

## Order Adopting Amendments

### COMMONWEALTH OF PENNSYLVANIA PENNSYLVANIA FISH AND BOAT COMMISSION

#### Title 58. Recreation Part II. Fish and Boat Commission Chapter 61 Fishing

## Preamble

The Fish and Boat Commission (Commission) amends 58 Pa. Code Chapter 61 (relating to seasons, sizes and creel limits). 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, 2010 or upon publication of an order in the *Pennsylvania Bulletin*, whichever occurs later.

#### B. *Contact Person*

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

#### C. *Statutory Authority*

The amendments to §§ 61.2 and 61.8 (relating to Delaware River and River Estuary; and Lehigh River, Schuylkill River and Tributaries) are published under the statutory authority of section 2102(b) of the code (relating to rules and regulations).

D. *Purpose and Background*

The final-form rulemaking is designed to improve, enhance and update the Commission's fishing regulations. The specific purposes of the amendments are described in more detail under the summary of changes.

E. *Summary of Changes*

(1) *American Shad on the Delaware River.* Since the mid-1980's, the daily creel limit for American shad in the Delaware River, the West Branch and the Estuary has been six fish with no minimum length limit, and there has been a year-round season. While in years past American shad was a popular gamefish and anglers often harvested them for consumption, in more recent years it has principally become a catch-and-release fishery. A large-scale creel survey in 2002 resulted in an estimated angler catch of 35,281 shad, of which 6,627 (19%) were harvested (Versar 2003). The 2002 harvest rate was about a third of the estimated 1986 creel survey harvest rate (49%) but was close to the estimated harvest rate for the 1995 (20%) survey. Individual angler trip data voluntarily submitted to the Delaware River and Estuary Angler Logbook Program from 2002 to 2006 indicated that anglers harvested a total of 139 shad of the 1,748 caught (8%) from 496 trips. Three or more shad were harvested on only four trips.

In 2007, the Atlantic States Marine Fisheries Commission's (ASMFC's) Shad and River Herring Technical Committee and American Shad Stock Assessment Subcommittee developed a coast wide stock assessment that indicated that adult American shad stocks in the Delaware River

have been declining since 1994. Nevertheless, the annual production of juvenile shad has remained stable. In some other coastal rivers, adult shad stocks have declined as well. Despite the continued depressed abundance and documented low harvest rates of adult American shad in the Delaware River and River Estuary, the creel limit of American shad in this Commonwealth has remained at six fish per day.

The Commission therefore proposed a reduction of the daily creel limit of American shad to three fish in cooperation with the other boundary states (New Jersey, New York and Delaware). Resource managers from all four states participating in the Delaware River Fish and Wildlife Cooperative Technical Committee (DRFWCTC) have verbally agreed that this reduction in the daily creel limit will not negatively impact angler use, and it is a proactive protective measure given the declining status of shad stocks in the Delaware River and other coastal river systems.

At a February 2009 meeting between the Commission and the New Jersey Department of Environmental Protection, Division of Fish and Wildlife (NJDEP), New Jersey staff indicated that their organization is actively pursuing a reduced daily creel limit from the current six fish to three fish in the Delaware River. Their Freshwater Fishery Council has approved the proposed reduction and will solicit public comments this summer. New Jersey staff expect to have the reduced creel limit in place by January 1, 2010; however, due to the fact that the freshwater and marine divisions of the agency have jurisdiction over different parts of the river, the proposed regulation will only pertain to the Delaware River mainstem waters from the New Jersey/New York state border, downstream to the Commodore Barry Bridge. In the remaining 2.9 river miles, from of the Commodore Barry Bridge to the Delaware state line, the creel limit will remain at six in New Jersey until at least 2011, when it is anticipated that New Jersey's Marine Fishery Council will reduce the creel limit in that section to three.

New York is moving forward with a proposed amendment to reduce the American shad creel limit to three per day in the upper Delaware River. They indicated that a 2010 date for implementation is extremely optimistic and that 2011 is more realistic.

Delaware's only recreational shad angling occurs on the Brandywine Creek, and it is extremely limited. Delaware is moving to reduce the creel limit of herring (they do not make a distinction between American shad and river herring) from 10 combined/day to six combined/day. They anticipate doing this in conjunction with a change in the commercial regulations, but they do not anticipate this change occurring for the 2010 season.

In the interest of coordination with the regulations of New Jersey and New York, the Commission has reduced the creel limit in the West Branch and the entire Delaware River mainstem from the confluence of the East and West Branches downstream to the Commodore Barry Bridge as set forth in the notice of proposed rulemaking. For the remaining 2.9 miles downstream of the Commodore Barry Bridge, the current daily limit of six will remain in effect until such time as New Jersey's Marine Council effectuates a change. At that time, the Commission will seek public comments on a proposed amendment that is consistent with New Jersey's.

The Commission has amended §61.2 to read as set forth in the notice of proposed rulemaking.

(2) *River Herring on the Delaware, Lehigh and Schuylkill Rivers.* Since the mid-1980's, the daily creel limit for river herring, a term applied collectively to blueback herring and alewife, in the Delaware River, West Branch and Estuary, has been a total of 35 herring, with no minimum length limit, and the season is open year-round. River herring are popular with striped bass anglers who use them either as live or cut bait. Principally, this fishery exists during the spring when river herring and striped bass are migrating into the Delaware River and Estuarine waters. Traditionally, anglers jigged for river herring for use as bait at the onset of a trip and during the trip. However, it has been

alleged that an illegal transport fishery has developed in which entrepreneurs catch river herring from the Delaware River and transport them to the New Jersey coast for sale as bait to coastal anglers.

In 2002, catch and harvest of river herring in the Delaware River and Estuary were estimated in a large-scale creel survey (Versar 2003). This survey resulted in an estimate of a total catch of 7,553 river herring of which 4,916 (65%) were harvested. Most of the fish harvested were taken from tidal waters (1,465 fish, Delaware Memorial Bridge to Trenton, NJ) and the lower reach of the non-tidal Delaware River (5,105 fish, Trenton, NJ upstream to Delaware Water Gap. Field observations by the creel clerks during the course of the 2002 survey indicated that only a small number of anglers target river herring. Many of these anglers were noted to have elaborate live-wells in their vehicles for keeping river herring alive, which accounted for the relatively high estimated harvest rates.

The ASMFC's Draft Amendment 2 to the Interstate Fishery Management Plan for Shad and River Herring states that river herring abundance has declined precipitously since the mid-1990's and remains depressed along the Atlantic Coast. The Commission therefore proposed a reduction in the daily creel limit to 10 along with the other Delaware River and Estuary boundary states of New York and New Jersey. Delaware's herring creel limit is already 10 per day. This action will unify regulations throughout the Delaware River. Resource managers participating in the DRFWCTC from all four states have verbally agreed that a reduction of the daily creel limit would not negatively impact angler use. This creel limit reduction is designed to allow for the continued use of river herring as a bait source by the individual angler, while reducing the economic incentive for the illegal sale of the fish for bait. New Jersey researchers conducted an informal survey of the most likely impacted commercial guides fishing the Delaware River. The results of the survey indicated strong support for a reduction in the daily creel limit.

At a February 2009 meeting between the Commission and the NJDEP, New Jersey staff indicated that their organization is actively pursuing the reduced river herring creel limit. Their

Freshwater Fishery Council has already approved the proposed reduction, and public comments were solicited this summer. New Jersey staff expect to have the reduced river herring creel limit in place by January 1, 2010; however, due to the fact that the freshwater and marine divisions of the agency have jurisdiction over different parts of the river, the proposed regulation will only pertain to the Delaware River mainstem waters from the New Jersey/New York state border, downstream to the Commodore Barry Bridge. In the remaining 2.9 river miles from of the Commodore Barry Bridge to the Delaware state line, the creel limit will remain at 35 in New Jersey until at least 2011, when it is anticipated that New Jersey's Marine Fishery Council will reduce the creel limit in that section to 10.

New York is not proposing any changes to its river herring creel limits due to the fact that they do not anticipate river herring ascending that far up the Delaware River.

Delaware's only recreational shad angling occurs on the Brandywine Creek, and it is extremely limited. Delaware is moving to reduce its creel limit of herring (they do not make a distinction between American shad and river herring) from 10 combined/day to six combined/day. They anticipate doing this in conjunction with a change in the commercial regulations, but they do not anticipate this change occurring for the 2010 season.

In the interest of coordination with the regulations of New Jersey, the Commission has reduced the creel limit in the West Branch and the entire Delaware River mainstem from the confluence of the East and West Branches downstream to the Commodore Barry Bridge as set forth in the notice of proposed rulemaking. Given the anadromous fish restoration efforts on the two major tributaries to the Delaware, the Commission also has imposed a 10 fish per day creel limit on the Lehigh River and Schuylkill River as set forth in the notice of proposed rulemaking. For the remaining 2.9 miles downstream of the Commodore Barry Bridge, the current daily limit of 35 river herring will remain in effect until such time as New Jersey's Marine Council effectuates a change. At that time, the Commission will seek public comments on a proposed amendment that is consistent with New Jersey's.

The Commission has amended §§ 61.2 and 61.8 to read as set forth in the notice of proposed rulemaking.

It should be noted that after the Commission approved publication of the notice of proposed rulemaking containing these amendments, ASFMC approved Amendment 2 to the Interstate Fishery Management Plan for Shad and River Herring. The amendment prohibits commercial and recreational fisheries of river herring beginning January 1, 2012, unless a state or jurisdiction develops and submits for approval a sustainable management plan by January 1, 2010. The amendment defines a sustainable fishery as “a commercial and/or recreational fishery that will not diminish the potential future stock reproduction and recruitment.” Submitted plans must clearly demonstrate that the state or jurisdiction’s river herring fisheries meet this new definition of sustainability through the development of sustainability targets that must be achieved and maintained.

ASFMC’s approval of Amendment 2 was taken in response to widespread concern regarding the decline of river herring stocks. While many populations of blueback herring and alewife, collectively known as river herring, are in decline or remain depressed at stable levels, lack of fishery-dependent and independent data makes it difficult to ascertain the status of river herring stocks coastwide. Between 1985 and 2007, commercial landings of river herring decreased by 97 percent from 13.6 million pounds to 317,000 pounds.

The Commission continues to work with other state agencies with jurisdiction that includes parts of the Delaware River or Delaware Estuary to develop a coordinated interstate approach for future regulations. This coordinated approach resulted in the Commission’s adoption of the amendments set forth in the notice of proposed rulemaking. It should be noted that a total moratorium on river herring is likely for the states of New Jersey, Delaware and Pennsylvania, beginning in January 2012 as a result of the ASFMC action to approve Amendment 2 to the Interstate Fishery Management Plan for Shad and River Herring.

F. *Paperwork*

The final-form rulemaking will not increase paperwork and will not create new paperwork requirements.

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 private sector or the general public.

H. *Public Comments*

A notice of proposed rulemaking was published at 39 Pa. B. 3455 (July 11, 2009). During the formal comment period, the Commission received two public comments concerning the American shad proposal. One comment questions the need for a reduction in the creel limit; the other supports it. After the formal comment period, the Commission received one comment from the Delaware Riverkeeper Network, supporting the reduced creel limit for American shad but urging the Commission to extend the reduced limit to the entire river and not exempt the 2.9 miles downstream of the Commodore Barry Bridge. The Commission did not receive any public comments regarding the proposal for river herring. Copies of all public comments were provided to the Commissioners.

**FINDINGS**

The Commission finds that:

(1) Public notice of intention to adopt the 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 all public comments received were considered.

(3) The adoption of the 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 61, are amended by amending §§61.2 and 61.8 to read as set forth in 39 Pa. B. 3455.

(B) The Executive Director will submit this order and 39 Pa. B. 3455 to the Office of Attorney General for approval as to legality and form as required by law.

(C) The Executive Director shall certify this order and 39 Pa. B. 3455 and deposit them with the Legislative Reference Bureau as required by law.

(D) This order shall take effect on January 1, 2010 or upon publication in the *Pennsylvania Bulletin*, whichever occurs later

For the Pennsylvania Fish and Boat Commission

Douglas J. Austen, Ph.D.  
Executive Director