

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 3500 Tidal
Finfish, specifically, the addition of new Section 3550 Cobia**

DATE: March 25, 2020

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Wednesday, February 26, 2020, 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 regulatory amendments to 7 DE Admin. Code 3500 Tidal Finfish, specifically, the addition of new 3550 Cobia (“Amendments”). Pursuant to 7 *Del. C.* §§901, 903(a), (b) & (e), the Department is proposing revisions to the existing Tidal Finfish regulations to include precautionary management measures for *Rachyentron Canadum* (“Cobia”), throughout the State of Delaware.

The Atlantic States Marine Fisheries Commission adopted the Interstate Fishery Management Plan for Atlantic Migratory Group Cobia (“Cobia FMP”) in November 2017, to provide an efficient management structure for the implementation of coastwide management measures and to complement cobia management in federal waters. As a precautionary approach to prevent the Cobia stock from reaching an overfished status, the Cobia FMP requires the States to adopt the precautionary management measures. The most recent stock assessment indicated that Cobia biomass has declined over the past two decades, however the stock was not overfished, and overfishing is not occurring.

In the past three (3) years Delaware has no reported commercial or recreational Cobia landings, preceding adoption of the FMP. As such, the Cobia FMP established the justification of *de minimis* status by recreational harvests, in weight, that are less than 1% of coastwide recreational landings within 2 of the most previous 3 years. As Delaware does qualify for *de minimis* status under the Cobia FMP criteria they may adopt either of two management options.

Option one (“Option 1”) reflects the *de minimis* management measures outlined in the Cobia FMP, to include recreation management measures at a minimum of 32 inches total length and one (1) fish per vessel per trip. The commercial management measures are a minimum of 37 inches total length, with a possession limit of two (2) fish per person and no greater than six (6) fish per vessel. Both recreation and commercial fisheries for Cobia will be open all year around.

Option two (“Option 2”) reflects the management measures in place for Virginia, which is the nearest jurisdiction. The commercial fishing management measures in Virginia are identical to that of Option 1, including an all year - open season. The recreational management differs with measurement limits of a minimum of 40 inches in total, a possession limit of one (1) per person, no greater than three (3) per vessel, and the season is open from June 1 – September 15.

Adoption of either option will ensure compliance with the Cobia FMP, as required by the *Atlantic Coastal Fisheries Cooperative Management Act* (16 USC §§5101, et seq.). At the time the Department drafted the proposed Regulations, it was unknown which of the two options would be adopted by its neighboring *de minimis* States, New Jersey and Maryland. Both neighboring States have since adopted Option 2. For consistency, ease of compliance and enforcement of regulations with its neighbors, Delaware proposes the adoption of Option 2.

The Amendment is expected to complement federal management in a consistent manner throughout the management unit and provide for the long-term stability of the

Cobia stock. Given the sporadic occurrence of Cobia in Delaware waters, it is unlikely that the proposed Amendment will have significant, measurable or predicable costs to the affected Delaware fisheries or their dependent businesses.

The Department has the statutory basis and legal authority to act with regard to promulgation of the Amendments pursuant to 7 *Del. C.* §§901, 903(a), (b) & (e). The Department published its initial proposed regulation Amendments in the February 1, 2020 *Delaware Register of Regulations*. Thereafter, the public hearing regarding this matter was held on February 26, 2020. There were eight (8) member of the public in attendance at the public hearing, with four (4) persons providing a verbal comment. 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 the close of business on March 12, 2020 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) fourteen (14) documents introduced by Department staff at the public hearing held on February 26, 2020 and marked by Hearing Officer Theresa Newman accordingly as Department Exhibits 1-14; and (3) a Technical Response Memorandum ("TRM"). The Department's person primarily responsible for the drafting and overall

promulgation of these proposed Amendments, Stewart Michels, Fisheries Program Manager II 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 an even split of opinions for each option. The comments in favor of Option 1 provide that this option is viable and has some advantages in terms of equal treatment of the recreational and commercial sectors. The Department considered this option; however, Option 1 and Option 2 have identical commercial management limits, therefor the Department focused more on the benefits of recreational limits.

The Department finds that comments in favor of Option 2 support more protection to the Cobia population than Option One. The recreational management limits for Option 2 (40" total length) are at higher minimum length requirement compared to Option 1 (38" in total length). In addition, Option 2 provides a more defined season, and the ability for multiple anglers to possess up to 3 Cobia per vessel per trip. The higher minimum length and a more restricted open season protects Cobia stock from being overfished. Accordingly, the Department's proposed Amendments are attached hereto as Appendix "A" for the Secretary's review.

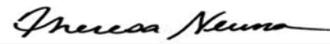
III. RECOMMENDED FINDINGS AND CONCLUSIONS:

Based on the record developed, I find and conclude that the Department has provided appropriate reasoning regarding the need for the proposed regulatory amendments to 7 DE Admin. Code 3500 Tidal Finfish, specifically, the addition of new Section 3550 Cobia. 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.* §§901, 903(a), (b) & (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 February 26, 2020, and during the 15 days subsequent to the hearing (through March 12, 2020), before making any final decision;
4. Promulgation of the proposed Amendments to 7 DE Admin. Code 3500 Tidal Finfish, specifically, the addition of new Section 3550 Cobia will enable the Department to include precautionary management measures for this fishery (including, but not limited to, the more restrictive open season from June 1 to September 15), and will better protect the stock of Cobia from being overfished in Delaware;
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’s proposed regulatory Amendments, as initially published in the February 1, 2020 *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 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

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
DIVISION OF FISH AND WILDLIFE
 Statutory Authority: 7 Delaware Code, Sections 901 and 903(a), (b) & (e)
 (7 Del.C. §§901 & 903(a), (b) & (e))

PROPOSED

REGISTER NOTICE
SAN #2019-07

Hearing Docket No.: 2020-R-F-0002

3550 Cobia (*Rachycentron canadum*)

1. TITLE OF THE REGULATIONS:

Amend 7 DE Admin. Code 3500 Tidal Finfish to include a new 3550 Cobia (*Rachycentron canadum*).

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

The Atlantic States Marine Fisheries Commission adopted the Interstate Fishery Management Plan for Atlantic Migratory Group Cobia (FMP) in November 2017. The most recent stock assessment indicated that Cobia biomass has declined over the past two decades, but the stock is not overfished and overfishing is not occurring. The FMP requires that states adopt the precautionary management measures contained in the FMP to prevent overfishing.

Cobia presence in Delaware waters is sporadic, but they are targeted by anglers when known to be present. Delaware had no reported commercial or recreational Cobia landings in the three years preceding adoption of the FMP. Therefore, Delaware qualifies for *de minimis* status under the FMP criteria and may adopt either of the following two management options:

Delaware's proposed Cobia management options.

| | Option 1 | | Option 2 | |
|------------------|-------------------|------------|--------------------------------|------------|
| | <i>De Minimis</i> | | Nearest Non- <i>De Minimis</i> | |
| | Recreational | Commercial | Recreational | Commercial |
| Min. Length | 32 | 37 | 40 | 37 |
| Possession Limit | 1 | 2 | 1 | 2 |
| Vessel Limit | 1 | 6 | 3 | 6 |
| Open Season | All Year | All Year | June 1 - Sept. 15 | All Year |

Option 1 reflects the *de minimis* management measures outlined in the FMP and Option 2 reflects the management measures in place for the nearest non-*de minimis* jurisdiction (VA). The commercial fishing management measures are identical in both options; however, the recreational management measures differ by the minimum length, maximum vessel limit and season.

Adoption of either option will ensure compliance with the FMP, as required by the Atlantic Coastal Fisheries Cooperative Management Act (16 USC §§5101, *et seq.*). The proposed action is expected to complement federal management in a consistent manner throughout the management unit and provide for the long-term stability of the stock. Given the sporadic occurrence of Cobia in Delaware waters, it is unlikely that the proposed action will have significant, measurable or predicable costs to the affected Delaware fisheries or their dependent businesses.

3. POSSIBLE TERMS OF THE AGENCY ACTION:

N/A

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:

N/A

6. NOTICE OF PUBLIC COMMENT:

The hearing record on the proposed changes to 7 DE Admin. Code 3500 Tidal Finfish to include a new 3550 Cobia opens February 1, 2020 (Hearing Docket No. 2019-R-F-0002). A public hearing on the proposed amendment will be held proceeding the adjournment of the public hearing on proposed amendments to 7 DE Admin. Code 3502 Striped Bass Spawning Season



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES AND
 ENVIRONMENTAL CONTROL**

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To: Theresa Newman, Regulatory Specialist

From: John H. Clark, Fisheries Section Administrator

Subject: Technical Response to public comments received regarding 7 DE Admin Code 3550 – Cobia

The Fisheries Section has considered all the public comments received regarding the two recreational options in the proposed Cobia regulation and decided that it is in Delaware’s best interest to proceed with Option Two; the recreational option based on Virginia’s Cobia regulation (Minimum size of 40”, Possession limit of 1 per angler per trip or 3 per vessel per trip, Season of June 1 through September 15). Public comments on the two recreational options were mixed, so this response addresses the comments and explains the Fisheries Section’s decision.

Comments in favor of Option One (Minimum size of 32”, Possession limit of 1 per angler per trip, No Closed Season) – 2 written comments, 3 comments at the public hearing.

Option One is the default *de minimis* option presented to states in the Atlantic States Marine Fisheries Commission’s Interstate Fishery Management Plan for the Atlantic Migratory Group Cobia. The Fisheries Section included this option in the proposed regulation when the regulation was drafted in 2018 as it was one of the two *de minimis* options offered to states. The Fisheries Section agrees with the commenters favoring this option that it is a viable option and has some advantages in terms of equal treatment of the recreational and commercial sectors. However, Cobia is almost exclusively a recreational species in Delaware, so treatment of the commercial sector is a minor consideration in evaluating the two options.

Comments in favor of Option Two (Minimum size of 40”, Possession limit of 1 per angler per trip or 3 per vessel per trip, Season of June 1 through September 15) – 4 written comments, 1 comment at the public hearing.

Option Two is the alternate *de minimis* option presented to states in the Atlantic States Marine Fisheries Commission’s Interstate Fishery Management Plan for the Atlantic Migratory Group Cobia. This option requires *de minimis* states to adopt the Cobia regulations of the state’s nearest non-*de minimis* neighbor, which for Delaware is Virginia. The Fisheries Section agrees with the commenters favoring this option that this option affords more protection to the Cobia population than Option One due to the larger minimum size and the defined season, while also allowing anglers fishing together on a vessel to possess more than one Cobia in the unlikely event that they catch more than one 40” Cobia.

The Fisheries Section has considered public comment, which is evenly split on the two options, and decided that Option Two is the best option for Delaware because of the reasons stated above and its regulatory consistency advantage. Delaware did not know which of the two options would be adopted by its neighboring *de minimis* states of New Jersey and Maryland at the time this proposed regulation was drafted. New Jersey and Maryland have since both adopted Option Two, so Delaware will have consistent regulations with its neighbors by adopting Option Two, which will make it easier for anglers to comply and the Enforcement officers of the three states to enforce. This consideration further tips the balance for the Fisheries Section in favor of Option Two.