

Secretary's Order No.: 2010-F-0012

**Approving Final Regulation Amendments to 7 DE Admin. Code 3521:
Weakfish Size Limit; Possession Limit; Seasons**

Date of Issuance: March 11, 2010

Effective Date of the Amendment: April 11, 2010

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. 3521 regarding Weakfish. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2009-32. The Department published the proposed amendments in the January 1, 2010 *Delaware Register of Regulations* and held a public hearing on January 21, 2010. The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated March 2, 2010 (Report). The Report recommends certain findings and the adoption of the proposed new regulation as attached to the Report as Appendix A.

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. 3521 as final, Delaware will be able to remain in compliance with the Interstate Fisheries Management Plan, as adopted by the ASMFC, to manage Weakfish in Delaware, to wit: (1) reduce the recreational creel limit for Weakfish from six (6) to one (1) fish per person, per day; and (2) limit commercial fishermen to no more than 100 pounds per vessel per day or per trip.

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 new regulation, and provided the public with an adequate opportunity to comment on the proposed new regulation, including at a public hearing;

3.) The Department held a public hearing on the proposed new 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 new regulation, as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;

5.) The recommended new regulation does not reflect any change from the proposed regulation as published in the January 1, 2010, *Delaware Register of Regulations*;

6.) The recommended regulation should be adopted as a final new regulation because (1) Delaware will be enabled to remain in compliance with the Interstate Fisheries Management Plan, as adopted by the ASMFC, to manage Weakfish in Delaware, to wit: (1) reduce the recreational creel limit for Weakfish from six (6) to one (1) fish per person, per day; and (2) limit commercial fishermen to no more than 100 pounds per vessel per day or per trip; and (4) the new regulation is well supported by documents in the record; and that

7.) 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.

/s/ Collin P. O'Mara
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 3521: Weakfish Size Limits; Possession Limit; Seasons**

DATE: March 2, 2010

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Thursday, January 21, 2010, 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 ("amendments") to Delaware Tidal Finfish Regulation No. 3521 regarding the management of Weakfish. The Department's proposed regulatory amendments would reduce the daily recreational creel limit from six (6) fish to one (1) fish, and would restrict all commercial vessels to a maximum harvest of 100 pounds per vessel, per day or per trip.

A recent peer-reviewed stock assessment for Weakfish by the Atlantic States Marine Fisheries Commission ("ASMFC") found the Weakfish stock to be depleted, with spawning stock biomass estimated to be just three percent (3%) of an unfished stock, well below the twenty percent (20%) threshold and thirty percent (30%) target reference points in the existing fisheries management plan. The decline in the Weakfish stock

reflects an increase after 1995 in natural mortality – death due to predation, competition, and ecological factors – rather than fishing mortality, which has remained moderate and stable during the same time period.

Although fishing mortality is not the primary cause of the Weakfish decline, it is further aggravated by losses to both commercial and recreational fisheries. As a result, the proposed management measures are designed to discourage recreational and commercial fishing efforts directed at Weakfish, decrease by-catch mortality, and reduce coastwide harvest by more than fifty (50%) percent.

The Department has the statutory basis and legal authority to act with regard to the proposed regulatory amendments to Delaware Tidal Finfish Regulation No. 3521, pursuant to 7 Del.C. §§901 and 903. Comment was received by the Department regarding this proposed promulgation, both prior to and at the time of the public hearing held on January 21, 2010, and the same will be discussed in detail 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 six documents introduced at the public hearing and marked by this Hearing Officer accordingly as Department Exhibits 1-6. The Department's person primarily responsible for the drafting and overall promulgation of these proposed regulatory amendments, Craig Shirey, developed the record with the relevant documents in the Department's files.

Following the submission of the Department's exhibits into the record, Mr. Shirey proceeded to offer a brief summary as to the history of Weakfish management in Delaware, and the purpose behind the present proposed promulgation. Weakfish, also

known as “sea trout” or “trout” (although certainly not the same species as the freshwater trout that appears in Delaware’s tidal streams), is the official State Fish of Delaware. In the 1980’s, Weakfish supported a tremendous fishery in Delaware, popular with both recreational and commercial fishermen. Since that time, however, the Weakfish population has significantly declined. Back in 1980, Weakfish were at a very high level of abundance in Delaware, with over 200 million pounds of spawning stock biomass. During the 1980’s and beyond, however, there began a sharp decline, caused mainly by overfishing. Once the population dropped below the threshold for management regulations, amendments were made to the Fisheries Management Plan for Weakfish. Fishing restrictions were implemented, and the stock began to recover. The Weakfish population grew to above the threshold level, and by the mid 1990’s Delaware had some good landings, which were a reflection of this increase in biomass. Subsequently, however, another sharp decline of this species began, and that same decline continues on to the present day.

The difference between the sharp decline of Weakfish in the 1980’s and the current, ongoing decline of this species’ population is that the decline of the 1980’s was caused by fishing mortality, whereas the current decline seems to be caused by an increase in natural mortality. The Department believes the Weakfish’s current increase in natural mortality is most likely the result of increases in several other predator species to the Weakfish, including, but not limited to, the Striped Bass, Spiny Dogfish, and Atlantic Croaker. Nevertheless, it is the opinion of the Department that a reduction in fishing mortality would poise the Weakfish stock for a quicker recovery, once natural mortality returns to more normal levels.

In November of 2009, ASMFC's Weakfish Management Board met and voted on numerous options concerning the conservation of this species. As a result, ASMFC selected the recommended regulation of a one-fish recreational creel limit per angler per day, and a 100-pound commercial vessel trip limit (i.e., a commercial vessel can only land 100 pounds per trip or per day, whichever is the longer period of time. Prior to this, there were no caps on commercial fishery during the open season. These recommended regulations are coastwise, and they are predicted to reduce fishing or the catch by over 50%. In order to remain in compliance with Amendment 4 to the Fisheries Management Plan of ASMFC, all states in this unit are required to adopt these regulatory amendments.

There were several members of the public that offered comment at the public hearing held on January 21, 2010. Mr. Richard Schneider was the first to offer public comment regarding this proposed promulgation. Mr. Schneider identified himself as being with the group, "Coalition to Protect the Environment". After noting statistical research he gathered regarding the population decline of Weakfish, Mr. Schneider offered comment as to what he believed to be the greatest source of fish mortality: the open-loop cooling system used at various facilities and factories in Delaware, namely, the Indian River Power Plant, the Valero Refinery, and the Salem 1 and 2 nuclear plants. Mr. Schneider explained that the open-loop systems draw water in to cool the facilities, and then dump the water back into the bay or river. The problem with this mechanism, according to Mr. Schneider, is that millions of fish are also drawn in with the water, pinned against the screen, and then die. In contrast, a closed-loop system would not draw the fish in with the water needed to cool such facilities.

According to Mr. Schneider's statistics, in one year's time the Valero Refinery killed 50,000 Weakfish, the Indian River Power Plant killed 300,000 Weakfish, and the Salem Nuclear Power Plants 1 and 2 killed two million Weakfish combined; all of these kills were to Weakfish that were approximately age one equivalent. It is Mr. Schneider's comment for the record that it is unfair for Delaware anglers to take the sole blame for the Weakfish decline, and to sacrifice their fishing livelihoods and/or recreational enjoyment in an attempt to increase the Weakfish population, when industry kills many times more fish than the fishermen catch; thus, industry must be held accountable for the destruction to the fisheries that they cause. Mr. Schneider urges not only a reduction of Weakfish daily catch limits, but also that an "official statement" be issued by the DNREC Secretary recommending the stoppage of open-loop cooling at facilities such as those mentioned above. Moreover, Mr. Schneider commented that the Weakfish stocks will never recover as long as open-loop cooling continues to kill millions of Weakfish year after year, and that "all of Delaware must work together to protect our natural resources".

At the time of this hearing, John Flaherty also offered the Department his comment in this matter. Mr. Flaherty wished to echo Mr. Schneider's concerns, and state that he also supported both the Department's adoption of the proposed Weakfish regulations and Mr. Schneider's recommendations regarding the issue of fish kills occurring from the open-loop cooling systems at the facilities mentioned above.

Additional public comments were received by the Department prior to the hearing via email, in lieu of attendance at the public hearing held on January 21, 2010. These comments voiced concern in general for the status of the Weakfish stock in Delaware, and agreed that the Department needed to act now in order to ensure continued enjoyment

of this species by both current and future generations of Delaware anglers. Many of the comments from Delaware anglers voiced concern over the increased population of predator species to the Weakfish, and suggested that the Department not only take the proposed action now to conserve the Weakfish, but also address the size limits of these predator species in future promulgations to further help the Weakfish stock replenish. Some comments went so far as to recommend a moratorium be placed on Weakfish until such time as the population showed a viable increase, while others referenced the concern that the population decline of this species was due to the heavy amount of commercial fishing for Weakfish, and not necessarily the result of overfishing on the part of recreational anglers. It should be noted that none of the public comment received by the Department was opposed to this proposed regulatory action.

In response to the public comment referenced above, the Department does acknowledge these concerns, and appreciates the sacrifice that some anglers have offered to make (i.e., recommendations of a moratorium on Weakfish) in order to support a resurgence of this species' stock. The current scientific data available at this time reveals that Weakfish stock is well below the threshold of abundance needed for species management. There is no guarantee that the current stock will cease to decline as a result of the specific limits proposed to be promulgated at this time; however, the Department must mirror the management plan for Weakfish as currently adopted by the ASMFC, as previously referenced above. Of note is the fact that, prior to this current proposed action, there were no caps on commercial effort with regard to Weakfish. Delaware did have some regulations in effect previously which restricted the commercial fishery with closed seasons during the peak of the Weakfish abundance, but there was historically no

cap on the commercial fishery during open season. Again, these proposed amendments to Delaware's existing regulations for this species are mandatory coastwide changes if Delaware is to remain in compliance with Amendment 4 to the Interstate Fisheries Management Plan for Weakfish as adopted by the ASMFC, and the Department believes that the conservation of this species will be greatly supported by the adoption of the same.

It should 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. 3521, concerning the management of Weakfish. 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. 3521 would enable Delaware to remain in compliance with the Interstate Fisheries Management Plan, as adopted by the ASMFC, to manage Weakfish in Delaware, to wit: (1) reduce the recreational creel limit for Weakfish from six (6) to one (1) fish per person, per day; and (2) limit commercial fishermen to no more than 100 pounds per vessel per day or per trip;
7. 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;
8. The Department's aforementioned proposed regulatory amendments concerning the management of Weakfish, as published in the January 1, 2010 *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
9. 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 .

 /s/ Lisa A. Vest .
LISA A. VEST
Public Hearing Officer

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