



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL**

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Secretary's Order No.: 2014-F-0017

**Approving Final Regulation Amendments to 7 DE Admin. Code 3521:
Weakfish Size Limit; Possession Limit; Seasons**

Date of Issuance: August 11, 2014

Effective Date of the Amendment: September 11, 2014

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. 3521 regarding Weakfish. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2014-03. The Department published the proposed amendments in the May 1, 2014 *Delaware Register of Regulations* and held a public hearing on May 22, 2014. The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated March 1, 2014 (Report). The Report recommends certain findings and the adoption of the proposed regulation amendments as attached to the Report as Appendix A.

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Findings and Discussion

I find that the proposed regulation amendments are 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 amendments. As a result of the regulatory development process, the Department received public comments supporting this proposed regulation, as discussed in the Report.

The proposed amendments to Delaware's existing regulations for this species are consistent with the Interstate Fisheries Management Plan for Weakfish as adopted by the ASMFC. Moreover, the proposed management strategy will better accommodate commercial fishing needs while continuing to protect the weakfish resource and providing bait for recreational anglers. It should also be noted that all proper notification and noticing requirements concerning this proposed promulgation were met by the Department.

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 regulation amendments as final;
- 2.) The Department provided adequate public notice of the aforementioned proposed amendments, and provided the public with an adequate opportunity to comment on said proposed amendments, including at a public hearing;
- 3.) The Department held a public hearing on the proposed regulation amendments 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 proposed regulation amendments, as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;

5.) The recommended final proposed amendments do not reflect any change from the initial proposed amendments as published in the May 1, 2014, *Delaware Register of Regulations*;

6.) Promulgation of the proposed regulatory amendments to Delaware Tidal Finfish Regulation No. 3521 will enable Delaware to remain consistent with the Interstate Fisheries Management Plan, as adopted by the ASMFC, to manage Weakfish in Delaware, to wit: (1) modification of the commercial weakfish management approach of intermittent net closures from May 1 through June 30 to an uninterrupted closure (all gears) from May 1 through June 2; (2) allowance of a weakfish bycatch during the closure of up to 100 pounds per day or trip for the commercial gill net fishery and accommodates commercial fishing for species other than weakfish (e.g., Atlantic menhaden and black drum); (3) no impact to the gill net restrictions as established in 7 *Del.C.* §923; (4) maintenance of existing recreational closures, as well as catch limits during the open season in all fisheries; and (5) elimination of mailed notices to netters, as the dates are annually published in the Delaware Fishing Guide, which is widely available in print, and is also posted online;

7.) The proposed regulation amendments are well supported by documents in the record; and that

8.) The Department shall submit this Order approving the final regulation amendments 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.

A handwritten signature in black ink, appearing to read "David S. Small", written over a horizontal line.

David S. Small
Secretary

HEARING OFFICER'S REPORT

TO: The Honorable David S. Small
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 3521: Weakfish Size Limits; Possession Limit; Seasons**

DATE: August 1, 2014

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Thursday, May 22, 2014, 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 regulatory amendments (“amendments”) to Delaware Tidal Finfish Regulation No. 3521 regarding the management of Weakfish. The Department’s proposed regulatory amendments would modify Delaware’s commercial weakfish management approach of intermittent net closures from May 1 through June 30 to an uninterrupted closure (all gears) from May 1 through June 2. The amendment proposes a weakfish bycatch allowance during the closure of up to 100 pounds per day or trip for the commercial gill net fishery and accommodates commercial fishing for species other than weakfish (e.g., Atlantic menhaden and black drum). It should be noted that the proposed action will not impact the gill net restrictions established in 7 *Del.C.* § 923, and existing recreational closures, as well as catch limits, during the open season in all fisheries will be maintained. Finally, the action proposes to eliminate mailed notices to netters, as the dates are annually published in the Delaware Fishing Guide, which is widely available in print and posted online.

The Atlantic States Marine Fisheries Commission (“ASMFC”) has determined that the proposed management strategy is consistent with Amendment III and Addendum IV to Amendment IV of the Interstate Fishery Management Plan for Weakfish. Further, the concept of the proposed action was endorsed by the Tidal Finfish Advisory Council at its January 15, 2014 meeting.

The Department has the statutory basis and legal authority to act with regard to the proposed regulatory amendments to Delaware Tidal Finfish Regulation No. 3521, pursuant to 7 *Del.C.* §§901(c & d) and 903(e)(2)(a). Comment was received by the Department regarding this proposed promulgation, both prior to and at the time of the public hearing held on May 22, 2014, 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 a verbatim transcript and fifteen documents introduced at the public hearing and marked by this Hearing Officer accordingly as Department Exhibits 1-15. The Department’s persons primarily responsible for the drafting and overall promulgation of these proposed regulatory amendments, Stewart Michels and John Clark, developed the record with the relevant documents in the Department’s files.

Following the submission of the Department’s exhibits into the record by Mr. Michels, Mr. Clark proceeded to offer a brief summary as to the history of Weakfish management in Delaware, and the purpose behind the present proposed promulgation. Weakfish, also known as “sea trout” or “trout” (although certainly not the same species as the freshwater trout that appears in Delaware’s tidal streams), is the official State Fish of Delaware. In the 1980’s, Weakfish supported a tremendous fishery in Delaware, popular with both recreational and commercial

fishermen. Since that time, however, the Weakfish population has significantly declined. Back in 1980, Weakfish were at a very high level of abundance in Delaware, with over 200 million pounds of spawning stock biomass. During the 1980's and beyond, however, there began a sharp decline, caused mainly by overfishing. Once the population dropped below the threshold for management regulations, amendments were made to the Fisheries Management Plan for Weakfish. Fishing restrictions were implemented, and the stock began to recover. The Weakfish population grew to above the threshold level, and by the mid 1990's Delaware had some good landings, which were a reflection of this increase in biomass. Subsequently, however, another sharp decline of this species began, and that same population decline in the 1990's was the instigation for management action for this species.

The difference between the sharp decline of Weakfish in the 1980's and the current, ongoing decline of this species' population is that the decline of the 1980's was caused by fishing mortality, whereas the current decline seems to be caused by an increase in natural mortality. The Department believes the Weakfish's current increase in natural mortality is most likely the result of increases in several other predator species, including, but not limited to, Striped Bass and Spiny Dogfish, as well as competition with similar species such as Atlantic Croaker. Nevertheless, it has historically been the opinion of the Department that a reduction in fishing mortality would poise the Weakfish stock for a quicker recovery, once natural mortality returns to more normal levels.

In years past, Delaware chose to go with net closure days to keep the nets out of the water on weekends during the peak recreational weakfish period and yet still allow netters to catch plenty of weakfish. Since 1997, Delaware has required nets to be out of the water for one week in May, one week in June, and all the weekends in May and June, in order to meet the

compliance requirements of Amendment III of the Fishery Management Plan for Weakfish (it should be noted that weekends are defined in Delaware regulations as Friday through Sunday). In addition to the periods of time noted above, Delaware already had closure days listed within the State Code, to wit: gill nets must be out of the water every weekend, beginning on May 10 from midnight Saturday until 4:00 p.m. Sunday. Thus, the Weakfish management plan added 17 closure days in 2013 to the state-mandated closure days.

The removal of all gill nets from the water during the aforementioned closure days has reduced the landings of other species. Black drum are found in Delaware in May and June, but these closure days limit the ability of netters to pursue black drum during this brief window of opportunity (black drum are typically intercepted with gill nets having a mesh size that would preclude the capture of weakfish). Additionally, fresh Atlantic Menhaden from the gill net fishery is in high demand during May as bait for striped bass, particularly on weekends. Menhaden caught in gill nets on Thursdays cannot be sold as fresh bait on Sunday. Thus, there is a huge market advantage for the netters to be able to gill net on Fridays.

Upon entering into discussions with the Tidal Finfish Advisory Council regarding Delaware's proposal to amend its current Weakfish regulations, the Department was instructed to go to ASMFC and request permission to utilize an alternative state management regime for this species, per Amendment III of the Weakfish Fishery Management Plan. This alternative management plan would enable Delaware to switch from closure days to a closed season. In order to maintain compliance with the ASMFC, Delaware must estimate the length of a closed weakfish season that would be the equivalent in reduction in harvest to the current closure days.

Thus, the Department followed ASMFC guidelines when estimating the proposed closed season. Such season must occur during the months of the maximum weakfish landings during the time period of 1989 to 1991. During that period, the majority of weakfish in Delaware were landed from April through June, with the peak landings month being May. After thoroughly reviewing all relevant data concerning this matter, the Department now proposes a closed season from May 1 to June 2, which would give the required 32% reduction in fishing mortality, as required by the aforementioned Plan. During this closed season, there will be no closure days, other than those required by Delaware law. Additionally, during the proposed closed season weakfish may be landed as bycatch from gill nets, as long as they are not more than 50% of the total catch of the day, up to 100 pounds.

There were two members of the public that offered comment at the public hearing held on May 22, 2014. Leonard Voss offered support for the Department's proposed amendments to its Weakfish regulations, noting that he believed the same will provide more opportunity for those netters who fish for drum earlier in May, as well as also enabling the Department to more effectively enforce the bass fishery season. In contrast, Gregory Jackson voiced concerns about the aforementioned proposed Weakfish amendments, stating that he feels the Department is "taking from me during the whole month of May". Prior to the public hearing by DNREC in this matter, Mr. Jackson submitted written comment, wherein he advised that he believed the proposed amendments, as written, would "...shut the commercial hook and line fisherman down May 1 to June 2."

In response to Mr. Jackson's comments voiced at the hearing, Mr. Clark explained again that the Department had to draft the proposed amendments to the current Weakfish regulations based upon the aforementioned Weakfish Fisheries Management Plan, as set forth by the ASFMC. The Department then reminded those in attendance at the public hearing of the importance of fishermen reporting their catch, as those reports greatly influence the manner by which the Department manages such species. Based upon the Department's statistical data in the present matter, the Weakfish commercial hook and line catch in May for the years 2010 and 2011 was zero. In 2012, the May catch was reported as 12 pounds, and in 2013 the May catch was 11 pounds. Thus, the Department believes that the proposed amendments to Delaware's current Weakfish regulations are neither capricious nor arbitrary, and are adequately supported by the Department's logical reasoning and scientific data, including, but not limited to, the aforementioned information generated from Weakfish catch reports from 2010 to present.

Again, the proposed amendments to Delaware's existing regulations for this species are consistent with the Interstate Fisheries Management Plan for Weakfish as adopted by the ASMFC, and the Department believes the proposed management strategy will better accommodate commercial fishing needs while continuing to protect the weakfish resource and providing bait for recreational anglers. 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 regulatory amendments to Delaware Tidal Finfish Regulation No. 3521, concerning the management of Weakfish. 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. 3521 would enable Delaware to remain consistent with the Interstate Fisheries Management Plan, as adopted by the ASMFC, to manage Weakfish in Delaware, to wit: (1) modification of the commercial weakfish management approach of intermittent net closures from May 1 through June 30 to an uninterrupted closure (all gears) from May 1 through June 2; (2) allowance of a weakfish bycatch during the closure of up to 100 pounds per day or trip for the commercial gill net fishery and accommodates commercial fishing for species other than weakfish (e.g., Atlantic menhaden and black drum); (3) no impact to the gill net restrictions as established in *7 Del.C. §923*; (4) maintenance of existing recreational closures, as well as catch limits during the open season in all fisheries; and (5) elimination of mailed notices to netters, as the dates are annually published in the Delaware Fishing Guide, which is widely available in print, and is also posted online;
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 the management of Weakfish, as published in the May 1, 2014 *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"

3521 Weakfish Size Limits; Possession Limits; Seasons.

(Penalty Section 7 Del.C. §936(b)(2))

1.0 It ~~shall be~~ is unlawful for any person to possess weakfish, *Cynoscion regalis*, taken with a hook and line, that measure less than thirteen (13) inches, total length.

2.0 It ~~shall be~~ is unlawful for any person to whom the Department has issued a commercial food fishing license and a food fishing equipment permit for hook and line to have more than one (1) weakfish in possession during the period beginning at 12:01 AM on ~~May 4~~ June 3 and ending at midnight on October 31 except on four specific days of the week as indicated by the Department on said person's food fishing equipment permit for hook and line.

3.0 It ~~shall be~~ is unlawful for any person, who has been issued a valid commercial food fishing license and a valid food fishing equipment permit for fishing equipment other than a hook and line to possess weakfish, lawfully taken by use of such permitted food fishing equipment, that measure less than twelve (12) inches, total length.

3.1 It ~~shall be~~ is unlawful for any person, who has been issued a valid commercial food fishing license and a valid food fishing equipment permit to possess more than one hundred pounds (100 lbs) of weakfish per vessel per day (a day being 24 hours) or trip, whichever is the longer period of time, during the periods January 1 through April 30 and June 3 through December 31.

13 DE Reg. 1354 (04/01/10)

4.0 It ~~shall be~~ is unlawful for any person, except a person with a valid commercial food fishing license, to have in possession more than one (1) weakfish, not to include weakfish in one's personal abode or temporary or transient place of lodging. A person may have weakfish in possession that measure no less than twelve (12) inches, total length, and in excess of one (1) if said person has a valid bill-of-sale or receipt for said weakfish that indicates the date said weakfish were received, the number of said weakfish received and the name, address and signature of the commercial food fisherman who legally caught said weakfish or a bill-of-sale or receipt from a person who is a licensed retailer and legally obtained said weakfish for resale.

11 DE Reg. 514 (10/01/07)

13 DE Reg. 1354 (04/01/10)

5.0 It is unlawful for any person issued a valid commercial food fishing license to take and reduce to possession any weakfish during the period May 1 through June 2, except a person issued a valid commercial food fishing license and a valid gill net food fishing permit by the Department may retain not more than 100 pounds of weakfish per day or trip (whichever is the longer period of time) as bycatch, provided that the

combined weight of all other finfish retained per said day or trip is greater than the combined weight of weakfish retained. [Note: All provisions of 7 Del. Code §923 continue to apply.]

~~5.06.0~~ It shall be ~~is~~ unlawful for any person, except a person issued a commercial food fishing license and a gill net equipment permit, to fish with any gill net in the Delaware Bay or Atlantic Ocean or to take and reduce to possession any weakfish from the Delaware Bay or the Atlantic Ocean with any fishing equipment other than a hook and line during the following periods of time:

Every weekend day (defined as 12:01 AM on Friday through midnight Sunday) in both May and June, plus contiguous weekdays (defined as 12:01 AM Monday through midnight Thursday) at the beginning of May and the end of June, such that the total number of closure days add up to thirty four (34) days. The exact dates of closures each year shall be ~~mailed in advance to the affected public and published~~ annually in the Delaware Fishing Guide.

~~6.07.0~~ The Department shall indicate on a person's food fishing equipment permit for hook and line four (4) specific days of the week during the period ~~May 1~~June 3 through October 31, selected by said person when applying for said permit, as to when said permit is valid to take in excess of one (1) weakfish but not more than 100 pounds per day. These four days of the week shall not be changed at any time during the remainder of the calendar year.

11 DE Reg. 514 (10/01/07)

13 DE Reg. 1354 (04/01/10)

~~7.08.0~~ It shall be unlawful for any person with a food fishing equipment permit for hook and line to possess more than one (1) weakfish while on the same vessel with another person who also has a food fishing equipment permit for hook and line unless each person's food fishing equipment permit for hook and line specifies the same day of the week in question for taking in excess of one (1) weakfish.

1 DE Reg 1770 (5/1/98)

2 DE Reg 1904 (4/1/99)

3 DE Reg 1088 (2/1/00)

4 DE Reg 1552 (3/1/01)

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

6 DE Reg. 1512 (5/1/03)

11 DE Reg. 514 (10/01/07)

13 DE Reg. 1354 (04/01/10)

