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VIA E-MAIL - sanders@state.or.us
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Stephen EA Sanders
Department of Justice
General Counsel Natural Resources
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201

Re: Petition to Adopt Temporary Rule - Oregon Department of Fish and Wildlife
Commission

Dear Steve:

This letter follows up on our recent discussions and transmits a petition to adopt a temporary rule.

We would appreciate your providing the petition and this letter to the Commission so that the Commission may take action on the petition at its November meeting. As we have discussed, the adoption of this rule is a matter of economic life or death to the fishermen to whom the rule may apply.

We have asked for the Commission to adopt the rule as a temporary rule because, if the relief that the rule would make possible is not made available before the start of the 2006-2007 fishery, then affected fishermen will suffer the extreme hardships that the rule is designed to give them the opportunity to avoid.

The current hardship rule permits the Commercial Fishery Permit Board to assign a fisherman to a different tier only if the failure to make qualifying landings occurred as a result of "death, permanent disability injury or serious illness requiring extended care by a physician." There are, however, other circumstances as unavoidable and as compelling as a physical ailment, such as a catastrophic loss, that should in fairness permit a permit holder to participate in the fishery in a higher tier. The proposed rule provides fishermen the chance to show that their failure to make qualifying landings was for reasons as compelling as failure of health.

Stephen EA Sanders
October 13, 2006
Page 2



To enable the Commission to act quickly, we have proposed to have the Commission adopt a new rule and not to amend an existing rule, which should avoid the need for addressing the issues set forth in OAR 137-001-0070(2) and for the public comment required by OAR 137-001-0070(3).

We have appreciated your courtesies in this process. If there are other steps we need to take or even those that would make your job easier, please let us know.

Very truly yours,

Davis Wright Tremaine LLP

A handwritten signature in cursive script, appearing to read 'Greg Chaimov', written over the printed name.

Gregory A. Chaimov
GAC/jan

Enclosure

STATE FISH AND WILDLIFE COMMISSION

In the Matter of the Adoption of Temporary
OAR 635-006-1070 Assigning Crab Pot Tiers
Based on Extreme Hardship

) PETITION TO ADOPT TEMPORARY
) RULE (COMMERCIAL GEAR
) OCEAN DUNGENESS CRAB)

1. Petitioner's name and address is Johnnie David Brown, 69764 Wildwood Road, North Bend, Oregon.

2. Petitioner is the principal of Sea Trap, Inc., an Oregon corporation that owns and operates two vessels in the Oregon Dungeness crab fishery.

3. Under the temporary rules adopted by the Commission September 8, 2006, the Department has assigned Petitioner to the tier with the limit of 200 pots.

4. The Commission's current hardship exemption is too narrow to provide adequate protection to fishermen who, in fairness, ought to be able to participate in the ocean Dungeness crab fishery. OAR 635-006-1065(1)(g)(A) permits the Commercial Fishery Permit Board to assign a fisherman to a different tier only if the failure to make qualifying landings occurred as a result of "death, permanent disability injury or serious illness requiring extended care by a physician." There are other circumstances as unavoidable and as compelling as a physical ailment, such as a catastrophic loss, that should permit a permit holder to participate in the fishery at a higher tier.

5. But for actions or events not reasonably within Petitioner's control, Petitioner was prevented from making landings that, under OAR 635-006-1015(1)(g)(E), would have provided for the assignment of Petitioner to a higher tier.

6. Because of limits imposed on other fisheries, Petitioner makes his living in the Oregon ocean Dungeness crab fishery and has no other means of earning a living. Because of the size of Petitioner's vessels, he cannot fish safely for ocean Dungeness crab by himself; he has to have the help of a crew. Petitioner cannot catch enough crabs with 200 pots to pay for bait, fuel, repairs, insurance, and other costs and pay himself and a crew a living wage. As a result, the individuals who have worked on Petitioner's crews are leaving to seek employment elsewhere. Petitioner is unable to find replacements.

7. If Petitioner cannot participate in the 2006-2007 ocean Dungeness crab fishery, then Petitioner will be unable to make the payments on the loans that encumber his vessels. If Petitioner cannot make the payments on the loans, he expects to lose one or both of his vessels in foreclosure.

8. Petitioner proposes that the Commission adopt a temporary rule applicable to the 2006-2007 ocean Dungeness crab fishery that would permit Petitioner and other fishermen who, because of unavoidable events or actions, face extreme hardship as a result of the tiers to which OAR 635-006-1015(1)(g)(E) assigns them.

9. Adoption of the rule as a temporary rule is necessary to avoid the extreme hardship that the tier assignments will otherwise cause. Unless the Commission adopts the rule before the 2006-2007 fishery, Petitioner and other similarly-situated fishermen will not be able to obtain a different tier assignment and they will suffer the extreme hardship that the rule is designed to prevent. In addition, the reasons for adopting the gear limitation rules as temporary rules apply here, such as the prevention of harm to the public interest and to the participants in the ocean Dungeness crab fishery through insufficient time to process appeals and for crabbers to adjust to the new crab pot system, purchase and affix the required buoy tags to the gear that they will be required to use and otherwise plan for the fishery.

10. The temporary rule that Petitioner proposes would read as follows:

635-006-1070. Extreme Hardship Assignment—Ocean Dungeness Crab Fishery

(1) The Commercial Fishery Permit Board shall increase the tier assignment for a permit holder who requests review under OAR 165-006-1065(1)(g) to the tier as described under OAR 635-006-1015(1)(g)(E) to which the permit holder would have been assigned based on the landings that the permit holder would have made but for an action or event that the permit holder could not reasonably have avoided.

(2) Subsection (1) of this section applies only if increasing the tier assignment is necessary to avoid a loss by the permit holder of a vessel or primary family residence.

11. The proposed rule is designed to apply only in the most limited and compelling of circumstances and only with adequate proof. First, the Commercial Fishery Permit Board will decide whether the event or action that prevented the permit holder from making landings that would have qualified the permit holder to a higher tier was, in fact, an event or action that the permit holder could not reasonably have avoided. Second, the Board will decide if the permit holder has provided adequate proof of the landings that the permit holder would have made but for the unavoidable circumstances. Finally, a permit holder will not qualify for a different assignment simply because the permit holder will lose income; to qualify for an extreme hardship assignment, the permit holder must show that the hardship from the current tier assignment is so extreme that the permit holder will lose the permit holder's vessel or family residence.

12. The Commission has the authority to adopt this temporary rule in the same measure as the Commission had authority to adopt the gear limitation program under ORS 494.146, 506.109, 506.119, 506.755 and 508.921.

13. Petitioner does not know of any person who may have a particular interest in the proposed temporary rule.

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Wherefore, Petitioner requests the State Fish and Wildlife Commission to adopt the proposed temporary rule, OAR 635-006-1070.

Dated October 13, 2006.

DAVIS WRIGHT TREMAINE LLP

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