

STATEMENTS OF POLICY

FISH AND BOAT COMMISSION

[58 PA. CODE CH. 57]

Listing of Wild Trout Streams

The Fish and Boat Commission (Commission) proposes a statement of policy in Chapter 57 (relating to statements of policy). The proposed statement of policy relates to the classification of wild trout streams. Although not required to publish a notice of a proposal to adopt a statement of policy, the Commission is publishing the proposed statement of policy in this manner and is seeking public comments because of the heightened public interest in this issue. The Commission is publishing this notice of a proposed statement of policy under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code).

A. *Effective Date*

The proposed statement of policy, if approved on final-form rulemaking, will go into effect upon publication in the *Pennsylvania Bulletin*.

B. *Contact Person*

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

C. *Statutory Authority*

The proposed statement of policy is published under the statutory authority of section 321 of the code (relating to administration and enforcement) that provides that the Commission administer and enforce the code and other laws of the Commonwealth relating to the protection, propagation and distribution of fish.

D. *Purpose and Background*

Section 105.1 of 25 Pa. Code (relating to definitions) defines the term "wild trout stream" as "a stream classified as supporting naturally reproducing trout populations by the Fish Commission." The definition goes on to provide that the list of wild trout streams is available from the Commission's Fisheries Management Division.

In litigation before the Environmental Hearing Board and the Commonwealth Court, the meaning and effect of this regulatory definition was clarified. Under these precedents, it is clear that the Department of Environmental Protection is to make an independent determination of how to use the Commission's classification of a water as a wild trout stream, as well the factual and expert information on which the classification is based, in making regulatory and permitting decisions. The precedents also indicate that the so-called "wild trout criteria" and the "wild trout list" have regulatory significance and should be published under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202). Although the identification of streams as wild trout streams essentially involves the exercise of professional judgment by fisheries managers and fisheries biologists, it is recognized that the public input may be a useful element in this process.

The Commission proposes a statement of policy that sets forth the basis for classification of streams supporting natural reproduction of trout. This wild trout list is not the same as the listing of Class A Wild Trout Waters or Wilderness Trout Streams. The wild trout stream list currently identifies about 1,500 stream sections that support naturally reproducing trout populations.

E. *Paperwork*

The proposed statement of policy will not increase paperwork and will create no new paperwork requirements.

F. *Fiscal Impact*

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

G. *Public Comments*

Interested persons are invited to submit written comments, objections or suggestions about the proposed statement of policy 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 to 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-141. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 58. RECREATION

PART II. FISH AND BOAT COMMISSION

Subpart A. GENERAL PROVISIONS

CHAPTER 57. STATEMENTS OF POLICY

Subchapter A. FISHERIES POLICIES

§ 57.11. Listing of wild trout streams.

(a) *Maintenance of list.* It is the policy of the Commission to accurately identify and classify streams supporting naturally reproducing populations of trout as wild trout streams. The Fisheries Management Division will maintain the list of wild trout streams. The Executive Director, with the approval of the Commission, will from time-to-time publish the list of wild trout streams in the *Pennsylvania Bulletin* and on the Internet. Persons with comments, objections or suggestions about the classification of streams listed may submit them to the Commission for review.

(b) *Criteria for classifying wild trout streams.* The classification of a stream as a wild trout stream means that the trout found there have resulted from natural reproduction and that the habitat supports wild trout. Identification of streams for the presence of wild trout typically involves:

(1) *Location and habitat.* Classifications of wild trout streams will involve examination of one or more sites, which may vary in size, within the stream. The exercise of judgment by the investigator is essential in describing the extent of the stream continuum to which the examination applies. The investigator should find that the habitat is such as would support natural reproduction of trout.

(2) *Exclusion of stocked trout.* In classifying a wild trout stream, the investigator should find trout resulting from natural reproduction in the stream section or upstream and downstream areas and their tributaries. In making this finding, the investigator will specifically exclude trout stocked as fingerlings or adults and trout that escape from a hatchery. The exercise of judgment is required in examining the trout for physical appearance such as coloration, fin condition, and body configuration as indicators of the source of the trout. Direct evidence of natural reproduction of trout is a factor in making this classification, but it is not required if the other elements are present.

(3) *Biological criteria.* In identifying a wild trout stream, the investigator should find one or more of the following:

(i) Young of the year trout less than 150 mm occur at some time in the stream section.

(ii) Two or more ages of wild trout occur at some time within the stream section.

(4) *Tributary linkages.* All tributaries to wild trout streams are classified as wild trout streams for their function as habitat for segments of wild trout populations, including nurseries and refuges, and in sustaining water quality necessary for wild trout.

(c) *Existing list.* All streams identified as wild trout streams on or before January 1, 2002, and listed as such by the Fisheries Management Division will continue to be considered as wild streams by the Commission.

(d) *Requests for evaluation or reevaluation of streams.* The Commission staff will evaluate or reevaluate the classification of streams as wild trout streams at the request of the Department of Environmental Protection (DEP) in connection with permitting decisions.

(1) Requests for evaluation or reevaluation from persons or parties other than DEP will be considered for review consistent with available staff and resources and prioritized based on the status of DEP permitting decisions related to the sites.

(2) Requests that the Commission staff evaluate or reevaluate stream sections for inclusion on or removal from the list of streams supporting naturally reproducing populations of trout may be addressed to the Bureau of Fisheries, Fish and Boat Commission, 450 Robinson Lane, Bellefonte, Pennsylvania 16823-9616.

(3) In evaluating requests to remove streams from the list of wild trout streams, the Commission will take into account circumstances where human intervention or manmade changes have diminished the capacity of a stream to meet the criteria set forth in this section.

(4) Streams will not be removed from the list of wild trout streams in circumstances where the investigator finds evidence that their characteristics and trout populations have been changed solely or principally as a result of human intervention.

(e) *Appeals.* A person aggrieved by the classification of a stream section as a wild trout stream section may appeal the agency action by filing a notice of appeal with the Executive Director, Fish and Boat Commission, P. O. Box 67000, Harrisburg, Pennsylvania 17106-7000, within 15 days after publication of the notice that the stream section had been so classified in the *Pennsylvania Bulletin*. Nothing in this subsection enlarges or diminishes the appeal rights of persons or parties in connection with permitting decisions and other actions of DEP.

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