

Secretary's Order No.: **2009-F-0013**

RE: Proposed Amendments to Delaware Tidal Finfish Regulations for 2009:
No. 3511: Summer Flounder; and
No. 3507: Black Sea Bass

Date of Issuance: April 14, 2009

Effective Date of the Amendment: May 11, 2009

I. Background:

A public hearing was held on Thursday, March 26, 2009, at 7:00 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on proposed amendments to the existing Delaware Tidal Finfish Regulations for both summer flounder and black sea bass.

Delaware is obligated to cap the summer flounder recreational harvest at 65,000 fish for 2009. The harvest cap has been adjusted up from the previous year's level of 64,000 fish, due to the fact that the latest scientific stock assessment data indicates that overfishing is not occurring in the stock. Three management options for the summer flounder that included potential minimum size limits ranging from 18.5 inches to 19.5 inches with a four fish creel limit (i.e., four fish per day) were presented at the public hearing for comment. Those options were designed to restrict the recreational summer flounder harvest in Delaware during 2009, and they embodied varying levels of risk with regard to Delaware potentially exceeding its allowable harvest quota for 2009, with the smallest size limit being the most risky and the largest minimum size limit being the least risky. Recreational fishermen, bait and tackle dealers will be affected by the option ultimately chosen to manage the summer flounder harvest for 2009.

The coast wide minimum size requirement for recreationally harvested black sea bass, as mandated by the Atlantic States Marine Fisheries Commission's (ASMFC) Fishery Management Plan (FMP) for Summer Flounder, Scup and Black Sea Bass for the 2009 fishing season is 12.5 inches¹. Delaware currently has a twelve (12) inch minimum size limit for recreationally harvested black sea bass. As such, it will be necessary to amend Tidal Finfish Regulation No. 3507 to adjust the current minimum size to comply with the ASMFC FMP.

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

After listening to the public comment received concerning summer flounder proposals during all phases of this promulgation process, and performing an exhaustive review and consideration of all components of the fishery, economic impacts and conservation of the resource, the Department believes "Option 3: 18.5 inches minimum size limit, 4 fish per day" best accomplishes the mandated summer flounder quota of 65,000 harvested fish (or less) with no closure period.

Numerous members of the public attended this hearing on March 26, 2009 to voice their concerns with regard to the Department's proposed changes to the summer flounder regulations, and the same were taken into consideration during the Division's review of this proposed regulatory amendment. It should be noted that no comment was received regarding the proposed amendment to the black sea bass regulations. Afterwards, the Hearing Officer prepared her report regarding this matter and submitted

¹ The federal regulations governing Summer Flounder and Black Sea Bass are managed under one fishery management program by ASMFC. Thus, the Department has historically amended the regulations

the same to the Secretary for review and consideration. Proper notice of the hearing was provided as required by law.

II. Findings:

The Department has provided a reasoned analysis and a sound conclusion with regard to the response given to the public comment received in this matter, as reflected in the Hearing Officer's Report of April 13, 2009, which is attached and expressly incorporated into this Order. Moreover, the following findings and conclusions are entered at this time:

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 these proposed amendments would bring Delaware into compliance with federal guidelines for the management of both summer flounder and black sea bass, since these species come under both federal and state jurisdiction;
7. With regard to the proposed amendments to Delaware's regulations concerning summer flounder, Option #3 will set the summer flounder

concerning both these species jointly as well.

restrictions for 2009 at an 18.5” minimum size limit and a 4-fish daily bag limit, with no seasonal closure. This was the option most supported by the public, based upon comments received by the Department during the public comment phase of this promulgation;

8. With regard to the proposed amendments to Delaware’s regulations concerning black sea bass, the 2009 season would carry the aforementioned restriction of a 12.5” minimum size limit;
9. The Department has reviewed both of 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;
10. The Department’s aforementioned proposed amendments to Delaware’s regulations concerning both summer flounder and Black Sea Bass, as published in the March 1, 2009 *Delaware Register of Regulations* (and as revised with respect to the summer flounder regulations to reflect the 18.5” minimum size limit, 4 fish per day, no closure specifications) and as set forth in Attachment “A” hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, both 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*;
11. The Department shall submit the proposed regulations (again, as revised with respect to the summer flounder regulations to reflect the 18.5” minimum size

limit, 4 fish per day, no closure specifications) as final regulations to the Delaware Register of Regulations for publication in its next available issue, and shall provide written notice to the persons affected by the Order; and that

12. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary.

III. Order:

Based on the record developed, as reviewed in the Hearing Officer's Memorandum dated April 13, 2009 and expressly incorporated herein, it is hereby ordered that the proposed amendments, as revised, to State of Delaware Tidal Finfish Regulation No. 3511 for Summer Flounder for 2009 and Regulation No. 3507 for Black Sea Bass be promulgated in final form in the customary manner and established rule-making procedure required by law.

IV. Reasons:

The promulgation of State of Delaware Tidal Finfish Regulations for both black sea bass and summer flounder for 2009 will bring Delaware into compliance with federal guidelines for the management of these species, since both come under both federal and state jurisdiction with regard to the harvest management of the same. This action, which incorporates Option #3 (18.5" minimum size limit, 4 fish per day, no closure specifications) as Delaware's formal management plan for summer flounder for the 2009 fishing season, will allow Delaware to maintain its harvest cap of 65,000 fish. It is incumbent upon Delaware to be in compliance with the Commission's plan, not only to avoid federal sanctions against Delaware and its fishery, but to protect these species with

these conservation measures to ensure that both summer flounder and black sea bass will continue to be found in Delaware waters in the future.

In developing this regulation, the Department has balanced the absolute environmental need for the State of Delaware to promulgate regulations concerning this matter with the important interests and public concerns surrounding the same, in furtherance of the policy, purposes, and authority of 7 Del. C. §903(e)(2)(a).

/s/ David S. Small
David S. Small
Acting Secretary

MEMORANDUM

TO: David S. Small, Acting Secretary

FROM: Lisa A. Vest, Hearing Officer

RE: Proposed Amendments to Delaware Tidal Finfish
Regulations No. 3511: Summer Flounder for 2008; and No. 3507: Black
Sea Bass

DATE: April 13, 2009

I. Background:

A public hearing was held on Thursday, March 26, 2009, at 7:00 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on proposed amendments to the existing Delaware Tidal Finfish Regulations for both summer flounder and black sea bass.

Delaware is obligated to cap the summer flounder recreational harvest at 65,000 fish for 2009. The harvest cap has been adjusted up from the previous year's level of 64,000 fish, due to the fact that the latest scientific stock assessment data indicates that overfishing is not occurring in the stock. Three management options for the summer flounder that included potential minimum size limits ranging from 18.5 inches to 19.5 inches with a four fish creel limit (i.e., four fish per day) were presented at the public hearing for comment. Those options were designed to restrict the recreational summer flounder harvest in Delaware during 2009, and they embodied varying levels of risk with regard to Delaware potentially exceeding its allowable harvest quota for 2009, with the smallest size limit being the most risky and the largest minimum size limit being the least

risky. Recreational fishermen, bait and tackle dealers will be affected by the option ultimately chosen by the Secretary to manage the summer flounder harvest for 2009.

The coast wide minimum size requirement for recreationally harvested black sea bass, as mandated by the Atlantic States Marine Fisheries Commission's (ASMFC) Fishery Management Plan (FMP) for Summer Flounder, Scup and Black Sea Bass for the 2009 fishing season is 12.5 inches². Delaware currently has a twelve (12) inch minimum size limit for recreationally harvested black sea bass. As such, it will be necessary to amend Tidal Finfish Regulation No. 3507 to adjust the current minimum size to comply with the ASMFC FMP.

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

After listening to the public comment received concerning summer flounder proposals during all phases of this promulgation process, and performing an exhaustive review and consideration of all components of the fishery, economic impacts and conservation of the resource, the Department believes "Option 3: 18.5 inches minimum size limit, 4 fish per day" best accomplishes the mandated summer flounder quota of 65,000 harvested fish (or less) with no closure period. 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.

Numerous members of the public attended this hearing on March 26, 2009 to voice their concerns with regard to the Department's proposed changes to the summer

flounder regulations, and the same were taken into consideration during the Division's review of this proposed regulatory amendment. It should be noted that no comment was received regarding the proposed amendment to the black sea bass regulations. Proper notice of the hearing was provided as required by law.

II. Summary of Hearing Record:

A. Department Presentation/Public Comment:

At the time of the hearing on March 26, 2009, 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 Atlantic States Marine Fisheries Commission (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 (hereinafter referred to as "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

² The federal regulations governing both Summer Flounder and Black Sea Bass are managed under one fishery management program by ASMFC. Thus, the Department has historically amended the regulations concerning both these species jointly as well.

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 at their joint meeting on December 9, 2008, that the states would implement conservation equivalent measures rather than a coast wide management program for summer flounder in 2009. The TAL has been increased for 2009, based upon the latest scientific data that indicates that (1) the stock is not overfished, and that (2) overfishing is not occurring. Thus, Delaware's harvest cap for 2009 will be 65,000 fish, which is slightly higher than the 64,000 fish target in 2008. Additionally, it is estimated that, based on the Marine Recreational Fisheries Statistics survey data, only approximately 33,000 summer flounder were harvested in Delaware during the 2008 fishing season. As such, a number of options can be considered that are designed to restrain the harvest at or below the harvest cap for 2009.

The following were the options presented for consideration at the public hearing on March 26, 2009:

- Option #1: 19.5" minimum size limit, 4 fish per day limit (no closure);
- Option #2: 19.0" minimum size limit, 4 fish per day limit (no closure);
- Option #3: 18.5" minimum size limit, four fish per day limit (no closure).

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 fishing surveys, the economics of Delaware's fishing licensing, the effect of closures upon Delaware's local

bait and tackle businesses, and, most importantly, the ability of the Department to enforce whatever option was ultimately chosen by the Secretary to manage the conservation of this species.

B. Department Review/Analysis Post-Hearing:

Following the hearing, the Department conducted an exhaustive review of all of the various options for management of the 2009 summer flounder harvest. After reviewing the comments received from the public during this promulgation matter, it was clear that Option 3 (18.5” minimum size limit, four fish per day limit, no closure) received the greatest public support of the three options offered by the Department to the public³. Copies of all of the emails received from the public concerning this regulatory matter through close of business on Friday, April 3, 2009 were forwarded to this Hearing Officer for inclusion into the public hearing record in this matter.

For the Secretary’s review, Delaware’s proposed amendments to both these regulatory matters, with the revisions to the proposed regulatory amendments concerning summer flounder having been made to reflect the Department’s choice of Option #3, are expressly incorporated into this report and attached hereto as Attachment “A” for that purpose. It should also 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.

³ All options presented at the public hearing satisfied federal mandates, and the Department made three options available for public comment at that time. Accordingly, the Department’s selection of one of these three options does not result in any substantive change to the amendments originally proposed in this matter.

III. Conclusions and Recommendations:

Based on the above discussion, I conclude that the Department has provided appropriate reasoning regarding the need for the proposed amendments to Delaware's Tidal Finfish Regulation Nos. 3511 (concerning summer flounder size limits, creel limits, and seasons) and 3507 (concerning black sea bass size limits), and has thoroughly addressed any public questions and/or comments provided during the various phases of the record developed in this matter. Accordingly, I recommend promulgation of these proposed amendments in the customary manner provided by law.

Further, I recommend the following findings:

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 these proposed amendments would bring Delaware into compliance with federal guidelines for the management of both summer flounder and black sea bass, since these species come under both federal and state jurisdiction;

7. With regard to the proposed amendments to Delaware's regulations concerning summer flounder, Option #3 will set the summer flounder restrictions for 2009 at an 18.5" minimum size limit and a 4-fish daily bag limit, with no seasonal closure. This was the option most supported by the public, based upon comments received by the Department during the public comment phase of this promulgation;
8. With regard to the proposed amendments to Delaware's regulations concerning black sea bass, the 2009 season would carry the aforementioned restriction of a 12.5" minimum size limit;
9. The Department has reviewed both of 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;
10. The Department's aforementioned proposed amendments to Delaware's regulations concerning both summer flounder and black sea bass, as published in the March 1, 2009 *Delaware Register of Regulations* (and as revised with respect to the Summer Flounder regulations to reflect the 18.5" minimum size limit, 4 fish per day, no closure specifications) and as set forth in Attachment "A" hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, both 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 that

11. The Department shall submit the proposed regulations (again, as revised with respect to the summer flounder regulations to reflect the 18.5” minimum size limit, 4 fish per day, no closure specifications) as final regulations to the Delaware Register of Regulations for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

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