

RULES AND REGULATIONS

Title 31—INSURANCE

INSURANCE DEPARTMENT

[31 PA. CODE CH. 65]

Collision Loss Settlements

The Insurance Department (Department) hereby deletes §§ 65.11—65.14 to read as set forth in Annex A. The Department is publishing this deletion as a final-form rulemaking. The Department's authority is found in sections 206, 506, 1501 and 1502 of The Administrative Code of 1929 (71 P. S. §§ 66, 186, 411 and 412), and the act of June 17, 1998 (P. L. 464, No. 68) (40 P. S. §§ 991.2001—991.2013) (Act 68) (formerly the act of June 5, 1968 (P. L. 140, No. 78)), relating to the cancellation, refusal to renew and refusal to write private passenger automobile insurance policies. The regulations required an insurer to use actual cash value with certain adjustments as the standard for settling collision losses.

Purpose

The purpose of this rulemaking is to delete §§ 65.11—65.14, to eliminate outdated regulations that do not serve any compelling public purpose. The regulations were adopted May 5, 1970, under the authority of former Act 78. Under the standard automobile collision loss insurance policy the insurer contracts to pay the insured the "actual cash value" of the insured's automobile at the time of a total loss by the insured. The regulations reiterate that the standard for settling collision losses is actual cash value and requires insurers to adjust the book value of an automobile on the basis of fair market value plus the State sales tax on the cost of a replacement vehicle. The regulations further define the term actual cash value as the cost of repairing or replacing the damaged property with other property of like kind and quality in the same physical condition, commonly known as replacement cost less depreciation.

After careful review, the Department is deleting the regulations because they are no longer necessary. Collision loss settlements are covered more comprehensively in Chapter 62 (relating to motor vehicle physical damage appraisers) (physical damage appraisers), adopted December 28, 1973. The subject regulations duplicate the requirements in § 62.3, which establishes standards to be used to determine replacement value under the insurance policy provisions covering the total loss of a motor vehicle.

The physical damage appraisers regulations provide better protection for insureds than the subject regulation because they provide more options for determining the value of the vehicle. Examples in determining the vehicle value are the guide source method, the dealer quotation method and the actual cost method. These methods are defined in Chapter 62. In certain situations, insurers are required to offer the higher of the values obtained in settlement.

Comments

Notice of this proposed rulemaking was published at 27 Pa. B. 3061 (June 28, 1997) with a 30-day public comment period. No comments were received during the 30-day public comment period.

Fiscal Impact

The deletion of these regulations will not have any impact on costs associated with the Department, insurance companies, physical damage appraisers, political subdivisions or the public.

Paperwork

The deletion of these regulations imposes no additional paperwork requirements on the Department, insurers, physical damage appraisers or the public.

Persons Regulated

The deletion of these regulations applies to insurance companies and individuals that determine the value of a vehicle or cost of repairs to a damaged vehicle in this Commonwealth.

Contact Person

Questions regarding these regulations should be directed to: Peter Salvatore, Regulatory Coordinator, Office of Special Projects, 1326 Strawberry Square, Harrisburg, PA 17120, (717) 787-4429. Questions may also be e-mailed to psalvato@ins.state.pa.us or faxed to (717) 705-3873.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on June 18, 1997, the Department submitted a copy of this rulemaking to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Insurance Committee and the Senate Banking and Insurance Committee. In addition to the submitted rulemaking, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." In compliance with section 5(c) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments received. A copy of that material is available to the public upon request.

This rulemaking was deemed approved by the House Committee and Senate Committee on August 9, 1999, in accordance with section 5a(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)). IRRC met on August 19, 1999, and approved the regulations in accordance with section 5a(e) of the Regulatory Review Act (71 P. S. § 745.5a(e)).

Findings

The Insurance Commissioner finds that:

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

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

Order

The Insurance Commissioner, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 31 Pa. Code Chapter 65, are amended by deleting §§ 65.11—65.14 to read as set forth in Annex A.

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

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

(d) The regulations adopted by this order shall take effect upon publication in the *Pennsylvania Bulletin*.

M. DIANE KOKEN,
Insurance Commissioner

(Editor's Note: For the order of the Independent Regulatory Review Commission relating to this document, see 29 Pa. B. 4749 (September 4, 1999).)

Fiscal Note: Fiscal Note 11-151 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 31. INSURANCE

PART VII. PROPERTY, FIRE AND CASUALTY INSURANCE

CHAPTER 65. MISCELLANEOUS PROVISIONS

§§ 65.11—65.14. (Reserved).

[Pa.B. Doc. No. 99-1575. Filed for public inspection September 17, 1999, 9:00 a.m.]

[31 PA. CODE CH. 84a]

Minimum Reserve Standards for Individual and Group Health and Accident Insurance Contracts

The Insurance Department (Department) hereby amends Chapter 84a (relating to minimum reserve standards for individual and group health and accident insurance contracts) to read as set forth in Annex A.

Statutory Authority

The amendments are adopted under the authority of sections 206, 506, 1501 and 1502 of The Administrative Code of 1929 (71 P. S. §§ 66, 186, 411 and 412) and sections 301.1 and 311.1 of The Insurance Department Act of 1921 (40 P. S. §§ 71.1 and 93) (act).

Comments and Response

Notice of proposed rulemaking was published at 28 Pa.B. 4931 (October 3, 1998) with a 30-day comment period. During the 30-day comment period, comments were received from the Insurance Federation of Pennsylvania, Inc. (IFP). During its regulatory review, the Independent Regulatory Review Commission (IRRC) submitted comments to the Department. The following is a response to those comments.

Both IFP and IRRC questioned the application of the minimum standards for contract reserves to contracts issued prior to October 23, 1993, the effective date of Chapter 84a. The Department notice of July 7, 1994, stated that the minimum standards for contract reserves applied to guaranteed renewable or noncancellable contracts issued prior to October 23, 1993. The proposed changes to Chapter 84a published on October 3, 1998, applied the minimum standards for contract reserves to all contracts issued prior to October 23, 1993, irrespective of the renewability provisions of the contracts. The pro-

posed change was made in response to the passage of the Health Insurance Portability Accountability Act (Pub. L. 104-191, 110 Stat. 1936), better known as HIPAA, that essentially made all medical contracts guaranteed renewable. The IFP and IRRC commented that some contracts, such as disability income, issued prior to October 23, 1993, may be renewable at the option of the company and not subject to the guaranteed renewable requirements of HIPAA. The Department agrees with the IFP and IRRC and has amended § 84a.6(a)(2) (relating to contract reserves) to apply the minimum standards for contract reserves to contracts issued prior to October 23, 1993, which are guaranteed renewable or noncancellable as set forth in the contract or as prescribed under HIPAA.

Because of the amendment of § 84a.6(a), the IFP and IRRC suggested that any increase in reserves required for guaranteed renewable contracts issued prior to October 23, 1993, be phased in over a 3 to 5 year period. Section 84a.6(a)(3) has been included to allow that the additional reserves may be phased in over a 3 year period with 1/3 of the required reserve at December 31, 1999, 2/3 of the required reserve at December 31, 2000, and 100% of the required reserve at December 31, 2001, and after.

Editorial changes, therefore, have been made to § 84a.6(a) by renumbering the original proposed paragraphs (2) and (3) to paragraphs (4) and (5) respectively.

Additionally, the IFP requested a clarification in the preamble that section II of the Appendix is intended to be consistent with, and not a modification of, the interest standard in the NAIC's Minimum Reserve Standards For Individual and Group Health Insurance Contracts Model Regulation. The Department believes that section II of the Appendix clearly sets forth the minimum interest standard and the requested clarification is unnecessary.

The IFP also recommended that the preamble clarify that the reserve requirements of Chapter 84a apply only to domestic companies. Chapter 84a is promulgated under the authority of sections 301.1 and 311.1 of the act. Sections 301.1 and 311.1 of the act do not provide for any distinction between domestic and nondomestic insurers in the application of the requirements. Accordingly, the Department believes the applicability of the chapter to extend to nondomestic insurers. Consequently, the Department did not state in the preamble that the chapter applies only to domestic insurers.

IRRC commented that the proposed rulemaking was in error because the Legislative Reference Bureau (LRB) did not delete existing clauses (A) and (B) of § 84a.6(b)(4)(iii). However, using its editorial privilege, the LRB did insert a new subparagraph (iv) between subparagraphs (iii) and (iii)(A) and (B). This was done in lieu of deleting clauses (A) and (B) under subparagraph (iii) and repeating the same clauses under subparagraph (iv). Accordingly, the Department has taken no further action to modify the proposed rulemaking.

The Department has further considered the grammatical revision made in § 84a.4(b)(ii) (relating to claim reserves) as it appeared in the proposed rulemaking. The Department views the original language as correct and, accordingly, has retained the original language.

Affected Parties

The rulemaking applies to life insurance companies, property and casualty insurance companies and fraternal benefit societies marketing health and accident insurance in this Commonwealth.

*Fiscal Impact**State Government*

There will be no increase in cost to the Department due to the adoption of the modifications to Chapter 84a. As part of its solvency surveillance responsibilities the Department currently reviews the methodology used by an insurance company to calculate health and accident reserves to ensure that the reserves are adequate and comply with the minimum standard requirements. The revisions and clarifications of the minimum standards will not create additional staff time to perform the analysis.

General Public

Since the final rulemaking concerns the solvency requirements applied to insurance companies, the public will benefit from a financially sound insurance industry in the ability of insurers to fulfill their contractual obligations.

Political Subdivisions

The amendments will not impose additional costs on political subdivisions. However, because the rulemaking promotes stability in the insurance industry in this Commonwealth, political subdivisions' tax revenues will benefit as a result of fewer insurance insolvencies. Fewer insolvencies will result in less unemployment and will increase incentives for insurers to market new insurance products in this Commonwealth.

Private Sector

The final rulemaking may have some fiscal impact on insurers. To the extent that reserves for business issued prior to October 23, 1993, do not comply with the minimum standard reserve requirements, an insurance company will need to increase the reserves. The changes to the minimum contract reserves standards that apply specifically to long-term care insurance will not affect current business. These changes apply only to contracts issued after the adoption of final rulemaking. There may be some expense incurred by an insurance company in modifying the reserve calculation system to comply with the amended minimum reserve standards.

Paperwork

The adoption of the final rulemaking will not impose additional paperwork on the Department or the insurance industry. The new requirements of the amendments apply to the reserve calculations but will not result in additional paperwork.

Effectiveness/Sunset Date

This final rulemaking becomes effective upon publication in the *Pennsylvania Bulletin*. No sunset date has been assigned.

Contact Person

Questions regarding this final-form rulemaking, should be directed to Peter J. Salvatore, Regulatory Coordinator, Office of Special Projects, 1326 Strawberry Square, Harrisburg, PA 17120, (717) 787-4429, or e-mail psalvato@ins.state.pa.us.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 23, 1999, the Department submitted a copy of the notice of proposed rulemaking to IRRC and to the Chairpersons of the House Insurance Committee and the Senate Banking and Insurance Committee. In addition to the submitted amendments, the

Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of that material is available to the public upon request.

In preparing these final-form regulations, the Department considered all comments received from IRRC, the Committees and the public. These final-form regulations were deemed approved by the House and Senate Committees on August 9, 1999. In accordance with section 5a(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), IRRC met on August 19, 1999, and approved the regulation in accordance with section 5a(e) of the Regulatory Review Act.

Findings

The Commissioner finds that:

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

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

Order

The Commissioner, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 31 Pa. Code Chapter 84a, are amended by amending §§ 84a.1, 84a.3 and Appendix A to read as set forth at 28 Pa.B. 4931 (October 3, 1998) and amending §§ 84a.4 and 84a.6 to read as set forth in Annex A.

(b) The Commissioner shall submit this order, 28 Pa.B. 4931 and Annex A to the Office of General Counsel and Office of Attorney General for approval as to form and legality as required by law.

(c) The Commissioner shall certify this order, 28 Pa.B. 4931 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) The amendments adopted by this order shall take effect upon final publication in the *Pennsylvania Bulletin*.

M. DIANE KOKEN,
Insurance Commissioner

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission relating to this document, see 29 Pa.B. 4749 (September 4, 1999))

Fiscal Note: Fiscal Note 11-190 remains valid for the final adoption of the subject regulations.

Annex A**TITLE 31. INSURANCE****PART IV. LIFE INSURANCE****CHAPTER 84a. MINIMUM RESERVE STANDARDS FOR INDIVIDUAL AND GROUP HEALTH AND ACCIDENT INSURANCE CONTRACTS****§ 84a.4. Claim reserves.**

(a) *General requirements.*

(1) Claim reserves are required for incurred but unpaid claims on health and accident insurance contracts.

(2) Appropriate claim expense reserves are required with respect to the estimated expense of settlement of incurred but unpaid claims.

(3) The reserves for prior valuation years are to be tested for adequacy and reasonableness along the lines of claim runoff schedules in accordance with the statutory financial statement including consideration of residual unpaid liability.

(b) *Minimum standards for claim reserves of disability income benefits.*

(1) The maximum interest rate for claim reserves is specified in Appendix A (relating to specific standards for morbidity, interest and mortality).

(2) Minimum standards with respect to morbidity are those specified in Appendix A; except that, at the option of the insurer:

(i) For claims with a duration from the date of disablement of less than 2 years, reserves may be based on the insurer's experience, if the experience is considered credible, or upon other assumptions designed to place a sound value on the liabilities.

(ii) For group disability income claims with a duration from date of disablement of more than 2 years but less than 5 years, reserves may, with the approval of the Commissioner, be based upon the insurer's experience for which the insurer maintains underwriting and claim administration control if the experience is considered credible. For an insurer's experience to be considered credible, the insurer shall be able to provide claim termination patterns over no more than 6 years reflecting at least 5,000 claim terminations during the third through fifth claim durations on reasonably similar applicable policy forms. Reserve tables based on credible experience shall be adjusted regularly to maintain reasonable margins. Demonstrations may be required by the Commissioner based on published literature. The request for approval of a plan of modification to the reserve basis shall include the following:

(A) An analysis of the credibility of the experience.

(B) A description of how the insurer's experience is proposed to be used in setting reserves.

(C) A description and quantification of the margins to be included.

(D) A summary of the financial impact that the proposed plan of modification would have had on the insurer's last filed annual statement.

(E) A copy of the approval of the proposed plan of modification by the Commissioner of the state of domicile.

(F) Other information deemed necessary by the Commissioner.

(3) For contracts with an elimination period, the duration of disablement shall be measured, as dating from the time that benefits would have begun to accrue had there been no elimination period.

(c) *Minimum standards for claim reserves of other benefits.*

(1) The maximum interest rate for claim reserves is specified in Appendix A.

(2) Minimum standards with respect to morbidity and other contingencies shall be based on the insurer's experience, if the experience is considered credible, or upon other assumptions designed to place a sound value on the liabilities.

(d) *Claim reserve methods.* A reasonable actuarial method or combination of methods may be used to estimate claim liabilities. The methods used for estimating liabilities generally may be aggregate methods, or various reserve items may be separately valued. Approximations based on groupings and averages may also be employed. Adequacy of the claim reserves shall be determined in the aggregate.

§ 84a.6. Contract reserves.

(a) *General requirements.*

(1) Contract reserves are required for the following:

(i) The individual and group contracts with which level premiums are used.

(ii) The individual and group contracts with respect to which, due to the gross premium pricing structure at issue, the value of the future benefits at any time exceeds the value of any appropriate future valuation net premiums at that time. This evaluation may be applied on a rating block basis if the total premiums for the block were developed to support the total risk assumed and expected expenses for the block each year, and an actuary certifies the premium development. The actuary should state in the certification submitted to the Department with the reserve valuation data that premiums for the rating block were developed such that each year's premium was intended to cover that year's costs without any prefunding. If the premium is also intended to recover costs for prior years, the actuary shall also disclose the reasons for and magnitude of the recovery. The values specified in this subsection shall be determined on the basis specified in subsection (b).

(2) Contract reserves are not required for individual contracts and group certificates already in force on October 23, 1993, that are not guaranteed renewable or noncancellable as set forth in the contract or certificate or as prescribed under the Health Insurance Portability and Accountability Act (Pub. L. 104-191, 110 Stat. 1936).

(3) If this section requires contract reserves for individual contracts or group certificates already in force on October 23, 1993, for which contract reserves were not held as of December 31, 1998, the additional reserves may be phased in over a 3-year period with 1/3 of the required reserve at December 31, 1999, 2/3 of the required reserves at December 31, 2000, and 100% of the required reserve at December 31, 2001, and after.

(4) The contract reserve is in addition to claim reserves and premium reserves.

(5) The methods and procedures for contract reserves shall be consistent with those for claim reserves for a contract, or else appropriate adjustment shall be made when necessary to assure provision for the aggregate liability. The date of incurrence shall be the same in determining both the contract reserves and the claim reserves.

(b) *Minimum standards for contract reserves.*

(1) *Morbidity or other contingency.*

(i) Minimum standards with respect to morbidity are those in Appendix A (relating to specific standards for morbidity, interest and mortality). Valuation net premiums used under each contract shall have a structure consistent with the gross premium structure at issue of the contract as this relates to advancing age of the insured, contract duration and period for which gross premiums have been calculated.

(ii) Contracts for which tabular morbidity standards are not specified in Appendix A shall be valued using tables established for reserve purposes by a qualified actuary and acceptable to the Commissioner. The morbidity tables shall contain a pattern of incurred claim costs that reflect the underlying morbidity and may not be constructed for the primary purpose of minimizing reserves.

(iii) If a morbidity standard specified in Appendix A is on an aggregate basis, the morbidity standard may be adjusted to a select and ultimate basis to reflect the effect of insurer underwriting by policy duration. The adjustments shall be appropriate to the underwriting and be acceptable to the Commissioner.

(2) *Maximum interest rate.* The maximum interest rate is specified in Appendix A.

(3) *Termination rates.*

(i) Termination rates used in the computation of reserves shall be on the basis of a mortality table as specified in Appendix A except as noted in subparagraphs (ii) and (iii).

(ii) Total termination rates may be used at ages and durations when these exceed specified mortality table rates, but not in excess of the lesser of 80% of the total termination rate used in the calculation of the gross premiums or 8%.

(iii) For long-term care individual contracts and group certificates issued on and after January 1, 1999, termination rates in addition to the specified mortality table rates may be used. The termination rates other than mortality may not exceed the following:

(A) For policy years 1 through 4, the lesser of 80% of the voluntary lapse rate used in the calculation of gross premiums and 8%.

(B) For policy years 5 and later, the lesser of 100% of the voluntary lapse rate used in the calculation of gross premiums and 4%.

(4) Reserve method.

(i) For health and accident insurance except long-term care and return of premium or other deferred cash benefits, the minimum reserve is the reserve calculated on the 2-year full preliminary term method; that is, under which the terminal reserve is zero at the first and also the second contract anniversary.

(ii) For long-term care insurance, the minimum reserve is the reserve calculated as follows:

(A) For individual contracts and group certificates issued before October 23, 1993, reserves calculated on the 2-year preliminary term method.

(B) For individual contracts and group certificates issued on or after October 23, 1993, reserves calculated on the 1-year preliminary term method.

(iii) For return of premium or other deferred cash benefits in individual contracts and group certificates issued prior to October 23, 1993, the minimum reserve is the reserve calculated on the 2-year preliminary term method.

(iv) For return of premium or other deferred cash benefits in individual contracts and group certificates issued on or after October 23, 1993, the minimum reserve is the reserve calculated as follows:

(A) On the 1-year preliminary term method if the benefits are provided at any time before the twentieth anniversary.

(B) On the 2-year preliminary term method if the benefits are only provided on or after the twentieth anniversary. Under the Insurance Department (Department) guidelines for the review of return of premium option, the return of premium benefit shall be available beginning by the tenth anniversary. The reference to benefits provided on or after the twentieth anniversary does not modify the referenced Department guideline as it pertains to form approval. This reference to a minimum reserve standard for benefits beginning on or after the twentieth anniversary is necessary only as it pertains to forms that are sold in other states.

(v) The preliminary term method may be applied only in relation to the date of issue of a contract. Reserve adjustments introduced later, as a result of rate increases, revisions in assumptions—for example, projected inflation rates—or for other reasons, shall be applied immediately as of the effective date of adoption of the adjusted basis.

(5) *Negative reserves.* Negative reserves on a benefit may be offset against positive reserves for other benefits in the same contract, but the total contract reserve with respect to benefits combined may not be less than zero.

(6) *Nonforfeiture benefits.* The contract reserve on a policy basis may not be less than the net single premium for the nonforfeiture benefits at the appropriate policy duration, where the net single premium is computed according to the specifications listed in this section.

(c) *Alternative valuation methods and assumptions.* If the contract reserve on contracts to which an alternative basis is applied is not less in the aggregate than the amount determined according to the standards of subsection (b)(1)—(3), an insurer may use reasonable assumptions as to interest rates, termination or mortality rates, or both, and rates of morbidity or other contingency. Also, subject to the preceding condition, the insurer may employ methods other than the methods stated in subsection (b)(4) in determining a sound value of its liabilities under the contracts, including the following:

(1) The net level premium method.

(2) The 1-year full preliminary term method.

(3) Prospective valuation on the basis of actual gross premiums with reasonable allowance for future expenses.

(4) The use of approximations such as those involving age groupings, groupings of several years of issue, average amounts of indemnity and grouping of similar contract forms.

(5) The computation of the reserve for one contract benefit as a percentage of, or by other relation to the aggregate contract reserves exclusive of the benefit so valued.

(6) The use of a composite annual claim cost for all or a combination of the benefits included in the contracts valued.

(d) *Tests for adequacy and reasonableness of contract reserves.*

(1) Annually, an appropriate review shall be made of the insurer's prospective contract liabilities on contracts valued by tabular reserves to determine the continuing adequacy and reasonableness of the tabular reserves giving consideration to future gross premiums. The insurer shall make appropriate increments to the tabular reserves if the tests indicate that the basis of the reserves is no longer adequate, subject to the minimum standards of subsection (b).

(2) If a company has a contract or a group of related similar contracts, for which future gross premiums will be restricted so that the future gross premiums reduced by expenses for administration, commissions and taxes will be insufficient to cover future claims, the company shall establish contract reserves for the shortfall in the aggregate.

[Pa.B. Doc. No. 99-1576. Filed for public inspection September 17, 1999, 9:00 a.m.]

Title 58—RECREATION

FISH AND BOAT COMMISSION

[58 PA. CODE CH. 75]

Endangered, Threatened and Candidate Species

The Fish and Boat Commission (Commission) by this order amends Chapter 75 (relating to endangered species). The Commission is publishing these amendments under the authority of 30 Pa.C.S. (relating to Fish and Boat Code) (code). The amendments relate to fish and fishing.

A. *Effective Date*

These amendments will go into effect upon publication of an order adopting the regulations.

B. *Contact Person*

For further information on the changes, contact Andrew L. Shiels, Nongame and Endangered Species Unit, (814) 359-5113, 450 Robinson Lane, Bellefonte, PA 16823, or Laurie E. Shepler, Assistant Counsel, (717) 657-4546, P. O. Box 67000, Harrisburg, PA 17106-7000. This final rulemaking is available electronically through the Commission's Web site (<http://www.fish.state.pa.us>).

C. *Statutory Authority*

The amendments are published under the statutory authority of sections 2102 and 2305 of the code (relating to rules and regulations; and threatened and endangered species).

D. *Purpose and Background*

The amendments are designed to update, modify and improve Commission regulations pertaining to endangered, threatened and candidate fish species. The specific purpose of the amendments is described in more detail under the summary of changes. This final rulemaking combines amendments that were contained in two separate notices of proposed rulemaking published at 28 Pa.B. 3591 (August 1, 1998) and 29 Pa.B. 1087 (February 27, 1999).

E. *Summary of Changes*

(1) *Section 61.2 (relating to Delaware River and River Estuary)*. The Commission, by separate order, previously adopted changes to this section. That order appears at 29 Pa.B. 819 (February 13, 1999).

(2) *Sections 75.1, 75.2 and 75.3 (relating to endangered species; threatened species; and candidate species)*. The Commission maintains a list of fishes, reptiles, amphibians and aquatic organisms that have declined in distribution and abundance to levels resulting in a determination that these species are endangered, threatened or candidate species in this Commonwealth. These lists have been developed over the years with the help and judgment of recognized experts on Pennsylvania species, such

as the Fishes Advisory Committee (Committee). This staff/outside expert committee makes recommendations to the Commission staff, and ultimately, the Commissioners, regarding species lists.

A multiyear cooperative study involving staff and faculty from The Pennsylvania State University and the Commission by means of funding from the Wild Resource Conservation Fund has resulted in a method of objectively classifying fish species as to their distribution and abundance within this Commonwealth. The number of locations where a species has been found is combined with the number of individuals of that species found at each location to develop a standardized method of ranking the level of endangerment for all species of fish known to occur in this Commonwealth. This work combines the more than 11,000 fish records from the Commission's fisheries management database with those of retired Penn State professor Dr. Edwin Cooper, the Penn State Fish Museum, University of Michigan Museum of Zoology, Cornell University, National Museum of Natural History, Environmental Protection Agency and the Academy of Natural Sciences in Philadelphia. All records were entered into a computer database and converted to Geographic Information System (GIS) data coverages. A ranking system was created to determine the relative rarity of each species of fish found in this Commonwealth.

The results indicated that changes to the endangered, threatened and candidate lists were necessary and appropriate. At that time, 46 fish species were listed. A notice of proposed rulemaking, containing changes to the list, was published at 28 Pa. B. 3591. In the notice of proposed rulemaking (Regulation No. 48A-82), the Commission proposed to amend the list to include 33 fish species as endangered, 16 as threatened and 12 as candidate for a total of 61 fish species. Four species were taken off the then current list either because they were more common than previously believed or because they are believed to be extirpated.

After the notice of proposed rulemaking was published, the Committee met and further redefined the list due to additional species location information received. As the result of the additional input from the Committee and consistent with the recommendations of the Commission's staff, the Commission approved the publication of a separate notice of proposed rulemaking. A second notice of proposed rulemaking (Regulation No. 48A-93), containing changes for which public input was sought, was published at 29 Pa.B. 1087. Specifically, the bridled shiner (*Notropis bifrenatus*) was listed at that time as a candidate species in § 75.3(b), and this species kept this status in the first proposed rulemaking. Based on additional information, however, the Commission, in the second notice of proposed rulemaking, sought public comment to list this fish as an endangered species under § 75.1(b). The longhead darter was listed at that time as an endangered species (§ 75.1(b)). The first notice of proposed rulemaking proposed to move this species to the candidate list (§ 75.3(b)). The second proposed rulemaking sought public comment on including this fish on the threatened species list (§ 75.2(b)). Finally, the second proposed rulemaking dealt with the Potomac sculpin that was listed as candidate species on both the then existing list and the list contained in the first notice of proposed rulemaking. Based on additional information, the Commission proposed to remove that species from the candidate list because the species no longer warrants listing.

On final rulemaking, the Commission adopted the amendments to read as set forth at Annex A. The final

list of endangered, threatened and candidate species of fish encompasses 34% of the 159 species of fish native to this Commonwealth.

F. Paperwork

The amendments will not increase paperwork and will create no new paperwork requirements.

G. Fiscal Impact

The amendments will have no adverse fiscal impact on this Commonwealth or its political subdivisions. The amendments will impose no new direct costs on the private sector or the general public. It is noted that the direct regulatory significance of designation of a species of fish as an endangered or threatened fish is limited to prohibiting persons from taking, catching, killing or possessing these fish in this Commonwealth. Since none of the species listed have any commercial or recreational significance because of their rarity, there are no direct fiscal impacts from providing these protections.

The private sector and regulated community have asserted that designation of certain fish as endangered or threatened may have indirect fiscal impacts on them because of impacts on permitting decisions by the Department of Environmental Protection (DEP) and other agencies. If an endangered or threatened species is found in an area slated for development, applicants for permits may be required to conduct additional studies or adjust the project to avoid adverse impacts on these fish and their habitat. These are fiscal impacts resulting from regulatory and statutory authorities other than those under the aegis of the Commission. As part of the extensive public input process in connection with these proposed rulemakings, DEP was asked to assess some of these indirect impacts on programs and permitting under its jurisdiction. It opined that the proposed changes to the lists of endangered, threatened and candidate species of fish would have "little or no" impacts on the regulated community or DEP. Many of the additions to the list are found in the same watersheds as species already listed so there would be little additional burden placed on projects in those areas.

H. Public Involvement

The first notice of proposed rulemaking was published at 28 Pa.B. 3591. A second notice of proposed rulemaking was published at 29 Pa.B. 1087. Since the publication of the first notice of proposed rulemaking in August 1998, the Commission has extended the public comment period several times. The final deadline for the submission of public comments was March 31, 1999. During the public comment period, the Commission received a total of 280 comments. Among those comments were 56 electronic mail transmissions and two petitions, one containing 86 names and the other containing 76 names. Of the 280 comments, 254 were in favor of the proposed changes to the lists; 10 were opposed; 2 requested additional information and 14 requested that the public comment period be extended. There were also several letters from members of the General Assembly. Most of those letters asked the Commission to extend the public comment deadline. As a result of those requests, the Commission extended the public comment several times. Copies of all public comments were provided to the Commissioners.

In addition, the Commission held two public meetings/hearings on the proposed amendments. On October 30, 1998, the Commission held a public meeting/hearing at DEP's Regional Headquarters on Elmerton Avenue in Harrisburg. Five individuals testified. The Commission also held a public meeting/hearing in the Meadville area

on March 29, 1999. Eighteen individuals provided comments. The Senate Game and Fisheries Committee held a hearing on March 9, 1999. Copies of the transcripts from both public meetings/hearings and the Senate hearing were provided to the Commissioners.

Findings

The Commission finds that:

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

(2) A public comment period was provided and all comments received were considered.

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

Order

The Commission, acting under the authorizing statutes, orders that:

(a) The regulations of the Commission, 58 Pa. Code Chapter 75, are amended by amending §§ 75.1—75.3 to read as set forth at Annex A.

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

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

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

PETER A. COLANGELO,
Executive Director

Fiscal Note: 48A-82 and 48A-93. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 58. RECREATION

PART II. FISH AND BOAT COMMISSION

Subpart B. FISHING

CHAPTER 75. ENDANGERED SPECIES

§ 75.1. Endangered species.

* * * * *

- (b) *Fish*. The following species are endangered:
- (1) Northern brook lamprey, *Ichthyomyzon fossor*.
 - (2) Shortnose sturgeon, *Acipenser brevirostrum*.
 - (3) Lake sturgeon, *Acipenser fulvescens*.
 - (4) Atlantic sturgeon, *Acipenser oxyrinchus*.
 - (5) Spotted gar, *Lepisosteus oculatus*.
 - (6) Hickory shad, *Alosa mediocris*.
 - (7) Cisco, *Coregonus artedi*.
 - (8) Silver chub, *Macrhybopsis storeriana*.
 - (9) Gravel chub, *Erimystax x-punctatus*.
 - (10) Bridle shiner, *Notropis bifrenatus*.
 - (11) River shiner, *Notropis blennioides*.
 - (12) Ghost shiner, *Notropis buchanani*.

- (13) Ironcolor shiner, *Notropis chalybaeus*.
- (14) Blackchin shiner, *Notropis heterodon*.
- (15) Redfin shiner, *Lythrurus umbratilis*.
- (16) Longnose sucker, *Catostomus catostomus*.
- (17) Bigmouth buffalo, *Ictiobus cyprinellus*.
- (18) Black bullhead, *Amerius melas*.
- (19) Mountain madtom, *Noturus eleutherus*.
- (20) Tadpole madtom, *Noturus gyrinus*.
- (21) Northern madtom, *Noturus stigmosus*.
- (22) Burbot, *Lota lota* (inland populations only).
- (23) Threespine stickleback, *Gasterosteus aculeatus*.
- (24) Banded sunfish, *Enneacanthus obesus*.
- (25) Warmouth, *Lepomis gulosus*.
- (26) Longear sunfish, *Lepomis megalotis*.
- (27) Iowa darter, *Etheostoma exile*.
- (28) Eastern sand darter, *Etheostoma pellucida*.
- (29) Northern riffleshell mussel, *Epioblasma torulosa rangiana*.
- (30) Clubshell mussel, *Pleurobema clava*.

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§ 75.2. Threatened species.

* * * * *

- (b) *Fish.* The following species are threatened:
 - (1) Mountain brook lamprey, *Ichthyomyzon greeleyi*.
 - (2) Skipjack herring, *Alosa chrysochloris*.
 - (3) Goldeye, *Hiodon alosoides*.
 - (4) Mooneye, *Hiodon tergisus*.
 - (5) Bigmouth shiner, *Notropis dorsalis*.

- (6) Southern redbelly dace, *Phoxinus erythrogaster*.
- (7) Smallmouth buffalo, *Ictiobus bubalus*.
- (8) Spotted sucker, *Minytrema melanops*.
- (9) Brindled madtom, *Noturus miurus*.
- (10) Bluebreast darter, *Etheostoma camurum*.
- (11) Spotted darter, *Etheostoma maculatum*.
- (12) Tippecanoe darter, *Etheostoma tippecanoe*.
- (13) Channel darter, *Percina copelandi*.
- (14) Gilt darter, *Percina evides*.
- (15) Longhead darter, *Percina macrocephala*.

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§ 75.3. Candidate species.

* * * * *

- (b) *Fishes.*
 - (1) Ohio lamprey, *Ichthyomyzon bdellium*.
 - (2) Least brook lamprey, *Lampetra aepyptera*.
 - (3) American brook lamprey, *Lampetra appendix*.
 - (4) Longnose gar, *Lepisosteus osseus*.
 - (5) Bowfin, *Amia calva*.
 - (6) Central mudminnow, *Umbra limi*.
 - (7) Eastern mudminnow, *Umbra pygmaea*.
 - (8) Hornyhead chub, *Nocomis biguttatus*.
 - (9) River redhorse, *Moxostoma carinatum*.
 - (10) Brook silverside, *Labidesthes sicculus*.
 - (11) Brook stickleback, *Culaea inconstans*.

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[Pa.B. Doc. No. 99-1577. Filed for public inspection September 17, 1999, 9:00 a.m.]
