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Secretary's Order No. 2007-F-0004

**Re: Application of Regulatory Flexibility Act to Regulation 3215,
Horseshoe Crab Harvest Moratorium**

Date of Issuance: February 5, 2007

Effective Date: February 5, 2007

In Order No. 2006-F-0047, the Department of Natural Resources and Environmental Control ("Department" or "DNREC") adopted Regulation 3215 to its Regulations administered by the Department's Division of Fish and Wildlife. Regulation 3215 imposed a two-year moratorium, beginning January 1, 2007, on the harvesting of horseshoe crabs in Delaware.

The purpose of the *Regulatory Flexibility Act, 29 Del. C. Ch. 104*, ("RFA" or "Act") is "to establish as a principle of regulatory policy that **regulatory and reporting requirements** fit the scale of those being regulated, that fewer, simpler requirements be made of individuals and small businesses and that to achieve these ends agencies be empowered and encouraged to issue regulations which apply differently to individuals and small businesses than to larger businesses." *29 Del C. 10402(b)* (emphasis added). This purpose is served by each agency considering "whether it is lawful, feasible and desirable for the agency to exempt individuals or small businesses from the effect of the rule or regulation or whether the agency may and should promulgate a rule or regulation which sets less stringent standards for compliance by individuals and/or small businesses." *29 Del C. 10404(a)*.

To qualify for consideration under the RFA, all persons and business entities must first qualify as either an "individual" or a "small business" within the meaning of the RFA. All persons subject to Regulation 3215 are involved in Regulation 3215 as a business enterprise, and are thus not "individuals." The Department submits that the RFA does not apply to Regulation 3215 because the business of harvesting and selling horseshoe crabs is not a "small business" within the meaning of 29 Del. C. § 10403(3). The RFA applies to business enterprises engaged "in any phase of the manufacturing, agricultural production or personal service..." Business enterprises engaged in the collection and selling of horseshoe crabs as bait and participating in associated related fisheries enterprises are not engaged in "agricultural production." Furthermore, neither plaintiff in *Bernie's Conchs v. State*, C.A. No. 06A-12-005-RFS is an "individual" or a "small business" within the meaning of the RFA.

Even if the Department should apply RFA, the analysis would result in the same conclusion as reached in Secretary's Order No. 2006-F-0047, namely, that Regulation 3215 should be adopted to protect the environment through a two-year moratorium on the harvesting of horseshoe crabs in Delaware. This two year period will allow the horseshoe crab population sufficient time to increase without the threat of depletion from harvesting them for use as bait, and it will increase the food supply for migratory birds.

An analysis under the Act, would consider: 1) the nature of reports; 2) the nature and estimated costs of other measures or investment that would be required by individuals and or small businesses in complying with a rule; 3) the nature and estimated cost of any legal, consulting and accounting services which individuals and/or small businesses would incur in complying with a rule; 4) the ability of individuals and/or small businesses to absorb the costs estimated under paragraphs (1), (2), and (3), of this subsection without suffering economic harm and without adversely affecting competition in the marketplace; 5) the additional cost, if any, to the agency of administering or enforcing a rule which

exempts or sets lesser standards for compliance by individuals and/or small businesses; and 6) the impact on the public interest of exempting or setting lesser standards of compliance for individuals and/or small businesses.

First, Regulation 3215 expressly eliminates all reporting requirement by suspending the other regulations' reporting requirements. Second, there is no cost to comply with not harvesting the horseshoe crabs, but cost savings. Third, there is no legal, consulting or accounting cost from not harvesting the horseshoe crabs. Fourth, there is cost to absorb. Fifth, the standard of compliance does not impose a burden. Sixth, there is no regulatory burden.

Persons subject to Regulation 3215 may lose income in 2007 and 2008 that they obtained through collecting and dredging horseshoe crabs, as compared to previous years. It is, of course, impossible to calculate income that may be generated by alternative activities undertaken as a substitute for horseshoe crab harvesting, but such income could even result in greater income production for those affected by the moratorium. There may be some loss of income to eelers and conch potters who use horseshoe crabs as a preferred bait. The Hearing Officer found that value of Delaware dockside landings in 2005 of horseshoe crabs at \$111,970, and the collective value of Delaware dockside landings in 2005 of eels and conchs at \$204,175. There are no costs of other measures or investments that would be required by individuals and/or small businesses in complying with regulation 3215.

There are no costs of any legal, consulting and accounting services which individuals and/or small businesses would incur in complying with Regulation 3215. The ability of individuals and/or small businesses to absorb the loss of income as compared to previous years without suffering economic harm is somewhat unknown, but persons subject to regulation 3215 may experience some economic hardship or loss to varying degrees. Any such loss is offset to some extent because persons in the fisheries business

understand that they are in a heavily regulated industry and catches can vary greatly year to year, due to natural and regulatory changes. Any loss of income as compared to previous years will not adversely affect competition in the marketplace. The additional cost to the agency of promulgating an amendment to Regulation 3215, which exempts or sets lesser standards for compliance by individuals and/or small businesses, as it relates to administrative, overhead, and enforcement costs to DNREC, is small.

On the other hand, the impact on the public interest, in exempting or setting lesser standards of compliance for individuals and/or small businesses with the requirements of Regulation 3215, is grave and potentially devastating. It is hard to envision how such an exemption would work without removing most or all protection and harvest limits. Any such exemption would result in less protection for the horseshoe crab and red knot populations. Especially with the levels of these populations greatly reduced from historic levels, any loss of those populations to the State, now or into the future, would be an incalculably large harm, for tourism, fisheries income, or otherwise. Therefore, I have determined that horseshoe crabs should receive the maximum amount of protection as a temporary measure for two years, and, similarly, the red knots should receive the maximum effort to protect them from environmental harm from a lack of food supply, now and into the future. Furthermore, an exemption could cause Delaware to violate compliance with Addendum IV, subjecting Delaware to federal sanctions if too many horseshoe crabs are taken by individuals or small businesses.

Wherefore, having considered the provisions of the RFA, including without limitation the factors and directives in the RFA, and the record of proceedings in the promulgation of Regulation 3215, I find and order that:

1. It is not feasible or desirable to exempt any persons or businesses, who may qualify as "individuals" or "small businesses" within the meaning of the Act, from the effect of Regulation 3215;

2. The Department should not amend Regulation 3215 under the RFA or promulgate a Regulation that would set a less stringent standard for compliance by individuals and /or small businesses.

s/John A. Hughes

John A. Hughes
Secretary