

Secretary's Order No.: 2010-F-0013

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

Date of Issuance: April 15, 2010

Effective Date of the Amendment: May 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. 3511 regarding Summer Flounder. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2010-01. The Department published the proposed amendments in the March 1, 2010 *Delaware Register of Regulations* and held a public hearing on March 23, 2010. The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated April 6, 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. 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 18.5 inches; (2) establish the creel limit at four (i.e., four fish per day); and (3) establish an eighty-day closure of the 2010 season from October 13th through December 31st. This management plan sets the minimum size limit at 18.5 inches, which is the more preferable size limit for this species (given the higher hook-related discard mortality associated with larger size limits for summer flounder). Additionally, the incorporation of a relatively short closed season within this management plan may help to instill and strengthen fishing ethics here in Delaware by encouraging/teaching the next generation of anglers to practice “catch and release” and promote the practice of “letting the big ones go every once and awhile”, thereby helping to fortify and rebuild the State’s summer flounder stock.

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 18.5" minimum size limit, 4 fish per day, and 80-day closure from October 13th through December 31st) 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, 2010, *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, to wit: (1) establish the size limit at 18.5 inches; (2) establish the creel limit at four (i.e., four fish per day); and establish an eighty-day closure of the 2010 season from October 13th through December 31st. This management option 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 80-day closure occurring from October 13th through December 31st. Moreover, this management option will 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.

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

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 6, 2010

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Tuesday, March 23, 2010, at 7:00 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 2010 by establishing (1) the size limit at 18.5 inches; (2) the creel limit at four (i.e., four fish per day); and (3) an eighty-day closure of the season, from October 13th through December 31st.

Delaware is obligated to cap the summer flounder recreational harvest at 80,000 fish for 2010. The harvest cap has been adjusted up from the previous year's level of 65,000 fish, due to the fact that the latest scientific stock assessment data indicates that overfishing is not occurring in this species, and that stock biomass continues to increase and rebuild. Four management options for the summer flounder, which included

potential minimum size limits ranging from 18.5 inches to 19.0 inches, creel limits ranging from 2 to 4 fish, and both open and closed season options, were all 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 promulgation¹. The options set forth by the Department were designed to restrict the recreational summer flounder harvest in Delaware during 2010 to ensure that the 80,000-fish harvest cap is not exceeded. These options were reviewed, analyzed and approved by the Summer Flounder Technical Committee of the Atlantic States Marine Fisheries Commission (“ASMFC”), and determined to meet the analytical specifications as required under the Commission’s conservation equivalency program for summer flounder. 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 2010.

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.

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 31, 2010). 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

¹ 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 four options does not result in any substantive change to the amendments originally proposed in this matter.

impacts and conservation of the resource, the Department believes “Option 1: 18.5 inches minimum size limit, 4 fish per day, with an eighty-day closure from October 13th through December 31st” best accomplishes the mandated summer flounder quota of 80,000 harvested fish (or less) for 2010. 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 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, 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 2010. Thus, Delaware’s harvest cap for 2010 will be 80,000 fish, which again has been adjusted up from the 2009 level of 65,000 fish.

As noted previously, four management options were presented for consideration at the public hearing held on March 23, 2010. These four options were designed to restrict the recreational summer flounder harvest in Delaware during 2010 to ensure that the 80,000 fish harvest cap is not exceeded. Again, all four options have been reviewed, analyzed and approved by the Summer Flounder Technical Committee of the Atlantic States Marine Fisheries Commission (“ASMFC”), and all 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 26, 2009:

- Option #1: 18.5” minimum size limit, 4 fish per day limit, eighty-day closure from October 13th – December 31st;
- Option #2: 18.5” minimum size limit, 3 fish per day limit, sixty-seven-day closure from October 26th – December 31st;
- Option #3: 18.5” minimum size limit, 2 fish per day limit, no closure;
- Option #4: 19.0” minimum size limit, 4 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 landings estimates, 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 ultimately chosen by the Secretary to manage the conservation of this species.

When taking into consideration all of the public comment received by the Department in during all phases of this proposed regulatory matter, it should be noted that the majority of those who provided comment on the record supported either Option 1 (18.5” size limit, 4 fish creel limit per day, and closure of season from Oct. 13th through Dec. 31st) or Option 4 (19.0” size limit, 4 fish creel limit per day, no closure). Both these groups were equally passionate with regard to their opinions on the management options for this species for the 2010 season. Those who voiced support for Option 1, such as Randy Ernst from Millsboro, believed it to be the option which allowed “...opportunity

for the majority of fishermen with the least restrictions”. Others, such as Jamey Cursi, offered the following comment:

Option 1 features a lower size limit and higher bag during the period of peak participation [which] will allow anglers the greatest opportunity to take advantage of the available quota. The closure period falls during a time when most anglers are focused on striped bass and tautog with limited targeted angling for flounder. Options with larger size limits and lower bag limits would likely result in an over-correction of a very modest overage.

Those who offered comment in support of Option 4 were not only in favor of the larger 19.0” size limit, but were very concerned as to the effects of a closed season, albeit a relatively short period (80 days). Tyler Long suggested that Option 4 would “...give anglers a better choice of fish to fish for in the fall months...” and that it would also “...help tackle store owners as well as the party, charter, and private boat businesses...” Still other comments, such as those provided by Amos “Butch” Evans of Old Inlet Bait and Tackle, Inc., voiced concerns over utilizing a closed season as part of the overall management plan for this species. In his written (e-mailed) comments dated March 24, 2010, Mr. Evans stated that he believed “[c]losed seasons are the most unfair management tool. Someone is cut out of fishing time....October and November are prime months for locals and vacationers alike”. Mr. Evans went on to comment that

“[i]ncreasing the minimum size by a half inch would be a wise move in an effort to guard against going over the quota again. We may not be afforded the same break next year.”

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 various options for management of the 2010 summer flounder harvest. After reviewing the comments received from the public during this promulgation matter, it was clear that Option 1 (18.5” minimum size limit, four fish per day limit, and 80 day closure from Oct. 13th – Dec. 31st) received the greatest public support of the four options offered by the Department to the public. The Department believes Option 1 to be a sound and effective management option with regard to summer flounder as well, and recommends the same to be promulgated at this time for the 2010 season, as it has already been approved by ASMFC’s Summer Flounder Technical Committee, and has been determined to meet the analytical specifications as required under the Commission’s conservation equivalency program for summer flounder.

In further support of this decision, the Department notes that, in comparison to the other management options available, Option 1 sets the minimum size limit at 18.5”, and not 19.0”, which is a more preferable size for this species². Additionally, the Department hopes that, by having a relatively short closed season, it may help to instill and strengthen fishing ethics here in Delaware by encouraging/teaching the next generation of anglers to practice catch-and-release and get into the habit of “letting the big ones go every once and awhile”, which will, in turn, also help to fortify and rebuild the State’s summer flounder stock. With regard to the concerns voiced by the public regarding the

² The scientific data available suggests that 19” summer flounder are less abundant in Delaware. Moreover, the larger minimum size limit would result in higher hook-related discard mortality. Thus, the smaller size limit of 18.5” is preferable with regard to the best management of this species.

80-day closure, it is important to note that, historically, only 1-2% of Delaware's annual summer flounder catch is typically landed during the months of October through December. Also, recreational anglers that are fishing in Delaware waters during those months are, at that point, beginning to fish for other species, such as striped bass and/or tautog (neither of which have a closed season during that time), and therefore this management option does not deprive fishermen of the enjoyment of summer flounder fishing during the typical peak of the season. Similarly, tourism in Delaware waters is not at a high point during the months of October through December, and so Delaware will not suffer a marked decrease in tourism dollars as a result of the 80-day closure associated with Option 1.

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 #1, are expressly incorporated into this report and attached hereto as Appendix "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.

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. 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, Option #1 will establish the summer flounder restrictions for 2010 at (1) minimum size limit at 18.5 inches; (2) creel limit at

