



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

Office of the
Secretary

Phone: (302) 739-9000
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Secretary's Order No.: 2018-F-0051

**RE: Approving Final Regulations to Amend 7 DE Admin. Code 3511:
 *Summer Flounder Size Limits; Possession Limits; Seasons***

Date of Issuance: September 19, 2018

Effective Date of the Amendment: October 11, 2018

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 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 regulation amendments ("Amendments") to 7 DE Admin. Code 3511: *Summer Flounder Size Limits; Possession Limits; Seasons*. This action is being taken by the Department to adopt provisions consistent with federal measures proposed for the recreational Summer Flounder management, in compliance with Addendum XXVIII to the Atlantic States Marine Fisheries Commission's ("ASMFC") Interstate Fishery Management Plan for Summer Flounder, Scup and Black Sea Bass. Specifically, the proposed action will allow Delaware to reduce its Summer Flounder minimum size limit by a half-inch to 16.5 inches.

The Atlantic States Marine Fisheries Commission (“ASMFC”) and Mid Atlantic Fisheries Management Council (“MAFMC”) extended the regional approach to recreational Summer Flounder management outlined in Addendum XXVIII to the Interstate Fishery Management Plan (FMP) for Summer Flounder, Scup, and Black Sea Bass through 2018. Addendum XXVIII allows states or regions to develop measures that will achieve the coast wide recreational harvest limit of 4.42 M pounds. Based on Summer Flounder stock status, states or regions may liberalize their 2017 recreational Summer Flounder regulations to allow for up to a 17% harvest increase in 2018.

By extending the provisions of Addendum XXVIII, Delaware continued to be grouped in a region (“DelMarVa”) with Maryland and Virginia. The DelMarVa region submitted an analysis to the ASMFC Summer Flounder Technical Committee for a four (4) fish possession limit, a 365-day season, and a 16.5-inch minimum size limit that is estimated to result in a 16.4% harvest increase. This proposed management strategy was approved by the ASMFC’s Management Board in February 2018, and allowed Delaware to reduce its Summer Flounder minimum size limit by a half inch.

The procedural requirements of 29 *Del.C.* §§10115 – 10118 did not afford the Department sufficient time to complete its formal regulatory amendment process prior to the beginning of the 2018 Summer Flounder recreational fishery. 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-0026 on April 13, 2018, in order to immediately implement the aforementioned necessary regulatory change. Shortly thereafter, the Department commenced its formal regulatory amendment process with Start Action Notice #2018-10 (May 15, 2018). It should be noted that the Department renewed its emergency regulations on Summer Flounder for an additional ninety (90) days with the issuance of Secretary’s Order No. 2018-F-0041 (July 18, 2018), in order to ensure that the provisions of the aforementioned emergency regulations would not expire prior to the formal finalization of these proposed Amendments.

The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 3511: *Summer Flounder Size Limits; Possession Limits; Seasons*, pursuant to 7 Del. C. §901 and §903(a), (b), and (e). The Department published its initial proposed regulation Amendments in the July 1, 2018 *Delaware Register of Regulations*. Thereafter, the public hearing regarding this matter was held on July 26, 2018. No members 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 August 10, 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 Vest prepared a Hearing Officer's Report dated September 14, 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 3511: *Summer Flounder Size Limits; Possession Limits; 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 3511: *Summer Flounder Size Limits; Possession Limits; Seasons*, pursuant to 7 *Del.C.* §901 and §903(a), (b), and (e);
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 July 26, 2018, and during the 15 days subsequent to the hearing (through August 10, 2018), before making any final decision;
4. Promulgation of the revised proposed Amendments to 7 DE Admin. Code 3511: *Summer Flounder Size Limits; Possession Limits; Seasons* will enable the Department to bring Delaware's existing Summer Flounder Regulations into compliance with current federal measures proposed for the recreational Summer Flounder fishery, consistent with Addendum XXVIII to the ASMFC's Interstate Fishery Management Plan for Summer Flounder, Scup and Black Sea Bass, specifically, by allowing Delaware to reduce its Summer Flounder minimum size limit by a half inch to 16.5 inches;
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" regarding same, as this promulgation is not substantially likely to impose additional costs or burdens upon individuals and/or small businesses;
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 July 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 3511: *Summer Flounder Size Limits; Possession Limits, 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

MEMORANDUM

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

FROM: Lisa A. Vest
Public Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: **Proposed Regulation Amendments to 7 DE Admin. Code 3511:**
Summer Flounder Size Limits; Possession Limits; Seasons

DATE: September 14, 2018

I. Background:

A public hearing was held on Thursday, July 26, 2018, at 6:00 p.m. at the Department of Natural Resources and Environmental Control (“DNREC,” “Department”), 89 Kings Highway, Dover, Delaware to receive comment on proposed amendments (“Amendments”) to 7 DE Admin. Code 3511: *Summer Flounder Size Limits; Possession Limits; Seasons*. This action is being taken by the Department at this time to adopt provisions in Delaware consistent with federal measures proposed for the recreational Summer Flounder management, specifically, to reduce its Summer Flounder minimum size limit by a half inch to 16.5 inches.

The Atlantic States Marine Fisheries Commission (“ASMFC”) and Mid Atlantic Fisheries Management Council (“MAFMC”) extended the regional approach to recreational Summer Flounder management outlined in Addendum XXVIII to the Interstate Fishery Management Plan (FMP) for Summer Flounder, Scup, and Black Sea Bass through 2018. Addendum XXVIII allows states or regions to develop measures that will achieve the coast wide recreational harvest limit of 4.42 M pounds.

Based on Summer Flounder stock status, states or regions may liberalize their 2017 recreational Summer Flounder regulations to allow for up to a 17% harvest increase in 2018. By extending the provisions of Addendum XXVIII, Delaware continued to be grouped in a region (“DelMarVa”) with Maryland and Virginia. The DelMarVa region submitted an analysis to the ASMFC Summer Flounder Technical Committee for a four (4) fish possession limit, a 365-day season and a 16.5-inch minimum size limit that is estimated to result in a 16.4% harvest increase. This proposed management strategy was approved by the ASMFC’s Management Board in February 2018, and allowed Delaware to reduce its Summer Flounder minimum size limit by a half inch.

The procedural requirements of 29 *Del.C.* §§10115 – 10118 did not afford the Department sufficient time to complete its formal regulatory amendment process prior to the beginning of the 2018 Summer Flounder recreational fishery. 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-0026 on April 13, 2018, in order to immediately implement the aforementioned necessary regulatory change. Shortly thereafter, the Department commenced its formal regulatory amendment process with Start Action Notice #2018-10 (May 15, 2018). It should be noted that the Department renewed its emergency regulations on Summer Flounder for an additional ninety (90) days with the issuance of Secretary’s Order No. 2018-F-0041 (July 18, 2018), in order to ensure that the provisions of the aforementioned emergency regulations would not expire prior to the formal finalization of these proposed Amendments.

The Department has the statutory basis and legal authority to act with regard to promulgation of the proposed amendments to 7 DE Admin. Code 3511, *Summer Flounder Size Limits; Possession Limits, Season*, pursuant to 7 Del. C. §901 and §903(a), (b), and (e). The Department published its initial proposed regulation Amendments in the July 1, 2018 *Delaware Register of Regulations*. Thereafter, the public hearing regarding this matter was held on July 26, 2018. No members 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 August 10, 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.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The public hearing record consists of the following documents: (1) a verbatim transcript; and (2) nineteen (19) documents introduced by Department staff at the public hearing held on July 26, 2018, and marked by this Hearing Officer accordingly as Department Exhibits 1-19. The Department's person primarily responsible for the drafting and overall promulgation of these proposed Amendments, Stewart Michels, Program Manager II, developed the record with the relevant documents in the Department's files.

As stated previously, no members of the public attended the aforementioned July 26, 2018 hearing, nor was any comment received by the Department at any time during the course of this regulatory promulgation. Accordingly, the Department's proposed Amendments are attached hereto as Appendix "A" 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 proposed amendments to 7 DE Admin. Code 3511: *Summer Flounder Size Limits; Possession Limits; Seasons*, as noted above. 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 the proposed Amendments to 7 DE Admin. Code 3511: *Summer Flounder Size Limits; Possession Limits; Seasons*, pursuant to 7 Del.C. §901 and §903(a), (b), and (e);
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 July 26, 2018, and during the 15 days subsequent to the hearing (through August 10, 2018), before making any final decision;

4. Promulgation of the proposed Amendments to 7 DE Admin. Code 3511: *Summer Flounder Size Limits; Possession Limits; Seasons*, will enable the Department to bring Delaware's existing Summer Flounder Regulations into compliance with current federal measures proposed for the recreational Summer Flounder fishery, consistent with Addendum XXVIII to the ASMFC's Interstate Fishery Management Plan for Summer Flounder, Scup and Black Sea Bass, specifically, by allowing Delaware to reduce its Summer Flounder minimum size limit by a half inch to 16.5 inches;

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" regarding same, as they are not substantially likely to impose additional costs or burdens upon individuals and/or small businesses;

6. The Department's proposed regulatory Amendments, as initially published in the July 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 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 7 DE Admin. Code 3511: *Summer Flounder Size Limits; Possession Limits; 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.



LISA A. VEST
Public Hearing Officer

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Attachments/Appendix:
Appendix A: Proposed Reg. Amendments

APPENDIX "A"

PROPOSED REGULATIONS

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Sections 901(c) and (d) and 903(e)(2)a (7 **Del.C.** §§901(c) and (d) and 903(e)(2)a)
7 **DE Admin. Code** 3511

REGISTER NOTICE
SAN #2018-10**3511 Summer Flounder Size Limits; Possession Limits; Season****1. TITLE OF THE REGULATIONS:**

7 **DE Admin. Code** 3511 Summer Flounder Size Limits; Possession Limits; Season.

2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE AND ISSUES:

This action is to adopt a minimum recreational summer flounder size limit of 16.5 inches (formerly 17 inches), consistent with Addendum XXVIII to the Interstate Fishery Management Plan (FMP) for Summer Flounder, Scup, and Black Sea Bass. The Department previously amended 7 **DE Admin. Code** 3511 Summer Flounder Size Limits; Possession Limits; Season to accommodate this change through an emergency action (Secretary's Order 2018-F-0026) pursuant to 29 **Del.C.** §10119 and 7 **Del.C.** §903(h) to assure that Delaware's recreational summer flounder fishery resource avoided unnecessary hardship, benefited from a sustainable harvest liberalization and remained competitive with similar fishing resources in New Jersey, Maryland and Virginia.

The Atlantic States Marine Fisheries Commission (ASMFC) and Mid Atlantic Fisheries Management Council extended the regional approach to recreational summer flounder management outlined in Addendum XXVIII to the Interstate Fishery Management Plan (FMP) for Summer Flounder, Scup, and Black Sea Bass through 2018. Addendum XXVIII allows states or regions to develop measures that will achieve the coastwise recreational harvest limit (RHL) of 4.42 M pounds. Based on summer flounder stock status, states or regions may liberalize their 2017 recreational summer flounder regulations to allow for up to a 17% harvest increase in 2018.

By extending the provisions of Addendum XXVIII, Delaware continues to be grouped in a region (DelMarVa) with Maryland and Virginia. The DelMarVa region submitted an analysis to the ASMFC Summer Flounder Technical Committee for a four (4) fish possession limit, a 365-day season and a 16.5-inch minimum size limit that was estimated to result in 16.4% harvest increase. This proposed management strategy was approved by the ASMFC's Management Board.

3. POSSIBLE TERMS OF THE AGENCY ACTION:

None

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

7 **Del.C.** §901 & §903 (a), (b) & (e)

5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL:

None

6. NOTICE OF PUBLIC COMMENT:

The hearing record on the proposed changes to 7 **DE Admin. Code** 3511 *Summer Flounder Size Limits; Possession Limits; Season* will open July 1, 2018. Individuals may submit written comments regarding the proposed changes via e-mail to Lisa.Vest@state.de.us or via the USPS to Lisa Vest, Hearing Officer, DNREC, 89 Kings Highway, Dover, DE 19901 (302) 739-9042. A public hearing on the proposed amendment will be held in conjunction with a public hearing on proposed amendments to 7 **DE Admin. Code** 3507 *Black Sea Bass Size Limit; Trip Limits, Seasons; Quotas* on July 26, 2018 beginning at 6:00 PM in the DNREC Auditorium, located at the Richardson & Robbins Building, 89 Kings Highway, Dover, DE 19901. Public comments will be received until close of business Friday, August 10, 2018.

7. PREPARED BY:

Stewart Michels
Email: Stewart.Michels@state.de.us
Ph: 739-9914

***Please Note: The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 Del.C. Ch. 104, is available at:**

<http://regulations.delaware.gov/register/july2018/proposed/22 DE Reg 24RFA 07-01-18.pdf>

3511 Summer Flounder Size Limits; Possession Limits; Season

(Penalty Section 7 Del.C. §936(b)(2))

- 1.0 It shall be unlawful for any recreational fisherman to have in possession more than four (4) summer flounder at or between the place where said summer flounder were caught and said recreational fisherman's personal abode or temporary or transient place of lodging.
- 2.0 It shall be unlawful for any person, other than qualified persons as set forth in section 4.0 of this regulation, to possess any summer flounder that measure less than ~~seventeen (17)~~ sixteen and one half (16.5) inches between the tip of the snout and the furthest tip of the tail.
- 3.0 It shall be unlawful for any person, to have in possession any part of a summer flounder that measures less than ~~seventeen (17)~~ sixteen and one half (16.5) inches between said part's two most distant points unless said person also has in possession the head, backbone and tail intact from which said part was removed.
- 4.0 Notwithstanding the size limits and possession limits in this regulation, a person may possess a summer flounder that measures no less than fourteen (14) inches between the tip of the snout and the furthest tip of the tail and a quantity of summer flounder in excess of the possession limit set forth in this regulation, provided said person has one of the following:
 - 4.1 A valid bill-of-sale or receipt indicating the date said summer flounder were received, the amount of said summer flounder received and the name, address and signature of the person who had landed said summer flounder;
 - 4.2 A receipt from a licensed or permitted fish dealer who obtained said summer flounder; or
 - 4.3 A bill of lading while transporting fresh or frozen summer flounder.
 - 4.4 A valid commercial food fishing license and a food fishing equipment permit for gill nets.
- 5.0 It shall be unlawful for any commercial finfisherman to sell, trade and or barter or attempt to sell, trade and or barter any summer flounder or part thereof that is landed in this State by said commercial fisherman after a date when the de minimis amount of commercial landings of summer flounder is determined to have been landed in this State by the Department. The de minimis amount of summer flounder shall be 0.1% of the coast wide commercial quota as set forth in the Summer Flounder Fishery Management Plan approved by the Atlantic States Marine Fisheries Commission.
- 6.0 It shall be unlawful for any vessel to land more than 200 pounds of summer flounder in any one day in this State.
- 7.0 It shall be unlawful for any person, who has been issued a commercial food fishing license and fishes for summer flounder with any food fishing equipment other than a gill net, to have in possession more than four (4) summer flounder at or between the place where said summer flounder were caught and said person's personal abode or temporary or transient place of lodging.