

Proposed Action on Regulations

For information concerning citizen participation in the regulation-making process, see inside front cover.

Symbol Key

- Roman type indicates existing text of regulation.
- *Italic type* indicates proposed new text.
- [Single brackets] indicate text proposed for deletion.

Promulgation of Regulations

An agency wishing to adopt, amend, or repeal regulations must first publish in the Maryland Register a notice of proposed action, a statement of purpose, a comparison to federal standards, an estimate of economic impact, an economic impact on small businesses, a notice giving the public an opportunity to comment on the proposal, and the text of the proposed regulations. The opportunity for public comment must be held open for at least 30 days after the proposal is published in the Maryland Register.

Following publication of the proposal in the Maryland Register, 45 days must pass before the agency may take final action on the proposal. When final action is taken, the agency must publish a notice in the Maryland Register. Final action takes effect 10 days after the notice is published, unless the agency specifies a later date. An agency may make changes in the text of a proposal. If the changes are not substantive, these changes are included in the notice of final action and published in the Maryland Register. If the changes are substantive, the agency must repropose the regulations, showing the changes that were made to the originally proposed text.

Proposed action on regulations may be withdrawn by the proposing agency any time before final action is taken. When an agency proposes action on regulations, but does not take final action within 1 year, the proposal is automatically withdrawn by operation of law, and a notice of withdrawal is published in the Maryland Register.

Title 08 DEPARTMENT OF NATURAL RESOURCES

Subtitle 02 FISHERIES SERVICE

Notice of Proposed Action

[16-174-P]

The Secretary of Natural Resources proposes to:

- (1) Adopt new Regulation **.06** and amend Regulation **.10** under **COMAR 08.02.08 Shellfish — General**.
- (2) Amend Regulation **.03** under **COMAR 08.02.12 Endangered and Threatened Fish Species**; and

Statement of Purpose

The purpose of this action is to list Jonah Crab (*Cancer borealis*) as in need of conservation and adopt both recreational and commercial management measures which are based on the current status of the stock, biology, fishery, and economic and management considerations. Another purpose of this action is to correct the spelling of the scientific name of Atlantic menhaden and make corrections to the requirements of a lobster trap.

According to the information in the Atlantic States Marine Fisheries Commission (ASMFC) Interstate Fishery Management Plan for Jonah Crab, Jonah crab is in need of protection against the potential negative impacts resulting from an unregulated fishery. Implementation of a coastwide conservation program is required.

“Conserve” means to use all methods and procedures for the purpose of increasing the number of individuals within a species or population up to the optimum carrying capacity of their habitat and maintaining these levels. Methods of conservation include activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition and maintenance, propagation and live trapping and transplantation, including the

periodic or total protection of species or populations as well as regulated taking.

The proposed action adds Jonah crab to the in need of conservation list and creates rules for both the recreational and commercial fisheries. These measures are necessary to conserve the crabs in alignment with coastal criteria and recommendations. Sound conservation and management measures prevent overfishing and achieve, on a continuous basis, the optimum yield from each fishery. The proposed action also corrects the spelling of the scientific name for Atlantic menhaden (*Brevoortia tyrannus*). This was a typographical error when the menhaden regulation was first proposed. One of the measures in the Jonah crab plan is for harvesters directing their efforts on catching Jonah crab to use a lobster trap that conforms to the ASMFC Interstate Fishery Management Plan for American Lobster. Those requirements are slightly different than what is described in the current lobster regulation. The proposed action clarifies that the escape vents need to be in the parlor section of the lobster trap and that the volume may not exceed 22, 950 cubic inches.

Jonah Crab (*Cancer borealis*)

Current Status of Stock

The current status of the stock is unknown. Unregulated harvest of Jonah crab may compromise the sustainability of the resource. The ASMFC Interstate Fishery Management Plan for Jonah Crab identified the lack of regulations in state and federal waters and permit/license requirements as problematic.

Landings have rapidly increased in the past 10 years and without new controls, effort could increase in an unregulated manner and the long-term availability of this resource for harvest could be compromised. Prior to the ASMFC Interstate Fishery Management Plan for Jonah Crab, there were no minimum size protections, nor were there regulations to protect spawning biomass, including restrictions on the harvest of females or egg carrying females. Moreover, unregulated harvest of Jonah crab with gears other than lobster traps has the potential to create a new directed fishery that does not conform with the intention of the ASMFC Interstate Fishery Management Plan for Jonah Crab. In addition, the development of a

new directed trap fishery could compromise the effectiveness of the Large Whale Take Reduction Plan.

Biology

Jonah crab is distributed in the waters of the Northwest Atlantic Ocean primarily from Newfoundland, Canada, to Florida, though a few specimens have been reported as far south as Bermuda (Haefner 1977; Drew 2011). The largest recorded Jonah crab was a male caught in Canada and measured 222 mm (8.7"); females generally do not exceed 150 mm (5.9") (Robichaud et al. 2000). Sea sampling of commercial fishing gear conducted in Maine on 7,131 crabs (Reardon, 2003) and Southern New England on 8,392 crabs (CFRF, unpublished data) indicate similar size distributions with only 2-4% of females and 69-71% of males captured greater than 5". Examination of the data suggests that both sexes reach near 100% maturity by 90 mm (3.5"). Females as small as 94 mm (3.7") have been recorded as carrying eggs by commercial fishermen participating in the Lobster/Jonah Crab Research Fleet Pilot Program administered through the Commercial Fisheries Research Foundation.

Jonah crab are omnivorous and consume a variety of species, including snails, mussels, urchins, algae, and arthropods, among other benthic invertebrates. American lobster (Ojeda and Dearborn 1991) and fish are predators of Jonah crab, particularly at smaller sizes. The apex trophic level of marine ecosystems is commonly targeted by fisheries because it is usually comprised of animals that represent the highest food and commercial value. As apex predators become depleted in areas of high fishing pressure, the fishery target will shift to species of lower trophic levels, a concept known as "fishing down marine food webs." In regions where top trophic levels have been heavily harvested, Jonah crab is becoming a more desirable fishery target. Concurrently, in these areas in the Gulf of Maine, the Jonah crab species has begun to take on the role of apex predator (Leland 2002). Where natural apex predators have become rare, Jonah crab is now primarily responsible for controlling benthic invertebrates.

Fishery

Since 1990 on average 95% of the coastwide landings have come from pots and traps; less than 1% of the catch was identified to come from dredges and trawls. In the early 1990s ex-vessel coastwide values were approximately \$1 to \$1.5 million dollars. Ex-vessel value increased in 2005 to \$3.5 million. From 2007 to 2011 ex-vessel value fluctuated from \$4.5 to \$5.6 million dollars, and reached an estimated \$12.7 million in 2013.

Jonah crab in Maryland is predominately a bycatch species in the American lobster fishery. Maryland landings are estimated at less than 1% of the coastwide landings, yet are very important to fishery participants and allow for income to offset reductions in other fisheries. Some Maryland lobstermen declaw the Jonah crab at sea. This historical practice of declawing the Jonah crab is currently permitted in the ASMFC Interstate Fishery Management Plan only for fishing vessels from states with a history of claw-only landings before the control date of June 2, 2015 (i.e., Maryland, Delaware, Virginia, and New Jersey). Maryland lobstermen remove both claws from the large male Jonah crab and return the crab to the ocean while other lobstermen retain and land the whole crab. The local dockside market is steady and expanding. Some lobstermen are exploring alternative markets such as claw clusters and picked claw meat. The value of the Maryland Jonah crab fishery is estimated at \$150,000 based on confidential fisherman and dealer reports.

Economic Considerations

Jonah crab is valuable to seafood consumers who do not or cannot fish themselves. Fishing vessels and seafood distributors engaged in

the commercial harvesting and marketing of Jonah crab produce expenditures and generate employment in the course of business activities. The economic impact in Maryland from enforcing the current coastwide ASMFC Interstate Fishery Management Plan should have no negative outcomes because the participants are generally compliant or exceed the management measures. Compliance should protect the market and allow for sustainability in the future. An ASMFC noncompliance finding resulting from not implementing the conditions of the fishery management plan would require a fishery shutdown and loss of revenue estimated at \$150,000 not including indirect costs (e.g., bait, ice, fuel).

Management Considerations

The ASMFC Interstate Fishery Management Plan for Jonah Crab requires commercial and recreational fisheries management measures in Maryland. The commercial management measures are as follows: 1) Participation in the directed trap fishery is limited to only those vessels and permit holders that already hold a federal lobster permit or can prove prior participation in the Jonah crab fishery before the control date of June 2, 2015; 2) All traps must conform to specifications of the lobster management plan, including the trap tag and escape vent requirements; 3) Landing of Jonah crab by all other individuals would require an incidental permit from a state or federal agency for the appropriate jurisdiction in which the vessel is fishing and would be subject to landing limits; 4) Mandatory reporting for dealers and harvesters; 5) Fishery dependent sampling; 6) A minimum size of 4.75 inches with no tolerance; 6) A prohibition on the retention of egg-bearing females; and 7) Only whole crabs may be retained and sold with the exception of individuals who can prove a history of claw landings before the June 2, 2015, control date in the states of New Jersey, Delaware, Maryland, and Virginia.

The recreational management measures consist of a 50-crab daily possession limit of any size and a prohibition on the possession of egg bearing females.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

The proposed action has no economic impact.

Economic Impact on Small Businesses

The proposed action has minimal or no economic impact on small businesses.

Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

Opportunity for Public Comment

Comments may be sent to Jonah Crab Regulations, Regulatory Staff, Department of Natural Resources Fisheries Service, B-2, 580 Taylor Avenue, Annapolis, MD 21401, or call 410-260-8300, or email to fisheriespubliccomment.dnr@maryland.gov, or fax to 410-260-8310. Comments will be accepted through August 8, 2016. A public hearing will be held on July 20, 2016, at 6:30 p.m. at Worcester County Library Ocean Pines Branch, 11107 Cathell Road, Ocean Pines, MD 21811.

08.02.08 Shellfish — General

Authority: Natural Resources Article, §§4-2A-03, 4-701, and 4-901, Annotated Code of Maryland

.06 Jonah Crabs.

A. Definitions.

(1) *In this regulation the following terms have the meanings indicated.*

(2) *Term Defined.* “Federally tagged lobster trap” means a trap that:

(a) Meets the requirements described in Regulation .10E and F of this chapter; and

(b) Has a tag that was issued by the National Marine Fisheries Service.

B. Recreational.

(1) An individual may not possess any Jonah crab that is egg-bearing or from which eggs have been intentionally removed.

(2) There is no season or size limit for the recreational fishery.

(3) The daily possession limit is 50 Jonah crabs per person per day.

C. Commercial Fishery.

(1) A person shall be licensed in accordance with Natural Resources Article, §4-701, Annotated Code of Maryland, and permitted in accordance with this regulation in order to catch, possess, or land Jonah crabs for commercial purposes.

(2) A person may not catch, land, possess, sell, offer to sell, or transport any Jonah crab:

(a) Which is egg-bearing or from which eggs have been intentionally removed; or

(b) Measuring less than 4-3/4 inches in width, measured at the widest part of the carapace (body shell).

(3) **Maryland Jonah Crab Landing Permits.**

(a) An individual is eligible to declare for a permit to catch and land Jonah crabs in Maryland if they are properly licensed in accordance with Natural Resources Article, §4-701, Annotated Code of Maryland.

(b) An individual is eligible to declare for a permit to catch and land Jonah crab claws in Maryland if they are properly licensed in accordance with Natural Resources Article, §4-701, Annotated Code of Maryland, and if the licensee can provide proof that they participated in the Jonah crab fishery prior to June 2, 2015.

(c) A landing permit is valid for the current commercial license year.

(d) Landing permits may not be transferred.

(4) Proof of eligibility for a landing permit as required in §C(3)(b) of this regulation shall be documented by records of the Department or records of the National Marine Fisheries Service.

(5) **Catch Limits.**

(a) An individual who is not in possession of a Maryland Jonah crab landing permit may not land Jonah crabs in Maryland.

(b) An individual who is not in possession of a Maryland Jonah crab claw landing permit may land only whole Jonah crabs in Maryland.

(c) An individual may land an unlimited number of Jonah crab claws and whole Jonah crabs per vessel per trip if the individual:

(i) Harvests Jonah crabs from a federally tagged lobster trap;

(ii) Is in possession of a valid federal lobster permit issued by the National Marine Fisheries Service;

(iii) Is in possession of a valid Maryland Jonah crab landing permit; and

(iv) Is in possession of a valid Maryland Jonah crab claw landing permit.

(d) An individual may land an unlimited number of whole Jonah crabs per vessel per trip if the individual:

(i) Harvests Jonah crabs from a federally tagged lobster trap;

(ii) Is in possession of a valid federal lobster permit issued by the National Marine Fisheries Service; and

(iii) Is in possession of a valid Maryland Jonah crab landing permit.

(e) An individual who harvests Jonah crabs from fishing gear other than a federally tagged lobster trap and is in possession of valid Maryland Jonah crab and Jonah crab claw landing permits may not land more than 2,000 Jonah crab claws per vessel per trip, regardless of whether or not the claws are attached to the Jonah crab.

(f) An individual who harvests Jonah crabs from fishing gear other than a federally tagged lobster trap and is in possession of a valid Maryland Jonah crab landing permit may not land more than 1,000 whole Jonah crabs per vessel per trip.

(6) Jonah crabs harvested for commercial purposes from Maryland waters of the Atlantic Ocean or from the waters of the Exclusive Economic Zone (EEZ) and landed in Maryland shall be sold to a dealer with a federal permit.

D. Reporting and Penalties.

(1) An individual shall record the harvest of Jonah crabs in accordance with Natural Resources Article, §4-206, Annotated Code of Maryland.

(2) A dealer shall transmit information weekly, or as required, on each Jonah crab transaction through the Department-approved reporting system.

(3) In addition to any other penalty, failure to comply with this regulation may result in the suspension of the current permit or the denial of a subsequent permit.

(4) Prior to suspending a permit or denying an application for a permit under this regulation, the Department shall give the licensee notice of its intended action and an opportunity to appear at a hearing conducted in accordance with the contested case procedures set forth in State Government Article, Title 10, Subtitle 2, Annotated Code of Maryland, and COMAR 08.01.04.

E. General.

(1) The Secretary may establish or modify catch limits or seasons for Jonah crabs in order to implement the Atlantic States Marine Fisheries Commission Interstate Fishery Management Plan for Jonah Crabs, by issuing a public notice on the Fisheries Service website.

(2) The public notice shall state its effective hour and date and shall be published on the Fisheries Service website at least 48 hours in advance of the effective hour and date.

(3) The Secretary shall make a reasonable effort to disseminate the public notice through various other media so that an affected person has reasonable opportunity to be informed.

(4) A violation of the restrictions set by the Secretary in accordance with this section is a violation of this regulation.

.10 American Lobsters.

A.—D. (text unchanged)

E. A lobster trap:

(1) Shall have a minimum of:

(a) One rectangular escape vent located in the parlor section of the trap which shall be a minimum of 2 inches by 5-3/4 inches; or

(b) Two circular escape vents located in the parlor section of the trap which shall have a minimum diameter of 2-5/8 inches;

(2) May not exceed a volume of 22,950 cubic inches;

[(2)] (3) — [(3)] (4) (text unchanged)

F. (text unchanged)

08.02.12 Endangered and Threatened Fish Species

Authority: Natural Resources Article, §4-2A-03, Annotated Code of Maryland

.03 Listing of Species.

A. The following species are listed as in need of conservation:

(1)—(16) (text unchanged)

- (17) Snapper Grouper Complex:
 - (a)—(ppp) (text unchanged)
 - (qqq) Sand tilefish (*Malacanthus plumieri*); [and]
 - (18) Atlantic menhaden [(*Brevoortia tyrannus*).] (*Brevoortia tyrannus*); and
 - (19) *Jonah crab (Cancer borealis)*.
- B. (text unchanged)

MARK J. BELTON
Secretary of Natural Resources

Title 10 DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Subtitle 09 MEDICAL CARE PROGRAMS

Notice of Proposed Action [16-172-P]

The Secretary of Health and Mental Hygiene proposes to amend:

- (1) Regulation .04 under **COMAR 10.09.04 Home Health Services**;
- (2) Regulation .07 under **COMAR 10.09.23 Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Services**;
- (3) Regulation .07 under **COMAR 10.09.50 EPSDT School Health-Related Services or Health-Related Early Intervention Services**; and
- (4) Regulation .06 under **COMAR 10.09.55 Physician Assistants**.

Statement of Purpose

The purpose of this action is to update language regarding the previous limitation prohibiting providers from billing Medicaid for services provided free of charge to other patients. This language aligns with a recent federal policy clarification on “Free Care Policy.”

Comparison to Federal Standards

There is a corresponding federal standard to this proposed action, but the proposed action is not more restrictive or stringent.

Estimate of Economic Impact

I. Summary of Economic Impact. This amendment will allow DHMH to reimburse providers for services given at no charge to the general public. Previously, these services were not reimbursable.

II. Types of Economic Impact.	Revenue (R+/R-)	Magnitude
	Expenditure (E+/E-)	
A. On issuing agency:	(E+)	Indeterminable
B. On other State agencies:	NONE	
C. On local governments:	NONE	
	Benefit (+) Cost (-)	Magnitude
D. On regulated industries or trade groups:	(+)	Indeterminable

- E. On other industries or trade groups: NONE
- F. Direct and indirect effects on public: NONE

III. Assumptions. (Identified by Impact Letter and Number from Section II.)

A. and D. The fiscal impact is indeterminable, but the Department believes it will be minimal since few providers deliver free services.

Economic Impact on Small Businesses

The proposed action has minimal or no economic impact on small businesses.

Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

Opportunity for Public Comment

Comments may be sent to Michele Phinney, Director, Office of Regulation and Policy Coordination, Department of Health and Mental Hygiene, 201 West Preston Street, Room 512, Baltimore, MD 21201, or call 410-767-6499 (TTY 800-735-2258), or email to dhmh.regs@maryland.gov, or fax to 410-767-6483. Comments will be accepted through August 8, 2016. A public hearing has not been scheduled.

10.09.04 Home Health Services

Authority: Health-General Article, §§2-104(b), 15-103, and 15-105,
Annotated Code of Maryland

.04 Covered Services.

- A.—B. (text unchanged)
- [C. The Program covers medical and other supplies which are used during a covered home health visit as part of the treatment ordered by the recipient's attending physician at a rate that is the lesser of the:
 - (1) Provider's customary charge to the general public; or
 - (2) Medicaid rate for the supply or pharmaceutical under COMAR 10.09.12 and 10.09.03.]
- [D.] C. (text unchanged)

10.09.23 Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Services

Authority: Health-General Article, §§2-104(b), 15-103, and 15-105,
Annotated Code of Maryland

.07 Payment Procedures.

- A.—C. (text unchanged)
- D. Reimbursement of Medically Monitored Intensive Inpatient Treatment Services Provided in an Intermediate Care Facility.
 - (1) (text unchanged)
 - (2) The Department shall pay the intermediate care facility the [lower] lesser of [the]:
 - (a) The provider's [usual and] customary charge *unless the service is free to individuals not covered by Medicaid*; or [the]
 - (b) The provider's per diem costs for covered services according to the principles established under Title XVIII of the Social Security Act, up to a maximum of \$400 per day.
 - (3) The [\$400 per day] maximum payment *in §D(2)(b) of this regulation* will be updated annually by the Centers for Medicare and Medicaid Service's published federal fiscal year market basket increase percentage relating to hospitals excluded from the prospective payment system.
 - [(3)] (4)—[(4)] (5) (text unchanged)
- E.—F. (text unchanged)