

HEARING OFFICER'S REPORT

TO: The Honorable Shawn M. Garvin
Cabinet Secretary, Dept. of Natural Resources and Environmental Control

FROM: Theresa Newman, Regulatory Specialist, Office of the Secretary,
Dept. of Natural Resources and Environmental Control

RE: **Proposed Regulation Amendments to 7 DE Admin. Code 3502:
*Striped Bass Spawning Season and Area Restrictions***

DATE: March 25, 2020

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Wednesday, February 26, 2020, 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 regulatory amendments to 7 DE Admin. Code 3502: *Striped Bass Spawning Season and Area Restrictions* (“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 is proposing amendments 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.

In 2018, Delaware's Striped Bass commercial quota allocation led to a quota overage, however several commercial gill net anglers that fish in the Delaware River did not meet the quota set forth for Striped Bass that year. At the July 24, 2018 Advisory Council on Tidal Finfisheries (“Advisory Council”) meeting the commercial fishermen explained why the current allocation led to a quota overage in 2018 and proposed

adjustments to the current seasonal fixed gill net exclusion area in the Delaware River, to facilitate the capture of Striped Bass more efficiently.

The current seasonal fixed gill net exclusion area extends from Liston Point (Delaware River) northward. This exclusion area was originally defined to prohibit fixed gill netting of Striped Bass in effort to reduce potential angler conflicts (not by reason of the biological concern for Striped Bass).

The Advisory Council discussed the option for extending the allowable fixed gill netting area over a series of 3 meetings. A member of the Advisory Council worked with the Enforcement Section of the Division of Fish and Wildlife, to coordinate the needs of the commercial fishing industry with the consideration of safety concerns regarding interactions between boats and recreational angling. The Enforcement Section and the Advisory Council found that opening 1.75 nautical miles (linear) of the Delaware River to fixed gill netting during the months of January through May, will alleviate interactions between commercial fishermen and recreational anglers. This area is not highly trafficked by recreational boaters in the late winter and the early spring, thus, poses a low potential for interaction of recreational anglers and boaters.

In September 2019, the Advisory Council endorsed the promulgation of the proposed Amendment to extend the allowable fixed gill netting area in the Delaware River. The Department and Advisory Council believes the proposed Amendments will both, afford the commercial anglers the ability to facilitate Striped Bass capture more efficiency by use of fixed gill netting in the Delaware River, and protect the safety of recreational angler's potential interaction with boaters. Moreover, it is also believed that the extended area proposed in this Amendment may help to reduce drift net and recreational angling interactions further north of the river.

The DFW expects that 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 only allows the commercial anglers to take a set amount of Striped Bass per year, and thereupon the quota being met, the fishery is then closed. It should be noted that 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.

The Department has the statutory basis and legal authority to act with regard to promulgation of the 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 nine (9) members of the public in attendance, with seven (7) verbal comments given at the public hearing. Pursuant to Delaware law, the record remained open for fifteen (15) additional days subsequent to the date of the public hearing for receipt of public comment. The hearing record formally closed with regard to public comment at the close of business on March 12, 2020 with a total of two (2) written comments received by the Department during the phase of this proposed regulatory promulgation.

After the record closed, the Department’s Division of Fish and Wildlife staff prepared a Technical Response Memorandum (“TRM”), at the request of this Hearing Officer, attached hereto as “Appendix B”.

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.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The public hearing record consists of the following documents: (1) a verbatim transcript; (2) twelve (12) documents introduced by Department staff at the public

hearing held on February 26, 2020 and marked by Hearing Officer Theresa Newman accordingly as Department Exhibits 1-12; and (3) a Technical Response Memorandum (“TRM”). The Department’s person primarily responsible for the drafting and overall promulgation of these proposed Amendments, Stewart Michels, Fisheries Program Manager II with the DFW, developed the record with the relevant documents in the Department’s files.

As stated previously, a TRM was provided by the Department’s expert staff., responding to those in support and those opposed to the Amendment. The opposed comments address concerns with the impact on the population of Striped Bass, increased interactions between recreational anglers and gill nets, and the increased amount of discarded dead Striped Bass due to anchor netting.

The Department distributes an equal limited quota to all gill netting licensee for Striped Bass landings as defined in 7 DE Admin Code 3505. With the vast majority of Delaware’s quota landed by netters fishing in Delaware Bay, is unlikely this Amendment will cause a large shift in anchor to the Delaware River which only accounts for less than 5 % of Delaware’s annual Striped Bass landings.

The DFW has no evidence of increased interactions between recreational anglers and gill nets will occur. However, it is expected that the interactions of commercial anglers with anchored gill nets may differ compared those with drift nets. As current gill net effort in Delaware River is limited to drift nets by regulation, this proposal is expected to lead some drift netters to switch to anchor netting which is more efficient than drift netting.

The DFW found that few Striped Bass are discarded by the gill net fishery now, thus are expected to have no effect on the population to commercial landings in the portion of the river designated herein this Amendment. The amount of Striped Bass discarding by the spring commercial gill net fishery has been very low during the last ten years due to a decreased population. The commercial fishermen keep their nets in the

water until they fill their quotas, and use net meshes that target Striped Bass and keep only those of size most valued by the market. Given the small amount of netting effort expended in the Delaware River, this proposal is unlikely to cause a substantial increase in the number of dead discarded Striped Bass.

The DFW finds that both commercial and recreational fishing have changed markedly in the Delaware River since the current regulation was adopted, which at that time was to reduce user conflicts between commercial fishermen and recreational anglers (not for the benefit of the Striped Bass population). In conjunction with DFW's Enforcement Section and the Advisory Council the proposed Amendment provides that anchor netting in this area will not substantially increase interactions between commercial fishermen and recreational angler. In addition, the Advisory Council, comprised of an equal number of commercial and recreational fishermen approved the proposed expansion and requested the Department to promulgate the proposed Amendments. With the approval of the Advisory Council, along with guidance provided from DFW's Enforcement Section, the Division of Fish and Wildlife recommends the Department to promulgate the Amendments as proposed. Accordingly, the Department's proposed Amendments are attached hereto as Appendix "A" for the Secretary's review.

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

Based on the record developed, I find and conclude that the Department has provided appropriate reasoning regarding the need for the proposed regulatory Amendments. Accordingly, I recommend promulgation of the same, in the customary manner provided by law.

Further, I recommend the Secretary adopt the following findings and conclusions:

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 the 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.



Theresa L. Newman
Public Hearing Officer

**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

PROPOSED

REGISTER NOTICE

SAN #2019-10

Hearing Docket No.: 2019-R-F-0026

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

1. TITLE OF THE REGULATIONS:

Amend 7 DE Admin. Code 3502 Striped Bass Spawning Season and Area Restrictions.

2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE AND ISSUES:

Several commercial striped bass gill net fishermen proposed adjustments to the seasonal fixed gill net exclusion area in the Delaware River to facilitate striped bass capture efficiency and to reduce drift gill net conflicts with recreational boaters and anglers. This action proposes 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. The current seasonal fixed gill net exclusion area extends from Liston Point (Delaware River) northward. This action would adjust the lower boundary of the exclusion area northward (upstream) to the southern shore of Appoquinimink River mouth at latitude 39°28'51.00"N and longitude 75°34'46.00"W.

The proposed action is consistent with the Atlantic States Marine Fisheries Commission's Interstate Fishery Management Plan for the Striped Bass, its amendments and addenda. The Advisory Council on Tidal Fisheries endorsed development of this action at their September 25, 2019 meeting. 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.

3. POSSIBLE TERMS OF THE AGENCY ACTION:

N/A

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

7 Del.C. §901(b), (c) & (d); §903(a) & (b); §903(e)(2)a.4; §903(e)(2)b.3, 4 & 6

5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL:

N/A

6. NOTICE OF PUBLIC COMMENT:

The hearing record on the proposed changes to 7 DE Admin. Code 3502 Striped Bass Spawning Season and Area Restrictions opens February 1, 2020 (Hearing Docket No. 2019-R-F-0026). A public hearing on the proposed amendment will be held on Wednesday, February 26, 2020 beginning at 6:00 PM in the DNREC Auditorium, located at the Richardson & Robbins Building, 89 Kings Highway, Dover, DE 19901. Individuals may submit written comments regarding the proposed changes via e-mail to DNRECHearingComments@delaware.gov, or via USPS to the DNREC Hearing Officer, 89 Kings Highway, Dover, DE 19901. Public comments will be received until close of business Thursday, March 12, 2020.

7. PREPARED BY:

Stewart Michels

Email: Stewart.Michels@delaware.gov

Ph: (302)739-9914

3502 Striped Bass Spawning Season and Area Restrictions.

(Penalty Section 7 Del.C. §936(b)(2))



STATE OF DELAWARE

**DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL**

DIVISION OF FISH & WILDLIFE

RICHARDSON & ROBBINS BUILDING

89 KINGS HIGHWAY

DOVER, DELAWARE 19901

FISHERIES
SECTION

PHONE

(302) 739-9914

Technical Response Memorandum

To: Theresa Newman, Regulatory Specialist

Through: David E. Saveikis, Director, Division of Fish and Wildlife

From: John H. Clark, Fisheries Section Administrator

Date: March 31, 2020

Subject: Department's response to comments received regarding 7 DE Admin. Code 3502 – Striped Bass Spawning Season and Area Restrictions

You presided over a public hearing on Wednesday, February 26, 2020 beginning at 6:00 PM in the Auditorium at the Richardson and Robbins Building, 89 Kings Highway, Dover. The subject of the public hearing was a proposed revision to 7 DE Admin. Code 3502 – Striped Bass Spawning Season and Area Restrictions. The Department heard seven verbal comments, memorialized verbatim in the public hearing transcript, and received two written comments.

This technical response memorandum (TRM) provides a summary of the comments received and the Division of Fish and Wildlife's (DFW) response to assist in the completion of the Hearing Officer's Report to the Secretary of the Department of Natural Resources and Environmental Control (Department). This memorandum groups the comments submitted to the Department into those in support and those opposed. Each comment received is included verbatim as an attachment. The public hearing transcript detailing comments presented at the public hearing is also attached to this memorandum.

I. Comments received in support of the proposal to extend the allowed anchor netting area from Liston Point to the mouth of the Appoquinimink River

The Department received one written and four verbal comments at the public hearing in support of the proposal. The written comment, from a recreational angler, stated that

extension of the allowed anchor netting area from Liston Point to the mouth of the Appoquinimink would benefit recreational fishermen because anchor netting is much more efficient than drift netting, thus the netters would catch their Striped Bass quotas faster with less net out and would have less interaction with recreational anglers. The four verbal comments, which were all from commercial fishermen, also stressed the greater efficiency of anchor netting, which would reduce the number of days they would need to fish to fill their quotas. Interactions with recreational anglers would be reduced by reducing the days the nets would need to be fished and the length of net fished. In addition, anchor nets can be fished closer to shore in the proposed area, which would further reduce interactions with recreational fishermen. The four verbal commenters also stressed that allowing anchor netting in this area would not increase the amount of discarding of Striped Bass.

Department Response:

The commenters reiterated points made by the DFW in explaining the rationale for this proposal. DFW agrees that interactions between anglers and gill nets may be reduced if the nets are in the water for fewer days, less net is fished, and the nets are fished closer to shore.

II. Comments received in opposition of the proposal to extend the allowed anchor netting area from Liston Point to the mouth of the Appoquinimink River

The Department received one written and three verbal comments at the public hearing in opposition to the proposal. The written comment opposes the extension of the allowed anchor netting area from Liston Point to the mouth of the Appoquinimink because of the commenter's concern of its impact on the population of Striped Bass, which is currently designated as overfished with overfishing occurring by the Atlantic States Marine Fisheries Commission. The commenter was concerned that Delaware's commercial gill netting occurs during the spring spawning run of Striped Bass and the gill net fishery is thus depleting females just prior to the spawn, thus expanding the anchor netting range up the river puts anchor nets that much closer to the spawning grounds. The first public hearing opposition comment stressed the unknown effect of the proposed regulation. Although the comment was not specific about the effect of most concern, presumably the concern was that netting effort in the expanded area would increase interactions between recreational anglers and anchored gill nets. The second and third public hearing opposition comments also included this concern in their comments. Two of the commenters also stated that extending the anchor netting area would increase the number of Striped Bass discarded dead from the gill nets.

Department Response:

DFW understands the concern of two commenters about the current state of the Striped Bass population, but this proposal does not affect the commercial harvest season nor the commercial Striped Bass quota, thus the comment is not germane to the proposal. The commenters are correct that DFW cannot predict the amount

of anchor gill netting effort that will be conducted in this extended area. However, there is no evidence to suggest that anchor gill netting will become a problem for anglers in the river. Delaware's Striped Bass landings are limited to our quota and our quota is distributed equally to all our licensed gill netters as an Individual Transferable Quotas. The Delaware River usually accounts for less than 5 % of Delaware's annual Striped Bass landings because the vast majority of Delaware's quota is landed by netters fishing Delaware Bay. This proposal is unlikely to cause a large shift in anchor net effort because the best areas to anchor net Striped Bass are in Delaware Bay. As current gill net effort in Delaware River is limited to drift nets by regulation, this proposal is expected to lead some drift netters to switch to anchor netting. Anchor netting is more efficient than drift netting, so less net will be used by those netters, but the anchor nets are in the water round the clock while drift nets are in the water for a few hours at a time. Several commenters were concerned about this proposal increasing interactions between recreational anglers and gill nets. The interactions of anglers with anchored gill nets may differ compared those with drift nets, but DFW has no evidence to suggest that interactions will increase or be more numerous or more severe. Two public hearing opposition comments contended that the proposal will increase the number of Striped Bass discarded dead as anchor netting is more likely result in a dead discarded Striped Bass than drift netting. DFW found that Striped Bass discarded from anchored gill nets had a much higher mortality rate than those from drift gill nets¹, however, few Striped Bass are discarded by the gill net fishery now. The study was conducted when the Striped Bass population was much more abundant, and the commercial fishermen were adjusting to new market conditions for Striped Bass. The amount of Striped Bass discarding by the spring commercial gill net fishery has been very low during the last ten years because the Striped Bass population has decreased greatly over that time, the commercial fishermen only keep their nets in the water until they fill their quotas, and the commercial fishermen are using net meshes that target Striped Bass that only catch Striped Bass of the size most valued by the market. Given the small amount of netting effort expended in the Delaware River, this proposal is unlikely to cause a substantial increase in the number of dead discarded Striped Bass.

III. Conclusion and final recommendation

The DFW appreciates the thoughtful comments submitted by the commenters. Having considered the written comments and the public comments entered into the record at the public hearing, DFW recommends that the Department adopt the proposed regulation. The current regulation was not adopted for the benefit of the Striped Bass population, rather it was adopted to reduce user conflicts between commercial fishermen and recreational anglers. Both commercial and recreational fishing have changed markedly in the Delaware

¹ Clark, J.H. and D. Kahn. 2011. Amount and Disposition of Striped Bass Discarded in Delaware's Spring Striped Bass Gill-Net Fishery during 2002 and 2003: Effects of Regulations and Fishing Strategies. North American Journal of Fisheries Management 29(3):576-585

River since the regulation was adopted. The Advisory Council on Tidal Finfisheries, which is comprised of an equal number of commercial and recreational fishermen, overwhelmingly approved a resolution asking DFW to promulgate this proposal. DFW's Enforcement Section worked with the Council to limit the extension to the area in the proposal and the Enforcement Section is confident that anchor netting in this area will not substantially increase interactions between commercial fishermen and recreational anglers. This proposal thus has the backing of the Council, the Enforcement Section and DFW, so it should be adopted as proposed.