



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

Office of the
Secretary

Phone: (302) 739-9000
Fax: (302) 739-6242

Secretary's Order No.: 2018-F-0024

**RE: Approving Final Regulations to Amend 7 DE Admin. Code 3301,
Non-Tidal Finfish: *Definitions***

Date of Issuance: April 13, 2018

Effective Date of the Amendment: May 11, 2018

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") pursuant to 7 *Del.C.* §§6006 and 6010, and all other relevant statutory authority, the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced regulatory proceeding.

Background, Procedural History and Findings of Fact

This Order relates to proposed regulation amendments ("Amendments") to 7 DE Admin. Code 3301, Non-Tidal Finfish: *Definitions*. To expand recreational freshwater trout angling opportunities, this action proposes to amend Delaware's non-tidal finfish regulation by formally defining that portion of Red Clay Creek from the dam just below the boundary between the State of Delaware and the Commonwealth of Pennsylvania to the bridge at Yorklyn Road as a designated trout stream.

Trout stream stocking provides an important recreational fishing opportunity in a densely populated area of the State, which has few other freshwater fishing opportunities. Red Clay Creek was formerly included as a designated trout stream, but fish tissue contamination resulting from industrial discharges precluded stocking since 1986. Research trout stockings conducted in Red Clay Creek by the Department in 2011 and 2016 demonstrated that trout once again can be safely stocked and consumed as a result of improving water quality.

Waters designated as trout streams are closed to all fishing 14 days prior to the first Saturday in April to provide for stocking time and fair access, as well as to deter poaching. Such designation also requires an annual trout stamp to fish from the first Saturday in April through June 30, and the first Saturday in October through November 30. No environmental impact is expected as the result of the proposed amendment. The proposed amendment will increase angling opportunities for Delaware's trout anglers and it is anticipated that the return of trout fishing to Red Clay Creek will better distribute trout angling pressure.

The Department has the statutory basis and legal authority to act with regard to this proposed regulatory promulgation, pursuant to 7 *Del.C.* §103(b). The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice #2017-16 (November 27, 2017). The Department published its initial proposed regulation Amendments in the February 1, 2018 *Delaware Register of Regulations*. The aforementioned proposed Amendments were then presented and thoroughly vetted by the Department at the public hearing on February 22, 2018.

Only one member of the public attended the February 22, 2018 public hearing. No formal public comment was received by the Department with regard to this proposed promulgation. It should also be noted that all proper notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

Hearing Officer Vest prepared a Hearing Officer's Report dated March 27, 2018 ("Report"). The Report documents the proper completion of the required regulatory amendment process, establishes the record, and recommends the adoption of the proposed Amendments as attached to the Report as Appendix "A".

Reasons and Conclusions

Based on the record developed by the Department's experts and established by the Hearing Officer's Report, I find that the proposed regulatory amendments to 7 DE Admin. Code 3301, Non-Tidal Finfish: *Definitions* are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed regulatory Amendments be promulgated as final. I further find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these regulatory Amendments.

In conclusion, the following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 3301, Non-Tidal Finfish: *Definitions*, pursuant to 7 *Del.C.* §103(b);
2. The Department has jurisdiction under its statutory authority, pursuant to 7 *Del.C.* Ch. 60 to issue an Order adopting these proposed regulatory Amendments as final;

3. The Department provided adequate public notice of the proposed regulatory Amendments, and all proceedings associated with the same, in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on the proposed regulatory Amendments, including at the time of the public hearing held on February 22, 2018, and held the record open through close of business on March 9, 2018, consistent with 29 *Del.C.* §10118(a), in order to consider public comment on the same before making any final decision;

4. Promulgation of the proposed regulatory amendments to 7 DE Admin. Code 3301, Non-Tidal Finfish: *Definitions*, will enable the Department to (1) formally define that portion of Red Clay Creek from the dam just below the boundary between the State of Delaware and the Commonwealth of Pennsylvania to the bridge at Yorklyn Road as a designated trout stream; (2) increase angling opportunities for Delaware's trout anglers; and (3) better distribute trout angling pressure in Delaware with the return of trout fishing to Red Clay Creek;

5. The Department has reviewed these proposed regulatory Amendments in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;

6. The Department's Hearing Officer's Report, including its established record and the recommended proposed regulatory amendments as set forth in Appendix "A", are hereby adopted to provide additional reasons and findings for this Order;

7. The Department's proposed regulatory Amendments, as published in the February 1, 2018 *Delaware Register of Regulations*, and as set forth in Appendix "A" as noted above, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws

and regulations. Consequently, they are 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

8. The Department shall submit this Order approving as final the proposed Amendments to 7 DE Admin. Code 3301, Non-Tidal Finfish: *Definitions*, 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.



Shawn M. Garvin
Secretary

HEARING OFFICER'S REPORT

TO: The Honorable Shawn M. Garvin
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 Regulation Amendments to 7 DE Admin. Code 3301,
Non-Tidal Finfish: *Definitions*

DATE: March 27, 2018

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Thursday, February 22, 2018, 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 7 DE Admin. Code 3301, Non-Tidal Finfish: *Definitions*. To expand recreational freshwater trout angling opportunities, this action proposes to amend Delaware’s non-tidal finfish regulation by formally defining that portion of Red Clay Creek from the dam just below the boundary between the State of Delaware and the Commonwealth of Pennsylvania to the bridge at Yorklyn Road as a designated trout stream.

Trout stream stocking provides an important recreational fishing opportunity in a densely populated area of the State, which has few other freshwater fishing opportunities. Red Clay Creek was formerly included as a designated trout stream, but fish tissue contamination resulting from industrial discharges precluded stocking since 1986. Research trout stockings conducted in Red Clay Creek by the Department in 2011 and 2016 demonstrated that trout once again can be safely stocked and consumed as a result of improving water quality.

Waters designated as trout streams are closed to all fishing 14 days prior to the first Saturday in April to provide for stocking time and fair access, as well as to deter poaching. Such designation also requires an annual trout stamp (\$2.10 resident youth/\$4.20 resident adult/\$6.20 non-resident) to fish from the first Saturday in April through June 30, and the first Saturday in October through November 30. No environmental impact is expected as the result of the proposed amendment. The proposed amendment will increase angling opportunities for Delaware's trout anglers and it is anticipated that the return of trout fishing to Red Clay Creek will better distribute trout angling pressure.

The Department has the statutory basis and legal authority to act with regard to this proposed regulatory promulgation, pursuant to 7 *Del.C.* §103(b). The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice #2017-16 (November 27, 2017). The Department published its initial proposed regulation Amendments in the February 1, 2018 *Delaware Register of Regulations*. The aforementioned proposed Amendments were then presented and thoroughly vetted by the Department at the public hearing on February 22, 2018. Only one member of the public attended that public hearing. No formal public comment was received by the Department with regard to this proposed promulgation. It should also be noted that all proper notification and noticing requirements concerning this matter were met by the Department. 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) eleven documents introduced by responsible Department staff at the public hearing held on February 22, 2018, and marked by this Hearing Officer accordingly as "Dept. Exhibits 1-9".

The Department's person primarily responsible for the drafting and overall promulgation of these proposed Amendments, Stewart Michels, Environmental Program Manager II, Division of Fish and Wildlife, developed the record with the relevant documents in the Department's files. The aforementioned proposed Amendments were presented and thoroughly vetted by the Department at the public hearing on February 22, 2018. 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 allowing additional public comment to be received regarding this proposed promulgation. The hearing record closed for comment in this matter on March 9, 2018, with no public comment having been received by the Department regarding this matter.

For the Secretary's review, a copy of the Department's proposed Amendments as published in the February 1, 2018 *Delaware Register of Regulations* is attached hereto as Appendix "A". Again, all proper notification and noticing requirements concerning this proposed promulgation were met by the Department in this matter.

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 3301, Non-Tidal Finfish: *Definitions*. Accordingly, I recommend promulgation of the same in the customary manner provided by law.

Further, I recommend the Secretary adopt the following findings and conclusions:

1. The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 3301, Non-Tidal Finfish: *Definitions*, pursuant to 7 *Del.C.* §103(b);

2. The Department has jurisdiction under its statutory authority, pursuant to 7 *Del.C.* Ch. 60 to issue an Order adopting these proposed regulatory Amendments as final;

3. The Department provided adequate public notice of the proposed regulatory Amendments, and all proceedings associated with the same, in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on the proposed regulatory Amendments, including at the time of the public hearing held on February 22, 2018, and held the record open through close of business on March 9, 2018, consistent with 29 *Del.C.* §10118(a), in order to consider public comment on the same before making any final decision;

4. Promulgation of the proposed regulatory amendments to 7 DE Admin. Code 3301, Non-Tidal Finfish: *Definitions*, will enable the Department to (1) formally define that portion of Red Clay Creek from the dam just below the boundary between the State of Delaware and the Commonwealth of Pennsylvania to the bridge at Yorklyn Road as a designated trout stream; (2) increase angling opportunities for Delaware's trout anglers; and (3) better distribute trout angling pressure in Delaware with the return of trout fishing to Red Clay Creek;

5. The Department has reviewed these proposed regulatory Amendments in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104;

6. The Department's proposed regulatory Amendments, as published in the February 1, 2018 *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

7. The Department shall submit the proposed regulatory Amendments as final regulatory amendments to 7 DE Admin. Code 3301, Non-Tidal Finfish: *Definitions*, 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.



LISA A. VEST
Public Hearing Officer

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Attachments/Appendix:

Appendix A: Proposed Reg. Amendments

APPENDIX “A”

**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL
CONTROL****DIVISION OF FISH AND WILDLIFE**

Statutory Authority: 7 Delaware Code, Section 103(b) (7 DeI.C. §103(b))
7 DE Admin. Code 3301

**REGISTER NOTICE
SAN #2017-16****3300 Non-Tidal Finfish
3301 Definitions****1. TITLE OF THE REGULATIONS:**

7 DE Admin. Code 3300 Non-Tidal Finfish - 7 DE Admin. Code 3301 Definitions

2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE AND ISSUES:

To expand recreational freshwater trout angling opportunities, this action proposes to amend Delaware's non-tidal finfish regulation (7 DE Admin Code 3301 (1.0)) by defining that portion of Red Clay Creek from the dam just below the boundary between the State of Delaware and the Commonwealth of Pennsylvania to the bridge at Yorklyn Road as a designated trout stream. Trout stream stocking provides an important recreational fishing opportunity in a densely populated area of the State, which has few other freshwater fishing opportunities. Red Clay Creek was formerly included as a designated trout stream, but fish tissue contamination resulting from industrial discharges precluded stocking since 1986. Research trout stockings conducted in Red Clay Creek by the Department in 2011 and 2016 demonstrated that trout once again can be safely stocked and consumed as a result of improving water quality.

Waters designated as trout streams are closed to all fishing 14 days prior to the first Saturday in April to provide for stocking time and fair access and to deter poaching. Such designation also requires an annual trout stamp (\$2.10 resident youth/ \$4.20 resident adult/ \$6.20 non-resident) to fish from the first Saturday in April through June 30 and the first Saturday in October through November 30. No environmental impact is expected as the result of the proposed amendment. The proposed amendment will increase angling opportunities for Delaware's trout anglers and it is anticipated that the return of trout fishing to Red Clay Creek will better distribute trout angling pressure.

3. POSSIBLE TERMS OF THE AGENCY ACTION:

None

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

7 DeI.C. §103(b)

5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL:

None

6. NOTICE OF PUBLIC COMMENT:

The hearing record on the proposed changes to 7 DE Admin. Code 3301 Definitions will open February 1, 2018. Individuals may submit written comments regarding the proposed changes via e-mail to Lisa.Vest@state.de.us or via the USPS to Lisa Vest, Hearing Officer, DNREC, 89 Kings Highway, Dover, DE 19901 (302) 739-9042. A public hearing on the proposed amendment will be held on February 22, 2018 beginning at 6:00 PM in the DNREC Auditorium, located at the Richardson & Robbins Building, 89 Kings Highway, Dover, DE 19901. Public comments will be received until close of business Friday, March 9, 2018.

7. PREPARED BY:

Stewart Michels
Stewart.Michels@state.de.us

(302)739-9914

***Please Note: The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 Del.C. Ch. 104, is available at:**

<http://regulations.delaware.gov/register/february2018/proposed/21 DE Reg 613RFA 02-01-18.pdf>

3300 Non-Tidal Finfish

3301 Definitions

- 1.0 For purposes of Regulations 3301 through 3311, the following words and terms shall have the following meaning, unless the context clearly indicates otherwise:

(Break in Continuity Within Section)

"Red Clay Creek", from the dam just below the boundary between the State of Delaware and the Commonwealth of Pennsylvania to the bridge at Yorklyn Road;

***Please Note: As the rest of the sections were not amended, they are not being published. A copy of the regulation is available at:**

3300 Non-Tidal Finfish

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Section 103 and 29 Delaware Code, Section 8003(7) (7 Del.C. §103 and 29 Del.C. §8003(7))
7 DE Admin. Code 3900

**REGISTER NOTICE
SAN # 2018-01**

3900 Wildlife

1. TITLE OF THE REGULATIONS:
7 DE Admin. Code 3900 Wildlife

2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE AND ISSUES:

7 DE Admin. Code 3900 Wildlife is being proposed for amendment to comply with the decision of the Delaware Supreme Court in *Bridgeville R&P Club v. DNREC* (Dec. 7, 2017) that invalidated portions of the existing regulations governing firearms. The emergency regulations promulgated on December 26, 2017 will be superseded by these regulations.

3. POSSIBLE TERMS OF THE AGENCY ACTION:
None

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

These regulations are issued by the Secretary pursuant to the power conveyed by the General Assembly for DNREC to promulgate necessary regulations to protect wildlife, 7 Del.C. §103, and to "[e]stablish and promulgate such rules and regulations governing the administration and operation of the Department as may be deemed necessary by the Secretary and which are not inconsistent with the laws of this State". 29 Del.C. §8003(7).

5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL:
None