

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))

7 DE Admin. Code 3550

FINAL

Secretary's Order No: 2021-F-0022

RE: Approving Final Amendments to 7 DE Admin. Code 3550 - *Cobia*

Date of Issuance: August 16, 2021

Effective Date: September 11, 2021

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 3550 - *Cobia* ("Amendments"). The Department proposes revisions to the existing regulations to implement changes to *Rachycentron canadum*'s ("*Cobia*") minimum size, vessel limit and open season throughout the State of Delaware.

This action is being taken by the Department to maintain compliance with Addendum I to 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 October 2020. The ASMFC adopted the Addendum I to the *Cobia FMP* to mandate changes to recreational *de minimis* measures.

In May 2020, the Department adopted regulations to implement management measurements for *Cobia*. During that time, 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. 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).

The current *Cobia* regulations establish the commercial management measures at 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.

Addendum I to the *Cobia FMP* redefined the recreational *de minimis* measures. As previously stated, Delaware qualifies for *de minimis* status under the *Cobia FMP* and to remain in compliance with the *Cobia FMP*, the Department 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 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*").

The Department also considered a second option reflecting the management measures in place for Virginia, which is the nearest non-*de minimis* jurisdiction, with established management measures. 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*").

The commercial management measures for both options remain the same as the May 2020 regulation, as described above.

The overall benefits of *Option 1* include a broader season (with no closed season) than the current restricted season and allows for anglers to catch legal-sized *Cobia* with reducing the recreational minimum size by 3 inches. *Option 1* has also been implemented by New Jersey, providing consistency, and ease of compliance and enforcement, of regulations with Delaware's neighboring *de minimis* state that share waters in Delaware Bay.

The Department hereby adopts the Amendments with the implementation of *Option 1* management measures. The Department believes that the implementation of the amended *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 July 1, 2021, *Delaware Register of Regulations*. Thereafter, the public hearing regarding this matter was held on July 22, 2021. There were two members of the public in attendance, however no public comment was given at that time. 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 August 6, 2021, with two 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 1 provides greater benefits than Option 2. The recreational management limits for Option 1 allow Delaware anglers to catch a legal-sized Cobia and the comments received are in favor of the year-round open season. Moreover, Option 1 is consistent with Delaware's neighboring state, New Jersey. As Delaware and New Jersey share waters in Delaware Bay, the consistency of the same measurements between the shared waters is more beneficial as both states tend to cross water lines. For these reasons, the Department proposes that Option 1 be incorporated into the aforementioned Amendments.

Following the receipt of the Department's TRM as noted above, the Hearing Officer prepared her Hearing Officer's Report dated August 9, 2021 ("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. 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 July 1, 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 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.

Shawn M. Garvin
Secretary

3550 Cobia (*Rachycentron canadum*)

4.0 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.

2.01.0 Recreational Possession Limits

- 2.1.1 It is unlawful for a recreational fisherman to possess more than one Cobia per day or per trip, whichever is longer.
- 2.2.2 Except in accordance with 4.0 Section 3.0 of this section regulation, 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

4.0 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.]~~

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

~~25 DE Reg. 297 (09/01/21) (Final)~~