

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Sections 901(c) & (d) and 903(b), (e), (f) & (i); (7 Del.C. §§901(c) & (d) and 903(b), (e), (f) & (i))
7 DE Admin. Code 3531

FINAL

Secretary's Order No.: 2018-F-0056

Date of Issuance: October 23, 2018

Effective Date of the Amendment: December 11, 2018

3531 Tautog; Size Limits, Creel Limits and Seasons

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 3531: *Tautog: Size Limits, Creel Limits and Seasons*. This action is being taken by the Department to adopt provisions consistent with current regional measures proposed for both recreational and commercial Tautog management, in compliance with Amendment 1 to the Atlantic States Marine Fisheries Commission's ("ASMFC") Interstate Fishery Management Plan for Tautog. Amendment 1 provides for the regional management of Tautog, based on the most recent stock assessment findings. That stock assessment indicated that the Delaware, Maryland and Virginia ("DelMarVa") component of the stock is overfished. The recreational and commercial management measures proposed in this action will improve the stock condition of the Tautog fishing resource.

The aforementioned Amendment 1 to the Interstate Fishery Management Plan for Tautog requires that Delaware implement recreational and commercial management measures consistent with the other states in the DelMarVa region. These measures include a 16-inch minimum size limit, a four (4) fish possession limit, and a closed season from May 16 through June 30. Additionally, based upon evidence from law enforcement officials that indicated significant illegal sales of Tautog, states with commercial Tautog fisheries must implement a commercial harvest tagging program by January 1, 2019. Implementation of such a program will require preregistration, harvest tagging, and tag reporting accountability measures to deter the illegal sale of Tautog. Lastly, to prevent or reduce mortality from lost commercial fishing gear, Amendment 1 requires certain degradable materials on pot and trap gear from which Tautog are retained.

The procedural requirements of 29 Del.C. §§10115 - 10118 precluded timely implementation of the measures noted above, and would have potentially jeopardized Delaware's Tautog fishing resource through the continuance of unnecessary closures during the periods of May 12 through July 16, and September 1 through September 28 (which are periods of high fishing activity, as they include Independence Day and Labor Day). Those unnecessary closures would have impacted the recreational and commercial fisheries, as well as their dependent businesses (such as seafood retailers, bait and tackle stores, etc.), and would have put the affected parties at a competitive disadvantage to neighboring states. Therefore, pursuant to 29 Del.C. §10119 and 7 Del.C. §903(h), the Department adopted emergency regulations with the issuance of Secretary's Order No. 2018-F-0035, effective July 1, 2018, in order to immediately implement the aforementioned necessary regulatory change.

The required minimum size limit, possession limit, and closed season are currently in effect through the aforementioned prior issuance of Secretary's Order No. 2018-F-0035. However, these measures, along with all other measures as required by Amendment 1, must be promulgated through the full provisions of the Administrative Procedures Act, as referenced above. Thus, the Department commenced its formal regulatory amendment process with Start Action Notice #2018-08 (April 29, 2018).

The Department has the statutory basis and legal authority to act with regard to promulgation of the proposed amendments to 7 DE Admin. Code 3531: *Tautog: Size Limits, Creel Limits and Seasons*, pursuant to 7 Del.C. §901 (c & d), and §903(e)(2)(a). The Department published its initial proposed regulation Amendments in the August 1, 2018 Delaware Register of Regulations. Thereafter, the public hearing regarding this matter was held on August 23, 2018. One member of the public attended that public hearing. Pursuant to Delaware law, the record remained open for fifteen (15) additional days subsequent to the date of the public hearing for receipt of public comment. The hearing record formally closed with regard to public comment at close of business on September 7, 2018, with no comment having been received

by the Department during any phase of this proposed regulatory promulgation. It should be noted that all 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 Lisa A. Vest prepared the Hearing Officer's Report dated October 17, 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 3531: Tautog: Size Limits, Creel Limits and Seasons**, 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 revised 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 3531: Tautog: Size Limits, Creel Limits and Seasons**, pursuant to **7 Del.C. §901 (c & d)** and **§903(e)(2)(a)**;
2. The Department has jurisdiction under its statutory authority, pursuant to **7 Del.C. Ch. 60**, to issue an Order adopting these proposed Amendments as final;
3. The Department provided adequate public notice of the initial proposed Amendments and all proceedings in a manner required by the law and regulations, and provided the public with an adequate opportunity to comment on the same, including at the time of the public hearing held on August 23, 2018, and during the 15 days subsequent to the hearing (through September 7, 2018), before making any final decision;
4. Promulgation of the proposed Amendments to **7 DE Admin. Code 3531: Tautog: Size Limits, Creel Limits and Seasons**, will enable the Department to bring Delaware's existing Regulations into compliance with current regional measures proposed for both recreational and commercial Tautog management, specifically: (1) a 16-inch minimum size limit; (2) a four (4) fish possession limit; (3) a closed season from May 16 through June 30; (4) the implementation of a commercial harvest tagging program by January 1, 2019, which will require preregistration, harvest tagging, and tag reporting accountability measures to deter the illegal sale of Tautog; and (5) to prevent or reduce mortality from lost commercial fishing gear, the requirement of certain degradable materials on pot and trap gear from which Tautog are retained;
5. The Department has reviewed the proposed 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 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 initially published in the August 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 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 3531: Tautog: Size Limits, Creel Limits and Seasons** 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

3531 Tautog; ~~Size Limits, Creel Limits and Seasons~~

1.0 Recreational and Commercial Size Limits

- ~~4.01.1~~ Notwithstanding the provisions of **7 Del.C. §§929 and 939**, it ~~shall be~~ is unlawful for any person to possess any tautog, *Tautoga onitis*, less than ~~fifteen (15)~~ sixteen (16) inches in total length.

2.0 Recreational and Commercial Possession Limits and Seasons

- 2.1 Notwithstanding the provisions of **7 Del.C. §§938, and 939**, it ~~shall be~~ is unlawful for any person to ~~possess~~ take and reduce to possession more than ~~five (5)~~ four (4) tautog per day during the period beginning at

12:00 a.m. on January 1 and ending at 11:59 p.m. on ~~March 31~~ May 15, and during the period beginning at 12:00 a.m. on July 17 and ending at 11:59 p.m. on ~~August~~ December 31, ~~and during the period beginning at 12:00 a.m. on September 29 and ending at 11:59 p.m. on December 31,~~ at or between the place where said tautog were caught and said person's personal abode, or temporary or transient place of lodging or, for a licensed commercial foodfisherman, point of sale.

3.0 ~~Notwithstanding the provisions of 7 Del.C. §§938, 939, it shall be unlawful for any person to possess more than three (3) tautog during the period beginning at 12:00 a.m. on April 1 and ending at 11:59 p.m. on May 11, at or between the place where said tautog were caught and said person's personal abode or temporary or transient place of lodging.~~

4.02.2 ~~Notwithstanding the provisions of subsections 1.0, 2.0 and 3.0 of this regulation 7 Del.C. §§938 and 939, it shall be is unlawful for any person to possess take and reduce to possession any tautog during the period beginning at 12:00 a.m. on May 1216 and ending at 11:59 p.m. on July 16 and during the period beginning at 12:00 a.m. on September 1 and ending at 11:59 p.m. on September 28, except in said person's personal abode or temporary or transient place of lodging June 30.~~

3.0 Commercial Tagging

3.1 After December 31, 2018, it is unlawful for a commercial fisherman to possess tautog in Delaware unless it is tagged prior to landing with a tautog harvest tag issued by the Division in accordance with this section.

3.1.1 Tautog harvest tags must be firmly affixed to the bony portion of the gill cover (operculum) such that the tag number faces outward from the body and can be readily viewed.

3.2 The Division of Fish and Wildlife may only issue tautog harvest tags to those commercial fishermen that apply to participate in the commercial tautog fishery using a form provided by the Division and returning said form to the Division by no later than September 1 in the calendar year preceding their participation.

3.3 After December 31, 2018, it is unlawful to buy, sell, barter or trade or offer to buy, sell, barter or trade tautog unless the fish has a firmly affixed and lawfully applied tautog harvest tag issued by a state in accordance with Amendment 1 to the Interstate Fishery Management Plan for Tautog (October 2017).

3.4 It is unlawful for any person issued tautog harvest tags by the Division to fail to report the loss, theft, damage or defect of a tag to the Division within 12 hours of discovery.

3.5 It is unlawful for any person issued tautog harvest tags to not file a complete and accurate monthly accounting of tag use by the last working day of the month following tag use on a form provided by the Division.

3.6 It is unlawful to buy, sell, barter or trade or offer to buy, sell or trade any tautog that has attached a tag reported as lost, stolen, damaged, defective or otherwise unusable in accordance with subsection 3.4 of this section.

3.7 Unless reported in accordance with subsection 3.4 or 3.5 of this section, it is unlawful for any person issued tautog harvest tag(s) to not return to the Division all unused tags by no later than February 15 of the year following their issuance.

4.0 Gear Requirements

4.1 It is unlawful to retain tautog from any pot or trap unless the hinges or fasteners of at least one panel or door of the pot or trap is equipped with one of the following degradable materials:

4.1.1 Untreated hemp or jute string of not more than 3/16-inch (4.8 mm) diameter;

4.1.2 Magnesium alloy fasteners, timed float released (pop-up devices) or similar device approved by the Division;

4.1.3 Non-galvanized or non-coated iron wire of not more than 0.094-inch (2.39 mm) diameter.

1 DE Reg. 1771 (05/01/98)

6 DE Reg. 1360 (04/01/03)

11 DE Reg. 1257 (03/01/08)

15 DE Reg. 1177 (02/01/12)

16 DE Reg. 216 (08/01/12)

22 DE Reg. 517 (12/01/18) (Final)