

**Secretary's Order No.: 2011-F-0027**

**Approving Final Regulation Amendments to 7 DE Admin. Code 3511:  
Summer Flounder Size Limits; Possession Limit; Seasons**

**Date of Issuance: April 18, 2011**  
**Effective Date of the Amendment: May 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 regulatory amendments to Delaware Tidal Finfish Regulation No. 3511 regarding Summer Flounder. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2011-04. The Department published the proposed amendments in the March 1, 2011 *Delaware Register of Regulations* and held a public hearing on March 24, 2011. The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated April 14, 2011 (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. 3511 as final, Delaware will be able to remain in compliance with the federal guidelines for the management of summer flounder, as set forth jointly by both the ASMFC and NOAA, to wit: (1) establish the size limit at 18 inches; (2) establish the creel limit at four (i.e., four fish per day); and (3) establish a sixty-nine day closure of the 2011 season from October 24<sup>th</sup> through December 31<sup>st</sup>. In further support of the selection of this option, the size limit reduction should lead to more chances for anglers to catch a keeper-sized summer flounder, and should also provide some relief for shore-based anglers who do not have access to larger flounder that are found in deeper water habitats. While the year-end closure remains in effect, it is being shortened by 11 days from the 2010 closure period. Moreover, the closure takes place during months when less than 1% of the harvest traditionally occurs. If the summer flounder stock continues to improve, Delaware anglers can expect to see increased summer flounder harvests and continued relaxation in regulations.

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 (as revised to reflect the 18" minimum size limit, 4 fish per day, and 69-day closure from October 24<sup>th</sup> through December 31<sup>st</sup>) satisfy the aforementioned federal mandates with regard to Delaware's management of summer flounder, and do not result in any substantive change from the proposed amendments as originally published in the March 1, 2011, *Delaware Register of Regulations*;

6.) The recommended amendments should be adopted as final because Delaware will be enabled to remain in compliance with the federal guidelines for the management of summer flounder, as set forth jointly by both the ASMFC and NOAA. It will not deprive fishermen of the enjoyment of summer flounder during the typical peak of the season, nor will it cause Delaware to suffer a marked decrease in tourism, as a result of the 69-day closure occurring from October 24<sup>th</sup> through December 31<sup>st</sup>. This management option will also help to fortify and rebuild the summer flounder stock while simultaneously helping to encourage and teach sound fishing ethics to the next generation

of anglers in Delaware. Moreover, if the summer flounder stock continues to improve, Delaware anglers can expect to see increased summer flounder harvests and continued relaxation in regulations.

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.

/s/ Collin P. O'Mara  
Collin P. O'Mara  
Secretary

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## **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 3511: Summer Flounder Size Limits; Possession  
Limit; Seasons**

**DATE:** April 14, 2011

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### **I. BACKGROUND AND PROCEDURAL HISTORY:**

A public hearing was held on Thursday, March 24, 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. 3511 regarding the management of Summer Flounder. The Department proposes to manage this species in 2011 by establishing (1) the size limit at 18 inches; (2) the creel limit at four (i.e., four fish per day); and (3) an sixty-nine day closure of the season, from October 24<sup>th</sup> through December 31<sup>st</sup>.

The Summer Flounder Fishery Management Plan details the annual process that the Summer Flounder Fishery Management Board, the Mid-Atlantic Fishery Management Council and the National Marine Fisheries Service are to use for conservation equivalency in the recreational summer flounder fishery. These agencies agreed at their joint meeting on December 15, 2010 that the states would implement

conservation equivalent measures rather than a coastwide management program for summer flounder in 2011. The total allowable harvest quota has been increased for 2011, based on the latest scientific data that indicates that the stock is not overfished, and that overfishing is not occurring.

Delaware is obligated to cap the summer flounder recreational harvest at 107,000 fish for 2011, which is higher than the 80,000 fish target in 2010. In addition, it is estimated, based on the Marine Recreational Fisheries Statistics survey data, that approximately 76,000 summer flounder were harvested in Delaware during the 2010 fishing season. Two management options for the summer flounder, which included potential minimum size limits of either 18 inches to 18.5 inches, creel limits of 4 fish, and both open and closed season options, were both presented at the public hearing for comment, and the public was encouraged to offer comment to the Department concerning these options during all phases of this proposed regulatory promulgation<sup>1</sup>. Again, the options set forth by the Department were designed to restrict the recreational summer flounder harvest in Delaware during 2011 to ensure that the 107,000-fish harvest cap is not exceeded. Recreational fishermen and bait and tackle dealers will be affected by the option ultimately chosen by the Secretary to manage the summer flounder harvest for 2011.

The Department has the statutory basis and legal authority to act with regard to the proposed regulatory amendments to Delaware Tidal Finfish Regulation No. 3511, pursuant to 7 Del.C. §903(e)(2)(a). No other Delaware regulations are affected by these proposals.

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<sup>1</sup> All options presented at the public hearing satisfied federal mandates, and the Department made four such options available for public comment at that time. Accordingly, the Department's selection of one of these options does not result in any substantive change to the amendments originally proposed in this matter.

Public comment was received by the Department regarding this proposed promulgation during all phases of the public hearing process (up until the closure of the record with regard to public comment on March 30, 2011). After an exhaustive review of the public comment received concerning the aforementioned summer flounder management options, and after consideration of all components of the fishery, economic impacts and conservation of the resource, the Department believes the option of 18 inches minimum size limit, 4 fish per day, with an sixty-nine day closure from October 24<sup>th</sup> through December 31<sup>st</sup> best accomplishes the mandated summer flounder quota of 107,000 harvested fish (or less) for 2011. An analysis of the Department's recommended management option for summer flounder, along with discussion of the public comment received concerning the same, will be further discussed 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 seven exhibits introduced at the public hearing and marked by this Hearing Officer accordingly as Department Exhibits 1-7. 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, Richard Wong, Biometrician 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. Mr. Wong began the Department's presentation by explaining that summer flounder is a federally managed species, and that management of the same is somewhat

unique, as it is jointly managed by the ASMFC and the National Oceanic and Atmospheric Administration (“NOAA”). As such, the Delaware regulations must comply with any and all rules and regulations which pertain to summer flounder that are set forth by these federal entities.

Although its management is shared between federal entities, the National Marine Fisheries Service (“NMFS”) actually makes the final decision as to what the total allowable landings are for summer flounder for each year. At the end of each year, NMFS announces what the total allowable landings will be for the upcoming year. The total allowable landings number (hereinafter referred to as “TAL”) fluctuates each year, and it is tied to the status of the stock. Thus, as the stock improves, the TAL goes up; conversely, as the stock declines, the TAL goes down. The TAL is effectually the quota for the given year.

The aforementioned federal entities agreed that the states would implement conservation equivalent measures rather than a coast wide management program for summer flounder in 2011. Thus, Delaware’s harvest cap for 2011 will be 107,000 fish, which again has been adjusted up from the 2010 level of 80,000 fish.

As noted previously, two management options were presented for consideration at the public hearing held on March 24, 2011. Both options were designed to restrict the recreational summer flounder harvest in Delaware during 2011 to ensure that the 107,000 fish harvest cap is not exceeded. Again, both options have been reviewed, analyzed and approved by the Summer Flounder Technical Committee of the Atlantic States Marine Fisheries Commission (“ASMFC”), and both have been determined to meet the analytical

specifications as required under the Commission's conservation equivalency program for summer flounder.

The following were the options presented for consideration at the public hearing on March 24, 2011:

- 18" minimum size limit, 4 fish per day limit, with a sixty-nine day closure from October 24<sup>th</sup> – December 31<sup>st</sup>; or
- 18.5" minimum size limit, 4 fish per day limit, with no closed season

Following the Department's presentation, the public hearing was opened up for public comment. Many persons attending the hearing that night offered their comments and concerns to the Department regarding what each believed to be the best option for summer flounder management here in Delaware. Common concerns voiced during this portion of the hearing were, as always, the reliability of the landings estimates, the economics of Delaware's fishing licensing, the effect of closures upon Delaware's local bait and tackle businesses, the mortality rates of discarded fish, and, most importantly, the ability of the Department to enforce whatever option ultimately chosen by the Secretary to manage the conservation of this species.

As noted previously, the two options that were available to Delaware anglers for the 2011 fishing season were developed on the most recent catch and effort statistics, and they were both designed to keep Delaware in compliance with the quota guidelines developed as part of the interstate management plan. In vetting these proposed management options to the public, both in public notices prior to the public hearing and at the time of the public hearing on March 24, 2011, the Department's Division of Fish

and Wildlife had hoped that there would be one option that was preferred by an overwhelming majority of the fishermen. In this instance, however, that was not the case, and the public comments were equally divided between the aforementioned two options. Since there are those fishermen that prefer no closed season, and those that would prefer a slightly smaller fish even if it includes a short season closure, the split in preference is understandable.

Both these groups were equally passionate with regard to their opinions on the management options for this species for the 2011 season. Many who voiced support for the option of 18 inches with the brief season closure, such as Chuck Barker, believed it to be the option which would allow him to "...bring a few more fish home to eat". Mr. Barker noted in his comments that he typically fishes most weekends in the Delaware Bay between April and September, and that on many occasions last year, he caught 10 to 12 flounder, none of which were able to be kept, due to the fact that they did not meet the minimum size limit. Others, such as Captain Benjamin Shamburger, offered comment with regard to his concerns of the high mortality rate for flounder which were caught and had to be thrown back into the water due to being undersized. Captain Shamburger noted at the hearing that it is his experience approximately 50% of the fish that are caught are undersized, and that due to the trauma of being caught, often times they are hooked very deeply. Thus, the mortality rate is, in his opinion, much higher than the Department's estimate of 15%. It is possible that, with the proposed reduced minimum length of 18 inches, a higher percentage of the flounder that are caught will be able to be retained, thus lowering the mortality rate of discarded fish.

Those who offered comment in support of the alternative option of 18.5 inches minimum length with no closed season, such as Robert “Boots” DiGiacomo, noted that they were in favor of this option because (1) it treated residents and non-residents equally by keeping the season open throughout the year, and (2) the larger size limits reduces the likelihood of overfishing the stock, thus resulting in more stringent regulations in the future for this species. Joseph Parsons, of Steamers Crab & Seafood Co., echoed this opinion in his comments as well, noting that “...a close of the season forces anglers to target other species....[which] could eventually lead to overfishing the stripers, tog, sea bass and other species.”

Following the hearing, and the close of the record with respect to receiving public comment regarding this matter, the Department conducted an exhaustive review of all of the comments received with regard to both possible options for management of the 2011 summer flounder harvest. After reviewing the comments received from the public during this promulgation matter, it was clear that public comment was split evenly between the two options vetted to the public. Indeed, some comments received by the Department in this matter from local businesses (such as Mr. Miller from Old Salt Bait and Tackle) even included the statement that, while they wished to go on record in favor of one option, their customers were “50/50”. Thus, this Hearing Officer requested the Division of Fish and Wildlife to provide her with a formal Technical Response Memorandum (“TRM”), which summarized the options vetted to the public, and the Department’s expert opinion as to which option would best manage Delaware’s summer flounder stock for 2011.

In the Department’s TRM dated April 14, 2011, Mr. Shirey noted that one common theme the Division often hears from flounder fishermen in Delaware Bay or the

inland Bays is that the minimum length limit is too high relative to the size distribution of the flounder being caught. MRFSS survey data also indicates the number of fish being caught and released greatly exceeds landings by a great margin. It is the Department's belief that any reduction in the minimum size would result in the higher likelihood that an angler would be able to catch a legal-sized flounder. Thus, adoption of the 18" minimum size limit, rather than the 18.5" size limit, would help to satisfy the concerns of this segment of the angling community.

Mr. Shirey further notes in the aforementioned TRM that, up until 2010, the majority of Delaware fishermen that commented on the proposed fishing regulations preferred to have no closed season for flounder, and opted for the larger size limit that was necessary to compensate for the extended season. This trend, however, was broken in 2010 when the preferred option included a eighty-day closed season that extended from October 13<sup>th</sup> through December 31<sup>st</sup>. This season closure did undoubtedly result in some flounder being released that would have otherwise been kept, but other species (including tautog, sea bass, and striped bass) tend to be targeted during the end of the calendar year, and thus the flounder closure did not appear to represent a significant hardship to overall angling opportunities here in Delaware. The option proposed for 2011 which includes a 69-day season closure is less restrictive than the previous year, and takes place during a period when less than 1% of the harvest traditionally occurs in years with no closed season.

Based on all of these considerations, the Division of Fish and Wildlife's TRM indicates that the option which includes the 18-inch minimum size limit and the season closure from October 24<sup>th</sup> through December 31<sup>st</sup> is the Department's preferred

management option for the 2011 summer flounder season. With the adoption of said option, Delaware will be able to remain in compliance with the federal guidelines for the management of summer flounder, as set forth jointly by both the ASMFC and NOAA. In further support of the selection of this option, Mr. Shirey notes that the size limit reduction should lead to more chances for anglers to catch a keeper-sized summer flounder, and should also provide some relief for shore-based anglers who do not have access to larger flounder that are found in deeper water habitats. While the year-end closure remains in effect, it is being shortened by 11 days from the 2010 closure period. Moreover, the closure takes place during months when less than 1% of the harvest traditionally occurs. If the summer flounder stock continues to improve, Delaware anglers can expect to see increased summer flounder harvests and continued relaxation in regulations.

Lastly, as a result of its exhaustive review of the comments received in this matter, the Division has decided to not revise a portion of the wording of Regulation 3501, Subsection 3.0 (the summer flounder dismemberment clause), as originally proposed. The original intent was to modify the language to be more generic in nature, therefore making it unnecessary to change this particular subsection every time a size limit was amended. However, upon further reflection and consideration of this proposed language revision, the Division believes the same would provide the opportunity for a violator to argue that the Department failed to provide appropriate notice of the size limit within the regulations. Even though the size limit would have been quoted in the preceding subsection, the Division opts to not make this generic change. The Department is, however, moving forward with the decision to remove the wording “while on board a

vessel”, as this language had created a loophole which prevented enforcement of the dismemberment regulation to shore anglers since they were not on board a vessel.

For the Secretary’s review, Delaware’s proposed regulatory amendments concerning summer flounder 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. 3511, concerning the management of summer flounder. 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. 3511 would enable Delaware to remain in compliance with the federal guidelines for the management of summer flounder, as set forth jointly by both the ASMFC and NOAA;
7. With regard to the proposed amendments to Delaware's regulations concerning summer flounder, the summer flounder restrictions for 2011 will be established at (1) minimum size limit at 18 inches; (2) creel limit at four (i.e., four fish per day); and (3) a sixty-nine day closure of the season, from October 24<sup>th</sup> through December 31<sup>st</sup>. Moreover, the Department is revising the language of the aforementioned regulation regarding summer flounder to remove the wording "while on board a vessel", as this language had created a loophole which prevented enforcement of the dismemberment regulation to shore anglers since they were not on board a vessel;
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 management of summer flounder, as published in the March 1, 2011 *Delaware Register of Regulations* (and as revised to reflect the 18" minimum size limit, 4 fish per day, and 69-day closure from Oct. 24<sup>th</sup> through Dec. 31<sup>st</sup>) 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.

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