



STATE OF DELAWARE

**DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL**

OFFICE OF THE
SECRETARY

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Secretary's Order No.: 2012-F-0026

**Approving Final Regulation Amendments to 7 DE Admin. Code 3531:
Tautog Size Limits; Creel Limit; Seasons**

Date of Issuance: July 16, 2012

Effective Date of the Amendment: August 11, 2012

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 regulatory amendments to Delaware Tidal Finfish Regulation No. 3531 regarding Tautog. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2012-07. The Department published the proposed amendments in the June 1, 2012 *Delaware Register of Regulations* and held a public hearing on June 22, 2012. The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated July 11, 2012 (Report). The Report recommends certain findings and the adoption of the proposed regulation amendments as attached to the Report as Appendix A.

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Findings and Discussion

I find that the proposed new regulation is well-supported by the record developed by the Department, and adopt the Report to the extent it is consistent with this Order. The Department's experts in the Division of Fish and Wildlife developed the record and drafted the proposed regulation. As a result of the regulatory development process, the Department received public comments supporting this proposed regulation, as discussed in the Report.

With the adoption of these regulatory amendments to Delaware Tidal Finfish Regulation No. 3531 as final, Delaware will be able to modify its existing regulations to allow for less restrictive management measures, consistent with a 39% reduction in exploitation, while remain in compliance with the federal guidelines for the management of Tautog, as set forth by the ASMFC, to wit: *to reduce the size limit from 16 inches to 15 inches*. The current creel limit of five (i.e., five fish per day), with the exception of the time period from April 1 through May 11, at which time the creel limit will be 3, as well as the two current closures (the first at the beginning of summer, from May 12th through July 16th, and then a second closure at the end of summer, from Sept. 1st through Sept. 28th) shall all remain the same.

Of the two possible options vetted to the public during this promulgation process, the Department believes Option #1, as set forth above, to be the preferred reduction strategy with regard to tautog management for the 2012 season. Tautog exhibit site fidelity (aggregate around structure and return to the same sprawling areas), which makes them vulnerable to fishing pressure. Prior to the development of Addendum VI, Delaware's recreational tautog anglers expressed sentiment for Delaware to voluntarily

reduce its ten fish creel limit, despite the fact that Delaware would receive no credit for taking a voluntary reduction. The requests for such action were largely prompted by concerns that out-of-state charter boats were relocating to Delaware to fish for tautog in the winter, due to the liberal reel limits (highest along the Atlantic coast). The eight fish creel limit contained in "Option 2" would have continued to give Delaware the highest creel limits of any state along the coast, and would have thus perpetuated this concern. Furthermore, the ASMFC's Tautog Technical Committee has historically favored the use of lower creel limits to constrain the fishery in an effort to reduce the likelihood of recoupment.

The recreational spear fishing sector appears to prefer "Option 2", as the longer season may decrease the likelihood that poor water clarity will impact tautog catchability, as it does later in the summer. Comments from this sector of the recreational fishery appeared disproportionate to the larger recreational hook and line sector. As referenced above, the hook and line sector has a history of advocating for a reduced creel limit in recent years, based largely on concern that the local stock is being targeted by out of state vessels. Further, a popular Delaware fishing discussion website conducted a poll that substantiates a preference by the broader recreational fishing community for Option #1, with 66% (47) of the respondents supporting Option #1, and 34% (24) of the respondent supporting Option #2. This poll was incorporated into the public hearing record for consideration.

The Department concludes that, while either Option #1 or #2 would be consistent with the requirements contained in Addendum VI, Option #2 reduces the likelihood of recoupment and addresses concerns regarding Delaware's liberal creel limits. For these

reasons, the Department's Division of Fish & Wildlife supports the formal adoption of Option #1 as Delaware's preferred reduction strategy for tautog management in 2012.

In conclusion, the following findings and conclusions are entered:

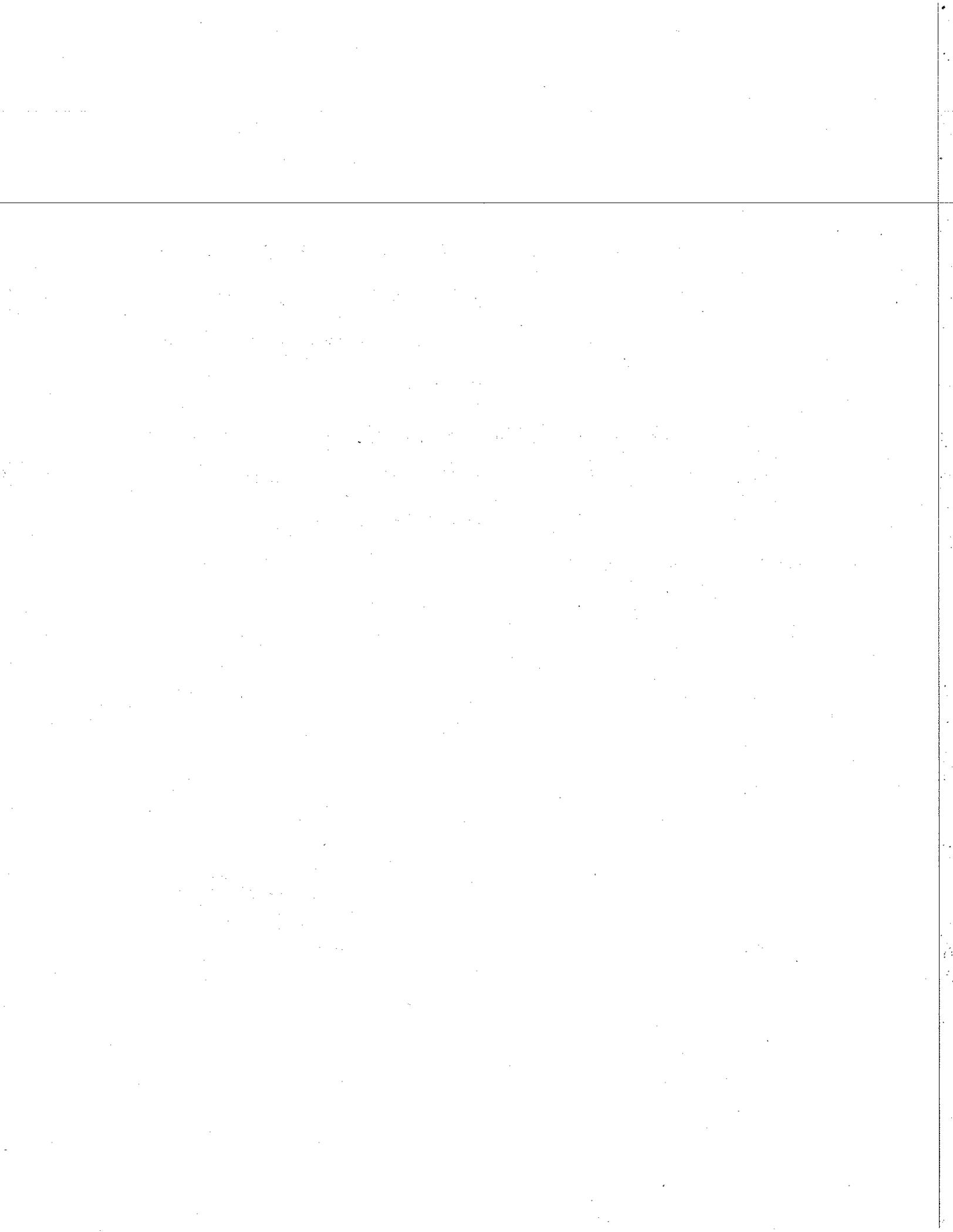
- 1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these proposed Amendments as final;
- 2.) The Department provided adequate public notice of the proposed regulatory amendments to this regulation, and provided the public with an adequate opportunity to comment on the proposed amendments, including at a public hearing;
- 3.) The Department held a public hearing on the proposed amendments to this regulation in order to consider public comments before making any final decision, and has considered all relevant and timely public comment received;
- 4.) The Department's Hearing Officer's Report, including its recommended record and the recommended amendments to this regulation, as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;
- 5.) The recommended amendments to this regulation satisfy the aforementioned federal requirements of reduction strategies with regard to Delaware's management of Tautog, and do not result in any change from the proposed amendments as originally published in the June 1, 2012, *Delaware Register of Regulations*;
- 6.) The recommended amendments should be adopted as final because Delaware will be enabled to modify its existing regulations to allow for less restrictive management measures, consistent with a 39% reduction in exploitation, while remain in compliance with the federal guidelines for the management of Tautog, as set forth by the ASMFC. Furthermore, with the promulgation of Option #1 as the preferred reduction

strategy for tautog management in 2012, Delaware will be able to meet the aforementioned 39% reduction mandate by the *reduction of the size limit for tautog from 16 inches to 15 inches*. The current creel limit of five (i.e., five fish per day), with the exception of the time period from April 1 through May 11, at which time the creel limit will be 3, as well as the two current closures (the first at the beginning of summer, from May 12th through July 16th, and then a second closure at the end of summer, from Sept. 1st through Sept. 28th) shall all remain the same; and

7.) The Department shall submit this Order approving the final amendments to this 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



HEARING OFFICER'S REPORT

TO: The Honorable Collin P. O'Mara
Cabinet Secretary, Department of Natural Resources and Environmental Control

FROM: Lisa A. Vest
Public Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: **Approving Final Delaware Regulatory Amendments to
7 DE Admin. Code 3531: Tautog Size Limits, Creel Limits; Seasons**

DATE: July 11, 2012

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Friday, June 22, 2012, at 7:00 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 ("amendments") to Delaware Tidal Finfish Regulation No. 3531 regarding the management of tautog. The Department proposes to amend its management of this species in 2012 by revising Delaware's current tautog regulations *to reduce the size limit from 16 inches to 15 inches*. The current creel limit of five (i.e., five fish per day), with the exception of the time period from April 1 through May 11, at which time the creel limit will be 3, as well as the two current closures (the first at the beginning of summer, from May 12th through July 16th, and then a second closure at the end of summer, from Sept. 1st through Sept. 28th) shall all remain the same. This proposed revision will liberalize the harvest of tautog and maintain Delaware's compliance with the Atlantic States Marine Fisheries Commission's Addendum VI to the Interstate Fishery Management Plan for Tautog.

Tautog are susceptible to overfishing, due to their slow growth, late maturity and spawning site fidelity. Spawning stock biomass has remained at low levels for the last decade. Current fishing mortality is estimated at 0.25. Addendum VI to the Fishery Management Plan for Tautog established a target of 0.15 to initiate stock rebuilding and end overfishing.

Delaware was previously mandated to modify its tautog regulations by the Atlantic States Marine Fisheries Commission ("ASMFC") for the 2012 fishing season to achieve a 53% reduction in harvest. This mandate was to reduce harvest by 53% as required under Addendum VI to the Interstate Fisheries Management Plan for Tautog ("Plan"). However, an error was identified and corrected in the 2011 stock assessment. Although the stock continues to be overfished, and overfishing is occurring, the updated 2011 assessment indicates that the required reduction in exploitation should be 39%. The ASMFC Tautog Management Board has approved modifications to state proposals to achieve the updated reduction target. As such, Delaware proposes to modify its existing regulations to allow for less restrictive management measures, consistent with a 39% reduction in exploitation. It is anticipated that these regulations, once revised, will remain in place for three to five years.

The Department developed two (2) management options that meet the specifications contained in Addendum IV to the Interstate Fisheries Management Plan for Tautog. Option #1 proposed to reduce the minimum size limit from 16 inches to 15 inches, and retain the current seasons and associated creel limits. Option #2 would maintain the existing 16 inch minimum size limit, but provide 16 additional summer fishing days and increase the daily creel limit by three (3) fish during the open seasons. Both proposed management options were expected to meet or exceed the required 39% reduction in tautog landings. These options were then vetted to the public at the public hearing held by the Department in this matter on June 22, 2012. Of the

two options, the Department's Division of Fish and Wildlife endorses Option #1 as the Department's preferred reduction strategy in this matter. The promulgation of Option #1 as Delaware's reduction strategy for tautog in 2012 would, as noted above, reduce the size limit from 16 inches to 15 inches, while maintaining existing creel limits and seasons.

The Department has the statutory basis and legal authority to act with regard to the proposed regulatory amendments to Delaware Tidal Finfish Regulation No. 3531, pursuant to 7 Del.C. § 901 (c) and (d), and 7 Del.C. §903(e)(2)(a). No other Delaware regulations are affected by these proposals.

Public comment was received by the Department regarding this proposed promulgation, and the same will be addressed below. Proper notice of the hearing was provided as required by law.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The public hearing record consists of a verbatim transcript and eight exhibits introduced at the public hearing and marked by this Hearing Officer accordingly as Department Exhibits 1-8. The Department's persons primarily responsible for the drafting and overall promulgation of these proposed regulatory amendments, Stewart Michels and Scott Newlin, developed the record with the relevant documents in the Department's files.

Following the submission of the Department's exhibits into the record, Scott Newlin, Environmental Scientist with the Department's Division of Fish and Wildlife, offered a brief explanation with regard to the salient points of the proposed amendments to these regulations. As noted above, the Department developed two (2) management options that meet the specifications contained in Addendum IV to the Interstate Fisheries Management Plan for tautog. Both proposed management options were expected to meet or exceed the required 39% reduction

in tautog landings. These options were then vetted to the public at the public hearing held by the Department in this matter on June 22, 2012. Of the two options, the Department's Division of Fish and Wildlife endorses Option #1 as the Department's preferred reduction strategy in this matter. The promulgation of Option #1 as Delaware's reduction strategy for tautog in 2012 would, as noted above, reduce the size limit from 16 inches to 15 inches, while maintaining existing creel limits and seasons.

Following the public hearing, the Department reviewed the record developed in this promulgation and provided this Hearing Officer with a Technical Response Memorandum (TRM) dated July 11, 2012, which set forth the reasoning behind the Department's selection of Option #1 as the preferred reduction strategy with regard to tautog management for the 2012 season. In the Department's TRM, the Department's Division of Fish and Wildlife explained that tautog exhibit site fidelity (aggregate around structure and return to the same sprawling areas), which makes them vulnerable to fishing pressure. Prior to the development of Addendum VI, Delaware's recreational tautog anglers expressed sentiment for Delaware to voluntarily reduce its ten fish creel limit, despite the fact that Delaware would receive no credit for taking a voluntary reduction. The requests for such action were largely prompted by concerns that out-of-state charter boats were relocating to Delaware to fish for tautog in the winter due to the liberal reel limits (highest along the Atlantic coast). The eight fish creel limit contained in "Option 2" would continue to give Delaware the highest creel limits of any state along the coast and perpetuate this concern. Furthermore, the ASMFC's Tautog Technical Committee has historically favored the use of lower creel limits to constrain the fishery in an effort to reduce the likelihood of recoupment.

The recreational spear fishing sector appears to prefer "Option 2", as the longer season may decrease the likelihood that poor water clarity will impact tautog catchability, as it does later in the summer. Comments from this sector of the recreational fishery appeared disproportionate to the larger recreational hook and line sector. As referenced above, the hook and line sector has a history of advocating for a reduced creel limit in recent years, based largely on concern that the local stock is being targeted by out of state vessels. Further, a popular Delaware fishing discussion website conducted a poll that substantiates a preference by the broader recreational fishing community for Option #1, with 66% (47) of the respondents supporting Option #1, and 34% (24) of the respondent supporting Option #2. This poll was incorporated into the public hearing record for consideration.

The Department's TRM of July 11, 2012 concludes that, while either Option #1 or #2 would be consistent with the requirements contained in Addendum VI, Option #2 reduces the likelihood of recoupment and addresses concerns regarding Delaware's liberal creel limits. For these reasons, the Department's Division of Fish & Wildlife supports the formal adoption of Option #1 as Delaware's preferred reduction strategy for tautog management in 2012.

For the Secretary's review, Delaware's proposed regulatory amendments concerning Tautog are expressly incorporated into this report and attached hereto as Appendix "A" for that purpose. It should be noted that the Department has reviewed these proposed 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.

It should also be noted that all proper notification and noticing requirements concerning this proposed promulgation were met by the Department.

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 to Delaware Tidal Finfish Regulation No. 3531, concerning the revised management of Tautog for the 2012 season. Accordingly, I recommend promulgation of these proposed amendments in the customary manner provided by law.

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

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 regulatory amendments to Delaware Tidal Finfish Regulation No. 3531 will enable Delaware to modify its existing regulations to allow for less restrictive management measures, consistent with a 39% reduction in exploitation, while remain in compliance with the federal guidelines for the management of Tautog, as set forth by the ASMFC;

7. Promulgation of the proposed amendments to Delaware's Tautog Regulations for 2012 will enable Delaware *to reduce the size limit from 16 inches to 15 inches*. The current creel limit of five (i.e., five fish per day), with the exception of the time period from April 1 through May 11, at which time the creel limit will be 3, as well as the two current closures (the first at the beginning of summer, from May 12th through July 16th, and then a second closure at the end of summer, from Sept. 1st through Sept. 28th) shall all remain the same;
8. The Department has reviewed 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;
9. The Department's aforementioned proposed regulatory amendments concerning the revised management of Tautog, as published in the June 1, 2012 *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

10. The Department shall submit the proposed regulation amendments as final amendments to the *Delaware Register of Regulations* for publication in its next available issue, and shall provide such other notice as the law and regulations require, and as the Department determines is appropriate.



LISA A. VEST
Public Hearing Officer

APPENDIX "A"

3531 Tautog; Size limits, Creel Limits and Seasons

(Penalty Section 7 Del.C. §936(b)(2))

1.0 Notwithstanding the provisions of 7 Del.C. §939, it shall be unlawful for any person to possess any tautog, *Tautoga onitis*, less than fifteen (15) inches in total length.

2.0 Notwithstanding the provisions of 7 Del.C. §§938, 939, it shall be unlawful for any person to possess more than five (5) tautog during the period beginning at 12:00 a.m. on January 1 and ending at 11:59 p.m. on March 31, and during the period beginning at 12:00 a.m. on July 17 and ending at 11:59 p.m. on August 31, and during the period beginning at 12:00 a.m. on September 29 and ending at 11:59 p.m. on December 31, at or between the place where said tautog were caught and said person's personal abode or temporary or transient place of lodging.

3.0 Notwithstanding the provisions of 7 Del.C. §§938, 939, it shall be unlawful for any person to possess more than three (3) tautog during the period beginning at 12:00 a.m. on April 1 and ending at 11:59 p.m. on May 11, at or between the place where said tautog were caught and said person's personal abode or temporary or transient place of lodging.

4.0 Notwithstanding the provisions of subsections 1.0, 2.0 and 3.0 of this regulation, it shall be unlawful for any person to possess any tautog during the period beginning at 12:00 a.m. on May 12 and ending at 11:59 p.m. on July 16 and during the period beginning at 12:00 a.m. on September 1 and ending at 11:59 p.m. on September 28, except in said person's personal abode or temporary or transient place of lodging.

1 DE Reg. 1771 (05/01/98)

6 DE Reg. 1360 (04/01/03)

11 DE Reg. 1257 (03/01/08)

15 DE Reg. 1177 (02/01/12)

