

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Section 903 (7 Del.C. §903)

7 DE Admin. Code 3505

FINAL

Secretary's Order No: 2024-F-0007

RE: Approving Final Amendments to 7 DE Admin. Code 3505 - *Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements*

Date of Issuance: March 05, 2024

Effective Date: April 11, 2024

3505 Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements.

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 7 DE Admin. Code 3505 - *Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements* ("Regulation"). The Department proposes revisions to the Regulation that will enable the Department to modify the anchor gill net season to better synchronize the season with the availability and market for striped bass, as recommended by the Advisory Council on Tidal Finfisheries ("Council").

The Department has the authority, under to 7 Del. C. §903, to implement management measures to enhance the conservation and management of coastal finfisheries. Striped bass have been coming into Delaware Bay and River earlier in the year as the waters warm up, and the market for striped bass has been increasing earlier in the season. The striped bass gill net season is open from February 15 through May 31. There are two main types of gillnetting techniques, drift gillnetting and anchor gillnetting. Currently, the drift gill net season is open for the duration of the striped bass gillnet season (February 15-May 31) and the anchor gill net season is only open from March 1 through May 10.

In accordance with 7 Del. C. §923, the Department limits the anchor gill net season. The anchor netting technique is more efficient than the drift netting technique however, it is also more destructive. While anchor gill netting accounts for 90% of striped bass gill net landings, the discard mortality rate associated with the anchor gill netting technique has a higher mortality rate of 41% compared to 8% for drift netting. Additionally, anchor gillnetting has also been linked to the mortality of other species including the Endangered Species Act-listed Atlantic Sturgeon and waterbirds, which have been discovered deceased in anchor gillnets.

On September 19, 2023, the Council unanimously approved a motion to recommend a modification to the anchor gill net season by adding two weeks in February and to eliminate two weeks between the end of April and beginning of May from the anchor gill netting season. This recommendation stems from the early arrival of striped bass into Delaware Bay and River as temperatures rise, and the increased market demand for striped bass earlier in the season. With the consideration of maintaining a 10-week duration and aligning the season with the availability and market demand for striped bass during the spring season, the Department proposed Amendments to modify the anchor gill netting season to begin on February 15th and conclude on April 26th.

To that, as set forth in 29 Del.C. §10119, the Department implemented Secretary Order # 2023-F-0031 ("EO") on December 1, 2023. The EO adopted amendments to the Regulations, effective February 15, 2024, and revised the 2024 anchor gill net season from the current dates of March 1 through May 10 to February 15 through April 26. The emergency regulations, as contained in the EO, were intended as interim measures, necessary to avoid the risk of harm to public health, safety, and welfare, pending the formal adoption of regulations pursuant to the *Administrative Procedures Act*.

Pursuant to 29 Del C. Ch. 101 and 7 Del. C. §903, the Department published its proposed regulation Amendments in

the January 1, 2024, Delaware Register of Regulations. Subsequent to publishing the proposed Amendments, the Council met on January 17, 2024, to further discuss the concerns raised by the late-season netters regarding the reduction of the anchor gill net season between the end of April and beginning of May. The Department proposed a compromise to adjust the dates of the season to include a couple of days into the month of May without extending its duration.

The Department *revised* proposed Amendments to commence the anchor gillnet season on February 19 after 4 pm, allowing anglers to deploy their anchor gill nets the night before the commencement of anchor gillnet season on February 20. This season would then extend through May 2. This slight adjustment maintains the 10-week duration for anchor gillnetting, while considering late-season netters, optimizing the spring anchor gill net season, and the market demand for striped bass.

The Department has the statutory basis and legal authority to act with regard to the formal promulgation of these *revised* proposed Amendments, pursuant to 7 Del. C. §903. As previously noted, the Department published its initial proposed regulation Amendments in the January 1, 2024, *Delaware Register of Regulations*. Thereafter, the public hearing regarding this matter was held on January 30, 2024. There were ten (10) members of the public in attendance. The Department presented the *revised* proposed Amendments at its public hearing that was held on January 30, 2024. The revisions, as set forth in the *revised* proposed Amendments, were properly vetted by the Department at the time of the virtual hearing and do not constitute a significant alteration to what was initially proposed. Therefore, no further public notification is required by the Department.

Pursuant to 29 Del.C. §10118(a), the hearing record ("Record") remained open for receipt of written comment for 15 days following the public hearing. The Record formally closed for comment in this matter at close of business on February 14, 2024, with ten (10) comments received by the Department for the formal promulgation.

It should be noted that all notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

Subsequent to the close of the Record, and at the request of presiding Hearing Officer Theresa Smith, the Department's Division of Fish and Wildlife staff prepared a Technical Response Memorandum ("TRM"). The TRM responds to the comments received by the Department in this matter and provides a thorough discussion in response to the suggestions and questions provided by the public.

Following receipt of the Department's TRM as noted above, the Hearing Officer prepared her Hearing Officer's Report dated February 15, 2024 ("Report"), which expressly incorporated both the Department's proposed Amendments and the TRM into the Record generated in this matter. 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 in the Division of Fish and Wildlife, and established by the Hearing Officer's Report, I find that the *revised* proposed regulatory Amendments to 7 DE Admin. 3505 - *Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements*, are well supported. I further find that the Department's experts fully developed the record to support adoption of these *revised* Amendments. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the *revised* proposed Amendments be promulgated as final.

The following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to this proposed regulatory promulgation, pursuant to 7 Del. C. §903;
2. The Department has jurisdiction under its statutory authority, pursuant to 7 Del.C. Chapter 60, to issue an Order adopting these *revised proposed* Amendments as final;
3. The Department provided adequate public notice of the initial proposed Amendments and subsequently the *revised proposed* Amendments, all proceedings in a manner required by the law and regulations, and provided the public with an adequate opportunity to comment on the same, including at the time of the public hearing held on January 30, 2024, and during the 15 days subsequent to the hearing (through February 14, 2024), before making any final decision;

4. Promulgation of the *revised* proposed Amendments to 7 DE Admin. 3505 - *Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements* will enable the Department to modify the anchor gill net season to better synchronize the season with the availability and market for Striped Bass;
5. The Department has reviewed the *revised* proposed Amendments in light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104, and has selected Exemption "B1," as this regulation is not substantially likely to impose additional cost or burdens upon individuals and/or small businesses;
6. The Department has reviewed this *revised* proposed regulatory promulgation in the light of 7 *Del.C.* §10003 and 29 *Del.C.* §10118(b)(3), and has determined that conducting such an assessment regarding the impact of this regulation on the achievement of the State of Delaware's greenhouse gas emissions reduction targets is not practical;
7. The Department's proposed regulatory Amendments, as initially published in the January 1, 2024, *Delaware Register of Regulations*, and subsequently revised, as set forth in Appendix "A" hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they 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*;
8. The Department shall submit the *revised* proposed Amendments as final regulatory amendments to the *Delaware Register of Regulations* for publication on April 1, 2024, and provide such other notice as the law and regulation require, and the Department determines is appropriate; and
9. The Department's emergency regulations implemented by Emergency Order # 2023-F-0031 will expire on April 11, 2024, when the final regulations become effective.

Lisa Borin Ogden
for Shawn M. Garvin
Secretary

3505 Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements.

3505 Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements.

(Penalty Section 7 **Del.C.** §936(b)(2))

- 1.0 It is unlawful for any commercial food fisherman using a gill net to take and reduce to possession any striped bass at any time except when said commercial food fisherman is authorized by the Department to participate in a commercial gill net fishery for striped bass established herein. A commercial food fisherman may use a gill net to take and reduce to possession striped bass during the period beginning at 12:01 A.M. on February 15 and ending at 4:00 P.M. on May 31 next ensuing. It is unlawful to use any gill net having a stretched-mesh size greater than four (4) inches to take striped bass during the period ~~February 15 until and including the last day in February~~ **beginning at 12:01 A.M. on [April 27 February 15 and ending at 4:00 PM on February 19 and beginning at 12:01 A.M. on May 2] and ending at 4:00 P.M. on May 31** unless the net is drifted. A commercial food fisherman may use a gill net to take and reduce to possession striped bass during the period beginning at 12:01 A.M. on November 15 and ending at 4:00 P.M. on December 31 next ensuing provided at least two (2) percent of the commercial allocation of striped bass for the gill net fishery, as determined by the Department, was not landed in the February - May gill net fishery. In order for a commercial food fisherman to be authorized by the Department to participate in a commercial gill net fishery, said commercial food fisherman shall have a valid food fishing equipment permit for a gill net and shall register in writing with the Department to participate in said fishery by February 1 for the February 15 - May 31 gill net fishery and by November 1 for the December gill net fishery.
- 2.0 It is unlawful for any commercial food fisherman using a hook and line to take and reduce to possession any striped bass at any time except when said commercial food fisherman is authorized by the Department to participate in a commercial hook and line fishery for striped bass established herein. Except as otherwise provided, a commercial food fisherman may use a hook and line to take and reduce to possession striped bass during the period beginning at 12:01 A.M. on April 1 and ending at 4:00 P.M. on December 31 next ensuing. In order for a commercial food fisherman to be authorized to participate in the commercial hook and line fishery, said commercial food fisherman shall register in writing with the Department to participate in said fishery by February 1.
- 3.0 The striped bass gill net fishery in February - May, the striped bass gill net fishery in November - December and the striped bass hook and line fishery in April - December shall be considered separate striped bass

fisheries. Each participant in a striped bass fishery shall be assigned an equal share of the total pounds of striped bass allotted by the Department to that fishery. A share shall be determined by dividing the number of pre-registered participants in that fishery into the total pounds of striped bass allotted to that fishery by the Department. The total pounds of the State's ASMFC commercial striped bass quota will be allotted to each fishery by the Department as follows: 95% for the February 15 - May 31 gill net fishery, 5% for the April - December hook and line fishery and, provided that in excess of two (2)% of the February 15 - May 31 gill net fishery allocation was not landed, said remainder for the November - December gill net fishery. Any overage of the State's commercial quota will be subtracted from the next year's commercial quota proportionally to the appropriate fishery.

- 4.0 It is unlawful for any commercial food fisherman to land, during a striped bass fishing season, more than the total pounds assigned by the Department to said individual commercial food fisherman.
- 5.0 It is unlawful for any commercial food fisherman to possess any landed striped bass that does not have locked into place through the mouth and gill (operculum) opening a striped bass harvest tag issued to said commercial fisherman by the Department.
- 6.0 The Department may issue tags to commercial food fishermen who register in writing with the Department to participate in a striped bass fishery. Each participant shall initially be issued a quantity of striped bass harvest tags that is to be determined by the Department by dividing said participant's assigned share in pounds by the estimated weight of a striped bass expected to be landed. If a commercial food fisherman needs additional tags to fulfill his or her assigned share, the Department shall issue additional tags after verifying the balance of the share from reports submitted by an official weigh station to the Department.
- 7.0 It is lawful for a commercial food fisherman who is authorized to be issued striped bass harvest tags by the Department to transfer said tags to another commercial food fisherman, provided said transfer is made prior to said tags being issued by the Department.
- 8.0 It is unlawful for any commercial food fisherman to apply a tag to a striped bass unless said tag had been issued or legally transferred to said commercial food fisherman by the Department.
- 9.0 It is unlawful to apply any striped bass tag issued by the Department to a striped bass if said tag had previously been applied to another striped bass.
- 10.0 It is unlawful for any commercial food fisherman to sell, barter or trade any striped bass, to attempt to sell, barter or trade any striped bass or to transport, to have transported or to attempt to have transported any striped bass out of the State unless said striped bass has been weighed and tagged at an official weigh station.
- 11.0 The Department may appoint individuals and their agents as official weigh stations to weigh and tag all striped bass landed in a commercial striped bass fishery. Official weigh stations, if requested, shall be compensated by the Department for each striped bass weighed and tagged. An official weigh station shall enter into an agreement with the Department to maintain records and report on a regular basis each commercial food fisherman's daily landings of striped bass weighed and tagged at said station. The Department shall provide official weigh stations with tags to be applied to each striped bass weighed.
- 12.0 Each commercial food fisherman participating in a striped bass fishery shall file a complete and accurate report with the Department on forms provided by the Department on all striped bass landed during said fishery. Each report shall be filed with the Department within 30 days after the end date of each fishery. All unused tags issued or legally transferred to a commercial food fisherman shall be returned to the Department with said report. Failure to file a complete and accurate report or failure to return all unused tags may disqualify the commercial food fishermen from future striped bass fisheries.

1 DE Reg 270 (09/01/97)

4 DE Reg 1552 (03/01/01)

8 DE Reg 1169 (02/01/05)

18 DE Reg. 889 (05/01/15)

20 DE Reg. 467 (12/01/16)

22 DE Reg. 674 (02/01/19)

27 DE Reg. 767 (04/01/24) (Final)