

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Section 901(c & d) (7 Del.C. §901(c & d))

7 DE Admin. Code 3511

FINAL

Secretary's Order No.: 2013-F-0016

Approving Final Regulation Amendments to 7 DE Admin. Code 3511:

Summer Flounder Size Limits; Possession Limit; Seasons

Date of Issuance: May 14, 2013

Effective Date of the Amendment: June 11, 2013

3511 Summer Flounder Size Limits; Possession Limits

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. 3511 regarding Summer Flounder. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2013-02. The Department published the proposed amendments in the March 1, 2013 Delaware *Register of Regulations* and held a public hearing on March 21, 2013. The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated May 3, 2013 (Report). The Report recommends certain findings and the adoption of the proposed regulation amendment 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 thoroughly discussed in the Report.

Summer flounder are managed cooperatively by the Atlantic States Marine Fisheries Commission (ASMFC), the Mid-Atlantic Fishery Management Council (MAFMC), and the National Marine Fisheries Service through Amendment 13 to the Summer Flounder, Scup and Black Sea Bass Fishery Management Plan and its subsequent addenda. The ASMFC and MAFMC approved a coastwide recreational summer flounder harvest limit for 2013, resulting in recreational summer flounder allocation of 78,512 fish to Delaware. Although this was a reduction from the 2012 allocation (87,536 fish), the 2013 quota represents a 104% increase relative to Delaware's 2012 recreational harvest (38,470 fish). As such, Delaware has an opportunity at this time to liberalize its management measures for the 2013 recreational summer flounder fishery, provided the management measures are approved by the ASMFC's Summer Flounder, Scup and Black Sea Bass Management Board following established criteria.

As discussed in the aforementioned Report, four options were developed and subsequently approved by the ASMFC's Summer Flounder, Scup and Black Sea Bass Technical Committee at their January 2013 meeting. These options, ranging from a proposed minimum size of 16.5 inches to 18.0 inches, served as the basis for the Department's proposed regulatory change. With the exception of the 18.0 inch option (which included with it a closed season from Oct. 24th through Dec. 31st and a zero percent estimated increase in harvest), the options presented by the Department for public comment called for a possession limit of 4 fish per day, no closed season, and an estimated increase in harvest from the prior year. It is appropriately noted that, as the estimated harvest for each option increases, the risk of exceeding the allowable catch so increases, and exceeding the allowable catch will result in a corresponding reduction in the following year's allowable catch.

While each of the options considered by the Department is predicted to achieve the management target under conditions similar to 2012, the Department remains somewhat concerned that the 2012 recreational landings data reflect an atypical shift in summer flounder distribution, due to the unusually warm weather that presented itself in 2012. This shift appears to have increased stock availability farther north, and reduced availability in Delaware and to the south. Should stock distribution return to a more typical pattern in 2013, the risk of exceeding our total allowable catch may substantially increase. Further exacerbating uncertainty in this matter is a shift to a new recreational sampling methodology that may

change summer flounder landings estimates for 2013.

In addition to the concerns noted above, there was a significant amount of public comment received with regard to the four options presented by the Department at the public hearing of March 21, 2013. These comments were given a thorough and exhaustive review by the Division of Fish & Wildlife, and were considered within the context of which of the approved options offered the most reasonable, risk-averse measure to manage Delaware's summer flounder fishery. While it is true that there are several ways to categorize the comment received in this matter, the fact remains that the two most favored options voiced by the public were for Option #3 (minimum size of 17.0 inches and an estimated increase in harvest of 40%) and Option #4 (minimum size of 16.5 inches, and an estimated increase in harvest of 81.8%). Both of these options call for a creel limit of 4, and no closed season, so those factors are not at issue in this particular deliberation. However, when comparing the estimated increase in harvest for each of these options, Option #4 is more than double the projected increase of Option #3. Given the concerns of Delaware potentially exceeding its total allowable catch (which, in turn, may result in a corresponding reduction in the following year's allowable catch), I hereby agree with the Department's recommendation offered for consideration, and believe the most appropriate and reasonable path forward for Delaware in this matter is to (1) liberalize the minimum size for 2013 by one inch, thus setting the summer flounder minimum size for 2013 at 17.0 inches; and (2) allowing the fishery to operate without a seasonal closure.

With the adoption of these regulatory amendments to Delaware Tidal Finfish Regulation No. 3511 as final, Delaware will be able to remain in compliance with the federal guidelines for the management of summer flounder, to wit: (1) establish the size limit at 17.0 inches; (2) establish the creel limit at four (i.e., four fish per day); and (3) establish a no-closure season for 2013. In support of the selection of this option, the size limit reduction should lead to more chances for anglers to catch a keeper-sized summer flounder, and should also provide some relief for shore-based anglers who do not have access to larger flounder that are often found in deeper water habitats. Additionally, this option provides for a no-closure season for 2013, which will provide additional opportunity for anglers to harvest summer flounder in Delaware waters, yet permit the Department to manage this fishery in a reasonable, risk-averse manner.

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 (as revised to reflect the aforementioned 17.0 inch minimum size limit, 4 fish per day, and no closed season for 2013) satisfy the aforementioned federal mandates with regard to Delaware's management of summer flounder, and do not result in any substantive change from the proposed amendments as originally published in the March 1, 2013, 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 summer flounder, as set forth cooperatively by the Atlantic States Marine Fisheries Commission (ASMFC), the Mid-Atlantic Fishery Management Council (MAFMC), and the National Marine Fisheries Service through Amendment 13 to the Summer Flounder, Scup and Black Sea Bass Fishery Management Plan and its subsequent addenda. It will not deprive fishermen of the enjoyment of summer flounder, nor will it cause Delaware to suffer a marked decrease in tourism (and potential correlating economic downturn) as a result of any fishery closure in 2013. Moreover, this management option will also help to fortify and continue to rebuild the summer flounder stock while simultaneously helping to encourage and teach sound fishing ethics to the next generation of anglers in Delaware.
- 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

3511 Summer Flounder Size Limits; Possession Limits; Season
(Penalty Section 7 Del.C. §936(b)(2))

- 1.0 It shall be unlawful for any recreational fisherman to have in possession more than four (4) summer flounder at or between the place where said summer flounder were caught and said recreational fisherman's personal abode or temporary or transient place of lodging.
- 2.0 It shall be unlawful for any person, other than qualified persons as set forth in section 4.0 of this regulation, to possess any summer flounder that measure less than ~~[eighteen (18)]~~ **seventeen (17)** inches between the tip of the snout and the furthest tip of the tail.

[Note: Size to be determined in combination with closed season, but is limited to options one through four listed in the below "Table of Management Options"]

- 7 DE Reg. 1575 (5/1/04)
- 12 DE Reg. 1430 (05/01/09)
- 13 DE Reg. 1468 (05/01/10)
- 14 DE Reg. 1235 (05/01/11)

- 3.0 It shall be unlawful for any person, to have in possession any part of a summer flounder that measures less than ~~[eighteen (18)]~~ **seventeen (17)** inches between said part's two most distant points unless said person also has in possession the head, backbone and tail intact from which said part was removed.

[Note: Size to be determined in combination with closed season, but is limited to options one through four listed in the below "Table of Management Options"]

- 13 DE Reg. 1468 (05/01/10)
- 14 DE Reg. 1235 (05/01/11)

- 4.0 Notwithstanding the size limits and possession limits in this regulation, a person may possess a summer flounder that measures no less than fourteen (14) inches between the tip of the snout and the furthest tip of the tail and a quantity of summer flounder in excess of the possession limit set forth in this regulation, provided said person has one of the following:

- 4.1 A valid bill-of-sale or receipt indicating the date said summer flounder were received, the amount of said summer flounder received and the name, address and signature of the person who had landed said summer flounder;
- 4.2 A receipt from a licensed or permitted fish dealer who obtained said summer flounder; or
- 4.3 A bill of lading while transporting fresh or frozen summer flounder.
- 4.4 A valid commercial food fishing license and a food fishing equipment permit for gill nets.

- 5.0 It shall be unlawful for any commercial finfisherman to sell, trade and or barter or attempt to sell, trade and or barter any summer flounder or part thereof that is landed in this State by said commercial fisherman after a date when the de minimis amount of commercial landings of summer flounder is determined to have been landed in this State by the Department. The de minimis amount of summer flounder shall be 0.1% of the coast wide commercial quota as set forth in the Summer Flounder Fishery Management Plan approved by the Atlantic States Marine Fisheries Commission.

- 6.0 It shall be unlawful for any vessel to land more than 200 pounds of summer flounder in any one day in this State.

- 7.0 It shall be unlawful for any person, who has been issued a commercial food fishing license and fishes for summer flounder with any food fishing equipment other than a gill net, to have in possession more than four (4) summer flounder at or between the place where said summer flounder were caught and said person's personal abode or temporary or transient place of lodging.

- 8.0 ~~Notwithstanding section 4.0 of this regulation, it shall be unlawful for any recreational or commercial hook and line fisherman to take and reduce to possession or to land any summer flounder during the closed season beginning 12:01 a.m. October 24 and ending 12:00 p.m. December 31 next ensuing.~~

[Note: Size to be determined in combination with closed season, but is limited to options one through four listed in the below "Table of Management Options"]

- 1 DE Reg. 1767 (5/1/98)
- 2 DE Reg. 1900 (4/1/99)
- 3 DE Reg. 1088 (2/1/00)
- 4 DE Reg. 1552 (3/1/01)

- 5 DE Reg. 462 (8/1/01)
- 5 DE Reg. 2142 (5/1/02)
- 6 DE Reg. 1358 (4/1/03)
- 7 DE Reg. 1575 (5/1/04)
- 8 DE Reg. 1488 (4/1/05)
- 9 DE Reg. 1759 (5/1/06)
- 10 DE Reg. 1722 (05/01/07)
- 11 DE Reg. 1493 (05/01/08)
- 12 DE Reg. 1430 (05/01/09)
- 13 DE Reg. 1468 (05/01/10)
- 14 DE Reg. 1235 (05/01/11)
- 16 DE Reg. 1281 (06/01/13) (Final)

Table of Management Options

| <u>Option</u> | <u>Minimum Size</u> | <u>Possession Limit</u> | <u>Closed Season</u> |
|---------------|---------------------|-------------------------|-----------------------------------|
| <u>1</u> | <u>18.0 inches</u> | <u>4</u> | <u>Oct. 24 - Dec 31 (69 days)</u> |
| <u>2</u> | <u>17.5 inches</u> | <u>4</u> | <u>None</u> |
| <u>3</u> | <u>17.0 inches</u> | <u>4</u> | <u>None</u> |
| <u>4</u> | <u>16.5 inches</u> | <u>4</u> | <u>None</u> |