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MEMORANDUM

TO: Marine Fisheries Advisory Commission
FROM: Daniel McKiernan, Acting Director *Daniel J McKiernan*
DATE: December 13, 2019
SUBJECT: Commercial Menhaden Management Proposals for Public Hearing

Proposal Overview

In response to interest from fishery participants and the Marine Fisheries Advisory Commission, DMF has developed proposed revisions to the commercial menhaden fishery's quota management. These changes are designed to: 1) enhance the ability for the Commonwealth's menhaden quota to be fully utilized; 2) provide the potential for Massachusetts harvesters to capitalize on the Interstate FMP's episodic events set aside; and 3) place the Massachusetts fishery on equal footing with other states with regards to incidental catch and small-scale fishery operation. In addition, DMF is advocating several permitting revisions to address concerns regarding latent effort, avoid user-group conflict, and maintain harvester accountability given an influx of interest to participate in the Massachusetts limited entry menhaden fishery.

Specifically, these proposals would:

1. Rescind the 95% quota use trigger for the limited access fishery, thereby allowing for a 25,000-lb limit from 85–100% quota use;
2. Replace the 1,000-lb (up to 5% trip weight) bycatch allowance with a 6,000-lb incidental catch and small-scale fishery allowance;
3. Establish rules for use of the Interstate FMP's episodic event set aside;
4. Adopt a May 1, 2020 control date for possible future use to limit effort in the fishery; and
5. Establish an owner/operator requirement for the limited entry fishery.

DMF plans to take these proposals to public hearing in early 2020 for possible implementation prior to the 2020 fishing season. Preliminary draft regulations are enclosed.

Background

Amendment 2 of the Interstate FMP for menhaden (enacted in 2013) established a coastwide Total Allowable Catch (TAC) for commercial harvest, state-by-state allocations of the TAC based on 2009–2011 landings (MA=0.84%), a 1% episodic events set aside (EESA) for use by the northeast states, and a 6,000-lb bycatch allowance for use by non-directed fisheries after a state's allocation was used. In response, DMF adopted a new limited entry menhaden permit, tiered trip limits based on the percent of quota used per permit category, and a bycatch allowance beginning in 2013. There was not an immediate need to access the EESA, so this was left out of DMF's regulations to implement Amendment 2 in Massachusetts.

As menhaden quota management was in its infancy, DMF took a cautious approach to the trip limits that were established for our initial quota amount of about 3 million pounds, as a means to manage the activities of the historical users of the resource and prolong the season. This included an open access trip limit of 6,000 pounds; and a limited access trip limit that began at 125,000 pounds and scaled down to 25,000 pounds at 75% quota use and 6,000 pounds at 95% quota use. DMF also implemented the bycatch allowance in a very literal sense by capping menhaden bycatch landings at a percent of the trip's total harvest (5% by weight) and at a more conservative amount (1,000 pounds). After four years of landing 70–90% of the quota, DMF moved the 75% trigger to 85% beginning in 2017, which became the first year that the fishery landed 100% of the quota.

In 2018, Amendment 3 was implemented. This primarily affected the state allocations and the bycatch allowance. Through a default allocation of 0.5% to each state, Massachusetts' quota share was increased to 1.27% (with our actual poundage having the potential to rise from transfers). This has resulted in an approximate doubling of the state's initial annual quota to more than 6 million pounds the last two years. The bycatch allowance was clarified to indicate that directed small-scale gears are eligible to participate, and thus it was renamed the incidental catch and small-scale fishery allowance. While landings made under this allowance are not counted towards state quotas, they must be reported to the ASMFC for inclusion in stock assessments. Coastwide landings under the provision have been minimal (e.g., less than 1% of the total coastwide harvest in 2018).

Amendment 3 did not revise the EESA. This set aside is set equal to 1% of the total allowable catch (about 4.48 million pounds in 2019) and is open to ME–NY after a state's quota has been used—if prior to September 1 and large amounts of menhaden remain in its state waters. Any overage of the EESA is deducted in the following year, and any EESA not used by October 31 is redistributed to all states. Rhode Island, New York, and Maine have all utilized the EESA since its inception, although Maine has been the sole participant the last two years. FMP requirements for use of the EESA include: a maximum possession limit of 120,000 pounds; harvest and possession restricted to the participating state's waters; and a daily reporting requirement.

Trip Limit Restructuring Proposals

The existing Massachusetts trip limit rules for the limited entry fishery leave the last 5% of quota to be harvested at a 6,000-lb trip limit (Table 1). At our current quota, this equates to approximately 300,000 pounds being reserved for small-scale gears (e.g., cast nets), because operators of larger capacity vessels opt not to participate in the fishery at such low trip limits. This has proven to be an excessive quota set-aside for these users the past two years. As a consequence of the annual quota not being reached (and there being no quota closure), Massachusetts has not been in a position to take advantage of the EESA. Interest in gaining access to this additional quota has been heightened by the reduced availability of other bait fishes (notably sea herring).

Table 1. Current and proposed menhaden trip limit structure.

Trigger	Limited Entry Trip Limit	Open Access Trip Limit
Quota-managed Fishery		
≤85% Quota Use	125,000 lb	6,000 lb
85% to 95% 100% Quota Use	25,000 lb	6,000 lb
>95 to 100% Quota Use	6,000 lb	6,000 lb
Bycatch Tolerance Incidental Catch and Small-scale Fishery	1,000 lb (≤5% catch weight)	1,000 lb (≤5% catch weight)
	6,000 lb	6,000 lb
Episodic Event Set Aside Fishery	120,000 lb	NA

Eliminating the 95% quota trigger will enable the remaining 5% of the quota to be taken at the 25,000-lb trip limit, benefitting the medium-scale operators that participate in this part of the fishery. The small-scale fishery will not be disadvantaged provided Massachusetts also adopts Amendment 3's allowance for small-scale and non-directed gears to land up to 6,000 pounds of menhaden after a state's quota fishery is concluded. The fishery achieving 100% of the quota, in concert with proposed rules to access the EESA, has the potential to further benefit medium and large-scale operators (provided set aside remains when our fishery closes).

The medium-scale operators who make use of the 25,000-lb trip limit demonstrated the ability to take 15% of the quota in 2019 (roughly 900,000 pounds at current quota levels). The fleet took its current 10% set-aside (roughly 600,000 pounds) in a single week, and ultimately nearly tripled that to 1.7 million pounds through quota transfers from other states acquired by DMF. Such quota transfers would remain an option for the limited entry fishery to continue fishing at the 25,000-lb trip limit as the quota is neared, especially if the EESA is already exhausted.

This brings us to an important reminder about the EESA being a shared set aside which has been exhausted as early as July 5 in one year. More relevant is the last two years' fisheries, which reflect the quota reallocations from Amendment 3. In both years, Maine opted into the EESA in mid-July, coinciding with our fishery's landings just taking off; in 2018, the EESA was exhausted by mid-August, while in 2019, about 360,000 lb went unused. The point being that MA adopting regulations for an EESA fishery does not necessarily guarantee access to the set aside. This would be an argument against trying to burn through our quota as quickly as possible (such as by reducing or eliminating the amount of quota to be fished at the 25,000-lb limit). Recall also that the 25,000-lb trip limit was originally established to reflect historical use of the resource by medium scale purse seiners.

Permitting Proposals

With the elevated demand for menhaden amidst low herring availability, interest is increasing to participate in Massachusetts's limited entry menhaden fishery. This has already prompted DMF to issue a new policy document clarifying the permitting rules this past spring (enclosed). An influx of new effort by medium- to large-scale purse seine vessels has the potential to disrupt the access of historical users and upset the delicate balance they maintain with other user groups (e.g., recreational and commercial harvesters of menhaden predator species, non-fishing boaters, other ecotourism activities).

A substantial number of the annually renewed menhaden endorsements are latent (unfished), constituting the potential for an increase in effort. A control date is a commonly used management tool to address latent effort, enabling the agency to provide different levels of access to historical participants vs new entrants in the future if needed. Accordingly, DMF is proposing to adopt a control rule of May 1, 2020 through which admission to and effort in the limited entry fishery could potentially be restricted in the future, subject to additional public comment and MFAC approval of the specific eligibility criteria and participant regulations.

While menhaden endorsement transfers would be subject to the standard transferability criteria, the requirement for having been actively fished in four of the past five years has a record of being evaded by the current permit holder illegally leasing the permit to the future permit holder to achieve the required fishing activity prior to proceeding with the transfer. To prevent this activity, DMF is also proposing that all menhaden endorsements be owner/operator. This has the added benefit of enhancing compliance with fishery reporting and conservation regulations. All currently active participants are believed to function as owner/operators at this time.

Attachment(s)

Draft Regulations

Guidelines to Commercial Menhaden Fishery Permitting Rules

Draft Regulations

322 CMR 6.00: REGULATION OF CATCHES

6.43: Atlantic Menhaden Management

(1) Purpose. The purpose of 322 CMR 6.43 is to comply with the **Atlantic States Marine Fisheries Commission's** Interstate Fishery Management Plan for Atlantic Menhaden to manage the Atlantic menhaden fishery in a manner that is biologically, economically, socially and ecologically sound, while protecting the resource and those who benefit from it.

(2) Definitions.

Atlantic Menhaden means that species known as *Brevoortia tyrannus* or commonly referred to as pogey or bunker.

Bait Dealer means any person issued a bait dealer permit in accordance with 322 CMR 7.01(3)(g): *Bait Dealer*.

Bycatch ~~means the non-targeted commercial catch and possession of a species.~~

Commercial Fisherman means any person fishing under the authority of a permit issued in accordance with 322 CMR 7.01(2): *Commercial Fisherman Permits*.

Declare means to file an advisory notification with the *Massachusetts Register* and publish it *via* the Marine Fisheries electronic mailing list and website.

Director means the Director of the Division of Marine Fisheries.

Episodic Events Set Aside means the 1% of the total allowable catch of Atlantic menhaden that is set aside for use by the states of Maine through New York when certain conditions exist as established in the Interstate Fishery Management Plan.

Land means to transfer or attempt to transfer the catch of fish from any vessel to any other vessel or onto any land, pier, wharf, dock or other artificial structure, or for a fishing vessel with any fish onboard to tie up to any dock, pier or other artificial structure.

Quota means the Commonwealth of Massachusetts annual commercial Atlantic menhaden quota adopted by the Atlantic States Marine Fisheries Commission and amended by required paybacks and authorized quota transfers and rollovers.

Trip means the time period that begins when a vessel departs from any land, pier, wharf, dock or other artificial structure to carry out commercial fishing operations, including the at-sea transfer and transport of fish, and that terminates with a return to any land, pier, wharf, dock or other artificial structure.

(3) Regulated Fishery Permit Endorsement Requirement. It shall be unlawful for any fisherman or vessel to take, land, or possess Atlantic menhaden in excess of 6,000 pounds per trip or per 24-hour day, whichever duration is longer, without a regulated commercial fishery permit endorsement for Atlantic menhaden issued by the Director, in accordance with 322 CMR 7.01(4)(a): *Regulated Fishery Permit Endorsement and managed pursuant to 322 CMR 7.06: Limited Entry Permits*.

(4) Commercial Fishing Limits.

(a) Quota Managed Fishery.

1. Regulated Fishery Trip Limits. Commercial fishermen who have been issued a regulated Atlantic menhaden fishery permit endorsement, in accordance with 322 CMR 6.43(3), and 7.01(4)(a): *Regulated Fishery Permit Endorsement*, shall abide by the following trip limits:

a. Until the Director declares that 85% of the commercial menhaden quota has been landed, it shall be unlawful to possess or land more than 125,000 pounds of menhaden in the coastal waters of the Commonwealth per trip or calendar day, whichever duration is longer; and

b. Once the Director has declared that 85% of the commercial menhaden quota has been landed, it shall be unlawful to possess or land more than 25,000 pounds of menhaden in the coastal waters of the Commonwealth per trip or calendar day, whichever duration is longer.

2. Open Access Fishery Trip Limits. Commercial fishermen who have not been issued a regulated Atlantic menhaden fishery permit in accordance with 322 CMR 6.43(3) and 7.01(4)(a): *Regulated Fishery Permit Endorsement* may possess and land up to 6,000 pounds of Atlantic menhaden per trip or 24-hour day, whichever duration is longer.

3. Quota Closure. It shall be unlawful to catch and retain or land Atlantic menhaden once the Director has declared that 100% of the quota has been harvested, except as provided at 322 CMR 6.43(4)(b) and 322 CMR 6.43(4)(c). The quota closure will be enacted and announced in accordance with the procedure set forth at 322 CMR 6.41(2)(c).

(a) Regulated Fishery Trip Limits. Commercial fishermen who have been issued a regulated Atlantic menhaden fishery permit endorsement, in accordance with 322 CMR 6.43(3), and 7.01(4)(a): *Regulated Fishery Permit Endorsement*, shall abide by the following trip limits:

1. Until the Director declares that 85% of the commercial menhaden quota has been landed, it shall be unlawful to possess or land more than 125,000 pounds of menhaden in the coastal waters of the Commonwealth per trip or calendar day, whichever duration is longer; and
2. Once the Director has declared that 85% of the commercial menhaden quota has been landed, it shall be unlawful to possess or land more than 25,000 pounds of menhaden in the coastal waters of the Commonwealth per trip or calendar day, whichever duration is longer; and
3. Once the Director has declared that 95% of the commercial menhaden quota has been landed, it shall be unlawful to possess or land more than 6,000 pounds of menhaden in the coastal waters of the Commonwealth per trip or calendar day, whichever duration is longer.

(b) Open Access Fishery Trip Limits. Commercial fishermen who have not been issued a regulated Atlantic menhaden fishery permit in accordance with 322 CMR 6.43(3) and 7.01(4)(a): *Regulated Fishery Permit Endorsement* may possess and land up to 6,000 pounds of Atlantic menhaden per trip or 24 hour day, whichever duration is longer.

(c) Closure. It shall be unlawful to catch and retain or land Atlantic menhaden once the Director has declared that 100% of the quota has been harvested, except as provided at 322 CMR 6.43(4)(d).

(b) (d) Bycatch Tolerance Incidental Catch and Small-scale Fishery. When the **Quota Managed Fishery is closed**, commercial quota has been harvested and the commercial fishery is closed, commercial fishermen may possess and land up to ~~1,000~~ **6,000** pounds of Atlantic menhaden bycatch per trip or per 24-hour day, whichever is longer. ~~The weight of the Atlantic menhaden bycatch shall not exceed 5% of the weight of the entire catch being landed.~~ Exception: There shall be no **such allowance allowable bycatch tolerance** for vessels using purse gear measuring 150 fathoms length and eight fathoms depth or greater.

(c) Episodic Event Set Aside Fishery. When the **Quota Managed Fishery is closed**, and if Massachusetts is approved by the Atlantic States Marine Fisheries Commission to participate in the Episodic Events Set Aside Program provided for in the Interstate Fishery Management Plan, commercial fishermen who have been issued a regulated Atlantic menhaden fishery permit endorsement, in accordance with 322 CMR 6.43(3), and 7.01(4)(a): *Regulated Fishery Permit Endorsement*, may possess and land up to 120,000 pounds of Atlantic menhaden per trip or calendar day, whichever duration is longer. Vessels participating in the Episodic Event Set Aside Fishery must harvest only from waters under the jurisdiction of the Commonwealth and land in Massachusetts ports. Daily catch reporting is required in accordance with 322 CMR 6.43(5). Once the Atlantic States Marine Fisheries Commissioner determines that the Episodic Event Set Aside is exhausted, the closure of the Episodic Event Set Aside Fishery will be enacted and announced in accordance with the process set forth at 322 CMR 6.41(2)(c).

(5) Daily Catch Reporting. All regulated Atlantic menhaden fishery permit endorsement holders must obtain a bait dealers permit, as defined at 322 CMR 7.01(3)(g): *Bait Dealer*, and report to the Division of Marine Fisheries their directed commercial Atlantic menhaden landings in the Commonwealth on a daily basis on forms provided by the Director.

322 CMR 7.00: PERMITS

7.01: Form, Use and Contents of Permits

(4)(a)2. Limited Entry Regulated Fishery Permit Endorsements. Commercial fisherman permits, issued in accordance with 322 CMR 7.01(2), may be endorsed with the following regulated fishery permit endorsements. Pursuant to the authority at M.G.L. c. 130, §2, the following regulated fishery permit endorsements are limited entry and may only be renewed and transferred subject to the provisions set forth at 322 CMR 7.06. These regulated fishery permit endorsements are required for the following:

- h. Menhaden. For a named individual ~~and/or vessel~~ to commercially fish for menhaden within the waters under the jurisdiction of the Commonwealth, or to harvest, possess or land ~~any~~ menhaden for commercial purposes in the Commonwealth, ~~A menhaden regulated fishery permit endorsement is not required to commercially fish for menhaden in the Commonwealth, provided no more than in excess of~~

6,000 pounds of menhaden ~~are possessed at any one time or landed within a per~~ calendar day or fishing trip **or 24-hour day**, whichever ~~period~~ **duration** is longer.

7.04: Commercial Fisheries Control Date

(1) Purpose. The purpose of 322 CMR 7.04 is to provide the Director and Marine Fisheries Advisory Commission with time to develop further access controls in certain commercial fisheries, including *moratoria* and limited entry, without the Director and Commission having to deal with large numbers of applicants attempting to enter the fisheries before access is restricted or denied. The implementation of the control date on an emergency basis is necessary to prevent a surge of applicants for licenses into fisheries for which the Director and the Commission may decide to restrict access in the future.

(2) Control Dates

(g) **Menhaden**. Any person who did not report the lawful landing or selling of menhaden under the authority of the limited entry regulated fishery permit endorsement prior to May 1, 2020 may not be provided future access into this fishery and may be subject to eligibility criteria for determining levels of future access to and allowable harvest in this fishery. Future access may be based on historic landings of a vessel or by a person, or other criteria established by the Director.

7.06: Limited Entry Permits

(1) Definitions.

Menhaden Regulated Fishery Permit Endorsement means those limited entry regulated fishery permit endorsements, issued and managed pursuant to M.G.L. c. 130, §§ 2 and 80, and 322 CMR 7.01(4)(a) and 322 CMR 7.06, that authorize a named individual to commercially fish for menhaden in accordance with the regulations set forth at 322 CMR 6.43.

(5) Owner-operator Requirements. All Fish Pot Regulated Fishery Permit Endorsements **and Menhaden Regulated Fishery Permit Endorsements** are issued to a named individual who shall be the owner operator of that commercial fishing business. This requirement may be waived by means of a letter of authorization from the Director for:

- (a) immediate family;
- (b) active military duty; or
- (c) for up to two years for good cause, including death or disability to the permit holder, subject to annual renewal. In all instances, the performance criteria at 322 CMR 7.06(4)(a)2. shall be met prior to the request for a letter of authorization.



Massachusetts Division of Marine Fisheries

Dr. David E. Pierce, Director

Policies, Procedures, and Guidelines

Guidelines to Commercial Menhaden Fishery Permitting Rules

Introduction and Purpose: There are up to five different permit endorsements that control menhaden fishing in state waters: the Menhaden endorsement, the Inshore Net endorsement, Mobile Gear Coastal Access Permit (CAP) endorsement, the Mobile Gear Coastal Access Permit for Purse Seine endorsement, and the Surface Gillnet endorsement. This document describes these five endorsements and the tiers of fishing opportunities permit holders based on what endorsements are held.

Menhaden Endorsement (Limited Entry): This endorsement is required for a commercial fishing vessel to harvest, possess, or land more than 6,000 lbs. of menhaden when the directed fishery is open and quota is available. Note: any commercially permitted vessel may take less than 6,000 lbs. without a menhaden endorsement.

Inshore Net Endorsement (Restricted Entry): This endorsement is required to use a purse seine gear within the Inshore Net Areas described at 322 CMR 4.02. The Inshore Net Areas include but are not limited to the Merrimack River, Plum Island Sound, Essex Bay, the Annisquam River, Gloucester Harbor, Salem Harbor, Beverly Harbor, Boston Harbor, and Plymouth Harbor. These permits are also further conditioned to control how and when purse seines may be fished for menhaden in the inshore net areas. Note that netting is strictly prohibited in one prominent Inshore Net Area - Buzzards Bay – with an exception for small cast nets.

Mobile Gear Coastal Access Permit Endorsement (CAP) (Limited Entry): This endorsement was created and established as limited entry in the early 1990's to control most forms of mobile gear fishing in state waters including otter trawling, and scallop dragging. Any holder of a CAP endorsement is eligible to deploy purse seines in waters under the jurisdiction of the Commonwealth seaward of the Inshore Net Areas.

CAP – Purse Seine Endorsement (Open Entry): This endorsement was created to accommodate vessels that were not eligible to obtain a CAP, but sought to participate in a purse seine fishery in state waters. Issuing this permit as a distinct open access endorsement (for purse seining only) allowed the agency to accommodate new entrants to participate in purse seining while maintaining the limited entry aspect of

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the CAPs. This permit may be obtained by any person who does not already have a limited entry CAP, but seeks to purse seine in waters under the jurisdiction of the Commonwealth seaward of the Inshore Net Areas.

Surface Gillnet endorsement: Many commercial permit holders purchase an open entry Surface Gillnet endorsement to utilize a small surface gillnet (under 300 linear feet) to harvest bait fish. Without a Menhaden endorsement, these permit holders are subject to the 6,000 lb possession limit while the menhaden fishery is open. The use of this gear is subject to the regulations at 322 CMR 4.14.

Classes of Menhaden Permits Endorsements and Authorized Fishing Activity: The following menhaden permitting classes detail possession limits and access to areas and gears based on endorsements held in combination:

- Class 1: Menhaden endorsement, Inshore Net endorsement, CAP or CAP - Purse Seine endorsement, and Surface Gillnet Permit.
 - Possession Limit: 125,000 lbs until 85% of the quota is harvested; 25,000 lbs. until 95% of the quota is harvested; 6,000 lbs until 100% of the quota is harvested
 - Areas Allowed to Be Fished with Purse Seines or Surface Gillnets: All waters under the jurisdiction of the Commonwealth unless otherwise restricted, including all authorized Inshore Net Areas
- Class 2: Menhaden endorsement and CAP endorsement; or Menhaden endorsement and CAP – Purse Seine endorsement; or Menhaden endorsement with Surface Gillnet endorsement.
 - Possession Limit: 125,000 lbs. until 85% of the quota is harvested; 25,000 lbs until 95% of the quota is harvested; 6,000 lbs. until 100% of the quota is harvested
 - Areas Allowed to Be Fished with Purse Seines: All waters under the jurisdiction of the Commonwealth seaward of the Inshore Net Areas, unless otherwise restricted.
 - Areas Allowed to Be Fished with Surface Gillnets: All waters under the jurisdiction of the Commonwealth, including Inshore Net Areas, unless otherwise restricted.
- Class 3: No Menhaden endorsement but possesses a CAP –Purse Seine, CAP, or Surface Gillnet endorsement
 - Possession Limit: 6,000 lbs until 100% of the quota is harvested
 - Areas Allowed to Be Fished with Purse Seines: All state waters seaward of the Inshore Net Areas, unless otherwise restricted.
 - Areas Allowed to Be Fished with Surface Gillnets: All waters under the jurisdiction of the Commonwealth, including Inshore Net Areas, unless otherwise restricted.