

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Sections 901 and 903(a), (b), (e), (f) and (i) (7 Del.C. §§901 & 903(a), (b), (e), (f) and (i))
7 DE Admin. Code 3505

FINAL

Secretary's Order No.: 2019-F-0002

3505 Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements

Date of Issuance: January 3, 2019

Effective Date of the Amendment: February 11, 2019

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("DNREC," "Department"), pursuant to 7 Del.C. §901 and §903(a), (b), (e), (f), and (i), and any 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 Amendments ("Amendments") to 7 DE Admin. Code 3505: *Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements*. This action is being taken by the Department to adjust the allocation of the commercial striped bass quota to Delaware's fisheries, due to a recent statutory change.

Delaware's commercial striped bass fishery is allocated through an annual quota in accordance with the Atlantic States Marine Fisheries Commission's ("ASMFC") Interstate Fishery Management Plan for Atlantic Striped Bass. Delaware's annual commercial striped bass quota allocation is apportioned by regulation to two gear types: (1) commercial gill net ("GN"); and (2) commercial hook and line ("HL"). These are managed as separate fisheries, with different size limits, seasons, and allocations in an effort to maximize fishing opportunities for each fishery, minimize dead discards, and prevent growth overfishing.

During the period of 1990-1996, Delaware allocated 90% of the quota to the GN fishery and 10% to the HL fishery. In 1997, in an effort to ensure full use of the quota, the allocation was changed to 95% for the GN fishery while the less efficient commercial HL fishery was kept at 10% to maintain individual hook and line quotas. This over-allocation improved overall quota attainment, as the GN fishery routinely landed its 95%, while the HL fishery historically did not land more than 3% of the quota. Thus, despite this over-allocation, Delaware did not have any quota overages during this period from 1997 to 2017 because the quota could not be transferred between the GN and HL fisheries.

The recent adoption of 7 Del.C. §903A provides for the transfer of striped bass quota between GN and HL fisheries. This action resulted in improved landing efficiency and, ultimately, a commercial striped bass quota overage in 2018. To prevent subsequent overages, the Department is ending the over-allocation of the quota and proposing two alternative allocation strategies. Option 1 would allocate 90% of Delaware's striped bass commercial quota to the GN fishery and 10% to the HL fishery; this would match the proportions used prior to 1997. Option 2 would allocate 95% of Delaware's striped bass commercial quota to the GN fishery and 5% to the HL fishery. Option 2 is the allocation strategy recommended by the Advisory Council on Tidal Fin Fisheries as a way to better ensure full use of Delaware's striped bass commercial quota.

In addition to the proposal of the above two options, the Department also proposes to adjust the required registration date to participate in the commercial HL fishery from March 15 to February 1 to align with the commercial GN fishery and better accommodate tag transfers.

The Department has the statutory basis and legal authority to act with regard to promulgation of the proposed Amendments to 7 DE Admin. Code 3505: *Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements*, pursuant to 7 Del.C. §901 and §903(a), (b), (e), (f), and (i). The Department published its initial proposed Amendments in the October 1, 2018 Delaware *Register of Regulations*. Thereafter, the public hearing regarding this matter was held on October 31, 2018.

No members of the public attended the aforementioned public hearing. Pursuant to Delaware law, the record remained open for fifteen 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 November 15, 2018, with one comment having been received by the Department during the post-hearing 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.

After the close of the comment period, the Department performed a thorough review of the hearing record, including

comments received. At the request of this Hearing Officer, a Technical Response Memorandum (TRM) was prepared by Department staff to the Department's final recommendations. In its TRM, the Department has recommended adjusting the allocation of the commercial striped bass quota to Delaware's fisheries by modifying the allocation to be 95% of the quota to the commercial GN fishery and 5% of the quota to commercial HL fishery. As noted previously, Option 2 is also the recommended method by the Advisory Council on Tidal Fin Fisheries. The Department also recommended adjusting the required registration date to participate in the commercial HL fishery from March 15 to February 1 to align with the commercial GN fishery.

Hearing Officer Bethany A. Fiske prepared a Hearing Officer's Report dated December 20, 2018. The report documents the proper completion of the required regulatory amendment process, establishes the record, and recommends the adoption of the *revised* 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 *revised* proposed Amendments to 7 **DE Admin. Code** 3505: *Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements* are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the *revised* proposed 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* 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 *revised* proposed Amendments to 7 **DE Admin. Code** 3505: *Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements*, pursuant to 7 **Del.C.** §901 and §903(a), (b), (e), (f), and (i);
2. The Department has jurisdiction under its statutory authority, pursuant to 7 **Del.C.** Ch. 60, to issue an Order adopting these *revised* 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 October 31, 2018, and during the 15 days subsequent to the hearing (through November 15, 2018), before making any final decision. No further re-noticing or re-publication of the Department's *revised* proposed Amendments is necessary in this matter, due to the fact that (1) all possible substantive changes were properly noticed via publication in the October 1, 2018 issue of the Delaware *Register of Regulations*; and (2) no further changes were made subsequent to that time that had not been previously noticed;
4. Promulgation of the *revised* proposed Amendments to 7 **DE Admin. Code** 3505: *Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements* will better ensure full use of Delaware's striped bass commercial quota and will adjust the required registration date to participate in the commercial HL fishery from March 15 to February 1 to align with the commercial GN fishery and better accommodate tag transfers;
5. The Department has reviewed the *revised* proposed Amendments in the light of the Regulatory Flexibility Act, consistent with 29 **Del.C.** Ch. 104, and believes the proposed Amendments 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 *revised* 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 Amendments, as published in the October 1, 2018 Delaware *Register of Regulations*, and then as *revised*, as set forth in Appendix A, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, these *revised* Amendments are approved as final, and 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 *revised* proposed Amendments to 7 **DE Admin. Code** 3505: *Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements* 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

(Penalty Section 7 **Del.C.** §936(b)(2))

- 1.0 It is unlawful for any commercial food fisherman using a gill net to take and reduce to possession any striped bass at any time except when said commercial food fisherman is authorized by the Department to participate in a commercial gill net fishery for striped bass established herein. A commercial food fisherman may use a gill net to take and reduce to possession striped bass during the period beginning at 12:01 A.M. on February 15 and ending at 4:00 P.M. on May 31 next ensuing. It is unlawful to use any gill net having a stretched-mesh size greater than four (4) inches to take striped bass during the period February 15 until and including the last day in February unless the net is drifted. A commercial food fisherman may use a gill net to take and reduce to possession striped bass during the period beginning at 12:01 A.M. on November 15 and ending at 4:00 P.M. on December 31 next ensuing provided at least two (2) percent of the commercial allocation of striped bass for the gill net fishery, as determined by the Department, was not landed in the February - May gill net fishery. In order for a commercial food fisherman to be authorized by the Department to participate in a commercial gill net fishery, said commercial food fisherman shall have a valid food fishing equipment permit for a gill net and shall register in writing with the Department to participate in said fishery by February 1 for the February 15 - May 31 gill net fishery and by November 1 for the December gill net fishery.
- 2.0 It is unlawful for any commercial food fisherman using a hook and line to take and reduce to possession any striped bass at any time except when said commercial food fisherman is authorized by the Department to participate in a commercial hook and line fishery for striped bass established herein. Except as otherwise provided, a commercial food fisherman may use a hook and line to take and reduce to possession striped bass during the period beginning at 12:01 A.M. on April 1 and ending at 4:00 P.M. on December 31 next ensuing. In order for a commercial food fisherman to be authorized to participate in the commercial hook and line fishery, said commercial food fisherman shall register in writing with the Department to participate in said fishery by March 15 February 1.
- 3.0 ~~It is unlawful for any commercial food fisherman using a hook and line, during the striped bass hook and line fishery established for subsection 2.0 herein, to land striped bass by means of a gill net or to have any gill net on board or to otherwise have in possession on or near his person any gill net.~~
- 4.03.0 The striped bass gill net fishery in February - May, the striped bass gill net fishery in November - December and the striped bass hook and line fishery in April - December shall be considered separate striped bass fisheries. Each participant in a striped bass fishery shall be assigned an equal share of the total pounds of striped bass allotted by the Department to that fishery. A share shall be determined by dividing the number of pre-registered participants in that fishery into the total pounds of striped bass allotted to that fishery by the Department. The total pounds of the State's ASMFC commercial striped bass quota will be allotted to each fishery by the Department as follows: ~~95~~ [TBD from Table] 95% for the February 15 - May 31 gill net fishery, ~~40~~ [TBD from Table] 5% for the April - December hook and line fishery and, provided that in excess of two (2)% of the February 15 - May 31 gill net fishery allocation was not landed, said remainder for the November - December gill net fishery. Any overage of the State's commercial quota will be subtracted from the next year's commercial quota proportionally to the appropriate fishery.

[Table. Annual quota allocation options for the commercial striped bass fishery pertaining to proposed amendments to 7 DE Admin. Code 3505 (3.0).

<u>Option</u>	<u>Commercial Gill Net Allocation</u>	<u>Commercial Hook & Line Allocation</u>
<u>1</u>	<u>90%</u>	<u>10%</u>
<u>2</u>	<u>95%</u>	<u>5%</u>

- 5.04.0 It is unlawful for any commercial food fisherman to land, during a striped bass fishing season, more than the total pounds assigned by the Department to said individual commercial food fisherman.
- 6.05.0 It is unlawful for any commercial food fisherman to possess any landed striped bass that does not have locked into place through the mouth and gill (operculum) opening a striped bass harvest tag issued to said commercial fisherman by the Department.
- 7.06.0 The Department may issue tags to commercial food fishermen who register in writing with the Department to participate in a striped bass fishery. Each participant shall initially be issued a quantity of striped bass harvest tags that is to be determined by the Department by dividing said participant's assigned share in pounds by the estimated weight of a striped bass expected to be landed. If a commercial food fisherman needs additional tags to fulfill his or her assigned share, the Department shall issue additional tags after verifying the balance of the share from reports submitted by an official weigh station to the Department.
- 8.07.0 It is lawful for a commercial food fisherman who is authorized to be issued striped bass harvest tags by the Department to transfer said tags to another commercial food ~~[fisherman fisherman,], authorized to participate~~

~~in the same striped bass fishery,~~ provided said transfer is made prior to said tags being issued by the Department.

~~9.08.0~~ It is unlawful for any commercial food fisherman to apply a tag to a striped bass unless said tag had been issued or legally transferred to said commercial food fisherman by the Department.

~~10.09.0~~ It is unlawful to apply any striped bass tag issued by the Department to a striped bass if said tag had previously been applied to another striped bass.

~~11.010.0~~ It is unlawful for any commercial food fisherman to sell, barter or trade any striped bass, to attempt to sell, barter or trade any striped bass or to transport, to have transported or to attempt to have transported any striped bass out of the State unless said striped bass has been weighed and tagged at an official weigh station.

~~12.011.0~~ The Department may appoint individuals and their agents as official weigh stations to weigh and tag all striped bass landed in a commercial striped bass fishery. Official weigh stations, if requested, shall be compensated by the Department for each striped bass weighed and tagged. An official weigh station shall enter into an agreement with the Department to maintain records and report on a regular basis each commercial food fisherman's daily landings of striped bass weighed and tagged at said station. The Department shall provide official weigh stations with tags to be applied to each striped bass weighed.

~~13.012.0~~ Each commercial food fisherman participating in a striped bass fishery shall file a complete and accurate report with the Department on forms provided by the Department on all striped bass landed during said fishery. Each report shall be filed with the Department within 30 days after the end date of each fishery. All unused tags issued or legally transferred to a commercial food fisherman shall be returned to the Department with said report. Failure to file a complete and accurate report or failure to return all unused tags may disqualify the commercial food fishermen from future striped bass fisheries.

1 DE Reg 270 (09/01/97)

4 DE Reg 1552 (03/01/01)

8 DE Reg 1169 (02/01/05)

18 DE Reg. 889 (05/01/15)

20 DE Reg. 467 (12/01/16)

22 DE Reg. 674 (02/01/19) (Final)