

PROPOSED RULEMAKING

FISH AND BOAT COMMISSION

[58 PA. CODE CH. 69]

Seasons, Sizes and Creel Limits for Lake Erie

The Fish and Boat Commission (Commission) proposes to amend Chapter 69 (relating to fishing in Lake Erie and boundary lakes). The Commission is publishing this amendment as a notice of proposed rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code). The proposed amendment relates to fishing.

A. *Effective Date*

The proposed amendment, if approved on final-form rulemaking, will go into effect on January 1, 2003, or upon publication of an order adopting the amendment in the *Pennsylvania Bulletin*, whichever occurs later.

B. *Contact Person*

For further information on the proposed amendment, contact Laurie E. Shepler, Assistant Counsel, (717) 705-7815, P. O. Box 67000, Harrisburg, PA 17106-7000. This proposal is available electronically through the Commission's website (<http://www.fish.state.pa.us>).

C. *Statutory Authority*

The proposed amendment to § 69.12 (relating to seasons, sizes and creel limits—Lake Erie) is published under the statutory authority of section 2102 of the code (relating to rules and regulations).

D. *Purpose and Background*

The proposed amendment is designed to update, modify and improve the Commission's regulations pertaining to fishing. The specific purpose of the proposed amendment is described in more detail under the summary of proposal.

E. *Summary of Proposal*

Current angling regulations, established in 1996, to conserve yellow perch in this Commonwealth's waters of Lake Erie and Presque Isle Bay, include a daily possession limit of 20 fish, an 8 inch minimum size limit and no closed season for sport fishing. On the open lake, these regulations were expected to: (1) constrain the harvest at or below the annual quota or Total Allowable Catch (TAC); and (2) reduce the harvest of small immature perch.

The same angling regulations were imposed upon the yellow perch fishery in Presque Isle Bay that has been subjected to very high fishing mortality especially during the ice fishery. The ice fishery had been responsible for the excessive over-fishing harvest prior to the implementation of the 8-inch minimum size limit and 20 perch per day possession limit.

The Commission's Lake Erie Research Unit is committed to continuing an intensive assessment of yellow perch to evaluate the yellow perch population, angler use and yellow perch harvest and to make any appropriate adjustments to the yellow perch regulations. On the open lake, strong yellow perch year classes and conservative regulations have resulted in increased population abundance at the highest levels since 1990, and yellow perch catch rates continue to increase. However, a sizeable proportion

of the open lake angler catch was released under the 8 inch minimum size limit, and mortality of these release fish was high because of hydraulic decompression. The Lake Erie Boat Angler Survey in the summer of 2001, demonstrated that the 20 yellow perch creel limit was constraining the yellow perch harvest within the Lake Erie Committee TAC. The Bay yellow perch population has also rebounded subsequent to the implementation of the regulations. However, because of the high minimum size limit relative to the relatively slow perch growth, the Bay creel rate has been low. The harvest of Bay caught yellow perch was only 7-19% of those caught during the years 1997-2001.

These intensive yellow perch assessments have shown that reducing the minimum size limit to 7 inches will continue to adequately protect yellow perch spawning stock under the condition of higher yellow perch population sizes. This should reduce complaints about catch and release mortality on the open lake and complaints about the low harvest rates on Presque Isle Bay. Commission staff expect harvest to increase by at least 30% by Presque Isle Bay anglers; however, on the open lake harvest, increases due to reducing the minimum size limit should be a little more than 15%.

Accordingly, the Commission proposes to amend § 69.12 to reduce the minimum size limit of yellow perch on Lake Erie and Presque Isle Bay from 8 inches to 7 inches. The daily creel limit of 20 and the no closed season will remain in effect.

F. *Paperwork*

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

G. *Fiscal Impact*

The proposed amendment will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The proposed amendment 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 amendment 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 ra-pfbcregs@state.pa.us. A subject heading of the proposal and a return name and address must be included in each transmission. In addition, all electronic comments must be contained in the text of the transmission, not in an attachment. 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-126. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 58. RECREATION

PART II. FISH AND BOAT COMMISSION

Subpart B. FISHING

CHAPTER 69. FISHING IN LAKE ERIE AND BOUNDARY LAKES

Subchapter B. SPORT FISHING AND ANGLING

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

* * * * *

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

SPECIES	SEASONS	MINIMUM SIZE	DAILY LIMIT
	* * * * *	* * * * *	
YELLOW PERCH	Open year-round	[8] 7 inches	20
	* * * * *		

[Pa.B. Doc. No. 02-522. Filed for public inspection April 5, 2002, 9:00 a.m.]

[58 PA. CODE CHS. 53, 61 AND 65]

Use Permits for Unpowered Boats; Fishing in the Susquehanna River and Its Tributaries; Special Fishing Regulations

The Fish and Boat Commission (Commission) proposes to amend Chapters 53, 61 and 65 (relating to Commission property; seasons, sizes and creel limits; and special fishing regulations). The Commission is publishing these amendments as a notice of proposed rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code). The proposed amendments relate to Commission property and fishing.

A. Effective Date

The proposed amendments, if approved on final-form 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 amendments, contact Laurie E. Shepler, Assistant Counsel, (717) 705-7815, P. O. Box 67000, Harrisburg, PA 17106-7000. This proposal is available electronically through the Commission's website (<http://www.fish.state.pa.us>).

C. Statutory Authority

The proposed amendment to § 53.27 (relating to use permits for unpowered boats) is published under the statutory authority of section 742(e) of the code (relating to use of property). The proposed amendment to § 61.7 (relating to Susquehanna River and tributaries) is published under the statutory authority of section 2102 of the code (relating to rules and regulations). The proposed amendment to § 65.24 (relating to miscellaneous special regulations) is published under the statutory authority of section 2307 of the code (waters limited to specific purposes).

D. Purpose and Background

The proposed amendments are designed to update, modify and improve the Commission's regulations pertaining to its property and fishing. The specific purpose of the proposed amendments is described in more detail under the summary of proposal.

E. Summary of Proposal

(1) *Section 53.27*. It has come to Commission staff's attention that the current wording of § 53.27(b), requiring use permit decals to be displayed above the waterline on both sides of the bow of the boat, creates a conflict with § 93.5(c) (relating to display of registration number and validation decal). Section 93.5(c) provides that no number other than the registration number may be displayed on either side of the bow of the vessel. Accordingly, the Commission proposes to amend this section to read as set forth in Annex A.

(2) *Section 61.7*. The Commission recently discovered an error in this section. To correct the error, the Commission proposes to amend the section to read as set forth in Annex A.

(3) *Section 65.24*. Dunkard Creek is a low gradient warmwater stream that flows through the rural setting of southern Greene County. The fish populations of Dunkard Creek have been sampled extensively dating back to 1976. The dominant gamefish sampled through the years has been smallmouth bass. Dunkard Creek has been documented over the years as one of the highest density smallmouth bass populations in a warmwater stream in Southwest Pennsylvania. Analysis of the smallmouth bass data through 1990 indicated that angler harvest was a major factor in reducing the quality of the bass population. Additionally, results of a 1990 Statewide Smallmouth Bass Angler Opinion Survey suggested that anglers were very interested in quality smallmouth bass fishing through use of more restrictive length limits. These reasons combined to provide the impetus to implement and study a Catch and Release regulation for black bass on a portion of Dunkard Creek effective in 1995 to improve the overall quality of the smallmouth bass fishery.

Two sampling sites were used in this evaluation, one in the catch and release section and one in the Statewide regulation section. The Dunkard Creek smallmouth bass population abundance, biomass, growth and year class strength demonstrated a similar declining trend from 1984 to 2000 at both sites. The number of smallmouth bass over 12 inches at both sites declined by about 60% for the years 1995 to 2000, compared to the 1984 to 2000 mean. This occurred even though both sites had more restrictive regulations applied over the evaluation period of 1984 to 2000. One site went from a minimum length limit of 10 to 12 inches and from a year-round season to a closed season in the spring, while the other site went to catch and release. The more restrictive harvest regulations should have led to an increase in abundance of smallmouth bass over 12 inches at both sites. Smallmouth bass growth data showed that older bass (ages 5 and 6) had a slower growth rate over time, even though abundance had been reduced. Rock bass populations also declined at both sites over the study period.

The declining smallmouth bass and rock bass population evidence combined pointed to habitat or water quality deterioration as possible factors. Water quality was not considered a major contributor, but erosion and sedimentation in the watershed as reported in a study by the Greene County Conservation District was identified

as a probable cause of the fish population declines. This documentation should serve as emphasis to heighten this awareness and take steps toward reducing and eliminating this pollution problem. Livestock farming operations and dirt and gravel roads were considered the major sediment producing sources in the upper watershed. Other sediment sources include mining and logging areas, runoff from waste sites, haul roads and construction sites.

The Dunkard Creek long-term data set allowed staff to document that the catch and release regulations for bass did not meet their objective of improving the quality of the bass population. However, this data set also allowed staff to discover the chronic effects of erosion and sedimentation on smallmouth bass and rock bass populations in the Dunkard Creek watershed. Conservation groups will now be directed to alleviate this pollution and ultimately return the quality component of the smallmouth bass population to its former state.

Accordingly, the Commission proposes that § 65.24 be amended to remove the miscellaneous special regulations on Dunkard Creek.

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 after publication of this notice in the *Pennsylvania Bulletin*. Comments submitted by facsimile will not be accepted.

Comments also may be submitted electronically at ra-pfbcregs@state.pa.us. A subject heading of the proposal and a return name and address must be included in each transmission. In addition, all electronic comments must

be contained in the text of the transmission, not in an attachment. 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-125. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 58. RECREATION

PART II. FISH AND BOAT COMMISSION

Subpart A. GENERAL PROVISIONS

CHAPTER 53. COMMISSION PROPERTY

§ 53.27. Use permits for unpowered boats.

* * * * *

(b) Use permits will be issued in the form of decals, showing the expiration date. [Decals shall be displayed above the waterline on both sides of the bow of the boat for which the permit is issued.] Decals shall be clearly displayed on both sides of the boat at the mid ship just below the gunwale. For low-volume boats, such as kayaks, decals shall be placed on both sides of the deck at the mid ship.

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Subpart B. FISHING

CHAPTER 61. SEASONS, SIZES AND CREEL LIMITS

§ 61.7. Susquehanna River and tributaries.

* * * * *

(d) The following seasons, sizes and creel limits apply to the Susquehanna River and its tributaries, including the Juniata River, the West Branch, "North Branch" and other tributaries [with] within the Susquehanna River Basin except the Conowingo Reservoir—see § 61.4 (relating to Conowingo Reservoir) and except for waters subject to special regulations (see Chapter 65 (relating to special fishing regulations)):

<i>SPECIES</i>	<i>SEASONS</i>	<i>MINIMUM SIZE</i>	<i>DAILY LIMIT</i>
	* * *	* * *	
[BASS Largemouth Smallmouth Spotted	January 1 to first Saturday after April 11 and first Saturday after June 11 to December 31.	Susquehanna River—Holtwood Dam to Fibradam in Sunbury 15 inches* *	4 (Combined species)* *
BASS Largemouth Smallmouth Spotted	January 1 to first Saturday after April 11 and first Saturday after June 11 to December 31.	Susquehanna River—Upstream of Fibradam in Sunbury 12 inches	6 (Combined species)
BASS Largemouth Smallmouth Spotted	January 1 to first Saturday after April 11 and first Saturday after June 11 to December 31.	Juniata River—Mouth upstream to Route 11/15 bridge near Amity Hall; and 18.5 mile section from the S.R. 0075 bridge at Port Royal downstream to Newport S.R. 0034 Bridge 15 inches* *	4 (Combined species)* *

<i>SPECIES</i>	<i>SEASONS</i>	<i>MINIMUM SIZE</i>	<i>DAILY LIMIT</i>
BASS Largemouth Smallmouth Spotted	January 1 to first Saturday after April 11 and first Saturday after June 11 to December 31.	Juniata River—All areas except as described in this subsection: 12 inches	6 (Combined species)]
BASS Largemouth Smallmouth Spotted	Inland seasons, sizes and creel limits apply except for waters under special regulations (See Chapter 65). See § 61.1 (relating to Commonwealth inland waters). For Conowingo Reservoir, see § 61.4 (relating to Conowingo Reservoir).		
* * * * *			

[**Note: Big Bass regulations—minimum size and creel limits—apply (see § 65.9)]

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>
* * * * *		
[Greene]	Dunkard Creek	The daily creel limit for smallmouth bass is zero in an area from the confluence of Shannon Run at the ford on T-339 downstream to the bridge on SR 2009, a distance of 4.2 miles. Smallmouth bass may not be killed or had in possession in this special regulation area.]
	* * * * *	

[Pa.B. Doc. No. 02-523. Filed for public inspection April 5, 2002, 9:00 a.m.]

STATE ARCHITECTS LICENSURE BOARD

[49 PA. CODE CH. 9] Examination Fees

The State Architects Licensure Board (Board) proposes to amend §§ 9.3, 9.41, 9.46 and 9.49a; add §§ 9.41a, 9.51 and 9.52; and delete §§ 9.111, 9.113, 9.114, 9.116—9.118, 9.131 and 9.132 to read as set forth in Annex A.

A. Effective Date

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

B. Statutory Authority

The proposed amendments are authorized under sections 8, 11 and 13 of the Architects Licensure Law (act) (63 P. S. §§ 34.8, 34.11 and 34.13).

C. Background and Purpose

Deletion of reference to the Architects Registration Examination (ARE) fee

The Board proposes to eliminate reference to the ARE examination fee over which the Board has no control or

involvement. The ARE is a recognized uniform examination used throughout the United States. The General Assembly has indicated its preference for the recognition of National uniform examinations and grading services in accordance with section 812.1 of The Administrative Code of 1929 (71 P. S. § 279.3a). The fee for the examination is established by the National examiner and communicated directly to the applicants. Applicants for the examination pay the examination fee directly to the National examiner. Thus, it is unnecessary and impractical for the Board to continue to publish the National examiner's examination fee in the Board's regulations.

In lieu of publishing the cost of the examination, the Board proposes to add § 9.41a (relating to adoption of National board examinations), which promulgates the adoption of National board examinations, including the fee established by the National Council of Architectural Registration Boards (NCARB).

Annual renewal fee for registered architecture firms

General operating and enforcement expenses of the Board are apportioned to the general licensee population through the collection of license renewal fees. Section 11(a) of the act requires the Board to increase fees by regulation if the revenues raised by fees, fines and civil penalties are not sufficient to meet expenditures over a 2-year period.

Section 13(j) of the act states that the Board shall, by promulgation of rules and regulations, require that registered architecture firms file with the Board information concerning their officers, directors, partners, professional association board of governors, beneficial owners, members or managers and other aspects of their organization as the Board deems appropriate. This section also authorizes the Board to charge each registered architecture firm an annual filing fee in an amount determined by the Board.

No renewal fee has been established for architecture firms. The Board seeks to establish a renewal fee for renewing the registration of architectural firms, thereby causing licensed firms to contribute to the general operating and enforcement expenses of the Board.

The annual fee of \$50 will be collected by the Board biennially. This means that, every 2 years, the Board will collect \$100 from each registered architecture firm.

Examination and grading procedures

Section 8(c) of the act authorizes the Board to adopt the examination and recommended grading procedures adopted by NCARB. Because the adoption of NCARB's examination and grading procedures would eliminate the

Board's role in the process, the Board proposes to delete regulations outlining its role in the administration of the examination.

D. Description of Amendments

Renewal fee for registered architecture firms

The following table outlines the affected fee and change:

<i>Application</i>	<i>Current Fee</i>	<i>Proposed Fee</i>
Annual renewal fee for registered architecture firms	\$0	\$ 50

Licensure by examination

Section 9.41 (relating to general requirements) informs candidates that the subject matter of the ARE examination is available from the NCARB.

Proposed § 9.41a includes of National board examinations, including the fee established by the NCARB.

Section 9.49a(a) (relating to diversified training requirements) informs candidates that information concerning the Intern Development Program (IDP) of the NCARB is available directly from the NCARB.

Section 9.49a(b) directs candidates to have the NCARB transmit a certificate of completion of IDP to the Board.

Grading and review

Sections 9.51 and 9.52 (relating to examination grading; and grading compilations) are identical to §§ 9.131 and 9.132 (relating to examination grading; and grading compilation). The Board proposes that these two sections become §§ 9.51 and 9.52, so that they will appear alongside the related regulations referring to licensure by examination and examination. Sections 9.131 and 9.132 would then be deleted.

Examination

Section 8(c) of the act authorizes the Board to adopt the examination and recommended grading procedures adopted by the NCARB. It is unnecessary to continue to publish §§ 9.111—9.118. The Board proposes that those sections of the regulations be deleted.

E. Compliance with Executive Order 1996-1

In compliance with Executive Order 1996-1, "Regulatory Review and Compliance," in drafting and promulgating the proposed amendments, the Board considered the proposed amendments as both required by law and the least restrictive means of covering the costs of services required to be performed by the Board. Further, on July 27, 2001, the Board solicited input from the American Institute of Architects of Pennsylvania and the National Council of Architect Registration Boards.

F. Fiscal Impact and Paperwork Requirements

The proposed amendments will implement an annual renewal fee for registered architecture firms in this Commonwealth, but, otherwise, should have no fiscal impact on the private sector, the general public or political subdivisions.

The proposed amendments will require the Board to alter some of its forms to reflect the new fee; however, the proposed amendments should create no additional paperwork for the private sector.

G. Sunset Date

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

H. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 21, 2002, the Board submitted a copy of this proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Professional Licensure Committee and Senate Consumer Protection and Professional Licensure Committees. In addition to submitting the proposed rulemaking, the Board has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Board 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 rulemaking, it will notify the Board within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria that have not been met by the portion of the proposed rulemaking to which an objection is made. 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 objections raised.

I. Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding this proposed rulemaking to Dorna Thorpe, State Architects Licensure Board, 116 Pine Street, P. O. Box 2649, Harrisburg, PA 17105-2649, dthorpe@state.pa.us, within 30 days following publication of this proposed rulemaking in the *Pennsylvania Bulletin*.

ANN SHEPARD HOUSTON,
President

Fiscal Note: 16A-416. 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 9. STATE ARCHITECTS LICENSURE BOARD

GENERAL PROVISIONS

§ 9.3. Fees.

[(a) The cost of the ARE is \$980. The fee for each portion is:

Predesign	\$ 92
Site Planning	\$129
Building Planning	\$155
Building Technology	\$145
General Structures	\$108
Lateral Forces	\$ 79
Mechanical and Electrical	\$ 83

Material and Methods	\$ 90
Construction Documents and Services	\$ 99
(b)] Initial license	\$ 40
[(c)] Reciprocal license with NCARB Certification	\$ 30
Reciprocal license without NCARB Certification	\$ 50
[(d)] Certification of licensure, registration or scores	\$ 25
[(e)] Biennial renewal of license	\$100
[(f)] Reactivation of lapsed or expired license	\$ 30
[(g)] Firm practice registration or modification	\$ 50
[(h)] License or registration verification	\$ 15
Annual renewal fee for registered architecture firms	\$ 50
(\$100 fee shall be assessed biennially)	

LICENSURE BY EXAMINATION

§ 9.41. General requirements.

Licensure may be granted to an applicant who has successfully passed the ARE examination. The subject matter is [**described in detail in the NCARB's Circular of Information No. 2 which is**] available from the [**Board or from the National Council of Architectural Registration Boards, 1735 New York Avenue, N.W., Suite 700, Washington, D.C. 20006**] NCARB.

§ 9.41a. Adoption of National Board Examinations.

(a) The Board has adopted the ARE given by the NCARB. Candidates for examination shall obtain applications directly from the NCARB and pay the fee for the examination directly to the NCARB.

(b) Candidates shall comply with examination procedures and conduct standards as established by the NCARB.

§ 9.46. Requirements for examination eligibility.

(a) A candidate for the examination shall have:

* * * * *

[(3)] (b) An architectural degree candidate applying for first time licensure is required to pass the entire professional licensure examination of the Board within 5 years of the date of [**notice by the Board of**] eligibility to take the examination. The Board may waive this requirement upon proof of medical hardship or other extraordinary circumstances.

§ 9.49a. Diversified training requirements.

(a) The Board has adopted NCARB Training Requirements for IDP [**as set forth in Appendix B to the 1985-1986 NCARB Circular of Information No. 1. The 1985-1986 NCARB Circular of Information No. 1**]. This information is available from [**: National Council of Architectural Registration Boards, 1735 New York Avenue, N. W., Suite 700, Washington, D. C. 20006**] the NCARB.

(b) The candidate shall keep records of required diversified training experience in accordance with NCARB IDP requirements. The candidate is responsible for having NCARB transmit a certificate of completion of IDP [**as part of the candidate's application. An application which does not contain a certificate will not be reviewed**] to the Board.

GRADING AND REVIEW

§ 9.51. Examination grading.

The ARE shall be graded using procedures developed by NCARB in consultation with a professional testing organization. Examination results shall be recorded by the Board in the record of the candidate and shall be maintained in accordance with § 9.27 (relating to inactive records).

§ 9.52. Grading compilation.

To qualify for licensure, a candidate shall receive a passing grade on each part or division of the examination. Grades received in individual parts or divisions will not be averaged. A candidate will have opportunities, subject to § 9.46(3) (relating to requirements for examination eligibility), to retake those portions of the examination which were failed.

EXAMINATION

§ 9.111. [**Dates of examination**] (Reserved).

[**The ARE shall be given on dates and in the form as made available to the Board by the NCARB.**]

§ 9.113. [**Location of examination site**] (Reserved).

[**The ARE shall be given at locations determined by the Board in conjunction with the NCARB.**]

§ 9.114. [**Due notice**] (Reserved).

[**A candidate eligible to take the examination will be given due notice of the date, time and place of examinations and will be given specific preexamination instructions. Candidates may schedule and reschedule examinations in accordance with NCARB Administration Procedures. The NCARB will notify candidates of scheduling deadlines and costs of rescheduling at the time the candidate first is scheduled to take the examination.**]

§ 9.116. [**Admittance**] (Reserved).

[**A candidate shall present his admission letter and form of positive identification for admittance to the examination. Candidates shall comply with examination procedures and conduct standards as established by NCARB.**]

§ 9.117. [**Proctors**] (Reserved).

[**The professional testing organization will arrange for proctors at an examination whose duty it is to administer the conduct of the examination. Candidates will be given specific instructions as to conduct which will be deemed to constitute suspected cheating. A candidate found to have engaged in suspected cheating shall be dismissed from the examination. Proof of the activity may result in disqualification to sit for future examinations.**]

§ 9.118. [**NCARB standard examination; transition candidate**] (Reserved).

[**(a) The examination will be the ARE in computer-administered form as adopted by the NCARB.**

(b) A candidate who did not successfully complete the entire examination in written format will be required to complete only the computer-

administered portions which were not successfully completed in written format.

(1) A candidate who has not passed both parts of Division B: Site Design on or before June 30, 1996, will be required to successfully complete the Site Planning part.

(2) A candidate who did not successfully complete Division C: Building Design on or before June 30, 1996, will be required to successfully complete the Building Planning and Building Technology parts.]

GRADING AND REVIEW

§ 9.131. [Examination grading] (Reserved).

[The ARE shall be graded using procedures developed by NCARB in consultation with a professional testing organization. Examination results shall be recorded by the Board in the record of the candidate and shall be maintained in accordance with § 9.27 (relating to inactive records).]

§ 9.132. [Grading compilation] (Reserved).

[To qualify for licensure, a candidate shall receive a passing grade on each part or division of the examination. Grades received in individual parts or divisions will not be averaged. A candidate will have unlimited opportunities, subject to § 9.46(3) (relating to requirements for examination eligibility), to retake those portions of the examination which were failed.]

[Pa.B. Doc. No. 02-524. Filed for public inspection April 5, 2002, 9:00 a.m.]

STATE BOARD OF OSTEOPATHIC MEDICINE

[49 PA. CODE CH. 25]

Sexual Misconduct

The State Board of Osteopathic Medicine (Board) proposes to adopt § 25.215 (relating to sexual misconduct) to read as set forth in Annex A.

Effective Date

This proposed regulation will be effective upon publication as an order of final-form rulemaking in the *Pennsylvania Bulletin*.

Statutory Authority

Under sections 10.1(c), 15(a)(8) and (b)(9) and 16 of the Osteopathic Medical Practice Act (63 P. S. §§ 271.10a(c), 271.15(a)(8) and (b)(9) and 271.16), the Board has authority to establish standards of professional conduct for Board regulated practitioners under its jurisdiction. These individuals include osteopathic physicians, physician assistants and respiratory care practitioners. Proposed § 25.215 identifies when sexual contact by Board regulated practitioners with patients, and under certain circumstances, immediate family members of patients, will be deemed unprofessional conduct.

Background and Purpose

It should be axiomatic that it is unprofessional conduct for a health care practitioner to engage in sexual contact with patients. Past decisions of the Board which have

been upheld by the Commonwealth Court; the Code of Ethics, as published by the American Osteopathic Association; and responsible professional publications addressing the issue denounce sexual contact between practitioner and patient. Nevertheless, complaints are filed each year by consumers who have been harmed by Board regulated practitioners who engage in this conduct.

Description of Proposed Regulation

The proposed regulation seeks to better protect patients by providing guidance to the profession and the public as to prohibited conduct relating to sexual contact between practitioners and patients. The proposed regulation would prohibit any sexual contact between a Board regulated practitioner and a current patient. The proposed regulation would further prohibit any sexual contact between a Board regulated practitioner and a former patient prior to the 2 year anniversary of the termination of the professional relationship when the Board regulated practitioner has been involved with the management or treatment of a patient for a mental health disorder. This 2-year period was developed from professional literature which indicates that an imbalance of power between health care practitioners and patients continues after the professional relationship ends.

The proposed regulation would also prohibit sexual exploitation by a Board regulated practitioner of a current or former patient or immediate family member of a patient. "Sexual exploitation" is defined by the regulation as sexual behavior that uses the trust, knowledge, emotions or influence derived from the professional relationship. The Board believes that it is appropriate to protect immediate family members from sexual exploitation by Board regulated practitioners because immediate family members are often as vulnerable as the patients.

The proposed regulation would also provide that Board regulated practitioners who engage in prohibited sexual contact with patients or former patients will not be eligible for placement in the Board's impaired professional program in lieu of disciplinary or corrective actions. The impaired professional program is unable to effectively monitor Board regulated practitioners who have engaged in sexual misconduct.

The proposed regulation would also provide that patient consent will not be considered a defense to disciplinary action in these cases. The imbalance of power inherent in the health care practitioner—patient relationship not only serves as the basis for the prohibition but also undermines the patient's ability to consent to the sexual contact as an equal. Indeed, the Board's experience in adjudicating these cases has repeatedly demonstrated the reality of the inherent imbalance of the relationship and the patient's inability to give meaningful consent to sexual contact.

Fiscal Impact and Paperwork Requirements

The proposed regulation should have no fiscal impact on the Commonwealth or its political subdivisions. Likewise, the proposed regulation should not necessitate any legal, accounting, reporting or other paperwork requirements.

Sunset Date

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

Compliance with Executive Order 1996-1

In compliance with Executive Order 1996-1, the Board extended an invitation to comment on early drafts of this proposal to numerous parties who have indicated an interest in the Board's regulatory activities. The list of these persons is available upon request from the contact person listed in this Preamble. Five physicians commented on the early version. Those commenting on the regulation seemed to agree that the sexual exploitation of patients is improper and should subject the Board regulated practitioner to disciplinary action. Some of the physicians were concerned that innocent behavior may be prohibited by the proposal and only the issue of exploitation should be addressed. Others misunderstood the language of the proposed regulation, and were concerned that the proposal would prohibit a sexual relationship with any patient for 2 years following the physician-patient relationship. The Board is satisfied that the current proposal adequately protects the public without unduly burdening Board licensees.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 27, 2002, the Board submitted a copy of this proposed regulation to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Professional Licensure Committee and the Senate Consumer Protection and Professional Licensure Committee. In addition to submitting the proposed regulation, the Board has provided IRRC and the Committees with a copy of a detailed regulatory analysis form prepared by the Board 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 a portion of the proposed regulation, it will notify the Board 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 the Board, the Governor and the General Assembly to review these objections before final publication of the proposed regulation.

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed regulation to Amy L. Nelson, Counsel, State Board of Medicine, 116 Pine Street, P. O. Box 2649, Harrisburg, PA 17105-2649, within 30 days of publication of this proposed regulation.

DANIEL D. DOWD, Jr., D.O.,
Chairperson

Fiscal Note: 16A-539. 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 25. STATE BOARD OF OSTEOPATHIC MEDICINE

Subchapter D. MINIMUM STANDARDS OF PRACTICE

§ 25.215. Sexual misconduct.

(a) *Definitions.* The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

Immediate family member—A parent or guardian, child, sibling, spouse or other family member with whom a patient resides.

Sexual behavior—Any sexual conduct which is nondiagnostic and nontherapeutic; it may be verbal or physical and may include expressions of thoughts and feelings or gestures that are sexual in nature or that reasonably may be construed by a patient as sexual in nature.

Sexual exploitation—Any sexual behavior that uses trust, knowledge, emotions or influence derived from the professional relationship.

(b) *Unprofessional conduct: sexual exploitation.* Sexual exploitation by a Board regulated practitioner of a current or former patient, or of an immediate family member of a patient, constitutes unprofessional conduct, is prohibited, and subjects the practitioner to disciplinary action.

(c) *Unprofessional conduct: sexual behavior.* Sexual behavior that occurs with a current patient constitutes unprofessional conduct, is prohibited, and subjects the practitioner to disciplinary action.

(d) *Sexual behavior prior to 2-year anniversary.* When the practitioner is involved with the management or treatment of a patient for a mental health disorder, sexual behavior with that former patient which occurs prior to the 2-year anniversary of the termination of the professional relationship constitutes unprofessional conduct, is prohibited, and subjects the practitioner to disciplinary action.

(e) *Impaired professional program.* A practitioner who engages in conduct prohibited by this section will not be eligible for placement into an impaired professional program in lieu of disciplinary or corrective actions.

(f) *Consent.* Consent is not a defense to conduct prohibited by this section.

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