



Rhode Island
Department of Environmental Management

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Memorandum

TO: Mark Gibson, Deputy Chief
Division of Fish & Wildlife

FROM: Frederick J. Vincent
Acting Director

DATE: November 5, 2004

RE: Regulations Regarding Finfish, Shellfish, and Lobster and Management Measures

I have reviewed your recommendations and all of the documentation you submitted in your memorandum dated October 18, 2004 (attached) which recommends regulatory changes related to:

- 1) The weekly landing permit program for the commercial summer flounder fishery;
- 2) The modification of possession limits, seasons and quota allocations for the commercial summer flounder fishery;
- 3) The modification of possession limits, seasons, and triggers for the commercial black sea bass fishery;
- 4) The modification of possession limits, seasons, and triggers for commercial black sea fishery;
- 5) The modification of possession limits, seasons, and triggers for the commercial scup fishery;
- 6) Commercial fishery management plans; and
- 7) Commercial licensing.

I have also reviewed the record of the public hearing, held on October 4, 2004 and the comments and recommendations received by the Marine Fisheries Council, members of the public, and industry groups. I hereby adopt the recommendations of the Division in items 1)-6) above.

With respect to item 7) commercial licensing, I note that there is strong agreement – among industry, the public, the Council, and you – regarding the proposal to allow new quahog endorsements for 2005; that there is also strong agreement to not make available

any new lobster endorsements for 2005; and that there is a difference of opinion on whether any new restricted finfish endorsements should be issued in 2005. I also note that the proposal for new shellfish licenses includes some specific provisions regarding student shellfish licenses, as well as retrospective and probationary performance testing, and that you have expressed strong concern over the Department's ability to administer such testing.

I will frame my decision on the commercial licensing proposals by addressing the several distinct but related issues that emerge from my review of the record.

Type of New Licenses/Endorsements

The first issue is the type of new license or endorsement that would become available in the fisheries where new entry is being considered. I note that the 2002 statute establishing the licensing program sets forth an essentially two-tiered licensing system comprised of "full" harvest Multipurpose and Principal Effort Licenses and "basic" harvest Commercial Fishing Licenses. The statute calls upon DEM to employ that two-tiered framework in a way that 1) facilitates upgrading license levels among residents already in a fishery; 2) provides lateral movement among residents who are holders of commercial fishing licenses to other types of fishing; and 3) enables new entrants into commercial fishing.

In accordance with the statute, the rules for the licensing program, also adopted in 2002, further flesh out the two-tiered framework by establishing: an entry-level Commercial Fishing License (CFL), with six "basic" endorsement categories, three of which are openly accessible to any new entrants into commercial fishing; and an upper-level Principal Effort License (PEL), with six "full" endorsement categories. PELs were initially made available only to previously licensed fishermen so as to grandfather them into the new program; in the two years since the program has been in effect, no new PELs or endorsements on PELs have been issued.

I note that in 2003, no new quahog or restricted finfish endorsements were made available, but 50 new lobster endorsements were issued. Importantly, those lobster endorsements were offered as new endorsements on new CFLs, at basic (100-pot) harvest levels. I further note that in 2003 and 2004, in accordance with the licensing statute and as further refined by the regulations, new entry into the quahog fishery was (and continues to be) available to student and over 65 licensees, at basic (3 bushel/1.5 bushel) harvest levels.

Against this backdrop, I note that while the draft regulations and some of the licensing proposals for 2005 referenced new PELs, other proposals and several people who commented at the public hearing referenced CFLs.

Based on my above-summarized analysis of the record, I find that it is important, and necessary, to remain consistent with the existing regulatory framework, unless there are compelling reasons to change direction. I find that there was no clear justification

provided in the record for issuing new, entry-level licenses for either the quahog or restricted finfish fisheries at full harvest levels. Rather, I feel that new license/endorsement opportunities in those fisheries should be offered as new CFL endorsements, at basic harvest levels, in the same manner that new lobster endorsements were issued in 2003. Such basic harvest levels have already been established for the quahog fishery. For the restricted finfish fishery, a basic harvest level possession limit equaling or approximating one-half of the full harvest level seems appropriate, and I defer to you and the Council to further define and clarify the restriction via subsequent regulatory action.

Availability of New Licenses/Endorsements

I turn now to the issue of whether new licenses/endorsements should, in fact, be made available in the three fishery sectors for 2005. First, I concur with the broadly supported recommendation that no new lobster endorsements should be issued at this time in view of the significant stock problems and ASMFC management initiatives in the Rhode Island area. Second, I concur with the broadly supported recommendation that a 3:1 exit/entry ratio be applied to the quahog fishery, resulting in the availability of 48 new CFLs with quahog endorsements for 2005.

With regard to new restricted finfish endorsements, I am aware that your recommendation – to allow for 13 new licenses/endorsements pursuant to a 5:1 exit/entry ratio – was not endorsed by a leading industry organization, nor by the Council; yet it did receive some support at the public hearing. In developing my response to how best to proceed on this issue, I note the following:

- Since 2003, there has been significant attrition in the fishery: a total of 68 licenses eligible to take restricted finfish in 2003 were retired in 2004. That drop came on the heels of an additional, less measurable decline between 2002 and 2003, when the new licensing program took effect. While we do not yet have the ability to determine how much of the attrition is associated with active vs. latent licenses, the shrinking number of licenses, *per se*, is a significant issue.
- As noted in your memo and in some of the comments made at the hearing, some of the species in the restricted finfish category are showing signs of improvement. Stock rebuilding and quota increases have been occurring in the summer flounder, scup, and striped bass fisheries. And 2004 marks the first year that the summer flounder fishery has remained open for the entire year.
- The Department has followed the Council's recommendation on this issue – i.e., to keep the fishery closed – over the past two years. In 2003, the Department and the Council were in agreement on the issue. Last year, the Department had advanced a 5:1 exit/entry proposal, but withdrew it based on the Council's opposition.

I understand that the Council's continuing opposition to new license/endorsement opportunities in the restricted finfish fishery relates to the problem of controlling entry into one gear category versus another (i.e., rod and reel vs. trawl), which the current licensing program is not set up to address; and to the need to take a cautionary approach

to new entry, which should be based on an as-yet-nonexistent data base that can show whether retired licenses are active or latent. I respect and appreciate the Council's position. I am concerned, however, that if we were to keep the restricted finfish fishery closed for a third straight year, we would not be abiding by one of the fundamental statutory mandates, which is to balance the needs and interests of licensed fishermen who wish to continue fishing in an economically viable manner with the needs and interests of other Rhode Islanders who seek the opportunity to become commercial fishermen, particularly with regard to the more profitable fisheries such as restricted finfish.

I find, therefore, that I cannot support a continuation of the *de facto* moratorium on new restricted finfish licenses/endorsements. I view the 5:1 exit/entry ratio as a very conservative approach, which should compensate for the likelihood that many of the 68 licenses that have dropped out of the fishery over the past year may have been latent licenses. And I note that the replacement licenses will be lower-level licenses that will further restrict the amount of new effort being added back into the fishery. I therefore adopt your recommendation that a 5:1 exit/entry ratio be applied to the restricted finfish fishery, resulting in the availability of 13 new CFLs with restricted finfish endorsements for 2005.

Prioritization

Next I turn to the issue of how, and to whom, the new licenses/endorsements should be issued. I note, with emphasis, that the regulations for the licensing program adopted in 2002 include a detailed prioritization process governing the issuance of new CFLs (section 6.7-6) and new PELs (section 6.7-7). Both priority schemes variously offer enhanced status to license holders and crew members, with further preference to those who can demonstrate at least two years of activity or participation.

As I reviewed the proposals, comments, and recommendations that came out of the recent regulatory review period, I noted that there were few, if any, direct references to the provisions of sections 6.7-6 and 6.7-7. The draft regulations that went out to notice proposed no changes to these sections (other than the deletion of a subsection due to its non-applicability after December 31, 2004). The shellfish and finfish proposals, and the discussion and recommendations by the Council and you, addressed the issue of prioritization, but not in a way that explicitly recognized the implications of changing the process at this time.

In fact, the implications are hugely important. Note, for example, that the third (and likely most applicable) priority under new PELs in section 6.7-7 is "any licensed Rhode Island resident who has held a lower level license, regardless of the type of license held, for two years or more." Since I have already decided not to move forward with new PELs at this time, the priority category will not be applicable to new licenses in 2005. But if a decision to issue new PELs had been made, there would have been a huge pool of eligible applicants – some 439 in total – who would have had a presumption of status under the current regulatory system, which has been in place for two years. Many of these individuals may have made investments and commitments over the past two years

so as to position themselves well when the opportunity to apply for a new license became available. To make changes to that priority system now, without doing so in a very clear, explicit, and fully justifiable manner, would certainly seem unfair and inappropriate, and possibly be illegal.

As I reviewed the existing prioritization scheme for new CFLs, which is germane to how and to whom the new quahog and restricted finfish endorsements will be issued for 2005, I note that the general thrust of the proposals offered at hearing is fairly consistent with the existing priorities. In keeping with the goal of issuing new licenses in a way that allows new entrants to move into commercial fishing, and also provides opportunities for established fishermen to move laterally into other fisheries, the second (and most applicable) priority category under section 6.7-6 is “licensed resident fishers who have been actively fishing their license and resident crew members who have been actively participating in the same fishery for which a new license is being sought.” I find that by adding some minor clarifying language, which does not add or drop anyone who would have otherwise qualified or not qualified for status under the category, the provision can serve as an effective means for issuing new quahog and restricted finfish licenses in a way that gets very close to the proposals offered at hearing, and is consistent with statutory purpose.

Specifically, I find that the new quahog and restricted finfish endorsements should be allocated evenly among 1) CFL holders who have been actively fishing their license and wish to move up, 2) crew members who have been actively participating in the same fishery and wish to become licensed in that fishery, and 3) PEL holders in other fisheries who wish to move laterally. If all of these three sub-categories were lumped together, as they are under the existing regulations, all of the new endorsements would likely have gone to PEL holders, since they would likely have been able to demonstrate more longevity than CFL holders or crew members. Distributing the new endorsements evenly among the three sub-categories is consistent with the purposes of the statute, the proposals and comments offered during the recent public hearing process, and the recommendations from the Council and you. And perhaps most importantly, the clarifying language poses little likelihood of impacting individuals who, over the past two years, may have made investments or other business decisions that were tied to the regulatory process for issuing new licenses. Such would have been the case if we had adopted the proposal to issue half or a third of the new quahog endorsements specifically to new CFL holders with non-quahog endorsements.

Other Shellfish Licensing Issues

Lastly, I will address the specifics of the proposal relating to the quahog fishery. First, I concur with the industry’s proposal that student shellfish license holders who are not eligible for renewal in that category due to the maximum age limitation, and who have been actively fishing their license, should be eligible to maintain their status as licensed commercial quahog fishermen. Conceptually, I agree with the suggestion that such individuals should be allowed to upgrade to PELs with quahog endorsements, which would enable them to fish at full harvest levels. However, as described above, that type

of change would necessitate an amendment to section 6.7-7, which was not explicitly offered at hearing. I therefore find that the most appropriate way to accommodate the interests of the industry on this issue, at this time, is to amend section 6.7-4(d) so as to render active student license holders who turn 24 automatically eligible for a CFL with a quahog endorsement. In essence, this change will keep them whole by grandfathering them at the same harvest level. I would suggest that the upgrade issue can and should be pursued next year during the next round of regulatory review. And finally, I concur with your recommendation not to support the retrospective and probationary performance testing advocated by industry and the Council for the quahog fishery. As you point out, this would be a difficult, if not impossible task for the Department to implement, given that the SAFIS electronic dealer reporting system will not be fully operational at the shellfish dealer level until 2006. Again, I would suggest that the issue can and should be brought back for consideration next year.

Future Changes

My overall impression of the new licensing program is that it is yet evolving, and demands careful review by all parties. I credit the newly formed Commercial Fishermen's Committee for their efforts to develop some initial proposed changes, but I must say that I am disappointed with the way the Division, in coordination with the Committee, addressed the proposed changes through the regulatory review process. I would strongly urge the Committee and the Division to reconvene early in 2005 to begin discussing and planning for any changes that are to be proposed for 2006. In fairness to the many hundreds of license holders, crew members, and others who have been tracking the new licensing program over the past two years with the hope and expectation that they will be able to move into commercial fishing or expand their commercial fishing activities, care needs to be taken to improve upon the existing system in a way that is reasonable, consistent, and transparent. I offer my full support in helping to achieve that.

*C/ Michael Lapisky
Robert Ballou*



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DIVISION OF FISH AND WILDLIFE

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TO: Frederick Vincent, Acting Director DEM

FROM: Mark Gibson, Deputy Chief for Marine Fisheries DFW

DATE: October 18, 2004

SUBJECT: Request for Decision on October 4, 2004 Marine Fisheries Hearing Items

Comments and recommendations on all proposals presented at the public hearing held on October 4, 2004 are summarized in this memorandum. The RIMFC considered these issues at their October 12th meeting and have provided advice. Supporting documentation submitted along with this memorandum include the public hearing summary document and supplements, RIMFC September 13 and October 12, 2004 meeting minutes, relevant advisory panel minutes, summary of public hearing comments and copies of all submitted written comments. The regulation filing process will be initiated upon receipt of your determinations regarding these proposals.

- 1) Modify the weekly landing permit program for the commercial summer flounder fishery:** This item was brought forward to develop a program for the winter 1 fishery which would allow fishermen to land summer flounder at an elevated amount. One proposal came from a collaborative working group and a second proposal was put forward by the Division of Fish and Wildlife (DFW) and Division of Law Enforcement. There were three public comments received at the meeting, one asking for aggregate landings to be extended to other sub periods, one suggesting doing away with possession limits all together, and one from The Division of Law Enforcement stating their opposition to the proposal from the collaborative working group as it stood at the public hearing. The Council tabled action on this item pending further deliberations between the Division of Law Enforcement, the DFW, and industry representatives. These groups are working together to come up with a consensus plan which will benefit all groups. These three groups will be meeting on October 22, 2004 to finalize their plan which will then be submitted before the Council on November 1, 2004. The DFW recommends that the Department defer action on this issue until after the November 1st Council meeting. The comment period on this issue remains open until November 15th at the request of the Council chair.

- 2) Modify possession limits, seasons, and quota allocations for the commercial summer flounder fishery:** This item was put forward to alter the management plan for the upcoming fishing year. Proposals came from two industry sectors (offshore trawlers and rod and reel) and one came from the DFW. There were two issues which were discussed at the public hearing; allocation plans and an underage proposal. There were no public comments on the allocation plans. The Council recommended to the Director that DEM adopt the summer flounder advisory panel recommended option which was the following: winter 1 = 54%, summer 1 = 17.5%, summer 2 = 17.5%, and winter 2 = 11%. The DFW recommends adoption of the advisory panel and Council preferred option. While the initial DFW proposal provided for a greater percent allocation during the summer, I note that the overall quota will increase in 2005 and that the DFW option was based on a 150 pound possession limit for part of summer I. The Council and AP option should be sufficient to keep summer I and summer II open at 100 pounds per day. We retain the usual authority to adjust possession limits and initiate sub-period closures in the event of unforeseen circumstances.

There were two public comments received on the underage proposal. One person was opposed to adopting the proposal and recommended remaining at status quo. The second person recommended using the same language for overages as was presented for underages. The Council recommended tabling this issue and sending it back to the summer flounder advisory panel. The DFW recommends that DEM defer action on this issue until the advisory panel can consider a comprehensive overage-underage strategy. The existing regulations which specify prorating of overage or underage to remaining periods are sufficient until that time.

- 3) Modify possession limits, seasons, and triggers for the commercial black sea bass fishery:** This item was put forward to alter the management plan for the upcoming fishing year. Proposals came from two industry sectors, trawlers and rod and reel fishermen. Four public comments were received regarding this issue. One was to go with the black sea bass recommended advisory panel option which decreased the possession limit during the August sub period in an effort to keep the fishery open all year. Three other public comments were to remain at status quo. The Council recommended remaining at status quo. The DFW recommends that DEM adopt the status quo allocation option. The sea bass commercial fishery operated successfully in 2004 and no changes to starting possession limits are needed.
- 4) Modify possession limits, seasons, and triggers for the commercial scup fishery:** There were several proposals to alter the management plan for the commercial scup fishery. Two were requirements from the Atlantic States Marine Fisheries Commission (ASMFC) which consisted of a bi-weekly landing program and a starting possession limit change for the winter 2 sub-period, and a third proposal came from a commercial representative on the scup/black sea bass advisory panel regarding possession limits in the summer. Regarding the aggregate landing proposal, the Council took a similar action to that for the summer flounder

aggregate landing program in that they tabled it pending further deliberations. There was one public comment supporting the collaborative workshop proposal. The DFW recommends that the Department defer action on this issue until after the November 1st Council meeting. The comment period on this issue remains open until November 15th

There was no public comment on the federally mandated possession limit change to the winter 2 fishery (which will be 3,500 pounds). The Council recommended endorsing the possession limit change. The DFW recommends adopting the required 3,500 pound starting limit.

There was no public comment on the second possession limit proposal for the May sub period. The Council declined to take action on this item. The DFW recommends remaining at the status quo 1,000 pound starting possession limit for the May sub-period.

- 5) **Amendments to the floating fish trap regulations:** This item introduced several changes to the existing floating fish trap regulations and was developed by the floating fish trap advisory panel. There was a great deal of public comment all regarding the safety zone stipulation in the proposed regulations. Many individuals present voiced their opposition to both the safety zone as it pertained to the shoreline, including a written comment from the Coastal Resource Management Council, and some comments in opposition to the safety zone as it pertained to boaters and commercial fishermen. The floating fish trap owners were also present and stated that they concede the shoreline portion (would strike this portion) but stated that the need for a safety zone as it pertains to boaters was important. The Council recommends adopting the floating fish trap regulations with the exception of section 14.6 which is the safety zone provision. They recommend sending this provision back to the floating fish trap advisory panel for further deliberations. The Council vote was 6 to approve and 1 opposed. The DFW recommends adopting the floating trap regulations except for provision 14.6, the safety zone, with the understanding that additional review of the safety zone issue will be done by the advisory panel.
- 6) **Receive public comments on the DEM proposed Management Plans for the shellfish, finfish, and crustacean sectors:** There were no public comments on these plans and the Council did not take any action on this item. The DFW recommends adoption of the sector management plans as required under the licensing statutes of Title 20.
- 7) **Receive public comments on amendments to the commercial fishing license regulations regarding the availability of licenses and endorsements in 2005 consistent, inter alia, with the proposed Management Plans set out above:** There was ample public comment both for and against allowing new entrants in to the restricted finfish and lobster endorsement categories. There was support for allowing new quahog endorsements to both fishermen and student shellfishermen.

The Council recommended that there be no new restricted finfish endorsements for 2005. The Council vote was 6 to approve and 1 abstention. The Council unanimously recommends that the Director adopt the shellfish proposal as it pertains to allowing new quahog endorsements for 2005. Finally the Council recommends no new lobster endorsements for 2005. The Council did not take action on the non-restricted finfish, non-quahog, and non-lobster crustacean endorsements. The DFW recommends that a limited number of restricted finfish endorsements be made available in 2005. With quota increases and stock rebuilding, it is increasingly difficult to defend closure of this license category. I note that a total of 67 licenses eligible to take restricted finfish were not renewed in 2004. Under a 5:1 exit entry ratio, a total of 13 replacement licenses could be offered. These licenses should be drawn via lottery from the existing pool of basic resident license holders with non-restricted finfish endorsement since there was an expectation that holders of this license would receive preference in license upgrades. With respect to shellfish licenses, I agree with Council and industry that a 3:1 exit entry ratio should apply and given that 148 shellfish licenses did not renew in 2004, a total of 48 replacement shellfish licenses with quahog endorsement can be issued. I do not support the retrospective and probationary performance testing advocated by industry and the Council. This would place a significant administrative burden on the Division. We would be required to review past documentation of license activity and track future performance. DFW does not have enough staff to do this and the Department already has witnessed submission of fraudulent documentation. Further, the SAFIS electronic dealer reporting system will not be fully operational at the shellfish dealer level until 2006. I recommend that the 48 licenses be drawn equally (16 each) via lottery from the following existing license pools:

1. Shellfish license with non-quahog endorsement
2. Principle effort restricted finfish and principle effort lobster
3. Student shellfish licenses.

This scheme would effectively merge the two elements of the advisory panel proposal and allow for new entrants to industry from multiple sources. I do not recommend any retrospective or prospective performance testing for the above mentioned reasons. With regard to lobster license, there should be no lobster licenses issued in view of the significant stock problems and ASMFC management initiatives in the Rhode Island area. No limitations are required for the non-restricted finfish, non-quahog, and non-lobster crustacean endorsements. These license categories can remain open.

Cc Mike Lapisky- RIDFW
Najih Lazar- RIDFW
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