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Commonwealth of Pennsylvania
Pennsylvania Fish and Boat Commission

Minutes

The 83rd Meeting of the Pennsylvania Fish and Boat Commission was held on Monday and Tuesday, October 6 and 7, 2008, at the Pennsylvania Fish and Boat Commission headquarters, Harrisburg, PA 17110.

Commission committees met on October 6 beginning at 9:50 a.m. and on October 7 beginning at 8:06 a.m. The public session for review of this agenda began at or about 12:56 p.m. on October 7.

Call to Order

The meeting was called to order by Commission President Leonard L. Lichvar and was followed by the Pledge of Allegiance to the Flag.

Roll Call

Members Present

Leonard L. Lichvar, President
Thomas C. Shetterly, Vice-President
Donald K. Anderson
Robert A. Bachman
Samuel M. Concilla
Richard W. Czop
Norman R. Gavlick
Steven M. Ketterer
William J. Sabatose

Members Not Present

William R. Worobec

Review and Approval of Minutes from the July 15, 2008 Meeting

A motion was made by Commissioner Sabatose and seconded by Commissioner Shetterly to approve the July 15, 2008 minutes as written. Motion carried.

Awards and Presentations

Commissioner William J. Sabatose was presented with an award that is traditionally presented to the outgoing president. The award acknowledged his outstanding leadership and dedication while serving as President of the Commission from July 17, 2007 to July 15, 2008.

Executive Director's Report

Dr. Austen's report highlighted the "PFBC Activity Report – Highlights for Third Quarter 2008" (Exhibit A) that was provided to the Commissioners. The report includes an update of major activities and accomplishments over the last three months. Dr. Austen also recognized Adrian Stouffer, Communications Specialist, and Dave Day, Conservation Coordinator, for their contributions to the Commission over the past several years. Adrian has accepted a position with the Pennsylvania Department of Conservation and Natural Resources, and Dave has accepted a position with Southern Illinois University. We wish them both well and success in their new positions.

Announcement of Executive Session

Commissioner Lichvar announced that an executive session was held on Monday, October 6, at 8:00 a.m. to discuss personnel and real estate issues and pending and anticipated litigation.

Reports of Commissioner Committees

Executive and Planning (Commissioner Lichvar) –

The Executive and Planning Committee met on Monday, October 6, at 9:50 a.m. Dr. Austen led a discussion regarding the 2008 Annual Plan of Work, and Brian Barner provided a review of the Fiscal Year 2009-10 budget. Dates for the 2009 Commission meetings were discussed. Tim Schaeffer provided an update on the Commission's strategic planning efforts.

Administration (Commissioner Concilla) –

The Administration Committee met on Monday, October 6, at 3:15 p.m. Brian Barner led a discussion on the Administration Committee charge. Scott Bollinger provided an update on the Lake Erie Access Improvement Program and program signage and boundary markings for easements. Dick Mulfinger provided a review of major projects and the property boundary marking project. Mike Bialousz, GIS Coordinator, gave a demonstration of the new map features on the Commission's website. Agenda items also were discussed.

Boating (Commissioner Ketterer) –

The Boating Committee met on Tuesday, October 7, at 9:45 a.m. Dan Martin led a discussion on the Boating Committee charge. A boating accident update and a water trails summit report were provided. Scott Bollinger provided an update on the Boating Facilities Grant Program, and Jackie Kramer explained a recent program modification that allows non-profit land trusts, conservancies and watershed associations to apply directly for funding. Dick Mulfinger provided a report on the Walnut Creek 5-year plan and the North East Marina repair efforts. It

also was announced that the next Boating Advisory Board meeting is scheduled for October 21, 2008.

Communications (Commissioner Shetterly) –

The Communications Committee met on Tuesday, October 7, at 10:45 a.m. An update on angler demographics, education and outreach was provided. A summary of marketing activities for 2008 and a marketing outlook through the spring of 2009 was given by Adrian Stouffer.

Fisheries (Commissioner Bachman) –

The Fisheries Committee met on Monday, October 6, at 10:55 a.m. and then reconvened at 1:35 p.m. following lunch. Agenda items were discussed. Staff provided an update of the fisheries program, the stocked trout program, and a review of catch and release bass regulation. Dick Mulfinger provided a review of the Reynoldsdale State Fish Hatchery project.

Habitat and Environmental (Commissioner Anderson) –

The Habitat and Environmental Committee met on Tuesday, October 7, at 8:00 a.m. Two agenda items were discussed pertaining to the Cooperative Habitat Improvement Grant Program and the Sinnemahoning Creek Watershed Restoration Grant Program. Gary Smith gave a presentation on habitat projects in southwestern Pennsylvania, and Tom Kamerzel provided a Marcellus Shale update.

During the Habitat and Environmental Committee report, a motion was made by Commissioner Anderson and seconded by Commissioner Czap directing the Executive Director to provide a report at the January 2009 Commission meeting outlining the feasibility of legislative solutions for funding mitigation for degradation of water resources in the Commonwealth stemming from water use. Motion carried.

During the Committee report, another motion was made by Commissioner Anderson and seconded by Commissioner Bachman that the Commission adopt a position statement on climate change (Exhibit B). Motion carried.

Law Enforcement (Commissioner Gavlick) –

The Law Enforcement Committee met on Monday, October 6, at 4:30 p.m. Tom Kamerzel provided a report on Bureau organization, workforce status and recruitment efforts for a new waterways conservation officer class that is scheduled to start in the summer of 2009.

The Committee also acted upon proposed revocations. The Committee revoked the fishing privileges of four individuals for one year. The Committee also revoked the boating privileges of one individual for one year with a reduction to six months upon successful completion of a safe boating course and revoked the boating privileges of one individual for two years with a reduction to one year upon successful completion of a safe boating course.

Legislation (Commissioner Sabatose) –

The Legislation Committee met on Tuesday, October 7, at 10:15 a.m. Tim Schaeffer led a discussion on the Legislation Committee process. Gary Moore provided updates on the Ingham

Spring land transfer, House Bill 1115 regarding a reduced fee fishing license for deployed National Guard servicemen and women, and legislative vacancies.

Public Comment to Commissioners and Staff

There were no comments or questions from the public.

EXECUTIVE & PLANNING

A. Dates for Fish and Boat Commission Meetings in 2009.

Commentary:

At the fall meeting each year, the Commission historically has established a schedule for regular meetings for the following year. Under the Fish and Boat Code, the Commission is required to have two meetings each year, one in January and the other in July. These meetings must be held in the Harrisburg area. Traditionally, the Commission has held two additional meetings each year in April or May and September or October.

Staff have reviewed the available dates and possible conflicts for scheduling regular Commission meetings for 2009. This review included a look at holiday, hunting and fishing seasons and other conflicting events. Based upon this review, the following dates are proposed for regular Commission meetings in 2009:

January 29-30, 2009 (Thursday and Friday)

April 20-21, 2009 (Monday and Tuesday)

July 13-14, 2009 (Monday and Tuesday)

October 5-6, 2009 (Monday and Tuesday)

The January and July 2009 meetings will be held at the Harrisburg headquarters. In an effort to avoid a conflict with the Pennsylvania Game Commission's meeting scheduled for January 25-27 and to hold the PFBC's January meeting in conjunction with the Susquehanna River Symposium scheduled for Saturday, January 31, staff propose that the January meeting be held on Thursday and Friday. The April and October 2009 meetings will be held at locations designated by the Commission for the transaction of business.

Briefer:

Dr. Douglas J. Austen, Executive Director

Recommendation:

Staff recommend that the Commission approve the dates for the regular meetings of the Commission for 2009 as set forth in the Commentary.

Action:

A motion was made by Commissioner Sabatose and seconded by Commissioner Bachman to approve the dates for the regular meetings of the Commission for 2009 as set forth in the Commentary. Motion carried.

B. Review and Approval of Submission of Fiscal Year 09-10 Budget Request.

Commentary:

Under Commonwealth government budget procedures and in accordance with sections 522 and 532 of the Fish and Boat Code (30 Pa. C.S. §§522, 532), the Commission annually submits to the Governor's Budget Office the proposed Commission budget for the following fiscal year. The Commission's submission for Fiscal Year 2009-10 is due at the Budget Office in the early part of October.

Staff have prepared preliminary draft budget documents for submission to the Budget Office. According to the Budget Office, these documents are confidential. After the Executive Director submits the budget request, the Governor's Office may make changes to the spending authority requested by the Commission. These changes are generally a result of changes in calculations for personnel and/or other costs. The Governor will announce the details of the FY 09-10 budget in February or March of 2009.

Briefers:

Dr. Douglas J. Austen, Executive Director
Barner P. Barner, Deputy Director, Office of Administration, Boating and Engineering

Recommendation:

Staff recommend that the Commission authorize the Executive Director to submit a request to the Governor's Budget Office for Fiscal Year 2009-10 spending authority as more fully described in staff's preliminary draft budget documents.

Action:

A motion was made by Commissioner Shetterly and seconded by Commissioner Anderson to authorize the Executive Director to submit a request to the Governor's Budget Office for Fiscal Year 2009-10 spending authority as more fully described in staff's preliminary draft budget documents. Motion carried.

ADMINISTRATION FINAL RULEMAKING

A. Release of Documents and Records.

Commentary:

Act 3 of 2008 has substantially changed the current Right-to-Know Law. Under the new law, which will apply to requests received after January 1, 2009, an agency may promulgate regulations and policies necessary for the agency to implement the statute. Section 51.9 of the Commission's regulations currently provides for the release of Commission documents and records. However, this section must be amended to be consistent with the provisions of the new Right-to-Know Law.

The changes to §51.9 that are necessitated by Act 3 of 2008 include allowing requests for records to come via electronic mail and changing the recipient of the request from the Executive Director to the Director of the Bureau of Administration, who will act as the Commission's Open Records Officer under the new Right-to-Know Law. Act 3 of 2008 provides that most fees charged under the Right-to-Know Law for reproduction of records will now be set for all Commonwealth agencies by the newly created Office of Open Records. The Commission therefore has proposed amendments in these regards.

In addition to and separate from the Right-to-Know Law requests, the Commission receives requests for documents through subpoenas. Section 101.6(d) of the Commission's regulations provides for a \$0.50 per page reproduction fee for responses to subpoena requests for investigative reports by Commission officers. The Commission receives subpoenas for a number of documents other than investigative reports. Accordingly, the Commission also has proposed to add new subsection (d) to §51.9 to cover reproduction costs for all subpoena requests and to remove that provision from §101.6.

A notice of proposed rulemaking was published at 38 Pa. B. 4909 (September 6, 2008) (Exhibit C). The Commission did not receive any public comments regarding the proposed amendments.

Briefer:

Bernard M. Matscavage, Director, Bureau of Administration

Recommendation:

Staff recommend that the Commission adopt the proposed amendments as set forth in the notice of proposed rulemaking. If adopted, these changes will go into effect on January 1, 2009.

Action:

A motion was made by Commissioner Ketterer and seconded by Commissioner Anderson to adopt the proposed amendments as set forth in the notice of proposed rulemaking. These changes will go into effect on January 1, 2009. Motion carried.

PROPERTY-RELATED MATTERS

B. Lease of Icedale Lake Property, Chester County.

Commentary:

The Commission owns a ± 50 acre parcel along West Brandywine Creek known as the Icedale Lake in West Brandywine and Honeybrook Townships, Chester County. The property is located $\pm 1/4$ mile south of Route 322 and ± 7 miles east of Honeybrook. The property was acquired in 1953 and contained a ± 25 acre dam that was breached in the mid-1980's because of safety concerns. The property has remained open to the public as a warm water fishery but is not currently heavily utilized. The site is undeveloped with only roadside parking. Remains of the former dam structure cause pooling at the site, which results in siltation collection and warming of the water.

West Brandywine Township has requested an agreement on the property so it may utilize the property in conjunction with its local park, trail and greenway facilities. Under such an agreement, the Township would like to establish a parking area, a trailhead, signage to show the history of the site and bird watching viewing area. The Township also would like to pursue grant money to remove more of the dam structure remnants in order to restore more of a natural channel flow. The Township is willing to continue to allow free public fishing and parking and the protection of the aquatic resources at the site.

A lease agreement is being considered because it addresses the Township's needs and provides the Commission with a degree of liability protection and control to protect the interests of anglers and boaters. The term will be dependent on the needs of the Township; however, it will not exceed 25 years.

The lease will require that the site remain open for public fishing free of charge along with parking related thereto and use of the site must not significantly impact the site's aquatic resources. The lease will place the burden of operational and maintenance responsibilities of the site on the Township.

The Commission will assist and provide technical guidance to the Township subject to the availability of resources and the best interests of the Commission. The lease agreement will provide an opportunity for additional habitat work to the West Branch of Brandywine Creek.

Briefer:

Richard M. Mulfinger, Director, Bureau of Engineering and Property Services

Recommendation:

Staff recommend that the Commission authorize the Executive Director to enter into a lease with the West Brandywine Township as described in the Commentary.

Action:

A motion was made by Commissioner Shetterly and seconded by Commissioner Anderson to authorize the Executive Director to enter into a lease with the West Brandywine Township as described in the Commentary. Motion carried.

C. Dibble Property Rights Acquisition, Girard Township, Erie County.

Commentary:

Section 2907.2 of the Fish and Boat Code, 30 Pa. C.S. §2907.2, provides that the proceeds from the sale of the special Lake Erie fishing permits and \$6 of the fees for the combination trout/salmon/Lake Erie permits are to be deposited into a restricted account within the Fish Fund for five years and that this restricted account “shall be used to provide public fishing access on or at Lake Erie and the watersheds of Lake Erie.” The funds that are deposited into the Lake Erie restricted account are restricted now and into the future for their legislatively intended purposes.

The Commission has been offered an easement on over 1,700 linear feet on both sides of Elk Creek as it flows across a parcel of property owned by Robert M. Dibble and Eleanor M. Dibble in Girard Township, Erie County, for \$18,000. The easement will be for public fishing, boating, and riparian and fishery management and will include the stream corridor and extend at least 25 feet back from the top of bank. A map depicting the subject parcel is attached as Exhibit D.

The easement area is located south of Route 20 along South Creek Road. The property is situated in the middle of the Girard American Legion Post 494 property that is currently open to public fishing.

Elk Creek provides significant steelhead fishing opportunities in the area. Also, Elk Creek received several trout stockings in 2008 in this area. The Commission’s regional law enforcement and fisheries staff have recommended that the easement be acquired.

The seller and the Commission have signed an option agreement that will allow staff to perform its due diligence. The Commission’s exercise of the option will be subject to meeting the due diligence and funding requirements. In addition, the seller has agreed to be responsible for all current applicable real estate and transfer taxes that are normally shared between the buyer and seller. The Commission may, at its sole discretion, pay any necessary costs to obtain and record a subordination of lien for the property.

Briefer:

Daniel G. Martin, Director, Bureau of Boating and Access

Recommendation:

Staff recommend that the Commission authorize the acquisition of the property rights along Elk Creek in Girard Township, Erie County, as more particularly described in the Commentary, utilizing monies in the Lake Erie restricted account.

Action:

A motion was made by Commissioner Concilla and seconded by Commissioner Anderson to authorize the acquisition of the property rights along Elk Creek in Girard Township, Erie County, as more particularly described in the Commentary, utilizing monies in the Lake Erie restricted account. Motion carried.

D. Lake Erie Regional Conservancy, Property Acquisition, McKean Township, Erie County.

Commentary:

Section 2907.2 of the Fish and Boat Code, 30 Pa. C.S. §2907.2, provides that the proceeds from the sale of the special Lake Erie fishing permits and \$6 of the fees for the combination trout/salmon/Lake Erie permits are to be deposited into a restricted account within the Fish Fund for five years and that this restricted account “shall be used to provide public fishing access on or at Lake Erie and the watersheds of Lake Erie.” The funds that are deposited into the Lake Erie restricted account are restricted now and into the future for their legislatively intended purposes.

Staff have been working with two partners on a property acquisition along Elk Creek in McKean Township, Erie County. A map depicting the subject parcel is attached as Exhibit E. The partners include the Lake Erie Regional Conservancy (LERC) and the Pennsylvania Department of Conservation and Natural Resources (DCNR). Based on an appraisal for the property, LERC is requesting a grant from the Commission in an amount not to exceed \$163,000. The grant funds will be used for the purchase price and costs associated with acquiring the property. LERC also has applied for funding from DCNR.

This property is located along West Road between State Highway 832 (Sterrettania Road) and Interstate 79. The property consists of 47.61 acres and includes approximately 4,900 linear feet of access on both sides of Elk Creek. This is an extremely popular location for steelhead anglers along Elk Creek. However, access to Elk Creek is severely limited. Once LERC acquires the property, it plans to construct a parking area on it to increase public access to this section of Elk Creek.

LERC will own and control the property subject to the terms and conditions established as part of the acquisition process. LERC has agreed that it will use the property, in part, to improve access to Elk Creek. LERC will grant to the Commission a public fishing access and conservation easement that will allow for public access along Elk Creek and a parking area in perpetuity. An agreement between LERC and the Commission will be developed that commits agency funds and will include specific provisions for the protection of the Commission’s interests and the angling public. The provisions will include a requirement that LERC or another conservation organization approved by the Commission hold a perpetual conservation easement on the balance of the property if LERC were to transfer the property to another entity in the future.

Briefer:

Daniel G. Martin, Director, Bureau of Boating and Access

Recommendation:

Staff recommend that the Commission authorize the Executive Director to enter into a cooperative agreement with LERC that commits an amount not exceed \$163,000 towards the acquisition of the property in McKean Township as more fully described in

the Commentary and to acquire a public fishing access and conservation easement that will allow public fishing access along this portion of Elk Creek in perpetuity.

Action:

A motion was made by Commissioner Concilla and seconded by Commissioner Czop to authorize the Executive Director to enter into a cooperative agreement with LERC that commits an amount not exceed \$163,000 towards the acquisition of the property in McKean Township as more fully described in the Commentary and to acquire a public fishing access and conservation easement that will allow public fishing access along this portion of Elk Creek in perpetuity. Motion carried.

E. McInchak Property Rights Acquisition, Girard Township, Erie County.

Commentary:

Section 2907.2 of the Fish and Boat Code, 30 Pa. C.S. §2907.2, provides that the proceeds from the sale of the special Lake Erie fishing permits and \$6 of the fees for the combination trout/salmon/Lake Erie permits are to be deposited into a restricted account within the Fish Fund for five years and that this restricted account “shall be used to provide public fishing access on or at Lake Erie and the watersheds of Lake Erie.” The funds that are deposited into the Lake Erie restricted account are restricted now and into the future for their legislatively intended purposes.

The Commission has been offered an easement on over 2,100 linear feet on both sides of Elk Creek as it flows across a parcel of property owned by Michael S. McInchak in Girard Township, Erie County, for \$27,000. The easement will be for public fishing, boating, and riparian and fishery management and will include the stream corridor and extend at least 25 feet back from the top of bank. A map depicting the subject parcel is attached as Exhibit F.

The easement area is located north of Route 20 along North Creek Road and is downstream of the Girard Borough Park. The Girard Borough Park is currently open to public fishing.

Elk Creek provides significant steelhead fishing opportunities in the area. Also, Elk Creek received several trout stockings in 2008 in this area, and the acquisition of the subject rights will provide additional trout fishing opportunities. The Commission’s regional law enforcement and fisheries staff have recommended that the easement be acquired.

The seller and the Commission have signed an option agreement that will allow staff to perform its due diligence. The Commission’s exercise of the option will be subject to meeting the due diligence and funding requirements. In addition, the seller has agreed to be responsible for all current applicable real estate and transfer taxes that are normally shared between the buyer and seller. The Commission may, at its sole discretion, pay any necessary costs to obtain and record a subordination of lien for the property.

Briefer:

Daniel G. Martin, Director, Bureau of Boating and Access

Recommendation:

Staff recommend that the Commission authorize the acquisition of the property rights along Elk Creek in Girard Township, Erie County, as more particularly described in the Commentary, utilizing monies in the Lake Erie restricted account.

Action:

A motion was made by Commissioner Concilla and seconded by Commissioner Anderson to authorize the acquisition of the property rights along Elk Creek in Girard Township, Erie County, as more particularly described in the Commentary, utilizing monies in the Lake Erie restricted account. Motion carried.

FISHERIES **FINAL RULEMAKING**

A. Sale, Introduction, Transportation and Importation of VHS-Susceptible Species of Fish.

Commentary:

Viral hemorrhagic septicemia (VHS) is an infectious disease found in a variety of fish species. In order to help prevent the spread of the disease, several agencies with jurisdiction, including the United States Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), the Commission and the Pennsylvania Department of Agriculture (PDA), have taken action.

On October 24, 2006, APHIS issued an emergency order prohibiting the importation of certain live fish species from the Canadian provinces of Ontario and Quebec into the United States. In addition, export of live fish of 37 VHS-susceptible species was prohibited from the eight Great Lake boundary states: Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin. On November 14, 2006, APHIS issued an amended order that allowed restricted movement under requirements for testing and certification that fish are VHS-free. On May 4, 2007, APHIS further amended the order to allow for catch and release fishing activities. APHIS again amended its order on April 2, 2008 to allow VHS-susceptible species of live non-salmonid fish from affected Canadian provinces to be imported into the United States for direct slaughter under an APHIS-issued permit. The APHIS order applies to live fish only. It does not address eggs.

Most recently, APHIS issued an interim rule that it published in the *Federal Register* on September 9, 2008. The interim rule, which will go into effect on November 10, 2008, establishes interstate movement and import requirements for VHS-susceptible fish species that originate from the eight Great Lake boundary states and the Canadian provinces of Ontario and Quebec.

Last year, the Commission adopted a new regulation at §69.3 (relating to the transportation of VHS-susceptible fish out of the Lake Erie watershed). This new regulation, which went into effect on January 1, 2008, applies to live or dead fish (and their parts but not eggs) and makes it unlawful to transport or cause the transportation of VHS-susceptible fish out of the Pennsylvania portion of the Lake Erie watershed into other watersheds in Pennsylvania except when certain conditions are met. Those conditions are (1) the fish are being transported to a disease testing facility and the persons transporting the fish have taken adequate measures to prevent escape and to disinfect discharged water and equipment used in the transportation of the fish and the fish are accompanied in transit by documentation stating the point of origin of the fish and the destination to which they are to be delivered for testing; (2) the fish are from a group of fish certified as having tested negative for VHS in accordance with the testing protocols adopted by PDA and approved by the Commission; (3) the fish are from an artificial propagation facility certified as having tested negative for VHS in accordance

with testing protocols; (4) the fish are being transported to a slaughter facility, processing plant or restaurant and the fish are accompanied in transit by documentation stating the point of origin of the fish and the destination to which they are to be delivered for slaughter, processing or consumption; or (5) the fish are dead, recreationally caught fish that are being transported solely for the purpose of human consumption.

The regulation further provides that for purposes of the section, species of fish that are susceptible to VHS are those species that the Commission has defined as such by notice published in the *Pennsylvania Bulletin*. On two occasions, the Commission has published notices defining VHS-susceptible species of fish. Although the Commission's regulation addressed the intrastate movement of VHS-susceptible species of fish, it did not address interstate movement.

PDA, which has broad jurisdiction under the Domestic Animal Law and more limited jurisdiction under the Aquaculture Development Law, issued a quarantine order on October 13, 2007. The quarantine order addressed both intrastate and interstate movement of VHS-susceptible species of fish, and its provisions dealing with intrastate movement are consistent with the Commission's regulation at §69.3. The order, like §69.3, applies to live or dead fish and their parts, but it does not apply to eggs. PDA later amended its order on December 8, 2007 to revise its definition of VHS-susceptible species to track APHIS's thinking on the subject. PDA again amended its order on August 30, 2008 to remove dead animals and dead animal parts from the definition of VHS-susceptible species. Therefore, the PDA quarantine order currently applies to live fish only.

Commission staff have met on numerous occasions with PDA staff in an effort to develop a coordinated approach for dealing with VHS, and there has been good cooperation between the agencies. Although the PDA order addresses interstate movement of VHS-susceptible species of fish, the Commission's officers cannot enforce it. Therefore, the Commission has proposed new regulations, which will be fully enforceable by our officers, that will address the sale, introduction and transportation of VHS-susceptible species of fish from VHS-affected or at risk states or regions. The proposed regulations are consistent with the approach taken by PDA and APHIS in their orders. In addition, the proposed regulations are consistent with the recent APHIS interim rule in most material respects.

The Commission also has proposed a new regulation to address the possession and use as bait of eggs taken from VHS-susceptible species of fish from VHS-affected or at risk states or regions and the Lake Erie watershed. In addition, the Commission has proposed amendments to §69.3 to further define VHS-susceptible species of fish for purposes of the section, to include provisions regarding their introduction and sale outside the Lake Erie watershed and to address the possession and use as bait of eggs from VHS-susceptible species of fish from the Lake Erie watershed outside the watershed.

A notice of proposed rulemaking was published at 38 Pa. B. 4910 (September 6, 2008) (Exhibit G). The Commission received one public comment supporting the proposed regulations and amendments. Copies of all public comments have been provided to the Commissioners.

By notice published in the *Pennsylvania Bulletin* at 38 Pa. B. 3338 (June 14, 2008) (Exhibit H), the Executive Director, acting under the authority of §65.25 (relating to temporary changes to fishing regulations), already has taken immediate action to make it unlawful to sell, introduce, transport or import VHS-susceptible species of fish, dead or alive, and the parts thereof into this Commonwealth from VHS-affected or at risk states, including Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Wisconsin, and VHS-affected or at risk regions, including the Canadian provinces of Ontario and Quebec, unless certain conditions are met. These temporary modifications went into effect immediately and will remain in effect until January 1, 2009, unless the Commission, by appropriate action, adopts the new regulations.

By second notice published in the *Pennsylvania Bulletin* at 38 Pa. B. 3876 (July 12, 2008) (Exhibit I), the Executive Director, acting under the authority of §65.25, already has taken immediate action to make it unlawful to possess and use as bait unpreserved, refrigerated or frozen eggs taken from VHS-susceptible species of fish from a VHS-affected or VHS-at risk state or region in or along the waters of the Commonwealth except within the Lake Erie watershed. The Executive Director also has taken immediate action to make it unlawful to possess and use eggs from VHS-susceptible species of fish from the Lake Erie watershed as bait in other watersheds of this Commonwealth. This action represents a change to §69.3, which previously allowed for the possession and use as bait of eggs from VHS-susceptible species of fish from the Lake Erie watershed in other watersheds of the Commonwealth provided the fish were from a group of fish certified as having tested negative for VHS or were from an artificial propagation facility certified as having tested negative for VHS. These temporary modifications went into effect immediately and will remain in effect until January 1, 2009, unless the Commission, by appropriate action, adopts the new regulations.

On final rulemaking, staff recommend several modifications to the proposed regulations and amendments set forth in the notice of proposed rulemaking. (Language to be removed has a line through it; language to be added is in capital letters).

Specifically, staff recommend that the Commission not adopt proposed §63.52 (text below) in favor of a more restrictive regulation regarding the possession and use of eggs as bait that staff recommend in agenda item B that follows. Because of the more general and restrictive proposed regulation dealing with the possession and use of eggs as bait, a regulation specifically addressing eggs from VHS-susceptible species of fish is not needed. For these same reasons, staff also recommend that the Commission not adopt the last sentence of §69.3(c) (text below) that addresses the possession and use of eggs from VHS-susceptible species of fish from the Lake Erie watershed as bait in other watersheds of this Commonwealth.

Staff further recommend that §73.4 be revised to make its provisions regarding the international movement of fish consistent with the APHIS interim rule that will go into effect on November 10, 2008.

§63.52. Eggs from VHS-susceptible species of fish.

(a) For purposes of this section, the following terms shall have the following meanings:

(1) Species of fish that are susceptible to viral hemorrhagic septicemia (VHS) are those species that the Animal and Plant Health Inspection Service of the United States Department of Agriculture (APHIS) designates by order or the Commission defines by notice in the *Pennsylvania Bulletin*.

(2) A VHS-affected or VHS-at risk state includes Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Wisconsin or any other state that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.

(3) A VHS-affected or VHS-at risk region includes the Canadian provinces of Ontario and Quebec or any other region that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.

(b) It is unlawful to possess and use as bait unpreserved, refrigerated or frozen eggs taken from VHS-susceptible species of fish from a VHS-affected or VHS-at risk state or region in or along the waters of the Commonwealth except within the Lake Erie watershed.

(c) It is unlawful to possess and use as bait eggs taken from VHS-susceptible species of fish from the portion of the Lake Erie watershed in this Commonwealth in other watersheds of this Commonwealth.

§69.3. Transportation, **introduction and sale** of VHS-susceptible **species of** fish out of the Lake Erie watershed.

* * *

(c) It is unlawful to **possess and** use VHS-susceptible species of fish[, **parts thereof or their eggs taken**] from the Lake Erie watershed as [**fishbait**] **bait** in **other watersheds of this** Commonwealth [**waters outside the Lake Erie watershed**] except when the fish are from a group of fish certified as having tested negative for VHS or are from an artificial propagation facility certified as having tested negative for VHS **in accordance with the testing protocols adopted by the Department and approved by the Commission.** **It is unlawful to possess and use eggs from VHS-susceptible species of fish from the Lake Erie watershed as bait in other watersheds of this Commonwealth.**

§73.4. Transportation and importation of VHS-susceptible species of fish.

* * *

(d) International movement. It unlawful to import or cause the importation of VHS-susceptible species of fish into this Commonwealth from a VHS-affected or VHS-at risk region, except as follows:

~~(1) VHS-susceptible species of live salmonid fish may be imported into the United States if the shipment meets the requirements set forth in 50 CFR §16.13(a)(3) and (b) (relating to importation of live or dead fish, mollusks, and crustaceans or their eggs).~~

~~(2) VHS-susceptible species of live non-salmonid fish may be imported into the United States for direct slaughter under an APHIS-issued permit. VHS-SUSCEPTIBLE SPECIES OF LIVE FISH MAY BE IMPORTED INTO THE UNITED STATES IF THE REQUIREMENTS OF 9 CFR §§93.910 THROUGH 93.916 ARE MET.~~

~~(3) (2) VHS-susceptible species of dead fish may be imported into the United States if the fish are recreationally caught and are for human consumption.~~

Briefer:

Leroy M. Young, Jr., Director, Bureau of Fisheries

Recommendation:

Staff recommend that the Commission adopt the new regulations and amendments as set forth in the notice of proposed rulemaking with the modifications described in the Commentary. If adopted, the new regulations and amendments will go into effect on January 1, 2009.

Action:

A motion was made by Commissioner Bachman and seconded by Commissioner Anderson that the Commission adopt the new regulations and amendments as set forth in the notice of proposed rulemaking with the modifications described in the Commentary. The new regulations and amendments will go into effect on January 1, 2009. Motion carried.

B. Collecting Eggs from Fish for Bait or Other Purposes.

Commentary:

Waterways Conservation Officers during the past year encountered anglers catching large female brown trout and removing the eggs contained within the fish. The fish were released back into the waters from which they were taken. The anglers indicated that they used these eggs as bait to fish for trout in other water areas. The continued removal of eggs from large female trout may have a detrimental effect on the numbers of young of the year fish in a wild trout population and likely cause undue harm to a fish that is released. Currently, the regulations require that fish must be released immediately unharmed from most specially regulated trout waters. Officers successfully charged two individuals for a violation of this regulation and, in doing so, had to prove that the fish were harmed by the removal of the eggs.

In order to clearly prohibit this activity, the Commission has proposed a new regulation, which is consistent with the Commission's "Resource First" policy. The proposed regulation makes it unlawful to take eggs from a fish taken from waters of this Commonwealth outside the Lake Erie watershed or to possess these eggs or use them as bait. Eggs taken from lawfully harvested fish from the Lake Erie watershed may be possessed and used as bait in the Lake Erie watershed only. The proposed regulation does not prohibit the possession of eggs contained within a lawfully harvested fish that is possessed for the purpose of human consumption.

A notice of proposed rulemaking was published at 38 Pa. B. 4776 (August 30, 2008) (Exhibit J). The Commission received two public comments regarding the proposed regulation. One supports the proposal and favors an even more restrictive approach that would prohibit the taking of eggs from fish from any water and would prohibit them from being used anywhere in the Commonwealth as bait. The other expresses concern because the proposed regulation does not address the use of eggs from other jurisdictions. However, this comment is based on an incorrect assumption that the proposed regulation is designed to address the spread of VHS (which is covered by a different proposed regulation that addresses the use of eggs taken from fish from all VHS-affected or at risk states or regions, not just eggs taken from fish in Pennsylvania). Copies of all public comments have been provided to the Commissioners.

By notice published in the *Pennsylvania Bulletin* at 38 Pa. B. 3875 (July 12, 2008) (Exhibit K), the Executive Director, acting under the authority of §65.25 (relating to temporary changes to fishing regulations), took immediate action to make it unlawful to take eggs from a fish taken from waters of this Commonwealth outside the Lake Erie watershed or to possess these eggs or use them as bait. This temporary modification went into effect immediately and will remain in effect until January 1, 2009, unless the Commission, by appropriate action, adopts the new regulation.

On final rulemaking, staff recommend modifications to the original proposal that was published in the *Bulletin*. These modifications are based on input that was informally

sought from members of the Fisheries Committee. (Language to be removed has a line through it; language to be added is in capital letters).

Specifically, staff recommend a proposed regulation relating to egg collection that makes it unlawful to remove or strip eggs from any fish taken from waters of the Commonwealth, whether dead or alive, except for trout and salmon that are taken from waters in the Lake Erie watershed. Staff also recommend a proposed regulation that prohibits the possession and use of unpreserved, refrigerated or frozen eggs regardless of their origin in or along the waters of this Commonwealth except in the Lake Erie watershed. In the Lake Erie watershed, unpreserved, refrigerated or frozen eggs from trout and salmon only may be possessed and used as bait.

§63.53. Egg collection.

~~**It is unlawful to take eggs from a fish taken from waters of this Commonwealth outside the Lake Erie watershed or to possess these eggs or use them as bait. Eggs taken from lawfully harvested fish from the Lake Erie watershed may be possessed and used as bait in the Lake Erie watershed only. This section does not prohibit the possession of eggs contained within a lawfully harvested fish that is possessed for the purpose of human consumption.**~~ IT IS UNLAWFUL TO REMOVE OR STRIP EGGS FROM FISH TAKEN FROM WATERS OF THIS COMMONWEALTH EXCEPT FOR TROUT AND SALMON TAKEN FROM WATERS IN THE LAKE ERIE WATERSHED.

§63.54. POSSESSION OR USE OF EGGS AS BAIT.

EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, IT IS UNLAWFUL TO POSSESS OR USE AS BAIT UNPRESERVED, REFRIGERATED OR FROZEN FISH EGGS REGARDLESS OF THEIR ORIGIN WHILE IN THE ACT OF FISHING IN OR ALONG WATERS OF THIS COMMONWEALTH. UNPRESERVED, REFRIGERATED OR FROZEN EGGS FROM TROUT OR SALMON MAY BE USED AND POSSESSED AS BAIT WHILE FISHING IN OR ALONG THE WATERS OF THE LAKE ERIE WATERSHED.

Briefer:

Leroy M. Young, Jr., Director, Bureau of Fisheries

Recommendation:

Staff recommend that the Commission adopt the new regulations set forth in the Commentary. If adopted, the new regulations will go into effect on January 1, 2009.

Action:

A motion was made by Commissioner Concilla and seconded by Commissioner Bachman to adopt the new regulations set forth in the Commentary. The new regulations will go into effect on January 1, 2009. Motion carried.

PROPOSED RULEMAKING

C. Amendments to Section 75.1 (Endangered Species) to add Salamander Mussel, Rabbitsfoot, and Snuffbox, and Amendments to Section 75.2 (Threatened Species) to add Sheepnose and Rayed-bean.

Commentary:

Staff propose that the following mussel species be added to the Commission's endangered or threatened species lists:

(1) Salamander mussel (*Simpsonaias ambigua*). Salamander mussels occur in sand or silt under large, flat stones in swift current in streams and rivers. Unlike other mussel species in Pennsylvania, it is the only species whose glochidia (mussel larvae) host is not a fish, but the mudpuppy (*Necturus maculosus*), which typically occupies similar rock shelter habitat.

Historically, salamander mussels occurred in the Great Lakes Basin and throughout most of the Mississippi River system. The salamander mussel was known from 90 streams/lakes in 15 states and Canada. The salamander historically occurred within the lakes, streams and rivers of the following states and provinces: Pennsylvania, Minnesota, Wisconsin, Michigan, Tennessee, Ohio, Missouri, Kentucky, Indiana, Illinois, Iowa, Arkansas, New York, West Virginia, and Ontario, Canada. Recent occurrences have been reported from only 53 of these streams/lakes in the following 11 states: Pennsylvania, Ohio, West Virginia, New York, Kentucky, Tennessee, Michigan, Illinois, Indiana, Iowa, and Missouri. Multiple streams may comprise single salamander mussel population segments, essentially decreasing the number of extant populations. Existing populations are generally separated and genetically isolated from each other by barriers such as impoundments or riverine reaches of unsuitable or otherwise unoccupied habitat.

Only three waterbodies in Pennsylvania have records of the salamander mussel. Research suggests that live salamander mussels are not easily detected; the oldest historic record (collected by Stansbery 1970 (Clarke 1985)) indicates the presence of salamander mussels in Navigational Pool 5 of the Allegheny River. Presently the salamander mussel is considered to exist only in Navigational Pool 5 and 6 of the Allegheny River (Smith 2005, 2007). Shells were found in 1985 and 1995 (T. Smith, personal communication), but no live individuals were detected. Surveys of French Creek and its tributaries did not detect the presence of the salamander mussel (Smith and Crabtree 2005, Smith and Crabtree, *in review*).

Salamander mussel was evaluated by staff using the Commission's mussel species documentation and listing/de-listing criteria. The species review showed that a population reduction is projected to be greater than 80% in the next ten years, the extent of stream/river occupancy is projected to be less than 10 miles, the species exists at less than 6 sites, and a continued, documented decline has occurred, all of which satisfies endangered status.

These mussels face direct and indirect threats to their habitat from a number of industrial activities. The potential also exists for a single catastrophic event (e.g., sodium hydroxide spill) to compromise the Allegheny River/French Creek/Dunkard Creek populations or their host species.

The Bivalve Technical Committee of the Pennsylvania Biological Survey (PABS) reviewed the Heritage rank of the Salamander Mussel and recommended that it be designated for “critically imperiled” (S1) status. Critically imperiled is defined as extremely rare or having factor(s) making it especially vulnerable to extirpation from the state, i.e., five or fewer occurrences or very few remaining individuals or acres (State Rank Definitions 1996). The PABS committee additionally recommended endangered listing status based on the aforementioned data and potential endangerment of the species in Pennsylvania.

Sufficient information has been collected from streams and rivers within Pennsylvania to warrant the species to be elevated from rare (non-listed) to endangered status. Therefore, staff propose that the salamander mussel be added to the Pennsylvania list of endangered species.

(2) Rabbitsfoot (*Quadrula cylindrica cylindrica*). The rabbitsfoot is a freshwater mussel that inhabits small to medium-sized streams and some larger rivers. It usually occurs in shallow areas along the bank and adjacent runs and shoals where the water velocity is reduced. Specimens may also occupy deep-water runs and have been reported in 9-12 feet of water. Bottom substrates generally include sand and gravel. This species seldom burrows but lies on its side on the stream bottom (Ecological Specialists, Inc. 1993, Parmalee and Bogan 1998, Watters 1988).

The rabbitsfoot historically occurred in Alabama, Arkansas, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, Tennessee, and West Virginia. Historically, the rabbitsfoot occurred in the lower Great Lakes sub-basin and Mississippi River Basin. The rabbitsfoot was previously known from 138 streams in 15 states. Rabbitsfoot populations are considered to still exist in only 49 streams in 13 states, which represents a 65% decline (USFWS 2008). Furthermore, in the streams where it does exist, populations with few exceptions are highly fragmented and restricted to short reaches. The rabbitsfoot is designated federally as a candidate species to be listed as threatened or endangered.

In Pennsylvania, rabbitsfoot populations are known to currently occur in the Allegheny River, French Creek, Muddy Creek, LeBoeuf Creek, and Conneautee Creek. Current threats to the rabbitsfoot in the Allegheny River include channel maintenance activities, sedimentation, bridge replacement projects, agricultural activities, silvicultural activities, and rapid expansion of the oil and gas industry. If coal mining increases in western Pennsylvania, it would become an additional threat to the rabbitsfoot in the Allegheny River. There is always potential for a single, catastrophic event (e.g., sodium hydroxide spill) to impact the French Creek or Allegheny River subpopulations. Other threats to the

rabbitsfoot in French Creek include nutrients from agriculture, aging septic systems (R.R. Evans, WPC, pers. comm., 2003), sedimentation, and municipal runoff and effluents. As with the Allegheny River, the rapid expansion of oil and gas development in northwestern Pennsylvania is a concern within the French Creek watershed. LeBoeuf and Conneautee Creeks are both tributaries to French Creek and face similar threats. Portions of Muddy Creek occur on the Erie National Wildlife refuge, which affords these portions protection. However, Muddy Creek is still threatened by sedimentation, agricultural runoff, expanding development in non-refuge lands, and the rapid expansion of oil and gas development.

Rabbitsfoot was evaluated by staff using the Commission's mussel species documentation and listing/de-listing criteria. The species review showed that a population reduction of greater than 80% is projected in the next ten years. The Bivalve Technical Committee of PABS reviewed the Heritage rank of the rabbitsfoot and recommended that it be designated for "critically imperiled" (S1) status. Critically imperiled is defined as extremely rare or having factor(s) making it especially vulnerable to extirpation from the state, i.e., five or fewer occurrences or very few remaining individuals or acres (State Rank Definitions 1996). The PABS committee additionally recommended endangered listing status based on the aforementioned data and potential endangerment of the species in Pennsylvania. Enough information has been collected from streams and rivers within Pennsylvania to warrant the rabbitsfoot to be elevated from rare (non-listed) to endangered status. Therefore, staff propose that Rabbitsfoot be added to the Pennsylvania list of endangered species.

(3) Snuffbox (*Epioblasma triquetra*). The snuffbox is found in small to medium-sized creeks to larger rivers and lakes. It occurs in swift currents of riffles and shoals and wave-washed lakeshores over gravel and sand with occasional cobble and boulders, and generally burrows deep into the substrate except when spawning or attracting a host (Parmalee and Bogan 1998).

Historically, the snuffbox occurred in portions of the Great Lakes basin, and throughout most of the Mississippi River system. The snuffbox was historically known from 208 streams/lakes in the following 18 states and Canada: Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, New York, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, Wisconsin, and in Ontario, Canada. Existing populations are known from 73 streams and lakes in 14 states and Canada. However, it is probable that the species persists in some of the 135 streams/lakes where it is considered extirpated and it may occur in some other streams. Multiple streams may comprise single snuffbox populations, essentially decreasing the number of existing populations. Current populations are generally separated and genetically isolated from each other by barriers such as impoundments or riverine reaches of unsuitable and otherwise unoccupied habitat (Butler 2007).

Historical literature suggests that at one time the snuffbox was relatively abundant in certain Pennsylvanian streams such as the upper Ohio River and Beaver River (Rhoads

1899) and Allegheny River (Ortmann 1909). The Lake Erie population is considered extirpated. Besides these waters, snuffbox have been reported from French Creek, West Branch French Creek, LeBoeuf Creek, Muddy Creek, Conneaut Outlet, Woodcock Creek, Little Mahoning Creek, Dunkard Creek, Shenango River, and Little Shenango River.

Snuffbox collections occurred sporadically since 1898 (Rhoads 1899). Populations were documented in the Allegheny River from Forest County downstream to Armstrong County. The construction of nine locks and dams on 72 miles of the Allegheny River between Armstrong County and Pittsburgh and other activities disrupted historical mussel habitat and snuffbox populations. Completion of the Kinzua Dam on the upper Allegheny River main stem in 1965 destroyed potential snuffbox habitat.

Muddy Creek contains snuffbox that are considered part of the more extensive French Creek population (Mohler et al. 2006). Smith and Crabtree (2005) reported abundance estimates from quantitative samples in French Creek which suggest that although present in most locations, snuffbox occur at relatively low mean densities. No snuffbox were found in Little Mahoning Creek during 15 timed-area surveys (T.A. Smith, personal communication). Snuffbox habitat in the Shenango River has been destroyed by two reservoirs (Pymatuning Lake and Shenango River Lake). These impoundments eliminated snuffbox habitat in about 50% of the 75-mile river. Snuffbox are currently present in the upper reaches of the Shenango River basin (Butler 2007). The Little Shenango River has a population reported from the lower portion of the river basin. The remaining habitat is separated by dams and reservoirs.

No snuffbox were found during recent mussel surveys of New York's tributaries to the Allegheny River (Smith and Horn 2006, Smith 2007, Smith and Meyer 2008b), and no snuffbox were found in the pooled portions of the Allegheny River (Smith and Meyer 2008c). Only French Creek is considered a stronghold for the species in Pennsylvania. Presently, snuffbox can be collected throughout French Creek but usually at relatively low numbers. Snuffbox are also sporadically collected from the Allegheny River from Forest to Armstrong County.

The snuffbox population is declining nationwide and within Pennsylvania. The snuffbox is proposed as a candidate at the federal level. The proportion of watersheds occupied by Pennsylvania's snuffbox population declined by approximately 23%, i.e., from 22 watersheds to 17 watersheds within the past 25 years. Several streams with snuffbox populations may occur within the same watershed in some cases. Of 107 individual streams with historic snuffbox populations, only 40 streams remain; a 37% reduction (Butler 2007).

The construction of the navigational lock and dam system in the Allegheny River in the 1920's and 1930's invariably changed the character of the river habitat. The locks and dams were built along a 72 mile section of the river. The construction of the Kinzua Dam for flood control has altered the natural flow regime and habitat of the upper Allegheny

River. These mussels face direct and indirect threats to their habitat from a number of industrial activities. Formerly, a strong hold for Pennsylvania's rich mussel fauna, the river bottom habitat in the Allegheny River, which is important for the survival of this mussel species, is rapidly being depleted by these practices. Other direct and indirect threats to the Allegheny River include sedimentation and pollution from oil and gas development, bridge replacement projects, and silvicultural activities. Coal mining activities in southwestern Pennsylvania have contributed to the degradation of the Monongahela River and its tributaries, which may have provided suitable habitat to the snuffbox at one time. Threats to French Creek include sedimentation, municipal runoff and industrial and municipal waste water treatment plant discharges. Aquatic invasives, such as zebra mussels, have been observed in the upper Allegheny River watershed (e.g., Edinboro Lake) and within French Creek. A single catastrophic event (e.g., sodium hydroxide spill) could impact the French Creek population or their host fish species.

Snuffbox was evaluated by staff using the Commission's mussel species documentation and listing/de-listing criteria. The species review showed that a population reduction of greater than 80% is projected in the next ten years. A continued decline of this species has been documented. These factors support endangered status.

The Bivalve Technical Committee of the PABS reviewed the Heritage rank of the Snuffbox and recommended it be designated as "critically imperiled" (S1) status. Critically imperiled is defined as extremely rare or having factor(s) making it especially vulnerable to extirpation from the state, i.e., five or fewer occurrences or very few remaining individuals or acres (State Rank Definitions 1996). The PABS committee additionally recommended endangered listing status based on the aforementioned data and apparent endangerment of the species in Pennsylvania.

Enough information has been collected from streams and rivers within Pennsylvania to justify that the snuffbox be elevated from rare (non-listed) to endangered status. Therefore, staff propose that snuffbox be added to the Pennsylvania list of endangered species.

(4) Sheepnose (*Plethobasus cyphus*). The sheepnose is primarily a larger-stream species. It occurs primarily in shallow shoal habitats with moderate to swift currents over coarse sand and gravel. Habitats with sheepnose may also have mud, cobble and boulders. Specimens in larger rivers may occur in deep runs (Butler 2002, Oesch 1984, Parmalee and Bogan 1998).

Historically, the sheepnose occurred throughout much of the Mississippi River system with the exception of the upper Missouri River system and most lowland tributaries in the lower Mississippi River system. This species is known from the Mississippi, Ohio, Cumberland, Tennessee, and Ohio Rivers, and scores of tributary streams rangewide. The sheepnose was historically known from 77 streams in 15 states: Alabama, Arkansas, Illinois, Indiana, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin (Butler 2002). According to

Parmalee and Bogan (1998) and Neves (1991), the sheepnose has been extirpated throughout much of its former range or reduced to isolated populations. The only records known from some streams are archeological specimens (Butler 2002).

The sheepnose has been eliminated from 51 of the 77 streams from which it was historically known; a decline of 66% (Butler 2002). This species has also been eliminated from long reaches of former habitat in hundreds of miles of the Illinois, Cumberland, and other rivers, and from several reaches of the Mississippi and Tennessee Rivers. In addition, the species is no longer present in the state of Arkansas (Butler 2002). Sheepnose are designated federally as a candidate species.

Historically, Ortmann (1909) considered the sheepnose to occur “more abundantly” in the Allegheny in Armstrong County than it did in the Ohio in Pennsylvania, where he sampled it “sparingly.” Records indicate that sheepnose were collected within the Monongahela River near Monessen, Ohio River near Shippingport (New Cumberland Pool, Dashields Pool), Beaver River near Wampum, and Allegheny River Pools 5 and 8.

Populations of the sheepnose in Pennsylvania were generally considered to exist if live or fresh dead specimens had been collected after 1982 (~25 years ago). Currently, populations of the sheepnose are only known from the Allegheny River in Forest and Venango Counties. Zimmerman (2002) reported several live and fresh dead specimens, including juveniles, near Oil City. This evidence suggests the presence of a viable population of the sheepnose in the upper Allegheny River (Butler 2002). The proportion of watersheds occupied by Pennsylvania’s sheepnose population has declined from seven to two, or 71%, within the past 25 years. Several streams may occupy the same watershed.

Threats to sheepnose include direct and indirect threats to their habitat from a number of industrial activities, sedimentation and pollution. There is potential for a single, catastrophic event (e.g., sodium hydroxide spill) to impact the Allegheny River population.

The majority of the remaining sheepnose populations appear to be small and geographically isolated. The one factor that most noticeably results in population isolation is impoundment of rivers as well as stream reaches heavily impacted by toxic effluents and contaminated sediments. The patchy distributional pattern of populations in short river reaches makes them much more susceptible to extirpation due to the lack of recolonization from other populations. A single catastrophic event, such as a toxic chemical spill, could cause the extirpation of small, isolated sheepnose occurrences. High levels of isolation make natural repopulation of any extirpated population impossible without human intervention. Population isolation also prohibits the natural interchange of genetic material between populations (USFWS 2008).

The likelihood is high that some or all of Pennsylvania’s sheepnose populations are below the effective population size (EPS) required to maintain long-term genetic and

population viability. Recruitment reduction or failure is a potential problem for many small mussel populations rangewide, a potential condition exacerbated by reduced range sizes and increasingly isolated populations. If these trends continue, further significant declines in total sheepnose population size and consequent reduction in long-term viability may soon become apparent. Its present distribution and status may be indicative of the detrimental bottleneck effect resulting when the EPS is not attained (USFWS 2008).

Staff evaluated the sheepnose using the Commission's mussel species documentation and listing/de-listing criteria. A 50% reduction in the next ten years is projected for this species, which satisfies threatened status.

The Bivalve Technical Committee of PABS reviewed the Heritage rank of the sheepnose and recommended it be designated as "critically imperiled" (S1) status. However, recent survey information (R. Vilella pers. comm.) from the upper Allegheny suggests that the PABS committee will be changing the status from S1 to S2 status (imperiled) - in the state because of rarity or because of some factor(s) making it very vulnerable to extirpation from the state. Typically six to 20 occurrences or few remaining individuals or acres qualify a species for an S2 rank (State Rank Definitions 1996). The PABS committee additionally recommended threatened listing status, i.e., species that may become endangered within the foreseeable future throughout their range in Pennsylvania unless the causal factors affecting the organism are abated.

Enough information has been collected from streams and rivers within Pennsylvania to warrant the sheepnose be elevated from rare to threatened status. Therefore, staff propose that sheepnose be added to the Pennsylvania list of threatened species.

(5) Rayed bean (*Villosa fabalis*). The rayed bean is known from smaller headwater creeks, but records exist in larger rivers. They are usually found in or near riffle areas, and in the shallow, wave-washed areas of glacial lakes, including Lake Erie. In Lake Erie, it is generally associated with islands in the western portion of the lake. Substrates typically include gravel and sand. It is sometimes associated with vegetation (e.g., water willow; *Justicia americana*, or water milfoil; *Myriophyllum* sp.) in and adjacent to riffles and shoals. Specimens are typically buried among the roots of the vegetation (Butler 2002).

Historically, the rayed bean occurred in parts of the upper (i.e. Lake Michigan drainage) and lower Great Lakes systems, and throughout most of the Ohio and Tennessee River systems. The rayed bean was historically known from 106 streams, lakes, and some man-made canals in 10 states. The rayed bean historically occurred in Illinois, Indiana, Kentucky, Michigan, New York, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia. Existing populations are known from 22 streams and one lake in five states. The rayed bean has disappeared from 78% of the total number of streams and other waterbodies from which it was historically known. (23 current waterbodies compared to 106 historic waterbodies.) The rayed bean has been eliminated from long stretches of

former habitat in hundreds of miles of the Maumee, Ohio, Wabash, and Tennessee Rivers and from numerous stream reaches in their tributaries. In addition, the species is no longer known from the states of Illinois, Kentucky, Tennessee, Virginia, and West Virginia representing half the states from which it was formerly known (Butler 2002).

Ortmann (1909) documented low numbers of rayed beans from the Allegheny River system. Presently, the Allegheny River population is one of the largest known, rangewide. The population extends from Cataraugus County, New York, to Armstrong County, Pennsylvania. It is currently found live in the Allegheny River (Pools 6, 8 and 9), French Creek and LeBoeuf Creek (Smith and Meyer 2008a; 2008 b). Rayed bean shell material has been found in Allegheny River Pool 7 (Smith and Meyer 2008a; 2008b). Populations of rayed bean also occur in French Creek and Cussewago Creek (Smith and Crabtree 2005).

Rayed bean are currently distributed within the upper Allegheny River watershed (Cussewago Creek, tributary to Conewango Creek and French Creek; LeBoeuf Creek) and within the middle Allegheny River and from Navigational Pools 6, 8 and 9. The Allegheny River population is one of the largest, rangewide (Butler 2002). However, the rayed bean is declining nationwide and within Pennsylvania. Nationally, of 106 individual streams/waterbodies with historic rayed bean populations, only 23 streams remain (a 78% stream reduction) (Butler 2002). The rayed bean is currently designated as a federal candidate and is under review to be listed as an endangered species.

The greatest threats to the French Creek population include sedimentation, municipal runoff and effluents. The rapid expansion of oil and gas exploration and development threatens existing populations (e.g., brines, organics) and stream sedimentation loading from the increasing number of dirt and gravel roads and well sites. Aquatic invasives, such as zebra mussels have been observed in the upper Allegheny River watershed (e.g., Edinboro Lake) and within French Creek.

These mussels face direct and indirect threats to their habitat from a number of industrial activities. There is potential for a single, catastrophic event (e.g., sodium hydroxide spill) to impact this population.

The majority of the remaining rayed bean populations appears to be small and geographically isolated. The factor that most noticeably results in population isolation is impounding of rivers but another factor is stream reaches that are heavily impacted by toxic effluents and contaminated sediments. The patchy distributional pattern of populations in short river reaches makes them much more susceptible to extirpation due to the lack of recolonization from other populations. A single catastrophic event, such as toxic chemical spills, could cause the extirpation of small, isolated rayed bean occurrences. High levels of isolation make natural repopulation of any extirpated population impossible without human intervention. Population isolation also prohibits the natural interchange of genetic material between populations (USFWS 2008).

The likelihood is high that some or all of Pennsylvania's rayed bean populations are below the effective population size (EPS) required to maintain long-term genetic and population viability. Recruitment reduction or failure is a potential problem for many small mussel populations rangewide, a potential condition exacerbated by reduced range sizes and increasingly isolated populations. If these trends continue, further significant declines in total rayed bean population size and consequent reduction in long-term viability may soon become apparent. Its present distribution and status may be indicative of the detrimental bottleneck effect resulting when the EPS is not attained (USFWS 2008).

Staff evaluated this species using the Commission's mussel species documentation and listing/de-listing criteria. The population is projected to be reduced by greater than 50% in next ten years, which satisfies a threatened status listing.

The Bivalve Technical Committee of PABS reviewed the Heritage rank of the sheepnose and recommended it be designated as "critically imperiled/imperiled" (S1S2) status. This combined status, on the border of critically imperiled and imperiled status, is due to the species' extreme rarity or because of some factor(s) making it especially vulnerable to extirpation from the state. "Critically imperiled" factors include the existence of five or fewer occurrences or very few remaining individuals or acres. "Imperiled status" can be due to rarity or because of some factor(s) making it very vulnerable to extirpation from the state, i.e., typically six to 20 occurrences or few remaining individuals or acres (State Rank Definitions 1996). The PABS committee additionally recommended a threatened listing status (Pennsylvania Biological Survey Suggested Status Definitions 2005) based on the aforementioned data and apparent endangerment of the species in Pennsylvania.

Enough information has been collected from streams and rivers within Pennsylvania to warrant the rayed bean to be elevated from rare to threatened status. Therefore, staff propose that rayed bean be added to the Pennsylvania list of threatened species.

Briefer:

Leroy M. Young, Jr., Director, Bureau of Fisheries

Recommendation:

Staff recommend that the Commission approve the publication of a notice of proposed rulemaking containing the amendments described in the Commentary. If adopted on final rulemaking, these amendments will go into effect upon publication in the *Pennsylvania Bulletin*.

Action:

A motion was made by Commissioner Bachman and seconded by Commissioner Ketterer to approve the publication of a notice of proposed rulemaking containing the amendments described in the Commentary. If adopted on final rulemaking, these amendments will go into effect upon publication in the *Pennsylvania Bulletin*. Motion carried.

OTHER MATTERS

D. Sinnemahoning Creek Watershed Restoration Grant Program.

Commentary:

On June 30, 2006 approximately 31 rail cars of a train operated by Norfolk Southern derailed near Gardeau, in Norwich Township, McKean County, Pennsylvania. The derailment resulted in sodium hydroxide spilling into the environment that caused damage to the natural resources of Big Fill Run, Sinnemahoning-Portage Creek and the Driftwood Branch of Sinnemahoning Creek.

Thereafter, the Commonwealth of Pennsylvania and Norfolk Southern reached a settlement agreement. As part of the settlement, Norfolk Southern agreed to pay the Commonwealth \$7,350,000 as restitution for the natural resource damages that occurred. The Commission received one-half of that amount, or \$3,675,000, and under the settlement must utilize the funds (minus its investigative and response costs of \$93,000) for purposes of developing and implementing projects that benefit recreational fishing and boating and the aquatic resources of Cameron, McKean, Elk and Potter Counties. The Commission's primary emphasis will be on projects in the Sinnemahoning Creek Watershed upstream of the confluence with the First Fork of Sinnemahoning Creek. The projects will be implemented utilizing Commission staff, contracted services or grants to Commission partners. Projects to be considered will include, but will not be limited to, acid mine drainage abatement; habitat protection, enhancement and restoration; the acquisition of properties (in fee or easements) for public fishing and access, as well as improvements to existing access areas; and aquatic inventories. The Commission deposited its share of the settlement into an interest bearing, restricted revenue account within the Fish Fund, which means that the monies can only be used for their specified purpose.

Under the settlement agreement, the Commission agreed that prior to funding projects, it would convene a stakeholder group for the purposes of seeking advice and developing recommendations regarding projects that meet the objectives described above. The first stakeholders' meeting took place on March 12, 2008.

In the upcoming months, staff will recommend to the Executive Director appropriate projects meeting the above objectives. Projects will conform to the Restoration Plan to be developed by Commission staff and made available to the public. Staff request that the Commission authorize the Executive Director to approve individual grants in the amount of \$100,000 or less per grantee per year for projects meeting the objectives of the Sinnemahoning Creek Watershed Restoration Grant Program. For grants exceeding that amount, staff will seek separate Commission approval. Staff note that the authorization that they are seeking is consistent with other grant programs, such as the State Wildlife Grant, Section 6 Endangered Species, Fish Passage and Habitat Restoration and Boating Facilities Grant Programs.

Briefer:

Leroy M. Young, Jr., Director, Bureau of Fisheries

Recommendation:

Staff recommend that the Commission authorize the Executive Director to approve individual grants in the amount of \$100,000 or less per grantee per year for projects meeting the objectives of the Sinnemahoning Creek Watershed Restoration Grant Program, as more fully described in the Commentary. For grants exceeding that amount, staff will seek separate Commission approval.

Action:

A motion was made by Commissioner Sabatose and seconded by Commissioner Anderson to authorize the Executive Director to approve individual grants in the amount of \$100,000 or less per grantee per year for projects meeting the objectives of the Sinnemahoning Creek Watershed Restoration Grant Program, as more fully described in the Commentary. For grants exceeding that amount, staff will seek separate Commission approval. Motion carried.

E. Cooperative Habitat Improvement Program (Adopt-a-Water).

Commentary:

Under the current Cooperative Habitat Improvement Program for lakes and streams (a.k.a. Adopt-a-Lake, Adopt-a-Stream), administered by the Division of Habitat Management, the maximum amount that the Commission contributes to purchase materials is \$2,000 per project. The amount of this support has been \$2,000 per project since January 1998. In some situations, inflationary pressure is rendering this amount insufficient to support projects under the program.

It is desirable to build some additional flexibility into the Cooperative Habitat Improvement Program by increasing the maximum amount that the Commission contributes to individual projects from the current level of \$2,000 to \$3,000. This will enable project cooperators to undertake more extensive projects where appropriate and counter inflationary pressures. Cooperators will still be required to provide equal value match in the form of donated materials and services or monetary contributions.

Briefer:

Leroy M. Young, Jr., Director, Bureau of Fisheries

Recommendation:

Staff recommend that the Commission approve an increase in the maximum amount of Commission financial support for each Cooperative Habitat Improvement Program project from \$2,000 to \$3,000.

Action:

A motion was made by Commissioner Anderson and seconded by Commissioner Czop to approve an increase in the maximum amount of Commission financial support for each Cooperative Habitat Improvement Program project from \$2,000 to \$3,000. Motion carried.

Other New Business

None.

Time and Place of January 2009 Commission Meeting

The next meeting is scheduled for January 29-30, 2009 and will be held at the Commission's headquarters in Harrisburg and in conjunction with the Susquehanna River Symposium scheduled for January 31, 2009.

Adjournment

A motion was made by Commissioner Shetterly and seconded by Commissioner Anderson to adjourn the meeting at approximately 1:35 p.m. Motion carried.