

Notice of Proposed Rulemaking

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) proposes to amend 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 proposed rulemaking under the authority of 30 Pa. C.S. (relating to the Fish and Boat Code) (code).

A. *Effective Date*

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

B. *Contact Person*

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

C. *Statutory Authority*

The proposed additions of §§63.51 and 73.4 (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 proposed additions of §§63.52 and 71.8 (relating to eggs from VHS-susceptible species of fish; and introduction of VHS-susceptible species of fish) are published under the statutory authority of section 2102(a) of the code. The proposed 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. In order 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. Most recently APHIS 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.

Last year, the Commission adopted a new regulation at §69.3 (relating to the transportation of VHS-susceptible fish out of the Lake Erie watershed). 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 the Pennsylvania portion of the Lake Erie watershed into other watersheds in Pennsylvania 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. 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 the Domestic Animal Law and more limited jurisdiction under the Aquaculture Development Law, issued a quarantine order on 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, applies to live or dead fish and their parts, but it does not apply to eggs. PDA later amended its order on December 8, 2007 to revise its definition of VHS-susceptible species to track APHIS's thinking on the subject.

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 proposes 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 also address eggs taken from VHS-susceptible species of fish from VHS-affected or at risk states or regions and the Lake Erie watershed.

By notice published in the *Pennsylvania Bulletin* 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, unless the Commission, by appropriate action, adopts the new regulations.

By second notice published in the *Pennsylvania Bulletin* 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 (relating to transportation of VHS-susceptible fish out of the Lake Erie watershed), 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, unless the Commission, by appropriate action, adopts the new regulations.

E. *Summary of Proposal*

The Commission proposes new regulations 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.

The Commission also proposes 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 proposes 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. The proposed provision dealing with eggs is consistent with the proposed new regulation on egg collection, which is intended to address egg collection on a statewide basis and is the subject of a separate notice of proposed rulemaking. The Commission proposes the new regulations and amendments to read as set forth at Annex A.

F. *Paperwork*

The proposed 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 and regions 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 proposed rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The proposed rulemaking will impose no new costs on the general public. The proposed 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 Comments*

Interested persons are invited to submit written comments, objections or suggestions about the proposed rulemaking to the Executive Director, Pennsylvania Fish and Boat Commission, P.O.

Box 67000, Harrisburg, PA 17106-7000, within 30 days after publication of this notice in the *Pennsylvania Bulletin*. Comments submitted by facsimile will not be accepted.

Comments also may be submitted electronically by completing the form at www.fishandboat.com/regcomments. If an acknowledgment of electronic comments is not received by the sender within 2 working days, the comments should be retransmitted to ensure receipt. Electronic comments submitted in any other manner will not be accepted.

For the Pennsylvania Fish and Boat Commission

Douglas J. Austen, Ph.D.
Executive Director

REVISED
Annex A

Regulation No. 48A-204

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*. “VHS-susceptible species” shall include fish that are dead or alive,

preserved or unpreserved, and the parts thereof. 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 is 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(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 the 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.

§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*. **“VHS-susceptible species” shall include fish that are dead or alive, preserved or unpreserved, and the parts thereof. 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*. “VHS-susceptible species” shall include fish that are dead or alive, preserved or unpreserved, and the parts thereof. 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(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. 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*. “VHS-susceptible species” shall include fish that are dead or alive,

preserved or unpreserved, and the parts thereof. 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 the 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.

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