

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Section 901(b) and 903(e)(2)a (7 Del.C. §901(b) §903(e)(2)a)
7 DE Admin. Code 3553

FINAL

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

3553 River Herring Creel Limit

Date of Issuance: December 15, 2011

Effective Date of the Amendment: February 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.

Collin P. O'Mara, Secretary

3553 River Herring Creel Limit

(Penalty Section 7 **Del.C.** 936(b)(2))

~~[Unless otherwise authorized,]~~ It shall be unlawful for any person to have in possession ~~except a person with a valid Delaware commercial food fishing license, more than ten (10) any~~ blueback herring and/or alewife (*Alosa aestivalis* and/or *Alosa pseudoharengus*), collectively known as river herring, unless said person has a valid bill-of-sale or receipt **[for said river herring from a state or jurisdiction where river herring harvest is lawful and]** that indicates the date said river herring were received, the number of said river herring received and the name, address and signature of the ~~commercial food fisherman~~ 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 DE Reg. 1315 (03/01/05)

11 DE Reg. 1259 (03/01/08)

15 DE Reg. 1179 (02/01/12) (Final)