

Secretary's Order No.: **2010-F-0043**

RE: Approving Amendments to 7 DE Admin. Code 3214:
Horseshoe Crab Annual Harvest Limit

Date of Issuance: December 21, 2010

Effective Date of the Amendment: February 11, 2011

I. Background:

A public hearing was held on Wednesday, November 23, 2010, at 7:00 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on proposed amendments to amend 7 DE Admin. Code 3214, Horseshoe Crabs – Annual Harvest Limit. The Department is proposing these regulation amendments in order to be in compliance with the provisions of the Atlantic States Marine Fisheries Commission, Addendum VI, to the Interstate Fishery Management Plan for Horseshoe Crab. Failure to comply with said provisions could result in complete closure of a specific fishery in Delaware.

Horseshoe crabs are managed under an Interstate Fisheries Management Plan (“IFMP”) developed and implemented by the Atlantic States Marine Fisheries Commission (“ASMFC”), of which Delaware is fully represented. The previous addendum (Addendum V) has now expired, and the Horseshoe Management Board has adopted Addendum VI to the IFMP. The development of this newest Addendum was based on input from multiple sources, including the Horseshoe Crab Technical Committee, the Shorebird Technical Committee, Adaptive Research Management Work Group, Horseshoe Crab Advisory Panel, the Horseshoe Crab Stock Assessment

Subcommittee, the Stock Assessment Peer Review Panel, and testimony from four public hearings held in Delaware, Maryland, New Jersey and Virginia.

The protocol for horseshoe crab management included in IFMP's Addendum VI is precautionary, due to the uncertainty surrounding the recovery of the Delaware Bay Region population and the importance of the species and its ecological role throughout the region. Addendum VI maintains the existing management for the Delaware Bay Region. Under the provisions of Addendum VI, Delaware's annual quota allocation will remain at 100,000 male-only horseshoe crabs. The Department's proposed amendments to Delaware's existing regulations regarding this species will allow male horseshoe crabs to be harvested from June 8 through December 31, or until Delaware's annual quota is landed. No female horseshoe crabs may be taken and/or harvested at any time. The above provisions for horseshoe crab management here in Delaware will remain in effect through April of 2013, unless changed through another IFMP Addendum prior to that time. It should be noted that, if Delaware's annual horseshoe crab quota allocation is exceeded in any calendar year, the overage is deducted from the following year's quota.

The Department published the proposed regulatory amendments in the November 1, 2010 *Delaware Register of Regulations*. Public comments were received from the public during the pre-hearing phase of this proceeding, as well as at the time of the public hearing held on November 23, 2010. Proper notice of the hearing was provided as required by law.

Subsequent to the public hearing held on November 23, 2010, the Department's presiding Hearing Officer, Lisa A. Vest, prepared her report and recommendation in the

form of a Hearing Officer's Memorandum to the Secretary dated December 13, 2010, and that Report in its entirety is expressly incorporated herein by reference.

II. Findings:

The Department has provided sound reasoning with regard to the proposed amendments to 7 DE Admin. Code 3214, Horseshoe Crabs – Annual Harvest Limit, as reflected in the Hearing Officer's Memorandum of November 23, 2010, which is attached hereto and expressly incorporated into this Order in its entirety. Moreover, the following findings and conclusions are entered at this time:

1. The Department has jurisdiction under its statutory authority, 7 Del.C. §2701 to make a determination in this proceeding;
2. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
3. The Department held a public hearing in a manner required by the law and regulations;
4. The Department considered all timely and relevant public comments in making its determination;
5. The Department has reviewed this proposed amendment 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;

6. Promulgation of the aforementioned proposed amendments to 7 DE Admin. Code 3214 will enable Delaware to comply with specific Fishery Management Plans approved by the Atlantic States Marine Fisheries Commission, thus preventing any closures of specific fisheries in Delaware;
7. The aforementioned proposed amendments to 7 DE Admin. Code 3214 will extend the effective date of Delaware's annual horseshoe crab quota allocation through April 30, 2013, in accordance with the provisions of Addendum VI to the Atlantic States Marine Fisheries Commission's Interstate Fishery Management Plan for Horseshoe Crab, to wit: the annual harvest limit for horseshoe crabs taken and/or landed in Delaware shall be 100,000 males, for a period extending from November 1, 2010 through April 30, 2013, or whatever the ASMFC has approved as Delaware's current annual quota. No female horseshoe crabs may be taken/landed at any time;
8. Additionally, if Delaware's annual horseshoe crab quota allocation is exceeded in any calendar year, the aforementioned proposed amendments to 7 DE Admin. Code 3214 will cause any year's allocation overage to be deducted from the following year's allocation, thus keeping Delaware in compliance with the ASMFC's IFMP for Horseshoe Crab;
9. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary;
10. The Department's proposed regulation, as published in the November 1, 2010 *Delaware Register of Regulations* and set forth within Attachment "A" of the Hearing Officer's Memorandum and attached hereto, is adequately supported,

not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, which shall go into effect twenty days after its publication in the next available issue of the *Delaware Register of Regulations*; and

11. The Department shall submit the proposed regulation as a final regulation to the Delaware Register of Regulation for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

III. Order:

Based on the record developed, as reviewed in the Hearing Officer's Memorandum dated December 13, 2010 and expressly incorporated herein, it is hereby ordered that the proposed amendments to 7 DE Admin. Code 3214, Horseshoe Crabs – Annual Harvest Limit be promulgated in final form in the customary manner and established rule-making procedure required by law.

IV. Reasons:

The promulgation of the amendments to 7 DE Admin. Code 3214, Horseshoe Crabs – Annual Harvest Limit will enable Delaware to remain in compliance with the provisions of the Atlantic States Marine Fisheries Commission, Addendum VI, to the Interstate Fishery Management Plan for Horseshoe Crab. As noted above, failure to comply with said provisions would result in federal sanctions being taken against Delaware, including, but not limited to, the federal government closing Delaware's horseshoe crab fishery. Such actions would result in economic detriment to Delaware's

fishermen, and therefore it is reasonable to enact these regulatory amendments at this time to prevent such detriments to Delaware's economy from occurring.

It should also be noted that conservation measures with regard to the harvesting of the horseshoe crab began to be applied in Delaware by ASMFC starting in 1999. Over the years subsequent to those measures being implemented, there are data indicating that the horseshoe crab population has begun to stabilize. Extending the current annual harvest quota of 100,000 male horseshoe crabs would result in the taking of a very small percentage of this species' overall population, and thus it is believed to not be detrimental to the overall population of this species. The estimated stock size in the Delaware Bay Region has increased significantly, from approximately 3 million to 9.6 million females, with exploitation rates down from 15% to 1%. In Delaware Bay proper, the results of the horseshoe crab spawning activity indicate that female spawning activity has remained stable from 1999 through 2009, while male spawning activity has significantly increased through the same time series. The increase in male horseshoe crabs is a good sign of recovery, and it is hoped that the female component of the stock exhibits a similar trend, as these newer year classes begin to mature.

Protection of the horseshoe crab here in Delaware is a responsibility which the Department does not take lightly. In developing this regulation, the Department has balanced the absolute environmental need for the State of Delaware to promulgate regulations concerning this matter with the important interests and public concerns surrounding the same, in furtherance of DNREC's mission of responsible environmental

stewardship to ensure the sustainability of Delaware's natural resources for the appreciation and enjoyment of future generations.

/s/ Collin P. O'Mara

Collin P. O'Mara
Secretary

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MEMORANDUM

TO: The Honorable Collin P. O'Mara
Cabinet Secretary, Dept. 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 Amendments to 7 DE Admin. Code 3214:
Horseshoe Crabs – Annual Harvest Limit

DATE: December 13, 2010

I. Background:

A public hearing was held on Tuesday, November 23, 2010, at 7:00 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on the Department's proposal to amend 7 DE Admin. Code 3214, Horseshoe Crabs – Annual Harvest Limit. The Department is proposing these regulation amendments in order to be in compliance with the provisions of the Atlantic States Marine Fisheries Commission, Addendum VI, to the Interstate Fishery Management Plan for Horseshoe Crab. Failure to comply with said provisions could result in complete closure of a specific fishery in Delaware.

Horseshoe crabs are managed under an Interstate Fisheries Management Plan ("IFMP") developed and implemented by the Atlantic States Marine Fisheries Commission ("ASMFC"), of which Delaware is fully represented. The previous addendum (Addendum V) has now expired, and the Horseshoe Management Board has adopted Addendum VI to the IFMP. The development of this newest Addendum was based on input from multiple sources, including the Horseshoe Crab Technical

Committee, the Shorebird Technical Committee, Adaptive Research Management Work Group, Horseshoe Crab Advisory Panel, the Horseshoe Crab Stock Assessment Subcommittee, the Stock Assessment Peer Review Panel, and testimony from four public hearings held in Delaware, Maryland, New Jersey and Virginia.

The status of the Delaware Bay Region horseshoe crab population was determined through analysis of many indicators. Survey indices revealed significant increases in 10 of the 20 indices used to assess horseshoe crab abundance and stock characteristics. While none showed signs of significant declines, the majority of survey indices in the Delaware Bay Region showed increases over time. Several indices, however, are still below the 1998 reference levels. Relative horseshoe crab biomass appears similar to 1996 and 1997 levels, while relative fishing mortality has declined to that of the 1991 level.

The estimated stock size in the Delaware Bay Region has increased significantly, from approximately 3 million to 9.6 million females, with exploitation rates down from 15% to 1%. In Delaware Bay proper, the results of the horseshoe crab spawning activity indicate that female spawning activity has remained stable from 1999 through 2009, while male spawning activity has significantly increased through the same time series. The increase in male horseshoe crabs is a good sign of recovery, and it is hoped that the female component of the stock exhibits a similar trend, as these newer year classes begin to mature.

The protocol for horseshoe crab management included in IFMP's Addendum VI is precautionary, due to the uncertainty surrounding the recovery of the Delaware Bay Region population and the importance of the species and its ecological role throughout

the region. Addendum VI maintains the existing management for the Delaware Bay Region. It prohibits the harvest and landing of horseshoe crabs in New Jersey and Delaware from January 1st through June 7th, and establishes a 100,000 male-only quota for each state. The Department's proposed amendments to Delaware's existing regulations regarding this species would, if promulgated by the Secretary, reflect the above-referenced management measures as set forth in Addendum VI, and would remain in effect through April of 2013, unless changed through another IFMP Addendum prior to that time. It should be noted that, if Delaware's annual horseshoe crab quota allocation is exceeded in any calendar year, the overage is deducted from the following year's quota.

Specifically, the proposed amendment to Delaware's horseshoe crab annual harvest limit states as follows:

The annual harvest limit for horseshoe crabs taken and/or landed in the state shall be 100,000 male horseshoe crabs for a period extending from November 1, 2010, through April 30, 2013, or whatever the Atlantic State Marine Fisheries Commission has approved as Delaware's current annual quota. No female horseshoe crabs may be taken/landed at any time.

The Department has the authority to promulgate this proposed regulation amendment, pursuant to 7 Del. C. §2701. The proposed amendments to 7 DE Admin. Code 3214, Horseshoe Crabs – Annual Harvest Limit, were published in the November 1, 2010 edition of the *Delaware Register of Regulations*. During both the pre-hearing phase of this promulgation and at the time of the hearing on November 23, 2010, public comment was received by the Department, which will be addressed below. Proper notice of the hearing was provided as required by law.

II. Summary of Hearing Record:

At the time of the hearing on November 23, 2010, Craig Shirey of the Department's Division of Fish and Wildlife offered the Department's seven (7) exhibits pertaining to this proposed amendment, and this Hearing Officer entered them into the formal hearing record developed in this matter. Included within those Departmental exhibits was a copy of the Start Action Notice for this promulgation (SAN No. 2010-21), copies of the legal notices regarding the holding of this public hearing on November 23, 2010, copies of the Atlantic States Marine Fisheries Commission's Addendum VI to the IFMP for Horseshoe Crab, and copies of the actual proposed amendments to Regulations 3214 as noted above.

Prior to the public hearing of November 23, 2010, public comment was received from both Paulette Hammond, President of the Maryland Conservation Council, and from Amy Roe. In her letter dated November 16, 2010, Ms. Hammond advised the Department that, while the Maryland Conservation Council prefers no taking of horseshoe crabs, this is not currently the ASMFC and Delaware regulation. Therefore, the Maryland Conservation Council supports the harvest quota allocation of 100,000 males as proposed, or until the quota is reached, and no taking of females at any time.

The Department also received written comment from Amy Roe prior to the hearing of November 23, 2010. In her letter dated November 14, 2010, Ms. Roe hopes that DNREC will institute a full moratorium on horseshoe crab harvests through April 30, 2013, as this species is "...a cherished aquatic creature and deserve our protection." Ms. Roe further notes that, should DNREC not impose a full moratorium in this matter, it is her hope that permit fees would be "...increased substantially so as to serve as a deterrent

for future harvests.” While Ms. Roe’s comment is noted herein for the purposes of summarizing the hearing record with regard to the public comment received by the Department in this matter, it should be noted that permit fees were not the subject of this proposed promulgation. Rather, the scope of this promulgation was to bring Delaware’s existing regulations into compliance with the ASMFC’s Interstate Fishery Management Plan for Horseshoe Crab, which at this time does not call for a full moratorium on horseshoe crab harvest. Thus, no changes were made to the proposed regulation amendments as a result of Ms. Roe’s comment regarding this matter.

Lastly, at the time of the public hearing on November 23, 2010, comment was received from Glenn Gauvry, President of the Ecological Research and Development Group, a non-profit organization dedicated to the conservation of the world’s four horseshoe crab species. Mr. Gauvry wished to voice his organization’s support of the Department’s proposed regulation amendment with regard to the annual harvest limits of horseshoe crabs.

For the Secretary’s review, and in order for the Secretary to gain a thorough understanding of this proposed promulgation, copies of the above-referenced proposed amendments are attached hereto as Appendix “A”, and the same are expressly incorporated into this Hearing Officer’s Report. It should be noted that the Department adhered to all appropriate Delaware statutes and the regulatory development process in this matter, and that the Department has met the required public notice obligations regarding this proposed amendment. It should also be noted that the Department has reviewed these proposed 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.

III. Conclusions and Recommendations:

Based on the record developed in this matter, I conclude that the Department has provided appropriate reasoning regarding the need for the proposed amendments to 7 DE Admin. Code 3214, Horseshoe Crabs – Annual Harvest Limit. Accordingly, I recommend promulgation of these proposed amendments in the customary manner provided by law.

Further, I recommend the following findings:

12. The Department has jurisdiction under its statutory authority, 7 Del.C. §2701, to make a determination in this proceeding;
13. The Department provided adequate public notice of the public hearing in a manner required by the law and regulations;
14. The Department held a public hearing in a manner required by the law and regulations;
15. The Department has reviewed these proposed 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;
16. Promulgation of the aforementioned proposed amendments to 7 DE Admin. Code 3214 will enable Delaware to comply with specific Fishery Management Plans approved by the Atlantic States Marine Fisheries Commission, thus preventing any closures of specific fisheries in Delaware;

17. The aforementioned proposed amendments to 7 DE Admin. Code 3214 will extend the effective date of Delaware's annual horseshoe crab quota allocation through April 30, 2013, in accordance with the provisions of Addendum VI to the Atlantic States Marine Fisheries Commission's Interstate Fishery Management Plan for Horseshoe Crab, to wit: the annual harvest limit for horseshoe crabs taken and/or landed in Delaware shall be 100,000 males, for a period extending from November 1, 2010 through April 30, 2013, or whatever the ASMFC has approved as Delaware's current annual quota. No female horseshoe crabs may be taken/landed at any time;
18. Additionally, if Delaware's annual horseshoe crab quota allocation is exceeded in any calendar year, the aforementioned proposed amendments to 7 DE Admin. Code 3214 will cause any year's allocation overage to be deducted from the following year's allocation, thus keeping Delaware in compliance with the ASMFC's IFMP for Horseshoe Crab;
19. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary;
20. The Department's proposed amendments to this regulation, as published in the November 1, 2010 *Delaware Register of Regulations* and as set forth within Appendix "A" hereto, are adequately supported, not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final regulation amendments, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and

21. The Department shall submit the proposed regulation amendments as final to the *Delaware Register of Regulation* for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

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