

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Sections 901(b) and 903 (e)(2)a
(7 Del.C. §901(b); 7 Del.C. §903 (e)(2)a)
7 DE Admin. Code 3531

FINAL

Secretary's Order No.: 2012-F-0001

3531 Tautog; Size Limits, Creel Limits and Seasons

SAN # 2011-09

Date of Issuance: January 17, 2012

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 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 2011-09. The Department published the proposed amendments in the September 1, 2011 *Delaware Register of Regulations* and held a public hearing on October 5, 2011. The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated January 3, 2012 (Report). The Report recommends certain findings and the adoption of the proposed new regulation 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 remain in compliance with the federal guidelines for the management of Tautog, as set forth by the ASMFC, to wit: (1) the size limit at 16 inches; (2) the creel limit at 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; and (3) a closure 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.

Of the possible options vetted to the public during this promulgation process, the Department believes the larger size limit of sixteen inches is more desirable for most recreational fishers and the for-hire sector (i.e., Headboat/Charter Boat). There is also a general sentiment among the public that there should be a uniform size limit for Delaware and nearby states (such as New Jersey, Maryland, and Virginia). All the Tautog management options being considered presently by both Maryland and Virginia require a sixteen-inch tautog size limit (the preferred management options for New Jersey are yet to be determined). A uniform size limit in this region will decrease confusion for those that fish both in Delaware and nearby states. Moreover, the uniform size limit may reduce illegal harvest by standardizing the catch.

The Department further notes that a summer closure is preferable to a winter closure. Historically, the winter season is considered the primary tautog season, and tautog is a primary target for the for-hire sector during winter. Tautog research conducted by the Department's Division of Fish and Wildlife has shown that the spawning season can extend into July, thus keeping the fishery closed during early July may, in fact, allow more tautog to spawn. Many other recreational fisheries are open in the summer season, thus a tautog fishery closure would have less of an impact in summer than in winter.

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 substantive change from the proposed amendments as originally published in the September 1, 2011, *Delaware Register of Regulations*;

6.) The recommended amendments should be adopted as final because Delaware will be enabled to remain in compliance with the federal guidelines for the management of Tautog, as set forth by the ASMFC. It will not deprive fishermen of the enjoyment of tautog fishing during the winter months, as historically, the winter season is considered the primary tautog season, and tautog is a primary target for the for-hire sector during winter. Additionally, this management option will also help to fortify and rebuild the tautog stock, as tautog research conducted by the Department's Division of Fish and Wildlife has shown that the spawning season can extend into July, thus keeping the fishery closed during early July may, in fact, allow more tautog to spawn. Many other recreational fisheries are open in the summer season, thus, a tautog fishery closure would have less of an impact in summer than in winter.

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; Size Limits, Creel Limits and Seasons.

(Penalty Section 7 Del.C. §936(b)(2))

- 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 ~~fourteen (14) inches~~ **[[TBD] sixteen (16)]** in total length ~~[during the period.]~~ beginning at 12:01 a.m. on July 1 and ending at 12:00 p.m. on March 31, next ensuing **[[TBD.]**
- 2.0** ~~It shall be unlawful for any person to possess any tautog less than fifteen (15) inches~~ **[[TBD] in total length during the period beginning at 12:01 a.m. on April 1 and ending at 12:00 p.m. on June 30, next ensuing** **[[TBD].**
- 32].0** Notwithstanding the provisions of 7 Del.C. §§938, 939, it shall be unlawful for any person to possess more than ~~three (3)~~ **[[TBD] five (5)]** tautog during the period beginning at 12:01 on April 1 and ending at 12:00 p.m. on June 30, next ensuing **[[TBD] 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 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.
- [4.0 3.0** Notwithstanding the provisions of 7 Del.C. §§938, 939, ~~it]~~ shall be unlawful for any person to possess more than ~~ten (10)~~ **[[TBD] three (3)]** tautog during the period beginning at 12:01 a.m. on July 1 and ending at 12:00 p.m. on March 31, next ensuing **[[TBD] 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.
- [5.0 4.0]** Notwithstanding the provisions of subsections 1.0, 2.0, ~~and~~ 3.0 ~~[and 4.0]~~ of this regulation, it shall be unlawful for any person to possess any tautog during the period beginning at 12:01 a.m. on May 12 and ending at 12:00 p.m. on June 30 and during the period beginning at 12:01 a.m. on September 1 and ending at 12:00 p.m. on September 28, next ensuing **[[TBD] 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)