PROPOSED RULEMAKING

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 93]

Water Quality Standards—Site-Specific Water Quality Criteria

The Environmental Quality Board (Board) proposes to amend Chapter 93 (relating to water quality standards). The amendments propose revisions to § 93.8d (relating to development of site-specific water quality criteria) and the replacement of a total mercury water quality criterion with a site-specific methylmercury criterion for Ebaughs Creek in § 93.9o (relating to Drainage List O) as set forth in Annex A.

This proposed rulemaking was adopted by the Board at its meeting of July 11, 2023.

A. *Effective Date*

This proposed rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin*. Once approved by the United States Environmental Protection Agency (EPA), water quality standards are used to implement the Federal Clean Water Act (CWA) (33 U.S.C. §§ 1251—1389).

B. *Contact Persons*

For further information, contact Michael (Josh) Lookenbill, Bureau of Clean Water, 11th Floor, Rachel Carson State Office Building, P.O. Box 8774, 400 Market Street, Harrisburg, PA 17105-8774, (717) 787-9637; or Michelle Moses, Assistant Counsel, Bureau of Regulatory Counsel, 9th Floor, Rachel Carson State Office Building, P.O. Box 8464, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the Pennsylvania Hamilton Relay Service at (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This proposed rulemaking is available on the Department of Environmental Protection's (Department) web site at www.dep.pa.gov (select "Public Participation," then "Environmental Quality Board," then navigate to the Board meeting of July 11, 2023).

C. *Statutory Authority*

This proposed rulemaking is authorized under sections 5(b)(1) and 402 of The Clean Streams Law (CSL) (35 P.S. §§ 691.5(b)(1) and 691.402), which authorize the Board to develop and adopt rules and regulations to implement the CSL (35 P.S. §§ 691.1—691.1001), and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20), which grants the Board the power and duty to formulate, adopt and promulgate rules and regulations for the proper performance of the work of the Department. In addition, sections 101(a)(2) and 303 of the CWA (33 U.S.C. §§ 1251(a)(2) and 1313) set forth requirements for water quality standards, which states must meet to implement the CWA in this Commonwealth. Section 101(a)(3) of the CWA declares the National policy that the discharge of toxic pollutants in toxic amounts be prohibited. Section 303(c)(2)(B) directs states to adopt numeric criteria for toxic pollutants if they are present in a discharge that could be reasonably expected to interfere with a state's designated uses and as necessary to support those uses.

D. *Background and Purpose*

Water quality standards are in-stream water quality goals that are implemented by imposing specific regulatory requirements (such as treatment requirements, effluent limits and best management practices) on individual sources of pollution. The water quality standards include the existing and designated uses of the surface waters of this Commonwealth, along with the specific numeric and narrative criteria necessary to achieve and maintain those uses, and antidegradation requirements.

The purpose and goals of this proposed rulemaking are: to revise the process for requesting, developing and adopting site-specific water quality criteria in § 93.8d; to delete the Statewide total mercury water quality criterion of 0.05 micrograms per liter (µg/L) for Ebaughs Creek; and to add a site-specific dissolved methylmercury water quality criterion of 0.00004 µg/L for Ebaughs Creek in § 93.9o.

Regulations that clearly outline the site-specific criteria development process are critical to ensuring the Department receives the information necessary to determine if site-specific water quality criteria are applicable, to develop site-specific water quality criteria recommendations that are protective of surface water uses, and to incorporate the site-specific criteria into the Commonwealth's water quality standards. The proposed amendments will clarify when site-specific criteria may be requested or developed by the Department's own initiative and how a permit applicant may submit a request. Under § 93.8d(g) of the existing regulations, the Department has the authority to determine whether new Statewide criteria or modifications to Statewide criteria are appropriate. This determination may be based on the Department's initiative or a request by a permittee. The Department has the authority to develop site-specific criteria and Statewide criteria, as needed, to protect the waters of the United States and the surface waters of this Commonwealth. Due to the proposed deletion of § 93.8d(g), § 93.8d(a) is proposed to be amended to include the Department's continuing role to develop site-specific criteria on its own initiative.

Regarding the site-specific methylmercury water quality criterion for Ebaughs Creek, the York County Solid Waste and Refuse Authority (YCSWRA) has requested the Department develop a site-specific methylmercury water quality criterion for Ebaughs Creek, in lieu of applying the Statewide total mercury water quality criterion, to protect human health from the toxic effects of methylmercury and to inform their National Pollutant Discharge Elimination System (NPDES) permit effluent limitations for Outfall 002. Methylmercury is a component of total mercury and represents the most toxic form of mercury to human health. Since the Department does not currently have Statewide numeric water quality criteria for methylmercury, YCSWRA's request satisfies § 93.8d(a)(3).

On March 16, 2023, the Department met with the Water Resources Advisory Committee (WRAC) to present its recommended updates to § 93.8d and the site-specific methylmercury water quality criterion for Ebaughs Creek. WRAC voted to support presentation of this proposed rulemaking to the Board. Additionally, the Department presented draft regulatory amendments to the Agricultural Advisory Board on March 15, 2023, explaining the proposed changes.

E. *Summary of Proposed Rulemaking*

§ 93.8d. Development of site-specific water quality criteria

The Board proposes to update § 93.8d by revising the site-specific water quality criteria development and adoption process. The proposed amendments in § 93.8d(a) clarify when site-specific water quality criteria may be requested. No significant changes were made to this existing regulation. Subsection (b) requires an applicant to provide information that demonstrates a qualifying factor, under subsection (a), is met and also requires an applicant to show that none of the factors in subsection (a.1) are applicable.

The proposed amendments in subsection (a.1) clarify the conditions under which site-specific water quality criteria may not be requested. Under § 93.8d(a.1)(1), site-specific water quality criteria may not be requested if a pollutant is a cause of nonattainment of the requested waterbody or would otherwise interfere with attainment of protected surface water uses. Under § 93.8d(a.1)(2), an applicant may not request site-specific criteria when there is impairment to the aquatic life use unless the impairment is caused by means other than a pollutant. An applicant may request site-specific criteria when a pollutant, such as sediment, ammonia or iron, is not the cause of an impairment to the aquatic life use. An applicant may request site-specific criteria if, for example, the aquatic life use impairment is caused by flow alterations or habitat modification, which do not involve pollutants. Under § 93.8d(a.1)(3), a site-specific criterion may not be requested for surface waters with an existing or designated use of High Quality Waters (HQ) or Exceptional Value Waters (EV). The existing water quality of HQ or EV waterbodies must be maintained and protected under § 93.4a (relating to antidegradation), and thus, the water quality goals for these waterbodies are already site-specific. All information needed by an applicant to determine whether to make a request for site-specific criteria under subsection (a.1) is publicly available. The applicant's documentation of its determination under subsection (a.1) will be necessary information to provide to the Department under subsection (b). Subsection (b)(5) requires an applicant to provide information that demonstrates a circumstance where a pollutant is not the cause of water use impairments or demonstrates the waterbody is not one with an existing or designated use of HQ or EV.

Subsection (b) identifies the minimum data and information that must be included with an applicant's request for site-specific criteria. The information is necessary to ensure the applicant has evaluated the qualifying factors in subsections (a) and (a.1), with a particular focus on waterbody-specific characteristics. Once an applicant qualifies to proceed with site-specific criteria development, additional data must be submitted and evaluated in accordance with subsections (c) and (c.1).

Once a site-specific water quality criterion is developed and publicly noticed for comment, the Department will prepare a rulemaking for the adoption of the new criterion into Chapter 93. All water quality criteria will be developed through rulemaking and the appropriate rulemaking processes, consistent with the Commonwealth's laws.

Site-specific water quality criteria are used to develop effluent limitations in permits. Given the need for timely permit development, the Department intends to explore all options available for expediting rulemaking procedures to promulgate site-specific water quality criteria while maintaining robust public participation. Although § 93.8d(f)(4) is proposed for deletion, the obligation remains to promulgate site-specific criteria as regulations. The Department intends to enhance its public notices in the *Pennsylvania Bulletin* to reach a broader audience and will receive and respond to public comments on all draft site-specific water quality criteria. In addition, existing public notification and public participation processes available through the NPDES permitting process outlined in Chapter 92a (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance) will continue.

§ 93.9o. Drainage List O

The YCSWRA owns and operates the York County Sanitary Landfill, which is a 306-acre site located in Hopewell Township, York County. Between 1974 and 1997, the landfill received municipal and industrial waste, which was placed into lined and unlined cells. The site contains approximately 135 acres of unlined landfill. Detection of volatile organic compounds (VOC) in several groundwater wells was discovered in 1983 and was associated with the unlined cells. A treatment system was installed to remove the VOCs and began operation in 1985. The system consisted of 17 extraction wells and air stripping towers. The air stripping towers discharge the treated groundwater to a surface water of this Commonwealth under NPDES permit number PA0081744. Mercury was not known to be present in the discharge when the initial permit was issued. It was later identified as a potential pollutant of concern through the Department's permit renewal application review process.

Mercury is a naturally occurring, widely distributed element that cycles between various forms in the environment through natural processes and human activities with some forms being more toxic than others. Mercury can enter surface waters through multiple pathways, including but not limited to, atmospheric deposition, stormwater runoff generated by precipitation events and NPDES-permitted activities, including treatment systems from contaminated groundwater. Total mercury includes elemental, inorganic and organic forms of mercury. Elemental and inorganic mercury do not contribute significantly to oral toxicity. These forms are poorly absorbed by the human body and do not bioaccumulate in animals if ingested (Agency for Toxic Substances and Disease Registry 1999). Methylmercury, however, has been identified by scientists as one of the most toxic forms of mercury to humans. It is an organic form of mercury that is typically formed in the environment when bacteria capable of methylation are exposed to a source of inorganic or elemental mercury and convert it to methylmercury. Methylmercury in surface waters then enters into the food web of the aquatic ecosystem and bioaccumulates in the aquatic macroinvertebrates and fish. Oral ingestion of mercury by humans occurs almost exclusively through the consumption of contaminated fish and wildlife, and nearly all of the mercury found in animal tissue is in the form of methylmercury. Observed toxicity in humans is also related to exposure amount, exposure pathway and individual susceptibility.

YCSWRA's Outfall 002 discharges treated groundwater into an unnamed tributary to Ebaughs Creek, which is a small first-order tributary (that is, a headwater stream) with limited watershed area. The protected water uses for Ebaughs Creek include Cold Water Fishes, Migratory Fishes (CWF, MF). Based upon the Department's review of the available information, the Department has deter-

mined the primary source of mercury to Ebaughs Creek is the YCSWRA NPDES-permitted discharge and not a result of natural processes.

In accordance with § 93.8d, site-specific criteria may be established for the following three reasons: (1) to reflect conditions in a waterbody that differ from the EPA's criteria recommendations for protection of aquatic life, developed under section 304(a) of the CWA (33 U.S.C. § 1314(a)); (2) where necessary to protect more sensitive, intervening water uses as defined in Chapter 93, Table 2; and (3) where numeric criteria are necessary for a substance not currently listed in Chapter 93. Since the Department does not currently have a Statewide numeric water quality criterion for methylmercury, YCSWRA's request satisfies § 93.8d(a)(3).

YCSWRA requested the Department develop a site-specific methylmercury water quality criterion for Ebaughs Creek, in lieu of applying the Statewide total mercury water quality criterion, to inform their NPDES permit effluent limitations for Outfall 002. Methylmercury is a component of total mercury and represents the most toxic form of mercury to human health. The permit effluent limitations developed for YCSWRA will be a translation of the dissolved methylmercury water quality criterion established by this proposed rulemaking expressed as a site-specific total mercury discharge limit, as required under Federal NPDES regulations. These effluent limitations will continue to provide for control of total mercury while ensuring the toxic component, methylmercury, is not exceeded in the surface water or aquatic organisms.

YCSWRA performed a site-specific study for the collection of data necessary to develop a site-specific methylmercury water quality criterion for Ebaughs Creek that would be protective of human health. As required by § 93.8d(d), YCSWRA submitted a study plan to the Department for review, consideration and approval, and the Department approved a study plan.

Under CWA section 304(a), the EPA publishes recommended water quality criteria guidance that consists of scientific information regarding concentrations of specific chemicals or levels of parameters in water that protect aquatic life and human health. The Federal water quality standards regulations require states to review, for adoption, numeric water quality criteria that are based on section 304(a) criteria recommendations developed by the EPA, consider whether to modify section 304(a) criteria recommendations to reflect site-specific conditions, or establish criteria based on other scientifically-defensible methods.

The EPA has published a section 304(a) dissolved methylmercury water quality criterion recommendation for the protection of human health that is a fish-tissue based criterion of 0.3 milligrams per kilograms (mg/kg) (*Water Quality Criterion for the Protection of Human Health: Methylmercury, USEPA 823-R-01-001*). The EPA supports the adoption of methylmercury water quality criteria for the protection of human health because methylmercury is known to be one of the forms of mercury that is most toxic to humans. States have multiple options when developing and adopting methylmercury criteria, which may include the fish tissue recommendation, a water column criterion value based on the fish tissue recommendation, or both.

The EPA recommends that states adopt water column criteria values if adequate data is available to determine appropriate bioaccumulation factors (BAF). Bioaccumulation is the process of a chemical moving from the external environment (that is, surface water) into an organism. A BAF is a measure of how much a chemical accumulates within an organism. Thus, the Department required YCSWRA to collect fish tissue samples and surface water samples from Ebaughs Creek for the calculation of a site-specific BAF. The site-specific BAF was calculated to be 5.882398×10^{-6} liters per kilogram (L/kg). This BAF along with the human health exposure inputs for body weight, drinking water intake rate and fish consumption rate and the provisions for developing water quality criteria found in Chapters 93 and 16 (relating to water quality toxics management strategy—statement of policy) were used to convert the EPA's fish-tissue-based ambient water quality criterion for methylmercury into a water column criterion. The proposed site-specific dissolved methylmercury criterion for Ebaughs Creek is 0.00004 µg/L. For more information, see the rationale document for *Development of a Site-Specific Methylmercury Water Quality Criterion for Ebaughs Creek*, attached to the Regulatory Analysis Form.

F. *Benefits, Costs and Compliance*

Benefits

The regulated community and the public benefit from having regulations that clearly outline the site-specific criteria development process. These proposed amendments will ensure that site-specific water quality criteria are protective of surface water uses. Further, the proposed regulations establish qualifying factors that refine who may request development of criteria and clearly identify information the requestor must submit to develop the numeric criteria. This clarity will improve processing of requests for site-specific criteria. The Department intends to further explore ways to process requests in an efficient and timely manner and to enhance public notice of draft criteria for review and comment.

The site-specific dissolved methylmercury water quality criterion contained in this proposed rulemaking would be specific to Ebaughs Creek. YCSWRA's discharge is currently the only known discharge to Ebaughs Creek containing mercury and YCSWRA would benefit by having a permit with effluent limitations developed based on the proposed site-specific water quality criterion. Likewise, persons proposing a new discharge to Ebaughs Creek may benefit from the methylmercury criterion if mercury is found in a proposed new discharge.

Compliance costs

The proposed amendments to Chapter 93 will not immediately impose any costs on the regulated community. When site-specific criteria are necessary either to protect more sensitive intervening uses than those uses protected by a Statewide criterion or to protect a water use from substances currently lacking numeric criteria in Chapter 93, additional costs may be incurred by persons with NPDES permits. The costs for a permittee would be associated with conducting the required studies to develop the site-specific criteria and implementing the treatment technology necessary to meet the effluent limitations based on the criteria.

In some cases, the adoption of site-specific water quality criteria may result in effluent limitations that are less stringent than those based on Statewide criteria, and therefore, reduce the need for wastewater treatment technologies to remove pollutants, resulting in cost savings for a permittee. Treatment costs are site-specific and

depend upon the size and location of the discharge in relation to the size of the stream and many other factors. Furthermore, requests for site-specific criteria for a variety of pollutants may be initiated by persons with NPDES permits. It is not possible to precisely predict the costs or savings that could be incurred for any existing or new discharges to comply with any future site-specific criteria.

The expenditures necessary to meet new compliance requirements may exceed that which is required under existing regulations, but these proposed amendments are necessary to ensure existing and designated uses of surface waters of this Commonwealth are afforded the appropriate level of protection and to improve pollution control.

The proposed amendments to § 93.9o for Ebaughs Creek are specific to that waterbody. Furthermore, the proposed site-specific dissolved methylmercury water quality criterion for Ebaughs Creek would be applicable only to YCSWRA, and therefore, YCSWRA would be the only affected party. The proposed amendments will be implemented through the Department's permit and approval actions.

Compliance assistance plan

Surface waters of this Commonwealth are afforded a minimum level of protection through compliance with the water quality standards, including site-specific water quality criteria, which prevent pollution and protect existing and designated surface water uses.

The proposed amendments will be implemented through the Department's permit and approval actions. For example, the NPDES permitting program establishes effluent limitations based on the existing and designated protected water uses of the stream, and the water quality criteria developed to maintain those uses. These effluent limits are established to assure water quality is protected and maintained. Site-specific water quality criteria are protective of the water uses and are implemented in the same manner as Statewide water quality criteria.

Paperwork requirements

This proposed rulemaking should have no new direct paperwork impact on the Commonwealth, local governments and political subdivisions or the private sector. This proposed rulemaking would be implemented in accordance with existing Department regulations. A process to develop site-specific water quality criteria has been in effect for several decades. The proposed regulations refine the qualifying factors and criteria development studies that apply to a request for site-specific criteria; however, the overall paperwork impact will not change.

G. *Pollution Prevention*

The Federal Pollution Prevention Act of 1990 (42 U.S.C. §§ 13101—13109) established a National policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials, and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance.

Water quality standards are a major pollution prevention tool because they protect water quality and designated and existing uses of surface waters. The proposed amendments would be implemented through the Department's permit and approval actions. For example, the NPDES program will establish the more stringent of technology-based or water quality-based effluent limitations in permits. Water quality-based effluent limitations are determined by the existing and designated uses of the receiving stream and the water quality criteria necessary to protect those water uses. Site-specific water quality criteria are protective of the water uses and are implemented in the same manner as Statewide water quality criteria.

H. *Sunset Review*

The Board is not proposing to establish a sunset date for this proposed regulation because it is needed for the Department to carry out its statutory authority. The Department will continue to closely monitor this proposed regulation for its effectiveness and recommend updates to the Board as necessary.

I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on October 17, 2023, 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 Environmental Resources and Energy Committees. 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 in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) 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.

J. *Public Comments*

Interested persons are invited to submit to the Board written comments, suggestions, support or objections regarding this proposed rulemaking. Comments, suggestions, support or objections must be received by the Board by December 19, 2023.

Comments may be submitted to the Board online, by e-mail, by mail or express mail as follows.

Comments may be submitted to the Board by accessing eComment at http://www.ahs.dep.pa.gov/eComment.

Comments may be submitted to the Board by e-mail at RegComments@pa.gov. A subject heading of this proposed rulemaking and a return name and address must be included in each transmission.

If an acknowledgement of comments submitted online or by e-mail is not received by the sender within 2 working days, the comments should be retransmitted to the Board to ensure receipt. Comments submitted by facsimile will not be accepted.

Written comments should be mailed to the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA 17105-8477. Express mail should be sent to the Environmental Quality Board, Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301.

K. *Public Hearing*

The Board will hold a virtual public hearing for the purpose of accepting comments on this proposed rulemaking. The hearing will be held at 1 p.m. on December 5, 2023.

Persons wishing to present testimony at this hearing must contact Casey Damicantonio for the Department and the Board, (717) 783-8727 or RA-EPEQB@pa.gov, at least 1 week in advance of the hearing to reserve a time to present testimony. Language interpretation services are available upon request. Persons in need of language interpretation services must contact Casey Damicantonio by 5 p.m. on November 28, 2023.

Oral testimony is limited to 5 minutes for each witness. Organizations are limited to designating one witness to present testimony on their behalf at the hearing. Witnesses may provide testimony by means of telephone or Internet connection. Video demonstrations and screen sharing by witnesses will not be permitted.

Witnesses are requested to submit a written copy of their verbal testimony by e-mail to RegComments@pa.gov after providing testimony at the hearing.

Information on how to access the virtual public hearing will be available on the Board's webpage found through the Public Participation tab on the Department's web site at www.dep.pa.gov (select "Public Participation," then "Environmental Quality Board"). Prior to a hearing, individuals are encouraged to visit the Board's webpage for the most current information for accessing the hearing.

Members of the public wishing to observe a virtual public hearing without providing testimony are also directed to access the Board's webpage.

Persons in need of accommodations as provided for in the Americans with Disabilities Act of 1990 should contact the Board at (717) 783-8727 or through the Pennsylvania Hamilton Relay Service at (800) 654-5984 (TDD) or (800) 654-5988 (voice users) to discuss how the Board may accommodate their needs.

JESSICA SHIRLEY,
Interim Acting Chairperson

Fiscal Note: 7-571. No fiscal impact; recommends adoption.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 93. WATER QUALITY STANDARDS

WATER QUALITY CRITERIA

§ 93.8d. Development of site-specific water quality criteria.

(a) The Department will consider a request for site-specific criteria**, or the Department may develop site-specific criteria on its own initiative,** when one or more of the following apply:

(1) There exist site-specific biological or chemical conditions of **[receiving waters] the waterbody or waterbody segment** which differ from conditions upon which the **aquatic life** water quality criteria were based.

(2) More stringent criteria are needed for a **[parameter] pollutant** listed in § 93.7**, Table 3** (relating to specific water quality criteria) **or § 93.8c, Table 5 (relating to human health and aquatic life criteria for toxic substances) regarding water quality criteria for toxic substances** to protect more sensitive, intervening uses.

(3) There exists a need for a site-specific criterion for a **[substance] pollutant** not listed in **§ 93.7, Table 3 or** § 93.8c, Table 5 **[(relating to water quality criteria for toxic substances)]**.

(a.1) Site-specific criteria may not be developed when one or more of the following apply:

(1) If the request is for a waterbody or waterbody segment where a pollutant is a cause of nonattainment for a protected water use as listed in Pennsylvania's Integrated Water Quality Monitoring and Assessment Report, as amended and updated.

(2) If the request is for a waterbody or waterbody segment where an aquatic life use is not attained, unless the causes of nonattainment are due to causes other than pollutants as determined by the Department in an assessment. Assessments are publicly available on the Department's web site.

(3) If the request is for surface waters with an existing or designated use of HQ or EV.

(b) The **[request] applicant's demonstration** for **consideration of** site-specific criteria**, under subsections (a) and (a.1),** must include the **[results of scientific studies for the purpose of] following information, at a minimum**:

(1) **[Defining the areal boundaries for application of the site-specific criteria which will include the potentially affected wastewater dischargers identified by the Department, through various means, including, but not limited to, the total maximum daily load (TMDL) process described in Chapter 96 (relating to water quality standards implementation) or biological assessments] [Reserved]**.

(1.1) Identification of the pollutant of concern.

(2) **[Developing site-specific criteria which protect the surface water's existing and designated uses] [Reserved]**.

(2.1) Identification of the qualifying factor or factors in subsection (a).

(3) Identification of each waterbody or waterbody segment to which the site-specific criteria would apply, including stream name, municipality or municipalities, county or counties and existing and designated uses of each waterbody or waterbody segment.

(4) Scientific studies, data or other information that demonstrate the qualifying factor or factors in subsection (a) are met, which may include the following:

(i) Peer-reviewed, scientific literature related to the pollutant of concern.

(ii) For a demonstration of the qualifying factor in subsection (a)(1):

(A) Department or Federal water quality criteria rationale documents and regulations related to the pollutant of concern.

(B) Water quality and other relevant data collected on each waterbody or waterbody segment which demonstrate that the conditions differ from conditions upon which the existing aquatic life water quality criteria were based.

(iii) For a demonstration of the qualifying factor in subsection (a)(2):

(A) Documentation of more sensitive, intervening water uses for each waterbody or waterbody segment.

(B) Documentation of the presence, critical habitat or critical dependence of State-listed or Federally-listed threatened or endangered species in or on a surface water, if applicable.

(iv) Additional data or information as requested by the Department or that demonstrates the applicable qualifying factor is met.

(5) Information that demonstrates the factors in subsection (a.1) are not applicable.

(6) Information that demonstrates a water quality-based effluent limitation based on a water quality criterion found in § 93.7, Table 3 or § 93.8c, Table 5 is not achievable.

(c) **[Scientific studies] Based on the results of a demonstration that the request for site-specific criteria satisfies subsections (a), (a.1) and (b), the Department may require the applicant to undertake studies and submit additional information to develop site-specific criteria that includes the following, at a minimum:**

(1) Definition of the areal boundaries for application of the site-specific criteria which will include a description of each waterbody or waterbody segment.

(2) Identification of potentially affected National Pollutant Discharge Elimination System (NPDES)-permitted discharges, water withdrawals, total maximum daily loads (TMDL) and surface water assessments.

(3) Peer-reviewed scientific literature or other Department-approved data to be used in the development of the site-specific criterion. If data will be collected, a copy of the proposed plan for data collection shall be submitted for review, consideration and approval by the Department prior to commencement of data collection. Data collection shall be **[performed] completed** in accordance with the **Department's data collection protocols and the following** procedures and guidance **[in the], as amended and updated:** Water Quality Standards Handbook (EPA 1994), **[as amended and updated, including:]** "Guidance on the Determination and Use of Water-Effect Ratios for Metals" (February 1994); **[and]** the "Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health" (2000) **and the "Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses" (1985)**. Other guidance approved by the **[department] Department**, which is based on EPA-approved or scientifically defensible methodologies, may be used. The development of new or updated site-specific criteria for copper in freshwater systems shall be performed using the biotic ligand model (BLM).

(4) Copies of reports, including toxicity test data, signed by the consultant or entity that performed the work. Signed copies shall be submitted to the Department within 60 days of completion of the tests.

(5) Additional data or information as requested by the Department.

(c.1) If the required data and information is submitted, the Department will evaluate the information and may develop site-specific criteria for each requested waterbody or waterbody segment that protect the existing and designated uses of the surface waters in accordance with the criteria development methodologies outlined in subsection (c)(3), or other EPA-approved guidance and methods.

(c.2) The Department will incorporate approved site-specific criteria into this chapter and maintain a publicly available table of EPA-approved site-specific criteria.

(c.3) Site-specific criteria are not effective for Clean Water Act purposes until approved by the EPA.

(d) **[Prior to conducting studies specified in subsections (b) and (c), a proposed plan of study shall be submitted to the Department for review, consideration and approval] [Reserved]**.

(e) **[Signed copies of all reports including toxicity test data shall be submitted to the Department within 60 days of completion of the tests] [Reserved]**.

(f) **[If the Department determines that site-specific criteria are appropriate in accordance with subsection (a), the Department will do the following:**

(1) Publish the site-specific criterion in the *Pennsylvania Bulletin*, along with other special conditions under § 92a.82(b)(3) (relating to public notice of permit applications and draft permits) and provide for public participation and public hearing in accordance with §§ 92a.81, 92a.82, 92a.83 and 92a.85.

(2) Maintain a publicly available online table of site-specific criteria.

(3) Submit the methodologies used for site-specific criteria development to the EPA's Regional Administrator for review and approval, within 30 days of Department's final action.

(4) Prepare a recommendation to the EQB in the form of proposed rulemaking, incorporating that criterion for the water body segment] [Reserved].

(g) **[If the Department determines that new Statewide criteria or modifications to Statewide criteria are appropriate, the Department will prepare a recommendation to the EQB in the form of proposed rulemaking, incorporating the criteria into this chapter. The new criteria and changes to the criteria will become effective following adoption by the EQB as final rulemaking and publication in the *Pennsylvania Bulletin*]** **[Reserved]**.

(h) A person challenging a Department action under this section shall have the burden of proof to demonstrate that the Department's action does not meet the requirements of this section.

DESIGNATED WATER USES AND WATER QUALITY CRITERIA

§ 93.9o. Drainage List O.

Susquehanna River Basin in Pennsylvania

Susquehanna River

Stream	Zone	County	Water Uses Protected	Exceptions To Specific Criteria
		* * * * *		
3—Stone Run	Basin (all sections in PA)	Chester	TSF, MF	None
2—Deer Creek	Basin (all sections in PA)**, Source to Ebaughs Creek**	York	CWF, MF	None
3—Ebaughs Creek	**Basin (all sections in PA)**	**York**	**CWF, MF**	***Delete* Mercury Human Health = 0.05 µg/L *Add* Methylmercury Human Health = 0.00004 µg/L**
2—Deer Creek	**Basin (all sections in PA), Ebaughs Creek to Mouth**	**York**	**CWF, MF**	**None**
1—Chesapeake Bay (MD)				
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[Pa.B. Doc. No. 23-1508. Filed for public inspection November 3, 2023, 9:00 a.m.]

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 62]

Proposed Rulemaking: Natural Gas Distribution Company Business Practices; 52 Pa. Code § 62.225.

Public Meeting held
October 19, 2023

Commissioners Present: Stephen M. DeFrank, Chairperson; Kimberly Barrow, Vice Chairperson; Ralph V. Yanora; Kathryn L. Zerfuss; John F. Coleman, Jr.

Proposed Rulemaking: Natural Gas Distribution Company Business Practices; 52 Pa. Code § 62.225; L-2017-2619223

Order Withdrawing Rulemaking

By the Commission:

The Pennsylvania Public Utility Commission (Commission) proposed at the above-referenced Docket an Advance Notice of Proposed Rulemaking to solicit comments on amending our regulations at 52 Pa. Code § 62.225. The proposed regulatory changes addressed the release, assignment, and transfer of capacity among Natural Gas Distribution Companies (NGDCs) and Natural Gas Suppliers (NGSs). The proposed changes resulted from the Commission's Natural Gas Retail Markets Investigation (RMI) and were intended to improve the competitive market by revising how capacity is assigned and addressing the related issues of penalties and imbalance trading. Based on the comments received, the Commission finds that due to the diversity of the NGDCs' systems and operations the viability and benefits of implementing the proposed changes is questionable at this time, accordingly, the Commission, by this order, is withdrawing this proposal and closing this Docket.

Background

The history of proceedings that led to the initiation of this ANOPR proceeding is thoroughly recounted in the Commission's Advance Notice of Proposed Rulemaking Order adopted by the Commission at the Public Meeting held on August 31, 2017, and will not be repeated here. Through that ANOPR Order, the Commission released for comment several proposals regarding (1) uniform capacity costs for all customers; (2) capacity assignment from all assets; (3) imbalance trading; and (4) penalty structures during non-peak times. At the August 31, 2017, Public

Meeting, Chairman Gladys Brown Dutrieuille issued a statement in support of the ANOPR process to thoroughly deliberate the proposals.

The ANOPR Order was published in the *Pennsylvania Bulletin* on September 16, 2017, at 47 Pa.B. 5786, with comments on the proposals due within 45 days of publication. The Commission received comments from the following: Columbia Gas of Pennsylvania, Inc. (Columbia); Direct Energy Services, LLC, Direct Energy Business Marketing, LLC, and Direct Energy Business, LLC (collectively, Direct Energy); the Energy Association of Pennsylvania (EAP); Columbia Industrial Intervenors, the Philadelphia Area Industrial Energy Users Group, the Philadelphia Industrial and Commercial Gas Users Group, and the UGI Industrial Intervenors (collectively, Industrials); Mirabito Natural Gas, LLC (MNG); the National Energy Marketers Association (NEMA); National Fuel Gas Distribution Corp. (NFG); the Office of Consumer Advocate (OCA); PECO Energy Company (PECO); Peoples Gas Company LLC (Peoples); the Pennsylvania Energy Marketers Coalition (PEMC); Philadelphia Gas Works (PGW); the Retail Energy Supply Association and Shipley Energy (collectively, RESA); UGI Distribution Companies (UGI); Valley Energy, Inc. (Valley); and WGL Energy Services, Inc. (WGL).

On February 27, 2018, the Commission issued a Secretarial Letter announcing a Technical Conference to be held on March 29, 2018, where participants were given an opportunity to discuss the technical issues related to the proposed regulatory changes at this Docket and at Docket L-2016-2577413. The Technical Conference was held as scheduled.

Discussion

The Commission thanks the various stakeholders for their helpful participation and comments throughout this proceeding. We will briefly review the proposals and comments provided below.

I. *Uniform Capacity Costs for All Customers*

Capacity is generally released to NGSs to serve customers participating in the retail competitive natural gas market. This release can occur in different ways, but the cost of the capacity release is generally based upon the system average cost of capacity. In most service territories, an NGDC's capacity released for shopping customers are in turn paid for by the NGS providing the service.

A. *Proposed Regulation*

In the ANOPR, we proposed that applying Peoples' capacity payment mechanism statewide creates immediate and potentially lasting benefits for competition, including non-shopping customers. To accomplish this standardization the Commission proposed the following change to its regulations:

§ 62.225. Release, assignment or transfer of capacity.

(a) An NGDC holding contracts for firm storage or transportation capacity, including gas supply contracts with Commonwealth producers, or a city natural gas distribution operation, may release, assign, or transfer the capacity or Commonwealth supply, in whole or in part, associated with those contracts to licensed NGSs or large commercial or industrial customers on its system.

* * * * *

(3) A release, assignment or transfer **[must be based upon the applicable contract rate for]** **of** capacity or Pennsylvania supply **[and]** **shall** be subject to applicable contractual arrangements and tariffs. **Capacity or Pennsylvania supply costs shall be charged to all customers as a non-bypassable charge based on the average contract rate for those services.**

B. *Comments*

Columbia does not support this proposal for several reasons. First, through its 1307(f) process, Columbia already accomplishes what Peoples' standardized approach achieves regarding uniform capacity costs. Second, while Columbia could release capacity at zero cost, doing so would bring greater risk to Columbia's system as NGSs would have the ability to "game the system" by choosing to serve customers seasonally, thereby creating recovery issues for sales customers. Third, releasing capacity at zero cost and direct billing Choice customers would shift certain storage-related commodity costs, appropriately charged to Choice customers today under Columbia's average day program, to sales customers. Fourth, Columbia releases capacity to Choice NGSs on a recallable basis, however Columbia is not required to take the capacity back from the NGS if that capacity need decreases. Finally, Columbia is not aware of any supplier/marketer requesting that Columbia's program mimic Peoples' system. Consequently, Columbia does not support the codification of Peoples' capacity mechanism into existing Commission regulations. Columbia Comments at 7, 8.

If implemented properly, NFG does not object to this proposal but questions whether it would really result in an NGS offering innovative or lower priced services. To be sure, at least in some cases the NGS commodity price would be nominally lower because the capacity cost would be unbundled from the total cost. The same would be true for NGDC default supply service so comparatively there would be no difference; the change would be that the comparison would take place at a nominally lower rate. NFG believes the ANOPR's presumed efficacy of the Uniform Capacity Cost Proposal would benefit from a study comparing NGS rates to NGDC default rates that would include re-bundled rates in Peoples Natural Gas Company LLC territory. NFG Comments at 4.

PECO does not believe that maintaining capacity associated with critical assets for reliability purposes presents NGSs with a market disadvantage. PECO asserts that its virtual storage program eliminates the need to release capacity from critical assets. PECO releases the amount of capacity needed for each supplier to meet the suppliers' requirements, accordingly, NGDCs should not be required to provide virtual access to critical assets. PECO also expressed concern that virtual access could negatively impact reliability, noting that use of its LNG and Propane facilities must be weighed against existing demand and potential future demand requirements or PECO may not be able to meet its supplier of last resort requirements. PECO Comments at 4—7.

Peoples believes that this method has helped the development of the Customer Choice market in its service territory and can recommend this method. Peoples is concerned, however, that a regulation-prescribed method for assigning and recovering the cost of released capacity may be too restrictive and could limit potential responses to changes in the interstate capacity market. Peoples suggests that the Commission consider means other than a regulation for moving the natural gas Customer Choice marketplace toward consistent practices. The goal would be to encourage the adoption of consistent practices without locking the industry into a single methodology

that could not be modified until a future rulemaking permits a change. Peoples Comments at 4.

PGW states that under the Commission's proposal, the suppliers would no longer have to pay for the capacity. Rather, all customers would pay for the capacity. Suppliers would still receive the capacity, and when a supplier re-releases capacity, the NGS would then be able to keep any payments generated from that—rather than it being returned to PGW's customers. Second, this change shifts the risk of collecting costs onto paying customers. PGW is also concerned about the feasibility of incorporating myriad interstate pipeline contracts for a multitude of different services into its billing system. Such wholesale changes could require significant modifications to PGW's billing systems and retail systems. Changes of this nature and breadth will necessarily be a costly endeavor. PGW believes that a one-size fits-all approach may not be the most effective method for handling capacity release. PGW states that the proposal does not work for PGW because it does not sit in or near production areas, and therefore, has much higher capacity costs. PGW respectfully recommends that the Commission continue to provide NGDCs with the flexibility necessary to release capacity in the best interests of its ratepayers and the NGSs that serve each NGDC's territory. PGW Comments at 3, 4.

UGI posits that to the extent the Commission wishes to proceed with the ANOPR's proposal to recover the costs of gas supply assets released, transferred, or sold to Choice Suppliers from customers, UGI believes that the Commission should require that sharing mechanism credits resulting from assets paid for and used by PGC customers alone should be credited to those customers alone. UGI believes that the regulations should not mandate a particular Choice program design but should instead provide the Commission with the flexibility to permit variations to deal with unanticipated conditions. While UGI believes the proposal could be workable, with language changes, UGI believes the potential benefits may be overstated and need to be weighed against the cost of implementation. UGI comments at 8—12.

Valley states that the proposed modifications will be difficult for it to implement and asserts that some of the changes may be inconsistent with the Public Utility Code. Accordingly, Valley requests that the Commission decline to implement the proposed changes or exclude small gas utilities from the requirements. Valley Comments at 4—8.

EAP emphasizes that what works well for Peoples may not be directly comparable or workable for other NGDCs. EAP also states that implementing this change by other utilities may result in significant cost shifts inconsistent with the utilities' obligation to procure least-cost fuel relative to the statutory SOLR role. EAP Comments at 10.

At this time, the OCA does not object to the adoption of this approach if it can be fairly implemented in other systems. The OCA notes that a careful review of each NGDCs Price to Compare may be necessary to facilitate this change. OCA Comments at 2.

Direct Energy supports the Commission's proposal and agrees that applying Peoples' capacity payment mechanism statewide creates immediate and potentially lasting benefits for competition, including non-shopping customers. Direct Energy notes, however, that the rule should apply to Choice customers and any non-choice customer for whom capacity is assigned by the utility, whether as a mandatory requirement or because of the customer requesting that capacity be assigned. Direct Energy agrees that a socialization of upstream assigned capacity costs has the potential of making the market more competitive, because recovering the capacity costs through a distribution charge will reduce the NGS' financial risks. Direct Energy Comments at 2, 3.

The Industrials submit that the Commission's proposal to establish uniform capacity costs for all customers is unjust and unreasonable. The Industrials state that such a proposal would be problematic for several reasons, including the failure to: (1) recognize the unique differences among customer classes; (2) consider the distinctive capacity requirements on the various NGDCs' systems; (3) identify the provision in Section 2204(d)(3) of the Public Utility Code requiring that the release, assignment, or transfer of capacity shall be at the applicable contract rate for such capacity; and (4) distinguish the fact that the cited Peoples Tariff provision does not apply to Large C&I transportation customers. Assuming, arguendo, that the PUC seeks to implement a non-bypassable charge for capacity costs, the Industrials respectfully submit that Large C&I transportation customers be carved out of any application of this charge. Industrial Comments at 2, 3.

MNG states that any rulemaking that socializes costs creates market price distortions (i.e., there is no benefit for efficient use) and removes one of the primary tools upon which suppliers can differentiate and compete. Further, socialization of such valuable assets for the purpose of reducing barriers to entry would be a net loss in competitiveness. Regarding risk of payment, suppliers must be held to credit, reliability, and default standards as would any other unregulated entity. MNG states that burdening customers with assets that are not useful in supplying their geographic location distorts market economics. MNG notes that market distortions occur where any socialization economically benefits some customers and negatively impacts others. Such distortion encourages expansion and contraction of gas service that is contrary to actual market costs and in the long run is not economically sustainable. MNG Comments at 2.

While NEMA appreciates the stated purpose of the proposal, the proposal does not address whether the uniform capacity charge mechanism will include a change in the underlying capacity release program. If the uniform capacity charge mechanism is not accompanied by a commensurate change in which assets are released to suppliers and which assets are retained by the utilities so that suppliers receive an allocation more closely approximating a true slice-of-the-pie than they currently receive, it is not clear that the suppliers will indeed be better off. NEMA is also concerned that capacity costs are properly allocated and unbundled from utility delivery rates and included in the charge. NEMA is further concerned that it may become more challenging to compete with the utility monopoly, not less so, under this proposal. NEMA Comments at 3, 4.

PEMC supports this proposal, particularly the proposed regulatory language that "Capacity or Pennsylvania supply costs shall be charged to all customers as a non-bypassable charge based on the average contract rate for those services." PEMC believes this is an equitable approach, which will ensure system reliability to the benefit of all customers without placing the cost burden on a single group of customers. PEMC asserts that the proposal would minimize the risk of exposure for payment of capacity both from an NGDC and NGS perspective and provides for a level playing field in terms of risk of liability for non-payment of capacity. PEMC states that the proposal could reduce the financial barriers to entry

into the market by reducing the upfront capital required to begin serving customers. PEMC Comments at 3.

RESA supports the Commission's proposal for a uniform capacity as a means of leveling the playing field. RESA asserts that access to capacity assets, both pipeline and storage, on a level playing field is critical in making the market competitive. RESA posits that it is axiomatic that if suppliers and the default supplier are to receive an equal slice of capacity for each customer, as Peoples provides today, the payment for that slice should be the same for each. RESA states that charging customers directly for capacity assets allows suppliers to avoid the risk of recovery of capacity payments and eliminate the complex systems that some NGDCs employ that charge suppliers and then credit customers against an otherwise identical capacity charge. RESA cautions, however, that the fundamental premise of charging all customers the same amount for capacity, is providing suppliers with a bundle of usable capacity assets that fairly represents the physical basis of the system average cost, otherwise the system average cost basis for the charge would not be appropriate. RESA supports the notion of assigning a representative slice of system capacity assets to suppliers and supports the notion that such slice should follow the customer. RESA notes that NGDCs should not be permitted to provide a functionally inferior bundle of capacity assets, or a slice that includes virtual access to an asset which may have a vastly diminished value compared to the actual asset, and then still charge the system average cost for capacity. RESA Comments at 2, 3.

WGL supports the proposed modifications and agrees with the benefits that they would provide to the market, suppliers, utilities, and customers. WGL states that the changes would potentially reduce the risk for suppliers and simultaneously enable them to enhance their services. WGL notes that by eliminating the need for suppliers to pay for capacity upfront and then be at risk to recover the payments just to break even, suppliers would have a greater opportunity to focus on providing more competitive and innovative products and possibly lower price offerings. WGL cautions that if NGDCs place a new line item on the utility bill it could confuse customers. WGL Comments at 3—5.

C. *Disposition*

We agree with the commenters that state that a one-size-fits-all approach to capacity assignments is not appropriate for all NGDC systems and operations due to the capacity assets available and the varying costs of those capacity assets for each NGDC. We also agree with the commenters who raise concerns about the cost shift associated with the proposal and the cost-effectiveness of implementing the proposal in several of the service territories. While the proposal may reduce the upfront costs to enter the market in some NGDC service territories, it has not been shown in these comments that such cost reductions would in fact be conveyed to customers. For these reasons we will not proceed with this rulemaking proposal and will withdraw the rulemaking and close this docket.

II. *Capacity Assignment from All Assets*

The Commission recognized that physical access to certain facilities may raise reliability and/or operational problems for NGDCs and their customers. Therefore, virtual access to the asset may be the best option to provide NGSs with the ability to utilize and benefit from the asset but still provides overall control to the NGDC for reliability assurance.

A. *Proposed Regulation*

In the ANOPR we proposed the following additions to the regulation at 52 Pa Code § 62.225(a)(2):

§ 62.225. Release, assignment or transfer of capacity.

(a) An NGDC holding contracts for firm storage or transportation capacity, including gas supply contracts with Commonwealth producers, or a city natural gas distribution operation, may release, assign or transfer the capacity or Commonwealth supply, in whole or in part, associated with those contracts to licensed NGSs or large commercial or industrial customers on its system.

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(2) A release of an NGDC's pipeline and storage capacity assets must follow the customers for which the NGDC has procured the capacity, subject only to the NGDC's valid system reliability and Federal Energy Regulatory Commission constraints. **When release must be restricted due to reliability or other constraints, an NGDC shall develop a mechanism that provides proxy or virtual access to the assets.**

B. *Comments*

Columbia does not support this approach for a few reasons. First, Columbia's complex distribution system makes management of a "virtual access" approach extremely difficult due to its wide-spread geographic location, disaggregated markets, numerous market areas, numerous points of delivery and because of several pipelines feeding into its system. Second, the "virtual access" approach will create greater operational risk and reliability issues for Columbia's system. Third, given the issues identified above, Columbia would need to implement new systems and modify numerous existing systems just to attempt a "virtual access" approach with no identified benefits to justify these significant costs. Columbia Comments at 11.

While the NFG understands the ANOPR's intent for providing NGSs with broader, albeit indirect, access to restricted assets, the approach of a generic change to the applicable regulation ignores the unique operating circumstances applicable to and asset portfolios present in each NGDC's territory. Requiring NGDCs to develop a mechanism that provides proxy or virtual access to restricted assets appears counter to reliability because rather than permitting NGDCs to create different programs that meet each NGDC's unique reliability concerns, the ANOPR appears to advocate for only one solution—proxy or virtual access. The Virtual Access Mechanism language removes any balancing of the circumstances present; in effect it improperly presumes that restricted access provides a competitive advantage to the NGDC that must be remedied. NFG does not object to employment of virtual access mechanisms as an option but believes a better approach would be to address this concern on an NGDC by NGDC basis. NFG Comments at 6, 7.

Peoples believes providing virtual access to retained capacity can be done, again subject to conditions that may be specific to the capacity or to the NGDC's operations. In short, the implementation of the concept may have to be company specific and/or be flexible in the definition of proxy or virtual access to the assets. Peoples Comments at 5.

PGW submits that capacity assignment of restricted assets is best managed on an individual NGDC basis to

account for distinct service territory and system design characteristics. As such, PGW proposes that no changes are necessary to the Commission's regulations on this issue. PGW Comments at 6.

UGI states that in the area it operates, it is not reasonable or prudent to assume that substitute gas supplies could be procured at reasonable cost during peak conditions if certain key gas supply assets unexpectedly become unavailable. While the ANOPR appropriately recognizes the existence of reliability assets, UGI asserts that it mistakenly assumes that these assets can be released if there are appropriate contractual restrictions on their use or imposed through operational flow orders (OFO). UGI states that a contractual restriction only gives the utility the right to sue for damages or specific performance, neither of which provide the required gas deliveries on short notice to meet SOLR obligations, potentially affecting reliability. Regarding OFO restrictions, UGI states that such restrictions only enable the utility to issue penalties or deny future service for any violations, noting that such penalties may be of no concern to an insolvent supplier or a supplier leaving the market. UGI states that its Commission-approved bundled city gate sales obligations constitutes the provision of virtual access to its core market gas supply assets that are appropriate for its systems. UGI Comments at 12—14.

Valley has substantial concerns with the proposed use of GCR assets by NGSs. Because Valley is served by a single interstate pipeline, Valley is prudent in arranging for sufficient interstate pipeline capacity to serve its GCR customers. Valley also contracts for storage services near its service territory to ensure operational reliability. Valley uses the pipeline capacity year-round to fill the storage, and then calls upon its gas in storage to meet peak demands during the winter and to balance its system. Even virtual access by NGSs to the assets could impair operational reliability practices in the territory. Valley Comments at 8, 9.

EAP asserts that the proposal is not feasible on all NGDC systems based on the capacity constraints and other unique characteristics that differentiate the eastern Pennsylvania market from the western Pennsylvania market. EAP states that the proposed contractual restrictions only provide legal recourse after the NGDC has already replaced the required gas delivery necessary to fulfill its SOLR obligations, should the initial assets become unavailable due to virtual release. EAP Comments at 10.

The OCA submits that more information is needed from the NGDCs regarding the proposed regulation change. NGSs and NGDCs would need to properly identify assets to which NGSs do not currently have reasonable access, or where current mechanisms are not adequate. The OCA further submits that virtual or proxy capacity access has not been a major issue in recent Purchased Gas Cost proceedings, so it is not clear to the OCA what benefit is sought to be achieved. The OCA further recommends that the Commission develop protocols for specific resources to ensure reliability. OCA Comments at 3.

Direct Energy agrees that capacity should be assigned, as near as possible on a slice of system basis. Direct Energy recognizes that some assets may not be assignable and accordingly supports the Commission's proposal to create virtual access to various supply assets. Direct Energy notes, however, that virtual access must be structured to insure that access is established on a non-discriminatory basis. Direct Energy asserts that it is important that if the asset creates cost advantages that reduce the cost of gas for the NGDC, then those same cost advantages should be shared with the suppliers. Direct Energy Comments at 4.

NEMA suggests that increased detail and transparency is needed associated with what is or will be deemed a reliability asset by the utility. Utilities should not be permitted to unduly restrict supplier access to assets. NEMA recommends that more information about how virtual pooling will work under the proposal be provided to stakeholders. NEMA Comments at 5.

PEMC supports the proposal for capacity assignment from all assets, subject only to the NGDC's system reliability needs and Federal Energy Regulatory Commission regulations. PEMC states that the NGDC must develop a mechanism that provides a proxy or virtual access to the facilities assets in question to provide suppliers with the ability to utilize and benefit from these assets while allowing the NGDC to maintain overall control for reliability. PEMC states that communication between the suppliers and the NGDC is paramount, and the use of a particular physical asset may be denied based on pre-established rules. PEMC Comments at 4.

RESA suggest that the Section 2204(d)(3) of the Public Utility Code, 66 Pa.C.S. § 2204(d)(3), requires more than the ANOPR acknowledges regarding the level and type of assets that must be released. RESA asserts that this section of the Public Utility Code requires that if an NGDC releases capacity at all, it must indeed release the assets that the company would otherwise have used to serve the customer or group of customers. RESA notes that while the virtual storage does address some of the downside risk, it also eliminates the potential for any upside with any profit gained by selectively releasing the capacity is shared between the asset manager and the utility. RESA asserts that virtual storage does not provide the same optionality as actual storage, even when considering the costs to the supplier of meeting the requirements of the storage operator for filling and withdrawing from that storage. RESA states that if the NGDC were providing a virtual asset that is less valuable than the actual asset, then fairness would dictate that if the NGDC makes any profit on the asset that it will not, or cannot assign, the supplier a share in that profit. RESA does not take issue with the use of an asset manager, but if the primary reason for the non-assignment of a fair slice of assets is the asset manager's need for profit, this would be discriminatory. RESA also contends that assigned capacity must also be usable by the supplier to serve the customers whom it follows—that is, it must reasonably represent the same bundle of assets that the NGDC would use to serve the same customers. RESA Comments at 2—5.

WGL does not support a rule that would change the current programs that utilities have in place to deal with critical assets. WGL believes that such a rule would result in additional, unnecessary burdens for suppliers without commensurate benefits. WGL recommends that the Commission make it standard that all capacity releases be executed monthly, rather than yearly. WGL Comments at 6, 7.

C. *Disposition*

Again, we agree with the commenters that the one-size-fits-all approach for proxy or virtual access to assets can create greater operational risks for some NGDCs and may not be feasible for some NGDCs. In addition, the proposal would require some NGDCs to implement new systems

and modify numerous existing systems just to attempt a "virtual access" approach with no identified benefits to justify these significant costs. The benefits of the proposal may be suspect in that virtual storage does not provide the same optionality as actual storage, even when considering the costs to the supplier of meeting the requirements of the storage operator for filling and withdrawing from that storage. Commenters noted that the proposal would result in additional, unnecessary burdens for suppliers without commensurate benefits. Commenters also stated that more information about how virtual pooling would work under the proposal needs to be fleshed out prior to implementation. Commenters also noted that virtual or proxy capacity access has not been a major issue in recent Purchased Gas Cost proceedings, where the benefits of such a program can be determined on a case-by-case basis. For these reasons we will not proceed with this rulemaking proposal and will withdraw the rulemaking and close this docket.

III. *Imbalance Trading*

Penalties help ensure safe and reliable service in the natural gas market. While system reliability may be the primary mission of the NGDC, it is also a major focus of most market participants. In addition, it requires a cooperative approach between all market participants to ensure reliability. Improving upon this cooperative approach, therefore, should help to improve reliability in the natural gas market.

A. *Proposed Regulation*

In the ANOPR the Commission proposed that imbalance trading between market participants (both Choice and Transportation customers) should be a market feature. To implement this daily imbalance trading, the Commission proposed the following additions to the regulation at 52 Pa. Code § 62.225:

(5) An NGDC shall provide the opportunity for imbalance trading on the day the imbalance occurred. Capacity may be traded between market participants provided that either:

(i) The trade improves the position of both parties.

(ii) The trade improves the position of one party and is agreed to by the second party but does not negatively impact the second party's imbalance.

B. *Comments*

Columbia does not support this recommendation for several reasons. First, Columbia's system is not built for trading between CHOICE and Transportation and therefore it cannot accommodate such trading. Second, permitting NGSs to trade imbalances across transportation programs could result in NGSs "gaming the system." Third, for Columbia to implement and monitor such a program modification would require that the Company undertake expensive and time-consuming programming costs. Lastly, no party has requested this change and no clear reason as to the basis for such a change has been shared. Columbia Comments at 13.

NFG states that the use of the term "Capacity" in the proposed regulatory text is inconsistent with applicable FERC regulations, potentially exposing NGDCs to substantial penalties; capacity cannot be traded outside of FERC's capacity release mechanism. NFG believes this is simply an improper choice of language and proposes replacing the term Capacity with "Gas Imbalances" in the proposed Section 62.225. NFG, however, is concerned that the Daily Imbalance Trading Proposal is designed to address a problem that does not exist on its system and even if it did, due to illiquidity, is inferior to trading opportunities on the interstate pipeline system. NFG Comments at 13—16.

Peoples asserts that the allowance of imbalance trading would introduce a reliability risk that does not currently exist. Today, NGSs can trade gas supplies prior to the gas delivery day to satisfy their delivery target amounts. If, instead of acting proactively to manage deliveries, an NGS assumes that it can trade for gas at the end of or after the gas delivery day, and there turns out to be no other NGS in an opposite position with whom to trade imbalances, then the NGDC is left to manage that imbalance. Peoples Comments at 7.

PGW is opposed to daily imbalance trading for its interruptible transportation suppliers but may be amenable to interruptible transportation suppliers trading imbalances at the end of the month. Trading at the end of the month would help ensure better reliability than daily imbalance trading. However, before PGW could support such a proposal, it would need more developed information. PGW agrees that significant technology and system upgrades would be necessary to accommodate daily imbalance trading, as PGW's current system is not able to communicate with suppliers in real-time. Such upgrades would necessarily be costly. PGW does not support trading between interruptible and firm transportation supplier pools. Such a mechanism would be problematic because it could permit NGSs to manipulate the pools to create arbitrage opportunities that profit the NGSs at the expense of ratepayers. PGW Comments at 7.

UGI notes that it does not have smart meters that would permit the collection of real time daily imbalance information for its SOLR customers. UGI must ensure that appropriate deliveries are made to fulfill its SOLR obligations. UGI does provide a balancing service to handle any variations between the specified daily delivery amount and actual use. UGI Comments at 16, 17.

Valley has not implemented an EDI system and EDI will be needed to enable real-time information exchange regarding account usage, deliveries and over or under delivery status. Based on the experiences of Valley's sister-affiliates (Citizens' Electric Company and Wellsboro Electric Company), the costs to implement EDI will be $500,000 to $1 million. In a small territory like Valley's the cost equates to approximately $75 to $150 per customer. Valley suggests that implementing EDI to facilitate imbalance trading may not be cost-effective. Valley Comments at 9, 10.

EAP does not believe this proposal is workable or valuable to the marketplace and does not benefit customers. EAP states that most NGDCs don't have smart meters and cannot collect real-time, daily information from low volume market customers. The costs for implementing smart meters would be in addition to the IT costs necessary to update the NGDCs' electronic bulletin boards to enable such daily trades. EAP Comments at 11.

The OCA submits that it is not clear that there will be material benefits by creating daily imbalance trading. As a result, the OCA is concerned with the additional costs that will be incurred by developing the needed trading platform. The OCA states that it is unclear if there would be supplies available to trade imbalances on any day because all Choice suppliers should be delivering the requested amount. It may be that NGSs would find useful daily imbalance trading for only their larger, Transporta-

tion Program customers where the NGDC does not specify the daily amount to be delivered. The OCA submits that NGSs should be required to demonstrate a significant need for daily trading for Choice Program customers if those costs are to be incurred. Similarly, with respect to daily trading of capacity, there should be a demonstration of a significant need prior to the building of a daily trading platform. OCA Comments at 4, 5.

Direct Energy strongly supports the imbalance trading concept and notes that such trading is already permitted on some of the NGDC systems. Direct Energy also supports imbalance trading between Choice and Transportation programs, noting that artificial restrictions about imbalances trading between the two pools appears to be without operational justification. Trading between pools allows a supplier to offset a positive balance against a negative imbalance, causing no net impact on the system. Direct Energy Comments at 5.

NEMA supports the imbalance trading proposal on the basis that it is a source of flexibility for suppliers that provides suppliers with a means to minimize the costs to deliver natural gas to consumers. Moreover, by implementing a standardized approach as is proposed, it provides suppliers with a more definitive basis upon which to do business across utilities, thereby providing greater certainty of the costs of participating in the market. NEMA also agrees that communication of real-time information is critical for daily imbalance trading. NEMA Comments at 6.

PEMC supports the proposal for the trading of daily imbalances with the understanding that there may be system upgrades required to afford access to more real-time information. PEMC states that the proposal provides the ability for suppliers and the NGDCs to manage their portfolios in a more cost-efficient manner by minimizing imbalance penalties. PEMC Comments at 4.

RESA has long championed more uniform and market rational penalties. RESA asserts that the ability to trade imbalances among suppliers in near real time will allow suppliers to balance the market without resort to penalties, when one supplier might be long and the other short on a particular day. RESA acknowledges that daily read meters and IT systems capable of collecting and processing the information is needed, but there is not yet universal deployment of such systems. RESA wishes to be realistic and acknowledges that daily imbalance trading may be more than a few years out, due to the needed first step of upgrading metering capability on a statewide basis and all that such a task involves, even if consideration is given initially only to commercial customers. RESA Comments at 8.

WGL supports the Commission proposal if the rules do not cause a supplier or utility to go outside of the imbalance tolerance threshold, which has been ongoing in the marketplace without a rule in effect. WGL proposes a change to clarify that trades should be allowed between parties if they do not cause either party to go outside the utility's tolerance threshold. WGL Comments at 9.

C. *Disposition*

Commenters agree that significant and costly upgrades to NGDC systems are needed to accommodate daily imbalance trading. Commenters have also noted that no party has requested this change and no clear reason as to the basis for such a change has been shared with some commenters noting that the Daily Imbalance Trading Proposal is designed to address a problem that does not exist and may be inferior to trading opportunities on the interstate pipeline system. No commenter has demonstrated that the benefits of daily imbalance trading on every NGDC system would provide benefits in excess of the significant costs to upgrade NGDC systems needed to facilitate such a program. Accordingly, we will not proceed with this rulemaking proposal and will withdraw the rulemaking and close this docket.

IV. *Penalty Structure During Non-peak Times*

Penalties are a necessary market feature to help maintain system integrity and reliability. In Pennsylvania and within each NGDC, there is a difference in penalty structure during system peak demand periods and off-peak demand periods. Generally, system peak demand periods occur during the winter months (November through March) or when an operational flow order is issued. Penalties are appropriately higher during system peak demand periods because the harm to system reliability could be substantial. During the Retail Market Investigation stakeholder discussions, concerns were raised about the fairness of penalties during off-peak periods and corresponding questions about whether the penalties were sufficient to prevent inappropriate market behavior.

A. *Proposed Regulation*

In the ANOPR the Commission proposed a standardized penalty mechanism to reduce barriers to participation in the retail natural gas market. To implement this proposed standard, the Commission proposed the following additions to the regulation at 52 Pa. Code § 62.225:

(6) Penalties during system off-peak periods must correspond to market conditions.

(i) An NGDC shall use the system average cost of gas as the reference point for market based penalties. If an NGDC takes service from a local hub, it may use the local hub as a reference point for market based penalties.

(ii) The lowest penalty must be set at the market price.

B. *Comments*

Columbia opposes this proposal for several reasons, not the least of which is because NGDC systems do not function like EDC systems. First, Columbia notes that it does not operate its system in a vacuum. Rather, Columbia communicates and works regularly with NGSs to resolve issues like that of penalties. Columbia transformed its operational order penalty structure from a flat rate to a market-based rate as part of the settlement agreement in Docket No. R-2016-2529660. Second, an off-peak price structure would not work for Columbia as the Company is subject to operational orders during both peak and off-peak periods. Third, because Columbia has a very wide-spread geographic footprint served directly by six different pipelines it sees a very wide range of prices on the pipelines delivering to its system and has very little flexibility to maneuver receipts from pipeline to pipeline. Lastly, Columbia maintains that a standardized penalty structure works for EDCs but is not a realistic model for NGDCs due to system constraints and the vastly different array of resources the NGDCs must manage. Columbia Comments at 19, 20.

NFG states that while the text of the ANOPR appears to take reliability into consideration, the proposed regulatory addition doesn't capture the reliability discussion in the ANOPR. This is not to say that market pricing cannot be factored into penalties but if done improperly, market-oriented penalty pricing creates a gaming opportunity

that would benefit NGSs that fail to meet their delivery obligations to shopping customers at the expense of non-shopping customers. NFG Comments at 17.

PECO supports using penalty structures that are market-based and that prevent opportunities for arbitrage, however, PECO states that a one-size-fits-all approach will not work for all NGDCs. PECO states that if the penalty is not properly aligned with the specific Choice program, system balancing problems could result. PECO Comments at 8—10.

Peoples' current practice is consistent with this proposal. It provides a market-based cash out value but carries a high enough market premium/discount to encourage NGS attention to delivery obligations and protect retail customers from serving as a free balancing service for Choice suppliers. Peoples Comments at 8, 9.

PGW's daily imbalance penalty structure is designed to protect the reliability of its system by providing appropriate penalties. PGW believes that each NGDC should be provided maximum flexibility to design penalty mechanisms that best fit its unique distribution system needs. PGW would, therefore, recommend that no changes be made to the current regulations. PGW Comments at 10, 11.

UGI states that if system reliability rules are reasonable and clearly communicated, and penalties are appropriately set to deter risky behaviors, suppliers should be able comply with the reliability rules and avoid penalties. UGI believes that if suppliers can avoid penalties, such penalties should not be considered a barrier to increased participation in the market. UGI further asserts that reliability penalty assessments have not been significant, and thus cannot be considered a significant barrier to the market. UGI Comments at 20.

EAP believes that the current system-specific penalty structure is working to appropriately deter bad actors and avoid compromises to utility reliability. EAP notes that the effects of arbitrage might also be felt by other system customers, jeopardizing wider system supplies. EAP Comments at 12.

The OCA submits that the UGI standard for delivery shortfalls for off-peak periods provides adequate protection for NGDCs. However, it only appears to address shortfalls, not over deliveries. The OCA submits that the proposed regulation appears to be misstated in requiring that the lowest penalty must be set at the market price rather than the difference between published and local market prices. OCA Comments at 6.

Direct Energy supports the Commission's proposal, noting that market-based mechanisms are fairer and more dynamic, and will serve as an effective deterrent to behavior that may threaten operational integrity. Direct Energy, however, does not support a need for a minimum penalty structure. Direct Energy Comments at 6.

The Industrials submit that penalties must consider the actor involved, the impact on the system, and degree of the injury, which is not currently the case. The Industrials recommend that NGDCs not charge penalties, but rather, simply charge the market rates for the imbalance when: (1) an NGS has an imbalance in an opposite direction of the overall system imbalance, resulting in the imbalance aiding the NGDC; (2) the imbalance is caused by the NGDC; or (3) the overall system remains in balance despite various NGS imbalances that negate themselves. The Industrials assert that implementing these changes would still assure that all market players are working towards a balanced system while not unreasonably penalizing a market participant for an error that caused no harm. The Industrials also propose that the Commission adopt a more flexible mechanism, like PGW's and PECO's, that allows suppliers to make-up gas in the summer to alleviate supplier imbalances. Industrials Comments at 7, 8.

NEMA agrees that penalties should be market-based. Additionally, NEMA states that penalties should be focused on deterring actual problems and not be unnecessarily punitive. NEMA notes that off-peak penalties should properly be designed so the punishment fits the crime and that the use of a multiplier in computing a penalty should be limited to a reasonable percentage, reflective of the off-peak period. NEMA Comments at 7.

PEMC supports the proposed penalty structure during non-peak times with the understanding that all NGDCs would establish penalties for system off-peak periods based upon its local gas costs. PEMC states that a straight multiplier could be used to generate the penalty during system off peak periods. At the same time, PEMC believes it is imperative to maintain the discretion of the NGDC to waive penalties, as appropriate, especially if the supplier does not flow the correct amount of gas due to inaccurate information from the NGDC or if an imbalance benefits the NGDC system daily balancing position. PEMC Comments at 5.

RESA agrees that penalties provide a meaningful tool to enforce delivery requirements. RESA states that to the extent penalties are based on actual market prices, however, with a rational multiplier, they will continue to provide an incentive to comply, while not exposing suppliers to extreme risk for non-compliance which can often be the result of mistakes, as opposed to intent to do so. RESA agrees that the Commission's vision that such requirements and the consequences for non-compliance be uniform across all NGDCs is a good way to avoid continual litigation of penalties. RESA also agrees that having a rational and uniform penalty structure on a statewide basis will eliminate barriers to entry and allow suppliers to better understand the risks of providing service. RESA further agrees at a market price multiplied by 115% would be a reasonable maximum penalty for non-delivery on a non-peak day. So long as the market price is determined by indices that are relevant to the service territory, RESA asserts that this should produce the appropriate incentives for compliance. RESA Comments at 9, 10.

WGL notes that utilities can now impose summer penalties on suppliers and that the penalties can be unreasonable. WGL submits that suppliers should have greater flexibility during the summer and proposes additional language. WGL Comments at 10, 11.

C. *Disposition*

While most commenters agree that a market-based penalty structure provides appropriate incentives to maintain system reliability during peak and off-peak periods, most commenters note that such a penalty structure may not work in every service territory due to each NGDCs unique configuration and operation. Accordingly, we agree with the commenters that state that a one-size-fits-all approach will not work for all NGDCs and that each NGDC should be provided maximum flexibility to design penalty mechanisms that best fit its unique distribution system needs. Accordingly, we will not proceed with this rulemaking proposal and will withdraw the rulemaking and close this docket.

Conclusion

As the changes to the Commission's regulations proposed in this proceeding may not work in every service territory due to each NGDC's unique configuration and operational characteristics, the resulting significant costs to implementing the changes and there not being demonstrated benefits in excess of those costs and operational risks, the Commission is withdrawing the proposed regulatory changes. The Commission appreciates the time and effort all stakeholders provided in this proceeding to inform the Commission and the regulated community more fully on natural gas distribution company business practices and potential opportunities to improve those practices; *Therefore*,

It Is Ordered That:

1. The instant rulemaking at Proposed Rulemaking: Natural Gas Distribution Company Business Practices; 52 Pa. Code § 62.225, Docket No. L-2017-2619223 be marked closed.

2. A copy of this Order be served on all jurisdictional natural gas distribution companies, the Office of Consumer Advocate, the Office of Small Business Advocate, the Commission's Bureau of Investigation and Enforcement and the parties that filed comments in this proceeding.

3. The Law Bureau shall deposit this Order with the Legislative Reference Bureau to be published in the *Pennsylvania Bulletin*.

4. The Office of Competitive Market Oversight shall electronically send a copy of this Order to all persons on the contact list for the Committee Handling Activities for Retail Growth in Electricity.

5. A copy of this Order shall be posted on the Commission's website at the Office of Competitive Market Oversight web page and on the web page for the *Retail Markets Investigation—Natural Gas*.

6. This Docket be marked closed.

ROSEMARY CHIAVETTA,
Secretary

ORDER ADOPTED: October 19, 2023

ORDER ENTERED: October 19, 2023

[Pa.B. Doc. No. 23-1509. Filed for public inspection November 3, 2023, 9:00 a.m.]

GAME COMMISSION

[58 PA. CODE CH. 133]

Wildlife Classification; Birds

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission) proposed at its September 16, 2023, meeting to amend § 133.21 (relating to classification of birds) to add the Black Rail (*Laterallus jamaicensis*) to the Commonwealth's list of threatened birds due to its Federally protected status and small, sporadic population in this Commonwealth.

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

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

This proposed rulemaking was made public at the September 16, 2023, meeting of the Commission. Comments can be sent until January 24, 2024, to the Director, Information and Education, Game Commission, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797.

1. *Purpose and Authority*

Black Rails are the smallest rail species in North America and the most secretive in behavior and habitat. Although this species is considered uncommon in this Commonwealth, compelling evidence indicates territories have been established and nesting may have been attempted. In 2020, the United States Fish and Wildlife Service classified the Eastern Black Rail subspecies *Laterallus jamaicensis jamaicensis* as threatened under the Endangered Species Act of 1973 (16 U.S.C. §§ 1531—1544), indicating between 0 to 5 breeding pairs currently occur in this Commonwealth. The Commission is proposing to amend § 133.21 to add the Black Rail (*Laterallus jamaicensis*) to the Commonwealth's list of threatened birds due to its Federally protected status and small, sporadic population in this Commonwealth.

Section 322(c)(8) of the code (relating to powers and duties of commission) specifically empowers the commission to "[a]dd to or change the classification of any wild bird or wild animal." Section 2102(a) of the code (relating to regulations) provides that "[t]he 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*

This proposed rulemaking will amend § 133.21 to add the Black Rail to the Commonwealth's list of threatened birds.

3. *Persons Affected*

Persons concerned with Black Rail within this Commonwealth will be affected by this proposed rulemaking.

4. *Cost and Paperwork Requirements*

This proposed rulemaking should not result in any additional cost or paperwork.

5. *Effective Date*

This 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 about this proposed rulemaking, contact Jason L. DeCoskey, Director, Bureau of Wildlife Protection, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

BRYAN J. BURHANS,
Executive Director

Fiscal Note: 48-501. No fiscal impact; 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.*

(i) King Rail (*Rallus elegans*)

(ii) Short-eared Owl (*Asio flammeus*)

(iii) Black Tern (*Chlidonias niger*)

(iv) Least Bittern (*Ixobrychus exilis*)

(v) Piping Plover (*Charadrius melodus*)

(vi) Loggerhead Shrike (*Lanius ludovicianus*)

(vii) American Bittern (*Botaurus lentiginosus*)

(viii) Great Egret (*Ardea alba*)

(ix) Yellow-crowned Night Heron (*Nyctanassa violacea*)

(x) Common Tern (*Sterna hirundo*)

(xi) Blackpoll Warbler (*Setophaga striata*)

(xii) Black-crowned Night-Heron (*Nycticorax nycticorax*)

(xiii) Dickcissel (*Spiza americana*)

(xiv) Sedge Wren (*Cistothorus stellaris*)

(xv) Yellow-bellied Flycatcher (*Empidonax flavi-ventris*)

(xvi) Upland Sandpiper (*Batramia longicauda*)

(xvii) Northern Goshawk (*Accipiter gentilis*)

(2) *Threatened.*

(i) Northern Harrier (*Circus hudsonius*)

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

(iii) [Reserved]

(iv) Red Knot (*Calidris canutus rufa*)

(v) Black Rail (*Laterallus jamaicensis*)

[Pa.B. Doc. No. 23-1510. Filed for public inspection November 3, 2023, 9:00 a.m.]

GAME COMMISSION

[58 PA. CODE CH. 141]

Hunting and Trapping; General

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission) proposed at its September 16, 2023, meeting to amend § 141.18 (relating to permitted devices) to authorize electronic devices used to disturb water with the purpose of preventing ice formation.

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

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

This proposed rulemaking was made public at the September 16, 2023, meeting of the Commission. Comments can be sent until January 24, 2024, to the Director, Information and Education, Game Commission, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797.

1. *Purpose and Authority*

The Commission recently conducted a formal review of the use of electronic devices intended to maintain open water, frequently referred to as "ice-eaters." Ice-eaters can come in a variety of forms, such as fountains, propellers and bubblers, all with the intention of disturbing water to prevent ice formation or melt ice that has already formed. Waterfowl hunters use these devices in other jurisdictions where their use is lawful to maintain open water and entice waterfowl to remain in the area for hunting opportunities. When considering electronic devices, the Commission generally reviews to what degree use of a given device might negatively impact principles of resource conservation, equal opportunity, fair chase or public safety. The Commission's review of these devices determined that their use would have insignificant negative impacts to the previously mentioned principles. Therefore, the Commission is proposing to amend § 141.18 to authorize electronic devices used to disturb water with the purpose of preventing ice formation.

Section 2102(a) of the code (relating to regulations) provides that "[t]he 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*

This proposed rulemaking will amend § 141.18 to authorize electronic devices used to disturb water with the purpose of preventing ice formation.

3. *Persons Affected*

Persons concerned with hunting where electronic devices used to disturb water for the purpose of preventing ice formation within this Commonwealth will be affected by this proposed rulemaking.

4. *Cost and Paperwork Requirements*

This proposed rulemaking should not result in any additional cost or paperwork.

5. *Effective Date*

This 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 about this proposed rulemaking, contact Jason L. DeCoskey, Director, Bureau of Wildlife Protection, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

BRYAN J. BURHANS,
Executive Director

Fiscal Note: 48-502. No fiscal impact; recommends adoption.

Annex A

TITLE 58. RECREATION

PART III. GAME COMMISSION

CHAPTER 141. HUNTING AND TRAPPING

Subchapter A. GENERAL

§ 141.18. Permitted devices.

Notwithstanding the prohibitions in § 141.6 (relating to illegal devices), the following devices may be used to hunt or take wildlife:

(1) Firearms that use an electronic impulse to initiate discharge of ammunition. This provision is not intended to authorize use of these devices when these firearms are otherwise prohibited devices for the applicable hunting or trapping season.

* * * * *

(11) Electronic hand-held and firearm-mounted night-vision and infrared optics used solely for furbearer hunting.

(12) Electronic devices used to disturb water for the purpose of preventing ice formation.

[Pa.B. Doc. No. 23-1511. Filed for public inspection November 3, 2023, 9:00 a.m.]

GAME COMMISSION

[58 PA. CODE CH. 141]

Hunting and Trapping; Furbearers

To effectively manage the wildlife resources of this Commonwealth, the Game Commission (Commission) proposed at its September 16, 2023, meeting to amend § 141.67 (relating to furbearer seasons) to prohibit the hunting of any furbearer using a dog during the overlap with any regular firearms deer season or regular firearms bear season.

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

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

This proposed rulemaking was made public at the September 16, 2023, meeting of the Commission. Comments can be sent until January 24, 2024, to the Director, Information and Education, Game Commission, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797.

1. *Purpose and Authority*

Over the past several years, the Commission received an increasing number of complaints relating to hunters who are using dogs to hunt coyotes during the regular firearms deer and bear seasons. The Commission determined that the act of using dogs to hunt coyotes during the regular firearms deer and regular firearms bear seasons has resulted in both intentional and unintentional pushing, driving or killing of these big game species. The use of dogs to hunt big game is generally unlawful within this Commonwealth. Moreover, the Commission observed that the use of dogs to hunt coyotes during the regular firearms deer and regular firearms bear seasons has frequently caused interference with hunters who were lawfully hunting deer or bear on properties where these activities coincided. The Commission is proposing to amend § 141.67 to prohibit the hunting of any furbearer using a dog during the overlap with any regular firearms deer season or regular firearms bear season.

Section 2102(a) of the code (relating to regulations) provides that "[t]he 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 § 141.67 are proposed under this authority.

2. *Regulatory Requirements*

This proposed rulemaking will amend § 141.67 to prohibit the hunting of any furbearer using a dog during the overlap with any regular firearms deer season or regular firearms bear season.

3. *Persons Affected*

Persons concerned with hunting of any furbearer using a dog during the overlap with any regular firearms deer season or regular firearms bear season within this Commonwealth will be affected by this proposed rulemaking.

4. *Cost and Paperwork Requirements*

This proposed rulemaking should not result in any additional cost or paperwork.

5. *Effective Date*

This 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 about this proposed rulemaking, contact Jason L. DeCoskey, Director, Bureau of Wildlife Protection, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

BRYAN J. BURHANS,
Executive Director

Fiscal Note: 48-504. No fiscal impact; recommends adoption.

Annex A

TITLE 58. RECREATION

PART III. GAME COMMISSION

CHAPTER 141. HUNTING AND TRAPPING

Subchapter D. FURBEARERS

§ 141.67. Furbearer seasons.

(a) *Permitted devices.* It is lawful to hunt or take furbearers during any furtaking season with the following devices:

(1) A manually operated or semiautomatic rifle or manually operated handgun that propels single-projectile ammunition.

(2) A manually operated or semiautomatic, centerfire shotgun or muzzleloading shotgun. The firearm must be 10 gauge or less, that propels single-projectile ammunition or multiple-projectile shotgun ammunition not larger than # 4 buckshot. The centerfire shotgun's magazine

capacity may not exceed two rounds. The shotgun's total aggregate ammunition capacity may not exceed three rounds.

(3) A muzzleloading rifle or handgun that propels single-projectile ammunition.

(4) A bow and arrow.

(5) A crossbow and bolt.

(6) A manually operated or semiautomatic air rifle or manually operated air handgun .22 caliber or larger that propels single-projectile pellet or bullet ammunition. BB ammunition is not authorized.

(7) A leg-hold trap, except as prohibited under section 2361(a)(8) of the act (relating to unlawful acts concerning taking of furbearers).

(8) A body-gripping trap, except as prohibited under section 2361(a)(11) of the act.

(9) A cable restraint device authorized by § 141.66 (relating to cable restraints).

(10) A snare, except as prohibited under § 141.62(b) (relating to beaver and otter trapping).

(11) A cage or box trap, except as prohibited under section 2361(a)(17) of the act.

(12) *A raptor.* The raptor shall be lawfully possessed under a falconry permit under section 2925 of the act (relating to falconry permits).

(b) *Prohibitions.* While hunting furbearers during any furbearer hunting or trapping season, it is unlawful to:

(1) Use or possess multiple-projectile shotgun ammunition larger than # 4 buckshot, except as authorized under section 2525 of the act (relating to possession of firearm for protection of self or others).

(2) Use or possess a device or ammunition not provided for in the act or in this section, except as authorized under section 2525 of the act.

(3) Use any firearm, other than authorized in this paragraph, to dispatch legally trapped furbearers during the overlap with the regular or special firearms deer seasons:

(i) A manually operated or semiautomatic rimfire rifle or manually operated rimfire handgun .22 caliber or less.

(ii) A manually operated or semiautomatic air rifle or manually operated air handgun between .177 and .22 caliber, inclusive, that propels single-projectile pellet or bullet ammunition. BB ammunition is not authorized.

(4) Hunt any furbearer using a dog during the overlap with any regular firearms deer season or regular firearms bear season.

[Pa.B. Doc. No. 23-1512. Filed for public inspection November 3, 2023, 9:00 a.m.]