

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 3758

FINAL

Secretary's Order No.: 2008-F-0020

3507 Black Sea Bass Size Limit; Trip Limits, Seasons; Quotas 3758 Possession of V-notched Lobsters Prohibited

Date of Issuance: May 15, 2008

Effective Date: June 11, 2008

I. Background

A public hearing was held on Thursday, April 24, 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 3507 concerning black sea bass size limits, trip limits, seasons and quotas. Also at issue in this hearing was a minor proposed amendment to Delaware Shellfish Regulation 3758, which concerns the possession of "V-notched" lobsters being prohibited. The Department's statutory basis to act on these matters can be found in 7 Del.C. §903, (3)(2)(a), and 7 Del.C. §1902, §2502. No other regulations are affected by these proposals.

The commercial black sea bass fishery in Delaware is managed by an individual quota system (ITQ) that is distributed to those fishermen meeting specific qualifying criteria for participation in either the fish pot or commercial hook and line fisheries. The current regulations do not allow the transfer of quota between individuals. However, declining quotas due to slower than anticipated stock recovery rates, as well as a lack of participation by some individuals that are assigned quotas, has created a situation where it would be advantageous to the fishermen to transfer quota in order to fully utilize Delaware's annual commercial black sea bass quota. The Department has proposed that eligible participants in the commercial sea bass fishery be allowed to make a one-time per season transfer of their quota, either in part or in whole, to another eligible participant in either the commercial sea bass pot fishery or the commercial sea bass hook and line fishery, respectively, on forms to be supplied by the Department.

The purpose of the proposed lobster regulatory change found in Delaware Shellfish Regulation 3758 is to bring Delaware into compliance with Addendum XI to Amendment 3 of the Atlantic States Marine Fisheries Commission lobster management plan for federal waters off Delaware, specifically, in what is known as Lobster Conservation Management Area 5. Delaware is required to re-define marking requirements for female lobsters. The mark used, called a "V-notch", is presently defined in Delaware regulations as a straight-sided triangular cut without setal hairs at least 1/4 inch in depth in the right of center tail flipper. This marking technique for released female lobsters is designed so that if the lobster so marked is recaptured, it can be recognized as a mature female and released. Although these marks are required to be applied to lobsters by states north of Delaware, it is possible for marked lobsters to show up in waters off of Delaware or to be taken from ocean waters north of Delaware and returned to a Delaware port, so Delaware must be in compliance with the federal marking and retention requirements. To remain in compliance Delaware is required to re-define the V-notch to be 1/8 inch or deeper, with or without setal hairs in the notch. With the new definition in force, no one will be allowed to land in Delaware any lobster bearing a V-notch of 1/8 inch or deeper with or without setal hairs, which begin to grow into the notch.

Only two members of the public attended this hearing on April 24, 2008 to listen to the Department's discussion regarding these proposed changes to the above referenced regulations, and no formal objections were raised regarding the same. 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 sound reasoning with regard to the proposed amendments to the aforementioned regulations, as reflected in the Hearing Officer's Report of May 14, 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 the proposed amendment to the existing Delaware Tidal Finfish Regulation 3507 concerning black sea bass size limits, trip limits, seasons and quotas, will allow eligible participants in the commercial sea bass fishery to make a one-time per season transfer of their quota, either in part or in whole, to another eligible participant in either the commercial sea bass pot fishery or the commercial sea bass hook and line fishery, respectively, on forms to be supplied by the Department;
7. Promulgation of the proposed amendment to Delaware Shellfish Regulation 3758 would bring Delaware into compliance with Addendum XI to Amendment 3 of the Atlantic States Marine Fisheries Commission lobster management plan for federal waters off Delaware, specifically, in what is known as Lobster Conservation Management Area 5, by re-defining V-notch marking requirements for female lobsters;
8. 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;
9. The Department's proposed regulation, as published in the April 1, 2008 *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
10. The Department's proposed amendments to both Delaware Tidal Finfish Regulation 3507 and Delaware Shellfish Regulation 3758 are adequately supported, not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final regulations, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and that
11. 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 May 14, 2008 and expressly incorporated herein, it is hereby ordered that the proposed amendments to both Delaware Tidal Finfish Regulation 3507 and Delaware Shellfish Regulation 3758 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. 3507 will allow eligible participants in the commercial sea bass fishery to make a one-time per season transfer of their quota, either in part or in whole, to another eligible participant in either the commercial sea bass pot fishery or the commercial sea bass hook and line fishery, respectively, on forms to be supplied by the Department. The ability to transfer said quotas will be advantageous to eligible fishermen, given the declining quotas due to slower than anticipated stock recovery rates, as well as a lack of participation by some individuals that are assigned quotas here in Delaware, so that Delaware's annual commercial black sea bass quota can be fully utilized.

Additionally, the promulgation of State of Delaware Shellfish Regulation 3758 would bring Delaware into

compliance with Addendum XI to Amendment 3 of the Atlantic States Marine Fisheries Commission lobster management plan for federal waters off Delaware, specifically, in what is known as Lobster Conservation Management Area 5, by re-defining V-notch marking requirements for female lobsters.

In developing these regulatory amendments, 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

3507 Black Sea Bass Size Limit; Trip Limits, Seasons; Quotas (Formerly Tidal Finfish Reg. 23)

(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) 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 It shall be unlawful for a commercial food fisherman to transfer quota allocation shares of black sea bass to another commercial food fishermen. 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)~~

3758 Possession of V-notched Lobsters Prohibited (Formerly S-26)

(Penalty Section 7 Del.C. §1912)

1.0 It shall be unlawful for any person to possess a V-notched female lobster. V-notched female lobster means any female lobster bearing a V-notch, a straight-sided triangular cut with or without setal hairs at least $\frac{1}{8}$ inch in depth and tapering to a sharp point, in the flipper next to the right of center flipper as viewed from the rear of the female lobster. V-notched female lobster also means any female lobster which is mutilated in a manner which could hide, obscure or obliterate such a mark. The right flipper will be examined when the underside of the lobster is down and its tail is toward the person making the determination.

2 DE Reg 1898 (4/1/99)

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