

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Sections 102 and 103 (7 Del.C. §§102 & 103)
7 DE Admin. Code 3901

FINAL

ORDER

3900 Wildlife

Secretary's Order No.: 2008-F-0042 Regulation 3903

I. Background:

A public hearing was held on Monday, August 25, 2008, at 6:30 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on proposed amendments to the existing Delaware Wildlife Regulation No. 3903. The Department wishes to add three additional sub-sections to Regulation No. 3903 concerning Mute Swans. These revisions serve to clarify the existing regulations in this Section, as well as to expand hunting opportunity to minors, and to protect aquatic ecosystems in Delaware from severe damage by Mute Swans.

Additionally, it should be noted that this proposed action also included the intent to change the title of Regulation No. 3903 to simply read "Waterfowl". The Department had wished to change the title of this regulation because there are several items as contained within this section which do not specifically pertain to the Division's adoption of Federal laws and regulations. However, on the advice of the Department's enforcement personnel, they decided to keep the title as is.

Two members of the public attended this hearing on August 25, 2008, however, no public comment or questions were received from them at that time. One e-mail offering public input was received by the Department prior to the hearing, and that suggestion was incorporated into these proposed amendments. Proper notice of the hearing was provided as required by law.

After the hearing, the Department performed an evaluation of the evidence entered into the record in this matter. Thereafter, the Hearing Officer prepared her report and recommendation in the form of a Hearing Officer's Memorandum to the Secretary dated September 10, 2008, and that Report is expressly incorporated herein by reference.

II. Findings:

The Department has carefully considered all relevant public input regarding its proposed regulation, and has provided a reasoned analysis and a sound conclusion with regard to the same, as reflected in the Hearing Officer's Memorandum of September 10, 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 these proposed amendments would expand hunting opportunity for minors and protect aquatic ecosystems in Delaware from severe damage by Mute Swans;

7. 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 that hunt or practice aviculture;

8. The Department's proposed amendments to Regulation 3903 are adequately supported, not arbitrary or capricious, and are 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

9. 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 Memorandum dated September 10, 2008, and expressly incorporated herein, it is hereby ordered that the proposed amendments to State of Delaware Regulation No. 3903 be promulgated in final form in the customary manner and established rule-making procedure required by law.

IV. Reasons:

The promulgation of the Division of Fish and Wildlife Regulation No. 3903, will aide the Department in its ability to provide better clarity to Delaware hunters with regard to the regulations concerning Mute Swans as contained in this section. Additionally, this rulemaking represents careful, deliberate and reasoned action by this agency to expand hunting opportunity for minors and to protect aquatic systems here in Delaware from severe damage by Mute Swans.

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 and purposes of 7 **Del.C.**, Ch. 60.

John A. Hughes, Secretary

3.0 ~~[Federal Laws and Regulations Adopted]~~ **Federal Laws and Regulations Adopted Waterfowl** (Formerly WR-3)

(Penalty Section 7 **Del.C.** §103(d))

3.1 Federal Laws.

It shall be unlawful for any person to hunt, buy, sell or possess any protected wildlife or part thereof, except in such manner and numbers as may be prescribed by the following federal laws and regulations promulgated thereunder: Airborne Hunting Act (16 USC § 742j-1 et seq.), Eagle Act (16 USC § 668 et seq.), Endangered Species Act (16 USC 1531 et seq.), Lacey Act (16 USC § 3371 et seq.), Marine Mammal Protection Act (16 USC § 1361 et seq.), and the Migratory Bird Treaty Act (16 USC § 703 et seq.). Notwithstanding the foregoing, the federal laws and regulations shall be superseded by more stringent restrictions prescribed by State law or regulation of the Department.

3.2 Sea Ducks.

Scoters, eiders and old squaw ducks may be taken during their special season not less than 800 yards seaward from the Delaware Bay shore beginning at an east/west line between Port Mahon and the Elbow Cross Navigation Light south to the Atlantic Ocean or in the Atlantic Ocean.

3.3 Non-toxic Shot.

3.3.1 Required Usage. Non-toxic shot, as defined by federal regulations, shall be required for waterfowl hunting in Delaware. It shall be unlawful for any person to possess shells loaded with lead shot while waterfowl hunting.

3.3.2 Maximum Shot Size. It shall be unlawful for any person to hunt, except for deer, in Delaware with any size non-toxic shot (as defined by federal regulations) pellet(s) larger than size T (.20 inches in diameter).

3.4 Special Mallard Release Areas.

The Division may issue permits to allow the taking of captive-reared mallards during the established waterfowl season under applicable federal regulations. Permits shall only be issued to persons who: control at least 100 acres of land on which there is suitable waterfowl habitat; agree to follow a management plan and federal regulations; and maintain a log of guests and birds harvested. Failure to follow the management plan or a violation of State or federal laws may result in the revocation of a Special Mallard Release Area Permit. Waterfowl may only be hunted on Special Mallard Release Areas from one-half hour after sunrise to one hour before sunset.

3.5 Mute Swans (*Cygnus olor*)

3.5.1 Mute swans shall be considered an exotic, invasive species that is not subject to state protection.

3.5.2 It shall be unlawful to possess, buy, sell, barter, trade, or transfer any **[live]** mute swan or their eggs to or from another person unless permitted by the Director of the Division of Fish and Wildlife.

3.5.3 It shall be unlawful to release any mute swan into the wild.

3.6 Special Shotgun Season for Young and Disabled Hunters

3.6.1 Waterfowl may be hunted on a special day established annually by the Division for disabled (non-ambulatory) hunters using a wheelchair for mobility and hunters 10 years of age or older but less than 16 years of age (10-15 years inclusive). Hunters 13-15 years of age must have completed an approved course in hunter training and possess a Delaware Resident or Non-Resident Junior Hunting License. Young hunters must be accompanied by a licensed non-hunting adult who is 21 years of age or older. Young hunters must be of sufficient size, physical strength and emotional maturity to safely handle a shotgun.

3 DE Reg. 289 (8/1/99)

6 DE Reg. 536 (10/1/02)

12 DE Reg. 496 (10/01/08) (Final)