

Order Adopting Regulations and Amendments

COMMONWEALTH OF PENNSYLVANIA PENNSYLVANIA FISH AND BOAT COMMISSION

Title 58. Recreation Part II. Fish and Boat Commission Chapters 63, 69, 71 and 73 Fishing

Preamble

The Fish and Boat Commission (Commission) amends Chapters 63, 69, 71 and 73 (relating to general fishing regulations; fishing in Lake Erie and boundary lakes; propagation and introduction of fish into Commonwealth waters; and transportation of live fish into this Commonwealth). The Commission is publishing this final-form rulemaking under the authority of 30 Pa. C.S. (relating to the Fish and Boat Code) (code).

A. *Effective Date*

The final-form rulemaking will go into effect on January 1, 2009.

B. *Contact Person*

For further information on the final-form rulemaking, contact Laurie E. Shepler, Esq., P.O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7810. This final-form rulemaking is available on the Commission's web site at www.fish.state.pa.us.

C. *Statutory Authority*

The additions of §§63.51 and 73.3 (relating to sale of VHS-susceptible species of fish; and transportation and importation of VHS-susceptible species of fish) are published under the statutory

authority of section 2102(c) of the code (relating to rules and regulations). The addition of § 71.8 (relating to introduction of VHS-susceptible species of fish) are published under the statutory authority of section 2102(a) of the code. The amendments to §69.3 (relating to transportation of VHS-susceptible fish out of the Lake Erie watershed) are published under the statutory authority of section 2102(a) and (c) of the code.

D. *Purpose and Background*

Viral hemorrhagic septicemia (VHS) is an infectious disease found in a variety of fish species. To help prevent the spread of the disease, several agencies with jurisdiction, including the United States Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), the Commission and the Pennsylvania Department of Agriculture (PDA), have taken action.

On October 24, 2006, APHIS issued an emergency order prohibiting the importation of certain live fish species from the Canadian provinces of Ontario and Quebec into the United States. In addition, export of live fish of 37 VHS-susceptible species was prohibited from the eight Great Lake boundary states: Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin. On November 14, 2006, APHIS issued an amended order that allowed restricted movement under requirements for testing and certification that fish are VHS-free. On May 4, 2007, APHIS further amended the order to allow for catch and release fishing activities. APHIS again amended its order on April 2, 2008 to allow VHS-susceptible species of live non-salmonid fish from affected Canadian provinces to be imported into the United States for direct slaughter under an APHIS-issued permit. The APHIS order applies to live fish only. It does not address eggs.

Most recently, APHIS issued an interim rule that it published in the *Federal Register* on September 9, 2008. The interim rule, which will go into effect on January 9, 2009, establishes interstate movement and import requirements for VHS-susceptible fish species that originate from the eight Great Lake boundary states and the Canadian provinces of Ontario and Quebec.

Last year, the Commission adopted a new regulation in §69.3. This new regulation, which went into effect on January 1, 2008, applies to live or dead fish (and their parts but not eggs) and makes it unlawful to transport or cause the transportation of VHS-susceptible fish out of this Commonwealth's portion of the Lake Erie watershed into other watersheds in this Commonwealth except when certain conditions are met. Those conditions are (1) the fish are being transported to a disease testing facility and the persons transporting the fish have taken adequate measures to prevent escape and to disinfect discharged water and equipment used in the transportation of the fish and the fish are accompanied in transit by documentation stating the point of origin of the fish and the destination to which they are to be delivered for testing; (2) the fish are from a group of fish certified as having tested negative for VHS in accordance with the testing protocols adopted by PDA and approved by the Commission; (3) the fish are from an artificial propagation facility certified as having tested negative for VHS in accordance with testing protocols; (4) the fish are being transported to a slaughter facility, processing plant or restaurant and the fish are accompanied in transit by documentation stating the point of origin of the fish and the destination to which they are to be delivered for slaughter, processing or consumption; or (5) the fish are dead, recreationally caught fish that are being transported solely for the purpose of human consumption.

The regulation further provides that for purposes of the section, species of fish that are susceptible to VHS are those species that the Commission has defined as such by notice published in the *Pennsylvania Bulletin*. On two occasions, the Commission has published notices defining VHS-susceptible species of fish. See 37 Pa. B. 6478 (December 8, 2007) and 38 Pa. B. 2425 (May 24, 2008). Although the Commission's regulation addressed the intrastate movement of VHS-susceptible species of fish, it did not address interstate movement.

PDA, which has broad jurisdiction under 3 Pa. C.S. Chapter 23 (relating to the Domestic Animal Law) and more limited jurisdiction under 3 Pa. C.S. Chapter 42 (relating to the Aquaculture Development Law), issued a quarantine order at 37 Pa. B. 5534 (October 13, 2007). The quarantine

order addressed both intrastate and interstate movement of VHS-susceptible species of fish, and its provisions dealing with intrastate movement are consistent with the Commission's regulation at §69.3. The order, like §69.3, applied to live or dead fish and their parts, but it did not apply to eggs. PDA later amended its order at 37 Pa. B. 6428 (December 8, 2007) to revise its definition of VHS-susceptible species to track APHIS's thinking on the subject. PDA again amended its order at 38 Pa. B. 4787 (August 30, 2008) to remove dead animals and dead animal parts from the definition of VHS-susceptible species. Therefore, the PDA quarantine order currently applies to live fish only.

Commission staff have met on numerous occasions with PDA staff in an effort to develop a coordinated approach for dealing with VHS, and there has been good cooperation between the agencies. Although the PDA order addresses interstate movement of VHS-susceptible species of fish, the Commission's officers cannot enforce it. Therefore, the Commission proposed new regulations, which will be fully enforceable by our officers, that will address the sale, introduction and transportation of VHS-susceptible species of fish from VHS-affected or at risk states or regions. The proposed regulations are consistent with the approach taken by PDA and APHIS in their orders. In addition, the proposed regulations are consistent with the recent APHIS interim rule in most material respects.

The Commission also proposed a new regulation to address the possession and use as bait of eggs taken from VHS-susceptible species of fish from VHS-affected or at risk states or regions and the Lake Erie watershed. In addition, the Commission proposed amendments to §69.3 to further define VHS-susceptible species of fish for purposes of the section, to include provisions regarding their introduction and sale outside the Lake Erie watershed and to address the possession and use as bait of eggs from VHS-susceptible species of fish from the Lake Erie watershed outside the watershed.

By notice published at 38 Pa. B. 3338 (June 14, 2008), the Executive Director, acting under the authority of §65.25 (relating to temporary changes to fishing regulations), took immediate action

to make it unlawful to sell, introduce, transport or import VHS-susceptible species of fish, dead or alive, and the parts thereof into this Commonwealth from VHS-affected or at risk states, including Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Wisconsin, and VHS-affected or at risk regions, including the Canadian provinces of Ontario and Quebec, unless certain conditions are met. These temporary modifications went into effect immediately and will remain in effect until January 1, 2009, at which time the new regulations adopted by this order will go into effect.

By second notice published at 38 Pa. B. 3876 (July 12, 2008), the Executive Director, acting under the authority of §65.25, took immediate action to make it unlawful to possess and use as bait unpreserved, refrigerated or frozen eggs taken from VHS-susceptible species of fish from a VHS-affected or VHS-at risk state or region in or along the waters of the Commonwealth except within the Lake Erie watershed. The Executive Director also took immediate action to make it unlawful to possess and use eggs from VHS-susceptible species of fish from the Lake Erie watershed as bait in other watersheds of this Commonwealth. This action represents a change to §69.3, which previously allowed for the possession and use as bait of eggs from VHS-susceptible species of fish from the Lake Erie watershed in other watersheds of the Commonwealth provided the fish were from a group of fish certified as having tested negative for VHS or were from an artificial propagation facility certified as having tested negative for VHS. These temporary modifications went into effect immediately and will remain in effect until January 1, 2009, at which time the new regulations adopted by this order will go into effect.

E. *Summary of Changes*

The Commission adopted new regulations that address the sale, introduction and transportation of VHS-susceptible species of fish from VHS-affected or at risk states or regions in §§63.51, 71.8 and 73.3. These regulations permit their sale, introduction and transportation when certain conditions are met. The Commission also adopted amendments to §69.3 to further define

VHS-susceptible species of fish for purposes of the section and to include provisions regarding their introduction and sale outside the Lake Erie watershed. The Commission adopted these new regulations and amendments as set forth in the notice of proposed rulemaking with the following modifications.

On final-form rulemaking, the Commission chose not to adopt proposed §63.52 (relating to eggs from VHS-susceptible species of fish) in favor of a more restrictive regulation regarding the possession and use of eggs as bait that the Commission adopted as part of another rulemaking package. Because of the more general and restrictive regulation dealing with the possession and use of eggs as bait, a regulation specifically addressing eggs from VHS-susceptible species of fish is not needed. For these same reasons, the Commission also did not adopt the last sentence of §69.3(c) that addresses the possession and use of eggs from VHS-susceptible species of fish from the Lake Erie watershed as bait in other watersheds of this Commonwealth. Last, on final-form rulemaking, the Commission revised §73.3 (designated as §73.4 in the notice of proposed rulemaking) to make its provisions regarding the international movement of fish consistent with the APHIS interim rule that will go into effect on January 9, 2009.

The Commission adopted the new regulations and amendments to read as set forth in Annex A.

F. *Paperwork*

The final-form rulemaking will increase paperwork and will create new paperwork requirements in that persons selling and transporting VHS-susceptible species of fish from VHS-affected or at risk states must have in their possession fish health certification reports. Persons who transport VHS-susceptible species from an affected or at risk state through the Commonwealth must carry documentation stating the point of origin of the fish and the location outside of this

Commonwealth to which they are to be delivered. Persons transporting these fish to facilities in the Commonwealth for testing and scientific purposes or to a slaughter facility, processing plant or restaurant in the Commonwealth must carry documentation stating the point of origin of the fish and the destination to which they are to be delivered. Many of these requirements are already in place under APHIS and PDA orders.

G. *Fiscal Impact*

The final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The final-form rulemaking will impose no new costs on the general public. The final-form rulemaking will impose new costs on the private sector in that prior to selling, introducing or transporting into this Commonwealth VHS-susceptible species of fish from VHS-affected or at risk states and regions, the fish or the artificial propagation facility where the fish are raised will have to be tested and certified as negative for VHS in accordance with approved protocols. Many of these requirements are already in place under APHIS and PDA orders.

H. *Public Involvement*

A notice of proposed rulemaking was published at 38 Pa. B. 4910 (September 6, 2008). The Commission received one public comment supporting the proposed regulations and amendments. Copies of all public comments have been provided to the Commissioners.

FINDINGS

The Commission finds that:

(1) Public notice of intention to adopt the regulations and amendments adopted by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§1201, 1202) and the regulations promulgated thereunder, 1 Pa. Code §§7.1 and 7.2.

(2) A public comment period was provided, and the public comments that were received were considered.

(3) The adoption of the regulations and amendments of the Commission in the manner provided in this order is necessary and appropriate for administration and enforcement of the authorizing statutes.

ORDER

The Commission, acting under the authorizing statutes, orders that:

(A) The regulations of the Commission, 58 Pa. Code Chapters 63, 69, 71 and 73, are amended by adding §§63.51, 71.8 and 73.3 and amending §69.3 to read as set forth in Annex A.

(B) The Executive Director will submit this order, Annex A and 38 Pa. B. 4910 to the Office of Attorney General for approval as to legality as required by law.

(C) The Executive Director shall certify this order, Annex A and 38 Pa. B. 4910 and deposit them with the Legislative Reference Bureau as required by law.

(D) This order shall take effect on January 1, 2009.

For the Pennsylvania Fish and Boat Commission

Douglas J. Austen, Ph.D.
Executive Director

Annex A

Regulation No. 48A-204

(Note: language that was added on final rulemaking is in capital letters; language that was deleted contains “strikethroughs.”)

Title 58. Recreation

Part II. Fish and Boat Commission

Subpart B. Fishing

CHAPTER 63. GENERAL FISHING REGULATIONS

§63.51. Sale of VHS-susceptible species of fish.

(a) For purposes of this section, the following terms shall have the following meanings:

(1) Species of fish that are susceptible to viral hemorrhagic septicemia (VHS) are those species that the Animal and Plant Health Inspection Service of the United States Department of Agriculture (APHIS) designates by order or the Commission defines by notice in the *Pennsylvania Bulletin*.

(i) The term “VHS-susceptible species” includes fish that are dead or alive, preserved or unpreserved, and the parts thereof.

(ii) The term “VHS-susceptible species” does not include the eggs of these species.

(2) A VHS-affected or VHS-at risk state includes Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Wisconsin or any other state that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.

(3) A VHS-affected or VHS-at risk region includes the Canadian provinces of Ontario and Quebec or any other region that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.

(b) It is unlawful to sell VHS-susceptible species of fish from the portion of the Lake Erie watershed in this Commonwealth in other watersheds of this Commonwealth except in accordance with §69.3(e)(relating to transportation, introduction and sale of VHS-susceptible species of fish out of the Lake Erie watershed).

(c) It unlawful to sell in this Commonwealth VHS-susceptible species of fish from a VHS-affected or VHS-at risk state, unless the following conditions are met:

(1) The sale meets the requirements of 30 Pa. C.S. §2507 (relating to sale of certain fish, reptiles and amphibians prohibited).

(2) The fish are from a group of fish certified as having tested negative for VHS or are from an artificial propagation facility certified as having tested negative for VHS in accordance with the testing protocols adopted by the Pennsylvania Department of Agriculture and approved by the Commission. Persons selling these fish shall have in their possession, and present upon the request of an officer authorized to enforce the code, either a copy of the fish health certification reports for all VHS- susceptible fish kept at the place of sale or a copy of the fish health certification report for the artificial propagation facility if the fish are from a facility certified as having tested negative for VHS.

(d) It unlawful to sell in this Commonwealth VHS-susceptible species of fish from a VHS-affected or VHS-at risk region, unless the fish meet the requirements of ~~§73.4~~ 73.3(d)(1) ~~and (2)~~ (relating to transportation and importation of VHS-susceptible species of fish).

~~§63.52. Eggs from VHS-susceptible species of fish.~~

(a) For purposes of this section, the following terms shall have the following meanings:

~~———— (1) Species of fish that are susceptible to viral hemorrhagic septicemia (VHS) are those species that the Animal and Plant Health Inspection Service of the United States Department of Agriculture (APHIS) designates by order or the Commission defines by notice in the *Pennsylvania Bulletin*.~~

~~———— (2) A VHS-affected or VHS-at risk state includes Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Wisconsin or any other state that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.~~

~~———— (3) A VHS-affected or VHS-at risk region includes the Canadian provinces of Ontario and Quebec or any other region that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.~~

~~(b) It is unlawful to possess and use as bait unpreserved, refrigerated or frozen eggs taken from VHS-susceptible species of fish from a VHS-affected or VHS-at risk state or region in or along the waters of this Commonwealth except within the Lake Erie watershed.~~

~~(c) It is unlawful to possess and use as bait eggs taken from VHS-susceptible species of fish from the portion of the Lake Erie watershed in this Commonwealth in other watersheds of this Commonwealth.~~

CHAPTER 69. FISHING IN LAKE ERIE AND BOUNDARY LAKES

§69.3. Transportation, **introduction and sale** of VHS-susceptible **species of** fish out of the Lake Erie watershed.

(a) For purposes of this section, species of fish that are susceptible to viral hemorrhagic septicemia (VHS) are those species that **the Animal and Plant Health Inspection Service of the United States Department of Agriculture designates by order or** the Commission **[has defined as such] defines** by notice published in the *Pennsylvania Bulletin*.

(1) The term “VHS-susceptible species” includes fish that are dead or alive, preserved or unpreserved, and the parts thereof.

(2) The term “VHS-susceptible species” does not include the eggs of these species.

(b) * * *

(c) It is unlawful to **possess and** use VHS-susceptible species of fish[, **parts thereof or their eggs taken**] from the Lake Erie watershed as [**fishbait**] **bait** in **other watersheds of this** Commonwealth [**waters outside the Lake Erie watershed**] except when the fish are from a group of fish certified as having tested negative for VHS or are from an artificial propagation facility certified as having tested negative for VHS **in accordance with the testing protocols adopted by the Department and approved by the Commission.** ~~**It is unlawful to possess and use eggs from VHS-susceptible species of fish from the Lake Erie watershed as bait in other watersheds of this Commonwealth.**~~

(d) It is unlawful to introduce VHS-susceptible species of fish from the Lake Erie watershed into other watersheds of this Commonwealth except when the fish are from a group of fish certified as having tested negative for VHS or are from an artificial propagation facility certified as having tested negative for VHS in accordance with the testing protocols adopted by the Department and approved by the Commission.

(e) It is unlawful to sell VHS-susceptible species of fish from the Lake Erie watershed in other watersheds of this Commonwealth unless the following conditions are met:

(1) The sale meets the requirements of 30 Pa. C.S. §2507 (relating to sale of certain fish, reptiles and amphibians prohibited).

(2) The fish are from a group of fish certified as having tested negative for VHS or are from an artificial propagation facility certified as having tested negative for VHS in accordance with the testing protocols adopted by the Department and approved by the Commission. Persons selling these fish shall have in their possession, and present upon the request of an

officer authorized to enforce the code, either a copy of the fish health certification reports for all VHS- susceptible fish kept at the place of sale or a copy of the fish health certification report for the artificial propagation facility if the fish are from a facility certified as having tested negative for VHS.

CHAPTER 71. PROPAGATION AND INTRODUCTION OF FISH INTO COMMONWEALTH WATERS

§71.8. Introduction of VHS-susceptible species of fish.

(a) For purposes of this section, the following terms shall have the following meanings:

(1) Species of fish that are susceptible to viral hemorrhagic septicemia (VHS) are those species that the Animal and Plant Health Inspection Service of the United States Department of Agriculture (APHIS) designates by order or the Commission defines by notice in the *Pennsylvania Bulletin*.

(i) The term “VHS-susceptible species” includes fish that are dead or alive, preserved or unpreserved, and the parts thereof.

(ii) The term “VHS-susceptible species” does not include the eggs of these species.

(2) A VHS-affected or VHS-at risk state includes Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Wisconsin or any other state that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.

(3) A VHS-affected or VHS-at risk region includes the Canadian provinces of Ontario and Quebec or any other region that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.

(b) It is unlawful to introduce VHS-susceptible species of fish from the portion of the Lake Erie watershed in this Commonwealth into other watersheds of this Commonwealth except in accordance with §69.3(d) (relating to transportation, introduction and sale of VHS-susceptible species of fish out of the Lake Erie watershed).

(c) It unlawful to introduce into the waters of this Commonwealth VHS-susceptible species of fish from an affected or at-risk state unless the fish are from a group of fish certified as having tested negative for VHS or are from an artificial propagation facility certified as having tested negative for VHS in accordance with the testing protocols adopted by the Pennsylvania Department of Agriculture and approved by the Commission.

(d) It unlawful to introduce into the waters of this Commonwealth VHS-susceptible species of fish from an affected or at-risk region unless the fish meet the requirements of ~~§73.4~~ 73.3(d)(1) and (2) (relating to transportation and importation of VHS-susceptible species of fish).

CHAPTER 73. TRANSPORTATION OF [LIVE] FISH INTO THIS COMMONWEALTH

§~~73.4~~ 73.3. Transportation and importation of VHS-susceptible species of fish.

(a) Definitions. For purposes of this section, the following terms shall have the following meanings:

(1) Species of fish that are susceptible to viral hemorrhagic septicemia (VHS) are those species that the Animal and Plant Health Inspection Service of the United States Department of Agriculture (APHIS) designates by order or the Commission defines by notice in the Pennsylvania Bulletin.

(i) The term “VHS-susceptible species” includes fish that are dead or alive, preserved or unpreserved, and the parts thereof.

(ii) The term “VHS-susceptible species” does not include the eggs of these species.

(2) A VHS-affected or VHS-at risk state includes Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Wisconsin or any other state that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.

(3) A VHS-affected or VHS-at risk region includes the Canadian provinces of Ontario and Quebec or any other region that APHIS later designates by order or the Commission later defines by notice in the *Pennsylvania Bulletin* as being VHS-affected or VHS-at risk.

(b) *Intrastate transportation.* It is unlawful to transport or cause the transportation of VHS-susceptible species of fish out of the portion of the Lake Erie watershed in this Commonwealth into other watersheds of this Commonwealth except in accordance with §69.3(b)(relating to transportation, introduction and sale of VHS-susceptible species of fish out of the Lake Erie watershed).

(c) *Interstate transportation.* It is unlawful to transport or cause the transportation of VHS-susceptible species of fish into this Commonwealth from a VHS-affected or VHS-at risk state, except when one of the following conditions is met:

(1) The fish are from a group of fish certified as having tested negative for VHS or are from an artificial propagation facility certified as having tested negative for VHS in accordance with the testing protocols adopted by the Pennsylvania Department of Agriculture (Department) and approved by the Commission. Persons transporting these fish shall have in their possession, and present upon the request of an officer authorized to enforce the code, a copy of the fish health certification reports for all VHS-susceptible fish being transported or a copy of the fish health certification report for the artificial propagation facility if the fish are from a facility that has been certified as having tested negative for VHS.

(2) The fish are being transported through this Commonwealth and the shipping container (tank, trailer, holding vessel or other container) remains biosecure in transit and the

fish are accompanied in transit by documentation stating the point of origin of the fish and the location outside of this Commonwealth to which they are to be delivered.

(3) The fish are being transported to facilities located within the Commonwealth for testing and scientific purposes and the persons transporting the fish have taken adequate measures to prevent escape and to disinfect discharged water and equipment used in the transportation of the fish and the fish are accompanied in transit by documentation stating the point of origin of the fish and the destination to which they are to be delivered for testing or scientific purposes.

(4) The fish are being transported to a slaughter facility, processing plant or restaurant within this Commonwealth and the fish are accompanied in transit by documentation stating the point of origin of the fish and the destination to which they are to be delivered for slaughter, processing or consumption.

(5) The fish are dead, recreationally caught fish that are being transported solely for the purpose of human consumption.

(d) *International movement.* It unlawful to import or cause the importation of VHS-susceptible species of fish into this Commonwealth from a VHS-affected or VHS-at risk region, except as follows:

~~(1) VHS-susceptible species of live salmonid fish may be imported into the United States if the shipment meets the requirements set forth in 50 CFR §16.13(a)(3) and (b) (relating to importation of live or dead fish, mollusks, and crustaceans or their eggs):~~

~~(2) VHS-susceptible species of live non-salmonid fish may be imported into the United States for direct slaughter under an APHIS-issued permit.~~ **VHS-SUSCEPTIBLE SPECIES OF LIVE FISH MAY BE IMPORTED INTO THE UNITED STATES IF THE REQUIREMENTS OF 9 CFR §§93.910 THROUGH 93.916 ARE MET.**

~~(3)~~ (2) VHS-susceptible species of dead fish may be imported into the United States if the fish are recreationally caught and are for human consumption.