

Secretary's Order No.: 2011-F-0046

**RE: Approving Final Regulations to Amend 7 DE Admin. Code 3553,
*River Herring Creel Limit***

Date of Issuance: December 15, 2011

Effective Date of the Amendment: January 11, 2012

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") the following findings, reasons and conclusions are entered as an Order of the Secretary in the above-referenced rulemaking proceeding.

Background and Procedural History

This Order considers proposed regulations to amend 7 DE Admin. Code 3553, *River Herring Creel Limit*. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2011-15. The Department published its initial proposed regulation Amendments in the November 1, 2011 *Delaware Register of Regulations*, and held a public hearing on November 28, 2011. Public comment was received by the Department during all phases of this promulgation (pre-hearing, post-hearing and at that time of the public hearing), and the Department responded fully and thoroughly to all questions from the public regarding this proposed promulgation. Furthermore, as a result of comments received from DNREC Enforcement personnel, the Department *revised* the original proposed amendment language subsequent to its publication in the *Register of Regulations* on November 1, 2011, in order to clarify the intent of this promulgation. That revision was fully vetted to the public at the time of

the public hearing on November 28, 2011, and no additional hearing or publication is necessary regarding this matter.

The Department is proposing revisions to Delaware Tidal Finfish Regulation No. 3553 in order for Delaware to adopt and incorporate Amendment 2 to the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate Fisheries Management Plan (IFMP) for Shad and River Herring. The aforementioned federal Amendment 2 prohibits commercial and recreational River Herring fisheries in state waters beginning January 1, 2012, unless a state or jurisdiction can demonstrate that their alewife and/or blueback herring stock(s) can support a commercial and/or recreational fishery that will not diminish potential future stock reproduction and recruitment. The lack of reliable, system-specific data prevents Delaware/New Jersey (i.e., Delaware River and Bay) and Delaware/Maryland (i.e., Nanticoke River) from providing reliable targets that would satisfy this mandate. Therefore, Delaware must close its recreational and commercial River Herring fisheries.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated December 9, 2011 (Report). The Report recommends certain findings and the adoption of the proposed *revised* Amendments, as attached to the Report as Appendix A.

Findings and Discussion

I find that the proposed *revised* Amendments are well-supported by the record developed by the Department, and I adopt the Report to the extent it is consistent with

this Order. The Department's experts developed the record and drafted the proposed *revised* Amendments.

I find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these *revised* Amendments. With the adoption of this Order, Delaware will be enabled to (1) be in compliance with Amendment 2 to the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate Fisheries Management Plan for Shad and River Herring by closing its recreational and commercial River Herring fisheries, effective January 1, 2012; and (2) be consistent with its neighboring states of Maryland and New Jersey, which are closing their River Herring fisheries, in the Maryland portion of the Nanticoke River, and in the Delaware River and Bay, respectively, as well.

In conclusion, the following findings and conclusions are entered:

- 1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these proposed *revised* Amendments as final;
- 2.) The Department provided adequate public notice of the proposed Amendments, and provided the public with an adequate opportunity to comment on the proposed *revised* Amendments, including at the public hearing held on November 28, 2011;
- 3.) The Department held a public hearing on November 28, 2011 in order to consider public comment before making any final decision;
- 4.) The Department's Hearing Officer's Report, including its recommended record and the recommended *revised* Amendments as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;

5.) The recommended *revised* Amendments should be adopted as final regulation Amendments because Delaware will be enabled to (1) be in compliance with Amendment 2 to the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate Fisheries Management Plan for Shad and River Herring by closing its recreational and commercial River Herring fisheries, effective January 1, 2012; and (2) be consistent with its neighboring states of Maryland and New Jersey, which are closing their River Herring fisheries, in the Maryland portion of the Nanticoke River, and in the Delaware River and Bay, respectively, as well; and, lastly, because (3) the amendments are well supported by documents in the record;

6.) The Department shall submit this Order approving the final regulation to the *Delaware Register of Regulations* for publication in its next available issue, and provide such other notice as the law and regulation require and the Department determines is appropriate.

/s/ Collin P. O'Mara
Collin P. O'Mara
Secretary

HEARING OFFICER'S REPORT

TO: The Honorable Collin P. O'Mara
Cabinet Secretary, Department of Natural Resources and Environmental Control

FROM: Lisa A. Vest
Public Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: **Proposed Regulations Amendments to 7 DE Admin. Code 3553:**
River Herring Creel Limit

DATE: December 9, 2011

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Monday, November 28, 2011, at 6:00 p.m. at the Department of Natural Resources and Environmental Control ("DNREC", "Department"), 89 Kings Highway, Dover, Delaware to receive comment on proposed amendments ("amendments") to 7 DE Admin. Code 3553, *River Herring Creel Limit*. The Department is proposing revisions to Delaware Tidal Finfish Regulation No. 3553 in order for Delaware to adopt and incorporate Amendment 2 to the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate Fisheries Management Plan (IFMP) for Shad and River Herring. The aforementioned federal Amendment 2 prohibits commercial and recreational River Herring fisheries in state waters beginning January 1, 2012, unless a state or jurisdiction can demonstrate that their alewife and/or blueback herring stock(s) can support a commercial and/or recreational fishery that will not diminish potential future stock reproduction and recruitment. The lack of reliable, system-specific data prevents Delaware/New Jersey (i.e., Delaware River and Bay) and Delaware/Maryland (i.e., Nanticoke River) from providing reliable targets that would

satisfy this mandate. Therefore, Delaware must close its recreational and commercial River Herring fisheries.

The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 3553, pursuant to 7 Del. C. §§901(e)(2)(a). Public comment was received by the Department at the time of the public hearing held on November 28, 2011, and the Department responded fully and thoroughly to all questions regarding this proposed promulgation at that time. Proper notice of the hearing was provided as required by law.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The public hearing record consists of the following documents: (1) a verbatim transcript; and (2) eight documents introduced at the public hearing held on November 28, 2011, and marked by this Hearing Officer accordingly as Department Exhibits 1 through 8. The Department's person primarily responsible for the drafting and overall promulgation of these proposed amendments, Stewart Michels, developed the record with the relevant documents in the Department's files. Following the submission of the Department's exhibits into the record at the aforementioned public hearing, Mr. Michels proceeded to offer a brief summary as to the Department's proposed actions in this matter.

Mr. Michels began his presentation by explaining that River Herring is a collective term applied to two species: the alewife and the blueback herring. These species migrate from the ocean and estuaries upstream into fresh water to spawn. Prior to ASMFC's adoption of Amendment 2, Delaware had adopted a 25-fish per day recreational possession limit in 2005, in order to discourage the development of a live-

bait River Herring fishery to support a growing recreational striped bass fishery. In 2008, this regulation was amended from the 25-fish per day possession limit to a 10-fish per person daily creel (harvest) limit. These actions were consistent with the management objectives of Amendment 1 to ASMFC's IFMP for Shad and River Herring, which were adopted to reduce fishing mortality on river herring.

River Herring was listed as a "species of concern" in 2006 by the National Marine Fisheries Service. In addition, the commercial catch of River Herring has been declining coastwide to very low levels. Only 300 lbs. of River Herring were reported from Delaware commercial fishermen in 2011, which is the lowest amount reported since mandatory reporting began in 1985. The majority of commercial River Herring landings in Delaware have originated from the Nanticoke River and its tributaries. The Maryland portion of the Nanticoke River will be closed to recreational and commercial fishing as part of a statewide River Herring closure planned for the State of Maryland. New Jersey plans to close its River Herring fishery in the Delaware River and Bay as well.

As noted above, Delaware has very little data pertaining to both the alewife and blueback herring species. Delaware has two separate stocks: one in the Nanticoke River system (which is a tributary to the Chesapeake Bay), and the Delaware Estuary stock. Commercial landings in Delaware have been declining appreciably since the early to mid-1990s, and presently the same are at near record low levels. It should also be noted that catch-per-unit in those fisheries has similarly declined as well. For the Delaware River and the Delaware Bay, indices pertinent to measuring relative abundance of these species indicate a downward trend in the years since such monitoring began in 1996. Additionally, the Department's Division of Fish and Wildlife young-of-the-year sampling

data indicates species decline relative to 1999, and the annual Seine survey conducted in the Nanticoke River system also reveals a declining trend in juvenile production of the alewife species.

Available data do not provide any reliable indication of improvements in River Herring populations since the mid to late 1990s, and therefore the Department is unable to make a determination regarding the impacts of harvest on future stock reproduction and recruitment at this time. Due to the inability of the Department to make such a determination, as well as the need to satisfy the mandates of the Atlantic States Marine Fisheries Commission, Delaware is forced to close its River Herring fishery at this time.

The Department's proposed amendments regarding Tidal Finfish Regulation 3553, *River Herring Creel Limit*, was published in the November 1, 2011 edition of the State of Delaware Register of Regulations. Subsequent to its publication, however, Capt. Robert Legates of the Department's Division of Fish and Wildlife, Enforcement Section Region 2, advised Mr. Michels that, as originally proposed, the amended River Herring regulation does not actually prohibit Delaware Commercial fishermen from harvesting the fish. Capt. Legates further advised that the language of the proposed amendment should be changed to state that it is *illegal to possess the fish by recreational and commercial fishermen unless they have a receipt from a harvester or a retailer in a State or jurisdiction where River Herring harvest is lawful*. The Department's Division of Fish and Wildlife agrees with Capt. Legates' recommendation, and has revised the proposed amendment language to reflect the same. The revision to the proposed amendment of Tidal Finfish Regulation 3553, *River Herring Creel Limit*, was vetted to the public at the time of the public hearing on November 28, 2011, and therefore no additional hearing is

necessary with regard to this proposed amendment revision. Additionally, the language *revisions* to the proposed regulatory amendment of Tidal Finfish Regulation 3553 are attached hereto as Attachment “A” for the Secretary’s review.

It should be noted that all proper notification and noticing requirements concerning this proposed promulgation were met by the Department.

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

Based on the record developed, I find and conclude that the Department has provided appropriate reasoning regarding the need for the proposed amendments to 7 DE Admin. Code 3553, *River Herring Creel Limit*, as noted above. Accordingly, I recommend promulgation of these proposed amendments in the customary manner provided by law.

Further, I recommend the Secretary adopt the following findings and conclusions:

1. Proper notice of the hearing was provided as required by law.
2. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
3. The Department provided adequate public notice of all proceedings in a manner required by the law and regulations;
4. The Department held its public hearing in a manner required by the law and regulations;

5. The Department considered all timely and relevant public comments in making its determination;
6. Promulgation of the proposed *revised* regulatory amendments to 7 DE Admin. Code 3553, *River Herring Creel Limit*, will enable Delaware to be consistent with Amendment 2 to the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate Fisheries Management Plan for Shad and River Herring by closing its recreational and commercial River Herring fisheries, effective January 1, 2012;
7. As of January 1, 2012, it shall be unlawful in the State of Delaware for any person to have in possession any blueback herring and/or alewife, collectively known as River Herring, unless said person has a valid bill of sale or receipt from a state or jurisdiction where River Herring harvest is lawful, and that bill of sale indicates the date said River Herring were received, the number of River Herring received, and the name, address, and signature of the harvester who legally caught said River Herring, or a bill of sale or receipt from a person who is a licensed retailer and legally obtained said River Herring for resale;
8. The Department has reviewed these proposed *revised* regulatory amendments in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;
9. The Department's aforementioned proposed regulatory amendments concerning *Delaware Tidal Finfish Regulation 3553*, as published in the

November 1, 2011 *Delaware Register of Regulations* and as subsequently *revised* and set forth in Appendix “A” hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final regulatory amendments, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and

10. The Department shall submit the proposed *revised* regulation amendments as final amendments to the *Delaware Register of Regulations* for publication in its next available issue, and shall provide such other notice as the law and regulations require, and as the Department determines is appropriate.

/s/Lisa A. Vest
LISA A. VEST
Public Hearing Officer

ahear\ River Herring 2011