

RULES AND REGULATIONS

Title 37—LAW

BOARD OF PARDONS

[37 PA. CODE CH. 81]

General Provisions

The Board of Pardons (Board), adopts a total revision of its rules contained in Chapter 81 (relating to Board of Pardons) under the authority of section 909 of The Administrative Code 1929 (AC) (71 P. S. § 299(c)) and the PA. CONST. Art. IV.

Background

The purpose of these amendments is to update and replace the rules governing the operation of the Board to reflect recently enacted statutory requirements as found in section 909 of the AC and section 34.1(a) of the act of August 6, 1941 (P.L. 861, No. 323) (61 P.S. § 331.34a(a)), known as the Pennsylvania Board of Probation and Parole Law and to incorporate current practices of the Board into regulations. The regulations of the Board have not been updated since 1986 and have become outdated for various reasons.

Summary

General Provisions

Limitations on Filing (§ 81.223). This section changes the criteria for calculating the time in which a person can refile an application for clemency if the previous application was not granted. The old regulations used the filing date of the previous application as the event from which time is calculated to determine eligibility for refiling and the new regulations use the date of the final adverse decision.

Use of Application (§ 81.226). This section expands the existing policy of the Board to notify victims or next of kin as in section 909(d) of the AC who are registered with the Office of Victim Advocate, Department of Corrections or the Board of Probation and Parole.

Listing for Hearing (§ 81.231(a)). Under section 909(b) of the AC, this section requires a majority vote of the Board to grant a public hearing on applications filed by prisoners serving life sentences or sentences for crimes of violence.

Listing for Hearing (§ 81.231(b)). Under section 909(c) of the AC, this section imposes a 10-day deadline for filing an application for commutation of a death sentence to life in prison. The 10-day period begins when the Governor issues an execution warrant.

Interview of the Application (§ 81.232). Under section 909(e) of the AC, this section establishes the procedures by which the members of the Board will interview an applicant for commutation prior to a public hearing if the applicant is serving a sentence of death, life or for a crime of violence.

Request for Reconsideration (§ 81.271). This section expands the scope of matters for which an applicant can request reconsideration. The old regulations allowed the applicant to request a rehearing. The new regulations allow an applicant to request that the Board reconsider its decision to deny a public hearing. This section also requires a showing of a change in circumstances as a

prerequisite for the request and establishes that requests for reconsideration are granted by a majority vote of the Board.

Recommendation (§ 81.301). Under section 909(f) of the AC, this section requires that a recommendation of the Board presented to the Governor for commutation of a death sentence, life sentence or sentence for a crime of violence must include a requirement that the applicant serve at least 1 year in a prerelease center prior to release on parole. This section also requires that the recommendations for commutation made to the Governor are conditional and suggests standard language for this purpose.

Record Maintenance (§ 81.305). This section enumerates the records of the Board to which the public has access.

Comments

Notice of proposed rulemaking was published at 26 Pa.B. 4988 (October 19, 1996), and provided for a 30-day public comment period. The comment period ended November, 18, 1996.

Comments were received from Charles E. Mann of Langhorne, Pennsylvania, the Pennsylvania Coalition Against Domestic Violence, (PCADV) and the Independent Regulatory Review Commission (IRRC). These comments and the Board's responses are as follows:

Mr. Mann objected to a crime victim being a member of the Board and changing the vote for commutation to a unanimous vote instead of a majority vote. The composition of the Board and the votes required to recommend a commutation are set by the Pennsylvania Constitution, and are therefore, beyond the scope of this rulemaking.

IRRC commented that in proposed § 81.202 the references to the statutory definition of "robbery" is incorrect. The Board accepts this comment and has revised the references to 18 Pa.C.S. § 3701 (a)(1)(i), (ii) or (iii).

IRRC commented that in proposed § 81.221 (relating to forms) the words "in forma pauperis" should be replaced with the words "without payment of costs" and that the definition of "form in forma pauperis" be deleted from § 81.202. The Board accepts these comments and has revised the sections accordingly.

IRRC commented that in proposed § 81.222(b) (relating to filing), the words "passport type photographs" be replaced by a description of the dimensions of photographs that the Board will accept. The Board disagrees with this suggestion and believes that the expression "passport type photographs" is universally understood and has never resulted in questions from applicants as to what photographs will be accepted. The Board chooses not to change this wording.

The PCADV and IRRC commented on proposed § 81.223 (relating to limitations on filing). The proposed section modified the starting point of the waiting period the Board requires between an unsuccessful application and the next application. The PCADV believes that this section should not be amended thereby retaining the waiting period starting from the date of original filing. IRRC suggests that the Board review the proposed amendment and provide justification for an amendment to the waiting period. The Board proposed this change because under the existing regulations in many instances, an applicant is eligible to file another application immedi-

ately after the Governor or Board has rendered an adverse decision. The Board or Governor being asked to decide the clemency issue so soon after making a decision is redundant because circumstances have not changed since the case was last decided.

If circumstances in a person's life change dramatically, they have the ability to request that the Board grant permission to file an application earlier than would normally be permitted § 81.224 (relating to request for early filing) or to request reconsideration (§ 81.271 (relating to request)).

When discussing this issue, the Board concluded that § 81.223 (b) is not consistent with subsection (a) and should be changed to read: "If an application receives two consecutive adverse decisions, an application may not be filed before the expiration of 24 months from the last adverse decision." The Board does not desire to amend this section in any other manner.

IRRC commented on proposed § 81.226 (relating to use of application) and noted that the section does not have provisions for applications that are denied. IRRC suggests that the Board add provisions describing the point in the process when an application is considered concluded and when and how an applicant will be notified of the Board's decision to deny the case a public hearing. The Board agrees that IRRC's recommendation is appropriate and has amended the section as suggested. IRRC further suggested that in subsection (c), now (d), the word "accepted" be replaced by the word "submitted." The Board agrees with this suggestion and has made the change.

IRRC commented on proposed § 81.228 (relating to subsequent use by applicant) suggesting that the Board specify what the costs of reproduction are or provide a cross reference as to where the cost may be found. The Board accepts this suggestion and has added language explaining that the cost of reproduction is set by Board resolution and that resolutions are available at the Board's office.

The PCADV commented on proposed § 81.231 (relating to listing for hearing) and objects to the provision that requires that applications for commutation of death sentences be filed with the Board within 10 days of the Governor signing an execution warrant. This subsection complies with recent statutory changes made by the Legislature as found in section 909(c) of the AC, and must remain part of the Board's regulations. IRRC also commented on this proposed section by pointing out that in subsection (b) the language was not identical to the language in the statute and suggested that the words "Governor's issuance of a warrant specifying a week for execution" replace the words "Governor's issuance of an execution warrant." The Board has changed the wording as suggested by IRRC.

The PCADV and IRRC commented on proposed § 81.232 (relating to interview of the applicant). Both were concerned that the applicant's attorney or representative could be excluded from the interview. It was not the Board's intention to exclude attorneys or representatives, but security and safety concerns are paramount. In response to the concerns raised, the Board has deleted the language concerning security risks and the Board's discretion in admitting attorneys or representatives to the interview and replaced it with a requirement that anyone attending an interview is subject to the rules of the Department of Corrections concerning entry into a prison by members of the public.

IRRC commented on proposed § 81.233 (relating to publication) noting that the section is silent regarding how the Board provides notice in a capital case and recommends clarification of the section to provide guidance in this area. The Board accepts this recommendation and has added language to the regulation explaining notice in capital cases and guarantees that at least 24 hours notice will be given for hearings in capital cases under all circumstances.

IRRC commented on proposed § 81.242 (relating to reinstatement) noting that it was vague. The Board agrees with the comments and has decided to delete the provision.

IRRC commented that in proposed § 81.261 (relating to time) the word "excluding" should be changed to "except" and that the word "provided" should be replaced by the phrase "determined by the Board." Further noted by IRRC was the fact that the notice for public hearing must conform with the Sunshine Act (65 P. S. §§ 271—286) which requires at least 24-hour notice. IRRC suggested that a sentence be added stating that notice of public hearings will be in accordance with the Sunshine Act. The Board agrees with the suggestions and has revised the section accordingly.

The PCADV and IRRC commented on proposed § 81.271 (relating to request). Both suggested that a 90-day time limit for the Board to respond to a request for reconsideration be added. The Board does not object to a limitation on its response to a request for reconsideration because these requests are always handled promptly. The Board did identify a problem with specifying 90 days as the time period. Because the Board does not meet in the months of July and August, it is possible that the Board could not respond within 90 days. The Board has amended the section to provide that the Board will take action on requests for reconsideration at the next possible regularly scheduled Board meeting. IRRC also suggested that the section address the question of whether Board action on a request for reconsideration will affect the date of a final adverse decision. The Board has clarified this issue by adding language to the regulation stating that the date of the original decision of the Board, if adverse, will be used in calculating the waiting period for another application.

IRRC commented on proposed § 81.281 (relating to appearance of applicant) pointing out that some applicants who are confined appear before the Board at an interview therefore the first sentence should specify that confined applicants may not appear at the public hearing. IRRC was also concerned about the clarity of the last provision of this section which used the phrase "for cause" when describing that applicants who are not confined are required to appear for the hearing unless excused by the Board "for cause." IRRC suggests that the phrase "for cause" be deleted. The Board accepts these comments and has revised the section accordingly.

IRRC commented that proposed § 81.283 (relating to fees for representation) should be deleted entirely because the subject matter is not the responsibility of the Board. The Board agrees and has deleted this provision from the final-form regulations.

IRRC commented on proposed § 81.293 (relating to witness) and suggested that the words "or subpoena" be added so that the section would read "The Board may request or subpoena a person to appear at the hearing as a witness." The Board accepts this comment and has revised the section accordingly.

IRRC commented that proposed § 81.294 (relating to communication with the Board) lacks clarity because it is lengthy. IRRC suggests the section be amended to "A person who wants to provide information to the Board regarding the merits of an application shall communicate or correspond with the Secretary." The Board accepts this comment and has amended the section in accordance with IRRC's suggestion.

The PCADV and IRRC had numerous comments on proposed § 81.301 (relating to recommendations). The PCADV commented that the Board's ability to place conditions on recommendations (subsection (c)) is vague and overly broad. The PCADV states that the section as written lacks basic requirements of due process. The PCADV further commented that a recommendation to the Governor to revoke clemency previously granted must happen only after a hearing. The Board notes that the appellate courts in this Commonwealth have recognized the Governor's broad discretion in making grants of clemency conditional with the accompanying ability to revoke clemency. Granting clemency is not a legal proceeding and due process requirements are not applicable to this process. Concerning the PCADV's comment about holding a hearing, the conditional language in subsection (e) states in part that "if it is determined upon hearing by the Board." Subsection (f) provides that when notified of a possible breach of a condition that the Board will discuss the situation and decide if a hearing is warranted. Only if the Board decides that the violation is serious enough to warrant a hearing could a recommendation be made to the Governor to revoke clemency.

IRRC commented that subsection (a) should be amended to reflect that the Board can hear applications for remission of fines and forfeitures and granting of reprieves. IRRC further commented that subsections (c) and (d) were vague and inconsistent and recommended that the first and last sentence of subsection (d) be deleted. IRRC also commented that in subsection (a) the words "reasons therefor" be changed to "reasons supporting the recommendation." IRRC also suggested that subsection (f) lacks clarity because the conjunction "or" is used without a comma in the first sentence.

In consideration of all the comments on this section, the Board has made the following changes:

The phrase "or for remission of fines and forfeitures and the granting of reprieves" has been added in subsection (a). The phrase "with reasons supporting the recommendation" has been added to subsection (a).

Subsections (c) and (d) have been amended as follows:

(c) Recommendations made to the Governor for commutation of sentence will be conditioned as set forth in subsection (e).

(d) Recommendations for a pardon may be made conditional by a majority vote by the Board.

The first sentence of subsection (f) has been changed to read, "when notified of a subsequent criminal offense conviction, or a probation or parole violation, the Secretary will inform the Board."

IRRC commented on proposed § 81.303 (relating to charter and warrant) and suggested that this section be deleted because the action of the Governor could not be withheld from the public for 14 days. The intent of this section was to allow sufficient time for the applicants to be notified of the Governor's decision before the information became public. The Board accepts the comment and has deleted this provision.

Affected Organizations and Individuals

The amendments will affect persons seeking Executive clemency by providing rules outlining the process from application to final disposition. Persons affected by a crime, like victims or next of kin, will also be affected by reason of their interest and involvement in the clemency process. A clear, concise and accurate group of regulations will benefit all those involved with the process.

Cost and Paperwork Requirements

There is no fiscal impact associated with the amendments for the Commonwealth, local government, the private sector or the general public.

Effective Date

The amendments will become effective upon publication in the *Pennsylvania Bulletin*.

Sunset Date

There is no sunset date for these regulations.

Contact Person

Further information is available by contacting the Board of Pardons, Nelson R. Zullinger, Secretary, 333 Market Street, 15th Floor, Harrisburg, PA 17126-0333.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5 (a)), on October 19, 1996, the Board submitted a copy of the notice of proposed rulemaking published at 26 Pa.B 4988 to IRRC and to the Chairpersons of the House and Senate Judiciary Committees. In compliance with section 5 (b.1) of the Regulatory Review Act, the Board also provided IRRC and the Committees with copies of the comments received.

In preparing these final-form regulations, the Board has considered comments received from IRRC and the public.

The final-form regulations were approved by the House Judiciary Committee on March 18, 1997, by IRRC on March 20, 1997, and deemed approved by the Senate Judiciary Committee on March 26, 1997.

Findings

The Board finds that:

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

(2) The amendment of the regulations of the Board in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statutes.

Order

The Board, acting under authorizing statutes, orders that:

(a) The regulations of the Board, 37 Pa. Code Chapter 81, are amended by:

(i) Deleting §§ 81.1, 81.2, 81.11, 81.12, 81.21—81.29, 81.31—81.33, 81.41, 81.42, 81.51, 81.52, 81.61—81.65, 81.71, 81.72, 81.81—81.84, 81.91—81.94 and 81.101—81.105;

(ii) Adding §§ 81.201, 81.211, 81.212, 81.222, 81.224, 81.225, 81.227, 81.241, 81.251, 81.252, 81.262, 81.263, 81.272, 81.282, 81.291, 81.292 and 81.302 to read as set forth at 26 Pa.B. 4988; and

(iii) Adding §§ 81.202, 81.221, 81.223, 81.226, 81.228, 81.231—81.233, 81.261, 81.271, 81.281, 81.283, 81.293, 81.294, 81.301, 81.303 and 81.304 to read as set forth in Annex A.

(*Editor's Note.* The proposal to add §§ 81.242, 81.284 and 81.305, included in the proposal at 26 Pa.B. 4988, has been withdrawn by the Board.)

(b) The Secretary shall submit this order, 26 Pa.B. 4988 and Annex A to the Offices of the Attorney General and General Counsel for approval as required by law.

(c) The Secretary shall certify this order, 26 Pa.B. 4988 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

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

NELSON R. ZELLINGER,
Secretary

(*Editor's Note.* For the text of the order of the Independent Regulatory Review Commission relating to this document, see 27 Pa.B. 1705 (April 5, 1997).)

Fiscal Note: Fiscal Note 56-1 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 37. LAW

PART III. AGENCIES AND OFFICES

Subpart A. BOARD OF PARDONS

CHAPTER 81. BOARD OF PARDONS

§ 81.1. (Reserved).

§ 81.2. (Reserved).

§ 81.11. (Reserved).

§ 81.12. (Reserved).

§§ 81.21—81.29. (Reserved).

§§ 81.31—81.33. (Reserved).

§ 81.41. (Reserved).

§ 81.42. (Reserved).

§ 81.51. (Reserved).

§ 81.52. (Reserved).

§§ 81.61—81.65. (Reserved).

§ 81.71. (Reserved).

§ 81.72. (Reserved).

§§ 81.81—81.84. (Reserved).

§§ 81.91—81.94. (Reserved).

§§ 81.101—81.105. (Reserved).

GENERAL PROVISIONS

§ 81.202. **Definitions.**

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

Application—The official form which shall be used to request a clemency hearing before the Board.

Board—The Board of Pardons of the Commonwealth.

Calendar—A published schedule of applications listed for public hearings during a particular session.

Capital case—A case in which the applicant has requested a commutation of death sentence to life imprisonment.

Clemency—The power of the Governor to pardon or commute a criminal sentence based upon recommendations by the Board.

Commutation—The reduction of a legal penalty or punishment.

Crime of violence—Includes the following:

(i) Murder of the third degree, voluntary manslaughter, rape, sexual assault, involuntary deviate sexual intercourse, aggravated assault as defined in 18 Pa.C.S. § 2702(a)(1) (relating to aggravated assault), robbery as defined in 18 Pa.C.S. § 3701(a)(1)(i),(ii) or (iii) (relating to robbery) or kidnapping.

(ii) An attempt to commit murder of the third degree, voluntary manslaughter, rape, sexual assault, involuntary deviate sexual intercourse, aggravated assault as defined in 18 Pa.C.S. § 2702(a)(1), robbery as defined in 18 Pa.C.S. § 3701 (a)(1)(i),(ii) or (iii) or kidnapping.

(iii) An offense committed while in visible possession of a firearm for which sentencing was imposed under 42 Pa.C.S. § 9712 (relating to sentences for offenses committed with firearms).

Filing—The receipt of the application by the Board's office.

Final adverse decision—One of the following:

(i) The denial of a public hearing by the Board.

(ii) The Board not recommending an application to the Governor.

(iii) The Governor denying an application.

Merit review—The process of reviewing an application by the Board to determine if the application has sufficient merit to hold a public hearing on the matter.

Merit review vote—A public vote by the Board to determine if a public hearing will be held on an application.

Pardon—Forgiveness; an act of grace from governing power which mitigates the punishment the law demands for the offense and restores the rights and privileges forfeited on account of the offense. The term does not mean expungement of the record.

Secretary—The administrator of the Board.

Vote—Action on approval or disapproval taken by a quorum of the Board at a public hearing.

APPLICATIONS

§ 81.221. **Forms.**

Applications shall be made on forms prescribed by the Board. The forms shall be obtained from the Secretary for a fee as established by Board resolution, except that the fee will be waived by the Board upon evidence satisfactory to the Board that the applicant is unable by reason of indigency to pay the fee. The official form to proceed without payment of costs shall be obtained from the Secretary and filed in place of the fee.

§ 81.223. **Limitations on filing.**

(a) Except as provided in § 81.224 (relating to request for early filing), an application may not be filed before the expiration of 12 months from a final adverse decision on any prior application.

(b) If an application receives two consecutive adverse decisions, an application may not be filed before the expiration of 24 months from the last adverse decision.

§ 81.226. Use of application.

(a) A copy of each application will be sent by the Board to the court, to the district attorney of the county from which the applicant was sentenced and to the correctional institution in which the applicant is confined to obtain expressions of opinions as to the merits of the application, and to the Board of Probation and Parole for its investigation.

(b) When the reports and opinions have been received, the members of the Board will review the case and a merit review vote will be conducted at a public hearing. If a public hearing is denied, the applicant will be notified of the final adverse decision in writing by the Secretary.

(c) If a public hearing is granted, the Board will make every reasonable effort to notify victims or next of kin, including providing notification to victims who are registered with the Office of Victim Advocate, Department of Corrections, Board of Probation and Parole and those whose whereabouts are otherwise known.

(d) Victims will be notified of their opportunity to offer prior comment regarding an application that has been granted a public hearing. Comment may be submitted in writing or presented orally in person. The Board will provide notice to the victims or next of kin of the date, time and place of a public hearing pertaining to their case. Written communications with the Board will be confidential.

§ 81.228. Subsequent use by applicant.

An applicant's representative or any of the persons named in § 81.226 (relating to use of application) may obtain a copy of the last application filed by the applicant, upon payment of the costs of reproduction. The cost of reproduction will be determined by Board resolution. Board resolutions are available for public inspection at the Board's office.

LISTINGS

§ 81.231. Listing for hearing.

(a) *Noncapital cases.* Applications are subject to merit review by the Board to determine if a public hearing will be granted. For prisoners serving life sentences or sentences for crimes of violence, a vote by a majority of the Board is required to grant a public hearing. In all other cases, except capital cases, two votes are required for a public hearing to be granted.

(b) *Capital cases.* Applicants seeking commutation of a death sentence will automatically receive a public hearing. Applications for commutation of death sentences shall be filed with the Board within 10 days of the Governor's issuance of a warrant specifying a week for execution.

§ 81.232. Interview of the applicant.

(a) If a public hearing is granted to an applicant who is serving a sentence of death, life or a sentence for murder, voluntary manslaughter, attempt to commit murder or attempt to commit voluntary manslaughter, each member of the Board will interview the applicant prior to the public hearing.

(b) If a member does not interview the applicant, that member may not vote at the public hearing.

(c) The interview will be conducted at a time, place and in a manner that is convenient to the Board. The interview may be conducted by the Board as a group or by an individual member. The interview will be held in private. The applicant's attorney or representative will be

permitted to attend. Persons attending an interview are subject to the rules of the Department of Corrections concerning entry into a prison by members of the public. The interview shall be recorded by the Board. Subsequent use of the recording will be at the Board's sole discretion.

§ 81.233. Publication.

(a) For every application to be heard, the Board will publish a notice stating:

(1) The applicant's true name and other names by which the applicant is or has been known.

(2) The crimes for which the applicant has applied for clemency.

(3) The institution, if any, in which the applicant is confined.

(4) The time and place of the public hearing at which the application will be heard.

(b) Except in capital cases, the notice described in subsection (a) will be made at least 1 week prior to the public hearing on the application. The notice will be published in a newspaper of general circulation in the county where the crimes were committed. If the Board meets in emergency session to consider an application in a capital case, 1 week prior notice may be impossible. If time permits, notice of public hearings in capital cases will be made as provided in subsection (a). Under all circumstances, at least 24 hour notice will be given.

HEARINGS

§ 81.261. Time.

The Board will meet in regular public hearings each month except the months of January, July and August except as may be otherwise determined by the Board. Public hearings may be canceled at the discretion of the Board. Notice of public hearings will be published in accordance with the Sunshine Act (65 P. S. §§ 271—286).

RECONSIDERATION

§ 81.271. Request.

(a) A request for reconsideration of any decision may be made to the Board. The applicant shall show a change in circumstances since the application was filed, or other compelling reasons, sufficient to justify reconsideration. Dissatisfaction with the Board's decision is not grounds to request reconsideration.

(b) The Board will take action on requests for reconsideration at the next possible public hearing. Meritorious requests may be addressed by the Board upon a public motion by any member. A request for reconsideration will be granted only upon a majority vote of the Board. If the matter to be reconsidered is the denial of a public hearing, another merit review vote will be taken immediately in accordance with § 81.231 (relating to listing for hearing). The date of the original final adverse decision of the Board will be used in calculating eligibility for refiling.

REPRESENTATION

§ 81.281. Appearance of applicant.

An applicant, if confined, may not appear at the public hearing, but may designate another person to appear for the applicant. An applicant, if not confined, shall appear personally at the public hearing unless excused by the Board.

§ 81.283. Commonwealth attorney.

The attorney for the Commonwealth or a designee has the right, and is encouraged, to appear at the public hearings to offer the Commonwealth's opinion.

CONDUCT OF HEARINGS AND COMMUNICATIONS**§ 81.293. Witnesses.**

The Board may request or subpoena a person to appear at the public hearing as a witness.

§ 81.294. Communications with the Board.

A person who wants to provide information to the Board regarding the merits of an application shall communicate or correspond with the Secretary.

DISPOSITION**§ 81.301. Recommendation.**

(a) An application for pardon or for remission of fines and forfeitures, and the granting of reprieves, or commutation of sentence may not be delivered to the Governor for a decision except on written recommendation of at least three members of the Board after public hearing. The recommendation will include a statement of the reasons supporting the recommendation.

(b) In cases when the applicant is serving a sentence described in § 81.232 (relating to interview of the applicant), a recommendation and Warrant of Commutation that is presented to the Governor shall include a requirement that the applicant serve at least 1 year in a prerelease center prior to release on parole unless transfer of the applicant to a prerelease center is not appropriate due to a certified terminal illness.

(c) Recommendations made to the Governor for commutation of sentence will be conditioned as set forth in subsection (e).

(d) Recommendations for a pardon may be made conditional by a majority vote by the Board.

(e) If it is the Board's desire that the commutation or pardon be conditional, any recommended Warrant of Commutation or Charter of Pardon presented to the Governor shall include the following language:

"Subsequent to this date, if it is determined, upon public hearing by the Board of Pardons, that (name) has committed a probation or parole violation or has been convicted of a new criminal offense, this grant of clemency may be rendered null and void by myself or by my successors in office."

(f) When notified of a subsequent criminal offense conviction, or probation or parole violation, the Secretary will inform the Board. The Board will then decide, on a case-by-case basis, whether to hold a public hearing regarding the suspected violation of the conditional pardon or commutation. After public hearing, a majority of the Board may recommend to the Governor that clemency be revoked.

§ 81.303. Charter and warrant.

If the recommendation of the Board is approved by the Governor, the Secretary will prepare the proper Charter of Pardon or Warrant of Commutation for the signature of the Governor and for the attachment of the Seal of the Commonwealth and the attestation of the Secretary of the Commonwealth.

§ 81.804. Record maintenance.

(a) Records, documents and files maintained by the Board are confidential except as provided in subsection (b).

(b) The following records are public: monthly calendars, minutes of public hearings, vote sheets of public hearings, completed applications and lists of actions taken by the Governor. The Board's written recommendation to the Governor will be made public only after the Governor has acted on an application.

[Pa.B. Doc. No. 97-589. Filed for public inspection April 18, 1997, 9:00 a.m.]

Title 58—RECREATION

FISH AND BOAT COMMISSION
[58 PA. CODE CHS. 69 AND 111]
Fishing and Boating

The Fish and Boat Commission (Commission) amends Chapters 69 and 111 (relating to fishing in Lake Erie and boundary lakes; and special regulations counties). The Commission is publishing these amendments under the authority of 30 Pa.C.S. (relating to Fish and Boat Code) (code). The amendments relate to fishing and boating.

A. Effective Date

These amendments will go into effect immediately upon publication of this order adopting the regulations.

B. Contact Person

For further information on the amendments, contact Dennis Guise, Chief Counsel, (717) 657-4525, P. O. Box 67000, Harrisburg, PA 17106-7000.

C. Statutory Authority

These amendments are published under the statutory authority of sections 2102 and 5124 of the code (relating to rules and regulations; and particular areas of water).

D. Purpose and Background

The amendments are designed to update, modify and improve Commission regulations on fishing and boating. The specific purpose of the amendments is described in more detail under the summary of changes.

E. Summary of Changes

(1) Sections 69.12 and 69.13 (relating to seasons, sizes and creel limits—Lake Erie; and seasons, sizes and creel limits—Lake Erie Tributaries). At its January 1996, meeting, the Commission, on final rulemaking, amended § 69.12 to provide that from 8 a.m. the first Saturday after April 11 until 12:01 a.m. the day after Labor Day, the daily limit for trout and salmon is 8 (combined species), only two of which can be lake trout and of theentire catch (combined species), only three can exceed 15 inches in length. After the final rulemaking was ap-

proved, the Commission received inquiries and comments concerning the restriction as applied to Lake Erie and Presque Isle Bay. It was pointed out that, on Lake Erie and Presque Isle Bay, the three fish over 15 inches limit could be unduly restrictive since a relatively high proportion of the catch of trout and salmon exceeds 15 inches. At its January 1997 meeting, the Commission adopted an amendment that increases the number of trout and salmon per day that may exceed 15 inches in length from three to five. In addition, under § 51.5 (relating to correction of regulations), a correction is made to § 69.12.

(2) Section 111.58(d) (relating to Susquehanna County). The Laurel Lake Association, Inc. Boating Committee petitioned the Commission to reconsider the current 60 horsepower restriction on Laurel Lake, Susquehanna County. The petitioners cited the size of the lake, more stringent restrictions on lakes of similar size, environmental concerns of the use of gasoline motors on such a small lake, the lack of enforcement by the Commission of current restrictions, and interference with other uses of the lake caused by high speed operation of motorboats as valid reasons for the reconsideration.

The Commission accepted the petition for further review at its July 1995 meeting and directed staff to prepare a report with recommendations for further action. After considering the use of the Laurel Lake and its physical constraints, staff recommended that additional restrictions on the operation of boats on this lake may be appropriate. The Boating Advisory Board (Board) reviewed the report and staff recommendations at its January 1996 meeting. The Board voted to recommend that the Commission consider an alternative regulation. The Commission's Boating Committee then recommended that the Commission not approve the staff and Board recommendations. The Commission therefore proposed to keep the present regulations in effect with one change, that is, to ban the operation of personal watercraft. At its July 1996 meeting, the Commission, on final rulemaking, adopted the personal watercraft amendment to § 111.58(d).

At its July and October 1996 meetings, the Commission also authorized the publication of a separate notice of proposed rulemaking to seek public comment on proposed amendments further limiting the operation of boats with internal combustion motors. Although there are at least two distinct viewpoints from persons who reside around or boat on Laurel Lake, there is general agreement that the interests of safe boating on this small impoundment require restrictions on the number of boats on the lake. In addition, the Commission sought public comment on a proposed system whereby boats powered by internal combustion motors of up to 60 horsepower must have a special permit to operate on Laurel Lake.

The proposed changes set forth in the notice of proposed rulemaking contained a number of provisions related to limiting the number of boats powered by internal combustion motors that may receive permits to operate on Laurel Lake and further restricting operations of these boats on the lake. The Commission specifically invited public comment on the various aspects of the proposal as alternatives. Although the proposed changes were not mutually exclusive, the Commission asked commentators to address comments to two distinct aspects of the proposal:

(a) Limiting the number of Laurel Lake permits for boats powered by internal combustion motors. One aspect of the proposal provided that no boats powered by internal combustion motors will be permitted to operate

on Laurel Lake if the lake was not its site of principal operation during the preceding year and if Laurel Lake is not the site of principal operation in the year of the permit. The Commission envisioned a very simple application process for this permit whereby a registered boat owner would simply certify, under penalty of law, that Laurel Lake was the site of principal operation in the preceding year. Since Laurel Lake has no publicly-owned or controlled boating access, this means that only those boats that operated on the Lake in the past will be allowed to do so in the future. This will essentially freeze the number of internal combustion boats on Laurel Lake. This aspect of the proposal also provided that the number of permits for boats powered by internal combustion motors will gradually be reduced as boats go out of service, are moved elsewhere or are sold or transferred.

(b) Creating an internal combustion motorboat operating zone. Another aspect of the proposal provided that internal combustion motorboats, which hold special Laurel Lake permits, are restricted to slow, minimum height swell speed operation except in a marked operating zone on the upper pond where, at any one time, no more than two of these boats may operate at higher speeds (with or without water skiers) by boating in a counterclockwise direction in accordance with the Rules of the Road and other restrictions on operation of boats at Laurel Lake. The Commission asked commentators to provide comments and suggestions as to whether, if the operating zone aspect of the proposal were adopted, it would be necessary or appropriate to limit permits to boats that had used Laurel Lake as the site of principal operation during the preceding year and whether it would be necessary or appropriate to gradually phase out the number of internal combustion motorboats on the lake.

Staff provided a worksheet to members of the Commission and the Board to assist them in addressing various aspects of the proposal as published in the *Pennsylvania Bulletin*.

At its meeting on December 20, 1996, the Board considered the alternatives and recommended that the Commission not implement a special permit system to cover boats powered by internal combustion motors. The Board therefore recommended against freezing, and thereafter, gradually reducing the number of boats powered by internal combustion motors on this lake. The Board did recommend, however, that the Commission adopt regulations establishing a marked "at-speed" operating zone for boats powered by internal combustion motors. Under the Board's recommendation, these regulations would (1) include a restriction that no more than two boats powered by internal combustion motors may operate in the zone at any one time; (2) continue to limit the hours (from 12 noon until 6 p.m.) during which boats powered by internal combustion motors may operate at a speed higher than slow-minimum height swell speed in the zone; and (3) include other restrictions on competing activities such as swimming, rafting or fishing in the operating zone during times when boats powered by internal combustion motors are operating "at speed" or towing water skiers. It also was the consensus of the Board that boaters be given first priority in the marked zone but that other uses would be permitted in the absence of any boats in the zone.

After giving full and fair consideration of the public comments on all sides of the issue, the Commission, at its January 1997 meeting, adopted the recommendation of the Board with an additional proviso, endorsed by many commentators, that internal combustion boats on Laurel

Lake be limited to those owned and operated by resident property owners. Because there is no publicly-operated or maintained access to Laurel Lake, restricting internal combustion boats to resident property owners appears not only workable but consistent with past practice. From a safety standpoint, this restriction appears justified to help assure that operators are familiar with the configuration of this lake. The concept of an "at-speed" operating zone has proven workable on other Commonwealth waters, such as Lily Lake and Beltzville Lake. These lakes do not have the express limit of no more than two boats operating in the zone at any one time, but the zones on those lakes are larger than that adopted for Laurel Lake.

F. Paperwork

The amendments hereby adopted will not increase paperwork and will create no new paperwork requirements.

G. Fiscal Impact

The amendments will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The amendments impose no new costs on the private sector or the general public.

H. Public Involvement

A notice of proposed rulemaking containing the proposed changes to §§ 69.12 and 69.13 was published at 26 Pa.B. 6098. These changes did not attract public comment.

A notice of proposed rulemaking containing the proposed changes to § 111.58 also was published at 26 Pa.B. 6098. The Commission received a total of 246 comments (plus petitions/attachments containing 268 signatures). These comments are in addition to comments received over many months.

The comments can be divided into three groups. One group of comments asks the Commission to adopt regulations that would provide for electric motors only on Laurel Lake. These comments oppose grandfathering to permit the handful of 60 horsepower motorboats that used Laurel Lake in the past to continue to use it in the future. Because these commentators believe that operation of boats powered by internal combustion motors should be banned beginning in 1997, they take no position on the proposed "at speed" operating zone limited to two boats. In this round, the Commission received 135 individual comments endorsing electric motors only and no grandfathering. The Commission also received notice that the Northeast Division of the Pennsylvania Federation of Sportsmen Clubs had voted to endorse either electric motors or 10 horsepower motors on Laurel Lake. The reasons cited in support of the position in these comments include, generally, safety, protection of aquatic resources, protection of competing uses (swimming/fishing), environmental/noise/aesthetic concerns.

On the other side, the Commission received 108 comments (plus petitions/attachments containing 268 signatures some of which duplicate individual commentators) opposed to additional restrictions on Laurel Lake except that most of these comments endorse the proposed at-speed operating zone. These comments include an extensive submission from the Laurel Lake Aquatics Association that includes signed letters from numerous persons who claim to own property at Laurel Lake. The reasons cited in support of the position in these comments include the existing restrictions on powerboating on Laurel Lake, the safety of past operations on the lake, the fun of boating, waterskiing, tubing and the like, property values and similar areas.

The comments on both sides contained numerous comments from members of the same family and the same address. A majority of the comments on both sides appear to have similar content and many could be described as form letters. However, a good number of commentators have expressed distinct individual viewpoints.

The Commission received three comments that do not fall into either distinct camp. One commentator appeared to endorse that part of the proposal that provided for freezing the number of powerboats at current levels, a permit system and a gradual phasing out of operation of boats operated by internal combustion motors. Another commentator objected to even electric motors on this lake because of the increased power of electric motors. The Susquehanna County Commissioners, who had previously written to the Commission to endorse electric motor/10 horsepower restrictions on Laurel Lake, wrote to inform the Commission that they had heard from a lot of constituents on the other side of the issue and now asked the Commission to consider all points of view.

Copies of all public comments have been provided to the Commissioners.

Findings

The Commission finds that:

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

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

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

Order

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

(a) The regulations of the Commission, 58 Pa. Code Chapters 69 and 111, are amended by amending § 69.13 to read as set forth at 26 Pa.B. 6089, and by amending §§ 69.12 and 111.58 to read as set forth at Annex A.

(b) The Executive Director will submit this order, 26 Pa.B. 6089 and Annex A to the Office of Attorney General for approval as to legality as required by law.

(c) The Executive Director shall certify this order, 26 Pa.B. 6089 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

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

PETER A. COLANGELO,
Executive Director

(*Editor's Note:* A proposal to amend § 69.13(d), amended in this document, remains outstanding at 27 Pa.B. 1468 (March 22, 1997).)

Fiscal Note: Fiscal Note 48A-58 remains valid for the final adoption of the subject regulations.

Annex A
TITLE 58. RECREATION
PART II. FISH AND BOAT COMMISSION
Subpart B. FISHING
CHAPTER 69. FISHING IN
LAKE ERIE AND BOUNDARY LAKES

§ 69.12. Seasons, sizes and creel limits—Lake Erie.

(a) It is unlawful to take, catch, kill or possess fish, except during the seasons specified in this section. It is not a violation of this section if a fish caught out of season from water where fishing for other species is lawful is immediately returned unharmed to the waters from which it was taken.

(b) It is unlawful to take, catch, kill or possess fish of less than the minimum size specified in this section. It is not a violation of this section if an undersized fish taken from waters where fishing is otherwise lawful is immediately returned unharmed to the waters from which it was taken.

(c) It is unlawful to take, catch or kill more than 1 day's limit of any species of fish as specified in the following chart during 1-calendar day. It is unlawful to possess more than 1 day's limit of any species of fish as specified in the following chart except under the following circumstances:

(1) A person may possess any number of lawfully caught fish at the person's residence.

(2) A person who is engaged in a fishing trip away from

home for 2 or more consecutive calendar days may, while transporting fish from the place where caught to his residence, possess a number of fish equal to no more than two times the daily creel limit for that species of fish. In prosecution for violation of this section, it shall be a rebuttable presumption that a person transporting fish from a fishing site caught all of the fish during 1-calendar day.

(3) A fish will not be considered to be caught in violation of this section if it is immediately returned unharmed to the waters from which it was taken.

(4) A fish caught that is not to be counted in the creel limit shall be immediately released unharmed into the water from which taken. Except as otherwise provided in § 53.24 or § 63.40 (relating to tournament and fishing derby permits; and fishing tournament and fishing derbies), a fish placed on a stringer, or confined by any type of container, structure or device, or not returned immediately to the water, will be considered as part of the daily creel or possession limits. Fish returned to the water shall be handled carefully and be returned unharmed to the water from which taken.

(5) Fish may be given to another person, but the fish shall be counted in the donor's creel limit and neither the donor nor the recipient may kill or possess (while in the act of fishing) more than the limit allowed.

(d) The following seasons, sizes and creel limits apply to Lake Erie and Presque Isle Bay, including peninsula waters:

<i>SPECIES</i>	<i>SEASONS</i>	<i>MINIMUM SIZE</i>	<i>DAILY LIMIT</i>
MUSKELLUNGE and MUSKELLUNGE HYBRIDS PIKE Northern	Inland seasons apply: See § 61.1	30 inches	2 (combined species)
		24 inches	2
WALLEYE*	Open year-round	15 inches	6
BASS Largemouth Smallmouth	January 1 to opening day of trout season in April and first Saturday after June 11 until December 31	15 inches	4 (combined species)
	Opening day of trout season in April until first Saturday after June 11.*	20 inches	1
TROUT and SALMON	First Saturday after April 11 until midnight Labor Day.	9 inches	8 (combined species only 2 of which may be lake trout). Of the entire catch (combined species) only 5 fish total may exceed 15 inches in length.
	12:01 a.m. the day after Labor Day until midnight on the Friday before the first Saturday after April 11	15 inches	3 (combined species only 2 of which may be lake trout).
STURGEON	No open season	ENDANGERED SPECIES	
SUNFISH, CRAPPIES, CATFISH, ROCK BASS, SUCKERS, EELS, CARP, WHITE BASS	Open year round	None	50 (combined species)
YELLOW PERCH	Open year-round	8 inches	20

<i>SPECIES</i>	<i>SEASONS</i>	<i>MINIMUM SIZE</i>	<i>DAILY LIMIT</i>
BAIT FISH FISH BAIT	Open year-round	None	50 (combined species)
ALL OTHER SPECIES	Inland regulations apply: See § 61.1		

*It is unlawful to conduct or participate in a fishing tournament (as defined in § 63.40 (relating to seasons for fishing tournaments)) for bass on Lake Erie or Presque Isle Bay during the period from opening day of trout season in April until the first Saturday after June 11.

Subpart C. BOATING
CHAPTER 111. SPECIAL REGULATIONS
COUNTIES

§ 111.58. Susquehanna County.

(a) *Cotrell Lake.* The operation of boats powered by internal combustion motors is prohibited.

(b) *East Lake.* The operation of boats powered by internal combustion motors is prohibited.

(c) *Lakeside Pond.* The use of motors in excess of 10 horsepower is prohibited.

(d) *Laurel Lake.*

(1) *Internal combustion motors prohibited.* After April 1, 1997, the operation of boats powered by internal combustion motors is prohibited except as otherwise provided in this subsection.

(2) *Operation of boats powered by motors of up to 60 horsepower.* Resident property owners at Laurel Lake are permitted to operate boats powered by motors of up to 60 horsepower. It is unlawful for a person, other than a resident property owner or a member of the property owner's immediate family, to operate a boat powered by an internal combustion motor on Laurel Lake. It is unlawful for a person, including a resident property owner and members of the immediate family, to operate a boat powered by a motor rated in excess of 60 horsepower.

(3) *Restrictions on operation of boats powered by internal combustion motors.* Operation of boats powered by internal combustion motors is subject to the following restrictions:

(i) *Ski devices.* No more than one water ski device with a maximum of one skier may be towed by a boat.

(ii) *Upper Lake.* Boat speed is limited to slow, minimum height swell speed except that, during the period from noon until 6 p.m., no more than two boats powered by internal combustion motors may, at any one time,

operate at speeds greater than slow, minimum height swell speed in the marked boat operating zone. Boats operating in the marked zone shall circle in a counter-clockwise direction and shall be subject to the restrictions in this subsection and the code and this subpart. It is unlawful to water ski or to operate a boat at greater than slow, minimum height swell speed at any location on the upper lake from 6 p.m. until noon of the following day.

(iii) *Lower Lake.* It is unlawful to water ski or to operate a boat at greater than slow, minimum height swell speed at any time at any location on the lower lake.

(iv) *Personal watercraft.* The operation of personal watercraft is prohibited.

(4) *Restrictions on competing uses of marked boat operating zone.* Boats powered by internal combustion motors operating at authorized speeds greater than slow, minimum height swell speed in the marked boat operating zone shall have priority during the time periods when the operation is authorized under paragraph (3)(ii). It is unlawful to operate or stop a boat in the marked boat operating zone in a manner that interferes with authorized operation of internal combustion powered motorboats in the zone.

(e) *Little Elk Lake.* The operation of boats powered by internal combustion motors is prohibited.

(f) *Quaker Lake.* The use of motors in excess of 7.5 horsepower is prohibited.

(g) *Stump Pond.* The operation of boats powered by internal combustion motors is prohibited.

(h) *Tripp Lake.* The operation of boats powered by internal combustion motors is prohibited.

(i) *Upper Lake, New Milford Township.* Motors are prohibited.

[Pa.B. Doc. No. 97-590. Filed for public inspection April 18, 1997, 9:00 a.m.]