

Secretary's Order No.: **2009-F-0039**

RE: Approving Final Delaware Regulation  
Amendments for 2009:  
7 DE Admin. Code 3512: Winter Flounder; and  
7 DE Admin. Code 3711: Knobbed Whelks (Conch)

Date of Issuance: October 15, 2009

Effective Date of the Amendment: November 11, 2009

**I. Background:**

A public hearing was held on Wednesday, September 30, 2009, at 6:00 p.m. at the Department of Natural Resources and Environmental Control ("DNREC", "Department"), 89 Kings Highway, Dover, Delaware to receive comment on proposed amendments to the Delaware Tidal Finfish Regulations for both Winter Flounder and Knobbed Whelks (Conch). The purpose of the aforementioned proposed amendments to Delaware Tidal Finfish Regulation No. 3512 for Winter Flounder is to bring Delaware into compliance with Addendum 1 to Amendment 1 of the Interstate Fishery Management Plan for Inshore Stocks of Winter Flounder as administered by the Atlantic States Marine Fisheries Commission ("ASMFC"). To effectuate this compliance, Delaware must reduce its recreational daily harvest limit to two winter flounder per person per day, as well as capping the daily commercial harvest limit for any commercial fisherman at 50 pounds.

On May 4, 2009, the Winter Flounder Management Board approved Addendum 1 to the Interstate Fisheries Management Plan for in-shore stocks of winter flounder. This includes measures to achieve fishing mortality for the Gulf of Maine stock, and to rebuild the overfished southern New England Mid-Atlantic stocks to prevent excessive fishing efforts from shifting to state waters in response to federal management measures.

Individual states are required to implement all measures in this addendum, in addition to continuing those contained in Addendum 1.

The southern New England Mid-Atlantic winter flounder stock is severely depleted. The proposed reduction in creel limit from the existing ten (10) fish limit to two (2) fish is estimated to reduce harvest throughout the region by 46%, while still allowing for some directed fishing effort. Very few winter flounder are presently landed in Delaware by recreational fishermen. The proposed commercial restrictions would limit commercial vessels to a maximum possession limit of 50 pounds of winter flounder per trip. For Delaware fishermen, it should have no immediate impact, given the current levels of landings are very low. No other changes are proposed to the minimum size of winter flounder that may be taken during the open season, or to the allowable recreational harvest season. Winter flounder stocks taken in federal waters or those taken by commercial fishermen in possession of a federal permit are subject to the catch restrictions currently in place for federal waters.

The Department has the statutory basis and legal authority to act with regard to the proposed regulatory amendments concerning Delaware Tidal Finfish Regulation 3512 for Winter Flounder, pursuant to 7 Del.C. §§903(e)(2)(a).(3). No other Delaware regulations are affected by these proposals.

Also at issue at the public hearing held on September 30, 2009 were the Department's proposed regulatory amendments to existing Delaware Shellfish Regulation 3711 for Knobbed Whelks (Conchs). The purpose of these proposed amendments is to establish a tolerance for undersize knobbed whelks (also known as knobbed conchs) in the dredge and pot commercial fisheries similar to the existing tolerance established in

Regulation 3711, Section 2.0, for the channeled or smooth whelks (conchs). The proposed amendments to this regulation would allow the retention of up to five (5) undersized knobbed whelks per 60 pound bag, or basket, of whelks per day. The allowance of a few undersized knobbed whelks during the course of normal harvesting operations will be a convenience for harvesters who have to pay crews of widely varying experience to cull undersize conchs from the harvest. Additionally, such a tolerance is in recognition of the fact that, occasionally, conch shells are partially broken off either during or prior to harvesting. This proposed regulatory amendment will ease the burden of Department enforcement staff that must check the harvest for compliance with applicable minimum size limits.

The Department has the statutory basis and legal authority to act with regard to the proposed regulatory amendments concerning Shellfish Regulation 3711, pursuant to 7 Del.C. §1902(a)(5) and §2804. No other Delaware regulations are affected by these proposals.

Only one comment was received by the Department from the public regarding the proposed amendments to Shellfish Regulation 3711 (Knobbed Whelks), which was in support of this proposed promulgation. There were no comments received by the Department with regard to the proposed regulatory amendments to Delaware Tidal Finfish Regulation 3512 concerning winter flounder.

The Department provided proper notice of the hearing as required by law. Afterwards, Hearing Officer Lisa A. Vest prepared her Hearing Officer's Report dated October 9, 2009, which is attached and expressly incorporated into this Order regarding this matter, and submitted the same to the Secretary for review and consideration.

## **II. Findings:**

The Department has provided a reasoned analysis and a sound basis in the record to support the issuance of the final regulations proposed in this matter. Moreover, the following findings and conclusions are entered at this time:

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 the proceeding and the public hearing in a manner required by the law and regulations;
4. The Department held a public hearing in a manner required by the law and regulations;
5. The Department considered all timely and relevant public comments in making its determination;
6. Promulgation of the proposed amendments to Delaware Tidal Finfish Regulation 3512 (Winter Flounder) would bring Delaware into compliance with Addendum 1 to Amendment 1 of the Interstate Fishery Management Plan for Inshore Stocks of Winter Flounder as administered by the Atlantic States Marine Fisheries Commission, which represents the federal guidelines for the management of winter flounder, consistent with federal management plans and state jurisdiction;
7. Adoption of the proposed amendments to Delaware Tidal Finfish Regulation 3512 would reduce Delaware fishermen's recreational daily harvest limit to

two (2) winter flounder per person per day, as well as cap the daily commercial harvest limit for any commercial fishermen at 50 pounds;

8. The aforementioned proposed amendments to Delaware's existing regulations concerning winter flounder are considered necessary, due to the fact that Southern New England/Mid-Atlantic winter flounder stocks are considered to be overfished, and that overfishing is still occurring. Moreover, promulgation of the proposed amendments will cause winter flounder stocks taken in federal waters, or those taken by commercial fishermen in possession of a federal permit, to be subject to the catch restrictions currently in place for federal waters;
9. Promulgation of the proposed amendments to Delaware Shellfish Regulation 3711 will establish a tolerance for undersized knobbed whelks (conchs) in the dredge and pot commercial fisheries similar to the existing tolerance established in Regulation 3711, Section 2.0, for the channeled or smooth whelks (conchs), namely, to allow the retention of up to five (5) undersized knobbed whelks per 60 pound bag or basket of whelks per day;
10. The Department has reviewed both of 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;
11. The Department's aforementioned proposed amendments to Delaware's regulations concerning both winter flounder and knobbed whelks (conchs), as published in the September 1, 2009 *Delaware Register of Regulations* and as

set forth in Attachment “A” of the aforementioned Hearing Officer’s Report, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, both 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*;

12. The Department shall submit the proposed regulations as final regulations to the Delaware Register of Regulations for publication in its next available issue, and shall provide written notice to the persons affected by the Order; and that
13. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary.

**III. Order:**

Based on the record developed, as reviewed in the Hearing Officer’s Report dated October 9, 2009 and expressly incorporated herein, it is hereby ordered that the proposed amendments to Delaware Tidal Finfish Regulation 3512: Winter Flounder; and Delaware Shellfish Regulation 3711: Knobbed Whelk (Conch), be promulgated in final form in the customary manner and established rule-making procedure required by law.

**IV. Reasons:**

The promulgation of the amendments to Delaware Tidal Finfish Regulation 3512: Winter Flounder will bring Delaware into compliance with federal guidelines for the management of this species. It is incumbent upon Delaware to be in compliance with ASMFC’s plan, not only to avoid federal sanctions against Delaware and its fisheries, but

to protect this species with these conservation measures to ensure that winter flounder will continue to be found in Delaware waters in the future. Similarly, the promulgation of the amendments to Delaware Shellfish Regulation 3711: Knobbed Whelks (Conchs) will establish a tolerance for undersized knobbed whelks, thereby lessening the burden on Department enforcement staff that must regularly check the harvest for compliance with applicable minimum size limits.

In developing this regulation, the Department has balanced the absolute environmental need for the State of Delaware to promulgate regulations concerning this matter with the important interests and public concerns surrounding the same, in furtherance of the policy, purposes, and authority of 7 Del. C. §903(e)(2)(a).(3), §1902(a)(5), and §2804.

/s/ Collin P. O'Mara  
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:** **Approving Final Delaware Regulation Amendments for 2009:  
7 DE Admin. Code 3512: Winter Flounder; and  
7 DE Admin. Code 3711: Knobbed Whelks (Conchs)**

**DATE:** October 9, 2009

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

A public hearing was held on Wednesday, September 30, 2009, at 6:00 p.m. at the Department of Natural Resources and Environmental Control ("DNREC", "Department"), 89 Kings Highway, Dover, Delaware to receive comment on proposed amendments to the Delaware Tidal Finfish Regulations for both Winter Flounder and Knobbed Whelks (Conch). The purpose of the aforementioned proposed amendments to Delaware Tidal Finfish Regulation No. 3512 for Winter Flounder is to bring Delaware into compliance with Addendum 1 to Amendment 1 of the Interstate Fishery Management Plan for Inshore Stocks of Winter Flounder as administered by the Atlantic States Marine Fisheries Commission ("ASMFC"). To effectuate this compliance, Delaware must reduce its recreational daily harvest limit to two winter flounder per person per day, as well as capping the daily commercial harvest limit for any commercial fisherman at 50 pounds.

On May 4, 2009, the Winter Flounder Management Board approved Addendum 1 to the Interstate Fisheries Management Plan for in-shore stocks of winter flounder. This includes measures to achieve fishing mortality for the Gulf of Maine stock, and to rebuild the overfished southern New England Mid-Atlantic stocks to prevent excessive fishing efforts from shifting to state waters in response to federal management measures. Individual states are required to implement all measures in this addendum, in addition to continuing those contained in Addendum 1.

The southern New England Mid-Atlantic winter flounder stock is severely depleted. It is estimated that the spawning stock biomass is only 9% of the target biomass, and the fishing mortality rate is 260% of the target rate. The proposed reduction in creel limit from the existing ten (10) fish limit to two (2) fish is estimated to reduce harvest throughout the region by 46%, while still allowing for some directed fishing effort.

Very few winter flounder are presently landed in Delaware by recreational fishermen. Marine recreational fishing surveys indicate the Delaware landings in 2006 and 2007 were well below 1,000 fish. The proposed commercial restrictions would limit commercial vessels to a maximum possession limit of 50 pounds of winter flounder per trip. Throughout the region, the possession limit is estimated to reduce harvest by approximately 65%. For Delaware fishermen, it should have no immediate impact, given the current levels of landings are very low<sup>1</sup>.

No other changes are proposed to the minimum size of winter flounder that may be taken during the open season, or to the allowable recreational harvest season. Again, these changes are considered necessary because the Southern New England/Mid-Atlantic

winter flounder stocks are considered to be overfished, and overfishing is still occurring. Winter flounder stocks taken in federal waters or those taken by commercial fishermen in possession of a federal permit are subject to the catch restrictions currently in place for federal waters.

The Department has the statutory basis and legal authority to act with regard to the proposed regulatory amendments concerning Delaware Tidal Finfish Regulation 3512, pursuant to 7 Del.C. §§903(e)(2)(a).(3). No other Delaware regulations are affected by these proposals.

Also at issue at the public hearing held on September 30, 2009 were the Department's proposed regulatory amendments to existing Delaware Shellfish Regulation 3711 for Knobbed Whelks (Conchs). The purpose of these proposed amendments is to establish a tolerance for undersize knobbed whelks (also known as knobbed conchs) in the dredge and pot commercial fisheries similar to the existing tolerance established in Regulation 3711, Section 2.0, for the channeled or smooth whelks (conchs). The proposed amendments to this regulation would allow the retention of up to five (5) undersized knobbed whelks per 60 pound bag, or basket, of whelks per day<sup>2</sup>. The allowance of a few undersized knobbed whelks during the course of normal harvesting operations will be a convenience for harvesters who have to pay crews of widely varying experience to cull undersize conchs from the harvest. Additionally, such a tolerance is in recognition of the fact that, occasionally, conch shells are partially broken off either during or prior to harvesting. This proposed regulatory amendment will ease the burden

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<sup>1</sup> In 2007, for example, there were only six (6) pounds of winter flounder that were landed by Delaware fishermen.

<sup>2</sup> The term "undersized" knobbed whelks refer to those whelks (conch) that are less than the applicable minimum length or diameter of measurement in effect during the year in question.

of Department enforcement staff that must check the harvest for compliance with applicable minimum size limits.

The Department has the statutory basis and legal authority to act with regard to the proposed regulatory amendments concerning Delaware Shellfish Regulation 3711, pursuant to 7 Del.C. §1902(a)(5) and §2804. No other Delaware regulations are affected by these proposals.

Only one comment was received by the Department from the public regarding the proposed amendments to Shellfish Regulation 3711 (Knobbed Whelks), which was in support of this proposed promulgation. There were no comments received by the Department with regard to the proposed regulatory amendments to Delaware Tidal Finfish Regulation 3512 concerning winter flounder. Proper notice of the hearing was provided as required by law.

## **II. SUMMARY OF THE PUBLIC HEARING RECORD:**

The public hearing record consists of a verbatim transcript and seven documents introduced at the public hearing and marked by this Hearing Officer accordingly as Department Exhibits 1-3: Winter Flounder Regulatory Amendments; and Department Exhibits 1-4: Knobbed Whelks (Conchs) Regulatory Amendments. The Department's person primarily responsible for the drafting and overall promulgation of these proposed regulatory amendments, Craig Shirey, developed the record with the relevant documents in the Department's files. Following the submission of the Department's Exhibits into the public hearing record, Mr. Shirey offered a brief explanation with regard to the salient points of the proposed amendments to these regulations.

As noted previously, the purpose of the aforementioned proposed amendments to Delaware Tidal Finfish Regulation No. 3512 for Winter Flounder is to bring Delaware into compliance with Addendum 1 to Amendment 1 of the Interstate Fishery Management Plan for Inshore Stocks of Winter Flounder as administered by the Atlantic States Marine Fisheries Commission (“ASMFC”). To effectuate this compliance, Delaware must reduce its recreational daily harvest limit to two winter flounder per person per day, as well as capping the daily commercial harvest limit for any commercial fisherman at 50 pounds. With regard to the proposed amendments to the Delaware Shellfish Regulation 3711 for Knobbed Whelks (Conchs), the Department intends to establish a tolerance for undersize knobbed whelks (also known as knobbed conchs) in the dredge and pot commercial fisheries similar to the existing tolerance established in Regulation 3711, Section 2.0, for the channeled or smooth whelks (conchs). The proposed amendments to this regulation would allow the retention of up to five (5) undersized knobbed whelks per 60 pound bag, or basket, of whelks per day.

The only member of the public that attended the aforementioned hearing held on Wednesday, September 30, 2009 was Leonard “Limbo” Voss, Chairman of the Delaware Shellfish and Advisory Council. Mr. Voss wished to go on record as supporting the Department’s promulgation of the amendments to existing Shellfish Regulation 3711, as the same brings Delaware into alignment with industry standards with regard to knobbed whelk allowances. Mr. Voss also wished to commend the Department on the speed with which they have addressed this issue here in Delaware. It should be noted that there were no comments received by the Department with regard to the proposed regulatory amendments to Delaware Tidal Finfish Regulation 3512: Winter Flounder.

At the conclusion of the public hearing on September 30, 2009, this Hearing Officer formally closed the record with regard to any additional public comment regarding either of these proposed promulgations, as all proper notification and noticing requirements concerning the same had been met by the Department at that time.

**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 Delaware Tidal Finfish Regulation 3512: Winter Flounder; and Delaware Shellfish Regulation 3711: Knobbed Whelks (Conchs), and has thoroughly addressed any public questions and/or comments provided to the Department during the development of the record in this matter. 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:

14. Proper notice of the hearing was provided as required by law.
15. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
16. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
17. The Department held a public hearing in a manner required by the law and regulations;
18. The Department considered all timely and relevant public comments in making its determination;

19. Promulgation of the proposed amendments to Delaware Tidal Finfish Regulation 3512 (Winter Flounder) would bring Delaware into compliance with Addendum 1 to Amendment 1 of the Interstate Fishery Management Plan for Inshore Stocks of Winter Flounder as administered by the Atlantic States Marine Fisheries Commission, which represents the federal guidelines for the management of winter flounder, consistent with federal management plans and state jurisdiction;
20. Adoption of the proposed amendments to Delaware Tidal Finfish Regulation 3512 would reduce Delaware fishermen's recreational daily harvest limit to two (2) winter flounder per person per day, as well as cap the daily commercial harvest limit for any commercial fishermen at 50 pounds;
21. The aforementioned proposed amendments to Delaware's existing regulations concerning winter flounder are considered necessary, due to the fact that Southern New England/Mid-Atlantic winter flounder stocks are considered to be overfished, and that overfishing is still occurring. Moreover, promulgation of the proposed amendments will cause winter flounder stocks taken in federal waters, or those taken by commercial fishermen in possession of a federal permit, to be subject to the catch restrictions currently in place for federal waters;
22. Promulgation of the proposed amendments to Delaware Shellfish Regulation 3711 will establish a tolerance for undersized knobbed whelks (conchs) in the dredge and pot commercial fisheries similar to the existing tolerance established in Regulation 3711, Section 2.0, for the channeled or smooth

whelks (conchs), namely, to allow the retention of up to five (5) undersized knobbed whelks per 60 pound bag or basket of whelks per day;

23. The Department has reviewed both of 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;
24. The Department's aforementioned proposed amendments to Delaware's existing Regulations concerning both winter flounder and knobbed whelks (conchs), as published in the September 1, 2009 *Delaware Register of Regulations* and as set forth in Attachment "A" hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, both 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
25. The Department shall submit the proposed regulations as final regulations to the Delaware Register of Regulations for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

/s/ Lisa A. Vest  
LISA A. VEST  
Public Hearing Officer