

## MEMORANDUM

TO: John A. Hughes, Secretary

FROM: Lisa A. Vest, Hearing Officer

RE: Proposed Amendments to Delaware Shellfish Regulations for Conch (Whelks) and Lobsters

DATE: November 14, 2006

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### **I. Background:**

A public hearing was held on Tuesday, October 17, 2006, at 7:30 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on proposed amendments to the existing Delaware Shellfish Regulations for Conch (Whelks) and Lobsters. The proposed changes are being made as resource conservation measures for Delaware fisheries, and include the following: Raising the minimum size for knobbed conchs (knobbed whelks) from five inches to six inches in one-quarter increments over a four-year period; allowing no new conch dredge licenses issued for a five-year period in excess of those issued in 2003-2005; and increasing the escape vent size in the parlor of lobster pots to coincide with new regulations in effect in Federal waters offshore of Delaware.

Whelks, also known as conchs, comprise Delaware's largest commercial fishery in terms of weight landed. Landings are dominated by knobbed whelks taken in the directed dredge fishery. Landings from Delaware's dredge fishery during the period of 2001 to 2004 were

equivalent to total landings from the remaining Atlantic Coast states. Landings reported for 2005 have declined by 50% relative to the 2004 landings. Fishery samples indicate that knobbed whelk landings are dominated by females at reproductive age. The female knobbed whelks enter the fishery at approximately 9.5 years of age and attain reproductive maturity at ten years of age.

Fishing mortality is currently in excess of the management benchmarks, indicating that the knobbed whelk stock is being overfished. To prevent fishery collapse, the Division of Fish and Wildlife recommends that the number of whelk dredge licenses not be increased from the current 31. Increasing the minimum size of knobbed whelks is also recommended to protect a greater proportion of the spawning stock.

Numerous members of the public attended this hearing on October 17, 2006, voicing their concerns with regard to the Department's proposed changes to these regulations. Comments were received from the public, both at the actual hearing and during the post-hearing phase as well. These concerns will be discussed in further detail herein below. Proper notice of the hearing was provided as required by law.

## **II. Summary of Hearing Record:**

At the time of the hearing on October 17, 2006, Roy Miller, Administrator of the Fisheries Section, Division of Fish and Wildlife, DNREC, offered the Department's exhibits pertaining to this proposed amendment, and offered a brief explanation with regard to the salient

points of the proposed amendments to these regulations. For the Secretary's review, the proposed amendments to these regulations are expressly incorporated into this report and attached hereto as Attachment "A" for that purpose.

Immediately thereafter, Richard Wong, a biometrician stock assessment scientist with DNREC's Division of Fish and Wildlife, proceeded to give an exhaustive presentation concerning the scientific data gathered by the Department with regard to the status of whelk (conch) dredging in Delaware, and the reasoning behind the Department's proposed amendments to these regulations. The Delaware Bay Whelk (Conch) Fishery Assessment 2005, prepared by David Bruce, Richard Wong, and Michael Greco of DNREC's Division of Fish and Wildlife (dated 7 September 2006), encompasses the broad spectrum of scientific data gathered by the Department in this matter, identifies all of the relevant issues with regard to potential fishery collapse in Delaware, and discusses them in a thorough and balanced manner which accurately reflects the information in the record. Therefore, the Secretary may get an in-depth understanding of the issues at hand with regard to this proposed promulgation by reading the aforementioned Delaware Fishery Assessment, which is expressly incorporated into this report and attached hereto as Attachment "B" for that purpose.

As the hearing turned toward the phase of public comments and questions, numerous people asked clarifying questions of the

Department to ensure their understanding of the proposed changes to these regulations. Mr. John Satterfield clarified with Mr. Wong of the Department that they did not count any dredge landings that occurred prior to the blue crab dredge season. Mr. Satterfield also questioned the conch measurements, noting that just because the conchs were removed from a Bowers Beach dredge boat does not necessarily indicate that they were harvested in the same area of the bay. Mr. Wong agreed, clarifying that the samples that made up the 1994 measurements were taken from a number of boating trips, and not just one singular trip. Mr. Wong further offered that, in general, the conchs were smaller in 2005 than they were in 1994. In 2005, there were a robust number of trips taken by the fishermen that were sampled, and thus it can be described as anecdotal evidence that the size structure of these creatures has gotten smaller within that time period.

Next, Mr. Larry Foley voiced concern about the Department's proposal to place a cap on the number of conch dredge licenses which may be issued. The proposed cap would be the number of licenses issued during the period 2003-2005. The Department's position is that, in the absence of some additional regulatory or legislative action in this regard, the number of conch dredge licenses issued in 2006 could have doubled from the year before and would rise again in 2007, and each year thereafter. Mr. Foley stated that there are currently people holding licenses that do not even have boats, and that, in his opinion, the proper

way to manage a resource is not by the number of licenses issued. He further voiced concern with this proposal due to the fact that each year is completely different with conch fishing, given weather variations, etc., and that he did not believe that the Department's data was reflecting the proper number of licenses.

In response to Mr. Foley's comments, Administrator Miller of the Division of Fish and Wildlife advised that there were 31 licenses issued in 2005. The proposed regulation recommends that anyone who held a license during the period 2003 through 2005 be eligible to renew their license. The reason the Department added in 2003 and 2004 is because under the conch statutes, licenses do not have to be renewed every year; however, licenses must be renewed at least once every three years. Thus, if you take the 2005 total of 31, you would then add 5 to it (there were five, in other words, that had a license in either 2003 or 2004 that did not renew in 2005. Mr. Miller further offered that, for 2004 (which is the most recent complete report on shellfishing currently in the Department's possession), in terms of active participants in the directed conch dredge fishery, there were 17 in 2004.

Lastly, Richard S. Hand, Sr., offered his comments and questions for the record at the public hearing. Mr. Hand stated that he has been part of the conch fishery his entire life, and he is also very concerned about the licensing issues involved in these proposed changes to these

regulations. In response, Administrator Miller referred to 7 Del.C., Chapter 28, which states in pertinent part:

*An applicant who is not eligible or an applicant who does not obtain a commercial conch dredge license within 90 days of August 26, 1994, or a commercial conch dredge licensee who fails to renew their license as provided in the provisions of Subsection D of this section, may register with the Department on a form provided by the Department for a commercial conch dredge license that may become valid after a five-year waiting period.*

Mr. Miller went on to explain that, as of January 1, 2006, the Department examined the applicant pool and found roughly 31 names in the applicant pool which would have become eligible during the Calendar Year 2006 for a conch dredge license in addition to the 35 that held it the year before. That indicated to the Department that there was a high likelihood that the number of conch dredge licenses could potentially double in 2006 over the previous year. The Department chose to temporarily freeze the number of licenses back in January of 2006 at the 2005 level until such time as the Department had an opportunity to examine its latest information, specifically, the catch data, which the conchers submitted for 2005. The Division of Fish and Wildlife was very interested in what the catch-per-unit effort had done between the two

years. The Department then brought it before the Advisory Council. Administrator Miller stated that Mr. Foley had corrected pointed out in his comments that the Advisory Council recommended to the Department that they go ahead and open up licenses for conch dredges, but DNREC knew that they would be proposing a regulation about this matter, so legal advice was sought by the Department in this matter.

On the advice of legal counsel, the Department then proposed regulations concerning the issuance of these licenses which would effect a moratorium, and Mr. Miller then reminded the audience at the public hearing that this was why the Department was here that evening. He then further reminded the public that the Department has not issued any new conch dredge licenses in 2006 to date, only renewals for those persons that held same in 2003, 2004 or 2005.

To further address concerns that Mr. Hand was voicing at the hearing, Administrator Miller clarified that the pot fishery targets primarily smooth whelk, channel whelk, whereas the dredge fishery catches mostly knobbed whelk, so in proposing these regulations, the Department stuck to the concerns of the dredge fishery. Moreover, Mr. Miller stated that the present regulation for channeled conch, smooth conch, is 6 inches, and he assured Mr. Hand that if a New Jersey boat is conching in Delaware waters, he or she is doing so illegally, and it then becomes an enforcement issue to pursue, because Delaware has not issued any conch dredge licenses to any residents of New Jersey.

Mr. Wong of the Department then offered additional clarification for Mr. Hand, explaining that the Department's estimated exploitation rate is based on the age composition of the catch. They were not taken from the samples conducted in 1994, but rather from the recent catch in 2005. There were samples from Bowers Beach, as well as outside of Bowers, that were utilized in this study. Thus, Mr. Wong stated that that the Department felt very confident that the sampling collected in 2005 gives a fairly accurate age composition of the conch population, and referred Mr. Hand back to the report for further review of the data.

Continuing on with Mr. Hand's concerns, Mr. Wong explained that it would be good to be harvesting the conchs at an older age, because it would allow females to spawn before being captured. Moreover, the Department realizes that may be two different stocks, i.e., an ocean stock and a bay stock.

In concluding the hearing, the Hearing Officer advised that the record with regard to public comment would remain open through October 20, 2006, and so if anyone wished to offer further comment to the Department regarding the proposed changes to these regulations, they should feel free to do so. During that time period, the only additional submission received from the public was an email from Richard Hand, which again questioned the Department with regard to

the issuance of dredge licenses and the accuracy of the scientific data collected to date in this matter.

In response to Mr. Hand's email of October 20, 2006, Administrator Miller offered the following clarifying information again for the record:

1. People on the 5-year waiting list will retain their eligibility to obtain a license following the end of the 5-year proposed moratorium period. Much can change over the next 5 years (i.e., changes in DNREC personnel, changes in Delaware law, etc.), nevertheless, if no substantive changes occur during that time, and entry into the fishery is re-opened in 5 years, then those persons on the existing waiting list would be first in line for a new conch dredge license.
2. A person who has been through our 2-year commercial fishing apprentice program may obtain a conch dredge license from a licensed conch dredger at any time, provided there is someone willing to transfer their license.
3. With regard to Mr. Hand's comments about the Chesapeake Bay, Mr. Miller assures that no activities that take place in that body of water has any relevance whatsoever to this proceeding, or to the Department's conch statutes and/or regulations in general. As for DNREC's landings figures, this data is merely a reflection of what Delaware conch fishermen report to the

Department in their mandatory monthly reports. These landings figures are as accurate as the fishermen themselves, as there is no independent verification of the accuracy of their reports, and this source represents the best information available). Finally, Mr. Miller offers that a few conch dredgers use a type of fishing gear known as a scallop dredge to dredge conchs. This gear drags a net and chain on the bottom. Others use a tooth-bar dredge that digs up the bay bottom like an 8-foot wide rake. Both types of gear harvest conchs, and both are legal gear in Delaware.

### **III. Conclusions and Recommendations:**

Based on the above discussion, I conclude that the Department has provided appropriate reasoning regarding the need for these proposed changes to Delaware's Conch Dredging Regulations, and has thoroughly addressed all public questions and/or comments provided during the workshop phase of the record developed in this matter. Accordingly, I recommend promulgation of these proposed amendments in the customary manner provided by law.

Further, I recommend the following findings:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;

2. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
3. The Department held a public hearing in a manner required by the law and regulations;
4. The Department considered all timely and relevant public comments in making its determination;
5. Promulgation of these proposed amendments will result in increased conservation of spawning stock biomass for a resource that is showing signs of over-exploitation;
6. More conchs will have reached maturity prior to being subject to harvest with the increase in the minimum size limit. This will likely depress landings until the conchs previously subject to harvest have grown from five inches to the newly proposed legal size of six inches. The Department estimates that it will take 3-4 years for a 5 inch conch to reach 6 inches;
7. The capping of the number of conch dredge licenses that the Department may issue to the number issued during the period of 2003-2005 will be maintained for a five-year period, thus preventing a potential doubling of fishing effort that could occur (based on the number of license applicants) if the number of available licenses were not capped. This will also help to limit increases in mortality caused by fishing which the Department

has determined is already excessive for the long-term health of this resource. Those license applicants who have been on the five-year waiting list will be unable to obtain a conch dredge license for a minimum of five additional years under this proposed regulation;

8. With the promulgation of these proposed changes, the rectangular escape vent in the parlor of lobster pots will be increased from the present  $1 \frac{15}{16}$  inches by  $5 \frac{3}{4}$  inches to 2 inches by  $5 \frac{3}{4}$  inches. If a circular vent is used, it is proposed that the minimum inside diameter be  $2 \frac{5}{8}$  inches. These vent dimensions would be consistent with federal requirements for lobster pots set in federal waters in Delaware. The overwhelming majority of Delaware's lobster landings are from federal waters and the proposed increase in vent size is considered to be the appropriate escape vent dimensions with the minimum lobster size limits ( $3 \frac{3}{8}$  inch carapace length) now in effect in Delaware and in federal waters offshore of Delaware;
9. The Department's proposed regulation, as published in the September 1, 2006 *Delaware Register of Regulations* and set forth in Attachment "A" hereto, is adequately supported, not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a

final regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and that

10. The Department shall submit the proposed regulation as a final regulation to the Delaware Register of Regulation 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  
Hearing Officer