

**REPORT OF THE
VIRGINIA MARINE RESOURCES COMMISSION**

**Report on the Establishment
of a Biological Sampling
Program and Adult
Abundance Index for Atlantic
Menhaden in Virginia**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



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VIRGINIA MARINE RESOURCES COMMISSION



**REPORT ON THE ESTABLISHMENT OF A BIOLOGICAL SAMPLING PROGRAM & ADULT ABUNDANCE
INDEX FOR ATLANTIC MENHADEN IN VIRGINIA**

Preface

The Virginia General Assembly enacted legislation, in February 2013, that requires the Virginia Marine Resources Commission (VMRC) to establish a biological sampling program for Atlantic menhaden (§28.2-400.6 of the Code of Virginia – Attachment 1). The legislation was created in response to the requirements of the Atlantic States Marine Fisheries Commission’s (ASMFC) Amendment 2 to the Fishery Management Plan for Atlantic Menhaden (available online at http://www.asmfc.org/uploads/file/atlanticMenhadenAmendment2_Dec2012.pdf), and was adopted by the ASMFC in December 2012. Amendment 2 requires each jurisdiction in the Chesapeake Bay (Maryland, Potomac River Fisheries Commission, and Virginia) to collect one 10-fish sample per 200 metric tons of menhaden landed for use as bait.

The VMRC implemented a new regulation pertaining to Atlantic menhaden, effective April 1, 2013 (Chapter 4VAC 20-1270-10 et seq. – Attachment 2), that establishes limited entry criteria, an individual transferable quota system, gear-specific quota allocations, bycatch provisions, reporting requirements, and violation penalties.

Section §28.2-400.2 of the Code of Virginia establishes the total allowable commercial landings for menhaden in 2013 and 2014 in metric tons equivalent to 318,067,167 pounds annually, and that the total amount of allowable landings shall be allocated as quotas among three sectors of the menhaden fishery. These three sectors are the purse seine menhaden reduction sector, the purse seine menhaden bait sector, and the non-purse seine menhaden bait sector. The purse seine menhaden reduction sector is allocated an annual quota of 286,396,768 pounds of allowable menhaden landings; the purse seine menhaden bait sector a 26,648,870-pound annual quota of allowable menhaden landings; and the non-purse seine menhaden bait sector a 5,021,529-pound annual quota of allowable menhaden landings.

The following report addresses §28.2-400.6B of the Code of Virginia by providing: (i) a description of progress in establishing the biological sampling program and development of the adult menhaden survey index, (ii) a discussion of difficulties in implementing the requirements of this section, including a lack of resources to properly implement the program, and (iii) a list of resources the Commission believes are necessary to properly implement the sampling program and index, with detailed justification, including an estimate of the cost of each item requested, for effective implementation of the program.

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Biological Sampling Program

Developmental Progress

The Commission has established a biological sampling program, in accordance with §28.2-400.6 of the Code of Virginia, that collects a minimum of one 10-fish sample per 200 metric tons landed for length and weight-at-age data from the commercial menhaden bait harvest. The VMRC's existing biological sampling program collects samples and biological data on a primary set of 13 commercially-important species, and collects similar data on recreational species through the Marine Sportfish Collection Project. These target food fish species have been the primary species for collections of biological data and include: striped bass, Atlantic croaker, spot, spotted seatrout, weakfish, red drum, black drum, tautog, cobia, bluefish, summer flounder, spadefish, and Spanish mackerel.

To calculate the target number of Atlantic menhaden samples, each non-purse seine menhaden gear-specific quota, in pounds, was converted to metric tons. The sampling requirement is for one 10-fish sample per 200 metric tons, and this standard was applied to each gear-specific quota to obtain a target number of samples (Table 1). Though the sampling requirement in the Virginia Acts of Assembly (Attachment 1) is not gear-specific, the Commission has chosen to apply the sampling requirement to Virginia's gear-specific fisheries (*e.g.*, gill net, pound net) because the non-purse seine menhaden bait sector quota is managed according to gear type. The final column in Table 1 shows the total target number of fish samples by gear type. The requirement to collect one 10-fish sample for every 200 metric tons landed has been met for 2013.

The addition of a 10-fish sample for every 200 metric tons as a sampling requirement was enacted during 2013 for Virginia's non-purse seine menhaden bait sector, with the number of required samples being exceeded for the main gear types (Table 2).

Menhaden collected by the VMRC biological sampling program are processed for length, weight, and scales for age and growth analysis. Scales are the current ageing structure used in menhaden assessments. In addition, the VMRC biological sampling program has collected paired otolith samples, for future menhaden scale versus otolith comparisons. The length-frequency distribution of all menhaden samples collected through October 2013 is provided in Table 3. The sampling protocols developed for collecting menhaden from the non-purse seine menhaden bait sector are designed to match the National Marine Fisheries Service (NMFS) approach to sampling menhaden from the purse seine menhaden reduction sector. This is to ensure that biological data from the VMRC biological sampling program and NMFS will be comparable.

The purse seine menhaden bait sector quota is 26,648,870 pounds, and requires that 604 fish samples (approximately 60 ten-fish samples) be collected. Some vessels offload menhaden for both the purse seine menhaden reduction sector and bait sector. Menhaden harvest from these vessels is currently sampled by the National Marine Fisheries Service (NMFS). Because the federal sampling program is primarily tasked with sampling the reduction sector, VMRC

biological sampling program technicians have also begun to opportunistically sample the purse seine bait sector, to augment the sample size for this particular gear type (italicized values in Table 2 reflect that sampling for the purse seine menhaden bait sector is minimal, and is to be combined with NMFS data). While NMFS has good coverage of the purse seine menhaden vessels, they have noted that additional coverage for the purse seine bait sector would be helpful, as their program continues to evolve.

Difficulties In Sampling Menhaden

When offloading for bait, the purse seine menhaden vessels generally reach the dock in the early evening (6 – 7 p.m.), and the catch is directly conveyed to freezer trays. The logistics of this process makes sampling the catch during the offloading process difficult. As a result, sampling for the remainder of 2013 will occur through periodic purchase of bait trays, as opposed to sampling during the offloading process.

The main concern with adding menhaden to the list of 13 primary species already sampled by the VMRC biological sampling program is the cost in time and personnel of sampling an additional species. Menhaden are not as readily available for sampling, as compared to the primary 13 food grade species. Further, as additional requirements are added to the existing list of commercial species, the time, effort, and resources spent sampling the original 13 species is diminished. To cover sampling the purse seine menhaden bait sector (60 ten-fish samples) and non-purse seine menhaden bait sector (11 ten-fish samples), a total of 718 fish must be collected, which equates to approximately 72 samples (comprised of 10 fish each). On a good sampling day, obtaining two sets of samples would be feasible (totaling 36 sampling days for a total of 72 sampling events). At the worst, obtaining one sample set in one day would be the maximum number of menhaden sampling days required (72 days). Considering this range of 36-72 sampling days, the list of resources in Tables 4a, 4b, 5, and 6 were developed by VMRC staff.

While adequately sampling Virginia's commercial menhaden bait sector is feasible, given the current VMRC resources, adequately sampling the purse seine menhaden reduction sector (with more than ten times the allowable landings) would not be possible with the VMRC's current resources. The VMRC biological sampling program currently has three field technicians who sample the primary 13 species throughout the Tidewater region. At the federal level, there is an individual field technician solely dedicated to sampling the purse seine menhaden reduction sector in Virginia. This individual also covers the purse seine menhaden bait sector throughout the year, and pound net bait sector from Early April to mid-May. If Virginia were to be required to sample the purse seine menhaden reduction sector, as well as both menhaden bait sectors, an additional technician would be necessary. The list of resources necessary to sample all three components of Virginia's commercial menhaden fisheries is provided in Table 5.

Adult Abundance Index

Developmental Progress

The Atlantic States Marine Fisheries Commission Atlantic Menhaden Technical Committee (TC) met September 17-18, 2013 to discuss data needs for the upcoming data workshop and 2014 benchmark stock assessment. One of the greatest needs is for the development of an adult abundance index for menhaden to support the Potomac River Fisheries Commission pound net index. The menhaden TC identified five jurisdictions in addition to the Potomac River Fisheries Commission that have collected landings data that may be useful for development of a fisheries-dependent abundance index. These data sources include pound net catches from Virginia, Maryland, Rhode Island, and Massachusetts, and gill net catches from New Jersey. Currently, the Potomac River Fisheries Commission pound net index is the only adult abundance index included in the Atlantic menhaden stock assessment (Figure 2).

The VMRC implemented mandatory harvest reporting from all commercial fisheries beginning in 1993. Approximately 63,000 individual records contain pound net harvest where catch from at least one species was sold during 1993-2012 (Figure 3). Over 9,500 of these records include menhaden harvest. These data will be useful in developing an abundance index from Virginia's pound net landings, using proven statistical methods.

Many methods have been used to develop abundance indices from fishery-dependent data. The most commonly used model is a general linear model (GLM). GLMs have long been recognized as valuable tools for the analysis of fisheries data, because of their ability to handle many different error distributions from both continuous and discrete datasets. When data have a high proportion of zeros, a delta-GLM approach is often used (Lo et al. 1992; Stefanson 1996). A delta-GLM is a two stage approach, where probability of a zero catch is modeled first, then a GLM is fit to the positive catches, and the product of these two approaches is used as the index value. It is clear from Figure 3 that in the mandatory harvest reporting database, only 15% of the records contain positive catches for menhaden, creating a high proportion of zeros.

VMRC staff will use the delta-GLM approach, as well as other zero inflated GLM models, to construct an abundance index for adult menhaden from the pound net fishery. A preliminary index from the MRC harvest reporting database is presented in Figure 4. There has been no attempt to address any of the limitations of these data (discussed below), which will be necessary before their inclusion into the 2014 benchmark stock assessment. Based on preliminary data analyses, the Virginia pound net index shows a similar trend as the PRFC index. Both are higher in the last half of the series; however the Virginia index shows much less variation over the course of the time series. The next step will be to compare the Virginia index to juvenile abundance indices calculated at one- to three-year lags to account for delayed entry to the fishery, as well as the PRFC index in the correct statistical framework.

In addition to mandatory harvest reporting data and sampling the commercial menhaden bait sector, VMRC staff has enlisted a licensed commercial harvester who has been permitted to use experimental pound nets for research and development. The experimental pound net uses a moveable leader instead of a fixed leader. The permittee has been recording the species composition and effort for one pound net. These data will also assist in developing an abundance index for menhaden from the pound net fishery. Staff has identified several additional pound net harvesters with whom to cooperate, to resolve some of the remaining difficulties (discussed below) with developing an abundance index for menhaden from Virginia's pound net fishery, but this outreach process is just beginning.

Traditional pound nets (Figure 1) are staked fish traps that are used in many parts of the world (Chittenden 1991) and have a long history of use in Chesapeake Bay (Reid 1955; Chittenden 1991; Schaffler et al. 2011). Pound net catch is presumed to be non-specific, but some species can avoid the leader to the trap. In the waters of Chesapeake Bay, pound nets primarily catch migratory fishes entering and leaving the Bay, resulting in highly variable catches (Dieperink and Rasmussen 1997).

Achieving Representative Samples from the Non-Purse Seine Menhaden Bait Sector

VMRC's mandatory harvest reporting database has a number of limitations that must be addressed. The most pressing issue is developing a method to categorize harvest that is reported under the market category 'bait'. Bait is a market category that encompasses several species that have no size or weight restrictions but are too small to market. Typically, fish landed under this category are ground into chum. Fish that are landed under this category generally include menhaden, spot, croaker, and bluefish, as well as juveniles of other species that otherwise have no restrictions on their harvest. Further, in the VMRC mandatory harvest reporting database, there is a trend between menhaden and bait landings with time (Figure 5). The proportion of menhaden landed in the bait category is declining, since the inception of mandatory reporting. A variety of causes might explain this trend, but the most likely explanation is more accurate reporting of true catch by harvesters through time. These issues will need to be addressed by staff in the continued development of the abundance index.

Another pressing issue is determining fishing effort in the pound net fishery. Many pound net harvesters have licenses for multiple pound nets. Currently, they are required to identify the number of nets fished when landing their catch, but not the specific harvest from those nets. The pound nets are often located in areas to maximize the catch of a certain species, and therefore different nets have different levels of catchability for each species. Further compounding this problem is that pound nets are fished on an irregular schedule, meaning that the time between emptying the pound and allowing the net to fish before it is fished again and emptied is variable and uncertain. Previous research shows that even if the soak time of a net is known, standardizing this effort is not as simple as dividing the catch by the number of hours/days the pound net was fished (ASMFC 2010; Schaffler et al. 2011).

Resolving the effort issue will allow a minor issue with the location and subsequent catch from several pound nets to be resolved. Because the nets are located to maximize catch of more valuable species (*e.g.*, striped bass, summer flounder, Spanish mackerel), some nets are placed in areas where they have less likelihood of harvesting menhaden, and consequently will add no signal to an index of menhaden abundance. Therefore, those pound nets where no menhaden have been harvested need to be identified and removed from the dataset used to develop an abundance index.

In addition to effort, the approximate age composition of the menhaden catch in Virginia's pound net fishery needs to be understood. It is expected that young menhaden dominate the Chesapeake Bay harvest, but without accurate information there is no way to effectively compare the abundance index derived from harvest to either the juvenile abundance index or the estimated abundances from the stock assessment model. Currently, there is no information on the age composition; however, development of biological sampling protocols will address this need. After having obtained this data, staff will be able correctly make use of the abundance index and determine its concordance with other indices.

Resources necessary for implementation of the sampling program & abundance index

Tables 4 through 6 provide the lists of resources the Commission has identified as necessary to properly implement the sampling program and abundance index, with detailed justification, including an estimate of the cost of each item requested. The continued operation of NMFS sampling of Virginia's purse seine menhaden reduction sector would require the VMRC biological sampling program to collect samples from only the non-purse seine menhaden bait sector, requiring the resources in Table 4a. Should VMRC's existing sampling program be required to sample the purse seine menhaden bait sector, the resources in Table 4b would be necessary. Finally, for sampling the purse seine menhaden reduction sector, the resources listed in Table 5 would be necessary.

One area of uncertainty in the budget stems from the price of commercial menhaden sold as bait, especially from the purse-seine menhaden bait sector. Samples will likely need to be purchased in trays, as the logistics of the offloading process for this sector do not allow for traditional sampling methods during the sorting process. The price for a tray of menhaden bait averages \$15 to \$20, greatly exceeding the \$0.06 per-pound average dockside value of menhaden overall, when the prices from the non-purse seine menhaden bait and purse seine menhaden reduction sectors are averaged together.

Necessary resources were estimated from current costs of sampling, processing, and conducting age and growth analysis on the 13 primary species that the VMRC biological sampling program monitors. These include the cost of obtaining the samples, the cost of supplies for processing samples, for preparing ageing materials, and for the time field sampling technicians will spend collecting menhaden. The Center for Quantitative Fisheries Ecology at Old Dominion University

has included documentation and resource allocation for potentially ageing menhaden samples, should the NMFS laboratory be unable to accommodate age and growth work for Virginia's commercial menhaden samples.

The largest portion of the budget will stem from reallocation of field technicians' sampling duties that is calculated based on current employee salary and fringe benefit rates. To effectively sample the non-purse seine menhaden bait sector, the total estimated cost is \$6,195.42 (Table 4a). For the purse seine menhaden bait sector, the costs would be \$6,210.13 (Table 4b). Because of the magnitude of sampling necessary to adequately reflect the size and age structure of the purse seine menhaden reduction sector alone, if NMFS cannot continue to sample this sector, an additional field sampling technician would be needed. In this case, the resources necessary increases significantly, as there is not only a much greater number of samples to collect, process, and age, but also the costs associated with outfitting a field technician with the standardized electronic equipment and transportation used for sampling. To cover the purse seine menhaden reduction sector, first year costs would total \$78,820.36, with \$47,745.36 in Year 2 forward (Table 5). For adequate sampling of purse seine menhaden bait sector, non-purse seine menhaden bait sector, and the purse seine menhaden reduction sector combined, a total of \$78,841.91 would be necessary in the first year and \$47,766.91 in subsequent years.

For development of the fishery-dependent abundance index from pound net data, the main cost is associated with the data analyst who recently joined VMRC staff. The cost of sampling pound net catch specifically for the abundance index is estimated in Table 6, at a total of \$20,895.00.

Summary

In its first year of implementation, VMRC has met the requirements set forth in ASMFC's Amendment II and by the Virginia Acts of Assembly. The Commission has established a biological sampling program to collect one 10-fish sample per 200 landed metric tons for length and weight-at-age data from the commercial menhaden harvest. This sampling requirement has been met for 2013; additionally, the VMRC finfish sampling program has initiated gear-specific sampling targets to bring greater accuracy to Virginia's biological data for menhaden.

VMRC has initiated a program to add Atlantic menhaden to the VMRC biological sampling program, in order to develop an adult menhaden survey index from Virginia pound nets. A data analyst has been hired by VMRC and specifically tasked with the continued development of the sampling program and abundance index. This report meets the requirements as set forth by §28.2-400.6 of the Code of Virginia, by (i) describing the progress in establishing the VMRC biological sampling program and the development of the abundance index, (ii) discussing difficulties in implementing the requirements, including a lack of resources to properly implement the program, and (iii) listing the resources the Commission believes are necessary to properly implement the sampling program and index, with detailed justification, including estimates of the cost for each item requested.

References

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Tables & Figures

Table 1. Target number of menhaden samples by gear, for Virginia's non-purse seine menhaden bait sector.

Gear	Quota (pounds)	Quota (metric tons)	Target number of 10-fish samples	Target number of fish
Pound net	3,412,020	1,548	8	77
Gill net	1,521,108	690	3	34
Trawl	58,847	27	0	1
Haul seine	20,103	9	0	0
Dredge	3,069	1	0	0
Fyke net	2,115	1	0	0
Fish pot	2,064	1	0	0
Cast net	1,930	1	0	0
Hook & line	234	0	0	0
Trot line	39	0	0	0
Total	5,012,078	2,273	11	114

Table 2. Number of menhaden sampled by month and gear (through September, 2013) by Virginia's Biological Sampling Program, along with target samples by gear.

Gear	Month								Sampled number of fish	Target number of fish
	March	April	May	June	July	August	September	October		
Pound net			109	45		55	84	137	430	77
Gill net	74	76					52	32	234	34
Trawl									0	1
Haul seine	10		54	39	1		1		105	0
<i>Purse seine*</i>						9		13	22	604
Grand Total	84	76	163	84	1	64	137	182	791	718

*Data from purse seine bait sector samples are to be combined with data from federal sampling to meet the 604-fish sampling target.

Table 3. Length distribution of menhaden samples from all gear types (2013).

Fork Length (inches)	Number of Samples
4	1
5	7
6	11
7	51
8	148
9	198
10	150
11	159
12	64
13	1
Grand Total	790

Table 4a. Itemized list of resources necessary for sampling the non-purse seine menhaden bait sector only.

Item	Purpose	Estimated Cost
Samples	Obtain biological data	\$3.42
Processing equipment (knives, tweezers, envelopes, vials)	To obtain hard parts for ageing	\$250.00
Ageing equipment (glass & acetate slides, diamond blades for isomet saws)	To process age and growth data	\$1,000.00
Field Sampling Technician Time*	Personnel to cover the additional sampling	\$4,942.00
Total Expenses		\$6,195.42

*Addition of menhaden sampling will take away from technicians' existing responsibilities for remaining 13 commercial species.

Table 4b. Itemized list of resources necessary for sampling the purse seine menhaden bait sector only.

Item	Purpose	Estimated Cost
Samples	Obtain biological data	\$18.13
Processing equipment (knives, tweezers, envelopes, vials)	To obtain hard parts for ageing	\$250.00
Ageing equipment (glass & acetate slides, diamond blades for isomet saws)	To process age and growth data	\$1,000.00
Field Sampling Technician Time*	Personnel to cover the additional sampling	\$4,942.00
Total Expenses		\$6,210.13

*Addition of menhaden sampling will take away from technicians' existing responsibilities for remaining 13 commercial species.

Table 5. Itemized list of resources necessary for sampling the purse seine menhaden reduction sector.

Item	Purpose	Estimated Cost
Samples*	Obtain biological data	\$194.86
Processing equipment (knives, tweezers, envelopes, vials)*	To obtain hard parts for ageing	\$500.00
Ageing equipment (glass & acetate slides, diamond blades for isomet saws)*	To process age and growth data	\$1,200.00
Field Sampling Technician (salary + fringe)*	Personnel to cover the additional sampling requirements	\$42,291.00
Field Sampling Kit		
- Lat 37 Fish Measuring Board	To measure sample lengths	\$7,000.00
- Juniper Systems Mx Handheld PC	To record biological data	\$2,875.00
- Doran 8000XL scale	To obtain weight data	\$1,200.00
Agency vehicle	Transportation for field technician	\$20,000.00
Vehicle costs*	Transportation for field technician	\$3,559.50
Total Expenses (Year 1)		\$78,820.36

*These costs would be ongoing, leading to subsequent annual costs of \$47,745.36 Year 2 forward.

Table 6. Itemized list of resources necessary for developing a fishery-dependent abundance index based on pound net data.

Item	Purpose	Estimated Cost
Data analyst (salary – 2 months time will be devoted to this)	Personnel to develop and maintain the index	\$8,500.00
Travel	Travel to pound net locations to sample catch characteristics to address assumptions about catch	\$1,320.00
Field Sampling Kit		
- Lat 37 Fish Measuring Board	To measure sample lengths	\$7,000.00
- Juniper Systems Mx Handheld PC	To record biological data	\$2,875.00
- Doran 8000XL scale	To obtain weight data	\$1,200.00
Total Expenses		\$20,895.00

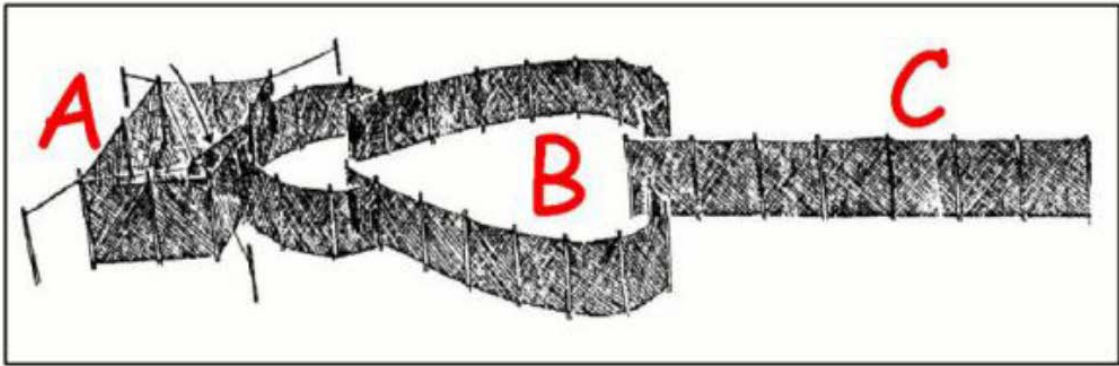


Figure 1. Diagram of a typical pound net fished in Chesapeake Bay. The pound net is composed of three main parts. The pound (A) is where fish are trapped, the heart (B) funnels fish into the pound, and the leader (C) begins close to shore and directs fish offshore toward the heart. Figure is adapted from Piavis et al. (2012).

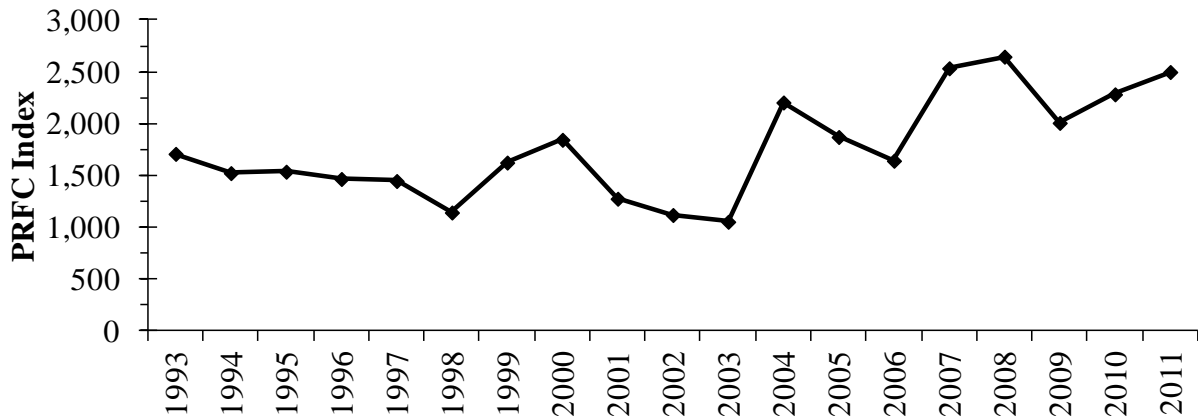


Figure 2. Potomac River Fisheries Commission menhaden abundance index developed from pound net landings.

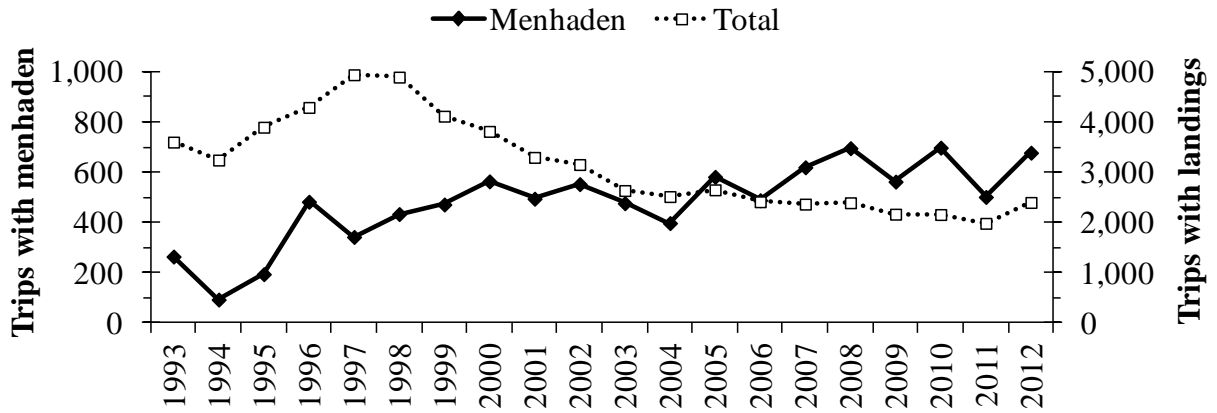


Figure 3. Number of trips where menhaden were landed and total number of trips in Virginia's pound net fishery.

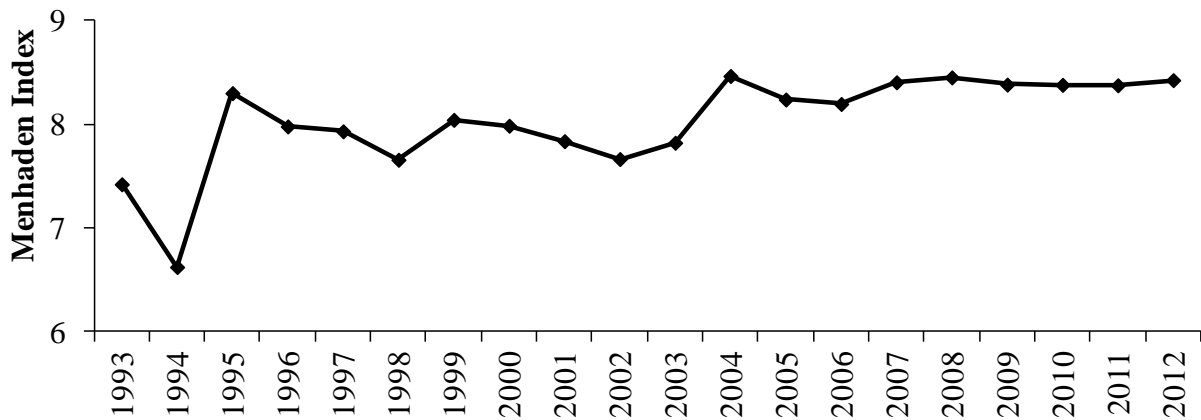


Figure 4. abundance index of menhaden from Virginia's pound net fishery.

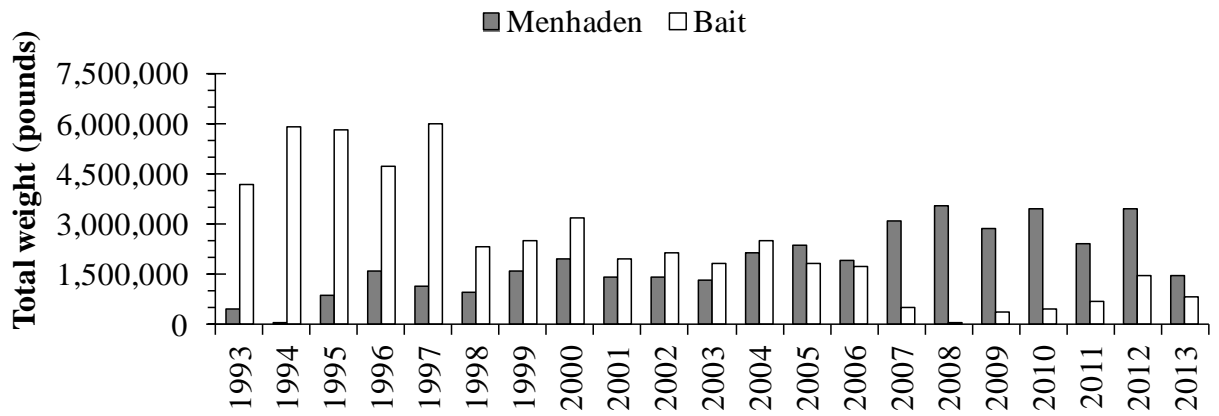


Figure 5. Menhaden and bait pound net landings (pounds) by year. Data for 2013 are current through June 30, 2013.

CHAPTER 59

An Act to amend and reenact §§ 2.2-4002, 28.2-204.1, 28.2-402, 28.2-403, and 28.2-1000.2 of the Code of Virginia and the second enactment of Chapter 41 of the Acts of Assembly of 2007, as amended by Chapters 178 and 728 of the Acts of Assembly of 2010; to amend the Code of Virginia by adding sections numbered 28.2-400.1 through 28.2-400.6; and to repeal § 28.2-1000.2 of the Code of Virginia, relating to management of the menhaden fishery.

[S 1291]

Approved February 23, 2013

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4002, 28.2-204.1, 28.2-402, 28.2-403, and 28.2-1000.2 of the Code of Virginia and the second enactment of Chapter 41 of the Acts of Assembly of 2007, as amended by Chapters 178 and 728 of the Acts of Assembly of 2010, are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 28.2-400.1 through 28.2-400.6 as follows:

§ 2.2-4002. Exemptions from chapter generally.

A. Although required to comply with § 2.2-4103 of the Virginia Register Act (§ 2.2-4100 et seq.), the following agencies shall be exempted from the provisions of this chapter, except to the extent that they are specifically made subject to §§ 2.2-4024, 2.2-4030, and 2.2-4031:

1. The General Assembly.
2. Courts, any agency of the Supreme Court, and any agency that by the Constitution is expressly granted any of the powers of a court of record.
3. The Department of Game and Inland Fisheries in promulgating regulations regarding the management of wildlife and for all case decisions rendered pursuant to any provisions of Chapters 2 (§ 29.1-200 et seq.), 3 (§ 29.1-300 et seq.), 4 (§ 29.1-400 et seq.), 5 (§ 29.1-500 et seq.), and 7 (§ 29.1-700 et seq.) of Title 29.1.
4. The Virginia Housing Development Authority.
5. Municipal corporations, counties, and all local, regional or multijurisdictional authorities created under this Code, including those with federal authorities.
6. Educational institutions operated by the Commonwealth, provided that, with respect to § 2.2-4031, such educational institutions shall be exempt from the publication requirements only with respect to regulations that pertain to (i) their academic affairs, (ii) the selection, tenure, promotion and disciplining of faculty and employees, (iii) the selection of students, and (iv) rules of conduct and disciplining of students.
7. The Milk Commission in promulgating regulations regarding (i) producers' licenses and bases, (ii) classification and allocation of milk, computation of sales and shrinkage, and (iii) class prices for producers' milk, time and method of payment, butterfat testing and differential.
8. The Virginia Resources Authority.
9. Agencies expressly exempted by any other provision of this Code.
10. The Department of General Services in promulgating standards for the inspection of buildings for asbestos pursuant to § 2.2-1164.
11. The State Council of Higher Education for Virginia, in developing, issuing, and revising guidelines pursuant to § 23-9.6:2.
12. The Commissioner of Agriculture and Consumer Services in adopting regulations pursuant to subsection B of § 3.2-6002 and in adopting regulations pursuant to § 3.2-6023.
13. The Commissioner of Agriculture and Consumer Services and the Board of Agriculture and Consumer Services in promulgating regulations pursuant to subsections B and D of § 3.2-3601, subsection B of § 3.2-3701, § 3.2-4002, subsections B and D of § 3.2-4801, §§ 3.2-5121 and 3.2-5206, and subsection A of § 3.2-5406.
14. The Board of Optometry when specifying therapeutic pharmaceutical agents, treatment guidelines, and diseases and abnormal conditions of the human eye and its adnexa for TPA-certification of optometrists pursuant to Article 5 (§ 54.1-3222 et seq.) of Chapter 32 of Title 54.1.
15. The Commissioner of the Department of Veterans Services in adopting regulations pursuant to subdivision 18 of § 2.2-2004.
16. The State Board of Education, in developing, issuing, and revising guidelines pursuant to § 22.1-203.2.
17. The Virginia Racing Commission, (i) when acting by and through its duly appointed stewards or in matters related to any specific race meeting or (ii) in promulgating technical rules regulating actual live horse racing at race meetings licensed by the Commission.
18. The Virginia Small Business Financing Authority.

19. The Virginia Economic Development Partnership Authority.

20. The Board of Agriculture and Consumer Services in adopting, amending or repealing regulations pursuant to subsection A (ii) of § 59.1-156.

21. The Insurance Continuing Education Board pursuant to § 38.2-1867.

22. The Board of Health in promulgating the list of diseases that shall be reported to the Department of Health pursuant to § 32.1-35 and in adopting, amending or repealing regulations pursuant to subsection C of § 35.1-14 that incorporate the Food and Drug Administration's Food Code pertaining to restaurants or food service.

23. (Expires January 1, 2014) The ~~Secretary of Natural Resources~~ *Commissioner of the Marine Resources Commission* in setting a date of closure for the Chesapeake Bay purse seine fishery for Atlantic menhaden for reduction purposes pursuant to § 28.2-1000.2.

24. The Board of Pharmacy when specifying special subject requirements for continuing education for pharmacists pursuant to § 54.1-3314.1.

25. The Virginia Department of Veterans Services when promulgating rules and regulations pursuant to § 58.1-3219.7.

B. Agency action relating to the following subjects shall be exempted from the provisions of this chapter:

1. Money or damage claims against the Commonwealth or agencies thereof.

2. The award or denial of state contracts, as well as decisions regarding compliance therewith.

3. The location, design, specifications or construction of public buildings or other facilities.

4. Grants of state or federal funds or property.

5. The chartering of corporations.

6. Customary military, militia, naval or police functions.

7. The selection, tenure, dismissal, direction or control of any officer or employee of an agency of the Commonwealth.

8. The conduct of elections or eligibility to vote.

9. Inmates of prisons or other such facilities or parolees therefrom.

10. The custody of persons in, or sought to be placed in, mental health facilities or penal or other state institutions as well as the treatment, supervision, or discharge of such persons.

11. Traffic signs, markers or control devices.

12. Instructions for application or renewal of a license, certificate, or registration required by law.

13. Content of, or rules for the conduct of, any examination required by law.

14. The administration of pools authorized by Chapter 47 (§ 2.2-4700 et seq.).

15. Any rules for the conduct of specific lottery games, so long as such rules are not inconsistent with duly adopted regulations of the State Lottery Board, and provided that such regulations are published and posted.

16. Orders condemning or closing any shellfish, finfish, or crustacea growing area and the shellfish, finfish or crustacea located thereon pursuant to Article 2 (§ 28.2-803 et seq.) of Chapter 8 of Title 28.2.

17. Any operating procedures for review of child deaths developed by the State Child Fatality Review Team pursuant to § 32.1-283.1.

18. The regulations for the implementation of the Health Practitioners' Monitoring Program and the activities of the Health Practitioners' Monitoring Program Committee pursuant to Chapter 25.1 (§ 54.1-2515 et seq.) of Title 54.1.

19. The process of reviewing and ranking grant applications submitted to the Commonwealth Neurotrauma Initiative Advisory Board pursuant to Article 12 (§ 51.5-178 et seq.) of Chapter 14 of Title 51.5.

20. Loans from the Small Business Environmental Compliance Assistance Fund pursuant to Article 4 (§ 10.1-1197.1 et seq.) of Chapter 11.1 of Title 10.1.

21. The Virginia Breeders Fund created pursuant to § 59.1-372.

22. The types of pari-mutuel wagering pools available for live or simulcast horse racing.

23. The administration of medication or other substances foreign to the natural horse.

C. Minor changes to regulations published in the Virginia Administrative Code under the Virginia Register Act (§ 2.2-4100 et seq.), made by the Virginia Code Commission pursuant to § 30-150, shall be exempt from the provisions of this chapter.

§ 28.2-204.1. Limited sale of gear licenses and permits; regulations.

A. The Commission may limit the number of gear licenses or permits to fish, except those licenses issued pursuant to *subdivisions 1 and 2 of § 28.2-402*, issued for use in a specific fishery. The Commission may, despite any such limits, issue such gear licenses or permits to fish to any person who has resided for at least five years on an island in the Commonwealth that is at least three miles from the mainland.

B. The Commission is authorized to promulgate regulations to carry out the provisions of this section. In determining whether to limit the sale of gear licenses or permits to fish, and determining who receives licenses, the Commission shall consider all factors relevant to the Commonwealth's fishery management policy, including but not limited to:

1. Economic and social consequences;
2. Food production;
3. Dependence on the fishery by licensees;
4. Efficiency of gear used in the fishery;
5. Impact on species and fisheries; and
6. Abundance of the resource.

§ 28.2-400.1. Criteria for qualifying for a limited entry purse seine menhaden bait license.

A. *The Commission shall establish and administer a limited entry purse seine menhaden bait license that meets the requirements of this section.*

B. *In order to qualify for a limited entry purse seine menhaden bait license, an applicant shall have held a purse seine license, as established in § 28.2-402, in 2011 and shall have landed menhaden in the Commonwealth in each of the years 2009, 2010, and 2011. Such person shall also have used purse seine gear to harvest menhaden in at least one of those three years. Proof of landings and gear usage shall be in the form of receipts, landing reports, or other verifiable documents as designated by the Commission.*

§ 28.2-400.2. Total allowable landings for menhaden.

A. *Except as provided for in subsections B, C, and D, the total allowable landings for menhaden shall be 144,272.84 metric tons per year.*

B. *If the total allowable landings specified in subsection A are exceeded in any year, the total allowable landings for the subsequent year will be reduced by the amount of the overage. Such overage shall be deducted from the sector of the menhaden fishery that exceeded the allocation specified in § 28.2-400.3.*

C. *The Commissioner may request a transfer of menhaden landings from any other state that is a member of the Atlantic States Marine Fisheries Commission. If the Commonwealth receives a transfer of menhaden in any year from another state, the total allowable landings for only that year shall increase by the amount of transferred landings. The Commissioner may transfer menhaden to another state only if there are unused landings after December 15.*

D. *Any portion of the one percent of the coast-wide total allowable catch set aside by the Atlantic States Marine Fisheries Commission for episodic events that is unused as of September 1 of any year shall be returned to Virginia and other states according to allocation guidelines established by the Atlantic States Marine Fisheries Commission. Any such return of this portion of the coast-wide total allowable catch to Virginia shall increase the total allowable landings for that year.*

§ 28.2-400.3. Allocation of the total allowable landings for menhaden.

A. *The total allowable landings for menhaden specified in § 28.2-400.2 shall be allocated among the purse seine menhaden reduction sector, purse seine menhaden bait sector, and non-purse seine menhaden bait sector in proportion to each sector's share of average landings in 2002 through 2011, and in proportion to each gear type landings within the non-purse seine bait sector during that period.*

B. *The Commission shall establish an Individual Transferable Quota System for any purse seine menhaden bait licensee that meets the requirements of § 28.2-400.1. The Commission shall not consider a limited entry purse seine menhaden bait licensee's landings of menhaden for reduction purposes for any purposes under the Individual Transferable Quota System required by this subsection.*

C. *Any landings of menhaden by a limited entry purse seine menhaden bait licensee at a qualified menhaden processing factory, as indicated on the mandatory daily landings reports required to be submitted under § 28.2-400.5, shall be attributed to the menhaden reduction sector for all purposes under this chapter. A qualified menhaden processing factory is one located in the Commonwealth and which has processed at least 100,000 metric tons of menhaden in each of the years 2009, 2010, and 2011.*

§ 28.2-400.4. Administration of the menhaden management program.

A. *Closure of the menhaden fishery shall occur when the Commissioner projects and announces that 100 percent of the total allowable landings have been taken. The Commissioner shall monitor the mandatory daily landings reports required to be submitted under § 28.2-400.5 by the:*

1. *Purse seine menhaden reduction sector and promptly announce the date of closure when the portion of the total allowable landings allocated to the purse seine menhaden reduction sector under § 28.2-400.3 are projected to be taken. The Commissioner shall also notify the operators of any qualified menhaden processing factory of the date of closure by the most convenient and expeditious means available;*

2. *Purse seine menhaden bait sector and promptly announce the date of closure when the portion of total allowable landings allocated to the purse seine fishery for bait under § 28.2-400.3 is projected to be taken. The Commissioner shall also notify the purse seine menhaden bait sector of the date of closure by the most convenient and expeditious means available; and*

3. *Non-purse seine menhaden bait sector and promptly announce the date of closure when the portion of total allowable landings allocated to the non-purse seine fishery for bait under § 28.2-400.3 is projected to be taken. The Commissioner shall also notify the operators of the non-purse seine bait fishery of the date of closure by the most convenient and expeditious means available. Once this closure*

is announced, any person licensed in the non-purse seine menhaden bait sector may possess and land up to 6,000 pounds of menhaden per day, provided that such person is fishing in accordance with all laws and regulations.

B. The Commissioner may reopen a fishery sector closed pursuant to this section if, after all reports have been received, the portion of the total allowable landings has not been harvested by that sector. The Commission may establish any regulations it deems necessary and advisable, including trip limits or a time-limited reopening, to ensure that the allowable landings for a reopened sector is not exceeded. Any such reopening and subsequent closure shall be done by direct notice to the relevant sector of the fishery.

C. The Commission shall maintain on its website a periodically updated tally of the menhaden harvest for each sector receiving an allocation under this section.

D. Except as provided in subdivision A 3, no person shall harvest menhaden for bait or reduction purposes after the portion of the total allowable landings for the sector in which that person holds a license has been closed. Any person violating this provision is guilty of a Class 1 misdemeanor.

§ 28.2-400.5. Reporting requirements.

A. Any person licensed for the purse seine menhaden reduction sector or purse seine menhaden bait sector shall submit landings reports to the Commissioner each non-weekend or non-holiday day that the applicable sector of the menhaden fishery is open for harvest utilizing the Captain's Daily Fishing Report produced by the National Marine Fisheries Service.

B. Persons licensed for the non-purse seine menhaden bait sector shall submit a report on a form and on a schedule established by the Commission. The reporting period established by the Commission shall be longer than one week.

C. The reporting form required to be developed by the Commission shall require the following information:

1. Trip start date;
2. Vessel identification number;
3. Individual fisherman identifier;
4. Identification of dealer purchasing landings;
5. Trip number;
6. Species harvested;
7. Quantity of fish landed and discarded in pounds or metric tons;
8. Disposition of the landings;
9. County or port landed;
10. Gear type used;
11. Quantity of gear used;
12. Number of sets made during each trip;
13. Time fishing gear is in the water;
14. Days or hours at sea;
15. Number of crewmembers;
16. Area fished; and
17. Date of unloading.

§ 28.2-400.6. Biological sampling program and adult abundance index.

A. The Commission shall:

1. Establish a biological sampling program to collect one 10-fish sample per 200 landed metric tons for length and weight-at-age data from the commercial menhaden harvest; and

2. Initiate a program to add Atlantic menhaden to the Virginia Marine Resources Commission's finfish biological sampling program in order to develop an adult menhaden survey index from Virginia pound nets.

B. By no later than December 1, 2013, the Commission shall submit a report to the General Assembly and the Governor that (i) describes progress in establishing the biological sampling program and development of the adult menhaden survey index called for by this section, (ii) discusses any difficulties in implementing the requirements of this section, including a lack of resources to properly implement the program, and (iii) provides a list of resources the Commission believes are necessary to properly implement the sampling program and index, with detailed justification, including an estimate of the cost of each item requested.

§ 28.2-402. License fee to take menhaden with purse nets.

Any person desiring to take or catch menhaden with purse nets shall pay to the officer or agent a license fee as follows or as subsequently revised by the Commission pursuant to § 28.2-201:

1. On each boat or vessel under ~~seventy~~ 70 gross tons fishing with purse net, \$3 per gross ton, but not more than \$150 for the purse seine menhaden reduction sector, \$249.

2. On each vessel ~~over seventy~~ 70 gross tons or over fishing with purse net, \$5 per gross ton, provided the maximum license fee for such vessels shall not be more than \$600 for the purse seine menhaden reduction sector, \$996.

3. On each boat or vessel under 70 gross tons fishing for the purse seine menhaden bait sector,

\$249.

4. On each vessel 70 gross tons or over fishing for the purse seine menhaden bait sector, \$996.

The officer or agent shall thereupon grant a license to use such net or other device and state in the license the name or names of the person or persons who shall use the same and the amount of the license fee.

§ 28.2-403. Action of Commissioner on such application; transfer of license of disabled vessel; delegation of authority; appeals.

A. If the Commissioner is satisfied that the disclosures required by § 28.2-400 have been made and that the application conforms in other respects to the provisions of that section *or to* § 28.2-400.1, and upon payment of the license fee specified in § 28.2-402, the Commissioner, or the officer through whom or in whose district the application was made, shall issue to the applicant a license for each of the purse seines, vessels, or other watercraft specified in the application. The license shall state the name of the licensee and the name of the vessel or other watercraft licensed.

If any vessel or other watercraft so licensed becomes disabled during the period of such license, the licensee may, with the consent of the Commissioner, hire or charter a vessel or other craft belonging to a nonresident to replace the disabled one for the unexpired period of such license. In such a case, the officer shall transfer the license issued for the disabled vessel or other craft to the one so hired or chartered without requiring any additional license.

B. The Commissioner may delegate to the officers his authority under this section. However, any person aggrieved by any action of an officer exercising such delegated authority shall have the right to appeal to the Commissioner for a review and correction of the actions of the officer. The appeal may be made by mailing a statement of the officer's action, together with the appellant's objections and the grounds for his objections, to the Commissioner. Upon receipt of such appeal, the Commissioner shall immediately notify the officer involved, who shall, within three days, deliver to the Commissioner all papers in his possession concerning the subject matter of the appeal, together with a written statement of and reasons for his actions. The Commissioner shall issue his ruling granting, transferring, refusing, or refusing to transfer the license within ten days after receipt by him of the appeal.

§ 28.2-1000.2. (Expires January 1, 2014) Annual closure of the Chesapeake Bay purse seine fishery for Atlantic menhaden.

A. For the purpose of this section:

"Chesapeake Bay" means the territorial waters of the Commonwealth lying west of the Chesapeake Bay Bridge-Tunnel.

"Purse seine fishery for Atlantic menhaden" means those vessels licensed pursuant to § 28.2-402 that harvest menhaden for the purpose of manufacturing them into fertilizer, fish meal, or oil.

B. Upon notification by the National Marine Fisheries Service of the date on which a determination that the purse seine fishery for Atlantic menhaden meets the annual menhaden harvest cap in the Chesapeake Bay, the Secretary of Natural Resources Commissioner shall promptly publish a notice in the Virginia Register announcing the date of closure. The Secretary of Natural Resources Commissioner shall also notify the operators of the purse seine fishery for Atlantic menhaden by the most convenient and expeditious means available. The date of closure shall be based on mandatory daily catch landings reports submitted to the National Marine Fisheries Service required to be submitted under § 28.2-400.5 by the purse seine fishery for Atlantic menhaden.

C. The annual menhaden harvest cap for the purse seine fishery for Atlantic menhaden shall be ~~109,020~~ 87,216 metric tons, subject to annual adjustment for underages or overages as specified in subsection D. In no event, however, shall the harvest of this fishery exceed ~~122,740~~ 98,192 metric tons in any one year.

D. If the harvest of the purse seine fishery for Atlantic menhaden does not exceed ~~109,020~~ 87,216 metric tons in any year to which the harvest cap applies, then the difference between the actual harvest and the harvest cap shall be applied as a credit applicable to the allowable harvest for the purse seine fishery for Atlantic menhaden for the following year. The credit may be used only for the subsequent annual harvest and shall not be spread over multiple years. Any annual harvest in excess of the harvest cap shall be deducted from the harvest cap, as modified pursuant to this subsection and subsection C for the subsequent annual harvest.

E. The 2007 harvest cap for the purse seine fishery for Atlantic menhaden shall be adjusted for any underage or overage, as specified in subsection D, from the actual 2006 harvest of the purse seine fishery for Atlantic menhaden.

F. No person shall take Atlantic menhaden by purse seine for reduction purposes from the Chesapeake Bay after the later of the date of closure implemented pursuant to subsection B or the date that actual notice is provided of such closure pursuant to subsection B. Any person violating this provision shall be guilty of a Class 1 misdemeanor.

2. That the second enactment of Chapter 41 of the Acts of Assembly of 2007, as amended by Chapters 178 and 728 of the Acts of Assembly of 2010, is amended and reenacted as follows:

2. That the provisions of this act shall expire on January 1, 2014 2015.

3. That § 28.2-1000.2 of the Code of Virginia is repealed effective January 1, 2015.

- 4. That the provisions of this act shall expire on January 1, 2015.**
- 5. That an emergency exists and this act is in force from its passage.**

PREAMBLE

This chapter establishes an allocation system for three fishing sectors of the commercial menhaden fishery, establishes a limited entry and individual transferable quota systems for the purse seine menhaden bait sector and establishes reporting requirements for the three sectors of the commercial menhaden fishery. This chapter is promulgated pursuant to the authority contained in §§ 28.2-201, 28.2-204 and 28.2-204.1 and §§ 28.2-400.1 through 28.2-400.5 of the Code of Virginia. The effective date of this chapter is April 1, 2013. The provisions of this chapter expire on January 1, 2015.

4VAC20-1270-10. Purpose.

The purpose of this chapter is to comply with the Interstate Fishery Management Plan for Atlantic menhaden, including the mandated 20 percent reduction in total allowable commercial landings of Atlantic menhaden from the average of the 2009 through 2011 landings.

4VAC20-1270-20. Definitions.

“*Nonpurse seine menhaden bait sector*” means those vessels that do not utilize a purse seine net to harvest menhaden and land menhaden only for use as bait in other fisheries.

“*Purse seine menhaden bait sector*” means those vessels that utilize a purse seine net to land menhaden only for use as bait in other fisheries.

“*Purse seine menhaden reduction sector*” means those vessels that utilize a purse seine net to land menhaden only at a qualified menhaden processing factory as described by § 28.2-400.3 of the Code of Virginia.

4VAC20-1270-30. Total allowable landings for menhaden; allocation, accountability, and overages.

A. Section § 28.2-400.2 of the Code of Virginia establishes the total allowable commercial landings for menhaden in 2013 and 2014 in metric tons equivalent to 318,067,167 pounds, and that total amount of allowable landings shall be allocated as quotas among three sectors of the menhaden fishery, as described below, pursuant to § 28.2-400.3 of the Code of Virginia. The purse seine menhaden reduction sector is allocated a quota of 286,396,768 pounds of allowable menhaden landings; the purse seine menhaden bait sector a 26,648,870 pound quota of allowable menhaden landings; and, the nonpurse seine menhaden bait sector a 5,021,529 pound quota of allowable menhaden landings.

B. Any menhaden landings on and after January 1, 2013, count towards that particular sector’s 2013 commercial quota.

C. Any overages of a sector's commercial quota shall be deducted from the following year's quota for that sector.

4VAC20-1270-40. Purse seine menhaden bait sector; limited entry criteria; Individual Transferable Quota System.

- A. To qualify for limited entry to the purse seine menhaden bait sector, the applicant must:
1. Have held a purse seine license in 2011 and landed menhaden in Virginia in 2009, 2010 and 2011, while using purse seine gear to harvest menhaden in one of those three years; and,
 2. Provide the Commission receipts and landings reports or other requested reports as proof of landings and gear usage to demonstrate that the criteria described in subdivision 1 of this subsection have been met.
- B. The Commission shall establish an individual transferable quota (ITQ) system for each purse seine menhaden bait licensee that meets the limited entry requirements in subsection A of this section. The quota for this sector will be allocated according to each qualified licensee's rounded percentage share of the average of the 2007 through 2011 menhaden landings.
- C. Each licensee qualified under the ITQ system may transfer quota to another licensee's ITQ upon approval of the Commissioner.

4VAC20-1270-50. Nonpurse seine menhaden bait sector quota; allocation and bycatch provisions.

A. For 2013 and 2014, the nonpurse seine commercial bait sector's allocation shall be by gear type as follows:

- | | |
|-------------------|-------------------|
| 1) Cast net: | 1,930 pounds. |
| 2) Dredge: | 3,069 pounds. |
| 3) Fyke net: | 2,115 pounds. |
| 4) Gill net: | 1,521,108 pounds. |
| 5) Hook and line: | 234 pounds. |
| 6) Pot: | 2,064 pounds. |
| 7) Pound net: | 3,412,020 pounds. |
| 8) Seine: | 20,103 pounds. |
| 9) Trawl: | 58,847 pounds. |
| 10) Trot line: | 39 pounds. |

B. Pursuant to § 28.2-400.4 of the Code of Virginia, once the Commissioner announces the date of closure for the nonpurse seine bait fishery, any person licensed in the nonpurse seine menhaden bait sector may possess and land up to 6,000 pounds of menhaden per day.

4VAC20-1270-60. Reporting requirements by menhaden fishery sector.

A. Each licensee of any purse seine vessel that harvests menhaden must submit a Captain's Daily Fishing Report to the Commission on each nonweekend or nonholiday day that either purse seine sector is open for harvest. The Captain's Daily Fishing report is produced by the National Marine Fisheries Service and provides preliminary estimates of harvest. Pursuant to § 28.2-204 of the Code of Virginia, those same licensees must submit to the Commission actual weekly harvest reports that include vessel name and exact weight of menhaden landed, in pounds, by Wednesday of the following week. Once ninety-seven percent of either purse seine sector's quota is projected and announced to have been met, each licensee of that purse seine sector must provide daily harvest totals to the Commission's Interactive Voice Recording System.

B. The nonpurse seine menhaden commercial bait sector shall submit daily reports according to the schedule and reporting requirements established by 4 VAC 20-610-10, "Pertaining to Commercial Fishing and Mandatory Harvest Reporting".

C. When the Commissioner announces that 90 percent of the nonpurse seine menhaden bait quota has been reached, each harvester of this sector is required to report his previous 10 days of landings to the Commission's Interactive Voice Recording System and must continue to report his additional landings every 10 days until it is announced that the nonpurse seine bait quota has been attained. More frequent reporting is permissible. The Commission may also implement other harvest conservation measures such as trip limits.

4VAC20-1270-70. Penalty.

As set forth in §28.2-903 of the Code of Virginia, any person violating any provision of this chapter shall be guilty of a Class 3 misdemeanor. A second and each subsequent violation of any provision of this chapter committed by the same person within 12 months of a prior violation is a Class 1 misdemeanor.

This is to certify that the foregoing is a true and accurate copy of the chapter passed by the Virginia Marine Resources Commission, pursuant to authority vested in the Commission by §28.2-201 of the Code of Virginia, duly advertised according to statute, and recorded in the Commission's minute book, at its meeting held in Newport News, Virginia on March 26, 2013.

**COMMONWEALTH OF VIRGINIA
MARINE RESOURCES COMMISSION**

By: _____
Jack G. Travelstead
Commissioner

Subscribed and sworn to before me this _____ day of March 2013.

Notary Public

