



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

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Secretary's Order No.: 2013-F-0035

**RE: Approving Final Regulations to Amend
7 DE Admin. Code 3200: *Horseshoe Crabs*, to include revisions to §3201
(*Definitions*) and to add a new §3216, to wit:
*Prohibition on Possession or Use of Asian Horseshoe Crabs***

Date of Issuance: September 10, 2013

Effective Date of the Amendment: October 11, 2013

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 3200: *Horseshoe Crabs*, to include revisions to §3201 (*Definitions*), and to add a new §3216, to wit: *Prohibition on Possession or Use of Asian Horseshoe Crabs*. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2013-06. The Department published its initial proposed regulation Amendments in the July 1, 2013 *Delaware Register of Regulations*, and held a public hearing on July 25, 2013.

Delaware's Good Nature depends on you!

The purpose of this action seeks to define and prevent the possession and use of Asian horseshoe crabs (*Carcinoscorpius rotundicauda*, *Tachypleus gigas*, and *Tachypleus tridentatus*) to protect human health and the shellfish resources of the State of Delaware. It should be noted that Delaware's Council on Shell Fisheries has endorsed the Department's development of regulations regarding this important issue.

Atlantic horseshoe crabs (*Limulus polyphemus*) are extensively used as bait in Delaware's American eel and whelk pot fisheries. The demand for horseshoe crabs as bait, as well as for their ecological functions, prompted the development of an extensive coastwide management program. The high demand and reduced availability of horseshoe crabs (particularly female horseshoe crabs) has driven prices very high in recent years, and has motivated seafood dealers in New York to import non-native Asian horseshoe crabs for use as bait in the American eel and whelk fisheries.

There is concern that these non-native Asian horseshoe crabs may host parasites and pathogens that could have severe negative impacts on Delaware's native horseshoe crab population (*Limulus polyphemus*), which is of extreme ecological and economic importance in the Delaware Bay. The Department is also concerned of the potential impacts of these parasites and pathogens upon other native species. In addition, the Department is aware that at least one species of Asian horseshoe crab, *C. rotundicauda*, is known to accumulate the powerful neurotoxin tetrodotoxin (TTX), which does not degrade by freezing or high temperature (cooking). Poisonings from this neurotoxin have been known to result in death in individuals that consume it through eating contaminated fish and shellfish. The potential for TTX accumulation in eel and whelk, as well as subsequent risk to human health, is unknown.

Due to the aforementioned human health concerns, the United States Fish & Wildlife Service is working to add Asian horseshoe crabs to the list of “Injurious Wildlife” under the Lacey Act. This federal action would make it unlawful to import Asian horseshoe crabs, however, such effort is expected to take a year or more to fully accomplish. Unfortunately, prohibiting the importation or use of Asian Horseshoe crabs is beyond the scope of the Atlantic States Marine Fisheries Commission’s Federal Management Plan for Horseshoe Crabs. However, the Commission recently approved Resolution 13-01, recommending that member states take any and all action necessary to ban the importation and use of Asian horseshoe crabs as bait as soon as possible.

The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 3200, *Horseshoe Crabs*, pursuant to 7 Del. C. §1902(a). It should be noted that no members of the public attended the public hearing held by the Department on July 25, 2013, nor was any public comment received by the Department at any time during the course of this promulgation. Proper notice of the hearing was provided as required by law.

The Department’s presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer’s Report dated August 28, 2013 (Report). This Report recommends certain findings and the adoption of the proposed Amendments as attached to the Report as Appendix A.

Findings and Discussion

I find that the proposed 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 Amendments.

Furthermore, I find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these Amendments.

With the adoption of this Order, Delaware will be enabled to protect human health and the shellfish resources of the State by revising its existing Regulations on Horseshoe Crab to add a definition for Asian horseshoe crabs under §3201, and to make it unlawful to possess or use as bait Asian horseshoe crabs, or parts thereof, without written authorization from the DNREC Director of the Division of Fish & Wildlife, through the inclusion of a new §3216.

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 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 same, including at the public hearing held on July 25, 2013;

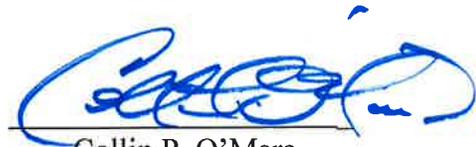
3.) The Department held a public hearing on July 25, 2013 in order to consider public comment before making any final decision;

4.) The Department's Hearing Officer's Report, including its recommended record and the recommended Amendments as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;

5.) The recommended Amendments should be adopted as final regulation Amendments because Delaware will be able to (1) add a definition for Asian horseshoe crabs under §3201; (2) make it unlawful to possess or use as bait Asian horseshoe crabs, or parts thereof, without written authorization from the DNREC Director of the Division

of Fish & Wildlife, through the inclusion of a new §3216; (3) better protect human health and the shellfish resources of the State of Delaware against the potential aforementioned hazards associated with the importation of this non-native Asian horseshoe crab; and lastly, because (4) 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.



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 Regulation Amendments to Amend 7 DE Admin. Code 3200: *Horseshoe Crabs*, to include revisions to §3201 (*Definitions*) and to add a new §3216, to wit: *Prohibition on Possession or Use of Asian Horseshoe Crabs***

DATE: August 28, 2013

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Thursday, July 25, 2013, 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. 3200: *Horseshoe Crabs*, to include revisions to §3201 (*Definitions*), and to add a new §3216, to wit: *Prohibition on Possession or Use of Asian Horseshoe Crabs*. The purpose of this action seeks to define and prevent the possession and use of Asian horseshoe crabs (*Carcinoscorpius rotundicauda*, *Tachypleus gigas*, and *Tachypleus tridentatus*) to protect human health and the shellfish resources of the State of Delaware. It should be noted that Delaware's Council on Shell Fisheries has endorsed the Department's development of regulations regarding this important issue.

Atlantic horseshoe crabs (*Limulus polyphemus*) are extensively used as bait in Delaware's American eel and whelk pot fisheries. The demand for horseshoe crabs as bait, as well as for their ecological functions, prompted the development of an extensive coastwide

management program. The high demand and reduced availability of horseshoe crabs (particularly female horseshoe crabs) has driven prices very high in recent years, and has motivated seafood dealers in New York to import non-native Asian horseshoe crabs for use as bait in the American eel and whelk fisheries.

There is concern that these non-native Asian horseshoe crabs may host parasites and pathogens that could have severe negative impacts on Delaware's native horseshoe crab population (*Limulus polyphemus*), which is of extreme ecological and economic importance in the Delaware Bay. The Department is also concerned of the potential impacts of these parasites and pathogens upon other native species. In addition, the Department is aware that at least one species of Asian horseshoe crab, *C. rotundicauda*, is known to accumulate the powerful neurotoxin tetrodotoxin (TTX), which does not degrade by freezing or high temperature (cooking). Poisonings from this neurotoxin have been known to result in death in individuals that consume it through eating contaminated fish and shellfish. The potential for TTX accumulation in eel and whelk, as well as subsequent risk to human health, is unknown.

Due to the aforementioned human health concerns, the United States Fish & Wildlife Service is working to add Asian horseshoe crabs to the list of "Injurious Wildlife" under the Lacey Act. This federal action would make it unlawful to import Asian horseshoe crabs, however, such effort is expected to take a year or more to fully accomplish. Unfortunately, prohibiting the importation or use of Asian Horseshoe crabs is beyond the scope of the Atlantic States Marine Fisheries Commission's Federal Management Plan for Horseshoe Crabs. However, the Commission recently approved Resolution 13-01, recommending that member states take any and all action necessary to ban the importation and use of Asian horseshoe crabs as bait as soon as possible.

The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 3200, *Horseshoe Crabs*, pursuant to 7 Del. C. §1902(a). The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2013-06. The Department published its initial proposed regulation Amendments in the July 1, 2013 *Delaware Register of Regulations*, and held the public hearing on July 25, 2013. It should be noted that no members of the public attended the aforementioned hearing held by the Department on July 25, 2013, nor was any public comment received by the Department at any time during the course of this promulgation. 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) thirteen documents introduced at the public hearing held on July 25, 2013, and marked by this Hearing Officer accordingly as Department Exhibits 1-13. 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 hearing held on July 25, 2013, Mr. Michels proceeded to offer a brief summary as to the Department's proposed actions for the benefit of the record developed in this matter (*see* Section I of this Report for said background summary). Again, it should be noted that no members of the public attended the aforementioned hearing held by the Department on July 25, 2013, nor was any public comment received by the Department at any time during the course of this promulgation.

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 these proposed amendments. It should also be noted that the Department has reviewed this proposed promulgation 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. 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 3200: *Horseshoe Crabs*, to include revisions to §3201 (*Definitions*), and to add a new §3216, to wit: *Prohibition on Possession or Use of Asian Horseshoe Crabs.*, 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. Promulgation of the proposed regulatory amendments to 7 DE Admin. Code 3200: *Horseshoe Crabs* will enable Delaware to protect human health and the shellfish resources of the State by adding a definition for Asian horseshoe crabs under §3201, and to make it unlawful to possess or use as bait Asian horseshoe crabs, or parts thereof, without written authorization from the DNREC Director of the Division of Fish & Wildlife, through the inclusion of a new §3216;
6. The Department has reviewed these proposed 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;
7. The Department's aforementioned proposed regulatory amendments concerning *Delaware Regulations Governing Wildlife*, as published in the July 1, 2013 *Delaware Register of Regulations* and as 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

8. The Department shall submit the proposed 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.



LISA A. VEST
Public Hearing Officer

APPENDIX “A”

3200 Horseshoe Crabs

3201 Definitions

(Penalty Section 7 **Del.C.** §2705(b))

1.0 The following definitions shall apply to terms in 7 **Del.C.** Ch. 27 relative to horseshoe crabs.

1.1 "**Asian Horseshoe Crabs**" shall mean any of the following species *Carcinoscorpius rotundicauda*, *Tachypleus gigas*, and *Tachypleus tridentatus*.

~~4.1.1.2~~ "**Bait Saving Device**" shall mean any device that when so deployed in or on a pot reduces either the rate at which bait, meaning horseshoe crabs or parts thereof, must be replenished or reduces the number or quantity of horseshoe crabs used as bait.

~~4.2.1.3~~ "**Collect**" shall mean to take live horseshoe crabs by any means other than by dredge.

~~4.3.1.4~~ "**Dispose of said Crabs Properly**" shall mean bury on the beach, incorporate into soil as fertilizer or any other method approved by the Department.

~~4.4.1.5~~ "**Dredge**" shall mean to use any device to gather, scrape, scoop, fish for or otherwise take bottom dwelling horseshoe crabs.

~~4.5.1.6~~ "**Personal, Non-Commercial Use**" shall mean to be used as food, fertilizer or bait or otherwise properly disposed without trading, bartering, or selling by one individual to another, or without transporting, shipping, or causing to be transported or shipped, out of state.

7 DE Reg. 220 (8/1/03)

10 DE Reg. 1029 (12/01/06)

11 DE Reg. 685 (11/01/07)

3216 Prohibition on Possession or Use of Asian Horseshoe Crabs

(Penalty Section 7 **Del.C.** §2705(b))

1.0 It is unlawful to possess or use as bait Asian horseshoe crabs or parts thereof without written authorization from the Director of the Division of Fish and Wildlife.

