

# 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 3507 and 3511

### FINAL

#### Secretary's Order No.: 2009-F-0013

Date of Issuance: April 14, 2009

Effective Date of the Amendment: May 11, 2009

#### **I. Background:**

A public hearing was held on Thursday, March 26, 2009, at 7:00 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on proposed amendments to the existing Delaware Tidal Finfish Regulations for both summer flounder and black sea bass.

Delaware is obligated to cap the summer flounder recreational harvest at 65,000 fish for 2009. The harvest cap has been adjusted up from the previous year's level of 64,000 fish, due to the fact that the latest scientific stock assessment data indicates that overfishing is not occurring in the stock. Three management options for the summer flounder that included potential minimum size limits ranging from 18.5 inches to 19.5 inches with a four fish creel limit (i.e., four fish per day) were presented at the public hearing for comment. Those options were designed to restrict the recreational summer flounder harvest in Delaware during 2009, and they embodied varying levels of risk with regard to Delaware potentially exceeding its allowable harvest quota for 2009, with the smallest size limit being the most risky and the largest minimum size limit being the least risky. Recreational fishermen, bait and tackle dealers will be affected by the option ultimately chosen to manage the summer flounder harvest for 2009.

The coast wide minimum size requirement for recreationally harvested black sea bass, as mandated by the Atlantic States Marine Fisheries Commission's (ASMFC) Fishery Management Plan (FMP) for Summer Flounder, Scup and Black Sea Bass for the 2009 fishing season is 12.5 inches<sup>1</sup>. Delaware currently has a twelve (12) inch minimum size limit for recreationally harvested black sea bass. As such, it will be necessary to amend Tidal Finfish Regulation No. 3507 to adjust the current minimum size to comply with the ASMFC FMP.

The Department has the statutory basis and legal authority to act with regard to these promulgations, pursuant to 7 Del.C. §903(e)(2)(a). No other Delaware regulations are affected by these proposals.

After listening to the public comment received concerning summer flounder proposals 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 3: 18.5 inches minimum size limit, 4 fish per day" best accomplishes the mandated summer flounder quota of 65,000 harvested fish (or less) with no closure period.

Numerous members of the public attended this hearing on March 26, 2009 to voice their concerns with regard to the Department's proposed changes to the summer flounder regulations, and the same were taken into consideration during the Division's review of this proposed regulatory amendment. It should be noted that no comment was received regarding the proposed amendment to the black sea bass regulations. 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.

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1. The federal regulations governing Summer Flounder and Black Sea Bass are managed under one fishery management program by ASMFC. Thus, the Department has historically amended the regulations concerning both these species jointly as well.

## **II. Findings:**

The Department has provided a reasoned analysis and a sound conclusion with regard to the response given to the public comment received in this matter, as reflected in the Hearing Officer's Report of April 13, 2009, 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 federal guidelines for the management of both summer flounder and black sea bass, since these species come under both federal and state jurisdiction;
7. With regard to the proposed amendments to Delaware's regulations concerning summer flounder, Option #3 will set the summer flounder restrictions for 2009 at an 18.5" minimum size limit and a 4-fish daily bag limit, with no seasonal closure. This was the option most supported by the public, based upon comments received by the Department during the public comment phase of this promulgation;
8. With regard to the proposed amendments to Delaware's regulations concerning black sea bass, the 2009 season would carry the aforementioned restriction of a 12.5" minimum size limit;
9. The Department has reviewed both of these proposed regulatory amendments 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;
10. The Department's aforementioned proposed amendments to Delaware's regulations concerning both summer flounder and Black Sea Bass, as published in the March 1, 2009 *Delaware Register of Regulations* (and as revised with respect to the summer flounder regulations to reflect the 18.5" minimum size limit, 4 fish per day, no closure specifications) and as set forth in Attachment "A" hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, both should be approved as final regulatory amendments, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*;
11. The Department shall submit the proposed regulations (again, as revised with respect to the summer flounder regulations to reflect the 18.5" minimum size limit, 4 fish per day, no closure specifications) as final regulations to the Delaware Register of Regulations for publication in its next available issue, and shall provide written notice to the persons affected by the Order; and that
12. 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 Memorandum dated April 13, 2009 and expressly incorporated herein, it is hereby ordered that the proposed amendments, as revised, to State of Delaware Tidal Finfish Regulation No. 3511 for Summer Flounder for 2009 and Regulation No. 3507 for Black Sea Bass 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 Regulations for both black sea bass and summer flounder for 2009 will bring Delaware into compliance with federal guidelines for the management of these species, since both come under both federal and state jurisdiction with regard to the harvest management of the same. This action, which incorporates Option #3 (18.5" minimum size limit, 4 fish per day, no closure specifications) as

Delaware's formal management plan for summer flounder for the 2009 fishing season, will allow Delaware to maintain its harvest cap of 65,000 fish. 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 these species with these conservation measures to ensure that both summer flounder and black sea bass 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).

David S. Small, Acting Secretary

### **3507 Black Sea Bass Size Limits; Trip Limits; Seasons; Quotas**

(Penalty Section 7 Del.C. §936(b)(2))

- 1.0 It shall be unlawful for any commercial person to have in possession any black sea bass (*Centropristis striata*) that measures less than eleven (11) inches, total length excluding any caudal filament.
- 2.0 It shall be unlawful for any recreational person to have in possession any black sea bass that measures less than ~~twelve (12)~~ twelve and one-half (12.5) inches total length excluding any caudal filament.

#### **6 DE Reg. 1230 (3/1/03)**

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

- 3.0 It shall be unlawful for any commercial fisherman to land, to sell, trade and or barter any black sea bass in Delaware unless authorized by a black sea bass landing permit issued by the Department. The black sea bass landing permit shall be presumed to transfer with the vessel whenever it is bought, sold, or otherwise transferred, unless there is a written agreement, signed by the transferor/seller and transferee/buyer, or other credible written evidence, verifying that the transferor/seller is retaining the vessel's fishing and permit history for purposes of replacing the vessel.
- 4.0 The black sea bass pot fishery and the black sea bass commercial hook and line fishery shall be considered separate black sea bass fisheries. The total pounds allocated to each fishery by the Department shall be as follows: 96 percent of the State's commercial quota, as determined by the ASMFC, for the pot fishery; 4 percent for the commercial hook and line fishery.
- 5.0 The Department may only issue a black sea bass landing permit for the pot fishery to a person who is the owner of a vessel permitted by the National Marine Fisheries Service in accordance with 50 CFR §§ 648.4 and who had applied for and secured from the Department a commercial food fishing license and has a reported landing history in either the federal or state reporting systems of landing by pot at least 10,000 pounds of black sea bass during the period 1994 through 2001. Those individuals that have landing history only in the federal data base must have possessed a state commercial food fishing license for at least one year during the time from 1994 through 2001.
- 6.0 The Department may only issue a black sea bass landing permit for the commercial hook and line fishery to a person who has applied for and secured from the Department a commercial food fishing license and a fishing equipment permit for hook and line and submitted landings reports in either the federal or state landing report systems for black sea bass harvested by hook and line during at least one year between 1994 and 2001.

#### **1 DE Reg. 1767 (5/1/98)**

**2 DE Reg. 1900 (4/1/99)**

**3 DE Reg. 1088 (2/1/00)**

**4 DE Reg. 1665 (4/1/01)**

**4 DE Reg. 1859 (5/1/01)**

**5 DE Reg. 2142 (5/1/02)**

**6 DE Reg. 348 (9/1/02)**

**6 DE Reg. 1230 (3/1/03)**

- 7.0 Any overage of the State's commercial quota will be subtracted by the Atlantic States Marine Fisheries Commission from the next year's commercial quota.

Any overage of an individual's allocation will be subtracted from that individual's allocation the next year and distributed to those individuals in the appropriate fishery that did not exceed their quota.

- 8.0 Each participant in a black sea bass fishery shall be assigned a equal share of the total pounds of black sea bass allotted by the Department for that particular fishery. A share shall be determined by dividing the number of pre-registered participants in one of the two recognized fisheries into the total pounds of black sea bass allotted to the fishery by the Department. In order to pre-register an individual must indicate their intent in writing to participate in this fishery.

- 9.0 Individual shares of the pot fishery quota may be transferred to another participant in the pot fishery. Any transfer of black sea bass individual pot quota shall be limited by the following conditions:

9.1 A maximum of one transfer per year per person.

9.2 No transfer of shares of the black sea bass pot fishery quota shall be authorized unless such transfer is documented on a form provided by the Department and approved by the Secretary in advance of the actual transfer.

- 10.0 Individual shares of the commercial hook and line fishery quota may be transferred to another participant in the commercial hook and line fishery. Any transfer of black sea bass individual commercial hook and line quota shall be limited by the following conditions:

10.1 A maximum of one transfer per year per person.

10.2 No transfer of shares of the black sea bass commercial hook and line quota shall be authorized unless such transfer is documented on a form provided by the Department and approved by the Secretary in advance of the transfer.

- 11.0 Each commercial food fisherman participating in a black sea bass fishery shall report to the Department, via the interactive voice phone reporting system operated by the Department, each days landings in pounds at least one hour after packing out their harvest.

- 12.0 It shall be unlawful for any recreational fisherman to have in possession more than 25 black sea bass at or between the place where said black sea bass were caught and said recreational fisherman's personal abode or temporary or transient place of lodging.

**7 DE Reg. 1575 (5/1/04)**

**6 DE Reg. 1230 (3/1/03)**

**8 DE Reg. 1488 (4/1/05)**

**9 DE Reg. 1759 (5/1/06)**

**11 DE Reg. 1662 (06/01/08)**

### 3511 Summer Flounder Size Limits; Possession Limits; Seasons

(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 ~~nineteen and one half (19.5)~~ **[eighteen and one half (18.5)]** inches between the tip of the snout and the furthest tip of the tail. **[(Note: size limit to be determined in combination with creel limit.)]**

#### 7 DE Reg. 1575 (5/1/04)

- 3.0 It shall be unlawful for any person while on board a vessel, to have in possession any part of a summer flounder that measures less than ~~nineteen and one half (19.5)~~ **[eighteen and one half (18.5)]** 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 limit to be determined in combination with creel limit.)]**
- 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.

**~~[(Note: Proposed options for creel limits and minimum size limits to restrict the recreational summer flounder harvest in Delaware during 2009. These options embody varying levels of risk~~**

with regard to Delaware potentially exceeding its allowable harvest quota for 2009, with the smallest size limit being the most risky and the largest minimum size limit being the least risky.

<u>Option</u>	<u>Season-Closure</u>	<u>Number-of-Open-Days</u>	<u>Bag-Limit</u>	<u>Minimum-Size-inches</u>
<u>1</u>		<u>365</u>	<u>4</u>	<u>18.5</u>
<u>2</u>		<u>365</u>	<u>4</u>	<u>19.0</u>
<u>3</u>		<u>365</u>	<u>4</u>	<u>19.5</u>

- 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)