

Order Adopting Amendments

COMMONWEALTH OF PENNSYLVANIA PENNSYLVANIA FISH AND BOAT COMMISSION

Title 58. Recreation Part II. Fish and Boat Commission Chapter 75 Fishing

Preamble

The Fish and Boat Commission (Commission) amends Chapter 75 (relating to endangered species). The Commission is publishing this final-form rulemaking under the authority of 30 Pa. C.S. (relating to the Fish and Boat Code) (code).

A. *Effective Date*

The final-form rulemaking will go into effect immediately upon publication in the *Pennsylvania Bulletin*.

B. *Contact Person*

For further information on the final-form rulemaking, contact Jason E. Oyler, Esq., P.O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7810. This final-form rulemaking is available on the Commission's website at www.fish.state.pa.us.

C. *Statutory Authority*

The amendments to §§75.2 and 75.3 (relating to threatened species; and candidate species) are published under the statutory authority of section 2305 of the code (relating to threatened and endangered species).

D. *Purpose and Background*

The final-form rulemaking is designed to improve, update and modify the Commission's threatened and candidate species lists. The specific purposes of the amendments are described in more detail under the summary of changes.

E. *Summary of Changes*

Commission staff recently reevaluated the listing/delisting process for endangered, threatened and candidate species and reviewed recent fish survey data, especially data collected via benthic trawling, which is a relatively new method used in the Commonwealth's rivers. Accordingly, the Commission proposed five fish species for delisting from the existing threatened or candidate species lists. The Fishes Technical Committee of Pennsylvania Biological Survey (PABS) reviewed the species proposed to be delisted and concurred with the proposed delisting.

(1) Smallmouth Buffalo (*Ictiobus bubalus*): The smallmouth buffalo is a large, deep-bodied sucker of the Ohio Basin that inhabits deeper sections of large rivers. It occurs in the Lake Michigan drainage and Mississippi River basin from Pennsylvania and Michigan to Montana and south to the Gulf of Mexico. It is secure or common across its range. In this Commonwealth, it inhabits the Ohio River, Monongahela River, and lock and dam section of the Allegheny River.

The smallmouth buffalo has recently become common in the Ohio River and can be collected with regularity in the Monongahela and lower Allegheny Rivers. Criswell collected in excess of 100 individuals during a single night of electrofishing on the Ohio River in 2003 and Ohio River Sanitation Commission personnel collected 49 during a survey in 1992. California University

of Pennsylvania personnel collected 17 specimens on an electrofishing run on the Monongahela River in 2003, and 16 were collected by Commission staff in Pool 8 of the Allegheny River in July 2004. Argent and Kimmel (2003) considered the smallmouth buffalo common in several pools they sampled in the Allegheny and Ohio rivers. Field surveys conducted throughout the historic Pennsylvania range since 1990 have documented a significant expansion in range and population size compared to pre-1990 information. The smallmouth buffalo is absent from the majority of twentieth century collection literature; however, recent electrofishing and gill netting surveys have documented a continuous distribution throughout the Ohio River and lower reaches of the Monongahela and Allegheny Rivers in the Commonwealth.

This species was run through the Commission's fish species documentation and objective listing/de-listing criteria and met Criteria A. 1. (Population reduction) that the population is increasing, Criteria B.3. (Distribution & Trends) that the distribution is greater than 150 miles of river/stream, and criteria B.4. (Summed Proportion of Watersheds Occupied), which compares all fish species documented occurrences and shows that this species is no longer rare in the Commonwealth. The Fishes Technical Committee of the PABS reviewed the Heritage rank of the smallmouth buffalo and recommended it be changed to "apparently secure" (S4) status - uncommon but not rare, and usually widespread in the state. The PABS Committee additionally recommended "delisting" status based on the aforementioned data and apparent commonality of the species in the Commonwealth. Enough information is available to determine that it is secure in the state at present and to justify the removal of smallmouth buffalo from Pennsylvania's list of threatened fishes. Therefore, the Commission proposed that smallmouth buffalo be removed from the Pennsylvania list of threatened species.

(2) Longhead Darter (*Percina macrocephala*): The longhead darter is a small fish species that prefers warm rivers and large streams and occupies a wide array of habitats, including riffles and runs over substrates of clean gravel, cobble, rubble, and boulders, especially at the interface areas

between strong current and backwash. It also occurs in pools with both clean bottoms of gravel and rubble and those covered with silt and/or detritus. The longhead darter occurs in the Ohio River drainage from New York to North Carolina, and west to Kentucky and Tennessee, but it is rare and highly localized in these locations. In this Commonwealth, it occurs throughout French Creek and the Allegheny River, including the lowermost sections of a number of tributaries in Crawford, Erie, Forest, McKean and Warren counties. It formerly occurred in the Monongahela River drainage.

The longhead darter has increased its range considerably during the past 25 years. Although Cooper (1985) did not report this taxon in this Commonwealth upriver of Allegheny Reservoir, it has been collected with frequency in the upper Allegheny River as far as Roulette, Potter County, and in Cole Creek and Potato Creek in McKean County. It was also collected with regularity in the middle Allegheny River between the Allegheny Reservoir and the influence of the lock and dam system near East Brady, Clarion County, and in French Creek during the period 1990 – present. The first recent records in the lower Allegheny River are those of single specimens from Armstrong County in 1986 and 1987. Argent and Kimmel (2003) reported the longhead darter from Allegheny County and it was collected by Commission staff in Pool 8 of the Allegheny River in 2004 and by R. Spear during benthic trawl trials in 2005 in Pools 6, 7, and 8.

Field surveys conducted throughout the historic Pennsylvania range since 1985 have documented a significant expansion in range and population size compared to pre-1985 information. Although historically represented by limited, widely scattered collections consisting of only a single or few individual(s), recent research has documented continuous distribution throughout French Creek from the New York state line in Erie County to its mouth in Venango County, and the Allegheny River from Potter County downstream to Allegheny County, as well as in the lower sections of a number of larger tributaries to both. Observations of more than 100 individuals at a single station have been reported on at least 3 occasions, and this taxon is now locally common to abundant in both waterways.

This species was run through the Commission's fish species documentation and objective listing/de-listing criteria and met Criteria A. 1. (Population reduction) that the population is increasing. The Fishes Technical Committee of PABS reviewed the Heritage rank of the longhead darter and recommended it be changed to "apparently secure" (S4) status - uncommon but not rare, and usually widespread in the state. The PABS Committee additionally recommended "delisting" status based on the aforementioned data and apparent commonality of the species in this Commonwealth. Enough information is available to make the determination that it is secure in the state at present and to justify the removal of longhead darter from Pennsylvania's list of threatened fishes. Therefore, the Commission proposed that the longhead darter be removed from the Pennsylvania list of threatened species.

(3) Channel Darter (*Percina copelandi*): Channel darters are small fish that occur primarily in clear rivers and large streams over substrates of sand and gravel. They occupy a variety of habitats, including riffles, runs, and pools, lakeshores, and sluggish pools with lightly silted bottoms in the Allegheny River. During a study in the Allegheny River, channel darters were found in significantly deeper habitats than other darter species. The Channel Darter occurs in the Great Lakes/St. Lawrence and Ohio River drainages from southern Quebec and Vermont to Michigan, and south to Kentucky and Tennessee. A disjunct population exists in the Arkansas, Ouchita, and Red River drainages in the southern Midwest, and additional isolated populations occur in Mississippi/Louisiana and Alabama. In the Commonwealth, they are distributed throughout most of the Allegheny and Ohio rivers. Also a few records exist from the Lake Erie drainage.

The channel darter is locally common in sections of the Allegheny River where clean gravel substrate occurs. Recent benthic trawl surveys of the "Three Rivers" area indicate that the channel darter is the most common darter species within samples. Abundance in the wadeable Upper Allegheny River and tributaries appears to be low, and abundance is uncertain in the Lake Erie drainage. The channel darter is absent from the majority of twentieth century collection literature;

however, recent electrofishing and benthic trawl surveys have documented a mostly continuous distribution throughout the Ohio and Allegheny Rivers within the Commonwealth.

This species was run through the Commission's fish species documentation and objective listing/de-listing criteria and met Criteria B.3. (Distribution & Trends) that the distribution is greater than 150 miles of river/stream. The Fishes Technical Committee of PABS reviewed the Heritage rank of the channel darter and recommended it be changed to "apparently secure" (S4) status - uncommon but not rare, and usually widespread in the state. The PABS Committee additionally recommended "delisting" status based on the aforementioned data and apparent commonality of the species in this Commonwealth. Enough information is available to determine that it is secure in the state at present and to justify the removal of channel darter from Pennsylvania's list of threatened fishes. Therefore, the Commission proposed that channel darter be removed from the Pennsylvania list of threatened species.

(4) River Redhorse (*Moxostoma carinatum*): The river redhorse is a large sucker that inhabits rivers and large creeks. It prefers clearer waters and gravelly or rocky substrates in flowing pools and runs. The river redhorse's enlarged pharyngeal arches and molariform teeth make it well suited for crushing the shells of mollusks, an important component of its diet. The river redhorse occurs in the St. Lawrence, Great Lakes and Mississippi River drainages from southern Quebec to central Minnesota and western Iowa, south to northern Alabama and eastern Oklahoma, and on the Gulf Slope from Florida to Louisiana and Mississippi. In this Commonwealth, it occurs in the Ohio River drainage, including the Allegheny, Beaver, Monongahela, Ohio, Shenango, and Youghiogheny Rivers.

Although never abundant, the river redhorse can now be collected regularly in the Allegheny and Ohio Rivers and to a lesser extent in the Monongahela River. It was collected recently in the Shenango River as well. This is the first record there since 1933. Its former and present scarcity may be attributed in part to the difficulty in sampling its large river habitat. Field surveys conducted

throughout the historic Pennsylvania range since 1990 have documented a significant expansion in range and population size compared to pre-1990 information. The river redhorse is absent from the majority of twentieth century collection literature; however, recent electrofishing and gill netting surveys have documented a continuous distribution throughout the Ohio River and lower reaches of the Monongahela and Allegheny Rivers and in Lake Erie within the Commonwealth.

This species was run through the Commission's fish species documentation and objective listing/de-listing criteria and met Criteria A. 1. (Population reduction) that the population is increasing and Criteria B.3. (Distribution & Trends) that the distribution is greater than 150 miles of river/stream. The Fishes Technical Committee of PABS reviewed the Heritage rank of the river redhorse and recommended it be changed to "apparently secure" (S4) status - uncommon but not rare, and usually widespread in the state. The PABS Committee additionally recommended "delisting" status based on the aforementioned data and apparent commonality of the species in the Commonwealth. Enough information is available to determine that it is secure in the state at present and to justify the removal of river redhorse from Pennsylvania's list of candidate fish species. Therefore, the Commission proposed that river redhorse be removed from the Pennsylvania list of candidate species.

(5) Longnose Gar (*Lepisteous osseus*): The longnose gar is a large pelagic fish species with an elongate body, long snout with numerous sharp, needle-like teeth. It prefers medium-sized, low-gradient rivers and large streams, lakes, impoundments, oxbows, and backwaters over a wide variety of substrates. The longnose gar occurs in the Atlantic Slope drainages from New Jersey and Pennsylvania to Florida, the St Lawrence River, Quebec through Great Lakes (except Lake Superior), and the Mississippi River basin to the Gulf Coast. It also occurs in the Gulf Slope drainages from Florida to Texas. In this Commonwealth, it was historically widespread in the Ohio River drainage, including the Allegheny, Conemaugh, Monongahela, and Ohio rivers, and Conneaut Lake. It also occurs at Presque Isle-Lake Erie, lower Susquehanna River, and Delaware River to

Monroe County. It has not been taken recently in the Conemaugh or Susquehanna Rivers, and is now considered extirpated from the Delaware River.

The longnose gar has become fairly common in the Ohio River and is taken regularly in the Monongahela River and lower section of the Allegheny River. Criswell and Stauffer (2003) captured approximately 25 specimens in a single gill net during a sampling effort on the Ohio River.

Although it has been taken recently in Conneaut Lake, its population status there is not known. The Lake Erie population is considered stable, and longnose gar can be collected regularly in near shore areas and around the mouths of tributaries.

Field surveys conducted throughout the historic Pennsylvania range since 1990 have documented a significant expansion in range and population size compared to pre-1990 information. Recent electrofishing and gill netting surveys have documented continuous distribution throughout the Ohio River and lower reaches of the Monongahela and Allegheny rivers and in Lake Erie within the Commonwealth.

This species was run through the Commission's fish species documentation and objective listing/de-listing criteria and met Criteria A. 1. (Population reduction) that the population is increasing and Criteria B.3. (Distribution & Trends) that the distribution is greater than 150 miles of river/stream. The Fishes Technical Committee of PABS reviewed the Heritage rank of the longnose gar and recommended it be changed to "apparently secure" (S4) status - uncommon but not rare, and usually widespread in the state. The PABS Committee additionally recommended "delisting" status based on the aforementioned data and apparent commonality of the species in this Commonwealth. Enough information is available to determine that it is secure in the state at present and to justify removal of longnose gar from Pennsylvania's list of candidate fishes. Therefore, the Commission proposed that longnose gar be removed from the Pennsylvania list of candidate species.

On final-form rulemaking, the Commission adopted the amendments to §§ 75.2 and 75.3 to read as set forth in the notice of proposed rulemaking.

F. *Paperwork*

The final-form rulemaking will not increase paperwork and will create no new paperwork requirements.

G. *Fiscal Impact*

The final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The final-form rulemaking will impose no new costs on the private sector or the general public.

H. *Public Comments*

A notice of proposed rulemaking was published at 38 Pa. B. 5035 (September 13, 2008). The Commission received one public comment supporting the proposed rulemaking. Copies of all public comments were provided to the Commissioners and considered prior to adoption of this final-form rulemaking.

FINDINGS

The Commission finds that:

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

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

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

ORDER

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

(A) The regulations of the Commission, 58 Pa. Code Chapter 75, are amended by amending §§75.2 and 75.3 to read as set forth in 38 Pa. B. 5035.

(B) The Executive Director will submit this order and 38 Pa. B. 5035 to the Office of Attorney General for approval as to legality as required by law.

(C) The Executive Director shall certify this order and 38 Pa. B. 5035 and deposit them with the Legislative Reference Bureau as required by law.

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

For the Pennsylvania Fish and Boat Commission

Douglas J. Austen, Ph.D.
Executive Director