

# PROPOSED RULEMAKING

## DEPARTMENT OF LABOR AND INDUSTRY

[ 34 PA. CODE CHS. 111 AND 131 ]

### Special Rules of Administrative Practice and Procedure Before the Workers' Compensation Appeals Board; Special Rules of Administrative Practice and Procedure Before Workers' Compensation Judges

The Department of Labor and Industry (Department), Workers' Compensation Appeal Board (Board) and Office of Adjudication (Office), proposes amendments to clarify and provide detailed guidance for practice and procedure before the Board, the Office and workers' compensation judges (judges). The Department also proposes to amend Chapters 111 and 131 (relating to special rules of administrative practice and procedure before the Workers' Compensation Appeal Board; and special rules of administrative practice and procedure before workers' compensation judges) (Rules) to provide additional guidance for the litigation of matters before the Board, the Office and judges, and to refine existing Rules governing practices and procedures before the Board, the Office and judges.

#### *Statutory Authority*

The Department proposes these Rules under the authority contained in sections 401.1 and 435(a) and (c) of the Workers' Compensation Act (act) (77 P. S. §§ 710 and 991(a) and (c)), and section 2205 of The Administrative Code of 1929 (71 P. S. § 565), as well as section 414 of the Occupational Disease Act (77 P. S. § 1514).

#### *Background*

In 1980, the Secretary of the Department established a Rules Committee (committee) to develop rules and procedures for the workers' compensation system. The committee consisted of a Board representative, judges, equal numbers of representatives of the claimant and defense bar and Department representatives. This committee was reactivated in 1987 to revise the Rules. Revisions to the Board Rules became effective on April 8, 1989, and revisions to the judges' Rules became effective on March 30, 1991. The committee was inactive until 1996, when it reconvened to incorporate comments received from the workers' compensation community, legislative amendments and changes in workers' compensation jurisprudence which occurred since the 1991 publication. As a result of this consideration, the Board and the judges' Rules in their present form became effective on December 7, 2002.

In the fall of 2006, it became evident that further revisions to the Board and the judges' Rules were necessary to incorporate legislative amendments, various appellate decisions and the Department's ability to accept filings electronically. Additionally, from 2002 to the present, the committee received written comments from various members of the workers' compensation community suggesting changes to the 2002 publication of the Rules. The commentators included members of the bar and representatives of various parties who litigate within this Commonwealth workers' compensation system. Since assembling in 2006, the committee established four subcommittees to review the various subchapters and specific

provisions of the judges' Rules, and one subcommittee to address the Board Rules. Each subcommittee considered each of the written comments assigned to it and any other issues which the entire committee determined warranted consideration. The subcommittees met separately and made recommendations to the committee, which as a whole reviewed the recommendations and created a draft of proposed revisions. During 2007, the draft was widely circulated throughout the workers' compensation community.

Thereafter, interested parties were provided with an opportunity to address the committee. Since July of 2007, the committee has undertaken an outreach program by means of the Statewide judges' conference and workers' compensation section meetings of various bar associations and with groups of interested attorneys. Additionally, on December 7, 2007, a telephone conference was held with the Pennsylvania Chamber of Business and Industry.

As a result of the outreach program, the committee received numerous written comments and suggestions, each of which was considered in great detail by the committee before revising the Rules. The revisions were approved by the committee on February 14 and March 14, 2008, and were incorporated into this rulemaking.

#### *Purpose*

These proposed amendments clarify and expedite the procedures in the workers' compensation system and update existing Rules to ensure compliance with amendments to the act and various appellate court decisions. The present Rules have not been comprehensively reviewed since at least 2002. Since that time, the act has been amended, and a change was made to the law governing child support payments that impacts certain workers' compensation awards. See the act of November 9, 2006 (P. L. 1362, No. 147) (Act 147); and the act of July 7, 2006 (P. L. 1055, No. 109) (Act 109). Additionally, advances in technology, including the ability of the Bureau of Workers' Compensation (Bureau) to accept certain filings electronically and the anticipation that the Board will also obtain such capability, prompted the need for these amendments. The proposed amendments incorporate these necessary changes, and ensure that parties will continue to be advised of up-to-date Rules for practice and procedures before the Board, the Office and judges.

#### *Affected Persons*

Those affected by these proposed amendments include the Workers' Compensation Appeal Board Commissioners and officials, employees of the Department of Labor and Industry, the Office of Adjudication and workers' compensation judges, as well as attorneys and litigants in the Pennsylvania workers' compensation system.

#### *Fiscal Impact*

There is no significant impact associated with this proposed rulemaking. However, the proposed amendments may provide the following savings to the regulated community: (1) reduced copying and mailing costs, as Board and Bureau forms may now be filed and served electronically; and (2) reduced overall litigation expenses attributable to the more expeditious process defined by the Rules.

#### *Summary of Proposed Rulemaking*

These proposed amendments clarify and provide detailed guidance for practice and procedure before the Board, the Office and judges.

*Chapter 111. Special Rules of Administrative Practice and Procedure before the Workers' Compensation Appeal Board*

The Department proposes to amend Chapter 111 to incorporate the Board's anticipated ability to accept certain filings electronically, and to allow service electronically.

The Department proposes to amend:

Section 111.3 (relating to definitions) to clarify the filing date if delivering by hand or electronically.

Section 111.11 (relating to content and form) to clarify that any reference to forms includes paper forms or the electronic format prescribed by the Board.

Section 111.12 (relating to filing, service and proof of service) to provide the mechanism for service by electronic filing.

*Chapter 131. Special Rules for Administrative Practice and Procedure before Workers' Compensation Judges*

The Department, through this proposed rulemaking, proposes to:

Amend § 131.3 (relating to waiver and modification of rules) to specify that mandatory mediation will not be assigned to an adjudicating judge.

Amend § 131.5 (relating to definitions) to include definitions for the following terms: "adjudicating judge," "Director of Adjudication," "Judge Manager," "mediating judge," "mediation," "Office of Adjudication," "Uninsured Employers Guaranty Fund" and "voluntary settlement conference." In addition, the Department proposes to amend the following definitions: "Act" to incorporate the provision of the act relating to the Uninsured Employers Guaranty Fund (UEGF), "additional defendant" to clarify that the UEGF cannot be joined in a proceeding, "defendant" to include the UEGF, except for purposes of joinder, penalties or assessment of counsel fees, "judge" to clarify that the Office of Adjudication, not the Bureau, is responsible for assignments, and "party" to clarify that a health care provider and the UEGF can be a party to a proceeding. The proposed amendments to this section are intended to define terms used throughout this chapter and to clarify the various methods of resolving issues that are available to parties under the act.

Amend § 131.11 (relating to filing, service and proof of service) to incorporate the Bureau's ability to accept filings electronically, and to provide the mechanism for electronic service.

Amend § 131.13 (relating to continuances or postponements of hearings) to incorporate the act's "good cause shown" standard that a judge must apply to a request for continuance or hearing postponement.

Amend § 131.22 (relating to transfer of cases or petitions on agreement of all parties) to clarify that the Office of Adjudication is one of the parties that must give consent before a case is transferred to a different judge.

Amend § 131.41 (relating to request for supersedeas or reconsideration of supersedeas) to clarify that a judge can modify a previous grant or denial of supersedeas on the judge's own motion.

Amend § 131.50a (relating to employee request for special supersedeas hearing under section 413(c) and (d) of the act) to clarify the current procedure for a special supersedeas hearing under section 413(c) and (d) of the

act (77 P.S. §§ 774.2 and 774.3) consistent with the Court's decision in *U.S. Airways v. W.C.A.B. (Rumbaugh)*, 854 A.2d 411 (Pa. 2004).

Amend § 131.52 (relating to first hearing procedures) to streamline the rule and to incorporate the act's mandate that judges create a trial schedule before or during the first hearing on the matter. Additionally, to incorporate the change of the name of a Bureau form referenced in the provision.

Amend § 131.53 (relating to procedures subsequent to the first hearing) to clarify that a judge may conduct conferences by any electronic means. The Department proposes deleting subsection (f), since the scheduling of medical examinations will be handled in § 131.52.

Amend § 131.53a (relating to consolidated hearing procedure) to clarify that judges can modify the rules governing consolidated hearings, so long as the procedures adopted are consistent with the act.

Add § 131.53b (relating to bifurcation) to provide a mechanism for a judge to bifurcate proceedings to promote the expeditious resolution of the proceedings.

Amend § 131.54 (relating to manner and conduct of hearings) to delete the reference to "Bureau."

Add § 131.56 (relating to withdrawal of appearance) to provide a mechanism for an attorney to withdraw from the proceedings in conformance with the Pennsylvania Rules of Professional Conduct. The proposed amendments require an attorney to seek leave to withdraw from the adjudicating judge if another attorney is not simultaneously entering an appearance. The proposed amendments also provide that a hearing will be held on any objection or on the adjudicating judge's own motion. Further, an adjudicating judge shall grant the request unless there is prejudice to the parties or proceedings. Additionally, the proposed amendments specify that an adjudicating judge has the authority to resolve cost and fee disputes so long as a fee agreement or petition was filed before discharge or withdrawal of counsel.

Amend § 131.57 (relating to compromise and release agreements) to clarify that subsection (d) does not apply if a resolution hearing was requested in accordance with § 131.60 (relating to resolution hearings).

Add § 131.59 (relating to alternative dispute resolution) to clarify that parties are not limited in using mediation or other forms of alternative dispute resolution for the exclusive purpose of achieving a compromise and release agreement.

Add § 131.59a (relating to voluntary settlement conferences) to clarify that the requirement that parties participate in mandatory mediation does not prevent participation in a voluntary settlement conference. Additionally, the proposed amendments set forth that voluntary settlement conferences are subject to 42 Pa.C.S. § 5949 (relating to confidential mediation communications and documents). The proposed amendments also clarify that, although an adjudicating judge cannot conduct the mandatory mediation, the adjudicating judge can conduct a voluntary settlement conference upon the parties' request.

Add § 131.59b (relating to mandatory mediation) to specify that an adjudicating judge cannot conduct the mandatory mediation conference, nor can the mandatory mediating judge participate in any decision on the merits of the petitions. Additionally, the proposed amendments set forth that the confidentiality provisions of 42 Pa.C.S. § 5949 are applicable to mandatory mediation proceedings, with certain enumerated exceptions. Finally, the

proposed amendments also provide that the adjudicating judge shall have the authority to impose sanctions for a party's failure to participate in mandatory mediation, and sets forth the provisions of the act and Rules that the adjudicating judge may consider when imposing sanctions.

Add § 131.60 to establish procedures for requesting a resolution hearing and the assignment of judges to the resolution hearing.

Amend § 131.66 (relating to the admissibility of oral depositions) to clarify the procedure for objecting to a deposition exhibit.

Amend § 131.111 (relating to decisions of judges) to provide a mechanism for a claimant to report to a judge the existence or nonexistence of a child support order and whether payments are current.

#### *Reporting, Recordkeeping and Paperwork Requirements*

The proposed amendments do not require the creation of any new forms. However, the proposed amendments do incorporate Act 109's mandate to report the existence or nonexistence of any child support order to a judge before the award of certain benefits under the act, and whether payments are current. There are no other additional reporting, recording or paperwork requirements on either the Commonwealth or the regulated community.

#### *Effective Date*

These proposed amendments will be effective on publication in the *Pennsylvania Bulletin*.

#### *Sunset Date*

No sunset date is necessary for these amendments. The Department will continue to monitor the impact and effectiveness of the regulations.

#### *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 26, 2008, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate Committee on Labor and Industry and the House Labor Relations Committee. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria that have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final-form publication of the rules, by the Department, the General Assembly and the Governor of objections raised.

#### *Contact Persons and Public Comment*

The contact persons are: (1) with respect to the Judges' Rules, Elizabeth A. Crum, Deputy Secretary for Compensation and Insurance, Department of Labor and Industry, 651 Boas Street, Harrisburg, PA 17121, (717) 787-5082; and (2) with respect to the Board Rules, Susan McDermott, Chairperson, Workers' Compensation Appeal Board, 901 North Seventh Street, 3rd Floor South, Harrisburg, PA 17102-1412, (215) 560-4583.

Interested persons may submit written comments to Elizabeth A. Crum, Deputy Secretary for Compensation and Insurance, Department of Labor and Industry, WCAB/WCJ Regulations—Comments, 651 Boas Street,

Harrisburg, PA 17121, within 30 days of the publication of this proposed rulemaking in the *Pennsylvania Bulletin*. Written comments received by the Department may be made available to the public.

SANDI VITO,  
*Acting Secretary*

**Fiscal Note:** 12-84. No fiscal impact; (8) recommends adoption.

### Annex A

## TITLE 34. LABOR AND INDUSTRY

### PART VII. WORKERS' COMPENSATION APPEAL BOARD

#### CHAPTER 111. SPECIAL RULES OF ADMINISTRATIVE PRACTICE AND PROCEDURE BEFORE THE WORKERS' COMPENSATION APPEAL BOARD

##### Subchapter A. GENERAL PROVISIONS

#### § 111.3. Definitions.

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

\* \* \* \* \*

**Filing—Delivery [ in person or ] by mail, in person or electronically.** If filing [ is ] by mail, it is deemed complete upon deposit in the United States mail, as evidenced by a United States Postal Service postmark, properly addressed, with postage or charges prepaid. **If filing by hand delivery or electronically, the filing date is the Board's date of receipt.**

\* \* \* \* \*

##### Subchapter B. APPEALS

#### § 111.11. Content and form.

(a) An appeal or cross appeal shall be filed with the Board on a form provided by the Board [ **or on a form containing substantially the following information** ]. **All references to forms shall mean paper forms or an electronic format prescribed by the Board. All forms shall contain the following information:**

\* \* \* \* \*

#### § 111.12. Filing, service and proof of service.

(a) [ **An** ] **When filing by mail or in person, an original and two copies of each appeal or cross-appeal shall be filed. Only the original appeal shall have attached a copy of the judge's decision which is in question as required by § 111.11(a)(5) (relating to content and form).**

(b) **When filing electronically, an original of each appeal or cross-appeal shall be filed. If the appeal is filed electronically, the Board will obtain a copy of the judge's decision from the Office of Adjudication.**

(c) The petitioner shall serve a copy of any appeal upon all parties and the judge.

[ (c) ] (d) The respondent shall serve a copy of any cross appeal upon all parties and the judge.

[ (d) ] (e) The petitioner or respondent shall, concurrently with the filing of an appeal or cross appeal, on a

form prescribed by the Board or in substantial compliance therewith, file a proof of service with the Board containing:

- (1) A statement of the date of service.
- (2) The names of parties and judge served.
- (3) The mailing address, the applicable zip code and the manner of service on the parties and judge served.

[ (e) ] (f) Subsections (a)—[ (d) ] (e) supersede 1 Pa. Code §§ 31.26, 33.15, 33.21—33.23, 33.32, 33.33 and 33.35—33.37.

**PART VIII. BUREAU OF WORKER'S COMPENSATION**

**CHAPTER 131. SPECIAL RULES OF ADMINISTRATIVE PRACTICE AND PROCEDURE BEFORE WORKERS' COMPENSATION JUDGES**

**Subchapter A. GENERAL PROVISIONS**

**§ 131.3. Waiver and modification of rules.**

(a) The judge may, for good cause, waive or modify a provision of this chapter, **except as otherwise provided in § 131.59b(a) (relating to mandatory mediation)**, upon motion of a party, agreement of all parties or upon the judge's own motion.

\* \* \* \* \*

**§ 131.5. Definitions.**

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

*Act*—The Pennsylvania Workers' Compensation Act (77 P. S. §§ 1—1041.4 and 2501—[ 2506 ] 2708).

*Additional defendant*—An insurance carrier, the Commonwealth or an employer, other than the insurance carrier or employer against which the original petition was filed, joined under this chapter, **not including the Uninsured Employers Guaranty Fund.**

*Adjudicating judge*—A judge assigned to hold hearings and issue a decisions relating to a petition or petitions.

\* \* \* \* \*

*Defendant*—An employer, insurance carrier and the Commonwealth, unless specifically designated individually, **and the Uninsured Employers Guaranty Fund, except for purposes of joinder, penalties or assessment of counsel fees under section 440 of the act (77 P. S. § 996).**

*Director of Adjudication*—The individual specified in section 1402 of the act (77 P. S. § 2502).

\* \* \* \* \*

*Judge*—A workers' compensation judge assigned by the [ Bureau ] Office of Adjudication as provided in [ section ] sections 401 and 401.1 of the act (77 P. S. §§ 701 and 710) or assigned by the [ Bureau ] Office of Adjudication to determine a petition filed under the act or the Disease Law.

*Judge Manager*—A workers' compensation judge with management responsibilities appointed under the Civil Service Act (71 P. S. §§ 741.1—741.1005).

*Mediating judge*—A judge assigned to mediate petitions in accordance with sections 401 and 401.1 of the act and this chapter.

*Mediation*—A conference conducted by a judge, as authorized by sections 401 and 401.1 of the act, having as its purpose an attempt to reconcile any or all disputes under the act or this chapter existing between contending parties.

*Office of Adjudication*—The Office of the Department created by section 1401(a) of the act (77 P. S. § 2501).

*Party*—A claimant, defendant, employer, insurance carrier, additional defendant, **health care provider** and, if relevant, the Commonwealth **and the Uninsured Employers Guaranty Fund.** An act required or authorized by this chapter, to be done by or to a party, may be done by or to that party's counsel of record.

\* \* \* \* \*

*Uninsured Employers Guaranty Fund*—The special fund established by Article XVI of the act.

*Voluntary settlement conference*—A conference conducted by a judge at the request of contending parties, having as its purpose an attempt to reconcile any or all disputes existing between those parties.

**Subchapter B. TIME**

**§ 131.11. Filing, service and proof of service.**

(a) Whenever filing is required by this chapter, it is deemed complete upon **one of the following: [ delivery in person or, if by mail, upon deposit in the United States Mail, as evidenced by a United States Postal Service postmark, properly addressed, with postage or charges prepaid. ]**

(1) Delivery in person.

(2) If by electronic submission, upon receipt at the electronic address and in a format as prescribed by the Department and published in the *Pennsylvania Bulletin*.

(3) If by mail, upon deposit in the United States Mail, as evidenced by a United States Postal Service postmark, properly addressed, with postage or charges prepaid.

(b) Whenever service is required by this chapter, it is deemed complete upon **one of the following: [ delivery in person or, if by mail, upon deposit in the United States Mail, as evidenced by a United States Postal Service postmark, properly addressed, with postage or charges prepaid, except as provided in § 131.81(b) (relating to subpoenas). ]**

(1) Delivery in person.

(2) If by electronic submission, upon receipt and in a format as prescribed by the Department and published in the *Pennsylvania Bulletin*.

(3) If by mail, upon deposit in the United States Mail, as evidenced by a United States Postal Service postmark, properly addressed, with postage or charges prepaid, except as provided in § 131.81(b) (relating to subpoenas).

\* \* \* \* \*

(d) Whenever a proof of service is required by this chapter, the proof of service shall contain the following:

\* \* \* \* \*

(3) The mailing address, the applicable zip code and the manner of service on the judge and others served, and, if applicable, the email address to which service was made.

(e) Unless otherwise specifically provided in this chapter, whenever the filing or service is required to be made upon the Bureau, it shall be made to the principal office of the Bureau at: 1171 South Cameron Street, Harrisburg, Pennsylvania 17104-2501, (717) 783-5421, or another address and telephone number as may be published in the *Pennsylvania Bulletin*. **Electronic filing and service on the Bureau shall be at the electronic address and in a format as prescribed by the Bureau and published in the *Pennsylvania Bulletin*.**

\* \* \* \* \*

**§ 131.13. Continuances or postponements of hearings.**

\* \* \* \* \*

(c) A continuance or postponement may be granted as set forth in this chapter for **[ substantial or compelling reasons ] good cause shown** at the discretion of the judge, if the continuance or postponement is consistent with this chapter and its purpose of providing an orderly and expeditious determination of proceedings before judges.

\* \* \* \* \*

(j) In ruling on requests for a continuance or postponement, the judge may consider one or more of the following, giving consideration to subsection (a):

\* \* \* \* \*

(8) Another reason deemed **[ to be substantial or compelling ]** by the judge **to be for good cause shown** and consistent with this chapter and the purposes of the act and the Disease Law.

\* \* \* \* \*

**Subchapter C. FORMAL PROCEEDINGS**

**GENERAL**

**§ 131.22. Transfer of cases or petitions on agreement of all parties.**

(a) If the transfer of the case is agreed to by the **[ Bureau ] Office of Adjudication**, the parties and the judge, the **[ Bureau ] Office of Adjudication** will promptly reassign the case or petition. Notice of reassignment will be given to all parties.

\* \* \* \* \*

**SUPERSEDAS**

**§ 131.41. Request for supersedeas or reconsideration of supersedeas.**

\* \* \* \* \*

(b) After a hearing, the judge may grant or deny the request for supersedeas in whole or in part. The grant or denial may be for specified or indefinite periods and may be subject to conditions that the judge orders to implement the intent of the act, Disease Law or this chapter. If a supersedeas has been granted or denied in whole or in part, the judge may, upon request **or on the judge's own motion**, and after hearing, review and modify the grant or denial as warranted.

\* \* \* \* \*

**§ 131.50a. Employee request for special supersedeas hearing under sections 413(c) and 413 (d) of the act.**

\* \* \* \* \*

(c) **During the course of a challenge hearing, the issues are limited to determining whether the claimant has stopped working or is earning the wages stated in the Notice of Suspension or Modification under sections 413(c) or 413(d) of the act (77 P. S. §§ 774.2 and 774.3) and the challenge shall be decided only on those issues.**

(d) **If the employer has filed a separate petition requesting supersedeas, the judge may receive evidence and issue a separate decision on the request for supersedeas if the judge determines the claimant will not be prejudiced by a ruling at that time.**

(e) The judge to whom the notice of challenge has been assigned will issue a written order on the challenge within 14 days of the hearing.

**[ (d) ] (f)** If the judge fails to hold a hearing within 21 days or fails to issue a written order approving the suspension or modification of benefits within 14 days of the hearing, the insurer shall reinstate the employee's workers' compensation benefits at the weekly rate the employee received prior to the insurer's suspension or modification of benefits under sections 413(c) or (d) of the act **[ (77 P. S. §§ 774.2 and 774.3) ]**.

**[ (e) ] (g)** Subsections (a)—**[ (d) ] (f)** supersede 1 Pa. Code §§ 35.161, 35.162, 35.190 and 35.225.

**HEARING PROCEDURE**

**§ 131.52. First hearing procedures.**

(a) The purpose of this chapter is to provide a fair and prompt hearing process, to allow all parties to introduce appropriate evidence and to receive a timely decision from the judge. Where practicable and appropriate, the entire record relating to any petition shall be completed at the initial hearing. **(b) The [ , recognizing that the hearing process may differ based upon several variables including geographic location, number of parties involved, case volume and availability of experts for testimony.**

**[ (c) ] (b)** The hearing process chosen in any specific case, including a determination of whether testimony will be accepted at the initial hearing, is within the discretion of the judge. **At or before the initial hearing by written order or on the record, the judge shall establish:**

**(1) Specific deadlines for the presentation of evidence by the parties.**

**(2) Dates for future hearings.**

**(3) Specific date and time for the mediation conference unless, for good cause shown, the judge determines at the first hearing or subsequently that mediation would be futile.**

**(4) Dates for setting any medical examinations to be scheduled.**

**[ (d) ] (c)** The moving party, at the first hearing, shall advise the judge and opposing parties of the following:

\* \* \* \* \*

**[ (e) ] (d)** The moving party, at the first hearing, unless otherwise directed by the judge, shall offer and have marked for identification available exhibits of the moving party.

**[(f)] (e)** The parties shall provide the judge with all documents required by law to be filed with the Bureau and which are relevant to issues in dispute with the same injury date and pertaining to the same claim. The judge will place those documents in evidence along with any other documents required to be filed by law with the Bureau or prior judges and which the judge deems relevant to the proceeding. The judge and the employee may not introduce the **[Employer's Report of Injury or Occupational Disease] First Report of Injury** into evidence.

**[(g)] (f)** Evidence furnished under this section does not become part of the record, unless otherwise admissible.

**[(h)] (g)** Unless otherwise ordered by the judge, the moving party shall present testimony.

**[(i)] (h)** Subsections (a)—**[(h)] (g)** supersede 1 Pa. Code §§ 35.101—35.106, 35.111—35.116, 35.121—35.128, 35.137, 35.138, 35.155 and 35.161—35.169.

**§ 131.53. Procedures subsequent to the first hearing.**

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**(d) The parties or the judge may request a conference at any time which may be held in person, by telephone, video, or any other electronic manner as directed by the judge.**

**(e) A party wishing to present testimony in the form of rebuttal or surrebuttal shall notify the judge in writing within 21 days after conduct of the hearing or deposition at which the testimony to be rebutted or surrebutted has been given.**

**[(e)] (f)** Following a request to present rebuttal or surrebuttal testimony, the testimony shall be presented at a hearing or deposition provided the testimony shall be taken no later than 45 days after the conclusion of the case of the party presenting the testimony or evidence to be rebutted or surrebutted.

**[(f) Dates of the medical examinations, if not scheduled prior to the first hearing actually held, shall be scheduled within 45 days after the first hearing actually held. ]**

\* \* \* \* \*

**§ 131.53a. Consolidated hearing procedure.**

**(a) One day trials or other consolidated hearing procedures may be scheduled and conducted pursuant to [these rules] this chapter to the extent practical. The judge may waive or modify [these rules] this chapter as may be appropriate and adopt and direct procedures which are fair and just for a determination of the issues consistent with act.**

**§ 131.53b. Bifurcation.**

**(a) The judge may, upon request or upon the judge's own motion, consider bifurcation of issues to promote the expeditious resolution of cases.**

**(b) Subsection (a) supersedes 1 Pa. Code §§ 33.61, 35.18, 35.54 and 35.55, and also supersedes 1 Pa. Code Chapter 35, Subchapter D (relating to motions).**

**§ 131.54. Manner and conduct of hearings.**

**(a) The judge will conduct fair and impartial hearings and maintain order. At the discretion of the judge, the**

hearings may be conducted by telephone or other electronic means if the parties do not object. Disregard by participants or counsel of record of the rulings of the judge shall be noted on the record, and if the judge deems it appropriate, will be made the subject of a written report to the **[Bureau's]** Director of Adjudication together with recommendations.

**(b) If the participants or counsel are guilty of disrespectful, disorderly or contumacious language or conduct in connection with a hearing, the judge may suspend the hearing or take other action as the judge deems appropriate, including the submission of a written report to the [Bureau's] Director of Adjudication together with recommendations.**

\* \* \* \* \*

**§ 131.56a. Withdrawal of appearance.**

**(a) An attorney may withdraw his appearance without leave if another attorney has previously entered or is simultaneously entering an appearance on behalf of the party.**

**(b) Leave to withdraw an appearance shall be sought by written request to the adjudicating judge. An attorney may not withdraw representation until the adjudicating judge grants the request.**

**(c) In requesting a withdrawal of appearance, the attorney shall:**

**(1) Verify whether any party has any objection to the withdrawal request.**

**(2) Serve notice of the request to withdraw on his or her own client, all unrepresented parties and counsel of record for all represented parties.**

**(3) File a proof of service as provided in § 131.11(d) (relating to filing, service and proof of service).**

**(d) Except for withdrawals of appearance under subsection (a), the adjudicating judge shall, after conducting a hearing on any objection, or on the adjudicating judge's own motion, issue an interlocutory order granting the request unless the adjudicating judge determines that there will be prejudice to the parties or to the proceedings.**

**(e) Upon withdrawal of appearance, in the event of a fee dispute, the adjudicating judge shall have the authority to determine entitlement to receipt of counsel fees and costs, whether under sections 440 or 442 of the act (77 P. S. §§ 996 and 998), so long as the fee agreement or petition has been filed before discharge or withdrawal of counsel.**

**(f) Subsections (a)—(e) supersede 1 Pa. Code §§ 31.5, 33.32—33.37, 35.1, 35.2, 35.121—35.128, 35.225 and 35.226.**

**§ 131.57. Compromise and release agreements.**

\* \* \* \* \*

**(d) The judge will expedite the convening of a hearing on the compromise and release agreement. The judge will circulate a written decision on the proposed compromise and release agreement within 30 days after the hearing. This subsection does not apply if a resolution hearing has been requested in accordance with § 131.60 (relating to resolution hearings).**

\* \* \* \* \*

**§ 131.59. Alternative dispute resolution.**

(a) Mandatory mediation and other forms of alternative dispute resolution may be utilized by the parties under this chapter and will not be limited in purpose to achieving a compromise settlement (compromise and release agreement), but may have as a goal conventional adjustment of the claim, the narrowing of issues by means of stipulation for decision by the adjudicating judge or other amicable resolution.

(b) Subsection (a) supersedes 1 Pa. Code §§ 31.21—31.23, 33.42, 35.41, 35.48—35.51, 35.111—35.116 and 35.155.

**§ 131.59a. Voluntary settlement conferences.**

(a) Nothing in this chapter precludes the parties from participating in a voluntary settlement conference, subject to 42 Pa.C.S. § 5949 (relating to confidential mediation communications and documents).

(b) If all parties and the adjudicating judge agree, the adjudicating judge may conduct the voluntary settlement conference and may subsequently participate in a decision on the merits of the petition or petitions if they are not resolved amicably.

(c) Subsections (a)—(b) supersede 1 Pa. Code §§ 31.21—31.23, 33.42, 35.41, 35.48—35.51 and 35.111—35.116 and also supersede 1 Pa. Code Chapter 35, Subchapter E (relating to presiding officers).

**§ 131.59b. Mandatory mediation.**

(a) A mandatory mediation will not be assigned to an adjudicating judge. Petitions not resolved by mediation will proceed before the adjudicating judge as if mediation had not occurred. The mediating judge will not participate in any decision on the merits of the petition or petitions. This subsection cannot be waived or modified, as otherwise provided in § 131.3 (relating to waiver and modification of rules).

(b) Mandatory mediation activities conducted by mediating judges shall be subject to 42 Pa.C.S. § 5949 (relating to confidential mediation communications and documents) except that:

(1) The definition of “mediation” in section 401 of the act (77 P. S. § 701) shall be applicable.

(2) Communications, conduct or documents are not confidential if relevant to establish that a party or counsel failed to do one of the following:

(i) Appear for a mediation without prior approval of the mediating judge.

(ii) Attend a mediation in person or by teleconference, as required by the mediating judge.

(iii) Have requisite authority to accept, modify or reject settlement proposals offered at the mediation, whether at the mediation, or within a reasonable period of time after the mediation as established by the mediating judge.

(c) The adjudicating judge shall possess authority to impose sanctions for the failure of the parties to comply with the mediation provisions of sections 401 and 401.1 of the act (77 P. S. §§ 701 and 710) and may consider section 435(b) and (d) of the act (77 P. S. § 991(b) and (d)), as well as circumstances and

sanctions set forth in section 131.13(j) and (m) (relating to continuances and postponements of hearings).

(d) Nothing in this chapter precludes the parties from participating in a voluntary settlement conference, subject to 42 Pa.C.S. § 5949 (relating to confidential mediation communications and documents).

(e) Subsections (a)—(d) supersede 1 Pa. Code §§ 31.21—31.23, 33.42, 35.41, 35.48—35.51 and 35.111—35.116 and also supersede 1 Pa. Code Chapter 35, Subchapter E (relating to presiding officers).

**§ 131.60. Resolution hearings.**

(a) A resolution hearing must be requested in writing.

(b) Counsel for either party, or any unrepresented party, may request a resolution hearing at any time after all parties are prepared to proceed within the time limits prescribed by the act and this rule for resolution hearings.

(c) If a petition is pending before a judge, the request for a resolution hearing must be directed to the assigned judge.

(d) If a petition is not pending before a judge, the request for a resolution hearing must be directed to the Judge Manager for the judge's office serving the county of the claimant's residence. If the claimant resides outside of this Commonwealth, the request must be directed to the Judge Manager for the judge's office most proximate to the claimant's residence. The Judge Manager will assign a judge to conduct the resolution hearing.

(e) The assigned judge's office will schedule the resolution hearing within 14 business days of receiving the request for a resolution hearing.

(f) The Judge Manager may reassign any case from one judge to another to ensure compliance with the resolution hearing requirements of sections 401 and 401.1 of the act (77 P. S. §§ 701 and 710). The Judge Manager will notify both judges of the reassignment.

(g) The judge conducting the resolution hearing will require proof that a petition has been filed with the Bureau, and will make the proof a part of the record. Upon receiving the proof, the judge will proceed with the hearing and circulate a final decision within 5 business days of the hearing.

(h) The assigned judge need not comply with the procedures in this rule if any party is unable to proceed within the time limits established by the act for resolution hearings.

(i) Subsections (a)—(h) supersede 1 Pa. Code §§ 31.5, 31.13—31.15, 31.21—31.23, 33.42, 35.41, 35.48—35.51, 35.111—35.116, 35.155, 35.185—35.190, 35.201—35.207, 35.211—35.214, 35.225, 35.226, 35.231—35.233 and 35.241.

**EXCHANGE OF INFORMATION AND  
DEPOSITIONS AND DISCOVERY**

**§ 131.66. Admissibility of oral depositions.**

\* \* \* \* \*

(b) Objections shall be made and the basis for the objections stated at the time of the taking of the depositions. Only objections which are identified in a separate writing, introduced prior to the close of the evidentiary

record, as close of the record is specified in § 131.101(c)—(e) (relating to briefs, findings of fact and close of record), and stating the specific nature of the objections and the pages where they appear in the deposition or the exhibits to which they refer will be preserved for ruling. Objections not so preserved are waived.

\* \* \* \* \*

**DECISIONS**

**§ 131.111. Decisions of judges.**

\* \* \* \* \*

(c) In any petition which may result in the payment of a monetary award subject to 23 Pa.C.S. § 4308.1 (relating to collection of overdue support from monetary awards), a decision will not be issued until the claimant provides to the judge a written statement signed by the claimant and made subject to 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities), including:

- (1) The claimant’s full name, mailing address, date of birth and Social Security number.
- (2) Whether there is an outstanding child support order against the claimant, and if so, whether payments are current or in arrears.
- (3) Written documentation of arrears from the Pennsylvania Child Support Enforcement System website, or, if no arrears exist, written documentation from the web site indicating no arrears.

[(c)] (d) Subsections (a) [and (b)]—(c) supersede 1 Pa. Code §§ 31.13, 31.14, 35.190, 35.201—35.207, 35.225, 25.226 and 35.241.

[Pa.B. Doc. No. 08-1626. Filed for public inspection September 5, 2008, 9:00 a.m.]

**FISH AND BOAT COMMISSION**

**[ 58 PA. CODE CHS. 51 AND 101 ]  
General Provisions; Boating**

The Fish and Boat Commission (Commission) proposes to amend Chapters 51 and 101 (relating to administrative provisions; and boating accidents). The Commission is publishing this proposed rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code).

*A. Effective Date*

The proposed rulemaking, if approved on final-form rulemaking, will go into effect on January 1, 2009.

*B. Contact Person*

For further information on the proposed rulemaking, contact Jason E. Oyler, Esq., P. O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7810. This proposed rulemaking is available on the Commission’s web site at [www.fish.state.pa.us](http://www.fish.state.pa.us).

*C. Statutory Authority*

The proposed amendment of § 51.9 (relating to release of documents and records) is published under the statutory authority of section 504 of the Right-to-Know Law (65 P.S. § 67.504) and section 506 of The Administrative Code 1929 (71 P.S. § 186). The proposed rulemaking to

§ 101.6 (relating to investigation reports by commission officers) is published under the statutory authority of section 506 of The Administrative Code of 1929.

*D. Purpose and Background*

The proposed rulemaking is designed to update the Commission’s regulations to be consistent with the new Right-to-Know Law and to consolidate its regulations relating to records. The specific purpose of the proposed amendments is described in more detail under the summary of proposal.

*E. Summary of Proposal*

Act 3 of 2008 has substantially changed the current Right-to-Know Law. Under the new law, which will apply to requests received after January 1, 2009, an agency may promulgate regulations and policies necessary for the agency to implement the statute. Section 51.9 of the Commission’s regulations currently provides for the release of Commission documents and records. However, this section must be amended to be consistent with the provisions of the new Right-to-Know Law.

The changes to § 51.9 that are necessitated by Act 3 of 2008 include allowing requests for records to come by means of electronic mail and changing the recipient of the request from the Executive Director to the Director of the Bureau of Administration, who will act as the Commission’s Open Records Officer under the new Right-to-Know Law. Act 3 of 2008 provides that most fees charged under the Right-to-Know Law for reproduction of records will now be set for all Commonwealth agencies by the newly created Office of Open Records.

In addition to and separate from the Right-to-Know Law requests, the Commission receives requests for documents through subpoenas. Section 101.6(d) of the Commission’s regulations provides for a 50¢ per page reproduction fee for responses to subpoena requests for investigative reports by Commission officers. The Commission receives subpoenas for a number of documents other than investigative reports. Accordingly, the Commission proposes to add new subsection (d) to § 51.9 to cover reproduction costs for all subpoena requests and to remove that provision from § 101.6.

The Commission proposes that §§ 51.9 and 101.6 be amended to read as set forth in Annex A.

*F. Paperwork*

The proposed rulemaking will not increase paperwork and will not create new paperwork requirements because the Commission is currently required to respond to Right-to-Know Law requests and subpoenas.

*G. Fiscal Impact*

The proposed rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. With one exception, the proposed rulemaking will impose no new costs on the private sector or the general public as the Commission currently has a reproduction fee for both Right-to-Know Law requests and subpoena requests. With respect to requests for records made by subpoena, the proposed rulemaking imposes a \$1 per page charge for color copies and a \$1 per document charge on electronic media plus \$2 per diskette or compact disc, and a charge of \$1 per page up to \$5 per document for certified copies of documents. The impact of these proposed charges will be nominal.

### H. Public Comments

Interested persons are invited to submit written comments, objections or suggestions about the proposed rulemaking to the Executive Director, Fish and Boat Commission, P. O. Box 67000, Harrisburg, PA 17106-7000, within 30 days after publication of this notice in the *Pennsylvania Bulletin*. Comments submitted by facsimile will not be accepted.

Comments also may be submitted electronically by completing the form at [www.fishandboat.com/regcomments](http://www.fishandboat.com/regcomments). If an acknowledgment of electronic comments is not received by the sender within 2 working days, the comments should be retransmitted to ensure receipt. Electronic comments submitted in any other manner will not be accepted.

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

**Fiscal Note:** 48A-206. No fiscal impact; (8) recommends adoption.

### Annex A

## TITLE 58. RECREATION

### PART II. FISH AND BOAT COMMISSION

#### Subpart A. GENERAL PROVISIONS

#### CHAPTER 51. ADMINISTRATIVE PROVISIONS

##### § 51.9. Release of documents and records.

(a) Consistent with [ **the act of June 21, 1957 (P. L. 390, No. 212), as amended by the act of June 29, 2002 (P. L. 663, No. 100) and commonly** ] the Right-to-Know Law (65 P. S. §§ [ **66.1—66.9** ] **67.101—67.3104**), and [ **section** ] **sections 324 and 5503** of the code (relating to Commission records; and **accident reports**), the Commission will make public records contained in its files available to requesters for inspection and duplication during the Commission's regular business hours of 8 a.m. to 4 p.m., Monday through Friday (excluding Commonwealth holidays).

(b) Requests for release of public records contained in Commission files [ **shall** ] **must** be made in writing and submitted to: [ **Executive Director** ] **Director, Bureau of Administration**, Pennsylvania Fish and Boat Commission, Post Office Box 67000, Harrisburg, Pennsylvania 17106-7000. Written requests for release of public records may be sent by mail or by means of facsimile **or by e-mail**, or they may be delivered in person during the Commission's regular business hours. The Commission will not accept anonymous[, ] **or oral** [ **or e-mail** ] requests.

(c) [ **If a photocopier or reproduction device under the control of the Commission is used to duplicate information released under this section, the** ] **The** requester will be charged [ **25¢ per letter or legal size page for the copies** ] **the fee prescribed by the Office of Open Records for the reproduction and release of documents on paper or in electronic media. [ If the Commission copies oversize pages (in excess of legal size), the charge will be \$1 per page or the actual cost of duplication, whichever is greater. If the Commission copies documents to electronic media (such as, computer diskette), the requester will be charged \$1 per document copied (if 1 megabyte or less in size) plus \$2 per diskette. For electronic documents of more than 1 megabyte**

**in size, the requester will be charged \$3 per document plus \$10 or the cost of the media on which the document is stored, whichever is greater. ]** The Commission will charge \$1 per page up to \$5 per document for certified copies. If the Commission mails copies of documents duplicated under this section to the requester, the requester will be charged the actual cost of postage or shipping. All charges shall be payable by check or money order made payable to "Pennsylvania Fish and Boat Commission." The Commission may require a requester to prepay fees if the fees are expected to exceed \$100. The Commission may waive copy charges and mailing charges for good cause or in the public interest. [ **When the total copying and mailing charges for a request are \$10 or less, the Commission ordinarily will waive collection. ]**

**(d) Requests for records made by subpoena, in addition to collection of subpoena fees, are subject to a reproduction charge of \$0.50 per page for black and white copies and \$1 per page for color copies. Copies provided on electronic media will be charge at \$1 per document, plus \$2 per diskette or compact disc. The Commission will charge \$1 per page up to \$5 per document for certified copies requested under a subpoena.**

#### Subpart C. BOATING

#### CHAPTER 101. BOATING ACCIDENTS

##### § 101.6. Investigation reports by Commission officers.

\* \* \* \* \*

[ **(d) The Commission may, in addition to collection of subpoena fees, charge a reproduction fee of 50¢ per page. ]**

[Pa.B. Doc. No. 08-1627. Filed for public inspection September 5, 2008, 9:00 a.m.]

### [ 58 PA. CODE CHS. 63, 69, 71 AND 73 ]

#### Fishing

The Fish and Boat Commission (Commission) proposes to amend Chapters 63, 69, 71 and 73. The Commission is publishing this proposed rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code).

##### A. Effective Date

The proposed rulemaking, if approved on final-form rulemaking, will go into effect on January 1, 2009.

##### B. Contact Person

For further information on the proposed rulemaking, contact Laurie E. Shepler, Esq., P. O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7810. This proposed rulemaking is available on the Commission's web site at [www.fish.state.pa.us](http://www.fish.state.pa.us).

##### C. Statutory Authority

The proposed additions of §§ 63.51 and 73.4 (relating to sale of VHS-susceptible species of fish; and transportation and importation of VHS-susceptible species of fish) are published under the statutory authority of section 2102(c) of the code (relating to rules and regulations). The proposed additions of §§ 63.52 and 71.8 (relating to eggs from VHS-susceptible species of fish; and introduction of VHS-susceptible species of fish) are published under the

statutory authority of section 2102(a) of the code. The proposed amendments to § 69.3 (relating to transportation of VHS-susceptible fish out of the Lake Erie Watershed) are published under the statutory authority of section 2102(a) and (c) of the code.

#### D. Purpose and Background

Viral hemorrhagic septicemia (VHS) is an infectious disease found in a variety of fish species. To help prevent the spread of the disease, several agencies with jurisdiction, including the United States Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), the Commission and the Department of Agriculture (PDA), have taken action.

On October 24, 2006, APHIS issued an emergency order prohibiting the importation of certain live fish species from the Canadian provinces of Ontario and Quebec into the United States. In addition, export of live fish of 37 VHS-susceptible species was prohibited from the eight Great Lake boundary states: Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin. On November 14, 2006, APHIS issued an amended order that allowed restricted movement under requirements for testing and certification that fish are VHS-free. On May 4, 2007, APHIS further amended the order to allow for catch and release fishing activities. Most recently APHIS amended its order on April 2, 2008, to allow VHS-susceptible species of live nonsalmonid fish from affected Canadian provinces to be imported into the United States for direct slaughter under an APHIS-issued permit. The APHIS order applies to live fish only. It does not address eggs.

Last year, the Commission adopted a new regulation in § 69.3. This new regulation, which went into effect on January 1, 2008, applies to live or dead fish (and their parts but not eggs) and makes it unlawful to transport or cause the transportation of VHS-susceptible fish out of this Commonwealth's portion of the Lake Erie watershed into other watersheds in this Commonwealth except when certain conditions are met. Those conditions are: (1) the fish are being transported to a disease testing facility and the persons transporting the fish have taken adequate measures to prevent escape and to disinfect discharged water and equipment used in the transportation of the fish and the fish are accompanied in transit by documentation stating the point of origin of the fish and the destination to which they are to be delivered for testing; (2) the fish are from a group of fish certified as having tested negative for VHS in accordance with the testing protocols adopted by Department of Agriculture (PDA) and approved by the Commission; (3) the fish are from an artificial propagation facility certified as having tested negative for VHS in accordance with testing protocols; (4) the fish are being transported to a slaughter facility, processing plant or restaurant and the fish are accompanied in transit by documentation stating the point of origin of the fish and the destination to which they are to be delivered for slaughter, processing or consumption; or (5) the fish are dead, recreationally caught fish that are being transported solely for the purpose of human consumption. The regulation further provides that for purposes of the section, species of fish that are susceptible to VHS are those species that the Commission has defined as such by notice published in the *Pennsylvania Bulletin*. On two occasions, the Commission has published notices defining VHS-susceptible species of fish. See 37 Pa.B. 6478 (December 8, 2007) and 38 Pa.B. 2425 (May 24, 2008). Although the Commission's regulation addressed the intraState movement of VHS-susceptible species of fish, it did not address interstate movement.

The PDA, which has broad jurisdiction under 3 Pa.C.S. Chapter 23 (relating to Domestic Animal Law) and more limited jurisdiction under 3 Pa.C.S. Chapter 42 (relating to Aquaculture Development Law), issued a quarantine order at 37 Pa.B. 5534 (October 13, 2007). The quarantine order addressed both intrastate and interstate movement of VHS-susceptible species of fish, and its provisions dealing with intrastate movement are consistent with the Commission's regulation at § 69.3. The order, like § 69.3, applies to live or dead fish and their parts, but it does not apply to eggs. The PDA later amended its order at 37 Pa.B. 6428 (December 8, 2007), to revise its definition of VHS-susceptible species to track APHIS's thinking on the subject. See also 38 Pa.B. 4787 (August 30, 2008).

Commission staff have met on numerous occasions with PDA staff in an effort to develop a coordinated approach for dealing with VHS, and there has been good cooperation between the agencies. Although the PDA order addresses interstate movement of VHS-susceptible species of fish, the Commission's officers cannot enforce it. Therefore, the Commission proposes new regulations, which will be fully enforceable by our officers, that will address the sale, introduction and transportation of VHS-susceptible species of fish from VHS-affected or at risk states or regions. The proposed regulations also address eggs taken from VHS-susceptible species of fish from VHS-affected or at risk states or regions and the Lake Erie Watershed.

By notice published at 38 Pa.B. 3338 (June 14, 2008), the Executive Director, acting under the authority of § 65.25 (relating to temporary changes to fishing regulations), took immediate action to make it unlawful to sell, introduce, transport or import VHS-susceptible species of fish, dead or alive, and the parts thereof into this Commonwealth from VHS-affected or at risk states, including Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Wisconsin, and VHS-affected or at risk regions, including the Canadian provinces of Ontario and Quebec, unless certain conditions are met. These temporary modifications went into effect immediately and will remain in effect until January 1, 2009, unless the Commission, by appropriate action, adopts the new regulations.

By second notice published at 38 Pa.B. 3876 (July 12, 2008), the Executive Director, acting under the authority of § 65.25, took immediate action to make it unlawful to possess and use as bait unpreserved, refrigerated or frozen eggs taken from VHS-susceptible species of fish from a VHS-affected or VHS-at risk state or region in or along the waters of this Commonwealth except within the Lake Erie Watershed. The Executive Director also took immediate action to make it unlawful to possess and use eggs from VHS-susceptible species of fish from the Lake Erie Watershed as bait in other watersheds of this Commonwealth. This action represents a change to § 69.3, which previously allowed for the possession and use as bait of eggs from VHS-susceptible species of fish from the Lake Erie Watershed in other watersheds of this Commonwealth provided the fish were from a group of fish certified as having tested negative for VHS or were from an artificial propagation facility certified as having tested negative for VHS. These temporary modifications went into effect immediately and will remain in effect until January 1, 2009, unless the Commission, by appropriate action, adopts the new regulations.

#### E. Summary of Proposal

The Commission proposes new regulations that will address the sale, introduction and transportation of VHS-susceptible species of fish from VHS-affected or at risk

states or regions. The proposed regulations are consistent with the approach taken by the PDA and the APHIS in their orders.

The Commission also proposes a new regulation to address the possession and use as bait of eggs taken from VHS-susceptible species of fish from VHS-affected or at risk states or regions and the Lake Erie Watershed. In addition, the Commission proposes amendments to § 69.3 to further define VHS-susceptible species of fish for purposes of the section, to include provisions regarding their introduction and sale outside the Lake Erie Watershed and to address the possession and use as bait of eggs from VHS-susceptible species of fish from the Lake Erie watershed outside the watershed. The proposed provision dealing with eggs is consistent with the proposed new regulation on egg collection, which is intended to address egg collection on a Statewide basis and is the subject of a separate notice of proposed rulemaking. The Commission proposes the new regulations and amendments to read as set forth at Annex A.

#### F. Paperwork

The proposed amendments will increase paperwork and will create new paperwork requirements in that persons selling and transporting VHS-susceptible species of fish from VHS-affected or at risk states and regions must have in their possession fish health certification reports. Persons who transport VHS-susceptible species from an affected or at risk state through the Commonwealth must carry documentation stating the point of origin of the fish and the location outside of this Commonwealth to which they are to be delivered. Persons transporting these fish to facilities in this Commonwealth for testing and scientific purposes or to a slaughter facility, processing plant or restaurant in this Commonwealth must carry documentation stating the point of origin of the fish and the destination to which they are to be delivered. Many of these requirements are already in place under the APHIS and the PDA orders.

#### G. Fiscal Impact

The proposed rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The proposed rulemaking will impose no new costs on the general public. The proposed amendments will impose new costs on the private sector in that prior to selling, introducing or transporting into this Commonwealth VHS-susceptible species of fish from VHS-affected or at risk states and regions, the fish or the artificial propagation facility where the fish are raised will have to be tested and certified as negative for VHS in accordance with approved protocols. Many of these requirements are already in place under the APHIS and the PDA orders.

#### H. Public Comments

Interested persons are invited to submit written comments, objections or suggestions about the proposed rulemaking to the Executive Director, Fish and Boat Commission, P. O. Box 67000, Harrisburg, PA 17106-7000, within 30 days after publication of this notice in the *Pennsylvania Bulletin*. Comments submitted by facsimile will not be accepted.

Comments also may be submitted electronically by completing the form at [www.fishandboat.com/regcomments](http://www.fishandboat.com/regcomments). If an acknowledgment of electronic comments is not received by the sender within 2 working days, the comments should be retransmitted to ensure receipt. Electronic comments submitted in any other manner will not be accepted.

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

**Fiscal Note:** 48A-204. No fiscal impact; (8) recommends adoption.

### Annex A

## TITLE 58. RECREATION

### PART II. FISH AND BOAT COMMISSION

#### Subpart B. FISHING

#### CHAPTER 63. GENERAL FISHING REGULATIONS

(*Editor's Note:* The text of §§ 63.51 and 63.52 is new. It has been printed in regular type.)

#### § 63.51. Sale of VHS-susceptible species of fish.

(a) For purposes of this section, the following terms have the following meanings:

(1) Species of fish that are susceptible to viral hemorrhagic septicemia (VHS) are those species that the Animal and Plant Health Inspection Service of the United States Department of Agriculture (APHIS) designates by order or the Commission defines by notice in the *Pennsylvania Bulletin*.

(i) The term "VHS-susceptible species" includes fish that are dead or alive, preserved or unpreserved, and the parts thereof.

(ii) The term "VHS-susceptible species" does not include the eggs of these species.

(2) A VHS-affected or VHS-at risk state includes Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Wisconsin or any other state that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.

(3) A VHS-affected or VHS-at risk region includes the Canadian provinces of Ontario and Quebec or any other region that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.

(b) It is unlawful to sell VHS-susceptible species of fish from the portion of the Lake Erie Watershed in this Commonwealth in other watersheds of this Commonwealth except in accordance with § 69.3(e) (relating to transportation, introduction and sale of VHS-susceptible species of fish out of the Lake Erie Watershed).

(c) It is unlawful to sell in this Commonwealth VHS-susceptible species of fish from a VHS-affected or VHS-at risk state, unless the following conditions are met:

(1) The sale meets the requirements of 30 Pa.C.S. § 2507 (relating to sale of certain fish, reptiles and amphibians prohibited).

(2) The fish are from a group of fish certified as having tested negative for VHS or are from an artificial propagation facility certified as having tested negative for VHS in accordance with the testing protocols adopted by the Department of Agriculture and approved by the Commission. Persons selling these fish shall have in their possession, and present upon the request of an officer authorized to enforce the code, either a copy of the fish health certification reports for all VHS-susceptible fish kept at the place of sale or a copy of the fish health certification report for the artificial propagation facility if the fish are from a facility certified as having tested negative for VHS.

(d) It is unlawful to sell in this Commonwealth VHS-susceptible species of fish from a VHS-affected or VHS-at risk region, unless the fish meet the requirements of § 73.4(d)(1) and (2) (relating to transportation and importation of VHS-susceptible species of fish).

**§ 63.52. Eggs from VHS-susceptible species of fish.**

(a) For purposes of this section, the following terms have the following meanings:

(1) Species of fish that are susceptible to viral hemorrhagic septicemia (VHS) are those species that the Animal and Plant Health Inspection Service of the United States Department of Agriculture (APHIS) designates by order or the Commission defines by notice in the *Pennsylvania Bulletin*.

(2) A VHS-affected or VHS-at risk state includes Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Wisconsin or any other state that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.

(3) A VHS-affected or VHS-at risk region includes the Canadian provinces of Ontario and Quebec or any other region that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.

(b) It is unlawful to possess and use as bait unpreserved, refrigerated or frozen eggs taken from VHS-susceptible species of fish from a VHS-affected or VHS-at risk state or region in or along the waters of this Commonwealth except within the Lake Erie Watershed.

(c) It is unlawful to possess and use as bait eggs taken from VHS-susceptible species of fish from the portion of the Lake Erie Watershed in this Commonwealth in other watersheds of this Commonwealth.

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

§ 69.3. Transportation, **introduction and sale** of VHS-susceptible **species of fish** out of the Lake Erie watershed.

(a) For purposes of this section, species of fish that are susceptible to viral hemorrhagic septicemia (VHS) are those species that **the Animal and Plant Health Inspection Service of the United States Department of Agriculture designates by order or the Commission [has defined as such] defines** by notice published in the *Pennsylvania Bulletin*.

**(1) The term “VHS-susceptible species” includes fish that are dead or alive, preserved or unpreserved, and the parts thereof.**

**(2) “VHS-susceptible species” does not include the eggs of these species.**

\* \* \* \* \*

(c) It is unlawful to **possess and use** VHS-susceptible species of fish **[ , parts thereof or their eggs taken ]** from the Lake Erie watershed as **[ fishbait ] bait** in **other watersheds of this Commonwealth [ waters outside the Lake Erie watershed ]** except when the fish are from a group of fish certified as having tested negative for VHS or are from an artificial propagation facility certified as having tested negative for VHS **in accordance with the testing protocols adopted by the Department and approved by the Commission. It is unlawful to possess and use eggs from VHS-**

**susceptible species of fish from the Lake Erie watershed as bait in other watersheds of this Commonwealth.**

**(d) It is unlawful to introduce VHS-susceptible species of fish from the Lake Erie watershed into other watersheds of this Commonwealth except when the fish are from a group of fish certified as having tested negative for VHS or are from an artificial propagation facility certified as having tested negative for VHS in accordance with the testing protocols adopted by the Department and approved by the Commission**

**(e) It is unlawful to sell VHS-susceptible species of fish from the Lake Erie watershed in other watersheds of this Commonwealth unless the following conditions are met:**

**(1) The sale meets the requirements of 30 Pa.C.S. § 2507 (relating to sale of certain fish, reptiles and amphibians prohibited).**

**(2) The fish are from a group of fish certified as having tested negative for VHS or are from an artificial propagation facility certified as having tested negative for VHS in accordance with the testing protocols adopted by the Department and approved by the Commission. Persons selling these fish shall have in their possession, and present upon the request of an officer authorized to enforce the code, either a copy of the fish health certification reports for all VHS- susceptible fish kept at the place of sale or a copy of the fish health certification report for the artificial propagation facility if the fish are from a facility certified as having tested negative for VHS.**

**CHAPTER 71. PROPAGATION AND INTRODUCTION OF FISH INTO COMMONWEALTH WATERS**

*(Editor’s Note: The text of §§ 71.8 and 73.4 is new. It has been printed in regular type.)*

**§ 71.8. Introduction of VHS-susceptible species of fish.**

(a) For purposes of this section, the following terms have the following meanings:

(1) Species of fish that are susceptible to viral hemorrhagic septicemia (VHS) are those species that the Animal and Plant Health Inspection Service of the United States Department of Agriculture (APHIS) designates by order or the Commission defines by notice in the *Pennsylvania Bulletin*.

(i) The term “VHS-susceptible species” include fish that are dead or alive, preserved or unpreserved, and the parts thereof.

(ii) The term “VHS-susceptible species” does not include the eggs of these species.

(2) A VHS-affected or VHS-at risk state includes Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Wisconsin or any other state that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.

(3) A VHS-affected or VHS-at risk region includes the Canadian provinces of Ontario and Quebec or any other region that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.

(b) It is unlawful to introduce VHS-susceptible species of fish from the portion of the Lake Erie watershed in this Commonwealth into other watersheds of this Commonwealth except in accordance with § 69.3(d) (relating to transportation, introduction and sale of VHS-susceptible species of fish out of the Lake Erie watershed).

(c) It is unlawful to introduce into the waters of this Commonwealth VHS-susceptible species of fish from an affected or at-risk state unless the fish are from a group of fish certified as having tested negative for VHS or are from an artificial propagation facility certified as having tested negative for VHS in accordance with the testing protocols adopted by the Department of Agriculture and approved by the Commission.

(d) It is unlawful to introduce into the waters of this Commonwealth VHS-susceptible species of fish from an affected or at-risk region unless the fish meet the requirements of § 73.4(d)(1) and (2) (relating to transportation and importation of VHS-susceptible species of fish).

#### CHAPTER 73. TRANSPORTATION OF [LIVE] FISH INTO THIS COMMONWEALTH

##### § 73.4. Transportation and importation of VHS-susceptible species of fish.

(a) *Definitions.* For purposes of this section, the following terms have the following meanings:

(1) Species of fish that are susceptible to viral hemorrhagic septicemia (VHS) are those species that the Animal and Plant Health Inspection Service of the United States Department of Agriculture (APHIS) designates by order or the Commission defines by notice in the *Pennsylvania Bulletin*.

(i) The term "VHS-susceptible species" includes fish that are dead or alive, preserved or unpreserved, and the parts thereof.

(ii) The term "VHS-susceptible species" does not include the eggs of these species.

(2) A VHS-affected or VHS-at risk state includes Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Wisconsin or any other state that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.

(3) A VHS-affected or VHS-at risk region includes the Canadian provinces of Ontario and Quebec or any other region that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.

(b) *IntraState transportation.* It is unlawful to transport or cause the transportation of VHS-susceptible species of fish out of the portion of the Lake Erie watershed in this Commonwealth into other watersheds of this Commonwealth except in accordance with § 69.3(b) (relating to transportation, introduction and sale of VHS-susceptible species of fish out of the Lake Erie watershed).

(c) *InterState transportation.* It is unlawful to transport or cause the transportation of VHS-susceptible species of

fish into this Commonwealth from a VHS-affected or VHS-at risk state, except when one of the following conditions is met:

(1) The fish are from a group of fish certified as having tested negative for VHS or are from an artificial propagation facility certified as having tested negative for VHS in accordance with the testing protocols adopted by the Department of Agriculture (Department) and approved by the Commission. Persons transporting these fish shall have in their possession, and present upon the request of an officer authorized to enforce the code, a copy of the fish health certification reports for all VHS-susceptible fish being transported or a copy of the fish health certification report for the artificial propagation facility if the fish are from a facility that has been certified as having tested negative for VHS.

(2) The fish are being transported through this Commonwealth and the shipping container (tank, trailer, holding vessel or other container) remains biosecure in transit and the fish are accompanied in transit by documentation stating the point of origin of the fish and the location outside of this Commonwealth to which they are to be delivered.

(3) The fish are being transported to facilities located within this Commonwealth for testing and scientific purposes and the persons transporting the fish have taken adequate measures to prevent escape and to disinfect discharged water and equipment used in the transportation of the fish and the fish are accompanied in transit by documentation stating the point of origin of the fish and the destination to which they are to be delivered for testing or scientific purposes.

(4) The fish are being transported to a slaughter facility, processing plant or restaurant within this Commonwealth and the fish are accompanied in transit by documentation stating the point of origin of the fish and the destination to which they are to be delivered for slaughter, processing or consumption.

(5) The fish are dead, recreationally caught fish that are being transported solely for the purpose of human consumption.

(d) *International movement.* It is unlawful to import or cause the importation of VHS-susceptible species of fish into this Commonwealth from a VHS-affected or VHS-at risk region, except as follows:

(1) VHS-susceptible species of live salmonid fish may be imported into the United States if the shipment meets the requirements set forth in 50 CFR 16.13(a)(3) and (b) (relating to importation of live or dead fish, mollusks, and crustaceans or their eggs).

(2) VHS-susceptible species of live nonsalmonid fish may be imported into the United States for direct slaughter under an APHIS-issued permit.

(3) VHS-susceptible species of dead fish may be imported into the United States if the fish are recreationally caught and are for human consumption.

[Pa.B. Doc. No. 08-1628. Filed for public inspection September 5, 2008, 9:00 a.m.]