

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Sections 901(b), (c) and (d); 903(a), (b), (e)(2)a.4 and (e)(2)b.3, 4 and 6 (7 **Del.C.** §§901(b), (c) & (d); 903(a), (b), (e)(2)a.4 & (e)(2)b.3, 4 & 6)
7 **DE Admin. Code** 3502

FINAL

Secretary's Order No: 2020-F-0013

RE: Approving Final Amendments to 7 DE Admin. Code 3502: Striped Bass Spawning Season and Area Restrictions

Date of Issuance: April 27, 2020

Effective Date: June 11, 2020

Bass (Striped Bass; Black Sea Bass) 3502 Striped Bass Spawning Season and Area Restrictions

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** 3502: *Striped Bass Spawning Season and Area Restrictions* ("Amendments"). The Department proposes revisions to expand the current allowable area where fixed gill nets can be used by opening approximately 1.75 nautical miles (linear) of the Delaware River during the months of January through May. More specifically, this Amendment will adjust the lower boundary of the exclusion area northward (upstream) to the southern shore of Appoquinimink River mouth at latitude 39°26'51.00"N and longitude 75°34'46.00"W.

This action is being taken by the Department to expand the current allowable area where fixed gill nets can be used to facilitate Striped Bass capture more efficiently and to maintain minimal interactions between gill net recreational anglers and commercial anglers. The seasonal fixed gill net exclusion area is currently extended from Liston Point (Delaware River) northward. This exclusion area was originally defined to prohibit fixed gill netting of Striped Bass in an effort to reduce potential recreational and commercial angler interactions (not by reason of the biological concern for Striped Bass.)

In 2018, the Delaware quota allocation for Striped Bass led to a quota overage in the commercial fisheries. Pursuant to 7 **DE Admin. Code** 3505, the 2019 Striped Bass quota was then reduced, due to the previous year's overage that occurred. Contrary to the 2018 quota overage, several of the commercial gill net anglers, specifically those who fish the Delaware River, did not catch their quota in 2018. These commercial anglers felt that the reduced Striped Bass quota set forth for 2019 was unfair, given that the Delaware River allowable area (permitted for fixed gill netting of Striped Bass), did not allow these anglers to meet their quota.

On July 24, 2018, the commercial anglers proposed adjustments to the current seasonal fixed gill net exclusion area in the Delaware River at the monthly Tidal Finfish Advisory Council ("Advisory Council") meeting. The commercial anglers proposed adjustments to expand the allowable area with efforts to efficiently catch Striped Bass using fixed gill netting. Over a series of 3 meetings, the Advisory Council (comprised of an equal number of commercial and recreational anglers), considered adjustments to the aforementioned excluded area to allow fixed gill netting of Striped Bass. A member of the Advisory Council worked with the Enforcement Section of the Division of Fish and Wildlife to ensure boating safety protocols of the proposed allowable area were met to reduce potential interactions with recreational anglers and commercial boats.

As previously stated, the current seasonal fixed gill net exclusion area extends from Liston Point (Delaware River) northward. The Division of Fish and Wildlife's Enforcement Section and the Advisory Council found that opening 1.75 nautical miles (linear) of the Delaware River to fixed gill net fishing during the months of January through May will reduce angler interactions in this area. During the months in late winter and early spring, this area is known to not be highly trafficked by recreational boaters, thus, the Department expects there to be a low risk of potential interactions between recreational anglers and commercial boats. This area also allows commercial anglers the opportunity to catch Striped Bass more efficiently using fixed gill nets. Moreover, the expansion of the commercial quota allocation area may reduce drift net and recreational angling interactions further north of the river. This proposed area was then endorsed by the Advisory Council on September 25, 2019, with a unanimous motion to promulgate the Amendments, herein.

Pursuant to the *Atlantic Coastal Fisheries Cooperative Management Act* of 1993, this proposed action is consistent

with the Atlantic States Marine Fisheries Commission's Interstate Fishery Management Plan for the Striped Bass, its amendments and addenda. Under the FMP, Delaware has the authority to establish its own commercial fishermen annual commercial quota. The Department expects the Striped Bass landings will be unaffected by this Amendment, as the commercial Striped Bass fishery is managed through, and limited by, an annual commercial quota with mandatory harvester and weigh station tagging and reporting. The quota-based management allows the commercial anglers to only take a set amount of Striped Bass per year, and when the quota is met, the fishery is closed.

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.* §§901 (b), (c) & (d), 903 (a) & (b), 903 (e)(2)a.4, 903 (e)(2)b.3, 4 & 6. The Department published its initial proposed regulation Amendments in the February 1, 2020 *Delaware Register of Regulations*. Thereafter, the public hearing regarding this matter was held on February 26, 2020. There were 9 members of the public in attendance at the public hearing, with 7 verbal comments given at the public 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 March 12, 2020, with one additional comment 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 with regard to concerns of the impact on the Striped Bass population, the interactions between recreational anglers and gill nets, and discarded dead Striped Bass, due to anchor netting.

The Department's experts in the Division of Fish and Wildlife have concluded that the Delaware River accounts for less than 5% of Delaware's annual Striped Bass landings and it is unlikely that there will be a large shift of anchor nets to the allowable area in the Delaware River. The Department expects that the interactions of anglers with anchored gill nets may differ, compared to those with drift nets. As current gill net effort in the Delaware River is limited to drift nets by regulation, this Amendment is expected to lead drift netters to anchor netting (which is a more efficient style of catching fish). The Division of Fish and Wildlife have also found that few Striped Bass are currently discarded, thus the allowable fixed gill netting expended in the Delaware River is expected to not cause a substantial increase in the number of dead discarded Striped Bass and shall have no effect on the population.

Following the receipt of the Department's TRM as noted above, the Hearing Officer prepared her Hearing Officer's Report dated March 25, 2020 ("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 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 (b), (c) & (d), 903 (a) & (b), 903 (e)(2)a.4, 903 (e)(2)b.3, 4 & 6;
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 February 26, 2020, and during the 15 days subsequent to the hearing (through March 12, 2020), before making any final decision;
4. Promulgation of the proposed Amendments to 7 **DE Admin. Code** 3502: *Striped Bass Spawning Season and Area Restrictions*, will enable the Department to expand the current allowable area where fixed gill nets can be used by opening approximately 1.75 nautical miles (linear) of the Delaware River to fixed gill net fishing during the months of January through May. More specifically, this Amendment will adjust the lower boundary of the exclusion area northward (upstream) to the southern shore of Appoquinimink River mouth at latitude 39°26'51.00"N and longitude 75°34'46.00"W;
5. The Department has reviewed the 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's proposed regulatory Amendments, as initially published in the February 1, 2020 *Delaware*

Register of Regulations, and 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.

Shawn M. Garvin
Secretary

**3500 Tidal Finfish
Bass (Striped Bass; Black Sea Bass)**

3502 Striped Bass Spawning Season and Area Restrictions.

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

- 1.0 The spawning season for striped bass (*Morone saxatilis*) in Delaware shall begin at 12:01 A.M. on April 1 and continue through midnight on May 31 of each calendar year.
- 2.0 It is unlawful for any person to take and retain any striped bass during the striped bass spawning season from the Nanticoke River or its tributaries, the Delaware River and its tributaries to the north of a line extending due east beginning at and including the south jetty at the mouth of the C & D Canal, or the C & D Canal or its tributaries.
- 3.0 It is unlawful for any person to fish a fixed gill net in the Nanticoke River or its tributaries or the C & D Canal or its tributaries during the striped bass spawning season.
- 4.0 It is unlawful for any person to fish during the striped bass spawning season in the Nanticoke River or its tributaries or the C & D Canal or its tributaries with a drift gill net of multi- or mono-filament twine larger than 0.28 millimeters in diameter (size #69) or a stretched mesh size larger than five and one-half (5 1/2) inches.
- 5.0 It is unlawful for any person to fish any fixed gill net in the Delaware River north of a line beginning at ~~Liston Point (River Mile 48.06)~~ the southern shore of Appoquinimink River at latitude 39°26'51.00"N and longitude 75°34'46.00"W and continuing due east to the boundary with New Jersey during January, February, March, April or May.
- 6.0 It is unlawful for any person to fish during the striped bass spawning season defined in 3502 ~~section~~ Section 1.0 and in the areas defined in 3502 ~~section~~ Section 2.0 with natural bait using any hook other than a non-offset circle hook when said hook measures greater than three-eighths (~~3/8s~~) (3/8) inches as measured from the point of the hook to the shank of the hook.

8 DE Reg. 1169 (02/01/05)

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

23 DE Reg. 1040 (06/01/20) (Final)