

# RULES AND REGULATIONS

## Title 37—LAW

### STATE POLICE

#### [37 PA. CODE CH. 23]

#### Administration of the Bureau of Liquor Control Enforcement Age Compliance Check Program

The State Police is adding Chapter 23 (relating to administration of the Bureau of Liquor Control Enforcement Age Compliance Check program) to read as set forth in Annex A.

As a requirement of section 1 of the act of December 3, 2002 (P.L. 1144, No. 141) (Act 141), this final-form rulemaking is necessary for the general administration of the age compliance program. The effective date of Act 141 was February 1, 2003. This final-form rulemaking prescribes the manner in which compliance checks are to be performed and requires officers, employees and interns of the Bureau of Liquor Control Enforcement (Bureau) to undergo approved training prior to participation in a compliance check.

#### *Statutory Authority*

This final-form rulemaking is authorized by Act 141.

#### *Effect*

This final-form rulemaking will affect the Bureau and establishments licensed to serve alcoholic beverages

#### *Effective Date/Sunset Date*

This rulemaking will go into effect upon final-form publication in the *Pennsylvania Bulletin*. The regulations will sunset when Act 141 sunsets on December 31, 2007.

#### *Comments and Responses*

The State Police did not receive any comments from the Senate Committee on Law and Justice. The State Police received the following comments from the House Judiciary Committee.

1. The Committee suggested that the training curriculum for underage buyers include a segment on alcohol abuse. The State Police accepted this suggestion and included § 23.21(b)(1)(v) (relating to required training) to require that training.

2. The Committee noted its concern with language found in § 23.22(a) (relating to age compliance schedule) which stated that age compliance checks would be conducted with no less than one Bureau officer and one underage buyer. The Committee suggested that the language be amended to read "no less than one Bureau officer for each underage buyer." The State Police adopted that suggestion and revised § 23.22(a) accordingly.

3. The Committee was concerned with the language found in proposed § 23.22(e) which stated that the Bureau officer "will endeavor to maintain visual contact with the underage buyer." The Committee felt the phrase "will endeavor" did not set a sufficiently clear standard and suggested the subsection be amended to provide that the Bureau officer "shall maintain" visual contact with the underage buyer. The State Police did not make the suggested revision because the crowded bar environment and the necessity of effective undercover operations make it impractical for a Bureau officer to maintain a "visual lock" on the underage buyer at all times. In a crowded

bar, it would not be uncommon for the Bureau officer to lose temporary visual contact as the underage buyer moves through the bar or the officer occasionally scans the crowd under normal undercover procedure. In response to the Committee's comment, the State Police has eliminated the requirement that Bureau officers endeavor to maintain contact. Instead, the State Police will enact undercover operating procedures to address this situation.

4. The Committee expressed some concerns about proposed § 23.22(j), which related to notifying the licensed premises of the compliance check results. First, the Committee recommended that the actual licensee be notified; second, that the Bureau officer who supervised the underage buyer be responsible for providing the notification; third, that written notification of compliance be made within 10 working days of the age compliance check program. With respect to the Committee's first point, the State Police believes there would be innumerable problems associated with notifying the actual licensee of the compliance check results. A liquor license can be held by an individual, a partnership or a corporation. Moreover, a management corporation can be placed under contract by the "licensee" to operate the premises; this is common practice with franchises and bars located in major hotels. In response to the Committee's concern, the State Police has provided in § 23.23 (relating to notification of results of age compliance check), that the notification will be made to the Board-approved manager or person in charge of the licensed premises. This is consistent with Liquor Control Board (Board) regulations that require a bar to have a full-time manager. See 40 Pa. Code §§ 5.16, 5.17 and 5.23 (relating to appointment of managers, distributor or importing distributor licensees: appointment of manager; and appointment of managers). With respect to the Committee's second point, the final-form rulemaking has been amended to provide that a Bureau officer will make the required notification; however, that notification does not need to be made by the same officer who supervised the underage buyer during the compliance check. The Bureau may want to use the same undercover officer to conduct additional compliance checks in that bar or to supervise the underage buyer in more than one establishment on any given day. For that reason, the State Police has chosen to retain the flexibility of using another Bureau officer to make the required notification. The State Police has accepted the Committee's recommendation that written notification of compliance be provided within 10 working days; that requirement is now contained in § 23.23(b).

The State Police received the following comments from the Independent Regulatory Review Commission (IRRC):

1. IRRC incorporated comments and concerns raised by the House Judiciary Committee. The State Police has responded to those comments as previously outlined.

2. IRRC commented that the definition of "compliance" should include references to the statutes with which the licensee needs to comply. This final-form rulemaking has been amended to include a reference to section 493(1) of the Liquor Code (47 P.S. § 4-493(1)) (Code). IRRC also questioned whether the final-form rulemaking needs to include a definition of the terms "sale or sell." The State Police decided to retain the definition of "sale or sell" to be consistent with the Code, which contains such a definition.

3. IRRC recommended including a provision specifying how the State Police will determine if required training has been completed. The State Police does not believe the provision is necessary with respect to Bureau officers who cannot become Bureau officers until they have successfully completed a 13—15 week resident training course at the State Police Academy (Academy). With respect to the training required of underage buyers, § 23.21(b)(2) of the final-form rulemaking requires underage buyers to pass an examination administered by the Bureau.

4. Section 23.22(a) of the proposed rulemaking required an age compliance check to be performed with “at least one Bureau officer and one underage buyer.” IRRC asked in what situations there would not be a one-to-one ratio. Based on comments received from the House Judiciary Committee, the final-form rulemaking provides that the age compliance check shall be conducted with at least one Bureau officer for each underage buyer.

5. IRRC expressed three concerns regarding the notice procedures and requirements contained in proposed § 23.22(j). First, IRRC noted that subsections (a)—(i) addressed how compliance checks would be implemented and that subsection (j) addressed notification requirements after the compliance check was completed. IRRC recommended that subsection (j) be separated from § 23.22 and assigned its own section. The State Police has adopted IRRC’s suggestion and moved the notification procedures to § 23.23. Second, IRRC noted that the proposed rulemaking states that notification of the results of the age compliance check would be given to the licensed premises. IRRC suggested that the final-form rulemaking should direct the Bureau officer to give written notice of the results of the compliance check to an individual such as a manager or person in charge of the premises. The State Police agrees. Section 23.23 of the final-form rulemaking states that notification will be made to the Board-approved manager or person in charge of the licensed premises. The final-form rulemaking also includes a definition of the term “Board-approved manager.” Finally, IRRC suggested that the final-form rulemaking should specify the date, time and any other information, if available, that would assist the licensee and its employees in complying with the law. In response to this suggestion, the State Police has added § 23.23(c), which requires the verbal and written notification to include the date and time of the compliance check as well as the name of the server if known.

6. IRRC suggested amending the preamble to include an expiration date of December 31, 2007, to be consistent with Act 141, which will sunset on that date. The State Police made the suggested revision.

7. IRRC pointed out that the proposed rulemaking incorrectly refers to the Liquor Code as 43 P. S. IRRC also suggested that the regulation refer to specific sections of the Liquor Code and the Crimes Code that will be addressed in training for underage buyers. As a result of IRRC’s comments, § 23.21(b) has been revised to provide that underage buyers will receive training on sections 493(1) and 493(14) of the Liquor Code (47 P. S. §§ 4-493(1) and 4-493(14)) and 18 Pa.C.S. §§ 6307—6310.3.

The Pennsylvania Tavern Association (Association) provided the House Judiciary Committee with the following comments which were subsequently forwarded to the State Police:

1. The Association suggested altering the definition of an “underage buyer” to provide that the underage buyer

must be “an individual who a reasonable person standing in the shoes of the server would believe to be underage at the time of purchase or attempt to purchase and would require the underage buyer to produce valid proof of age.” The State Police made no response to this comment. The purpose of the age compliance check is to ensure that licensed premises comply with the law, and it is illegal to serve alcohol, malted or brewed beverages to persons under the age of 21 regardless of their physical appearance.

2. The Association suggested that no more than one underage buyer should be supervised by a single Bureau officer. In response to this comment, the State Police revised § 23.22(a) to provide that a compliance check will be conducted with one Bureau officer for each underage buyer.

3. Like the House Judiciary Committee, the Association suggested that Bureau officers be required to maintain constant visual contact with the underage buyer. The State Police thoughtfully considered this suggestion but rejected it as impractical. The final-form rulemaking has been amended to omit any requirement as to maintaining eye contact; instead, that issue will be addressed in internal standard operating procedures.

4. The Association suggested that licensed establishments be given immediate notice of noncompliance. The State Police made no change in response to this comment because § 23.22(j)(2) already provided that immediate verbal notification would be made when a licensed premises is not in compliance. At IRRC’s suggestion, in the final-form rulemaking, the notification provisions were moved to a new subsection in § 23.23. The requirement of immediate notification of noncompliance has been retained and can now be found in § 23.23(a).

5. The Association also suggested that the notice of compliance or noncompliance should include the date, time and location of the compliance check as well as the name of the server. The final-form rulemaking has been amended to provide in § 23.23(c) that verbal and written notification will include the date and time of the compliance check as well of the name of the server if it is known.

Finally, the Board provided the following comments to the Senate Committee on Law and Justice, which shared them with the State Police:

1. The Board opined that the definition of the term “purchase” is used in a manner inconsistent with the definition. The State Police disagrees and no change has been made to the regulation in response to this comment.

2. The Board commented that the proposed rulemaking does not detail the training Bureau officers must complete before participating in an age compliance check. The State Police do not believe Act 141 requires Bureau officers who supervise age compliance checks to receive specific training. Given the fact that an individual must be 21 years of age to work as a Bureau officer, Bureau officers will never serve as underage buyers. Section 21.21(a) reflects the fact that to become a Bureau officer, one must complete a 13—15 week resident training program at the Academy, which will include training related to age compliance checks. The State Police has chosen not to include more specific information about the resident training program’s curriculum in the final regulation in order to retain the requisite flexibility to make changes to the training based on experience with the age compliance check program.

3. The Board questioned whether the Bureau’s failure to comply with the regulations could expose the Bureau

officer or the underage buyer to criminal liability or have consequences in a subsequent administrative action against the licensee. Internal checks and balances within the State Police will ensure that age compliance checks are conducted properly and no changes were made to the regulations based on the Board's comment.

4. The Board noted that a previous draft of House Bill 850, which ultimately became Act 141, had prohibited the underage buyer from orally misrepresenting the buyer's age. No change has been made to this final-form rulemaking based on the Board's observation. It is not uncommon for underage individuals to verbally represent that they are 21 in an effort to obtain alcohol, malt or brewed beverages. Consequently, it is entirely appropriate to allow underage buyers to make that verbal representation during an age compliance check in which the focus is the licensee's compliance with the law.

*Regulatory Review*

On December 8, 2003, copies of the proposed rulemaking were delivered to IRRC and the Majority and Minority Chairpersons of the House Judiciary Committee and Senate Law and Justice Committee. Notice of proposed rulemaking was published at 33 Pa. B. 6227 (December 20, 2003) and provided for a 30-day public comment period. In compliance with section 5(c) of the Regulatory Review Act (71 P.S. § 745.5(c)), the State Police provided IRRC and the Committees with copies of all comments received during the public comment period, as well as other documents if requested. In preparing the final-form rulemaking, the State Police has considered all comments received from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), this final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC approved the final-form rulemaking on October 7, 2004.

*Contact Person*

For further information on the final-form rulemaking, contact Syndi L. Guido, Policy Director, State Police, 1800 Elmerton Avenue, Harrisburg, PA 17110, (717) 772-0905. Individuals who are disabled and require an alternative format of this document (that is, large print, audio tape, Braille) should contact Syndi Guido so that necessary arrangements can be made.

*Fiscal Impact*

This final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions and will impose no new costs on the general public or private sector.

*Paperwork Requirements*

The final-form rulemaking will not increase paperwork and will create no new paperwork requirements.

*Findings*

The State Police finds that:

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

(2) A public comment period was provided as required by law and all comments were considered and forwarded to IRRC and the Senate and House Committees.

(3) The adoption of this final-form rulemaking in the manner provided in this order is necessary and appropriate for administration and enforcement of the authorizing statute.

*Order*

The State Police, acting under the authorizing statutes, orders that:

(a) The regulations of the State Police, 37 Pa. Code, are amended by adding §§ 23.1 and 23.21–23.24 to read as set forth in Annex A.

(b) The State Police will submit this order and Annex A to the Office of General Counsel and Office of Attorney General as required by law for approval as to form and legality.

(c) The State Police shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*. The chapter will sunset on December 31, 2007.

COLONEL JEFFREY B. MILLER  
*Chairperson*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 34 Pa.B. 5859 (October 23, 2004).)*

**Fiscal Note:** Fiscal Note 17-64 remains valid for the final adoption of the subject regulations.

**Annex A**

**TITLE 37. LAW**

**PART I. STATE POLICE**

**CHAPTER 23. ADMINISTRATION OF THE BUREAU OF LIQUOR CONTROL ENFORCEMENT AGE COMPLIANCE CHECK PROGRAM GENERAL PROVISIONS**

Sec. 23.1.	Definitions.
<b>COMPLIANCE CHECKS</b>	
23.21.	Required training.
23.22.	Age compliance checks.
23.23.	Notification of results of age compliance check.
23.24.	Sunset date.

**GENERAL PROVISIONS**

**§ 23.1. Definitions.**

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

*Age compliance check*—An undercover investigation of a licensed premises during which an underage buyer purchases or attempts to purchase liquor or malt or brewed beverages under the supervision of a Bureau officer.

*Board-approved manager*—A person appointed or designated by the licensee and approved by the Liquor Control Board under 40 Pa. Code § 5.16, § 5.17 or § 5.23 (relating to appointment of managers, distributor or importing distributor licensees; appointment of manager; and appointment of managers).

*Bureau officer*—A State Police officer or liquor enforcement officer who is assigned to an age compliance check.

*Compliance*—Refusing sale or service of liquor or malt or brewed beverages to the underage buyer as required by section 493(1) of the Liquor Code (47 P.S. § 4-493(1)).

*Enforcement Bureau or Bureau*—The Bureau of Liquor Control Enforcement of the State Police.

*Licensed premises*—A business licensed by the Liquor Control Board to sell liquor or malt or brewed beverages in this Commonwealth.

*Liquor*—Includes any alcoholic, spirituous, vinous, fermented or other alcoholic beverage, or combination of liquors and mixed liquor a part of which is spirituous, vinous, fermented or otherwise alcoholic, including all drinks and drinkable liquids, preparations or mixtures, and reused, recovered or redistilled denatured alcohol usable or taxable for beverage purposes which contain more than .5% of alcohol by volume, except pure ethyl alcohol and malt or brewed beverages.

*Malt or brewed beverages*—Any beer, lager beer, ale, porter or similar fermented malt beverage containing .5% or more of alcohol by volume, by whatever name the beverage may be called.

*Purchase*—Obtaining food, nonalcoholic beverages, liquor, alcohol or malt or brewed beverages for consideration.

*Sale or sell*—The transfer of liquor, alcohol or malt or brewed beverages for consideration.

*Underage buyer*—An individual between 18 and 20 years of age who is an officer, employee or intern of the Enforcement Bureau and participates in an age compliance check.

#### COMPLIANCE CHECKS

##### § 23.21. Required training.

(a) *Bureau officers.* Before participating in an age compliance check, Bureau officers shall complete training approved by the Enforcement Bureau.

(b) *Underage buyers.* Before participating in an age compliance check, an underage buyer shall:

(1) Complete a training course prescribed by the Enforcement Bureau, which includes instruction in at least the following areas of study:

(i) Sections 493(1) and 493(14) of the Liquor Code (47 P. S. §§ 4-493(1) and 4-493(14)) and 18 Pa.C.S. §§ 6307—6310.3.

(ii) Safety protocols.

(iii) Undercover investigations.

(iv) Testifying in court.

(v) Alcohol abuse.

(2) Pass an examination administered by the Enforcement Bureau.

##### § 23.22. Age compliance checks.

(a) The age compliance check shall be conducted with at least one Bureau officer for each underage buyer.

(b) A Bureau officer shall be in charge of the age compliance check.

(c) A Bureau officer shall enter and remain inside the licensed premises during the age compliance check.

(d) The age compliance check shall be conducted at the licensed premises during regular business hours.

(e) The Bureau officer shall observe the activity inside the licensed premises and determine if it is safe and appropriate to conduct the age compliance check.

(f) Underage buyers may purchase or attempt to purchase liquor or malt or brewed beverages only during an age compliance check and only while under the direct supervision of a Bureau officer.

(g) Underage buyers may not consume liquor or malt or brewed beverages.

(h) If an underage buyer removes the liquor or malt or brewed beverages from the licensed premises, the underage buyer shall deliver the liquor or malt or brewed beverages to the Bureau officer as soon as possible, consistent with safety protocols.

##### § 23.23. Notification of results of age compliance check.

A Bureau officer will be responsible for insuring notification is made of the results of the age compliance check to the Board-approved manager or person in charge of the licensed premises.

(1) If the licensed premises is not in compliance, immediate verbal notification will be provided followed by written notification within 10 working days.

(2) If the licensed premises is found to be in compliance, written notification of compliance will be provided within 10 working days.

(3) Verbal and written notification will include the date and time of the compliance check as well as the name of the server if known.

##### § 23.24. Sunset date.

This chapter will expire on December 31, 2007.

[Pa.B. Doc. No. 04-2102. Filed for public inspection November 24, 2004, 9:00 a.m.]

## Title 58—RECREATION

### FISH AND BOAT COMMISSION

#### [58 PA. CODE CHS. 61, 65 AND 69]

#### Fishing

The Fish and Boat Commission (Commission) by this order amends Chapters 61, 65 and 69 (relating to seasons, sizes and creel limits; special fishing regulations; and fishing in Lake Erie and boundary lakes). The Commission is publishing this final-form rulemaking under 30 Pa.C.S. (relating to the Fish and Boat Code) (code). The changes relate to the season, size and creel limit for American shad in the Schuylkill River upstream of the I-95 Bridge and its tributaries; eliminating the phrase "molded facsimiles or replicas" as used in various special fishing regulations where terminal tackle is restricted to artificial lures; changing the name of the Select Trout Stocked Lake Program to the Early Season Trout Stocked Waters Program; and the seasons, sizes and creel limits for burbot and smelt in Lake Erie, its tributaries and Presque Isle Bay.

##### A. Effective Date

This final-form rulemaking will go into effect on January 1, 2005.

##### B. Contact Person

For further information on the final-form rulemaking, contact Laurie E. Shepler, Esq. (717) 705-7815, P. O. Box 67000, Harrisburg, PA 17106-7000. This final-form rulemaking is available electronically through the Commission's website [www.fish.state.pa.us](http://www.fish.state.pa.us).

### C. Statutory Authority

The amendments to §§ 61.1, 61.8 and 69.12 (relating to Commonwealth inland waters; Lehigh River and tributaries; and seasons, sizes and creel limits—Lake Erie and Lake Erie tributaries) are published under section 2102 of the code (relating to rules and regulations). The amendments to §§ 65.1—65.3, 65.5—65.7, 65.10 and 65.24 are published under section 2307 of the code (relating to waters limited to specific purposes).

### D. Purpose and Background

This final-form rulemaking is designed to update, modify and improve the Commission's regulations pertaining to fishing. The specific purpose of this final-form rulemaking is described in more detail under the summary of changes.

### E. Summary of Changes

(1) *Section 61.8.* Major efforts to open or remove blockages to anadromous fish migration on the Schuylkill River are underway. Three dams are now or will be breached/removed. These dams are Plymouth Dam (River Mile (RM) 18), Vincent Dam (RM 42) and Felix Dam (RM 79). The Fairmount Dam (RM 9) has a vertical slot fishway that is to be rebuilt in 2005. On March 10, 2004, groundbreaking occurred for a fishway at Flat Rock Dam (RM 15). Norristown Dam (RM 21) will have fish passage in place by 2006, and Black Rock Dam (RM 37) will have fish passage by 2007.

The Commission has been stocking fry shad in the Schuylkill River for several years, and sampling as recent as 2003 indicates that these fish are returning as adults. With the likelihood of more and more of the river being open to passage, there is a need to implement restrictive regulations to enhance restoration efforts while providing anglers with an opportunity to fish for and harvest this exciting sport fish. The Commission believes that a one shad creel limit, which currently is in place on the Lehigh River where similar restoration work is underway, is appropriate to maintain a fishery yet not degrade restoration efforts. As anglers are able to go out and catch American shad and possibly harvest one on occasion, they should be more inclined to actively support restoration activities.

The Commission chose not to use the Fairmount Dam as the downstream limit on the Schuylkill River for this final-form rulemaking, unlike the current regulations on the Lehigh River where the Easton Dam (right at the confluence with the Delaware River) is the downstream limit of waters having the one fish creel limit. Although the several mile reach of the river from the Fairmount Dam downstream to the confluence with the Delaware River/Estuary is tidal, American shad tend to concentrate at the base of the Fairmount Dam. Thus, using the I-95 Bridge as a downstream limit for the one fish limit will provide additional protection to adult American shad having a definite interest in ascending the Schuylkill River. The Commission accordingly established a one fish creel limit for American shad in the Schuylkill River basin upstream of the bridge on I-95 at Philadelphia. Specifically, the Commission amended § 61.8 to read as set forth in the notice of proposed rulemaking.

(2) *Sections 65.1—65.3, 65.5—65.7 and 65.24.* Where terminal tackle is restricted to artificial lures, the Commission's regulations provide that fishing may be done with artificial lures only constructed of metal, plastic, rubber, or wood or with flies and streamers constructed of natural or synthetic materials. Lures may be used with spinning or fly fishing gear. Use of other gear is prohib-

ited. Specifically prohibited are the use of molded facsimiles or replicas of insects, earthworms, fish eggs, fish or any invertebrate or vertebrate either singly or in combination with the other materials.

Generally, in these areas (that is, Selective Harvest, Delayed Harvest Fly-fishing Only; Heritage Trout Angling Program, Catch-and-Release, Delayed Harvest Artificial Lures Only, Trophy Trout Program and the West Branch of the Delaware River in Wayne County), the use or possession of fishbait, natural bait or baitfish and the use of a device, natural or synthetic, capable of catching fish other than artificial lures is prohibited. However, the wording varies slightly from regulation to regulation.

The phrase "molded facsimiles or replicas of insects," as used in the regulations, is difficult to apply when dealing with the vast array of processes used to create artificial fishing lures. In addition, the life forms that molded facsimiles or replicas are intended to represent further confound the interpretation of the regulations.

The Commission simplified these regulations by eliminating the specific prohibition against the use of molded facsimiles or replicas of insects, earthworms, fish eggs, fish or any invertebrate or vertebrate either singly or in combination with the other materials. The Commission also modified the regulations to state uniformly that the use or possession of any natural bait, baitfish, fishbait, bait paste and similar substances, fish eggs (natural or molded) or any other edible substances, and the use of any other lure, other than artificial lures, flies or streamers, is prohibited in these areas. In § 65.5 (relating to catch-and-release), the prohibition against barbed hooks and the requirement that barbless hooks are used will remain. The Commission amended these sections to read as set forth in the notice of proposed rulemaking.

(3) *Section 65.10 (relating to Select Trout Stocked Lake Program).* At the July 1994 meeting, the Commission approved the creation of what later became known as the Select Trout Stocked Lake Program. Through the stocking of a portion of the preseason trout allocation during the January through early March period in select lakes, reservoirs and stream sections, the Commission provides opportunities for trout angling (and harvest of three trout per day) in waters that normally would be closed to fishing during March as part of the traditional preseason stocking period. As stream sections are included in the program, a name change is warranted, particularly for use in publications, website coverage and correspondence to the angling public. Thus, without changing the intent of the program, the Commission changed the name of § 65.10 from "Select Trout Stocked Lake Program" to "Early Season Trout Stocked Waters Program." The Commission also amended § 61.1 (relating to Commonwealth inland waters) to reflect the new name of the program, which is referenced in that section. The Commission amended these sections to read as set forth in the notice of proposed rulemaking.

In accordance with § 51.5 (relating to correction of regulations), the Executive Director took immediate corrective action on the Commission's behalf to change the reference to lakes in § 65.10(a) to "waters." This section will read as set forth in Annex A.

(4) *Section 65.24 (relating to miscellaneous special regulations).* Lower Burrell Park Pond (also locally known as Holtzhauer Lake) is a 4 acre impoundment located in northwestern Westmoreland County and owned by the City of Lower Burrell (City). The impoundment was built on an unnamed tributary to Little Pucketa Creek and is

very accessible to a public road (68% within 110 yards). The entire shoreline is open to public angling, but ice fishing and boating are not permitted on the impoundment. The impoundment is located in a city park that has a walking trail around the lake, a handicap access fishing pier, several parking areas, picnic pavilions and recreational facilities. A May 2002 fish population sampling by the Commission's Area Fisheries Manager found largemouth bass to be the dominant warmwater game fish and bluegill to be the dominant panfish. The bass and bluegill fish population size structure and density are of relatively high quality.

Informal catch and release regulations have been imposed by the City at the impoundment since September 2000. The City would like to continue with the catch and release regulations and to have them enforced by the Commission. The Commission concurs with the City's request and has not heard of any complaints about the current but "informal" regulations. Because the pond is a publicly owned, highly accessible impoundment in an urban population area, it has great appeal for the trout stocking program. Commission staff will continue to work with the City on this aspect of a management plan.

The Commission amended § 65.24 to impose catch-and-release only regulations for all species at Lower Burrell Park Pond to optimize use of this waterway. Specifically, the Commission amended this section to read as set forth in the notice of proposed rulemaking.

(5) *Section 69.12.* Anglers occasionally catch burbot by hook and line in Lake Erie and Presque Isle Bay. However, burbot may only be legally taken by SCUBA divers by use of nonmechanical spears or gigs at a depth of at least 60 feet during the period, June 1 to September 30, with a daily limit of five. Although inland populations of burbot are endangered and therefore harvest is not allowed, burbot in Lake Erie are abundant enough to support commercial and sport harvest. The Commission's Bureau of Law Enforcement personnel indicate that anglers who catch burbot during the winter months rarely catch more than a couple per day. Thus, the Commission amended this section to allow burbot to be taken by hook and line with a limit of five per day and no closed season. Commission staff anticipate no adverse impacts to burbot populations as a result of the change.

As with burbot, anglers occasionally catch smelt through the ice in Presque Isle Bay. Under the Commission's current regulations, smelt are not specifically listed and have been considered baitfish. Baitfish may be taken year around with no minimum size requirement and a daily limit of 50 (combined species). To clarify the existing regulations, the Commission amended this section to list smelt separately with no closed season, no minimum length and no creel limit. Commission staff do not anticipate any adverse impacts to the smelt population as a result of the change.

Section 69.12 (relating to season, sizes and creel limits—Lake Erie and Lake Erie tributaries) with the changes described in the notice of proposed rulemaking allowed burbot to be taken by hook and line year 'round, while they could be taken by SCUBA divers by nonmechanical spears or gigs only during the season, June 1 to September 30. There is no sound fisheries management reason for this distinction. Therefore, the Commission, on final-form rulemaking, amended this section to allow the taking of burbot by nonmechanical spears or gigs year around. The Commission amended this section to read as set forth in Annex A.

#### F. Paperwork

This final-form rulemaking will not increase paperwork and will create no new paperwork requirements.

#### G. Fiscal Impact

This final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. This final-form rulemaking will impose no new costs on the private sector or the general public.

#### H. Public Involvement

A notice of proposed rulemaking was published at 34 Pa.B. 3603 (July 10, 2004). The Commission did not receive any public comments concerning the proposed amendments to §§ 61.8 and 65.24 (with regard to Lower Burrell Park Pond). The Commission received one public comment supporting the proposed changes to §§ 65.1—65.3, 65.5—65.7, 65.10 and 65.24 (with regard to West Branch Delaware River ) and § 69.12. Copies of all public comments were provided to the Commissioners.

#### Findings

The Commission finds that:

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

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

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

#### Order

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

(a) The regulations of the Commission, 58 Pa. Code Chapters 61, 65 and 69, are amended by amending §§ 61.1, 61.8, 65.1—65.3, 65.5—65.7 and 65.24 to read as set forth at 34 Pa.B. 3603 and by amending §§ 65.10 and 69.12 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(b) The Executive Director will submit this order, 34 Pa.B. 3603 and Annex A to the Office of Attorney General for approval as to legality as required by law.

(c) The Executive Director shall certify this order, 34 Pa.B. 3603 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect January 1, 2005.

DOUGLAS J. AUSTEN, Ph.D.,  
*Executive Director*

**Fiscal Note:** 48A-156 remains valid for the final adoption of the subject regulations.

#### Annex A

#### TITLE 58. RECREATION

#### PART II. FISH AND BOAT COMMISSION

#### Subpart B. FISHING

#### CHAPTER 65. SPECIAL FISHING REGULATIONS

#### § 65.10. Early Season Trout Stocked Waters Program.

(a) The Executive Director, with the approval of the Commission, may designate waters as part of the Early

Season Trout Stocked Waters Program. The designation of waters as part of the Early Season Trout Stocked Waters Program shall be effective upon publication of a notice of designation in the *Pennsylvania Bulletin*.

(b) It is unlawful to fish in waters designated as part of the Early Season Trout Stocked Waters Program except in compliance with the following requirements:

(1) Notwithstanding § 63.3 (relating to fishing in approved trout waters), fishing is permitted from March 1 until midnight, March 31.

(2) The daily creel limit is: three combined species during the period from the day after Labor Day until midnight, March 31 of the following year. Except during this period, the Statewide creel limits apply (See § 61.1 (relating to Commonwealth inland waters).)

(3) Except as otherwise provided in this section, Statewide regulations (including size and creel limits) apply to waters in the Early Season Trout Stocked Waters Program.

**CHAPTER 69. FISHING IN LAKE ERIE AND BOUNDARY LAKES**

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

\* \* \* \* \*

(f) Subject to the provisions of subsections (d) and (e), the following seasons, sizes and creel limits apply to Lake Erie, Lake Erie tributaries and Presque Isle Bay, including peninsular waters:

<i>SPECIES</i>	<i>SEASONS</i>	<i>MINIMUM SIZE</i>	<i>DAILY LIMIT</i>
MUSKELLUNGE and MUSKELLUNGE HYBRIDS PIKE	Inland seasons apply: See § 61.1.	40 inches	1
Northern		24 inches	2
WALLEYE	January 1 to midnight March 15 and 12:01 a.m. the first Saturday in May to December 31	18 inches	4
BASS Largemouth Smallmouth	January 1 to opening day of trout season in April and first Saturday after June 11 until December 31	15 inches	4 (combined species only 2 of which may be lake trout).
	Opening day of trout season in April until first Saturday after June 11.*	20 inches	
TROUT and SALMON	First Saturday after April 11 until midnight Labor Day.	9 inches	5 (combined species only 2 of which may be lake trout).
	12:01 a.m. the day after Labor Day until midnight on the Friday before the first Saturday after April 11	15 inches	3 (combined species only 2 of which may be lake trout).
STURGEON	No open season	ENDANGERED SPECIES	
SUNFISH, CRAPPIES, CATFISH, ROCK BASS, SUCKERS, EELS, CARP, WHITE BASS	Open year round	None	50 (combined species)
YELLOW PERCH	From December 1 Through March 31	7 inches	20
	From April 1 through November 30	8 inches	20
BAIT FISH FISH BAIT	Open year round	None	50 (combined species)
BURBOT (when taken by hook and line or when taken by SCUBA divers by use of nonmechanical spears or gigs at a depth of at least 60 feet)	Open year-round	None	5
Smelt (when taken by hook and line)	Open year-round	None	None
ALL OTHER SPECIES	Inland regulations apply: See § 61.1		

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

[Pa.B. Doc. No. 04-2103. Filed for public inspection November 24, 2004, 9:00 a.m.]

**[58 PA. CODE CHS. 103, 105, 107 AND 111]****Boating**

The Fish and Boat Commission (Commission) by this order amends Chapters 103, 105, 107 and 111 (relating to rules of the road; operational conditions; boating restrictions; and special regulations counties). The Commission is publishing this final-form rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code). This final-form rulemaking relates to the definition of "slow, no wake speed" and eliminating the term "slow, minimum height swell speed" as used throughout the Commission's regulations.

**A. Effective Date**

The final-form rulemaking will go into effect on January 1, 2005.

**B. Contact Person**

For further information on the final-form rulemaking, contact Laurie E. Shepler, Esq., P. O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7815. This final-form rulemaking is available electronically through the Commission's website [www.fish.state.pa.us](http://www.fish.state.pa.us).

**C. Statutory Authority**

The amendments to §§ 103.2, 103.3, 103.16, 105.3 and 107.5 are published under the statutory authority of section 5123 of the code (relating to general boating regulations). The amendments to §§ 111.2—111.4, 111.6, 111.9, 111.13, 111.14, 111.17, 111.20—111.25, 111.27, 111.30, 111.31, 111.36, 111.40—111.43, 111.46, 111.48, 111.49, 111.52, 111.56, 111.58, 111.59, 111.62, 111.64 and 111.66 are published under the statutory authority of section 5124 of the code (relating to particular areas of water).

**D. Purpose and Background**

The final-form rulemaking is designed to update, modify and improve the Commission's boating regulations. The specific purpose of the amendments is described in more detail under the summary of changes. The Commission's Boating Advisory Board considered the proposed amendments and recommended that the Commission adopt them as set forth in the notice of proposed rulemaking.

**E. Summary of Changes**

Historically, the Commission's regulations have used the term "slow, minimum height swell speed," as opposed to the more common term, "slow, no wake speed." Section 103.2 defines "slow, minimum height swell speed" as the "lowest engagement speed for the engine and that the wake or wash creates a minimum disturbance." The section also provides that "Buoys and signs marked 'slow, no wake' shall mean operation at slow, minimum height swell speed."

The current definition does not adequately describe what the Commission means by "slow, no wake speed." There have been misunderstandings by the boating public and problems when citations by Commission officers for wake violations have been challenged in court. Staff have reviewed the definitions for "slow, no wake speed" in other states and by the National Park Service. Other states and the Federal government do not use the term "slow, minimum height swell speed."

The Commission therefore proposed that the term "slow, minimum height swell speed" be replaced with

"slow, no wake speed" so the public better understands the term. The Commission also proposed amending the definition to reflect the accepted standards in other states. The Commission has amended § 103.2 (relating to definitions) to read as set forth in the notice of proposed rulemaking.

In addition, there are several references to slow, minimum height swell speed throughout the Commission's regulations. The Commission proposed that these references in §§ 103.3, 103.16, 105.3, 107.5, 111.2, 111.3, 111.4, 111.6, 111.9, 111.13, 111.14, 111.17, 111.20—111.25, 111.27, 111.30, 111.31, 111.36, 111.40—111.43, 111.46, 111.49, 111.52, 111.56, 111.58, 111.59, 111.62, 111.64 and 111.66 be amended to reflect the new term. The Commission amended these sections to read as set forth in the notice of proposed rulemaking. In accordance with § 51.5 (relating to correction of regulations), the Executive Director took immediate corrective action on the Commission's behalf to change the reference in § 111.48 to slow, minimum height swell speed to slow, no wake speed as set forth in Annex A.

**F. Paperwork**

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

**G. Fiscal Impact**

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

**H. Public Involvement**

A notice of proposed rulemaking was published at 34 Pa.B. 4466 (August 14, 2004). The Commission did not receive any public comments concerning the proposal.

**Finding**

The Commission finds that:

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

(2) A public comment period was provided and no comments were received.

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

**Order**

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

(a) The regulations of the Commission, 58 Pa. Code Chapters 103, 105, 107 and 111, are amended by amending §§ 103.2, 103.3, 103.16, 105.3, 107.5, 111.2—111.4, 111.6, 111.9, 111.13, 111.14, 111.17, 111.20—111.25, 111.27, 111.30, 111.31, 111.36, 111.40—111.43, 111.46, 111.49, 111.52, 111.56, 111.58, 111.59, 111.62, 111.64 and 111.66 to read as set forth in 34 Pa.B. 4466 and § 111.48 to read as set forth in Annex A.

(b) The Executive Director will submit this order, 34 Pa.B. 4466 and Annex A to the Office of Attorney General for approval as to legality as required by law.



(c) The Executive Director shall certify this order, 34 Pa.B. 4466 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect January 1, 2005.

DOUGLAS J. AUSTEN, Ph.D.,  
*Executive Director*

**Fiscal Note:** Fiscal Note 48A-157 remains valid for the final adoption of the subject regulations.

*(Editor's Note:* For the final text of § 111.56, see 34 Pa.B. 6333 (November 27, 2004).)

**Annex A**  
**TITLE 58. RECREATION**  
**PART II. FISH COMMISSION**  
**Subpart C. BOATING**  
**CHAPTER 111. SPECIAL REGULATIONS**  
**COUNTIES**

**§ 111.48. Northampton County.**

(a) *East Bangor Dam.* The operation of boats powered by internal combustion motors is prohibited.

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

(c) *Delaware River.* The operation of personal watercraft is prohibited within the Delaware Water Gap National Recreation Area (upstream from mile 209.5).

(d) *Lehigh River.* Boats are limited to slow, no wake speed in the main channel 150 feet upstream and 150 feet downstream from the Route 33 access ramp.

[Pa.B. Doc. No. 04-2104. Filed for public inspection November 24, 2004, 9:00 a.m.]

**[58 PA. CODE CH. 111]**  
**Boating**

The Fish and Boat Commission (Commission) by this order amends Chapter 111 (relating to special regulations counties). The Commission is publishing this final-form rulemaking under 30 Pa.C.S. (relating to the Fish and Boat Code) (code). The final-form rulemaking relates to the elimination of the slow, no wake zone in the Horseshoe Curve part of the Youghiogheny River Lake, Somerset County.

**A. Effective Date**

This final-form rulemaking will go into effect on January 1, 2005.

**B. Contact Person**

For further information on the final-form rulemaking, contact Laurie E. Shepler, Esq., P. O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7815. This final-form rulemaking is available electronically through the Commission's website [www.fish.state.pa.us](http://www.fish.state.pa.us).

**C. Statutory Authority**

The amendment to § 111.56 (relating to Somerset County) is published under section 5124 of the code (relating to particular areas of water). A person violating the regulations contained in Chapter 111 commits a summary offense of the third degree for which a \$50 fine is imposed.

**D. Purpose and Background**

This final-form rulemaking is designed to update, modify and improve the Commission's boating regulations. The specific purpose of the amendment to § 111.56 is described in more detail under the summary of change. The Commission's Boating Advisory Board considered the proposed amendment and recommended that the Commission adopt the amendment as set forth in the notice of proposed rulemaking.

**E. Summary of Change**

The United States Army Corps of Engineers (Corps), Pittsburgh District, requested that a provision of § 111.56(b)(1) be removed. Corps staff at Youghiogheny River Lake stated that the regulation is not necessary because usage in the Horseshoe Curve part of the lake, even during peak usage periods, does not warrant the retention of a slow, no wake zone. In addition, subsection (b) combines personal flotation device requirements in the same subsection as the slow, no wake areas. Separating these subjects into different paragraphs increases the clarity of the regulation. The Commission amended this section to read as set forth in the notice of proposed rulemaking.

As part of the proposed rulemaking package, the Commission also proposed a change to § 111.2 (relating to Allegheny County). Specifically, the Commission proposed the creation of a slow, no wake zone on the Ohio River, Allegheny County, in the back channel of Neville Island from the Coraopolis Bridge upstream to the Interstate 79 bridge from May 1 through October 1. The Commission did not adopt the proposed amendment on final-form rulemaking, and accordingly, the proposed amendment is withdrawn.

**F. Paperwork**

The final-form rulemaking will not increase paperwork and will create no new paperwork requirements.

**G. Fiscal Impact**

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

**H. Public Involvement**

A notice of proposed rulemaking was published at 34 Pa.B. 4152 (August 7, 2004). The Commission did not receive any public comments concerning the proposed amendment to § 111.56.

**Findings**

The Commission finds that:

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

(2) A public comment period was provided, and no comments were received.

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

**Order**

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

(a) The regulations of the Commission, 58 Pa. Code Chapter 111, are amended by amending § 111.56 to read as set forth in Annex A.

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

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

(d) This order shall take effect January 1, 2005.

DOUGLAS J. AUSTEN, Ph.D.,  
*Executive Director*

**Fiscal Note:** 48A-158. No fiscal impact; (8) recommends adoption.

*(Editor's Note: A document amending §111.56 appears at 34 Pa.B. 6333 (November 27, 2004).)*

**Annex A**

**TITLE 58. RECREATION**

**PART II. FISH AND BOAT COMMISSION**

**Subpart C. BOATING**

**CHAPTER 111. SPECIAL REGULATIONS  
COUNTIES**

**§ 111.56. Allegheny County.**

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

(b) *Youghiogheny River Lake.*

(1) Persons shall wear a Coast Guard approved personal flotation device at all times when on board boats less than 16 feet in length or any canoe or kayak.

(2) Boats are limited to slow, no wake speed within the following areas:

(i) *Wilkins Hollow Cove.*

(ii) *Tub Run Cove.* From a line extending in a south-westerly direction between the outermost points of land on each side of the cove as marked.

(iii) *Somerfield Recreation Area.* As marked in the vicinity of the boat launch ramp and marina.

(iv) *Fall Run Cove.*

(v) *Hall Run Cove.*

(vi) *Braddocks Run Cove.*

(vii) *Reason Run Cove.*

(viii) *Off Somerfield Hill.*

[Pa.B. Doc. No. 04-2105. Filed for public inspection November 24, 2004. 9:00 a.m.]