

HEARING OFFICER'S REPORT

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

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

RE: Proposed Regulation Amendments to 7 DE Admin. Code 3505 - *Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements*

DATE: February 15, 2024

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Tuesday January 30, 2024, at 6:00 p.m. via the State of Delaware's Zoom Video Communication 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 3505 - *Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements* ("Regulation"). Pursuant to 7 *Del. C.* §903 the Department is proposing revisions to the Regulation to modify the anchor gill net season to better synchronize the season with the availability and market for striped bass.

The striped bass gill net season is open from February 15 through May 31. There are two main types of gillnetting techniques, drift gillnetting and anchor gillnetting. Currently, drift gillnetting is open for the duration of the striped bass gill net season (February 15-May 31) and anchor gill netting is only open from March 1 through May 10.

At the April 18 and September 19, 2023, Advisory Council on Tidal Finfisheries ("Council") meeting, members discussed modifying the spring anchor gill net season. Delaware's striped bass fishery is controlled by a quota and to better synchronize the spring anchor gill net season with the availability of striped bass the council suggested

the Department revise the Regulation. Striped bass have been coming into Delaware Bay and River earlier in the year as the waters warm up, and the market for striped bass has been increasing earlier in the season.

The anchor netting technique is a more efficient than drift netting however it is also more destructive. Anchor gill netting accounts for 90% of striped bass gill net landings. When a gill netter discards a striped bass for any reason (over quota, poor market conditions, etc.), those striped bass discarded from anchor gillnets had a 41% mortality rate, whereas those discarded from drift gillnets only experience an 8% mortality rate. Furthermore, anchor gillnetting has been associated with the mortality of other species including the Endangered Species Act-listed Atlantic Sturgeon and waterbirds, which have been discovered deceased in anchor gillnets. To better match the anchor net season to the availability and market for striped bass, the Council unanimously approved a motion on September 19, 2023, to recommend the Department modify the anchor gill net season by adding two weeks in February and to eliminate two weeks between the end of April and beginning of May from the anchor gill netting season.

The Department considered the recommendation and proposed Amendments to adjust the anchor gill net season, beginning February 15th (rather than March 1st) and extend it through April 26th (rather than May 10th.) The proposed modification to the anchor gill net season maintains a 10-week duration for anchor gillnetting while adjusting the season to synchronize the spring anchor gill net season with the availability of and market for striped bass.

It should be noted that, in accordance with the procedures set forth in 29 *Del.C.* §10119 and pursuant to 7 *Del.C.* §903(h), the Department implemented Emergency Secretary Order # 2023-F-0031 (“EO”) on December 1, 2023, regarding the anchor gill netting season. The EO adopts amendments to the Regulations, effective February 15, 2024, that revised the 2024 anchor gill net season from the current dates of March 1 through May 10 to February 15 through April 26. The promulgation of the Emergency Order remains in effect for no longer than 120 days. The emergency regulations, as

contained in the EO, were intended as interim measures, necessary to avoid the risk of harm to public health, safety, and welfare, pending the formal adoption of regulations pursuant to the Administrative Procedures Act.

The Department has the statutory basis and legal authority to act regarding promulgation of the Amendments pursuant to 7 *Del. C.* §903. The Department published its proposed regulation Amendments in the January 1, 2024, *Delaware Register of Regulations*.

Subsequent to the publishing the proposed Amendments in the *Delaware Register of Regulations*, the Advisory Council on Tidal Finfisheries met on January 17, 2024, and further discussed the proposed Amendments. As a compromise to the netters who voiced concerns about losing days of the anchor gillnet season between April and May, and without adding additional number of days to the season, the Department proposed to modify the dates to include a couple of days in May to the season. The Department *revised* proposed Amendments to modify the anchor gillnet season beginning the season on February 19 after 4 pm, to allow anglers to deploy their nets the night before the commencement of anchor gillnet season on February 20 and extend the season through May 2. This slight shift in the season preserves the 10-weeks for anchor gillnetting while optimizing the time to align with the spring anchor gill netting season, market demand for striped bass, and with the consideration of late-season netters.

As a result, the Department presented the *revised* proposed Amendments at the public hearing that was held on January 30, 2024. The revisions, as set forth in the *revised* proposed Amendments, were properly vetted by the Department at the time of the virtual hearing and do not constitute a significant alteration to what was initially proposed. Therefore, no further public notification is required by the Department.

There were ten (10) members of the public in attendance 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 February 14, 2024, with a total of ten (10) 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) thirteen (13) documents introduced by Department staff at the public hearing held on January 30, 2024, and marked by Hearing Officer Theresa Smith accordingly as Department Exhibits 1-13; 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 responds to ten (10) comments. The Department received comments in support of the *revised* proposed Amendments as well as comments suggesting keeping the current start of the season (February 15) and extend the season by adding two weeks in May (May 10). While comments suggested an extension, some of the same commenters also stated they agreed with the *revised* proposed Amendments, if the extension was not feasible. The Department does not believe extending the anchor gill netting season beyond the current timeframe would lead to more striped bass harvest. Rather, the

concern is that more days of anchor netting would lead to more dead discarded striped bass, more dead of other fish species, including species with populations already under stress, and more death of other animals, such as water birds. The Department believes that the *revised* proposed Amendments won't increase the mortality of discarded striped bass and other species, while providing the most advantageous anchor gill netting season to meet market demand for striped bass.

Accordingly, the Department's proposed Amendments and TRM are attached hereto as Appendix "A" and Appendix "B," respectively, for the Secretary's review.

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 *revised* proposed regulatory amendments to 7 DE Admin. Code 3505 - *Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements*. 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.* §903;
2. The Department has jurisdiction under its statutory authority, pursuant to 7 *Del.C.* Chapter 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 January 30, 2024, and during the 15 days subsequent to the hearing (through February 14, 2024), before making any final decision;

4. Promulgation of the proposed Amendments to 7 DE Admin. Code to 3505 - *Striped Bass Commercial Fishing Seasons; Quotas; Tagging and Reporting Requirements* will enable the Department to modify the anchor gill net season to better synchronize the season with the availability and market for Striped Bass;

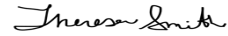
5. The Department has reviewed the proposed Amendments in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104, and has selected Exemption “B1,” as this regulation is not substantially likely to impose additional cost or burdens upon individuals and/or small businesses;

6. The Department has reviewed this *revised* proposed regulatory promulgation in the light of 7 *Del.C.* §10003 and 29 *Del.C.* §10118(b)(3), and has determined that conducting such an assessment regarding the impact of this regulation on the achievement of the State of Delaware's greenhouse gas emissions reduction targets is not practical;

7. The Department’s proposed regulatory Amendments, as initially published in the January 1, 2024, *Delaware Register of Regulations*, and then subsequently revised, 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*;

8. The Department’s emergency regulations implemented by Emergency Order # 2023-F-0031 will expire on April 11, 2024, when the final regulations become effective; and

9. The Department shall submit the *revised* 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. Smith
Public Hearing Officer