

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))

FINAL

Secretary's Order No: 2020-F-0012

RE: Approving Final Amendments to 7 DE Admin. Code 3500 Tidal Finfish,
specifically, the addition of new Section 3550: Cobia

Date of Issuance: April 15, 2020

Effective Date: May 11, 2020

3550 Cobia (*Rachycentron canadum*)

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 all 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 7 DE Admin. Code 3500 Tidal Finfish, specifically, the addition of new Section 3550 Cobia ("Amendments"). The Department proposes revisions to the existing Tidal Finfish regulations to set forth precautionary management measures for *Rachycentron Canadum* ("Cobia"), throughout the State of Delaware.

This action is being taken by the Department to maintain compliance with the Interstate Fishery Management Plan for Atlantic Migratory Group Cobia ("Cobia FMP") under the authority of the *Atlantic Coastal Fisheries Cooperative Management Act* ("ACFCMA") (16 USC §§5101, et seq.) that was adopted by the Atlantic States Marine Fisheries Commission ("ASMFC") in November, 2017.

The ASMFC adopted the Cobia FMP to provide an efficient management structure for the implementation of coastwide management measures and to complement cobia management in federal waters. The concern of future stock status, due to Allowable Catching Limit overages in federal waters, precipitated the development of an interstate fishery management plan for state specific management measures. After a review of the available information developed by the Atlantic Migratory Group Cobia, the South Atlantic State/ Federal Fisheries Management Board recommended initiation of the Cobia FMP.

Preceding ASMFC's adoption of the Cobia FMP, Delaware has had no reported commercial or recreational Cobia landings in the past 3 years. The Cobia FMP established the justification of *de minimis* status by recreational harvests in weights that are less than 1% of coastwide recreational landings within 2 of the previous 3 years. As Delaware does qualify for *de minimis* status under the FMP criteria, they may adopt either of two management options described below.

The Department considered the first option outlined in the Cobia FMP that reflects *de minimis* management measures to include recreation and commercial Cobia fisheries, with an all year open season ("Option 1"). The recreational management measures are a minimum of 32 inches total length with 1 fish per vessel per trip. The commercial management measures are a minimum of 37 inches total length, with a possession limit of 2 fish per person and no greater than 6 fish per vessel.

The Department also considered a second option reflecting the management measures in place for Virginia, which is the nearest jurisdiction, with established management measures ("Option 2"). The commercial fishing management measures in Virginia are identical to that of Option 1. The recreational management measurement, however, is limited with open season from June 1 – September 15, with a minimum of 40 inches in total length, and possession limit of 1 per person with a maximum of 3 per vessel. It should be noted that during the time the Department reviewed the proposed Amendments, Maryland and New Jersey had not adopted a management measure plan for Cobia.

The overall benefits of Option 2 include a more defined season with a higher minimum total length for recreational fishing, and a more limited recreational fishery quota than Option 1. These precautionary management measure shall protect Cobia stock from being overfished and allow for Cobia to stock for future fishery. In addition, Option 2 has also been implemented by Maryland and New Jersey, providing consistency, and ease of compliance and enforcement, of regulations with Delaware's neighboring *de minimis* States.

The Department hereby adopts the Amendments with the implementation of Option 2 management measures, as a precautionary approach to prevent the Cobia stock from reaching an overfished status throughout the State of Delaware. The Department believes that the implementation of the new Cobia regulations will maintain social and economic benefits to the fishing communities involved, by ensuring a Cobia fishery for future generations. Moreover, the Department

anticipates the proposed Amendments will not have any 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 the formal promulgation of these proposed Amendments, pursuant to 7 **Del.C.** §§901, 903(a), (b) and (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 public members in attendance, who provided comment at the public hearing. Pursuant to 29 **Del.C.** §10118(a), the hearing record ("Record") remained open for receipt of additional written comment for 15 days following the public hearing. The Record formally closed for comment in this matter at close of business on March 12, 2020, with no additional comments received by the Department for the formal 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.

Subsequent to the close of the Record, and at the request of presiding Hearing Officer Theresa Newman, the Department's Division of Fish and Wildlife staff prepared a Technical Response Memorandum ("TRM"). The TRM responds to the comments received by the Department in this matter and provides a thorough discussion with regard to the two possible options for Cobia management for Delaware at this time. Since both Option 1 and Option 2 have identical commercial management limits for this fishery, the Department focused more on the benefits of recreational limits in its deliberations concerning this matter.

The Department's experts in the Division of Fish and Wildlife have concluded that Option 2 provides greater support (and more protection) to the Cobia population than Option 1. The recreational management limits for Option 2 (40" in total length) are at a higher minimum length requirement compared to that of Option 1 ("38" in total length). Moreover, Option 2 provides a limited open season, and the ability for multiple anglers to possess up to 3 Cobia per vessel per trip. For these reasons, the Department proposes that Option 2 be incorporated into the aforementioned Amendments, as those precautionary management measures (along with the more restricted open season from June 1 to September 15) will better protect the stock of Cobia from being overfished in Delaware.

Following the receipt of the Department's TRM as noted above, the Hearing Officer prepared her Hearing Officer's Report dated March 25, 2020 ("Report"), which expressly incorporated both the Department's proposed Amendments and the TRM into the Record generated in this matter. 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 in the Division of Fish and Wildlife, and established by the Hearing Officer's Report, I find that the proposed regulatory Amendments to 7 **DE Admin. Code** 3500 Tidal Finfish, specifically, the addition of new Section 3550 Cobia, are well-supported. I further find that the Department's experts fully developed the record to support adoption of these Amendments. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed Amendments be promulgated as final.

The following reasons and conclusions are entered:

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) 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 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 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.

Shawn M. Garvin
Secretary

3500 Tidal Finfish
3550 Cobia (*Rachycentron canadum*)

1.0 Recreational Possession Limits

- 1.1 It is unlawful for a recreational fisherman to take and reduce to possession more than one Cobia per day or per trip, whichever is longer.**
- 1.2 Except in accordance with 3.0 of this section, it is unlawful to have aboard any boat or vessel more than one Cobia.**

2.0 Recreational Size Limit

It is unlawful for a recreational fisherman to possess a Cobia that measures less than 32 inches in total length.

3.0 Commercial Possession Limits

- 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.**
- 3.2 It is unlawful for a commercial fisherman to possess more than two Cobia per day or per trip, whichever is longer.**
- 3.3 Notwithstanding subsections 3.1 and 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.**

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]

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 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 Cobia.**

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.

23 DE Reg. 936 (05/01/20) (Final)