



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

OFFICE OF THE  
SECRETARY

89 KINGS HIGHWAY  
DOVER, DELAWARE 19901

PHONE: (302) 739-9000  
FAX: (302) 739-6242

**Secretary's Order No.: 2013-F-0048**

**RE: Approving Final Regulations to Amend 7 DE Admin. Code 3500,  
Tidal Finfish Regulations, to include a  
New Section 3588: *Atlantic Menhaden***

**Date of Issuance: November 13, 2013**

**Effective Date of the Amendment: December 11, 2013**

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") the following findings, reasons and conclusions are entered as an Order of the Secretary in the above-referenced rulemaking proceeding.

**Background and Procedural History**

This Order considers proposed regulations to amend 7 DE Admin. Code 3500, Tidal Finfish Regulations, to include a new Section 3588: *Atlantic Menhaden*. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2013-23. The Department published its initial proposed regulation amendments in the September 1, 2013 *Delaware Register of Regulations*. The Department then held a public hearing on September 30, 2013. The public hearing record remained open at that time for public comment through October 15, 2013.

*Delaware's Good Nature depends on you!*

The purpose of the Department's proposed promulgation is to establish regulations consistent with Amendment 2 to the Atlantic States Marine Fisheries Commission's ("ASMFC") Interstate Fishery Management Plan ("IFMP") for Atlantic Menhaden. Specifically, the proposed action seeks to (1) establish Delaware's annual Atlantic Menhaden quota consistent with Amendment 2; (2) establish timely reporting by the fishery; (3) provide for closure of the fishery upon reaching quota; and (4) establish a daily by-catch limit.

The recent population assessment of Atlantic Menhaden (*Brevoortia tyrannus*) showed a decline in population abundance and low recruitment rates. Estimates of fishing mortality show that overfishing is occurring and, in response, the ASMFC adopted Amendment 2 to the IFMP for Atlantic Menhaden. Amendment 2 is designed to minimize the chance of a population decline due to overfishing, reduce the risk of recruitment failure, reduce impacts to species which are ecologically dependent on Atlantic menhaden, and minimize adverse effects on participants in the fishery.

Implementation of Amendment 2 required that states submit implementation plans for approval by the ASMFC's Atlantic Menhaden Management Board. The Board approved Delaware's implementation plan at its May 22, 2013 meeting. The Department's proposed regulatory action will formally adopt the management measures contained in Delaware's Atlantic Menhaden implementation plan.

The proposed amendments were thoroughly vetted by the Department at the public hearing on September 30, 2013. No public comment was received by the Department from the public at any time during the course of this proposed promulgation. It should also be noted that all proper notification and noticing requirements concerning

this proposed promulgation were met by the Department. Proper notice of the hearing was provided as required by law.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated October 31, 2013 (Report). The Report recommends certain findings and the adoption of the proposed amendments as attached to the Report as Appendix A.

### **Findings and Discussion**

I find that the proposed amendments are well-supported by the record developed by the Department, and I adopt the Report to the extent it is consistent with this Order. The Department's experts developed the record and drafted the proposed amendments. As previously noted, no public comment was received by the Department from the public at any time during the course of this proposed promulgation.

I find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these amendments. The adoption of this Order will allow Delaware to (1) establish Delaware's annual Atlantic Menhaden quota consistent with Amendment 2; (2) establish timely reporting by the fishery; (3) provide for closure of the fishery upon reaching quota; and (4) establish a daily by-catch limit.

In conclusion, the following findings and conclusions are entered:

- 1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these proposed amendments as final;

2.) The Department provided adequate public notice of the proposed amendments, and provided the public with an adequate opportunity to comment on both the initial proposed amendments, as well as the proposed amendments, including at the public hearing held on September 30, 2013;

3.) The Department held a public hearing on September 30, 2013 in order to consider public comment before making any final decision;

4.) The Department's Hearing Officer's Report, including its recommended record and the recommended amendments as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;

5.) The adoption of this Order will allow Delaware to (1) establish Delaware's annual Atlantic Menhaden quota consistent with Amendment 2; (2) establish timely reporting by the fishery; (3) provide for closure of the fishery upon reaching quota; and (4) establish a daily by-catch limit;

6.) The recommended amendments should be adopted as final regulation amendments because Delaware will be able to (1) formally adopt the management measures contained in Delaware's Atlantic Menhaden implementation plan; (2) minimize the chance of a population decline due to overfishing, reduce the risk of recruitment failure, reduce impacts to species which are ecologically dependent on Atlantic menhaden, and minimize adverse effects on participants in the fishery; and lastly, because (3) the amendments are well supported by documents in the record;

7.) The Department shall submit this Order approving the final regulation 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.



---

Collin P. O'Mara  
Secretary



## HEARING OFFICER'S REPORT

**TO:** The Honorable Collin P. O'Mara  
Cabinet Secretary, Department 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 3500, Tidal Finfish Regulations, to include a new Section 3588: *Atlantic Menhaden***

**DATE:** October 31, 2013

---

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

A public hearing was held on Monday, September 30, 2013, at 6:30 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 3500, Tidal Finfish Regulations, to include a new Section 3588: *Atlantic Menhaden*. The purpose of the Department's proposed promulgation is to establish regulations consistent with Amendment 2 to the Atlantic States Marine Fisheries Commission's ("ASMFC") Interstate Fishery Management Plan ("IFMP") for Atlantic Menhaden. Specifically, the proposed action seeks to (1) establish Delaware's annual Atlantic Menhaden quota consistent with Amendment 2; (2) establish timely reporting by the fishery; (3) provide for closure of the fishery upon reaching quota; and (4) establish a daily by-catch limit.

The recent population assessment of Atlantic Menhaden (*Brevoortia tyrannus*) showed a decline in population abundance and low recruitment rates. Estimates of fishing mortality show that overfishing is occurring and, in response, the ASMFC adopted Amendment 2 to the IFMP for Atlantic Menhaden. Amendment 2 is designed to minimize the chance of a population

decline due to overfishing, reduce the risk of recruitment failure, reduce impacts to species which are ecologically dependent on Atlantic menhaden, and minimize adverse effects on participants in the fishery.

Implementation of Amendment 2 required that states submit implementation plans for approval by the ASMFC's Atlantic Menhaden Management Board. The Board approved Delaware's implementation plan at its May 22, 2013 meeting. If promulgated, the Department's proposed regulatory action will formally adopt the management measures contained in Delaware's Atlantic Menhaden implementation plan.

The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 3507, pursuant to 7 Del. C. §§901 (c) & (d), 903(e)(2)a. No public comment was received by the Department at any time during this proposed promulgation. 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) eleven documents introduced at the public hearing held on September 30, 2013, and marked by this Hearing Officer accordingly as Department Exhibits 1-11. The Department's person primarily responsible for the drafting and overall promulgation of these proposed amendments, Stewart Michels, developed the record with the relevant documents in the Department's files. Following the submission of the Department's exhibits into the record at the aforementioned public hearing, Mr. Michels proceeded to offer a brief summary as to the Department's proposed actions in this matter.

Atlantic Menhaden provide a tremendously important role in the Delaware estuary and offshore waters as a forage fish and by providing valuable ecological services. Atlantic

Menhaden also serve as the primary, perhaps exclusive, bait in Delaware's blue crab pot fishery, which is by far the most valuable commercial fishing resource within the State. Elsewhere along the Atlantic Coast, they provide similar services and uses, as well as providing an important source of fish oil and fish meal to support a wide range of products.

Results from the ASMFC's 2012 Stock Assessment Update found overfishing to be occurring. In order to reduce the risk of decline due to overfishing, recruitment failure, and impacts to ecologically dependent species, as well as participants in the fisheries, the Commission adopted Amendment 2 to the IFMP. Under Amendment 2, the annual total allowable catch is to be set by the Atlantic Menhaden Management Board on an annual basis, or, for multiple years. The Board established the total allowable catch for the commercial Menhaden fishery in 2013. This reflects a 20 percent reduction from the average catch from the years 2009 through 2011. State quotas were allocated based on average landings for the same period. For Delaware, this equates to 0.01 percent of the coastwide land, for a total of 22.33 metric tons, or, about 49,229 pounds. This quota will remain in place until changed by Board action.

States are obligated to close the directed fishery once this quota is reached. Section 1.0 of the proposed regulation amendments under new Section 3588 establishes Delaware's quota as determined by the Commission, and provides a mechanism to close the fishery. Once the fishery is closed, an incidental by-catch allowance of 6,000 pounds per day will remain in place during the closed season. This by-catch allowance is established under proposed Section 2.0. Amendment 2 further requires timely reporting of catch to minimize the potential for overages in the fishery. Section 3.0 of the proposed regulation amendments requires daily landings reporting through the Department's interactive voice phone reporting system. Further, Section 3.0 clarifies

that monthly logbook reports will still be required by Delaware's commercial harvesters. Finally, under proposed Section 4.0, the proposed amendments prohibit the use of multiple vessels to offload catch as a way to circumvent the 6,000 pound by-catch allowance.

Pursuant to Delaware law, the record remained open for fifteen (15) additional days subsequent to the date of the public hearing, for the purpose of receiving additional public comment. Although the public hearing record remained open for public comment through October 15, 2013, no public comment was received by the Department at any time during the course of this proposed promulgation. It should also be noted that all proper notification and noticing requirements concerning this proposed promulgation were met by the Department.

### **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 3500, Tidal Finfish Regulations, to include a new Section 3588: *Atlantic Menhaden*, as noted above. Accordingly, I recommend promulgation of these proposed amendments in the customary manner provided by law.

Further, I recommend the Secretary adopt the following findings and conclusions:

1. Proper notice of the hearing was provided as required by law.
2. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
3. The Department provided adequate public notice of all proceedings in a manner required by the law and regulations;
4. The Department held its public hearing in a manner required by the law and regulations;

5. Promulgation of the proposed regulatory amendments to 7 DE Admin. Code 3500, Tidal Finfish Regulations, to include a new Section 3588: *Atlantic Menhaden*, will allow Delaware to (1) establish Delaware's annual Atlantic Menhaden quota consistent with Amendment 2; (2) establish timely reporting by the fishery; (3) provide for closure of the fishery upon reaching quota; and (4) establish a daily by-catch limit;
6. The recommended amendments should be adopted as final regulation amendments because Delaware will be able to (1) formally adopt the management measures contained in Delaware's Atlantic Menhaden implementation plan; (2) minimize the chance of a population decline due to overfishing, reduce the risk of recruitment failure, reduce impacts to species which are ecologically dependent on Atlantic menhaden, and minimize adverse effects on participants in the fishery; and lastly, because (3) the amendments are well supported by documents in the record;
7. The Department has reviewed these proposed regulatory amendments in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;
8. The Department's aforementioned proposed regulatory amendments concerning 7 DE Admin. Code 3500, Tidal Finfish Regulations, to include a new Section 3588: *Atlantic Menhaden*, as published in the September 1, 2013 *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

9. The Department shall submit the proposed regulation amendments as final amendments to the *Delaware Register of Regulations* for publication in its next available issue, and shall provide such other notice as the law and regulations require, and as the Department determines is appropriate.



---

LISA A. VEST  
Public Hearing Officer

# **APPENDIX "A"**



# **Title 7 Natural Resources and Environmental Control**

## **3500 Tidal Finfish**

### **3000 Division of Fish and Wildlife**

#### **3500 Tidal Finfish**

#### **3588 Atlantic Menhaden**

##### **1.0 Atlantic Menhaden Quota**

- 1.1** The annual quota for Atlantic menhaden shall be determined in accordance with the Atlantic States Marine Fisheries Commission's Interstate Fishery Management Plan for Atlantic Menhaden and its subsequent amendments and addenda.
- 1.2** Any person who has been issued a valid commercial food fishing license may take and reduce to possession Atlantic menhaden during the period beginning at 12:01 AM January 1 and ending when the Department has determined that the annual Atlantic menhaden quota has been landed. The Department shall establish, based on recent fishery performance and landings, a date and time to order the directed fishery closed.

##### **2.0 Atlantic Menhaden Bycatch Allowance**

- 2.1** It is unlawful for any person who has been issued a valid commercial food fishing license to take and reduce to possession more than 6,000 pounds of Atlantic menhaden during any one day once the Department has determined that the Atlantic menhaden fishery is closed.
- 2.2** It shall be unlawful for any person who has been issued a valid commercial food fishing license or any vessel, regardless of the number of licensed commercial fisherman onboard that vessel, to possess or land more than 6,000 pounds of Atlantic menhaden in any one (1) day once the Department has determined the annual Atlantic menhaden fishery is closed.

##### **3.0 Atlantic Menhaden Reporting Requirements**

- 3.1** It is unlawful for any person who has been issued a valid commercial food fishing license to not accurately and completely report their Atlantic menhaden landings to the Department, via the interactive voice phone reporting system, within 24 hours of landing.

3.2 In addition to the requirement to phone in daily landing reports, it is unlawful for any person who has been issued a valid commercial food fishing license to not accurately and completely compile and file monthly log sheets detailing their daily landings of Atlantic menhaden on forms supplied by the Department. These forms must be submitted by the 10th of the month next ensuing. Failure to submit these monthly reports on a timely basis may be cause for revocation or non-renewal of their commercial food fishing license.

4.0 Atlantic Menhaden Landing Restrictions

4.1 It is unlawful for any person who has been issued a valid commercial food fishing license to offload Atlantic menhaden to any other vessel or means of conveyance prior to landing.