

Secretary's Order No.: 2012-F-0001

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

Date of Issuance: January 17, 2012

Effective Date of the Amendment: February 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 2011-09. The Department published the proposed amendments in the September 1, 2011 *Delaware Register of Regulations* and held a public hearing on October 5, 2011. The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated January 3, 2012 (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. 3531 as final, Delaware will be able to remain in compliance with the federal guidelines for the management of Tautog, as set forth by the ASMFC, to wit: (1) the size limit at 16 inches; (2) the creel limit at 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; and (3) a closure 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.

Of the possible options vetted to the public during this promulgation process, the Department believes the larger size limit of sixteen inches is more desirable for most recreational fishers and the for-hire sector (i.e., Headboat/Charter Boat). There is also a general sentiment among the public that there should be a uniform size limit for Delaware and nearby states (such as New Jersey, Maryland, and Virginia). All the Tautog management options being considered presently by both Maryland and Virginia require a sixteen-inch tautog size limit (the preferred management options for New Jersey are yet to be determined). A uniform size limit in this region will decrease confusion for those that fish both in Delaware and nearby states. Moreover, the uniform size limit may reduce illegal harvest by standardizing the catch.

The Department further notes that a summer closure is preferable to a winter closure. Historically, the winter season is considered the primary tautog season, and tautog is a primary target for the for-hire sector during winter. Tautog research

conducted by the Department's Division of Fish and Wildlife has shown that the spawning season can extend into July, thus keeping the fishery closed during early July may, in fact, allow more tautog to spawn. Many other recreational fisheries are open in the summer season, thus a tautog fishery closure would have less of an impact in summer than in winter.

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 substantive change from the proposed amendments as originally published in the September 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 Tautog, as set forth by the ASMFC. It will not deprive fishermen of the enjoyment of tautog fishing during the winter months, as historically, the winter season is considered the primary tautog season, and tautog is a primary target for the for-hire sector during winter. Additionally, this management option will also help to fortify and rebuild the tautog stock, as tautog research conducted by the Department's Division of Fish and Wildlife has shown that the spawning season can extend into July, thus keeping the fishery closed during early July may, in fact, allow more tautog to spawn. Many other recreational fisheries are open in the summer season, thus, a tautog fishery closure would have less of an impact in summer than in winter.

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 3531: Tautog Size Limits, Creel Limits; Seasons**

DATE: January 3, 2012

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Wednesday, October 5, 2011, 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. 3531 regarding the management of Tautog. The Department proposes to manage this species in 2012 by establishing (1) the size limit at 16 inches; (2) the creel limit at 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; and (3) a closure 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.

The purpose of the proposed amendments to Delaware's existing Tidal Finfish Regulation 3531 is to reduce tautog landings by 53%, in order to bring Delaware into compliance with Addendum VI to the Atlantic States Marine Fisheries Commission (ASMFC)'s Interstate Fishery Management Plan for Tautog (*Tautoga Onitis*). A 2011

stock assessment update indicated that the tautog stock continues to be overfished, and that overfishing is occurring. Tautog biomass has not responded to previous management measures, and fishing pressure and fishing mortality rates have increased as well. Spawning stock biomass has remained at low levels for the past decade, and thus a significant reduction in the target fishing mortality rate is necessary at this time.

As noted above, per Addendum VI to the ASMFC's Instate Fishery Management Plan, all states are required to adopt a strategy to reduce their total Tautog harvest by 53% for 2012, as noted above. In response to that mandate, the Department developed four (4) options by which to achieve the required 53% reduction in tautog landings, all of which were deemed viable strategies and approved by the ASMFC Tautog Management Board. These options were then vetted to the public at the public hearing held by the Department in this matter on October 5, 2011. Of the four options, the Department's Division of Fish and Wildlife endorses the third option presented at the public hearing of October 5, 2011 as the Department's preferred reduction strategy in this matter. The promulgation of Option 3 as Delaware's reduction strategy for Tautog in 2012 would establish (1) the size limit at 16 inches; (2) the creel limit at 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; and (3) a closure 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.

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. §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 seven exhibits introduced at the public hearing and marked by this Hearing Officer accordingly as Department Exhibits 1-10. The Department's person primarily responsible for the drafting and overall promulgation of these proposed regulatory amendments, 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. Mr. Newlin began the Department's presentation by explaining that Tautog is a unique fish, in that they have a tendency to aggregate around structure, and also tend to return to the same spawning areas. Tautog also have slow growth rates, and mature very late in life. As such, the species is very slow to rebuild. The Tautog harvest here in Delaware is predominantly recreational, with a ratio in 2009 of 99% recreational, and only 1% commercial.

Tautog is managed by the Atlantic States Marine Fisheries Commission (ASMFC) who, in 2011, completed a stock assessment which revealed that this stock is currently being overfished, and that overfishing is occurring. Additionally, Tautog biomass has not responded to previous management measures adopted by the ASFMC, and fishing pressure and fishing mortality rates have increased for this species as well. Spawning stock biomass for Tautog has remained at low levels for the past decade, and thus a significant reduction in the target fishing mortality rate is necessary at this time.

In response to the aforementioned 2011 stock assessment, ASMFC adopted Addendum VI to the Tautog Management Plan, which requires that all states must adopt a strategy to reduce their total Tautog harvest by 53% for 2012. Four (4) options that would achieve the required reduction were formulated by the Department's Division of Fish and Wildlife, and were presented to ASMFC. All four options were deemed viable strategies to meet the reduction requirement, and were approved by the ASMFC Tautog Management Board. These options were then vetted to the public at the public hearing held by the Department in this matter on October 5, 2011.

At the time of the hearing on October 5, 2011, comments were received from the public concerning the four options for Tautog management in 2012. The majority of the comments voiced at that time supported Option 3, which called for a size limit of 16 inches, creel limit at five (with the exception of the time period from April 1 through May 11, at which time the creel limit would be reduced to 3), and two closures during 2012: the first at the beginning of summer (from May 12 through July 16), and the second at the end of summer (from Sept. 1 through Sept. 28). Other comments were received by the Department in the days following the hearing held on October 5, 2011,

however, those comments will not be addressed in this Report, as they were received subsequent to the record closing with regard to public comment concerning this matter.

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 December 5, 2011, which set forth the Department's preferred reduction strategy with regard to Tautog management for the 2012 season. Of the four options vetted at the time of the public hearing, the Department's Division of Fish and Wildlife endorses Option 3 as the Department's preferred reduction strategy in this matter. The promulgation of Option 3 as Delaware's reduction strategy for Tautog in 2012 would establish (1) the size limit at 16 inches; (2) the creel limit at 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; and (3) a closure 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.

In the Department's TRM dated December 5, 2011, the Department's Division of Fish and Wildlife explained that the larger size limit in Option 3 allows for a larger creel limit than in Options 1 or 2, which the Department believes is more desirable for most recreational fishers and the for-hire sector (i.e., Headboat/Charter Boat). Additionally, the Department notes that there is a general sentiment among the public that there should be a uniform size limit for Delaware and nearby states (such as New Jersey, Maryland, and Virginia). All the options being considered presently by both Maryland and Virginia require a sixteen-inch tautog size limit (the preferred management options for New Jersey are yet to be determined). A uniform size limit in this region will

decrease confusion for those that fish both in Delaware and nearby states. Moreover, the uniform size limit may reduce illegal harvest by standardizing the catch.

The Department further notes that Option 3 is preferred over Option 4 because it requires a summer closure instead of a winter closure. Historically, the winter season is considered the primary tautog season, and tautog is a primary target for the for-hire sector during winter. Tautog research conducted by the Department's Division of Fish and Wildlife has shown that the spawning season can extend into July, thus keeping the fishery closed during early July may, in fact, allow more tautog to spawn. Many other recreational fisheries are open in the summer season, thus a tautog fishery closure would have less of an impact in summer than in winter.

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 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 would enable Delaware to remain in compliance with the federal guidelines for the management of Tautog, as set forth by the ASMFC;
7. With regard to the proposed amendments to Delaware's regulations concerning Tautog, the Tautog restrictions for 2012 would establish (1) the size limit at 16 inches; (2) the creel limit at 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; and (3) a closure 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;
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 Tautog, as published in the September 1, 2011 *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.

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