

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Section 903(e)(2)(a), (7 **Del.C.** §903(e)(2)(a))
7 DE Admin. Code 3531

FINAL

Secretary's Order No.: 2008-F-0006

3531 Tautog; Size Limits, Creel Limits and Seasons (Formerly Tidal Finfish Reg. 22)

Date of Issuance: February 13, 2008
Effective Date of the Amendment: March 11, 2008

I. Background:

A public hearing was held on Wednesday, January 23, 2008, at 7:00 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on proposed amendments to the existing Delaware Tidal Finfish Regulation 3531 concerning tautog size limits, creel limits, and seasons. In order to come into compliance with Addendum V of the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate Fishery Management Plan (FMP) for Tautog, Delaware Tidal Finfish Regulation 3531 must be changed to incorporate one of twelve management options, approved by the ASMFC Tautog Technical Committee. Each option would reduce tautog exploitation by a minimum of 25.6%, as mandated in Addendum V.

Both recreational and commercial fishermen will be affected, as commercial size limits, creel limits and seasons are identical to recreational management measures. Failure to comply with regional FMPs, as approved by the ASMFC, may result in the total closure of the tautog fishery in Delaware by order of the Secretary of Commerce. The Department has the statutory basis and legal authority to act with regard to this promulgation pursuant to 7 **Del.C.** §903(e)(2)(a). No other Delaware regulations are affected by this proposal.

After listening to the public comment received during all phases of this promulgation process, and performing an exhaustive review and consideration of all components of the fishery, economic impacts and conservation of the resource, the Department believes "Option 8b" best accomplishes the mandated 25.6% reduction with a shorter closure period, less economic impact, and greater fairness to the shore zone and free diver components of this important recreational fishery. The current Division of Fish and Wildlife Enforcement Chief also concurs with this judgment, and anticipates no major problem in enforcing these proposed revised regulations.

Numerous members of the public attended this hearing on January 23, 2008 to voice their concerns with regard to the Department's proposed changes to these regulations, and the same were taken into consideration during the Division's review of this proposed regulatory amendment. Afterwards, the Hearing Officer prepared her report regarding this matter and submitted the same to the Secretary for review and consideration. Proper notice of the hearing was provided as required by law.

II. Findings:

The Department has provided a reasoned analysis and a sound conclusion with regard to the response given to each such comment, as reflected in the Hearing Officer's Report of February 12, 2008, which is attached and expressly incorporated into this Order. Moreover, the following findings and conclusions are entered at this time:

1. Proper notice of the hearing was provided as required by law.
2. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
3. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
4. The Department held a public hearing in a manner required by the law and regulations;
5. The Department considered all timely and relevant public comments in making its determination;
6. Promulgation of these proposed amendments would bring Delaware into compliance with

Addendum V of the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate Fishery Management Plan (FMP) for Tautog, by incorporation of Department Option 8b, which was previously approved by the ASMFC Tautog Technical Committee;

7. Option 8b will set the creel limit at 10 fish, size limit 14", from Jan. 1st through March 31st; then, at 3 fish, size limit 15", from April 1st through May 11th; then, a spring closure from May 12th through June 30th; then, back to 10 fish, size limit 14", from July 1st through August 31st; then, a fall closure from September 1st through September 28th; then, back to 10 fish, size limit 14", from September 29th through December 31st;

8. By selection of Option 8b, tautog exploitation will be reduced in Delaware by a minimum of 25.6%, as mandated in Addendum V of the ASMFC's Interstate FMP for Tautog, with a shorter closure period, less economic impact and greater fairness to the shore zone and free diver components of this important recreational fishery;

9. The Department has reviewed this proposal and its components with the current Division of Fish and Wildlife Enforcement Chief, and said Chief concurs and anticipates no major problem with enforcement of the proposed revised regulations;

10. The Department has reviewed this proposed amendment in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;

11. The Department's proposed regulation, as published in the January 1, 2007 *Delaware Register of Regulations* and set forth in Attachment "A" hereto, is adequately supported, not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and that

12. The Department's proposed amendments to Tidal Finfish Regulation 3531 are adequately supported, not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and that

13. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary.

III. Order:

Based on the record developed, as reviewed in the Hearing Officer's Report dated February 12, 2008 and expressly incorporated herein, it is hereby ordered that the proposed amendments to State of Delaware Tidal Finfish Regulation No. 3531 – Tautog Size Limits, Creel Limits, and Seasons - be promulgated in final form in the customary manner and established rule-making procedure required by law.

IV. Reasons:

The promulgation of State of Delaware Tidal Finfish Regulation No. 3531 will bring Delaware into compliance with Addendum V of the Atlantic States Marine Fisheries Commission's Interstate Fishery Management Plan for Tautog. This action, which incorporates Option 8b as Delaware's management plan for tautog (as approved by the ASMFC Tautog Technical Committee) will reduce tautog exploitation by a minimum of 25.6%, as mandated by Addendum V noted above. It is incumbent upon Delaware to be in compliance with the Commission's plan, not only to avoid federal sanctions against Delaware and its fishery, but to protect this species with these conservation measures to ensure that tautog will continue to be found in Delaware waters in the future.

In developing this regulation, the Department has balanced the absolute environmental need for the State of Delaware to promulgate regulations concerning this matter with the important interests and public concerns surrounding the same, in furtherance of the policy, purposes, and authority of 7 Del.C. §903(e)(2)(a).

John A. Hughes, Secretary

1.0 It shall be unlawful for any person to possess any tautog, *Tautoga onitis*, less than fourteen (14) inches 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.

2.0 It shall be unlawful for any person to possess any tautog less than fifteen (15) inches 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.

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 12:01 on April 1 and ending at 12:00 p.m. on June 30, next ensuing, 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 It shall be unlawful for any person to possess more than ten (10) 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, 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 Notwithstanding the provisions of subsections 1.0[, **2.0, 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, except in said person's personal abode or temporary or transient place of lodging.

1 DE Reg 1771 (5/1/98)

6 DE Reg. 1360 (4/1/03)

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