

Secretary's Order No.: 2010-F-0021

**RE: Approving Final Regulations to Amend 7 DE Admin. Code 3705,
 *Delaware Black Sea Bass: Size Limit, Trip Limits, Seasons, and Quotas***

Date of Issuance: July 20, 2010

Effective Date of the Amendment: August 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 regulations to amend 7 DE Admin. Code 3507, *Delaware Black Sea Bass: Size Limit, Trip Limits, Seasons, and Quotas*. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2010-13. The Department published its initial proposed regulation Amendments in the May 1, 2010 *Delaware Register of Regulations*, and held a public hearing on May 21, 2010. The public hearing record remained open at that time for public comment through May 31, 2010.

Subsequent to the Department's initial publication of its proposed regulation Amendments on May 1, 2010, but prior to the public hearing held on May 21, 2010, the Flounder, Scup and Black Sea Bass Management Board of the Atlantic States Marine Fisheries Commission reviewed the final landings data on black sea bass. These data indicated that the original plan calling for 44% harvest reduction of this species would not be necessary. Instead, updated management measures were developed and approved

that anticipated harvest reduction of this species by 26%. The new proposal maintained the original season, but also added an additional season, to extend through the months of November and December. The new season, although slightly more conservative than required, was developed as a buffer to account for the uncertainty and the effectiveness in the new regulations.

As required, in order to remain in compliance with the above referenced ASMFC Fisheries Management Plan for black sea bass and be consistent with all other coastal states, the Department's Division of Fish and Wildlife is proposing to adopt the regulation that was approved by the Board as noted above, and to *revise* the original draft regulation to include additional language which reflects the longer open season. Under the *revised* proposed regulations, the season will be open from May 22nd through October 11th, and then again from November 1st through December 31st. Again, the Board is requiring states to implement this seasonal closure in order to keep the ASMFC's 2010 recreational harvest cap of 1.8 million pounds from being exceeded. The current 12.5" minimum size and 25 fish creel limit remain in place at this time.

The *revised* proposed Amendments were thoroughly vetted by the Department at the public hearing on May 21, 2010. No comment was received by the Department subsequent to the holding of said public hearing, and thus no additional revisions have been made to the proposed *revised* regulation Amendments.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated July 1, 2010 (Report). The Report recommends certain findings and the adoption of the proposed *revised* Amendments as attached to the Report as Appendix A.

Findings and Discussion

I find that the *revised* 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 *revised* Amendments. Throughout the regulatory development process regarding this promulgation, the Department received public comment, as noted in the Report, and the same was fully addressed by Department staff in a thorough and balanced manner, accurately reflecting the information as contained in the public hearing record which was developed in this matter.

I find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these *revised* Amendments. With the adoption of this Order, Delaware will (1) allow Delaware to remain in compliance with the Summer Flounder, Scup and Black Sea Bass Fishery Management Plan, as implemented by both the NMFS and the ASMFC; (2) implement additional regulatory measures necessary to prevent the 2010 harvest cap from being exceeded; and (3) make Delaware's black seas bass fishing regulations identical to management measures adopted by surrounding states and those likely to be in place in federal waters.

In conclusion, the following findings and conclusions are entered:

- 1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these *revised* 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 both the initial proposed Amendments, as well as the proposed *revised* Amendments, including at the public hearing held on May 21, 2010;

3.) The Department held a public hearing on May 21, 2010 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 *revised* Amendments as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;

5.) The recommended *revised* Amendments should be adopted as final regulation Amendments because Delaware will be able to (1) mirror its black sea bass management measures with those of surrounding states, as well as those likely to be in place in federal waters; (2) remain in compliance with the aforementioned Fishery Management Plan for this species, as implemented by both the NMFS and the ASMFC; and lastly, because (3) the amendments are well supported by documents in the record;

6.) 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.

/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: **Proposed Regulations Amendments to 7 DE Admin. Code 3507, Delaware Black Sea Bass: Size Limit, Trip Limits, Seasons, and Quotas**

DATE: July 1, 2010

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Friday, May 21, 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 amendments ("amendments") to 7 DE Admin. Code 3507, *Delaware Black Sea Bass: Size Limit, Trip Limits, Seasons, and Quotas*. The Department is proposing revisions to Delaware Tidal Finfish Regulation No. 3507 to include a recreational season rather than a year-round open season. This action will make Delaware's black sea bass fishing regulations identical to management measures adopted by surrounding states and those likely to be in place in federal waters where almost all of the landings are generated.

The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 3507, pursuant to 7 Del. C. §§901(b) and 903(e)(2)a.3.

Comment was received by the Department regarding this proposed promulgation, and the same will be discussed in detail 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 the following documents: (1) a verbatim transcript; and (2) eight documents introduced at the public hearing held on May 21, 2010, and marked by this Hearing Officer accordingly as Department Exhibits 1-8. The Department's person primarily responsible for the drafting and overall promulgation of these proposed 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 at the aforementioned public hearing, Mr. Shirey proceeded to offer a brief summary as to the Department's proposed actions in this matter. Black sea bass are a highly sought after marine species that range from Florida to the Gulf of Maine. They occur in both State and Federally managed waters, and are one of four (4) species that are jointly managed by the Atlantic States Marine Fisheries Commission ("ASMFC") and the Mid-Atlantic Fisheries Management Council ("MAFMC").

In Delaware, black sea bass occur throughout the Delaware Bay and ocean waters, but landings are almost entirely from offshore waters, beyond Delaware's three-mile limit. The Delaware Bay and other inshore areas function primarily as nursery habitat, with fish in excess of the 12.5" minimum size seldom encountered. Black sea bass are considered a temperate reef fish that commonly inhabit rocky bottoms near reef sites, wrecks, and jetties. Delaware recreational black sea bass landings average approximately

74,000 fish per year, and usually rank in the top five of the fish most commonly landed in this state.

Traditionally, most of Delaware's recreational black sea bass landings occur during the months of June through October. The National Marine Fisheries Service ("NMFS") establishes a Total Allowable Landings ("TAL") limit for this species, based on the recommendations of its scientific and statistical committee¹. The annual quota is divided between recreational and commercial sectors, 51% to 49%, respectively. Recreational fisheries management measures include the same combination of size, bag limit, and seasons set for the entire coast. The landings of the recreational fisheries are estimated through the Marine Recreational Fisheries Statistics Survey ("MRFSS").

In 2009, the estimated total recreational landings were projected to greatly exceed the TAL well before the end of the season. In an effort to prevent possible overfishing, NMFS implemented an emergency 180-day closure effective October 5, 2009. As a result of these early projections, the Flounder, Scup and Black Sea Bass Management Board of ASMFC ("Board") adopted a measure that would reduce the harvest by an estimated 44%. This reduction was to be achieved through an open season that would extend from May 22nd through September 12th. This season was the season that was originally proposed in the Start Action Notice ("SAN") and in the draft regulation that was posted in the Delaware Register of Regulations on May 1, 2010.

After the aforementioned Board reviewed the final landings data, it was determined that the total harvest was not as high as projected, but the TAL was still exceeded. These new landings estimates were made available at the end of April.

¹ This committee, composed of a group of independent scientific experts, established a recommended harvest level based on the most recent information on the status of the sea bass stocks and landings data.

Instead of a 44% reduction, it was determined that it would only be necessary to reduce recreational harvest by 21.4%. In early May, the Board developed and approved management measures that were anticipated to reduce harvest by 26%. The new proposal maintained the May 22nd through September 12th season, but it added an additional season, to extend through the months of November and December. Although the new season is slightly more conservative than what was required, it was developed as a buffer to account for the uncertainty and the effectiveness in the new regulations.

As required, in order to remain in compliance with the Interstate Fisheries Management Plan for black sea bass, the Department's Division of Fish and Wildlife is proposing to adopt the regulation that was approved by the Board as noted above, and to *revise* the original draft regulation to include additional language which reflects the longer open season. Under the *revised* proposed regulations, the season will be open from May 22nd through October 11th, and then again from November 1st through December 31st. Again, the Board is requiring states to implement this seasonal closure in order to keep the ASMFC's 2010 recreational harvest cap of 1.8 million pounds from being exceeded. The current 12.5" minimum size and 25 fish creel limit remain in place at this time.

It should be noted that no members of the public attended the hearing held on May 21, 2010. Only one comment was received from the public at all (via e-mail), but that comment concerned suggestions and preferences for black sea bass creel limits and size limits, neither of which are the subject 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.

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 *revised* amendments to 7 DE Admin. Code 3507, *Delaware Black Sea Bass: Size Limit, Trip Limits, Seasons, and Quotas*, 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. The Department considered all timely and relevant public comments in making its determination;
6. Promulgation of the proposed *revised* regulatory amendments to 7 DE Admin. Code 3507, *Delaware Black Sea Bass: Size Limit, Trip Limits, Seasons, and Quotas*, will (1) allow Delaware to remain in compliance with the Summer Flounder, Scup and Black Sea Bass Fishery Management Plan, as implemented by both the NMFS and the ASMFC; (2) implement additional regulatory measures necessary to prevent the 2010 harvest cap from being exceeded; and (3) make Delaware's black seas bass fishing regulations

identical to management measures adopted by surrounding states and those likely to be in place in federal waters;

7. The Department has reviewed these proposed *revised* 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 *revised* regulatory amendments concerning *Delaware Tidal Finfish Regulation 3507*, as published in the May 1, 2010 *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 *revised* 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