

Regulatory Analysis Form		This space for use by IRRC
(1) Agency Department of Environmental Protection		RECEIVED 2005 APR 22 PM 2: 27 PA DEPARTMENT OF ENVIRONMENTAL PROTECTION GENERAL COMMISSION
(2) I.D. Number (Governor's Office Use) #7-394		IRRC Number: # 2461
(3) Short Title Storage, Handling, and Use of Explosives		
(4) PA Code Cite 25 PA Code, Chapter 211	(5) Agency Contacts & Telephone Numbers Primary Contact: Marjorie Hughes, 783-6395 Secondary Contact: Michele Tate, 783-8727	
(6) Type of Rulemaking (Check One) <input type="checkbox"/> Proposed Rulemaking <input type="checkbox"/> Final Order Adopting Regulation <input checked="" type="checkbox"/> Final Order, Proposed Rulemaking Omitted	(7) Is a 120-Day Emergency Certification Attached? <input type="checkbox"/> No <input type="checkbox"/> Yes: By the Attorney General <input type="checkbox"/> Yes: By the Governor	
(8) Briefly explain the regulation in clear and non-technical language. This regulation provides for effective theft and intrusion resistance for explosives storage facilities.		
(9) State the statutory authority for the regulation and any relevant state or federal court decisions. The statutory authority for this final rulemaking is provided under Section 11 of the act of July 1, 1937 (P.L.2681, No. 537)(73 P.S. Sections 161); Reorganization Plan No. 8 of 1981 (71 P.S. Section 751-35); Section 4.2 of the Surface Mining Conservation and Reclamation Act (52 P.S. Section 1396.4b); Section 11(e) of the Noncoal Surface Mining Conservation and Reclamation Act (52 P.S. Section 3311(e)); and Sections 1917-A and 1920-A(b) of The Administrative Code of 1929 (71 P.S. Sections 510-17 and 510-20(b)).		

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(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

The regulation is not mandated by any federal or state law or court order, or federal regulation

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

Existing state and federal standards for explosives magazines are inadequate to prevent thefts of explosive materials. This final-omitted rulemaking will provide additional significant deterrence of thefts of explosives from magazines and subsequent accidental or deliberate injury to persons and damage to property. This final-omitted rulemaking responds, in part, to concerns raised by the Pennsylvania State Police and the Pennsylvania Office of Homeland Security in regard to inadequate standards for explosives magazine security.

Due to the lack of security measures, explosives have been stolen from magazines in Pennsylvania. From March 2003 to December 2003, the last period for which data from ATF is available, Pennsylvania led the nation with 9 explosives thefts. In these 9 thefts 1,859 pounds of explosives and 375 detonators, necessary to detonate the explosives, were stolen. Not all of this material has been recovered. The Department knows of at least two thefts which occurred in 2004. The theft of explosives poses a significant risk to the public's safety.

(12) State the public health, safety, environmental or general welfare risks associated with non-regulation.

By not properly securing explosives storage sites from unauthorized intrusion and theft, stored explosives are vulnerable and may be stolen and employed by terrorists or other criminals to harm people or property. Additionally, explosives may be improperly detonated by untrained individuals causing injury to themselves or others.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

Citizens of the Commonwealth and others who may be the victims of terrorist bombings or other criminal uses of stolen commercial explosives. Additionally, citizens of the Commonwealth and others who may be injured by the improper detonation of stolen explosives by untrained persons.

Regulatory Analysis Form

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effect as completely as possible and approximate the number of people who will be adversely affected.)

The explosives industry will be most affected by this regulation. A lesser standard of security will be applied to the fireworks industry. The construction and mining industries will be affected because the explosives industry will most likely need to increase prices to cover the cost of the required security measures. Smaller companies may decide not to store explosives, but have them delivered directly as needed from distributors to the job sites.

There are approximately 350 persons that currently store explosives in Pennsylvania who will be directly affected by this rulemaking. Costs of implementing this regulation will vary according to the size of the magazine site. The costs are significant. Small magazine sites, where a few hundred pounds of explosives or less are stored, may cost less than \$15,000 to secure. Larger sites, where 1,000,000 of explosives are stored, may cost less than \$70,000 to secure. There are provisions in the regulations for the use of natural barriers and the use of innovative technology that could significantly lower costs.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

There are approximately 350 persons that currently store explosives in Pennsylvania that will be directly affected by these regulations. These persons store either blasting agents, high explosives, or detonators. Their size varies from individuals, to very small corporations to large corporations.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

Due to the urgent need for these regulations there was no time to obtain input from the public. However, both the Pennsylvania Office of Homeland Security and the Pennsylvania State Police assisted in the development have reviewed the regulations and concur in their adoption.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

Small magazine sites, where a few hundred pounds of explosives or less are stored, may cost less than \$15,000 to secure. Larger sites, where 1,000,000 or more pounds of explosives are stored, may cost less than \$70,000 to secure. The savings to the regulated community would be in the form of prevention of possible lawsuits stemming from explosives stolen from an inadequately secured site resulting in harm to people or property. The cost to insure secured facilities may be less than the costs to insure unsecured facilities.

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(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

Local governments are not subjected to costs as a result of this regulation. Savings to local governments could result from the theft resistance of explosives storage sites. Secure explosives storage sites may deter criminals and terrorists from attempting explosives thefts and the necessity of local police to investigate the thefts and apprehend and prosecute the persons responsible.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting or consulting procedures which may be required.

With the exception of an increase in workload, the explosives program will not be significantly affected by these regulations. Projecting that the regulations will be promulgated in the second quarter of 2005, some Department staff time will be expended in FY 2004 to inspect sites and to review security plans that are submitted to the Department (note, upon promulgation of the regulations, the inspection and notification requirements imposed in the rulemaking take effect immediately; licensees must submit their security plans to the Department within 60 days from the effective date of the regulations). The Department anticipates in FY 2004 that \$26,000 in staff time (including personnel -- salary and benefits -- and operating costs) will be expended to implement the provisions of the regulations.

In the next five fiscal years (starting with FY 2005), there will be no need for additional central office staff to implement the regulations; however, an increase in field staff in the eastern portion of the state will be necessary to adequately monitor the implementation of these regulations. The Department estimates that in FY 2005 two additional staff (Blasting and Explosives Inspectors) and equipment will be needed, which should total approximately \$147,500 (personnel costs --salary plus benefits-- and operating costs). A 3% increase, per year, for FY+2, FY+3, FY+4, and FY+5, is included below to reflect the future costs associated with the additional staff and equipment needed to implement these regulations.

The savings to state government is estimated based upon the assumption that the additional security afforded by these regulations will reduce magazine thefts by 50% to 4 per year (1 per quarter). PSP estimates 200 hours of investigation time is spent per theft/incident for a total of 800 hours annually. The average hourly salary of a state trooper (including benefits) for an 8-hour shift is \$36.78/hour. Given that approximately 200 hours of PSP staff time is spent per incident, 4 less incidents per year would save the PSP approximately \$29,424 annually (or \$7,356/incident based on cost figures for the last quarter of FY 2004). Please note, cost savings projections for FY+1 through FY+5 are calculated using a 3% increase per year. Cost savings for the Current Fiscal Year are based on the anticipation that the regulations will be promulgated in April 2005, resulting in at least one fewer incident through the end of Fiscal Year 2004. Under certain circumstances, some of the cost savings realized by the PSP may be shared by local jurisdictions.

(20) In the table below, provide an estimate of the fiscal savings and cost associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government	\$7,356	\$29,424	\$30,307	\$31,217	\$32,154	\$33,119
Total Savings						
COSTS:						
Regulated Community	\$1,419,783	\$4,259,347				
Local Government						
State Government	\$26,000	\$147,500	\$152,000	\$156,500	\$161,000	\$165,000
Total Costs						
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses						

(20a) Explain how the cost estimates listed above were derived.

The costs to industry to implement this regulation will include initial costs for the construction of outer and inner perimeter security measures. In estimating these costs, the Department chose conservative estimates, and assumed that all licensees will choose to erect chain link fences with concertina razor wire for inner security and earthen berms for outer security, which are the more expensive options to implement. The regulations provide for using natural barriers for outer perimeter security and other measures determined to be effective at deterring access by wheeled vehicles. Costs could be significantly lowered if magazines are sited in locations where natural barriers can be used or effective and innovative methods are used for inner perimeter security. Costs could also be significantly lower if the licensee already has appropriate security measures in place.

There are estimated to be 10 large and 336 small magazine sites located throughout the Commonwealth; however, it is anticipated that these numbers may decrease after the regulations are promulgated, assuming that some licensees may choose to have their licenses lapse if magazines were previously used for convenience purposes only. Large sites are estimated to have an average diameter of 2,500 feet, while small sites are estimated to have an average diameter of 500 feet. Costs were estimated for both large and small sites by calculating the costs associated with constructing inner and outer perimeter security measures. The cost to industry for outer perimeter security was determined by calculating the number of yards of material needed to build an earthen berm at \$1.00 per yard (the cost of \$1.00 per yard is the Department's reclamation cost for moving material using trucks and loaders, which is estimated to be the same costs industry would incur for similar material movement). The cost to industry for inner perimeter security was determined by calculating the total feet of fencing needed for large and small magazine sites. The cost of the fencing is calculated at \$25 per foot and was

REGULATORY ANALYSIS FORM

obtained from fence suppliers.

The following includes the Department's itemized estimates for costs to both large and small magazine sites and the calculated total cost for the regulated community to implement the regulations:

Large Explosives Magazine Sites

Inner Perimeter Security:

5 groups of high explosive magazines 62' diameter each

975' total feet of fence at \$25/ft = \$24,375

5 gates at \$1,000 each = \$5,000

TOTAL Inner Perimeter Costs = \$29,375

Outer Perimeter Security:

2500' diameter = 7,850 feet of berm of 70 sq. feet cross section = 549,500 cu feet = 20,351 cu yard

20,351 cu yard at \$1 = \$20,351

1 gate at \$2,000 = \$2,000

TOTAL Outer Perimeter Costs = \$22,351

TOTAL Cost for a Large Magazine Site = \$51,726

Small Explosives Magazine Sites

Inner Perimeter Security:

1 high explosives magazine 62' in diameter

195' total feet of fence at \$25/ft = \$4,875

1 gate at \$1,000 = \$1,000

TOTAL Inner Perimeter Costs = \$5,875

Outer Perimeter Security

500' diameter = 4070 feet of berm of 70 sq. feet cross section = 109,900 cu feet = 4,070 cu yard

4,070 cu yd at \$1 = \$4,070

1 gate at \$2,000 = \$2,000

TOTAL Outer Perimeter Costs = \$6,070

TOTAL Cost for a Small Magazine Site = \$11,945

Large Fireworks Magazine Sites

Inner Perimeter Security:

5 groups of high explosive magazines 62' diameter each

975' total feet of fence at \$25/ft = \$24,375

5 gates at \$1,000 each = \$5,000

TOTAL Inner Perimeter Costs = \$29,375

Outer Perimeter Security Around High Explosives Magazines:

112' diameter = 352 feet of berm of 70 sq. feet cross section = 24,651 cu feet = 913 cu yard

913 cu yard at \$1 = \$913 X 5 High Explosives Magazines (or groups of High-Ex

Magazines)=\$4,565

5 gates at \$2,000 = \$10,000

TOTAL Outer Perimeter Costs = \$14,565

TOTAL Cost for a Large Fireworks Magazine Site = \$43,940

Small Fireworks Magazine Sites With High Explosives Magazine

Inner Perimeter Security:

1 high explosives magazine 62' in diameter
195' total feet of fence at \$25/ft = \$4,875
1 gate at \$1,000 = \$1,000
TOTAL Inner Perimeter Costs = \$5,875

Outer Perimeter Security Around High Explosives Magazine:

112' diameter = 352 feet of berm of 70 sq. feet cross section = 24,651 cu feet = 913 cu yard
913 cu yard at \$1 = \$913
1 gate at \$2,000 = \$2,000

Outer Perimeter for entire site:

1 gate at access point=\$2,000

TOTAL Outer Perimeter Costs = \$4,913

TOTAL Cost for a Small Fireworks Magazine Site w/ High Explosives= \$10,788

Small Fireworks Magazine Sites Without High Explosives Magazines

Outer Perimeter Security:

1 gate at \$2,000 = \$2,000
TOTAL Outer Perimeter Costs = \$2,000

TOTAL Cost for a Small Fireworks Magazine Site w/o High Explosives = \$2,000

Total Cost to Regulated Community

TOTAL Cost for a Large Explosives Magazine Site = \$51,726 x 9 sites = \$465,534
TOTAL Cost for a Small Explosives Magazine Site = \$11,945 x 297 sites = \$3,540,666
TOTAL Cost for a Large Fireworks Magazine Site = \$43,940 x 1 site = \$43,940
TOTAL Cost for a Small Fireworks Magazine Site w/ High Explosives = \$10,788 x 8 sites = \$86,304
TOTAL Cost for a Small Fireworks Magazine Site w/o High Explosives= \$2,000x 31 sites = \$62,000

TOTAL COST to Regulated Community: \$4,198,444

Total initial costs to the regulated community to implement the regulations are estimated to be no more than \$4.2 million/annually, or approximately \$349,871/month. All security measures in the regulations must be implemented within 360 days of the Department's approval of the licensee's security plan, unless the licensee requests and receives approval for a longer time period from the Department. As a result, it is projected that costs to the regulated community to implement the regulations will occur in Fiscal Year 2005.

The cost to the Commonwealth is based on the estimated costs of 2 additional Blasting and Explosives Inspectors and additional equipment (initial investment in FY 2005 will be approximately \$147,500, which includes personnel costs --salary plus benefits-- and operating costs). Projected costs in FY 2005-2009 are reflective of a 3% cost adjustment/year. The additional personnel and equipment will be necessary to monitor the implementation and long-term maintenance of the security measures.

The savings to state government is estimated based upon the assumption that the additional security afforded by these regulations will reduce magazine thefts by 50% to 4 per year. PSP estimates 200 hours of investigation per theft for a total of 800 hours. Costs include, salaries, benefits, overhead, etc. In certain circumstances, some of these cost savings may be shared by local jurisdictions.

(20b) Provide the past three-year expenditure history for programs affected by the regulation. It is unknown what amount, if any, has been spent to provide security.

Program	FY-3	FY-2	FY-1	Current FY
Department of Environmental Protection - Environmental Program Management	\$43,354,000	\$43,780,000	\$41,056,000	*\$38,294,000
Pennsylvania State Police – General Fund	\$143,156,000	\$139,561,000	\$147,208,000	*\$155,694,000
Pennsylvania State Police – Motor License Fund	\$304,990,000	\$310,144,000	\$311,975,000	*\$331,337,000

Note:

* Authorized amount.

(22.) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

The number of deaths, injuries and property damage that could result from the criminal or accidental use of stolen explosives is incalculable but are likely to greatly exceed the costs of providing the additional security.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

The Commonwealth has been regulating explosives storage for 71 years. Site security has been left to the discretion of the magazine owners/operators. This has proven to be largely inadequate. The only available alternative is to mandate adequate security measures.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

No alternative regulatory schemes have been considered. However, the regulations establish performance standards and provide the regulated community the opportunity to select the most cost effective solution which meets the performance standard.

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

Yes, these amendments establish a performance standard for outer perimeters security to prevent unauthorized wheeled vehicle access to the site, inner perimeter security for sites storing high explosives or detonators to prevent unauthorized persons from accessing the site, site inspection standards and improvements to the measures to prevent cutting of locks. The U. S., Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives is the federal agency that regulates the storage of explosives. ATF is in the process of developing regulations addressing magazine security but the federal regulatory process is extremely time consuming and will not occur in a timely fashion to prevent thefts in Pennsylvania.

Due to the lack of security measures, explosives have been stolen from magazines in Pennsylvania. From March 2003 to December 2003, the last period for which data from ATF is available, Pennsylvania led the nation with 9 explosives thefts. In these 9 thefts 1,859 pounds of explosives and 375 detonators, necessary to detonate the explosives, were stolen. Not all of this material has been recovered. The Department knows of two thefts which occurred in 2004. The theft of explosives poses a significant risk to the public's safety.

Due to the theft of explosives from magazines, the Pennsylvania Office of Homeland Security, the Pennsylvania State Police and the Department decided the prompt adoption of additional security measures was necessary.

(25) How does the regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

These regulations are more stringent than those of neighboring states. Pennsylvania explosives company pricing increases to pay for the security of storage sites would be offset by out-of-state competitor's additional explosives transportation costs.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

These regulations will not affect existing or proposed regulations of the Department or other state agencies.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

Since this is a Final Order with the Notice of Proposed Rulemaking omitted, there were no hearings or public information meetings prior to the submission; however, the Department met with trade organizations representing the explosives, mining, fireworks and construction industries and briefed them on the rulemaking and solicited their input by providing these organizations with ten days to submit comments. After comments were received, the Department held a second meeting with industry to discuss their comments and the changes made in response to the comments. Additional changes to the rulemaking were made based upon the conclusions of this second meeting with industry. In addition to these outreach efforts, the Department briefed the Department's Mining and Reclamation Advisory Board (MRAB) about these regulations and sent notification about the rulemaking to explosives magazine licensees in the Commonwealth. After the regulations become effective, the Department will hold a series of informational meetings to assist the regulated community in complying with the new security requirements.

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

These regulations will not significantly change existing reporting, record keeping, or other paperwork

requirements. The magazine license application will now include a plan depicting the security measures to be taken. The amendments make it clear, the licensee must notify the state police, local police and the Department as to the occurrence of thefts and break-ins or attempted thefts and break-ins. The licensee must also document its magazine inspections that are to be performed to detect unauthorized entry.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

There are no special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

It is anticipated that these regulations will become effective upon final approval. The inspections and notification requirements contained in the rulemaking will take effect immediately, upon promulgation of the regulations. The rulemaking provides 60 days for licensees to submit to the Department plans and schedules for the implementation of inner and outer perimeter security measures. Within 180 days from submitting the security plan, the licensee must implement either the outer or inner perimeter security measure requirements. Within 360 days of the licensee's submission of the security plan, all security measures (outer and inner perimeter) must be implemented unless the licensee requests and receives Department approval for a longer time period. The time extension request can be submitted either as part of the security plan or after the licensee starts implementing the plan. Finally, magazine licensees will immediately have to begin the daily inspections, maintain inspection logs and notify police of storage magazines and report any thefts or break-ins.

(31) Provide the schedule for continual review of the regulation.

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

NOTE: Copy includes underlined blue highlights to indicate changes adopted at April 19, 2005 EQB meeting to address IRRC Order.

**NOTICE OF FINAL RULEMAKING
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD
25 Pa. Code Chapter 211
Handling, Use and Storage of Explosives**

Order

The Environmental Quality Board (EQB or Board) hereby amends Chapter 211 pertaining to the storage of explosives as set forth in Annex A.

These amendments establish standards to ensure that explosive magazines are secure from unauthorized intrusion and theft.

Notice of proposed rulemaking is omitted under section 204 (2) and (3) of the act of July 31, 1968, P.L. 769, No. 240, (45 P.S. §1204 (2) and (3)). Subsection (2) provides that an agency may omit the notice of proposed rulemaking if all persons subject to the regulation are named therein and are either served with the proposed regulation or have actual notice of the proposed regulation. There are approximately 350 persons that will be directly affected by these regulations. They include licensees of outdoor magazines and those persons who currently store in Pennsylvania explosives in the form of fireworks, blasting agents, high explosives, and detonators. All these persons were sent a copy of this Final Order and Annex A at least two weeks prior to the EQB's January 18, 2005 and April 19, 2005 meetings. Subsection (3) provides that an agency may omit the notice of proposed rulemaking if the agency finds for good cause that notice of proposed rulemaking is impracticable, unnecessary or contrary to the public interest. In this case using the Notice of Proposed Rulemaking procedure is contrary to the public's interest. As more fully explained in the background section, the existing magazine standards are inadequate to prevent the theft of explosives. These amendments will provide additional significant deterrence to thefts of explosives from magazines and subsequent accidental or deliberate injury to persons and damage to property.

These amendments were adopted by order of the EQB at its meeting of January 18, 2005. At the April 19, 2005 Board meeting, the EQB approved amendments to the Final Order addressing the Independent Regulatory Commission's (IRRC) March 10, 2005 disapproval of the EQB January 18, 2005 rulemaking. The IRRC disapproval Order was received March 16, 2005.

A. Effective Date

These amendments are effective upon publication in the *Pennsylvania Bulletin*.

B. Contact Persons and Information

For further information contact Joseph G. Pizarchik, Director, Bureau of Mining and Reclamation, Rachel Carson State Office Building, 5th floor, 400 Market Street, P.O. Box 8461

NOTE: Copy includes underlined blue highlights to indicate changes adopted at April 19, 2005 EQB meeting to address IRRRC Order.

Harrisburg, PA 17105-8461 (717) 783-9892, or Marc A. Roda, Assistant Counsel, Bureau of Regulatory Counsel, Rachel Carson State Office Building, 9th floor, P.O. Box 8464, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling 1-800-654-5984 (TDD users) or 1-800-654-5988 (voice users). This regulation is available electronically through the DEP Web site (<http://www.dep.state.pa.us>).

C. Statutory Authority

The final rulemaking is being made under the authority of:

Section 11 of the Explosives Act of 1937 (73 P.S. § 161), and Reorganization Plan No. 8 of 1981 (71 P.S. § 751-35), which authorizes the Department to promulgate implementing regulations for the licensing of blasters and the use, storage and handling of explosives in most contexts other than mining;

Section 4.2 of the Surface Mining Conservation and Reclamation Act and Section 11(e) of the Noncoal Surface Mining Conservation and Reclamation Act (52 P.S. §§ 1396.4b and 3311(e)), which direct the Department to promulgate regulations concerning the handling and use of explosives at coal and noncoal surface mine sites as well as the licensing of blasters; and

Sections 1917-A and 1920-A of the Administrative Code of 1929, 71 P.S. § 510-20. Sections 1917-A and 1920-A of the Administrative Code of 1929 authorize the Board to adopt regulations to prevent the occurrence of a nuisance and to promulgate such rules and regulations as are necessary for the proper work of the Department.

D. Background

The Department's regulations addressing the storage of explosives are found in Chapter 211, Subchapter B (relating to the storage and classification of explosives). Subchapter B incorporates by reference the performance and design requirements established by the United States Department of Justice, Bureau of Alcohol, Tobacco, and Firearms (ATF), found at 27 C.F.R. Part 555 Subpart K (relating to Storage). See § 211.115(a) (relating to standards for classifying and storing explosives and constructing, maintaining and siting magazines). The current ATF regulations focus on safety concerns related to location of magazines to reduce threat from accidental explosions. The magazine security requirements are minimal and only address design requirements for magazine construction, doors and locks on the doors. There are no effective perimeter security requirements and magazines are too readily accessible to those who want to steal explosives. See *e.g.* § 555.207 (relating to Construction of type 1 magazines).

As a result of inadequate security requirements, explosives have been stolen from magazines in Pennsylvania. From March 2003 to December 2003, the last period for which data from ATF is available, Pennsylvania led the nation with 9 explosives thefts. In these 9 thefts 1,859 pounds of explosives and 375 detonators, necessary to detonate the explosives, were stolen. Not all of this material has been recovered. These thefts of explosives poses a significant risk to the public's safety and the threat of future thefts may present an even greater risk to the public safety.

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A recent theft of explosives investigated by the Pennsylvania State Police (PSP) resulted in the Pennsylvania Office of Homeland Security, the PSP and the Department working to develop regulatory standards for additional magazine security measures. These amendments establish specific performance standards and include examples that meet the performance standards. The amendments specifically provide magazine licensees the flexibility to propose and use other methods and technologies that meet the performance standards and which may be more cost effective.

These amendments also add a duty that magazine licensees must report thefts of explosives and attempted break-ins to the Department, the PSP and any local police with jurisdiction. The information will be used to assess the effectiveness of these security standards and for possible necessary enhancements.

The Department's regulations are being amended because neither the Pennsylvania Office of Homeland Security nor the PSP have regulatory authority over the construction or operation of explosive magazines. These agencies have assisted in the development of these amendments and concur that their implementation will significantly enhance security of the Commonwealth and reduce the risk of theft of explosives and the resulting risk of injury to persons and damage to property.

Pursuant to section 5(f) of the Regulatory Review Act (71 P. S. § 745.5(f)), on February 8, 2005, the Department submitted a copy of the January 18, 2005, final rulemaking with notice of proposed rulemaking omitted to the IRRC and the Chairpersons of the House and Senate Environmental Resources and Energy Committees. On the same date, the Department also submitted this rulemaking to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P.S. §§ 732-101-732-506). In addition to the final rulemaking, IRRC and the Committees were provided with a copy of a detailed regulatory analysis form prepared by the Department.

On March 9, 2005 the House and Senate Committees were deemed to have approved the January 18, 2005 EQB Final Order. On March 10, 2005, the IRRC held a meeting and disapproved the January 18, 2005 EQB Final Order. IRRC's written disapproval Order was received March 16, 2005. IRRC disapproved the rulemaking, finding it was not in the public interest to approve the requirements. IRRC identified cost and clarity concerns. In addition, IRRC indicated that the Board should consider lower standards for compliance for the fireworks industry.

The need to move quickly to address IRRC's disapproval was highlighted by recent developments. Sometime between 1:00 pm Friday, March 11, 2005 and 2:05 pm Monday, March 14, 2005, the weekend immediately following IRRC's disapproval of the security measures to prevent unauthorized wheeled vehicles from accessing explosive storage magazines, unauthorized personnel broke into a magazine. A wheeled vehicle was used to drive up to a magazine and to pull the locking mechanism from the magazine door. A comparison of the magazine contents to the licensee's inventory records disclosed that the compromised magazine contained more explosives than the inventory records indicated were present. It was impossible

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to determine if anything was stolen. This was the fourth magazine break in at this site in 10 years.

As suggested at the IRRC hearing and by various legislators, representatives of the Department and PSP met with representatives of the fireworks industry and the explosives industry to obtain their input on how the EQB should address the issues listed in the IRRC Order. The changes approved by the EQB at the April 19, 2005 meeting are based on industry input. The summary below identifies the changes from the January 18, 2005 EQB Final Order made in response to the IRRC Order.

E. Summary of Final Rulemaking

This final rulemaking amends Chapter 211 (relating to storage, handling and use of explosives) to establish effective security standards for the storage of explosives. The amendments are summarized below.

§211.101 Definitions.

This section is amended to include definitions for the following terms: access point, concertina razor wire, indoor magazines, inner perimeter security, outdoor magazine site, outer perimeter security and wheeled vehicle. These are critical terms used in the new subsections (c) and (d) added to § 211.115 (relating to standards for classifying and storing explosives and constructing, maintaining and siting magazines). Defining these terms should minimize the risk of confusion in applying these new security standards.

Additionally, this section has been amended to include a definition for the term display fireworks. This change addresses one of the stated grounds for the IRRC Order, specifically: direct costs to the private sector; desirability and feasibility of setting lesser standards for small business; clarity; and adverse effects on prices of goods and services and competition. A provision specifically directed to the storage of fireworks has been added to the regulation.

§211.111 Scope.

This section is amended to clarify that Subchapter B of Chapter 211 does not apply to explosives which are stored underground in permitted underground mines.

§211.113 Application contents.

Subsection (b) is amended to include two new requirements for the license application. To enable risk assessment and prompt emergency response, the application is to include a plan showing the security measures being undertaken, as well as, the longitude and latitude of the magazine.

§211.115 Standards for classifying and storing explosives and constructing, maintaining and siting magazines.

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Subsection (a)

This subsection incorporates by reference the ATF regulations for classifying and storing explosives. The citation to the ATF regulations is corrected to reflect that the ATF regulations have been recodified from 27 C.F.R. Part 55 to part 555 as a result of moving ATF to the Department of Justice. The Department's regulations will now contain security standards for magazines in addition to those required by ATF. If the ATF establishes, at some time in the future, magazine security standards that conflict with the Department's regulations, the more stringent standards will apply.

Subsection (c)

This subsection requires that indoor magazines be located in buildings, which are in compliance with applicable building codes and other regulations. To address the stated grounds for the IRRC Order, specifically, direct costs to the private sector and adverse effects on prices of goods and services and competition, this section has been amended to no longer require indoor magazines for the storage of detonators to be located in a separate, secure room from other indoor magazines. This change will reduce costs to indoor magazine licensees storing detonators.

Subsection (d)

This subsection contains most of the new security standards established by this final order. It also clarifies that § 211.115 (d) does not apply to Type 3 magazines. To address the stated grounds for the IRRC Order, specifically, IRRC's desire for lower security standards for the fireworks industry, direct costs to the private sector, desirability and feasibility of setting lesser standards of compliance for small business, and adverse effects on prices of goods and services and competition, this subsection has been amended to no longer require daily inspection or perimeter security measures, except for an outer perimeter gate at any access point, for Type 4 magazines storing display fireworks.

This change was based on industry input and to address IRRC's objection to treating explosive magazine storing fireworks the same as other explosive storage magazines when securing them against theft. The industry and IRRC believe stolen fireworks pose less of a risk to public safety compared to other explosives. This change will dramatically reduce the fireworks industry costs of implementing these regulations. For many small fireworks magazine licensees, some of whom are hobbyists, the only requirement beyond the standards in the current regulations will be for an outer perimeter access gate.

Paragraph (d)(1)

This paragraph establishes, the requirement that the magazine be inspected daily by the licensee or his agent. Inspections of magazines containing explosives shall occur at least once every 24 hours. A record of the inspection and any problems encountered is to be maintained for at least three years. To address the stated grounds for the IRRC Order, specifically, direct costs

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to the private sector and desirability and feasibility of setting lesser standards of compliance for small business, and adverse effects on prices of goods and services and competition, this section has been amended to no longer require inspection of magazines every 24 hours provided the magazines are equipped with electronic intrusion detection devices and are located at sites that have outer perimeter gates equipped with electronic intrusion detection devices. Therefore, inspection requirements will be no more stringent than the standards in the current regulations. This change will significantly reduce industry costs of implementing these regulations.

Paragraph (d)(2,3, 8 and 9)

Paragraphs 2, 3, 7 and 9 establish the standards addressing access to magazines. Magazine licensees are to establish outer perimeter security to obstruct or deter, to the greatest extent possible, unauthorized wheeled vehicles from entering the site. Paragraph 3 identifies various measures or combinations, which can be used to obstruct or deter, to the greatest extent possible, unauthorized vehicular access. Access through the outer perimeter security is limited to one point unless otherwise approved by the Department. Paragraph 9 addresses the signs to be placed on the outer perimeter system. The signs are to warn first responders and the public of the hazards on the site. These amendments provide the licensee with the flexibility to propose alternative security measures that meet the performance standards.

To address the stated grounds for the IRRC Order, specifically, clarity and costs, the regulation has been amended to specify additional outer perimeter security measures including the use of guard personnel, closed circuit television, and electronic intrusion detection devices.

Paragraphs (d)(4,6, and 7)

These paragraphs require additional measures to obstruct or deter, to the greatest extent possible, unauthorized personnel access to the magazine, and provide the licensee with the flexibility to propose alternative security measures that meet the performance standards.

Paragraph 4 provides an additional security performance standard for magazines used to store high explosives or detonators. In addition to the outer perimeter security to obstruct or deter unauthorized wheeled vehicle intrusions to all magazines, inner perimeter security to obstruct or deter the intrusion of unauthorized persons must be provided for magazines containing high explosives or detonators. To address the stated grounds for the IRRC Order, specifically, clarity and costs, the regulation has been amended to specify additional inner perimeter security measures, including the use of guard personnel, closed circuit television, electronic intrusion detection devices, and fencing. Paragraph 6 has also been modified to address IRRC's belief that a single perimeter barrier was adequate. It has been amended to allow a single layer of security, if it meets the performance standards of obstructing unauthorized entry of the site by wheeled vehicles and deters unauthorized access to the magazines by personnel.

To address the stated grounds for the IRRC Order, specifically, direct costs to the private sector and adverse effects on prices of goods and services and competition, the minimum distance that inner perimeter security is required to be from a magazine has been reduced from 25 feet to 6 feet. This reduction would save a magazine licensee storing high explosives or

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detonators in a magazine with a width and length of 10 feet and choosing fencing as inner perimeter security approximately \$3,000 or a savings of nearly 2/3 the cost to meet the requirements.

Paragraph (d)(5 and 11)

These paragraphs require that all mobile and easily moveable magazines being used as stationary magazines must be immobilized. These amendments provide the licensee with the flexibility to propose alternative security measures that meet the performance standards. To address the stated grounds for the IRRC Order, specifically, clarity and direct costs to the private sector, the regulations have been amended to clarify which magazines need to be secured to terrain features. These magazines can be identified by measuring their dimensions, which can easily be determined, instead of by weighing them, which would require considerably more effort and additional costs.

Paragraph (d)(11 and 12)

Paragraph 11 requires the licensee to notify the state police and local law enforcement personnel of the establishment of an explosives magazine. The police will be better informed of the magazine location and may be able to patrol the area and more timely respond to attempted thefts. Paragraph 12 requires the licensee to immediately report to the state police, local law enforcement officials and the Department all thefts, break-ins, attempted break-ins and unaccounted for explosives. Timely investigation should allow for greater recovery of stolen explosives and apprehension of perpetrators. This information will also be useful in evaluating the effectiveness of these regulations.

Subsection (e) and (f)

These subsections establish a compliance schedule for magazines licensed on the effective date of this rulemaking. The inspection and notification requirements contained in this rulemaking take effect immediately. The rulemaking provides 60 days for licensees to submit to the Department plans and schedules for the implementation of inner and outer perimeter security measures. This rulemaking provides each licensee with the flexibility to choose the sequence in which they implement the inner and outer perimeter security measures. All security measures must be implemented within 360 days of the security plan approval unless the licensee requests and justifies and the Department approves a longer time period. The time extension request can be submitted either as part of the security plan or after the licensee starts implementing the plan. To address the stated grounds for the IRRC Order, specifically, reasonableness of requirements, implementation procedures and timetables for compliance and clarity, the regulations have been amended to clearly state that the security measures must be implemented within 360 days of the department's approval of the security plan rather than within 360 days of the licensee's submittal of the plan. Finally, magazine licensees will immediately have to begin the daily inspections, maintain inspection logs and notify police of storage magazines and report any thefts or break-ins. These requirements will improve security immediately at explosive magazines.

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Subsections (g) and (h)

These subsections provide the licensee with the flexibility to propose to the Department alternatives to the security requirements specified in section 211.115. This rulemaking also provides the timeframes for the Department's review and action on such proposals. A licensee can request the Department to formally approve the measures described in the security plan.

Subsection (i)

This subsection provides that a licensee who installs and maintains security measures required by these regulations shall be deemed to have obstructed or deterred unauthorized intrusions upon a magazine site.

F. Benefits and Costs

Benefits

The benefits of this rulemaking are difficult to quantify. By greatly reducing the potential for the theft of explosives, this rulemaking makes significantly less likely that individuals will have to bear the costs associated with injuries to persons and property damage resulting from the inept or malicious use of explosives. Reducing access to magazine sites should also reduce the number of thefts and the costs of related investigations.

Compliance Costs

Small magazine sites, where a few hundred pounds of explosives or less are stored, may cost less than \$12,000 to secure. Larger sites are estimated to cost less than \$52,000 to secure. The savings to the regulated community would be in the form of prevention of possible lawsuits stemming from explosives stolen from an inadequately secured site, resulting in harm to people or property. The cost to insure secured facilities may be less than the costs to insure unsecured facilities. The licensees' loss due to stolen explosives should also be reduced.

Compliance Assistance Plan

Compliance assistance will be in the form of allowing adequate time to implement these regulations and providing outreach and meetings to discuss the regulatory changes proposed with the affected industry community. The Pennsylvania Office of Homeland Security, the PSP and the Department also met with industry trade associations to discuss the amendments.

Paperwork requirements

Plans showing the specifications of all security measures required by this regulation will have to be prepared and submitted to the Department. Additional reporting requirements will not significantly change existing reporting, record keeping, or other paperwork requirements. Additional record-keeping requirements will be required to document inspection activities.

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Persons Affected by the Regulations

The final regulation directly affects a class of persons who hold explosive storage licenses issued by the Department and operate in Pennsylvania outdoor magazines and magazines for the storage of blasting agents, high explosives or detonators. This class of licensees consists of approximately 350 magazine site operators. The Department maintains a database that identifies the explosive storage license holders/magazine site operators who will receive direct notice from the Department concerning the new requirements.

G. Pollution Prevention

This rulemaking addresses security measures to be taken to prevent unauthorized access to magazines and to prevent the theft of explosives from the magazines. As a result, the issue of pollution prevention is not applicable to this rulemaking except as the additional security will reduce the criminal use of stolen explosives that may cause environmental pollution through the release of regulated substances.

H. Sunset Review

These regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

I. Regulatory Review

Under section 7(c) of the Regulatory Review Act (71 P. S. § 745, 7(c)), on April 22, 2005, the Department submitted a copy of this amended final rulemaking with notice of proposed rulemaking omitted to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees. On the same date, the Department also submitted this rulemaking to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P.S. §§ 732-101-732-506). In addition to the final rulemaking, IRRC and the Committees were provided with a copy of a detailed regulatory analysis form prepared by the Department.

J. Findings of the Board

The Board finds that:

(1) The amendments as set forth in Annex A are appropriate to implement the requirements of the Explosives Act of 1937, as well as, the Surface Mining Conservation and Reclamation Act and the Non-Coal Surface Mining Conservation and Reclamation Act.

(2) Use of the omission of notice of proposed rulemaking procedure is appropriate because the notice of proposed rulemaking procedure specified in sections 201 and 202 of the CDL (45 P.S. §§1201 and 1202) is, in this instance, contrary to the public interest.

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(3) The use of the notice of proposed rulemaking procedures is, in this instance, impracticable, unnecessary and contrary to the public interest in light of the current threat to the public safety from explosive magazines in Pennsylvania that have inadequate security measures. As demonstrated by recent thefts, the existing regulations leave explosives magazines vulnerable to theft.

(4) All persons directly affected by this Final Order were sent a copy of the proposed amendments at least two weeks prior to the adoption of the proposed amendments.

(5) These amendments are necessary and appropriate for administration and enforcement of the authorizing acts identified in section C of this preamble and in the public interest.

K. Order of the Board

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

(a) The regulations of the Department of Environmental Protection, 25 Pa. Code Chapter 211 are amended as set forth in Annex A.

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

(c) The Chairperson shall submit this Order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy committees as required by the Regulatory Review Act.

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

(e) This order shall take effect immediately.

BY:

Kathleen A. McGinty
Chairperson
Environmental Quality Board

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Annex A
TITLE 25. ENVIRONMENTAL PROTECTION
PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION
SUBPART D. ENVIRONMENTAL HEALTH AND SAFETY
ARTICLE IV. OCCUPATIONAL HEALTH AND SAFETY
CHAPTER 211. STORAGE, HANDLING AND USE OF EXPLOSIVES

§ 211.101. Definitions.

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

Access point-- a point in the outer perimeter security and a point in the inner perimeter security that allows entry to or exit from the magazine or the magazine site.

Airblast--An airborne shock wave resulting from an explosion, also known as air overpressure, which may or may not be audible.

Blast area--The area around the blast site that should be cleared to prevent injury to persons and damage to property.

Blast site--The specific location where the explosives charges are loaded into the blast holes.

Blaster--An individual who is licensed by the Department under Chapter 210 (relating to blasters' licenses) to detonate explosives and supervise blasting activities.

Blaster--in--charge--The blaster designated to have supervision and control over all blasting activities related to a blast.

Blasting activity--The actions associated with the use of explosives from the time of delivery of explosives to a worksite until all postblast measures are taken, including priming, loading, stemming, wiring or connecting, detonating, and all necessary safety, notification and monitoring measures.

Building--A structure that is designed for human habitation, employment or assembly.

Concertina razor wire--razor wire that is extended in a spiral for use as a barrier, such as along or on a fence and having a minimum of 101 coils of wire to 50 linear feet.

Delay interval--The designed time interval, usually in milliseconds, between successive detonations.

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Detonator--A device containing an initiating or primary explosive that is used for initiating detonation of explosives. The term includes electric blasting caps of instantaneous and delay types, blasting caps for use with safety fuses, detonating cord, delay connectors and nonelectric instantaneous and delay blasting caps.

Display fireworks - Large fireworks designed primarily to produce visible or audible effects by combustion, deflagration, or detonation. This term includes, but is not limited to, salutes containing more than 2 grains (130 mg) of explosive materials, aerial shells containing more than 40 grams of pyrotechnic compositions, and other display pieces which exceed the limits of explosive materials for classification as consumer fireworks. Display fireworks are classified as fireworks UN0333, UN0334 or UN0335 by the U.S. Department of Transportation at 49 CFR 172.101. This term also includes fused setpieces containing components which together exceed 50 mg of salute powder.

Explosive--A chemical compound, mixture or device that contains oxidizing and combustible materials or other ingredients in such proportions or quantities that an ignition by fire, friction, concussion, percussion or detonation may result in an explosion.

(i) The term includes safety fuse, squibs, detonating cord and igniters.

(ii) The term does not include the following:

(A) Commercially manufactured black powder, percussion caps, safety and pyrotechnic fuses, matches and friction primers, intended to be used solely for sporting, recreational or cultural purposes in antique firearms or antique devices, as defined in 18 U.S.C.A. § 921 (relating to definitions).

(B) Smokeless powder, primers used for reloading rifle or pistol cartridges, shot shells, percussion caps and smokeless propellants intended for personal use.

Flyrock--Overburden, stone, clay or other material ejected from the blast area by the force of a blast.

Indoor magazine--a magazine located entirely within a secure intrusion-resistant and theft-resistant building which is primarily used for commercial or industrial purposes.

Inner perimeter security--measures taken to increase the intrusion resistance and theft resistance of a magazine that encircles an individual or a group of magazines. These measures lie within the outer perimeter security measures.

Magazine--A structure used for the storage of explosives.

Misfire--Incomplete detonation of explosives.

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Outdoor magazine site--the contiguous area of land upon which the following are located: a magazine or group of magazines; the outer perimeter security, and the inner perimeter security, if any.

Outer perimeter security--measures taken to increase the intrusion resistance of a magazine (s) that encircle the area where the magazine (s) are situated.

Particle velocity--A measure of the intensity of ground vibration, specifically the time rate of change of the amplitude of ground vibration.

Peak particle velocity--The maximum intensity of particle velocity.

Person--A natural person, partnership, association, or corporation or an agency, instrumentality or entity of state government.

Primer--A cartridge or package of high explosives into which a detonator has been inserted or attached.

Purchase--To obtain ownership of explosives from another person.

Sale or sell--To transfer ownership of explosives to another person.

Scaled distance (Ds)--A value calculated by using the actual distance (D) in feet, measured in a horizontal line from the blast site to the nearest building or structure, neither owned nor leased by the blasting activity permittee or its customer, divided by the square root of the maximum weight of explosives (W) in pounds, that is detonated per delay period of less than 8 milliseconds.

$$Ds = D / (\text{square root}) W$$

Stemming--Inert material placed in a blast hole after an explosive charge for the purpose of confining the explosion gases to the blast hole, and inert material used to separate explosive charges in decked holes.

Structure--A combination of materials or pieces of work built or composed of parts joined together in some definite manner for occupancy, use or ornamentation. The term includes everything that is built or constructed, including bridges, offices, water towers, silos and dwellings.

Utility line--An electric cable, fiber optic line, pipeline or other type of conduit used to transport or transmit electricity, gases, liquids and other media including information.

Wheeled vehicle-- a vehicle that moves about on three or more wheels and has a gross vehicle weight of less than 11,000 pounds.

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§ 211.111. Scope

(a) This subchapter applies to the classification and storage of explosives. It establishes the requirements, procedures and standards for licensing, constructing, and siting and maintaining magazines.

(b) Persons storing explosives underground in permitted underground mines are exempt from this subchapter.

* * *

§ 211.113. Application contents.

(a) An application to obtain, renew, modify or transfer a magazine license shall be on forms approved by the Department. Before the Department issues, renews, transfers or modifies a license, the application must demonstrate that the applicant has complied with the applicable requirements of this chapter.

(b) A completed license application shall include:

* * *

(6) A plan showing the design, specifications, dimensions and locations of all security measures to be installed pursuant to subsection 211.115(d) of this Subchapter.

(7) The latitude and longitude of outdoor magazines except for Type 3 magazines as defined in 27 CFR Section 555.203(c).

(8) The latitude and longitude of indoor magazines containing high explosives.

* * *

§ 211.115. Standards for classifying and storing explosives and constructing, maintaining and siting magazines.

(a) The provisions of 27 CFR Part 555, Subpart K (relating to storage), are incorporated herein by reference. If any provision of 27 CFR Part 555, Subpart K addresses an issue addressed in this section then the more stringent provision shall apply. These provisions shall be used to:

- (1) Classify explosives.
- (2) Determine which class of explosives may be stored in each type of magazine.
- (3) Determine the quantity of explosives that may be stored.
- (4) Determine the applicable construction standards for each type of magazine.
- (5) Site the magazine.
- (6) Specify maintenance and housekeeping standards for a magazine.
- (7) Grant Variances.

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(b) For purposes of incorporation by reference of 27 CFR Part 555, Subpart K, the term "Department" is substituted for the term "director" and the term "representatives of the Department" is substituted for the term "ATF Official"

(c) Indoor magazines shall be located in buildings which are in compliance with all applicable building codes and other applicable regulations

(d) Persons storing only display fireworks in Type 4 magazines as defined in 27 CFR 555.203(D) are exempt from this subsection except for paragraphs 211.115(d)8 and 211.115 (d)9. Type 3 magazines as defined in 27 CFR Section 555.203(c), are exempt from this subsection. The following security measures shall apply to outdoor magazines and to indoor magazines located in buildings that are not intrusion-resistant and theft-resistant:

(1) Each magazine site shall be inspected by the licensee or his agent at least daily at approximately 24 hour intervals. If all magazines and outer perimeter security gates at the site are equipped with electronic intrusion detection devices conforming with subparagraphs 211.115(d)3(ii) or 211.115(d)3(iii), and 211.115(d)4(ii) or 211.115(d)4(iii), or otherwise approved, in writing, by the Department, the inspection shall be conducted at least every 7 days. Individual magazines or entire magazine sites which do not contain explosives are not required to be inspected provided the inspection records reflect the date the last explosives were removed from the magazine. Each inspection shall include the magazine itself, the access points and perimeter security. The inspection can be performed by a person or electronically by remote cameras. A record of the inspections shall be kept and made available to the Department. Records shall be maintained for a period of at least 3 years. The record of each inspection shall include:

(i) The name (s) of the person (s) who inspected the site.

(ii) The date and time each inspection began and ended.

(iii) Any information related to the integrity of the magazine site.

(iv) Actions taken on problems discovered.

(v) The dates on which no inspections were conducted because no explosives were contained in the magazine.

(2) There shall be no more than one access point to each magazine site. The Department may approve, in writing, more than one access point to a magazine site if the Department determines that the security of the site will be maintained.

(3) Each magazine shall have outer perimeter security that shall obstruct, to the greatest extent possible, unauthorized access to the magazine by wheeled vehicles. The outer perimeter security shall surround the entire magazine site and shall be located at least 25 feet away from the exterior of any magazine within the site or at

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least 25 feet away from the inner perimeter security measures, whichever is applicable. The Department may approve, in writing, lesser distances upon request when the Department determines a lesser distance is appropriate and will not compromise the security of the magazine site. The outer perimeter security requirements can be met by measures approved by the Department as provided for in subsection 211.115(g) or by one or a combination of the following:

(i) A sufficient number of personnel assigned to physically inspect each magazine containing explosives or detonators at least once every hour. All persons acting in this capacity shall at all times be equipped with a communications device capable of providing direct verbal communications with either the police department having jurisdiction or another person who has the ability to contact the police department having jurisdiction.

(ii) Closed Circuit Television (CCTV) continuously monitoring the entire outer perimeter, or any portion of the outer perimeter that is not protected by another measure.

(A) The images shall be recorded and maintained at least until magazine integrity is confirmed during the next required site inspection.

(B) The latest output images of all CCTV camera (s) shall be viewed at least once every hour by a person having direct verbal communications with the police department having jurisdiction.

(iii) Electronic intrusion detection devices including, but not limited to; microwave sensors, seismic detectors, vehicle detectors, alarms or infrared motion detectors.

(A) If microwave sensors, seismic sensors, vehicle detectors or similar devices are used, the zone of detection of the devices shall encompass the entire outer perimeter, or any portion of the outer perimeter that is not protected by another measure.

(B) All systems shall have the capability of providing initial notification of an alert within 15 minutes of an event and an on-site presence in response to an alert within one hour.

(C) All systems shall have a backup power supply, and shall provide an alert in the event of a power loss or a compromise of the system integrity.

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(iv) An earthen barrier, a minimum of 7 feet in height. Earthen barriers shall be constructed to obstruct, to the greatest extent possible, unauthorized access by wheeled vehicles. If made of loose soils the earthen barrier shall be compacted and vegetated to the greatest extent possible.

(v) A barrier constructed of boulders. The boulders shall be of a size and weight sufficient to deter, to the greatest extent possible, defeat of the barrier by wheeled vehicles.

(vi) A highwall that is a minimum of 7 feet in height and whose face or slopes are sufficient to obstruct, to the greatest extent possible, unauthorized access to the magazine site by wheeled vehicles.

(vii) Barriers composed of natural terrain features which are impassable, to the greatest extent possible, to wheeled vehicles.

(viii) A fencing system constructed of members that are of sufficient size, strength and anchorage to deter, to the greatest extent possible, the fencing system from being bent over, broken through or uprooted by a wheeled vehicle.

(ix) Other equivalent barriers approved by the Department, in writing.

(4) In addition to the requirements contained in subsection (d)(3) of this section, a magazine or group of magazines within a site that contains high explosives or detonators shall be enclosed by inner perimeter security designed to obstruct, to the greatest extent possible, access by unauthorized persons. The additional inner perimeter security shall be located at least 6 feet away from the exterior of any magazine within the site and at least 25 feet inside and away from the outer perimeter security. The inner perimeter security requirement can be met by measures approved by the Department as provided for in subsection 211.115(g) or by one or a combination of the following:

(i) A sufficient number of personnel assigned to physically inspect each magazine containing high explosives or detonators at least once every hour. All persons acting in this capacity shall at all times be equipped with a communications device capable of providing direct verbal communications with either the police department having jurisdiction or another person who has the ability to contact the police department having jurisdiction.

(ii) Closed Circuit Television (CCTV) continuously monitoring the magazine interior or the exterior of the door(s) of each magazine containing high explosives or detonators.

(A) The images shall be recorded and maintained at least until magazine integrity is confirmed during the next required site inspection.

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(B) The latest output images of all CCTV camera(s) shall be viewed at least once every hour by a person having direct verbal communications with the police department having jurisdiction.

(iii) Electronic intrusion detection devices including, but not limited to; microwave sensors, seismic detectors, alarms or infrared motion detectors.

(A) If alarms, infrared motion detectors or other similar devices are used, they shall be installed on each magazine containing high explosives or detonators. Alarms shall be installed on all magazine doors. Infrared motion detectors and other similar devices shall be installed on the interior of each magazine.

(B) If microwave sensors, seismic sensors or similar devices are used, the zone of detection of the devices shall encompass the entire inner perimeter, or any portion of the inner perimeter that is not protected by another measure.

(C) All systems shall have the capability of providing initial notification of an alert within 15 minutes of an event and an on-site presence in response to an alert within one hour.

(D) All systems shall have a backup power supply, and shall provide an alert in the event of a power loss or a compromise of the system integrity.

(iv) A highwall that is a minimum of 20 feet in height and whose face or slopes are sufficient to obstruct, to the greatest extent possible, access by unauthorized persons.

(v) A fence constructed of a minimum of 9 gauge chain link fencing with a maximum two-inch mesh that is kept in a condition which maintains its original functionality. The fence shall:

(A) Be buried at least one foot at the base or be equipped with a minimum 1.66 inch outside diameter bottom rail.

(B) Have a minimum height of eight feet above the ground.

(C) Have a top rail with a minimum 1.66 inch outside diameter.

(D) Have firmly anchored posts 10 feet or less on center. End, corner, and pull posts shall have a minimum outside diameter of 2.875 inches if round or 2.5--inch square. Intermediate posts shall have a minimum outside diameter of 2.375 inches if round or 2.25--inch C--Section. Posts shall be set in concrete at a minimum depth of 33 inches. The post holes shall be a

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minimum of 12 inches in diameter and shall be completely filled with concrete.

(E) Have outriggers at the top with concertina razor wire attached.

(F) Have concertina razor wire attached on the inside at the bottom.

(G) Have as many gates as the licensee demonstrates are necessary to provide for the safe exit of employees in the event of an emergency.

(H) All inner perimeter security emergency exit gates shall meet the requirements specified in paragraph 211.115(d)6.

(I) Vegetation shall be kept trimmed or suppressed to a distance of 6 feet from each side of the fence.

(vi) The Department may approve, in writing, the use of other security fence systems or other barriers that provide at least equivalent security.

(5) In addition to outer perimeter security, all portable magazines being used as stationary magazines and magazines having an a volume of less than 3 cubic yards shall be immobilized by fastening the magazine securely to the earth or a terrain feature in a manner sufficient to prevent displacement of the magazine by a wheeled vehicle.

(6) Any single layer of perimeter security measures that obstructs, to the greatest extent possible, unauthorized access to the magazine by wheeled vehicles and deters, to the greatest extent possible, access by unauthorized persons, and is located at least 25 feet away from the exterior of any magazine within the site may be employed to satisfy the requirements of both paragraphs 211.115(d)(3) and 211.115(d)(4).

(7) Inner perimeter security gates shall be constructed at all access points. Gates shall have firmly anchored posts and shall be kept in a condition which maintains their original functionality. Each gate shall be securely padlocked whenever the site is unoccupied.

(i) Gates shall be constructed of a minimum of 9 gauge chain link fencing with a maximum two-inch mesh. Gate frame members shall be a minimum outside diameter of 1.9 inches if round or 2.0--inch if square.

(ii) Gates shall have firmly anchored gate posts with a minimum 6.625--inch outside diameter. Posts shall be set in concrete at a minimum depth of 42 inches. The postholes shall be a minimum of 16 inches in diameter and shall be completely filled with concrete.

(iii) Gates shall have outriggers at the top with concertina razor wire attached.

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(iv) The construction of the gates shall be contiguous with the surrounding fence.

(v) All gates shall have 2 locks. The locks shall have separate hasps and staples.

(vi) Each lock shall have a hood of at least 1/4-inch thick steel. The hoods must prevent sawing or lever-cutting action on the locks, hasps, and staples.

(vii) Each lock shall have at least five tumblers and a case--hardened shackle of at least 3/8 inches in diameter.

(viii) When a lock and chain are used to secure a gate, the minimum specification of the chain shall be 3/8 inch Grade 70, Transport.

(ix) The department may approve, in writing, the use of other security gate systems that provide at least equivalent security.

(8) Outer perimeter security gates shall be constructed at all access points. Gates shall be designed and constructed to deter, to the greatest extent possible, defeat of the gate by wheeled vehicles. Gates shall have firmly anchored posts and shall be kept in a condition which maintains their original functionality. Gateposts shall be a minimum 6.625--inch outside diameter. Posts shall be set in concrete at a minimum depth of 42 inches. The postholes shall be a minimum of 16 inches in diameter and shall be completely filled with concrete. The department may approve, in writing, the use of gateposts having smaller diameters or other shapes and/or alternate gatepost anchoring methods that provide at least equivalent security.

(9) Outer perimeter security gates shall be padlocked whenever the site is unoccupied. All gates shall have 2 locks which meet the specifications of subsection (d)(6) (vi-viii) of this section.

(10) No trespassing signs shall be placed around the outer perimeter of the site. Warning signs shall be placed at all access points. Signs shall be well maintained.

(i) No trespassing signs shall be spaced such that, except for corners, adjacent signs are visible.

(ii) Signs shall be placed such that a bullet passing directly through the sign will not impact a magazine.

(iii) Warning Signs at all access points shall provide notice of private property and no trespassing, in addition to providing a notice substantially conforming to the following: "Danger, never fight explosives fires, explosives are stored on this site" to warn first responders and the public of the hazards contained within.

NOTE: Copy includes underlined blue highlights to indicate changes adopted at April 19, 2005 EQB meeting to address IRRC Order.

(iv) Warning signs at all access points shall provide an emergency contact phone number.

(v) Signs shall not be obscured by vegetation or other obstructions.

(vi) Signs shall be constructed of a durable, weather--resistant material. Letters and numbers shall be of a minimum height of 2 inches that can be easily seen and read.

(11) Magazines shall be constructed to the standards contained in this subsection:

(i) All magazines shall be constructed according to the construction standards found in 27 CFR 555 Subpart K with the following additions:

(A) Mobile type 5 magazines being used as stationary magazines for more than one year must be located within the outer perimeter security, shall be immobilized in accordance with 27 CFR Section 555.211 and shall be fastened securely to the earth or a terrain feature in a manner sufficient to prevent movement of the magazine by a motor vehicle. Motor vehicles used to transport bulk blasting agents that are left unattended at a magazine site must have two Department approved methods of disabling the vehicles to render them effectively immobilized and the vehicles must be kept within the outer perimeter security. Disabling methods may include:

(I) Steering locking devices

(II) Pedal locking devices

(III) Fuel or electrical system disablers.

(IV) Other equivalent disabling measures approved by the Department.

(B) Systems of pumps and/or tanks used to store, mix or dispense bulk blasting agents at magazine sites shall be equipped with locks or shall otherwise be constructed to prevent the unauthorized removal of blasting agents from the system.

(12) Any person who stores explosive materials shall notify both the local police having jurisdiction in the area where the explosives are being stored and the Pennsylvania State Police of such storage. This notification must be made in the manner of and in addition to the notification requirements in 27 CFR Part 555 Subpart K, § 555.201 (f).

(13) Any person who stores explosive materials shall immediately notify the Department, the Pennsylvania State Police and the local police jurisdiction, if any, when any of the following occur:

NOTE: Copy includes underlined blue highlights to indicate changes adopted at April 19, 2005 EQB meeting to address IRRC Order.

(i) Evidence is discovered of a break--in or theft at the magazine, or an attempted theft or break--in has occurred.

(ii) The security measures required by this section have been breached or disabled or partially breached or disabled. Short--term partial breaches of security of less than forty--eight (48) hour duration need not be reported under this subsection if all of the following apply:

- (A) The partial breach was due to equipment failure or accidental or natural causes.
- (B) An account of the partial breach was recorded pursuant to Subsection (d)(1) of this section.
- (C) Immediate measures are being taken to repair or replace the partial breach.

(iii) Unauthorized persons exhibiting suspicious behavior are observed in the vicinity of the magazine.

(iv) Inventory records indicate that explosive material is missing and unaccounted for.

(14) The notifications to state and local agencies required in subsections (d)(11) and (d)(12) of this section shall be in addition to any notification required by agencies of the United States.

(e) Licensees of magazines licensed prior to _____, 2005, (the effective date of this amendment) shall comply with the requirements of this section according to the following schedule except as approved by the Department pursuant to subsections 211.115(f) and (g):

(1) Immediately upon -----, 2005, (the effective date of these amendments) the inspection and notification requirements must be implemented.

(2) Within 180 days of approval of the plan required by subsections 211.115(f) or 211.115(g), implement either the outer or inner perimeter security measure requirements.

(3) Within 360 days of approval of the plan required by subsections 211.115(f) or 211.115(g), implement the remaining perimeter security measure requirements.

(4) The Department, at its sole discretion, may approve, in writing, a time extension to the requirements of either subsection 211.115 (e) (2) or subsection 211.115 (e) (3) if the licensee has demonstrated a good faith effort to comply with the perimeter security measure requirements imposed under this chapter.

(f) Within 60 days of -----, 2005, (effective date of these amendments), licensees of magazines licensed prior to -----, 2005, (effective date of these amendments) shall submit to the Department on forms provided by the Department:

NOTE: Copy includes underlined blue highlights to indicate changes adopted at April 19, 2005 EQB meeting to address IRRC Order.

- (1) The plan required by subsection 211.113(b)(6) (relating to application contents).
- (2) A schedule for the implementation of the plan required by subsection 211.113(b)(6).
- (3) If the security enhancements required by subsection 211.115(d) cannot be implemented in the time frames required by subsection 211.115(e) the plan shall include a request for a time extension. The request for a time extension shall include a schedule and a justification for such extension. The Department will act upon time extension requests within 30 days of the receipt of the request.

(g) After consultation with the Pennsylvania State Police and the Pennsylvania Office of Homeland Security, the Department may approve, in writing, alternatives to specific requirements of this section which are based upon advanced technology or other alternatives and which, either alone or in combination with other measures, provide at least equivalent security at magazines or magazine sites. The Department will act upon requests for approval of alternative security measures or, upon the written request of the licensee, for approval of plans submitted pursuant to subsection (f) of this section within 30 days of the receipt of the request. The Department may extend this review period for up to an additional 30 days if such additional time is necessary to properly review the request.

(h) All requests for Department approval of plans submitted pursuant to §211.115(f) or alternate requirements, including alternative security measures and time extensions under this section, shall be on forms provided by the Department.

(i) A licensee shall be deemed to be in compliance with this section as to having deterred or obstructed, to the greatest extent possible, unauthorized intrusion upon a magazine site if the licensee constructs, installs, implements and maintains the security measures specified in subsection (d) of this section, which meet the requirements of this section and which are specified by the licensee in one of the following:

- (1) A plan submitted to the Department pursuant to subsection (f) of this section.
- (2) A plan submitted to and approved by the Department pursuant to subsection (g) of this section.
- (3) A plan submitted to the Department pursuant to paragraph 211.113(b)(6) of this Subchapter.

**ENVIRONMENTAL QUALITY BOARD RESPONSE TO THE INDEPENDENT
REGULATORY REVIEW COMMISSION DISAPPROVAL**

Commission's Finding

“Direct cost to private sector (71 P.S. §745.5b(b)(1)(i))

This regulation will impose large costs directly on the regulated industries without allowing them sufficient time to budget for those costs. It is impossible for us to accurately predict the economic and fiscal impacts of this regulation since the universe of potential “alternatives” is uncharted and unknown. The Board needs to further clarify the criteria that will be used to approve alternatives so that the licensees can select cost-effective means of compliance.”

Environmental Quality Board Response

In preparing implementation cost estimates, the Department estimated costs based on the most expensive scenarios for all Pennsylvania magazine sites with the foreknowledge that the resulting cost estimate would appear high. Many less costly alternatives are provided by the regulations, however the extent to which licensees would implement these less costly measures is unknown.

Numerous magazine site visits by the Pennsylvania State Police (PSP) and Department of Environmental Protection (DEP) personnel have confirmed that the majority of licensees will be able to comply with these regulatory requirements at considerably less than the estimated costs by utilizing a combination of natural terrain features, materials already on site, alternatives other than fencing, etc. Indeed, many licensees have historically, voluntarily and prudently secured their sites in the absence of regulatory requirements to do so and, therefore, are already in substantial compliance with this regulation.

It is difficult to accurately predict the economic and fiscal impacts of this regulation because the performance-based nature of the requirements allow for a wide variety of physical and technological measures to achieve compliance, combined with an inability to predict the precise choices which licensees will make in this regard. Comments received from licensees indicated a strong preference for performance-based (versus prescriptive) regulations to allow for a wide variety of options and flexibility to fit different individual magazine sites. The economic and fiscal impacts of highly prescriptive regulations are more easily predicted - but this is contrary to the expressed preference of most licensees.

The Department, along with Pennsylvania State Police (PSP) and Office of Homeland Security (OHS) have formed and have begun working with an agency-industry committee to evaluate and distribute additional information on magazine security

measures that could also be implemented to provide compliance with this regulation.

To assist licensees' in their selection of cost-effective alternative security measures, Section 211.115(d)(3), outer perimeter security, has been expanded to identify other types of outer perimeter security measures to clarify what the licensee can do to meet the regulatory performance standards, and Section 211.115(d)(4), inner perimeter security, has been expanded to identify other types of inner perimeter security measures to clarify what the licensee can do to meet the regulatory performance standards. In addition, Section 211.115(d) has been amended to reduce the minimum distance from the magazine to the inner perimeter security measures from 25 feet to 6 feet.

Commission's Finding

“Adverse effects on prices of goods and services and competition. (71 P.S. §745.5b(b)(1)(ii))

The added costs of this regulation are likely to place Pennsylvania businesses at a competitive disadvantage with similar businesses in other states that are not subject to similar requirements. Therefore, the Board should consider revisions to the regulation to mitigate these costs.”

Environmental Quality Board Response

The Commonwealth is the first state to aggressively move forward to address the vulnerability of these facilities. We are convinced that if there is any out-of-state competitive advantage it will be short-lived as other states, insurance carriers, the financial industry, and possibly the federal government implement similar requirements.

Nevertheless, the regulations have been revised as follows:

Subsection 211.115(c) has been changed to no longer require that detonator magazines be secured in a separate room from other magazines. Licensees will not have the expense of establishing a second secure room and a second exit door.

Subsection 211.115(d) has been changed to exempt Type 4 magazines storing display fireworks from all security enhancement provisions except for a gate at any access point, which must be locked when the site is unoccupied. A definition of “display fireworks” has been added to 211.101. Only fireworks licensees storing bulk salutes will be subject to these regulations, significantly reducing the costs to the fireworks industry. Paragraph 211.115(d)(3)(i), (d)(4)(i) and (6) have been changed to no longer require daily inspection of magazines provided the magazines are equipped with electronic intrusion detection devices and the magazines are located at sites that have outer perimeter gates equipped with electronic intrusion detection devices. This change will reduce the licensee inspection costs to approximately one-seventh of what daily inspection would cost.

Paragraph 211.115(d)(4) has been changed to allow a single layer of perimeter security if that single layer meets the performance standards for inner and outer perimeter security, and has been changed to reduce the minimum separation distance between inner perimeter security and the magazine from 25 feet to 6 feet. A single security layer should be less costly than two layers. The distance reduction (between the magazine and the security measure) should lower costs by up to 75%.

Paragraphs 211.115(d)(3) and (4) have been changed to identify other acceptable outer and inner perimeter security measures that may be more cost effective to employ than the listed physical barriers.

Paragraph 211.115 (d)(5) has been changed to clarify which magazines need to be secured to terrain features. These magazines can now be identified by measuring their dimensions (which can easily be determined) instead of weighing them, eliminating the costs to weigh the magazine.

Paragraph 211.115(d)(6) was added. It allows licensees to save costs by combining inner and outer perimeter security in to a single system should they choose to do so and provided it meets the performance standards.

Paragraphs 211.115(d)(7) and (8) which govern the gate standards, have been changed to allow the gates to be constructed of materials other than those previously prescribed in the regulation. This revision provides flexibility to licensees to lower compliance costs by use of materials they may have on hand that are as effective at preventing unauthorized access.

Commission's Finding

“Desirability and feasibility of setting lesser standards of compliance for small business (71 P.S. §745.5b(b)(1)(v))

We believe the Board should consider lower standards for compliance for the fireworks industry. Many manufactures and distributors of fireworks in Pennsylvania are either small businesses or hobbyists who produce holiday displays for small towns. The black powder used in their products entails only a minimal security risk when compared to explosives used in the construction or mining industries. The Board should revisit this issue and adopt lesser standards that will still preserve the balance between the safety of the public and promotion of small business.”

Environmental Quality Board Response

This regulation was developed in response to concerns from the Pennsylvania Office of Homeland Security and the Pennsylvania State Police relating to actual thefts and the vulnerability of future thefts from explosives storage magazines. Security expertise within these agencies indicate that thefts from unsecured magazines is the most likely scenario for criminals and terrorists to obtain such materials regardless of the business intent for obtaining those materials and regardless of the size of the business interest.

The proposition that the vulnerability of fireworks magazines represents less of a threat to the public safety than the vulnerability of other types of explosives magazines has not been affirmatively demonstrated. Many of the ingredients in fireworks are as dangerous as those found in other explosive devices. Persons have been injured, maimed, disabled and killed by fireworks. This is why it is a crime in Pennsylvania and many other states for unlicensed persons to possess fireworks.

Likewise, the proposition that black powder is a relatively harmless explosive that is found in only small quantities within fireworks is equally erroneous. Black powder, when confined, is a powerful explosive. It is the explosive of choice to build pipe bombs and similar devices. Certain types of fireworks contain multiple pounds of black powder per device. The assumption that criminals or terrorists would not take the time or have the patience to extract black powder from fireworks to assemble destructive or lethal devices is pure speculation.

Government agencies concerned with security issues have concluded that criminals or terrorists are more likely to steal explosives than they are to purchase black powder at retail stores because of the risk of being identified by store personnel or recorded on surveillance cameras.

Nevertheless, to address IRRC's Order with respect to the fireworks industry, many of whom IRRC stated are small businesses, Subsection 211.115(d) has been revised. This Subsection has been changed to exempt Type 4 magazines storing display fireworks from all security enhancement provisions except for a gate at any access point. The gate must be locked when the site is unoccupied.

Commission's Finding

“Protection of the public health, safety and welfare. (71 P.S. §745.5b(b)(1)(v))

This regulation may have an inadvertent but detrimental impact on the public health, safety and welfare. If the cost of storing explosives or fireworks in Pennsylvania becomes unaffordable, transportation of explosives may increase. Licensees may strive to reduce costs by either reducing the number of storage sites or moving out-of-state. This could necessitate shipment of this material across state lines or for longer distances. In turn, a greater threat to the public safety could result from an increased vulnerability to theft and risk of accidents. We also find that the required barriers may present a safety hazard to employees. In the event of a fire or other catastrophic event, employees must have several avenues of escape. The Board needs to consider both of these safety concerns as it revises the regulation.”

Environmental Quality Board Response

The regulations do not prohibit multiple access points. To address IRRC's concerns regarding employee safety where chain link fence with razor wire is selected for inner perimeter security, § 211.115 (d)(4)(v) has been changed to allow the fence to have as many gates as the licensee demonstrates are necessary to provide for the safe exit of employees in the event of an emergency. Licensees are free to design a security system appropriate for their specific facility and the Department urges them to consider worker safety in that design.

It is anticipated that all licensees will make business decisions regarding future operation of their current magazines based on a variety of costs and benefits specific to individual magazine site conditions. In that analysis they may find that an increased cost of longer transportation (fuel, labor, equipment) would offset the costs associated with securing a magazine.

The vulnerability of explosives storage is real and immediate, and at this point concerns about increased risk in the transportation of explosives is speculative. Title 49, Code of Federal Regulations currently includes adequate packaging requirements for the transportation of explosive material. The agencies will monitor the situation and consider a future rulemaking to address any security concerns that may develop in the transportation of explosives. USDOT has focused additional attention on the transportation of all hazardous material, including explosives. Should more protective transportation requirements become necessary, DEP would support efforts to increase security requirements for explosives transportation.

To address IRRC's concerns regarding public health, safety and welfare, § 211.115 (d)(10) has been changed to modify the sign requirements to better alert the public and first responders to dangers associated with the explosives stored at the site.

Commission's Finding

“Clarity and lack of ambiguity. (71 P.S. §745.5b(b)(3)(ii))

Sections 211.115(6)(3) and (d)(4) state that the security system ‘shall obstruct, to the greatest extent possible’ unauthorized access by wheeled vehicles or by unauthorized persons. The regulation does not establish criteria for acceptable alternatives. Hence, the regulated parties have no notice of what other security measures DEP will approve in lieu of the prescriptive measures. If electronic surveillance or intrusion detection systems would be acceptable alternatives, then the basic terms, standards and prerequisites for them should be included in the regulation.”

Environmental Quality Board Response

Providing a significant amount of detail within the publicly available regulation was balanced with the need to maintain some level of security regarding the system design itself so as to not provide a blueprint to criminals to compromise those systems.

Nevertheless, the regulations have been revised as follows:

Sections 211.115 (d)(3) and 211.115 (d)(4) have been amended to now include details on the types of electronic security measures that meet the regulation performance standards. Sections 211.115 (d)(3) and (d)(4) have been changed to include electronic intrusion detection devices including, but not limited to; microwave sensors, seismic detectors, vehicle detectors, alarms or infrared motion detectors. If microwave sensors, seismic sensors, vehicle detectors or similar devices are used, the zone of detection must be appropriate for either inner or outer perimeter security application. Further, all systems must have the capability of providing initial notification of an alert within 15 minutes of an event and an on-site presence in response to an alert within one hour. In addition, all systems must have a backup power supply, and provide an alert in the event of a power loss or a compromise of the system integrity.

No changes were made to the performance standards in Sections 211.115 (d)(3) and (d)(4). The Department met with the regulated industry following IRRC's disapproval to discuss this concern. Based upon these discussions, the Department determined that the regulated industries did not find the standards vague or ambiguous.

Commission's Finding

“Reasonableness of requirements, implementation procedures and timetables for compliance. (71 P.S. §745.5b(b)(3)(iv))

Although there is a definite need for security in the storage of explosives and black powder, we question the reasonableness of this regulation. The Board claims that this regulation is necessary to prevent thefts of explosives... We believe a one-perimeter barrier would be sufficient to impede intrusion by both vehicles and human. To insure that licensees have a reasonable amount of time to comply, the time period for implementation should begin with DEP approval of the plan, not the date the plan is submitted.”

Environmental Quality Board Response

The regulations do not address employee theft or poor inventory control. Internal operating procedure is a matter of common business practice best left to the licensee and is not an area traditionally regulated. In addition, the federal ATF has regulations governing inventory control.

In response to IRRC's "one perimeter barrier" adequacy statement, Sections 211.115(d)(3)(i) and 211.115 (d)(4)(i) have been added to allow inner and outer perimeter security to be met with the use of security personnel.

In addition § 211.115(d)(6) has been added to allow a single layer of security if that single layer meets the performance standards for inner and outer perimeter security. To address the implementation timeframe, § 211.115 (e) has been changed to start the implementation time clock upon DEP approval of the plan required by § 211.115 (f) or §211.115 (g). These security measures must be implemented within 360 days of the department's approval of the security plan rather than within 360 days of the licensee's submittal of the plan.

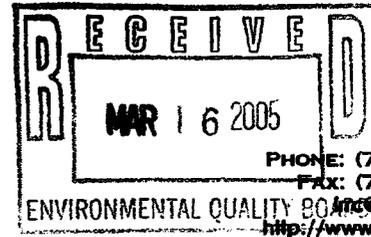
Commission's Finding

“We have determined this regulation is consistent with the statutory authority of the Board (73 P.S. §161 and 71 P.S. §751-35) and the intention of the General Assembly. However, after considering all of the other criteria of the Regulatory Review Act discussed above, we find promulgation of this regulation is not in the public interest.”

Environmental Quality Board Response

The Board agrees with the Commission's determination that the regulation is consistent with the Board's statutory authority and the intent of the General Assembly. The Board also believed that the regulations were in the public interest. Nevertheless, the changes described above have been made to address the Commission's disapproval that was based on this finding.

JOHN R. MCGINLEY, JR., ESQ., CHAIRMAN
ALVIN C. BUSH, VICE CHAIRMAN
DANIEL F. CLARK, ESQ.
ARTHUR COCCODRILLI
MURRAY UFBERG, ESQ.
MARY S. WYATTE, ACTING EXECUTIVE DIRECTOR/CHIEF COUNSEL



INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

March 16, 2005

Honorable Kathleen A. McGinty, Chairperson
Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 16th Floor
Harrisburg, PA 17101

Re: Regulation #7-394 (IRRC #2461)
Environmental Quality Board
Storage, Handling and Use of Explosives

Dear Chairperson McGinty:

The Independent Regulatory Review Commission disapproved your regulation on March 10, 2005. Our order is enclosed and will be available on our website at www.irrc.state.pa.us.

Within 40 days of receipt of our order, Section 7(a) of the Regulatory Review Act requires you to select one of the following options: (1) proceed with promulgation under Section 7(b); (2) proceed with promulgation under Section 7(c); or (3) withdraw the regulation. If you do not take any action within this period, the regulation is deemed withdrawn.

If you or your staff has any questions, please contact Mary S. Wyattte, our Acting Executive Director, at 783-5506.

Sincerely,

John R. McGinley, Jr., Esq.
Chairman

wbg
Enclosure

cc: Honorable Mary Jo White, Chairman, Senate Environmental Resources and Energy Committee
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and Energy Committee
Honorable William F. Adolph, Jr., Majority Chairman, House Environmental Resources and Energy Committee
Honorable Camille George, Democratic Chairman, House Environmental Resources and Energy Committee

**INDEPENDENT REGULATORY REVIEW COMMISSION
DISAPPROVAL ORDER**

Commissioners Voting:

Public Meeting Held March 10, 2005

John R. McGinley, Jr., Esq., Chairman
Alvin C. Bush, Vice Chairman
Daniel F. Clark, Esq.
Arthur Coccodrilli - Dissenting
Murray Ufberg, Esq., by Phone - Dissenting

Regulation No. 7-394
Environmental Quality Board
Storage, Handling and Use of Explosives

On February 8, 2005, the Independent Regulatory Review Commission (Commission) received this regulation from the Environmental Quality Board (Board). This rulemaking amends 25 Pa. Code §§ 211.101, 211.111, 211.113 and 211.115. Notice of proposed rulemaking was omitted for this regulation.

This regulation amends the procedures, requirements and standards for explosive storage facilities to deter the theft of explosives. It is being promulgated as a result of the combined efforts of the Department of Environmental Protection (DEP), Pennsylvania State Police and Governor's Office of Homeland Security.

We commend these agencies for recognizing the need to improve security and taking the lead to address this issue. We agree there is a need to augment security to protect the public. Regrettably, this regulation fails to meet several of the criteria set forth in the Regulatory Review Act.

Direct costs to the private sector (71 P.S. § 745.5b(b)(1)(i))

This regulation will impose large costs directly on the regulated industries, without allowing them sufficient time to budget for those costs. The Board projects total costs of about \$5.7 million to construct the security measures. It did not estimate recurring costs for requirements such as daily inspections. The regulated industry contends that construction costs will be \$34 million and annual recurring costs will be between \$7 and \$40 million.

It is impossible for us to accurately predict the economic and fiscal impacts of this regulation since the universe of potential "alternatives" is uncharted and unknown. The Board needs to further clarify the criteria that will be used to approve alternatives so that licensees can select cost-effective means of compliance.

**Adverse effects on prices of goods and services and competition
(71 P.S. § 745.5b(b)(1)(ii))**

The significant costs of this regulation will be passed on to the users of explosives and fireworks, resulting in an adverse effect on the prices of goods and services. The added costs of this regulation are likely to place Pennsylvania businesses at a competitive disadvantage with similar businesses in other states that are not subject to similar requirements. Therefore, the Board should consider revisions to the regulation to mitigate these costs.

systems and determine whether they provide an equivalent or greater level of security compared to physical barriers designed to “obstruct” entry.

Also, the determination of what constitutes “the greatest extent possible” is subjective and, therefore, completely within the discretion of DEP. Regulated parties have no advance notice of what is financially or technically possible in order for their plans to pass muster. DEP touts this language as “flexible.” We find it vague, since it could be applied inconsistently.

If electronic surveillance or intrusion detection systems would be acceptable alternatives, then the basic terms, standards and prerequisites for them should be included in the regulation. This would not only provide the regulated community with clear direction but, more importantly, would enable it to comply with the new requirements in both an expeditious and cost-effective manner.

Reasonableness of requirements, implementation procedures and timetables for compliance (71 P.S. § 745.5b(b)(3)(iv))

Although there is a definite need for security in the storage of explosives and black powder, we question the reasonableness of this regulation. The Board claims that this regulation is necessary to prevent thefts of explosives. To support this claim, the Board cites nine explosive thefts between March and December of 2003, based on statistics from the Bureau of Alcohol, Tobacco and Firearms, U.S. Department of Justice (ATF). According to these figures, Pennsylvania had the highest number of thefts of any of the 50 states during this period. However, the regulation would not have prevented five of those thefts, which resulted from employee theft and poor inventory control. Only four of the nine thefts involved forced entry (breaking of locks or doors).

Currently no perimeter barriers are mandated for high explosive storage facilities. This regulation will require two perimeter barriers. We note that neither the ATF nor other states have any similar requirements for one or two physical barriers on the perimeters of explosives storage sites. Also, DEP is not aware of any draft regulations proposed by ATF or neighboring states with similar requirements for physical barriers. We believe a one-perimeter barrier would be sufficient to impede intrusion by both vehicles and humans.

We also question why the implementation schedule in this regulation is based on the date a plan is submitted. The date a plan is submitted starts the time periods for implementation specified in Section 211.115(e) which include 180 days to implement either outer or inner perimeter security requirements. However, there is no time limit placed on DEP to approve the plan during this 180-day period. Furthermore, if a licensee requests an alternative, even more lead time for implementation could be lost. We recognize that there is a provision for a time extension, but that request must be filed with the initial plan. To insure that licensees have a reasonable amount of time to comply, the time period for implementation should begin with DEP approval of the plan, not the date the plan is submitted.

April 22, 2005
EQB #7-394
IRRC #2461

RECONSIDERATION REPORT
REGULATORY REVIEW ACT – 71 P.S. § 745.7(c)
FINAL-OMITTED RULEMAKING REGULATION #7-394
Storage, Handling and Use of Explosives
25 *Pennsylvania Code*, Chapter 211

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 - c. Regulatory Analysis Form**

- B. Findings of the Commission**

- C. Agency Response to the IRRC Order of Disapproval**

April 22, 2005
EQB #7-394
IRRC #2461

- A. Final-Omitted Regulation
 - a. Order
 - b. Annex A
 - c. Regulatory Analysis Form

April 22, 2005
EQB #7-394
IRRC #2461

B. Findings of the Commission

April 22, 2005
EQB #7-394
IRRC #2461

C. Agency Response to the IRRC Order of Disapproval



Pennsylvania Department of Environmental Protection

Rachel Carson State Office Building

P.O. Box 2063

Harrisburg, PA 17105-2063

April 22, 2005

Policy Office

717-783-8727

Mary S. Wyatte, Esq.
Acting Executive Director
Independent Regulatory Review Commission
14th Floor, Harrisstown #2
333 Market Street
Harrisburg, PA 17120

RE: Reconsideration Report Revised Final-Omitted Rulemaking – Storage, Handling and Use of Explosives, 25 Pa.Code Chapter 211 (#7-394)

Dear Ms. Wyatte:

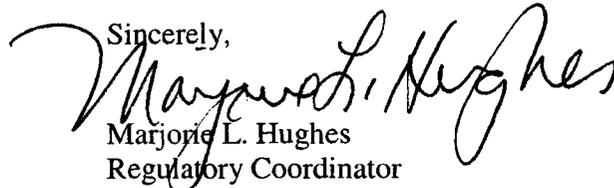
Pursuant to the Regulatory Review Act, enclosed is a copy of the Department's Reconsideration Report for review by the Commission following the Commission's disapproval by Order received on March 16, 2005. The Environmental Quality Board (EQB) approved the revised final-omitted rulemaking on April 19, 2005.

Following the Commission's disapproval, the Department met with your office, and with representatives of the fireworks and explosives industry to discuss the rulemaking further. As a result of those discussions, revisions were developed and approved by the Board.

As required by 71 P.S. § 745.7(c), this Report includes the revised final-omitted rulemaking, the findings of the Commission and the Agency's response to the Disapproval Order. The Pennsylvania Office of Homeland Security and the Pennsylvania State Police concur with the revisions included in the Reconsideration Report.

The Department will provide assistance as necessary to facilitate the Commission's review of this Reconsideration Report. This review is tentatively scheduled for May 12, 2005. Please contact me if I can provide any additional information.

Sincerely,



Marjorie L. Hughes
Regulatory Coordinator

Enclosure

cc: J. Duecker, Office of Homeland Security
V. Babich, Pennsylvania State Police



**TRANSMITTAL SHEET FOR REPORT PURSUANT TO SECTION 7(b) and 7(c)
OF THE REGULATORY REVIEW ACT**

I.D. NUMBER: 7-394
SUBJECT: Storage, Handling and Use of Explosives
PA CODE: 25 Pa. Code, Chapter 211
AGENCY: Environmental Protection

TYPE OF REPORT

- Agency Report contains final-form regulation **without revision**, the findings of the Commission and agency response and recommendation pursuant to Section 7(b) of the Regulatory Review Act.

- X • Agency Report contains the **revised final-form regulation**, the findings of the Commission and agency response and recommendation pursuant to Section 7(c) of the Regulatory Review Act.

RECEIVED
 2005 APR 22 PM 2:27
 REGULATORY REVIEW COMMISSION

FILING OF REPORT

DATE	SIGNATURE	DESIGNATION
		GOVERNOR'S OFFICE (333 Market Street)
4/22/05	<i>Vicki R. Hoffman</i>	HOUSE COMMITTEE ON Environmental Resources and Energy
4/22/05	<i>Joseph M. Scari</i>	Office of Attorney General
5/2/05	<i>Rat Carnathan</i>	SENATE COMMITTEE ON Environmental Resources and Energy
4/22/05	<i>Stephen J. Hoffman</i>	INDEPENDENT REGULATORY REVIEW COMMISSION

4-22-05 *Joseph M. Scari* Office of Attorney General

April 20, 2001