

# RULES AND REGULATIONS

## Title 22—EDUCATION

### STATE BOARD OF EDUCATION

[22 PA. CODE CH. 14]

#### Special Education Services and Programs

The State Board of Education (Board) amends Chapter 14 (relating to special education services and programs). The Board takes this action under the authority of sections 1372 and 2603-B of the Public School Code of 1949 (code) (24 P. S. §§ 13-1372 and 26-2603-B). Notice of proposed rulemaking was published at 33 Pa.B. 4306 (August 30, 2003) with an invitation to submit written comments.

#### *Purpose*

The final-form rulemaking amends § 14.162(c) (relating to impartial due process hearing and expedited due process hearing). The purpose of amending § 14.162(c) is to align the Commonwealth's special education regulations with the requirements imposed by the United States Department of Education's Office of Special Education Programs (OSEP) regarding parental consent and the initiation of educational services. If the Commonwealth does not make this change by June 30, 2004, the Commonwealth risks having more than \$336 million in Federal special education funds withheld by the United States Department of Education, affecting services to nearly 250,000 students.

#### *Comments and Responses*

The Board received public comments regarding the proposed rulemaking. In addition, the House Education Committee (Committee) held a hearing on October 8, 2003, and briefly continued its discussion at a hearing on October 15, 2003. Though the Committee did not officially submit comments, one member of the Committee did submit comments for consideration and Committee staff asked a question about the OSEP's position. In a letter, a State Representative urged the Board to challenge the OSEP, arguing that the OSEP's position is inconsistent with the requirements of the Individuals With Disabilities Education Act (IDEA). The State Representative believes the OSEP's position puts school districts at risk for legal challenges that could result in assessment of monetary damages were parents later to claim that the district did not fulfill its duty.

In addition, the Board received a letter from the Pennsylvania School Boards Association (PSBA). The PSBA opposes the rulemaking, believing the OSEP's position to be inappropriate and putting school districts at risk of legal liability for not providing students a free appropriate public education (FAPE) as required by IDEA. In its letter, the PSBA urges the Board to move forward to a hearing with the United States Department of Education, believing that an administrative hearing would result in a favorable decision for the Commonwealth and no loss of Federal funds.

At a public committee meeting held by the Board on February 21, 2003, the Standing Committee on Special Education received written and oral testimony regarding the proposed rulemaking from five commentators. The Education Law Center did not take a position on the proposed rulemaking and asked that other changes be made to Chapter 14 beyond those outlined in § 14.162.

The Pennsylvania State Education Association concurred that the proposed rulemaking was necessary to avoid Federal funding jeopardy. Two commentators asked the Board not to make the revision and to challenge the OSEP's position through the hearing process. They expressed concern that school districts will face financial judgments resulting from legal challenges to districts that do not provide FAPE, even when a parent refuses FAPE. Another commentator asked the Board to state explicitly that a school district's obligation to provide FAPE ends upon a parent's refusal to consent to an initial offer of FAPE and does not request an impartial hearing.

#### *Overall Comments and Policy Considerations*

Federal IDEA funding awarded to the Commonwealth for the 2003-04 school year is conditioned upon the Commonwealth making the necessary regulatory revision by June 30, 2004. In correspondence dated June 23, 2003, the Department of Education (Department) informed OSEP that it is committed to making this proposed rulemaking.

The following outlines the substance of correspondence between the United States Department of Education and the Department regarding this issue.

- In an e-mail message sent June 28, 2002, the OSEP advised the Director of the Department's Bureau of Special Education (Bureau) that the Commonwealth must revise the regulation. The message stated:

In reviewing your eligibility documents, OGC brought it to my attention that there is a problem in Chapter 14. Specifically, § 14.162, Impartial due process hearing and expedited due process hearing, paragraph (c), reads: "A school district may request a hearing to proceed with an initial evaluation, *an initial educational placement* or a reevaluation when the district has not obtained parental consent as required by 34 CFR 300.505(c) (relating to parental consent). When a parent rejects the district's proposed identification of a child, proposed evaluation, proposed provision of a free appropriate public education or proposed educational placement, the school district may request an impartial due process hearing.

The emphasized words need to be eliminated to be consistent with 34 CFR 300.505(b), which does not include a parent's refusal to provide consent for initial placement.

- On January 28, 2003, in an e-mail message to the Director of the Bureau, the OSEP confirmed that the proposed amendment to § 14.162(c) conforms to the OSEP's interpretation of 34 CFR 300.505(b).

- In a letter dated June 23, 2003, to the United States Department of Education's Division of Monitoring and State Improvement Planning, the Director of the Bureau delivered a signed statement assuring the OSEP "that Pennsylvania will continue to implement all required actions to ensure adherence with requirements for Part B grant awards under the Individuals with Disabilities Education Act (IDEA)." The Department also assured the OSEP that "[a]ll necessary modifications to state regulations required to address 34 CFR § 300.505 have been provided to the State Board of Education, have progressed through public input stages, and are pending regulatory adoption. . . ."

The Department's statement of assurance also provided:

1. As soon as possible, but no later than July 1, 2004, the State will make all of the changes to its statutes, regulations, policies and procedures, as specified in the memorandum from Hugh Reid to Dr. Fran James Warkowski that are necessary to make them consistent with the following requirements of the Individuals with Disabilities Education Act (IDEA) and its implementing regulations in 34 CFR Part 300 (relating to assistance to states for the education of children with disabilities), and will provide the Secretary with a copy of the revised documents showing those revisions to Chapter 14 of the *Pennsylvania Code* to change § 14.162 consistent with 34 CFR § 300.505(b). The suggested language should include: "The Individuals with Disabilities Education Act Amendments of 1997 require a public agency to obtain informed parental consent before it initiates provision of special education and related services (34 CFR § 300.505). The Pennsylvania Department of Education, Bureau of Special Education has agreed to seek a State Board revision to Chapter 14 of the *Pennsylvania Code* to change § 14.162(c) to enhance the Pennsylvania Department of Education's enforcement capabilities. Informed parental consent must be obtained before: (1) conducting an initial evaluation; (2) reevaluation; and (3) the initial provision of special education and related services (34 CFR § 300.505(a)(1)). The public agency may seek a hearing officer decision permitting an initial evaluation and reevaluation when parents withhold consent (34 CFR § 300.505(b)). However, a hearing officer may not override a parental withholding of consent for the initiation of special education services. A parent's decision on whether to allow a school district to begin to initiate special education program is exclusive to the parent."

2. Throughout the period of the State's grant awards for fiscal year 2003 under Part B of the IDEA, the State will ensure that all public agencies in the State will comply with all of the requirements of Parts A and B of the IDEA and its implementing regulations; and

3. The State will provide OSEP with a copy of a memorandum notifying all public agencies of the changes that impact on public agencies' provision of special education and related services that OSEP requires as a result of its review of the State's eligibility documents.

- In a letter dated July 1, 2003, from Stephanie S. Lee, Director of the OSEP to Vicki L. Phillips, Secretary of Education, the OSEP conditionally approved the Commonwealth's Eligibility Document Submission for Federal Fiscal Year 2003. The OSEP's determination that the Commonwealth was eligible for conditional approval was based on the Department providing its assurance that "as soon as possible, but no later than July 1, 2004, Pennsylvania will revise Chapter 14 of the *Pennsylvania Code* to change § 14.162, consistent with 34 CFR § 300.505(b)." The letter also required the Department to notify all public schools of this final-form rulemaking and the impact on their provision of special education services. The Department distributed a memorandum by means of an e-mail on August 15, 2003, to school administrators notifying them of the final-form rulemaking and the need for schools to comply with the change during the 2003-04 school year.

Finally, Congress is currently engaged in reauthorization of IDEA. A bill recently approved by the Senate Health, Education, Labor and Pension Committee includes language that addresses this issue. The language in the bill is consistent with the OSEP's existing interpretation. Therefore, it is highly probable that this requirement will be clearly addressed in Federal statute upon reauthorization of IDEA.

The Board believes the number of students affected by this final-form rulemaking is relatively small. Based on the most recent school year for which data is available, of nearly 250,000 students eligible for special education services, there was only one case where a school district sought a hearing officer's order to allow it to provide special education services to a student without parental consent.

Upon careful consideration of the issues raised by all commentators, the Board believes it is in the best interest of the Commonwealth to comply with the directive from the OSEP and to revise § 14.162(c).

*Affected Parties*

The final-form rulemaking affects the students and professional employees of the public schools of this Commonwealth (including intermediate units, area vocational-technical schools, public charter and alternative schools).

*Costs and Paperwork Estimates*

Without proper alignment with Federal requirements, the Department might have its Federal funding for special education withheld, the current total exceeding \$336 million.

*Effective Date*

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

*Sunset Date*

In accordance with its policy and practice respecting all of its regulations, the Board will review the effectiveness of Chapter 14 every 4 years. Thus, no sunset date is necessary.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 18, 2003, the Board submitted a copy of the notice of proposed rulemaking, published at 33 Pa.B. 4306, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Committees on Education for review and comment.

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

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on March 24, 2004, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on March 25, 2004, and approved the final-form rulemaking.

*Contact Person*

The official responsible for information on the final-form rulemaking is Jim Buckheit, Executive Director, State Board of Education, 333 Market Street, Harrisburg, PA 17126-0333, (717) 787-3787 or TDD (717) 787-7367.

*Findings*

The Board finds that:

(1) Public notice of the intention to adopt this final-form rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S.

§§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law, and all comments were considered.

(3) The final-form rulemaking is necessary and appropriate for the administration of the Public School Code of 1949.

#### Order

The Board, acting under authorizing statute, orders that:

(a) The regulations of the Board, 22 Pa. Code Chapter 14, are amended by amending § 14.162(c) to read as set forth at 33 Pa.B. 4306.

(b) The Executive Director shall submit this order and 33 Pa.B. 4306 to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form as required by law.

(c) The Executive Director of the Board shall certify this order and 33 Pa.B. 4306 and deposit them with the Legislative Reference Bureau as required by law.

(d) This order is effective upon publication in the *Pennsylvania Bulletin*.

JIM BUCKHEIT,  
*Executive Director*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 34 Pa.B. 2027 (April 10, 2004).)*

**Fiscal Note:** Fiscal Note 6-287 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 04-758. Filed for public inspection April 30, 2004, 9:00 a.m.]

## Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

### STATE BOARD OF DENTISTRY

#### [49 PA. CODE CH. 33]

#### Application Fees

The State Board of Dentistry (Board) amends § 33.3 (relating to fees) by revising certain application fees to read as set forth in Annex A.

#### A. Effective Date

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

#### B. Statutory Authority

The final-form rulemaking is authorized under section 4(b) of the Dental Law (act) (63 P. S. § 123(b)).

#### C. Background and Purpose

The act requires the Board to set fees by regulation so that revenues meet or exceed expenditures over a biennial period. General operating expenses of the Board for services that are provided directly to individual licensees or applicants are excluded from general operating revenues and are funded through fees in which the cost of providing the service forms the basis for the fee.

In a recent systems audit of the operations of the Board within the Bureau of Professional and Occupational Affairs (Bureau), the fees for services to licensees and applicants were analyzed to determine if the fees reflected the actual cost of providing the services. Actual cost calculations are based on the following formula:

$$\begin{array}{r} \text{Number of minutes to perform the function} \\ \times \\ \text{Pay rate for the classification of personnel performing the} \\ \text{function} \\ + \\ \text{A proportionate share of administrative overhead} \end{array}$$

The analysis, with regard to the Board, determined that there are currently no fees for two services, which does not support the actual cost of providing those services: application for dental radiology authorization and notification application—postgraduate training or faculty member.

Section 11.4 of the act (63 P. S. § 130e) provides that no auxiliary personnel may perform radiologic procedures unless under the direct supervision of the dentist who is on the premises at the time that the X-ray is taken, and unless the person has passed the radiologic examination. Section 33.302 (relating to auxiliary personnel performing radiologic procedures) implements these provisions. Persons who have passed the Board approved dental radiologic procedure examination file an application requesting authorization to perform those radiologic procedures under the direct supervision of a dentist. A letter of authorization is issued by the Board.

Section 2(d) of the act (63 P. S. § 121(d)) allows dentists who are licensed in another state or country to practice without licensure in this Commonwealth for the limited purpose of teaching, including clinical teaching, in a dental school or advanced dental education program in this Commonwealth approved by the Board after notification to the Board and in accordance with Board regulations. Section 2(f) of the act allows the practice of dentistry without a license by persons in a dental clinic operated nonprofit during the duration of an internship, residency or other approved graduate training program by persons with the required education for admission into the program, and after notification to the Board.

In this final-form rulemaking, fees for the services identified previously would be adjusted to allocate costs to those who use the service or make application. The Board would continue to apportion enforcement and operating costs to the general licensing population by means of its license renewal fee through the biennial reconciliation of revenue and expenditures.

#### D. Description of Services

##### *Application Fee for Dental Radiology Authorization*

This fee is necessary to offset costs incurred by the Board to process a request for authorization to perform radiologic procedures under the direct supervision of a dentist.

Applicants apply to and are examined by a professional testing contractor. Candidates who pass the examination are reported to the Bureau by the contractor. This information is entered into the Bureau's database and an authorization letter is issued to the applicant. The information must be maintained in the database perpetually for informational purposes and for providing duplicate authorization letters upon request. This fee is the only contribution applicants make to the operational expenses

of the Board since the authorization is not subject to renewal. The administrative overhead charge has been averaged for the boards offering the radiology examination.

*Notification Application—Postgraduate Training or Faculty Member*

This fee is necessary to offset costs incurred by the Board to process a notification application for postgraduate training or faculty member.

The Board receives the application and supporting documents, reviews for completeness, contacts the applicant to request any missing information or documents, or both, confirms the status of the applicant's license in another state or foreign education, if applicable, and issues a letter of authorization, or discrepancy notice, as appropriate.

*E. Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on October 3, 2001, the Board submitted a copy of the notice of proposed rulemaking, published at 31 Pa. B. 5714 (October 13, 2001), to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Professional Licensure Committee and the Senate Consumer Protection and Professional Licensure Committee for review and comment.

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

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on December 16, 2003, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5g of the Regulatory Review Act, the amendment was deemed approved by IRRC, effective December 17, 2003.

*F. Fiscal Impact and Paperwork Requirements*

The final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The fees will have a modest impact on those members of the private sector who apply for services from the Board. The final-form rulemaking will impose no additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

*G. Sunset Date*

The Board continuously monitors the cost effectiveness of its regulation. Therefore, no sunset date has been assigned.

*G. Contact Person*

Further information may be obtained by contacting Lisa Burns, Board Administrator, State Board of Dentistry, P. O. Box 2649, Harrisburg, PA 17105-2649, liburns@state.pa.us.

*I. Findings*

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments were considered.

(3) This final-form rulemaking does not enlarge the purpose of proposed rulemaking published at 31 Pa. B. 5714.

(4) This final-form rulemaking is necessary and appropriate for administering and enforcing the authorizing act identified in Part B of this preamble.

*J. Order*

The Board, acting under its authorizing statutes, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 33, are amended by amending § 33.3 to read as set forth in Annex A.

(b) The Board shall submit this order and Annex A to the Office of General Counsel and to the Office of Attorney General as required by law.

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

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

VEASEY B. CULLEN, Jr., D.M.D.,  
*Chairperson*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 34 Pa.B. 134 (January 3, 2004).)*

**Fiscal Note:** Fiscal Note 16A-4611 remains valid for the final adoption of the subject regulation.

**Annex A**

**TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS**

**PART I. DEPARTMENT OF STATE**

**Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS**

**CHAPTER 33. STATE BOARD OF DENTISTRY**

**Subchapter A. GENERAL PROVISIONS**

**§ 33.3. Fees.**

Following is the schedule of fees charged by the Board:

Application fee—dentists, dental hygienists and expanded function dental assistants . . . . .	\$20
Criteria approval application fee—dentists, dental hygienists and expanded function dental assistants . . . . .	\$35
Fictitious name registration fee . . . . .	\$35
Verification of license, permit or registration fee—dentists, dental hygienists and expanded function dental assistants . . . . .	\$15
Certification of scores, permit or registration fee—dentists, dental hygienists and expanded function dental assistants . . . . .	\$25
Biennial renewal fee—dentists . . . . .	\$100
Biennial renewal fee—dental hygienists . . . . .	\$40
Biennial renewal fee—expanded function dental assistants . . . . .	\$25
Biennial renewal fee—unrestricted or restricted anesthesia permit . . . . .	\$25
Temporary permit—expanded dental assistants . . . . .	\$15
Application fee—dental radiology authorization . . . . .	\$20
Notification application—postgraduate training or faculty member . . . . .	\$25

[Pa.B. Doc. No. 04-759. Filed for public inspection April 30, 2004, 9:00 a.m.]

# Title 58—RECREATION

## GAME COMMISSION [58 PA. CODE CH. 141] Hunting and Trapping

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission), at its October 7, 2003, meeting, adopted the following amendments:

Amend §§ 141.4, 141.22, 141.41, 141.43 and 141.45 and add § 141.20 (relating to protective material required) to reduce confusion related to the wearing of protective material by consolidating related regulations into one section.

The final-form rulemaking will have no adverse impact on the wildlife resources of this Commonwealth.

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

Notice of proposed rulemaking was published at 33 Pa.B. 4680 (September 20, 2003).

### 1. Introduction

The Commission amends §§ 141.4, 141.22, 141.41, 141.43 and 141.45 and adds § 141.20 to reduce confusion related to the wearing of protective material by consolidating related regulations into one section.

### 2. Purpose and Authority

Florescent orange requirements are currently in section 2524 of the code (relating to protective material required) and at least nine different sections of the attendant regulations in Chapter 141 (relating to hunting and trapping). These requirements have been amended many times and are so varied that Commission officers, the court system and, most importantly, the hunters have a difficult time interpreting them. By consolidating the regulations into one section, there should be a reduction in confusion regarding the wearing of protective material for all who must abide by or enforce the regulations. The final-form rulemaking will not take effect until the 2004-2005 hunting license year.

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 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." This provision provides the statutory authority for the final-form rulemaking.

### 3. Regulatory Requirements

The final-form rulemaking will consolidate sections related to the wearing of protective material into one section to reduce confusion.

### 4. Persons Affected

Persons wishing to hunt game and wildlife in this Commonwealth will be affected by the final-form rulemaking.

### 5. Comment and Response Summary

In response to the proposed rulemaking regarding the wearing of fluorescent orange safety material, the Commission received a total of 5,174 comments. Of this total,

5,163 comments were in opposition to the proposed rulemaking and 11 comments were in support of the proposed rulemaking. The majority of the comments received in opposition to the proposed rulemaking were not opposed to the consolidation of the fluorescent orange requirements into one section, but rather were opposed to the inclusion of additional fluorescent orange requirements. In response to the comments received, the Commission removed the language imposing additional fluorescent orange requirements in an attempt to make them more amenable. The final-form rulemaking consolidates sections related to the wearing of protective material into one section and imposes no new or more expansive requirements regarding the wearing of fluorescent orange safety material.

### 6. Cost and Paperwork Requirements

The final-form rulemaking should not result in additional cost or paperwork.

### 7. Effective Date

The final-form rulemaking will be effective July 1, 2004, and will remain in effect until changed by the Commission.

### 8. Contact Person

For further information regarding the final-form rulemaking, contact Michael A. Dubaich, Director, Bureau of Law Enforcement, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

### Findings

The Commission finds that:

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

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

### Order

The Commission, acting under authorizing statute, orders that:

(a) The regulations of the Commission, 58 Pa. Code Chapter 141, are amended by amending §§ 141.4, 141.22, 141.41, 141.43 and 141.45 to read as set forth at 33 Pa.B. 4680 and by adding § 141.20 to read as set forth in Annex A.

(b) The Executive Director of the Commission shall certify this order, 33 Pa.B. 4680 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(c) This order shall become effective July 1, 2004.

VERNON R. ROSS,  
Executive Director

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

Annex A

PART III. GAME COMMISSION

CHAPTER 141. HUNTING AND TRAPPING

Subchapter A. GENERAL

§ 141.20. Protective material required.

(a) It is unlawful to hunt or assist to hunt game or wildlife or move to or from a hunting location, from 1 hour before legal hunting hours to 1 hour after legal hunting hours outside of a motorized vehicle, at any time without wearing a minimum of 250 square inches of daylight fluorescent orange-colored material on the head, chest and back combined so that it is visible in a 360° arc. This shall include going to or from a hunting location before or after legal shooting hours. Except as provided in subsection (b)(2) and (3), camouflage orange clothing is lawful provided it contains the minimum amount of fluorescent orange-colored material.

(b) *Permitted acts.* It is lawful to:

(1) Hunt without wearing daylight fluorescent orange-colored material for:

- (i) Crows.
- (ii) Doves.
- (ii) Waterfowl.

(iv) Small game under the authority of a valid falconry permit.

(v) Deer during the flintlock muzzleloader season.

(2) Except during any big game season, hunt for woodchucks while wearing a hat made of solid daylight fluorescent orange-colored material on the head only.

(3) Move about or relocate while wearing a hat containing a minimum of 100 square inches of a solid daylight fluorescent orange-colored material on the head only and be stationary without wearing the required orange-colored material when hunting for:

- (i) Turkey during the spring turkey season.
- (ii) Turkey during the fall turkey season in Wildlife Management Units 1A, 1B, 2A, 2B, 5B, 5C and 5D.
- (iii) Deer with a bow and arrow or crossbow and bolt during any archery season which is concurrent with the fall turkey season.

(4) Be on stand and stationary while hunting for turkey during the fall season in Wildlife Management Units 2C, 2D, 2E, 2F, 2G, 3A, 3B, 3C, 3D, 4A, 4B, 4C, 4D, 4E and 5A and in lieu of the required 250 square inches place a band containing a minimum of 100 square inches of daylight fluorescent orange-colored material within 15 feet of their location so it is visible in a 360° arc.

(5) Except as provided in paragraph (3)(iii) and during any firearms season for deer that precedes the regular firearms season, hunt for deer with a bow and arrow or crossbow during any archery deer season without wearing daylight fluorescent orange-colored material. When stationary during the overlap with the firearms season for deer in lieu of the required 250 square inches place a minimum of 100 square inches of daylight fluorescent orange-colored material within 15 feet of their location so it is visible in a 360° arc.

(c) A person who violates any provision of this section shall be subject to the penalties as provided in the act.

[Pa.B. Doc. No. 04-760. Filed for public inspection April 30, 2004, 9:00 a.m.]

GAME COMMISSION

[58 PA. CODE CH. 147, 147a AND 147b]

Depredation

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission), at its October 7, 2003, meeting, adopted the following amendments:

Add Chapter 147, Subchapter U (relating to depredation) to provide permanent regulations regarding the co-signing of Federal depredation permits for migratory birds (both waterfowl and nonwaterfowl); and rescind Chapters 147a and 147b.

The final-form rulemaking will have no adverse impact on the wildlife resources of this Commonwealth.

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

Notice of proposed rulemaking was published at 33 Pa.B. 4682 (September 20, 2003).

1. *Introduction*

The Commission is adding Subchapter U to provide policy and procedures regarding the co-signing of Federal depredation permits for migratory birds (both waterfowl and nonwaterfowl).

2. *Purpose and Authority*

Though waterfowl and other migratory birds are widely recognized as a valuable natural resource and are enjoyed by millions of residents in this Commonwealth, their presence in certain natural and man-altered environments can be devastating and costly. This is particularly the case in certain agricultural areas and during late winter and spring. Regulated hunting has been and still is the most effective and preferred method to control waterfowl populations over the long term. Thus, regulated hunting is given first priority in the proper management of waterfowl populations by this final-form rulemaking.

There are, however, some situations when hunting is ineffective or impractical to properly address waterfowl populations and their associated effects in certain areas. It is in these areas that the mitigation of nuisance and damage problems may require alternative methods of management, including both lethal and nonlethal procedures. The United States Fish and Wildlife Service has the authority, under the Migratory Bird Treaty Act (16 U.S.C.A. §§ 703—711), to issue migratory bird permits authorizing the taking of migratory birds and their nests, eggs and young to address depredation and damage problems. This final-form rulemaking will additionally require that applications for depredation permits be co-signed by the Commission.

Adding Subchapter U will, in part, replace Chapter 147a (relating to temporary guidelines relating to the co-signing of Federal depredation permits—statement of policy), first established in January 1995. Chapter 147a provided temporary guidelines relating to the co-signing of Federal depredation permits for migratory birds other than waterfowl. Subchapter U will provide permanent

procedures for the co-signing of depredation permits regarding migratory birds other than waterfowl by the Commission.

Adding Subchapter U, specifically §§ 147.744 and 147.745 (relating to depredation permits for migratory waterfowl; and exclusions), will also replace Chapter 147b (relating to guidelines relating to the issuance of depredation permits for waterfowl—statement of policy). Chapter 147b provided temporary guidelines regarding the co-signing of Federal depredation permits for migratory waterfowl. Subchapter U will provide permanent procedures for the co-signing of depredation permits regarding migratory waterfowl by the Commission. It will also provide a listing of those migratory bird species that are excluded from those species subject to depredation permits by standing Federal depredation order.

Section 2901(b) of the code (relating to authority to issue permits) provides “the commission may, as deemed necessary to properly manage the game or wildlife resources, promulgate regulations for the issuance of any permit and promulgate regulations to control the activities which may be performed under authority of any permit issued.” Section 2103(a) of the code (relating to applicability of Federal laws) states that “Federal regulations shall not apply if commission regulations or other provisions of this title prescribe stronger or more detailed restrictions for the taking of migratory birds, nongame birds or game or wildlife.” 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 . . . in this Commonwealth, including regulations relating to the . . . management of game or wildlife and game or wildlife habitat . . . in this Commonwealth.” These provisions provide the statutory authority for the final-form rule-making.

### 3. *Regulatory Requirements*

The final-form rulemaking will establish certain prerequisites and procedures for an applicant to complete before a Federal depredation permit will be co-signed by the Commission. These prerequisites and procedures include the exhaustion of all reasonable nonlethal methods for damage control and, in the case of waterfowl, having the site open to hunting and that hunting has been ineffective or is impractical.

### 4. *Persons Affected*

Persons suffering damage from and wishing to apply for depredation permits for migratory birds will be affected by the final-form rulemaking.

### 5. *Comment and Response Summary*

There were no official comments received regarding this final-form rulemaking.

### 6. *Cost and Paperwork Requirements*

The final-form rulemaking should not result in additional cost or paperwork.

### 7. *Effective Date*

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

### 8. *Contact Person*

For further information regarding the final-form rulemaking, contact Michael A. Dubaich, Director, Bureau of Law Enforcement, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

### *Findings*

The Commission finds that:

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

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

### *Order*

The Commission, acting under authorizing statute, orders that:

(a) The regulations of the Commission, 58 Pa. Code Chapters 147, 147a and 147b, are amended by adding §§ 147.741—147.745 and by deleting §§ 147a.1—147a.6 and 147b.1—147b.4 to read as set forth in Annex A.

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

(c) This order shall become effective upon publication in the *Pennsylvania Bulletin*.

VERNON R. ROSS,  
*Executive Director*

**Fiscal Note:** Fiscal Note 48-170 remains valid for the final adoption of the subject regulations.

## **Annex A**

### **TITLE 58. RECREATION**

#### **PART III. GAME COMMISSION**

#### **CHAPTER 147. SPECIAL PERMITS**

#### **Subchapter U. DEPREDATION**

Sec.

- 147.741. Definitions.
- 147.742. Depredation permits for migratory birds other than waterfowl.
- 147.743. Disposition of birds destroyed.
- 147.744. Depredation permits for migratory waterfowl.
- 147.745. Exclusions.

#### **§ 147.741. Definitions.**

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

*Applicant*—The owner or principal officer of an aquaculture facility, which is suffering severe economic loss, or a person suffering property damage from migratory birds.

*Aquaculture*—The controlled culture of aquatic organisms, particularly finfish, under artificial circumstances—that is, ponds, raceways—for economic profit or by the Fish and Boat Commission. Net pens are excluded for the purpose of this definition.

*WCO*—Wildlife Conservation Officer.

*WS*—United States Department of Agriculture Wildlife Services.

#### **§ 147.742. Depredation permits for migratory birds other than waterfowl.**

(a) A depredation permit issued by the United States Fish and Wildlife Service to an applicant may be co-signed under the following circumstances:

(1) A visit to the applicant's facility has been made by a WCO or the WS representative and a problem is

verified to exist. A copy of WS Migratory Bird Damage Project Report will be furnished to the Commission by the WS investigator before submitting the form to the United States Fish and Wildlife Service.

(2) The applicant has exhausted all recommendations for reasonable nonlethal control methods provided by the Commission and the WS representative.

(3) The applicant agrees to implement WS/Commission recommendations for working towards a permanent solution within a period of time agreed to by the applicant, if economically feasible for the facility.

(b) Upon receipt of an application for a United States Fish and Wildlife Service depredation permit that meets the requirements of subsection (a)(1)—(3), the Commission will review the application and if approved forward the application to the United States Fish and Wildlife Service Migratory Bird Permit office.

**§ 147.743. Disposition of birds destroyed.**

Unless otherwise specified in a particular permit, the following apply:

(1) Within 48 hours of killing birds, the permittee shall notify the Commission by phone of the killing and of the number of birds killed and the species of birds killed.

(2) Birds shall be disposed of as specified in the permit or as directed by the Commission.

**§ 147.744. Depredation permits for migratory waterfowl.**

(a) A depredation permit issued by the United States Fish and Wildlife Service to an applicant may be co-signed by the Commission when the following criteria are met:

(1) Subsequent to a complaint, the site has been visited by a WCO to verify that a problem exists. A Commission waterfowl complaint form will be furnished to the Commission by the WCO. A copy of the Federal depredation permit application will be furnished to the complainant by the WCO.

(2) The applicant has demonstrated the site is open to hunting and hunting has been ineffective or hunting is impractical.

(3) The applicant shall demonstrate that reasonable nonlethal control methods have been attempted. Nonlethal control methods shall include the following:

(i) Feeding of waterfowl is prohibited. The applicant shall address this issue and include evidence of the enforcement of a “no feeding” policy.

(ii) Exclusion and harassment measures (fencing, repellents, scare devices, and the like).

(iii) Habitat manipulation (eliminate feeding areas, resting and breeding habitat).

(b) The following control methods are approved for population reduction and will be specifically identified in the depredation permit:

(1) Oiling, addling or freezing of eggs.

(2) Shooting may be used to reinforce nonlethal measures according to the following guidelines:

(i) The permit will specify the number of birds to be shot with no more than 10% of the nuisance flock to be killed except on airports covered by Airport Safety Control permits issued by the Commission.

(ii) Waterfowl may only be taken with shotgun using nontoxic shot no larger than size T.

(iii) The use of blinds, bait, decoys and calls is prohibited.

(3) Depopulation of waterfowl by the applicant, its employees, wildlife control agents, WS or authorized Federal or State wildlife agency personnel will be specified in the permit under the following guidelines:

(i) The number of birds to be killed may not exceed that specified in the permit.

(ii) Killing will be conducted only by persons specified in the permit by shooting with shotguns using nontoxic shot no larger than size T, or capturing birds and euthanasia by chemical or mechanical devices approved for use by the Executive Director or a designee.

(c) Waterfowl carcasses taken under depredation permits will be used according to the following guidelines:

(1) Care will be taken to preserve carcasses for human consumption and shall be made available to food banks or others specified in the permit. Birds euthanized by chemical means will not be utilized for human consumption.

(2) When the condition of the birds is unsuitable for human consumption or food banks, or individuals are not available to accept carcasses, the birds may be disposed of in a sanitary method by burying, incineration or depositing in approved landfills or refuse facilities.

**§ 147.745. Exclusions.**

(a) A permit is not required for red winged and rusty blackbirds, cowbirds and grackles which are listed in the United States Fish and Wildlife Service’s standing depredation order (50 CFR 21.43 (relating to depredation order for blackbirds, cowbirds, grackles, crows and magpies)).

(b) A depredation permit will not be issued for the taking of any endangered or threatened species, as defined in 50 CFR Part 17 (relating to endangered and threatened wildlife and plants) and § 133.21 (relating to classification of birds).

(c) Depredation permits for waterfowl will only be issued during the waterfowl hunting season, where hunting cannot be used as a control method.

(d) A depredation permit will not be renewed if the permittee has not made a good faith effort to implement nonlethal control recommendations by the Commission or WS.

**CHAPTER 147a. (Reserved)**

**§§ 147a.1—147a.6. (Reserved).**

**CHAPTER 147b. (Reserved)**

**§§ 147b.1—147b.4. (Reserved).**

[Pa.B. Doc. No. 04-761. Filed for public inspection April 30, 2004, 9:00 a.m.]