



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

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Secretary's Order No.: 2013-F-0038

**RE: Approving Final Regulations to Amend 7 DE Admin. Code 3507,
 Delaware Black Sea Bass: Size Limit, Trip Limits, Seasons, and Quotas
 (pursuant to E.O. 36 DNREC Regulatory Review)**

Date of Issuance: October 14, 2013

Effective Date of the Amendment: November 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 3507, *Delaware Black Sea Bass: Size Limit, Trip Limits, Seasons, and Quotas*, as a result of the Department's exhaustive review of its existing Fish and Wildlife Regulations, pursuant to Governor Markell's Executive Order No. 36 (hereinafter referred to as "E.O. 36"). In June of 2012, Governor Markell issued E.O. 36, which directed all state agencies, including DNREC, to perform a focused review of their existing, older regulations, identify and remove regulatory hurdles, and modernize and streamline any regulations

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that may be outdated or unnecessarily burdensome, while maintaining the state's commitment to improving public health and environmental performance.

Among the considerations of the Department's aforementioned focused review of its existing regulations under E.O. 36 was to ensure that the same continued to serve the original purpose for which they were adopted, and to provide for improvements. As a result, the Department's review found that the current black sea bass regulations, as found in 7 DE Admin. Code 3507, contain unnecessary qualifying criteria and do not adequately address black sea bass commercial permit transferability. The proposed amendments to 7 DE Admin. Code 3507 will better accommodate the needs of Delaware's commercial black sea bass permittees.

The proposed amendments to Delaware's existing black sea bass regulations are needed because several of the current permit holders will be retiring from commercial fishing, and the Department wants to allow other Delawareans to obtain these permits. The Atlantic States Marine Fisheries Commission's Interstate Fisheries Management Plan for Black Sea Bass allocates Delaware an annual commercial black sea bass quota. This proposed regulatory action will assure that there will continue to be Delaware permit holders to harvest this valuable resource.

The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2013-18 (E.O.36). The Department published its initial proposed regulation Amendments in the July 1, 2013 *Delaware Register of Regulations*, and held a public hearing on July 25, 2013.

The proposed Amendments were thoroughly vetted by the Department at the aforementioned public hearing on July 25, 2013. No member of the public attended said

hearing. 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 public comment was received by the Department from the public at any time during the course 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 September 28, 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, no members of the public attended the hearing held on July 25, 2013, and no public comment was received by the Department from the public at any time during the course 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 better accommodate the needs of Delaware's commercial black sea bass permittees by removing existing unnecessary qualifying criteria and adequately addressing black sea bass commercial permit transferability.

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 initial proposed Amendments, including at the public hearing held on July 25, 2013;

3.) The Department held a public hearing on July 25, 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 better accommodate the needs of Delaware's commercial black sea bass permittees by removing existing unnecessary qualifying criteria and adequately addressing black sea bass commercial permit transferability;

6.) The recommended Amendments should be adopted as final regulation Amendments because Delaware will be able to (1) assure that there will continue to be Delaware permit holders to harvest black sea bass commercially; (2) further the purpose of Governor Markell's initiatives as set forth in Executive Order No. 36, to wit: strengthen Delaware's economy by modernizing and streamlining regulations that may be outdated or unnecessarily burdensome, while maintaining the state's commitment to improving public health and environmental performance; 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 ^{NS}
Public Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: **Proposed Regulation Amendments to Amend 7 DE Admin. Code 3507:
Black Sea Bass Limit: Trip Limits; Seasons; Quotas
(pursuant to E.O. 36 DNREC Regulatory Review)**

DATE: September 28, 2013

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Thursday, July 25, 2013, at 6:30 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: *Black Sea Bass Limit: Trip Limits; Seasons; Quotas*. This public hearing was held as a result of the Department's review of its existing regulations, pursuant to Governor Markell's Executive Order No. 36 (hereinafter referred to as "E.O. 36"). In June of 2012, Governor Markell issued E.O. 36, which directed all state agencies, including DNREC, to perform a focused review of their existing, older regulations, identify and remove regulatory hurdles, and modernize and streamline any regulations that may be outdated or unnecessarily burdensome, while maintaining the state's commitment to improving public health and environmental performance.

Among the considerations of the Department's aforementioned focused review of its existing regulations under E.O. 36 was to ensure that the same continued to serve the original purpose for which they were adopted, and to provide for improvements. As a result, the

Department's review found that the current black sea bass regulations, as found in 7 DE Admin. Code 3507, contain unnecessary qualifying criteria and do not adequately address black sea bass commercial permit transferability. The proposed amendments to 7 DE Admin. Code 3507 will better accommodate the needs of Delaware's commercial black sea bass permittees.

The proposed amendments to Delaware's existing black sea bass regulations are needed because several of the current permit holders will be retiring from commercial fishing, and the Department wants to allow other Delawareans to obtain these permits. The Atlantic States Marine Fisheries Commission's Interstate Fisheries Management Plan for Black Sea Bass allocates Delaware an annual commercial black sea bass quota. This proposed regulatory action will assure that there will continue to be Delaware permit holders to harvest this valuable resource.

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), 903(f). The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2013-18 (E.O.36). The Department published its initial proposed regulation Amendments in the July 1, 2013 *Delaware Register of Regulations*, and held the public hearing on July 25, 2013. It should be noted that no members of the public attended the aforementioned hearing held by the Department on July 25, 2013, nor was any public comment received by the Department at any time during the course of this 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) nine documents introduced at the public hearing held on July 25, 2013, and marked by

this Hearing Officer accordingly as Department Exhibits 1-9. 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 hearing held on July 25, 2013, Mr. Michels proceeded to offer a brief summary as to the Department's proposed actions for the benefit of the record developed in this matter. As referenced above, the Department's review of existing Tidal Finfish regulations found that 7 DE Admin. Code 3507 pertaining to black sea bass failed to adequately provide for the transferability of commercial black sea bass permits.

The commercial black sea bass fishery is managed through a joint Atlantic States Marine Fisheries Commission and federal fishery management plan using quota-based management and a limited commercial entry system. Under the Fishery Management Plan, to cap effort in the fishery, entry into the commercial black sea bass fisheries was limited to harvesters that could demonstrate a history in the fishery, and Delaware's present regulation reflects that by establishing qualifying criteria. Several of the current qualified Delaware black sea bass landing permit holders, however, will be retiring from commercial fishing, and there are presently no provisions in existing regulations that would allow them to transfer their black sea bass landing permits.

The Department wants to provide an opportunity for other Delawareans to benefit from the continued responsible harvest of our Atlantic States Marine Fisheries Commission-issued commercial Black Sea Bass quota. To accommodate Delaware commercial Black Sea Bass landing permit transfers, the Department is proposing in 7 DE Admin. Code 3507, Section 3, to

allow landing permit transfers to individuals eligible for Delaware's other commercial fishing licenses and permits as established in 7 *Del.C.*, Chapter 29.

The current qualifying criteria contained in 7 DE Admin. Code 3507, Section 5, has resulted in Delaware having six eligible commercial black sea bass potters. With these six eligible potters having been clearly established for approximately ten (10) years, the Department is seeking to eliminate the qualifying language and simply limit the permits to those six individuals holding a permit in 2013. Under the proposed changes, Section 5 will allow the present permit holders to transfer their black sea bass permit for the pot fishery to those individuals that qualify for our other commercial fishing licenses and permits, again, according to the provisions found in 7 *Del.C.*, Chapter 29.

Similarly, the Department proposes to amend 7 DE Admin. Code, Section 6, pertaining to the commercial black sea bass hook and line fishery. This proposed change will remove the qualifying criteria and allow the present thirteen commercial sea bass hook and line anglers to also transfer their black sea bass landing permits to qualified individuals, according to the eligibility requirements found in 7 *Del.C.*, Chapter 29.

As noted previously, no member of the public attended the aforementioned hearing held by the Department on July 25, 2013, nor was any public comment received by the Department at any time during the course of this promulgation.

For the Secretary's review, and in order for the Secretary to gain a thorough understanding of this proposed promulgation, copies of the above-referenced proposed amendments are attached hereto as Appendix "A", and the same are expressly incorporated into this Hearing Officer's Report. It should be noted that the Department adhered to all appropriate Delaware statutes and the regulatory development process in this matter, and that the Department

has met the required public notice obligations regarding these proposed amendments. It should also be noted that the Department has reviewed this proposed promulgation 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.

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 3507: *Black Sea Bass Limit: Trip Limits; Seasons; 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. Promulgation of the proposed regulatory amendments to 7 DE Admin. Code 3507: *Black Sea Bass Limit: Trip Limits; Seasons; Quotas* will enable Delaware to better accommodate the needs of Delaware's commercial black sea bass permittees by removing existing unnecessary qualifying criteria and adequately addressing black sea bass commercial permit transferability;

6. Additionally, promulgation of this proposed regulatory action by the Department will further the purpose of Governor Markell's initiatives as set forth in Executive Order No. 36, to wit: to strengthen Delaware's economy by modernizing and streamlining regulations that may be outdated or unnecessarily burdensome, while maintaining the state's commitment to improving public health and environmental performance;
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 to 7 DE Admin. Code 3507: *Black Sea Bass Limit: Trip Limits; Seasons; Quotas*, as published in the July 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.



LISA A. VEST
Public Hearing Officer

APPENDIX “A”

3500 Tidal Finfish

3507 Black Sea Bass Size Limit; Trip Limits, Seasons; Quotas

3.0 It shall be unlawful for any commercial fisherman to land, to sell, trade and or barter any black sea bass in Delaware unless authorized by a black sea bass landing permit issued by the Department. The black sea bass landing permit shall be presumed to transfer with the vessel whenever it is bought, sold, or otherwise transferred to an eligible transferee as defined in 7 Del.C. §2903, unless there is a written agreement, signed by the transferor/seller and transferee/buyer, or other credible written evidence, verifying that the transferor/seller is retaining the vessel's fishing and permit history for purposes of replacing the vessel.

5.0 The Department may only issue a black sea bass landing permit for the pot fishery to a person who is the owner of a vessel permitted by the National Marine Fisheries Service in accordance with 50 CFR §§ 648.4 ~~and who had applied for and secured from the Department a commercial food fishing license and has a reported landing history in either the federal or state reporting systems of landing by pot at least 10,000 pounds of black sea bass during the period 1994 through 2001. Those individuals that have landing history only in the federal data base must have possessed a state commercial food fishing license for at least one year during the time from 1994 through 2001. pertaining to black sea bass and was either issued a black sea bass landing permit by the Department in 2013 or was the transferee of black sea bass landing permit issued by the Department as per 3507 (3.0). The number of black sea bass landings permits issued by the Department for the pot fishery in any year will not exceed six.~~

6.0 The Department may only issue a black sea bass landing permit for the commercial hook and line fishery to a person who has applied for and secured from the Department a commercial food fishing license and a fishing equipment permit for hook and line and was either issued a black sea bass landing permit by the Department in 2013 or was the transferee of black sea bass landing permit issued by the Department as per 3507 (3.0) ~~and submitted landings reports in either the federal or state landing report systems for black sea bass harvested by hook and line during at least one year between 1994 and 2001. The number of black sea bass landings permits issued by the Department for the commercial hook and line fishery in any year will not exceed thirteen.~~

1 DE Reg.1767 (5/1/98)

2 DE Reg. 1900 (4/1/99)

3 DE Reg. 1088 (2/1/00)

4 DE Reg. 1665 (4/1/01)

4 DE Reg. 1859 (5/1/01)

5 DE Reg. 2142 (5/1/02)

6 DE Reg. 348 (9/1/02)

6 DE Reg. 1230 (3/1/03)

