

Secretary's Order No.: **2008-F-0006**

RE: Proposed Amendments to Delaware Tidal Finfish
Regulation 3531: Tautog Size Limits, Creel Limits, and Seasons

Date of Issuance: February 13, 2008

Effective Date of the Amendment: March 11, 2008

I. Background:

A public hearing was held on Wednesday, January 23, 2008, at 7:00 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on proposed amendments to the existing Delaware Tidal Finfish Regulation 3531 concerning tautog size limits, creel limits, and seasons. In order to come into compliance with Addendum V of the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate Fishery Management Plan (FMP) for Tautog, Delaware Tidal Finfish Regulation 3531 must be changed to incorporate one of twelve management options, approved by the ASMFC Tautog Technical Committee. Each option would reduce tautog exploitation by a minimum of 25.6%, as mandated in Addendum V.

Both recreational and commercial fishermen will be affected, as commercial size limits, creel limits and seasons are identical to

recreational management measures. Failure to comply with regional FMPs, as approved by the ASMFC, may result in the total closure of the tautog fishery in Delaware by order of the Secretary of Commerce. The Department has the statutory basis and legal authority to act with regard to this promulgation pursuant to 7 Del.C. §903(e)(2)(a). No other Delaware regulations are affected by this proposal.

After listening to the public comment received during all phases of this promulgation process, and performing an exhaustive review and consideration of all components of the fishery, economic impacts and conservation of the resource, the Department believes “Option 8b” best accomplishes the mandated 25.6% reduction with a shorter closure period, less economic impact, and greater fairness to the shore zone and free diver components of this important recreational fishery. The current Division of Fish and Wildlife Enforcement Chief also concurs with this judgment, and anticipates no major problem in enforcing these proposed revised regulations.

Numerous members of the public attended this hearing on January 23, 2008 to voice their concerns with regard to the Department’s proposed changes to these regulations, and the same were taken into consideration during the Division’s review of this proposed regulatory amendment. Afterwards, the Hearing Officer prepared her report regarding this matter and submitted the same to the Secretary for

review and consideration. Proper notice of the hearing was provided as required by law.

II. Findings:

The Department has provided a reasoned analysis and a sound conclusion with regard to the response given to each such comment, as reflected in the Hearing Officer's Report of February 12, 2008, which is attached and expressly incorporated into this Order. Moreover, the following findings and conclusions are entered at this time:

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 these proposed amendments would bring Delaware into compliance with Addendum V of the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate

Fishery Management Plan (FMP) for Tautog, by incorporation of Department Option 8b, which was previously approved by the ASMFC Tautog Technical Committee;

7. Option 8b will set the creel limit at 10 fish, size limit 14", from Jan. 1st through March 31st; then, at 3 fish, size limit 15", from April 1st through May 11th; then, a spring closure from May 12th through June 30th; then, back to 10 fish, size limit 14", from July 1st through August 31st; then, a fall closure from September 1st through September 28th; then, back to 10 fish, size limit 14", from September 29th through December 31st;
8. By selection of Option 8b, tautog exploitation will be reduced in Delaware by a minimum of 25.6%, as mandated in Addendum V of the ASMFC's Interstate FMP for Tautog, with a shorter closure period, less economic impact and greater fairness to the shore zone and free diver components of this important recreational fishery;
9. The Department has reviewed this proposal and its components with the current Division of Fish and Wildlife Enforcement Chief, and said Chief concurs and anticipates no major problem with enforcement of the proposed revised regulations;
10. The Department has reviewed this proposed amendment 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;

11. The Department's proposed regulation, as published in the January 1, 2007 *Delaware Register of Regulations* and set forth in Attachment "A" hereto, is adequately supported, not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and that
12. The Department's proposed amendments to Tidal Finfish Regulation 3531 are adequately supported, not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and that
13. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary.

III. Order:

Based on the record developed, as reviewed in the Hearing Officer's Report dated February 12, 2008 and expressly incorporated herein, it is hereby ordered that the proposed amendments to State of Delaware Tidal Finfish Regulation No. 3531 – Tautog Size Limits, Creel Limits, and Seasons - be promulgated in final form in the customary manner and established rule-making procedure required by law.

IV. Reasons:

The promulgation of State of Delaware Tidal Finfish Regulation No. 3531 will bring Delaware into compliance with Addendum V of the Atlantic States Marine Fisheries Commission's Interstate Fishery Management Plan for Tautog. This action, which incorporates Option 8b as Delaware's management plan for tautog (as approved by the ASMFC Tautog Technical Committee) will reduce tautog exploitation by a minimum of 25.6%, as mandated by Addendum V noted above. It is incumbent upon Delaware to be in compliance with the Commission's plan, not only to avoid federal sanctions against Delaware and its fishery, but to protect this species with these conservation measures to ensure that tautog will continue to be found in Delaware waters in the future.

In developing this regulation, the Department has balanced the absolute environmental need for the State of Delaware to promulgate regulations concerning this matter with the important interests and public concerns surrounding the same, in furtherance of the policy, purposes, and authority of 7 Del. C. §903(e)(2)(a).

/s/ John A. Hughes

John A. Hughes
Secretary

MEMORANDUM

TO: John A. Hughes, Secretary

FROM: Lisa A. Vest, Hearing Officer

RE: Proposed Amendments to Delaware Tidal Finfish
Regulation 3531: Tautog Size Limits, Creel Limits, and
Seasons (formerly Tidal Finfish Regulation 22)

DATE: February 12, 2008

I. Background:

A public hearing was held on Wednesday, January 23, 2008, at 7:00 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on proposed amendments to the existing Delaware Tidal Finfish Regulation 3531 concerning tautog size limits, creel limits, and seasons. In order to come into compliance with Addendum V of the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate Fishery Management Plan (FMP) for Tautog, Delaware Tidal Finfish Regulation 3531 must be changed to incorporate one of twelve management options, approved by the ASMFC Tautog Technical Committee. Each option would reduce tautog exploitation by a minimum of 25.6%, as mandated in Addendum V.

Both recreational and commercial fishermen will be affected, as commercial size limits, creel limits and seasons are identical to recreational management measures. Failure to comply with regional FMPs, as approved by the ASMFC, may result in the total closure of the

tautog fishery in Delaware by order of the Secretary of Commerce. The Department has the statutory basis and legal authority to act with regard to this promulgation pursuant to 7 Del.C. §903(e)(2)(a). No other Delaware regulations are affected by this proposal.

After listening to the public comment received during all phases of this promulgation process, and performing an exhaustive review and consideration of all components of the fishery, economic impacts and conservation of the resource, the Department believes “Option 8b” best accomplishes the mandated 25.6% reduction with a shorter closure period, less economic impact, and greater fairness to the shore zone and free diver components of this important recreational fishery. The current Division of Fish and Wildlife Enforcement Chief also concurs with this judgment, and anticipates no major problem in enforcing these proposed revised regulations. A detailed analysis of this recommended management option, along with discussion of the public comment received concerning the same, will be further discussed below.

Numerous members of the public attended this hearing on January 23, 2008 to voice their concerns with regard to the Department’s proposed changes to these regulations, and the same were taken into consideration during the Division’s review of this proposed regulatory amendment. Proper notice of the hearing was provided as required by law.

II. Summary of Hearing Record:

A. Department Presentation/Public Comment at Hearing:

At the time of the hearing on January 23, 2008, Jeff Tinsman, Environmental Scientist with the Department's Division of Fish and Wildlife (as well as Delaware's representative on the ASMFC's Tautog Management Board), submitted the Department's exhibits pertaining to these proposed amendments to the Hearing Officer, and offered a brief explanation with regard to the salient points of the proposed amendments to these regulations.

Mr. Tinsman began the Department's presentation by explaining that Delaware must reduce its exploitation of the tautog by 25.6%, which is Addendum V to the Fisheries Management Plan. Based upon the Department's scientific data, overfishing is presently occurring in Delaware, and therefore this reduction is necessary. From 2003 to 2005, the average recreational harvest in Delaware was over 92,000 fish recreational, and only about 703 fish commercial. This amounts to a percentage of over 99% recreational harvesting. Coast-wide, tautog harvests are about 90% recreational and 10% commercial.

Tautog management in Delaware began in the early 1990's through private efforts of the charter boat industry, associated with the decline in large weakfish around 1990. Delaware proceeded with a unilateral effort at that time to manage this species through legislation, established the first meaningful size limits and creel limits along the coast, and ended up

with a 15-inch size limit for the spawning season (April through June), a three fish creel limit (which was quite restrictive) and a 10 fish creel limit for the rest of the year, with a 12-inch size limit at that time. When the Atlantic States Marine Fisheries Plan was put in place in the late 1990's, a 14-inch coast-wide size limit was imposed, and that is why Delaware now has this matrix of 14-15 inch size limits now.

All states with existing measures that were more restrictive (like Delaware, Massachusetts and Rhode Island) with 16-inch size limits were essentially forced to maintain those limits, and so Delaware did not have the option to drop back at that time. Over the past nine years, Delaware has made two reductions in fishing mortality for tautog of about 25-35%. Those were done by a closed season. The first closure was from September 1st -17th, and then in the second round closure occurred from the 18th – 28th, so Delaware is now essentially closed the whole month of September. So these previous actions are the basis from which the Department is proposing the current amendments to the tautog regulations, namely, ten 14-inch fish for most of the year, three 15-inch fish during the spawning season, and then a closed season for most of September.

In discussing all of the proposed options presented to the public at the hearing on January 23, 2008, Mr. Tinsman made special note of the fact that, with regard to deliberations on how to reduce fishing mortality, once changes are implemented (i.e., closed seasons put in place or a

creel limit given up), they cannot be changed or regained. As an example, he cited the fact that the summer flounder closure during the summer months was very unpopular one year, and so the Department changed that completely. That flexibility, according to Mr. Tinsman, does not exist with tautog, so the Department must be especially cautious with its considerations of what is being given up in terms of closures and/or creel limits.

Based upon the Department's summary of marine recreational fishing surveys for Delaware for tautog, one can see when fish are caught throughout the calendar year. Each year is broken down in 6 "waves", and their results are as follows:

Wave 1 (Jan. and Feb.): No survey conducted, so essentially no credit for closures or anything during that period;

Wave 2 (March and April): Approximately 5% of the fish are caught;

Wave 3 (May and June): Approximately 30% of the fish are caught;

Wave 4 (July and August): Another 5% of the fish are caught;

Wave 5 (September and October): Although Delaware is closed most of September, approximately 42% of the fish are caught;

Wave 6 (November and December): Approximately 16% of the fish are caught.

These data supports that Delaware's fishery is approximately 60% fall, 30% spring, during the spawning season when they are moving

ashore, and then incidental catches in both spring and summer. The fishery is made up of three different components: (1) a boat fishery, including private, charter and head boats (which is a dominant aspect of the fishery); (2) a small shore fishery at Masseys Landing and Indian River Inlet (which takes place primarily during the tourist season in the summer, and thus is offset somewhat from the other part of the fishery); and (3) a small group of “free divers” that dive at breakwater and spear tautog.

Mr. Tinsman then described each of the twelve management option plans that were presented to the public at the hearing on January 23, 2008. Following that, the 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 tautog management here in Delaware. Common concerns voiced during this portion of the hearing were, as always, the reliability of the fishing surveys, 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 was ultimately chosen by the Secretary to manage the conservation of this species.

B. Department Review/Analysis Post-Hearing:

Following the hearing, the Department conducted an exhaustive review of all of the various options for reducing the recreational harvest of tautog by 25.6%, as mandated by the ASMFC. After reviewing the comments received from the public during this promulgation matter, it was clear that Option 8c received the greatest support from the public, with Option 8b receiving the second highest support. Out of the 12 options proposed at the hearing, these two choices were by far the most popular, and should thus be the two choices under consideration at this time. It should be noted, however, that one reason Option 8c may have dominated the voting was an email appeal made by prominent head and charter vessel captains from Lewes to their patrons.

Both Option 8b and 8c maintain the 10 fish creel limit for part of the year. Option 8c accomplishes the required 25.6% reduction by adding 96 days in June, July, August and October to the existing 28 day closure for a total closure of 124 days. This long closure during the summer is necessary because only 5.4% of Delaware's tautog harvest occurs during July and August. Option 8b accomplishes the required reduction by creating a *second* spring closure from May 12 – June 30, for a total of 50 additional days. Combined with the existing 28 day fall closure, this option would close the Tautog season for a total of 78 days. The shorter closure in May and June is possible because 31.2% of

Delaware's annual tautog harvest occurs in May and June. Option 8b is therefore more efficient, in terms of the length of the required closure, in making the mandated reduction (50 days vs. 96 days).

Option 8b would close the season during the period of time during which spawning occurs (late May and June). The existing three fish creel limit and higher 15" size limit, which are in place from April 1 through June 30, are designed to reduce harvest pressure on fish during the spawning season when they are most vulnerable to harvest. They are inshore where smaller vessels have access to them, they are concentrated, and they are feeding heavily. A closure during this time period, as proposed in Option 8b, would further protect fish from harvest and by-catch mortality during the spawning season. Allowing fish which have survived until mid-May to complete the spawning season may or may not influence recruitment, but it has been a popular option with anglers and suggested during previous rounds of reductions in tautog harvest. Option 8c would also protect tautog for part of the spawning season (June), but by closing for the entire summer, two of the smaller components of the fishery would be virtually eliminated. These are the shore zone fishery at Indian River Inlet and Masseys Landing, and the "free divers", who spear tautog at the outer breakwater off of Lewes. A summer closure would impact tourist activities as well, with secondary impacts on bait and tackle dealers who sell them bait.

Several charter and head boat captains have made the argument that they would prefer Option 8c, which would allow them to continue fishing on tautog until June 1, because the flounder are not yet here in numbers. Data from Delaware's Marine Recreational Survey shows that the flounder harvest in Delaware is occurring earlier in the season, as the stock recovers. Harvest begins in March and by June 1, 20% of Delaware's annual flounder catch has been harvested, making this a questionable argument. Some other charter boat captains favor option 8b, and most say they could live with either Option 8b or 8c.

The enforcement feasibility of each of these two options was discussed between DNREC Fish and Wildlife personnel, namely, Roy Miller, Jeff Tinsman and Richard Cole, and Fish and Wildlife Enforcement Chief Jim Graybeal, and he believes Option 8b to be the best option from an enforcement perspective, preferring it over a long summer closure. Despite the relative complexity of the management framework, Chief Graybeal sees no problem enforcing the new spring closure regulation. In summary, because of greater fairness to all components of the fishery, greater efficiency in meeting the mandated reduction, potentially greater conservation of the resource, and less economic impact during the tourist season, the Department's Division of Fish and Wildlife believes that Option 8b is the best option with regard to Delaware's future management of this species.

For the Secretary's review, Delaware's proposed amendments to these regulations are expressly incorporated into this report and attached hereto as Attachment "A" for that purpose. Also attached and expressly incorporated into this Hearing Officer's Report as Attachment "B" is the hard copy of the Department's PowerPoint presentation given at the public hearing of January 23, 2008, which sets forth much of the scientific data regarding current tautog management here in Delaware, and the twelve management options proposed at the aforementioned hearing.

It should also be noted that the Department has reviewed this proposed amendment 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. Conclusions and Recommendations:

Based on the above discussion, I conclude that the Department has provided appropriate reasoning regarding the need for these proposed changes to Delaware's Tidal Finfish Regulation 3531 concerning tautog size limits, creel limits, and seasons, and has thoroughly addressed any public questions and/or comments provided during the various phases of the record developed in this matter.

Accordingly, I recommend promulgation of these proposed amendments in the customary manner provided by law.

Further, I recommend the following findings:

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 these proposed amendments would bring Delaware into compliance with Addendum V of the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate Fishery Management Plan (FMP) for Tautog, by incorporating Department Option 8b, which was previously approved by the ASMFC Tautog Technical Committee;
7. Option 8b will set the creel limit at 10 fish, size limit 14", from Jan. 1st through March 31st; then, at 3 fish, size limit 15", from April 1st through May 11th; then, a spring closure from May 12th through June 30th; then, back to 10 fish, size limit 14", from

July 1st through August 31st; then, a fall closure from September 1st through September 28th; then, back to 10 fish, size limit 14", from September 29th through December 31st;

8. By selection of Option 8b, tautog exploitation will be reduced in Delaware by a minimum of 25.6%, as mandated in Addendum V of the ASMFC's Interstate FMP for tautog, with a shorter closure period, less economic impact and greater fairness to the shore zone and free diver components of this important recreational fishery;
9. The Department has reviewed this proposal and its components with the current Division of Fish and Wildlife Enforcement Chief, and said Chief concurs and anticipates no major problem with enforcement of the proposed revised regulations;
10. The Department has reviewed this proposed amendment 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;
11. The Department's proposed regulation, as published in the January 1, 2007 *Delaware Register of Regulations* and set forth in Attachment "A" hereto, is adequately supported, not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a final

regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and that

12. The Department shall submit the proposed regulation as a final regulation to the Delaware Register of Regulation for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

_____/s/Lisa A. Vest_____.
LISA A. VEST
Hearing Officer