

PROPOSED RULEMAKING

DEPARTMENT OF HEALTH

[28 PA. CODE CH. 18]

Public Swimming and Bathing Places

The Department of Health (Department) proposes to amend Chapter 18 (relating to public swimming and bathing places) by adding definitions for "certified lifeguard" and "recreational swimming establishment" in § 18.1 (relating to definitions), and by amending § 18.42 (relating to lifeguards). The Department also proposes to include in § 18.42 the requirements for lifeguard certification and the factors to be considered in determining adequate lifeguard coverage.

A. Purpose

The Department is directed by the act of June 18, 1998 (P. L. 531, No. 75) (Act 75), amending the Public Bathing Law (35 P. S. §§ 672—680d) to determine appropriate authorities to certify lifeguards and to promulgate regulations to determine the number of lifeguards required at a recreational swimming establishment when the recreational swimming establishment is open to the public. The Department is to promulgate these regulations in consultation with approved certifying authorities and recreational swimming establishments.

The lifeguard requirements of Act 75 and the proposed amendments are intended to enhance public safety by requiring adequate lifeguard coverage at certain types of swimming facilities and by setting forth requirements for the certification of lifeguards. The regulation currently appearing in § 18.42, requiring lifeguard coverage for public bathing places, was struck by the Pennsylvania Supreme Court in 1990 as exceeding the promulgating agency's regulatory authority. *Spooner v. Secretary of Commonwealth*, 574 A.2d 600 (Pa. 1990). The act of June 28, 1995 (P. L. 89, No. 18), the Conservation and Natural Resources Act (71 P. S. §§ 1340.101—1340.1103), which dismantled the former Department of Environmental Resources and transferred certain powers and duties to other agencies, also required the Department to again administer the Public Bathing Law.

Act 75 granted authority to the Department to ensure that there is an adequate number of certified lifeguards at certain swimming establishments. The application of the proposed lifeguard requirements is limited to "recreational swimming establishments" as defined in Act 75. Two major limitations of Act 75's application are that the swimming establishment must be open to the public and charge a fee for admission. The Department therefore proposes to amend § 18.42 to delete the inoperative language and to add language which corresponds to the requirements of Act 75.

The Department conducted a stakeholder meeting on October 1, 1998, to consult with representatives of lifeguard certifying authorities and recreational swimming establishments on the development of regulations relating to the lifeguard requirements of Act 75. Information and suggestions provided by stakeholders have been included in these proposed amendments.

B. Requirements

§ 18.1 Definitions

A "certified lifeguard" is defined in Act 75 as an individual who has a current certificate in lifeguarding

from a certifying authority recognized by the Department in a notice published in the *Pennsylvania Bulletin*. The Department proposes to add the statutory definition to this section.

A "recreational swimming establishment" is defined in Act 75 as:

A facility that is designed, constructed, and/or designated for use by individuals for the primary purpose of swimming, where a fee is charged for admission. This definition includes, but is not limited to, swimming pools, water rides, wave pools, swimming beaches and other outdoor swimming facilities. The term excludes those facilities owned by condominiums, other property owner associations, rental arrangements which include three or more families or social units, hotels or motels, campgrounds, private clubs and private organizations which do not provide access to the general public, swimming facilities used exclusively for hydrotherapy and residential swimming facilities used solely by the owner of a residence, his family and personal guests. 35 P. S. § 673

Since this definition enables a swimming establishment to change its status based upon whether a fee is charged, and since the amendment to section 4.1(a) of the Public Bathing Law (35 P. S. § 675.1(a)) requires only that an adequate number of certified lifeguards shall be on duty at a recreational swimming facility when it is "open to the public," the Department is proposing the following addition to the statutory definition of a "recreational swimming establishment:"

When a facility otherwise excluded by this definition provides access to the general public and charges a fee for admission, it shall be considered a recreational swimming establishment.

This addition anticipates a situation in which a facility (for example, hotel, motel) which is typically excluded from the definition of a recreational swimming establishment, is operating for a time in a manner which renders it a recreational swimming establishment subject to the requirements of Act 75.

§ 18.42 Lifeguards

The Department proposes to change the title of this section to "certified lifeguards" to reflect the Act 75 directive. Current subsections (a) and (b) would be replaced with new subsections (a) and (b).

Subsection (a) recognized lifeguard certifying authorities.

This subsection proposes criteria that would require a lifeguarding course of a lifeguarding certifying authority for that certifying authority to be recognized by the Department. The criteria are based on Nationally-recognized lifeguard certifying authority standards.

Subsection (b) facilities requiring lifeguards.

This subsection would provide the Department's criteria for determining that an adequate number of certified lifeguards are on duty at a recreational swimming establishment to protect the safety of the public when that establishment is in operation. Traditionally, the number of lifeguards required at public bathing places under National standards has been based upon the surface area of the facility, user load (number of swimmers in the pool), or a combination of both. This approach to deter-

mining an adequate number of lifeguards at a given facility does not take into consideration the proliferation of uniquely designed pools and types of facilities (for example, wave pools).

A number of Nationally-recognized lifeguard certifying authorities (for example, The American Red Cross, YMCA, Ellis and Associates, Inc.) have addressed the need for adequate lifeguard coverage by recognizing that each facility is different and that any attempt to protect user safety must account for individual facility size, design and utilization. Furthermore, while it is important to have an adequate number of lifeguards, swimmers' safety is further protected when those lifeguards have been trained and situated so they can visually monitor, detect, react and reach a victim within an acceptable amount of time. This subsection would incorporate current certifying authority standards for ensuring adequate lifeguard coverage.

C. *Who is Affected by the Proposed Amendments*

The proposed amendments requiring adequate coverage by certified lifeguards at recreational swimming establishments would affect swimming and bathing facilities when they are open for use by the general public and a fee is charged for admission. These establishments include, water parks, municipal pools, State park pools and natatoria. The proposed amendments would affect establishments which do not usually meet the statutory definition of a recreational swimming establishment (for example, hotels or motels) but may on occasion operate as a recreational swimming establishment when that facility is open to the general public and charges a fee for admission. The proposed amendments would also enhance the safety of the public when it uses recreational swimming establishments.

D. *Cost and Paperwork Estimates*

These proposed amendments are projected to have little fiscal impact on the Commonwealth, local government, the private sector and the general public. Most recreational swimming establishments, as defined by Act 75, currently employ lifeguards to protect the safety of their patrons. Facilities which comply with these regulations may derive a benefit from lower liability insurance rates which may offset potential costs incurred. The proposed amendments will not significantly increase paperwork.

E. *Effective Date/Sunset Date*

These proposed amendments will be effective immediately upon final adoption. There is no sunset date.

F. *Statutory Authority*

The amendments are proposed under Act 75. Act 75 requires that the Department determine appropriate authorities to certify lifeguards and promulgate regulations to determine the number of lifeguards required at a recreational swimming establishment.

G. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Department will submit a copy of the proposed amendments to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare. In addition to submitting the proposed amendments, the Department will provide IRRC and the Committees with a copy of a Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1,

"Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRC has objections to any portion of the proposed amendments, it will notify the Department within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review prior to final publication of the amendments, by the Department, the General Assembly and the Governor, of objections raised.

H. *Contact Person*

Interested persons are invited to submit all comments, suggestions or objections regarding the proposal to William M. Williams, Environmental Health Administrator, Bureau of Community Health Systems, Room 628, Health and Welfare Building, Harrisburg, PA 17120, (717) 787-4366 within 30 days after publication of this proposal in the *Pennsylvania Bulletin*. A person with a disability may submit comments, suggestions or objections regarding the proposed amendments to William Williams in alternative formats, such as audiotape, braille or V/TT: (717) 783-6514 or the Pennsylvania AT&T Relay Service at (800) 654-5984 [TT]. A person with a disability may request an alternative format of this document by contacting William Williams so that he may make the necessary arrangements.

GARY L. GURIAN,
Acting Secretary

Fiscal Note: 10-155. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 28. HEALTH AND SAFETY

PART II. LOCAL HEALTH

CHAPTER 18. PUBLIC SWIMMING AND BATHING FACILITIES

GENERAL PROVISIONS

§ 18.1. Definitions.

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

* * * * *

Certified lifeguard—An individual who has a current certificate in lifeguarding, from a lifeguard certifying authority, as recognized by the Department in a notice published yearly in the *Pennsylvania Bulletin*.

* * * * *

Recreational swimming establishment—A facility that is designed, constructed or designated for use by individuals for the primary purpose of swimming, if a fee is charged for admission. The term includes swimming pools, water rides, wave pools and swimming beaches and other outdoor swimming facilities. The term excludes those facilities owned by condominiums, other property owner associations, rental arrangements which include three or more families or social units, hotels or motels, campgrounds, private clubs and private organizations which do not provide access to the general public, swimming facilities used exclusively for hydrotherapy, and residential swimming facil-

ities used solely by the owner of a residence, the owner's family and personal guests. When a facility otherwise excluded by this definition provides access to the general public and charges a fee for admission, it shall be considered a recreational swimming establishment.

* * * * *

GENERAL SAFETY

§ 18.42. Certified [Lifeguards] lifeguards.

(a) [*Number.* One or more competent lifeguards in adequate number shall be on duty at the water-side at all times the public bathing place is open to use by bathers, and may not be assigned other tasks which will divert attention from the safety of the bather.

(b) *Qualifications.* Lifeguards shall be capable swimmers, skilled in lifesaving methods and in methods of artificial resuscitation as evidenced by the possession of a currently valid certificate or other proof of proficiency from a recognized agency offering instructions in these fields.]

Recognized lifeguard certifying authorities. The Department will recognize a lifeguard certifying authority if the certifying authority's lifeguard training course satisfies the following requirements:

- (1) The course is conducted pursuant to a written training plan, instructors' manual and textbook.
 - (2) It provides for instruction in cardiopulmonary resuscitation.
 - (3) It provides for instruction in first aid.
 - (4) It includes a system for evaluating swimming ability.
 - (5) It provides for instruction in lifeguarding responsibilities and pool operation.
 - (6) It provides a method for testing and certification.
 - (7) It includes a certificate which expires if renewal criteria are not satisfied.
 - (8) Its instructors have completed an approved lifeguard instructors' certification program.
 - (9) Upon successful completion of the course, the names of certified individuals are entered into an accessible information system.
- (b) *Required number of lifeguards.* A recreational swimming establishment shall have on duty an adequate number of certified lifeguards to protect the safety of users. To ensure an adequate number of certified lifeguards, the operator of a recreational swimming establishment shall:
- (1) Develop, write and adhere to a lifeguard coverage plan for the recreational swimming establishment incorporating the standards of a Department-recognized lifeguard certifying authority which specifies how the recreational swimming establishment shall provide an adequate number of certified lifeguards at relevant times. This plan shall be posted in an area commonly utilized by lifeguard staff and shall be available to the Department and any member of the public upon request.
 - (2) Consider facility size, design and utilization.

(3) Station one or more lifeguards at waterside when the recreational swimming establishment is open and not assign other tasks which could divert the attention of lifeguards from the safety of users.

(4) Ensure that the entire area of the recreational swimming establishment can be visually monitored by lifeguards at least every 10 seconds.

(5) Ensure that the lifeguard-to-victim response time is 20 seconds or less.

(6) Monitor and evaluate lifeguard staff performance during actual or simulated operational conditions, and modify the lifeguard coverage plan as necessary to ensure the safety of users.

(7) Provide appropriate lifeguard orientation and regular inservice training at least yearly on the topics of lifesaving techniques, safety equipment and emergency procedures.

[Pa.B. Doc. No. 99-226. Filed for public inspection February 12, 1999, 9:00 a.m.]

FISH AND BOAT COMMISSION

[58 PA. CODE CH. 63]

Fishing for Bass During Spring Season

The Fish and Boat Commission (Commission) proposes to add § 63.43 (relating to fishing for bass during spring season). The Commission is publishing this regulation as a notice of proposed rulemaking under the authority of 30 Pa.C.S. (relating to Fish and Boat Code) (code). The proposed regulation deals with fishing for bass during the spring season.

A. *Effective Date*

The proposed regulation, if approved on final rule-making, will go into effect on January 1, 2000, or upon publication of an order adopting the regulation in the *Pennsylvania Bulletin*, whichever occurs later.

B. *Contact Person*

For further information on the proposed rulemaking, contact Laurie E. Shepler, Assistant Counsel, (717) 657-4546, P. O. Box 67000, Harrisburg, PA 17106-7000. This proposal is available electronically through the Commission's Web site (<http://www.fish.state.pa.us>).

C. *Statutory Authority*

The proposed regulation is published under the statutory authority of section 2102 of the code (relating to rules and regulations).

D. *Purpose and Background*

The proposal is designed to update, modify and improve Commission regulations relating to fishing for bass during the spring season. The specific purpose is described in more detail under the summary of proposal.

E. *Summary of Proposal*

One of the issues raised by the Commission's recent changes to bass season, size and creel limits was the perception that bass populations require special protection during the traditional closed season from mid-April until mid-June. Therefore, the Commission proposes that

during the period from 12:01 a.m. on the first Saturday after April 11 until 12:01 a.m. on the first Saturday after June 11, it will be unlawful to kill or possess (while in the act of fishing) any largemouth, smallmouth or spotted bass. Under the proposal, no tournaments will be permitted during this time period. Catch and release fishing for bass during this period will be limited. It will be unlawful for an angler to repeatedly cast into a clearly visible bass spawning nest or redd in an effort to catch or take bass. Otherwise, a bass caught and immediately returned unharmed to the waters from which taken during this period will not be considered a violation of the regulation.

F. Paperwork

The proposal will not increase paperwork and will create no new paperwork requirements.

G. Fiscal Impact

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

H. Public Comments

Interested persons are invited to submit written comments, objections or suggestions about the proposed regulation to the Executive Director, Fish and Boat Commission, P. O. Box 67000, Harrisburg, PA 17106-7000, within 30 days after publication of this notice in the *Pennsylvania Bulletin*. Comments submitted by facsimile will not be accepted.

Comments also may be submitted electronically at "regulations@fish.state.pa.us." A subject heading of the proposal and a return name and address must be included in each transmission. If an acknowledgment of electronic comments is not received by the sender within 2 working days, the comments should be retransmitted to ensure receipt.

PETER A. COLANGELO,
Executive Director

Fiscal Note: 48A-92. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 58. RECREATION

PART II. FISH AND BOAT COMMISSION

Subpart B. FISHING

CHAPTER 63. GENERAL FISHING REGULATIONS

§ 63.43. Fishing for bass during spring season.

During the period from 12:01 a.m. on the first Saturday after April 11 until 12:01 a.m. on the first Saturday after June 11:

(1) It is unlawful to kill or possess, while in the act of fishing, any largemouth, smallmouth or spotted bass.

(2) Tournaments are not permitted.

(3) Catch and release fishing for bass is limited as follows: It is unlawful for an angler to repeatedly cast into a clearly visible bass spawning nest or redd in an effort to catch or take bass. Otherwise, a bass caught and immediately returned unharmed to the waters from

which taken during this period will not be considered a violation of this section.

[Pa.B. Doc. No. 99-227. Filed for public inspection February 12, 1999, 9:00 a.m.]

FISH AND BOAT COMMISSION

[58 PA. CODE CHS. 63 AND 65]

Sale, Purchase or Barter of Fish Parts and Fish Eggs; Miscellaneous Special Regulation

The Fish and Boat Commission (Commission) proposes to add § 63.42 (relating to sale, purchase or barter of fish parts and fish eggs) and amend § 65.24 (relating to miscellaneous special regulations). The Commission is publishing these amendments as a notice of proposed rulemaking under the authority of 30 Pa.C.S. (relating to Fish and Boat Code) (code). The proposed amendments deal with fishing.

A. Effective Date

The proposed amendments, if approved on final rulemaking, will go into effect upon publication of an order adopting the amendments in the *Pennsylvania Bulletin*.

B. Contact Person

For further information on the proposed changes, contact Laurie E. Shepler, Assistant Counsel, (717) 657-4546, P. O. Box 67000, Harrisburg, PA 17106-7000. This proposal is available electronically through the Commission's Web site (<http://www.fish.state.pa.us>).

C. Statutory Authority

The proposed amendments are published under the statutory authority of section 2102 of the code (relating to rules and regulations).

D. Purpose and Background

The proposed amendments are designed to update, modify and improve Commission regulations relating to fishing. The specific purpose of each amendment is described in more detail under the summary of proposal.

E. Summary of Proposal

(1) *Section 63.42 (relating to sale, purchase or barter of fish parts and fish eggs)*. The Commission recently received inquiries as to whether it is legal to sell fish parts and fish eggs. The principal focus of these inquiries has been on the sale of steelhead eggs taken from Lake Erie and its tributaries. Various groups and individuals have expressed the belief that the taking and killing of these sportfish for purpose of selling their eggs is inappropriate.

It has been the Commission staff's position that the sale, offer for sale or purchase of fish, fish parts and fish eggs by anglers is prohibited by section 3311 of the code (relating to sale of certain fish prohibited). There are limited exceptions to this general rule for species authorized to be taken by holders of Lake Erie commercial fishing licenses. In addition, holders of live bait fish, live fish bait and live fish dealers licenses may sell or purchase certain species (not including steelhead) of live fish.

To clarify the interpretation of existing law and enhance its enforceability, the Commission proposes an amendment to its general fishing regulations.

(2) Section 65.24 (relating to miscellaneous special regulations). For some years, portions of Paden (Finley) Creek and Linesville Creek, Crawford County, have had miscellaneous special regulations in effect during the walleye run each spring. During a recent review of this regulation, Commission staff noted that clarification is necessary to protect walleye in these rather small streams during the spawning season. Linesville Creek flows into Pymatuning Sanctuary while Paden (Finley) Creek enters the main lake north of Clark Island. Both streams are conducive to poaching activity (including spearing) when walleye are running.

The Commission believes that it is appropriate to declare portions of both streams as nursery waters under § 67.1 (relating to nursery waters and exhibition areas) and to close them to all fishing during the period March 1 through April 15. This will provide adequate protection to walleye stocks. The designation will apply to the reach of Paden (Finley) Creek from the mouth upstream to "Finley Bridge" on State Route 6 and to Linesville Creek from the mouth (Pymatuning Sanctuary) upstream to the Conrail Railroad bridge north of State Route 6 in Linesville. Furthermore, the nursery water designation will prohibit spearing or gigging, or both, on these streams during the March 1 through April 15 period as a further measure to protect walleye during the spawning run. This designation makes unnecessary the current special regulation prohibiting spear fishing during the walleye run each spring when Finley and Linesville Creeks are so posted. Therefore, the Commission proposes to remove both streams from miscellaneous special regulation under § 65.24.

F. Paperwork

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

G. Fiscal Impact

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

H. Public Comments

Interested persons are invited to submit written comments, objections or suggestions about the proposed amendments to the Executive Director, Fish and Boat Commission, P. O. Box 67000, Harrisburg, PA 17106-7000, within 30 days of publication of this notice in the *Pennsylvania Bulletin*. Comments submitted by facsimile will not be accepted.

Comments also may be submitted electronically at "regulations@fish.state.pa.us." A subject heading of the proposal and a return name and address must be in-

cluded in each transmission. If an acknowledgment of electronic comments is not received by the sender within 2 working days, the comments should be retransmitted to ensure receipt.

PETER A. COLANGELO
Executive Director

Fiscal Note: 48A-91. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 58. RECREATION

PART II. FISH AND BOAT COMMISSION

Subpart B. FISHING

CHAPTER 63. GENERAL FISHING REGULATIONS

§ 63.42. Sale, purchase or barter of fish parts and fish eggs.

It is unlawful for a person to sell, purchase, offer for sale or barter any fish parts or fish eggs obtained from fish taken from the waters of this Commonwealth, including boundary waters. This prohibition does not apply to fish parts and fish eggs lawfully taken and sold or offered for sale by holders of commercial fishing licenses under Chapter 29 of the code (relating to special licenses and permits), if the particular species of fish is authorized for taking by commercial licensees. This prohibition does not apply to the sale, purchase, offer for sale or barter of fish parts and fish eggs legally obtained from fish taken lawfully from waters outside this Commonwealth, if the seller or purchaser is able to document the source of the fish parts or fish eggs from lawful sources outside this Commonwealth.

CHAPTER 65. SPECIAL FISHING REGULATIONS

§ 65.24. Miscellaneous special regulations.

The following waters are subject to the following miscellaneous special regulations:

<i>County</i>	<i>Name of Water</i>	<i>Special Regulations</i>
		* * * * *
[Crawford	Finley and Linesville Creeks	Spearing fish is prohibited during the Walleye run each spring when these streams are so posted.]
		* * * * *

[Pa.B. Doc. No. 99-228. Filed for public inspection February 12, 1999, 9:00 a.m.]