

# DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

## DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Section 103(b) (7 **Del.C.** §103(b))  
7 **DE Admin. Code** 3301

### FINAL

Secretary's Order No.: 2018-F-0024

**RE: Approving Final Regulations to Amend 7 DE Admin. Code 3301,  
Non-Tidal Finfish: *Definitions***

**Date of Issuance: April 13, 2018  
Effective Date of the Amendment: May 11, 2018**

#### **3300 Non-Tidal Finfish 3301 Definitions**

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 and 6010, and all other relevant statutory authority, 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 regulation amendments ("Amendments") to 7 **DE Admin. Code** 3301, Non-Tidal Finfish: *Definitions*. To expand recreational freshwater trout angling opportunities, this action proposes to amend Delaware's non-tidal finfish regulation by formally defining that portion of Red Clay Creek from the dam just below the boundary between the State of Delaware and the Commonwealth of Pennsylvania to the bridge at Yorklyn Road as a designated trout stream.

Trout stream stocking provides an important recreational fishing opportunity in a densely populated area of the State, which has few other freshwater fishing opportunities. Red Clay Creek was formerly included as a designated trout stream, but fish tissue contamination resulting from industrial discharges precluded stocking since 1986. Research trout stockings conducted in Red Clay Creek by the Department in 2011 and 2016 demonstrated that trout once again can be safely stocked and consumed as a result of improving water quality.

Waters designated as trout streams are closed to all fishing 14 days prior to the first Saturday in April to provide for stocking time and fair access, as well as to deter poaching. Such designation also requires an annual trout stamp to fish from the first Saturday in April through June 30, and the first Saturday in October through November 30. No environmental impact is expected as the result of the proposed amendment. The proposed amendment will increase angling opportunities for Delaware's trout anglers and it is anticipated that the return of trout fishing to Red Clay Creek will better distribute trout angling pressure.

The Department has the statutory basis and legal authority to act with regard to this proposed regulatory promulgation, pursuant to 7 **Del.C.** §103(b). The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice #2017-16 (November 27, 2017). The Department published its initial proposed regulation Amendments in the February 1, 2018 Delaware *Register of Regulations*. The aforementioned proposed Amendments were then presented and thoroughly vetted by the Department at the public hearing on February 22, 2018.

Only one member of the public attended the February 22, 2018 public hearing. No formal public comment was received by the Department with regard to this proposed promulgation. It should also 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.

Hearing Officer Vest prepared a Hearing Officer's Report dated March 27, 2018 ("Report"). The Report documents the proper completion of the required regulatory amendment process, establishes the record, and recommends the adoption of the proposed Amendments as attached to the Report as Appendix "A".

#### **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 regulatory amendments to 7 **DE Admin. Code** 3301, Non-Tidal Finfish: *Definitions* are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed regulatory

Amendments be promulgated as final. I further find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these regulatory Amendments.

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 amendments to 7 **DE Admin. Code** 3301, Non-Tidal Finfish: *Definitions*, pursuant to 7 **Del.C.** §103(b);
2. The Department has jurisdiction under its statutory authority, pursuant to 7 **Del.C.** Ch. 60 to issue an Order adopting these proposed regulatory Amendments as final;
3. The Department provided adequate public notice of the proposed regulatory Amendments, and all proceedings associated with the same, in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on the proposed regulatory Amendments, including at the time of the public hearing held on February 22, 2018, and held the record open through close of business on March 9, 2018, consistent with 29 **Del.C.** §10118(a), in order to consider public comment on the same before making any final decision;
4. Promulgation of the proposed regulatory amendments to 7 **DE Admin. Code** 3301, Non-Tidal Finfish: *Definitions*, will enable the Department to (1) formally define that portion of Red Clay Creek from the dam just below the boundary between the State of Delaware and the Commonwealth of Pennsylvania to the bridge at Yorklyn Road as a designated trout stream; (2) increase angling opportunities for Delaware's trout anglers; and (3) better distribute trout angling pressure in Delaware with the return of trout fishing to Red Clay Creek;
5. The Department has reviewed these proposed regulatory Amendments in the light of the Regulatory Flexibility Act, consistent with 29 **Del.C.** Ch. 104, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;
6. The Department's Hearing Officer's Report, including its established record and the recommended proposed regulatory amendments as set forth in Appendix "A", are hereby adopted to provide additional reasons and findings for this Order;
7. The Department's proposed regulatory Amendments, as published in the February 1, 2018 Delaware *Register of Regulations*, and as set forth in Appendix "A" as noted above, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they are 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*; and
8. The Department shall submit this Order approving as final the proposed Amendments to 7 **DE Admin. Code** 3301, Non-Tidal Finfish: *Definitions*, 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.

Shawn M. Garvin  
Secretary

### 3300 Non-Tidal Finfish

#### 3301 Definitions

- 1.0 For purposes of Regulations 3301 through 3311, the following words and terms shall have the following meaning, unless the context clearly indicates otherwise:
  - “**Administered by the Division**” means owned, leased or licensed by the Division.
  - “**Bait**” means any nontoxic food material, compound or mixture of ingredients which wildlife is able to consume.
  - “**Baited Field**” means 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**” means:
    - “**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;
    - “**Red Clay Creek**”, from the dam just below the boundary between the State of Delaware and the Commonwealth of Pennsylvania to the bridge at Yorklyn 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”** means the Director or Acting Director of the Division.

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

**“Established road”** 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”** 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”** 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”** means either actual or constructive possession of or any control over the object referred to.

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

**“Season”** 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”** 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 (08/01/99)**

**3 DE Reg. 1738 (06/01/00)**

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

**21 DE Reg. 886 (05/01/18) (Final)**