included numerous detailed comments. A Comment and Response Document was prepared and adopted by the Commission to address the comments received from the public.

Together with the other materials gathered during the development of its regulation, the Commission reviewed the extensive public comments, including consultant reports, scientific literature and other statements and materials submitted, and examined the experience of other jurisdictions with HVHF. Based upon its review, the Commission by Resolution No. 2021-01 on February 25, 2021, found and determined that:

1. As the scientific and technical literature and the reports, studies, findings and conclusions of other government agencies reviewed by the Commission have documented, and as the more than a decade of experience with high volume hydraulic fracturing in regions outside

the Delaware River Basin have evidenced, despite the dissemination of industry best practices and government regulation, high volume hydraulic fracturing and related activities have adversely impacted surface water and groundwater resources, including sources of drinking water, and have harmed aquatic life in some regions where these activities have been performed.

2. The region of the Delaware River Basin underlain by shale formations is comprised largely of rural areas dependent upon groundwater resources; sensitive headwater areas considered to have high water resource values; and areas draining to DRBC Special Protection Waters.

3. The geology of the region in which shale formations potentially containing natural gas are located in the Basin is characterized by extensive geologic faults and fractures providing preferential pathways for migration of fluids (including gases).

4. If commercially recoverable natural gas is present in the Delaware River Basin and if HVHF were to proceed in the Basin, then:

a. Spills and releases of hydraulic fracturing chemicals, fluids and wastewater would adversely impact surface water and groundwater, and losses of well integrity would result in subsurface fluid (including gas) migration, impairing drinking water resources and other uses established in the Comprehensive Plan.

b. The fluids released or migrating would contain pollutants, including salts, metals, radioactive materials, organic compounds, endocrine-disrupting and toxic chemicals, and chemicals for which toxicity has not been determined, impairing the water uses protected by the Comprehensive Plan.

c. HVHF activities and their impacts would be dispersed over and adversely affect thousands of acres of sensitive water resource features, including, among others, forested groundwater infiltration areas, other groundwater recharge locations, and drainage areas to Special Protection Waters, where few existing roads are designed to safely carry the heavy industrial traffic required to support HVHF, prevent dangerous spills or provide access to remediate spills that occur.

5. For these reasons and other grounds described in the administrative record for this rulemaking:

a. High-volume hydraulic fracturing and related activities pose significant, immediate and long-term risks to the development, conservation, utilization, management, and preservation of the water resources of the Delaware River Basin and to Special Protection Waters of the Basin, considered by the Commission to have exceptionally high scenic, recreational, ecological, and/or water supply values.

b. Controlling future pollution by prohibiting high volume hydraulic fracturing in the Basin is required to effectuate the Commission's Comprehensive Plan, avoid injury to the waters of the Basin as contemplated by the Comprehensive Plan and protect the public health and preserve the waters of the Basin for uses in accordance with the Comprehensive Plan.

The Commission's Comment and Response Document responds to comments regarding the risks to water resources posed by HVHF, and the potential and observed adverse impacts of HVHF and related activities on water resources. In addition, it addresses comments concerning: the Commission's authority; the intersection of Commission, state and Federal rules; the proposed rule text; basis

and background documents; economic impacts; the relationship of HVHF and related activities to DRBC's Comprehensive Plan, rules and policies; public health; chemical disclosures; climate change; renewable energy; policies and reports on the Susquehanna River Basin; the public input process; compliance and enforcement; constitutional challenges and other matters.

*Changes to the draft rule.* Upon adopting its final rules concerning HVHF, the Commission withdrew proposed § 440.4—Exportation of water for hydraulic fracturing of oil and natural gas wells and § 440.5—Produced Water (and importation of wastewater), and revised § 440.2—Definitions to eliminate terms associated solely with the two deleted sections. Within part 401, comprising the Commission's Rules of Practice and Procedure, proposed amendments to § 401.35—Classification of Projects for Review concerning the importation and exportation of water and wastewater into and from the Basin were withdrawn. Also, within part 401, proposed amendments to § 401.43—Regulatory Program Fees related to wastewater treatability studies were withdrawn. The final rules were revised to eliminate all references to the deleted sections, and public comments specific to these sections are not addressed in the Commission's Comment and Response document. The topics of water exportation and wastewater importation will be addressed as appropriate through one or more separate Commission actions.

The Comprehensive Plan amendments and final rules replace the Executive Director Determinations of May 19, 2009, June 14, 2010 and July 23, 2010. The Resolution for the Minutes of May 5, 2010, which postponed the Commission's consideration of well pad projects until the adoption of final rules, expires by its own terms.

*Related Materials:* Additional materials can be found on the Commission's website, [www.drbc.net](http://www.drbc.net), at [https://www.state.nj.us/drbc/about/regulations/final-rule\\_hvhf.html](https://www.state.nj.us/drbc/about/regulations/final-rule_hvhf.html). These include links to Resolution No. 2021-01 of February 25, 2021 adopting the final rule; the Commission's Comment and Response Document; a mark-up comparing the final to the proposed rule text for 18 CFR part 440; and mark-ups comparing the amended to the existing rule text for 18 CFR 401.35 and 401.43.

The Commission's notice of proposed rulemaking, proposed rule text, written comments received, and transcripts of public hearings can be found on the Commission's website at [https://www.nj.gov/drbc/meetings/proposed/notice\\_hydraulic-fracturing.html](https://www.nj.gov/drbc/meetings/proposed/notice_hydraulic-fracturing.html).

A summary of Commission actions with respect to hydraulic fracturing for oil and gas extraction prior to the Commission's September 13, 2017 directive is available at: <https://www.nj.gov/drbc/programs/natural/archives.html>.

The rule text, shown in the CFR numbering system, follows:

For the reasons set forth in the preamble, effective May 31, 2021, the Commission's rule adoption amends the Pennsylvania Administrative Code, Title 25, Part V, Chapter 901 (18 CFR chapter III), as set forth below.

#### **PART 401—RULES OF PRACTICE AND PROCEDURE**

1. The authority citation for part 401 continues to read as follows:

Authority: Delaware River Basin Compact (75 Stat. 688), unless otherwise noted. Subpart C—Project Review Under Section 3.8 of the Compact

2. Amend § 401.35 as follows:

- a. Revise paragraphs (a) introductory text, (a)(2) and (15), and (b)(14) through (17);
- b. Remove paragraph (b)(18);
- c. Revise paragraph (c);
- d. Remove paragraph (d).

The revisions read as follows:

§ 401.35 Classification of projects for review under section 3.8 of the Compact.

(a) Except as the Commission may specially direct by notice to the project owner or sponsor, a project in any of the following classifications will be deemed not to have a substantial effect on the water resources of the Basin and is not required to be submitted under Section 3.8 of the Compact:

\* \* \* \* \*

(2) A withdrawal from ground water when the daily average gross withdrawal during any 30 consecutive day period does not exceed 100,000 gallons;

\* \* \* \* \*

(15) Draining, filling, or otherwise altering marshes or wetlands when the area affected is less than 25 acres; provided, however, that areas less than 25 acres shall be subject to Commission review and action where neither a state nor a Federal level review and permit system is in effect;

\* \* \* \* \*

(b) \* \* \*

(14) Landfills and solid waste disposal facilities affecting the water resources of the Basin;

(15) State and local standards of flood plain regulation;

(16) Electric generating or cogenerating facilities designed to consumptively use in excess of 100,000 gallons per day of water during any 30-day period; and

(17) Any other project that the Commission may specially direct by notice to the project sponsor or land owner as having a potential substantial water quality impact on waters classified as Special Protection Waters.

(c) Regardless of whether expressly excluded from review by paragraph (a) of this section, any project or class of projects that in the view of the Commission could have a substantial effect on the water resources of the basin may, upon special notice to the project sponsor or landowner, be subject to the requirement for review under section 3.8 of the Compact.

3. Amend § 401.43 as follows:

a. Revise paragraphs (b)(1) introductory text, (b)(1)(iii) introductory text, (b)(2)(i), (b)(4)(iii), and (c); and

b. In paragraph (e), in table 1, revise the table heading and the heading for the middle column.

The revisions read as follows:

§ 401.43 Regulatory program fees.

\* \* \* \* \*

(b) \* \* \*

(1) Application fee. Except as set forth in paragraph (b)(1)(iii) of this section, the application fee shall apply to:

\* \* \* \* \*

(iii) Exemptions. The application fee shall not apply to:

\* \* \* \* \*

(2) \* \* \*

(i) Except as provided in paragraph (b)(2)(ii) of this section, an annual monitoring and coordination fee shall apply to each active water allocation or wastewater discharge approval issued pursuant to the Compact and implementing regulations in this part, regardless of whether the approval was issued by the Commission in the form of a docket, permit or other instrument, or by a Signatory Party Agency under the One Permit Program rule (§ 401.42).

\* \* \* \* \*

(4) \* \* \*

(iii) Modification of a DRBC approval. Following Commission action on a project, each project revision or modification that the Executive Director deems substantial shall require an additional application fee calculated in accordance with paragraph (e) of this section and subject to an alternative review fee in accordance with paragraph (b)(3) of this section.

\* \* \* \* \*

(c) Indexed adjustment. On July 1 of every year, beginning July 1, 2017, all fees established by this section will increase commensurate with any increase in the annual April 12-month Consumer Price Index (CPI) for Philadelphia, published by the U.S. Bureau of Labor Statistics during that year.<sup>1</sup> In any year in which the April 12-month CPI for Philadelphia declines or shows no change, the application fee and annual monitoring and coordination fee will remain unchanged. Following any indexed adjustment made under this paragraph (c), a revised fee schedule will be published in the Federal Register by July 1 and posted on the Commission's website. Interested parties may also obtain the fee schedule by contacting the Commission directly during business hours.

\* \* \* \* \*

(e) \* \* \*

TABLE 1 TO § 401.43—APPLICATION FEES

* * *	Application Fee	* * *
* * * * *		

\* \* \* \* \*

4. Add part 440 to read as follows:

PART 440—HIGH VOLUME HYDRAULIC FRAC-TURING

- Sec. 440.1 Purpose, authority, and relationship to other requirements.
- 440.2 Definitions.
- 440.3 High volume hydraulic fracturing (HVHF).

Authority: Delaware River Basin Compact (75 Stat. 688).

§ 440.1 Purpose, authority, and relationship to other requirements.

(a) Purpose. The purpose of this part is to protect and conserve the water resources of the Delaware River Basin. To effectuate this purpose, this section establishes standards, requirements, conditions, and restrictions to prevent or reduce depletion and degradation of surface and groundwater resources and to promote sound practices of water resource management.

<sup>1</sup> Consumer Price Index—U/ Series ID: CUURA102SA0/Not Seasonally Adjusted/ Area: Philadelphia-Wilmington-Atlantic City, PA-NJ-DE-MD/Item: All items/Base Period: 1982-84=100.



(b) *Authority.* This part implements Sections 3.1, 3.2(a), 3.2(b), 3.6(b), 3.6(h), 4.1, 5.2, 7.1, 13.1 and 14.2(a) of the Delaware River Basin Compact.

(c) *Comprehensive Plan.* The Commission has determined that the provisions of this part are required for the immediate and long range development and use of the water resources of the Basin and are therefore incorporated into the Commission's Comprehensive Plan.

(d) *Relationship to other Commission requirements.* The provisions of this part are in addition to all applicable requirements in other Commission regulations in this chapter, dockets, and permits.

(e) *Severability.* The provisions of this part are severable. If any provision of this part or its application to any person or circumstances is held invalid, the invalidity will not affect other provisions or applications of this part, which can be given effect without the invalid provision or application.

(f) *Coordination and avoidance of duplication.* In accordance with and pursuant to section 1.5 of the Delaware River Basin Compact, to the fullest extent it finds feasible and advantageous the Commission may enter into an Administrative Agreement (Agreement) with any Basin state or the Federal Government to coordinate functions and eliminate unnecessary duplication of effort. Such Agreements will be designed to: effectuate intergovernmental cooperation, minimize the efforts and duplication of state and Commission staff resources wherever possible, ensure compliance with Commission-approved requirements, enhance early notification of the general public and other interested parties regarding proposed activities in the Basin, indicate where a host state's requirements satisfy the Commission's regulatory objectives, and clarify the relationship and project review decision making processes of the states and the Commission for projects subject to review by the states under their state authorities and by the Commission under Section 3.8 and Articles 6, 7, 10 and 11 of the Compact.

#### § 440.2 Definitions.

For purposes of this part, the following terms and phrases have the meanings provided. Some definitions differ from those provided in regulations of one or more agencies of the Commission's member states and the Federal Government.

*Basin* is the area of drainage into the Delaware River and its tributaries, including Delaware Bay.

*Commission* is the Delaware River Basin Commission (DRBC) created and constituted by the Delaware River Basin Compact.

*Fracturing fluid(s)* is a mixture of water (whether fresh or recycled) and/or other fluids and chemicals or other additives, which are injected into the subsurface and which may include chemicals used to reduce friction, minimize biofouling of fractures, prevent corrosion of metal pipes or remove drilling mud damage within a wellbore area, and propping agents such as silica sand, which are deposited in the induced fractures.

*High volume hydraulic fracturing (HVHF)* is hydraulic fracturing using a combined total of 300,000 or more gallons of water during all stages in a well completion, whether the well is vertical or directional, including horizontal, and whether the water is fresh or recycled and regardless of the chemicals or other additives mixed with the water.

*Hydraulic fracturing* is a technique used to stimulate the production of oil and natural gas from a well by injecting fracturing fluids down the wellbore under pres-

sure to create and maintain induced fractures in the hydrocarbon-bearing rock of the target geologic formation. Person is any natural person, corporation, partnership, association, company, trust, Federal, state, or local governmental unit, agency, or authority, or other entity, public or private.

*Water resource(s)* is water and related natural resources in, on, under, or above the ground, including related uses of land, which are subject to beneficial use, ownership, or control within the hydrologic boundary of the Delaware River Basin.

#### § 440.3 High volume hydraulic fracturing (HVHF).

(a) *Determination.* The Commission has determined that high volume hydraulic fracturing poses significant, immediate and long-term risks to the development, conservation, utilization, management, and preservation of the water resources of the Delaware River Basin and to Special Protection Waters of the Basin, considered by the Commission to have exceptionally high scenic, recreational, ecological, and/or water supply values. Controlling future pollution by prohibiting such activity in the Basin is required to effectuate the Comprehensive Plan, avoid injury to the waters of the Basin as contemplated by the Comprehensive Plan, and protect the public health and preserve the waters of the Basin for uses in accordance with the Comprehensive Plan.

(b) *Prohibition.* High volume hydraulic fracturing in hydrocarbon bearing rock formations is prohibited within the Delaware River Basin.

*Dated:* April 16, 2021

PAMELA M. BUSH, Esq.,  
Secretary

**Fiscal Note:** Fiscal Note # 68-60 remains valid for the final adoption of the subject regulations.

#### Annex A

### TITLE 25. ENVIRONMENTAL PROTECTION PART V. DELAWARE RIVER BASIN COMMISSION CHAPTER 901. GENERAL PROVISIONS

#### § 901.1. Rules of Practice and Procedure.

The rules of practice and procedure as set forth in 18 CFR Part 401 (2018) are hereby incorporated by reference and made a part of this title.

### CHAPTER 902. GROUNDWATER PROTECTION AREAS

Sec.  
902.1. Groundwater protection area, Southeastern Pennsylvania.

#### § 902.1. Groundwater protection area, Southeastern Pennsylvania.

The basin regulations, groundwater protection, Southeastern Pennsylvania, as set forth in 18 CFR Part 430 (2018), are hereby incorporated by reference and made part of this title.

### CHAPTER 903. HYDRAULIC FRACTURING IN SHALE AND OTHER FORMATIONS

Sec.  
903.1. Hydraulic fracturing in shale and other formation.

#### § 903.1. Hydraulic fracturing in shale and other formation.

The hydraulic fracturing in shale and other formation regulations, as set forth in 18 CFR Part 440 (2018), are hereby incorporated by reference and made part of this title.

[Pa.B. Doc. No. 21-748. Filed for public inspection May 14, 2021, 9:00 a.m.]

## Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

### STATE BOARD OF OPTOMETRY

[ 49 PA. CODE CH. 23 ]

#### General Revisions

The State Board of Optometry (Board) amends §§ 23.1, 23.21, 23.82, 23.86, 23.87 and 23.91 to read as set forth in Annex A.

#### *Effective Date*

The amendments will be effective upon publication of this final-form rulemaking in the *Pennsylvania Bulletin*.

#### *Statutory Authority*

The amendments are authorized under the Optometric Practice and Licensure Act (act) (63 P.S. §§ 244.1—244.12). Section 3(b)(14) of the act (63 P.S. § 244.3(b)(14)) gives the Board the authority to promulgate all rules and regulations necessary to carry out the purposes of the act. Under section 3(b)(12) of the act, the Board is authorized to establish and approve by rule and regulation courses of continuing professional optometric education. Section 6(c) of the act (63 P.S. § 244.6(c)) authorizes the Board to issue a license without an examination to applicants from other states.

#### *Background and Purpose*

The regulations define contact lenses to include lenses that correct vision conditions, act as a diagnostic or therapeutic device, or provide a cosmetic or decorative effect. Additionally, the regulations make amendments that clarify continuing education requirements and the sources that may be utilized to obtain the requisite 30 hours of continuing education. This final-form rulemaking revises the fee schedule to include fees for continuing education provider initial approval and renewal fees and clarifies the fee for retroactive approval. The Board also amends the reciprocity regulations to clarify that an applicant for licensure by reciprocity who is a graduate of an unaccredited school must comply with the requirements of § 23.14 (relating to graduates of unaccredited schools).

#### *Comments to Proposed Rulemaking*

The Board published a notice of proposed rulemaking at 49 Pa.B. 922 (March 2, 2019), for 30 days of public comment. The Board did not receive any comments from the public. As part of their review under the Regulatory Review Act, the Independent Regulatory Review Commission (IRRC) submitted comments. The Board received no comments from the House Professional Licensure Committee (HPLC) or the Senate Consumer Protections and Licensure Committee (SCP/PLC). The following represents a summary of the comments received and the Board's response.

#### *Comments from the Independent Regulatory Review Commission*

##### *Continuing education requirements*

IRRC commented about § 23.82 (relating to continuing education requirements; continuing education reporting; audit and enforcement) which requires a licensee to complete 30 hours of continuing education in the 2 years immediately preceding renewal. IRRC expressed concerns that the amendments in § 23.82 possibly do not align with section 5(b) of the act (63 P.S. § 244.5(b)), which

states that a license shall not be renewed unless the applicant submits proof of completion of the requisite 30 hours of continuing education. IRRC asked the Board to explain how the amendments in § 23.82 are consistent with 5(b) of the act and with the intent of the General Assembly. IRRC asked if the act contained a provision that would allow the Board to renew a license or not suspend a license when it becomes aware that continuing education requirements have not been met. Additionally, IRRC asked the Board to explain the consequences to a licensee when the licensee indicates that continuing education requirements have not been met and also asked whether a license would be automatically suspended and subject to discipline or a citation if the Board became aware of a continuing education deficiency through an audit.

As part of the existing renewal application procedures, licensees must certify that they completed the requisite continuing education. Prior to submitting the renewal application on the Bureau of Professional and Occupational Affairs' (Bureau) online platform (the Pennsylvania Licensing System (PALS)), the licensee must sign below the following statement:

"I certify that the information provided in this application is true and correct to the best of my knowledge, information, and belief. I understand that submission of false information subjects me to penalties under 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities)."

Under existing procedures, which would continue after the promulgation of this final-form rulemaking, the Board does not require submission of continuing education certificates with the renewal application. The previous certification requirement is consistent with section 5(b) of the act as the Board is accepting the certification as proof of completion of continuing education. This is consistent with the practices of other boards under the Bureau. If the previous certification is not completed, the Board would not renew the applicant's license. In consideration of IRRC's comments, and to ensure consistency with the mandates of the act and the intent of the General Assembly, the Board determined that further clarification was necessary. Thus, the Board amended § 23.82(b) by making the certification of the required continuing education "a condition of renewal." Meaning if a licensee submits a renewal application and does not certify completion of the requisite 30 hours of continuing education, the license would not be renewed. To further clarify the continuing education regulations, the Board revised § 23.82(a) to clarify that a licensee who fails to renew by the expiration of the biennial renewal period may not engage in the practice of optometry until continuing education requirements are met and the license is renewed or reactivated.

IRRC asked how the Board will implement the new continuing education requirements and questioned the consequences of not complying with continuing education requirements. When an applicant fails to complete continuing education, the Board sends the licensee a discrepancy letter with instructions to complete the continuing education. Failure to comply with the discrepancy letter would result in the license not being renewed. To measure and enforce compliance with continuing education requirements, the Board conducts random audits. In instances where the Board learns of continuing education discrepancies after a license is renewed through an audit or otherwise, the license would not be automatically suspended as there are no provisions in the act that

provide for automatic suspension for failure to complete continuing education. Instead, because licensees have a property interest in their licenses, the Board would refer the matter to the prosecution division for the issuance of a citation or for the initiation of formal action against the licensee. As such, the licensee is provided due process before an act of suspension or other discipline is taken against the license.

The procedures put forth in the regulation are not new to the Board, but rather act to codify operating procedures, so the licensees are more aware of the procedures surrounding renewal and nonrenewal of licenses. The civil penalty for failing to complete continuing education is already a part of the Board's schedule of civil penalties in § 43b.25 (relating to schedule of civil penalties—optometrists). The mechanisms already exist for filing renewal applications, certifying continuing education completion, conducting audits and initializing disciplinary actions. Therefore, this portion of the regulation serves as a codification of the existent procedures and consequences.

Finally, for clarity, the Board reformatted § 23.82(a) to include paragraphs (1)—(3). This amendment does not substantively change this provision. Additionally, the Board amended § 23.82(d) to reflect the recent recodification under Act 53, the act of July 1, 2020 (P.L. 575, No. 53).

#### *Sources of continuing education*

IRRC's second comment is regarding § 23.86 (relating to sources of continuing education hours) for which IRRC noted that the Board did not cross reference the course requirements in § 23.83 (relating to continuing education subject matter) in subsections (b) and (d). The Board agrees that adding cross-references to § 23.83(b) and (d) adds clarity; therefore, the Board added the cross references to this final-form rulemaking. Additionally, in § 23.86(a) the Board clarified that the approved providers of continuing education courses are authorized to provide continuing education courses in all professional optometric continuing education subject matters found at § 23.83, not just § 23.83(a) as was previously stated. Also, in § 23.86(d) the Board exchanged the word "given" for "offered" and deleted the word "providers" and replaced it with "an individual or entity" to provide additional clarity of language. The Board also made minor grammatical revisions by making reference to a course instead of courses.

IRRC also commented that the proposed rulemaking at § 23.86(e) does not provide the rate of awarded continuing education hours per minutes of a program. For clarity, the Board added the rate of 1 continuing education hour for every 50 minutes. Additionally, IRRC asked the Board to explain its rationale for removing the pre-approval option from subsection (h). The Board removed the pre-approval process for two reasons. First, the pre-approval process has not been utilized by licensees. Second, the Board believes pre-approving an action that has not yet occurred would be difficult and is an unreliable way to approve continuing education credits. For instance, it would not be possible to pre-approve publication of a book or article, when the book or article has not been written, let alone selected for publication by a publisher. While a licensee could submit an outline or description of the proposed book or article, throughout the writing process there are numerous revisions and alterations that the end product often results in something quite different than

what the drafter initially planned. Additionally, providing for retroactive approval puts subsection (h) in line with subsection (e).

IRRC further questioned whether licensees seeking continuing education credit under subsection (h) would be required to provide documentation to the Board within 60 days of the services as set forth in subsection (e). The Board does intend to apply the 60-day requirement to subsection (h) and has amended subsection (h) to reflect that a licensee shall provide documentation to the Board within 60 days of completion of the service, utilizing the process set forth in subsection (e). Additionally, IRRC asked if 60 days was a feasible span of time for the licensee to submit documentation to the Board and inquired as to when individuals would be expected to submit documentation. The Board believes that 60 days is a reasonable timeframe for an applicant to submit documentation to seek approval of continuing education. A teacher, preceptor or speaker would have 60 days from the day the lecture was completed to submit an application to the Board. Additionally, an author would have 60 days from the day the article or book was published or 60 days from the completion of research to file an application with the Board. IRRC also asked the Board to explain the implementation procedure for this portion of the regulation. The implementation of this provision is a simple process. An applicant will complete an application seeking retroactive approval and provide all supporting documentation; the Board then reviews the application and, in most cases, approves the continuing education credits. Under the regulations, the fee for retroactive approval of \$45 is the same fee that the Board charged for pre-approval for continuing education for service as a teacher, preceptor, lecturer or speaker and for publications, articles, books and research relating to the practice of optometry; therefore, adding the retroactive fee does not have a fiscal impact to the regulated community.

IRRC asked why § 23.86(f) was being deleted, how the new allocations differed from those listed in subsection (f), why there is a need to restructure the percentage allocations and what the percentage allocations were for subsections (a) and (b). The only percentage that has changed with this final-form rulemaking is to allow for up to 50% of the credit hours to be obtained in subsection (g), which provides for continuing education credit through correspondence programs, taped study programs, online or webinar programs, journal courses and individual study programs. Previously, licensees were only allowed to obtain up to 25% of their credit hours for correspondence programs, taped study programs, online or webinar programs, journal courses and individual study programs. Providing licensees with the ability to obtain up to 50% of continuing education programs through home study programs such as online or webinar programs provides more flexibility to licensees, may be a lower cost option and may provide for a wider variety of course selections. For further clarity, the Board has reincorporated the content of the former subsection (f) into what is now subsection (i) and included the updated percentage allotment for subsection (g) and added subsection (e) into the grouping so all percentages are clearly set forth in one subsection. Additionally, the Board has clarified in subsection (i) that the continuing education credits earned under subsections (a), (b) and (d) must be no less than 50% of the total hours.

#### *Reporting of continuing education credit hours*

IRRC's third comment is regarding § 23.87 (relating to reporting of continuing education credit hours). IRRC



asked if the Board currently has access to the continuing education tracking databases and use of the information for compliance purposes. The Board does not currently have access to the continuing education tracking databases; however, as part of the paid for service, the user can print a report from the continuing education tracker database and provide it to the Board as proof of completion of the requisite continuing education. IRRC further inquired as to whether the Board has considered the mandatory use of a database to track continuing education credit. While the Board has considered mandatory use of such a database, it is not feasible to do so at this time due to internal technology constraints. The Board does see the efficiency of electronic databases that track continuing education and has included this provision to allow licensees to take advantage of such databases. IRRC also inquired as to how the Board intends to implement this section of the regulation. As utilizing a continuing education database will not be mandatory for the licensees, this will not require efforts of the Board to implement. Rather, this section provides notice to licensees that use of a database is permitted to maintain continuing education records as required under § 23.88 (relating to retention of continuing education records).

#### *Standards for commercial support*

IRRC's final comment is in regard to § 23.90 (relating to standards for commercial support). IRRC questioned how the Board would determine whether continuing education is free from control of commercial interest. IRRC also found the regulatory language in subsection (c) to be ambiguous. Upon further review, the Board determined that the commercial support issues addressed in this section are already regulated by industry standards through the Accreditation Council for Continuing Medical Education. As such, the Board has removed this section from this final-form rulemaking.

#### *Fiscal Impact and Paperwork Requirements*

This final-form rulemaking should have no fiscal impact on the Commonwealth or its political subdivisions. Only minor paperwork requirements are imposed for the Board to develop a form for approval of providers of continuing education under § 23.86(b)(1) and a biennial renewal form for providers under § 23.86(b)(2). The Board will also make minor modifications in other existing forms. There is no fiscal impact to the regulated community associated with the \$45 fee for retroactive approval of continuing education under § 23.86(e) and (h) because the Board currently charges \$45 for this service. The amendments to the fee schedule for this fee are meant to clarify the existing fee schedule and do not create a new fee. Regardless, the \$45 cost could be avoided by simply taking all continuing education through pre-approved providers and courses.

Continuing education providers who are not pre-approved now have the option of obtaining provider approval at a cost of \$135, or of obtaining course approval at \$45 per course, which is the current fee. If a provider offers more than three courses per biennium, it would be advantageous to seek provider approval and then renew in subsequent years for \$45. Providers of continuing education courses could benefit from the new fee structure in that they could apply for provider approval and pay a \$135 fee, rather than pay a \$45 fee for each course offered.

#### *Sunset Date*

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

#### *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on February 15, 2019, the Board submitted a copy of proposed rulemaking, published at 49 Pa.B. 922 to IRRC and the Chairpersons of the HPLC and the SCP/PLC for review and comment.

Under section 5(c) of the Regulatory Review Act, the Board shall submit to IRRC, HPLC and SCP/PLC copies of comments received during the public comment period, as well as other documents when requested. In preparing the final-form regulation, the Board has considered all comments from IRRC, the HPLC, the SCP/PLC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on April 14, 2021, the final-form rulemaking was deemed approved by the HPLC and the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on April 15, 2021, and approved the final-form rulemaking.

#### *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), known as the Commonwealth Documents Law and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) A public comment period was provided as required by law.

(3) This final-form rulemaking does not include any amendments that would enlarge the scope of proposed rulemaking published at 49 Pa.B. 922.

(4) This final-form rulemaking adopted by this order is necessary and appropriate for the administration of the Optometric Practice and Licensure Act.

#### *Order*

The Board, acting under its authorizing statute, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 23 are amended by amending §§ 23.1, 23.21, 23.82, 23.86, 23.87 and 23.91 to read as set forth in Annex A with ellipses referring to the existing text of the regulations.

*(Editor's Note:* Section 23.90 of the proposed rulemaking was not adopted in this final-form rulemaking.)

(b) The Board shall submit this final-form regulation to the Office of Attorney General and the Office of General Counsel for approval as required by law.

(c) The Board shall submit this final-form regulation to IRRC, the HPLC and the SCP/PLC as required by law.

(d) The Board shall certify this final-form regulation and deposit them with the Legislative Reference Bureau as required by law.

(e) The final-form rulemaking shall take effect upon publication in the *Pennsylvania Bulletin*.

LUANNE K. CHUBB, OD, FAAO,  
Chairperson

*(Editor's Note:* See 51 Pa.B. 2468 (May 1, 2021) for IRRC's approval order.)

**Fiscal Note:** Fiscal note 16A-5213 remains valid for the final adoption of the subject regulations.

## Annex A

## TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

## PART I. DEPARTMENT OF STATE

## Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 23. STATE BOARD OF OPTOMETRY  
GENERAL PROVISIONS

## § 23.1. Definitions.

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

\* \* \* \* \*

*Clinical Skills Assessment Examination*—A clinical skills competency examination developed, prepared, administered and scored by the NBEO, which the Board adopts as the State clinical examination for licensure.

*Contact lens*—A medical device or any other item or device of any material, tissue or power, including plano or zero-powered, that is required to be dispensed by prescription, and is placed directly on the cornea or the cornea and sclera to do any of the following:

- (i) Correct vision conditions.
- (ii) Act as a diagnostic or therapeutic device.
- (iii) Provide a cosmetic or decorative effect.

*Continuing education hour*—Fifty minutes of continuing education.

\* \* \* \* \*

## LICENSE BY RECIPROCITY AND INTERSTATE CERTIFICATION

## § 23.21. Reciprocal application.

(a) An applicant for licensure by reciprocity to practice optometry in this Commonwealth shall submit the following to the Board:

(1) A completed application which has been filed with the Board together with the fee required by § 23.91 (relating to fees), in the form of a check or money order, made payable to “Commonwealth of Pennsylvania—OE.”

(2) A certificate of preprofessional education issued by the Department, showing that the preliminary education requirements are satisfied.

(3) A transcript of subjects and grades from the college or school of optometry from which the applicant has graduated.

(b) Any school or college of optometry from which the applicant for reciprocity has graduated shall be one approved by the Board at the time he was graduated.

(c) An applicant for licensure by reciprocity who is a graduate of an unaccredited school shall comply with the requirements of § 23.14 (relating to graduates of unaccredited schools).

## CONTINUING EDUCATION

## § 23.82. Continuing education hour requirements; continuing education reporting; audit and enforcement.

(a) An applicant for biennial license renewal or reactivation of license is required to complete, during the 2 years immediately preceding renewal or reactivation, a minimum of 30 hours of continuing education. A licensee

whose license is not renewed by the expiration of the biennial renewal period may not engage in the practice of optometry until the continuing education requirements are satisfied and the license has been renewed or reactivated.

(1) For licensees certified in accordance with section 4.1 of the act (63 P.S. § 244.4a), regarding certification to prescribe and administer pharmaceutical agents for therapeutic purposes, at least 6 of the required 30 hours shall concern the prescription and administration of pharmaceutical agents for therapeutic purposes.

(2) For licensees certified in accordance with section 4.2 of the act (63 P.S. § 244.4b), regarding additional requirements to prescribe and administer pharmaceutical agents for the treatment of certain types of glaucoma, at least 4 of the 30 hours shall concern the prescription and administration of pharmaceutical agents for the treatment of glaucoma. No more than 4 hours taken in the treatment of glaucoma may be applied toward the 6 hours required to maintain therapeutic certification; however, all licensees shall complete at least 30 total hours.

(3) Completion of a Board-approved course described in section 4.1(a)(2) of the act or continuing education described in section 4.2 of the act shall satisfy the continuing education requirement for the biennial renewal period in which it is completed including the 6-hour requirement in therapeutics and the 4-hour requirement in glaucoma.

(b) Licensees shall certify completion of the required continuing education on the biennial renewal application as a condition of renewal. False certifications will be grounds for disciplinary action under section 7(a)(3) of the act (63 P.S. § 244.7(a)(3)).

(c) The Board may randomly audit licensees to ensure compliance with the continuing education requirements. A licensee selected for audit shall provide information to document the licensee's completion of required continuing education, which shall include the information at § 23.87(a) (relating to reporting of continuing education credit hours).

(d) A licensee who, as a result of an audit, is determined to be deficient in continuing education hours will be subject to formal disciplinary action under section 7(a)(8) of the act (63 P.S. § 244.7(a)(8)), or will be subject to the issuance of a citation under section 3108 of the act of July 1, 2020 (P.L. 575, No. 53) in accordance with § 43b.25 (relating to schedule of civil penalties—optometrists).

(e) Notwithstanding other disciplinary action taken as set forth in subsection (d), a licensee who is determined to be deficient in continuing education hours is required to make up all deficient hours of continuing education and submit documentation containing the information set forth in subsection (c) to the Board within 6 months from the issuance of a citation or the imposition of formal discipline. Hours of continuing education submitted to the Board to make up for a deficiency may not be used to satisfy the continuing education requirement for the current biennium.

(f) Failure to make up all deficiencies as set forth in subsection (e) will subject the licensee to further disciplinary action under section 7(a)(8) of the act.

(g) The Board may waive the requirements of continuing education in cases of certified illness or undue hardship. It is the duty of each licensee seeking waiver to notify the Board in writing and request the waiver prior



to the end of the biennial renewal period for which the waiver is sought. The waiver will be granted, denied or granted in part.

**§ 23.86. Sources of continuing education hours.**

(a) The Board finds that the providers listed as follows have currently met the standards for provider approval for all acceptable courses of continuing education that meet the requirements of § 23.83 (relating to continuing education subject matter). Accordingly, the following providers are preapproved sources for continuing optometric education courses:

(1) The American Optometric Association, and its state affiliates.

(2) The Pennsylvania Optometric Association, and its local societies.

(3) All schools and colleges of optometry accredited by the Accreditation Council on Optometric Education (ACOE) of the American Optometric Association, or its successor.

(4) The College of Optometrists in Vision Development (COVD).

(5) The Council on Optometric Practitioner Education (COPE).

(6) Continuing education courses offered by accredited medical colleges, as defined in section 2 of the Medical Practice Act of 1985 (63 P.S. § 422.2).

(7) The Optometric Extension Program.

(8) The American Academy of Optometry and its state affiliates.

(9) The American Academy of Ophthalmology and its state affiliates.

(10) The American Medical Association and its state affiliates.

(b) The Board may approve other providers of continuing education not listed in subsection (a). The Board will maintain on its web site a list of all approved providers.

(1) A provider seeking approved provider status shall:

(i) Apply to the Board, on forms supplied by the Board, at least 90 days in advance of the date the initial course is given. The provider may not offer any course for credit until the Board grants its approval as an approved provider.

(ii) Pay the required fees under § 23.91 (relating to fees).

(iii) Demonstrate that the provider is competent to provide continuing education to optometrists.

(iv) Ensure that the courses provided meet the requirements of § 23.83 (relating to continuing education subject matter).

(2) All provider approvals expire November 30th of each even-numbered year, regardless of the date of issuance, and must be renewed biennially.

(c) The approval given to the providers approved in accordance with subsections (a) and (b) is subject to reevaluation. A rescission of provider or program approval will be made only in accordance with 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure).

(d) A course which is offered by an individual or entity that has not been approved in accordance with subsections (a) or (b) will count as continuing education hours

provided that the course is approved by the Board prior to implementation of the course, and the course meets the requirements of § 23.83 (relating to continuing education subject matter). The course provider shall submit an application for course approval on a form supplied by the Board and pay the fee required under § 23.91 at least 45 days in advance of the date the course is given.

(e) Continuing education credit may be awarded retroactively for attending programs, to include lectures and college or university courses, which have not been previously approved at the rate of 1 continuing education hour for every 50 minutes. The attendee shall apply to the Board for approval on a form supplied by the Board, pay a fee under § 23.91 and document attendance within 60 days of attending the program. The attendee shall demonstrate to the Board's satisfaction that the program meets the requirements in § 23.83. A licensee may complete up to 50% of the licensee's required continuing education in programs approved under this subsection or subsections (f)—(h).

(f) It shall be permissible to attend clinical conferences, clinical rounds, or training under a preceptor through clinical hospitals, medical centers, schools, and colleges which are acceptable at the rate of 1 continuing education hour for every 50 minutes. If requested by the Board, a licensee shall provide documentation of completion. A licensee may complete up to 25% of the licensee's required continuing education from sources in this subsection and up to an additional 25% in required continuing education from any of the sources in subsections (e), (g) or (h).

(g) Credit hours will be given for correspondence programs, taped study programs, online or webinar programs, journal courses, and other individual study programs at the rate of 1 continuing education hour for every 50 minutes. However, proper credit being given for such program is dependent upon the licensee proving, to the satisfaction of the Board, that the program meets the provisions of subsections (a) or (b). A licensee may complete up to 50% of the licensee's required continuing education in individual study in accordance with this subsection or in the continuing education from any of the sources in subsections (e), (f) or (h).

(h) Credit hours will be credited for service as a teacher, preceptor, lecturer, or speaker and for publications, articles, books, and research relating to the practice of optometry. A licensee shall provide documentation to the Board within 60 days of completion of the previous service utilizing the process set forth in subsection (e). One continuing education hour will be granted for every 50 minutes of initial instruction or research, and 2 continuing education hours will be granted for the preparation of each hour of instruction. If a licensee prepares written materials to accompany the instruction, the continuing education credits for only the instruction will be doubled. Five continuing education hours will be granted for publication of a book, and 2 continuing education hours will be granted for publication of an article or a chapter in a book. A licensee may complete up to 25% of the licensee's required continuing education in accordance with this subsection and up to an additional 25% from any of the required continuing education sources in subsections (e), (f) and (g).

(i) Of the 30 hours of continuing education credit required at § 23.82 (relating to continuing education hour requirements), the following shall apply:

(1) Continuing education credits earned under subsections (a), (b) and (d) shall account for no less than 50% of the total required hours.

(2) Continuing education credits earned under subsections (e), (f) or (h) shall account for no more than 25% of the total hours individually and not more than 50% of the hours when combined towards the total hours.

(3) Continuing education credits earned under subsection (g) may account for up to 50% of total required hours.

(4) Courses in jurisprudence or ethics shall count for no more than 2 hours of the total.

(5) Courses within the optometric curriculum offered by an accredited school of optometry or medicine in the United States or Canada shall count for no more than 25% of the required biennial credit hours. Two continuing education credit hours will be provided for each semester credit earned, including a course which the licensee audits.

**§ 23.87. Reporting of continuing education credit hours.**

(a) Applicants for a license or license renewal shall provide, at a time prescribed and on forms approved by the Board, a signed statement certifying that they have met the continuing education requirements set forth in section 5(b) of the act (63 P.S. § 244.5(b)) by providing information which shall include the following:

- (1) Dates attended.
- (2) Continuing education hours claimed.
- (3) Title of course, including the course number assigned by the Board, if applicable, and description of content. For those courses which are approved to meet the requirements for therapeutic or glaucoma certification, the licensee claiming credit shall ensure that the certificate of attendance includes the course number and

number of hours that apply toward the requirement for therapeutic or glaucoma certification.

(4) School, clinical hospital, medical center, optometric center or organization sponsoring course, clinical conference, clinical rounds or preceptor training.

(5) Instructor.

(6) Name of licensee.

(b) If a course provider does not use an electronic database such as the Association of Regulatory Boards of Optometry's (ARBO's) Optometric Education (OE) Tracker to report a continuing education course, the licensee may make arrangements to have the continuing education course entered into an electronic database for compliance purposes.

**FEES**

**§ 23.91. Fees.**

The following is the schedule of fees for services charged by the Board:

\* \* \* \* \*

Application for continuing education course or program approval .....	\$45
Application for continuing education provider initial approval for providers under § 23.86(b) (relating to sources of continuing education hours) .....	\$135
Biennial renewal fee for providers approved under § 23.86(b) .....	\$45
Application for licensees seeking continuing education credit retroactively under § 23.86(e) or (h) .....	\$45
Application for certification to treat glaucoma .....	\$25

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