

# Regulatory Analysis Form

(Completed by Promulgating Agency)

**INDEPENDENT REGULATORY  
REVIEW COMMISSION**

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(All Comments submitted on this regulation will appear on IRRC's website)

(1) Agency:

Department of State, Bureau of Professional and Occupational Affairs

(2) Agency Number: 16A

Identification Number: 54

IRRC Number: 2903

(3) PA Code Cite:

49 Pa. Code § 43b.13a

(4) Short Title:

Schedule of civil penalties – engineers, land surveyors and geologists

(5) Agency Contacts (List Telephone Number and Email Address):

Primary Contact: **Thomas A. Blackburn, Regulatory Unit counsel, Department of State;**  
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(717)783-7200; P.O. Box 2649, Harrisburg, PA 17105-2649; (717)787-0251; cymontgome@pa.gov

(6) Type of Rulemaking (check applicable box):

- ☐ Proposed Regulation  
☒ Final Regulation  
☐ Final Omitted Regulation

- ☐ Emergency Certification Regulation;  
☐ Certification by the Governor  
☐ Certification by the Attorney General

(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

**This rulemaking amends the schedule of civil penalties of the State Registration Board for Professional Engineers, Land Surveyors and Geologists (Board) to correct deficiencies identified by the Commonwealth Court in the recent case of *Evans v. State Reg. Bd. For Prof. Engineers, Land Surveyors and Geologists*, 15 A.3d 99 (Pa. Cmwlth. 2011).**

(8) State the statutory authority for the regulation. Include specific statutory citation.

**Section 5(a) of the act of July 2, 1993 (P.L. 345, No. 48) (Act 48) (63 P.S. § 2205(a)) authorizes the Commissioner, after consultation with the appropriate licensing boards in the Bureau of Professional and Occupational Affairs (Bureau), to promulgate a schedule of civil penalties for violations of the acts or regulations of these boards. Section 11(b) of the Engineer, Land Surveyor and Geologist Registration Law (Act) (63 P.S. § 158(b)) authorizes the Board to levy a civil penalty of up to \$1,000 on any licensee who violates any provision of the Act or on any person who practices the profession without a license to do so. Section 5(b)(4) of Act 48 (63 P.S. § 2205(b)(4)) authorizes the Board, as a licensing board within the Bureau, to levy a civil penalty of not more than \$10,000 on any licensee or unlicensed person who violates any provision of the act or Board regulations. However, section 5(a) of Act 48 limits the civil penalty levied by citation to no more than \$1,000 per violation.**

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

**In response to the holding of *Evans v. State Reg. Bd. for Prof. Engineers, Land Surveyors and Geologists*, 15 A.3d 99 (Pa. Cmwlth. 2011) that the Board's Act 48 schedule cites to improper statutory provisions, the rulemaking is intended to correct those citations. The rulemaking is not otherwise mandated by any federal or state law or court order.**

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

**See the response to question 10. In addition, the rulemaking would extend the benefits of the Act 48 citation process to those matters charging practice on a lapsed licensed for up to an entire biennial renewal cycle, not just one year, and for subsequent violations as well.**

(11) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

**This rulemaking is not based upon any scientific data, studies, or references.**

(12) Describe who and how many people will be adversely affected by the regulation. How are they affected?

**The Board has not identified any group of individuals or entities that will be adversely affected by the rulemaking.**

(13) 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.

**The rulemaking will apply to those persons who practice engineering, land surveying or geology in this Commonwealth without a license to do so and to all licensees of the Board. However, it will be applied only to those unlicensed persons whose acts of practice are holding out and to those licensees who continue to practice the profession after the license has expired. There are approximately 31,700 licensed professional engineers, 2,900 licensed professional land surveyors, and 2,600 licensed professional geologists in this Commonwealth, with current licenses.**

(14) 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. Explain how the dollar estimates were derived.

**Those members of the regulated community who are charged with violating any of the applicable provisions of law will enjoy a savings as a result of compliance with this proposed rulemaking, as a result of using the summary Act 48 citation process rather than full formal disciplinary action. This benefit applies even to the extent that the rulemaking corrects references in the Act 48 schedule, as in the absence of such correction, all violations must be prosecuted through formal action. There are no other costs to members of the regulated community associated with compliance with the rulemaking.**

(15) 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. Explain how the dollar estimates were derived.

**There are no costs or savings to local governments associated with compliance with the rulemaking.**

(16) 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. Explain how the dollar estimates were derived.

**The Bureau and the Board will enjoy a savings as a result of compliance with this proposed rulemaking, as a result of using the summary Act 48 citation process rather than full formal disciplinary action. This benefit applies even to the extent that the rulemaking corrects references in the Act 48 schedule, as in the absence of such correction, all violations must be prosecuted through formal action. There are no other costs or savings to state government associated with implementation of the rulemaking.**

(17) In the table below, provide an estimate of the fiscal savings and costs 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
<b>SAVINGS:</b>	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
<b>Total Savings</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>
<b>COSTS:</b>						
Regulated Community						
Local Government						
State Government						

<b>Total Costs</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>
<b>REVENUE LOSSES:</b>						
<b>Regulated Community</b>						
<b>Local Government</b>						
<b>State Government</b>						
<b>Total Revenue Losses</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>

(17a) Provide the past three year expenditure history for programs affected by the regulation.

<b>Program</b>	<b>FY -3 (2008-09)</b>	<b>FY -2 (2009-10)</b>	<b>FY -1 (2010-11)</b>	<b>Current FY (2011-12)</b>
<b>Pa. State Reg. Bd. for Professional Engineers, Land Surveyors and Geologists</b>	(actual) \$839,068	(projected) \$977,052	(budgeted) \$1,008,000	(budgeted) \$1,028,000

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

**No adverse effects or costs have been associated with compliance with the rulemaking. Therefore, the above-identified benefits outweigh any cost.**

(19) Describe the communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

**Because the rulemaking is intended only to correct the schedule references as noted in the adverse court decision, the Board did not prepare and circulate an exposure draft of the proposed rulemaking. However, the Board discussed this proposed rulemaking in public session at its meeting February 3, 2011. After publication as proposed, the Board discussed all comments and discussed revisions to the rulemaking in public session at its meeting November, 2011. All public sessions are open to the public, and representatives of the three professions generally attend the public sessions of all Board meetings.**

(20) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

**No alternative regulatory schemes were considered.**

(21) 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 regulations.

**The rulemaking does not overlap or conflict with any federal requirements.**

(22) How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states?

**The rulemaking sets no standards for licensure or practice. It merely corrects legal cites in the Board's Act 48 schedule of civil penalties.**

**The rulemaking will not put Pennsylvania at a competitive disadvantage with other states.**

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

**This rulemaking will have no effect on other regulations of the Board or other state agencies.**

(24) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

**Because the rulemaking merely corrects the references of the Board's Act 48 schedule, it would not require any legal, accounting or consulting procedures or additional reporting, recordkeeping or other paperwork. To the extent it includes additional violations in the Act 48 schedule, the rulemaking reduces the paperwork burden by permitting matters to be prosecuted through the issuance of Act 48 citations rather than formal disciplinary action. The rulemaking will not otherwise change any existing reporting, recordkeeping or other paperwork requirements.**

(25) 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.

**The Board has determined that there are no special needs of any subset of its applicants or licensees for whom special accommodations should be made.**

(26) Include a schedule for review of the regulation including:

- |   |                                  |
|---|----------------------------------|
| A. The date by which the agency must receive public comments:                               | <u><b>September 19, 2011</b></u> |
| B. The date or dates on which public meetings or hearings will be held:                     | <u><b>N/A</b></u>                |
| C. The expected date of promulgation of the proposed regulation as a final-form regulation: | <u><b>By Sept. 19, 2013</b></u>  |
| D. The expected effective date of the final-form regulation:                                | <u><b>Upon publication</b></u>   |
| E. The date by which compliance with the final-form regulation will be required:            | <u><b>Upon publication</b></u>   |
| F. The date by which required permits, licenses or other approvals must be obtained:        | <u><b>N/A</b></u>                |

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

**The Commissioner and the Board continually review the efficacy of their regulations, as part of the annual review process pursuant to Executive Order 1996-1. The Board reviews its regulatory proposals at regularly scheduled public meetings, generally the third Wednesday of each odd-numbered month. More information can be found on the Board's website ([www.dos.state.pa.us/eng](http://www.dos.state.pa.us/eng)).**

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(Pursuant to Commonwealth Documents Law)

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Professional and Occupational Affairs  
(AGENCY)*Megan L. Considine*  
Megan L. ConsidineDOCUMENT/FISCAL NOTE NO. 16A-54MAY 16 2012  
DATE OF APPROVAL\_\_\_\_\_  
DATE OF APPROVAL\_\_\_\_\_  
DATE OF ADOPTION:(Deputy General Counsel  
(Chief Counsel,  
Independent Agency  
(Strike inapplicable title)BY: \_\_\_\_\_  
*Katie True*  
Katie True☐ Check if applicable  
Copy not approved.  
Objections attached.TITLE: Commissioner  
(EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)☐ Check if applicable.  
No Attorney General approval  
or objection within 30 day  
after submission.

## FINAL RULEMAKING

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

49 Pa. Code § 43b.13a

SCHEDULE OF CIVIL PENALTIES - ENGINEERS, LAND SURVEYORS AND GEOLOGISTS

The Commissioner of Professional and Occupational Affairs (Commissioner) amends § 43b.13a (relating to schedule of civil penalties – engineers, land surveyors and geologists) to read as set forth in Annex A.

#### Description and Need for the Rulemaking

Section 5(a) of the act of July 2, 1993 (P. L. 345, No. 48) (Act 48) (63 P.S. § 2205(a)) authorizes agents of the Bureau of Professional and Occupational Affairs (Bureau) to issue citations and impose civil penalties under schedules adopted by the Commissioner in consultation with the Bureau's licensing boards. It further provides that any such penalty shall not exceed the sum of \$1,000 per violation. Act 48 citations streamline the disciplinary process by eliminating the need for formal orders to show cause, answers, adjudications and orders, and consent agreements. At the same time, licensees who receive an Act 48 citation have the right to a hearing and retain their due process right of appeal prior to the imposition of discipline. The State Registration Board for Professional Engineers, Land Surveyors and Geologists (Board) has had an Act 48 schedule of civil penalties since 2001 (*See*, 31 Pa. B. 1227 (March 3, 2001)).

The Board reviewed its entire Act 48 schedule following the decision in *Evans v. State Reg. Bd. for Prof. Engineers, Land Surveyors and Geologists*, 15 A.3d 99 (Pa. Cmwlth. 2011). The court reversed the Board's order sustaining a citation issued to Mr. Evans under section 4(e) of the Engineer, Land Surveyor and Geologist Registration Law (act) (63 P.S. § 151(e)) for practicing geology on a lapsed license, including by holding himself out as a licensee. Section 3(a) of the act (63 P.S. § 150(a)) makes it "unlawful for any person to practice or to offer to practice engineering in this Commonwealth, unless he is licensed and registered under the laws of this Commonwealth as a professional engineer" and similarly prohibits the unlicensed practice of land surveying and geology. Section 3(b) of the act provides that a person is construed to practice or offer to practice engineering, land surveying or geology if the person, among other things, "by verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself to be an engineer, land surveyor or geologist, or through the use of some other title implies that he is an engineer, land surveyor or geologist or that he is registered under this act." The prohibition against unlicensed practice applies also to practicing while one's license is lapsed, that is, the license was not renewed upon expiration. *See*, 49 Pa. Code § 37.18(3) (relating to reactivation of licensure status) (which provides that a licensee whose license has lapsed due to failure to register biennially with the Board is prohibited from the practice of that profession in this Commonwealth unless the licensure status is reactivated). Section 4(e) of the act authorizes the Board, among other thing, to require licensees to register biennially with the Board and to collect the biennial registration fee, to issue biennial registration to those licensees who renew, to suspend the licenses of persons who do not renew and to reinstate the licenses of those persons who thereafter renew and pay the registration fees. Because section 4(e) of the act empowers the Board to do many tasks but does not impose any duties on licensees, the court held that a licensee cannot be disciplined for "violating" this section of the act. The court also noted that a licensee can no more "violate" a section of the act providing a definition (as does section 3(b) of the act) than "violate" a section of the act that provides the Board's authority (as does section 4(e)). The court opined that, based upon allegations of practicing on a lapsed license by holding oneself out as a licensee, the Commonwealth should have charged under section 3(a) of the act that generally prohibits unlicensed practice, as section 3(b) of the act construes holding



oneself out as a licensee to be, and in light of the Board's authority under section 4(e). The court further noted its understanding that the Commonwealth issued the citation referencing section 4(e) because the Board's Act 48 schedule does not mention section 3(a) of the act, but only provides for sections 3(b) and 4(e) for unlicensed practice by holding out and for practice on a lapsed license, respectively.

As indicated above, the Board's current Act 48 schedule of civil penalties authorizes issuance of a citation under 63 P.S. § 151(e) for first offense of "biennial renewal – practicing on a lapsed license or registration." In accordance with the holding in *Evans*, the Board proposed deleting this provision. In its place the Board proposed providing for a citation for violating its regulations at § 37.18(3) by practicing on a lapsed license for less than one renewal cycle while in compliance with the continuing education requirements. The Board did not propose including a provision for practicing on a lapsed license while not in compliance with the continuing education requirements.

The current schedule also authorizes issuance of a citation under 63 P.S. § 150(b) for "representing oneself as an engineer, land surveyor or geologist on sign, advertisement, letterhead or card, without being licensed or registered" and provides that the penalty for a first offense is a civil penalty of \$1,000 and for a subsequent offense is formal action. Following the holding in *Evans*, the Board proposed revising this description to make clear that the citation is for violating 63 P.S. § 150(a) as construed by section 3(b) of the act and not simply for "violating" section 3(b).

#### Summary of Comments and Responses to Proposed Rulemaking

The Commissioner published a notice of proposed rulemaking at 41 Pa.B. 4538 (August 20, 2011) with a 30-day public comment period. The Board received no written comments from the public. The Board received comments from the House Professional Licensure Committee (HPLC) as part of its review of proposed rulemaking under the Regulatory Review Act (71 P.S. §§ 745.1-745.12). The Independent Regulatory Review Commission (IRRC) notified the Board that it did not have any comments. The Board did not receive any comments from the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC).

In its only comments, the HPLC recommended either removing the § 37.18 provision or adding another provision to address practicing on a lapsed license without being in compliance with the continuing education requirements along with a harsher penalty for this violation. The Board agrees that a licensee who has not completed the continuing education requirements and continues to practice despite not renewing (for which completion of continuing education is a condition) generally merits a harsher sanction than a licensee who has completed the required continuing education and continues to practice despite simply failing to complete the necessary paperwork and pay the fee. For this reason, the Board intends that licensees who are charged with practicing on a lapsed license while not in compliance with the continuing education requirements should not simply receive a citation with a maximum civil penalty of \$1,000. Instead, such charges should be addressed through formal action for which the maximum sanction would be the suspension or revocation of the license and a civil penalty of \$10,000. *See*, section 4(g) of the act (Board may suspend or revoke the license of one who commits

misconduct in the practice of the profession, including violating any provision of the act or Board regulations); section 11(b) of the act (63 P.S. § 158(b)) (Board may levy a civil penalty on any licensee who violates any provision of the act or on any person who practices the profession without being properly licensed to do so); section 5(b)(4) of Act 48 (licensing board may levy civil penalty of up to \$10,000 on any licensee who violates any provision of the applicable licensing act or board regulation). Because this remedy is available via formal action for anything not on the Act 48 schedule of civil penalties, the Board has not revised its schedule in response to this comment.

#### Fiscal Impact and Paperwork Requirements

The final-form rulemaking will have no adverse fiscal impact on the Commonwealth, its political subdivisions or the private sector. The rulemaking will impose no additional paperwork requirements upon the Commonwealth, its political subdivisions, or the private sector.

#### Effective Date

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

#### Statutory Authority

This rulemaking is authorized by section 5(a) of the act of July 2, 1993 (P. L. 345, No. 48) (Act 48) (63 P. S. § 2205(a)).

#### Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on August 8, 2011, the Board submitted a copy of the notice of proposed rulemaking, published at 41 Pa.B. 4538 (August 20, 2011), to IRRC and the chairpersons of the HPLC and the SCP/PLC for review and comment.

As indicated above, no comments were received from the public, IRRC or the SCP/PLC. In preparing the final-form rulemaking, the Board considered all comments received from the HPLC.

On \_\_\_\_\_, 2012, the Board delivered final-form rulemaking to IRRC, the HPLC and the SCP/PLC. Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on \_\_\_\_\_, 2012, the final-form rulemaking was approved by the HPLC. On October 6, 2010, the final-form rulemaking was deemed approved by the SCP/PLC. Under section 7(c.1) of the Regulatory Review Act (71 P.S. § 745.7(c.1)), IRRC met on \_\_\_\_\_, 2012, and, because it had no comments on proposed and the Commissioner did not amend the rulemaking, was deemed to have approved the final-form rulemaking under section 5.5(g) of the Regulatory Review Act.

### Additional Information

Persons who require additional information about the final-form rulemaking should submit inquiries to Regulatory Unit Counsel, Department of State, by mail to P.O. Box 2649, Harrisburg, PA 17105-2649, by telephone at (717) 783-7049, or by e-mail at [st-engineer@state.pa.us](mailto:st-engineer@state.pa.us).

### Findings

The Commissioner finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law and all comments were considered.
- (3) This final-form rulemaking does not include any amendments that would enlarge the scope of proposed rulemaking published at 41 Pa.B. 4538.
- (4) The final-form rulemaking adopted by this order is necessary and appropriate for the administration of the authorizing acts set forth in this preamble.

### Order

The Commissioner, acting under the authority provided by act of July 2, 1993 (P. L. 345, No. 48), orders that:

- (a) The regulations of the Commissioner at 49 Pa. Code Chapter 43b are amended, by amending § 43b.13a to read as set forth in Annex A.
- (b) The Bureau shall submit this order and Annex A to the Office of Attorney General and the Office of General Counsel for approval as required by law.
- (c) The Bureau shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.
- (d) The final-form rulemaking shall take effect upon publication in the *Pennsylvania Bulletin*.

Katie True  
Commissioner of Professional and Occupational  
Affairs

**Annex A**

**TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS**

**PART I. DEPARTMENT OF STATE**

**Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS**

**CHAPTER 43b. COMMISSIONER OF PROFESSIONAL AND**

**OCCUPATIONAL AFFAIRS**

**SCHEDULE OF CIVIL PENALTIES, GUIDELINES FOR IMPOSITION OF CIVIL**

**PENALTIES AND PROCEDURES FOR APPEAL**

\* \* \* \* \*

**§ 43b.13a. Schedule of civil penalties – engineers, land surveyors and geologists.**

**STATE REGISTRATION BOARD FOR PROFESSIONAL ENGINEERS, LAND**

**SURVEYORS AND GEOLOGISTS**

<b>Violation Under 63 P.S.</b>	<b>Title/Description</b>	<b>Penalties</b>
Section [150(b)] <u>150(a)</u>	[Representing] <u>Offering to practice</u> <u>engineering, land surveying or</u> <u>geology in this Commonwealth by</u> <u>representing oneself as an engineer,</u> land surveyor or geologist on sign, advertisement, letterhead or card, <u>as</u> <u>construed by section 3(b),</u> without being licensed or registered	1st offense—\$1,000 2nd offense—formal action

[Section 151(e)	Biennial renewal—Practicing on a lapsed license or registration	1st offense—
		Up thru 5 months—\$500
		6 months thru 1 year—\$1,000
		over 1 year—formal action
		2nd offense—formal action]

\* \* \* \* \*

Violation Under	Title/Description	Penalties
49 Pa. Code Chapter 37		

\* \* \* \* \*

<u>Section 37.18(3)</u>	<u>Practicing engineering, land surveying</u>	<u>One renewal cycle or less - \$50</u>
	<u>or geology in this Commonwealth</u>	<u>per month lapsed, not to</u>
	<u>after license and registration have</u>	<u>exceed \$1,000</u>
	<u>lapsed (while in compliance with</u>	<u>More than one renewal cycle –</u>
	<u>continuing education requirements)</u>	<u>formal action</u>

Violation under 63 P. S.	Title/Description	Civil Penalty
Section 11.63(a)(6)	Failure to complete 8 hours of acceptable continuing professional education in tax subjects during reporting period	1st or 2nd offense—\$300 # 3rd or subsequent offense—formal action
Section 11.63(a)(7)	Failure to complete 4 hours of acceptable continuing professional education in professional ethics during reporting period	1st or 2nd offense—\$300 # 3rd or subsequent offense—formal action
Section [ 11.68(b) ] 11.67(b)	Failure to timely submit documentation of continuing professional education during Board audit (assumes no other continuing education violation)	1st offense—\$500 2nd offense—formal action

\* The first offense provision does not apply to a situation involving multiple occurrences or a pattern or practice of misconduct.

# When there are violations of both 63 P. S. § 9.8b(b) and 49 Pa. Code § 11.63(a)(1), (6) or (7) (relating to CPE subject areas; relevance to professional competence), a combined civil penalty will not be assessed for both sets of violations. The highest civil penalty will be assessed whether for the violation of 63 P. S. § 9.8b(b) or 49 Pa. Code § 11.63(a)(1), (6) or (7).

[Pa.B. Doc. No. 11-1428. Filed for public inspection August 19, 2011, 9:00 a.m.]

#### [ 49 PA. CODE CH. 43b ]

#### Schedule of Civil Penalties—Engineers, Land Surveyors and Geologists

The Commissioner of Professional and Occupational Affairs (Commissioner) proposes to amend § 43b.13a (relating to schedule of civil penalties—engineers, land surveyors and geologists) to read as set forth in Annex A.

##### Effective Date

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

##### Statutory Authority

Section 5(a) of the act of July 2, 1993 (P. L. 345, No. 48) (Act 48) (63 P. S. § 2205(a)) authorizes the Commissioner, after consultation with licensing boards in the Bureau of Professional and Occupational Affairs (Bureau), to promulgate a schedule of civil penalties for violations of the acts or regulations of the licensing boards.

##### Background and Need for the Amendment

Act 48 authorizes agents of the Bureau to issue citations and impose civil penalties under schedules adopted by the Commissioner in consultation with the Bureau's licensing boards. Act 48 citations streamline the disciplinary process by eliminating the need for formal orders to show cause, answers, adjudications and orders, and consent agreements. At the same time, licensees who receive an Act 48 citation retain their due process right of appeal prior to the imposition of discipline. The use of Act 48 citations has increased steadily since 1996, when the program was first implemented, and they have become an important part of the Bureau's enforcement efforts. The State Registration Board for Professional Engineers, Land Surveyors and Geologists (Board) has had an Act 48 schedule of civil penalties since 2001. See 31 Pa.B. 1227 (March 3, 2011).

Section 3(a) of the Engineer, Land Surveyor and Geologist Registration Law (act) (63 P. S. § 150(a)) makes it "unlawful for any person to practice or to offer to practice engineering in this Commonwealth, unless he is licensed and registered under the laws of this Commonwealth as a professional engineer" and similarly prohibits unlicensed

practice of land surveying and geology. Section 3(b) of the act provides that a person is construed to practice or offer to practice engineering, land surveying or geology if the person, among other things, "by verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself to be an engineer, land surveyor or geologist, or through the use of some other title implies that he is an engineer, land surveyor or geologist or that he is registered under this act." The prohibition against unlicensed practice applies also to practicing while one's license is lapsed; that is, the license was not renewed upon expiration. See § 37.18(3) (relating to reactivation of licensure status), which provides that a licensee whose license has lapsed due to failure to register biennially with the Board is prohibited from the practice of that profession in this Commonwealth unless the licensure status is reactivated. Section 4(e) of the act (63 P. S. § 151(e)) authorizes the Board, among other thing, to require licensees to register biennially with the Board and to collect the biennial registration fee, issue biennial registration to those licensees who renew, suspend the licenses of persons who do not renew and reinstate the licenses of those persons who thereafter renew and pay the registration fees. To enforce these provisions, section 11(b) of the act (63 P. S. § 158(b)) authorizes the Board to levy a civil penalty of up to \$1,000 on a licensee who violates a provision of the act or on a person who practices the profession without being properly licensed to do so. Section 5(b)(4) of Act 48 authorizes the Board, as a licensing board within the Bureau, to levy a civil penalty of not more than \$10,000 on a licensee or unlicensed person who violates a provision of the act or Board regulations. However, section 5(a) of Act 48 limits the civil penalty levied by citation to no more than \$1,000 per violation. This authority to levy a civil penalty is in addition to the Board's authority under section 4(g) of the act to suspend or revoke the license and registration of a licensee who has, among other things, committed misconduct in the practice of the profession, which includes violating a provision of the act or Board regulations.

The Board's current Act 48 schedule of civil penalties authorizes issuance of a citation under section 4(g) of the act for representing oneself as an engineer, land surveyor or geologist on a sign, advertisement, letterhead or card

without being licensed or registered and provides that the penalty for a first offense is a civil penalty of \$1,000 and for a subsequent offense is formal action. It is generally simpler and more straightforward and therefore more amenable to the streamlined procedures in Act 48 to prove that a person offered to practice the profession by holding himself out as an engineer, land surveyor or geologist through use of a business card or other medium than to prove that the person actually practiced the profession. Charges of actually practicing the profession are brought only through the traditional process of filing an order to show cause, an answer from the respondent and full hearing. The current schedule also authorizes issuance of a citation under section 4(e) of the act for biennial renewal—practicing on a lapsed license or registration and provides that the penalty for a first offense is a civil penalty of \$500 for practices up through 5 months or \$1,000 for practice from 6 months to a year and for a subsequent offense is formal action.

In the recent case of *Evans v. State Reg. Bd. for Prof. Engineers, Land Surveyors and Geologists*, 15 A.3d 99 (Pa. Cmwh. 2011), the court reversed the Board's order sustaining a citation issued under section 4(e) of the act for practicing geology on a lapsed license. Because section 4(e) of the act empowers the Board to do many tasks but does not impose duties on licensees, the court held that a licensee cannot be disciplined for "violating" this section of the act. The court also noted that a licensee can no more "violate" a section of the act providing a definition (as does section 3(b) of the act) than "violate" a section of the act that provides the Board's authority (as does section 4(e) of the act). The court opined that the Commonwealth should have charged under section 3(a) of the act, as construed by section 3(b) of the act and in light of the Board's authority under section 4(e) of the act. The court further noted its understanding that the Commonwealth issued the citation referencing section 4(e) of the act because the Board's Act 48 schedule does not mention section 3(a) of the act, but only provides for sections 3(b) and 4(e) of the act for unlicensed practice by holding out and for practice on a lapsed license, respectively.

#### *Description of the Proposed Amendments*

The Commissioner, in consultation with the Board, proposes to amend the Board's schedule to correct the deficiencies noted by the Commonwealth Court. Instead of a citation for unlicensed practice by holding out referencing only section 3(b) of the act, the schedule would reference section 3(a) of the act and describe the violation as "offering to practice engineering, land surveying or geology by representing oneself as an engineer, land surveyor or geologist on sign, advertisement, letterhead or card, as construed by section 150(b), without being licensed or registered." Instead of a citation for practice on a lapsed license referencing section 4(e) of the act, the schedule would reference § 37.18(3) and use the language of that section to describe the violation as "practicing after license and registration have lapsed, while in compliance with continuing education requirements." The Board's regulation in § 37.19(c)(5) (relating to biennial renewal of licensure status) requires a licensee to verify compliance with the continuing education requirements as a condition of licensure renewal. Section 37.111(d) (relating to continuing education) provides that a licensee who failed to complete the required amount of continuing education is subject to an Act 48 citation and is required to make up all deficient continuing education. Because of the greater risk of harm to the public by a licensee continuing to practice after expiration of the license

without renewing due to having failed to complete the required amount of continuing education, a combination of violations should normally be addressed through formal action. However, it is not the Board's intention that the Commonwealth would be precluded from issuing both citations to a licensee who did not complete the required amount of continuing education and did not renew but continued to practice and who subsequently cured the deficiency in continuing education and reactivated the license before the end of that biennial renewal cycle. The maximum civil penalty of \$1,000 is appropriate for a licensee who has continued to practice an entire biennial renewal cycle on a lapsed license. Because the biennial renewal cycle is 24 months, the schedule would provide that the civil penalty is \$50 per month up to a maximum of \$1,000.

Subsequent violations of practicing on a lapsed license for less than one renewal cycle would also be subject to an Act 48 citation and does not need to proceed through the formal disciplinary process. Because practice for an extended period of time might suggest the need to impose additional sanctions, violations of practice on a lapsed license for more than one renewal cycle would proceed through the formal disciplinary process. The Board has concluded that the amount of the civil penalty for practicing on a lapsed license should be proportionate to the length of time from expiration of the license until the licensee has reactivated the license.

#### *Fiscal Impact and Paperwork Requirements*

The proposed rulemaking should not have adverse fiscal impact on the Commonwealth, its political subdivisions or the private sector. The proposed rulemaking will not impose additional paperwork requirements upon the Commonwealth, its political subdivisions or the private sector. To the extent that the proposed rulemaking corrects the references in the Act 48 citation schedule, there will not be fiscal impact. Moreover, to the extent the proposed rulemaking also provides for additional violations of the act and Board regulations to be prosecuted through the issuance of a citation rather than formal action, the proposed rulemaking will reduce the paperwork requirements of both the Commonwealth and the regulated community by eliminating the need for orders to show cause, answers, consent agreements and adjudications/orders for those violations subject to the Act 48 citation process.

#### *Sunset Date*

Professional licensure statutes require each board to be self-supporting. Therefore, the Commissioner and the boards continuously monitor the cost effectiveness of their regulations. As a result, a sunset date has not been assigned.

#### *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on August 8, 2011, the Commissioner submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Professional Licensure Committee (HPLC) and the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC). A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria which have not been met. The Regulatory Review

Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor of comments, recommendations or objections raised.

**Public Comment**

Interested persons are invited to submit written comments, recommendations or objections regarding this proposed rulemaking to Regulatory Unit Counsel, Department of State, P. O. Box 2649, Harrisburg, PA 17105-

2649, ST-ENGINEER@state.pa.us, within 30 days of publication of this proposed rulemaking in the *Pennsylvania Bulletin*. Reference No. 16A-54 (schedule of civil penalties—engineers, land surveyors and geologists) when submitting comments.

KATIE TRUE,  
Commissioner

Fiscal Note: 16A-54. No fiscal impact; (8) recommends adoption.

**Annex A**

**TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS**

**PART I. DEPARTMENT OF STATE**

**Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS**

**CHAPTER 43b. COMMISSIONER OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS**

**SCHEDULE OF CIVIL PENALTIES, GUIDELINES FOR IMPOSITION OF CIVIL PENALTIES AND PROCEDURES FOR APPEAL**

§ 43b.13a. Schedule of civil penalties—engineers, land surveyors and geologists.

**STATE REGISTRATION BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS AND GEOLOGISTS**

**Violation Under 63 P. S.**

**Title/Description**

**Penalties**

Section [ 150(b) ] 150(a)

[ Representing ] Offering to practice engineering, land surveying or geology in this Commonwealth by representing oneself as an engineer, land surveyor or geologist on sign, advertisement, letterhead or card, as construed by section 150(b), without being licensed or registered

1st offense—\$1,000

2nd offense—formal action

[ Section 151(e)

Biennial renewal—Practicing on a lapsed license or registration

1st offense—

Up thru 5 months—\$500

6 months thru 1 year—\$1,000

over 1 year—formal action

2nd offense—formal action ]

\* \* \* \* \*

**Violation Under 49  
Pa. Code Chapter 37**

**Title/Description**

**Penalties**

\* \* \* \* \*

**Section 37.18(3)**

Practicing engineering, land surveying or geology in this Commonwealth after license and registration have lapsed (while in compliance with continuing education requirements)

One renewal cycle or less—\$50 per month lapsed, not to exceed \$1,000

More than one renewal cycle—formal action

[Pa.B. Doc. No. 11-1429. Filed for public inspection August 19, 2011, 9:00 a.m.]



## PUBLIC COMMENTATORS FOR 16A-54

There were no public comments received relating to Regulation 16A-54.



COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS  
Post Office Box 2649  
Harrisburg, Pennsylvania 17105-2649  
(717) 783-7200

May 30, 2012

The Honorable Silvan B. Lutkewitte, III, Chairman  
INDEPENDENT REGULATORY REVIEW COMMISSION  
14<sup>th</sup> Floor, Harristown 2, 333 Market Street  
Harrisburg, Pennsylvania 17101

Re: Final Regulation  
Bureau of Professional and Occupational Affairs  
16A-54: SCHEDULE OF CIVIL PENALTIES

Dear Chairman Lutkewitte:

Enclosed is a copy of a final rulemaking package of the Commissioner of Bureau of Professional and Occupational Affairs pertaining to Schedule of Civil Penalties.

The Board will be pleased to provide whatever information the Commission may require during the course of its review of the rulemaking.

Sincerely,

A handwritten signature in black ink that reads "Katie True".

Katie True  
Commissioner  
Bureau of Professional and Occupational Affairs

KT/JJW:rs  
Enclosure

cc: Katie True, Commissioner  
Bureau of Professional and Occupational Affairs  
Rebecca Oyler, Director of Policy, Department of State  
Steven V. Turner, Chief Counsel  
Department of State  
Cynthia Montgomery, Regulatory Counsel  
Department of State  
Jeffrey J. Wood, Counsel  
State Board of Registration Board for Professional Engineers, Land  
Surveyors and Geologists  
State Board of Registration Board for Professional Engineers, Land Surveyors and Geologists

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE  
REGULATORY REVIEW ACT**

I.D. NUMBER: 16A-54

SUBJECT: SCHEDULE OF CIVIL PENALTIES – ENGINEERS, LAND SURVEYORS &  
GEOLOGISTS

AGENCY: DEPARTMENT OF STATE  
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

**TYPE OF REGULATION**

Proposed Regulation

X Final Regulation

Final Regulation with Notice of Proposed Rulemaking Omitted

120-day Emergency Certification of the Attorney General

120-day Emergency Certification of the Governor

Delivery of Tolled Regulation

a. With Revisions                      b. Without Revisions

2012 MAY 30 AM 10:56

RECEIVED  
IRRC

**FILING OF REGULATION**

DATE	SIGNATURE	DESIGNATION
		HOUSE COMMITTEE ON PROFESSIONAL LICENSURE
5/30/12	<i>Michelle Warren</i>	MAJORITY CHAIR <u>Julie Harhart</u>
5/30/12	<i>Mary Walmer</i>	SENATE COMMITTEE ON CONSUMER PROTECTION & PROFESSIONAL LICENSURE
		MAJORITY CHAIR <u>Robt. M. Tomlinson</u>
5/30/12	<i>K Cooper</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL (for Final Omitted only)
		LEGISLATIVE REFERENCE BUREAU (for Proposed only)

May 17, 2012