



STATE OF DELAWARE  
DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL

OFFICE OF THE  
SECRETARY

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**Secretary's Order No.: 2013-F-0015**

**RE: Approving Final Regulations to Amend 7 DE Admin. Code 3500, for the addition of a new section in the Tidal Finfish Regulations, to wit: 7 DE Admin. Code §3545: *Invasive Finfish***

**Date of Issuance: May 9, 2013**

**Effective Date of the Amendment: June 11, 2013**

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 regulations to amend 7 DE Admin. Code 3500, specifically, for the inclusion of a new section in Delaware's Tidal Finfish regulations, to wit: 7 DE Admin. Code §3545: *Invasive Finfish*. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2012-24. The Department published its initial proposed regulation in the March 1, 2013 *Delaware Register of Regulations*. The Department then held a public hearing on March 21, 2013. The public hearing record remained open at that time for public comment through April 5, 2013.

*Delaware's Good Nature depends on you!*

The proposed new section of the Delaware Tidal Finfish regulations seeks to enable the Department to (1) formally designate snakehead fish, blue catfish, flathead catfish, walking catfish, and grass carp as invasive finfish species; (2) prohibit the unauthorized stocking, possession, purchase, transport or sale of live invasive finfish; and (3) specify fishing equipment and methods to take invasive finfish species. Snakehead fish, blue catfish, flathead catfish, walking catfish and grass carp are all invasive finfish species whose introduction or proliferation are likely to cause economic and/or environmental harm to Delaware's tidal waters. The proposed action will assist in preventing the introduction or proliferation of these invasive fishes in Delaware.

The proposed Amendments were thoroughly vetted by the Department at the public hearing on March 21, 2013, at which time comments supporting this proposal were received from both the Center for the Inland Bays and the Delaware Mobile Surf Fishermen, or DMS Inc. Pursuant to Delaware law, the record remained open for fifteen (15) additional days subsequent to the date of the public hearing, for the purpose of receiving additional public comment. No additional public comment was received by the Department from the public during the post-hearing phase of this proposed promulgation. It should also be noted that all proper notification and noticing requirements concerning this proposed promulgation were met by the Department. Proper notice of the hearing was provided as required by law.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated April 25, 2013 (Report). The Report recommends certain findings and the adoption of the proposed Amendments as attached to the Report as Appendix A.

## **Findings and Discussion**

I find that the proposed Amendments are well-supported by the record developed by the Department, and I adopt the Report to the extent it is consistent with this Order. The Department's experts developed the record and drafted the proposed Amendments. As previously noted, comment voicing support of this proposed action was received from the public that attended the hearing held on March 21, 2013. No additional public comment was received by the Department from the public during the post-hearing phase of this proposed promulgation.

I find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these Amendments. The adoption of this Order will allow Delaware to (1) formally designate snakehead fish, blue catfish, flathead catfish, walking catfish, and grass carp as invasive finfish species; (2) prohibit the unauthorized stocking, possession, purchase, transport or sale of live invasive finfish; and (3) specify fishing equipment and methods to take invasive finfish species.

In conclusion, the following findings and conclusions are entered:

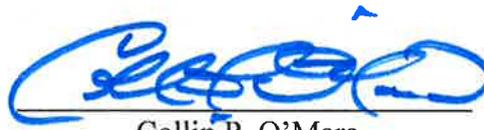
- 1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these proposed Amendments as final;
- 2.) The Department provided adequate public notice of the proposed Amendments, and provided the public with an adequate opportunity to comment on the proposed Amendments, including at the public hearing held on March 21, 2013;
- 3.) The Department held a public hearing on March 21, 2013 in order to consider public comment before making any final decision;

4.) The Department's Hearing Officer's Report, including its recommended record and the recommended Amendments as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;

5.) The adoption of this Order will allow Delaware to amend its existing Tidal Finfish Regulations (7 DE Admin. Code §3500) to include a new section, §3545, *Invasive Finfish*, which will (1) formally designate snakehead fish, blue catfish, flathead catfish, walking catfish, and grass carp as invasive finfish species; (2) prohibit the unauthorized stocking, possession, purchase, transport or sale of live invasive finfish; and (3) specify fishing equipment and methods to take invasive finfish species;

6.) The recommended Amendments should be adopted as final regulation Amendments because Delaware will be enabled to (1) formally identify those finfish species which are categorized as invasive, whose introduction or proliferation are likely to cause economic and/or environmental harm to Delaware's tidal waters; (2) assist in preventing the introduction or proliferation of said invasive fishes in Delaware; and lastly, because (3) the amendments are well supported by documents in the record;

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.



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:** **Proposed Regulation Amendments to 7 DE Admin. Code 3500, for the addition of a new section in the Tidal Finfish Regulations, to wit: 7 DE Admin. Code §3545: Invasive Finfish**

**DATE:** April 25, 2013

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

A public hearing was held on Thursday, March 21, 2013, 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 amendments (“amendments”) to 7 DE Admin. Code 3500, specifically, for the inclusion of a new section in Delaware’s Tidal Finfish regulations, to wit: 7 DE Admin. Code §3545: *Invasive Finfish*. The proposed new section of the Delaware Tidal Finfish regulations seeks to enable the Department to (1) formally designate snakehead fish, blue catfish, flathead catfish, walking catfish, and grass carp as invasive finfish species; (2) prohibit the unauthorized stocking, possession, purchase, transport or sale of live invasive finfish; and (3) specify fishing equipment and methods to take invasive finfish species. Snakehead fish, blue catfish, flathead catfish, walking catfish and grass carp are all invasive finfish species whose introduction or proliferation are likely to cause economic and/or environmental harm to Delaware’s tidal waters. The proposed action will assist in preventing the introduction or proliferation of these invasive fishes in Delaware.

The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 3500, pursuant to 7 Del. C. §§901 and 903(e)(2)a.3, and, specifically, pursuant to 7 Del C. §942(b).

Members of the public attended the hearing held by the Department in this matter on March 21, 2013, and their comments will be addressed below. No additional public comment was received by the Department during the post-hearing phase of this proposed promulgation. 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; and (2) ten documents introduced at the public hearing held on March 21, 2013, 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 amendments, Stewart Michels, developed the record with the relevant documents in the Department's files.

Following the submission of the Department's exhibits into the record at the aforementioned public hearing, Mr. Michels proceeded to offer a brief summary as to the Department's proposed actions in this matter. Based on the best available biological information, the U.S. fish & Wildlife Service (USFWS) added the entire Channidae (snakehead) and Clariidae (walking catfish) families to the list of injurious fish, mollusks, and crustaceans covered under the Lacy Act. Northern snakehead, which are native to Asia, are present in Delaware's tidal and non-tidal waters. The USFWS agreed that snakehead fishes threaten ecological harmony, present major risks to ecosystems and aquatic communities and could eliminate some threatened and endangered species that are restricted in distribution.

In Delaware, the area of greatest concern with respect to snakehead is the valuable recreational largemouth bass fishery, particularly down on the Nanticoke River. Snakeheads could also impact commercially important species as well in the lower salinity areas in the Delaware River if the species were to develop there. There are no known records of walking catfish in Delaware. This family of fishes is native to Asia. Walking catfish have the ability to rapidly reproduce and spread, including overland, and their potential to outcompete native fishes and negatively impact aquaculture make them a threat to Delaware's environment and economy.

Blue catfish (*Ictalurus furcatus*) and flathead catfish (*Pylodictis olivaris*) are native to the Mississippi River drainage. Flathead catfish have already been reported in Delaware's tidal waters, and blue catfish have been found in adjoining states with shared waters. Both species function as top-level predators with broad diets, attain large sizes, and are salinity tolerant. The introduction of these species in nearby states contributed to the extirpation of native ictalurid species such as white catfish and bullheads through competition and predation.

Grass carp (*Ctenopharyngodon idella*), a native to Asia, feed on submerged aquatic vegetation. When adequately controlled, through barriers and sterility, this species can be an effective tool at controlling nuisance aquatic vegetation. Uncontrolled, the species can denude large expanses of beneficial submerged aquatic vegetation. Submerged aquatic vegetation is valuable spawning, nursery and foraging habitat for native centrarchids and other aquatic species. The removal of submerged aquatic vegetation often leads to increased phytoplankton and diminished water quality.

With regard to the taking of these invasive finfish species, the Department proposes that they may be taken with any gear that one is lawfully permitted to use within Delaware. Mr. Michels noted that bow and arrow has been demonstrated to be particularly effective gear for

taking northern snakehead. Mr. Michels further noted that, insofar as review of these proposed measures, the Tidal Finfish Advisory Council has been periodically updated as to the status of this proposed promulgation (most recently at their meeting held the night before the Department's public hearing), and the Council has expressed no objections to any of the proposed measures as noted above.

As previously noted, there were members of the public that attended the hearing held on March 21, 2013, and all comments voiced at that time (from both the Center for the Inland Bays and the Delaware Mobile Surf Fishermen, or, DMS Inc.) were in support of the Department's proposed action. A clarifying question was asked of the Department by Capt. Brian Wazlavek with respect to possession of grass carp, and the Department answered that question fully at the time of the hearing. Pursuant to Delaware law, the record remained open for receipt of public comment for an additional fifteen (15) days subsequent to the date of the public hearing, however, no additional comment was received by the Department during that time. 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 amendments to 7 DE Admin. Code 3500, specifically, for the inclusion of a new section in Delaware's Tidal Finfish regulations, to wit: 7 DE Admin. Code §3545: *Invasive Finfish*, as noted above. 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 all proceedings in a manner required by the law and regulations;
4. The Department held its public hearing in a manner required by the law and regulations;
5. Promulgation of the proposed regulatory amendments to amend its existing Tidal Finfish Regulations (7 DE Admin. Code §3500) to include a new section, §3545, *Invasive Finfish*, will (1) formally designate snakehead fish, blue catfish, flathead catfish, walking catfish, and grass carp as invasive finfish species; (2) prohibit the unauthorized stocking, possession, purchase, transport or sale of live invasive finfish; and (3) specify fishing equipment and methods to take invasive finfish species;
6. The recommended Amendments should be adopted as final regulation Amendments because Delaware will be enabled to (1) formally identify those finfish species which are categorized as invasive, whose introduction or proliferation are likely to cause economic and/or environmental harm to Delaware's tidal waters; (2) assist in preventing the introduction or proliferation of said invasive fishes in Delaware; and lastly, because (3) the amendments are well supported by documents in the record;

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 7 DE Admin. Code 3500, specifically, for the inclusion of a new section in Delaware's Tidal Finfish regulations, to wit: 7 DE Admin. Code §3545: *Invasive Finfish*, as published in the March 1, 2013 *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.



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LISA A. VEST  
Public Hearing Officer

# **APPENDIX “A”**



## **3545 Invasive Finfish.**

(Penalty Section 7 **Del.C.** 936(b)(2))

### 1.0 Definitions.

- 1.1 For the purpose of Tidal Finfish Regulation 3545, the following words and phrases shall have the following meaning ascribed to them, unless the context clearly indicates otherwise:

**“Invasive finfish”** means any species of the family Channidae, including but not limited to the northern snakehead (*Channa argus*) and blotched snakehead (*C. maculata*); blue catfish (*Ictalurus furcatus*); flathead catfish (*Pylodictis olivaris*); walking catfish (*Clarias batrachus*); and grass carp (*Ctenopharyngodon idella*).

**“Director”** means the Director of the Division of Fish and Wildlife.

**“Bow and arrow”** means an instrument with one or more pointed barbed or barbless prongs or blades affixed to a straight shaft and propelled by a stringed mechanical device.

### 2.0 Transportation, Possession and Sale.

- 2.1 It is unlawful to transport, purchase, possess, or sell a live invasive finfish without the written permission of the Director.

### 3.0 Stocking.

- 3.1 It is unlawful to stock any invasive finfish, including the eggs thereof or other biological material, capable of spread, reproduction or propagation, into the tidal waters of this state without the written permission of the Director.

### 4.0 Equipment and Methods Used for Invasive Species Fishing.

- 4.1 It is lawful for a person to take invasive finfish with any fishing equipment or method for which they are licensed, permitted or lawfully exempt.
- 4.2 It is lawful for a licensed, permitted or lawfully exempt recreational angler to take invasive finfish in Delaware’s tidal waters with a bow and arrow.

