

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Sections 901(b) and 903(e); (7 Del.C., §§901(b) & 903(e))
7 DE Admin. Code 3531

FINAL

Secretary's Order No.: 2012-F-0026

Date of Issuance: July 16, 2012

Effective Date of the Amendment: August 11, 2012

3531 Tautog

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 regulatory amendments to Delaware Tidal Finfish Regulation No. 3531 regarding Tautog. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2012-07. The Department published the proposed amendments in the June 1, 2012 *Delaware Register of Regulations* and held a public hearing on June 22, 2012. The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated July 11, 2012 (Report). The Report recommends certain findings and the adoption of the proposed regulation amendments as attached to the Report as Appendix A.

Findings and Discussion

I find that the proposed new regulation is well-supported by the record developed by the Department, and adopt the Report to the extent it is consistent with this Order. The Department's experts in the Division of Fish and Wildlife developed the record and drafted the proposed regulation. As a result of the regulatory development process, the Department received public comments supporting this proposed regulation, as discussed in the Report.

With the adoption of these regulatory amendments to Delaware Tidal Finfish Regulation No. 3531 as final, Delaware will be able to modify its existing regulations to allow for less restrictive management measures, consistent with a 39% reduction in exploitation, while remain in compliance with the federal guidelines for the management of Tautog, as set forth by the ASMFC, to wit: *to reduce the size limit from 16 inches to 15 inches*. The current creel limit of five (i.e., five fish per day), with the exception of the time period from April 1 through May 11, at which time the creel limit will be 3, as well as the two current closures (the first at the beginning of summer, from May 12th through July 16th, and then a second closure at the end of summer, from Sept. 1st through Sept. 28th) shall all remain the same.

Of the two possible options vetted to the public during this promulgation process, the Department believes Option #1, as set forth above, to be the preferred reduction strategy with regard to tautog management for the 2012 season. Tautog exhibit site fidelity (aggregate around structure and return to the same sprawling areas), which makes them vulnerable to fishing pressure. Prior to the development of Addendum VI, Delaware's recreational tautog anglers expressed sentiment for Delaware to voluntarily reduce its ten fish creel limit, despite the fact that Delaware would receive no credit for taking a voluntary reduction. The requests for such action were largely prompted by concerns that out-of-state charter boats were relocating to Delaware to fish for tautog in the winter, due to the liberal reel limits (highest along the Atlantic coast). The eight fish creel limit contained in "Option 2" would have continued to give Delaware the highest creel limits of any state along the coast, and would have thus perpetuated this concern. Furthermore, the ASMFC's Tautog Technical Committee has historically favored the use of lower creel limits to constrain the fishery in an effort to reduce the likelihood of recoupment.

The recreational spear fishing sector appears to prefer "Option 2", as the longer season may decrease the likelihood that poor water clarity will impact tautog catchability, as it does later in the summer. Comments from this sector of the recreational fishery appeared disproportionate to the larger recreational hook and line sector. As referenced above, the hook and line sector has a history of advocating for a reduced creel limit in recent years, based largely on concern that the local stock is being targeted by out of state vessels. Further, a popular Delaware fishing discussion website conducted a poll that substantiates a preference by the broader recreational fishing community for Option #1, with 66% (47) of the respondents supporting Option #1, and 34% (24) of the respondent supporting Option #2. This poll was incorporated into the public hearing record for consideration.

The Department concludes that, while either Option #1 or #2 would be consistent with the requirements contained in Addendum VI, Option #2 reduces the likelihood of recoument and addresses concerns regarding Delaware's liberal creel limits. For these reasons, the Department's Division of Fish & Wildlife supports the formal adoption of Option #1 as Delaware's preferred reduction strategy for tautog management in 2012.

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 Amendments as final;

2.) The Department provided adequate public notice of the proposed regulatory amendments to this regulation, and provided the public with an adequate opportunity to comment on the proposed amendments, including at a public hearing;

3.) The Department held a public hearing on the proposed amendments to this regulation in order to consider public comments before making any final decision, and has considered all relevant and timely public comment received;

4.) The Department's Hearing Officer's Report, including its recommended record and the recommended amendments to this regulation, as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;

5.) The recommended amendments to this regulation satisfy the aforementioned federal requirements of reduction strategies with regard to Delaware's management of Tautog, and do not result in any change from the proposed amendments as originally published in the June 1, 2012, *Delaware Register of Regulations*;

6.) The recommended amendments should be adopted as final because Delaware will be enabled to modify its existing regulations to allow for less restrictive management measures, consistent with a 39% reduction in exploitation, while remain in compliance with the federal guidelines for the management of Tautog, as set forth by the ASMFC. Furthermore, with the promulgation of Option #1 as the preferred reduction strategy for tautog management in 2012, Delaware will be able to meet the aforementioned 39% reduction mandate by the *reduction of the size limit for tautog from 16 inches to 15 inches*. The current creel limit of five (i.e., five fish per day), with the exception of the time period from April 1 through May 11, at which time the creel limit will be 3, as well as the two current closures (the first at the beginning of summer, from May 12th through July 16th, and then a second closure at the end of summer, from Sept. 1st through Sept. 28th) shall all remain the same; and

7.) The Department shall submit this Order approving the final amendments to this 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

3531 Tautog

- 1.0 Notwithstanding the provisions of 7 **Del.C.** §939, it shall be unlawful for any person to possess any tautog, *Tautoga onitis*, less than ~~sixteen (16)~~ **[fifteen (15) inches]** in total length.
- 2.0 Notwithstanding the provisions of 7 **Del.C.** §§938, 939, it shall be unlawful for any person to possess more than ~~five (5)~~ **[five (5)]** tautog during the period beginning at 12:00 a.m. on January 1 and ending at 11:59 p.m. on March 31, and during the period beginning at 12:00 a.m. on ~~July 17~~ **[July 17]** and ending at 11:59 p.m. on August 31, and during the period beginning at 12:00 a.m. on September 29 and ending at 11:59 p.m. on December 31, at or between the place where said tautog were caught and said person's personal abode or temporary or transient place of lodging.
- 3.0 Notwithstanding the provisions of 7 **Del.C.** §§938, 939, it shall be unlawful for any person to possess more than three (3) tautog during the period beginning at 12:00 a.m. on April 1 and ending at 11:59 p.m. on May 11, at or between the place where said tautog were caught and said person's personal abode or temporary or transient place of lodging.
- 4.0 Notwithstanding the provisions of subsections 1.0, 2.0 and 3.0 of this regulation, it shall be unlawful for any person to possess any tautog during the period beginning at 12:00 a.m. on May 12 and ending at 11:59 p.m. on July 16 and during the period beginning at 12:00 a.m. on September 1 and ending at 11:59 p.m. on September 28, except in said person's personal abode or temporary or transient place of lodging.

1 DE Reg. 1771 (05/01/98)

6 DE Reg. 1360 (04/01/03)

11 DE Reg. 1257 (03/01/08)

15 DE Reg. 1177 (02/01/12)

15 DE Reg. 1677 (06/01/12)

16 DE Reg. 216 (08/01/12) (Final)