



RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
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Office of the Director

Memorandum

To: Mark Gibson, Deputy Chief

From: Janet Coit, Director

Date: December 8, 2014

Re: Final Decisions Pertaining to Shellfish Closures Reviewed at September 3, 2014 RIMFC Meeting; and September 30, 2014 Marine Fisheries Public Hearing Items

This memo codifies the final decisions on the following regulatory matters:

- Shellfish closures at two oyster restoration sites in Ninigret Pond
- Winter Harvest Schedules for Shellfish Management Areas other than Greenwich Bay
- Annual updates to the Finfish, Shellfish, and Crustacean Sector Management Plans
- Eight amendments to the commercial licensing regulations

In rendering these final decisions, I reviewed all relevant supporting documentation, including the minutes of the August 27, 2014 Shellfish Advisory Panel meeting; the minutes of the September 14, 2014 Industry Advisory Committee meeting; the September 30, 2014 public hearing document and public hearing comments; the minutes of the September 3, 2014 and October 6, 2014 meetings of the RI Marine Fisheries Council; and your memos to me, summarizing the Division's positions, dated October 21, 2014.

Shellfish Closures in Ninigret Pond

Issue: Foster Cove, which is part of Ninigret Pond, has historically supported wild oyster populations. Currently, it represents one of the few areas in RI where the oyster population is solely habitat limited, i.e., there is not enough suitable substrate to support settlement of the oyster larvae available in the system. Accordingly, the area is being targeted for oyster habitat restoration.

In support of the habitat restoration efforts, the Division proposed closing two areas to shellfishing in the cove. The closed areas will serve as oyster reserves to protect current and future oyster restoration work in the cove. The first site is a $\frac{3}{4}$ acre rectangular area on the north shore of the pond, which is slated to receive cultch for substrate enhancement as part of the EQIP restoration program administered by NRCS in cooperation with the Division. The second site is a 2.4 acre area extending 75 ft. from shore surrounding a peninsula on the east shore of the cove containing restoration plots created by TNC and the Division to evaluate alternative substrate enhancement techniques. This area along the peninsula is monitored and will be targeted for future restoration work.

Although there are few, if any, harvestable oysters located in these 2 areas, the closure is necessary to protect any recruitment that may occur as a result of the restoration practices.

Review: The Division presented the proposal to the RI Marine Fisheries Council's Shellfish Advisory Panel (SAP) on August 27, 2014. The SAP voted unanimously in support of the proposal, with the condition that the closure be subject to review after 5 years, and either lifted if it no longer served its purpose, or extended if additional protection is warranted. The proposal was then reviewed by the full Council on September 3, 2014. The Council voted unanimously to recommend adoption of the proposal, with the same 5-year sunset provision recommended by the SAP.

Per your memo of October 21, 2014, the Division supports the proposal and concurs with the Council's recommendation regarding the 5-year sunset provision.

Decision: Consistent with the Council's recommendation, I support the enactment of the two closures for a period of five (5) years, as presented. Prior to the sunset date, the areas shall be reviewed by both the Division and the Council to determine whether there is a basis for extending the closures.

Winter Harvest Schedules for Shellfish Management Areas other than Greenwich Bay

Issue: The six shellfish management areas that are subject to winter harvest schedules are reviewed every year to determine the need for any adjustments to the schedules.

Review: With regard to five of the six shellfish management areas – i.e., all except Greenwich Bay – the Division presented a status quo proposal to the SAP on August 27, 2014. The SAP voted unanimously to support the proposal, with the caveat that the opening of the Bristol Harbor Management Area should be changed from January 3 to January 1. The proposal was then reviewed by the full Council on October 6, 2014. The Council voted unanimously to recommend adoption of the proposal, as modified to reflect the new January 1 opening for Bristol Harbor.

Per your memo of October 21, 2014, the Division supports the status-quo proposal and concurs with the new January 1 opening for Bristol Harbor.

Decision: Consistent with the Council's recommendation, I support the status-quo proposal, modified to reflect a new January 1 opening for Bristol Harbor, as presented.

Annual Updates to the Finfish, Shellfish, and Crustacean Sector Management Plans

Issue: The three sector management plans are reviewed and updated every year to reflect the current status of the fisheries and management programs. The plans also identify the number of new license endorsements to be issued for the following year, per the exit/entry ratios.

The application of status quo exit/entry ratios for the restricted finfish, quahog, and soft-shell clam fisheries would result in the issuance of 21 new quahog endorsements for 2015, 12 new soft-shell clam endorsements for 2015, and 3 new restricted finfish endorsements for 2015.

Review: The Council's Industry Advisory Committee (IAC) met on September 14, 2014 to review the sector plans and new license endorsement proposals for 2015. The IAC voted to support the application of status-quo exit/entry ratios for 2015. The plans and new license

endorsement proposals were the subject of a public hearing held on September 30, 2014; no comments were received. The plans and new license endorsement proposals were reviewed by the full Council on October 6, 2014. The Council voted unanimously to recommend adoption of the updated sector plans, including the application of status-quo exit/entry ratios for 2015.

Per your memo of October 21, 2014, the Division supports adoption of the updated sector plans and the application of status-quo exit/entry ratios for 2015.

Decision: Consistent with the Council's recommendation, I support the adoption of the updated Finfish, Shellfish, and Crustacean Sector Management Plans, as well as the application of status-quo exit/entry ratios for the finfish, quahog, and soft-shell clam fisheries, as presented. I understand that this will result in the issuance of 21 new quahog endorsements for 2015, 12 new soft-shell clam endorsements for 2015, and 3 new restricted finfish endorsements for 2015.

Amendments to the Commercial Fishing Licensing Regulations

1. Opportunity for Over 65 Shellfish License Holders to obtain CFL w/Quahog endorsement

Issue: The commercial licensing regulations afford priority status to new license/endorsement applicants who fall into three categories: 1) residents holding active CFLs that are endorsed in the same fishery sector for which a new license/endorsement is sought; 2) residents holding active PELs; and 3) resident crew members active in the same fishery sector for which a new license/endorsement is sought. The process does not allow holders of a 65 and Over Shellfish licenses (available only to residents) to qualify for priority status.

The regulatory process also enables holders of active Student Shellfish licenses to obtain CFLs with quahog endorsements; and further enables holders of active CFLs with quahog endorsements to obtain PELs with quahog endorsements. The process does not provide opportunities to advance for holders of 65 and Over Shellfish licenses.

The Division proposed an amendment that would enable any holder of an active 65 and Over Shellfish license to obtain a CFL with a Quahog endorsement, provided that the individual has not been cited for a violation of a RI marine fisheries law or regulation during the prior two years. The harvest opportunities associated with the two licenses are the same – both allow the holder to harvest up to 3 bushels of quahogs per day. However, the change will enable holders of active 65 and Over Shellfish licenses to obtain a CFL with quahog endorsement, qualifying them for priority status with regard to new license/endorsement opportunities, while also opening an avenue to advance to a PEL with quahog.

Review: At the IAC's September 14, 2015 meeting, the committee voted to support the proposal. There were no comments offered at the September 30, 2015 public hearing. At the Council's October 6, 2014 meeting, the Council voted unanimously to recommend adoption of the proposal.

Per your memo of October 21, 2014, the Division recommends adoption of the proposal.

Decision: Consistent with the Council's recommendation, I support adoption of the proposal, as presented.

2. ***Clarification that holders of PELs or CFLs with Quahog endorsements who are over 65 must pay the standard fees for all other non-shellfish-related endorsements***

Issue: Per statute, there is no fee for a 65 and Over Shellfish license. Per regulation, there is also no fee for a PEL with a Quahog endorsement if the holder is at least 65 years of age. It has always been understood, by DEM, that standard fees applied to any/all additional licenses/endorsements obtained by individuals aged 65 or over; however, the Department was recently challenged due to an alleged lack of clarity on the issue.

In an attempt to clarify the issue, the Division proposed language establishing that fees apply to all endorsements on PELs held by individuals age 65 and over except Quahog, Soft-Shell Clam, Whelk, and Other Shellfish endorsements.

Review: At the IAC's September 14, 2015 meeting, the committee voted to support the proposal. There were no comments offered at the September 30, 2015 public hearing. At the Council's October 6, 2014 meeting, the Council voted unanimously to recommend adoption of the proposal.

Per your memo of October 21, 2014, the Division recommends adoption of the proposal.

Decision: Consistent with the Council's recommendation, I support adoption of the proposal, with one technical change, and one editorial comment.

The technical change is that the existing regulatory provision that specifically waives the fee for holders of PELs with a Quahog endorsement who are at least 65 years of age should be expanded to include, as well, holders of CFLs with a Quahog endorsement who are at least 65 years of age. This technical change is consistent with the amendment set forth above under item #1.

The editorial comment is that there may have been sufficient basis to propose that the fee waiver apply only to the license – PEL or CFL – and the Quahog endorsement, but not to any other endorsement, e.g., Soft-Shell Clam, Whelk, and Other Shellfish. However, no specific recommendation was made to modify the proposal (at hearing or by the Council). What's more, the current practice by DEM's Licensing Office has been to not charge fees for those endorsements. As such, those additional endorsements will remain available at no fee, unless modified by subsequent regulatory action.

3. ***Remove gear and fishery sector declarations from license application***

Issue: All applicants for CFLs and PELs are required to identify the primary gear type they intend to employ during the year. All applicants for MPLs are required to provide that same information, plus identify the fishery endorsement sector(s) into which they intend to focus their effort during the year. These declarations are expressly for informational purposes only, and are non-binding. These declarations are also unrelated to the required license endorsements that must be obtained (on CFLs and PELs) in order to be eligible to harvest and land species in the species endorsement categories and/or employ certain gear types pursuant to the gear endorsement categories.

The Division proposed eliminating these gear and fishery sector declarations, since the information is now captured -- more accurately -- by the electronic reporting system and therefore no longer needed as part of the license application process.

Review: At the IAC's September 14, 2015 meeting, the committee voted to support the proposal. There were no comments offered at the September 30, 2015 public hearing. At the Council's October 6, 2014 meeting, the Council voted unanimously to recommend adoption of the proposal.

Per your memo of October 21, 2014, the Division recommends adoption of the proposal.

Decision: Consistent with the Council's recommendation, I support adoption of the proposal, as presented.

4. *Allow trips reported to SAFIS on a landing permit to be considered for activity standard*

Issue: To meet the standard of "actively fishing," an applicant must be able to demonstrate that he/she fished at least 75 days over the past two years pursuant to a valid RI license. Activity based on landing permits does not qualify.

The Division proposed expanding the qualification standard to include documented landings recorded on an applicant's landing permit over the past two years, provided that the applicant also held a CFL, PEL, MPL during the same period of time. This would allow consideration of a broader range of SAFIS transaction records to establish an applicant's status under the "actively fished" standard.

Review: At the IAC's September 14, 2015 meeting, the committee voted to support the proposal. There were no comments offered at the September 30, 2015 public hearing. At the Council's October 6, 2014 meeting, the Council voted unanimously to recommend adoption of the proposal.

Per your memo of October 21, 2014, the Division recommends adoption of the proposal.

Decision: Consistent with the Council's recommendation, I support adoption of the proposal, as presented.

5. *Changes to provisions governing paper logbook endorsement*

Issue: In 2014, a new paper logbook endorsement was established. The new endorsement, which costs \$25, is only applicable to commercial finfish and lobster fishermen, fishing in RI waters, who do not submit VTRs and who wish to continue using the state-issued paper logbooks in lieu of electronic reporting. Given the newness of the provision, it was made available at any time during the year.

The Division proposed some technical amendments to the regulations governing the paper logbook endorsement, including:

- Renaming it the paper harvester catch and effort logbook; and

- Clarifying that logbooks (as well as electronic recordings) for all trips must be filled out prior to the start of the next trip, rather than at the end of each day fished;

The Division also proposed repealing the provision that allows the paper logbook endorsement to be obtained at anytime during the year and replacing it with a provision requiring all commercial license applicants to declare their reporting method at the time of license issuance or renewal, and if opting into the paper logbook reporting system, obtaining and paying for the paper logbook endorsement at that time. This change would enhance compliance with reporting, and ease the administrative burden for the Division. It was proposed as a reasonable follow-up to the first year of the new programmatic change, and appropriate given the amount of training and guidance provided by the Division over the course of the year.

Review: At the IAC's September 14, 2015 meeting, the committee debated the matter and ultimately took no position on the proposal. There were no comments offered at the September 30, 2015 public hearing. At the Council's October 6, 2014 meeting, the Council voted unanimously to recommend adoption of the proposal.

Per your memo of October 21, 2014, the Division recommends adoption of the proposal.

Decision: Consistent with the Council's recommendation, I support adoption of the proposal, as presented.

6. *Changes to provisions governing dockside sales endorsement*

Issue: Federal permit holders engaged in dockside sales are subject to duplicate electronic reporting requirements – they must submit VTRs as well as eTrip reports.

To eliminate the duplication, the Division proposed an amendment to the Dockside Sales endorsement provisions, establishing a process whereby everyone who obtains a Dockside Sales endorsement, will be provided with a paper dockside sales logbook, and everyone who reports their landings using VTRs will be required to use the logbooks in lieu of having to file eTrip reports.

The Division also proposed a new quarterly requirement for the submittal of dockside sales reports to be consistent with the existing harvester logbook requirements.

On a separate note, the Dockside Sales provisions require that all sales must be made from the vessel that harvested the product. That precludes specifically authorized alternative approaches, such as the one involving the lobster shack in Newport. The Division proposed a modification to the regulatory provision, maintaining the vessel-based restriction "unless otherwise authorized by the Director."

Review: At the IAC's September 14, 2015 meeting, the committee voted to support the proposal. There were no comments offered at the September 30, 2015 public hearing. At

the Council's October 6, 2014 meeting, the Council voted unanimously to recommend adoption of the proposal.

Per your memo of October 21, 2014, the Division recommends adoption of the proposal.

Decision: Consistent with the Council's recommendation, I support adoption of the proposal, as presented.

7. ***New proof of employment standard for establishing priority status as a crew member***

Issue: To meet the standard of "actively participating," an applicant must be able to demonstrate that he/she worked as a crew member at least 75 days over the past two years. The only proof required to meet the standard is one or more affidavits signed by one or more licensed captains. For some applicants, the veracity of their status as an actual crew member has been questionable, notwithstanding the claims made via the affidavits.

To address this issue, the Division proposed tightening the standard by clarifying that the applicant must have been a paid crew member, and that such status be verified via a record of payment, such as a W-2 form or paystub.

Review: At the IAC's September 14, 2015 meeting, the committee debated the matter and ultimately took no position on the proposal. There were no comments offered at the September 30, 2015 public hearing. At the Council's October 6, 2014 meeting, the Council debated the matter and ultimately voted to recommend adoption of the proposal, with the caveat that the proposed new provision be amended to read as follows: "To be considered a paid crew member, the crew member must have a record of being paid by a vessel owner or person licensed to fish commercially ~~such as~~ by either a W-2 form, ~~or~~ paycheck stub, or 1099 form."

Per your memo of October 21, 2014, the Division recommends adoption of the proposal.

Decision: I appreciate the Council's support for a more rigorous standard governing priority status for license applicants based on their status as crew members. I also agree with the Council's recommendation to allow consideration of 1099 forms. However, I disagree with the Council's recommendation to expressly limit allowable documentation to just the three types of records. I prefer to establish a burden of proof upon the applicant, and allow the applicant to submit whatever proof they have, in the form of documented record of payment, with emphasis on the three types of records as acceptable examples. Although I am not aware of other examples that might be considered acceptable, I would prefer to structure the new provision in a way that affords some discretion in making that call. Accordingly, I ask that the final regulation be worded as follows: "To be considered a paid crew member, the crew member must have a record of being paid by a vessel owner or person licensed to fish commercially, such as a W-2 form, 1099 form, and/or paycheck stub from a financial institution." This is the same language that was originally noticed, amended only by adding "1099 form."

8. *Balancing of endorsement opportunities to address equitable allocations among prioritization categories*

Issue: The commercial licensing regulations afford priority status to new license/endorsement applicants who fall into three categories: 1) residents holding active CFLs that are endorsed in the same fishery sector for which a new license/endorsement is sought; 2) residents holding active PELs; and 3) resident crew members active in the same fishery sector for which a new license/endorsement is sought. One-third of the total number of new licenses/endorsements is made available to each of the three categories. If, in any of the categories, there are fewer eligible applicants than there are licenses/endorsements available for issue, then the balance will be evenly distributed to the other two categories. Within each category, eligible applicants will be prioritized based on the length of time, in years, they have been actively fishing their license, or actively participating in the fishery as a crew member, on a continuing basis.

At times, the Department has faced situations where the number of available licenses/endorsements cannot be distributed equitably to priority applicants, per the above-described process. In such cases, the Director has had to formally authorize the issuance of an additional license/endorsement.

To address this issue, the Division proposed an amendment that would allow the Department to increase the number of available licenses/endorsements to provide an equitable allocation among the three priority categories.

Review: At the IAC's September 14, 2015 meeting, the committee voted to support the proposal. There were no comments offered at the September 30, 2015 public hearing. At the Council's October 6, 2014 meeting, the Council voted unanimously to recommend adoption of the proposal.

Per your memo of October 21, 2014, the Division recommends adoption of the proposal.

Decision: Consistent with the Council's recommendation, I support adoption of the proposal, as perfected by staff. The final wording shall be as follows:

At the end of sub-sections 6.7-6(a) and 6.7-6(b), add:

"If the selection of qualified applicants cannot be resolved equitably by the initial prioritization and lottery process, and if the number of remaining endorsements cannot be distributed evenly between the remaining categories, the number of remaining endorsements will be rounded up to provide each remaining category with the necessary endorsement(s) required to complete the selection process."