

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Section 1104 (7 Del.C. §1104)

7 DE Admin. Code 3301 and 3304

FINAL

Secretary's Order No: 2022-F-0028

RE: Approving Final Amendments to 7 DE Admin. Code 3300 - *Non-Tidal Finfish*, sections 3301- *Definitions* and 3304 - *Creel Limits, Size Limits and Seasons, 3.0 Trout*

Date of Issuance: December 29, 2022

Effective Date: February 11, 2023

3300 Non-Tidal Finfish

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 3300 - *Non-Tidal Finfish*, more specifically sections 3301- *Definitions* and 3304 - *Creel Limits, Size Limits and Seasons, 3.0 Trout* ("Regulation"). The Department proposes revisions to the Regulation that will enable the Department to augment the waters open for trout fishing by adding an additional 0.4 miles of trout stream to the stocked portion of Red Clay Creek and designate this area as fly-fishing only. In addition, the Department proposes revisions to the Regulation to designate "Youth Day" as the first Saturday of April in trout streams and the first Saturday of March in trout ponds.

In 2018, a section of Red Clay Creek was designated as a trout stream, allowing stocking for trout to be fished in these waters. The trout stream section of Red Clay Creek measures 1.0 miles from the dam just below the boundary between the State of Delaware and the Commonwealth of Pennsylvania, to the bridge at Yorklyn Road in Hockessin, Delaware. As a result of the improved water quality in Red Clay Creek, the Department worked with Auburn Valley State Park to expand the trout stream section in these waters by 0.4 miles. The Amendment extends the trout stream of Red Clay Creek by 0.4 miles past the bridge at Yorklyn Road and downstream to the Auburn Valley State Park boundary adjacent to Creek Road. The Department proposes the 0.4-mile expansion be reserved for fly-fishing only to alleviate the high population of fly-fishing in White Clay Creek.

Fly-fishing is an angling method that uses a light-weight lure to catch fish. The fly is cast using a fly rod, reel, and specialized weighted line that requires casting techniques significantly different from other forms of casting. Throughout the State the only trout stream area reserved for fly-fishing only is one section of White Clay Creek. With the growing popularity of fly-fishing, the Department has designated the 0.4-mile expansion of trout stream in Red Clay Creek as a second trout stream area reserved for fly-fishing only.

Freshwater trout angling is a seasonally popular activity and fly-fishing has grown in popularity amongst anglers. Fly-fishing and trout angling saw an increase during the Covid-19 pandemic. In 2020, under the authority granted by the Governor's Covid-19 Emergency Order, the Department designated the first day of the 2020 trout season as "Youth Day". This day was reserved for those under the age of 16 to fish for trout. The event grew in popularity amongst all anglers, including experienced angler's being able to assist those under the age of 16. The Emergency Order was terminated in 2021, and the Department is required to amend the Regulation to continue the designation of "Youth Day" for anglers under the age of 16.

The Department proposes Amendments to continue the designation of "Youth Day" as the beginning of the trout season. The Amendment will designate the first Saturday of March in trout ponds and the first Saturday of April in trout streams as "Youth Day". Subsequently, trout season for all anglers will then begin on the first Sunday of March in trout ponds and the first Sunday of April in trout streams.

The Department intends to encourage youth to become anglers by providing a designated day for youth to fish for trout a day before all anglers can begin trout fisheries in the streams and ponds. In addition, the 0.4-mile expansion of trout stream in Red Clay Creek for fly-fishing only is expected to ease the overpopulated stream in White Clay Creek.

The Department has the statutory basis and legal authority to act with regard to the formal promulgation of these proposed Amendments, pursuant to 7 Del. C. §103 (a & b). The Department published its initial proposed regulation Amendments in the November 1, 2022, *Delaware Register of Regulations*. Thereafter, the public hearing regarding this matter was held on November 22, 2022. There were four members of the public in attendance, with three (3) public

comments given at the time of the hearing. Pursuant to 29 *Del.C.* §10118(a), the hearing record ("Record") remained open for receipt of additional written comment for 15 days following the public hearing. The Record formally closed for comment in this matter at close of business on December 7, 2022, with six (6) written 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 Newman, 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 the receipt of the Department's TRM as noted above, the Hearing Officer prepared her Hearing Officer's Report dated December 21, 2022 ("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 proposed regulatory Amendments to 7 DE Admin. 3300 - *Non-Tidal Finfish*, sections 3301- *Definitions* and 3304 - *Creel Limits, Size Limits and Seasons, 3.0 Trout*, are well supported. I further find that the Department's experts fully developed the record to support adoption of these Amendments. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the 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.* §§901, 903(a, b, & e) and 7 *Del. C.* §103 (a & b);
2. The Department has jurisdiction under its statutory authority, pursuant to 7 *Del.C.* Chapter 60, to issue an Order adopting these proposed Amendments as final;
3. The Department provided adequate public notice of the initial proposed Amendments and 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 November 22, 2022, and during the 15 days subsequent to the hearing (through December 7, 2022), before making any final decision;
4. Promulgation of the proposed Amendments to 7 DE Admin. 3300 - *Non-Tidal Finfish*, sections 3301- *Definitions* and 3304 - *Creel Limits, Size Limits and Seasons, 3.0 Trout*, will enable the Department to augment the waters open for trout fishing by adding an additional 0.4 miles of trout stream to the stocked portion of Red Clay Creek, designate the added 0.4 miles as a fly-fishing only area, and designate "Youth Day" as the first Saturday of March in trout ponds and the first Saturday of April in trout streams.
5. The Department has reviewed the proposed Amendments in light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104, and believes the same to be lawful, feasible and desirable, and the recommendations as proposed should be applicable to all Delaware citizens equally;
6. The Department's proposed regulatory Amendments, as initially published in the November 1, 2022, *Delaware Register of Regulations*, 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*; and
7. The Department shall submit the proposed Amendments as final regulatory amendments 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.

Lisa Borin Ogden
For: 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 the bridge at Route 2 (Kirkwood Highway);

"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 approximately 1.4 miles downstream to the Auburn Valley State Park boundary adjacent to Creek Road (39°48'31.00"N and 75°40'13.00"W Delaware Coordinate System of 1983);

"White Clay Creek", from the boundary line between this State and the Commonwealth of Pennsylvania to the downstream side of Paper Mill Road; and

"Wilson Run", from Route 92 through Brandywine Creek State Park.

"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 and Red Clay Creek from the downstream side of Yorklyn Road (39°48'29.00"N and 75°40'33.00"W Delaware Coordinate System of 1983) approximately 0.4 miles downstream to the Auburn Valley State Park boundary adjacent to Creek Road (39°48'31.00"N and 75°40'13.00"W Delaware Coordinate System of 1983).

"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.

"Youth" means any individual under the age of 16 engaged in fishing.

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)

22 DE Reg. 776 (03/01/19)

23 DE Reg. 882 (04/01/20)

3304 Creel Limits, Size Limits and Seasons

(Penalty Section 7 Del.C. §1304)

- 1.0 Closed Seasons. Unless otherwise provided by law or regulation of the Department, there is no closed season, size limits or possession limits on any species of fish taken by hook and line in any non-tidal waters of this State.
- 2.0 Bass.
 - 2.1 Statewide limits.
 - 2.1.1 It is unlawful for any person to have in possession more than six (6) largemouth bass or to have in possession more than six (6) smallmouth at or between the place where said largemouth and/or smallmouth bass were caught and said person's personal abode or temporary or transient place of lodging.
 - 2.1.2 Unless otherwise authorized in this regulation, it is unlawful for any person to possess any largemouth bass that measure less than twelve (12) inches in total length. Any largemouth bass taken which is less than the twelve (12) inches in total length must be immediately returned to the water with the least possible injury.
 - 2.1.3 It is unlawful for any person to possess any smallmouth bass measuring from twelve (12) inches to and including (17) inches in total length. Any smallmouth bass taken which is equal to or greater than twelve (12) inches and less than or equal to seventeen (17) inches must be immediately returned to the water with the least possible injury.
 - 2.1.4 Notwithstanding 2.1.1 of this section, it is unlawful for any person to have in possession more than one (1) smallmouth bass measuring more than seventeen (17) inches in total length at or between the place where said smallmouth bass was caught and said person's personal abode or temporary or transient place of lodging.
 - 2.1.5 It is lawful for any person to have in possession while fishing up to six (6) smallmouth bass that are less than twelve (12) inches in total length.
 - 2.2 Becks Pond.
 - 2.2.1 Notwithstanding 2.1.1 of this section, it is unlawful for any person to have in possession while fishing on Becks Pond more than two (2) largemouth bass.
 - 2.2.2 Notwithstanding 2.1.2 of this section, it is unlawful for any person to have in possession while fishing on Becks Pond any largemouth bass less than fifteen (15) inches in total length. Any largemouth bass less than fifteen (15) inches in total length must be immediately returned to Becks Pond with the least possible injury.
- 3.0 Trout.
 - 3.1 Pond and Stream Seasons.
 - 3.1.1 It is unlawful for any person to fish for rainbow trout, brown trout, brook trout, or any hybrids of these species in designated trout streams, except between and including the first ~~Saturday~~ Sunday of April and the second Saturday of March of each succeeding year.
 - 3.1.2 ~~3.1.1~~ Notwithstanding subsection 3.1.1, it is lawful for any youth to fish for rainbow trout, brown trout, brook trout, or any hybrids of these species in designated trout streams on the first Saturday of April.
 - ~~3.1.2~~ 3.1.3 It is unlawful for any person to fish for rainbow trout, brown trout, brook trout, or any hybrids of these species in designated trout ponds, except between and including the first ~~Saturday~~ Sunday of March and the second Saturday of February of each succeeding year.
 - 3.1.4 ~~3.1.3~~ Notwithstanding subsection 3.1.3, it is lawful for any youth to fish for rainbow trout, brown trout, brook trout, or any hybrids of these species in designated trout ponds on the first Saturday of March.
 - 3.2 Hours of Fishing.
 - 3.2.1 It is unlawful for any person to fish for rainbow trout, brown trout, brook trout, or any hybrids of these species in designated trout streams on the opening day of the trout season before 7:00 a.m. and thereafter for the remainder of the trout season between one-half hour after sunset and one-half hour before sunrise.

- 3.2.2 It is unlawful for any person to fish for rainbow trout, brown trout, brook trout, or any hybrids of these species in designated trout ponds on the opening day of the trout season before 7 a.m. and thereafter for the remainder of the trout season between one-half hour after sunset and one-half hour before sunrise.
- 3.3 Possession. It is unlawful for any person to possess in any one day during the prescribed open season more than six (6) rainbow trout, brown trout brook trout or any hybrids of these species in any combination. On any day after a person takes his or her legal limit of trout, said person is prohibited from fishing in a designated trout stream or a designated trout pond on the same day, unless otherwise authorized by law or this regulation.
- 3.4 Trout Stamp.
- 3.4.1 It is unlawful for any person to fish in a designated trout stream from the first Saturday in April through June 30 and from the first Saturday in October through November 30, unless said person has in his or her possession a valid trout stamp, or unless said person is exempted by law from having a trout stamp.
- 3.4.2 It is unlawful for any person to fish in a designated trout pond from the first Saturday in March through April 1, unless said person has in his or her possession a valid trout stamp, or unless said person is exempted by law from having a trout stamp.
- 3.5 Restricted Trout Stream.
- 3.5.1 It is unlawful for any person to fish in a restricted trout stream with more than two (2) flies on a line at any one time.
- 3.5.2 It is unlawful for any person to use any metallic, wooden, plastic or rubber spinners, spoons, lures, plugs, or any natural or synthetic bait on any restricted trout stream.
- 3.5.3 It is unlawful for any person to have in his or her possession more than four (4) trout within 50 feet of any restricted trout stream. On the restricted trout stream only, trout may be caught and released as long as the four (4) trout possession limit is not exceeded. All trout released must be returned to the water as quickly as possible with the least possible injury.
- 3.6 Closure of Designated Trout Streams and Ponds.
- 3.6.1 It is unlawful for any person to fish in a designated trout stream two weeks (14 days) prior to the scheduled opening of the stream trout season.
- 3.6.2 It is unlawful for any person to fish in a designated trout pond two weeks (14 days) prior to the scheduled opening of the pond trout season.
- 4.0 Striped Bass and Hybrid Striped Bass
- 4.1 It is unlawful for any person to have in his or her possession while fishing in the non-tidal waters of this State more than two (2) striped bass (*Morone saxatilis*) or striped bass hybrids (*Morone saxatilis* x *M. chrysops*).
- 4.2 It is unlawful for any person to possess any striped bass or any striped bass hybrid under the length of fifteen (15) inches measured from the tip of the snout to the tip of the tail while fishing in the non-tidal waters of this State.
- 5.0 Panfish Limits. It is unlawful for any person to have in possession while fishing in any State-owned non-tidal water more than fifty (50) panfish in aggregate to include bluegill, pumpkinseed, redear sunfish, black crappie, white crappie, white perch or yellow perch, provided no more than twenty-five (25) of the fifty (50) allowed in possession are of any one species.

3 DE Reg. 289 (08/01/99)

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

13 DE Reg. 1350 (04/01/10)

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

22 DE Reg. 776 (03/01/19)

26 DE Reg. 706 (02/01/23) (Final)