PROPOSED RULEMAKING

DELAWARE RIVER BASIN COMMISSION

[25 PA. CODE CH. 901]

Proposed Amendments to the Comprehensive Plan and Water Code Relating to the Operation of Lake Wallenpaupack During Drought Watch, Drought Warning and Drought Conditions

The Delaware River Basin Commission (Commission) will hold a public hearing to receive comments on proposed amendments to the Commission's *Comprehensive Plan* and *Water Code* to incorporate a revised drought operating plan for the Lake Wallenpaupack Reservoir and Hydroelectric Facility, located in Pike County in the Lackawaxen Watershed. The reservoir and facility are currently owned and operated by PPL Holtwood, LLC (PPL). The proposed rulemaking would increase by 12,500 acre-feet, or 4.1 billion gallons, the amount of Lake Wallenpaupack water available to the Commission for flow augmentation in the main stem Delaware River during drought watch, drought warning and drought emergency conditions, as defined in Section 2.5.3 of the Water Code and Docket D-77-20 CP (Revision 4), dated April 28, 1999. The minimum lake elevation to be maintained during drought conditions B the target elevation for December 1 B would decrease from 1,170 feet to 1,167.5 feet. The right to use as much as 4.1 billion gallons of Lake Wallenpaupack water to augment Delaware River flows during drought would be deemed to satisfy up to 10,000 acre-feet of the Commission's consumptive use replacement requirement for the Martins Creek and Lower Mount Bethel generating facilities and future facilities that PPL (or its successors in interest) might construct. That is, under the proposed drought plan, the Commission would release PPL (and its successors) from the requirement that it provide up to 10,000 acre-feet or 3.3 billion gallons of dedicated storage to replace, gallon for gallon, water consumptively used by the entity's existing and future generating facilities when the basin is in drought watch, drought warning or drought operations.

Dates

The public hearing will be held on Wednesday, October 16, 2002, during the Commission's regular business meeting, which will begin at 1:30 p.m. Persons wishing to testify are asked to register in advance with the Commission Secretary, (609) 883-9500 ext. 203. Written comments will be accepted through Friday, November 15, 2002. Comments must be received, not merely postmarked, by that date.

Addresses

The public hearing will be held at the Commission's offices, 25 State Police Drive, West Trenton, NJ. Written comments should be addressed to the Commission Secretary at Delaware River Basin Commission, P. O. Box 7360, West Trenton, NJ 08628-0360.

Further Information, Contacts

A draft resolution enacting the proposed amendments to Sections 2.5.5 and 2.5.6 of the *Water Code* and the current text of the *Water Code* (which is incorporated in the *Comprehensive Plan*) may be viewed on the Commission's website at http://www.drbc.net. Contact Pamela M. Bush at (609) 883-9500 ext. 203, with questions about the proposed rulemaking change or the rulemaking process.

It is proposed to amend Article 2, Sections 2.5.5 and 2.5.6 of the Commission's *Water Code* (25 Pa. Code § 901.2) (which is incorporated in the Commission's *Comprehensive Plan*). References to "drought watch" are noted in brackets to reflect that the "drought watch" condition, defined by Docket D-77-20 CP (Revision 4), has not to date been incorporated in the rule. The "drought watch" condition is not proposed to be incorporated in the rule at this time. However, for the period of effectiveness of the relevant provisions of Docket D-77-20 CP (Revision 4), the proposed rule changes would be applied to the "drought watch" condition where noted.

The following sentence is added at the end of the first paragraph of Section 2.5.5:

> Lake Wallenpaupack also may be utilized to complement the drought management operations of the New York City reservoirs during "drought warning" [and drought watch] conditions as defined by Figure 1 in Section 2.5.3A.

The second paragraph of Section 2.5.5 (beginning "Lake Wallenpaupack and the Mongaup reservoirs . . .") is revised as follows, beginning with the third sentence:

> During "drought" and "drought warning" [and drought watch] conditions, as defined in Figure 1 of Section 2.5.3.A of the Water Code, the power companies shall release water only in accordance with Commission direction. The Lake Wallenpaupack elevation schedules during normal, drought warning, [drought watch,] and drought conditions are set forth in Table 2. The lake elevations in Table 2 have been established to preserve the recreation values and other operational benefits of the lake while also providing water storage to be utilized at the direction of the Commission during the Commission's drought operations as set forth in this section and in Section 2.5.6. The utilization of Lake Wallenpaupack at the direction of the Commission during the Commission's drought operations shall be conditioned upon the following:
>
> 1. Utilization of Lake Wallenpaupack during drought warning [and watch] shall be consistent with PPL's FERC license and power generation requirements as well as with lake and downstream needs.
>
> 2. During drought, PPL may, at the Commission's direction, operate for power production when the lake elevation is above the following first-of-month "normal elevation" as defined in Table 2.
>
> 3. During a declared power emergency, PPL may operate for power production regardless of lake elevation.
>
> 4. Subject to the concurrence of the Commission, in response to changing electrical demand patterns, PPL may revise the lake elevations for "normal conditions" shown in Table 2.

Table 2 of Section 2.5.5 is revised in its entirety, as follows:

TABLE 2. LAKE WALLENPAUPACK ELEVATION SCHEDULES

Day	*Normal Conditions*	*Drought Warning [and Watch]*	*Drought*
June 1	1187.0	1187.0	1187.0
July 1	1185.0	1185.0	1185.0
August 1	1183.0[1]	1183.0[1]	1183.0[1]
September 1	1181.0	1180.0	1179.0
October 1	1179.0	1176.0	1175.0
November 1	1181.0	1172.0	1171.0
December 1	1182.0	1167.5	1167.5
January 1	1183.0	1170.1	1170.1
February 1	1181.5	1173.3	1173.3
March 1	1180.0	1175.6	1175.6
April 1	1182.3	1182.3	1182.3
May 1	1185.6	1185.6	1185.6

[1] The existing FERC license for the Lake Wallenpaupack Hydroelectric Project requires that, except when flood waters are being stored, the maximum elevation of the lake shall be limited to elevation 1,182.0 between August 1 and November 15 of each year (Article 41). In its application to the FERC for a new license, PPL will seek to include the drought condition lake elevation schedules in Table 2 on a permanent basis, including a lake elevation of 1,183.0 on August 1. In the interim, until the FERC issues a new license, PPL will request annual approval from the FERC to operate the lake in accordance with Table 2 during the August 1-November 15 period. PPL will notify the Commission of the FERC's response to each annual request.

Subsection C.3.c is added to Section 2.5.6, as follows:

c. The Commission may direct releases from Lake Wallenpaupack subject to the same conditions as applied to operation during lower basin drought in D.3.e, except that utilization of Lake Wallenpaupack during lower basin drought warning shall be consistent with PPL's FERC license and power generation requirements as well as with lake and downstream needs.

At Subsection D.3.b.iv of Section 2.5.6, the volume of storage assigned to Lake Wallenpaupack is revised to 33.9 bg from 29.81 bg.

A second sentence is added to Subsection D.3.e.i of Section 2.5.6 as follows:

During drought, PPL may, at the Commission's direction, operate for power production when the lake elevation is above the following first-of-month "normal elevation" as defined in Table 2 and during a declared power emergency regardless of lake elevation.

PAMELA M. BUSH,
Secretary

Fiscal Note: 68-42. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART V. DELAWARE RIVER BASIN COMMISSION

CHAPTER 901. GENERAL PROVISIONS

§ 901.2. Comprehensive Plan and water quality.

The Comprehensive Plan regulations as set forth in 18 CFR Part 401, Subpart **[(2001)] 2002** and the Water Code and Water Quality Standards as set forth in 18 DFR Part 410 **[(2001)] 2002** are hereby incorporated by reference and made a part of this title.

[Pa.B. Doc. No. 02-1733. Filed for public inspection October 4, 2002, 9:00 a.m.]

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) to read as set forth in Annex A. The proposed rulemaking includes requirements relating to the bacteriological monitoring of water at public bathing beaches to protect the public health while swimming and bathing.

A. *Purpose of the Proposed Rulemaking*

The proposed rulemaking is intended to provide enhanced public health protection to individuals who bathe and swim at this Commonwealth's public bathing beaches. The proposed rulemaking specifies the requirements for notifying the public when a bathing beach is closed, the type of bacteriological water testing that must be done, the level of disease-carrying organisms in the water that requires a beach to be closed, the procedures for collecting water samples and the laboratory testing procedures. Additional requirements for beaches located on Lake Erie are also included. The effect of the proposed rulemaking will be improved detection of disease-carrying organisms in bathing beach water and reduced public exposure to these organisms.

The proposed rulemaking applies to 242 bathing beaches in this Commonwealth that are permitted by the Department, including those located at State parks, community locations and privately-owned campgrounds, resorts and camps. The scope of the proposed rulemaking includes public bathing beaches that have a fresh water source or flow, including natural and manmade lakes and ponds and beaches located on rivers and streams.

The proposed rulemaking is consistent with recommendations of the Environmental Protection Agency (EPA) relating to bacteriological testing of water at public bathing beaches. The EPA recommends that water at public bathing beaches be tested each week for Escherichia coli (E. coli) to detect disease-carrying organisms in the water that may cause human illness such as gastroenteritis, salmonellosis, cholera, respiratory infections, hepatitis, giardiasis, dysentery, cryptosporidiosis, parasitic worms and lysteria. These illnesses can be mild to very serious or deadly. Ingesting even a small mouthful of contaminated water has the potential of causing any of these illnesses. Young children are especially at risk due to the greater likelihood of swallowing bathing water. Children, the elderly and people with weakened immune systems have a greater chance of getting sick if they come in contact with contaminated water.

The most frequent sources of disease-carrying organisms in bathing water are sewage overflows, animal waste, polluted storm runoff, sewage treatment plant and septic system malfunctions, boating waste, trash, pesticides and fertilizers. Pollution is also much higher during and following a rainstorm because water draining into the beach may be carrying sewage from overflowing

sewage treatment systems. By frequent water testing, disease-carrying organisms that may be harmful to humans, can be detected earlier and the source can be located and either corrected or a beach can be closed until the contamination is at a nonharmful level.

On October 10, 2000, the Beaches Environmental Assessment and Coastal Health Act (Beach Act) (Pub. L. No. 106-284), was passed and amended the Federal Water Pollution Control Act (33 U.S.C.A. §§ 1251—1387) to include significant new beach protections. The Beach Act applies to coastal beaches on the Great Lakes, including those at Presque Isle State Park in Erie County. The Beach Act requires that all states with coastal beaches adopt either the E. coli or the enterococci testing standard for Great Lakes beaches, as well as public notification of beach closure requirements. The Federal statutory deadline for adopting state regulations is April 2004. The new Federal law governs only Lake Erie beaches in this Commonwealth; however, the proposed rulemaking extends the same level of protection to all public bathing beaches in this Commonwealth to provide a more effective level of public health protection to all individuals using any of this Commonwealth's public bathing beaches. Consistent with the Commonwealth's commitment to enhance tourism, the proposed rulemaking supports tourism by providing increased public health protections at this Commonwealth's beaches.

A comparison of requirements and practices of several other states was completed by the Department. States such as Illinois, Ohio and Michigan are already following the EPA standard for E. coli testing. Other states such as New York and Indiana are in the process of changing their laws and regulations to require the E. coli testing method.

Several formal and informal meetings and discussions have been held over the past 18 months with consumer protection advocates, campground operators, municipal beach operators, health care professionals and local government agencies to present and discuss the Department's proposed rulemaking. A public meeting was held in August 2002 to review the proposed rulemaking, with invitations sent to 26 affected consumer, health care professional, beach operator and municipal organizations. To further the effectiveness of the proposed rulemaking, the Department is coordinating the proposed rulemaking with the Department of Environmental Protection to assure compatibility with other Commonwealth regulations relating to water quality. The Department has also discussed the proposed rulemaking with the Department of Conservation and Natural Resources to coordinate implementation issues relating to the State park beaches.

B. *Summary of the Proposed Rulemaking*

The proposed rulemaking specifies the requirements for notifying the public when a bathing beach is closed, the type of bacteriological water testing that must be done, the level of disease-carrying organisms in the water that requires a beach to be closed, the procedures for collecting water samples and the laboratory testing procedures and documentation. Additional requirements for a beach located on Lake Erie are also included. Following is a summary of the specific proposed amendments:

Section 18.1. Definitions. The Department is proposing to add a definition of "local health department" to clarify the meaning of this term as used in § 18.30(h) (relating to water samples). The definition is based on the Local Health Administration Law (16 P. S. §§ 12001—12028). It tracks the definition of "local health department" found in other Department regulations. See 28 Pa. Code Chapter 27 (relating to communicable and noncommunicable diseases).

Section 18.28. Bathing beach contamination. Subsection (a) includes proposed amendments relating to the requirements for notifying the public if a beach is closed. The Department is proposing amendments to specify the size and the location of the posted signs. This requirement is consistent with the EPA's public notice requirement under the Beach Act. In discussions with this Commonwealth's beach operators, while public notice of beach closure is generally provided, the method of providing notice of closure and the actual signage varies across this Commonwealth. Some beaches post closings on websites as well as with visual signs at the beach. The Department is proposing to regulate the size and location of the signs to give clear public notice of a beach closing. The sign need only inform the public that the beach is closed and need not specify the reason for the closing.

Subsection (b)(2) proposes to amend the type of water testing from a fecal coliform test to an E. coli test in accordance with recommendations of the EPA. The current paragraph requires a weekly fecal coliform test. This paragraph has been in effect since 1971. The proposed amendment would not change the frequency of testing that is required, but rather change the type of laboratory test that must be completed. The proposed amendment would not require permittees to collect additional samples of water.

The Department is proposing this amendment in the type of laboratory test based on current information and data that establishes the E. coli test to be better at identifying disease-carrying organisms that may cause a risk to humans than the currently required fecal coliform test. Both the fecal coliform and the E. coli test are indicators that the water has been contaminated with disease-carrying organisms from sewage or human or animal waste. However, the data demonstrates that the E. coli test is a more reliable indicator of the presence of organisms that cause human illness than the fecal coliform test.

E. coli is a type of fecal coliform bacteria that is commonly found in the intestines of animals and humans. Because it lives in the intestines, the presence of E. coli in water is a strong indicator that the water has been contaminated with sewage or human or animal waste. This waste may carry other kinds of disease-causing organisms and may indicate the need for additional testing. Most of the hundreds of strains of E. coli are perfectly harmless and live inside human intestines and actually aid in digestion. However, one particular strain, E. coli 0157:H7, can cause an infection that may result in serious diarrhea and abdominal cramps and is potentially fatal in small children. In accordance with the EPA recommendations and research, the fecal coliform test that is currently required is less effective than the E. coli test at establishing the presence of disease-carrying organisms.

The EPA has conducted studies at marine and freshwater bathing beaches designed to determine if swimming in sewage and waste contaminated water carries a health risk for bathers, and, if so, for what type of illness. The significant swimming-associated rates for gastroenteritis were always observed at the more polluted beaches at each study location. Statistically significant swimming-associated gastroenteritis rates were not observed at any of the relatively unpolluted beaches. The research confirmed that total coliforms and fecal coliforms showed

very weak correlations to gastroenteritis. The research showed that testing for either E. coli or enterococci did correlate highly to swimming-associated gastroenteritis in freshwater to indicate that these two tests are equally efficient for monitoring water quality in fresh water. The Department is proposing to use the E. coli test versus the enterococci test because the E. coli test is more available and less costly than the enterococci test; further research has proven that there is no greater level of protection in the enterococci test for freshwater beaches. The EPA research supports the premise that E. coli has a very strong correlation between positive results and incidence of people getting sick. The correlation for fecal coliforms, according to this research, is close to zero.

Subsection (b)(2) includes a proposed amendment to the level requiring a necessary beach closing from 1,000 per 100 milliliters for fecal coliform to 235 per 100 milliliters for E. coli in accordance with recommendations of the EPA. The EPA recommends various levels of protection based on water usage. The level suggested by the EPA for a designated freshwater beach area is 235 per 100 milliliters. The Department is proposing to adopt this standard. The EPA has other protection levels for marine water, infrequent bathing use and for other water uses such as boating or water sports which are not under the authority of the Department's public bathing place program.

Subsection (b)(3) includes a proposed amendment to the level requiring a necessary beach closing from 200 per 100 milliliters for fecal coliform to a level that exceeds a geographic mean of 126 per 100 milliliters for E. coli for any 30-day period, consistent with the recommendations of the EPA. This requirement for a study of the test results over a 30-day period is not new. It is required so that a comprehensive look at the test results over a 1-month period can be studied in addition to the 1-day levels. This is necessary to detect and correct long-term contamination problems at the beach.

Section 18.30. Water samples. Proposed subsection (b) is new. It includes a proposed amendment to require a sample be taken each year within 1 week prior to opening the beach for the season for all beaches. This is important so that any contamination that may have occurred over the fall, winter and spring seasons be detected prior to public use of the beach for the swimming season. The text of current subsection (b) is redesignated as subsection (c).

Proposed subsection (d) is also new. It addresses all bathing beaches, including those located on Lake Erie, and specifies the location within the swimming area from which the water sample must be drawn. Proposed subsection (d) would require the sample to be taken from water that is approximately 30 inches in depth and half-way down between the surface and the bottom of the water. This is consistent with current practice. Subsection (d)(3) would clarify the Department's existing authority to require additional analysis and water samples included in current subsection (b) (proposed subsection (c)). Proposed subsection (d)(3) states that the Department may require additional samples to be taken based on factors such as bather load, weather conditions and bacteriological history.

Proposed subsection (e) is new and applies only to Lake Erie beaches. The proposed requirements are mandated for Lake Erie under the Beach Act. Proposed subsection (e) would address multiple samplings for each Lake Erie beach applying an arithmetic mean and would prohibit sampling during high wave activity. These requirements have already been partially implemented by the Erie County Health Department for the 2002 swimming season. Proposed subsection (e)(4) would also allow the Erie County Health Department to adopt additional standards that are more stringent than the proposed rulemaking.

Proposed subsection (f) is new and would clarify that swimming pools are still sampled and monitored in accordance with the current regulations requiring total coliform testing. No changes to the swimming pool requirements are included in this proposed rulemaking. The total coliform test for swimming pools is considered appropriate for swimming pools because of the different nature of the water. Swimming pool water is chemically treated and disinfected continuously. Bathing beaches must rely on the natural water flow to remove contamination. Therefore, the risk of disease transmission is much lower in a swimming pool than at a beach.

The current subsection (c) is redesignated as subsection (g).

Proposed subsection (h) is new. It includes a requirement for laboratories to report test results exceeding the limits in this section to the appropriate district office of the Department and to the appropriate local health department. This is important so the Department, or local health department in whose jurisdiction the bathing beach is located, can monitor compliance with this chapter and address long-term problems at bathing beaches. Most laboratories currently report in accordance with this requirement.

Section 18.31. Laboratory testing. Subsection (a) includes a proposed amendment requiring laboratories to perform tests of water samples in accordance with the 20th edition of the *Standard Methods for the Examination of Water and Wastewater*, as amended, or with another method approved by the EPA. This is necessary to stay abreast with current methods of water testing.

The Department proposes to add subsection (b) to clarify existing language in current subsection (a) relating to laboratory documentation of the method used to complete the tests of the water samples.

C. *Statutory Authority*

The Department's authority to promulgate regulations related to public swimming and bathing places is established under the Public Bathing Law (35 P. S. §§ 672—680d) and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20).

D. *Persons and Entities Affected*

The proposed rulemaking would apply to 242 public bathing beaches that have a fresh water source or flow, including natural and manmade lakes and ponds and beaches located on rivers and streams, which are permitted by the Department. Bathing beaches located at State parks, community locations and privately-owned campgrounds, resorts and camps would be included. Specifically, those bathing beaches include: 47 State park beaches operated by the Department of Conservation and Natural Resources; 77 beaches operated by private campgrounds and resorts; 50 beaches operated by organized camps; 44 beaches operated by municipalities; and 4 Army Corps of Engineer Beaches. Of the 242 bathing beaches, the majority are located in the northern part of this Commonwealth with 40% in the northeast, 24% in the northwest and 10% in north central region of this Commonwealth. Only 26% of the bathing beaches are located in the southeast, southwest and south central parts of this Commonwealth.

E. *Cost and Paperwork Estimates*

The proposed rulemaking will have little fiscal effect on the Commonwealth, local government, the private sector or on the general public. The requirement for the frequency of water sampling has not been changed. There will be no cost increase for completing the E. coli test as opposed to the currently required fecal coliform test. The Department conducted a study of laboratory test fees in August 2002. Thirty-eight laboratories across this Commonwealth, New Jersey, Maryland, Ohio and Delaware that are used currently to complete water testing were contacted to compare fees for the new E. coli tests with the current fecal coliform tests. Of the 38 laboratories contacted, 19 charged the same for each test. Three charged slightly less for the E. coli test than the coliform test and three charged slightly more for the E. coli test than the coliform test. Ten of the laboratories do not currently conduct the E. coli tests. The Department will contact these laboratories, explain the new Commonwealth requirements and encourage the provision of the new tests. It is fully expected that additional laboratories will offer the E. coli tests once public demand is present.

It is not anticipated that there will be additional beach closings due to the new testing that would result in loss to the local economy or beach operator revenue. A study conducted by the Department of Environmental Protection in 2001-2002 of State park beaches comparing the results of fecal coliform and E. coli testing shows that, at the majority of beaches, similar numbers of closings would occur under either testing method. The Department does not anticipate a large number of additional closings. In the Department of Environmental Protection study, in a few incidences (6% of the total sample of 253), the exceedance level was reached for E. coli but not for fecal coliform. This data may indicate that there may be a few additional beach closures using the E. coli test. However, the public health protection provided by requiring the more reliable E. coli tests outweighs the minimal economic loss of a few potential added beach closures.

There is no additional paperwork required by the proposed rulemaking. While the proposed rulemaking would require laboratories to report positive results to the Department, or the local health department within whose jurisdiction the bathing beach is located, most laboratories already comply with this reporting requirement.

F. *Effective/Sunset Dates*

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

No sunset date has been established. The Department will monitor the effectiveness of these regulations on an ongoing basis through its annual health and safety inspections of public swimming and bathing places.

G. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 25, 2002, the Department submitted a copy of this proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Health and Human Services Committee and the Senate Public Health and Welfare Committee. In addition to submitting the proposed rulemaking, the Department has provided IRRC and the Committees with a copy of a detailed 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 rulemaking, it will notify the Department 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 Department, the General Assembly and the Governor of objections raised.

H. *Contact Person*

Interested persons are invited to submit written comments, suggestions or objections relating to the proposed rulemaking to Dennis C. Wilson, Environmental Health Administrator, Department of Health, Bureau of Community Health Systems, Room 628 Health and Welfare Building, P. O. Box 90, Harrisburg, PA, 17108-0090, (717) 787-4366, within 30 days after publication of this notice in the *Pennsylvania Bulletin*. Persons with a disability may submit comments, suggestions or objections to Dennis Wilson in alternative formats, such as by audiotape or Braille, or by using V/TT (717) 783-6514 or the Pennsylvania AT&T Relay Services at (800)654-5984 (TT) for persons with speech or language impairments.

Persons with a disability who would like to obtain this document in an alternative format should contact Dennis Wilson so that necessary arrangements may be made.

ROBERT S. ZIMMERMAN, Jr.,
Secretary

Fiscal Note: 10-170. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 28. HEALTH AND SAFETY

PART II. LOCAL HEALTH

CHAPTER 18. PUBLIC SWIMMING AND BATHING PLACES

GENERAL PROVISIONS

§ 18.1. Definitions.

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

* * * * *

***Local health department*—Each county department of health under the Local Health Administration Law (16 P. S. §§ 12001—12028), and each department of health in a municipality approved for a Commonwealth grant to provide local health services under section 25 of the Local Health Administration Law (16 P. S. § 12025).**

* * * * *

WATER SUPPLY

§ 18.28. Bathing beach contamination.

(a) Use of a bathing beach found to be contaminated shall be discontinued until written approval **to reopen the bathing beach for swimming or bathing** is obtained from the Department. **The permittee shall prominently post legible signs measuring at least 8″ by 11″ at all entrances to the bathing beach area informing the public that the bathing beach is closed and that swimming or bathing is prohibited.**

The approval will be given by the Department when the Department finds that the waters of the bathing beach are no longer contaminated.

(b) The water in bathing beaches will be considered contaminated for bathing purposes when one of the following conditions exists:

* * * * *

(2) **[The fecal coliform density of a sample collected at a bathing beach exceeds 1,000 per 100 milliliters.] The E. coli density of a water sample taken from the bathing beach exceeds 235 per 100 milliliters.**

(3) **[The fecal coliform density in at least five consecutive samples of the water taken over not more than a 30-day period exceeds a geometric mean of 200 per 100 milliliters.] The E. coli density in all water samples taken from the bathing beach, in any 30-day period during the bathing beach's operating season, exceeds a geometric mean of 126 per 100 milliliters.**

§ 18.30. Water samples.

* * * * *

(b) **A sample shall be taken within 1 week prior to the opening of the bathing beach for the season.**

(c) * * *

(d) Bathing water shall be sampled in accordance with the following requirements:

(1) Each sample shall be taken from water that is approximately 30 inches deep and at a midpoint between the bottom and the surface of the water.

(2) Each sample shall be tested individually for E. coli in accordance with § 18.31.

(3) The Department may require additional samples be taken based upon the size of the bathing area, bather loads, weather conditions, the bacteriological history of the water, as well as other factors that may influence the quality of the water.

(e) For a bathing beach located on Lake Erie, the bathing water shall be sampled in accordance with subsections (a), (b) and (d) and the following additional requirements:

(1) At least three samples of water shall be taken from each beach at least once a week. One sample shall be taken from approximately 50 feet from each end of the beach and the third sample shall be taken from the center of the beach.

(2) The arithmetic mean of the three samples from each beach shall be used to determine if the beach water is contaminated using the standards described in § 18.28 (relating to bathing beach contamination).

(3) A sample may not be taken when the beach is closed due to high wave activity, but shall be taken the day the beach is reopened for swimming and bathing.

(4) The Erie County Department of Health may impose additional requirements that are equal to or more stringent than the requirements of this section.

(f) For a swimming pool, specialty pool, spa and hot tub, the bathing water shall be sampled at least once a week from the area of average depth, in accordance with § 18.27 (relating to swimming pool contamination).

* * * * *

[(c)] (g) * * *

(h) The laboratory conducting the bacteriological testing shall report test results exceeding the criteria specified in §§ 18.27 and 18.28 (relating to swimming pool contamination; and bathing beach contamination) to the appropriate district office of the Department or the local health department within 24 hours of the availability of the laboratory result.

§ 18.31. Laboratory testing.

(a) Laboratory tests of water **samples** shall be performed by competent personnel **at an environmental laboratory that is registered by the Department of Environmental Protection** in accordance with the procedure provided in the **[12th edition of]** *Standard Methods for the Examination of Water and Wastewater*, **20th edition,** published jointly by the American Public Health Association and the American Water Works Association**, as amended, or in accordance with a method approved by the Environmental Protection Agency for the testing of water samples. [Conformity to these standards shall be evidenced by a statement from the laboratory to such effect.]**

(b) The laboratory shall document the method used to complete the tests of the water samples and make the documentation available to the Department upon request.

[Pa.B. Doc. No. 02-1734. Filed for public inspection October 4, 2002, 9:00 a.m.]

DEPARTMENT OF PUBLIC WELFARE

[55 PA CODE CHS. 178 AND 181]

Resource Provisions for Categorically NMP-MA and MNO-MA; Income Provisions for Categorically Needy NMP-MA and MNO-MA

The Department of Public Welfare (Department) proposes to amend Chapters 178 and 181 (relating to resource provisions for categorically NMP-MA and MNO-MA; and income provisions for categorically needy NMP-MA and MNO-MA) under the authority of sections 201(2), 403(b), 441.1 and 442.1 of the Public Welfare Code (62 P. S. §§ 201(2), 403(b), 441.1 and 442.1); sections 1917(c) and 1924 of Title XIX of the Social Security Act (42 U.S.C.A. §§ 1396p(c) and 1396r-5); and Federal regulations for posteligibility treatment of income of institutionalized individuals found in 42 CFR 435.725(c)(4)(ii) and (d) and 435.832(c)(4)(ii) and (d) (relating to posteligibility treatment of income of institutionalized individuals in SSI States: application of patient income to the cost of care; and post-eligibility treatment of income of institutionalized individuals: application of patient income to the cost of care).

Purpose

The purpose of this proposed rulemaking is to codify rules that revise the Medical Assistance (MA) eligibility requirements for applicants and recipients in need of long-term care (LTC) services both in the community and in an institutional setting. This proposed rulemaking revises the financial requirements to qualify for MA payment for LTC services and posteligibility calculation of the amount of income the MA recipient in LTC facilities is required to contribute toward the cost of institutional care.

Background

The Department is committed to administering an efficient and effective MA program. The Department wants to ensure access to quality health care for its most vulnerable citizens, including those who require LTC services.

Over the past year, the Commonwealth, as well as many other states, has experienced a significant increase in costs under the MA Program. No immediate relief is in sight. This fiscal pressure has required states to examine closely all expenditures and evaluate and prioritize what programs can continue to be fully funded.

The Department has taken steps to contain costs in past years through the implementation of managed care and the institution of management controls to avoid payments for services not medically necessary. Despite these changes, expenses in the MA Program continue to grow.

MA is a means-tested Federal-State funded program designed to provide health care benefits to individuals with limited income and resources. While the Federal government provides a baseline of what eligibility groups must be covered and what benefits must be provided in order for states to receive Federal financial participation, states may choose to expand eligibility to additional groups as well as provide additional services. Historically, the Commonwealth has adopted most of the eligibility and service options under Federal law and exercised various options to use less restrictive methodologies to determine eligibility. As a result, the Commonwealth is administering one of the most generous MA Programs in the country.

In reviewing program areas to help reduce the significant growth in expenditures, the Department has compared its current MA Program requirements with the requirements the Federal government mandates as well as what other states provide. As a result of this comparison, options were identified that would bring Pennsylvania's program more in line with the Federal baseline as well as closer to what other states provide.

Despite the increasing costs, the Department, unlike its counterparts in other states, has not limited service coverage. Instead, the Commonwealth's approach has been to try to protect benefits for those in greatest financial need while looking at those areas of the program where individuals have some existing income or resources to pay for at least part of their care.

Current escalating cost in the MA Program compels the Department to make changes that will control costs without compromising access to LTC services. While taking steps to reduce coverage causes concern, taking less drastic action at this point to minimize growth now will hopefully mitigate the need to limit coverage or eliminate entire eligibility groups. These revisions target eligibility rules that are more generous than required by Federal statute or regulation. Under current policy, some individuals are able to divert available resources to avoid paying for LTC. This proposed rulemaking will help maintain the current level of coverage for current recipients and require those with available resources to assume greater financial responsibility for their care.

This proposed rulemaking implements four changes to current policy related to eligibility for services for LTC under the MA Program. The first revision changes the method of computing available income and resources between spouses by implementing the Income-First Rule. This includes an expansion of the definitions to delineate the terms used to implement the Income-First Rule. (See §§ 178.2 and 178.124(b)(2) (relating to definitions; and resource eligibility for the institutionalized spouse.) The second revision expands the circumstances when the ineligibility period for services for LTC under the MA Program when an applicant or recipient transfers a resource and fair market value is not received. (See §§ 178.104(d) and 178.174(d) (relating to disposition of assets and fair consideration provisions for transfers on or after July 30, 1994; and disposition of assets and fair consideration provisions for transfers on or after July 30, 1994).) The third revision limits the amount of unpaid medical expenses owed by an MA recipient that is allowed as an income deduction when determining contribution toward the cost of LTC services. (See § 181.452(d)(5)(iii) (relating to posteligibility determination of income available from an MA eligible person toward the cost of care).) The final revision eliminates an optional income deduction that is currently provided for maintenance of a home when the LTC recipient's stay in the LTC facility is expected to be less than 6 months. (See § 181.452(d)(6).)

Income-First Rule

Background

The Medicare Catastrophic Coverage Act of 1988 (MCCA) (42 U.S.C.A. § 1396r-5) included provisions that protect the spouse living at home (called the community spouse (CS)) from having her resources depleted when the other spouse (called the institutionalized spouse (IS)) is admitted to an LTC facility. Until the MCCA, Federal standards often left a spouse living at home destitute, the couple's assets drained to qualify the spouse in the institution for MA. The provisions in MCCA responded to this problem. MCCA added section 1924 to Title XIX of the Social Security Act (42 U.S.C.A. § 1396r-5), revising the MA statutory standards for providing the CS with additional income to bring her up to the protected level. These requirements are known as the "spousal impoverishment" provisions. These provisions govern the treatment of assets (income and resources) of the couple for determining MA eligibility and allow for the provision of additional income to the CS.

The provisions of 42 U.S.C.A. § 1396r-5 require that a resource assessment be completed when one spouse is admitted to an LTC facility. The total available resources owned by the couple, both jointly and individually, on the date of admission are determined. A determination is made of the CS's share of the couple's total resources, generally one-half of the total subject to the minimum and maximum resource standards consistent with section 1924(c) of the Social Security Act. The remaining resources are considered available to the IS.

In addition to preserving resources for the CS, the requirements of MCCA were designed to ensure that the CS has sufficient income to meet basic monthly needs. Section 1924(d) of the Social Security Act requires the establishment of a minimum monthly maintenance needs

allowance for the CS. The minimum monthly maintenance needs allowance is an annually updated figure set to a level that is 1/12th of 150% of the official Federal poverty level for a family of two. If the CS's income is less than the minimum monthly maintenance needs allowance, states may adopt a method to permit the amount of the shortfall to be met from the income or resources of the IS in accordance with section 1924(d)(1)(B) and (f)(2)(A)(iii) of the Social Security Act.

The Department's current regulations provide that the income-first method is to be used for providing the CS with additional income to bring her up to the protected level. (See 55 Pa. Code §§ 178.124(b) and 181.452.) This income transfer must occur before additional resources can be protected to provide the CS with income. Current regulations, however, do not conform to current practice which is based on the provisions of a settlement agreement in *Hurly v. Houstoun*, C. A. No. 93-3666 (U. S. Dist. Ct. E. D. Pa.) In *Hurly*, plaintiffs challenged the Department's regulations implementing section 1924(d) of the Social Security Act, contending that the income-first rule did not comply with Federal law. As a result of a settlement reached between plaintiffs and the Department in June 1996, the Department revised its procedures. The Department uses an "annuity rule" which permits the couple to use resources to purchase an annuity that will provide the CS with the additional income that she is permitted. At the time the *Hurly* settlement was reached, there were no Federal regulations to interpret the Federal statute.

On September 7, 2001, the United States Department of Health and Human Services issued a notice of proposed rulemaking allowing states to choose either the income-first or resource-first method to determine how the CS will be provided with additional income. (See 66 FR 4676.) Thereafter, the United States Supreme Court decided that the income-first rule was a reasonable interpretation of section 1924(d) of the Social Security Act. See *Wisconsin Department of Health and Family Services v. Blumer*, 534 U. S. 952 (2002). Based upon these developments, the Department will restore the income-first policy which is set forth in the current regulations including certain technical amendments to improve clarity.

Proposed Rulemaking

This proposed rulemaking eliminates the Commonwealth's Annuity Rule procedure and implements the income-first method when determining how the CS is provided with additional income—the Federal term is the "CS monthly income allowance." Using the income-first rule takes into account the anticipated monthly contribution of income from the IS to the CS to bring the CS's income up to the protected income level. The monthly contribution of income from the IS to the CS is considered before any additional resources can be allocated to the CS for the purpose of generating income. These resources are intended to be used to help pay for the cost of LTC services until the IS is eligible for MA. This method eliminates the option for a couple to automatically preserve additional resources to purchase an annuity to generate monthly income for the CS.

Partial Month of Ineligibility

Background

Section 1917(c) of the Social Security Act (42 U.S.C.A. § 1396p(c)) requires a period of ineligibility for MA coverage of LTC services when the applicant or recipient or his spouse transfers resources for less than fair market value within a specified look-back period. The period of ineligibility is called the penalty period or disqualification period. The length of the penalty period is calculated by dividing the uncompensated value of all transferred assets by the current average monthly rate for private nursing facility care (NFC) at the time of application for MA. States have the choice of not imposing a penalty period for transfers of less than a full month. Pennsylvania is using full months and rounding down when the calculation results in a fraction.

Proposed Amendment

This proposal expands the circumstances in which an MA ineligibility period for payment of LTC services will result from a transfer of an asset that occurs when fair market value has not been received. Currently, existing regulations do not require a penalty period for a transfer of an asset that is less than the average monthly rate for private NFC and for a partial penalty period of less than 1 month when the calculation of the period of ineligibility for payment of LTC services results in a fraction of a month. A penalty will be imposed under these proposed amendments for a transfer of asset that is less than the average monthly rate and for a partial penalty period. This proposal will require that an individual be responsible for paying for LTC services equal to the entire amount of the asset that was transferred for less than fair market value if a penalty is imposed due to failure to receive fair market value. Any transfer of assets, regardless of the amount, will be evaluated to determine if an individual will be denied payment of LTC services.

Limit on Unpaid Medical Expenses

Background

An MA recipient who is residing in an LTC facility is required to contribute to the cost of LTC by using monthly income after deductions in accordance with 42 CFR 435.725(c)(4)(ii) and 435.832(c)(4)(ii). Deductions include expenses for medical or remedial care recognized under state law but not covered under the state's MA plan. These deductions are subject to allowable limits the state may establish. Current regulations in § 181.452(d)(5)(ii) permit these deductions regardless of the amount of the expense when determining the amount of income an MA recipient must contribute toward the cost of LTC services. The medical expense is deducted from the MA recipient's income in the calendar month the medical expense is paid by the MA recipient.

Proposed Amendment

This proposal sets a limit of $10,000 for an outstanding unpaid medical expense that can be used as an allowable medical expense deduction when calculating an MA recipient's contribution toward cost of care. The $10,000 limit is a reasonable limit approximately equal to 3 months of NFC at the MA rate. The limit is intended to encourage individuals who are potentially eligible for MA to apply for MA on a timely basis to prevent a medical expense debt to a LTC facility at the private rate.

Elimination of the Home Maintenance Deduction

Background

States have the option of providing a home maintenance allowance deduction when determining contribution toward cost of NFC in accordance with 42 CFR 435.725(d) and 435.832(d). This deduction is allowed if a physician has certified that the resident will likely return home within 6 months.

Proposed Amendment

This proposal eliminates the home maintenance allowance as an allowable deduction when determining an MA recipient's contribution toward cost of NFC. It is estimated that these proposed amendments will affect approximately 3,794 individuals applying for or receiving LTC under the MA Program.

Need for Proposed Rulemaking

This proposed rulemaking is necessary to revise the MA eligibility requirements for applicants and recipients requesting LTC MA to address the significant growth in costs in the MA Program.

Summary of Requirements

I. The following are regulations that apply to applicants and recipients for LTC services both in the community and in an institutional setting:

Sections 178.104(d) and 178.174(d). These subsections are proposed to expand the circumstances in which there could be a period of MA ineligibility for LTC services due to a transfer of assets without receiving fair market value and increase the disqualification period. In accordance with 42 U.S.C.A. § 1396p(c), an applicant or recipient of MA or spouse of an applicant who transfers an asset without receiving fair market value could be subject to a period of ineligibility for payment of LTC services under the MA Program.

Currently, there is no disqualification or penalty period of less than 1 month. Consequently, a transfer of assets with a value at less than the average monthly pay rate for private NFC without receiving fair market value does not result in a penalty period for payment of LTC services. This revision expands the circumstances for a penalty period. Under the proposed change, a partial month penalty period may be imposed for an asset transfer that is less than the average monthly pay rate for private NFC.

In addition, the change extends the penalty period to include a partial month when the calculation to determine the penalty period yields a fraction. This revision will make applicants and recipients responsible for more of the cost of their LTC services both in institutional settings and for those LTC services received in a residential setting. Applicants and recipients will be responsible for paying toward the cost of LTC services the amount equivalent to the cost of the asset that was transferred without receiving fair market value.

II. The following are regulations that apply to applicants and recipients for LTC services in an institutional setting:

A. *Section 178.2.* This section has been expanded to include additional terms that are used to define various income standards and allowance amounts. These standards/amounts are applied to the provisions that govern the treatment of assets (income and resources) of a couple when one spouse is admitted to a LTC facility.

B. *Section 178.124(b)(2).* This paragraph is modified to incorporate the change in the method of providing the CS with additional income to bring her up to the protected level when one spouse is admitted to a LTC facility. Currently, the couple has the option to use available resources to purchase an annuity that will generate monthly income for the CS if the CS's monthly income is less than the protected income level established by Federal law. This revision will require that if the CS's own monthly income which includes interest income generated by the resources that are protected for the CS is less than the protected income level, a contribution of monthly income can be provided from the IS. This revision does not eliminate the provision that protects the CS's income level; it is changing how the CS will receive that monthly income. If the CS's monthly income including the determined contribution of monthly income from the IS is less than the protected income level, the IS can continue to use available resources to purchase an annuity to generate monthly income for the CS.

C. *Section 181.452(d)(5).* This paragraph is revised to include a limitation on the total amount that is allowable as a medical and remedial expense deduction when determining an MA recipient's contribution toward cost of care. Currently, any medical or remedial expense, regardless of the amount, is an allowable deduction when determining an MA recipient's contribution toward cost of care. This change will limit the total deduction allowed for outstanding medical and remedial expenses to $10,000. See 42 CFR 435.725(f) and 435.832(f).

D. *Section 181.452(d)(6).* This paragraph is deleted to remove the income deduction that is given for maintenance of an MA recipient's home for short-term stays in an LTC facility when determining contribution toward cost of care. See 42 CFR 435.725(d) and 435.832(d).

Affected Individuals and Organizations

This proposed rulemaking will affect applicants and recipients who are requesting or receiving LTC services, both in the community and in an institutional setting. Applicants and recipients will be responsible for paying more toward the cost of LTC.

Accomplishments/Benefits

This proposed rulemaking will continue to allow the Department to provide MA benefits to the Commonwealth's Federally-mandated eligibility groups, while providing sound fiscal management of the Commonwealth's limited resources.

Fiscal Impact

Commonwealth. The Department estimates the Fiscal Year 2002-2003 savings to be $7.001 million ($3.171 million in State funds).

Public Sector. There is a potential cost to county LTC facilities with residents who incur an outstanding unpaid medical expense for LTC services.

Private Sector. There is a potential cost to private LTC facilities with residents who incur outstanding medical expense for LTC services in excess of $10,000 before becoming eligible for MA. Individuals may be responsible to pay more for LTC services under the income-first rule.

Paperwork Requirements

No additional forms or paperwork will be required to implement this change in the regulations. Current forms and workbook pages will continue to be used.

Effective Dates

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

Sunset Date

There is no sunset date. The Department monitors regulations through its Quality Control and Corrective Action agencies.

Public Comment Period

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed amendments to the Department of Public Welfare, Edward J. Zogby, Director, Bureau of Policy, Room 431, Health and Welfare Building, Harrisburg, PA 17120, (717) 787-4081, within 30 days after the publication in the *Pennsylvania Bulletin*. Comments received within the 30 calendar days will be reviewed and considered in the preparation of the final-form regulations. Comments received after the 30-day comment period will be considered for subsequent revisions of these regulations.

Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (Voice Users).

Regulatory Review Act

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 25, 2002, the Department submitted a copy of these 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 rulemaking, the Department has provided IRRC and the Committees with a copy of a detailed 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 the Commission has any objections to any portion of the proposed amendments, it will notify the Department within ten 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 Act specifies detailed procedures for review, prior to final publication of the final-form regulations, of objections raised by the Department, the General Assembly and the Governor.

FEATHER O. HOUSTOUN,
Secretary

Fiscal Note: 14-478. No fiscal impact; (8) recommends adoption. These proposed revisions will result in savings totaling $3.171 million to the 2002-2003 Medical Assistance—Long Term, Inpatient and Outpatient appropriations.

Annex A

TITLE 55. PUBLIC WELFARE

PART II. PUBLIC ASSISTANCE MANUAL

Subpart D. DETERMINATION OF NEED AND AMOUNT OF ASSISTANCE

CHAPTER 178. RESOURCE PROVISIONS FOR CATEGORICALLY NMP-MA AND MNO-MA

Subchapter A. GENERAL PROVISIONS FOR MA RESOURCES COMMON TO ALL CATEGORIES OF MA

GENERAL PROVISIONS FOR MA RESOURCES

§ 178.2. Definitions.

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

* * * * *

***CSMMNA—Community Spouse Monthly Maintenance Needs Amount*—The income needed by the community spouse to prevent the community spouse from being impoverished according to Federal standards. This figure is based on the community spouse's monthly shelter expense and the minimum and maximum monthly maintenance need allowances.**

* * * * *

***Excess shelter amount*—The resulting amount of the community spouse's monthly shelter expense that exceeds the shelter expense allowance.**

* * * * *

***MAMMNA—Maximum Monthly Maintenance Need Allowance*—The maximum amount of income permitted to be protected to prevent the community spouse from being impoverished, as established under section 1924(a)(3)(c) of the Social Security Act (42 U.S.C.A. § 1396r-5(d)(3)(c)). A revision to the amount required by Federal law and regulations is published annually as a notice in the *Pennsylvania Bulletin*.**

* * * * *

***MIMMNA—Minimum Monthly Maintenance Need Allowance*—The minimum amount of income permitted to be protected to prevent the community spouse from being impoverished, as established under section 1924(d)(3)(A) and (B), which is 1/12th of 150% of the official income poverty limit for a family of two. A revision to the amount required by Federal law and regulations is published annually as a notice in the *Pennsylvania Bulletin*.**

***MMNA—Monthly Maintenance Need Allowance*—The amount of income that the institutionalized spouse can contribute to the community spouse.**

***Monthly shelter expense*—The monthly cost for housing, including:**

(i) Rent, mortgage payment, including principal and interest, property taxes and property insurance.

(ii) Maintenance charge for a condominium or cooperative less the utility allowance described in subparagraph (iii).

(iii) One of the two standard utility allowances (SUAs) specified in § 501.7(a)(1) and (2) (relating to treatment of income).

(iv) Telephone allowance specified in § 501.7(a)(3).

(v) Homeless shelter allowance specified in § 501.7(a)(4).

* * * * *

***Shelter expense allowance*—Thirty percent of the minimum monthly maintenance need allowance. A revision to the amount required by Federal law and regulations is published annually as a notice in the *Pennsylvania Bulletin*.**

* * * * *

Subchapter B. AGED-, BLIND- AND DISABLED-**RELATED** CATEGORIES OF MA

DISPOSITION OF PROPERTY AND FAIR CONSIDERATION PROVISIONS FOR THE AGED-, BLIND- AND DISABLED-**RELATED** CATEGORIES OF MA

§ 178.104. Disposition of assets and fair consideration provisions for transfers on or after July 30, 1994.

* * * * *

(d) The **[number of months] period** of ineligibility for **[the institutionalized] an** individual who **is applying for, or receiving MA for NFC as defined in § 178.2, including services in an ICF/MR facility, or a level of care in an institution equivalent to NFC, or home or community-based waiver services furnished under a Title XIX waiver and who** disposes of assets for less than FMV **begins in the month of transfer if the date does not occur during an existing period of ineligibility. The period of ineligibility** shall be **[equal to the]**:

(1) The number of months, including partial months, arrived at by dividing the total cumulative UV of all assets transferred by the individual or the individual's spouse on or after the look-back date divided by the average monthly cost to a private patient of NFC in effect in **[the] this** Commonwealth at the time of application.

(2) A partial month if the total cumulative UV of all assets transferred by the individual or the individual's spouse on or after the look-back date, divided by the average monthly cost to a private patient of NFC in effect in this Commonwealth at the time of application results in a fraction.

* * * * *

RESOURCE ELIGIBILITY REQUIREMENTS FOR AN INSTITUTIONALIZED SPOUSE WITH A COMMUNITY SPOUSE

§ 178.124. Resource eligibility for the institutionalized spouse.

* * * * *

(b) *Allowance revision.* The community spouse resource allowance may be revised if either spouse establishes at a Departmental hearing, based on evidence acceptable to the Department, that:

* * * * *

(2) **[Income generated by the community spouse resource allowance is not sufficient to raise the community spouse's income to the monthly standard community spouse maintenance need allowance amount described in § 181.452(c)(2)(ii) (relating to posteligibility determination of income available from an MA eligible person toward his cost of care). The Department hearing officer will establish a resource amount adequate to assure that the community spouse has income up to the community spouse maintenance need allowance amount. This applies only if the institutionalized spouse actually gives the community spouse maintenance need allowance to the community spouse.] Additional monthly income is needed for the community spouse and is calculated as follows:**

(i) The community spouse's total gross monthly income is calculated by adding the following:

(A) The total gross monthly earned income includes earned income specified in §§ 181.91—181.96 (relating to types of earned income counted for the aged, blind and disabled categories).

(B) The total gross monthly unearned income includes unearned income specified in §§ 181.101—181.109 (relating to types of unearned income counted for the aged, blind and disabled categories). Interest and other income generated by the community spouse resource determined under § 178.123 are included as unearned income of the community spouse.

(ii) The monthly shelter costs of the community spouse are added together to arrive at a total monthly shelter expense.

(iii) If the total monthly shelter expense exceeds the shelter expense allowance, the excess shelter amount is added to the MIMMNA to arrive at the CSMMNA. The excess shelter amount plus the MIMMNA cannot exceed the MAMMNA except as provided in subparagraph (vii).

(iv) If the total monthly shelter expense is equal to or less than the shelter expense allowance, the MIMMNA is the CSMMNA.

(v) If the community spouse's total gross monthly income determined in subparagraph (i) is equal to or greater than the CSMMNA determined in subparagraph (iii) or (iv), the community spouse is not in need of an MMNA unless subparagraph (vii) applies.

(vi) If the community spouse's total monthly income determined in subparagraph (i) is less than the CSMMNA determined in subparagraph (iii) or (iv), the difference is the MMNA, unless subparagraph (vii) applies.

(vii) The MMNA may exceed the CSMMNA determined in subparagraph (iii) or (iv) if one of the following applies:

(A) A greater amount is ordered through a court order under section 1924(d)(5) of the Social Security Act (42 U.S.C.A. § 1396r-5(d)(5)).

(B) A greater amount is determined as a result of a Department hearing decision in which either spouse establishes that the community spouse needs income greater than the MMNA due to exceptional circumstances resulting in significant financial duress.

(viii) If the institutionalized spouse's total gross monthly income as described in § 181.452(a) (relating to posteligibility determination of income available from an MA eligible person toward cost of care) less allowable deductions in § 181.452(d) is not sufficient to raise the community spouse's income to the MMNA described in subparagraph (vi), or unless subparagraph (vii) applies, the resource allowance as determined under § 178.123 may be revised as follows:

(A) Through the fair hearing process, if the Department hearing officer establishes a resource amount adequate to assure that the community spouse has income up to the MMNA.

(B) If the institutionalized spouse actually gives the MMNA to the community spouse.

* * * * *

Subchapter C. TANF-RELATED AND GA-RELATED CATEGORIES OF MA

DISPOSITION OF PROPERTY AND FAIR CONSIDERATION PROVISIONS FOR THE **[AFDC] TANF-** AND GA-**RELATED** CATEGORIES OF MA

§ 178.174. Disposition of assets and fair consideration provisions for transfers on or after July 30, 1994.

* * * * *

(d) The **[number of months] period** of ineligibility for **[the institutionalized] an** individual who **is applying for, or receiving MA for NFC as defined in § 178.2, including services in an ICF/MR facility, or a level of care in an institution equivalent to NFC, or home or community-based waiver services furnished under a Title XIX waiver and who** disposes of assets for less than FMV **begins in the month of transfer provided that the date does not occur during an existing period of ineligibility. The period of ineligibility** shall be **[equal to the]:**

(1) The number of months, including partial months, arrived at by dividing the total, cumulative **[uncompensated value] UV** of the assets transferred by the individual or the individual's spouse, on or after the look-back date, divided by the average monthly cost to a private patient of **[nursing facility services] NFC** in effect in this Commonwealth at the time of application.

(2) A partial month if the total cumulative UV of all assets transferred by the individual or the individual's spouse on or after the look-back date, divided by the average monthly cost to a private patient of NFC in effect in this Commonwealth at the time of application results in a fraction.

* * * * *

CHAPTER 181. INCOME PROVISIONS FOR CATEGORICALLY NEEDY NMP-MA AND MNO-MA

Subchapter D. POSTELIGIBILITY DETERMINATION OF ELIGIBILITY FOR MA PAYMENT TOWARD COST OF CARE IN INSTITUTIONS

POSTELIGIBILITY DETERMINATION PROVISIONS

§ 181.452. Posteligibility determination of income available from an MA eligible person toward the cost of care.

* * * * *

(d) The following amounts are deducted from the MA eligible person's total gross income identified in subsection (a) for persons in the aged, blind and disabled-related categories, or subsection (b) for persons in the TANF-related or GA-related categories and adjusted as applicable by the treatment of Veterans Administration benefits under subsection (c) for all MA eligible persons in the following order:

* * * * *

(5) The following medical expenses which are not subject to payment by a third party are deducted in the calendar month the medical expenses are paid**[.]:**

* * * * *

(iii) **[Expenses paid by the MA eligible person for necessary] Necessary** medical or remedial care recognized under State statutes or regulations but not covered under the MA Program**, subject to a total deduction limit of $10,000**.

[(6) An amount for maintenance of a single MA eligible person's home if a physician has certified that he is likely to return to his home within a 6-month period from the date he entered the facility. When this deduction is given, it may not be deducted for more than one 6-consecutive month period. The maintenance need amount for the single person is the MA income limit for one person in Appendix A. A home is defined as the residence maintained by the MA eligible person before he entered the facility and to which he plans to return. If a person is discharged and subsequently returns to a facility, the single MA eligible person is eligible for a new 6 consecutive month period for this deduction if a physician certifies that the person is likely to return to his home within a 6-month period from the date of admittance to the facility.]

* * * * *

[Pa.B. Doc. No. 02-1735. Filed for public inspection October 4, 2002, 9:00 a.m.]

[55 PA. CODE CH. 181]

Income Provisions for Categorically Needy NMP-MA and MNO-MA

The Department of Public Welfare (Department) proposes to amend Chapter 181 (relating to income provisions for categorically needy NMP-MA and MNO-MA) under sections 201(2), 403(b), 441.1 and 442.1 of the Public Welfare Code (62 P. S. §§ 201(2), 403(b), 441.1 and 442.1); section 1902(a)(10)(A) and (C) and (17) of the Social Security Act (42 U.S.C.A. § 1396a(a)(10)(A) and (C) and (17)); and Federal regulations for optional Medical Assistance (MA) coverage and financial requirements found in 42 CFR 435.301, 435.601, 435.602 and 435.831.

Purpose

The purpose of this proposed rulemaking is to eliminate Non-Money Payment (NMP) spend-down and to limit the use of unpaid medical expenses of an applicant or recipient as a deduction for MA in determining Medically Needy Only (MNO) Spend-down eligibility. This proposed rulemaking provides that a medical expense may not be deducted if it was incurred before the first calendar day of the third month preceding the month of application.

Background

The Department is committed to administering an efficient, effective MA program that ensures access to quality health care for this Commonwealth's most vulnerable citizens. Notwithstanding this commitment, the Department must make changes to the MA Program to address the increasing fiscal demands.

Over the past year, the Commonwealth, as well as many other states, has experienced a significant increase in costs under the MA Program. No immediate relief is in sight. This fiscal pressure has required states to examine closely all expenditures and evaluate and prioritize what programs can continue to be fully funded.

The Department has taken steps to contain costs in past years, through the implementation of managed care

and the institution of management controls to avoid payments for services which are not medically necessary. Despite these changes, expenses in the MA Program continue to grow.

MA is a means-tested Federal-State funded program designed to provide health care benefits to individuals with limited income and resources. While the Federal government provides a baseline of what eligibility groups must be covered and what services must be provided in order for states to receive Federal Financial Participation (FFP), states may choose to expand eligibility to include additional groups as well as provide additional services. Historically, the Commonwealth has adopted most of the eligibility and service options available under Federal law and exercised various options to use less restrictive methodologies to determine eligibility. As a result, the Commonwealth has one of the most generous MA Programs in the country.

In reviewing program areas to help reduce the significant growth in expenditures, the Department has compared its current MA Program requirements with the requirements the Federal government mandates as well as what other states provide. As a result of this comparison, options were identified that would bring the Commonwealth's program more in line with the Federal baseline as well as closer to what other states provide.

Despite the increasing cost, the Department, unlike its counterparts in other states, has not limited benefits. Instead, the Commonwealth's approach has been to try to protect benefits for those in greatest financial need while looking at those areas of the program where individuals have some existing income or resources to pay for at least part of their care. The Department recognizes that taking steps to reduce benefits causes concern. The basis of this concern is that the proposed changes to eliminate NMP spend-down and limit the use of an unpaid medical expense will result in approximately 7,196 individuals losing MA under the current NMP spend-down provisions and approximately 14,802 individuals losing MA under the current MNO provisions. However, taking less drastic action at this point to minimize growth now will hopefully mitigate the need to limit benefits to the Federally-mandated eligibility groups.

The Department's NMP spend-down provisions are not Federally mandated. Eliminating these provisions will allow the Department to continue to provide services to the population that must be served to assure FFP. Additionally, by limiting the retroactive period from which MNO clients can claim an income deduction for past medical expenses, the Department can further cut costs to assure continued benefits to the Federally-mandated eligibility groups.

Under the current regulations, an individual not eligible for MA due to having net income in excess of the NMP or MNO income limit can qualify for MA benefits by spending down the excess income on medical expenses. Unpaid medical expenses can be deducted from an applicant's or recipient's income as long as those expenses meet certain criteria. The unpaid medical expense must: 1) not be subject to payment by a third party; 2) not be paid by MA, once MA is authorized; 3) be the legal obligation of a member of the applicant or recipient group; 4) have a verified amount and date of service; and 5) not have been used in a prior MA eligibility determination.

Current regulations do not limit when the medical expense being used in the eligibility determination was incurred. As a result, the medical expense could have been incurred several years ago. This proposed rulemaking will limit the time period of an unpaid medical expense to those expenses incurred on or after the first calendar day of the third month preceding the month of application.

Need for Proposed Rulemaking

This proposed rulemaking is necessary to revise the MA eligibility requirements for applicants and recipients requesting MA to address the significant growth in costs of the MA Program.

Summary of Requirements

1. *Sections 181.11(d), 181.13 and 181.21(b) and (c).* These provisions propose deletion of references and cross references to NMP spend-down and deletion of eligibility requirements for that program.

2. *Sections 181.12(c)(2) and 181.14(d)(1)(v).* These provisions propose amendments to add language that indicates that unpaid medical expenses cannot be used as a deduction if the date of service is earlier than the first calendar day of the third month preceding the month of application and to remove language that permits expenses from other time periods to be used as a deduction.

Affected Persons and Organizations

This proposed rulemaking applies to applicants and recipients who apply for or receive MA benefits under NMP or MNO spend-down. The individuals affected by the elimination of NMP Spend-down will automatically be reviewed for MNO MA or Medical Assistance for Workers with Disabilities (MAWD) benefits before termination. The Department implemented MAWD by public notice at 32 Pa.B. 289 (January 12, 2002). A separate proposed rulemaking will be published to codify MAWD. Additionally, these individuals may be eligible for the Insurance Department's Children's Health Insurance Program (CHIP) or adultBasic Program or the Department of Aging's Pharmaceutical Assistance Contract for the Elderly (PACE) or PACE Needs Enhancement Tier (PACENET) if they meet the eligibility requirements of the specific program.

The changes to MNO spend-down will affect individuals who have unpaid medical expenses incurred before the first calendar day of the third month preceding the month of application and their eligibility was a result of using these unpaid medical expenses as a deduction when determining MA eligibility.

Accomplishments/Benefits

This proposed rulemaking will continue to allow the Department to provide MA benefits to this Commonwealth's Federally-mandated eligibility groups, while providing sound fiscal management of the Commonwealth's limited resources.

Fiscal Impact

Commonwealth

The Department has estimated savings for the MA Program by eliminating the spend-down eligibility group from NMP and the changes to the MNO spend-down process to be $18.923 million in Fiscal Year 2002-2003 with the Commonwealth's savings to be $9.272 million. The Commonwealth's savings will increase to approximately $43.784 million per year by Fiscal Year 2006-2007.

The Department's MAWD program may experience an increase in enrollment and the CHIP and adultBasic Programs, under the Department of Insurance, and the

PACE/PACENET program, under the Department of Aging, may experience an increase in applications or enrollment.

Public Sector

There will be no impact on municipal or county governments.

Private Sector

There is potential for health care providers to have an increase in uncompensated care due to applicant or recipient ineligibility.

Paperwork Requirements

There are no additional forms or reports needed. There will be a reduction in the amount of medical expense paperwork the caseworker will handle, analyze and record.

Effective Date

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

Sunset Date

There is no sunset date. The Department monitors regulations through its quality control and corrective action agencies.

Public Comment Period

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed rulemaking to the Department of Public Welfare, Edward J. Zogby, Director, Bureau of Policy, Room 431, Health and Welfare Building, Harrisburg, PA 17120, (717) 787-4081, within 30 days after the publication in the *Pennsylvania Bulletin*. Comments received within the 30-calendar days will be reviewed and considered in the preparation of the final-form regulations. Comments received after the 30-day comment period will be considered for subsequent revisions of these regulations.

Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (Voice Users).

Regulatory Review Act

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 25, 2002, the Department submitted a copy of this proposed rulemaking 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 this proposed rulemaking, the Department has provided IRRC and the Committees with a copy of a detailed 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 rulemaking, 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-form publication of the regulations, of objections raised by the Department, the General Assembly and the Governor.

FEATHER O. HOUSTOUN,
Secretary

Fiscal Note: 14-477. No fiscal impact; (8) recommends adoption. Savings to the Medical Assistance Inpatient, Outpatient and Capitation Appropriations totaling $9.272 million is expected with the promulgation of these regulations.

Annex

TITLE 55. PUBLIC WELFARE

PART II. PUBLIC ASSISTANCE MANUAL

Subpart D. DETERMINATION OF NEED AND AMOUNT OF ASSISTANCE

CHAPTER 181. INCOME PROVISIONS FOR CATEGORICALLY NEEDY NMP-MA AND MNO-MA

Subchapter A. GENERAL PROVISIONS FOR MA INCOME COMMON TO ALL CATEGORIES OF MA

CONTINUING AND RETROACTIVE ELIGIBILITY PROVISIONS FOR ALL CATEGORIES OF MA

§ 181.11. Continuing eligibility.

* * * * *

(d) For persons who do not meet the requirements of subsection (b) or (c), eligibility for continuing MA benefits exists if the applicant/recipient meets the eligibility requirements under § **[181.13 or]** **181.14** (relating to **[eligibility under NMP-MA spend-down; and]** eligibility under MNO-MA spend-down).

§ 181.12. Retroactive eligibility.

* * * * *

(c) For MNO-MA categories, income eligibility for retroactive MA benefits exists if one of the following applies:

* * * * *

(2) The applicant's/recipient's countable net income in the combined retroactive/prospective period, less medical expenses is equal to, or less than, the appropriate MNO-MA 6-month period income limits in Appendix F. Unpaid medical expenses **[that are not subject to payment by a third-party, which remain the legal obligation of the applicant/recipient, and are not to be paid for under the MA Program once MA is authorized], incurred on or after the first calendar day of the third month preceding the month of application,** and paid medical expenses, are deducted from the countable net income in the combined retroactive/prospective period as provided under § 181.14(e)(1)—(6) (relating to eligibility under MNO-MA spend-down) **[. This includes medical expenses incurred before the retroactive period.] if the unpaid medical expenses meet the following conditions:**

(i) Are not subject to payment by a third party.

(ii) Remain the legal obligation of the applicant/recipient.

(iii) Are not to be paid for under the MA Program once MA is authorized.

§ 181.13. **[Eligibility under NMP-MA spend-down] (Reserved)**.

[(a) Eligibility under NMP-MA spend-down is available to an applicant/recipient except for an applicant/recipient receiving skilled nursing care or intermediate care.

(b) The applicant/recipient shall meet the NMP-MA eligibility criteria, including the income criteria, to qualify for NMP-MA spend-down.

(c) The period of NMP-MA spend-down eligibility begins the day of the calendar month in which eligibility for NMP-MA spend-down is established and continues through the last day of that calendar month.

(d) Income eligibility for NMP-MA spend-down exists when the applicant's/recipient's:

(1) Countable net income less $10 is equal to, or less than, the appropriate NMP-MA income limits in Appendix A for the aged, blind and disabled categories not receiving skilled nursing care or intermediate care.

(2) Countable net income less $10 and medical expenses in subsection (e) is equal to, or less than, the appropriate NMP-MA income limits in Appendix A for the aged, blind and disabled categories not receiving skilled nursing care or intermediate care.

(3) Countable net income less $10 is equal to, or less than, the appropriate NMP-MA income limits in Appendix C for the AFDC categories and the GA categories not receiving skilled nursing care or intermediate care.

(4) Countable net income less $10 and medical expenses in subsection (f) is equal to, or less than, the appropriate NMP-MA income limits in Appendix C for the AFDC categories and the GA categories not receiving skilled nursing care or intermediate care.

(e) Deductible medical expenses include:

(1) Unpaid medical expenses, including those reasonably expected to be incurred, which meet the requirements in this paragraph. The unpaid medical expenses:

(i) Are not subject to payment by a third-party.

(ii) Are not to be paid for under the NMP-MA Program once NMP-MA is authorized.

(iii) Are the legal obligation of the applicant/recipient.

(iv) Have not previously been used as a deduction in the determination of eligibility for a prior authorization of MA.

(2) Paid medical expenses which meet the requirements in this paragraph. The paid medical expenses:

(i) Are paid in the calendar month for which spend-down is requested.

(ii) Have not previously been used as a deduction in the determination of eligibility for a prior authorization of MA.

(f) Medical expenses meeting the requirements in subsection (e) are deducted in the calendar month for which spend-down is requested in the following order:

(1) Medicare and other health insurance premiums including enrollment fees, deductibles or coinsurance charges incurred by the applicant/recipient regardless of whether they are paid or unpaid.

(2) Copayments or deductibles required by the Department. An applicant/recipient participating in the Copayment Program required by the Department is permitted a medical expense deduction for copayment expenses, subject to the copayment limit established by the Department.

(3) Expenses incurred—paid and unpaid—by the applicant/recipient for necessary medical and remedial services recognized under State statutes or regulations but not included in the NMP-MA Program.

(4) Expenses incurred—paid and unpaid—by the applicant/recipient for necessary medical and remedial services that are included in the NMP-MA Program.

(g) A monthly review of eligibility for NMP-MA spend-down is required except when the countable net income less $10 is equal to, or less than, the appropriate income limit. A monthly review does not require a reapplication unless:

(1) The monthly review falls in the month that a complete reapplication of eligibility for NMP-MA is due.

(2) Three consecutive months have elapsed since the applicant/recipient requested a determination of eligibility for NMP-MA spend-down.]

§ 181.14 Eligibility under MNO-MA spend-down.

* * * * *

(d) Deductible medical expenses include:

(1) Unpaid medical expenses, including those reasonably expected to be incurred, which meet the requirements in this paragraph. The unpaid medical expenses:

* * * * *

(v) Have been incurred on or after the first calendar day of the third month preceding the month of application.

* * * * *

TREATMENT OF INCOME COMMON TO ALL CATEGORIES OF MA

§ 181.21. Treatment of actual and anticipated income and expenses.

* * * * *

(b) In determining continuing eligibility for MA, **[except NMP-MA spend-down,]** either the anticipated or actual income, or both, and work, personal and dependent care expenses to be received beginning with the first day of the calendar month containing the effective date of the application or reapplication are used, or the actual income and work, personal and dependent care expenses received 30 days before the calendar month of application or reapplication for MA may be projected to determine anticipated income and work, personal and dependent care expenses.

[(c) A combination of actual and anticipated income and expenses are considered to determine NMP-MA spend-down eligibility for MA. Actual income and expenses are used from the beginning of the calendar month to the day of the calendar

month in which eligibility for NMP-MA spend-down is established. Anticipated income and work, personal and dependent care expenses are used for the remainder of the calendar month.]

[Pa.B. Doc. No. 02-1736. Filed for public inspection October 4, 2002, 9:00 a.m.]

[55 PA. CODE CH. 1121]
Pharmaceutical Services

The Department of Public Welfare (Department) under section 201(2) of the Public Welfare Code (62 P. S. § 201(2)), proposes to amend Chapter 1121 (relating to pharmaceutical services) to read as set forth in Annex A.

Purpose

The purpose of this proposed rulemaking is to revise the rates paid by the Department to pharmacy providers governing payment for and dispensing of brand-name prescription drugs under the fee-for-service component of the Medical Assistance (MA) Program.

Need for the Proposed Rulemaking

The MA Program assures the availability of a wide array of medically-necessary healthcare services, supplies and equipment to approximately 1.5 million indigent persons. Prescription drugs are among the healthcare services covered by the MA Program. Drugs available from multiple manufacturers are often referred to as generic or multisource drugs. Drugs available from only one manufacturer that holds the patent for the drug product are referred to as single-source or brand-name drugs.

Under Federal law, the payment for prescription drugs reflects the state Medicaid agency's best estimate of the price generally and currently paid by pharmacy providers for a drug marketed or sold by a particular manufacturer in the package size of the drug most frequently purchased by providers (that is the estimated acquisition cost (EAC)) plus a reasonable dispensing fee. See 42 CFR 447.331(b) (relating to drugs: aggregate upper limits of payment). Prior to October 1995, the Department's regulations defined the estimated acquisition cost as the average wholesale price (AWP) for a drug. The AWP is the price assigned to the drug by its manufacturer as listed in publications universally used in the pharmaceutical industry. The listed AWP does not reflect discounts or rebates offered to pharmacy providers by manufacturers.

Until October 1995, the Department, unlike 40 other state Medicaid agencies and most other private sector third-party payors throughout this Commonwealth, paid for brand-name prescription drugs with no percentage discount off the AWP price. After determining that the payment rates of most of these other public and commercial payors reflected discounts equal to or greater than AWP minus 10%, and having determined as well that clients covered by those other payors enjoyed access to quality pharmacy services, the Department, consistent with its responsibility to assure clients' access to quality healthcare services at efficient and economical rates (see 42 U.S.C.A. § 1396a(a)(30)(A)), adopted AWP minus 10%, plus a $4 dispensing fee as its fee-for-service payment policy for brand-name prescription drugs.

When the Department adopted the changes to its prescription payment policy in October 1995, it was aware that other payors reimbursed at discounts in excess of 10% and that the Office of Inspector General (OIG) for the United States Department of Health and Human Services (DHHS) had issued reports in 1984 and 1989 of Nationwide studies it had conducted evidencing that pharmacies were purchasing brand-name drugs at discounts of AWP minus 15.5%. In November 1990, the Omnibus Budget Reconciliation Act of 1990, Pub.L. No. 101-508, 104 Stat. 1388, was passed which placed a 4-year moratorium on changes to states' reimbursement policies for prescription drugs. The Department, in adopting AWP minus 10% plus a $4 dispensing fee, determined that although a greater discount off AWP could be justified (in addition to a lower dispensing fee), under the then-existing circumstances, the proposed rate represented an appropriate initial change to its payment policy.

During the past 7 years, additional studies, reports and data have been released relating to payment for and the dispensing of brand-name prescription drugs. The DHHS, OIG released two new studies relating to pharmacy reimbursement. A study was released in November 1998 by Pricewaterhouse Coopers (PwC) concerning the cost of filling a prescription and providing pharmacy services, including reasonable profits derived in the Commonwealth's Medicaid and Pharmaceutical Assistance Contract for the Elderly (PACE) Programs. The Legislative Budget and Finance Committee (LBFC) also released a report ("Long Term Care Pharmacy Dispensing Costs"), in December 2000, concerning "the relative adequacy of MA reimbursement for pharmacies dispensing medications to residents of long-term care nursing facilities compared to pharmacies dispensing to traditional retail customers."

The OIG report issued in April 1997, was entitled "Medicaid Pharmacy—Actual Acquisition Cost of Prescription Drug Products for Brand Name Drugs" (Report #A-06-96-00030). The OIG randomly selected ten states and the District of Columbia (California, Delaware, Florida, Maryland, Missouri, Montana, Nebraska, New Jersey, North Carolina and Virginia) and reviewed their drug purchases. The OIG combined the results of four categories of pharmacies, including rural-chain pharmacies, rural-independent pharmacies, urban-chain and urban-independent pharmacies, and estimated that pharmacies' actual acquisition cost for brand-name prescription drugs was a National average of AWP minus 18.3%.

In August 2001, the OIG issued results of another study ("Medicaid Pharmacy—Actual Acquisition Costs of Brand Name Prescription Drug Products" [A-06-00-00023]) involving an eight-state sample (Montana, Florida, Colorado, Indiana, Texas, Washington, West Virginia and Wisconsin) of the same types of pharmacies as in the prior study plus "nontraditional pharmacies" (that is nursing home pharmacies and hospital pharmacies). The nontraditional pharmacies were sampled separately. The OIG estimated that Nationally, the invoice price for brand-name drugs was an average of 21.84% below AWP for traditional pharmacies and 31.18% below AWP for nontraditional pharmacies.

The purpose of the pharmacy service study conducted by PwC for the Department and the Department of Aging, released in November 1998, was to determine the "full cost of filling a prescription and providing pharmacy services, including reasonable profits, in the Commonwealth's PACE/PACENET and MA programs." The study was conducted at the direction of the General Assembly. See section 2201-A of The Administrative Code of 1929 (71 P. S. § 581-13). The authors of the study estimated that pharmacy net income for the dispensing of MA fee-for-service claims in 1997 was minus $0.01 per claim

or −0.0% of acquisition costs and concluded that independent pharmacies are not disadvantaged by the MA payment relating to the cost of acquiring drugs. The estimate did not reflect additional income pharmacies receive from manufacturers in the form of rebates and discounts, as well as the sale of nonprescription items. The study noted that other third-party payors, unlike most state Medicaid agencies, paid pharmacies at AWP minus 12-14% for most brand-name drugs. It was also noted that the National Association of Chain Drug Stores issued a strong rebuttal to the findings contained in the HHS-OIG 1997 audit of actual acquisition costs.

The LBFC, in preparing its report, sent surveys to all long-term care providers in this Commonwealth. In its report, LBFC noted that 42% of the providers surveyed, serving 87% of the State's licensed nursing beds, responded to the survey. The LBFC concluded that there is "no reason to conclude that there are significant differences in drug acquisition costs for the retail pharmacies as a group and long-term care pharmacies." (See LBFC Report at p. 10).

The LBFC study recommended that the Department "should consider" adjusting the dispensing fee to long-term care pharmacies so as "to take into account the additional activities pharmacies are required to perform when dispensing to residents of long term-care facilities." (See LBFC Report at p. 10). Based on reported, nonverified cost information, the LBFC concluded that the "additional cost" (that is costs above what would be incurred in a retail pharmacy) for the long-term care dispensing amounted to $2.87 per prescription.

The PwC study, relying on a 1998 study by the National Association of Chain Drug Stores, estimated that the average dispensing costs in 1997 were $6.22 per claim in this Commonwealth, compared to a National average of $6.06 per claim and a $6.44 per claim average in the states contiguous to this Commonwealth. The PwC study also determined that the prevalent payment by state Medicaid program rates relating to dispensing fees fell within a range of between $4.01—$4.50.

As of September 1, 2002, the average dispensing fee paid by six contiguous state Medicaid programs for pharmacy services was approximately $3.91 per claim and the average payment by the largest 15 state Medicaid programs (excluding Pennsylvania) was approximately $4.30.

The Department, in setting payment rates for pharmacy services under the MA Program, seeks to assure the availability to MA clients of high quality pharmacy services, equal to that of the general population in the same geographic regions, at the best possible price. In proposing the changes in payment for and the dispensing of brand-name drugs, the Department has considered the concerns expressed by both retail and long-term care pharmacies that current payments for pharmacy services do not reflect the "costs" they incur in providing those services. The Department has taken into account the studies and reports noted in this Preamble and their review of the "profitability" of providing pharmacy services and consideration of accounting for rebates, discounts, manufacturer's promotions, and mix of prescriptions by payor, along with consideration of profitability from total pharmacy revenues (that is, nonprescription sales).

When the Department modified its payment rate from AWP to AWP minus 10% in 1995, the pharmacy industry predicted that the reduction in payment would restrict recipient access to and the quality of pharmacy services. To date, there is no evidence that remotely suggests that the change in payment reduced access by MA clients to high quality pharmacy services anywhere in the State let alone resulted in less access to service than that enjoyed by members of the general public.

Since 1995, payment rates both Nationally and within this Commonwealth for brand-name drugs and dispensing fees have continued to fall. Pharmacy providers generally contend that the decreases in payments by third-party payors are unfair to them and adversely impact their customers. As the payor of pharmacy coverage for 1.5 million MA adults and children, the Department has a duty to act as a prudent purchaser while assuring access to service. In analyzing the data and reviewing the analyses of the data contained in the several reports and studies released during the past several years, a fair reading of that information supports a conclusion that private and public payors Nationally, regionally, and within this Commonwealth obtain access to pharmacy services for their members/enrollees at payments for brand name drugs that range from AWP −10% to AWP −21% and at dispensing fees that range from $2 to over $6. These ranges are also consistent with payment information disclosed by pharmacies in the course of litigation with the Department. The information disclosed by pharmacies establishes that they routinely are paid at rates well below AWP −10% plus $4. Indeed, the larger commercial insurers pay in the range of AWP minus 15-16% plus a $2 dispensing fee. Given these payment ranges, and taking into account providers' claims relating to the costs of providing services, the Department believes that its proposal to pay for brand-name drugs at AWP minus 15% plus a dispensing fee of $4.25 per prescription, though higher than necessary to obtain access by client to quality pharmacy services, is consistent with its duty to assure access by MA clients to pharmacy services at rates that compare most favorably with those of other major payors, both public and private, of pharmacy services.

Summary of the Proposed Rulemaking

The Department proposes to amend Chapter 1121 as follows:

1. Section 1121.55 (relating to method of payment) revises the Department's payment formula to include the dispensing fee increase to $4.25 for all MA prescriptions.

2. Section 1121.56 (relating to drug cost determination) contains the Department's proposed amendment to EAC as the AWP minus 15%.

Affected Organizations

Approximately 3,100 pharmacy providers enrolled in the MA Program and participating in the fee-for-service delivery system will be affected by the lower reimbursement rates.

Accomplishments/Benefits

The Commonwealth will benefit by aligning its payment policies for brand-name prescription drugs with that of other third-party payors.

Fiscal Impact

The Commonwealth

The application of the proposed revision to the EAC determination and the proposed increase in the dispensing fee for the balance of Fiscal Year 2002-2003 should result in a reduction of $22,538,000 in total expenditures.

This reduction will represent a net savings of $10,381,000 for FY 2002-2003 in State funds.

Political Subdivisions

There will be no fiscal impact on the political subdivisions as a result of this proposed rulemaking.

Private Sector

The proposed revision to the EAC determination with the proposed dispensing fee increase will result in an overall reduction in payments to all pharmacy providers enrolled in the MA Program who participate in the fee-for-service delivery system.

General Public

There will be no fiscal impact on the general public with this proposed rulemaking.

Paperwork Requirements

There will be no additional reports or new forms needed to comply with the proposed rulemaking, nor will there be additional legal, accounting or consulting assistance required to fulfill the requirements of these sections.

Effective Date

The effective date for the implementation of this proposed rulemaking is October 1, 2002.

Sunset Date

The effectiveness of the proposed rulemaking will be evaluated on an ongoing process. Necessary and appropriate changes will be made in response to letters and recommendations from other offices, agencies and individuals. Therefore, no sunset date has been set.

Public Comment Period

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed rulemaking to the Department of Public Welfare, Office of Medical Assistance Programs, c/o Deputy Secretary's Office, Attention: Regulations Coordinator, Room 515, Health and Welfare Building, Harrisburg, PA 17120 within 30 days after the date of publication of this notice in the *Pennsylvania Bulletin*. Comments received within 30-calendar days will be reviewed and considered in the preparation of the final-form regulations. Comments received after the 30-day comment period will be considered for any subsequent revisions of this proposed rulemaking.

Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (Voice users).

Regulatory Review Act

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 25, 2002, the Department submitted a copy of this proposed rulemaking 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 rulemaking, the Department has provided IRRC and the Committees with a copy of a detailed 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.

If IRRC has objections to any portion of the proposed rulemaking, 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-form publication of the regulations of objections raised, by the Department, the General Assembly and the Governor.

HEATHER O. HOUSTOUN,
Secretary

Fiscal Note: 14-479. No fiscal impact; (8) recommends adoption. These proposed revisions will result in savings of $10,381,000 to the 2002-2003 Medical Assistance—Outpatient appropriation assuming an effective date of implementation of October 1, 2002.

Annex A

TITLE 55. PUBLIC WELFARE

PART III. MEDICAL ASSISTANCE MANUAL

CHAPTER 1121. PHARMACEUTICAL SERVICES

PAYMENT FOR PHARMACEUTICAL SERVICES

§ 1121.55. Method of payment.

(a) The Department will pay a pharmacy for a compensable legend and nonlegend drug (after deducting the applicable copayment amount, as described in § 1101.63(b) (relating to payment in full)), the lowest of the following amounts:

(1) The estimated acquisition cost (EAC) for the drug, multiplied by the number of units dispensed, plus a $**[4] 4.25** dispensing fee.

(2) The State MAC for the drug, multiplied by the number of units dispensed, plus a $**[4] 4.25** dispensing fee.

* * * * *

(b) The Department will pay a pharmacy for a compensable compounded prescription at the lower of the cost of all ingredients plus a $**[5] 5.25** dispensing fee or the provider's usual and customary charge to the general public.

* * * * *

§ 1121.56. Drug cost determination.

(a) The Department will base its drug cost for compensable legend and nonlegend drugs on the lower of:

(1) The Estimated Acquisition Cost (EAC) established by the Department as the current AWP found in the Department's pricing service for the most common package size of that product minus **[10%] 15%**.

* * * * *

[Pa.B. Doc. No. 02-1737. Filed for public inspection October 4, 2002, 9:00 a.m.]

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 93]

Stream Redesignation; East Branch Codorus Creek

The Environmental Quality Board (Board) proposes to amend § 93.9o (relating to Drainage List O) to read as set forth in Annex A. This proposed rulemaking would

redesignate a portion of the East Branch Codorus Creek from Cold Water Fishes (CWF) to Warm Water Fishes (WWF) to reflect the appropriate designated use for this stream.

This proposed rulemaking was adopted by the Board at its meeting of September 17, 2002.

A. *Effective Date*

This proposed rulemaking is effective upon publication in the *Pennsylvania Bulletin* as final-form rulemaking.

B. *Contact Persons*

For further information, contact Edward R. Brezina, Chief, Division of Water Quality Assessment and Standards, Bureau of Water Supply and Wastewater Management, 11th Floor, Rachel Carson State Office Building, P. O. Box 8467, (717) 787-9637; or Michelle Moses, Assistant Counsel, Bureau of Regulatory Counsel, 9th Floor, Rachel Carson State Office Building, P. O. Box 8464, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This proposed rulemaking is available electronically through the Department of Environmental Protection's (Department) website (http://www.dep.state.pa.us).

C. *Statutory and Regulatory Authority*

This proposed rulemaking is made under the authority of sections 5(b)(1) and 402 of The Clean Streams Law (35 P. S. §§ 691.5(b)(1) and 691.402), which authorize the Board to develop and adopt rules and regulations to implement the provisions of The Clean Streams Law and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), which grants to the Board the power and duty to formulate, adopt and promulgate rules and regulations for the proper performance of the work of the Department. In addition, section 303 of the Federal Clean Water Act (33 U.S.C.A. § 1313) sets forth requirements for water quality standards and the Federal regulation in 40 CFR 131.32 (relating to Pennsylvania) sets forth certain requirements for portions of the Commonwealth's antidegradation program.

D. *Background of the Amendment*

The Commonwealth's Water Quality Standards, set forth, in part, in Chapter 93 (relating to water quality standards), implement the provisions of sections 5 and 402 of The Clean Streams Law and section 303 of the Federal Clean Water Act. Water quality standards are in-stream water quality goals that are implemented by imposing specific regulatory requirements (such as treatment requirements and effluent limits) on individual sources of pollution.

The lower reaches of the East Branch Codorus Creek, including Lakes Redman and Williams, were evaluated in response to a rulemaking petition submitted by the York Water Company. The petition requested redesignation of the main stem of the East Branch Codorus Creek from the inlet of Lake Redman to the mouth from CWF to WWF. The petition contained extensive data on water quality and the fishery in this portion of the basin, including Lakes Redman and Williams.

The Department's evaluation involved review of data in the petition and data obtained from the Fish and Boat Commission (Commission). The data shows that Lake Redman, Lake Williams and the East Branch Codorus Creek downstream from Lake Williams support a WWF community. The existence of a warm water fishery in Lake Redman has been documented since 1970. Surveys beginning in 1983 have shown a WWF community. The warm water fishery in the lower main stem was documented in 1996.

Based upon its review of the petition and the Departments' recommendation, the Board proposes to adopt the designations described in this Preamble and set forth in Annex A.

Copies of the Department's stream evaluation report for this waterbody are available from Edward R. Brezina whose address and phone number are listed in Section B.

The information presented in the report clearly indicates that the aquatic life existing use of the petitioned surface waters is WWF. The WWF existing use is less restrictive than its CWF designated use. In addition, the information in the report supports redesignation under § 93.4(b) (relating to Statewide water uses). This information indicates that the petitioned surface waters were designated in error in 1979 when the Board adopted the current regulatory CWF designated use. The Board is proposing that the less restrictive use be adopted based on the data that demonstrates the requirements of § 93.4(b) have been satisfied. Section 93.4(b) states that less restrictive designated uses than those currently designated for particular waters listed in §§ 93.9a—93.9z may be adopted when it is demonstrated that: (1) the designated use is more restrictive than the existing use; (2) the use cannot be attained by implementing effluent limits required under sections 301(b) and 306 of the Federal Clean Water Act (33 U.S.C.A. §§ 1311(b) and 1316) or implementing cost-effective and reasonable Best Management Practices for nonpoint source control; and (3) dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate the modification in a way that would result in the attainment of the use.

E. *Benefits, Costs and Compliance*

Executive Order 1996-1, "Regulatory Review and Promulgation," requires a cost/benefit analysis of the proposed rulemaking.

1. *Benefits*—Overall, the citizens of this Commonwealth will benefit from this proposed rulemaking because it will reflect the appropriate designated use and maintain the most appropriate degree of protection for this stream. In addition, the York Water Company will benefit by being able to meet projected future water demands and ensuring an adequate water supply for its customers. The change in designation would allow water withdrawn from the Susquehanna River to be pumped, as needed, into Lake Redman for water supplies.

2. *Compliance Costs*—Generally, the proposed rulemaking should have no fiscal impact on, or create additional compliance costs for, the Commonwealth or its political subdivisions. No costs will be imposed directly upon local governments by this recommendation.

Persons conducting or proposing activities or projects that result in new or expanded discharges to streams shall comply with the regulatory requirements relating to the designated use. Treatment costs are site-specific and depend upon the size of the discharge in relation to the size of the stream and many other factors.

3. *Compliance Assistance Plan*—The proposed rulemaking has been developed as part of an established program and is consistent with water quality standards requirements established by the Federal Clean Water Act and The Clean Streams Law. All surface waters in this

Commonwealth are afforded a minimum level of protection through compliance with the water quality standards, which prevent pollution and protect designated water uses.

The proposed rulemaking will be implemented through the National Pollutant Discharge Elimination System permitting program since the stream use designation is a major basis for determining allowable discharge effluent limitations. These permit conditions are established to assure water quality criteria are achieved and designated uses are protected. New and expanded discharges with water quality-based effluent limitations are required to provide effluent treatment according to the water quality criteria associated with designated water uses.

4. *Paperwork Requirements*—The proposed rulemaking should have no direct paperwork impact on the Commonwealth, local governments and political subdivisions or the private sector. This proposed rulemaking is based on existing Department regulations.

F. *Pollution Prevention*

The water quality standards program is a major pollution prevention tool because the objective is to protect in-stream water uses.

G. *Sunset Review*

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

H. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 24, 2002, the Department submitted a copy of the proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment. In addition to the proposed amendment, IRRC and the Committees have been provided a detailed regulatory analysis form prepared by the Department, in compliance with Executive Order 1996-1. 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 amendment, it will notify the Department 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 that portion of the proposed amendment to which an objection is made. The Regulatory Review Act specifies detailed procedures for review by the Department, the Governor and the General Assembly before publication of the final-form regulation.

I. *Public Comments*

Written Comments—Interested persons are invited to submit comments, suggestions or objections regarding the proposed rulemaking to the Environmental Quality Board, P. O. Box 8477, Harrisburg, PA 17105-8477. Express mail: Rachel Carson State Office Building, 15th Floor, 400 Market Street, Harrisburg, PA 17101-2301. Comments submitted by facsimile will not be accepted. The Board must receive comments by November 19, 2002 (within 45 days of publication in the *Pennsylvania Bulletin*). Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by November 19, 2002. The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the proposed amendment will be considered. If sufficient interest is generated as a result of this publication, a public hearing or meeting, or both, will be scheduled at an appropriate location to receive additional comments.

Electronic Comments—Comments may be submitted electronically to the Board at RegComments@state.pa.us. A subject heading of the proposal and return name and address must be included in each transmission. The Board must also receive comments submitted electronically by November 19, 2002.

DAVID E. HESS,
Chairperson

Fiscal Note: 7-379. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 93. WATER QUALITY STANDARDS

§ 93.9o. Drainage List O.

Susquehanna River Basin in Pennsylvania

Susquehanna River

Stream	Zone	County	Water Uses Protected	Exceptions To Specific Criteria
	* * * * *			
4—East Branch Codorus Creek	Basin, PA 214 to **[mouth] Inlet of Lake Redman**	York	CWF	None
4—East Branch Codorus Creek	**Main Stem, Inlet of Lake Redman to Mouth**	**York**	**WWF**	**None**

Stream	Zone	County	Water Uses Protected	Exceptions To Specific Criteria
5—Unnamed Tributaries to East Branch Codorus Creek	Inlet of Lake Redman to Mouth	York	CWF	None
5—Inners Creek	Basin	York	CWF	None

* * * * *

[Pa.B. Doc. No. 02-1738. Filed for public inspection October 4, 2002, 9:00 a.m.]

FISH AND BOAT COMMISSION

[58 PA. CODE CHS. 61 AND 65]

Fishing

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

A. *Effective Date*

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

C. *Statutory Authority*

The proposed amendment to § 61.2 (relating to Delaware River and River Estuary) 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 (relating to waters limited to specific purposes).

D. *Purpose and Background*

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

E. *Summary of Proposal*

(1) *Section 61.2.* Management (including regulations) of the Delaware River and Delaware Estuary fish stocks is somewhat complicated given that four state jurisdictions and Federal interests are involved. Over the years, major efforts have been made to promulgate consistent regulations across the four jurisdictions or at least those having the subject species. This was done not only for ease of enforcement but also to simplify matters for the angling public. As the status of fish populations changes, so does the need to address regulations, which has been the case with striped bass in the past 20 years or so.

Currently, the harvest of river herring, which include alewife (alosa pseudoharengus) and blueback herring (alosa aestivalis), in the Delaware River is unregulated in this Commonwealth. There are no restrictions because there was little angling activity on these fish due to low abundance, other more sought after species and the like. Efforts are presently underway to restore herring runs in select tributaries in Chester County. In addition, with the recent expansion of the striped bass population and sport fishery on the New Jersey coast and in the Delaware River and Estuary, river herring have become a very popular live bait. The market for individual live herring has been reported as high as $5 per fish. Even though New Jersey has a 50 herring daily limit, anglers are coming into this Commonwealth, purchasing a fishing license, catching herring and then returning to New Jersey to sell their catch. Biological and law enforcement staff in New Jersey and this Commonwealth believe that uniform regulations would be in the best interest of the angling public and management of herring stocks.

New Jersey is proposing to reclassify river herring as a bait fish, which would limit daily harvest to 35. The Commonwealth has been requested to consider imposing a similar daily creel limit. The Commonwealth and New Jersey historically have worked together to insure that harvest regulations accomplish common management goals and are consistent between states on our common border water.

Accordingly, the Commission proposes that § 61.2 be amended to establish a daily limit of 35 for river herring (alewife and blueback herring) in the Delaware River, Delaware Estuary and Delaware River/Estuary tributaries from the mouths upstream to the limit of tidal influence and the Lehigh River from its mouth upstream to the first dam in Easton, PA. At a future Commission meeting, staff will be able to advise the Commission regarding the outcome of the New Jersey action on this matter as well as preliminary results from the ongoing angler use and harvest survey on the Delaware River/Estuary, particularly if a more restrictive limit is warranted. The Commission proposes to amend this section to read as set forth in Annex A.

(2) *Section 65.24.* Lake Winola (formerly Breeches Pond) is a natural lake in Overfield Township, Wyoming County. Years ago a concrete and earth filled dam 13 feet high was constructed across the outlet resulting in the current 198 acre pool. Lake Winola has a maximum depth of 66 feet, a mean depth of 30 feet and a surface total alkalinity of 38 parts per million. The Commission manages the lake as a warm water/cool water fishery with seasonal trout fishing opportunities provided by the stocking of adult size trout. An important sportfish, largemouth bass, have received attention from the Area Fisheries Manager with regard to attempts to improve

growth rates and overall size structure in the population. Previous efforts centered on efforts to establish other forage species, but those efforts had little impact on bass growth.

Based on three electrofishing samples (1991, 1995 and 2000), the Lake Winola largemouth bass population can be characterized as high density and slow growing. The growth rate, particularly for 2 years of age and older bass, was well below the State average. Anglers have reported high catch rates of bass with very few legal size individuals. Low relative weights of bass greater than 8 inches in length suggest that these fish are very vulnerable to angling. In addition, length frequency distribution indicates that the population size structure has been impacted by angler harvest.

Largemouth bass populations are typically managed using minimum length limits. As the minimum length limit increases, there is a tendency to stockpile increasing numbers of sublegal bass. Stockpiling is not a problem in a fast growing population but is undesirable in a slow growing high-density situation. For this reason, big bass special regulations as well as the current Statewide regulation are inappropriate for Lake Winola. Slot length limits are an option to improve the size structure of high density, slowing growing largemouth bass populations. The success of a slot limit depends on anglers willing to harvest subslot fish. The Commission is proposing a protected slot limit of 12 to 18 inches at Lake Winola. Harvest of smaller, more numerous bass should improve growth of older bass once they enter the 12 to 18 inch window. Also, opportunity will exist to harvest the occasional trophy size bass. The Commission proposes to amend § 65.24 to read as set forth in Annex A.

F. *Paperwork*

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

G. *Fiscal Impact*

The proposed rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The proposed rulemaking 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 rulemaking 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-133. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 58. RECREATION

PART II. FISH AND BOAT COMMISSION

Subpart B. FISHING

CHAPTER 61. SEASONS, SIZES AND CREEL LIMITS

§ 61.2. Delaware River and River Estuary.

* * * * *

(d) The following seasons, sizes and creel limits apply to the Delaware River and to Delaware River tributaries from the mouths of the tributaries upstream to the limit of the tidal influence and the Lehigh River from its mouth upstream to the first dam in Easton, Pennsylvania:

SPECIES	*SEASONS*	*MINIMUM SIZE*	*DAILY LIMIT*
	* * * * *		
RIVER HERRING (**alewife and blueback herring**)	Open year-round	No minimum	**[No daily limit] 35**
	* * * * *		

CHAPTER 65. SPECIAL FISHING REGULATIONS

§ 65.24. Miscellaneous special regulations.

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

County	*Name of Water*	*Special Regulations*
	* * * * *	

County	*Name of Water*	*Special Regulations*
Wyoming	**Lake Winola**	**Bass—It is unlawful to take, catch, kill or possess bass that are 12 to 18 inches in length. The daily creel limit for bass less than 12 inches in length and greater than 18 inches in length is 6, only one of which may exceed 18 inches in length. Closed to all fishing from 12:01 a.m. March 1 to 8 a.m. the first Saturday after April 11.**

[Pa.B. Doc. No. 02-1739. Filed for public inspection October 4, 2002, 9:00 a.m.]

STATE BOARD OF CERTIFIED REAL ESTATE APPRAISERS

[49 PA. CODE CH. 36]

Biennial Renewal Fees and Examination Fees

The State Board of Certified Real Estate Appraisers (Board) proposes to amend § 36.6 (relating to fees) to read as set forth in Annex A.

Description of Proposed Rulemaking

Section 36.6 sets forth a schedule of fees charged by the Board. The proposed rulemaking would raise the biennial renewal fees for certified real estate appraisers and certified Pennsylvania evaluators from $105 to $225; establish a biennial renewal fee of $225 for certified broker/appraisers; and delete the examination fees for certified real estate appraisers and certified Pennsylvania evaluators.

Background and Need for Proposed Rulemaking

a. *New Biennial Renewal Fees*

Section 9 of the Real Estate Appraisers Certification Act (REACA) (63 P. S. § 457.9) provides that the Board's biennial revenues from fees, fines and civil penalties shall meet or exceed the Board's biennial expenditures. Because fines and civil penalties historically account for a small percentage of the Board's total revenues, the Board must generate most of its revenues from fees.

The Board's principal sources of fee revenues are the fees charged to certificateholders for biennial renewal of their certifications. The biennial renewal fees account for approximately 88% of the Board's fee revenues during each biennial renewal period. The biennial renewal fees defray general operating expenses and overhead—primarily in the areas of investigation, prosecution and enforcement—that are not susceptible to being apportioned to a specific segment of persons and entities regulated by the Board and, therefore, are borne equally by the entire regulated community.

The Board established biennial renewal fees of $105 for certified real estate appraisers in 1992 and for certified Pennsylvania evaluators in 1993. These fees have not been raised since their adoption. Additionally, the Board has not yet established a biennial renewal fee for the recently created certification class of broker/appraiser, whose initial biennial renewal occurred in 1999. Meanwhile, the Board's annual expenses have risen steadily, from $113,104.50 in FY93-94 to $413,000 in FY00-01, with expenses for FY06-07 projected to be $570,000.

According to an analysis prepared by the Department of State's Bureau of Finance and Operations (BFO), the Board's current biennial renewal fee structure is inadequate to meet the Board's revenue needs. Unless the biennial renewal fees are increased, the Board faces large deficits in upcoming years as reflected in the following projections made by the BFO in February:

Financial Status	*FY01-02*	*FY02-03*	*FY03-04*	*FY04-05*	*FY05-06*	*FY06-07*
Beginning Balance:	418,463.31	(39,153.83)	(96,775.46)	(407,400.56)	(445,275.46)	(787,900.46)
Revenue:	149,500	499,125	210,375	499,125	210,375	499,125
Prior Yr. Returned Funds:	0	0	0	0	0	0
Total Revenue:	568,013.31	459,971.17	113,599.54	91,724.54	(234,900.46)	(288,775.46)
Expenses:	445,000	506,000	521,000	537,000	553,000	570,000
Prior Yr. Expenses:	162,167.14	50,746.63	0	0	0	0
Remaining Balance:	(39,153.83)	(96,775.46)	(407,400.46)	(445,275.46)	(787,900.46)	(858,755.46)

To close the widening gap between the Board's projected revenues and expenses, the BFO recommended that the Board adopt uniform biennial renewal fees in an amount between $200 and $250 for the Board's certificateholders, effective with the biennial renewal period that begins July 1, 2003. The proposed biennial renewal fee of $225—representing the midpoint of the BFO's recommended range—would raise biennial renewal revenues by approximately $621,000, from the current $346,500 to $967,500, according to the BFO's estimates. The BFO projects that these additional biennial revenues would enable the Board to have comfortable positive balances at the end of the next several fiscal years, including approximately $180,600 at the end of FY03-04.

b. *Deletion of Examination Fees*

The examinations for certification as a real estate appraiser and certified Pennsylvania evaluator are developed, administered and graded by Assessment Systems, Inc. (ASI), an independent testing organization under contract with the Commonwealth. The Board has no role in establishing or collecting examination fees. Examination fees are established by contract between ASI and the Commonwealth and are collected from Board-approved examination candidates at ASI's testing centers. The Board proposes to discontinue the practice of periodically amending its regulations to publish updated schedules of examination fees. Accordingly, the proposed rulemaking would delete all references to examination fees for certified real estate appraisers and certified Pennsylvania evaluators. The Board will continue to provide current examination fee information to examination candidates on its website.

Fiscal Impact

The proposed rulemaking will generate approximately $621,000 in additional biennial renewal fee revenues, broken down as follows:

Certification Class	*No. of Renewing Certificateholders*		*Fee Increase*	*Additional Revenues*
General Appraiser	1,088	×	$120	$130,560
Residential Appraiser	1,700	×	$120	$204,000
Certified Pennsylvania Evaluator	512	×	$120	$ 61,440
Broker/Appraiser	1,000	×	$225	$225,000

Paperwork Requirements

The proposed rulemaking will require the Board to change its biennial renewal forms to reflect the new fees. The proposed rulemaking will not create additional paperwork requirements for the regulated community.

Effective Date

The proposed rulemaking will become effective upon publication of the final-form regulation in the *Pennsylvania Bulletin*. The new biennial renewal fees will apply to certificateholders who renew certifications for the biennial renewal period beginning July 1, 2003.

Statutory Authority

Section 5(6) of the REACA (63 P. S. § 457.5(6)) authorizes the Board to establish fees for its operations. Section 9 of REACA requires the Board to establish fees by regulation and to ensure that revenues derived from fees, fines and civil penalties are adequate to cover the Board's expenditures over a biennial period. Section 9 of the Assessors Certification Act (63 P. S. § 458.9) authorizes the Board to establish renewal and other fees relating to certified Pennsylvania evaluators by regulation.

Compliance with Executive Order 1996-1

In accordance with Executive Order 1996-1, "Regulatory Review and Promulgation," the Board, in drafting and promulgating the proposed rulemaking, attempted to balance its statutory obligation to generate adequate revenues to support its operations against the objective to minimize the fiscal impact on the regulated community. The Board considers the proposed rulemaking to be both required by law and the least restrictive means of covering the cost of activities that the Board is required to perform.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 25, 2002, the Board submitted copies of this notice of proposed rulemaking to the Independent Regulatory Review Commission (IRRC), the Senate Standing Committee on Consumer Protection and Professional Licensure, and the House Standing Committee on Professional Licensure. The Board also provided IRRC and the Committees with copies of a Regulatory Analysis Form and Fee Report Form prepared in compliance with Executive Order 1996-1. Copies of these forms are available to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRC has objections to the proposed rulemaking, it will notify the Board within 10 days of the close of the Committee's review period, specifying the regulatory review criteria that have not been met. The Regulatory Review Act sets forth procedures that permit IRRC, the General Assembly and the Governor to review any objections prior to final-form adoption of the proposed rulemaking.

Public Comment

The Board invites interested persons to submit written comments, suggestions or objections regarding the proposed rulemaking to Steven Wennberg, Counsel, State Board of Certified Real Estate Appraisers, P. O. Box 2649, Harrisburg, PA 17105-2649 within 30 days following publication of this notice of proposed rulemaking in the *Pennsylvania Bulletin*.

GEORGE D. SINCLAIR,
Chairperson

Fiscal Note: 16A-7013. 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 36. STATE BOARD OF CERTIFIED REAL ESTATE APPRAISERS

Subchapter A. GENERAL PROVISIONS

§ 36.6. Fees.

The following is the schedule of fees charged by the Board:

* * * * *

Certified Real Estate Appraisers

* * * * *

[Examination fee.....$100]

* * * * *

[Examination fee.....$100]

Biennial renewal fee ..... $**[105] 225**

Certified Broker/Appraisers

* * * * *

Biennial renewal fee..... $225

Certified Pennsylvania Evaluators

* * * * *

Biennial renewal fee ..... $**[105] 225**

* * * * *

[Examination fee.....$200]

[Pa.B. Doc. No. 02-1740. Filed for public inspection October 4, 2002, 9:00 a.m.]