

Secretary's Order No.: **2008-F-0007**

RE: Proposed Amendments to Delaware Tidal Finfish
Regulation 3553: River Herring Creel Limit

Date of Issuance: February 13, 2008

Effective Date of the Amendment: March 11, 2008

I. Background:

A public hearing was held on Thursday, January 24, 2008, at 7:00 p.m. at the University of Delaware, Hugh R. Sharp Campus, Cannon Laboratory, 700 Pilottown Road, Lewes, Delaware, to receive comment on proposed amendments to the existing Delaware Tidal Finfish Regulation 3553 concerning river herring creel limits. The stocks of blueback herring (*Alosa aestivalis*) and alewife (*Alosa pseudoharengus*), both commonly referred to as river herring, are currently in steep decline throughout the Atlantic coast. Concern over the status of these stocks has prompted four states to close their river herring fisheries entirely. A significant harvest by recreational fishermen has recently developed in the spawning areas where river herring concentrate (at the base of spillways and dams), and are easily exploited. Most are captured using nets and transported alive to use as live bait for striped bass.

The existing regulation is a possession limit that allows for multiple trips per day with no daily cap on landings. The Department believes this regulation is insufficient to protect remaining stocks of river herring from over-exploitation, and is difficult to enforce. Therefore, the Department is proposing to amend that current regulation from a possession limit to a daily creel (harvest) limit, and to reduce that limit from 25 river herring per person to 10 fish per person per day. This action would be consistent with the intent of the current Fisheries Management Plan for Shad and River Herring, and should protect stocks from overfishing until new requirements are adopted by the Atlantic States Marine Fisheries Commission Management Board for Shad and River Herring.

No members of the public attended this hearing on February 13, 2008. After the hearing, the Hearing Officer prepared her report regarding this matter, and submitted the same to the Secretary for his review. Proper notice of the hearing was provided as required by law.

II. Findings:

The Department has provided a reasoned analysis and a sound conclusion with regard to the proposed amendment to the Delaware regulations regarding River Herring and its creel limit, as reflected in the Hearing Officer's Report of February 13, 2008, which is attached hereto

and expressly incorporated into this Order. Moreover, the following findings and conclusions are entered at this time:

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 the proceeding and the public hearing in a manner required by the law and regulations;
4. The Department held a 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 these proposed amendments would amend the current regulation from a possession limit to a daily creel (harvest) limit, and would reduce that limit from 25 river herring per person to 10 fish per person per day;
7. The proposed amendment to the current river herring regulation would be consistent with the intent of the current Fisheries Management Plan for Shad and River Herring, and should protect stocks from overfishing until new requirements are adopted by the Atlantic States Marine Fisheries Commission Management Board for Shad and River Herring.

8. 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;
9. The Department's proposed regulation, as published in the January 1, 2008 *Delaware Register of Regulations* and set forth in Attachment "A" 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 ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and that
10. The Department's proposed amendments to Tidal Finfish Regulation 3553 are adequately supported, not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and that
11. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary.

III. Order:

Based on the record developed, as reviewed in the Hearing Officer's Report dated February 13, 2008, and expressly incorporated herein, it is hereby ordered that the proposed amendments to State of Delaware Tidal Finfish Regulation No. 3553 - River Herring Creel Limits - be promulgated in final form in the customary manner and established rule-making procedure required by law.

IV. Reasons:

The promulgation of State of Delaware Tidal Finfish Regulation No. 3553 will amend that current regulation from a possession limit to a daily creel (harvest) limit, and will reduce that limit from 25 river herring per person to 10 fish per person per day. This action would be consistent with the intent of the current Fisheries Management Plan for Shad and River Herring, and should protect stocks from overfishing until new requirements are adopted by the Atlantic States Marine Fisheries Commission Management Board for Shad and River Herring.

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 the policy and purposes of 7 Del.C. § 903 (e)(2)(a) and Chapter 15, respectively

/s/John A. Hughes

John A. Hughes
Secretary

MEMORANDUM

TO: John A. Hughes, Secretary

FROM: Lisa A. Vest, Hearing Officer

RE: Proposed Amendments to Delaware Tidal Finfish
Regulation 3553: River Herring Creel Limits

DATE: February 13, 2008

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The existing regulation is a possession limit that allows for multiple trips per day with no daily cap on landings. The Department believes this regulation is insufficient to protect remaining stocks of river

herring from over-exploitation, and is difficult to enforce. Therefore, the Department is proposing to amend that current regulation from a possession limit to a daily creel (harvest) limit, and to reduce that limit from 25 river herring per person to 10 fish per person per day. This action would be consistent with the intent of the current Fisheries Management Plan for Shad and River Herring, and should protect stocks from overfishing until new requirements are adopted by the Atlantic States Marine Fisheries Commission Management Board for Shad and River Herring.

Of note is the fact that no members of the public attended this hearing on January 24, 2008 to voice their concerns with regard to the Department's proposed changes to these regulations. There was, however, one comment received via email by the Department concerning this proposed promulgation, and the same will be addressed below. Proper notice of the hearing was provided as required by law.

II. Summary of Hearing Record:

Although proper and sufficient notice of the public hearing on January 24, 2008 was given to the public by the Department, no persons other than this Hearing Officer and personnel from the Department's Division of Fish and Wildlife attended the same. The Hearing Officer waited an additional twenty-five minutes before beginning the hearing, but still no one else showed up at that time. Therefore, at 7:25 p.m. on the evening of January 24, 2008, the Hearing Officer began the hearing,

regarding this promulgation. Craig Shirey, Program Manager for the Department's Division of Fish and Wildlife, offered the Department's seven exhibits pertaining to these proposed amendments at that time, and the same were accepted by the Hearing Officer. These exhibits were as follows: (1) a copy of the agendas and minutes of the Tidal Finfish Advisory Counsel meetings of October 25, 2007 and November 20, 2007, where changes to the river herring regulation were proposed and discussed with the council and public; (2) a copy of the Department's start-action notice which was dated December 10, 2007 to amend Tidal Finfish Regulation 3553, River Herring creel limit; (3) a copy of the legal notice posted in the Delaware State News and the News Journal on December 25 and 26, respectively; (4) a copy of the proposed regulation change sent to the State Registrar and appeared in the Delaware Register of Regulations Volume II, Issue 7, Tuesday, January 1, 2008; (5) a copy of the press release that was posted on the Division's website on January 18, 2008 and was released via fax and e-mail on that same date to television, radio and newspapers that have signed up for the notification of Department press releases; (6) a copy of the comment sent via e-mail and received on January 2, 2008 from Alan Davis concerning the proposed regulation change; and (7) a hard copy of the oral presentation that Mr. Shirey had planned to give to members of the public attending the hearing that night. Due to the fact that no one attended the hearing, this presentation was not given, but was instead entered into the record

as one of the Department's exhibits in support of this proposed regulation amendment.

For brevity's sake, and for the Secretary's review, Delaware's proposed amendment to this current regulation is expressly incorporated into this report and attached hereto as Attachment "A" for that purpose. Attachment "B", also expressly incorporated into this report and attached hereto, is a copy of the public handout entitled, "Shad and River Herring Public Information Document for Amendment 2", which was made available at the time of the public hearing on January 24, 2008 (although no members of the public attended the same). Lastly, Attachment "C" is a copy of Department's Exhibit #7, a hard copy of the narrative discussion which would have been verbally given by Mr. Shirey at the time of the hearing, had any members of the public shown up for the same. This narrative provides a great deal of background information on the current status of river herring on a coast-wide basis, and also in Delaware in particular, and documents the reasoning as to why the Department believes this amendment promulgation is necessary at this time. Again, rather than reiterate that information herein, the same is simply attached hereto for brevity's sake, and expressly incorporated into this report.

There was one comment received from Alan Davis, via email, on January 2, 2008. In his email, Mr. Davis supported the concept of a daily creel limit, but was concerned with what he believed to be "...no

provision made for a reasonable possession limit”. Mr. Davis further believed that the proposed regulation should be “recrafted” to allow for “...a possession limit different from the creel limit”. The Department acknowledged this email upon its receipt, and took his comments under consideration. The Department subsequently contacted Mr. Davis (post-hearing) to let him know that this promulgation was reviewed again in the light of his comments and concerns, however, based upon the current scientific data in the Department’s possession at this time regarding this matter, the Department had decided to move forward with this promulgation as originally drafted.

It should also be noted that 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.

III. Conclusions and Recommendations:

Based on the above discussion, I conclude that the Department has provided appropriate reasoning regarding the need for these proposed changes to Delaware’s Tidal Finfish Regulation 3553 concerning river herring size creel limits, and has thoroughly addressed any public questions and/or comments provided during the various phases of the record developed in this matter. Accordingly, I recommend

promulgation of these proposed amendments in the customary manner provided by law.

Further, I recommend the following findings:

1. The Department has jurisdiction under its statutory authority 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. Promulgation of these proposed amendments would amend the current regulation from a possession limit to a daily creel (harvest) limit, and would reduce that limit from 25 river herring per person to 10 fish per person per day;
6. The proposed amendment to the current river herring regulation would be consistent with the intent of the current Fisheries Management Plan for Shad and River Herring, and should protect stocks from overfishing until new requirements are adopted by the Atlantic States Marine Fisheries Commission Management Board for Shad and River Herring.

7. 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;
8. The Department's proposed regulation, as published in the January 1, 2008 *Delaware Register of Regulations* and set forth in Attachment "A" 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 ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and that
9. 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.

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