

PROPOSED RULEMAKING

DEPARTMENT OF AGRICULTURE

[7 PA. CODE CHS. 46 AND 76]

Food Code; Food Employee Certification

The Department of Agriculture (Department) proposes to amend Chapters 46 and 76 (relating to food code; and food employee certification) to read as set forth in Annex A.

Statutory Authority

Sections 5701—5714 of 3 Pa.C.S. (relating to Retail Food Facility Safety Act), 3 Pa.C.S. §§ 5721—5737 (relating to Food Safety Act), the act of July 2, 1935 (P. L. 589, No. 210) (31 P. S. §§ 645—660g), known as the Milk Sanitation Law, section 1705(d) of The Administrative Code of 1929 (71 P. S. § 445(d)) and 3 Pa.C.S. §§ 6501—6510 (relating to Food Employee Certification Act) provide the legal authority for this proposed rulemaking.

The Retail Food Facility Safety Act charges the Department with responsibilities regarding the licensure, inspection, cleanliness and sanitation of “retail food facilities” (such as restaurants) in this Commonwealth. This includes the responsibility to promulgate regulations necessary to implement the Retail Food Facility Safety Act and requires that, in promulgating these regulations, the Department “be guided by the most current edition of the Food Code, published by the United States Department of Health, Food and Drug Administration” (see 3 Pa.C.S. § 5707(a) (relating to powers of department)) (Model Food Code). The Retail Food Facility Safety Act also affords the Department the discretion to establish retail food facility license intervals of greater than 1 year, but requires that these license intervals be established by regulation and that the regulations use risk-based factors identified in the Model Food Code as a basis for determining the appropriate license interval.

The Food Safety Act charges the Department with the responsibility to: (1) regulate, register and inspect “food establishments” in the Commonwealth (see 3 Pa.C.S. § 5734(a) (relating to registration of food establishments)); (2) promulgate regulations and food safety standards necessary to the proper enforcement of the food safety requirements in the Food Safety Act (see 3 Pa.C.S. § 5733(a) (relating to rules and regulations)); and (3) construe the Food Safety Act and its attendant regulations in a manner that is as consistent with Federal statutory and regulatory authority as practicable (see 3 Pa.C.S. § 5736 (relating to construction of subchapter)).

The Milk Sanitation Law requires that a person selling milk, milk products or manufactured dairy products have a Department-issued permit. It also charges the Department with responsibility to promulgate regulations necessary for the proper enforcement of the Milk Sanitation Law. (See section 19 of the Milk Sanitation Law (31 P. S. § 660c).)

Section 1705(d) of The Administrative Code of 1929 requires the Department to establish regulatory standards necessary to enforce food safety laws.

The Food Employee Certification Act requires that a retail food facility have at least one employee who holds a valid certificate evidencing successful completion of a

Department-approved food safety training course (see 3 Pa.C.S. § 6504(a) (relating to certification of employees)) and authorizes the Department to promulgate regulations necessary for the proper enforcement of the Food Employee Certification Act (see 3 Pa.C.S. § 6505 (relating to rules and regulations)).

Purpose

The act of November 23, 2010 (P. L. 1039, No. 106) (Act 106) accomplished a significant overhaul of the food-related statutes administered and enforced by the Department. It repealed the Public Eating and Drinking Places Law and the Food Act and supplanted these statutes with the Retail Food Facility Safety Act and the Food Safety Act, respectively. It also made substantive changes to the Food Employee Certification Act. Although many of the provisions of these new or revised food-related statutes are similar to the statutes they replaced, there are also a number of changes that necessitate this proposed rulemaking.

The proposed rulemaking seeks to: (1) adopt the terminology and implement the changes necessitated or authorized by Act 106; (2) incorporate, to the extent practicable, the standards and requirements of the Model Food Code as the food safety standards and requirements for this Commonwealth; (3) establish retail food facility license intervals of greater than 1 year using risk-based factors identified in the Model Food Code as a basis for determining the appropriate license interval; and (4) streamline the food employee certification regulations in Chapter 76 to reflect changes produced by Act 106.

Background

The Model Food Code is the product of a collaborative effort among the Department, the United States Food and Drug Administration, the United States Department of Agriculture Food Safety Inspection Service, the Centers for Disease Control, various State and local public health and food control agencies, food industry representatives, academia and consumers. It represents the state-of-the-science with respect to food handling and food safety. It is adopted by reference in portions of the current regulations in Chapter 46. It is also a basis for food safety training courses Nationwide. In addition, the Retail Food Facility Safety Act specifically requires that the Department be guided by the Model Food Code in promulgating regulations (see 3 Pa.C.S. § 5707(a)). Against this backdrop, the Department is satisfied that the regulated community is familiar with the Model Food Code and that the expansive adoption of Model Food Code standards and requirements in the proposed rulemaking will not have an adverse impact on that regulated community.

The other provisions of the proposed rulemaking implement new or revised statutory requirements established by Act 106, which revised or replaced a number of the food-related statutes as previously described.

Need for the Proposed Rulemaking

The proposed rulemaking is driven by the substantial changes to underlying food safety related statutes accomplished by Act 106.

The proposed rulemaking is also needed to reduce foodborne illness to the fullest extent possible. This public health and safety objective is the primary reason for the proposed rulemaking.

The food safety standards in this proposed rulemaking should also serve the regulated community by helping to lower the number of claims and lawsuits related to foodborne illness.

The provisions of the proposed rulemaking that prescribe the appropriate license intervals for various types of retail food facilities (based on risk-based factors identified in the Model Food Code) are needed for the Department and other licensors of these facilities to make better use of limited manpower resources involved in accomplishing inspections and processing license paperwork.

Act 106 also made significant revisions to the Food Employee Certification Act. The proposed rulemaking is needed to implement these changes.

The Department is satisfied there are no reasonable alternatives to proceeding with the proposed rulemaking.

Overview of the Major Provisions of the Proposed Rulemaking

Proposed amendments to § 46.3 (relating to definitions) delete a number of terms that are defined in the Model Food Code to maintain a common vocabulary of food safety terminology. When an underlying statute uses a term that is not used in the Model Food Code, but that is synonymous with another term in the Model Food Code, the proposed rulemaking identifies that synonymous Model Food Code term. This occurs in the definitions of “licensee,” “proprietor” and “retail food facility.”

Proposed § 46.4 (relating to adoption of Model Food Code) would adopt the standards of the Model Food Code as the regulatory standards of the Department to the extent they do not conflict with an underlying statute or a specific provision of Chapter 46.

The proposed rulemaking would rescind current regulatory provisions when the subject matter of those provisions is adequately addressed in the underlying statutes or the Model Food Code, or when the provisions are no longer necessary. These deletions are throughout the proposed rulemaking and address a wide range of food safety related subjects.

Proposed amendments to § 46.212 (relating to food prepared in a private home) add language to track with 3 Pa.C.S. § 5712 (relating to applicability) that generally exempts food that is prepared in private homes and then sold at events such as church suppers and fundraisers for charitable organizations from the requirements of the Retail Food Facility Safety Act.

The list of the types of retail food facilities that are exempt from licensure under the Retail Food Facility Safety Act are proposed to be amended in § 46.1141 (relating to license requirement) to reflect that 3 Pa.C.S. § 5703(b) (relating to license required) affords a licensor (whether the Department or a local government unit) the discretion to issue an order establishing which types of retail food facilities will be exempt. The Department has exercised this discretion and published an order at 41 Pa.B. 524 (January 22, 2011) designating the types of retail food facilities that are exempt. A reference to this order or its date or place of publication is not included in the proposed rulemaking because the order might change and it might cause confusion in those jurisdictions where the licensor is an entity other than the Department.

Proposed amendments to § 46.1141(c) establish retail food facility license intervals based on risk-based factors identified in the Model Food Code as authorized under section 5703(g) of the Retail Food Facility Safety Act.

Proposed § 76.20 (relating to definitions) would establish definitions either included or authorized in the Food Employee Certification Act.

Proposed § 76.21 (relating to certification programs) would implement 3 Pa.C.S. § 6503(c) (relating to certification programs) that the Department recognize certain certification programs as adequate for purposes of meeting the requirements of the Food Employee Certification Act. It would also require the Department to maintain, post on the Department’s web site and readily provide copies of that list of acceptable certification programs.

Affected Individuals and Organizations

The proposed rulemaking would impact the public by reducing the number of foodborne illness outbreaks originating from retail food facilities and food establishments.

Retail food facilities and food establishments would also be affected by the proposed rulemaking. Fewer foodborne illness incidents will benefit owners, operators and employees of these businesses who will be spared some costs associated with lawsuits, compensation or business disruption relating to foodborne illness. Also, since the proposed rulemaking would bring the Commonwealth’s food safety standards into greater alignment with the Model Food Code, and the Model Food Code is the basis for food safety standards in all of the continental United States, there may be some savings associated with operating in a regulatory environment where there is a greater degree of consistency and uniformity in regulatory food safety standards.

Fiscal Impact

Commonwealth. Aside from an initial expected outlay of approximately \$5,000 to revise literature, web sites, forms and the electronic licensing system, the proposed rulemaking would not impose costs or have fiscal impact on the Commonwealth. The Department currently registers and inspects food establishments under the Food Safety Act and licenses and inspects retail food facilities under the Retail Food Facility Safety Act. The proposed rulemaking would not appreciably expand or alter the Department’s role in administering and enforcing these underlying statutes.

Political subdivisions. The proposed rulemaking would not impose costs or have fiscal impact upon political subdivisions. Although a local government unit may act as the “licensor” of retail food facilities within its borders, the proposed rulemaking would not impose requirements on a local government unit licensor that is not imposed by one or more of the underlying statutes.

Private sector. The proposed rulemaking is not expected to impose costs on the private sector. Owners of restaurants, food processing operations, other retail food facilities and other food establishments are already familiar with the food safety standards and procedures prescribed under the Model Food Code. Chapter 46 embodies many of the provisions of the Model Food Code. The Model Food Code is the basis for much of the food safety related

training that is available to these persons and that has been obtained for purposes of compliance with the Food Employee Certification Act.

General public. The proposed rulemaking would enhance public health and safety. It is expected to reduce the number of cases of foodborne illness attributable to food originating from food facilities in this Commonwealth. This should result in some indeterminate cost savings to the general public.

Paperwork Requirements

The proposed rulemaking is not likely to appreciably impact upon the paperwork generated by the Department or other retail food facility licensors or retail food facilities or food establishments.

Effective Date

The proposed rulemaking will be effective 1 month following final-form publication in the *Pennsylvania Bulletin*.

Sunset Date

There is not a sunset date for the proposed rulemaking. The Department will review the efficacy of these regulations on an ongoing basis.

Public Comment Period/Contact Person

Interested persons are invited to submit written comments regarding the proposed rulemaking within 30 days following publication in the *Pennsylvania Bulletin*. Comments should be submitted to the Department of Agriculture, Bureau of Food Safety and Laboratory Services, 2301 North Cameron Street, Harrisburg, PA 17110-9408, Attention: Sheri Morris.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 1, 2012, 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 House and Senate Standing Committees on Agriculture and Rural Affairs. 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 which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor of comments, recommendations or objections raised.

GEORGE D. GREIG,
Secretary

Fiscal Note: 2-174. (1) General Fund; (2) Implementing Year 2011-12 is \$5,000; (3) 1st Succeeding Year 2012-13 is \$0; 2nd Succeeding Year 2013-14 is \$0; 3rd Succeeding Year 2014-15 is \$0; 4th Succeeding Year 2015-16 is \$0; 5th Succeeding Year 2016-17 is \$0; (4) 2010-11 Program—\$1,835,780; 2009-10 Program—\$1,341,812; 2008-09 Program—\$1,088,400; (7) General Government Operations—Bureau of Food Safety; (8) recommends adoption.

Annex A

TITLE 7. AGRICULTURE

PART III. BUREAU OF FOOD SAFETY AND LABORATORY SERVICES

Subpart A. SOLID FOODS

CHAPTER 46. FOOD CODE

Subchapter A. PURPOSE [AND]; DEFINITIONS; ADOPTION OF MODEL FOOD CODE

§ 46.2. Scope.

This chapter establishes definitions; sets standards for management and personnel, food operations and equipment and facilities; and provides for retail food facility plan review, licensing, [registration,] inspection and employee restriction.

§ 46.3. Definitions.

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

[*Additive*—A food additive or a color additive.

[*Adulterated*—Food with respect to which one or more of the following is accurate:

(i) The food bears or contains any poisonous or deleterious substance, which may render it injurious to health. However, if the substance is not an added substance, the food will not be considered adulterated if the quantity of the substance in the food does not ordinarily render it injurious to health.

(ii) The food bears or contains any added poisonous or added deleterious substance, which is unsafe within the meaning of section 11 of the Food Act (31 P. S. § 20.11). This subparagraph does not apply to a pesticide chemical in or on a raw agricultural commodity, a food additive or a color additive.

(iii) The food is a raw agricultural commodity and bears or contains a pesticide chemical which is unsafe within the meaning of section 11 of the Food Act, except that, when a pesticide chemical has been used in or on a raw agricultural commodity with an exception granted or tolerance prescribed under section 11 of the Food Act or under any of the Federal acts and the raw agricultural commodity has been subjected to processing such as canning, cooking, freezing, dehydrating or milling, the residue of the pesticide remaining in or on the processed food will, notwithstanding section 11 of the Food Act and this subparagraph, not be deemed unsafe if the residue in or on the raw agricultural commodity has been removed to the extent possible in good manufacturing practice and the concentration of the residue in the processed food when ready to eat is not greater than the tolerance prescribed for the raw agricultural commodity.

(iv) The food bears or contains any food additive, which is unsafe within the meaning of section 11 of the Food Act or any of the Federal acts.

(v) The food consists in whole or in part of any diseased, contaminated, filthy, putrid or decomposed substance or is otherwise unfit for food.

(vi) The food has been produced, prepared, packed or held under unsanitary conditions so that it may have become contaminated with filth or may have been rendered diseased, unwholesome or injurious to health.

(vii) The food is, in whole or part, the product of a diseased animal or of an animal which has died otherwise than by slaughter.

(viii) The food is in a container composed, in whole or part, of any poisonous or deleterious substance which may render the contents injurious to health, unless the container is fabricated or manufactured with good manufacturing practices as that standard is defined and delineated by any of the Federal acts and their regulations.

(ix) The food has been intentionally subjected to radiation, unless the use of the radiation was in conformity with a regulation or exemption under section 11 of the Food Act or under one of the Federal acts.

(x) The food has had any valuable constituent, in whole or part, omitted or abstracted therefrom.

(xi) The food has had any substance substituted wholly or in part.

(xii) Damage or inferiority of the food is concealed in any manner.

(xiii) A substance has been added to the food and it is mixed or packed so as to increase its bulk or weight or reduce its quality or strength or make it appear better or of greater value than it is.

(xiv) The food bears or contains any color additive which is unsafe within the meaning of section 11 of the Food Act or under one of the Federal acts.

(xv) The food bears or contains eggs processed by or egg products derived from a manufacturing, processing or preparing method wherein whole eggs are broken using a centrifuge-type egg breaking machine that separates the egg's liquid interior from the shell.

Approved—Acceptable to the Department based on a determination of conformity with principles, practices and generally recognized standards proven to be scientifically sound that protect public health.]

Bed and breakfast homestead or inn—A private residence which contains ten or fewer bedrooms used for providing overnight accommodations to the public, and in which breakfast is the only meal served and is included in the charge for the room.

[**Beverage**—A liquid for drinking, including water.

Bottled drinking water—Water that is sealed in bottles, packages or other containers and offered for sale for human consumption. The term includes bottled mineral water.

CFR—The most-recently published edition or revision of the *Code of Federal Regulations*, a compilation of the general and permanent rules published in the *Federal Register* by the executive departments and agencies of the Federal government.

CIP—*Cleaned in place*—

(i) Cleaned in place by the circulation or flowing by mechanical means through a piping system of a detergent solution, water rinse and sanitizing solution onto or over equipment surfaces that require cleaning, such as the method used, in part, to clean and sanitize a frozen dessert machine.

(ii) The term does not include the cleaning of equipment such as band saws, slicers or mixers that are subjected to in-place manual cleaning without the use of a CIP system.

Casing—A tubular container for sausage products made of either natural or artificial (synthetic) material.

Certification number—A unique combination of letters and numbers assigned by the Department or other shellfish control authority having jurisdiction to a molluscan shellfish dealer according to the provisions of the National Shellfish Sanitation Program.

Color additive—A material which is a dye, pigment or other substance made by a process of synthesis or similar artifice or extracted, isolated or otherwise derived, with or without intermediate or final change of identity, from a vegetable, animal, mineral or other source and when added or applied to a food is capable, alone or through reaction with other substances, of imparting color thereto.

(i) The term includes black, white and intermediate grays.

(ii) The term does not include materials, which the Secretary, by regulation, determines are used, or are intended to be used, solely for a purpose other than coloring.

(iii) The term does not include any pesticide chemical, soil or plant nutrient or other agricultural chemical solely because of its effect in aiding, retarding or otherwise affecting, directly or indirectly, the growth or otherwise natural physiological process of produce of the soil and thereby affecting its color, whether before or after harvest.

Commingle—To combine shellstock harvested on different days or from different growing areas as identified on the tag or label or to combine shucked shellfish from containers with different container codes or different shucking dates.

Comminuted—A food that is reduced in size by methods including chopping, flaking, grinding or mincing. The term includes fish or meat products that are reduced in size and restructured or reformulated such as gefilte fish, gyros, ground beef and sausage; and a mixture of two or more types of meat that have been reduced in size and combined, such as sausages made from two or more meats.

Confirmed disease outbreak—A foodborne disease outbreak in which laboratory analysis of appropriate specimens identifies a causative agent and epidemiological analysis implicates the food as the source of the illness.

Consumer—A person, who is a member of the public, takes possession of food, is not functioning in the capacity of an operator of a food facility or food processing plant, and does not offer the food for resale.

Controlled atmosphere packaging—A type of reduced oxygen packaging in which the atmosphere of a package of food is modified so that until the package is opened, its composition is different from air, and continuous control is maintained, such as by using oxygen scavengers or a combination of

total replacement of oxygen, nonrespiring food and impermeable packaging material.

Corrosion-resistant material—A material that maintains acceptable surface cleanability characteristics under prolonged influence of the food to be contacted, the normal use of cleaning compounds and sanitizing solutions and other conditions of the use environment.

Critical control point—A point or procedure in a specific food system where loss of control may result in an unacceptable health risk.

Critical limit—The maximum or minimum value to which a physical, biological or chemical parameter must be controlled at a critical control point to minimize the risk that the identified food safety hazard may occur.]

Department—The Department of Agriculture of the Commonwealth. The term is synonymous with the term “regulatory authority” in the Model Food Code.

Drinking water, potable water or water—Safe drinking water as defined in the Pennsylvania Safe Drinking Water Act (35 P. S. §§ 721.1—721.17). The term does not include water such as boiler water, mop water, rainwater, wastewater and “nondrinking” water.

[Dry storage area—A room or area designated for the storage of packaged or containerized bulk food that is not potentially hazardous and dry goods such as single service items.

EPA—The United States Environmental Protection Agency.

Easily cleanable—

- (i) A characteristic of a surface that:
 - (A) Allows effective removal of soil by normal cleaning methods.
 - (B) Is dependent on the material, design, construction and installation of the surface.
 - (C) Varies with the likelihood of the surface’s role in introducing pathogenic or toxigenic agents or other contaminants into food based on the surface’s approved placement, purpose and use.
- (ii) The term includes a tiered application of the criteria that qualify the surface as easily cleanable as specified in subparagraph (i) to different situations in which varying degrees of cleanability are required, such as one of the following:
 - (A) The appropriateness of stainless steel for a food preparation surface as opposed to the lack of need for stainless steel to be used for floors or for tables used for consumer dining.
 - (B) The need for a different degree of cleanability for a utilitarian attachment or accessory in the kitchen as opposed to a decorative attachment or accessory in the consumer dining area.

Easily movable—A unit of equipment that is both of the following:

- (i) Portable; mounted on casters, gliders or rollers; or provided with a mechanical means to safely tilt the unit of equipment for cleaning.
- (ii) Has no utility connection, a utility connection that disconnects quickly or a flexible utility con-

nection line of sufficient length to allow the equipment to be moved for cleaning of the equipment and adjacent area.

Egg—The shell egg of the domesticated chicken, turkey, duck, goose or guinea.]

Employee—The license [or registration] holder, person in charge, person having supervisory or management duties, person on the payroll, family member, volunteer, person performing work under contractual agreement or other person working in a retail food facility.

[Equipment—

(i) An article that is used in the operation of a food facility such as a freezer, grinder, hood, ice maker, meat block, mixer, oven, reach-in refrigerator, scale, sink, slicer, stove, table, temperature measuring device for ambient air, vending machine or warewashing machine.

(ii) The term does not include items used for handling or storing large quantities of packaged foods that are received from a supplier in a cased or overwrapped lot, such as hand trucks, forklifts, dollies, pallets, racks and skids.

Exclude—To prevent a person from working as a food employee or entering a food facility except for those areas open to the general public.]

FDA—The United States Food and Drug Administration.

[Federal acts—The Wholesome Meat Act (21 U.S.C.A. §§ 601—641), the Federal Food, Drug and Cosmetic Act (21 U.S.C. §§ 301—399), the Poultry Products Inspection Act (21 U.S.C.A. §§ 451—471), the Fair Packaging and Labeling Act (15 U.S.C.A. §§ 1451—1461), the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C.A. § 136—136y) and the Nutrition Labeling and Education Act of 1990 (21 U.S.C.A. § 343-1).

Fish—The term includes:

(i) Fresh or saltwater finfish, crustaceans, all mollusks and other forms of aquatic life (including alligator, frog, aquatic turtle, jellyfish, sea cucumber, and sea urchin and the roe of those animals), other than birds or mammals, if the animal life is intended for human consumption.

(ii) The term includes an edible human food product derived in whole or in part from fish, including fish that have been processed in any manner.]

Food—An article used for food or drink by humans, including chewing gum and articles used for components of any article. The term does not include medicines and drugs.

[Food Act—The Food Act (31 P. S. §§ 20.1—20.18).

Food additive—

(i) A substance, the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food, with respect to which one or more of the following is correct:

(A) The substance is not generally recognized, among experts qualified by scientific training and experience to evaluate its safety, as having been

adequately shown through scientific procedures to be safe under the conditions of its intended use.

(B) The substance has been used in food prior to January 1, 1958, and is not generally recognized, among experts qualified by scientific training and experience to evaluate its safety, as having been adequately shown through scientific procedures or experience based on common use in food, to be safe under the conditions of its intended use.

(ii) The term does not include the following:

(A) A pesticide chemical in or on a raw agricultural commodity.

(B) A pesticide chemical to the extent that it is intended for use or is used in the production, storage or transportation of any raw agricultural commodity.

(C) A color additive.

(D) A substance used in accordance with a sanction or approval granted prior to the enactment of this subparagraph under a statute repealed by the Food Act, under the Poultry Products Inspection Act or under the Wholesome Meat Act.

(E) A new animal drug.

Foodborne disease outbreak—The occurrence of two or more cases of a similar illness after ingestion of a common food.

Food-contact surface—One of the following:

(i) A surface of equipment or a utensil with which food normally comes into contact.

(ii) A surface of equipment or a utensil from which food may drain, drip or splash into a food, or onto a surface normally in contact with food.

Food employee—An individual working with unpackaged food, food equipment or utensils, or food-contact surfaces.]

Food establishment—

(i) A [**retail food store and a**] room, building or place or portion thereof or vehicle maintained, used or operated for the purpose of commercially storing, packaging, making, cooking, mixing, processing, bottling, baking, canning, freezing, packing or otherwise preparing or transporting or handling food.

(ii) The term [**includes those portions of public eating and drinking licensees which offer food for sale for off-premises consumption, except**] excludes retail food facilities, retail food establishments, public eating and drinking places and those portions of establishments operating exclusively under milk or milk products permits.

(iii) The term is synonymous with the term "food processing plant" in the Model Food Code.

[*Food facility*—A public eating or drinking place or a retail food establishment. The term does not include the following:

(i) A food service facility provided by or at an organized camp or campground.

(ii) A food service facility provided by or at a school.

(iii) A food service facility at an institution such as a nursing home or hospital.

(iv) Any other food service facility that is not a public eating or drinking place.

(v) Food processing plants, warehousing establishments and other food establishments that comply with the following:

(A) Are not retail food establishments.

(B) Do not provide food to the consumer either directly or indirectly (such as through the home delivery of groceries).

(C) Applicable Federal regulations.

Food facility operator—The entity that is legally responsible for the operation of the food facility, such as the owner, owner's agent or other person.

Food facility premises—The food facility, its contents and the contiguous land or property under the control of the food facility operator. If a food facility is a component of a larger operation, such as a hotel, motel, shopping mall or public campground, and that larger operation is also under the control of the food facility operator, that larger operation is part of the food facility premises to the extent it may impact the food facility, its personnel or its operations.

Food processing plant—A commercial operation that manufactures, packages, labels or stores food for human consumption and does not provide food directly to a consumer. The term does not include a food facility.]

Food Safety Act—The Food Safety Act (3 Pa.C.S. §§ 5721—5737).

[*Game animal*—

(i) An animal, the products of which are food, that is not classified as any of the following:

(A) Fish, as that term is defined in this chapter.

(B) Cattle, sheep, swine, goat, horse, mule or other equine, as those terms are used in 9 CFR Chapter III, Subchapter A (relating to agency organization and terminology; mandatory meat and poultry products inspection and voluntary inspection and certification).

(C) Poultry, as that term is used in 9 CFR Chapter III, Subchapter A.

(D) Ratites, such as ostriches, emus or rheas.

(ii) The term includes mammals such as reindeer, elk, deer, antelope, water buffalo, bison, rabbit, squirrel, opossum, raccoon, nutria or muskrat, and nonaquatic reptiles such as land snakes.

General use pesticide—A pesticide that is not classified by the EPA for restricted use as specified in 40 CFR 152.175 (relating to pesticides classified for restricted use).]

HACCP—*Hazard Analysis Critical Control Point*—A system developed by the National Advisory Committee on Microbiological Criteria for Foods that identifies and monitors specific foodborne hazards that can adversely affect the safety of the food products.

[*HACCP plan*—A written document that delineates the formal procedures for following the HACCP principles developed by the National Advisory Committee on Microbiological Criteria for Foods.

Hazard—A biological, chemical or physical property (such as the presence of pathogens, pesticides, natural toxins, rodent contamination or foreign materials) that may cause an unacceptable consumer health risk.

Hermetically sealed container—A container that is designed and intended to be secure against the entry of microorganisms and, in the case of low acid canned foods, to maintain the commercial sterility of its contents after processing.

High humidity cooking—Cooking in an oven that attains relative humidity of greater than 90% for at least 1 hour as measured in the cooking chamber or exit of the oven, or cooking in a moisture-impermeable bag that provides 100% humidity.

Highly susceptible population—A group of persons who are more likely than other people in the general population to experience foodborne disease because both of the following conditions exist:

(i) The group is comprised of immunocompromised persons, preschool-age children or older adults.

(ii) The group obtains food at a facility that provides services such as custodial care, health care, assisted living services, nutritional services or socialization services. Examples of facilities providing these services include child or adult day care centers, health care centers, assisted living facilities, hospitals, nursing homes, kidney dialysis centers and senior centers.

Honestly presented—Food offered for human consumption in a way that does not mislead or misinform the consumer, and without misrepresenting the true appearance, color or quality of the food through the use of food or color additives, colored overwraps, lighting or other means.

Imminent health hazard—A significant threat or danger to health that is considered to exist when there is evidence sufficient to show that a product, practice, circumstance or event creates a situation that requires immediate correction or cessation of operation to prevent injury based on one or more of the following:

(i) The number of potential injuries.

(ii) The nature, severity and duration of the anticipated injury.

Injected—Manipulating a meat so that infectious or toxigenic microorganisms may be introduced from its surface to its interior through tenderizing with deep penetration or injecting the meat such as with juices which may be referred to as “injecting,” “pinning” or “stitch pumping.”

Juice—When used in the context of food safety, the term refers to the aqueous liquid expressed or extracted from one or more fruits or vegetables, purées of the edible portions of one or more fruits or vegetables, or any concentrate of the liquid or purée. The term includes juice as a whole beverage, an ingredient of a beverage, and a puree as an ingredient of a beverage. This definition does not apply to standards of identity established by the FDA or USDA.

Kitchenware—Food preparation and storage utensils.]

License—A grant to a [licensee to operate a public eating or drinking place, as defined in the Public Eating and Drinking Places Law] proprietor to operate a retail food facility. The term is synonymous with the term “permit” in the Model Food Code.

Licensee—The person, such as a retail food facility operator, that is directly responsible for the operation of a retail food facility and holds a current license. The term is synonymous with the term “permit holder” in the Model Food Code.

Licensors—Includes the following:

(i) The county department of health or joint-county department of health, whenever the [public eating or drinking place] retail food facility is located in a political subdivision which is under the jurisdiction of a county department of health or joint-county department of health.

(ii) The health authorities of cities, boroughs, incorporated towns and first-class townships, whenever the [public eating or drinking place] retail food facility is located in a city, borough, incorporated town or first-class township not under the jurisdiction of a county department of health or joint-county department of health.

(iii) The health authorities of second class townships and second class townships which have adopted a home rule charter which elect to issue licenses under the [Public Eating and Drinking Places Law] Retail Food Facility Safety Act whenever [the public eating and drinking place] a retail food facility is located in [the] a second class township or second class township which has adopted a home rule charter not under the jurisdiction of a county department of health or joint-county department of health.

(iv) The Department, whenever the [public eating and drinking place] retail food facility is located in any other area of this Commonwealth.

Linens—Fabric items such as cloth hampers, cloth napkins, tablecloths, wiping cloths and work garments, including cloth gloves.

mg/L—Milligrams per liter, which is the metric equivalent of parts per million.

Meat—The flesh of animals used as food including the dressed flesh of cattle, swine, sheep or goats and other edible animals. The term does not include fish, poultry and wild game animals as specified under § 46.221(b) and (c) (relating to game animals).]

Milk Sanitation Law—The act of July 2, 1935 (P. L. 589, No. 210) (31 P. S. §§ 645—[660e] 660g).

Mobile food facility—Any stationary, movable or temporary food facility—such as a stand, vehicle, cart, basket, box or similar structure from which food is stored, prepared, processed, distributed or sold—which physically locates at one site or location for no more than 14 consecutive days, whether operating continuously or not during this time. The term does not include a food facility that is physically located at one site for more than 14 consecutive days.]

Model Food Code—The most current edition of the *Food Code* published by the Department of Health and Human Services, Food and Drug Administration.

[Modified atmosphere packaging—

(i) A type of reduced oxygen packaging in which the atmosphere of a package of food is modified so that its composition is different from air but the atmosphere may change over time due to the permeability of the packaging material or the respiration of the food.

(ii) The term includes: reduction in the proportion of oxygen, total replacement of oxygen or an increase in the proportion of other gases such as carbon dioxide or nitrogen.

Molluscan shellfish—An edible species of fresh or frozen oysters, clams, mussels and scallops or edible portions thereof, except when the scallop product consists only of the shucked adductor muscle.

Nonpublic water supply—A system for the provision of piped water for human consumption that is not a public water system.

Other food regulatory agency—Local bodies, State bodies other than the Commonwealth or Federal enforcement bodies having jurisdiction over a food establishment or food processing plant. Examples include the USDA with respect to most meat processing plants within this Commonwealth and the FDA having jurisdiction over food products imported from other countries.]

Organized camp—A combination of programs and facilities established for the primary purpose of providing an outdoor group living experience for children, youth and adults with social, recreational and educational objectives that is operated and used for 5 consecutive days or more during one or more seasons of the year.

[pH—The symbol for the negative logarithm of the hydrogen ion concentration, which is a measure of the degree of acidity or alkalinity of a solution. Values between 0 and 7 indicate acidity and values between 7 and 14 indicate alkalinity. The value for pure distilled water is 7, which is considered neutral.

Packaged—

(i) Bottled, canned, cartoned, securely bagged or securely wrapped in a food facility or a food processing plant.

(ii) The term does not include a wrapper, carryout box or other nondurable container used to containerize food with the purpose of facilitating food protection during service and receipt of the food by the consumer.

Pennsylvania Construction Code Act—35 P. S. §§ 7210.101—7210.1103.

Pennsylvania Sewage Facilities Act—35 P. S. §§ 750.1—750.20a.

Permanent food facility—A food facility—whether stationary or mobile—that is not a temporary food facility operating more than 14 days in a single calendar year—whether these days are consecutive or not.

Person—A corporation, partnership, limited liability company, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person.

Personal care items—

(i) Items or substances that may be poisonous, toxic or a source of contamination and are used to maintain or enhance a person's health, hygiene or appearance.

(ii) The term includes items such as medicines, first aid supplies, cosmetics, toiletries (such as toothpaste and mouthwash) and similar items.]

Person in charge—[The individual present at a food facility responsible for the operation at the time of inspection.] A person designated by a retail food facility operator to be present at a retail food facility and responsible for the operation of the retail food facility at the time of inspection.

[Physical facilities—The structure and interior surfaces of a food facility, including accessories such as soap and towel dispensers and attachments such as light fixtures and heating or air conditioning system vents.

Plumbing fixture—A receptacle or device that is one or more of the following:

(i) Permanently or temporarily connected to the water distribution system of the premises and demands a supply of water from the system.

(ii) Discharges used water, waste materials or sewage directly or indirectly to the drainage system of the premises.

Plumbing system—The water supply and distribution pipes; plumbing fixtures and traps; soil, waste and vent pipes; sanitary and storm sewers and building drains, including their respective connections, devices and appurtenances within the premises; and water-treating equipment.

Poisonous or toxic material—A substance that is not intended for ingestion and that fits within one or more of the following categories:

(i) Cleaners and sanitizers, including cleaning and sanitizing agents and agents such as caustics, acids, drying agents, polishes and other chemicals.

(ii) Pesticides.

(iii) Substances necessary for the operation and maintenance of the establishment, such as nonfood grade lubricants, solvents and personal care items that may be deleterious to health.

(iv) Substances that are not necessary for the operation and maintenance of the establishment and are on the premises for retail sale, such as petroleum products and paints.

Potentially hazardous food—

(i) A food which consists, in whole or part, of milk or milk products, eggs, meat, poultry, fish, shellfish, edible crustacea or other ingredients, including synthetic ingredients, which is in a form capable of supporting rapid and progressive growth of infectious or toxigenic microorganisms.

(ii) The term does not include foods that have a pH level of 4.6 or below or a water activity of 0.85 or less under standard conditions or food products

in hermetically sealed containers processed to maintain commercial sterility.

Poultry—One or more of the following:

(i) A domesticated bird (chickens, turkeys, ducks, geese or guineas), whether live or dead, as defined in 9 CFR Chapter III, Subchapter A, Part 381 (relating to poultry products inspection regulations).

(ii) A migratory waterfowl or game bird, such as pheasant, partridge, quail, grouse, guineas, pigeon or squab, whether live or dead, as defined in the USDA regulations in 9 CFR Part 362 (relating to voluntary poultry inspection regulations).

(iii) The term does not include ratites.

Primal cut—A basic major cut into which carcasses and sides of meat are separated, such as a beef round, pork loin, lamb flank or veal breast.]

Proprietor—A person, partnership, association or corporation conducting or operating a retail food facility in this Commonwealth. The term is synonymous with the term “person” in the Model Food Code.

Public eating or drinking place—A place within this Commonwealth where food or drink is served to or provided for the public, with or without charge. The term does not include dining cars operated by a railroad company in interstate commerce or a bed and breakfast homestead or inn.

[**Public Eating and Drinking Places Law**—The act of May 23, 1945 (P. L. 926, No. 369) (35 P. S. §§ 655.1—655.13).

Public water system—A system which provides water to the public for human consumption, and which has at least 15 service connections or regularly serves an average of at least 25 individuals daily at least 60 days out of the year, or as otherwise specified in 25 Pa. Code Chapter 109 (relating to safe drinking water).

(i) The term includes collection, treatment, storage and distribution facilities under control of the operator of the system and used in connection with the system.

(ii) The term also includes a system which provides water for bottling or bulk hauling for human consumption.

Ratite—An animal belonging to the same family as ostriches, emus and rheas.]

Raw agricultural commodity—A food in its raw or natural state, including fruits which are washed, colored or otherwise treated in their unpeeled, natural form prior to marketing, or as otherwise defined in section 5722 of the Food Safety Act (relating to definitions).

[**Ready-to-eat food**—Any of the following types of food:

(i) Food in a form that is edible without additional preparation to achieve food safety, such as raw animal-derived foods that have been cooked in accordance with § 46.361 or § 46.362 (relating to cooking raw animal-derived foods; and microwave cooking), or fish that have been frozen in accordance with § 46.364 (relating to parasite destruction in fish other than molluscan shellfish by freezing),

although additional preparation may occur for palatability or aesthetic, epicurean, gastronomic or culinary purposes.

(ii) Food that is raw or partially-undercooked animal-derived food, where the food facility offering the food has complied with § 46.361(d)(1) and the consumer notification requirements of § 46.423 (relating to consumer advisory required with respect to animal-derived foods that are raw, undercooked or not otherwise processed to eliminate pathogens), although additional preparation may occur for palatability or aesthetic, epicurean, gastronomic or culinary purposes.

(iii) Food that is prepared in accordance with a variance issued by the Department under § 46.361(d)(2) and § 46.1103 (relating to variances), although additional preparation may occur for palatability or aesthetic, epicurean, gastronomic or culinary purposes.

(iv) Raw fruits and vegetables that are washed in accordance with § 46.285 (relating to washing raw fruits and vegetables).

(v) Fruits and vegetables that are cooked for hot holding in accordance with § 46.363 (relating to plant food cooking for hot holding).

(vi) Potentially hazardous food that is cooked in accordance with the time and temperature requirements for that specific food in §§ 46.361—46.363, and that is cooled as specified in § 46.384 (relating to potentially hazardous food: cooling).

(vii) Plant food with respect to which further washing, cooking or other processing is not required for food safety, and from which rinds, peels, husks or shells (if naturally present) are removed.

Reduced oxygen packaging—

(i) The reduction of the amount of oxygen in a package by removing oxygen; displacing oxygen and replacing it with another gas or combination of gases; or otherwise controlling the oxygen content to a level below that normally found in the surrounding 21% oxygen atmosphere.

(ii) A process as specified in subparagraph (i) that involves a food for which *Clostridium botulinum* is identified as a microbiological hazard in the final packaged form.

(iii) The term includes vacuum packaging, modified atmosphere packaging and controlled atmosphere packaging.

Refuse—Solid waste not carried by water through the sewage system.

Registration—A grant to a person to operate a food establishment within this Commonwealth as required by section 14 of the Food Act (31 P. S. § 20.14).

Reg. Penna. Dept. Agr.—An abbreviation connoting that a food bearing that abbreviation on its package label has been processed by a food establishment that is “registered with the Pennsylvania Department of Agriculture” in accordance with section 14(a) of the Food Act.

Restrict—To limit the activities of a food employee so that there is no risk of transmitting a disease that is transmissible through food and the food employee does not work with exposed food,

clean equipment, utensils, linens and unwrapped single-service or single-use articles.

Restricted egg—Any check, dirty egg, incubator reject, inedible, leaker or loss as defined in Chapter 87 (relating to standards for grading and marketing eggs).

Restricted use pesticide—A pesticide classified for restricted use under section 3(d) of the Federal Insecticide, Fungicide and Rodenticide Act of 1947 (7 U.S.C.A. § 136(d)), or a pesticide designated by the Secretary for restricted use under section 7(b)(6) of the Pennsylvania Pesticide Control Act of 1973 (3 P. S. § 111.27(b)(6)).]

Retail food establishment—[A food]

(i) An establishment which stores, prepares, packages, vends, offers for sale or otherwise provides food for human consumption and which relinquishes possession of food to a consumer directly, or indirectly, through a delivery service such as home delivery of grocery orders or delivery service provided by common carriers.

(ii) The term does not include dining cars operated by a railroad company in interstate commerce or a bed and breakfast homestead or inn.

Retail food facility—A public eating or drinking place or a retail food establishment. The term is synonymous with the term “food establishment” in the Model Food Code.

Retail food facility operator—The entity that is legally responsible for the operation of the retail food facility, such as the owner, owner’s agent or other person.

Retail Food Facility Safety Act—The Retail Food Facility Safety Act (3 Pa.C.S. §§ 5701—5714).

[**Risk**—The likelihood that an adverse health effect will occur within a population as a result of a hazard in a food.

Safe material—One or more of the following:

(i) An article manufactured from or composed of materials that may not reasonably be expected to result, directly or indirectly, in their becoming a component or otherwise affecting the characteristics of any food.

(ii) An additive that is used as specified in section 409 or section 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C.A. §§ 301 and 376).

(iii) A material that is not an additive and that is used in conformity with applicable regulations of the FDA.

Sanitization—The application of cumulative heat or chemicals on cleaned food-contact surfaces that, when evaluated for efficacy, is sufficient to yield a reduction of five logs, which is equal to a 99.999% reduction, of representative disease microorganisms of public health importance.

Sealed—Free of cracks or other openings that allow the entry or passage of moisture.]

Secretary—The Secretary of the Department or an authorized representative, employee or agent of the Department.

[**Service animal**—An animal such as a guide dog, signal dog or other animal individually trained to provide assistance to an individual with a disability.

Servicing area—An operating base location to which a mobile food facility or transportation vehicle returns regularly for things such as discharging liquid or solid wastes, refilling water tanks and ice bins and boarding food.

Sewage—A substance, which contains waste products or excrements or other discharges from the bodies of human beings or animals and any noxious or deleterious substance being harmful or inimical to the public health, or to animal or aquatic life, or to the use of water for domestic water supply or for recreation.

Shellfish control authority—A State, Federal, foreign, tribal or other government entity legally responsible for administering a program that includes certification of molluscan shellfish harvesters and dealers for interstate commerce.

Shellfish permit—A permit issued by the Department in accordance with Chapter 49 (relating to shellfish) and the National Shellfish Sanitation Program, that authorizes a person to operate a food establishment for shellfish.

Shellfish permit holder—The entity that meets the following conditions:

(i) Is legally responsible for the operation of the food establishment such as the owner, owner’s agent or other person.

(ii) Possesses a valid shellfish permit to operate a shellfish food establishment.

Shellstock—Raw, in-shell molluscan shellfish.

Shiga toxin-producing Escherichia coli—Any E. coli capable of producing Shiga toxins, also called Verocytotoxins or Shiga-like toxins. This includes, but is not limited to, E. coli serotypes O157:H7, O157:NM and O157:H.

Shucked shellfish—Molluscan shellfish that have one or both shells removed.

Single-service articles—Tableware, carry-out utensils and other items such as bags, containers, place mats, stirrers, straws, toothpicks and wrappers that are designed and constructed for one time, one person consumer use after which they are intended for discard.

Single-use articles—

(i) Utensils and bulk food containers designed and constructed to be used once and discarded.

(ii) The term includes items such as wax paper, butcher paper, plastic wrap, formed aluminum food containers, jars, plastic tubs or buckets, bread wrappers, pickle barrels, ketchup bottles and number 10 cans which do not meet the materials, durability, strength and cleanability specifications in §§ 46.521(a), 46.541(a) and 46.542(a) and (b) (relating to materials in multiuse utensils and food-contact surfaces; durability and strength; and cleanability of multiuse food-contact surfaces and CIP equipment) for multiuse utensils.

(iii) The term does not include formed aluminum containers used in conjunction with pan liners that may be reused to cook nonpotentially hazardous baked goods.

Slacking—The process of moderating the temperature of a food such as allowing a food to gradually increase from a temperature of -23°C

(-10°F) to -4°C (25°F) in preparation for deep-fat frying or to facilitate even heat penetration during the cooking of previously block-frozen food such as spinach.

Smooth—One or more of the following:

(i) A food-contact surface having a surface free of pits and inclusions with cleanability equal to or exceeding that of (100 grit) number-3 stainless steel.

(ii) A nonfood-contact surface of equipment having a surface equal to that of commercial grade hot-rolled steel free of visible scale.

(iii) A floor, wall or ceiling having an even or level surface with no roughness or projections that renders it difficult to clean.

Substance—A material intended for use in producing, manufacturing, packaging, processing, preparing, treating, transporting or holding food and any source of radiation intended for any use.

Sulfiting agent—A substance which imparts a residual of sulfur dioxide.

Table—mounted equipment—Equipment that is not portable and is designed to be mounted off the floor on a table, counter or shelf.

Tableware—Eating, drinking and serving utensils for table use such as plates, flatware (including forks, knives and spoons) and hollowware (including bowls, cups, serving dishes and tumblers).

Temperature measuring device—A thermometer, thermocouple, thermistor or other device that indicates the temperature of food, air or water.

Temporary food facility—A food facility that operates for a period of no more than 14 consecutive days in a fixed location and in conjunction with a single event or celebration (such as a fair, festival, carnival or other transitory gathering).

Temporary license—Either of the following:

(i) A license that is the following:

(A) Issued to the operator of a temporary food facility.

(B) Valid for the duration of a particular event or celebration (such as a fair or carnival) of no more than 14 days duration (whether these days are consecutive or nonconsecutive).

(C) Issued to the operator with respect to no more than three events or celebrations in a particular calendar year.

(ii) A license that is the following:

(A) Issued to a food facility operator operating a food facility, whether stationary or mobile.

(B) In operation for a total of no more than 14 days within a particular calendar year.

(C) Not in conjunction with an event or celebration.

USDA—The United States Department of Agriculture.

Utensil—A food-contact implement or container used in the storage, preparation, transportation, dispensing, sale or service of food. The term includes the following:

(i) Kitchenware or tableware that is multiuse, single-service or single-use.

(ii) Gloves used in contact with food.

(iii) The temperature sensing probes of food temperature measuring devices.

(iv) Probe-type price or identification tags used in contact with food.

Utility sink—A sink used for the disposal of mop water or other similar liquid waste.

Vacuum packaging—A type of reduced oxygen packaging in which air is removed from a package of food and the package is hermetically sealed so that a vacuum remains inside the package, such as sous vide.

Variance—A written document issued by the Department that authorizes a modification or waiver of one or more requirements of this chapter if, in the opinion of the Department, a health hazard or nuisance will not result from the modification or waiver.

Vending machine—A self-service device that, upon insertion of a coin, paper currency, token, card or key, dispenses unit servings of food in bulk or in packages without the necessity of replenishing the device between each vending operation.

Vending machine location—The room, enclosure, space or area where one or more vending machines are installed and operated. The term includes the storage areas and areas on the premises that are used to service and maintain the vending machines.

Warewashing—The cleaning and sanitizing of food-contact surfaces of equipment and utensils.

Water activity or a_w —A measure of the free moisture in a food, obtained by dividing the water vapor pressure of the substance by the vapor pressure of pure water at the same temperature. Water activity is typically indicated by the symbol a_w .

Water for human consumption—The term includes water that is used for drinking, bathing and showering, cooking, dishwashing or maintaining oral hygiene.

Whole-muscle, intact beef—Whole muscle beef that is not injected, mechanically tenderized, reconstructed, or scored and marinated, from which beef steaks may be cut.]

(*Editor's Note:* The following section is new and printed in regular type to enhance readability.)

§ 46.4. Adoption of Model Food Code.

The provisions, terms, procedures, appendices and standards in the current edition of the Model Food Code are adopted to the extent they do not conflict with one or more of the following:

- (1) The Retail Food Facility Safety Act.
- (2) The Food Safety Act.
- (3) This chapter.

Subchapter B. [**MANAGEMENT AND PERSONNEL**]
 (Reserved)

(Editor's Note: As part of this proposed rulemaking, the Department is proposing to rescind Subchapter B which appears in 7 Pa. Code pages 46-17—46-28, serial pages (356767), (356768) and (301595)—(301604).)

- Sec.
- 46.101. (Reserved).
- 46.102. (Reserved).
- 46.111—46.115. (Reserved).
- 46.131—46.137. (Reserved).
- 46.151—46.153. (Reserved).

Subchapter C. **FOOD**
 [**CHARACTERISTICS**]

§ 46.201. [**Food shall be safe, unadulterated and honestly presented**] (Reserved).

[**Food shall be safe, unadulterated and—in accordance with § 46.421(b) (relating to accurate representation)—honestly presented.**]

FOOD SOURCES

§ 46.211. [**Food sources**] (Reserved).

[**Food shall be obtained from sources that comply with the Food Act, the Public Eating and Drinking Places Law and this chapter. Records of food sources shall be maintained and made available for review upon request by the Department.**]

§ 46.212. **Food prepared in a private home.**

(a) *General.* Food prepared in a private home [, not approved by the Department, may not] may be used or offered for human consumption in a retail food facility [.] if the following apply:

(1) The food is not potentially hazardous food.

(2) The food is used or offered for human consumption by any of the following organizations:

(i) A tax-exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C.A. § 501(c)(3)).

(ii) A volunteer fire company or ambulance, religious, charitable, fraternal, veterans, civic, sportsmen, agricultural fair or agricultural association or a separately chartered auxiliary of an association on a nonprofit basis.

(iii) An organization that is established to promote and encourage participation and support for extracurricular recreational activities for youth of primary and secondary public, private and parochial school systems on a nonprofit basis.

(3) The organization that uses or offers the food for human consumption informs consumers that the organization uses or offers food that has been prepared in private homes that are not licensed or inspected.

(4) The food is donated to an organization described under paragraph (2).

(b) *Private homes that are registered food establishments under the Food Safety Act.* Food prepared in a private home may be offered for human consumption in a retail food facility if the private home is registered with the Department as a food establishment under the Food Safety Act.

(Editor's Note: As part of this proposed rulemaking, the Department is proposing to rescind §§ 46.213—46.216 which appear in 7 Pa. Code pages 46-31—46-32, serial pages (301607) and (301608).)

- Sec.
- 46.213—46.216. (Reserved).

§ 46.217. **Milk and milk products.**

Milk and milk products [**shall be obtained from sources that comply**] may be offered for human consumption in a retail food facility if the facility complies with section 2 of the Milk Sanitation Law (31 P. S. § 646).

(Editor's Note: As part of this proposed rulemaking, the Department is proposing to rescind §§ 46.218—46.222, 46.241—46.251, 46.261, 46.262, 46.281—46.286, 46.301—46.307, 46.321—46.323, 46.341—46.344, 46.361—46.366, 46.381—46.385, 46.401, 46.402, 46.421—46.423, 46.441 and 46.461 which appear in 58 Pa. Code pages 46-32—46-63, serial pages (301608)—(301639).)

- Sec.
- 46.218—46.222. (Reserved).
- 46.241—46.251. (Reserved).
- 46.261. (Reserved).
- 46.262. (Reserved).
- 46.281—46.286. (Reserved).
- 46.301—46.307. (Reserved).
- 46.321—46.323. (Reserved).
- 46.341—46.344. (Reserved).
- 46.361—46.366. (Reserved).
- 46.381—46.385. (Reserved).
- 46.401. (Reserved).
- 46.402. (Reserved).
- 46.421—46.423. (Reserved).
- 46.441. (Reserved).
- 46.461. (Reserved).

Subchapter D. [**EQUIPMENT, UTENSILS AND LINENS**] (Reserved)

(Editor's Note: As part of this proposed rulemaking, the Department is proposing to rescind Subchapter D which appears in 58 Pa. Code pages 46-63—46-97, serial pages (301639), (301640), (351231), (351232) and (301643)—(301673).)

- Sec.
- 46.501. (Reserved).
- 46.521—46.523. (Reserved).
- 46.541—46.544. (Reserved).
- 46.561—46.563. (Reserved).
- 46.581—46.595. (Reserved).
- 46.611—46.615. (Reserved).
- 46.631—46.634. (Reserved).
- 46.651. (Reserved).
- 46.652. (Reserved).
- 46.671—46.676. (Reserved).
- 46.691—46.693. (Reserved).
- 46.711—46.719. (Reserved).
- 46.731. (Reserved).
- 46.751—46.753. (Reserved).
- 46.771—46.775. (Reserved).

Subchapter E. [**WATER, PLUMBING AND WASTE WATER**] (Reserved)

(Editor's Note: As part of this proposed rulemaking, the Department is proposing to rescind Subchapter E which appears in 58 Pa. Code pages 46-97—46-110, serial pages (301673)—(301686).)

- Sec.
- 46.801—46.806. (Reserved).
- 46.821—46.825. (Reserved).
- 46.841—46.844. (Reserved).
- 46.861—46.863. (Reserved).
- 46.881—46.886. (Reserved).

Subchapter F. [PHYSICAL FACILITIES] (Reserved)

(Editor's Note: As part of this proposed rulemaking, the Department is proposing to rescind Subchapter F which appears in 58 Pa. Code pages 46-110—46-120, serial pages (301686)—(301696).)

- Sec. 46.901. (Reserved). 46.902. (Reserved). 46.921. (Reserved). 46.922. (Reserved). 46.941—46.946. (Reserved). 46.961—46.965. (Reserved). 46.981. (Reserved). 46.982. (Reserved).

Subchapter G. [POISONOUS OR TOXIC MATERIALS] (Reserved)

(Editor's Note: As part of this proposed rulemaking, the Department is proposing to rescind Subchapter G which appears in 58 Pa. Code pages 46-121—46-125, serial pages (301697)—(301701).)

- Sec. 46.1001. (Reserved). 46.1002. (Reserved). 46.1021—46.1029. (Reserved). 46.1041. (Reserved).

Subchapter H. ADMINISTRATIVE PROCEDURES ACCESS, APPROVALS AND VARIANCES

§ 46.1101. Access to retail food facilities.

After the Department or licensor presents identification, the person in charge shall allow the Department or licensor to determine if the retail food facility is in compliance with this chapter by allowing access to the facility, allowing inspection and providing information and records specified in this chapter and to which the Department or licensor is entitled under the [Public Eating and Drinking Places Law, the Food Act] Retail Food Facility Safety Act and any other relevant statutory or food regulatory authority during the retail food facility's hours of operation and other reasonable times if the facility is not open during normal business hours.

§ 46.1102. Obtaining Department or licensor approval.

* * * * *

(b) Written request. A person seeking an approval from the Department or a licensor under this chapter shall submit a written request for approval to the entity from which approval is sought. If approval is sought from the Department, the written request shall be mailed or delivered to the following address:

Pennsylvania Department of Agriculture Bureau of Food Safety and Laboratory Services [Attn: Chief, Division of Food Safety] 2301 North Cameron Street Harrisburg, Pennsylvania 17110-9408

* * * * *

(e) Standard for approval. The Department or licensor shall grant approval if it determines the approval would not constitute or cause a violation of the [Food Act, the Public Eating and Drinking Places Law] Retail Food Facility Safety Act or this chapter, and that no health hazard would result from the approval.

§ 46.1103. Variances.

(a) Modifications and waivers. The Department may grant a variance by modifying or waiving the requirements of this chapter if—in the opinion of the Department—a health hazard will not result from the variance. If a variance is granted, the Department will retain the information specified in subsection (b) in its records for the retail food facility and provide a copy of the approved variance to the licensor if the licensor is an entity other than the Department.

(b) Documentation of proposed variance and justification. Before a variance from a requirement of this chapter is approved, the information that shall be provided by the person requesting the variance and retained in the Department's file on the retail food facility includes the following:

* * * * *

(c) Conformance with approved procedures. If the Department grants a variance as specified in subsection (a), or an HACCP plan is otherwise required as specified in § 46.1122(a), the retail food facility operator shall do the following:

* * * * *

(2) Maintain and provide to the Department or licensor, upon request, records specified in § 46.1122(b)(4) and (5) that demonstrate that the following are routinely employed:

* * * * *

PLAN SUBMISSION AND APPROVAL

§ 46.1121. Facility and operating plans.

(a) When plans are required. A retail food facility licensing applicant or retail food facility operator shall have plans and specifications reviewed by the Department or licensor and will submit these properly prepared plans and specifications (as described in subsection (b)) to the Department or licensor for review and approval (using the procedure described in § 46.1142 (relating to application procedure for appropriate license [or registration])) before any of the following:

- (1) The construction of a retail food facility. (2) The conversion of an existing structure for use as a retail food facility.

(3) The remodeling of a retail food facility (including installation and use of any new major food equipment for heating, cooling and hot and cold holding food) or a change of type of retail food facility or food operation if the Department or licensor determines that plans and specifications are necessary to ensure compliance with this chapter.

- (4) A change of ownership of a retail food facility.

(b) Contents of the plans and specifications. The plans and specifications for a retail food facility shall include (as required by the Department or licensor based on the type of operation, type of food preparation and foods prepared) the following information to demonstrate conformance with this chapter:

- (1) Intended menu and consumer advisory intentions, if a consumer advisory is required under [§ 46.423 (relating to consumer advisory required with respect to animal-derived)] the Model Food Code for animal

foods that are raw, undercooked or not otherwise processed to eliminate pathogens[)].

* * * * *

(7) Other information that may be required by the Department or licensor for the proper review of the proposed construction, conversion or modification of a retail food facility, and requested by the Department or licensor in writing.

§ 46.1122. HACCP plans.

(a) When [a] an HACCP plan is required.

(1) Before engaging in an activity that requires [a] an HACCP plan, a retail food facility applicant or retail food facility operator shall submit to the Department or licensor for approval a properly prepared HACCP plan as specified in subsection (b) and the relevant provisions of this chapter if any of the following occurs:

(i) Submission of [a] an HACCP plan is required according to applicable Federal or State laws.

(ii) A variance is required as specified in [§ 46.250(b)(2)(ii), § 46.361(d)(2), § 46.401 or § 46.589(b)] the Model Food Code.

* * * * *

(2) A retail food facility applicant or retail food facility operator shall have a properly prepared HACCP plan as specified in [§ 46.402 (relating to reduced oxygen packaging)] the Model Food Code for reduced oxygen packaging.

(b) Contents of [a] an HACCP plan. For a retail food facility that is required in subsection (a) to have [a] an HACCP plan, the plan and specifications shall indicate the following:

* * * * *

§ 46.1123. Confidentiality of trade secrets.

The Department or licensor will treat as confidential information that meets the criteria specified in law for a trade secret and is contained on inspection report forms and in the plans and specifications submitted as specified in §§ 46.1121(b) and 46.1122(b) (relating to facility and operating plans; and HACCP plans).

§ 46.1124. Preoperational inspection of construction.

The Department or licensor will conduct one or more preoperational inspections to verify that the retail food facility is constructed and equipped in accordance with the approved plans and approved modifications of those plans, and variances granted under § 46.1103 (relating to variances). The Department or licensor will also verify the retail food facility is otherwise in compliance with this chapter[, the Food Act and the Public Eating and Drinking Places Law] and the Retail Food Facility Safety Act.

REQUIREMENTS FOR OPERATION

§ 46.1141. [Requirement: license or registration] License requirement.

(a) General requirement. A person may not operate a retail food facility without a valid [registration issued by the Department, or] license issued by the Department or licensor, unless otherwise provided in subsection (b).

(b) [Exceptions.

(1) A building, structure or place owned, leased or otherwise in possession of a person or municipal corporation or public or private organization, used or intended to be used by two or more farmers or an association of farmers for the purpose of selling food directly to consumers—otherwise known as a farmer’s market—shall be considered to be a single retail food establishment for purposes of registration under section 14 of the Food Act (31 P. S. § 20.14).

(2) [Exemptions. The following [food establishments] retail food facilities are exempt from [registration] licensure requirements under [section 14 of the Food Act] the Retail Food Facility Safety Act but remain subject to the inspection provisions and all other provisions of the Retail Food Facility Safety Act:

(i) Vehicles used primarily for the transportation of a consumer commodity in bulk or quantity to manufacturers, packers, processors or wholesale or retail distributors.

(ii) A food establishment in which at least 50% of the commodities sold were produced on the farm on which the food establishment is located.

(iii) A food establishment in which food or beverages are sold only through a vending machine.

(iv) A food establishment in which only prepackaged, nonpotentially hazardous food or beverages are sold.]

(1) A retail food facility in which only prepackaged, nonpotentially hazardous food or beverages are sold.

(2) A retail food facility that sells only raw agricultural commodities.

(3) A retail food facility that is exempt from licensure by an order of the Secretary that has been published in the Pennsylvania Bulletin in accordance with section 5703(b)(1) of the Retail Food Facility Safety Act (relating to license required) if the licensor is the Department.

(4) A retail food facility that is exempt from licensure by an order of the local government unit or units having licensing authority in accordance with section 5703(b)(1) of the Retail Food Facility Safety Act if the licensor is an entity other than the Department.

(c) License interval. A license certificate issued by the Department under this chapter sets forth the license expiration date. The license interval varies, in accordance with the risk-based factors identified in the Model Food Code, as follows:

(1) 24-month license interval.

(i) The license interval is 24 months with respect to a retail food facility that:

(A) Serves or sells only pre-packaged, nonpotentially hazardous foods (non-time/temperature control for safety foods).

(B) Prepares only nonpotentially hazardous foods (non-time/temperature control for safety foods).

(C) Heats only commercially processed, potentially hazardous foods (time/temperature Control for Safety Food (TCS foods)) for hot holding.

(D) Does not cool potentially hazardous foods (TCS foods) for hot holding.

(ii) Examples of the type of retail food facility that would typically be subject to the 24-month license interval in subparagraph (i) are convenience store operations, hot dog carts and coffee shops.

(iii) The license interval for a retail food facility is 24 months if the retail food facility would otherwise be subject to the 18-month license interval in paragraph (2) but demonstrates to the Department, through historical documentation, that it has achieved and documented active managerial control of foodborne illness risk factors identified in the Model Food Code. These risk factors include:

(A) A history of noncompliance with provisions regarding foodborne illness risk factors or critical items.

(B) Specialized processes conducted.

(C) Food preparation a day in advance of service.

(D) Large numbers of people served.

(E) A history of foodborne illnesses or complaints, or both.

(F) Highly susceptible population served.

(2) *18-month license interval.*

(i) The license interval is 18 months with respect to a retail food facility that:

(A) Has a limited menu.

(B) Prepares/cooks and serves most products immediately.

(C) May involve hot and cold holding of potentially hazardous foods (TCS foods) after preparation or cooking.

(D) Limits complex preparation of potentially hazardous foods (TCS foods) requiring cooking, cooling, and reheating for hot holding to only a few potentially hazardous foods (TCS foods).

(ii) Examples of the type of retail food facility that would typically be subject to the 18-month license interval in subparagraph (i) are retail food store operations that have only a limited number of separate departments (such as deli, bakery, produce, seafood or meat area), institutional facilities that do not serve a highly susceptible population and quick food service operations.

(iii) The license interval for a retail food facility is 18 months if the retail food facility would otherwise be subject to the 12-month license interval in paragraph (3) but demonstrates to the Department, through historical documentation, that it has achieved and documented active managerial control of foodborne illness risk factors in paragraph (1).

(iv) The license interval for a retail food facility is 18 months if the retail food facility would otherwise be subject to the 24-month license interval in paragraph (1), but the retail food facility is newly-licensed or has not yet demonstrated to the Department, through historical documentation, that it has achieved and documented active managerial control of foodborne illness risk factors in paragraph (1).

(3) *12-month license interval.*

(i) The license interval is 12 months with respect to a retail food facility that:

(A) Has an extensive menu and entails handling of raw ingredients.

(B) Has complex preparation including cooking, cooling and reheating for hot holding involves many potentially hazardous foods (TCS foods).

(C) Uses a variety of processes that require hot and cold holding of potentially hazardous food (TCS foods).

(ii) Examples of the type of retail food facility that would typically be subject to the 12-month license interval in subparagraph (i) are full service restaurants or retail food stores with a full range of separate departments (such as deli, bakery, produce, seafood or meat area) that includes ready-to-eat foods from a café, salad bar or hot food bar.

(iii) The license interval for a retail food facility is 12 months if the retail food facility would otherwise be subject to the 6-month license interval in paragraph (4) but demonstrates to the Department, through historical documentation, that it has achieved and documented active managerial control of foodborne illness risk factors in paragraph (1).

(iv) The license interval for a retail food facility is 12 months if the retail food facility would otherwise be subject to the 18-month license interval in paragraph (2), but the retail food facility is newly-licensed or has not yet demonstrated to the Department, through historical documentation, that it has achieved and documented active managerial control of foodborne illness risk factors in paragraph (1).

(4) *6-month license interval.*

(i) The license interval is 6 months with respect to a retail food facility that serves a highly susceptible population or that conducts specialized processes such as smoking, curing or reduced oxygen packaging to extend shelf life.

(ii) Examples of the type of retail food facility that would typically be subject to the 6-month license interval in subparagraph (i) are preschools, hospitals, nursing homes and establishments conducting processing at retail.

(iii) The license interval for a retail food facility is 6 months if the retail food facility would otherwise be subject to the 12-month license interval in paragraph (3), but the retail food facility is newly-licensed or has not yet demonstrated to the Department, through historical documentation, that it has achieved and documented active managerial control of foodborne illness risk factors in paragraph (1).

§ 46.1142. Application procedure for appropriate license [or registration].

Prior to the opening of a retail food facility, the operator shall contact the Department or licensor to obtain the appropriate application form for the required license [or registration]. The Department or licensor will supply the applicant with the appropriate form, based upon the type of retail food facility involved. [If the food facility is a public eating and drinking

place, the applicant shall obtain a license. If the food facility is a retail food establishment, the applicant must obtain a registration. A single location (such as a grocery store that also serves hot ready-to-eat foods) might require both a license and a registration.]

§ 46.1143. Issuance.

(a) *New, converted or remodeled retail food facilities.* For retail food facilities that are required to submit plans as specified in § 46.1121(a) (relating to facility and operating plans), the Department [will issue a registration, or the Department] or licensor will issue a license to the applicant after the following occur:

* * * * *

(b) *License [or registration] renewal.* The retail food facility operator of an existing retail food facility shall submit an application, the required fee and be in compliance with this chapter prior to issuance [by the Department of a renewed registration or license, or the issuance] of a renewed license by the Department or a licensor.

(c) *Change of ownership.* Licenses [and registrations] are nontransferable. New owners shall apply to the Department or licensor in accordance with § 46.1142 (relating to application procedure for appropriate license [or registration]).

§ 46.1144. Conditions of retention: responsibilities of the retail food facility operator.

To retain a license [or registration] issued by the Department or licensor under this chapter, a retail food facility operator shall do the following:

(1) Post the license [or registration] in a location in the retail food facility that is conspicuous to consumers and the Department or licensor.

* * * * *

(3) If a retail food facility is required in § 46.1122(a) (relating to HACCP plans) to operate under [a] an HACCP plan, comply with the plan as specified in § 46.1103(c).

(4) Immediately contact the Department or licensor to report an illness of a food employee as specified in [§ 46.111(b) (relating to duty to report disease or medical condition)] Subpart 2-201 of the Model Food Code.

(5) Immediately discontinue operations and notify the Department or licensor if an imminent health hazard may exist because of an emergency such as a fire, flood, extended interruption of electrical or water service, sewage backup, misuse of poisonous or toxic materials, onset of an apparent foodborne illness outbreak, gross unsanitary occurrence or condition or other circumstance that may endanger public health. A retail food facility operator need not discontinue operations in an area of a facility that is unaffected by the imminent health hazard.

(6) Not resume operations discontinued in accordance with paragraph (5) or otherwise according to the [Public Eating and Drinking Places Law or the Food Act] Retail Food Facility Safety Act until approval is obtained from the Department or licensor.

(7) Allow representatives of the Department or licensor access to the retail food facility as specified in § 46.1101 (relating to access to retail food facilities).

* * * * *

(9) [Upgrade or replace refrigeration equipment as specified in § 46.385(a)(3) (relating to potentially hazardous food: hot and cold holding), by December 13, 2008, if the circumstances specified in paragraph (8)(i) and (ii) do not occur first, and unless a variance has been approved as specified in § 46.1103.

(10)] Comply with directives of the Department or licensor including time frames for corrective actions specified in inspection reports, notices, orders, warnings and other directives issued by the Department or licensor in regard to the operator's retail food facility or in response to community emergencies.

[(11)] (10) Accept notices issued and served by the Department or licensor according to the [Public Eating and Drinking Places Law or the Food Act] Retail Food Facility Safety Act.

(11) Remit a fee owed to the Department under section 5703(j) of the Retail Food Facility Safety Act (relating to license required) within the time prescribed by the Department.

(12) Remit a civil penalty assessed against the retail food facility operator under the Retail Food Facility Safety Act or this chapter within 30 days of the later of either of the following:

(i) The effective date of the final adjudication assessing the civil penalty.

(ii) The expiration of the applicable deadline by which the final adjudication could be appealed to an appellate court of the Commonwealth.

Subpart C. MISCELLANEOUS PROVISIONS

CHAPTER 76. FOOD EMPLOYEE CERTIFICATION

(Editor's Note: As part of this proposed rulemaking, the Department is proposing to rescind §§ 76.1—76.17 and 76.19 which appear in 58 Pa. Code pages 76-1—76-18, serial pages (304941)—(304958).)

Sec.
76.1—76.17. (Reserved).
76.19. (Reserved).

(Editor's Note: Sections 76.20 and 79.21 are new and printed in regular type to enhance readability.)

§ 76.20. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless otherwise defined in Chapter 46 (relating to food code):

Act—The Food Employee Certification Act (3 Pa.C.S. §§ 6501—6510).

Certificate—A certificate of completion issued by a certification program that has been evaluated and listed by an accrediting agency that has been recognized by the Conference for Food Protection Standards for Accreditation of Food Protection Manager Certification Program.

Conference for Food Protection—An independent, National voluntary nonprofit organization to promote food safety and consumer protection. Participants in this organization include Federal, State and local regulatory agencies, universities, test providers, certifying organizations, consumer groups, food service and retail store trade

associations, and retail food facility operators. The objectives of the organization include identifying and addressing food safety problems and promoting uniformity of regulations in food protection.

Department—The Department of Agriculture of the Commonwealth.

Employee—As defined in 3 Pa.C.S. § 5702 (relating to definitions).

§ 76.21. Certification programs.

(a) *General recognition of certification programs.* For purposes of compliance with the act, the Department recognizes certification programs, including examinations developed under those programs, that are evaluated and listed by an accrediting agency that has been recognized by the Conference for Food Protection as conforming to the Conference for Food Protection Standards for Accreditation of Food Protection Manager Certification Program.

(b) *List of acceptable certification programs.* The Department maintains a current list of Department-recognized certification programs. The Department will:

- (1) Publish the current list in the *Pennsylvania Bulletin* annually and when the list is revised.
- (2) Post the current list on the Department's web site at www.agriculture.state.pa.us.
- (3) Provide a copy of the current list upon request directed to the Department's Bureau of Food Safety and Laboratory Services at (717) 787-4315 or the following mailing address:

Pennsylvania Department of Agriculture
Bureau of Food Safety and Laboratory Services
ATTN: Food Employee Certification
2301 North Cameron Street
Harrisburg, Pennsylvania 17110-9408

[Pa.B. Doc. No. 12-1514. Filed for public inspection August 10, 2012, 9:00 a.m.]

GAME COMMISSION

[58 PA. CODE CH. 141]

Hunting and Trapping; Permitted Devices

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission) proposed at its June 26, 2012, meeting to amend § 141.18 (relating to permitted devices) to permit the use of electronic crow decoys to hunt crows.

The proposed rulemaking will not have an adverse impact on the wildlife resources of this Commonwealth.

The authority for the proposed rulemaking is 34 Pa.C.S. (relating to Game and Wildlife Code) (code).

The proposed rulemaking was made public at the June 26, 2012, meeting of the Commission. Comments can be sent, until September 21, 2012, to the Director, Bureau of Information and Education, Game Commission, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797.

1. Purpose and Authority

Each year the Commission is asked to review the potential use of certain devices for hunting or trapping purposes that are otherwise prohibited by statute or regulation. As part of the review process, the Commission generally reviews to what degree use of a given device

might negatively impact principles of resource conservation, equal opportunity or public safety. The Commission has recently been requested to review the use of electronic crow decoys for use in the hunting of crows. After thoughtful review, the Commission determined that use of these devices for crow hunting purposes would be acceptable due to negligible impacts to the previously mentioned principles.

Section 2102(b)(1) of the code (relating to regulations) authorizes the Commission to "promulgate regulations relating to seasons and bag limits for hunting or furtaking, the possession of certain species or parts thereof, the number and types of devices and equipment allowed, the identification of devices and the use and possession of devices." Section 2102(a) of the code provides that "The commission shall promulgate such regulations as it deems necessary and appropriate concerning game or wildlife and hunting or furtaking in this Commonwealth, including regulations relating to the protection, preservation and management of game or wildlife and game or wildlife habitat, permitting or prohibiting hunting or furtaking, the ways, manner, methods and means of hunting or furtaking, and the health and safety of persons who hunt or take wildlife or may be in the vicinity of persons who hunt or take game or wildlife in this Commonwealth." The amendments to § 141.18 are proposed under this authority.

2. Regulatory Requirements

The proposed rulemaking will amend § 141.18 to permit the use of electronic crow decoys to hunt crows.

3. Persons Affected

Persons wishing to hunt crows through the use of crow decoys within this Commonwealth may be affected by the proposed rulemaking.

4. Cost and Paperwork Requirements

The proposed rulemaking should not result in additional cost or paperwork.

5. Effective Date

The proposed rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

6. Contact Person

For further information regarding the proposed rulemaking, contact Richard R. Palmer, Director, Bureau of Wildlife Protection, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

CARL G. ROE,
Executive Director

Fiscal Note: 48-347. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 58. RECREATION

PART III. GAME COMMISSION

CHAPTER 141. HUNTING AND TRAPPING

Subchapter A. GENERAL

§ 141.18. Permitted devices.

The following devices may be used to hunt or take wildlife:

* * * * *

(4) Electronic illuminating devices that are affixed at the aft end of a bolt or arrow and used solely for the purpose of locating or tracking bolt or arrow flight after being launched from a crossbow or bow.

(5) Electronic crow decoys used solely for harvesting crows.

[Pa.B. Doc. No. 12-1515. Filed for public inspection August 10, 2012, 9:00 a.m.]

[58 PA. CODE CH. 135]

Lands and Buildings; Unlawful Actions

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission) proposed at its June 26, 2012, meeting to amend § 135.2 (relating to unlawful actions) to create a regulatory violation to possess, maintain, operate, occupy or travel by all-terrain vehicle (ATV) or snowmobile in a manner not in accordance with the standards in 75 Pa.C.S. (relating to Vehicle Code).

The proposed rulemaking will not have an adverse impact on the wildlife resources of this Commonwealth.

The authority for the proposed rulemaking is 34 Pa.C.S. (relating to Game and Wildlife Code) (code).

The proposed rulemaking was made public at the June 26, 2012, meeting of the Commission. Comments can be sent, until September 21, 2012, to the Director, Bureau of Information and Education, Game Commission, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797.

1. Purpose and Authority

Unauthorized ATV operation on State game lands and hunter access cooperator properties continue to be one of the top ten violations Wildlife Conservation Officers (WCO) encounter each year. Illegal ATV operation has been identified as a major source of wildlife habitat destruction across the landscapes of these lands and waters. These usage violations are very often accompanied by ATV classification offenses (registration, insurance, and the like) as set forth in 75 Pa.C.S. Under current law, WCOs do not have authority to enforce 75 Pa.C.S. summary offenses. The Commission normally forwards these violations to other enforcement authorities. This practice typically ends in mixed results. Delays and jurisdictional problems often result in significant challenges in the processing of these cases successfully. The Commission is proposing to amend § 135.2 to create a regulatory violation to possess, maintain, operate, occupy or travel by ATV or snowmobile in a manner not in accordance with the standards in 75 Pa.C.S. This proposed amendment will ensure safe and effective enforcement of these requirements occurring on lands and waters under Commission ownership, lease, agreement or control.

Section 721(a) of the code (relating to control of property) provides “The administration of all lands or waters owned, leased or otherwise controlled by the commission shall be under the sole control of the director, and the commission shall promulgate regulations . . . for its use and protection as necessary to properly manage these lands or waters.” Section 2102(a) of the code (relating to regulations) provides that “The commission shall promulgate such regulations as it deems necessary and appropriate concerning game or wildlife and hunting or furtaking in this Commonwealth, including regulations relating to

the protection, preservation and management of game or wildlife and game or wildlife habitat, permitting or prohibiting hunting or furtaking, the ways, manner, methods and means of hunting or furtaking, and the health and safety of persons who hunt or take wildlife or may be in the vicinity of persons who hunt or take game or wildlife in this Commonwealth.” The amendments to § 135.2 are proposed under this authority.

2. Regulatory Requirements

The proposed rulemaking will amend § 135.2 to create a regulatory violation to possess, maintain, operate, occupy or travel by ATV or snowmobile in a manner not in accordance with the standards in 75 Pa.C.S.

3. Persons Affected

Persons operating snowmobiles or ATVs on lands or waters under Commission ownership, lease, agreement or jurisdiction may be affected by the proposed rulemaking.

4. Cost and Paperwork Requirements

The proposed rulemaking should not result in additional cost or paperwork.

5. Effective Date

The proposed rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

6. Contact Person

For further information regarding the proposed rulemaking, contact Richard R. Palmer, Director, Bureau of Wildlife Protection, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

CARL G. ROE,
Executive Director

Fiscal Note: 48-346. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 58. RECREATION

PART III. GAME COMMISSION

CHAPTER 135. LANDS AND BUILDINGS

Subchapter A. GENERAL PROVISIONS

§ 135.2. Unlawful actions.

In addition to the prohibitions in the act on lands, waters or buildings under Commission ownership, lease, **agreement, control** or jurisdiction, it is unlawful, except with the permission of the person in charge of the lands, or the written permission of the Director to:

* * * * *

(11) Travel by mechanical or motorized conveyance or ride animals on newly constructed, seeded or planted roads, or other areas, when posted against the travel.

(12) Possess, maintain, operate, occupy or travel by snowmobile or ATV in a manner not in accordance with the standards in 75 Pa.C.S. Chapter 77 (relating to Snowmobile and All-Terrain Vehicle Law).

[Pa.B. Doc. No. 12-1516. Filed for public inspection August 10, 2012, 9:00 a.m.]

[58 PA. CODE CH. 131]

Preliminary Provisions; Enforcement

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission) proposed at its June 26, 2012, meeting to amend § 131.3 (relating to enforcement) to eliminate the reference to the Department of Environmental Resources and replace it with a reference to Department of Conservation and Natural Resources and also to update the reference to the Commission's officers as Wildlife Conservation Officers.

The proposed rulemaking will not have an adverse impact on the wildlife resources of this Commonwealth.

The authority for the proposed rulemaking is 34 Pa.C.S. (relating to Game and Wildlife Code) (code).

The proposed rulemaking was made public at the June 26, 2012, meeting of the Commission. Comments can be sent, until September 21, 2012, to the Director, Bureau of Information and Education, Game Commission, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797.

1. *Purpose and Authority*

On July 1, 1995, relevant portions of the Conservation and Natural Resources Act (71 P.S. §§ 1340.101—1340.1103) effectively created the Department of Conservation and Natural Resources and changed the name of the Department of Environmental Resources to the Department of Environmental Protection. The 1995 name changes were not incorporated in § 131.3. The Commission is proposing to amend § 131.3 to amend the reference to the Department of Environmental Resources by updating the reference to the Department of Conservation and Natural Resources. The Commission is also proposing to update the reference to the Commission's officers as Wildlife Conservation Officers. This proposed rulemaking is nonsubstantive and is not intended to further expand or further limit the enforcement authority of any classification of officer.

Section 2102(a) of the code (relating to regulations) provides that "The commission shall promulgate such regulations as it deems necessary and appropriate concerning game or wildlife and hunting or furtaking in this Commonwealth, including regulations relating to the protection, preservation and management of game or wildlife and game or wildlife habitat, permitting or prohibiting hunting or furtaking, the ways, manner, methods and means of hunting or furtaking, and the health and safety of persons who hunt or take wildlife or may be in the vicinity of persons who hunt or take game or wildlife in this Commonwealth." The amendments to § 131.3 are proposed under this authority.

2. *Regulatory Requirements*

The proposed rulemaking will amend § 131.3 to eliminate the reference to the Department of Environmental Resources and replace it with a reference to Department of Conservation and Natural Resources and to also update the reference to the Commission's officers as Wildlife Conservation Officers.

3. *Persons Affected*

Enforcement personnel of the Department of Conservation and Natural Resources will be affected by the proposed rulemaking.

4. *Cost and Paperwork Requirements*

The proposed rulemaking should not result in additional cost or paperwork.

5. *Effective Date*

The proposed rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

6. *Contact Person*

For further information regarding the proposed rulemaking, contact Richard R. Palmer, Director, Bureau of Wildlife Protection, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

CARL G. ROE,
Executive Director

Fiscal Note: 48-345. No fiscal impact; (8) recommends adoption.

Annex A**TITLE 58. RECREATION****PART III. GAME COMMISSION****CHAPTER 131. PRELIMINARY PROVISIONS****§ 131.3. Enforcement.**

In addition to [**Game Commission**] **Wildlife Conservation Officers** or Deputy [**Game Commission**] **Wildlife Conservation Officers**, the Director designates and empowers the following persons to enforce the act and this part while acting within the scope of their employment and jurisdiction.

* * * * *

(4) Pennsylvania Department of [**Environmental Conservation and Natural Resources**] personnel with enforcement powers.

* * * * *

[Pa.B. Doc. No. 12-1517. Filed for public inspection August 10, 2012, 9:00 a.m.]

[58 PA. CODE CH. 147]

Special Permits; Nuisance Wildlife Control Operator

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission) proposed at its June 26, 2012, meeting to amend § 147.724 (relating to nuisance wildlife control operator examination) to require applicants to take the required examination within 180 days of the final approval of their applications by the Bureau of Wildlife Protection (Bureau) and limit approved applicants to a total of two opportunities to take the examination each permit year. The Commission also proposed to rescind § 147.724a and add these requirements to § 147.724.

The proposed rulemaking will not have an adverse impact on the wildlife resources of this Commonwealth.

The authority for the proposed rulemaking is 34 Pa.C.S. (relating to Game and Wildlife Code) (code).

The proposed rulemaking was made public at the June 26, 2012, meeting of the Commission. Comments can be sent, until September 21, 2012, to the Director, Bureau of Information and Education, Game Commission, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797.

1. *Purpose and Authority*

Each year the Commission processes a few hundred nuisance wildlife control operator applications. The application process ends with an examination that shall be passed with a minimum score of 80% before a permit will be issued. In numerous instances, applicants never take the examination or contact the Commission after an extended period of time and request the opportunity to take the examination. Currently, § 147.724 does not limit an applicant from taking the examination months or even years after their initial application. This deferral in time often results in unreasonable administrative difficulties for the Commission in its attempt to accommodate the delayed testing for these applicants. The Commission is proposing to amend § 147.724 to require applicants to take the required examination within 180 days of the final approval of their applications by the Bureau.

The nuisance wildlife control operator examination has a high failure rate. This is normally the result of the applicant not reviewing or studying the materials provided by the Commission. The Commission has recently identified a significant rise in the number of applicants retesting, sometimes multiple times in a single year, in an attempt to learn the material from the test and ultimately pass the examination. Currently, § 147.724 does not limit the number of times an approved applicant can take the required examination. The Commission is also proposing to amend § 147.724 to limit approved applicants to a total of two opportunities to take the examination each permit year.

Lastly, the Commission is proposing to rescind § 147.724a and add the requirements to § 147.724. This amendment is nonsubstantive and does not create or remove regulatory requirements.

Section 2102(a) of the code (relating to regulations) provides that "The commission shall promulgate such regulations as it deems necessary and appropriate concerning game or wildlife and hunting or furtaking in this Commonwealth, including regulations relating to the protection, preservation and management of game or wildlife and game or wildlife habitat, permitting or prohibiting hunting or furtaking, the ways, manner, methods and means of hunting or furtaking, and the health and safety of persons who hunt or take wildlife or may be in the vicinity of persons who hunt or take game or wildlife in this Commonwealth." The amendments to § 147.724 and rescission of § 147.724a are proposed under this authority.

2. *Regulatory Requirements*

The proposed rulemaking will amend § 147.724 to require applicants to take the required examination within 180 days of the final approval of their applications by the Bureau and limit approved applicants to a total of two opportunities to take the examination each permit year. The proposed rulemaking will also rescind § 147.724a and add the requirements to § 147.724.

3. *Persons Affected*

Persons wishing to apply for a nuisance wildlife control operator permit may be affected by the proposed rulemaking.

4. *Cost and Paperwork Requirements*

The proposed rulemaking should not result in additional cost or paperwork.

5. *Effective Date*

The proposed rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

6. *Contact Person*

For further information regarding the proposed rulemaking, contact Richard R. Palmer, Director, Bureau of Wildlife Protection, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

CARL G. ROE,
Executive Director

Fiscal Note: 48-348. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 58. RECREATION

PART III. GAME COMMISSION

CHAPTER 147. SPECIAL PERMITS

Subchapter T. NUISANCE WILDLIFE CONTROL OPERATOR

§ 147.724. Nuisance wildlife control operator examination.

(a) New agents [**shall be**] **are** required to obtain a minimum score of 80% on a supervised written examination approved by the Director.

(b) The examination [**shall include**] **must cover** the following subject matter:

* * * * *

(4) Diseases and parasites.

(5) **Public relations.**

(c) **New or existing agents seeking certification to control white-tailed deer are required to pass an additional separate examination after passing the basic examination. This examination is subject to the same examination subject matter and minimum score standards under subsections (a) and (b).**

(d) **New or existing agents applying for certification shall take the required examination within 180 days of final approval of their applications by the Bureau of Wildlife Protection.**

(e) **New or existing agents are eligible to take each certification examination a maximum of two times each permit year.**

§ 147.724a. [**Nuisance deer control examination**] **(Reserved).**

[(a) **New agents shall be required to obtain a minimum score of 80% on a supervised written examination approved by the Director.**

(b) **The examination must include the following subject matter:**

(1) **Biology, life history and habits of white-tailed deer.**

(2) **Control methods, care and handling and euthanasia.**

- (3) Laws and regulations.
- (4) Diseases and parasites.
- (5) Public relations.]

[Pa.B. Doc. No. 12-1518. Filed for public inspection August 10, 2012, 9:00 a.m.]

[58 PA. CODE CH. 133]
Wildlife Classification; Birds

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission) proposed at its June 26, 2012, meeting to amend § 133.21 (relating to classification of birds) to reflect the current status of breeding populations of threatened and endangered wild birds within this Commonwealth and also to update scientific nomenclature.

The proposed rulemaking will not have an adverse impact on the wildlife resources of this Commonwealth.

The authority for the proposed rulemaking is 34 Pa.C.S. (relating to Game and Wildlife Code) (code).

The proposed rulemaking was made public at the June 26, 2012, meeting of the Commission. Comments can be sent, until September 21, 2012, to the Director, Bureau of Information and Education, Game Commission, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797.

1. *Purpose and Authority*

The Commission is proposing to amend § 133.21 to reflect the current status of breeding populations of threatened and endangered wild birds within this Commonwealth and also to update scientific nomenclature. The upland sandpiper, a grassland nesting bird long classified as threatened, has declined precipitously over the last two decades and has virtually disappeared from this Commonwealth. The Commission believes its rarity and diminished breeding range warrant downgrading its status to endangered. The northern harrier, once a rare but regular breeder in this Commonwealth, has experienced a marked decline in this Commonwealth as well as declines in northwest and northcentral regions over the last few decades, prompting a proposal to list this species as threatened. The northern harrier is listed as either endangered or threatened in neighboring states. Long-eared owls are extremely rare breeders in this Commonwealth and difficult to survey. Nesting locations have been confirmed in only seven locations in recent years, despite a concerted survey effort over much of the last decade. Most nests are located in the Ridge and Valley and Appalachian Plateau regions. The rarity and diffuse scattering of nest records within this Commonwealth have prompted this proposed rulemaking to list the long-eared owl as threatened. Finally, in a major reorganization of warbler nomenclature in 2011 by the American Ornithologist's Union, the genus *Dendroica* was changed to *Setophaga* necessitating this administrative change in the scientific name of the endangered blackpoll warbler.

Section 322(c)(8) of the code (relating to powers and duties of commission) specifically empowers the Commission to "Add to or change the classification of any wild bird or wild animal." Section 2102(a) of the code (relating to regulations) provides that "The commission shall promulgate such regulations as it deems necessary and appropriate concerning game or wildlife and hunting or

furtaking in this Commonwealth, including regulations relating to the protection, preservation and management of game or wildlife and game or wildlife habitat, permitting or prohibiting hunting or furtaking, the ways, manner, methods and means of hunting or furtaking, and the health and safety of persons who hunt or take wildlife or may be in the vicinity of persons who hunt or take game or wildlife in this Commonwealth." The amendments to § 133.21 are proposed under this authority.

2. *Regulatory Requirements*

The proposed rulemaking will amend § 133.21 to reflect the current status of breeding populations of threatened and endangered wild birds in this Commonwealth and also to update scientific nomenclature.

3. *Persons Affected*

Persons wishing to hunt or trap game or wildlife within this Commonwealth may be affected by the proposed rulemaking.

4. *Cost and Paperwork Requirements*

The proposed rulemaking should not result in additional cost or paperwork.

5. *Effective Date*

The proposed rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin* and will remain in effect until changed by the Commission.

6. *Contact Person*

For further information regarding the proposed rulemaking, contact Richard R. Palmer, Director, Bureau of Wildlife Protection, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

CARL G. ROE,
Executive Director

Fiscal Note: 48-344. No fiscal impact; (8) recommends adoption.

Annex A
TITLE 58. RECREATION
PART III. GAME COMMISSION
CHAPTER 133. WILDLIFE CLASSIFICATION
Subchapter B. BIRDS

§ 133.21. **Classification of birds.**

The following birds are classified:

- (1) *Endangered.*

* * * * *

- (xi) Blackpoll Warbler ([*Dendroica*] *Setophaga striata*)

* * * * *

- (xv) Yellow-bellied Flycatcher (*Empidonax flaviventris*)

- (xvi) **Upland Sandpiper (*Batramia longicauda*)**

- (2) *Threatened.*

* * * * *

- (iii) [**Upland Sandpiper (*Batramia longicauda*)**]
Northern Harrier (*Circus cyaneus*)

- (iv) **Long-eared Owl (*Asio otus*)**

[Pa.B. Doc. No. 12-1519. Filed for public inspection August 10, 2012, 9:00 a.m.]