

RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

DELAWARE RIVER BASIN COMMISSION

[25 PA. CODE CH. 901]

Temporary Amendment of the Water Quality Regulations, Water Code and Comprehensive Plan to Designate the Lower Delaware River a Special Protection Water

Summary

At its public meeting on January 19, 2005, the Commission temporarily amended the Commission's *Water Quality Regulations, Water Code and Comprehensive Plan* by classifying the Lower Delaware River—the reach between River Mile 209.5, which is the downstream boundary of the Delaware Water Gap National Recreation Area, and River Mile 133.4, which is the head of tide at Trenton, NJ—as Significant Resource Waters. The effect of this action was to make the Lower Delaware River subject to all provisions of the Commission's Special Protection Waters regulations except those that depend for implementation upon the use of numeric values for existing water quality.

Dates

This rule is effective immediately, and unless extended by amendment, it shall expire on September 30, 2005. An accompanying notice in today's *Pennsylvania Bulletin* proposes to extend the rule through September 30, 2006, pending a separate notice and comment rulemaking to permanently classify the Lower Delaware. See 35 Pa.B. 5013 (September 10, 2005).

Supplementary Information

On September 22, 2004, the Delaware River Basin Commission published on its website a Notice of Proposed Rulemaking to amend the *Water Quality Regulations, Water Code and Comprehensive Plan* to designate the Lower Delaware River a Special Protection Water. Notice was published in the *Federal Register* on September 23, 2004 (69 FR 57008), the *Delaware Register of Regulations* on October 1, 2004, the *New Jersey Register* on October 4, 2004, the *Pennsylvania Bulletin* on October 9, 2004, and the *New York Register* on October 20, 2004. A public hearing was held on October 27, 2004, and the public was invited to comment, either in person at the hearing or in writing through November 30, 2004. During the comment period, the Commission received approximately 250 letters from business, industry, individuals, municipalities and elected officials, including some opposed to designation. It also received between 1,100 and 1,200 letters and petitions in favor of designation. The Commission modified its proposed rule in part based upon comments received on the proposed action and in part based upon the need for additional analysis before all provisions of the Special Protection Waters regulations could be put into effect in the Lower Delaware.

In enacting the amendment, the Commission found on the basis of a series of studies, prior findings, plans and a federal designation, that the Lower Delaware River is characterized by exceptionally high scenic, recreational, and ecological values and water supply uses that require special protection. Before deciding whether or not to

classify certain sections of the Lower Delaware River as Outstanding Basin Waters, as originally proposed, and whether to make the temporary Special Protection Waters designation permanent for some or all of the Lower Delaware River, the Commission wishes to establish numeric values for existing water quality based upon analysis of a 5-year (2000-2004) data set, for which the final year of data only became available late in 2004. The Commission recognized that the process of developing numeric values based upon 5 years of data and subjecting them to public review and comment could take many months. It decided to provide temporary classification in order to protect the exceptional value of the Lower Delaware from degradation during that period. The proposed values for existing water quality in the Lower Delaware River based on the 5-year data set have been compiled and will be the subject of a separate notice and comment rulemaking by the Commission.

Further Information, Contacts:

The complete text of Resolution No. 2005-2, temporarily amending the *Water Quality Regulations, Water Code, and Comprehensive Plan* by designating the Lower Delaware River a Special Protection Water, is available on the Commission's website at www.drbc.net or upon request from the Delaware River Basin Commission, P. O. Box 7360, West Trenton, NJ 08628-0360. For further information, contact Pamela M. Bush, Commission Secretary and Assistant General Counsel, Delaware River Basin Commission, at (609) 883-9500, Ext. 203.

The final-form rulemaking temporarily amends Article 3, Section 3.10.3.A.2.g.2), listing stream reaches classified as Significant Resource Waters, by the addition of the following subsections 3.10.3.A.2.g.2).(b); 3.10.3.A.2.g.6).; and 3.10.3.A.2.g.7).

(b) The Lower Delaware River between River Miles 209.5 (the downstream boundary of the Delaware Water Gap National Recreation Area) and 133.4 (the Head of Tide at Trenton, NJ);

* * *

6) For the stream reaches listed in Section 3.10.3.A.2.g.2).(b), all provisions of Section 3.10.3.A.2 shall be in effect except those listed below:

- The requirement at Section 3.10.3.A.2.b.2). that “[p]oint and non-point sources from outside the boundaries of stream reaches classified as Significant Resource Waters shall be treated as required and then dispersed in the receiving water so that no measurable change occurs at Boundary and Interstate Special Protection Waters Control Points.”

- The requirement of Section 3.10.3.A.2.b., read in combination with Section 3.10.3A.2.d.6), that new and expanding wastewater treatment projects discharging to Special Protection Waters may be subject to additional treatment requirements, above and beyond the effluent criteria defining Best Demonstrable Technology, as necessary to ensure no measurable change in existing water quality in Special Protection Waters.

- The requirement at Section 3.10.3A.2.f. that state environmental agencies “shall assure to the extent possible, that existing water quality in Special Protection Waters is not measurably changed by pollution discharged into the intrastate tributary watersheds within their jurisdiction.”

Sections 3.10.3.A.2.g.2).(b) and 3.10.3.A.2.g.6). shall expire on September 30, 2005, unless extended by amendment to this rule.

PAMELA M. BUSH, ESQ.,
Secretary

Fiscal Note: Fiscal Note 68-43 remains valid for the final adoption of the subject regulation.

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 A (2005) and the Water Code and Water Quality Standards as set forth in 18 CFR Part 410 (2005) are hereby incorporated by reference and made a part of this title.

[Pa.B. Doc. No. 05-1671. Filed for public inspection September 9, 2005, 9:00 a.m.]

Title 58—RECREATION

FISH AND BOAT COMMISSION

[58 PA. CODE CHS. 53 AND 63]

General Provisions; Fishing

The Fish and Boat Commission (Commission) has amended Chapters 53 and 63 (relating to Fish and Boat Commission property; and general fishing regulations). The Commission is publishing this final-form rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code). The final-form rulemaking relates to eliminating the requirement that tournaments, as a condition for culling, establish a daily limit of one fish less than the Statewide creel limit.

A. Effective Date

The final-form rulemaking will go into effect upon publication in the *Pennsylvania Bulletin*, not on January 1, 2006, as set forth in the notice of proposed rulemaking.

B. Contact Person

For further information on the final-form rulemaking, contact Laurie E. Shepler, Chief Counsel, P. O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7815. This final-form rulemaking is available on the Commission's website at www.fish.state.pa.us.

C. Statutory Authority

The amendments to §§ 53.24 and 63.40 (relating to tournament and fishing derby permits; and fishing tournaments and fishing derbies) are published under the statutory authority of sections 322 and 2102 of the code (relating to rules and regulations).

D. Purpose and Background

The final-form rulemaking is designed to improve and update the Commission's regulations. The specific purpose of the amendments is described in more detail under the summary of changes.

E. Summary of Changes

As an outgrowth of recent discussions with tournament anglers and sponsors, there was interest in amending the

Commission's current regulations dealing with culling. Accordingly, the Commission has eliminated the requirement that tournament rules establish a daily limit of at least one fish less than the Statewide creel limit. This amendment will not have a negative fisheries impact, and the Commission's Bureau of Law Enforcement does not anticipate any problems. The Commission amended §§ 53.24 and 63.40 to read as set forth in the notice of proposed rulemaking.

As part of the proposed rulemaking package, the Commission also proposed amendments to §§ 51.32, 51.33, 51.35, 63.20 and 65.13. The Commission has not yet considered these proposed amendments on final-form rulemaking.

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

Notice of proposed rulemaking was published at 35 Pa.B. 3419 (June 18, 2005). The Commission did not receive any public comments regarding the proposed amendments to §§ 53.24 and 63.40.

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 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 53 and 63, are amended by amending §§ 53.24 and 63.40 to read as set forth at 35 Pa.B. 3419.

(*Editor's Note:* The proposal to amend §§ 51.32, 51.33, 51.35, 63.20 and 65.13, included in the proposal at 35 Pa.B. 3419, has been postponed by the Commission.)

(b) The Executive Director will submit this order and 35 Pa.B. 3419 to the Office of Attorney General for approval as to legality as required by law.

(c) The Executive Director shall certify this order and 35 Pa.B. 3419 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*.

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

Fiscal Note: Fiscal Note 48A-171 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 05-1672. Filed for public inspection September 9, 2005, 9:00 a.m.]

FISH AND BOAT COMMISSION
[58 PA. CODE CHS. 61, 65 AND 69]
Fishing

The Fish and Boat Commission (Commission) 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 the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code). The final-form rulemaking relates to the seasons, sizes and creel limits for various species in the Delaware River and River Estuary, the West Branch of the Delaware River in Wayne County and the Conowingo Reservoir. The final-form rulemaking also reduces the size limit and increases the number of walleye that may be taken from Lake Erie and its tributaries.

A. Effective Date

The final-form rulemaking will go into effect on January 1, 2006.

B. Contact Person

For further information on the final-form rulemaking, contact Laurie E. Shepler, Chief Counsel, P. O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7810. This final-form rulemaking is available on the Commission's website at www.fish.state.pa.us.

C. Statutory Authority

The amendments to §§ 61.2, 61.4 and 69.12 (relating to Delaware River and Estuary; Conowingo Reservoir; and seasons sizes and creels limits—Lake Erie and Lake Erie tributaries) are published under the statutory authority of section 2102 of the code (relating to rules and regulations). The amendment to § 65.24 (relating to miscellaneous special regulations) is published under the statutory authority of section 2307 of the code (related to waters limited to specific purposes). The amendment to § 69.33 (relating to use of trap nets) is published under the statutory authority of section 2903 of the code (relating to boats and net licenses for boundary lakes).

D. Purpose and Background

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

E. Summary of Changes

(1) *Section 61.2.* Three jurisdictions, New York, New Jersey and the Commonwealth, work in a cooperative fashion in setting regulations for the Delaware River and the West Branch because both are border waters. Differences in the rulemaking processes, license years and fisheries within different reaches may result in regula-

tions being out of synchrony for a year or so. However, the jurisdictions coordinate and attempt to provide consistency for the anglers.

Northern Pike. In the past few years, the Commission has become aware of occasional catches of northern pike from the Delaware River, which most likely originate from a few naturalized populations occurring in the drainage. Currently, regulations on northern pike do not exist. While it is not the Commission's intent to foster increases in this esocid in the river, it is likely that a low density northern pike population will persist. The Commission has adopted a 24-inch minimum length limit, a two fish daily creel limit and a year-round season to provide consistency with New Jersey's regulations. For simplification, the Commission has adopted a river wide approach even though pike have not been reported in the West Branch and the upper main stem to any great extent.

Trout. New York is seeking a 15-day extension to the trout season as part of refining trout regulations statewide. Currently, the season on the main stem and the West Branch closes at midnight September 30 when a catch-and-release artificial-lures-only begins on the West Branch. The Commission has extended the regular season 15 days on both waterways. This will provide additional angling opportunity with harvest of one trout per day upstream of I-84, five per day downstream of I-84 and two per day on the West Branch.

Black Bass (largemouth and smallmouth). Currently a year-round season with a 12-inch minimum length limit and five bass per day creel limit applies to the Delaware River and Estuary. Regulation changes recently adopted and effective January 2005 by New Jersey for the Delaware River are more conservative with respect to harvest during the black bass spawning period. The Commission has adopted amendments regarding the New Jersey/Pennsylvania portion of the river (downstream of I-84) that: (1) impose a catch-and-immediate release season that begins on the first Saturday after April 11 and extends through 12:01 a.m. the first Saturday after June 11; and (2) provide an opportunity for competitive anglers to have "paper" or catch-measure-immediate release tournaments during the catch-and-release season. This change will provide consistency with New Jersey's regulations.

Striped Bass. The upstream point of tidal influence at Trenton Falls is used as the boundary for separating freshwater and marine regulations. Use of a more readily identifiable descriptor would be easier for both anglers and law enforcement personnel. Accordingly, the Commission has adopted the Calhoun Street Bridge as a more recognizable limit. The extension is approximately 0.5 mile upstream.

The Commission has amended §§ 61.2 and 65.24 to read as set forth in the notice of proposed rulemaking.

(2) *Section 61.4.* By virtue of an agreement between the State of Maryland and the Commonwealth regarding shared jurisdictional waters, the Commonwealth will establish regulations for the Youghiogheny River Lake and Maryland will do the same for the Conowingo Reservoir. Maryland's fisheries staff recently notified the Commission that the Commonwealth's regulations for the Conowingo Reservoir are not current with Maryland's regulations. Thus, the Commission has amended its regulations pertaining to northern pike, striped bass and striped bass/white bass hybrids, sunfish, crappies, carp, channel catfish, suckers, eels, yellow perch and madtoms

so that they are consistent with Maryland's regulations. The Commission has amended § 61.4 to read as set forth in the notice of proposed rulemaking.

(3) *Sections 69.12 and 69.33.* Currently, an 18-inch minimum length and four per day creel limit are in effect for walleye taken from this Commonwealth waters of Lake Erie, Presque Isle Bay and peninsular waters. This regulation went into effect on January 1, 2004, and was designed to rebuild Lake Erie walleye populations. A relatively strong year class in 2001 was followed by a poor year class in 2002, and protection was needed to ensure that walleye numbers did not reach dangerously low levels.

In 2003, the largest year class of walleyes in 2 decades was produced and those fish will be 3 years of age and reaching average lengths of between 15 and 18 inches in 2006. This will result in a large number of walleyes that would not be harvestable under current regulations and would be subject to increased mortality due to culling. The purpose of the current regulations was to promote the rehabilitation of the walleye fishery. Based on the strength of the 2001 and 2003 year classes, and the sacrifices made by anglers in 2004 and 2005, that objective will have been met. Accordingly, the Commission has lowered the minimum size limit to 15 inches and has restored the creel limit to six per day. The Commission amended §§ 69.12 and 69.33 to read as set forth in the notice of proposed rulemaking. This action will allow Pennsylvania Lake Erie anglers to participate fully in the improving walleye fishery.

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

Notice of proposed rulemaking was published at 35 Pa.B. 2395 (April 23, 2005). The Commission did not receive any public comments regarding the proposed amendments to §§ 61.2, 61.4 and 65.24. Prior to the formal public comment period, the Commission received one public comment opposing the amendments to §§ 69.12 and 69.33. The Commission received one comment opposing these changes following the formal public comment period. 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 §§ 61.2, 61.4, 65.24, 69.12 and 69.33 to read as set forth at 35 Pa.B. 2395.

(b) The Executive Director will submit this order and 35 Pa.B. 2395 to the Office of Attorney General for approval as to legality as required by law.

(c) The Executive Director shall certify this order and 35 Pa.B. 2395 and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect on January 1, 2006.

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

Fiscal Note: Fiscal Note 48A-166 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 05-1673. Filed for public inspection September 9, 2005, 9:00 a.m.]

FISH AND BOAT COMMISSION [58 PA. CODE CHS. 63 AND 69] Fishing

The Fish and Boat Commission (Commission) amends Chapters 63 and 69 (relating to general fishing regulations; and fishing in Lake Erie and boundary lakes). The Commission is publishing this final-form rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code). The final-form rulemaking clarifies the definition of "approved trout waters." The final-form rulemaking also eliminates the minimum size limit for recreationally caught yellow perch in Lake Erie and its tributaries during the April 1 through November 30 period and for commercially caught yellow perch and increases the recreational creel limit to 30.

A. Effective Date

The amendment to § 63.3 (relating to fishing in approved trout waters) will go into effect on January 1, 2006. The amendments to §§ 69.12 and 69.33 (relating to seasons, sizes and creel limits—Lake Erie and Lake Erie tributaries; and use of trap nets) will go into effect upon publication in the *Pennsylvania Bulletin* and not on January 1, 2006, as set forth in the notice of proposed rulemaking.

B. Contact Person

For further information on the final-form rulemaking, contact Laurie E. Shepler, Chief Counsel, P. O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7815. This final-form rulemaking is available on the Commission's website at www.fish.state.pa.us.

C. Statutory Authority

The amendments to §§ 63.3 and 69.12 are published under the statutory authority of section 2102 of the code (relating to rules and regulations). The amendments to § 69.33 are published under the statutory authority of section 2903 of the code (relating to boat and net licenses for boundary lakes).

D. Purpose and Background

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

E. Summary of Changes

(1) *Section 63.3.* Prior to late 2002, the Commission's regulations defined the list of approved trout waters as the list contained in the "Summary Book." That definition did not allow the Commission much flexibility in adding and removing waters from the list. Accordingly, the Commission amended its regulations to define the term as "designated waters open to public fishing that are stocked with trout."

It recently has come to the staff's attention that the definition may be read in a manner that is not entirely consistent with the way that the Commission historically has designated waters as approved trout waters. Specifically, the Commission historically has designated entire waters or sections of waters as being approved trout waters even though they may contain parts that are closed to public fishing and therefore are not stocked with trout. These waters or sections, however, are primarily open to the public. To remove the portions that are closed to the public from the list of approved trout waters would create a complicated patchwork of waters that are approved trout waters and those that are not. It would create difficulty in enforcement and would cause confusion among anglers, which was not the intention of the regulatory definition of approved trout waters. To clarify that the definition of "approved trout waters" is consistent with the Commission's historical approach, the Commission amended § 63.3 to read as set forth in the notice of proposed rulemaking.

(2) *Sections 69.12 and 69.33.* Dramatic declines in Lake Erie yellow perch in Commonwealth waters during the 1990s required conservative harvest regulations for the fisheries. In 1996, the daily creel limit was reduced to 20 perch and an 8-inch minimum size limit was implemented to reduce exploitation and enhance spawning stock size. In 2002, the Commission amended its regulations to reduce the minimum size limit from 8 inches to 7 inches during the December 1 through March 31 period, while maintaining the 8-inch minimum size limit during the April 1 through November 30 period. An 8.5-inch minimum size limit is in effect for commercially caught yellow perch in this Commonwealth.

Other jurisdictions have implemented yellow perch conservation measures, but none continue to be as conservative as the Commonwealth. None of the jurisdictions have a recreational minimum size limit. Ohio has a creel limit of 30. Other jurisdictions have creel limits of 50.

By 2004, the Lake Erie perch had recovered to levels of abundance seen in the late 1980s with a 350% increase since the early 1990s. Even more dramatic, the 2004 population will more than double in 2005 due to the very large 2003 year-class. The 2004 boat angler survey estimated Commonwealth anglers harvested over 500,000 perch of the 750,000 perch that were caught. Thus, about 198,000 yellow perch were released because they were undersize. Catch and release mortality can be high because of hydraulic decompressing when there are large numbers of undersize yellow perch. With the very strong 2003 year class growing into the population as 3 year olds in 2006, losses could far exceed those seen in previous years.

The opportunity exists to reduce these losses and allow this Commonwealth's yellow perch anglers to benefit from the large yellow perch populations with an increase in harvest with large yellow perch populations. Appropriate regulatory changes include eliminating the minimum size limit for recreationally caught yellow perch during the April 1 through November 30 period and for commercially caught yellow perch and increasing the recreational creel limit to 30. These actions will reduce the release rate and any associated mortality. The commercial catch will continue to be controlled with a quota set at 30,000 pounds for this Commonwealth for 2005.

The yellow perch population is strong in Lake Erie and this Commonwealth's portion of Lake Erie. The Commission's evaluations suggest that the exceptional fishing should be sustained for several years. Beyond that, fishing quality would depend on yellow perch reproductive success in the coming years. The Commission will continue to be diligent in its assessment of Lake Erie fish stocks and increase the agency's agility in responding to changes in population status.

The Commission amended §§ 69.12 and 69.33 to read as set forth in the notice of proposed rulemaking.

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 35 Pa.B. 3421 (June 18, 2005). Prior to the formal public comment period, the Commission received one written public comment concerning the proposed amendment to § 63.3. The Commission received one written public comment during the formal public comment period. Both expressed concerns regarding the impact that the proposed rulemaking would have on private property rights and the related economic effects. The Commission also entertained oral comments at several public meetings. With regard to the proposed amendments to §§ 69.12 and 69.33, the Commission received two written public comments. One supported the proposal; the other opposed it. 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 63 and 69, are amended by amending §§ 63.3, 69.12 and 69.33 to read as set forth at 35 Pa.B. 3421.

(b) The Executive Director will submit this order and 35 Pa.B. 3421 to the Office of Attorney General for approval as to legality as required by law.

(c) The Executive Director shall certify this order and 35 Pa.B. 3421 and deposit them with the Legislative Reference Bureau as required by law.

(d) The amendment to § 63.3 will go into effect on January 1, 2006. The amendments to §§ 69.12 and 69.33 will go into effect upon publication in the *Pennsylvania Bulletin*.

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

Fiscal Note: Fiscal Note 48A-167 remains valid for the final adoption of the subject regulations.

[Pa.B. Doc. No. 05-1674. Filed for public inspection September 9, 2005, 9:00 a.m.]

FISH AND BOAT COMMISSION
[58 PA. CODE CH. 75]
Fishing; Endangered Species

The Fish and Boat Commission (Commission) amends Chapter 75 (relating to endangered species). The Commission is publishing this final-form rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code). The final-form rulemaking adds the eastern spadefoot toad and eastern pearlshell to the list of endangered species, moves the rough green snake from the list of threatened species to the list of endangered species and updates the scientific names of certain listed species.

A. *Effective Date*

The final-form rulemaking will go into effect immediately upon publication in the *Pennsylvania Bulletin*.

B. *Contact Person*

For further information on the final-form rulemaking, contact Laurie E. Shepler, Chief Counsel, P. O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7815. This final-form rulemaking is available on the Commission's website at www.fish.state.pa.us.

C. *Statutory Authority*

The amendments to §§ 75.1, 75.2 and 75.3 (relating to endangered species; threatened species; and candidate species) are published under the statutory authority of section 2305 of the code (relating to threatened and endangered species).

D. *Purpose and Background*

The final-form rulemaking is designed to update, modify and improve the Commission's regulations pertaining to endangered, threatened and candidate species. The specific purpose of the amendments is described in more detail under the summary of changes.

E. *Summary of Changes*

(1) Eastern Spadefoot Toad (*Scaphiopus holbrookii*). The eastern spadefoot toad is an inhabitant of sandy soils along the floodplains of streams and rivers and in temporary depressions in agricultural fields. Reproduction

occurs within one or two nights during and after heavy rain events, concentrated in vernal pools, rain-filled depressions in farm fields and along streams.

Two extant breeding populations of eastern spadefoot toads are currently reported in this Commonwealth in Northumberland and Berks Counties. Several years of herpetological inventory in this Commonwealth have failed to turn up additional records of the toads. Reports of occasional encounters in Franklin County remain unconfirmed. According to Hulse (2003), there were historical unvouchered reports of spadefoot toads in the Delaware Valley from Philadelphia to Monroe County, but these areas have since been heavily developed and industrialized.

The species ranges from southern New England to the Florida Keys and west to eastern Louisiana, but this Commonwealth forms a break between the New England populations and Maryland. The status of the spadefoot toad in the states surrounding this Commonwealth is as follows: it is listed as endangered in Ohio, considered a species of concern in New York, "declining" in New Jersey, rare in West Virginia, threatened in Massachusetts and endangered in Connecticut.

Given that spadefoot toads occur in floodplains and valleys, they are threatened by habitat destruction from residential and industrial development, as well as habitat alteration and changes in water chemistry from agricultural practices. The water in which they breed can be temporary pools, which are not necessarily delineated wetlands. Thus, wetland regulations cannot be relied upon to provide sufficient protection for this species.

The Pennsylvania Biological Survey (PABS) Amphibian and Reptile Technical Committee recommended the eastern spadefoot toad be listed as a State endangered species in 2002. Because there are only two known occurrences of this species in this Commonwealth and current survey efforts have failed to find additional occurrences, the Commission has added the eastern spadefoot toad to the Pennsylvania list of endangered species.

(2) Eastern Pearlshell (*Margaritifera margaritifera*). The eastern pearlshell is a freshwater mussel found in cold water trout streams and small rivers in softwater (acidic) conditions that have low levels of calcium. This is the only species of Pennsylvania mussel that is distributed beyond the North American continent. It occurs in the northeast from this Commonwealth north to Canada, as well as northern Europe.

Historically in the early 1900s, the eastern pearlshell occurred in several tributaries of the Little Schuylkill River, including Locust Creek, Panther Creek, Indian Run and Cold Run. However, impacts to water quality from coal mining in the Little Schuylkill drainage have eradicated the eastern pearlshell from all but Locust Creek, based on Statewide surveys from 1991 to 1995. While the population in Locust Creek is locally abundant, based on a 2003 survey, two dams on the creek restrict the pearlshell to 7 miles of stream with little likelihood of dispersal.

Two large eastern pearlshell mussels were collected in the Delaware River in recent years as part of extensive mussel surveys in the Upper Delaware. This species is documented to live over 100 years, and these specimens were determined to be extremely old. Based on the failure to find additional specimens during the ongoing collection efforts in the Upper Delaware or its tributaries, these specimens appear to represent a remnant population that is no longer reproducing.

The eastern pearlshell is listed as a species of concern in New York, Rhode Island and Connecticut, while it is threatened in Vermont. Additionally, the International Union for Conservation of Nature and Natural Resources has given it endangered status primarily due to threats to the European populations. Primary threats to the persistence of the eastern pearlshell are degradation of water quality, alteration of pH, eutrophication and temperature increases in the streams.

The PABS Bivalve Subcommittee of the Invertebrate Technical Committee recommended the eastern pearlshell be listed as a State endangered species in 2003. The restriction of a reproducing population of the eastern pearlshell mussel to only one small stream in this Commonwealth makes it very vulnerable to extirpation from activities that could adversely impact Locust Creek. Therefore, the Commission has added the eastern pearlshell to the Pennsylvania list of endangered species.

(3) Rough Green Snake (*Opheodrys aestivus*). The rough green snake is an arboreal species most often associated with wetland and riparian areas. The rough green snake is common in southern states from Texas to Florida, with this Commonwealth being the northern limit of its range. It has been known from only two isolated locations in this Commonwealth: Greene and Chester Counties. Thus, the Commission listed the rough green snake as a threatened species in 1979.

Several historic specimens or reports of this species are known from other counties. However, the only known locality of this species that has been confirmed as a reproducing population since 1939 is one in Chester County. The Greene County occurrence has not been seen since 1924 and is presumed extirpated. One additional sighting has been recorded from Lancaster County near the Maryland line, but the identification was not confirmed and no evidence of a population was documented. A Statewide Herpetological Atlas project failed to find any additional populations.

The rough green snake is a species of concern in Ohio and is rare in Delaware and West Virginia. This snake species is threatened primarily by habitat alteration from residential and industrial development.

The PABS Amphibian and Reptile Technical Committee recommended the rough green snake be listed as a state endangered species in 2002. Because there is only one known occurrence of this species in this Commonwealth and current survey efforts have failed to find additional occurrences, the Commission has moved the rough green snake from the list of Pennsylvania threatened species to the list of endangered species.

(4) *Updating Scientific Names*. The Commission has amended § 75.1 to change the name of *Clemmys muhlenbergii* (bog turtle) to *Glyptemys muhlenbergii*. Recent molecular data and genetic studies have resulted in a split in the genus *Clemmys*. Based on morphological data, Holman and Fritz (2001) split *Clemmys* as follows: *Clemmys guttata* was retained as the only member of the genus; *Clemmys insculpta* and *C. muhlenbergii* were placed in the genus *Glyptemys*. An independent analysis by Feldman and Parham (2002) supported this conclusion. Therefore, the species formerly named *Clemmys muhlenbergii* is now assigned to *Glyptemys muhlenbergii*. The name change has been adopted by NatureServe, an international biological conservation group that tracks rare and endangered species, as well as the Center for North American Herpetology (CNAH), the National herpetological group that tracks name changes.

The Commission also has amended § 75.3 to change the name of *Emydoidea blandingii* (Blandings Turtle) to *Emys blandingii*. Recent molecular and genetic studies (Feldman and Parham, 2002) have resulted in a rearrangement of several turtle groups, including the grouping of *Emydoidea blandingii* with *Emys orbicularis* in the genus *Emys*. The name change has been adopted by NatureServe and the CNAH.

The Commission further has amended § 75.1 to change the name of *Rana utricularia* (Coastal Plain Leopard Frog) to *Rana sphenoccephala*. Literature referring to this species from 1974 to 1992 used the old name *Rana utricularia* based on a morphological study by Pace (1974). However, in 1992 the International Commission on Zoological Nomenclature ruled that the name of this frog would return to *Rana sphenoccephala*, which it had been given in more recent references.

On final-form rulemaking, the Commission adopted all of the amendments as set forth in the notice of proposed rulemaking.

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 direct adverse fiscal impacts on the Commonwealth or its political subdivisions. The final-form rulemaking will impose no new direct costs on the private sector or the general public. It is noted that the direct regulatory significance of designating a species as an endangered or threatened species is limited to prohibiting persons from taking, catching, killing or possessing these species in this Commonwealth. Since none of the species listed have any commercial or recreational significance because of their rarity, there are no direct fiscal impacts from providing these protections.

The private sector and regulated community have asserted that the designation of the eastern spadefoot toad as endangered will have indirect fiscal impacts on the Commonwealth because the Commission will incur additional costs to survey and investigate all areas where the toad may be located. The Commission does not routinely survey for endangered species. However, to the extent that the Commission would conduct biological surveys for this species, the surveys would be geographically based on known locations. As stated in the notice of proposed rulemaking, there currently are only two known breeding locations for the eastern spadefoot toad. Thus, the Commission's surveying costs would be nominal.

The private sector and regulated community also have asserted that the designation of the eastern spadefoot toad as endangered may have indirect fiscal impacts to them and political subdivisions because of the impacts on permitting decisions by the Department of Environmental Protection and other agencies. If an endangered or threatened species is found in an area slated for development, applicants for permits may be required to conduct additional studies or adjust their projects to avoid adverse impacts to this species and its habitat. It has been asserted that as a result, development may be restricted or completely halted, thus resulting in less tax revenue for political subdivisions. These fiscal impacts, however, result from regulatory and statutory authorities under the aegis of agencies other than the Commission.

H. *Public Involvement*

Notice of proposed rulemaking containing the proposed amendments was published at 35 Pa.B. 2398 (April 23, 2005). Before the formal public comment period, the Commission received five public comments regarding the proposed rulemaking. Two of the five generally supported the proposed listings; two specifically supported the listings of the eastern spadefoot toad and the rough green snake; and one specifically supported the listing of the eastern pearlshell mussel. During the formal public comment period, the Commission received six public comments. One supported the listing of the eastern pearlshell mussel; two supported the listings of the eastern spadefoot toad and the rough green snake; one supported the listing of the eastern spadefoot toad; and two raised concerns over the listing of the eastern spadefoot toad. After the formal public comment period, the Commission received a letter from the Department of Transportation requesting additional information from the Commission. Copies of all public comments were provided to the Commissioners.

After the conclusion of the public comment period, it was brought to Commission staff's attention that there was an error in the preamble of the notice of proposed rulemaking. The notice of proposed rulemaking erroneously stated that two extant breeding populations of eastern spadefoot toads are currently reported in this Commonwealth in Northumberland and Bucks Counties. The correct counties are Northumberland and Berks Counties. In light of this error, a correction was published at 35 Pa.B. 3425 (June 18, 2005) seeking public comments for an additional 30-day period. Following publication of the correction, the Commission received 21 public comments supporting the addition of the spadefoot toad to the endangered species list. Copies of those public comments were provided to the Commissioners as well.

The Commission did not receive any public comments regarding the proposal to update the scientific names of

the Bog Turtle, Coastal Plain Leopard Frog and Blandings Turtle.

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 Chapter 75, are amended by amending §§ 75.1, 75.2 and 75.3 to read as set forth at 35 Pa.B. 2398.

(b) The Executive Director will submit this order and 35 Pa.B. 2398 to the Office of Attorney General for approval as to legality as required by law.

(c) The Executive Director shall certify this order and 35 Pa.B. 2398 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*.

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

Fiscal Note: Fiscal Note 48A-174 remains valid for the final adoption of the subject regulations.

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