

HEARING OFFICER'S REPORT

TO: The Honorable Shawn M. Garvin
Cabinet Secretary, Dept. of Natural Resources and Environmental Control

FROM: Theresa Newman, Regulatory Specialist, Office of the Secretary,
Dept. of Natural Resources and Environmental Control

RE: Proposed Regulation Amendments to 7 DE Admin. Code 3300 – *Non-Tidal Finfish*, sections 3301- *Definitions* and 3304 - *Creel Limits, Size Limits and Seasons, 3.0 Trout*

DATE: December 21, 2022

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Tuesday, November 22, 2022, at 6:00 p.m. via the State of Delaware Cisco WebEx Meeting Platform by the Department of Natural Resources and Environmental Control (“DNREC,” “Department”), to receive comment on proposed regulatory amendments (“Amendments”) to 7 DE Admin. Code 3300 – Non-Tidal Finfish, more specifically sections 3301- *Definitions* and 3304 - *Creel Limits, Size Limits and Seasons, 3.0 Trout* (“Regulation”) that will enable the Department to augment the waters open for trout fishing by adding an additional 0.4 miles of trout stream to the stocked portion of Red Clay Creek and designate this area for fly-fishing only. In addition, the Department proposes to designate “Youth Day” as the first Saturday of April in trout streams and the first Saturday of March in trout ponds.

The Department provides a put-and-take freshwater trout fishery each spring in select piedmont streams of New Castle County, one pond in Kent County, and one pond in Sussex County. In 2018, a section of Red Clay Creek was designated as a trout stream allowing stocking for trout to be fished in these waters. The trout stream section of Red Clay Creek currently runs 1.0 miles from the dam just below the boundary between the State of Delaware and the Commonwealth of Pennsylvania, to the bridge at Yorklyn Road in Hockessin, Delaware.

Over time, the water quality has improved in Red Clay Creek which has provided an opportunity to expand the trout stream section of Red Clay Creek through an undeveloped area in Auburn Valley State Park. With the cooperation of Auburn Valley State Park, the Department proposes to expand the trout stream by 0.4 miles. The proposed Amendments will extend the trout stream section of Red Clay Creek beyond the bridge at Yorklyn Road, approximately 0.4 miles downstream to the Auburn Valley State Park boundary adjacent to Creek Road. The 0.4-mile extension will be reserved for fly-fishing only. Currently one area of White Clay Creek is reserved for fly-fishing only. The proposed expansion of Red Clay Creek will allow a second area in Delaware to be reserved for fly-fishing only.

Fly-fishing is an angling method that uses a light-weight lure to catch fish. The fly is cast using a fly rod, reel, and specialized weighted line that requires casting techniques significantly different from other forms of casting. Freshwater trout angling is a seasonally popular activity and fly-fishing has grown popularity amongst anglers. Moreso, the trout season became more popular during the Covid-19 pandemic.

In 2020, under the authority granted by the Governor's Covid-19 Emergency Order, the Department designated the first day of the 2020 trout season on trout streams as "Youth Day". This day was reserved for those under the age of 16. The event grew popularity amongst experienced anglers, and those under the age of 16. As the Emergency Order was terminated in 2021, the Department is required to amend the Regulation to continue the designation of "Youth Day" for anglers under the age of 16.

The Department proposes Amendments to continue the designation of "Youth Day" as the beginning of the trout season. The proposed Amendments will designate the first Saturday of April in trout streams and the first Saturday of March in trout ponds as "Youth Day". In turn, trout season for all anglers will then begin on the first Sunday of April in trout streams and the first Sunday in March in trout ponds

The proposed Amendments will allow for the State to continue the “Youth Day” for anglers under the age of 16 and encouraging the youth to become anglers by providing a designated day for youth to fish for trout. In addition, the proposed Amendment is expected to ease the overpopulated stream in White Clay Creek with adding an additional 0.4 miles for fly-fishing in the trout stream section of Red Clay Creek, creating a second location for a fly-fishing only area.

The Department has the statutory basis and legal authority to act regarding promulgation of the Amendments pursuant to 7 *Del. C.* §103 (a & b). The Department published its proposed regulation Amendments in the November 1, 2022, *Delaware Register of Regulations*. Thereafter, the public hearing regarding this matter was held on November 22, 2022. There were four (4) members of the public in attendance and three (3) verbal comments given at the virtual public hearing. Pursuant to Delaware law, the record remained open for fifteen (15) additional days after the date of the public hearing for receipt of public comment. The hearing record formally closed with regard to public comment at the close of business on December 7, 2022, with a total of six (6) written comments received by the Department during the phase of this proposed regulatory promulgation.

After the record closed, the Department’s Division of Fish and Wildlife staff prepared a Technical Response Memorandum (“TRM”), at the request of this Hearing Officer, attached hereto as Appendix “B”.

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.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The public hearing record consists of the following documents: (1) a verbatim transcript; (2) ten (10) documents introduced by Department staff at the public hearing

held on November 22, 2022 and marked by Hearing Officer Theresa Newman accordingly as Department Exhibits 1-10; and (3) a Technical Response Memorandum (“TRM”). The Department’s person primarily responsible for the drafting and overall promulgation of these proposed Amendments, John Clark, Environmental Program Administrator with the Division of Fish and Wildlife, developed the record with the relevant documents in the Department’s files.

As stated previously, a TRM was provided by the Department’s expert staff. The TRM responded to nine comments received by the Department, with majority of comments in favor of the proposed Amendments. One question pertaining to handicap accessibility and two suggestions pertaining to the proposed amended Regulation. The Department advised that the added 0.4 miles is an underdeveloped area in Auburn State Park, therefor general parking and handicap parking are not established. A commenter suggested an “artificial lures-only” area rather than “fly-fishing- only” area. The Department considered the comment however, artificial lures would not be enforceable due to the variation of artificial lures available on the market. The variation of materials and number of hooks that relate to “artificial” lures and rods would require identifying definitions to enforce what would be acceptable. The Department received another suggestion to have a delayed harvest area (area would be catch and release only for a specified period at the beginning of the season) on the trout streams. The Department understands that delayed harvest can be an effective way to allow more anglers to enjoy a limited number of trout, trout biology makes it infeasible for Delaware’s trout streams. The water temperatures in Delaware’s lower gradient streams can reach the upper temperature limit for trout survival soon after stocking in the spring. Anglers may keep four to six trout per day depending on location and anglers are encouraged to keep trout as most of the trout will not survive in Delaware’s streams as the temperatures rise, therefor a delayed harvest would not be beneficial for trout anglers. The Department considered all the comments and proceeded with the promulgation of the proposed Amendments.

Accordingly, the Department’s proposed Amendments and the Department’s TRM are attached hereto as Appendix “A” and Appendix “B” for the Secretary’s review, accordingly.

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 7 DE Admin. Code 3300 – *Non-Tidal Finfish*, more specifically sections 3301- Definitions and 3304 - *Creel Limits, Size Limits and Seasons, 3.0 Trout*. 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 this proposed regulatory promulgation, pursuant to 7 *Del. C.* §103 (a & b);
2. The Department has jurisdiction under its statutory authority, pursuant to 7 *Del.C.* Chapter 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 November 22, 2022, and during the 15 days subsequent to the hearing (through December 7, 2022), before making any final decision;
4. Promulgation of the proposed Amendments to 7 DE Admin. Code 3300 – *Non-Tidal Finfish*, sections 3301- *Definitions* and 3304 - *Creel Limits, Size Limits and Seasons, 3.0 Trout* that will enable the Department to augment the waters open for trout

fishing by adding an additional 0.4 miles of trout stream to the stocked portion of Red Clay Creek and reserving this area as a fly-fishing only, and designate “Youth Day” as the first Saturday of April in trout streams and the first Saturday of March in trout ponds;

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 the recommendations as proposed should be applicable to all Delaware citizens equally;

6. The Department’s proposed regulatory Amendments, as initially published in the November 1, 2022 *Delaware Register of Regulations*, 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 Amendments as final regulatory 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.



Theresa L. Newman
Public Hearing Officer