

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Section 903(e)(1)g (7 Del.C. §903(e)(1)g)
7 DE Admin. Code 3536

FINAL

Secretary's Order #2011-F-0038

3536 Fish Pot Requirements

Date of Issuance: September 15, 2011

Effective Date of the Amendment: October 11, 2011

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") the following findings, reasons and conclusions are entered as an Order of the Secretary in the above-referenced rulemaking proceeding.

Background and Procedural History

This Order considers proposed regulations to amend 7 DE Admin. Code 3536, *Fish Pot Requirements*. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2011-02. The Department published its initial proposed regulation Amendments in the March 1, 2011 *Delaware Register of Regulations*, and held a public hearing on March 25, 2011. Public comment was received by the Department at the time of the public hearing, and the Department responded fully and thoroughly to all questions and concerns from the public regarding this proposed promulgation.

Over the past decade, complaints and conflicts have surfaced between recreational hook and line fishermen and commercial fish pot fishermen on some of the artificial reef sites developed in the Delaware Bay. The abundance of fish pots and their marking lines and floats have, in some instances, prevented or interfered with normal recreational fishing opportunities. This has become a subject of discussion and consideration with both the Department and the Tidal Finfish Council for almost three years. And, while a compromise resolution was sought, no legal or enforceable solution was found that could pass muster with the Department's enforcement staff and the Attorney General's office. Also during this time, the State of Delaware's funding resource (the U.S. Fish and Wildlife Service) became aware of the above situation, and has been pushing both DNREC and other Mid-Atlantic states to resolve this issue.

The Department has recently received legislative authority to regulate the type of fishing gear that can be used on reef sites within Delaware waters. The current proposal to amend Tidal Finfish Regulation 3536 concerning Fish Pot Requirements is intended to eliminate existing conflicts between hook and line gear and other types of fishing gear currently fished on artificial reef sites. It is also intended to address some concerns of the funding agency (USFWS) that some fishing gear presently being fished on Delaware reef sites is incompatible with the intent of the funding agency in providing support to the Delaware Reef Program.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated August 12, 2011 (Report). The Report recommends certain findings and the adoption of the proposed Amendments as attached to the Report as Appendix A.

Findings and Discussion

I find that the proposed Amendments are well-supported by the record developed by the Department, and I adopt the Report to the extent it is consistent with this Order. The Department's experts developed the record and drafted the proposed Amendments.

I find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these Amendments. With the adoption of this Order, Delaware will (1) eliminate existing conflicts between hook and line gear and other types of fishing gear currently fished on artificial reef sites; and (2) address some concerns of the funding agency (USFWS) that some fishing gear presently being fished on Delaware reef sites is incompatible with the intent of the funding agency in providing support to the Delaware Reef Program.

In conclusion, the following findings and conclusions are entered:

1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these proposed Amendments as final;

2.) The Department provided adequate public notice of the proposed Amendments, and provided the public with an adequate opportunity to comment on the proposed Amendments, including at the public hearing held on March 25, 2011;

3.) The Department held a public hearing on March 25, 2011 in order to consider public comment before making any final decision;

4.) The Department's Hearing Officer's Report, including its recommended record and the recommended Amendments as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;

5.) The recommended Amendments should be adopted as final regulation Amendments because Delaware will be able to (1) eliminate existing conflicts between hook and line gear and other types of fishing gear currently fished on artificial reef sites; (2) address some concerns of the funding agency (USFWS) that some fishing gear presently being fished on Delaware reef sites is incompatible with the intent of the funding agency in providing support to the Delaware Reef Program; and, lastly, because (3) the amendments are well supported by documents in the record;

6.) The Department shall submit this Order approving the final regulation 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.

Collin P. O'Mara, Secretary

3536 Fish Pot Requirements

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

- 1.0 It shall be unlawful for any person to fish, set, place, use or tend any fish pot in the tidal waters of this state unless said fish pot has two escape vents placed in the parlor portion of said pot which complies with one of the following minimum sizes: 1.375 inches by 5.75 inches; or a circular vent 2.5 inches in diameter; or a square vent with sides of 2 inches, inside measure. Pots constructed of wooden lathes must have spacing of at least 1.375 inches between one set of lathes.
- 2.0 It shall be unlawful for any person to fish, set, place, use or tend any fish pot in the tidal waters of this state unless said fish pot contains a panel (ghost panel) measuring at least 3.0 inches by 6.0 inches affixed to said pot with one of the following degradable materials:
 - 2.1 Untreated hemp, jute or cotton string of 3/16 inches diameter or smaller; or
 - 2.2 Magnesium alloy timed float release (pop-up devices) or similar magnesium alloy fasteners; or
 - 2.3 Ungalvanized or uncoated iron wire of 0.094 inches diameter or smaller.
- 3.0 It shall be lawful for a person to take and reduce to possession any food fish, except tautog, black seabass or summer flounder, when said food fish is caught in his/her crab pot provided said food fish is not otherwise illegal to possess at that time.
- 4.0 It shall be lawful for a person to take and reduce to possession any food fish, except tautog, black seabass or summer flounder, when said food fish is caught in his/her blue crab dredge provided said food fish is not otherwise illegal to possess at that time.
- 5.0 It shall be unlawful to take or attempt to take any finfish within the geographic boundaries of any permitted artificial reef site under Delaware jurisdiction by any method other than hook and line or spear. The coordinates of Delaware permitted reef sites are defined in U.S. Army Corps of Engineers permit CENAP-OP-R-200500059-1 and any updated permits subsequently issued and are depicted on NOAA charts 12304 and 12214. An Artificial Reef Guide is also available to the public upon request and on-line.

2 DE Reg. 1905 (4/1/99)

6 DE Reg. 350 (9/1/02)

10 DE Reg. 1035 (12/01/06)

14 DE Reg. 862 (03/01/11) (Prop.)

15 DE Reg. 533 (10/01/11) (Final)