

PROPOSED RULEMAKING

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 93]

Water Quality Standards; Dunbar Creek et al. Stream Redesignations

The Environmental Quality Board (Board) proposes to amend Chapter 93 (relating to water quality standards). The amendments will modify the drainage lists at §§ 93.9c, 93.9k, 93.9l, 93.9o, 93.9r, 93.9t and 93.9v regarding designated water uses and water quality criteria as set forth in Annex A. The purpose of this proposed rulemaking is to update the designated uses so that the surface waters of this Commonwealth are afforded the appropriate level of protection. This proposed rulemaking fulfills the Commonwealth's obligations under State and Federal law to review and revise, as necessary, water quality standards that are protective of surface waters.

This proposed rulemaking was adopted by the Board at its meeting of April 20, 2021.

A. Effective Date

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as a final-form rulemaking. 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.A. §§ 1251—1388).

B. Contact Persons

For further information, contact Gary Walters, 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 by calling (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," and then navigate to the Board meeting of April 20, 2021).

C. Statutory and Regulatory Authority

This proposed rulemaking is being made under the authority of 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 to 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(c)(2)(A) of the CWA (33 U.S.C.A. §§ 1251(a)(2) and 1313(c)(2)(A)) set forth requirements for water quality standards.

D. Background and Purpose

The purpose of developing water quality standards is to protect this Commonwealth's surface waters. This Commonwealth's surface waters, through the water quality standards program, are protected for a variety of uses, including: aquatic life; drinking water supplies for hu-

mans, livestock and wildlife; irrigation for crops, turf and other horticultural activities; industrial water supplies; fish consumption; recreation; and special protection. The purpose of this proposed rulemaking is to update the designated uses so that the surface waters of this Commonwealth are afforded the appropriate level of protection.

Section 5 of the CSL (35 P.S. § 691.5) instructs the Department to consider water quality management and pollution control in the watershed as a whole, and the present and possible future uses of waters when adopting rules and regulations. In addition to these requirements, the Commonwealth has responsibilities under the CWA that require water quality standards to be reviewed and approved by the EPA for consistency with the mandates under that act. Section 101(a)(2) of the CWA (33 U.S.C.A. § 1251(a)(2)), establishes the National goal that, wherever attainable, water quality should provide for the protection and propagation of fish, shellfish and wildlife, and for recreation in and on the water. Section 303(c)(2)(A) of the CWA requires water quality standards to include: designated uses of waters; taking into consideration their use and value for public water supplies; propagation of fish and wildlife; recreational purposes; and agricultural, industrial and other purposes. Section 303(d)(4)(B) of the CWA establishes an antidegradation policy for waters where the quality of the water equals or exceeds levels necessary to protect the designated uses for these waters. The designated uses included in this proposed rulemaking are consistent with these State and Federal statutory mandates.

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 (BMP)) on individual sources of pollution. Section 303(c)(1) of the CWA, requires states to periodically review and revise, as necessary, their water quality standards. Water quality standards include designated uses, numeric and narrative criteria to protect those uses, and antidegradation requirements for surface waters. These proposed amendments are the result of new information presented for stream evaluations of designated uses.

Prior to establishing a regulation that modifies a stream designation, the Department has an obligation to protect existing uses when data indicates that a surface water attains or has attained an existing use. Section 93.1 (relating to definitions) defines "existing uses" as "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." Similarly, § 93.4c (relating to implementation of antidegradation requirements) requires the Department to make a final determination of existing use protection for a surface water as part of a final permit or approval action. During a review of a permit application and a draft permit, interested persons may provide the Department with additional information regarding existing use protection for the surface water. The Department also presents additional information in draft stream evaluation reports that are made available for public comment.

Where the existing uses are different than the designated uses for a surface water, the waterbody will immediately receive the water quality protection identified by either the attained uses or the designated uses,

whichever use is most protective. For example, if the designated use of a stream is listed as Cold Water Fishes (CWF) but the Department's evaluation of available existing use information indicates that the water also attains the use of High Quality waters (HQ), the stream would be protected for this HQ-CWF existing use prior to a rulemaking. A stream redesignation proposal will then be initiated through the rulemaking process to ensure the designated uses in the drainage lists found in §§ 93.9a—93.9z are consistent with the existing uses of the stream. See section E for a detailed explanation of the public participation process preceding the development of this proposed rulemaking.

In addition to existing use determinations made during a Department permit or approval process, stream use evaluations may be initiated in other ways. The Department may identify candidate streams for redesignation of uses during routine waterbody investigations. Other agencies may request use evaluations to be considered and members of the public may submit a rulemaking petition to the Board in accordance with § 93.4d (relating to processing of petitions, evaluations and assessments to change a designated use).

By protecting the water uses and the quality of the water necessary to maintain the uses, benefits may be gained in a variety of ways by all residents and visitors of this Commonwealth. For example, clean water used for drinking water supplies benefits the consumers by lowering drinking water treatment costs and reducing medical costs associated with drinking water illnesses. Clean surface waters benefit this Commonwealth by providing for increased tourism and recreational use of the waters. Clean water provides for increased wildlife habitat and more productive fisheries. Furthermore, clean water attracts businesses and industry that require a high quality of surface water for production or operation. This proposed rulemaking benefits not only local residents but those from outside the areas affected by this proposed rulemaking who come to enjoy the benefits and aesthetics of outdoor recreation.

The proposed amendments are the result of stream evaluations conducted by the Department in response to: petitions (Bear Run, Cranberry Creek, Two Lick Creek); a request from the Pennsylvania Fish and Boat Commission (PFBC) (Dunbar Creek); the Department's ongoing Statewide monitoring activities (UNT 08187 to South Branch Codorus Creek and Clyde Run); and an error identified in Chapter 93 (UNT 28168 to Oley Creek). The stream redesignations rely on the special protection qualifiers found at § 93.4b(a)(2)(i)(A) and (ii), (b)(1)(iii) and (v) and (b)(2) (relating to qualifying as High Quality or Exceptional Value Waters). The redesignations also include evaluation of the protected water uses specified in § 93.3 (relating to protected water uses) (UNT 08187 to South Branch Codorus Creek) and the less restrictive use qualifiers specified in § 93.4(b) (relating to Statewide water uses) (UNT 28168 to Oley Creek). The specific qualifiers applied for each of the stream redesignation recommendations are detailed in the individual stream evaluation reports available on the Department's web site. This proposed rulemaking was developed by the Bureau of Clean Water following a comprehensive evaluation of the physical, chemical and biological characteristics of these waterbodies and other information available on these waterbodies.

E. *Summary of Proposed Rulemaking*

Proposed redesignations of Dunbar Creek et al.

As part of this stream redesignation process and in accordance with § 93.4c, the Department offered opportunities for the public to provide data and information during the review of surface water uses. The Department provided public notice of its intent to assess Bear Creek, Clyde Run, Cranberry Creek, Dunbar Creek, Two Lick Creek, UNT 28168 to Oley Creek and UNT 08187 to South Branch Codorus Creek and requested water quality data for these streams through publications in the *Pennsylvania Bulletin* as summarized in Table 1.

Table 1. *Pennsylvania Bulletin* publication dates for notices of stream evaluation.

<i>Stream Name</i>	<i>Pennsylvania Bulletin</i>	<i>Publication Date</i>
Bear Run	37 Pa.B. 4490	August 11, 2007
	46 Pa.B. 3328	June 25, 2016
Clyde Run	40 Pa.B. 5643	October 2, 2010
Cranberry Creek	44 Pa.B. 6149	September 27, 2014
	48 Pa.B. 5924	September 22, 2018
Dunbar Creek	30 Pa.B. 2071	April 22, 2000
Two Lick Creek	34 Pa.B. 1520	March 13, 2004
UNT 28168 to Oley Creek	45 Pa.B. 2676	May 30, 2015
UNT 08187 to South Branch Codorus Creek	42 Pa.B. 2539	May 12, 2012

Additionally, notices of the intent to assess these streams were posted on the Department's web site. The Department directly notified affected municipalities, planning commissions, conservation districts and Commonwealth agencies of these redesignation evaluations in letters dated as summarized in Table 2.

Table 2. Letters of notification to affected governmental organizations and agencies.

<i>Stream Name</i>	<i>Date of Letter</i>
Bear Run	May 22, 2007
	July 8, 2016

<i>Stream Name</i>	<i>Date of Letter</i>
Clyde Run	November 5, 2010
Cranberry Creek	September 15, 2017
Dunbar Creek	April 19, 2000
Two Lick Creek	March 2, 2004
UNT 28168 to Oley Creek	May 11, 2015
UNT 08187 to South Branch Codorus Creek	April 2, 2012

In response to these notifications, the Department received one letter in support of the redesignation for Bear Run. The Department received no additional water quality data for Bear Run, Clyde Run, Dunbar Creek, Two Lick Creek, UNT 28168 to Oley Creek or UNT 08187 to South Branch Codorus Creek. Temperature data was provided by Karl M. Weiler for Cranberry Creek.

Following the period for data submission described in the notices of intent to assess, the Department evaluated all available water quality data and other applicable information for these streams, drafted stream evaluation reports and published the draft reports on its web site for public review and comment as summarized in Table 3. If members of the public are interested in receiving notifications of stream evaluations, including the notices of intent to assess and draft stream evaluation reports, they may subscribe to the Department's Electronic Notification System, eNotice.

Table 3. Stream evaluation draft report publication for public comment.

<i>Stream Name</i>	<i>Draft Report Publication Date</i>	<i>Petitioner (if applicable)</i>
Bear Run	February 24, 2017	Ken Sink Chapter of Trout Unlimited
Clyde Run	July 14, 2018	
Cranberry Creek	July 14, 2018	Brodhead Creek Watershed Association
Dunbar Creek	July 14, 2018	
Two Lick Creek	February 24, 2017	Ken Sink Chapter of Trout Unlimited
UNT 28168 to Oley Creek	July 14, 2018	
UNT 08187 to South Branch Codorus Creek	February 24, 2017	

Each draft report was open for public comment for no less than a 30-day period.

For Bear Run, one comment was received in support of the Exceptional Value Waters (EV) and HQ-CWF recommendations.

For Clyde Run, one comment was received in support of the recommendations.

For Cranberry Creek, approximately 159 comments were received in response to the draft report. Ten comments expressed opposition and 148 comments expressed support for the recommendations. A macroinvertebrate survey conducted by Normandeu Associates was submitted.

For Dunbar Creek, the Department received 46 comments in support of the recommendations.

For Two Lick Creek, the Department received three comments in response to the draft report. One comment was in support of the recommendation and two comments were in opposition.

No comments were received on the draft report for UNT 28168 to Oley Creek.

One comment was received in support of the EV recommendation for UNT 08187 to South Branch Codorus Creek.

Copies of the stream evaluation reports for these waterbodies are available on the Department's web site or from the contact persons listed in section B of this preamble. All data and comments received in response to these notifications were considered in the review of the surface water evaluations for these streams. The data

and information collected on these waterbodies support the Board's proposed rulemaking as set forth in Annex A.

Department staff delivered a presentation of this proposed rulemaking to the Agricultural Advisory Board on November 7, 2019. Staff provided a brief overview of the stream redesignation process and the Department's recommendations for the streams included in this proposed rulemaking.

The following is a brief summary of the Department's recommendations for each waterbody:

§ 93.9c. Drainage List C

Cranberry Creek—The Brodhead Creek Watershed Association submitted a petition requesting that Cranberry Creek, from its source to mouth, be considered for redesignation to EV. The indigenous aquatic community is an excellent indicator of long-term water quality conditions and is used as a measure of both water quality and ecological significance. The integrated benthic macroinvertebrate score test described at § 93.4b(b)(1)(v) was applied to Cranberry Creek. Dimmick Meadow Brook (05244) served as the EV reference for stream metrics comparisons. Three of four stations met the 92% comparison required to qualify for EV. Therefore, the Department recommends that the Cranberry Creek basin, from and including UNT 04948 to its mouth be designated as EV, Migratory Fishes (EV, MF) in § 93.9c (relating to Drainage List C). The remainder of the Cranberry Creek basin, from its source to UNT 04948 should maintain the current designated use of HQ-CWF, MF.

§ 93.9k. *Drainage List K*

UNT 28168 to Oley Creek—The Department conducted an evaluation of UNT 28168 to Oley Creek due to an error discovered in § 93.9k (relating to Drainage List K) that affected the Oley Creek basin and UNT 28168. The error listed these surface waters with two conflicting use designations. A correction to § 93.9k was made in the stream redesignation rulemaking published at 47 Pa.B. 7029 (November 18, 2017), which lists the designated use of UNT 28168 as HQ-CWF consistent with the 1979 rulemaking. UNT 28168 is also currently listed on the Commonwealth's CWA section 303(d) list of impaired waters. The aquatic life use of UNT 28168 is impaired, and the source has been identified on the CWA section 303(d) list as Abandoned Mine Drainage. The Department evaluated the stream to determine if the human caused conditions that created the impairment occurred before the special protection designation and whether or not the current designated use of HQ-CWF is attainable. As required by § 93.4(b), a use attainability analysis was conducted to determine the appropriate designated aquatic life use of the water. A survey of UNT 28168 indicated that it is appropriately listed on the section 303(d) list of impaired waters. Furthermore, historical aerial photography confirms that significant mining activity as early as 1939 caused conditions that prevented UNT 28168 from meeting the Conservation Area designated use in 1973 and the HQ designated use in 1979. Due to current limitations in available treatment technologies, land availability and remediation, for both point and nonpoint source control of the specific pollutants of concern, UNT 28168 will not attain the HQ-CWF use. Therefore, the Department recommends that UNT 28168 to Oley Creek be designated as CWF, MF in § 93.9k.

§ 93.9l. *Drainage List L*

Bear Run—The Ken Sink Chapter of Trout Unlimited submitted a petition requesting that the Bear Run basin, from its source to its confluence with South Branch Bear Run, be considered for redesignation to HQ or EV. On April 16, 2016, the PFBC added Bear Run, from its source to its confluence with South Branch Bear Run, to the List of Class A Wild Trout Waters following public notice and comment (46 Pa.B. 1977 (April 16, 2016)). The Bear Run basin, from its source to its confluence with South Branch Bear Run, qualifies as HQ based on § 93.4b(a)(2)(ii) regarding Class A wild trout stream qualifier. In addition, the portions of the Bear Run basin located entirely within State Game Land (SGL) 174 meet the definition in § 93.1 for an "outstanding National, State, regional or local resource water." These waters satisfy the HQ qualifiers in § 93.4b(a) and are located within SGL managed by the Pennsylvania Game Commission (PGC). The PGC has established coordinated water quality protective measures in its resource management plans that provide protection to substantial reaches of the watershed corridor. As such, these stream segments qualify as EV waters under § 93.4b(b)(1)(iii). Therefore, the Department recommends that: the Bear Run basin, from UNT 27063 to South Branch Bear Run excluding the headwaters of Brooks Run, be designated as EV in § 93.9l (relating to Drainage List L); and that the Bear Run basin, from its source to and including UNT 27063, and the Brooks Run basin from its source to and including UNT 27059, be designated as HQ-CWF in § 93.9l.

§ 93.9o. *Drainage List O*

UNT 08187 to South Branch Codorus Creek—The Department evaluated the UNT 08187 to South Branch Codorus Creek basin as part of ongoing Statewide moni-

toring efforts. Biological data were collected to evaluate UNT 08187 since the indigenous aquatic community is an excellent indicator of long-term water quality conditions. The integrated benthic macroinvertebrate score test described at § 93.4b(b)(1)(v) was applied to UNT 08187. Carbaugh Run (60248) served as the EV reference for stream metrics comparisons. Both stations on UNT 08187 met the 92% comparison required to qualify for EV. Therefore, the Department recommends the entire basin of UNT 08187 to South Branch Codorus Creek be designated as EV, MF in § 93.9o (relating to Drainage List O).

§ 93.9r. *Drainage List R*

Clyde Run—The Department evaluated the Clyde Run basin as part of ongoing Statewide monitoring efforts. Biological data were collected to evaluate Clyde Run since the indigenous aquatic community is an excellent indicator of long-term water quality conditions. The integrated benthic macroinvertebrate score test described at § 93.4b(b)(1)(v) was applied to Clyde Run. Korb Run (54831) served as the EV reference for stream metrics comparisons. The Clyde Run station met the 92% comparison required to qualify for EV. Therefore, the Department recommends the entire basin of Clyde Run be designated as EV in § 93.9r (relating to Drainage List R).

§ 93.9t. *Drainage List T*

Two Lick Creek—The Ken Sink Chapter of Trout Unlimited submitted a petition requesting that the Two Lick Creek main stem, from the tailrace of the Two Lick Reservoir to Yellow Creek, be considered for redesignation to HQ-CWF. The Two Lick Creek main stem is currently designated Trout Stocking (TSF). The indigenous aquatic community is an excellent indicator of long-term water quality conditions. The integrated benthic macroinvertebrate score test described at § 93.4b(a)(2)(i)(A) was applied to Two Lick Creek. Cross Fork (23765) and Kettle Creek (23661) served as the EV references for stream metrics comparisons. Data collected at two stations on Two Lick Creek in 2005 were compared to Cross Fork while data collected at one of the same stations in 2009 were compared to Kettle Creek. None of the Two Lick Creek samples exceeded the 83% comparison required to qualify for HQ. As a result of data collection, the Department documented the presence of a naturally reproducing Salmonidae community and other flora and fauna indigenous to a cold water habitat in Two Lick Creek. Therefore, the Department recommends the Two Lick Creek main stem, from the Two Lick Reservoir tailrace to the confluence of Yellow Creek, be designated as CWF in § 93.9t (relating to Drainage List T).

§ 93.9v. *Drainage List V*

Dunbar Creek—The PFBC submitted information to the Department requesting that the Dunbar Creek basin, from its source to Gist Run, be considered for redesignation to EV. The integrated benthic macroinvertebrate score test described at § 93.4b(b)(1)(v) was applied to Dunbar Creek. Clear Shade Creek (45293) served as the EV reference for stream metrics comparisons. Six of 12 stations on Dunbar Creek met the 92% comparison required to qualify for EV. In addition, the portions of the Dunbar Creek basin located entirely within SGL 51 meet the definition in § 93.1 for an "outstanding National, State, regional or local resource water." These waters are currently designated HQ and are located within SGL managed by the PGC. The PGC has established coordinated water quality protective measures in its resource management plans that provide protection to substantial reaches of the watershed corridor. As such, these stream

segments qualify as EV waters under § 93.4b(1)(iii). The PGC water quality protective measures combined with reasonable acid mine drainage remediation and recovery projects demonstrate that an EV designated use for the Glade Run basin as set forth in Annex A is appropriate. Therefore, the Department recommends EV designations in § 93.9v (relating to Drainage List V) for: the Dunbar Creek basin, from its source to Glade Run; the Glade Run basin, from the boundary of SGL 51 to Mouth; and the Dunbar Creek basin, from Glade Run to Gist Run.

Proposed correction to Drainage List C

In the Sobers Run rulemaking published at 48 Pa.B. 866 (February 10, 2018), Swiftwater Creek basin retained its HQ designation with the exception of adding an EV designation for the source of Swiftwater Creek to, but not including, UNT 04960 to Swiftwater Creek. The word “basin” was inadvertently omitted with the listing of UNT 04960 to Mouth, thereby eliminating listings for tributaries to that section of Swiftwater Creek. This proposed rulemaking restores the original HQ listing for those tributaries by adding the “basin” designation.

The Department recommends the Board adopt this proposed rulemaking as set forth in Annex A.

F. Benefits, Costs and Compliance

Benefits

Overall, this Commonwealth’s residents and visitors and its natural resources will benefit from this proposed rulemaking because it provides the appropriate level of protection to preserve the integrity of existing and designated uses of surface waters in this Commonwealth. Protecting water quality provides economic value to present and future generations in the form of a clean water supply for: human consumption, wildlife, irrigation and industrial use; recreational opportunities such as fishing (also for consumption), water contact sports and boating; and aquatic life protection. It is important for the Commonwealth to ensure that the associated opportunities and activities continue in a manner that is environmentally, socially and economically sound. Protection and maintenance of water quality ensures its future availability for all potential uses.

Increased property values are an economic and social benefit of clean water protected by this proposed regulation.

A reduction in toxics found in the waterways of this Commonwealth may lead to increased property values for properties located near rivers or lakes. The study, “The Effect of Water Quality on Rural Nonfarm Residential Property Values,” (Epp and Al-Ani, *American Journal of Agricultural Economics*, Vol. 61, No. 3 (Aug. 1979), pp. 529—534 (www.jstor.org/stable/1239441), used real estate prices to determine the value of improvements in water quality in small rivers and streams in this Commonwealth. Water quality, whether measured in pH or by the owner’s perception, has a significant effect on the price of adjacent property. The analysis showed a positive correlation between water quality and housing values. They concluded that buyers are aware of the environmental setting of a home and that differences in the quality of nearby waters affect the price paid for a residential property.

A 2010 report from the Delaware Riverkeeper Network (www.delawareriverkeeper.org/sites/default/files/River_Values_Report_0.pdf) discusses a case study from the Maine Agricultural and Forest Experiment Station which

compared water-front property values based on whether the water that the homes faced was considered clean. Properties located near higher quality waters had higher market value than if the waterbody was lower in water quality. It was shown in some cases that a decline in water quality can completely abate the market value premium associated with a home being a waterfront property.

A 2006 study from the Great Lakes region estimated that property values were significantly depressed in two regions associated with toxic contaminants (polyaromatic hydrocarbons (PAHs), polychlorinated biphenyls (PCBs) and heavy metals). The study showed that a portion of the Buffalo River region (approximately 6 miles long) had depressed property values of between \$83 million and \$118 million for single-family homes, and between \$57 million and \$80 million for multifamily homes as a result of toxic sediments. The same study estimated that a portion of the Sheboygan River (approximately 14 miles long) had depressed property values of between \$80 million and \$120 million as the result of toxics. “Economic Benefit of Sediment Remediation in the Buffalo River AOC and Sheboygan River AOC: Final Project Report,” (www.nemw.org/Econ). While this study related to the economic effect of contaminated sediment in other waters in the Great Lakes region, the idea that toxic pollution depresses property values applies in this Commonwealth. A reduction in toxic pollution in this Commonwealth’s waters has a substantial economic benefit to property values in close proximity to waterways.

Maintenance of abundant and healthy fish and wildlife populations and support for outdoor recreation are social and economic benefits of clean water protected by this proposed regulation.

Businesses requiring a clean source water and those in the recreation industry will be positively affected by these proposed regulations. The maintenance and protection of the water quality will ensure the long-term availability of recreational fisheries and other activities.

The Center for Rural Pennsylvania prepared a report titled “Economic Values and Impacts of Sport Fishing, Hunting and Trapping Activities in Pennsylvania,” (www.rural.palegislature.us/documents/reports/hunting.pdf) that examined such economic values and impacts between the years 1995 to 1997. The report provides a snapshot of how much money these sporting activities bring to this Commonwealth and how they affect employment in rural areas. A major finding of that report is the total annual value of \$3.7 billion for sport fishing was almost three times the \$1.26 billion spent in travel costs to use fishing resources during the same 12-month period. The total net annual benefit to anglers was \$2.49 billion.

According to the “Angler Use, Harvest and Economic Assessment on Wild Trout Streams in Pennsylvania,” (R. Greene, et al. 2005) (www.fishandboat.com/Fish/Fisheries/TroutPlan/Documents/WildTroutStreamAnglerUseCatchEconomicContribution.pdf), the PFBC collected information to assess the economic impact of wild trout angling in this Commonwealth, during the 2004 regular trout season, April 17 through September 3, 2004. The PFBC found, based on the results of this study, that angling on wild trout streams contributed over \$7.16 million to this Commonwealth’s economy during the regular trout season in 2004.

According to the “2011 National Survey of Fishing, Hunting and Wildlife-Associated Recreation” (www.census.gov/prod/2012pubs/fhw11-nat.pdf) for this Commonwealth,

prepared by the United States Fish and Wildlife Service, approximately 1,101,000 anglers, participated in fishing and 3,598,000 persons participated in wildlife watching in the year 2011. In addition, all fishing related expenditures in this Commonwealth totaled \$485 million in 2011. These expenditures include food and lodging, transportation and other expenses (that is, equipment rental, bait, cooking fuel). In 2011, wildlife watchers spent \$1.3 billion on activities in this Commonwealth. Expenditures include trip-related costs and equipment.

According to the Outdoor Industry Association, this Commonwealth's outdoor recreation generates 251,000 direct in-State jobs, \$8.6 billion in wages and salaries and \$1.9 billion in State and local tax revenue. These figures include both tourism and outdoor recreation product manufacturing. The association reports that 56% of Commonwealth residents participate in outdoor recreation each year. (See Outdoor Industry Association (2017), "The Outdoor Economy: Take it Outside for American Jobs and a Strong Economy," (<https://outdoorindustry.org/resource/pennsylvania-outdoor-recreation-economy-report>).

Southwick Associates prepared a report for the Theodore Roosevelt Conservation Partnership that analyzed the economic contribution of outdoor recreation in this Commonwealth. This 2018 report, "The Power of Outdoor Recreation Spending in Pennsylvania: How hunting, fishing, and outdoor activities help support a healthy state economy" (www.trcp.org/wp-content/uploads/2018/12/TRCP-and-Southwick-PA-Economic-Analysis-12-6-18.pdf) states that during 2016 there were more than 390,000 jobs supported by outdoor recreation activities in this Commonwealth, and for comparison, this is more than the number of jobs in this Commonwealth that supported the production of durable goods. Outdoor recreation had an economic contribution in this Commonwealth of almost \$17 billion in salaries and wages paid to employees and over \$300 million in Federal, State and local tax revenue.

Maintenance of the current green infrastructure along streams and the associated reduction in tax expenditures are social and economic benefits of clean water protected by this regulation.

The findings of a 2014 Lehigh Valley Planning Commission report entitled "Lehigh Valley Return on Environment" demonstrates the benefits when clean water and natural areas are protected. The report (www.lvpc.org/pdf/2014/ReturnOnEnvironment_Dec_18_2014.pdf) states, "the current green infrastructure along streams in the Lehigh Valley reduces tax dollars by avoiding more than \$110.3 million annually in expenditures for water supply (\$45.0 million), disturbance (flood) mitigation (\$50.6 million) and water quality (\$14.7 million)."

Savings in water filtration for downstream communities that rely on surface waters for water supplies and availability of unpolluted water for domestic, agricultural and industrial uses are benefits of clean water protected by this proposed regulation.

The Department identified one public water supply facility with a raw water intake located within the candidate stream sections for redesignation in this proposed rulemaking package. This public water supplier, which serves over 22,300 citizens, will benefit from this proposed rulemaking because its raw source water will be afforded a higher level of protection. This proposed rulemaking further provides the likelihood of economic benefits to the public water supplier and the local community. By maintaining clean surface water, public water suppliers may avoid the costly capital investments that

are often required for the installation of advanced water treatment processes as well as the higher annual operations and maintenance costs associated with effective operation of these processes. In turn, the public water supplier's customers will benefit from reduced fees for clean drinking water.

Compliance costs

This proposed rulemaking is necessary to protect and maintain the existing water quality of the HQ and EV waters, to protect existing water uses and to effectively control discharges of pollutants into the affected streams. These amendments to Chapter 93 will not impose any new compliance costs on persons engaged in regulated activities under existing individual permits or approvals from the Department since existing discharges are included in any determination of existing water quality when streams are redesignated to HQ or EV. Additional compliance costs may arise when permits or approvals are necessary for new or expanded regulated activities in HQ or EV waters, or when streams are redesignated to different nonspecial protection designations (such as WWF to CWF). Discharges to special protection streams are not eligible for coverage under National Pollutant Discharge Elimination System (NPDES) general permits, based on § 92a.54(a)(8) (relating to general permits), and therefore, require individual permits. Some additional cost will be incurred by facilities required to obtain an individual permit. The Department will implement stream redesignations through permit and approval actions.

Persons adding or expanding a discharge to a stream may need to provide a higher level of treatment or additional BMPs to protect the designated and existing uses of the affected streams, which could result in higher engineering, construction or operating costs. Treatment costs and BMPs are based on the specific design and operation of a facility, which also requires consideration of the size of the discharge in relation to the size of the stream and many other factors.

In the future, a person who proposes a new, additional or increased point source discharge to an EV or HQ water would need to satisfy the antidegradation requirements found in § 93.4c(b)(1). An applicant for any new, additional or increased point source discharge to special protection waters must evaluate nondischarge alternatives, and the applicant must use an alternative that is environmentally sound and cost effective when compared to the costs associated with achieving a nondegrading discharge. If a nondischarge alternative is not environmentally sound and cost-effective, an applicant for a new, additional or increased discharge must utilize antidegradation best available combination of technologies (ABACT), which include cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies.

The permit applicant must demonstrate in the permit application that their new or expanded activities will not lower the existing water quality of special protection streams. If an applicant cannot meet these nondegrading discharge requirements, a person who proposes a new, additional or increased discharge to HQ waters is given an opportunity to demonstrate there is a social or economic benefit of the project that would justify a lowering of the water quality. The social and economic justification (SEJ) demonstration must show that the discharge is necessary to accommodate important economic or social development in the area in which the waters are located and that a lower water quality will protect all other

applicable water uses for the waterbody. SEJ is not available for proposed discharges to EV waters. The water quality of EV streams must be maintained and protected.

There are approximately 10,300 facilities across this Commonwealth that hold permits issued under Chapter 92a (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance). This Statewide number of approximately 10,300 includes NPDES permits for concentrated animal feeding operations, industrial waste, municipal separate storm sewer systems (MS4), treated sewage and stormwater associated with industrial activities. This total does not include NPDES permits for stormwater associated with construction activities, discussion follows. Out of this Statewide total of approximately 10,300, only nine facilities currently hold active NPDES permits for discharges to the stream segments being considered for redesignation in this proposed rulemaking.

The types of discharges with active NPDES permits located in waters affected by this proposed rulemaking include industrial wastewater and industrial stormwater. There is also one Chapter 91 (relating to general provisions) pesticide permit within the waters affected by this proposed rulemaking. Since the presence of these discharge activities did not preclude the attainment of the HQ or EV use, the discharges to these waters may continue as long as the discharge characteristics of both quality and quantity remain the same. Thus, redesignation to special protection does not impose any additional special treatment requirements on existing permitted discharges.

As previously stated, discharge activities to special protection streams are not eligible for coverage under NPDES general permits and, therefore, require individual permits. Individual permits are required in special protection waters because the existing quality of the water must be protected. Therefore, each discharge must be evaluated individually for each stream. Site-specific characteristics of the stream water quality are used to determine effluent limitations for discharges to a stream. The individual permits are necessary to track the quality and quantity of any existing permitted discharges to ensure that additional or increased discharges to a special protection water do not occur without the Department's review in accordance with the antidegradation regulations.

There are no NPDES general permits available for discharges to special protection waters. In addition, there are no general permits available for discharges of treated sewage effluent or industrial waste effluent with the exception of the PAG-04 (general permit for small flow sewage treatment facilities). The Department identified four NPDES permits for discharges to waters proposed for redesignation to special protection, and all four permits are currently individual permits. Consequently, there would be no change in the permitting requirements for these activities.

The remaining five NPDES permits discharge into Two Lick Creek, which is recommended for redesignation from TSF to CWF. The types of discharges with active NPDES permits located in the Two Lick Creek basin include industrial waste and industrial stormwater. These permits will not be affected by the redesignation.

Although no stormwater discharges from MS4s have been identified in the waters proposed for redesignation, in general, local governments that are MS4s will most

likely have additional costs associated with MS4 permitting requirements for discharges to HQ or EV waters. Any MS4 that discharges to an HQ or EV water will be required to obtain an individual permit. The application fee for a new individual permit is \$5,000 compared to \$500 for the general permit (that is, NPDES General Permit for Stormwater Discharges from Small MS4s (PAG-13)). If there is an existing MS4 permit (whether it is currently the general permit or an individual permit) to discharge into one of the proposed HQ or EV waters, any subsequent permit application fee for an individual permit is \$2,500. The annual fee for all MS4 permits is the same, whether it is for coverage under the general permit or for an individual permit. There is a difference in cost between the initial issuance of an individual permit and approval of coverage under the general permit due to increased staff time needed to review permit applications and implementation oversight that is associated with individual permits. An individual permit allows for the tailoring of an MS4's stormwater management program and its implementation of the minimum control measures.

Statewide, there are thousands of active earth disturbance activities requiring general or individual NPDES permits for stormwater discharges associated with construction activities issued under Chapter 102 (relating to erosion and sediment control). These permits for stormwater discharges associated with construction activities were not included in the preceding permit analyses because of the short-term, temporary nature of these permitted discharges.

A person proposing a new earth disturbance activity requiring a permit under Chapter 102 with a discharge to an HQ or EV water must obtain an individual permit and comply with the antidegradation provisions, as applicable. Where a permitted discharge existed prior to the receiving waterbody attaining an existing or designated use of HQ or EV, those persons may continue to operate using BMPs that have been approved by the Department and implemented. Any new discharges to the waterbody would be required to comply with the antidegradation provisions, as applicable, and must undergo an antidegradation analysis. Based on the analysis, additional construction and post-construction BMPs may need to be implemented on the remaining area that will be disturbed.

The administrative filing fee for an individual permit is \$1,500 compared to \$500 for the general permit, as set forth in § 102.6(b)(1) (relating to permit applications and fees). The erosion and sediment (E&S) BMPs and their ABACT rating, if applicable, are identified in the Department's Erosion and Sedimentation Pollution Control Manual (363-2134-008) and the Department's Alternative E&S and Post-Construction Stormwater Management BMPs list. The Department may also approve alternative BMPs that maintain and protect the existing water quality and water uses.

Where onlot sewage systems are planned, compliance with the sewage facilities planning and permitting regulations in Chapters 71, 72 and 73 (relating to administration of Sewage Facilities Planning Program; administration of Sewage Facilities Permitting Program; and standards for onlot sewage treatment facilities) will continue to satisfy § 93.4c. Permit applicants of sewage facilities with proposed discharges to HQ waters, subject to antidegradation requirements, may demonstrate SEJ at the sewage facilities planning stage and need not redemonstrate SEJ at the discharge permitting stage.

The SEJ demonstration process is available to sewage and nonsewage discharge applicants for any naturally occurring substances identified in accordance with the Department's Water Quality Antidegradation Implementation Guidance (391-0300-002).

A more detailed description of cost is discussed in the Regulatory Analysis Form, required under the Regulatory Review Act (71 P.S. §§ 745.1—745.14), that accompanies this proposed rulemaking.

Compliance assistance plan

This proposed rulemaking will not impose any new compliance requirements on persons engaged in regulated activities under existing individual permits or approvals from the Department. When applying for permits or approvals for new, additional or increased discharges, the Department will provide compliance assistance.

Paperwork requirements

NPDES general permits are not available for discharges to HQ or EV waters. Applications for individual permits will require additional paperwork. The individual permits are necessary to track the quality and quantity of any existing permitted discharges to ensure that additional or increased discharges to a special protection water do not occur without the Department's review in accordance with the antidegradation regulations.

This proposed rulemaking will not, however, impose any new paperwork requirements on persons engaged in regulated activities under existing individual permits or approvals from the Department. When applying for permits or approvals for new, additional or increased discharges to HQ or EV waters, additional information may need to be submitted to the Department as part of the permit application or approval request. As discussed previously, the permit applicant will complete an antidegradation analysis. The applicant will describe how the proposed activity will be conducted to maintain existing water quality. If water quality cannot be maintained and the proposed discharge will be to an HQ water, the applicant may submit an SEJ for the lowering of water quality.

G. Pollution Prevention

The Federal Pollution Prevention Act of 1990 (42 U.S.C.A. §§ 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.

The water quality standards and antidegradation program are major pollution prevention tools because the objective is to prevent degradation by maintaining and protecting existing water quality and existing uses. Although the antidegradation program does not prohibit new or expanding wastewater discharges, nondischarge alternatives must be implemented when environmentally sound and cost-effective. Nondischarge alternatives, when implemented, remove impacts to surface water and may reduce the overall level of pollution to the environment by remediation of the effluent through the soil. In addition, if no environmentally sound and cost-effective alterna-

tives are available, discharges must be nondegrading except as provided in § 93.4c(b)(1)(iii) regarding SEJ in HQ waters.

H. Sunset Review

These regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

I. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on June 24, 2021, the Department submitted a copy of this proposed rulemaking and a copy of the 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 regulations 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 September 14, 2021.

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 Hearings

The Board will hold a virtual public hearing for the purpose of accepting comments on this proposed rulemaking. The hearing will be held on August 30, 2021, at 2 p.m.

Persons wishing to present testimony at the hearing must contact Jennifer Swan for the Department and the Board, (717) 783-8727 or RA-EPEQB@pa.gov, by August 26, 2021, to reserve a time to present testimony.

Organizations are limited to designating one witness to present testimony on their behalf. Verbal testimony is

limited to 5 minutes for each witness. 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 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 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 the hearing, individuals are encouraged to visit the Board’s webpage for the most current information for accessing the hearing.

Any members of the public wishing to observe the public hearing without providing testimony are also di-

rected to access the Board’s webpage. Those who have not registered with Jennifer Swan in advance as described previously will remain muted for the duration of the public hearing.

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.

PATRICK McDONNELL,
Chairperson

Fiscal Note: 7-557. No fiscal impact; (8) 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

DESIGNATED WATER USES AND WATER QUALITY CRITERIA

§ 93.9c. Drainage List C.

Delaware River Basin in Pennsylvania

Delaware River

Stream	Zone	County	Water Uses Protected	Exceptions to Specific Criteria
* * * * *				
3—Paradise Creek	Basin, Devils Hole Creek to Forest Hills Run	Monroe	HQ-CWF, MF	None
4—Forest Hills Run	Basin, Source to Swiftwater Creek	Monroe	HQ-CWF, MF	None
5—Swiftwater Creek	Basin, Source to UNT 04960 at 41°5’58.5”N; 75°20’4.8”W	Monroe	EV, MF	None
6—UNT 04960	Basin	Monroe	HQ-CWF, MF	None
5—Swiftwater Creek	Basin , UNT 04960 to Mouth	Monroe	HQ-CWF, MF	None
4—Forest Hills Run	Basin, Swiftwater Creek to Mouth	Monroe	HQ-CWF, MF	None
3—Paradise Creek	Basin, Forest Hills Run to [Mouth] Cranberry Creek	Monroe	HQ-CWF, MF	None
4—Cranberry Creek	Basin, Source to UNT 04948 at 41°8’28.6”N; 75°16’58.7”W	Monroe	HQ-CWF, MF	None
5—UNT 04948	Basin	Monroe	EV, MF	None
4—Cranberry Creek	Basin, UNT 04948 to Mouth	Monroe	EV, MF	None
3—Paradise Creek	Basin, Cranberry Creek to Mouth	Monroe	HQ-CWF, MF	None
3—Michael Creek	Basin	Monroe	HQ-CWF, MF	None
* * * * *				

§ 93.9k. Drainage List K.

Susquehanna River Basin in Pennsylvania
Susquehanna River

Stream	Zone	County	Water Uses Protected	Exceptions to Specific Criteria
* * * * *				
2—Salem Creek	Basin	Luzerne	CWF, MF	None
2—Nescopeck Creek	Basin, Source to [PA 309 Bridge] Oley Creek	Luzerne	HQ-CWF, MF	None
<u>3—Oley Creek</u>	<u>Basin, Source to UNT 28168 at 41°3'7.1"N; 75°54'40.8"W</u>	<u>Luzerne</u>	<u>HQ-CWF, MF</u>	<u>None</u>
<u>4—UNT 28168</u>	<u>Basin</u>	<u>Luzerne</u>	<u>CWF, MF</u>	<u>None</u>
<u>3—Oley Creek</u>	<u>Basin, UNT 28168 to Mouth</u>	<u>Luzerne</u>	<u>HQ-CWF, MF</u>	<u>None</u>
<u>2—Nescopeck Creek</u>	<u>Basin, Oley Creek to PA 309 Bridge at 41°2'14.7"N; 75°57'11.9"W</u>	<u>Luzerne</u>	<u>HQ-CWF, MF</u>	<u>None</u>
2—Nescopeck Creek	Main Stem, PA 309 Bridge to Mouth	Luzerne-Columbia	TSF, MF	None
* * * * *				

§ 93.9l. Drainage List L.

Susquehanna River Basin in Pennsylvania
West Branch Susquehanna River

Stream	Zone	County	Water Uses Protected	Exceptions to Specific Criteria
* * * * *				
3—Tributaries to West Branch Susquehanna River	Basins, North Run to [Chest Creek] Bear Run	Clearfield	CWF, MF	None
<u>3—Bear Run</u>	<u>Basin, Source to UNT 27063 at 40°54'5.1"N; 78°50'51.0"W</u>	<u>Indiana</u>	<u>HQ-CWF, MF</u>	<u>None</u>
<u>4—UNT 27063</u>	<u>Basin</u>	<u>Indiana</u>	<u>HQ-CWF, MF</u>	<u>None</u>
<u>3—Bear Run</u>	<u>Basin, UNT 27063 to Brooks Run</u>	<u>Indiana</u>	<u>EV, MF</u>	<u>None</u>
<u>4—Brooks Run</u>	<u>Basin, Source to UNT 27059 at 40°54'10.5"N; 78°49'41.6"W</u>	<u>Indiana</u>	<u>HQ-CWF, MF</u>	<u>None</u>
<u>5—UNT 27059</u>	<u>Basin</u>	<u>Indiana</u>	<u>HQ-CWF, MF</u>	<u>None</u>
<u>4—Brooks Run</u>	<u>Basin, UNT 27059 to Mouth</u>	<u>Indiana</u>	<u>EV, MF</u>	<u>None</u>
<u>3—Bear Run</u>	<u>Basin, Brooks Run to South Branch Bear Run</u>	<u>Indiana</u>	<u>EV, MF</u>	<u>None</u>
<u>3—Bear Run</u>	<u>Basin, South Branch Bear Run to Mouth</u>	<u>Indiana</u>	<u>CWF, MF</u>	<u>None</u>
<u>3—Tributaries to West Branch Susquehanna River</u>	<u>Basins, Bear Run to Chest Creek</u>	<u>Clearfield</u>	<u>CWF, MF</u>	<u>None</u>
3—Chest Creek	Basin, Source to Patton Water Supply	Cambria	HQ-CWF, MF	None
* * * * *				

§ 93.9o. Drainage List O.

Susquehanna River Basin in Pennsylvania
Susquehanna River

Stream	Zone	County	Water Uses Protected	Exceptions to Specific Criteria
* * * * *				
3—Stoverstown Branch	Basin	York	WWF, MF	None
3—South Branch Codorus Creek	Basin, Source to [UNT from Glen Rock Valley at RM 16.85] UNT 08187 at 39°46'26.7"N; 76°43'15.2"W	York	WWF, MF	None
4—UNT 08187	Basin	York	EV, MF	None
3—South Branch Codorus Creek	Basin, UNT 08187 to UNT from Glen Rock Valley at 39°47'36"N; 76°43'49"W	York	WWF, MF	None
4—UNT to South Branch Codorus Creek Through Glen Rock Valley	Basin	York	CWF, MF	None
* * * * *				

§ 93.9r. Drainage List R.

Ohio River Basin in Pennsylvania
Clarion River

Stream	Zone	County	Water Uses Protected	Exceptions to Specific Criteria
* * * * *				
3—Clarion River	Basin, Maxwell Run to [Callen Run] Clyde Run	Elk-Jefferson	CWF	None
4—Clyde Run	Basin	Elk	EV	None
3—Clarion River	Basin, Clyde Run to Callen Run	Elk-Jefferson	CWF	None
4—Callen Run	Basin	Jefferson	HQ-CWF	None
* * * * *				

§ 93.9t. Drainage List T.

Ohio River Basin in Pennsylvania
Kiskiminetas River

Stream	Zone	County	Water Uses Protected	Exceptions to Specific Criteria
* * * * *				
6—Two Lick Creek				
7—South Branch Two Lick Creek	Basin, Source to Confluence with North Branch	Indiana	HQ-CWF	None
7—North Branch Two Lick Creek	Basin, Source to Confluence with South Branch	Indiana	CWF	None
6—Two Lick Creek	Main Stem, Confluence of North and South Branches to [Mouth] Two Lick Reservoir tailrace	Indiana	TSF	None

Stream	Zone	County	Water Uses Protected	Exceptions to Specific Criteria
7—[Unnamed] Tributaries to Two Lick Creek	Basins, Confluence of North and South Branches to [Mouth] <u>Two Lick Reservoir tailrace</u>	Indiana	CWF	None
[7—Browns Run	Basin	Indiana	CWF	None
7—Buck Run	Basin	Indiana	CWF	None
7—Dixon Run	Basin	Indiana	CWF	None
7—Penn Run	Basin	Indiana	CWF	None
7—Allen Run	Basin	Indiana	CWF	None
7—Ramsey Run	Basin	Indiana	CWF	None
7—Stoney Run	Basin	Indiana	CWF	None]
6—Two Lick Creek	<u>Basin, Two Lick Reservoir tailrace to Yellow Creek</u>	Indiana	CWF	None
7—Yellow Creek	[Main Stem] Basin, Source to [Yellow Creek State Park Dam] Little Yellow Creek	Indiana	CWF	None
[8—Unnamed Tributaries to Yellow Creek	Basins, Source to Yellow Creek State Park Dam	Indiana	CWF	None
8—Leonard Run	Basin	Indiana	CWF	None
8—Laurel Run	Basin	Indiana	CWF	None
8—Rose Run	Basin	Indiana	CWF	None
8—Laurel Run	Basin	Indiana	CWF	None]
8—Little Yellow Creek	Basin	Indiana	HQ-CWF	None
7—Yellow Creek	<u>Basin, Little Yellow Creek to Yellow Creek State Park Dam</u>	Indiana	CWF	None
7—Yellow Creek	Main Stem, Yellow Creek State Park Dam to Mouth	Indiana	TSF	None
8—[Unnamed] Tributaries to Yellow Creek	[Main Stem] Basins, Yellow Creek State Park Dam to Mouth	Indiana	CWF	None
[8—Ferrier Run	Basin	Indiana	CWF	None
7—Tearing Run	Basin	Indiana	CWF	None
7—Cherry Run	Basin	Indiana	CWF	None]
6—Two Lick Creek	<u>Main Stem, Yellow Creek to Mouth</u>	Indiana	TSF	None
7—Tributaries to Two Lick Creek	<u>Basins, Yellow Creek to Mouth</u>	Indiana	CWF	None
6—Weirs Run	Basin	Indiana	CWF	None
* * * * *				

§ 93.9v. Drainage List V.

Ohio River Basin in Pennsylvania
Monongahela River

Stream	Zone	County	Water Uses Protected	Exceptions to Specific Criteria
* * * * *				
4—Dunbar Creek	Basin, Source to [Gist Run] <u>Glade Run</u>	Fayette	[HQ-CWF] <u>EV</u>	None

Stream	Zone	County	Water Uses Protected	Exceptions to Specific Criteria
<u>5—Glade Run</u>	<u>Basin, Source to Boundary of SGL 51</u>	<u>Fayette</u>	<u>HQ-CWF</u>	<u>None</u>
<u>5—Glade Run</u>	<u>Basin, Boundary of SGL 51 to Mouth</u>	<u>Fayette</u>	<u>EV</u>	<u>None</u>
<u>4—Dunbar Creek</u>	<u>Basin, Glade Run to Gist Run</u>	<u>Fayette</u>	<u>EV</u>	<u>None</u>
5—Gist Run	Basin	Fayette	TSF	None
* * * * *				

[Pa.B. Doc. No. 21-1194. Filed for public inspection July 30, 2021, 9:00 a.m.]

DEPARTMENT OF HEALTH

[28 PA. CODE CHS. 201 AND 211]

Long-Term Care Nursing Facilities

The Department of Health (Department), after consultation with the Health Policy Board, proposes to amend §§ 201.1—201.3 and 211.12(i), to read as set forth in Annex A.

Due to the projected length of the complete revisions to the Department’s regulations and given that few if any changes have been made to the existing regulations over the last 24 years, the Department tentatively intends to promulgate proposed amendments to Part IV Subpart C (relating to long-term care facilities) in five separate parts. The Department believes that promulgating the changes in this way will allow the public a greater opportunity to thoroughly examine the proposed amendments and provide detailed comments to the proposed changes. It will also allow the Department to focus more closely on those comments and provide a more considered and cogent response to questions and comments. This proposed rulemaking is the first set of amendments to be proposed.

The Department tentatively proposes to promulgate the amendments to Subpart C in the following sequence. The actual contents of each proposed rulemaking packet are subject to change as the Department develops each packet.

Proposed Rulemaking 1

- § 201.1. Applicability.
- § 201.2. Requirements.
- § 201.3. Definitions.
- § 211.12(i). Nursing Services.

Proposed Rulemaking 2

- § 201.23. Closure of facility.
- Chapter 203. Application of Life Safety Code for Long-Term Care Nursing Facilities.
- Chapter 204. Physical Environment and Equipment Standards for Alteration, Renovation or Construction of Long-Term Care Nursing Facilities. (new)
- Chapter 205. Physical Environment and Equipment Standards for Long-Term Care Nursing Facilities.

§ 207.4. Ice containers and storage.

Proposed Rulemaking 3

- § 201.11. Types of ownership.
- § 201.12. Application for license.
- § 201.13. Issuance of license.
- § 201.15. Restrictions on license.
- § 201.17. Location.
- § 201.22. Prevention, control and surveillance of tuberculosis (TB).
- § 209.1. Fire department service.
- § 209.7. Disaster preparedness.
- § 209.8. Fire drills.
- § 211.1. Reportable diseases.

Proposed Rulemaking 4

- § 201.14. Responsibility of licensee.
- § 201.18. Management.
- § 201.19. Personnel policies and procedures.
- § 201.20. Staff development.
- § 201.27. Advertisement of special services.
- § 201.30. Access requirements.
- § 201.31. Transfer agreement.
- § 207.2. Administrator’s responsibility.
- § 211.2. Physician services.
- § 211.4. Procedure in event of death.
- § 211.5. Clinical records.
- § 211.6. Dietary services.
- § 211.7. Physician assistants and certified registered nurse practitioners.
- § 211.9. Pharmacy services.
- § 211.12. Nursing services.
- § 211.15. Dental services.
- § 211.16. Social services.

Proposed Rulemaking 5

- § 201.21. Use of outside resources.
- § 201.24. Admission policy.
- § 201.25. Discharge policy.
- § 201.26. Power of attorney.
- § 201.29. Resident’s rights.
- § 209.3. Smoking.

§ 211.3. Oral and telephone orders.

§ 211.8. Use of restraints.

§ 211.10. Resident care policies.

§ 211.11. Resident care plan.

§ 211.17. Pet therapy.

I. *Background and Need for Amendments*

The percentage of adults 65 years of age or older in this Commonwealth is increasing. In 2010, approximately 15% of Pennsylvanians were 65 years of age or older. In 2017, this number increased to 17.8%. This Commonwealth also has a higher percentage of older adults when compared to other states. In 2017, this Commonwealth ranked fifth in the Nation in the number (2.2 million) of older adults and seventh in percentage (17.8%). The increase in older Pennsylvanians is expected to continue. It has been estimated that by 2030, there will be 38 older Pennsylvanians (65 years of age or older) for every 100-working age Pennsylvanians (15 years of age to 64 years of age). Penn State Harrisburg, Pennsylvania State Data Center. Population Characteristics and Change: 2010 to 2017 (Research Brief). <https://pasdc.hbg.psu.edu/data/research-briefs/pa-population-estimates> (last visited: November 25, 2020). As the number of older Pennsylvanians increases, the number of those needing long-term care nursing will also increase. It has been estimated that an individual turning 65 years of age today has an almost 70% chance of needing some type of long-term nursing care during the remainder of their lifetime. U.S. Department of Health and Human Services. How Much Care Will You Need? <https://longtermcare.acl.gov/the-basics/how-much-care-will-you-need.html> (last visited: December 4, 2020). Currently, there are more than 72,000 Pennsylvanians residing in 689 long-term care nursing facilities licensed by the Department.

The Department's long-term care nursing facilities regulations have not been updated since 1999, with the last significant update occurring in 1997 after the 1996 amendment to the Health Care Facilities Act (HCFA or act) (35 P.S. §§ 448.101–448.904b). Since that time, there have been substantial changes in the means of delivering care and providing a safe environment for residents in long-term care nursing facilities. This proposed rulemaking is necessary to improve the quality of care delivered to residents, increase resident safety and minimize procedural burdens on health care practitioners who provide care to residents in long-term care nursing facilities.

The Department began the process of updating the current long-term care regulations in late 2017. The Department sought review, assistance and advice from members of a long-term care work group (LTC Work Group) consisting of relevant stakeholders. The members of the LTC Work Group were drawn from a diverse background and included representatives from urban and rural long-term care facilities and various stakeholder organizations and consumer groups that work in the area of resident care and delivery of services. The LTC Work Group members consisted of representatives from the following organizations: American Institute of Financial Gerontology; Baker Tilly Virchow Krause, LLP; Berks Heim and Rehabilitation; Fulton County Medical Center; Garden Spot Community; HCR ManorCare; Inglis House; Landis Communities; Leading Age; Legg Consulting Services; LIFE Pittsburgh; Luzerne County Community College; The Meadows at Blue Ridge; Mennonite Home, Lutheran Senior Life Passavant Community; PA Coalition of Affiliated Healthcare and Living Communities; Penn-

sylvania Home Care Association; University of Pittsburgh; and Valley View Nursing Home. The following State agencies participated: Department of Aging; the Department of Human Services (DHS); and the Department of Military and Veteran's Affairs (DMVA).

The members of the LTC Work Group met regularly during 2018 with the LTC Work Group's primary focus being the simplification and modernization of the existing long-term care regulations. Upon completion of the LTC Work Group's discussions, the Department conducted an internal review of the recommended changes. While the Department accepted most of the language and substantive changes proposed by the LTC Work Group and attempted to incorporate them in this proposed rulemaking, the Department is proposing additional changes to language and additional substantive changes, as well.

During 2019 and 2020, the Department conferred with other agencies, that will be potentially affected by the proposed regulatory changes, to seek their input on provisions within their substantive expertise. These agencies included the Department of Aging, DHS and DMVA. The Department received recommendations from these agencies regarding the draft proposed regulations and made additional changes to the proposed regulations to enhance resident safety and quality of care.

This is the first rulemaking packet developed as a result of the previous discussions. The purpose of this rulemaking is to create consistency between Federal and State requirements for long-term care nursing facilities by expanding the adoption of the Federal requirements to include all the requirements set forth in 42 CFR Part 483, Subpart B (relating to requirements for long term care facilities). This proposed rulemaking also updates existing definitions applicable to long-term care nursing facilities by adding, updating and deleting definitions as fully explained as follows. Finally, this proposed rulemaking increases the number of direct care hours that long-term care nursing facilities are required to provide to residents, per shift, while also clarifying that nursing staff providing such care must possess the appropriate competencies and skills necessary to do so.

II. *Description of Proposed Amendments*

§ 201.1. *Applicability*

The Department proposes to delete the phrases "profit and nonprofit" and "which provide either skilled nursing care or intermediate nursing care, or both, within the facilities under the act." These phrases are presently used in this section to describe the types of long-term care nursing facilities to which Part IV, Subpart C applies. The Department proposes, with the previous deletions, to add the phrase "as defined in section 802.1 of the act (35 P.S. § 448.802a)" after the term "long-term care nursing facilities" to clarify that this subpart applies to all long-term care nursing facilities as defined by the act. The act applies to all long-term care nursing facilities regardless of whether the facility is designated as a profit or nonprofit. In addition, the definition of a long-term care nursing facility under the act is more descriptive than what is presently provided for in this section of the regulations. The proposed changes to directly reference the definition of "long-term care nursing facility" add clarity and promote consistency in the application of the act and in the application and scope of this subpart to long-term care nursing facilities.

§ 201.2. *Requirements*

The Department proposes to break § 201.2 (relating to requirements) into four subsections. The existing lan-

guage will move into subsection (a), with some changes. Specifically, the Department proposes to update the citation to the Federal requirements and delete the exceptions to the Federal requirements that are currently listed in this section. The effect of this change will be to adopt the Federal requirements in 42 CFR Part 483, Subpart B in their entirety. In subsection (b), the Department proposes to incorporate by reference Chapter 7 and Appendix PP—Guidance to Surveyors for Long-Term Care Facilities from the Centers of Medicare & Medicaid Services (CMS) State Operations Manual. Chapter 7 and Appendix PP are the parts of the State Operations Manual that are applicable to the implementation of 42 CFR Part 483, Subpart B. The Department proposes to add language in subsection (c) to clarify that a long-term care nursing facility may still apply for an exception under §§ 51.31—51.34 (relating to exceptions). The Department proposes to add language in subsection (d) to clarify that a violation of the Federal requirements will be considered a violation at the State level as well, unless an exception has been granted under §§ 51.31—51.34.

The Department's surveyors survey long-term care nursing facilities for compliance with both the State and Federal regulations for long-term care nursing facilities. With respect to the Federal regulations, the Department is designated as the State Survey Agency for CMS. As such, the Department is responsible for conducting surveys of facilities, including long-term care nursing facilities, for compliance with the participation requirements for Medicare and Medicaid¹. The Federal participation requirements for long-term care nursing facilities are located at 42 CFR Part 483, Subpart B. Presently, only three long-term care nursing facilities licensed by the Department do not participate in either Medicare or Medicaid. The remaining facilities participate in either Medicare or Medicaid, and as such, are already required at the Federal level to comply with the Federal requirements. See 42 CFR 483.1 (relating to basis and scope). Requiring all long-term care nursing facilities to comply with the Federal requirements across the board at the State level, without exceptions, will make the survey process more efficient and will create consistency and eliminate confusion in the application of standards for all long-term care nursing facilities that are licensed in this Commonwealth. In addition, all long-term care nursing facilities licensed by the Department were and are already required to comply with some of the Federal requirements based on the existing language in this section. Thus, any negative impact in applying the Federal requirements to the three facilities that do not participate in Medicare or Medicaid will be minimum and is vastly outweighed by the need for consistency in the application of standards in long-term care nursing facilities Statewide.

§ 201.3. Definitions

The Department proposes to divide § 201.3 (relating to definitions) into two subsections. In subsection (a), the Department proposes to incorporate all terms that are defined in 42 CFR Part 483, Subpart B to be consistent with the adoption of the Federal requirements in § 201.2. The incorporation of terms in subsection (a) includes all terms specifically defined in 42 CFR 483.5 (relating to definitions), as well as all other terms that are defined throughout 42 CFR Part 483, Subpart B. The Department also proposes to incorporate all terms that are defined in the State Operations Manual, Chapter 7 and Appendix PP—Guidance to Surveyors for Long-Term Care Faci-

ities, issued by CMS. The Department proposes to delete existing terms that are incorporated in subsection (a). The Department proposes to delete definitions that are outdated or for which ordinary dictionary definitions apply. In subsection (b), the Department proposes to retain, update or add certain definitions that are not defined in either the Federal requirements or the State Operations Manual. The changes are as follows:

1. As explained in more detail as follows, the following definitions are proposed to be deleted because they are now incorporated by reference from either the Federal regulations or the State Operations Manual, or both: abuse (including verbal abuse; sexual abuse; physical abuse; mental abuse; involuntary seclusion; and neglect); administrator; charge nurse; clinical laboratory; dietician; director of nursing services; elopement; exit or exitway; full-time; interdisciplinary team; nurse aide, restraint (including physical restraint and chemical restraint); and social worker.

Abuse is defined in 42 CFR 483.5 and in multiple sections of Appendix PP of the State Operations Manual. Abuse includes verbal abuse, sexual abuse, physical abuse and mental abuse. Verbal abuse is further defined in Appendix PP of the State Operations Manual in section F600. Sexual abuse is defined separately in 42 CFR 483.5 and further defined in section F600 of Appendix PP of the State Operations Manual. Physical abuse is defined in section F600 of Appendix PP of the State Operations Manual. Mental abuse is defined in section F600 of Appendix PP of the State Operations Manual. Involuntary seclusion, which is included in the existing regulations, is defined in section F603 of Appendix PP of the State Operations Manual. Neglect is defined separately in 42 CFR 483.5 and in section F609 of Appendix PP of the State Operations Manual.

Administrator is defined at 42 CFR 483.70(d)(2) (relating to administration). Charge nurse is a licensed nurse designated by a long-term care nursing facility to serve in this capacity under 42 CFR 483.35(a)(2) (relating to nursing services). Laboratory services are covered under 42 CFR 483.50(a) (relating to laboratory, radiology, and other diagnostic services). A facility that provides its own laboratory services or performs any laboratory tests directly must have a certificate under section 353 of the Clinical Laboratory Improvement Amendments of 1988 (CLIA) (42 U.S.C.A. § 263a). The term "clinical laboratory" is defined in the CLIA.

A dietician is referred to as a qualified dietician under the Federal requirements and is defined at 42 CFR 483.60 (relating to food and nutrition services). A director of nursing services is a registered nurse designated by a long-term care nursing facility to serve in this capacity under 42 CFR 483.35(b)(2). Elopement, which refers to a resident leaving the premises or a safe area without authorization, is defined in section F689 of Appendix PP of the State Operations Manual.

Exit is defined in section F906 in Appendix PP of the State Operations Manual. Full-time is defined in Appendix PP of the State Operations Manual, sections F727 and F801, as working more than 35 or more hours a week. Interdisciplinary team is defined in 42 CFR 483.21(b)(2)(ii) (relating to comprehensive person-centered care planning). Nurse aide is defined in 42 CFR 483.5. Restraint refers to both physical and chemical restraints, 42 CFR 483.12 (relating to freedom from abuse, neglect and exploitation). Physical restraints and chemical restraints are defined in Appendix PP of the State Opera-

¹ In this Commonwealth, Medicaid is referred to or known as Medical Assistance (MA).

tions Manual in sections F604 and F605, respectively. Social worker is defined in 42 CFR 483.70(p).

2. The Department proposes to delete the following definitions because they are outdated and will no longer be used in this subpart: existing facility; locked restraints; medical record practitioner; resident activities coordinator; residential unit; responsible person; and skilled or intermediate nursing care.

3. The Department proposes to delete the following definitions because they are not used in this subpart, and therefore, a definition is not necessary: audiologist; dietetic service supervisor; occupational therapist; occupational therapy assistant; physical therapist; physical therapy assistant; practice of pharmacy; and speech/language pathologist.

4. The Department proposes to delete the following definitions because the ordinary dictionary definition applies: ambulatory resident and nonambulatory resident. The terms “ambulatory” and “nonambulatory” are understood to have their ordinary dictionary definitions when applied to describe a resident who is able to walk or not able to walk in a long-term care nursing facility. Separate definitions for “ambulatory resident” and “nonambulatory resident” are not necessary and could result in conflict and confusion if they remained in this subpart.

5. The Department proposes to delete the following definitions, and replace them with new terms and definitions in subsection (b):

The definition of “proprietary drug” will be deleted and replaced with the definition of “non-prescription medication.” The shift from the use of the term “proprietary drug” to “non-prescription medication” reflects a change in terminology used in the long-term care nursing environment. The definition will also be changed to reflect common usage of this term to refer to an over-the-counter medication that is purchased without a prescription.

The definition of “nonproprietary drug” will be deleted. The use of the word “prescription” more accurately reflects the current terminology that is used. The existing definition of the word “prescription” will be updated to: (1) replace the word “drugs” with the word “medications” to reflect current terminology; (2) replace the words “licensed medical” with “health care” before the word “practitioner” for consistency with the use and meaning of the term “health care practitioner” in this subpart; and (3) delete the word “his” to make this definition gender neutral.

6. The Department proposes to update the following definitions, and include them in subsection (b):

The citation to HCFA in the definition of “act” will be updated to reflect the proper citation that encompasses all provisions of the act.

The definition of “licensed practical nurse” will be updated to add the acronym “LPN” and to include a citation to the regulations of the State Board of Nursing to more accurately describe an individual licensed in this capacity under the Practical Nurse Law (63 P.S. §§ 651—667.8).

The terms “drug” and “drugs” will be replaced with “medication” and “medications” in the definitions for “administration of drugs,” “drug administration” and “drug dispensing” to reflect current terminology used to describe the process of administering medications to residents in long-term care nursing facilities. The Department is not proposing any substantive changes to these three definitions. However, as a result of these changes,

the definitions for “medication administration” and “medication dispensing” will be moved so that they appear in alphabetical order in § 201.3(b).

The definition of “registered nurse” will be updated with minor changes to the phrasing of the definition for clarity. This includes the addition of the acronym “RN” and a citation to the regulations of the State Board of Nursing to more accurately describe an individual licensed in this capacity under the Professional Nursing Law (63 P.S. §§ 211—225.5).

7. The following definitions will be retained and included in subsection (b) with no changes: alteration; authorized person to administer drugs and medications; basement; CRNP—certified registered nurse practitioner; clinical records; controlled substance; corridor; department; drug or medication; facility; licensee; NFPA; nurse aide; nursing care; nursing service personnel; pharmacist; pharmacy; physician assistant; and resident.

8. The Department proposes to add the following definition to subsection (b):

The Department proposes to add the definition of “health care practitioner” from the act for consistency in the application of the term to long-term care nursing facilities and to recognize the range of health care professionals that provide care to residents in long-term care nursing facilities. The term “practitioner” when used as a standalone term in this subpart is considered to be synonymous with those individuals defined as a “health care practitioner” under the act.

§ 211.12. Nursing services

The Department proposes to amend subsection (i) to add the phrase “for each shift” to ensure that there are proper nursing staff to provide direct care² for residents throughout the 24-hour period. The Department is concerned that without this clarification, a facility might attempt to meet the requirement for the minimum number of direct care hours by frontloading the required hours during one part of the day, leaving residents without adequate care for the remainder of the 24-hour period. This addition also aligns with the Federal requirements that long-term care nursing facilities post on a daily basis the number of nursing staff directly responsible for resident care on a “per shift” basis. See 42 CFR 483.35(g)(1)(iii).

The Department proposes to increase the minimum number of direct resident care hours from 2.7 to 4.1. Numerous studies, including a study by CMS in 2001, have found a direct correlation between the quality of resident care, quality of resident life and the number of direct care hours that the resident receives. Benefits of higher staffing ratios include improved activity levels, lower mortality rates, fewer infections, less antibiotic use, fewer pressure ulcers and fewer catheterized residents, improved eating patterns and pain levels and improved mental health. Juh Hyun Shin, PhD, RN & Sung-Heui Bae, PhD, MPH, RN. Nurse Staffing, Quality of Care, and Quality of Life in U.S. Nursing Homes, 1996—2011, 38 Journal of Gerontological Nursing 46 (2012). In its 2001 study, CMS suggested that a minimum of 4.1 hours of direct care per resident day would improve the quality of care provided to a resident, and that anything below that amount could “result in harm and jeopardy to residents.” Medicare and Medicaid Programs;

² Under the Federal requirements, which are adopted by the Department in § 201.2, direct care refers to assisting a resident, through interpersonal contact, with care and services that allow the resident to attain or maintain the highest practicable physical, mental and psychosocial well-being. 42 CFR 483.70(q)(1).

Reform of Requirements for Long-Term Care Facilities, See 80 FR 42168, 42202 (July 16, 2015).

Despite this finding, CMS declined to include a minimum number of direct care hours when it proposed to update the Federal requirements in 2015. CMS agreed that the existing staffing requirements needed to be clarified but believed that it did not have sufficient information at that time to require a specific number of staffing hours. *Id.* at 42201. CMS was also concerned that requiring specific numbers would conflict with requirements already established by states and “would limit flexibility and innovation in designing new models of person-centered care delivery to residents.” *Id.* at 42175.

Instead, CMS proposed language that would require nursing staff to possess the appropriate competencies and skills to provide health care and services to residents in long-term care facilities. CMS also proposed that long-term care facilities use a facility assessment to determine direct care staff needs. *Id.* at 42171. In the final-form rulemaking, CMS responded to concerns about its failure to implement required minimum staffing hours, by reiterating that it was concerned that a mandated ratio could have unintended consequences such as staffing to a minimum, input substitution (hiring for one position by eliminating another), task diversion (assigning non-standard tasks to a position) and the stifling of innovation. Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 FR 68688, 68753—68759 (October 4, 2016). The lack of a Federal requirement has left it up to states to determine and set a required minimum number of direct care hours.

Nationally, in 2016 the number of reported actual total direct care nursing hours (including RNs, LPN/LVNs and NAs) was, on average, on par with the recommended 4.1 hours per resident day. However, there was wide variation among states with some states such as Florida, Alaska, Idaho, Oregon and Utah exceeding 4.5 hours per resident day. Kaiser Family Foundation. Nursing Facilities, Staffing, Residents and Facility Deficiencies: 2009 through 2016. (2018). <https://www.kff.org/report-section/nursing-facilities-staffing-residents-and-facility-deficiencies-2009-through-2016-staffing-levels/> (last visited: March 19, 2021). However, minimum requirements set by states continued to be lower than the recommended 4.1 hours of direct care per resident day. *Id.*

The Department reviewed the regulations of the surrounding states of New York, New Jersey, Maryland, Delaware, Ohio and West Virginia to determine if those states have set a minimum requirement for direct care nursing hours. A review of New Jersey, Maryland, Delaware, Ohio and West Virginia regulations reflects minimum requirements from 2.25 hours to 3.67 hours. New York does not have a minimum level, but instead merely provides that sufficient staffing is required. See N.Y. Comp. Codes R. & Regs. tit. 10, § 415.13(a). West Virginia has the lowest minimum requirement of direct care resident hours with a required minimum of 2.25 hours. See W. Va. Code R. § 64-13-8. Ohio and New Jersey require a minimum of 2.5 hours, Maryland requires a minimum of 3.0 hours and Delaware has the highest requirement at 3.67 hours of care. See Ohio Admin. Code 3701-17-08; N.J. Admin. Code § 8:85-2.2; Md. Code Regs. 10.07.02.19; and 16 Del. Admin. Code § 3201-5.0.³

³ See also, Harrington, Charlene, Ph.D. Nursing Home Staffing Standards in State Statutes and Regulations. (2010). <https://theconsumervoice.org/uploads/files/issues/Harrington-state-staffing-table-2010.pdf> (last visited: March 19, 2021) (state-by-state summary of statutes and regulations pertaining to nursing home staffing requirements).

Momentum is gaining, however, for states to act regarding nursing staff ratios in long-term care nursing facilities as the novel coronavirus (COVID-19) pandemic has heightened awareness of this issue. Legislation was recently introduced in New York that, if enacted, will establish a minimum requirement of 4.85 direct care nursing hours. Safe Staffing for Quality Care Act, Assembly Bill 108, 244th State Assembly Reg. Sess. (N.Y. 2021). Legislation has also been introduced in Connecticut that, if passed and enacted, will establish a minimum requirement of 4.1 direct care nursing hours. Raised S.B. 1030, General Assembly Reg. Session (Conn. 2021). The Rhode Island Senate also recently passed a bill, which, if enacted, will require all nursing facilities to provide a minimum daily average of 4.1 hours of direct nursing care per resident, per day. Nursing Home Staffing and Quality Care Act, S.B. 0002, General Assembly Reg. Session (R.I. 2021).

The Department has a duty to protect the health of all Pennsylvanians, including those who are 65 years of age and older. Given that a significant number of the population in this Commonwealth consists of individuals 65 years of age and older, with an expected increase in that population in the next several years, it is even more important that the Department act to ensure the health and safety of this vulnerable population. The Department has carefully considered the impact that requiring an increase in direct care staffing hours will have on long-term care nursing facilities. The Department strongly believes that increasing the number of direct care staffing hours from 2.7 to 4.1 will have a positive impact on the quality of life and quality of care for every resident in a long-term care nursing facility, as proven by the many studies on this issue. While there will be an impact on long-term care nursing facilities as a result of this increase, the Department feels strongly that the benefits to older Pennsylvanians now and in the future outweighs those costs.

Finally, the Department proposes to add language to § 211.12(i), from the Federal requirements in 42 CFR 483.35, to indicate that a facility shall have a sufficient number of staff with the appropriate competencies and skill sets to provide nursing care and related services to: (1) assure resident safety; and (2) attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident. The addition of this language addresses CMS's concerns that a mandated ratio could result in unintended consequences by clarifying that the increase to 4.1 direct resident care hours per shift will be a minimum requirement and will not excuse a long-term care nursing facility from CMS's requirement that the facility have adequate staff with the appropriate competencies and skill sets to care for residents.

III. *Fiscal Impact and Paperwork Requirements*

Fiscal Impact

Commonwealth

Department

The Department licenses long-term care nursing facilities. The Department's surveyors perform the function of surveying and inspecting long-term care nursing facilities for compliance with both Federal and State regulations. The Department does not expect there to be any increase in costs associated with its responsibility to license and survey long-term care nursing facilities. Rather, the proposed amendments, in particular the adoption of the Federal requirements without exceptions, will create con-

sistency in the licensing and survey process for long-term care nursing facilities because the same standards will now apply to all long-term care nursing facilities in the Commonwealth. This will result in a more streamlined licensing and inspection process for both the Department and long-term care nursing facilities operating in this Commonwealth.

The Department is also the State agency charged with administering and overseeing the Nurse Aid Registry for the Commonwealth. Under Federal law, any individual who works in a long-term care nursing facility as a nurse aide must meet the statutory requirements to be included on the State's Nurse Aide Registry. See 42 U.S.C.A. § 1396r(b)(5)(c). The Department is required to handle the administrative hearings related to the annotation process for nurse aides accused of abuse. There is currently a total of 335,792 nurse aides on the registry. The Department is not able to quantify the impact that the proposed regulations will have on its management of the Nurse Aide Registry. The Department's proposal to increase the number of direct care hours will most likely result in the hiring of additional nurse aides, which may increase the number of nurse aide annotations. However, it is the Department's position that an increase in the number of nurse aides hired at a long-term care nursing facility would increase the level of care provided to residents and thus should decrease the number of abuse allegations.

DHS

The proposed amendment to the number of direct care hours will increase costs to the Medical Assistance, or Medicaid, program (MA) in DHS. DHS determined the cost impact of the Department's proposed increase in direct care hours. Although the Department currently licenses a total of 689 long-term care nursing facilities, for its analysis, DHS excluded the six long-term care nursing facilities that are operated by DMVA. Of the 683 remaining long-term care nursing facilities, a total of 615 receive MA payments. Of these 615 long-term care nursing facilities, 595 are private facilities and 20 are county facilities. The median hourly rate for a nursing staff assistant was determined to be \$22.91. The total additional nursing assistant staff hours needed to bring each MA facility up from 2.7 to 4.1 direct care hours is 15,986,835. To provide the most accurate estimate, DHS considered actual nursing staff assistant costs for each MA facility, rather than the median hourly rate. The additional nursing assistant staff hours needed for each MA long-term care nursing facility multiplied by the facility-specific hourly rate results in \$385.7 million in additional costs across all MA long-term care nursing facilities (\$355.7 million for the 595 private facilities and \$30.0 million for county facilities). The Federal MA Program match in Federal Fiscal Year (FFY) 2022 is 52.68% of this \$385.7 million, or \$203.2 million, which results in a net cost to DHS of approximately \$182.5 million. DHS does not have sufficient data to determine who will bear the burden of the remaining costs not covered by MA, for the MA facilities, but believes that at least some of this amount will have to be borne by the regulated community. Nonetheless, the Department feels strongly that the increase in quality of life and safety for the approximately 67,500 residents in the impacted long-term care nursing facilities outweighs any additional costs to either the MA program in DHS or the regulated community.

DMVA

DMVA operates six veterans' homes across this Commonwealth with more than 1,300 residents and employs more than 2,000 clinical and professional staff. An increase in direct care nursing hours to 4.1 requires the Bureau of Veterans Homes to add staff to the direct care complement resulting in an additional 235 employees. The average cost to DMVA for one direct care provider is \$105,207.42. This cost includes salary and benefits. The total overall estimated cost to DMVA for the increase will be \$24,723,743.70. This will also be a cost-to-carry for subsequent fiscal years. The Federal MA Program rate will apply to these direct care workers. This increase in staff (\$12.9 million) could be implemented over a 3-year period, and with an estimated Federal MA Program rate of 52%, would be an increase of approximately \$4.3 million in state funding per year.

Department of State (DOS)

The DOS has jurisdiction to investigate complaints related to health care practitioners. The proposed amendments will not have any identifiable fiscal impact on the DOS. Requiring all long-term care nursing facilities to comply with the Federal requirements in 42 CFR Part 483, Subpart B will provide consistency and will assist the DOS's investigators and prosecutors in enforcing standards for nursing home administrators. Additionally, because the increase in direct care nursing hours is expected to improve the quality of life and care of residents in long-term care nursing facilities, the DOS may see a decrease in the number of complaints.

Local government

There are currently 20 county-owned long-term care nursing facilities which account for approximately 8% (8,706 beds) of long-term care nursing beds across this Commonwealth. Allegheny County owns four of the nursing homes; the remaining homes are in the following 15 counties: Berks; Bradford; Bucks; Chester; Clinton; Crawford; Delaware; Erie; Indiana; Lehigh; Monroe; Northampton; Philadelphia; Warren; and Westmoreland.

The county-owned long-term care nursing facilities participate in either Medicare or Medicaid, and thus, will not be impacted by the Department's incorporation of the Federal requirements in § 201.2.

None of the 20 county-owned long-term care nursing facilities meet or exceed the proposed increase in direct care nursing hours. This will impact the 16 counties which own nursing homes. The Department does not have the necessary data to calculate what the exact cost to these counties will be. However, based on the analysis performed by DHS, some of this cost (\$30.0 million) will be covered by MA.

Regulated community

The proposed amendments to the regulations will apply to all 689 licensed long-term care nursing facilities in this Commonwealth. These facilities provide health services to more than 72,000 residents. The existing regulations of the Department already incorporate many of the Federal requirements and any burden by the expansion, in § 201.2, to incorporate the remaining Federal requirements in 42 CFR Part 483, Subpart B will only impact those long-term care nursing facilities that do not participate in Medicare or Medicaid. There are currently only three long-term care nursing facilities that do not participate in either Medicare or Medicaid. Requiring a long-term care nursing facility to comply with the Federal requirements across the board, without exceptions, will

make the survey process more efficient and will create consistency and eliminate confusion in the application of standards to long-term care nursing facilities, which will benefit all long-term care nursing facilities. Any negative impact on the three facilities that do not participate in Medicare or Medicaid will be minimum as they are already required by existing § 201.2 to comply with the majority of the requirements in 42 CFR Part 483, Subpart B. Any negative impact is also vastly outweighed by the need for consistency and efficiency in the application of standards for long-term care nursing facilities in this Commonwealth.

The increase in direct nursing care hours from 2.7 to 4.1 will directly impact 603 of the total 689 licensed long-term care nursing facilities licensed by the Department. The 603 impacted facilities provide care to approximately 67,500 residents. To determine this number, the Department utilized data extracted in January 2020. It was determined by the Department that this data would be more accurate than data from 2020 as there was concern that 2020 data may be skewed because of the COVID-19 pandemic and its impact on long-term care nursing facility staffing. DHS determined the cost impact on facilities that participate in MA. The median hourly rate for a nursing staff assistant was determined to be \$22.19. The total additional nursing assistant staff hours needed to bring each MA facility up from 2.7 to 4.1 direct care hours is 15,986,835. To provide the most accurate estimate of the cost impact on MA facilities, DHS considered actual nursing staff assistant costs for each facility, rather than the median hourly rate. The additional nursing staff hours needed for each MA nursing facility multiplied by the facility-specific hourly rate results in \$385.7 million in additional costs across all MA long-term care nursing facilities (\$355.7 million for the 595 private facilities and \$30.0 million for county facilities). The Federal MA match in FFY 2022 is 52.68% of this \$385.7 million, or \$203.2 million, which results in a net cost to DHS of approximately \$182.5 million. DHS does not have sufficient data to determine who will bear the burden of the remaining costs not covered by MA but believes that at least some of this amount will have to be borne by the regulated community.

Of the long-term care nursing facilities that do not participate in MA, the Department identified 65 long-term care nursing facilities that accept only Medicare as payment and three facilities that are "private pay only." Medicare is an insurance program managed by the Federal government. According to Medicare.gov, direct care services, that is, assistance with activities of daily living in long-term care nursing facilities, are generally not covered. Medicare Part A may cover care in a certified skilled nursing facility if it is deemed medically necessary. The Department does not have sufficient data to determine whether any of the direct care services being provided to long-term care nursing residents is medically necessary, and thus, covered under Medicare. Of the 65 Medicare-only facilities, in January 2020, 40 were above the proposed staffing ratio of 4.1, five did not have any residents and 20 were operating below the proposed 4.1 staffing ratio. In an attempt to determine the most accurate estimate, the Department excluded the five facilities that did not have residents in January 2020 and estimated costs based on the 20 facilities that were operating below the proposed 4.1 ratio. Assuming that the direct care services provided by nursing staff in the Medicare-only facilities are not covered by Medicare, the Department estimates that the cost to the 20 impacted facilities will be \$183,450 annually. Of the three

private pay facilities, two already exceed the proposed 4.1 ratio; one does not exceed the proposed ratio. The annual cost to the single private pay facility is estimated to be \$10,205. The Department believes that the increase in quality of life and safety for the approximately 67,500 residents in the impacted long-term care nursing facilities outweighs any additional cost to the regulated community.

General public

There are expected to be no additional costs to the general public. The more than 72,000 residents in the 689 licensed long-term care nursing facilities will benefit from the adoption of the Federal requirements because the same standards will now be applied to all long-term care nursing facilities, regardless of whether those facilities participate in Medicare or Medicaid. It is expected that the proposed increase in direct care hours provided to residents will improve the quality of life and care of approximately 67,500 Pennsylvanians who reside in the 603 long-term care nursing facilities mentioned previously, as will all older Pennsylvanians who may need long-term care nursing in the future.

Paperwork Requirements

This proposed rulemaking does not impose any additional paperwork requirements on any of the previous entities.

IV. Statutory Authority

Sections 601 and 803 of the HCFA (35 P.S. §§ 448.601 and 448.803) authorize the Department to promulgate, after consultation with the Health Policy Board, regulations necessary to carry out the purposes and provisions of the HCFA. Section 801.1 of the HCFA (35 P.S. § 448.801a) seeks to promote the public health and welfare through the establishment of regulations setting minimum standards for the operation of health care facilities. The minimum standards are to assure safe, adequate and efficient facilities and services and to promote the health, safety and adequate care of patients or residents of those facilities. In section 102 of the HCFA (35 P.S. § 448.102), the General Assembly has found that a purpose of the HCFA is, among other things, to assure that citizens receive humane, courteous and dignified treatment. Finally, section 201(12) of the HCFA (35 P.S. § 448.201(12)) provides the Department with explicit authority to enforce its rules and regulations promulgated under the HCFA.

The Department also has the duty to protect the health of the people of this Commonwealth under section 2102(a) of the Administrative Code of 1929 (71 P.S. § 532(a)). The Department has general authority to promulgate regulations under section 2102(g) of the Administrative Code of 1929.

V. Effectiveness/Sunset Date

These regulations will become effective upon publication in the *Pennsylvania Bulletin* as final-form regulations. A sunset date will not be imposed. The Department will monitor the regulations and update them as necessary.

VI. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on July 21, 2021, 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 Senate Health and Human Services Commit-

tee and the House Health Committee. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor of comments, recommendations or objections raised.

VII. *Contact Person*

Interested persons are invited to submit comments, suggestions or objections to the proposed regulations within 30 days after publication of this notice in the *Pennsylvania Bulletin*. The Department prefers that comments, suggestions or objections be submitted by e-mail to RA-DHLTCRegs@pa.gov. Persons without access to e-mail may submit comments, suggestions or objections to Lori Gutierrez, Deputy Director, Office of Policy, 625 Forster Street, Room 814, Health and Welfare Building, Harrisburg, PA 17120, (717) 317-5426. Persons with a disability may submit questions in alternative format such as by audio tape, Braille, or by using V/TT (717) 783-6514 or the Pennsylvania Hamilton Relay Service at (800) 654-5984 (TT). Persons who require an alternative format of this document may contact Lori Gutierrez at the previous address or telephone number so that necessary arrangements can be made. Comments should be identified as pertaining to Rulemaking 10-221 (Long-Term Care Facilities, Proposed Rulemaking 1).

ALISON BEAM,
Acting Secretary

Fiscal Note: 10-221. (1) General Fund;

(7) DOH, Quality Assurance; (2) No identifiable fiscal impact; (4) 2019-20 Program—\$22,051,000; 2018-19 Program—\$23,001,000; 2017-18 Program—\$22,044,000;

(7) DHS, MA—Long-Term Nursing Facilities; (2) Implementing Year 2022-23 is \$182,500,000; 1st Succeeding Year 2023-24 through 5th Succeeding Year 2027-28 are \$182,500,000; (4) 2019-20 Program—\$470,024,000; 2018-19 Program—\$850,015,000; 2017-18 Program—\$1,010,000,000;

(7) DMVA, Veterans Homes; (2) Implementing Year 2022-23 is \$4,300,000; 1st Succeeding Year 2023-24 is \$4,300,000; 2nd Succeeding Year 2024-25 is \$4,300,000; 3rd Succeeding Year is \$24,800,000; 4th Succeeding Year is \$24,800,000; 5th Succeeding Year is \$24,800,000; (4) 2019-20 Program—\$101,058,000; 2018-19 Program—\$104,014,000; 2017-18 Program—\$98,040,000;

(7) DOS, Occupational Licensing Assessment; (2) No fiscal impact; (4) 2019-20 Program—\$365,000; 2018-19 Program—\$422,000; 2017-18 Program—\$0;

(8) recommends adoption. Neither the Department of Health, nor the Department of State, will incur costs as a result of this regulatory action. The Department of Human Services and the Department of Military and Veterans Affairs will both incur significant costs as outlined previously.

Annex A

TITLE 28. HEALTH AND SAFETY

PART IV. HEALTH FACILITIES

Subpart C. LONG-TERM CARE FACILITIES

CHAPTER 201. APPLICABILITY, DEFINITIONS, OWNERSHIP AND GENERAL OPERATION OF LONG-TERM CARE NURSING FACILITIES

GENERAL PROVISIONS

§ 201.1. Applicability.

This subpart applies to [**profit and nonprofit**] long-term care nursing facilities [**which provide either skilled nursing care or intermediate nursing care, or both, within the facilities under the act**] as defined in section 802.1 of the act (35 P.S. § 448.802a).

§ 201.2. Requirements.

(a) The Department incorporates by reference **42 CFR Part 483**, Subpart B of the Federal requirements for long-term care facilities, [**42 CFR 483.1—483.75 (relating to requirements for long-term care facilities) revised as of October 1, 1998**] (relating to requirements for long-term care facilities), as licensing regulations for long-term care nursing facilities [**with the exception of the following sections and subsections:**

(1) Section 483.1 (relating to basis and scope).

(2) Section 483.5 (relating to definitions).

(3) Section 483.10(b)(10), (c)(7) and (8) and (o) (relating to level A requirement: Resident rights).

(4) Section 483.12(a)(1), (b), (c)(1) and (d)(1) and (3) (relating to admission, transfer and discharge rights).

(5) Section 483.20(j) and (m) (relating to resident assessment).

(6) Section 483.30(b)—(d) (relating to nursing services).

(7) Section 483.40(e) and (f) (relating to physician services).

(8) Section 483.55 (relating to dental services).

(9) Section 483.70(d)(1)(v) and (3) (relating to physical environment).

(10) Section 483.75(e)(1), (h) and (p) (relating to administration)].

(b) The Department incorporates by reference the Centers for Medicare & Medicaid State Operations Manual, Chapter 7 and Appendix PP—Guidance to Surveyors for Long-Term Care Facilities.

(c) A facility may apply for an exception to the requirements of this subpart under §§ 51.31—51.34 (relating to exceptions).

(d) Failure to comply with the requirements specified in 42 CFR Part 483, Subpart B shall be considered a violation of this subpart, unless an exception has been granted under §§ 51.31—51.34.

§ 201.3. Definitions.

(a) The Department incorporates by reference all terms defined in 42 CFR Part 483, Subpart B (relating to requirements for long-term care facil-

ities) and in the Centers for Medicare & Medicaid State Operations Manual, Chapter 7 and Appendix PP—Guidance to Surveyors for Long-Term Care Facilities.

(b) The following words and terms, when used in this subpart, have the following meanings, unless the context clearly indicates otherwise:

[**Abuse**—The infliction of injury, unreasonable confinement, intimidation or punishment with resulting physical harm or pain or mental anguish, or deprivation by an individual, including a caretaker, of goods or services that are necessary to attain or maintain physical, mental and psychosocial well-being. This presumes that instances of abuse of all residents, even those in a coma, cause physical harm, or pain or mental anguish. The term includes the following:

(i) **Verbal abuse**—Any use of oral, written or gestured language that willfully includes disparaging and derogatory terms to residents or their families, or within their hearing distance, regardless of their age, ability to comprehend or disability. Examples of verbal abuse include:

(A) Threats of harm.

(B) Saying things to frighten a resident, such as telling a resident that the resident will never be able to see his family again.

(ii) **Sexual abuse**—Includes sexual harassment, sexual coercion or sexual assault.

(iii) **Physical abuse**—Includes hitting, slapping, pinching and kicking. The term also includes controlling behavior through corporal punishment.

(iv) **Mental abuse**—Includes humiliation, harassment, threats of punishment or deprivation.

(v) **Involuntary seclusion**—Separation of a resident from other residents or from his room or confinement to his (with/without roommates) against the resident's will, or the will of the resident's legal representative. Emergency or short term monitored separation from other residents will not be considered involuntary seclusion and may be permitted if used for a limited period of time as a therapeutic intervention to reduce agitation until professional staff can develop a plan of care to meet the resident's needs.

(vi) **Neglect**—The deprivation by a caretaker of goods or services which are necessary to maintain physical or mental health.]

Act—The Health Care Facilities Act [(35 P.S. §§ 448.101—448.904)] (35 P.S. §§ 448.101—448.904b).

Administration of [drugs] medication—The giving of a dose of medication to a patient as a result of an order of a practitioner licensed by the Commonwealth to prescribe [drugs] medications.

[**Administrator**—An individual who is charged with the general administration of a facility, whether or not the individual has an ownership interest in the facility and whether or not the individual's functions and duties are shared with one or more other individuals. The administrator shall be currently licensed and registered by the Department of State under the Nursing Home Administrators License Act (63 P.S. §§ 1101—1114.2).]

Alteration—An addition, modification or modernization in the structure or usage of a building or section thereof or change in the services rendered.

[**Ambulatory resident**—An individual who is physically and mentally capable of getting in and out of bed and walking a normal path to safety in a reasonable period of time, including the ascent and descent of stairs without the aid of another person.

Audiologist—A person licensed as an audiologist by the Pennsylvania State Board of Examiners in Speech-Language and Hearing, or excluded from the requirement of licensure under the Speech-Language and Hearing Licensure Act (63 P.S. §§ 1701—1719).]

Authorized person to administer drugs and medications—Persons qualified to administer drugs and medications in facilities are as follows:

(i) Physicians and dentists who are currently licensed by the Bureau of Professional and Occupational Affairs, Department of State.

(ii) Registered nurses who are currently licensed by the Bureau of Professional and Occupational Affairs, Department of State.

(iii) Practical nurses who have successfully passed the State Board of Nursing examination.

(iv) Practical nurses licensed by waiver in this Commonwealth who have successfully passed the United States Public Health Service Proficiency Examination.

(v) Practical nurses licensed by waiver in this Commonwealth who have successfully passed a medication course approved by the State Board of Nursing.

(vi) Student nurses of approved nursing programs who are functioning under the direct supervision of a member of the school faculty who is present in the facility.

(vii) Recent graduates of approved nursing programs who possess valid temporary practice permits and who are functioning under the direct supervision of a professional nurse who is present in the facility. The permits shall expire if the holders of the permits fail the licensing examinations.

(viii) Physician assistants and registered nurse practitioners who are certified by the Bureau of Professional and Occupational Affairs.

Basement—A story or floor level below the main or street floor. If, due to grade differences, there are two levels qualifying as a street floor, a basement is a floor below the lower of the two street floors.

CRNP—Certified Registered Nurse Practitioner—A registered nurse licensed in this Commonwealth who is certified by the State Board of Nursing and the State Board of Medicine as a CRNP, under the Professional Nursing Law (63 P.S. §§ 211—225) and the Medical Practice Act of 1985 (63 P.S. §§ 422.1—422.45).

[**Charge nurse**—A person designated by the facility who is experienced in nursing service administration and supervision and in areas such as rehabilitative or geriatric nursing or who acquires the preparation through formal staff development programs and who is licensed by the Commonwealth as one of the following:

(i) A registered nurse.

(ii) A registered nurse licensed by another state as a registered nurse and who has applied for

endorsement from the State Board of Nursing and has received written notice that the application has been received by the State Board of Nursing. This subparagraph applies for 1 year, or until Commonwealth licensure is completed, whichever period is shorter.

(iii) A practical nurse who is a graduate of a Commonwealth recognized school of practical nursing or who has 2 years of appropriate experience following licensure by waiver as a practical nurse.

(iv) A practical nurse shall be designated by the facility as a charge nurse only on the night tour of duty in a facility with a census of 59 or less.

Clinical laboratory—A place, establishment or institution, organized and operated primarily for the performance of bacteriological, biochemical, hematological, microscopical, serological or parasitological or other tests by the practical application of one or more of the fundamental sciences to material originating from the human body, by the use of specialized apparatus, equipment and methods, for the purpose of obtaining scientific data which may be used as an aid to ascertain the state of health. The tests are conducted using specialized apparatus, equipment and methods, for the purpose of obtaining scientific data which may be used as an aid to ascertain the state of health.]

Clinical records—Facility records, whether or not automated, pertaining to a resident, including medical records.

Controlled substance—A drug, substance or immediate precursor included in Schedules I—V of the Controlled Substance, Drug, Device and Cosmetic Act (35 P.S. §§ 780-101—780-144).

Corridor—A passageway, hallway or other common avenue used by residents and personnel to travel between buildings or sections of the same building to reach a common exit or service area. The service area includes, but is not limited to, living room, kitchen, bathroom, therapy rooms and storage areas not immediately adjoining the patient's sleeping quarters.

Department—The Department of Health of the Commonwealth.

[**Dietetic service supervisor**—A person who meets one of the following requirements:

- (i) Is a dietitian.
- (ii) Is a graduate of a dietetic technician or dietetic assistant training program, correspondence course or classroom course approved by the American Dietetic Association.
- (iii) Is a member of the American Dietetic Association or the Dietary Managers Association.
- (iv) Is a graduate of a State approved course that provided 90 or more hours of classroom instruction in food service supervision and has experience as a supervisor in a health care institution with consultation from a dietitian.
- (v) Has training and experience in food service supervision and management in a military service equivalent in content to the program in subparagraph (iv).

(vi) Has a baccalaureate degree from a State approved or accredited college or university and has at least 12 credit hours in food service, nutri-

tion or diet therapy and at least 1 year of supervisory experience in the dietary department of a health care facility.

Dietitian—A person who is either:

(i) Registered by the Commission on Dietetic Registration of the American Dietetic Association.

(ii) Eligible for registration and who has a minimum of a bachelor's degree from a United States regionally accredited college or university and has completed the American Dietetic Association (ADA) approved dietetic course requirements and the requisite number of hours of ADA approved supervised practice.

Director of nursing services—A registered nurse who is licensed and eligible to practice in this Commonwealth and has 1 year of experience or education in nursing service administration and supervision, as well as additional education or experience in areas such as rehabilitative or geriatric nursing, and participates annually in continuing nursing education. The director of nursing services is responsible for the organization, supervision and administration of the total nursing service program in the facility.

Drug administration—An act in which a single dose of a prescribed drug or biological is given to a resident by an authorized person in accordance with statutes and regulations governing the act. The complete act of administration entails removing an individual dose from a previously dispensed, properly labeled container, verifying it with the physician's orders, giving the individual dose to the proper resident and promptly recording the time and dose given.

Drug dispensing—An act by a practitioner or a person who is licensed in this Commonwealth to dispense drugs under the Pharmacy Act (63 P.S. §§ 390-1—390-13) entailing the interpretation of an order for a drug or biological and, under that order, the proper selecting, measuring, labeling, packaging and issuance of the drug or biological for a resident or for a service unit of the facility.]

Drug or medication—A substance meeting one of the following qualifications:

- (i) Is recognized in the official United States Pharmacopeia, or official National Formulary or a supplement to either of them.
- (ii) Is intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals.
- (iii) Is other than food and intended to affect the structure or a function of the human body or other animal body.

(iv) Is intended for use as a component of an article specified in subparagraph (i), (ii) or (iii), but not including devices or their components, parts or accessories.

[**Elopement**—When a resident leaves the facility without the facility staff being aware that the resident has done so.

Existing facility—A long-term care nursing facility or section thereof which was constructed and licensed as such on or before July 24, 1999.

Exit or exitway—A required means of direct egress in either a horizontal or vertical direction leading to the exterior grade level.]

Facility—A licensed long-term care nursing facility as defined in Chapter 8 of the act (35 P.S. §§ 448.801—448.821).

[**Full-time**—A minimum of a 35-hour work week.

Interdisciplinary team—A team including the resident's attending physician, a registered nurse with responsibility for the resident and other appropriate staff in disciplines as determined by the resident's needs, and the resident. If the resident is cognitively impaired and unable to fully participate, the team shall include to the extent practicable, the participation of the resident, and shall also include the resident's family, a responsible person or the resident's legal representative.]

Health Care Practitioner—As defined in section 103 of the act (35 P.S. § 448.103). The term "practitioner" when used alone in this subpart is deemed to be synonymous with this definition.

LPN—Licensed practical nurse—A practical nurse licensed to practice under the Practical Nurse Law (63 P.S. §§ 651—667.8) and the regulations of the State Board of Nursing at 49 Pa. Code Chapter 21, Subchapter B (relating to practical nurses).

Licensee—The individual, partnership, association or corporate entity including a public agency or religious or fraternal or philanthropic organization authorized to operate a licensed facility.

[**Locked restraints**—A mechanical apparatus or device employed to restrict voluntary movement of a person not removable by the person. The term includes shackles, straight jackets and cage-like enclosures and other similar devices.

Medical record practitioner—A person who is certified or eligible for certification as a registered records administrator (RRA) or a health information technologist/accredited record technician by the American Health Information Management Association (AHIMA) and who has the number of continuing education credits required for each designation by the AHIMA.]

Medication administration—An act in which a single dose of a prescribed medication or biological is given to a resident by an authorized person in accordance with statutes and regulations governing the act. The complete act of administration entails removing an individual dose from a previously dispensed, properly labeled container, verifying it with the physician's orders, giving the individual dose to the proper resident and promptly recording the time and dose given.

Medication dispensing—An act by a practitioner or a person who is licensed in this Commonwealth to dispense medications under the Pharmacy Act (63 P.S. §§ 390-1—390-13) entailing the interpretation of an order for a medication or biological and, under that order, the proper selecting, measuring, labeling, packaging and issuance of the medication or biological for a resident or for a service unit of the facility.

NFPA—National Fire Protection Association.

[**Nonambulatory resident**—A resident who is not physically or mentally capable of getting in and out of bed and walking a normal path to safety in a reasonable period of time, including the ascent and descent of stairs, without the aid of another person.

Nonproprietary drug—A drug containing a quantity of controlled substance or drug requiring a prescription, a drug containing biologicals or substances of glandular origin—except intestinal-enzymes and liver products—and drugs which are administered parenterally.]

Non-prescription medication—An over-the-counter medication legally purchased without a prescription.

[**Nurse aide**—An individual providing nursing or nursing-related services to residents in a facility who:

- (i) Does not have a license to practice professional or practical nursing in this Commonwealth.
- (ii) Does not volunteer services for no pay.
- (iii) Has met the requisite training and competency evaluation requirements as defined in 42 CFR 483.75 (relating to administration).
- (iv) Appears on the Commonwealth's Nurse Aide Registry.
- (v) Has no substantiated findings of abuse, neglect or misappropriation of resident property recorded in the Nurse Aide Registry.]

Nursing care—A planned program to meet the physical and emotional needs of the resident. The term includes procedures that require nursing skills and techniques applied by properly trained personnel.

Nursing service personnel—Registered nurses, licensed practical nurses and nurse aides.

[**Occupational therapist**—A person licensed as an occupational therapist by the State Board of Occupational Therapy Education and Licensure.

Occupational therapy assistant—A person licensed as an occupational therapy assistant by the State Board of Occupational Therapy Education and Licensure.]

Pharmacist—A person licensed by the State Board of Pharmacy to engage in the practice of pharmacy.

Pharmacy—A place properly licensed by the State Board of Pharmacy where the practice of pharmacy is conducted.

[**Physical therapist**—A person licensed as a physical therapist by the State Board of Physical Therapy.

Physical therapy assistant—A person registered as a physical therapy assistant by the State Board of Physical Therapy.]

Physician assistant—An individual certified as a physician assistant by the State Board of Medicine under the Medical Practice Act of 1985 (63 P.S. §§ 422.1—422.45), or by the State Board of Osteopathic Medical Examiners under the Osteopathic Medical Practice Act (63 P.S. §§ 271.1—271.18).

[**Practice of pharmacy**—The practice of the profession concerned with the art and science of the evaluation of prescription orders and the preparing, compounding and dispensing of drugs and

devices, whether dispensed on the prescription of a medical practitioner or legally dispensed or provided to a consumer. The term includes the proper and safe storage and distribution of drugs, the maintenance of proper records, the participation in drug selection and drug utilization reviews and the responsibility of relating information as required concerning the drugs and medicines and their therapeutic values and uses in the treatment and prevention of disease. The term does not include the operations of a manufacturer or distributor as defined in The Controlled Substance, Drug, Device and Cosmetic Act (35 P.S. §§ 780-101—780-144).]

Prescription—A written or verbal order for [drugs] medications issued by a [licensed medical] health care practitioner in the course of [his] professional practice.

[*Proprietary drug*—A drug which does not contain a quantity of a controlled substance which can be purchased without a prescription and may be purchased from sources other than a pharmacy, and is usually sold under a patented or trade name.]

RN—Registered nurse—[A nurse] An individual licensed to practice [in this Commonwealth] professional nursing under The Professional Nursing Law (63 P.S. §§ 211—225.5) and the regulations of the State Board of Nursing at 49 Pa. Code Chapter 21, Subchapter A (relating to registered nurses).

Resident—A person who is admitted to a licensed long-term care nursing facility for observation, treatment, or care for illness, disease, injury or other disability.

[*Resident activities coordinator*—A person who meets one of the following requirements:

- (i) Is a qualified therapeutic recreation specialist.
- (ii) Has 2 years of experience in a social or recreational program, within the last 5 years, 1 year of which was full-time in a patient activities program in a health care setting.

Residential unit—A section or area where persons reside who do not require long-term nursing facility care.

Responsible person—A person who is not an employe of the facility and is responsible for making decisions on behalf of the resident. The person shall be so designated by the resident or the court and documentation shall be available on the resident’s clinical record to this effect. An employe of the facility will be permitted to be a responsible person only if appointed the resident’s legal guardian by the court.

Restraint—A restraint can be physical or chemical.

(i) A physical restraint includes any apparatus, appliance, device or garment applied to or adjacent to a resident’s body, which restricts or diminishes the resident’s level of independence or freedom.

(ii) A chemical restraint includes psychopharmacologic drugs that are used for discipline or convenience and not required to treat medical symptoms.

Skilled or intermediate nursing care—Professionally supervised nursing care and related medical and other health services provided for a period exceeding 24 hours to an individual not in need of hospitalization, but whose needs are above the level of room and board and can only be met in a long-term care nursing facility on an inpatient basis because of age, illness, disease, injury, convalescence or physical or mental infirmity. The term includes the provision of inpatient services that are needed on a daily basis by the resident, ordered by and provided under the direction of a physician, and which require the skills of professional personnel, such as, registered nurses, licensed practical nurses, physical therapists, occupational therapists, speech pathologists or audiologists.

Social worker—An individual with the following qualifications:

- (i) A Bachelor’s Degree in social work or a Bachelor’s Degree in a human services field including sociology, special education, rehabilitation counseling and psychology.
- (ii) One year of supervised social work experience in a health care setting working directly with individuals.

Speech/language pathologist—A person licensed as a speech/language pathologist by the State Board of Examiners in Speech-Language and Hearing, or excluded from the requirements of licensure under the Speech-Language and Hearing Licensure Act (63 P.S. §§ 1701—1719).]

CHAPTER 211. PROGRAM STANDARDS FOR LONG-TERM CARE NURSING FACILITIES

§ 211.12. Nursing services.

(a) The facility shall provide services by sufficient numbers of personnel on a 24-hour basis to provide nursing care to meet the needs of all residents.

* * * * *

(i) A minimum number of general nursing care hours shall be provided for each 24-hour period. The total number of hours of general nursing care provided during each shift in each 24-hour period shall, when totaled for the entire facility, be a minimum of [2.7] 4.1 hours of direct resident care for each resident. A facility shall have, during each shift in each 24-hour period, a sufficient number of nursing staff with the appropriate competencies and skill sets to provide nursing care and related services to:

- (1) assure resident safety; and
- (2) attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident.

(j) Nursing personnel shall be provided on each resident floor.

* * * * *

[Pa.B. Doc. No. 21-1195. Filed for public inspection July 30, 2021, 9:00 a.m.]