

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Section 903(h) and 29 Delaware Code, Section 10119
(7 Del.C. §903(h) and 29 Del.C. §10119)
7 DE Admin. Code 3511

FINAL

Secretary's Order No. 2017-F-0019

Date of Issuance: August 10, 2017

Effective Date of the Amendment: September 11, 2017

3511 Summer Flounder Size Limits; Possession Limits; Season

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 7 Del.C. §§901(c & d) and 903(e)(2), 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 proposed regulatory Amendments to 7 DE Admin. Code 3511: *Summer Flounder Size Limits; Possession Limits; Seasons* ("Amendments"). On February 2, 2017, the Atlantic States Marine Fisheries Commission's ("ASMFC") Summer Flounder, Scup and Black Sea Bass Management Board approved Addendum XXVIII to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan ("FMP"), thus maintaining regional management for the 2017 recreational Summer Flounder fishery. Addendum XXVIII requires each region to increase their Summer Flounder minimum size limit by one inch and adopt a no more than four fish possession limit to stay within the 2017 recreational harvest limit. This action only affects Delaware's existing 16-inch minimum size limit, as Delaware's existing recreational Summer Flounder possession limit is four fish.

Subsequent to the ASMFC's approval of Addendum XXVIII as referenced above, the Department consulted with the other states (Maryland and Virginia) within Delaware's ASMFC-defined region, and both states committed at that time to adopt a 17-inch minimum size limit and a four fish possession limit by April 1, 2017. This deadline necessitated that the Department adopt an Emergency Regulation with regard to this matter, in order to (1) meet the implementation target date; (2) remain compliant with the FMP; and (3) protect the Summer Flounder resource from overfishing. Additionally, the adoption of such Emergency Regulation provided for the welfare of those individuals (and of Delaware's businesses) dependent upon the Summer Flounder recreational fishery. Failure to adopt such measures in a timely fashion would have risked a federal closure of the fishery, in accordance with the Atlantic Coastal Fisheries Cooperative Management Act.

Pursuant to 29 Del.C. §10119 and 7 Del.C. §903(h), the Department adopted such Emergency Regulation, as referenced above, without prior notice or public hearing, to amend 7 DE Admin. Code 3511: *Summer Flounder Size Limits; Possession Limits; Seasons* with the issuance of Emergency Secretary's Order (No. 2017-F-0012). Said Order became effective at 12:01 a.m. on April 1, 2017, and was published in the *State of Delaware Register of Regulations* on that same date. 29 Del.C. §10119 authorizes Emergency Regulations when an agency determines that an imminent peril to the public health, safety or welfare requires the amendment of a regulation with less than the notice required by 29 Del.C. §10115. Additionally, 7 Del.C. §903(h) authorizes the Department to adopt Emergency Regulations when such regulations are necessary to deal with an actual or imminent public health threat or danger to a fishing resource or habitat involving finfish. It should be noted that the aforementioned Emergency Secretary's Order was effective for ninety (90) days from its date of issuance on April 1, 2017.

While concurrently adopting the above-referenced Emergency Regulation, DNREC began its internal regulatory development process to formally amend 7 DE Admin. Code 3511. Thus, the Department's Division of Fish and Wildlife commenced said process with Start Action Notice ("SAN") #2017-05, signed by me on April 17, 2017. The Department subsequently published its initial proposed regulation Amendments in the June 1, 2017 *Delaware Register of Regulations*, and scheduled its public hearing to be held on June 29, 2017.

Since it would not be possible to complete DNREC's internal regulatory development process prior to the expiration of the initial Emergency Regulation Order referenced above, on June 2, 2017, Emergency Secretary's Order No. 2017-F-0016 was issued, which, pursuant to 7 Del.C. §903(h), provides for a one-time renewal of an Emergency Regulation when such regulation is necessary to deal with an actual or imminent public health threat or danger to a fishing resource or habitat involving finfish. Said Order (which formally extended the aforementioned Emergency Regulation for an additional ninety [90] days) became effective at 12:01 a.m. on June 30, 2017, and was published in the *State of Delaware Register of Regulations* on July 1, 2017.

It should be noted that the issuance of the subsequent Emergency Secretary's Order dated June 2, 2017, provided for seamless regulatory coverage for Delaware's Summer Flounder resource, from the date of issuance of the initial Emergency Secretary's Order No. 2017-F-0012 (dated April 1, 2017), through the expiration of the subsequent Emergency Secretary's Order No. 2017-F-0016 (which will be September 30, 2017). Thus, the Department maintained continuous compliance with ASMFC's approved Addendum XXVIII to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, and was enabled to prevent overfishing the Summer Flounder resource.

As noted above, the Department held a public hearing regarding this proposed promulgation on June 29, 2017. Consistent with 29 **Del.C.** §10118(a), the public hearing record remained open for public comment through July 14, 2017. Members of the public attended the June 29, 2017 public hearing; however, no opposition to this proposed promulgation was received by the Department at that time, nor at any subsequent time prior to the hearing record closing with regard to public comment on July 14, 2017. All proper notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

Hearing Officer Lisa A. Vest prepared a Hearing Officer's Report dated July 24, 2017 ("Report"). The Report documents the proper completion of the required regulatory amendment process, establishes the record, and recommends the adoption of the proposed Amendments, attached to the Report as Appendix "A".

Reasons and Conclusions

Based on the record developed by the Department's experts and established by the Hearing Officer's Report, I find that the proposed regulatory Amendments to 7 **DE Admin. Code** 3511, *Summer Flounder Size Limits; Possession Limits; Seasons*, are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed regulatory Amendments be promulgated as final.

I find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these regulatory Amendments. The adoption of the above will enable Delaware to comply with the ASMFC's approved Addendum XXVIII to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, thus maintaining consistent regional management for the 2017 recreational Summer Flounder fishery, and protecting the Summer Flounder resource from overfishing.

In conclusion, the following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 **DE Admin. Code** 3511, *Summer Flounder Size Limits; Possession Limits; Seasons*, pursuant to 7 **Del.C.** Ch. 60, and 7 **Del.C.** §§901(c & d) and 903(e)(2);
2. The Department has jurisdiction under its statutory authority, pursuant to 7 **Del.C.** Ch. 60, and 7 **Del.C.** §§901(c & d) and 903(e)(2), to issue an Order adopting these proposed regulatory amendments as final;
3. The Department provided adequate public notice of the proposed regulatory amendments to 7 **DE Admin. Code** 3511, *Summer Flounder Size Limits; Possession Limits; Seasons*, and all proceedings associated with the same, in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on the proposed regulatory amendments, including at the time of the public hearing held on June 29, 2017, and held the record open through close of business on July 14, 2017, consistent with 29 **Del.C.** §10118(a), in order to consider public comment on the same before making any final decision;
4. Promulgation of the proposed regulatory amendments to 7 **DE Admin. Code** 3511, *Summer Flounder Size Limits; Possession Limits; Seasons*, will enable the Department to comply with the ASMFC's approved Addendum XXVIII to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, thus maintaining regional management for the 2017 recreational Summer Flounder fishery, and to protect the Summer Flounder resource from overfishing;
5. The Department's Hearing Officer's Report, including its established record and the recommended proposed regulatory Amendments as set forth in Appendix "A" thereto, are hereby adopted to provide additional reasons and findings for this Order;
6. The Department has reviewed these proposed regulatory Amendments in the light of the Regulatory Flexibility Act, consistent with 29 **Del.C.** Ch. 104 (version applicable to all regulations initially published on or after January 1, 2016), and has selected Exemption "B" regarding same, as this proposed regulation is not substantially likely to impose additional costs or burdens upon individuals and/or small businesses;
7. The Department's proposed regulatory Amendments, as published in the June 1, 2017 *Delaware Register of Regulations*, and as fully vetted at the public hearing of June 29, 2017 as noted above, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they are 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
8. The Department shall submit this Order approving as final the proposed amendments to 7 **DE Admin. Code** 3511, *Summer Flounder Size Limits; Possession Limits; Seasons* 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

3511 Summer Flounder Size Limits; Possession Limits; Season

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

- 1.0 It shall be unlawful for any recreational fisherman to have in possession more than four (4) summer flounder at or between the place where said summer flounder were caught and said recreational fisherman's personal abode or temporary or transient place of lodging.
- 2.0 It shall be unlawful for any person, other than qualified persons as set forth in section 4.0 of this regulation, to possess any summer flounder that measure less than ~~sixteen (16)~~ seventeen (17) inches between the tip of the snout and the furthest tip of the tail.

7 DE Reg. 1575 (05/01/04)

12 DE Reg. 1430 (05/01/09)

13 DE Reg. 1468 (05/01/10)

14 DE Reg. 1235 (05/01/11)

16 DE Reg. 1283 (06/01/13)

17 DE Reg. 1091 (05/01/14)

- 3.0 It shall be unlawful for any person, to have in possession any part of a summer flounder that measures less than ~~sixteen (16)~~ seventeen (17) inches between said part's two most distant points unless said person also has in possession the head, backbone and tail intact from which said part was removed.

13 DE Reg. 1468 (05/01/10)

14 DE Reg. 1235 (05/01/11)

16 DE Reg. 1283 (06/01/13)

17 DE Reg. 1091 (05/01/14)

- 4.0 Notwithstanding the size limits and possession limits in this regulation, a person may possess a summer flounder that measures no less than fourteen (14) inches between the tip of the snout and the furthest tip of the tail and a quantity of summer flounder in excess of the possession limit set forth in this regulation, provided said person has one of the following:

- 4.1 A valid bill-of-sale or receipt indicating the date said summer flounder were received, the amount of said summer flounder received and the name, address and signature of the person who had landed said summer flounder;
- 4.2 A receipt from a licensed or permitted fish dealer who obtained said summer flounder; or
- 4.3 A bill of lading while transporting fresh or frozen summer flounder.
- 4.4 A valid commercial food fishing license and a food fishing equipment permit for gill nets.

- 5.0 It shall be unlawful for any commercial finfisherman to sell, trade and or barter or attempt to sell, trade and or barter any summer flounder or part thereof that is landed in this State by said commercial fisherman after a date when the de minimis amount of commercial landings of summer flounder is determined to have been landed in this State by the Department. The de minimis amount of summer flounder shall be 0.1% of the coast wide commercial quota as set forth in the Summer Flounder Fishery Management Plan approved by the Atlantic States Marine Fisheries Commission.

- 6.0 It shall be unlawful for any vessel to land more than 200 pounds of summer flounder in any one day in this State.

- 7.0 It shall be unlawful for any person, who has been issued a commercial food fishing license and fishes for summer flounder with any food fishing equipment other than a gill net, to have in possession more than four (4) summer flounder at or between the place where said summer flounder were caught and said person's personal abode or temporary or transient place of lodging.

1 DE Reg. 1767 (05/01/98)

2 DE Reg. 1900 (04/01/99)

3 DE Reg. 1088 (02/01/00)

4 DE Reg. 1552 (03/01/01)

5 DE Reg. 462 (08/01/01)
5 DE Reg. 2142 (05/01/02)
6 DE Reg. 1358 (04/01/03)
7 DE Reg. 1575 (05/01/04)
8 DE Reg. 1488 (04/01/05)
9 DE Reg. 1759 (05/01/06)
10 DE Reg. 1722 (05/01/07)
11 DE Reg. 1493 (05/01/08)
12 DE Reg. 1430 (05/01/09)
13 DE Reg. 1468 (05/01/10)
14 DE Reg. 1235 (05/01/11)
16 DE Reg. 1283 (06/01/13)
21 DE Reg. 239 (09/01/17) (Final)