

Order Adopting Amendments

COMMONWEALTH OF PENNSYLVANIA PENNSYLVANIA FISH AND BOAT COMMISSION

Title 58. Recreation Part II. Fish and Boat Commission Chapters 53, 91, 97, 101, 105, 109 and 111 General Provisions and Boating

Preamble

The Fish and Boat Commission (Commission) amends 58 Pa. Code Chapters 53, 91, 97, 101, 105, 109 and 111 (relating to commission property; general provisions; operated provided equipment; boating accidents; operational conditions; specialty boats and waterskiing activities; and special regulations counties). The Commission is publishing this final-form rulemaking under the authority of 30 Pa. C.S. (relating to the Fish and Boat Code) (code). The amendments modify and update the Commission's boating regulations.

A. *Effective Date*

The final-form rulemaking will go into effect immediately upon publication of an order 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 electronically through the Commission's website at www.fish.state.pa.us.

C. *Statutory Authority*

The amendment to §53.8 (relating to boats) is published under the statutory authority of section 741 of the code (relating to control of property). The amendments to §§91.5, 97.1, 101.5, 105.3 and 109.1 (relating to parental and boat owner responsibility; personal floatation devices; confidentiality of boating accident reports; unacceptable boating practices; and air boats) are published under the statutory authority of section 5123 (relating to general boating regulations). The amendment to §109.6 (relating to special marine events) is published under the statutory authority of section 5122 of the code (relating to registration, licenses, permits, plates and statistics). The amendments to §§111.17 and 111.20 (relating to Clearfield County; and Crawford County) are published under the statutory authority of section 5124 of the code (relating to particular areas of water).

D. *Purpose and Background*

The final-form rulemaking is designed to update, modify and improve the Commission's boating regulations. The specific purpose of the proposed amendments is described in more detail under the summary of changes. On June 9, 2009, the Commission's Boating Advisory Board (BAB) considered each of the amendments and recommended that the Commission adopt the amendments as set forth in the notice of proposed rulemaking with the exception noted below.

E. *Summary of Changes*

(1) *Sections 53.8 and 97.1.* Section 97.1(f) of the Commission's regulations follows the Code of Federal Regulations that excludes racing shells, rowing sculls and racing kayaks from the requirements for personal floatation devices (PFDs). However, this subsection provides that the exemption does not apply on Commission and State Park owned or controlled boating waters. Section 53.8 of the Commission's regulations similarly requires occupants of skulls, shells and racing kayaks to carry or wear Coast Guard approved PFDs on Commission property.

This type of boating is somewhat exclusive due to its nature. Most often, racing shells, sculls and kayaks are used by high school, college or university students or special clubs. They are, with few exceptions, very safe boaters, and the accident record for such boats does not point to a need for requiring PFDs for their occupants. Moreover, there is no support to require occupants of such boats to wear PFDs on small Commission lakes when they are not required to carry them onboard on larger waters.

Section 91.7(f) also provides detailed information on what type of PFDs must be carried by the safety boat accompanying the shells, sculls or racing kayaks. However, section 97.1(f) does not, and may not (because of the Federal regulations), require that there to be a safety boat present. It therefore does not make sense to stipulate requirements for safety boats when the safety boats are not required to be on the scene under the Federal regulations. Also, this section states that safety boats shall carry a sufficient number of Type I, II, III or V PFDs for the occupants of the racing boats that they accompany. Any PFDs required to be carried, however, should be the type that can easily be thrown to someone in the water (*e.g.*, Type IV throwable PFDs). Moreover, the accident record for such boats does not point to the need for requiring PFDs on safety boats. Accordingly, the Commission adopted the amendments to §§53.8 and 97.1 to read as set forth in the notice of proposed rulemaking.

(2) *Section 91.5.* The Commission's current regulations do not include a provision making it unlawful for a boat owner knowingly to allow someone to operate a boat without a boating safety education certificate onboard when the individual is required to have one. The Commission's law enforcement staff have requested that this requirement be added. The Commission therefore amended §91.5 to read as set forth in the notice of proposed rulemaking.

(3) *Section 101.5.* The confidentiality of boating accident reports is covered in detail in section 5503 of the code (relating to accident reports) and in §101.5 of the Commission's regulations. The Commission receives requests for certified abstracts for specific boating accidents. This is the only information that can be released from the Boating Accident Report (PFC-260) filed by the boat operator or owner who was involved in a reportable, recreational boating accident. Commission staff have required that such requests be in writing and have accepted e-mails as sufficient. Accordingly, the Commission amended § 101.5 to read as set forth in the notice of proposed rulemaking.

(4) *Section 105.3.* The existing regulation concerning pontoon boats allows passengers to ride outside the normal passenger carrying area when the pontoon boat is travelling at slow, no wake speeds. This is an unsafe practice because the passenger can very easily fall overboard, even at the reduced, slow, no-wake speed. Because of the nature of the hull design of pontoon boats, slow, no-wake can be a faster speed than on single hull boats, such as a runabout. If the passenger is in the bow of the boat and falls overboard, he will most likely be struck by the boat's propeller with catastrophic results. This very scenario took place last year on a lake in western Pennsylvania when the pontoon boat operator unexpectedly hit a log causing a boy, who was riding on the bow outside of the normal passenger carrying area, to fall overboard and be struck by the boat's propeller.

The BAB considered the proposed amendment and recommended that the Commission's staff review the proposal to determine whether it places an unfair restriction on passengers riding in installed seating on the bow, outside the continuous railing on such boats, at slow, no wake speed and whether an accommodation should be made to permit this practice. Staff further reviewed the proposed amendment and determined that it is not overly burdensome and sitting in seats outside the railing of pontoon boats at any speed, even slow, no wake, is a dangerous practice and one that

should not be permitted. The Commission therefore amended §105.3 to read as set forth in the notice of proposed rulemaking.

(5) *Section 109.1.* Section 109.1 of the Commission's regulations provides detailed standards for the construction of air boats. However, there is no known example of this regulation being enforced in any part by Commission officers. In fact, a recent technical inquiry by a member of the general public about this regulation could not be answered because there are no known sources for the content of this regulation. There are very few airboats in this Commonwealth, and the Commission's law enforcement staff have had few issues with operators of these unusual boats. The Commission therefore rescinded §109.1 as set forth in the notice of proposed rulemaking.

(6) *Section 109.6.* Section 109.6(b)(5) of the Commission's regulations provides that the Commission will not issue a special activities permit for a marine event in a State Park unless the applicant first obtains written permission from the Bureau of State Parks, Department of Conservation and Natural Resources (DCNR) for the event. The Commission, however, issues permits for events occurring in State Forests, not just those in State Parks. The regulation goes on to state that for marine events held on waters under the ownership or control of other Federal or State agencies, the Commission will require evidence that the applicant has the permission of the controlling agency.

To simplify the regulation, the Commission proposed to revise the regulation to simply require the permission of the entity that owns or controls the waters on which the marine event will occur. The Commission routinely issues special activities for marine events that occur on private and public waters, including waters owned or controlled by the DCNR, the Pennsylvania Game Commission, the United States Army Corps of Engineers (USACOE), and county and municipal

governments. The Commission therefore amended §109.6 to read as set forth in the notice of proposed rulemaking.

(7) *Section 111.17.* Curwensville Lake is a USACOE, Baltimore District impoundment of the West Branch of the Susquehanna River in central Clearfield County. It is managed jointly by the USACOE and the Clearfield County Recreation and Tourism Authority. The lake comprises 790 acres with 19 shoreline miles and unrestricted horsepower. The lake provides open water adjacent to the dam with the majority of the water in a serpentine pattern based upon the original river contours. The lake narrows severely in its upper reaches. Use of the upper area is popular but not conducive to unrestricted horsepower boating. These upper reaches, most of which are less than 200 feet in width, have been posted and enforced as a slow, no-wake area but have never been defined by regulation. Giving clear and legal definition of the slow, no wake area is of joint interest of the agencies and will enhance fairness in public notice and enforceability.

The USACOE has requested that the slow, no-wake area be marked in the area upriver of the cliff at Ferguson and the area between the old viaduct pillars. The Commission therefore amended §111.17 to read as set forth in the notice of proposed rulemaking.

(8) *Section 111.20.* Pymatuning Lake is part of Pymatuning State Park. DCNR regulates the waterway's horsepower limit and has recently set it at 20 horsepower, like several other lakes owned or controlled by the DCNR. In the past, the Commission removed all references to horsepower limits on DCNR waterways from Chapter 111 of the Commission's regulations. Removal of Pymatuning Lake will complete that process. Accordingly, the Commission amended §111.20 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 amendments will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The amendments will impose no new costs on the private sector or the general public.

H. *Public Involvement*

A notice of proposed rulemaking containing the proposed amendments was published at 39 Pa. B. 1870 (April 11, 2009). Prior to the public comment period, the Commission received one public comment regarding the proposed amendments to §§ 53.8 and 97.1 suggesting different language; one comment opposing the amendments to § 91.5; and one public comment generally supporting the proposed amendment to § 105.3 but suggesting alternative language. The Commission did not receive any public comments regarding the other proposed amendments. Copies of all public comments were provided to the Commissioners.

FINDINGS

The Commission finds that:

(1) Public notice of intention to adopt the amendments adopted by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§1201, 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 Chapters 53, 91, 97, 101, 105, 109 and 111, are amended by amending §§53.8, 91.5, 97.1, 101.5, 105.3, 109.1, 109.6, 111.17 and 111.20 to read as set forth in 39 Pa. B. 1870.

(B) The Executive Director will submit this order and 39 Pa. B. 1870 to the Office of Attorney General for approval as to legality and form as required by law.

(C) The Executive Director shall certify this order and 39 Pa. B. 1870 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