

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Sections 901(c & d) and 903(e)(3) (7 Del.C. §§901(c & d) & 903(e)(3))

FINAL

Secretary's Order No.: 2015-F-0036

3500 Tidal Finfish
3542 Tilefish

Date of Issuance: December 15, 2015

Effective Date of the Amendment: January 11, 2016

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") pursuant to 7 Del.C. §§6006, 6010, the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced regulatory proceeding.

Background, Procedural History and Findings of Fact

This Order relates to proposed *revised* regulation Amendments to 7 DE Admin. Code 3500: *Tidal Finfish*, to include new Section 3542, to wit: *Tilefish* (hereinafter referred to as "*Tilefish* regulations"). The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2015-03 dated April 26, 2015. The Department published its initial proposed regulation Amendments in the June 1, 2015 Delaware *Register of Regulations*. The Department then held a public hearing on June 24, 2015. Consistent with 29 Del.C. §10118(a), the public hearing record remained open for public comment initially through July 9, 2015.

The purpose of this proposed regulatory promulgation is to adopt as final the aforementioned proposed Amendments to these *Tilefish* regulations ("Amendments"). Blueline Tilefish (*Caulolatilus microps*) is an ocean dwelling, deep water species that is susceptible to exploitation due to its long-lived, sedentary nature. The species is federally managed from North Carolina through Florida by the South Atlantic Fishery Management Council ("SAFMC") through the amended Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic (1983).

The SAFMC sharply reduced the Annual Catch Limits in 2014 based on results from the 2013 coastwide stock assessment, which indicated the Blueline Tilefish ("Blueline") was overfished and overfishing was occurring. The harvest reductions in the South Atlantic resulted in the commercial sector targeting Blueline in unregulated Mid-Atlantic States, primarily New Jersey. Reported landings from Virginia and northward have increased from approximately 11,000 pounds annually (average 2005-2013) to about 217,000 pounds in 2014. Most of these fish were caught in federal waters off the coast of Delmarva. Additionally, Northeast vessel trip reports from the recreational for-hire sector indicated that Blueline landings significantly increased in the areas from approximately Cape Hatteras to mid-New Jersey (Federal Statistical Areas 616-636). Virginia and Maryland, although not SAFMC member states, enacted the *SAFMC Blueline Tilefish Regulations* earlier this year, in response to the 2014 landings. The Mid-Atlantic Fishery Management Council ("MAFMC") then formally requested that all member states consider adopting incidental commercial trip limits and recreational bag limits that mirror current Virginia and Maryland state regulations. This request was followed by an emergency meeting of the MAFMC, in which the council voted to request that the National Marine Fisheries Service ("NMFS") implement emergency rules to restrict commercial and recreational landings of Blueline Tilefish in the Mid-Atlantic.

Consistent with the MAFMC's request and input from Delaware's Advisory Council on Tidal Finfisheries, the Department proposed two options for a new Tilefish regulation. Both proposed options included a commercial trip limit of 300 pounds and a recreational possession limit of no more than seven (7) fish per person; however, Option #1 limited the new regulation to Blueline Tilefish, while Option #2 applied the regulation more broadly (as is the case in Maryland and Virginia) to include both Blueline Tilefish and Golden Tilefish (*Lopholatilus chamaelonticeps*).

The aforementioned proposed Amendments were presented and thoroughly vetted by the Department at the public hearing on June 24, 2015. As noted previously, no members of the public attended the above referenced hearing, however, comment was received by the Department via email with regard to the two management options referenced above. 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. It should be noted that all proper notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

The hearing record formally closed with regard to public comment at close of business on Thursday, July 9, 2015. In all, four comments had been received by members of the public, each offering an opinion as to which of the two management

options discussed at the public hearing was best for Delaware's management of Tilefish. At that time, the comments were thoroughly reviewed by responsible Department staff and, at the request of the Hearing Officer, a Technical Response Document ("TRM") was subsequently prepared by Stewart Michels in response to the same. This TRM, dated August 27, 2015, set forth the Department's official endorsement of Option #2, to wit: an aggregated (i.e., both Blueline Tilefish *and* Golden Tilefish) seven (7) fish recreational possession limit and a 300 pound aggregated commercial possession limit, as it pertains to the proposed Amendments to Delaware's Finfish Regulations regarding Tilefish, and provided the Department's reasoning regarding same.

Among the factors considered by the Department's Division of Fish and Wildlife with regard to this endorsement were as follows: (1) both Golden Tilefish and Blueline Tilefish are long-lived and sedentary, making them susceptible to exploitation; (2) both species are poorly assessed (i.e., data limited) and recreational landings of both species are not fully accounted for in the respective stock assessments; (3) Option #2 will constrain harvest and prevent an unmanaged expansion of the Blueline Tilefish fishery until more data become available; (4) Option #2 measures are consistent with the MAFMC request, as well as measures adopted in both Maryland and Virginia; (5) Delaware does not have an active commercial tilefish fishery for either species that would be economically impacted; and that (6) the majority of public comment received favors the aggregated limits option.

While reviewing the proposed regulatory language when drafting the aforementioned TRM, substantive changes were made to the same by the Department's Division of Fish & Wildlife, in order to provide greater understanding to the regulated community regarding the term "possess". Specifically, this proposed regulatory promulgation now provides for the inclusion of the phrase, "aboard a vessel" following the word "possess" in Sections (1.1), (1.2), and (1.3). This substantive change allows for the possession of multiple limits at someone's residence, hotel room, retail store, etc., however, given the distance at which this fishery is prosecuted (near the continental shelf), it is highly unlikely that a person or vessel would be able to land multiple times per day. Nevertheless, in the spirit of transparency, the Department deemed this post-hearing edit to be substantive, thus necessitating a re-noticing of the proposed regulation, and a re-publishing of the same for an additional 30 days to allow for public comment.

This proposed regulatory promulgation was re-published in the *Register of Regulations* on November 1, 2015, and comment was accepted through December 1, 2015. Accordingly, Mr. Michels provided this Hearing Officer with a *supplemental* TRM, dated December 7, 2015, which not only re-affirmed all information set forth in his initial TRM dated August 25, 2015, but also confirmed the re-publication of this proposed promulgation as described above, and that no opposition of the aforementioned clarification to the regulation language was received by the Department in this matter.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated December 11, 2015 ("Report"). The Report documents the proper completion of the required regulatory amendment process, establishes the record, and recommends the adoption of the proposed *revised* Amendments as attached to the Report as Appendix "B".

Reasons and Conclusions

Based on the record developed by the Department's experts and established by the Hearing Officer's Report, I find that the proposed *revised* regulatory Amendments to 7 **DE Admin. Code** 3500: *Tidal Finfish*, to include new Section 3542, to wit: *Tilefish*, are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed regulatory *revised* Amendments be promulgated as final.

I find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these *revised* regulatory Amendments. The adoption of these *revised* regulatory Amendments will allow Delaware to (1) adopt new regulations with regard to Delaware's management of Tilefish, consistent with the MAFMC's request and input from Delaware's Advisory Council on Tidal Finfisheries; (2) constrain harvest and prevent an unmanaged expansion of the Blueline Tilefish fishery until more data become available; (3) implement the following possession limits for both Blueline Tilefish *and* Golden Tilefish, to wit: an aggregated (i.e., both Blueline Tilefish *and* Golden Tilefish) seven (7) fish recreational possession limit and a 300 pound aggregated commercial possession limit; and (4) provide additional clarity and a greater understanding to the regulated community with regard to the terms "possess" and "aboard a vessel" as a result of the substantive changes made to this proposed regulatory promulgation.

In conclusion, the following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to the proposed *revised* Amendments to 7 **DE Admin. Code** 3500: *Tidal Finfish*, to include new Section 3542, to wit: *Tilefish*, pursuant to 7 **Delaware Code**, Sections §§901 (c & d), 903(e)(3);

2. The Department has jurisdiction under its statutory authority, pursuant to 7 **Del.C.** Ch. 60, to issue an Order adopting these proposed *revised* regulatory Amendments as final;

3. The Department provided adequate public notice of the initial proposed regulatory Amendments and all proceedings in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on said Amendments, including at the time of the public hearing held on June 24, 2015, and held the record open through close of business on July 9, 2015, consistent with 29 **Del.C.** §10118(a), in order to consider public comment on these proposed regulatory Amendments before making any final decision;

4. Due to substantive changes made to the proposed regulatory language, the Department caused the *revised* proposed regulatory amendments to be re-published in the State of Delaware *Register of Regulations* on November 1, 2015, provided the public with an additional 30 days to comment on the same, and held the record open through close of business on December 1, 2015, in order to consider all public comment on these proposed revised regulatory amendments before making any final decision;

5. The Department's Hearing Officer's Report, including its established record and the recommended proposed *revised* regulatory Amendments as set forth in its Appendix "B", are hereby adopted to provide additional reasons and findings for this Order;

6. The adoption of these proposed *revised* regulatory Amendments will allow Delaware to (1) adopt new regulations with regard to Delaware's management of Tilefish, consistent with the MAFMC's request and input from Delaware's Advisory Council on Tidal Finfisheries; (2) constrain harvest and prevent an unmanaged expansion of the Blueline Tilefish fishery until more data become available; (3) implement the following possession limits for both Blueline Tilefish *and* Golden Tilefish, to wit: an aggregated (i.e., both Blueline Tilefish *and* Golden Tilefish) seven (7) fish recreational possession limit and a 300 pound aggregated commercial possession limit; and (4) provide additional clarity and a greater understanding to the regulated community with regard to the terms "possess" and "aboard a vessel" as a result of the substantive changes made to this proposed regulatory promulgation;

7. The Department has reviewed these proposed *revised* regulatory Amendments in the light of the Regulatory Flexibility Act, consistent with 29 **Del.C.** Ch. 104 (version applicable to all regulations initially published on or before December 31, 2015), and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;

8. The Department's proposed *revised* regulatory Amendments, as re-published in the November 1, 2015 *Delaware Register of Regulations*, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they are approved as final *revised* regulatory amendments, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and

9. The Department shall submit this Order approving as final the proposed *revised* Amendments to 7 **DE Admin. Code** 3500: *Tidal Finfish*, to include new Section 3542, to wit: *Tilefish*, 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.

David S. Small
Secretary

3542 Tilefish

1.0 Tilefish possession limits

- 1.1 It is unlawful for a recreational finfisherman to possess aboard a vessel more than seven (7) tilefish in aggregate to include blueline tilefish (*Caulolatilus microps*) or golden tilefish (*Lopholatilus chamaelonticeps*), unless otherwise authorized by the Department.
- 1.2 Notwithstanding the provisions of subsection 1.1, a person issued a valid commercial food fishing license may possess aboard a vessel up to 300 pounds of tilefish in aggregate to include blueline tilefish (*Caulolatilus microps*) or golden tilefish (*Lopholatilus chamaelonticeps*) in any number, provided said tilefish were taken using gear for which said person is lawfully permitted under 7 **Del.C.** §915.
- 1.3 It is unlawful for a person issued a valid commercial food fishing license to possess aboard a vessel more than 300 pounds of tilefish in aggregate to include blueline tilefish (*Caulolatilus microps*) or golden tilefish (*Lopholatilus chamaelonticeps*).

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