

## 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 3550 - *Cobia*

**DATE:** August 9, 2021

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### **I. BACKGROUND AND PROCEDURAL HISTORY:**

A public hearing was held on Thursday, July 22, 2021, 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 3550 Cobia (“Regulation”). Pursuant to 7 *Del. C.* §§901, 903(a), (b) & (e), the Department is proposing revisions to the Regulation to implement changes to *Rachycentron canadum*’s (“Cobia”) minimum size, vessel limit and open season throughout the State of Delaware.

In May 2020, the Department adopted management measures for Cobia to meet the requirement of the Interstate Fishery Management Plan for Atlantic Migratory Group Cobia (“Cobia FMP”) established by the Atlantic States Marine Fisheries Commission. The Cobia FMP established the justification of *de minimis* status by recreational harvests, for states that have less than 1% of coastwide recreational landings by weight, within 2 of the most recent 3 years. At that time, Delaware reported no commercial or recreational Cobia landings for three years prior to the adoption of the May 2020 Regulation. As such, Delaware qualified for *de minimis* status under the Cobia FMP criteria and adopted management measures that were the same as the Commonwealth of Virginia (the closest neighboring State with non-*de minimis* status).

Currently, the commercial management measures are a minimum of 37 inches in total length, with a possession limit of two (2) fish per person and no greater than six (6) fish per vessel, and an open season of all year around. The Cobia recreational management measures are a minimum of 40 inches in total length, a possession limit of one (1) per person, no greater than three (3) per vessel, and an open season from June 1 – September 15. It should be noted that during the phase of the May 2020 promulgation, neighboring states such as Maryland and New Jersey also adopted the same management measures.

In October 2020, the Atlantic States Marine Fisheries Commission adopted Addendum I to the Cobia FMP that mandated changes to recreational *de minimis* measures. Addendum I redefined the recreational *de minimis* measures, therefore Delaware must adopt either of the following two *de minimis* options to remain in compliance with Cobia FMP:

Option one reflects the *de minimis* management measures outlined in Addendum I to the FMP, that include recreational management measures of a minimum of 37 inches total length, a possession limit of one (1) fish per person, one (1) fish per vessel, and with open season all year (“Option 1”), rather than limited to June 1 – September 15 (per the May 2020 Regulations).

Option two reflects the management measures in place for the nearest non-*de minimis* jurisdiction (Virginia). The recreational management measures remain the same size limit as the May 2020 Regulation, with a minimum of 40 inches in total length; however, only one (1) fish per vessel can measure more than fifty (50) inches, additionally a possession limit of one (1) per person and no greater than two (2) fish per vessel, and the open season is reduced by two weeks to June 15 – September 15 (“Option 2”).

It should be noted that the commercial management measures for both options remain the same as they were adopted in May 2020.

Adoption of either option will ensure compliance with Addendum I to 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.

For consistency, ease of compliance and enforcement of regulations with its neighbor, New Jersey, the Department proposes the adoption of Option 1. Option 1 is the default *de minimis* option presented to states in the ASMFC's Addendum I to the Cobia FMP. The Department proposes that the smaller minimum size will make it more likely for an angler to catch a legal-sized Cobia. In addition, adopting regulations to be the same as New Jersey is a greater advantage to Delaware due to Delaware and New Jersey anglers sharing waters in the Delaware Bay.

The Department has the statutory basis and legal authority to act regarding promulgation of the Amendments pursuant to 7 *Del. C.* §§901, 903(a), (b) & (e). The Department published its proposed regulation Amendments in the July 1, 2021, *Delaware Register of Regulations*. Thereafter, the public hearing regarding this matter was held on July 22, 2021. There were two (2) 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 August 6, 2021 with a total of two (2) 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) eleven (11) documents introduced by Department staff at the public hearing held on July 22, 2021 and marked by Hearing Officer Theresa Newman accordingly as Department Exhibits 1-11; 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 two comments, both in favor of Option 1. The two comments provide the same opinion of Option 1 being more beneficial for Delaware anglers, making it more likely for anglers to catch a legal-sized Cobia and are in favor of the year-round open season.

The Department finds that comments in favor of Option 1 pose a greater advantage for Delaware anglers for the reasons noted above. There were no public comments in favor of option 2. While Delaware’s other neighboring state, Maryland, adopted Option 2 which is Virginia’s regulation, the non-*de minimis* measurements did not appeal to Delaware anglers. Although Delaware’s regulation will be inconsistent with one of its neighbors regardless of the selected regulatory option, the Fisheries Section recommends Option 1 as being more beneficial to Delaware in being consistent with New Jersey due to their Delaware Bay shared waters.

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 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 July 22, 2021, and during the 15 days subsequent to the hearing (through August 6, 2021), before making any final decision;
4. Promulgation of the proposed Amendments to 7 DE Admin. Code 3550 Cobia will enable the Department to implement changes to Cobia's minimum size, vessel limit and open season throughout the State of Delaware by adopting Option 1;
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 July 1, 2021 *Delaware Register of Regulations*, with the implementation of Option 1, 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.



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Theresa L. Newman  
Public Hearing Officer

Appendix A: Proposed Reg. Amendments  
Appendix B: Technical Response Memorandum

**TITLE 7 NATURAL RESOURCES & ENVIRONMENTAL CONTROL**  
**DELAWARE ADMINISTRATIVE CODE**

**Division of Fish and Wildlife**

**3500 Tidal Finfish**

**3550 Cobia (*Rachycentron canadum*)**

**~~1.0~~ Recreational Seasons**

~~1.1~~ It is unlawful for a recreational fisherman to possess any Cobia during the periods of January 1 through May 31 and September 16 through December 31.

~~1.2~~ It is lawful for a recreational fisherman to possess Cobia during the period of June 1 through September 15 in accordance with Sections 2.0 and 3.0.

**~~2.0~~ 1.0 Recreational Possession Limits**

~~2.1~~ 1.1 It is unlawful for a recreational fisherman to possess more than one Cobia per day or per trip, whichever is longer.

~~2.2~~ 1.2 Except in accordance with ~~4.0~~ 3.0 of this section, it is unlawful to have aboard any vessel more than ~~three~~ one Cobia.

**~~3.0~~ 2.0 Recreational Size Limit**

It is unlawful for a recreational fisherman to possess any Cobia that measures less than ~~40~~ 37 inches in total length.

**~~4.0~~ 3.0 Commercial Possession Limits**

~~4.1~~ 3.1 A commercial fisherman may take and reduce to possession no more than two Cobia per day or per trip, whichever is longer, using commercial fishing gear for which said fisherman is lawfully permitted.

~~4.2~~ 3.2 It is unlawful for a commercial fisherman to possess more than two Cobia per day or per trip, whichever is longer.

~~4.3~~ 3.3 Notwithstanding subsections ~~4.1~~ 3.1 and ~~4.2~~ 3.2, a commercial fishing vessel may have up to six Cobia per day or per trip, whichever is longer, onboard provided the number of Cobia does not exceed twice the number of commercial fishermen onboard that vessel.

**~~5.0~~ 4.0 Commercial Size Limit**

It is unlawful for a commercial fisherman to possess, trade, barter or sell or attempt to trade, barter or sell any Cobia that measure less than 37 inches in total length.

**[OR**



# TITLE NATURAL RESOURCES & ENVIRONMENTAL CONTROL

## DELAWARE ADMINISTRATIVE CODE

### 1.0 Recreational Seasons

~~1.1 It is unlawful for a recreational fisherman to possess any Cobia during the periods of January 1 through May 31 June 14 and September 16 through December 31.~~

~~1.2 It is lawful for a recreational fisherman to possess Cobia during the period of June 1 15 through September 15 in accordance with Sections 2.0 and 3.0.~~

### 2.0 Recreational Possession Limits

~~2.1 It is unlawful for a recreational fisherman to possess more than one Cobia per day or per trip, whichever is longer.~~

~~2.2 Except in accordance with 4.0 of this section, it is unlawful to have aboard any vessel more than three two Cobia with only one that measures greater than 50 inches in total length.~~

### 3.0 Recreational Size Limit

~~It is unlawful for a recreational fisherman to possess any Cobia that measures less than 40 inches in total length.~~

### 4.0 Commercial Possession Limits

~~4.1 A commercial fisherman may take and reduce to possession no more than two Cobia per day or per trip, whichever is longer, using commercial fishing gear for which said fisherman is lawfully permitted.~~

~~4.2 It is unlawful for a commercial fisherman to possess more than two Cobia per day or per trip, whichever is longer.~~

~~4.3 Notwithstanding subsections 4.1 and 4.2, a commercial fishing vessel may have up to six Cobia per day or per trip, whichever is longer, onboard provided the number of Cobia does not exceed twice the number of commercial fishermen onboard that vessel.~~

### 5.0 Commercial Size Limit

~~It is unlawful for a commercial fisherman to possess, trade, barter or sell or attempt to trade, barter or sell any Cobia that measure less than 37 inches in total length.]~~



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

DIVISION OF FISH & WILDLIFE  
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FISHERIES  
SECTION

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(302) 739-9914

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 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 1; the recreational option presented as the default *de minimis* Cobia regulation in the Atlantic States Marine Fisheries Commission (ASMFC) Addendum I to the Interstate Fishery Management Plan (FMP) for Atlantic Migratory Group Cobia (Minimum size of 37", Possession limit of 1 per angler or vessel per trip, No closed season). The two public comments on the recreational options both favored Option 1.**

Comments in favor of Option 1 (Minimum size of 37", Possession limit of 1 per angler or vessel per trip, No closed season) – 2 written comments.

Option 1 is the default *de minimis* option presented to states in the ASMFC's Addendum I to the FMP for Atlantic Migratory Group Cobia. Both commenters noted that the smaller minimum size will make it more likely for an angler to catch a legal-sized Cobia. Both also favored the year-round open season as opposed the three-month open season of Option 2. The Fisheries agrees those are valid reasons to support Option 1. One commenter noted that Option 1 is the regulatory option adopted by New Jersey, so Delaware and New Jersey will have the same Cobia regulation in Delaware Bay. The Fisheries Section agrees with the commenter that a Cobia regulation consistent with New Jersey's regulation is an advantage of Option 1 since Delaware anglers often fish on the New Jersey side of Delaware Bay and vice versa.

No comments were received in favor of Option 2 (Minimum size of 40", Possession limit of 1 per angler per trip or 2 per vessel per trip with only 1 per vessel > 50", Season of June 15 through September 15).

Option 2 is the alternate *de minimis* option presented to states in the ASMFC's Addendum I to the FMP for 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. Delaware's current Cobia regulation matches Virginia's previous Cobia regulation. Virginia revised its regulation to comply with Addendum I and this revised regulation apparently did not appeal to Delaware's anglers due to the larger minimum size and closed season. While Maryland adopted Virginia's revised regulation, New Jersey adopted the default de minimis regulation, so Delaware's two neighboring states with Cobia fisheries have different Cobia regulations. Although Delaware's regulation will be inconsistent with one of its neighbors regardless of the selected regulatory option, the Fisheries Section sees a greater advantage to Delaware in being consistent with New Jersey due to their Delaware Bay shared waters. The Fisheries Section has considered public comment and decided that Option One is the best option for Delaware because of the reasons stated above.