

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Section 903(e)(2)a.(3) (7 **Del.C.** §1903(e)(2)a.(3))
7 DE Admin. Code 3512

FINAL

Secretary's Order No.: **2009-F-0039**

Approving Final Delaware Regulation Amendments for 2009: 7 DE Admin. Code 3512: Winter Flounder

Date of Issuance: October 15, 2009

Effective Date of the Amendment: November 11, 2009

I. Background:

A public hearing was held on Wednesday, September 30, 2009, at 6:00 p.m. at the Department of Natural Resources and Environmental Control ("DNREC", "Department"), 89 Kings Highway, Dover, Delaware to receive comment on proposed amendments to the Delaware Tidal Finfish Regulations for both Winter Flounder and Knobbed Whelks (Conch). The purpose of the aforementioned proposed amendments to Delaware Tidal Finfish Regulation No. 3512 for Winter Flounder is to bring Delaware into compliance with Addendum 1 to Amendment 1 of the Interstate Fishery Management Plan for Inshore Stocks of Winter Flounder as administered by the Atlantic States Marine Fisheries Commission ("ASMFC"). To effectuate this compliance, Delaware must reduce its recreational daily harvest limit to two winter flounder per person per day, as well as capping the daily commercial harvest limit for any commercial fisherman at 50 pounds.

On May 4, 2009, the Winter Flounder Management Board approved Addendum 1 to the Interstate Fisheries Management Plan for in-shore stocks of winter flounder. This includes measures to achieve fishing mortality for the Gulf of Maine stock, and to rebuild the overfished southern New England Mid-Atlantic stocks to prevent excessive fishing efforts from shifting to state waters in response to federal management measures. Individual states are required to implement all measures in this addendum, in addition to continuing those contained in Addendum 1.

The southern New England Mid-Atlantic winter flounder stock is severely depleted. The proposed reduction in creel limit from the existing ten (10) fish limit to two (2) fish is estimated to reduce harvest throughout the region by 46%, while still allowing for some directed fishing effort. Very few winter flounder are presently landed in Delaware by recreational fishermen. The proposed commercial restrictions would limit commercial vessels to a maximum possession limit of 50 pounds of winter flounder per trip. For Delaware fishermen, it should have no immediate impact, given the current levels of landings are very low. No other changes are proposed to the minimum size of winter flounder that may be taken during the open season, or to the allowable recreational harvest season. Winter flounder stocks taken in federal waters or those taken by commercial fishermen in possession of a federal permit are subject to the catch restrictions currently in place for federal waters.

The Department has the statutory basis and legal authority to act with regard to the proposed regulatory amendments concerning Delaware Tidal Finfish Regulation 3512 for Winter Flounder, pursuant to 7 **Del.C.** §§903(e)(2)(a).(3). No other Delaware regulations are affected by these proposals.

There were no comments received by the Department with regard to the proposed regulatory amendments to Delaware Tidal Finfish Regulation 3512 concerning winter flounder.

The Department provided proper notice of the hearing as required by law. Afterwards, Hearing Officer Lisa A. Vest prepared her Hearing Officer's Report dated October 9, 2009, which is attached and expressly incorporated into this Order regarding this matter, and submitted the same to the Secretary for review and consideration.

II. Findings:

The Department has provided a reasoned analysis and a sound basis in the record to support the issuance of the final regulations proposed in this matter. 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 amendments to Delaware Tidal Finfish Regulation 3512 (Winter Flounder) would bring Delaware into compliance with Addendum 1 to Amendment 1 of the Interstate Fishery Management Plan for Inshore Stocks of Winter Flounder as administered by the Atlantic States Marine Fisheries Commission, which represents the federal guidelines for the management of winter flounder, consistent with federal management plans and state jurisdiction;
7. Adoption of the proposed amendments to Delaware Tidal Finfish Regulation 3512 would reduce Delaware fishermen's recreational daily harvest limit to two (2) winter flounder per person per day, as well as cap the daily commercial harvest limit for any commercial fishermen at 50 pounds;
8. The aforementioned proposed amendments to Delaware's existing regulations concerning winter flounder are considered necessary, due to the fact that Southern New England/Mid-Atlantic winter flounder stocks are considered to be overfished, and that overfishing is still occurring. Moreover, promulgation of the proposed amendments will cause winter flounder stocks taken in federal waters, or those taken by commercial fishermen in possession of a federal permit, to be subject to the catch restrictions currently in place for federal waters;
9. The Department has reviewed both of these proposed regulatory amendments 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;
10. The Department's aforementioned proposed amendments to Delaware's regulations concerning winter flounder, as published in the September 1, 2009 *Delaware Register of Regulations* and as set forth in Attachment "A" of the aforementioned Hearing Officer's Report, 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*;
11. The Department shall submit the proposed regulations as final regulations to the *Delaware Register of Regulations* for publication in its next available issue, and shall provide written notice to the persons affected by the Order; and that
12. 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 October 9, 2009 and expressly incorporated herein, it is hereby ordered that the proposed amendments to Delaware Tidal Finfish Regulation 3512: Winter Flounder be promulgated in final form in the customary manner and established rule-making procedure required by law.

IV. Reasons:

The promulgation of the amendments to Delaware Tidal Finfish Regulation 3512: Winter Flounder will bring Delaware into compliance with federal guidelines for the management of this species. It is incumbent upon Delaware to be in compliance with ASMFC's plan, not only to avoid federal sanctions against Delaware and its fisheries, but to protect this species with these conservation measures to ensure that winter flounder will continue to be found in Delaware waters in the future.

In developing this regulation, 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).(3), §1902(a)(5), and §2804.

Collin P. O'Mara
Secretary

3512 Winter Flounder Size Limit; Possession Limit; Seasons

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

- 1.0 It shall be unlawful for any person to possess any winter flounder, (*Pseudopleuronectes americanus*), that measure less than twelve (12) inches, total length.
- 2.0 It shall be unlawful for any recreational fisherman to have in possession more than ~~ten (10)~~ two (2) winter flounder per day (a day being 24 hours) at or between the place where said winter flounder were caught and said recreational fisherman's personal abode or temporary or transient place of lodging.
- 3.0 It shall be unlawful for any recreational fisherman to take and reduce to possession any winter flounder before 12:01 AM February 11 or after midnight April 10 in any given calendar year.
- 4.0 It shall be unlawful for any non-federally licensed commercial fishermen to harvest, land or possess more than 50 pounds of winter flounder per day. Federally licensed commercial fishermen are subject to current federal winter flounder harvest, landing, and possession limits.

8 DE Reg. 1718 (6/1/05)

13 DE Reg. 672 (11/01/09) (Final)