

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Chapter 60; (7 Del.C., Ch. 60)

FINAL

Secretary's Order No.: 2012-F-0050

3300 Non-Tidal Finfish

Date of Issuance: December 13, 2012

Effective Date of the Amendment: January 11, 2013

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 regulations to amend 7 **DE Admin. Code** 3300, Non-Tidal Finfish, specifically, Sections 3301, and 3303 through 3310. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2012-09. The Department published its initial proposed regulation Amendments in the September 1, 2012 Delaware *Register of Regulations*. The Department then held a public hearing on October 26, 2012. The public hearing record remained open at that time for public comment through November 10, 2012.

The Department's Division of Fish & Wildlife has received numerous complaints from the angling public regarding stocked trout harvest prior to the season opening. The proposed amendments to §§3301 and 3304 seek to expressly define Newton and Tidbury Ponds as designated trout ponds, and formally establish closed and open seasons of same. Division regulations close fishing in stocked freshwater trout streams two weeks prior to the opening of trout season, in order to allow stocked trout to acclimate to their surroundings, become well dispersed, and simplifies enforcement of the freshwater trout regulations. Unfortunately, stocked trout ponds were not included in the definition of the trout streams, and therefore similar closures to fishing prior to the opening of trout season have not been able to be adequately enforced by the Department.

The Department is also proposing to amend §§3303 to allow the take of northern and blotched snakehead by hook and line, as well as bow and arrow and spear in non-tidal waters. These species are categorized as non-native invasive, which have the potential to cause ecological harm. Bow fishing is an effective harvesting technique that may diminish their numbers and slow or prevent their spread (similar language exists for carp).

Other proposed amendments are editorial in nature. These changes are intended to clarify awkwardly worded language currently existing in §3304 (Section 4.0), and make the non-tidal regulatory language consistent with the Delaware Administrative Code Drafting and Style Manual (Sept. 2009 edition). There is no desire of the Department to change the meaning or intent of that existing Section in any way at this time. It should be noted that the Department has the statutory basis and legal authority to act with regard to the proposed amendments, pursuant to 7 **Del.C.** §103(a) and (b). The proposed Amendments were thoroughly vetted by the Department at the public hearing on October 26, 2012. No member of the public attended said hearing. Pursuant to Delaware law, the record remained open for fifteen (15) additional days subsequent to the date of the public hearing, for the purpose of receiving additional public comment. No public comment was received by the Department from the public at any time during the course of this proposed promulgation. It should also be noted that all proper notification and noticing requirements concerning this proposed promulgation were met by the Department. Proper notice of the hearing was provided as required by law.

Subsequent to the closing of the record in this matter on November 10, 2012, the Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated November 30, 2012 (Report). The Report recommends certain findings and the adoption of the proposed Amendments as attached to the Report as Appendix A.

Findings and Discussion

I find that the proposed Amendments are well-supported by the record developed by the Department, and I adopt the Report to the extent it is consistent with this Order. The Department's experts developed the record and drafted the proposed Amendments. As previously noted, no members of the public attended the hearing held on October 26, 2012, and no public comment was received by the Department from the public at any time during the course of this proposed promulgation. I find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these Amendments. The adoption of this Order will allow Delaware to formally define designated trout ponds,

prohibit the harvest of trout in designated trout ponds prior to the scheduled pond trout season, authorize the taking of northern and blotched snakehead (invasive species) by bow and arrow and spear, and make a number of minor editorial corrections to the non-tidal regulations.

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 Amendments, and provided the public with an adequate opportunity to comment on the proposed Amendments, including at the public hearing held on October 26, 2012;
- 3.) The Department held a public hearing on October 26, 2012 in order to consider public comment before making any final decision;
- 4.) The Department's Hearing Officer's Report, including its recommended record and the recommended Amendments as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;
- 5.) The adoption of this Order will allow Delaware to formally define designated trout ponds, prohibit the harvest of trout in designated trout ponds prior to the scheduled pond trout season, authorize the taking of northern and blotched snakehead (invasive species) by bow and arrow and spear, and make a number of minor editorial corrections to the non-tidal regulations;
- 6.) The recommended Amendments should be adopted as final regulation Amendments because Delaware will be able to (1) manage trout ponds by regulation, as is done for trout streams here in Delaware, in order to address concerns regarding trout harvest prior to the season opener on Delaware's two stocked ponds, namely, Newton Pond and Tidbury Pond; (2) establish the type of fishing gear that can be used to harvest northern snakehead and blotched snakehead, invasive species which can be potentially harmful, both economically and ecologically, to Delaware's native populations; (3) provide minor editorial changes to the existing regulations, which are not intended to change the meaning or intent of the existing regulations in any way; and lastly, because (4) the amendments are well supported by documents in the record;
- 7.) The Department shall submit this Order approving the final 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

3300 Non-Tidal Finfish

3301 Definitions

- 1.0 For purposes of Regulations 3301 through ~~3308~~ 3311, the following words and phrases ~~terms~~ shall have the following meaning ~~ascribed to them~~, unless the context clearly indicates otherwise:

"Administered by the Division" shall mean owned, leased or licensed by the Division.

"Bait" shall mean any nontoxic food material, compound or mixture of ingredients which wildlife is able to consume.

"Baited Field" shall ~~include~~ mean include any farm field, woodland, marsh, water body or other tract of land where minerals, grain, fruit, crop or other nontoxic compounds have been placed to attract wildlife to be hunted.

"Designated Trout Pond" means:

Newton Pond in Sussex county (near Greenwood);

Tidbury Pond in Kent County.

"Designated Trout Stream" shall mean:

"Beaver Run", from the boundary line between this State and the Commonwealth of Pennsylvania to the Brandywine River;

"Christina Creek", from the boundary line between this State and the State of Maryland through Rittenhouse Park;

"Mill Creek", from Brackenville Road to Route 7;

"Pike Creek", from Route 72 to Henderson Road;

"White Clay Creek", from the boundary line between this State and the Commonwealth of Pennsylvania to the downstream side of Paper Mill Road;

"Wilson Run", from Route 92 through Brandywine Creek State Park; and

"Director" shall mean the Director or Acting Director of the Division.

“**Division**” ~~shall~~ means the Division of Fish and Wildlife of the Department.

“**Established Road**” ~~shall~~ means a road maintained for vehicular use by the Division and designated for such use by the Division on current wildlife area maps.

“**Fishing**” or “**to fish**” ~~shall~~ means to take, catch, kill or reduce to possession or attempt to take, catch, kill or reduce to possession any fish by any means whatsoever.

“**Game Fish**” ~~shall include~~ means smallmouth bass, largemouth bass, black or white crappie, rock bass, white bass, walleye, northern pike, chain pickerel, muskellunge (or hybrids), salmon, trout, sunfishes and white bass/striped bass hybrids.

“**Possession**” ~~shall~~ means either actual or constructive possession of or any control over the object referred to.

“**Refuge**” ~~shall~~ means an area of land, whether in public or private ownership, designated by the Department as a refuge. Land shall only be designated with the permission of the landowner and if such designation is thought to be in the best interest of the conservation of wildlife. Refuges shall normally be closed at all times to all forms of hunting, except as permitted by the Director in writing for wildlife management purposes.

“**Restricted Trout Stream**” ~~shall~~ means the White Clay Creek from a point 25 yards above Thompson Bridge at Chambers Rock Road to the boundary line between this State and the Commonwealth of Pennsylvania.

“**Roadway**” ~~shall~~ means any road, lane or street, including associated right-of-ways, maintained by this State or any political subdivision of this State.

“**Season**” ~~shall~~ means that period of time during which a designated species of wildlife may be lawfully hunted or a designated species of fish may be lawfully fished.

“**Vehicle**” ~~shall include any~~ means in or by which someone travels or something is carried or conveyed or a means of conveyance or transport, whether or not propelled by its own power.

3 DE Reg. 289 (8/1/99)

3 DE Reg. 1738 (6/1/00)

3302 Special Permits

The Director may issue a permit authorizing the holder thereof to fish by means of nets or other device from any of the non-tidal waters of this State, provided the fishing serves a research, management or educational purpose.

3 DE Reg. 289 (8/1/99)

3303 Method of Take

(Penalty Section 7 **Del.C.** §1304)

1.0 Non-tidal Waters. It ~~shall be~~ is unlawful for any person to take fish from the non-tidal waters of this State, except by means of hook and line while under the immediate observation of the person using same. Carp, any species of snakehead (Family Channidae) and shad may be taken as set forth otherwise in this regulation.

2.0 Carp. It ~~shall be~~ is unlawful for any person to take carp, except by the following methods: hook and line; bow and arrow; and spear. Carp may be taken with a seine from freshwater ponds and non-tidal streams with permission from the Director and under the supervision of a representative of the Division.

3.0 Shad. Except as otherwise provided by law, it ~~shall be~~ is unlawful for any person to take shad, except by hook and line, provided said line has no more than two (2) lures attached. Each lure may have no more than one (1) single pointed hook.

4.0 Snakehead. It is lawful to take northern snakehead fish (*Channa argus*) or blotched snakehead fish (*Channa maculata*) from non-tidal waters of this State with hook and line; bow and arrow; and spear.

45.0 Snagging of Game Fish. It ~~shall be~~ is unlawful for any person to fish in the non-tidal waters of this State with hooks (single, double or treble) knowingly used to snag or otherwise catch or attempt to snag or otherwise catch any game fish by hooking said game fish in any part of the anatomy other than in the mouth.

56.0 Fish Ladders. It ~~shall be~~ is unlawful for any person to fish within ten (10) feet of an entrance or exit of a fish ladder or to remove fish from any fish ladder between March 15 and May 30.

3 DE Reg. 289 (8/1/99)

3304 Creel Limits, Size Limits and Seasons

(Penalty Section 7 **Del.C.** §1304)

- 1.0 Closed Seasons. Unless otherwise provided by law or regulation of the Department, there ~~shall be~~ is no closed season, size limits or possession limits on any species of fish taken by hook and line in any non-tidal waters of this State.
- 2.0 Bass.
- 2.1 Statewide limits.
- 2.1.1 It ~~shall be~~ is unlawful for any person to have in possession more than six (6) largemouth ~~bass and/~~ or to have in possession more than six (6) smallmouth bass at or between the place where said largemouth and/or smallmouth bass were caught and said person's personal abode or temporary or transient place of lodging.
- 2.1.2 Unless otherwise authorized in this regulation, it ~~shall be~~ is unlawful for any person to possess any largemouth bass that measure less than twelve (12) inches in total length. Any largemouth bass taken which is less than the twelve (12) inches in total length ~~shall~~ must be immediately returned to the water with the least possible injury.
- 2.1.3 It ~~shall be~~ is unlawful for any person to possess any smallmouth bass measuring from twelve (12) inches to and including (17) inches in total length. Any smallmouth bass taken which is greater than twelve (12) inches and less than seventeen (17) inches ~~shall~~ must be immediately returned to the water with the least possible injury.
- 2.1.4 Notwithstanding 2.1.1 of this section, it ~~shall be~~ is unlawful for any person to have in possession more than one (1) smallmouth bass measuring more than seventeen (17) inches in total length at or between the place where said smallmouth bass was caught and said person's personal abode or temporary or transient place of lodging.
- 2.1.5 It ~~shall be~~ is lawful for any person to have in possession while fishing up to six (6) smallmouth bass that are less than twelve (12) inches in total length.
- 2.2 Becks Pond.
- 2.2.1 Notwithstanding 2.1.1 of this section, it ~~shall be~~ is unlawful for any person to have in possession while fishing on Becks Pond more than two (2) largemouth bass.
- 2.2.2 Notwithstanding 2.1.2 of this section, it ~~shall be~~ is unlawful for any person to have in possession while fishing on Becks Pond any largemouth bass less than fifteen (15) inches in total length. Any largemouth bass less than fifteen (15) inches in total length ~~shall~~ must be immediately returned to Becks Pond with the least possible injury.
- ~~2.3~~ 3.0 Trout.
- 2.3.1 Pond and Stream Seasons. It ~~shall be unlawful for any person to fish for rainbow, brown and/or brook trout in designated trout streams, except between and including the first Saturday of April and the second Saturday of March of each succeeding year.~~
- 3.1.1 It is unlawful for any person to fish for rainbow trout, brown trout, brook trout, or any hybrids of these species in designated trout streams, except between and including the first Saturday of April and the second Saturday of March of each succeeding year.
- 3.1.2 It is unlawful for any person to fish for rainbow trout, brown trout, brook trout, or any hybrids of these species in designated trout ponds, except between and including the first Saturday of March and the second Saturday of February of each succeeding year.
- 2.3.2 Hours of Fishing. It ~~shall be unlawful for any person to fish for rainbow, brown and/or brook trout in designated trout streams on the opening day of the trout season before 7:30 a.m. and thereafter for the remainder of the trout season between one-half hour after sunset and one-half hour before sunrise.~~
- 3.2.1 It is unlawful for any person to fish for rainbow trout, brown trout, brook trout, or any hybrids of these species in designated trout streams on the opening day of the trout season before 7:30 a.m. and thereafter for the remainder of the trout season between one-half hour after sunset and one-half hour before sunrise.
- 3.2.2 It is unlawful for any person to fish for rainbow trout, brown trout, brook trout, or any hybrids of these species in designated trout ponds on the opening day of the trout season before 7 a.m. and thereafter for the remainder of the trout season between one-half hour after sunset and one-half hour before sunrise.
- 2.3.3 Possession. It ~~shall be~~ is unlawful for any person to ~~catch and/or have in his or her possession~~ possess in any one day during the prescribed open season more than six (6) rainbow trout, brown trout ~~and/or~~ brook trout or any hybrids of these species in any combination. On any day after a person takes his or her legal limit of trout, said person ~~shall be~~ is prohibited from fishing in a designated trout stream or a designated trout pond on the same day, unless otherwise authorized by law or this regulation.

2-3.4 Trout Stamp. It shall be unlawful for any person to fish in a designated trout stream on or before the first Saturday in April and June 30, of the same year, and on or before the first Saturday in October and November 30, of the same year, unless said person has in his or her possession a valid trout stamp, or, unless said person is exempted by law from having a trout stamp.

3.4.1 It is unlawful for any person to fish in a designated trout stream from the first Saturday in April through June 30 and from the first Saturday in October through November 30, unless said person has in his or her possession a valid trout stamp, or unless said person is exempted by law from having a trout stamp.

3.4.2 It is unlawful for any person to fish in a designated trout pond from the first Saturday in March through April 1, unless said person has in his or her possession a valid trout stamp, or unless said person is exempted by law from having a trout stamp.

2-3.5 Restricted Trout Stream.

2-3.5.1 It shall be ~~is~~ unlawful for any person to fish in a restricted trout stream with more than two (2) flies on a line at any one time.

2-3.5.2 It shall be ~~is~~ unlawful for any person to use any metallic, wooden, plastic or rubber spinners, spoons, lures, plugs, ~~and/or~~ any natural or synthetic bait on any restricted trout stream.

2-3.5.3 It shall be ~~is~~ unlawful for any person to have in his or her possession more than four (4) trout within 50 feet of any restricted trout stream. On the restricted trout stream only, trout may be caught and released as long as the four (4) trout possession limit is not exceeded. All trout released must be returned to the water as quickly as possible with the least possible injury.

2-3.6 Closure of Designated Trout Streams and Ponds.

3.6.1 ~~It shall be is~~ It is unlawful for any person to fish in a designated trout stream ~~within~~ two weeks (14 days) ~~of a~~ prior to the scheduled opening of the stream trout season.

3.6.2 It is unlawful for any person to fish in a designated trout pond two weeks (14 days) prior to the scheduled opening of the pond trout season.

2.4 4.0 Striped Bass (hybrids) and Hybrid Striped Bass

2.4.1 ~~It shall be is~~ It is unlawful for any person to have in his or her possession while fishing in the non-tidal waters of this State more than two (2) striped bass (*Morone saxatilis*) ~~and/or~~ striped bass hybrids (*Morone saxatilis crysops* x *M. chrysops*) ~~or any striped bass or striped bass hybrid under the length of fifteen (15) inches measured from the tip of the snout to the tip of the tail.~~

4.2 It is unlawful for any person to possess any striped bass or any striped bass hybrid under the length of fifteen (15) inches measured from the tip of the snout to the tip of the tail while fishing in the non-tidal waters of this State.

~~2-5~~ 5.0 Panfish Limits. It shall be ~~is~~ unlawful for any person to have in possession while fishing in any State-owned non-tidal water more than fifty (50) panfish in aggregate to include bluegill, pumpkinseed, redear sunfish, black crappie, white crappie, white perch or yellow perch, provided no more than twenty-five (25) of the fifty (50) allowed in possession are of any one species.

3 DE Reg. 289 (8/1/99)

3 DE Reg. 1738 (6/1/00)

13 DE Reg. 1350 (04/01/10)

3305 Ice Fishing

(Penalty Section 7 Del.C. §1304)

1.0 Restrictions.

1.1 It shall be ~~is~~ unlawful for any person to fish more than five (5) hook and lines in non-tidal water through ice.

1.2 It shall be ~~is~~ unlawful for any person to leave any hook and line being fished through the ice unattended.

1.3 It shall be ~~is~~ unlawful for any person to fish in non-tidal water through ice with any line having more than three hooks.

3 DE Reg. 289 (8/1/99)

3306 Closure of Department Ponds During Drawdowns

(Penalty Section 7 Del.C. §1304)

1.0 It shall be ~~is~~ unlawful for any person to fish in any pond or lake administered by the Department when the water level in said pond or lake is lowered for the purpose of aiding in the control of aquatic vegetation, the conservation of fishes or the repair of water control facilities, provided said pond or lake is duly posted with signs by the Division that state said pond or lake is closed to fishing.

3 DE Reg. 289 (8/1/99)

3307 Speed and Wake of Motorboats on Division Ponds

(Penalty Section 7 **Del.C.** §1304)

- 1.0 It ~~shall be~~ is unlawful for any person to operate a motorized vessel, except at a slow-no-wake speed, on any pond or lake administered by the Division.

3 DE Reg. 289 (8/1/99)

3308 Fish Stocking Practices

(Penalty Section 7 **Del.C.** §1304)

- 1.0 Stocking Fish Practices. It ~~shall be~~ is unlawful for any person to stock any species of fish into the non-tidal public waters of this State without the written permission of the Director. This regulation does not prohibit the stocking of private impoundments.
- 2.0 Transportation, Possession and Sale. It ~~shall be~~ is unlawful for any person to transport, purchase, possess, or sell walking catfish (*Clarius batrachus*) or the white amur or grass carp (*Ctenopharyngodon idella*) or live northern snakehead fish (*Channa argus*) or blotched snakehead fish (*Channa maculata*) without the written permission of the Director.

3 DE Reg. 289 (8/1/99)

8 DE Reg. 1315 (3/1/05)

3309 Lake Como

(Penalty Section 7 **Del.C.** §1304)

- 1.0 Bait. It ~~shall be~~ is unlawful for any person to use or have in his or her possession any live fish, as bait, while fishing on Lake Como.

3 DE Reg. 289 (8/1/99)

3310 Severability

- 1.0 If any section, subsection, paragraph, sentence, phrase or word of these regulations is declared unconstitutional by a court of competent jurisdiction, the remainder of these regulations shall remain unimpaired and shall continue in full force and effect, and proceedings thereunder shall not be affected.

3 DE Reg. 289 (8/1/99)

3311 Freshwater Fisherman Registry

- 1.0 All persons ages 16 and older who wish to fish in Delaware's fresh or tidal waters or both in any given year must first obtain a Fisherman Identification Network (F.I.N.) number for the year in question before fishing. This number may be obtained at no cost to the angler by calling a toll free number and providing the required information over the phone or by entering the required information on-line through an internet access portal designated by the Department for that purpose. Each person who requests a F.I.N. number is to write this number on his or her Delaware fishing license, or those who are legally unlicensed must be able to produce this number when checked by an enforcement agent when fishing in Delaware waters. Failure to provide a valid F.I.N. number for the year in question is a violation of 7 **Del.C.** §501 in the case of residents, or 7 **Del.C.** §506 in the case of non-residents, and will be treated the same as a failure to have a fishing license before going fishing. Information provided during the process of obtaining a F.I.N. number shall be treated as confidential and may only be shared with the National Marine Fisheries Service for the purpose of compliance with federal requirements for a national registry of marine fishermen.

12 DE Reg. 493 (10/01/08)

16 DE Reg. 245 (09/01/12) (Prop.)

16 DE Reg. 788 (01/01/13) (Final)