

RULES AND REGULATIONS

Title 58—RECREATION

FISH AND BOAT COMMISSION

[58 PA. CODE CH. 75]

Fishing

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 amendments add the Rabbitsfoot Mussel and the Snuffbox Mussel to the list of endangered species and the Sheepnose Mussel to the list of threatened species.

A. Effective Date

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

B. Contact Person

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

C. Statutory Authority

The amendments to §§ 75.1 and 75.2 (relating to endangered species; and threatened 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 and threatened species. The specific purpose of the amendments is described in more detail under the summary of changes.

E. Summary of Changes

(1) Salamander Mussel (*Simpsonaias ambigua*). The Salamander Mussel was proposed as an addition to the endangered species list. However, the Commission deferred any action to list the species for at least 60 days.

(2) Rabbitsfoot Mussel (*Quadrula cylindrica cylindrica*). The notice of proposed rulemaking indicated that the Rabbitsfoot met the criterion for population reduction over the next three generations (A.2) for the endangered criterion. After further analysis and reevaluation, the Commission determined that the Rabbitsfoot does not meet the A criterion but rather meets the B criterion as follows. The Commission therefore adopted the amendment adding the Rabbitsfoot to the endangered species list.

CRITERIA B

B.4.a

As related to fragmentation, six extant locations for Rabbitsfoot are known. Based upon its historic range in this Commonwealth, the Rabbitsfoot population is severely fragmented.

B.4.b

B.4.b.3. A total of 13 historic subpopulations are known for the Rabbitsfoot: Allegheny River (pools 5, 6 and 9),

French Creek, LeBoeuf Creek, Muddy Creek, Conneaut Creek, Pymatuning Creek, Shenango River, Beaver River, Ohio River (New Cumberland and Montgomery pools), Monongahela River. Seven subpopulations are considered extant: Allegheny River (East Brady, Althom), French Creek, LeBoeuf Creek, Muddy Creek, Conneaut Creek, and Shenango River, representing a 46% subpopulation decline. Aside from the French Creek subpopulation, remaining subpopulations are small and vulnerable to pollution events.

B.4.b.4. The number of areas of occupancy is conservatively projected to decline by at least 40%. Based upon recent survey data (within the past 25 years), seven subpopulations are known. The Conneaut Creek (0.75 river mile), LeBoeuf Creek (0.75 river mile), Shenango River (0.1 river mile), Allegheny River (2 subpopulations, totaling 5 river miles) and Muddy Creek subpopulations are considered vulnerable to the threats of chronic (sedimentation) or localized pollution events.

(3) Snuffbox (*Epioblasma triquetra*). The notice of proposed rulemaking indicated that the Snuffbox met the criteria for population reduction of greater than 80% in the next 10 years (A.2) and a documented continuing decline (B.4.b). After further analysis and reevaluation, the Commission determined that the Snuffbox also meets the criteria for endangered status for a 80% population reduction over the past three generations (A.1) and severe fragmentation and continuing decline (B.4.a and B.4.b). The Commission therefore adopted the amendment adding the Snuffbox to the endangered species list.

CRITERIA A

A.1

As related to a decline in area of occupancy, extent of occurrence or quality of habitat, twenty subpopulations of Snuffbox are known from the Commonwealth: Ohio River (New Cumberland and Montgomery pools), Allegheny River (pools 5, 6, 7, 8, Kinzua Dam downstream to pool 9), French Creek, LeBoeuf Creek, Woodcock Creek, Muddy Creek, West Branch French Creek, Conneaut Outlet, Beaver River, Shenango River, Pymatuning Creek, Little Shenango River, Dunkard Creek, Little Mahoning Creek, and Lake Erie. No recent surveys have documented live Snuffbox in Lake Erie, Ohio River (New Cumberland and Montgomery pools), Beaver River, or the Allegheny River (pools 5, 6, 7 and 8). The upper Allegheny River, LeBoeuf Creek, West Branch French Creek, Conneaut Outlet, Little Mahoning Creek, Shenango River, Little Shenango River and Dunkard Creek subpopulations are considered very small, unknown or declining. This status provides a suspected 80% population reduction decline over the past three generations (~81 years).

A.2

As related to a decline in area of occupancy, extent of occurrence or quality of habitat, 20 subpopulations of Snuffbox are known from the Commonwealth: Ohio River (New Cumberland and Montgomery pools), Allegheny River (pools 5, 6, 7, 8, Kinzua Dam downstream to pool 9), French Creek, LeBoeuf Creek, Woodcock Creek, Muddy Creek, West Branch French Creek, Conneaut Outlet, Beaver River, Shenango River, Little Shenango River, Pymatuning Creek, Dunkard Creek, Little Mahoning Creek, and Lake Erie. No recent surveys have documented live Snuffbox in Lake Erie, Ohio River (New

Cumberland and Montgomery pools), Beaver River, or the Allegheny River (pools 5, 6, 7 and 8). The upper Allegheny River, LeBoeuf Creek, West Branch French Creek, Conneaut Outlet, Little Mahoning Creek, Shenango River, Little Shenango River, and Dunkard Creek subpopulations are considered very small, unknown or declining. Combined with threats, a projected total population reduction of 80% is expected in the next three generations (~81 years).

As related to actual or potential levels of exploitation, the lock and dam system in the Allegheny and Ohio Rivers, combined with maintenance/commercial sand and gravel dredging have destroyed Snuffbox habitat, eliminated habitat continuity and genetically isolated upstream subpopulations from other subpopulations. Large impoundments such as the Allegheny Reservoir, Pymatuning Reservoir and Shenango River Lake have also destroyed Snuffbox habitat and eliminated genetic/host connectivity to downstream subpopulations.

As related to the effects of introduced taxa, hybridization, pathogens, pollutants, competitors or parasites, zebra mussels have destroyed the Lake Erie subpopulation and colonized the Allegheny River, Ohio River and French Creek. Mortality from zebra mussel infestation is expected. Anthropogenic disturbances such as acute or chronic pollution events could destroy remaining live Snuffbox in Dunkard Creek or other subpopulations. Sedimentation from oil and gas developments, forestry and agricultural practices could have an adverse effect on mussel/host interactions. The Snuffbox uses a unique strategy (fish capture) to lure hosts and transmit glochidia (*parasitic larvae phase of freshwater mussels*). Excessive turbidity associated with increased sedimentation would likely alter host numbers or behavior and reduce Snuffbox recruitment.

CRITERIA B

B.4.a

The Snuffbox is severely fragmented across its present range in this Commonwealth. This means that the Snuffbox is found in small and relatively isolated subpopulations that may go extinct with a reduced probability of recolonization.

B.4.b

B.4.b.3. Twenty historic subpopulations of Snuffbox are known from the Commonwealth: Ohio River (New Cumberland and Montgomery pools), Allegheny River (pools 5, 6, 7, 8, Kinzua Dam downstream to pool 9), French Creek, LeBoeuf Creek, Woodcock Creek, Muddy Creek, West Branch French Creek, Conneaut Outlet, Beaver River, Shenango River, Pymatuning Creek, Little Shenango River, Dunkard Creek, Little Mahoning Creek and Lake Erie. No recent surveys have documented live Snuffbox in Lake Erie, Ohio River (New Cumberland and Montgomery pools), Beaver River or the Allegheny River (pools 5, 6, 7, 8, Kinzua Dam downstream to pool 9). The upper Allegheny River, LeBoeuf Creek, West Branch French Creek, Conneaut Outlet, Little Mahoning Creek, Shenango River, Little Shenango River and Dunkard Creek subpopulations are considered very small, unknown or declining. This status provides an inferred 80% decline.

(4) Sheepnose (*Plethobasus cyphus*). The notice of proposed rulemaking indicated that the Sheepnose met the threatened criterion of 50% population reduction in the next 10 years (A.2). At the time, the Sheepnose also met at least one endangered criterion. However, exercising its best professional judgment, the Bivalve Subcom-

mittee of the Pennsylvania Biological Survey (PABS) recommended that it be listed as a threatened species due to evidence of reproduction and recruitment in the one subpopulation/location in which it exists. The Commission therefore proposed that the Sheepnose be listed as threatened. After further analysis and reevaluation, the Commission determined that the Sheepnose also meets the threatened criterion for extent of occupancy in stream or river miles (B.3) and the endangered criterion for historic population reduction (A.1). Despite the species' meeting at least one endangered criterion, the Commission adopted the amendment adding the Sheepnose to the threatened species list based on the PABS Bivalve Subcommittee's prior finding of evidence of reproduction and recruitment in the one subpopulation/location in which it exists.

CRITERIA A

A.1

As related to decline in area of occupancy, extent of occurrence or quality of habitat, nine historic subpopulations of Sheepnose are known from the Commonwealth: Allegheny River (pools 5, 6, 7 and 8), Ohio River (New Cumberland, Montgomery and Pittsburgh pools), Monongahela River and Beaver River. This species was previously considered extirpated from the Commonwealth, that is, a suspected 100% historic population reduction. However, a population of Sheepnose was recently discovered in the middle Allegheny River. This is the Commonwealth's only known extant Sheepnose population. In an historic context, if the middle Allegheny River (Kinzua Dam downstream to pool 9) population is assumed to be a historically present subpopulation, this provides a suspected 90% population reduction over the past four generations (100 years).

A.2

As related to decline in area of occupancy, extent of occurrence or quality of habitat, nine historic subpopulations of Sheepnose are known from the Commonwealth: Allegheny River (pools 5, 6, 7 and 8), Ohio River (New Cumberland, Montgomery, and Pittsburgh pools), Monongahela River and Beaver River. This species was previously considered extirpated. A recently discovered population in the middle Allegheny River subpopulation is the only subpopulation considered extant. This subpopulation appears to be thriving and expanding its range. With continuation of the threats detailed as follows, the Sheepnose status provides a projected 50% population reduction suspected to be met over the next three generations (~75 years).

A localized or catastrophic pollution event in this stretch of the Allegheny River would have a devastating impact on this population. Combined with the threats described as follows, the Sheepnose is likely to achieve a projected 50% population reduction over the next three generations (75 years).

As related to actual or potential levels of exploitation, the lock and dam system in the Allegheny and Ohio Rivers, combined with maintenance/commercial sand and gravel dredging have destroyed Sheepnose habitat, eliminated habitat continuity and genetically isolated subpopulations occurring in the Allegheny and Monongahela River systems. Sedimentation from oil and gas developments, forestry and agricultural practices could have an adverse effect on mussel/host interactions and reduce Sheepnose recruitment. The Sheepnose produces narrow, red lanceolate packets of glochidia called conglutinates. These conglutinates resemble fish prey items, specifically worms. Excessive turbidity associated

with increased sedimentation would likely alter host numbers or behavior (such as, ability of fish to find and consume conglutinates) thereby reducing Sheepnose recruitment.

As related to the effects of introduced taxa, hybridization, pathogens, pollutants, competitors or parasites, zebra mussels have colonized the Allegheny and Ohio Rivers. Mortality from zebra mussel infestation is expected. Anthropogenic disturbances such as acute or chronic pollution events could destroy the remaining Allegheny River Sheepnose subpopulation.

CRITERIA B

B.3

As related to extent of occupancy, the Allegheny River subpopulation occupies 25 river miles. Greater than 10 river miles and less than 50 river miles meets threatened status.

(5) Rayed Bean (*Villosa fabalis*). The Rayed Bean was proposed as an addition to the threatened species list. However, the Commission deferred any action to list the species until the results of ongoing and pending studies can be considered.

The Commission adopted the amendments to §§ 75.1 and 75.2 as set forth in Annex A.

F. Paperwork

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

G. Fiscal Impact

The amendments will have no direct adverse fiscal impact on the Commonwealth or its political subdivisions. The amendments will impose no new direct costs on the private sector or the general public. The direct regulatory significance of designating a mussel species as endangered or threatened is limited to prohibiting persons from taking, catching, killing or possessing these mussels in this Commonwealth. Because 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 designation of certain mussels as endangered or threatened may have indirect fiscal impacts on them and the Commonwealth because of 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 the project to avoid adverse impacts on these mussels and their habitat. These are fiscal impacts resulting from regulatory and statutory authorities other than those under the aegis of the Commission. Many of the additions to the list are found in the same watersheds as species already listed so there would be little additional burden placed on projects in those areas.

H. Public Comments

A notice of proposed rulemaking, containing the amendments and seeking public comments, was published at 38 Pa.B. 6617 (December 6, 2008). The original public comment period was December 6, 2008, through January 6, 2009. On January 30, 2009, the Commission extended the comment period until March 15 and directed staff to hold a public meeting on the listings in the greater Pittsburgh area prior to the April meeting. A notice extending the public comment period until March 15 and

advising the public of the meeting on March 2, 2009, in Kittanning was published at 39 Pa.B. 1074 (February 21, 2009).

The Commission received a total of 174 public comments, including oral and written comments provided at the March 2nd meeting. During the formal comment period of December 6, 2008, through January 6, 2009, and the extended comment period of January 31 through March 15, 2009, the Commission received 169 comments: 106 comments favor the proposal, 62 comments oppose it and one is undetermined. The Commission received five comments between January 7 and January 30, of which four support the proposal and one opposes it. The opposing comments were submitted by employees of the sand and gravel dredging industry (including a form letter signed by 30 employees of Glacial Sand and Gravel Company) and road building and extraction industries, including the Associated Pennsylvania Constructors, PA Aggregates and Concrete Association, PA Coal Association, The Marcellus Shale Committee representing the Independent Oil and Gas Association of PA and the PA Oil and Gas Association, and the three active Allegheny and Ohio River commercial sand and gravel dredging companies. The Commission also received opposing comments from the Department of Transportation (which was later clarified), the Port of Pittsburgh Authority, Freeport Terminals, Campbell Transportation, the National Waterways Foundation and Laborers Local 1058. The supporting comments were submitted by individuals, biologists, the PABS Mollusk Technical Advisory Committee, the Little Juniata River Association, The Nature Conservancy, Pennsylvania Environmental Council, Juniata Valley Audubon, The Moshannon Group of the Sierra Club, American Rivers, Freshwater Mollusk Conservation Society, the United States Department of the Interior, Fish and Wildlife Service, the United States Environmental Protection Agency, Mountain Watershed Association, Penn State University Sea Grant Program, Sustainable Environmental and Economic Partnership, French Creek Valley Conservancy, North Branch Land Trust, Wildlands Conservancy, Allegheny County Sportsmen's League, Center for Healthy Environments and Communities, the Carnegie Museum of Natural History and the Delaware River Network. Copies of all public comments and the transcript from the March 2 meeting were provided to the Commissioners. The Commissioners also were provided with copies of a comment/response document, which is available on the Commission's web site at www.fishandboat.com under "Featured Topics."

In response to the comments and the interest in the proposed listings by members of industry, the environmental community and the general public, the Commission, through its staff, conducted further analysis, clarified the A.2 criterion after consultation with PABS and reevaluated each of the proposed species as it relates to the objective criteria.

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 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) A public comment period was provided, and all public comments 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 and 75.2 to read as set forth in Annex A.

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

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

(d) This order shall take effect on immediately upon publication in the *Pennsylvania Bulletin*.

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

Fiscal Note: Fiscal Note 48A-208 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 58. RECREATION

PART II. FISH AND BOAT COMMISSION

Subpart B. FISHING

CHAPTER 75. ENDANGERED SPECIES

§ 75.1. Endangered species.

(a) *General.* The species of fish, amphibians and reptiles listed in subsections (b) and (c) are classified endangered. The catching, taking, killing, possessing, importing to or exporting from this Commonwealth, selling, offering for sale or purchasing of any individual of these species, alive or dead, or any part thereof, without a special permit from the Executive Director is prohibited.

(b) *Fish.* The following species are endangered:

- (1) Northern brook lamprey, *Ichthyomyzon fossor*.
- (2) Shortnose sturgeon, *Acipenser brevirostrum*.
- (3) Lake sturgeon, *Acipenser fulvescens*.
- (4) Atlantic sturgeon, *Acipenser oxyrinchus*.
- (5) Spotted gar, *Lepisosteus oculatus*.
- (6) Hickory shad, *Alosa mediocris*.
- (7) Cisco, *Coregonus artedi*.
- (8) Silver chub, *Macrhybopsis storeriana*.
- (9) Gravel chub, *Erimystax x-punctatus*.
- (10) Bridle shiner, *Notropis bifrenatus*.
- (11) River shiner, *Notropis blennioides*.
- (12) Ghost shiner, *Notropis buchmanii*.
- (13) Ironcolor shiner, *Notropis chalybaeus*.
- (14) Blackchin shiner, *Notropis heterodon*.
- (15) Redfin shiner, *Lythrurus umbratilis*.
- (16) Longnose sucker, *Catostomus catostomus*.
- (17) Bigmouth buffalo, *Ictiobus cyprinellus*.

- (18) Black bullhead, *Amerius melas*.
- (19) Mountain madtom, *Noturus eleutherus*.
- (20) Tadpole madtom, *Noturus gyrinus*.
- (21) Northern madtom, *Noturus stigmosus*.
- (22) Burbot, *Lota lota* (inland populations only).
- (23) Threespine stickleback, *Gasterosteus aculeatus*.
- (24) Banded sunfish, *Enneacanthus obesus*.
- (25) Warmouth, *Lepomis gulosus*.
- (26) Longear sunfish, *Lepomis megalotis*.
- (27) Iowa darter, *Etheostoma exile*.
- (28) Eastern sand darter, *Etheostoma pellucida*.

(c) *Reptiles and amphibians.* The following species are endangered:

- (1) Bog Turtle, *Glyptemys muhlenbergii*.
- (2) New Jersey Chorus Frog, *Pseudacris triseriata kalmi*.
- (3) Coastal Plain Leopard Frog, *Rana sphenoccephala*.
- (4) Massasauga Rattlesnake, *Sistrurus catenatus*.
- (5) Kirtland's Snake, *Clonophis kirtlandii*.
- (6) Eastern Mud Salamander, *Pseudotrion m. montanus*.
- (7) Eastern Spadefoot Toad, *Scaphiopus holbrookii*.
- (8) Rough Green Snake, *Opheodrys aestivus*.

(d) *Invertebrates.* The following species are endangered:

- (1) Northern riffleshell mussel, *Epioblasma torulosa rangiana*.
- (2) Clubshell mussel, *Pleurobema clava*.
- (3) Dwarf wedgemussel, *Alasmidonta heterodon*.
- (4) Eastern pearlshell mussel, *Margaritifera margaritifera*.
- (5) Rabbitsfoot mussel, *Quadrula cylindrica cylindrical*.
- (6) Snuffbox mussel, *Epioblasma triquetra*.

§ 75.2. Threatened species.

(a) *General.* The species of fish, amphibians and reptiles listed in subsections (b) and (c) are classified as threatened. The catching, taking, killing, possessing, importing to or exporting from this Commonwealth, selling, offering for sale or purchasing, of any individual of these species, alive or dead, or any part thereof, without a special permit from the Executive Director is prohibited.

(b) *Fish.* The following species are threatened:

- (1) Mountain brook lamprey, *Ichthyomyzon greeleyi*.
- (2) Skipjack herring, *Alosa chrysochloris*.
- (3) Goldeye, *Hiodon alosoides*.
- (4) Mooneye, *Hiodon tergisus*.
- (5) Bigmouth shiner, *Notropis dorsalis*.
- (6) Southern redbelly dace, *Phoxinus erythrogaster*.
- (7) Spotted sucker, *Minytrema melanops*.
- (8) Brindled madtom, *Noturus miurus*.
- (9) Bluebreast darter, *Etheostoma camurum*.
- (10) Spotted darter, *Etheostoma maculatum*.
- (11) Tippecanoe darter, *Etheostoma tippecanoe*.
- (12) Gilt darter, *Percina evides*.

(c) *Amphibians and reptiles*. The following species are threatened:

- (1) Green Salamander, *Aneides aeneus*.
- (2) Red-bellied Turtle, *Pseudemys rubriventris*.

(d) *Invertebrates*. The following species are threatened: Sheepnose mussel, *Plethobasus cyphus*.

[Pa.B. Doc. No. 09-1217. Filed for public inspection July 10, 2009, 9:00 a.m.]

PENNSYLVANIA GAMING CONTROL BOARD

[58 PA. CODE CHS. 401a, 403a, 405a, 491a, 493a, 494a, 495a, 497a, 499a AND 511a]

Rules of Practice and Procedures

The Pennsylvania Gaming Control Board (Board), under its general authority in 4 Pa.C.S. § 1202(b)(30) (relating to general and specific powers) and the specific authority in 4 Pa.C.S. § 1205 (relating to license or permit application hearing process; public input hearings), amends Chapters 401a, 403a, 405a, 491a, 493a, 494a, 495a, 497a, 499a and 511a to read as set forth in Annex A.

Purpose of the Final-Form Rulemaking

This final-form rulemaking makes a number of revisions to the Board's practice and procedure regulations to: improve their clarity; conform to current practice; and simplify some of the existing requirements.

Explanation of Amendments to Chapters 401a, 403a, 405a, 491a, 493a, 494a, 495a, 497a 499a and 511a

Throughout this proposed rulemaking, the phrase "report or recommendation" has been replaced with "report or report and recommendation." This reflects what the presiding officer actually does.

The Board has also eliminated the definition of the term "hearing officer" and various provisions and references to the term. The existing provisions in Chapter 491a (relating to general rules of practice) include hearing officers and presiding officers, but in practice, the Board only uses presiding officers. Therefore, the provisions related to hearing officers are not needed. The Board has also deleted the definition of "presiding officer" from § 491a.2 (relating to definitions) and placed it in § 401a.3 (relating to definitions) because the term is used in more than just Subpart H (relating to practice and procedure).

In § 405a.6 (relating to enforcement action), an incorrect citation to § 493.2(d) in subsection (c) has been replaced with the correct citation to § 493a.5 (relating to answers to complaints, petitions, motions and other filings requiring a response).

In § 491a.3 (relating to Office of the Clerk), the address for the Office of the Clerk has been updated to reflect the current location.

In § 491a.7(c) (relating to presiding officers), "issues of law" has been added to "a fact in issue" as a matter that the presiding officer will not discuss with one party without giving notice and an opportunity to participate to the other parties.

In §§ 491a.8 and 493a.9 (relating to hearings generally; and prehearing and other conferences), language has been

added to allow the use of video conferencing. This will make it easier for parties to participate in prehearing conferences and hearings.

Section 491a.8(j), which makes hearing transcripts available for public inspection, has been expanded to include language stating that if the Board receives a request for a hearing transcript that has not been prepared, the Board will prepare the transcript and make it available for public inspection within 30 days.

Section 493a.2 (relating to complaints) has been rewritten to improve its organization, eliminate duplicative provisions and move provisions related to answers to § 493.5 (relating to answers to complaints, petitions, motions and other filings requiring a response).

In § 493a.4 (relating to petitions generally), duplicative provisions have been deleted.

In § 493a.5, the section title has been changed and the section has been amended to delete duplicative provisions and add provisions pertaining to answers that previously were in § 493a.2.

In §§ 493a.5, 493a.10, 493a.13 and 494a.6 (relating to motions for summary judgment and judgment on the pleadings; consent agreements; and reopening of records deadlines) have been shifted from date of service to date of filing. This will make it easier for the Board to determine if answers have been filed in a timely manner.

A new § 493a.10a (relating to motions to protect confidential information) has been added to Chapter 493a. What is considered to be confidential information under the act has been a controversial issue. Accordingly, the Board is adding this new section to establish a process that can be used in proceedings to address this issue.

In § 494a.8 (relating to rehearing or reconsideration), a new subsection (b) has been added to clarify that filing a petition for rehearing or reconsideration does not toll the 30-day appeal period.

In § 495a.1 (relating to form of documentary filings generally), subsection (d) has been amended to allow parties to indicate a fax number or email address when papers may be served instead of a mailing address. This is being done to make it easier and faster to serve documents.

Section 495a.6 (relating to number of copies) has been revised to only require that the original copy of documents be filed with the Board. Because the Board is using an electronic internal filing system, multiple copies of documents are no longer needed.

In § 497a.1 (relating to date of filing), new provisions have been added that allow documents to be submitted by means of electronic transmission. However, documents will not be deemed to be officially filed until the Board receives any required filing fees.

In § 499a.4 (relating to notice of appearance or withdrawal), subsection (c) has been deleted. The Board has never required and can not foresee a need to require a practitioner to file a power of attorney authorizing the practitioner to represent their client.

In § 499a.6 (relating to contemptuous conduct), subsection (a) has been amended to include contemptuous conduct before a presiding officer, as well as the Board, as a basis for exclusion from a hearing.

Comment and Response Summary

Notice of proposed rulemaking was published at 38 Pa.B. 5441 (October 4, 2008).

The Board received comments from Downs Racing, L.P. (Downs), Greenwood Gaming and Entertainment, Inc. (Greenwood) and Sands Bethworks Gaming, LLC (Sands). By letter dated December 3, 2008, the Independent Regulatory Review Commission (IRRC) also submitted comments. All of these comments were reviewed by the Board and are discussed in detail as follows.

IRRC pointed out that although § 403a.7 (relating to temporary emergency orders) uses the term “presiding officer,” there is no applicable definition to this term. Section 491a.2 (relating to definitions) defines that term, but that section applies only to Subpart H, not Subpart A (relating to general provisions), where § 403a.7 is located.

The Board concurs with IRRC. In response, the definition of “presiding officer” has been deleted from § 491a.2 and placed in § 401a.3 (relating to definitions), which applies to the entire part.

IRRC expressed concern that the amendments to §§ 493a.5, 493a.6, 493a.10 and 493a.12; which change the trigger dates for responsive filings from the date of service to the date of filing, could make it difficult for parties who are served several days after filing to respond in a timely manner.

The Board notes that if a party is slow in providing service, the disadvantaged responding party is able to file a motion under § 497a.5 (relating to extensions of time and continuances) requesting additional time. Moreover, because this rulemaking will allow for electronic service, the Board does not expect that slow service will be an issue in the future. In addition, the existing regulation allows 10 days for the filing of answers to motions for summary judgment. While the Board thinks this is sufficient, it will monitor actual practice and consider using a longer period if experience shows that more time should be allotted.

Comments from the licensed facilities primarily offered opposition to the new proposed § 493a.10a. As the comments submitted by the licensed facilities raised substantially the same objections, references to the commentators, as follows, includes Greenwood, Downs and Sands.

The commentators stated that the process contained in § 493a.10a for filing a Motion to Protect Confidential Information unreasonably shifts the burden of protecting the information from the Board to the filing parties. They pointed to current procedure under § 407a.3, whereby filing parties simply mark any information they deem confidential, as the proper way for the Board to implement its statutory duty to protect the confidential information of the licensees. They believe the effect of the proposed proposed rulemaking would be to require a licensee to prevail on a motion seeking the confidentiality of material already defined and protected by the Right-to-Know Law (65 P. S. §§ 67.101—67.3104) as confidential. IRRC echoed the commentators on this point and asked the Board to explain its authority in that regard.

The Board does not agree that § 493a.10a relieves the Board of its statutory duty to protect confidential information. The intent of § 493a.10a was not to establish an adversarial situation that requires the filing party to prevail on a contested motion to protect information from disclosure to the public. The Motion to Protect Confidential Information is intended to give the filing party the opportunity to clarify for the Board exactly what information should be protected and why that information falls within the scope of the protections provided by the act and the Board’s regulations. Having this information on the record will assist the Board in dealing with requests for information made under the law.

In response to these comments, however, the Board has removed the language; “a party or individual may seek to protect confidential information” in § 493a.10a(a), and replaced it with; “a party or individual may designate information as confidential.” This clarifies that the purpose of the Motion to Protect Confidential Information is for the filing party to identify for the record the confidential information in its pleadings and provide the reason it should be so designated. If the Motion is acted on favorably, the Board will protect the confidential information from disclosure to other parties, under the act and its regulations.

The commentators also expressed concern over the treatment of the material sought to be protected during the pendency of the Motion to Protect Confidential Information. They questioned if the procedure in the proposed regulation would permit the information in question to be disclosed to another party prior to an interim ruling on the Motion by the Director of Hearings and Appeals.

The Board agrees that information sought to be designated confidential should be protected during the time it takes the Director of Hearings and Appeals to issue an interim order on the Motion to Protect Confidential Information. The process established by § 493a.10a will enable the Director to issue an interim order in a short amount of time. In response to the comments, however, the Board has added language to the final-form regulation ensuring that all information that is the subject of the Motion to Protect Confidential Information will be treated as confidential during its pendency.

The commentators also felt that compliance with § 493a.10a would create a negative fiscal impact on the filing parties. They assert that the necessity of filing a separate Motion to Protect Confidential Information with every pleading would significantly increase costs to the industry without any identifiable benefit. IRRC also commented that compliance with this section will result in some costs to the regulated community.

The Board acknowledges that compliance with proposed regulation § 493a.10a will result in some additional cost to licensed facilities that appear regularly before the Board. The Board feels, however, that the additional cost will be minimal and is justified in establishing a clear record of what the filing party considers to be confidential information and the justification for protecting it as such.

Finally, the commentators felt that the term “pleading and other papers” in the proposed § 493a.10a was vague. IRRC raised this concern in its comments, as well. In response, the Board has changed this language to “any papers filed with the Clerk.” This should clarify that anything filed with the Clerk can be the subject of a Motion to Protect Confidential Information.

In addition to reiterating some of the concerns of the licensed facilities, IRRC also raised several other issues regarding § 493a.10a. IRRC noted that § 493a.10a(a) refers only to “information,” while subsection (b) refers to “information” and “documents” in separate paragraphs, and subsection (c) only refers to “documents.”

The Board’s intent was to treat any “documents that contain confidential information” as confidential. No distinction between “documents” and “information” was intended. The proposed regulation has been changed to make clear and consistent reference to confidential information.

IRRC asked whether the interim order issued by the Director of Hearings and Appeals and the final order issued by the Board would protect the substance of the Motion to Protect Confidential Information, as well as the documents attached to it.

The Board has added language to the final-form rulemaking which clarifies that, to the extent that the motion contains confidential information, that information will be protected by both the Director's interim order and the final order of the Board.

Finally, IRRC questioned whether the Motion to Protect Confidential Information is intended to apply to information other than the information described in 4 Pa.C.S. § 1206.

In response to this question, the Board notes that this section is intended to apply to any information that is confidential under the act and the Board's regulations, as well as any other statutes.

Additional Revisions

In § 405a.6(c), the Board has corrected an incorrect citation to § 493.2(d) by replacing it with the correct citation to § 493a.5.

On March 19, 2009, IRRC voted to disapprove final-form Regulation No. 125-93. IRRC was concerned that the final-form regulation would unreasonably disadvantage the regulated community and would be likely to create confusion amongst the regulated community. This confusion would be created by using the filing date instead of the date of service which is used by most other administrative agencies.

On April 22, the Board adopted, and submitted to IRRC, a revised final-form rulemaking. The Board disagreed with IRRC's conclusion that the regulated community would be unreasonably disadvantaged because the provisions of the final-form regulation would apply equally to the Board and other regulated entities. However, the Board agreed that using the filing date instead of the date of service could be confusing. To address this concern the Board made three other changes.

First, the Board amended §§ 493a.5(a), 493a.10(c), 493a.12(f) and 494a.6(c) of the final-form rulemaking to return to the preexisting language which ties the response periods to the date of service instead of the date of filing. This will eliminate the potential for confusion for parties that also deal with other regulatory agencies that use the date of service for calculating response dates.

Second, the Board deleted § 497a.1(c) which would have tied the filing date to receipt of filing fees. The Board agrees that this could make it difficult for parties to accurately determine filing deadlines. Additionally, the Board is considering eliminating fees for most filings, so there is no need for this provision.

Lastly, to address the Board's original concern that adequate time be provided to all parties for filing responses under § 493a.5(a), the time period for filing answers has been increased from 20 days to 30 days. This will ensure that mailing delays do not adversely affect any parties' ability to respond. For the same reason, the time period for filing responses to motions for summary judgments under § 493a.10(c) has been increased from 10 days to 15 days.

Affected Parties

This final-form rulemaking will affect entities and individuals who are involved in Board proceedings.

Fiscal Impact

Commonwealth

Because most of the revisions in this final-form rulemaking reflect current Board practice or reflect relatively minor changes, there will be no significant costs or savings to the Board or other state agencies as a result of these revisions. The Board will experience some savings from being allowed to file and serve some documents electronically.

Political Subdivisions

This final-form rulemaking will have no fiscal impact on political subdivisions of this Commonwealth.

Private Sector

Entities and individuals who are involved in Board proceedings will experience some slight savings from being required to submit fewer copies of documents and being able to file and serve documents electronically. Individuals who participate in videoconferencing for hearings should also experience savings from reduced travel. Parties seeking to protect confidential information may experience some increased costs related to filing motions to protect confidential information, but since this process replaces a matter that was previously dealt with at prehearing conferences, the costs should not be significant.

General Public

This final-form rulemaking will have no fiscal impact on the general public.

Paperwork Requirements

This final-form rulemaking reduces the number of copies of documents that must be filed with the Board and allows electronic service to replace mailing of documents to provide service.

Parties seeking to protect confidential information will have to file a motion to protect confidential information, but this will eliminate the need to resolve this issue as part of a prehearing conference.

Effective Date

This final-form rulemaking will become effective upon publication in the *Pennsylvania Bulletin*.

Contact Person

The contact person for questions about this final-form rulemaking is Richard Sandusky, Director of Regulatory Review at (717) 214-8111.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 24, 2008, the Board submitted a copy of this proposed rulemaking, published at 38 Pa.B. 5441, and a copy of the Regulatory Analysis Form to IRRC and to the Chairpersons of the House Gaming Oversight Committee and the Senate Community, Economic and Recreational Development Committee (Committees).

Under section 5(c) of the Regulatory Review Act (71 P. S. § 745.5(c)), IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments received from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), the final-form rulemaking was

deemed approved by the Committees on May 20, 2009. Under section 5.1(e) of the Regulatory Review Act (71 P.S. § 745.5a(e)) IRRC met on May 21, 2009, and approved the final-form rulemaking.

Findings

The Board finds that:

(1) Public notice of intention to adopt these amendments was 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 thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) The final-form rulemaking is necessary and appropriate for the administration and enforcement of 4 Pa.C.S. Part II (relating to gaming).

Order

The Board, acting under 4 Pa.C.S. Part II, orders that:

(a) The regulations of the Board, 58 Pa. Code Chapters 401a, 403a, 405a, 491a, 493a, 494a, 495a, 497a, 499a and 511a are amended by amending §§ 403a.7, 491a.2, 491a.3, 491a.7—491a.9, 493a.2, 493a.4, 494a.4, 494a.5, 494a.8, 495a.1, 495a.6, 499a.4, 499a.6, 511a.6 and 511a.9 and by deleting § 491a.6 to read as set forth at 38 Pa.B. 5441 and by amending §§ 401a.3, 405a.6, 493a.5, 493a.10, 494a.6 and 497a.1; and by adding § 493a.10a to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(b) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(c) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

GREGORY FAJT,
Chairperson

(Editor's Note: The proposal to amend § 493a.12, included in the proposed rulemaking at 38 Pa.B. 5441 has been withdrawn by the Board. Section 405a.6, included in this final-form rulemaking, was not included in the proposed rulemaking at 38 Pa.B. 5441.)

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 2902 (June 6, 2009).)

Fiscal Note: Fiscal Note 125-93 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 58. RECREATION

PART VII. GAMING CONTROL BOARD

Subpart A. GENERAL PROVISIONS

CHAPTER 401a. PRELIMINARY PROVISIONS

§ 401a.3. Definitions.

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

* * * * *

Presiding officer—

(i) A member of the Board, or other person designated by the Board to conduct a proceeding.

(ii) This definition supersedes 1 Pa. Code § 31.3 (relating to the definitions).

* * * * *

CHAPTER 405a. BUREAU OF INVESTIGATIONS AND ENFORCEMENT

§ 405a.6. Enforcement action.

(a) Upon a determination by the Office of Enforcement Counsel that sufficient facts exist to support enforcement action against a person holding a license, permit, certification or registration issued by the Board, the Office of Enforcement Counsel will initiate a complaint in accordance with § 493.2 (relating to complaints), including a proposed order for an enforcement action and serve the complaint in accordance with § 491a.5 (relating to service by the Board).

(b) The complaint for an enforcement action will include a statement of the facts, the statute, regulation or statement of conditions that the person is being charged with violating and the remedy sought. The proposed order will be accompanied by a certificate of service demonstrating the date of service.

(c) Within 20 days from the date of service of complaint for an enforcement action, the person may file a notice of defense in accordance with § 493a.5 (relating to answers to complaints, petitions, motions and other filings requiring a response) and serve a copy of the notice of defense on the Office of Enforcement Counsel. Failure to file a notice of defense for an enforcement action complaint within 20 days will be deemed:

(1) A waiver by the person of any right to an administrative hearing before the Board.

(2) An admission by the person of all matters and facts alleged in the proposed order for enforcement action.

(3) Consent by the person to the entry of a final order by the Board disposing of the enforcement matter.

(d) Upon the person's failure to request a hearing within the prescribed 20 days, the Office of Enforcement Counsel will present the proposed enforcement order to the Board. The Board may, by resolution, adopt the proposed enforcement order.

(e) The Clerk will send a copy of the Board's final order to the person by first class mail.

Subpart H. PRACTICE AND PROCEDURE

CHAPTER 493a. PLEADINGS

§ 493a.5. Answers to complaints, petitions, motions and other filings requiring a response.

(a) Answers to complaints, petitions, motions and other filings requiring a response shall be filed with the Clerk and served on all other parties within 30 days after the date of service of the complaint, petition, motion or other pleading, unless a different time is prescribed by the Board or presiding officer.

(b) Failure to file a timely answer to a complaint or petition will constitute an admission of all matters and facts contained in the filing and may result in the waiver of the right to a hearing.

(c) Answers may contain the following:

(1) Admissions of the matter complained of and the alleged facts, in whole or in part.

(2) New matter or explanation by way of defense.

(3) Legal objections.

(4) Affirmative defenses.

(5) A request for a hearing.

(d) This section supplements 1 Pa. Code §§ 35.35—35.40.

§ 493a.10. Motions for summary judgment and judgment on the pleadings.

(a) *Motion for judgment on the pleadings.* After the pleadings are closed, but within a time so that the hearing is not delayed, a party may move for judgment on the pleadings.

(b) *Motion for summary judgment.* After the pleadings are closed, but within a time so that the hearing is not delayed, a party may move for summary judgment based on the pleadings and depositions, answers to interrogatories, admissions and supporting affidavits.

(c) *Answers to motions.* An answer to a motion for summary judgment or a motion for judgment on the pleadings, including an opposing affidavit to a motion for summary judgment, may be filed with the Clerk and served on all other parties within 15 days of the date of service of the motion. An answer to a motion for summary judgment may be supplemented by pleadings and depositions, answers to interrogatories or further affidavits and admissions.

(d) *Decisions on motions.* If a motion is granted in whole or in part by a presiding officer, it will be in the form of a report or report and recommendation. The Board will make a final ruling on a motion for judgment on the pleadings or a motion for summary judgment.

(e) *Supplementation.* This section supplements 1 Pa. Code Chapter 35, Subchapter D (relating to motions).

§ 493a.10a. Motions to protect confidential information.

(a) A party or individual may designate information as confidential under § 407a.3 (relating to confidential information) in any papers filed with the Clerk by filing a Motion to Protect Confidential Information.

(b) A Motion to Protect Confidential Information must:

(1) Set forth the specific reasons why the information should be deemed to be confidential information and, therefore, protected.

(2) Label as confidential all documents or portions of documents in the filing containing the confidential information that the party or individual is seeking to protect.

(c) Upon the filing of the Motion to Protect Confidential Information, the Director of Hearings and Appeals will review the motion and accompanying filings and, upon determining that a substantial basis exists, shall issue an interim order to protect the information, whether in the motion or the accompanying filings, from disclosure until the Board considers the matter in accordance with 65 Pa.C.S. §§ 701—716 (relating to open meetings). At all times during the pendency of the motion, the information in the motion and the accompanying filings shall be treated as confidential.

CHAPTER 494a. HEARING PROCEDURE

§ 494a.6. Reopening of record.

(a) After the conclusion of the hearing, a party in a proceeding may file with the presiding officer, prior to the issuance of a report or report and recommendation, a petition to reopen the proceeding for the purpose of taking additional evidence. The petition must set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or law alleged to have occurred since the hearing was concluded.

(b) After the issuance of a report or report and recommendation by a presiding officer and before the Board issues its final order, a party in a proceeding may file with the Board, a petition to reopen the proceeding for the purpose of taking additional evidence. The petition must set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or law alleged to have occurred since the issuance of a report or report and recommendation.

(c) Answers may be filed within 10 days of service of the petition. If no answers are filed, objections to the granting of the petition are waived.

(d) After the filing of the petition and answer, the Board or presiding officer will grant or deny the petition.

(e) Prior to filing a report or report and recommendation, the presiding officer, after notice to the parties, may reopen the proceedings for the receipt of further evidence on his own motion, if the presiding officer has reason to believe that the facts or law have changed as to require, or that the public interest requires, the reopening of the proceedings.

(f) Prior to the issuance of a final order, the Board, after notice to the parties, may reopen the proceeding for the receipt of further evidence, if the Board has reason to believe that the facts or law have changed as to require, or that the public interest requires, the reopening of the proceeding.

(g) This section supersedes 1 Pa. Code §§ 35.231—35.233 (relating to reopening of record).

CHAPTER 497a. TIME

§ 497a.1. Date of filing.

(a) Whenever a pleading or other document is required or permitted to be filed under this part or by statute, it will be deemed to be filed on one of the following dates:

(1) On the date actually received in the Office of the Clerk.

(2) On the date deposited with an overnight express package delivery service as shown on the express delivery receipt attached to or included within the envelope containing the document.

(3) On the date deposited in the United States mail as shown by the United States Postal Service stamp on the envelope or on a United States Postal Service Form 3817 certificate of mailing. A mailing envelope stamped by an in-house postage meter does not constitute proof of the date of mailing.

(4) On the date that the pleading or other document is received by electronic transmission in the Office of the Clerk.

(b) Failure to include a legible delivery receipt with the document may result in an untimely filing.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 31.11 (relating to timely filing required).

[Pa.B. Doc. No. 09-1218. Filed for public inspection July 10, 2009, 9:00 a.m.]

PENNSYLVANIA GAMING CONTROL BOARD
[58 PA. CODE CH. 441a]
Slot Machine Licensing

The Pennsylvania Gaming Control Board (Board), under the general authority in 4 Pa.C.S. § 1202(b)(30) (relating to general and specific powers) and the specific authority in 4 Pa.C.S. §§ 1205 and 1206 (relating to license or permit application hearing process; public input hearings; and Board minutes and records) amends Chapter 441a (relating to slot machine licenses) to read as set forth in Annex A.

Purpose of the Final-Form Rulemaking

This final-form rulemaking amends the provisions related to licensing hearings for applicants for slot machine licenses.

Explanation of Amendment to Chapter 441a

Section 441a.7 (relating to licensing hearings for slot machine licenses) lays out the procedures for the conduct of slot machine licensing hearings. Through this final-form rulemaking, the Board is expanding these provisions.

Specifically, the Board will require the Bureau of Investigations and Enforcement (BIE) to report any information concerning an applicant, which was obtained from sources in the public domain, at the licensing hearing.

Additionally, the Board may request that an applicant respond to questions that may relate to confidential information at the licensing hearing. The applicant will have the option of waiving the right to confidentiality and answering the questions at the public hearing or requesting that the matter be heard in executive session. The applicant will be required to state, on the record, the reasons why it believes the information is confidential and should be heard in executive session.

The final-form rulemaking also makes it clear that under no circumstances will an applicant be required to waive the right to confidentiality as a condition to receiving a slot machine license.

Adoption of these new provisions will provide additional guidance to applicants for slot machine licenses on the conduct of the licensing hearings and ensure that all information permitted by law will be contained in the public record.

Comment and Response Summary

Notice of proposed rulemaking was published at 38 Pa.B. 2269 (May 17, 2008).

The Board received comments from Sands Casino Resort Bethlehem (Sands) during the public comment period. On July 16, 2008, the Independent Regulatory Review Commission (IRRC) also filed comments. Both of these comments were considered by the Board and are discussed as follows.

Sands and IRRC expressed concerns that requiring an applicant to provide a "sufficient reason" as to why information should be treated as confidential could be perceived to be coercive and may conflict with 4 Pa.C.S. § 1206(f).

The Board believes that the proposal was consistent with the act. The proposed provision stated that information obtained by the Board or BIE from sources, not in the public domain, is considered to be confidential. It also repeat the provision in 4 Pa.C.S. § 1206(f) that the Board may not require an applicant to waive any confidentiality

as a condition for approval of a license. This language was included in the regulation to emphasize an applicant's right to have certain information treated as confidential. All this regulation does is clarify that an applicant has a choice as to how to proceed during a licensing hearing if a question arises that may involve confidential information. The applicant may elect to waive the confidentiality privilege or request that the matter be heard in executive session. However, because not all information provided as part of a licensing application is considered confidential, it is entirely appropriate for the Board to require an applicant to describe how the information requested would fall into one of the categories of protected information in 4 Pa.C.S. § 1310(a) (relating to application) or the Board's regulations.

IRRC asked how the Board would determine what is a "sufficient" reason. IRRC believe the term is vague and should be defined or that criteria for determining what is sufficient should be added to the regulation.

The Board's intention in this provision is simply to have the applicant state the reason, on the record, why the information should be treated as confidential. In essence what the Board expects an applicant to do is to state how the information falls into one of the categories of protected information listed in 4 Pa.C.S. § 1310(a) or the Board's regulations. To clarify this intent, § 441a.7(r)(2) (relating to licensing hearings for slot machine licenses) has been revised and the term "sufficient" has been deleted.

IRRC also asked that with the deletion of 4 Pa.C.S. § 1206(a), what the Board's authority is to hear confidential information in executive session.

The statutory basis for the Board to hear information protected under 4 Pa.C.S. § 1206(f) in executive session is found in 65 Pa.C.S. § 708 (relating to executive sessions), which allows an agency to hold an executive session to "discuss agency business which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law..." Because the confidentiality of this information is protected by law, it can be heard in executive session.

Next, IRRC asked if the Board had intended to cite 4 Pa.C.S. § 1206(f) in the proposed rulemaking instead of 4 Pa.C.S. § 1310(a).

That was the Board's intent and the citation has been corrected in the final-form rulemaking.

IRRC asked if a transcript would be made of an executive session, and if so, would the transcript be made available for release in accordance with 4 Pa.C.S. § 1206(f). IRRC also asked that if a transcript is not prepared, how would an applicant's meaningful appellate rights be protected.

A transcript will be prepared for any executive session and the transcript will be released under the circumstances outlined in 4 Pa.C.S. § 1206(f) pertaining to the release of confidential information. In the case of an appeal, the transcripts of any executive sessions will be released upon the lawful order of a court of competent jurisdiction.

IRRC also inquired how the Board will publish an order, when the Board renders a decision which is based on confidential information, without revealing the confidential information.

The Board's order does not have to contain the confidential information; it only needs to state that the Board

has reviewed the information and state if any of the information was the basis for the Board's approval or disapproval.

Lastly, IRRC suggested that the Board include detailed administrative procedures for conducting an executive session.

The Board has not adopted this suggestion. Based on past experience with licensing hearings, the Board does not see a need to add detailed procedures for the conduct of executive sessions.

Additional Revisions

On March 19, 2009, IRRC voted to disapprove final-form Regulation No. 125-86. IRRC was concerned that the final-form rulemaking might not fully preserve a slot machine license applicant's right under the act to protect certain information as confidential.

On April 22, 2009, the Board adopted and submitted to IRRC, a revised final-form rulemaking. While it was never the Board's intent to abridge an applicant's right to have confidential information protected the Board agreed that the language of the final-form rulemaking could be improved by incorporating additional revisions as suggested by IRRC. More specifically, the Board has made two additional changes.

First, subsection (r)(1) has been revised by deleting the phrase "Request, at the licensing hearing, that the matter be heard in executive session." and replacing it with "Invoke the protection afforded the applicant by 4 Pa.C.S. § 1206(f) and have the matter heard in executive session." This more appropriately reflects the protection afforded by the statute.

Second, also subsection (r)(2) has been amended by adding a reference to § 407a.3(a) (relating to confidential information) of the Board's regulations. This section describes in detail the types of information that the Board deems to be confidential. By adding this reference, slot machine applicants will be provided additional guidance as to what the Board considers to be confidential information.

Affected Parties

Applicants for slot machine licenses will be affected by this final-form rulemaking.

Fiscal Impact

Commonwealth

There will be no new costs or savings to the Board or other Commonwealth agencies as a result of this final-form rulemaking.

Political Subdivisions

This final-form rulemaking will have no fiscal impact on political subdivisions of this Commonwealth.

Private Sector

Applicants for slot machine licenses will not experience any increased costs or savings as a result of this final-form rulemaking.

General Public

This final-form rulemaking will have no fiscal impact on the general public.

Paperwork requirements

There are no new paperwork or reporting requirements associated with this final-form rulemaking.

Effective Date

The final-form rulemaking will become effective upon publication in the *Pennsylvania Bulletin*.

Contact Person

The contact person for questions about this final-form rulemaking is Richard Sandusky, Director of Regulatory Review at (717) 214-8111.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on May 1, 2008, the Board submitted a copy of this proposed rulemaking, published at 38 Pa.B. 2269 and a copy of the Regulatory Analysis Form to IRRC and to the Chairpersons of the House Gaming Oversight Committee and the Senate Community, Economic and Recreational Development Committee (Committees).

Under section 5(c) of the Regulatory Review Act (71 P. S. § 745.5(c)), IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments received from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), the final-form rulemaking was deemed approved by the Committees on May 20, 2009. Under section 5.1(e) of the Regulatory Review Act (71 P. S. § 745.5a(e)) IRRC met on May 21, 2009, and approved the final-form rulemaking.

Findings

The Board finds that:

(1) Public notice of intention to adopt this amendment was 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 thereunder, 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) The final-form rulemaking is necessary and appropriate for the administration and enforcement of 4 Pa.C.S. Part II (relating to gaming).

Order

The Board, acting under 4 Pa.C.S. Part II, orders that:

(a) The regulations of the Board, 58 Pa. Code Chapter 441a, are amended by amending § 441a.7 to read as set forth in Annex A, with the ellipses referring to the existing text of the regulation.

(b) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(c) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

GREGORY FAJT,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 2902 (June 6, 2009).)

Fiscal Note: Fiscal Note 125-86 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 58. RECREATION

PART VII. GAMING CONTROL BOARD

Subpart C. SLOT MACHINE LICENSING

CHAPTER 441a. SLOT MACHINE LICENSES

§ 441a.7. Licensing hearings for slot machine licensees.

* * * * *

(r) Information obtained by BIE during an applicant's background investigation based upon public record or upon information otherwise in the public domain will be heard by the Board during the licensing hearing. Information submitted by an applicant under 4 Pa.C.S. § 1310(a) (relating to slot machine license application character requirements) or obtained by the Board or BIE as part of a background investigation from any source not in the public domain is considered confidential. The Board may not require an applicant to waive any confidentiality provided for in 4 Pa.C.S. §§ 1206(f) and 1310(a) as a condition for the approval of a slot machine license or any other action of the Board. The Board may request that an applicant respond to inquiries related to confidential information during a licensing hearing to promote transparency in the regulation of gaming in this Commonwealth. An applicant who does not waive the right to confidentiality shall:

(1) Invoke the protection afforded the applicant under 4 Pa.C.S. § 1206(f) and have the matter heard in executive session.

(2) Provide the reason on the record explaining the basis for the invocation of confidentiality under § 407a.3(a) (relating to confidential information).

(s) At its discretion, the Board may terminate, recess, reconvene and continue the licensing hearing.

(t) An applicant may raise an objection to the conduct of the hearing, procedure, process or rulings of the Board as it relates to its own hearing or to the hearing of a competitive applicant as follows:

(1) An objection may be raised orally by stating the objection during the hearing of an applicant and the objection shall be stenographically recorded upon the record. The Board may request written briefing of the basis of the objection prior to issuing a ruling.

(2) An objection relating to the hearing of an applicant or to a hearing of a competitive applicant may be raised by means of written objection filed with the Clerk no later than 2 business days after the action or event giving rise to the objection. A written objection must clearly and concisely set forth the factual basis for the objection and be accompanied by a legal brief addressing the legal basis supporting the objection.

(3) If an applicant objects to an action or event in the hearing of another applicant, the caption of the objection must include the docket numbers of both proceedings conspicuously displayed and shall be served upon counsel for the other applicant by electronic means.

(4) In the event an objection is filed to the hearing of another applicant, counsel for that applicant may file a responsive brief within 2 business days of electronic service.

(5) An objection not raised as provided in paragraphs (1)—(3) will be deemed waived.

(u) Each Category 1 and Category 3 applicant may file a brief up to 25 pages in length within 10 days of the completion of the hearing with respect to all applications within its category. Each Category 2 applicant may file a brief up to 25 pages in length within 10 days of the completion of the hearing with respect to all applications that meet the same location criteria as the applicant as specified in subsection (n)(1)(i)—(iii). At the prehearing conferences, applicants in any category may waive the opportunity to file briefs.

(v) At the conclusion of the presentation of all testimony and evidence, the Board will cause the record to be transcribed. The transcript and evidence shall become part of the evidentiary record for the Board's consideration. For good cause shown, the Board may seal portions of the record.

(w) Following submission of the applicants' briefs, all applicants will have an opportunity to make final remarks in the form of oral argument before the Board in a manner and time prescribed by the Board. At the prehearing conferences, applicants in any category may waive the opportunity for oral argument.

(x) Upon the conclusion of the licensing hearings and upon review of the evidentiary record in its entirety, the Board will consider, approve, condition or deny the slot machine license applications. A final order, accompanied by the Board's written decision, will be served on the applicants for slot machine licenses.

(y) An applicant may appeal the denial of a slot machine license to the Pennsylvania Supreme Court as provided in the act.

(z) This subsection pertains exclusively to intervention in a licensing hearing for a slot machine license under this section and is not applicable to other hearings before the Board. The right to intervene in a hearing under this section is within the sole discretion of the Board.

(1) A person wishing to intervene in a licensing hearing for a slot machine license shall file a petition in accordance with this subsection.

(2) A person may file a petition to intervene under this subsection if the person has an interest in the proceeding which is substantial, direct and immediate and if the interest is not adequately represented in a licensing hearing.

(3) Petitions to intervene in a licensing hearing may be filed no later than 45 days prior to the commencement of the first scheduled licensing hearing, in the category of license for which the applicant, in whose hearing the petitioner seeks to intervene, has filed an application unless, in extraordinary circumstances for good cause shown, the Board authorizes a late filing. At the same time the petitioner files its petition with the Board, a complete copy of the petition to intervene shall be served on the Chief Enforcement Counsel and the applicant in whose licensing hearing the petitioner seeks to intervene.

(4) Petitions to intervene must set out clearly and concisely the facts demonstrating the nature of the alleged right or interest of the petitioner, the grounds of the proposed intervention, the position of the petitioner in the proceeding and a copy of the written statement to be offered under paragraph (6). The petitioner shall fully and completely advise the applicant and the Board of the specific issues of fact or law to be raised or controverted and cite provisions or other authority relied on.

(5) The applicant may file an answer to a petition to intervene, and in default thereof, will be deemed to have waived any objection to the granting of the petition. If made, answers shall be filed within 10 days after the date the petition is filed with the Board, unless for cause the Board prescribes a different time. A complete copy of the answer to the petition to intervene shall be served on the Chief Enforcement Counsel and the petitioner who seeks to intervene.

(6) Except when the Board determines that it is necessary to develop a comprehensive evidentiary record, the participation of a person granted the right to intervene in a licensing hearing will be limited to the presentation of evidence through the submission of written statements attested to under oath. The written statements shall be part of the evidentiary record.

(aa) This section supersedes any conflicting provisions of Subpart H (relating to practice and procedure) and 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure).

[Pa.B. Doc. No. 09-1219. Filed for public inspection July 10, 2009, 9:00 a.m.]
