

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Section 1902(a)(4) (7 Del.C. §1902(a)(4))
7 DE Admin. Code 3702 & 3771

FINAL

Secretary's Order No.: 2010-F-0020

3700 Shellfish Regulations

Date of Issuance: July 9, 2010

Effective Date of the Amendment: August 11, 2010

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") the following findings, reasons and conclusions are entered as an Order of the Secretary in the above-referenced rulemaking proceeding.

Background and Procedural History

This Order considers proposed regulations to amend 7 DE Admin. Code 3702 and 3771, Delaware Shellfish Regulations Pertaining to Oysters: Definitions and Oyster Harvesting Licensee Requirements. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2010-12. The Department published its initial proposed regulation Amendments in the April 1, 2010 *Delaware Register of Regulations*, and held a public hearing on Thursday, April 29, 2010. The public hearing record remained open at that time for public comment through April 30, 2010.

Subsequent to the Department's initial publication of its proposed regulation Amendments on April 1, 2010, the Department received numerous public comments concerning the proposed Amendments to Delaware's Shellfish Regulations Pertaining to Oysters. These comments were primarily focused on the proposed requirements of (1) a "processor" to retain tags for an extended period following the original purchase of legally harvested oysters; and that (2) no broken or previously used tags can be kept on the vessel. After thorough review by the Department, it was determined that no revisions to the initially proposed regulations regarding this matter were necessary.

With regard to the first proposed requirement noted above, the Enforcement Section of the Department's Division of Fish and Wildlife thoroughly reviewed this proposed regulation language in the light of the public comment received on this issue. The Department believes that no storage problem(s) should occur as a result of a "processor" now being required to keep the tags from any bags of oysters that he or she had opened. If, however, a "processor" should develop a storage problem, the tags would be picked up by Enforcement upon request, or at regular intervals, in order to avoid a storage problem. The Department discussed this rationale with members of the regulated community that had expressed their concerns on this issue at the time of the public hearing, and this arrangement was agreeable to both the "processors" and the Department's Enforcement Section. Again, no revision to the proposed regulation language is necessary, as the proposed amendments to 7 DE Admin. Code 3771 specifically allow for this arrangement to be made between the "processor" and the Department's Enforcement Section.

The second proposed regulatory requirement (i.e., no broken or previously used tags may be kept on the vessel) is the Department's attempt to eliminate one of the major "loopholes" in Delaware's current oyster regulations. At the present time, as long as used tags were permitted to remain onboard the oyster vessel, an oysterman could claim that the used tags were just removed from the oyster bags that were still onboard the vessel. Thus, by making it illegal to possess these invalid tags, oystermen would no longer be able to continue that practice. Concern was expressed at the public hearing that, on occasion, tags were either inadvertently broken or become otherwise unusable. Once again, the Department reviewed this proposed amendment in light of the public

comment received in this matter, and determined that no revision to the proposed regulation language is necessary.

Although neither the Fisheries Section nor the Enforcement Section of the Department has any knowledge of any such problems in the past with the oyster tags being used, the Department does acknowledge that the possibility exists of a seal becoming unusable as a result of insufficient quality control during its manufacture. In the event of such a problem, the Department's Fisheries Section shall work with the Enforcement Section and any other oysterman that has a valid complaint of a faulty or unusable tag. If necessary, the tag will be replaced with a new tag in order for the oysterman to harvest his full allocation.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated June 24, 2010 (Report). The Report recommends certain findings and the adoption of the proposed Amendments as attached to the Report as Appendix A.

Findings and Discussion

I find that the proposed Amendments are well-supported by the record developed by the Department, and I adopt the Report to the extent it is consistent with this Order. The Department's experts developed the record and drafted the proposed Amendments. Throughout the regulatory development process regarding this promulgation, the Department received public comment, as noted in the Report, and the same were fully addressed by Department staff in a thorough and balanced manner, accurately reflecting the information as contained in the public hearing record which was developed in this matter.

I find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these Amendments. With the adoption of this Order, Delaware will (1) require that oyster tags remain in place on oyster containers while being transported for processing; (2) require that tags on oyster containers remain in place until the containers are opened or emptied by a processor; (3) require processors to retain removed tags for a period of 90 days beyond the end of the calendar year; (4) make it unlawful to process oysters aboard a vessel; (5) define "processing" as it pertains to shellfish and shellfish products; (6) define "processor" as it pertains to shellfish and shellfish products; and (7) make it unlawful to possess a used or broken oyster tag on the harvesting vessel.

In conclusion, the following findings and conclusions are entered:

- 1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these proposed Amendments as final;
- 2.) The Department provided adequate public notice of the proposed Amendments, and provided the public with an adequate opportunity to comment on the proposed Amendments;
- 3.) The Department held a public hearing on April 29, 2010 in order to consider public comment before making any final decision;
- 4.) The Department's Hearing Officer's Report, including its recommended record and the recommended Amendments as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;
- 5.) The recommended Amendments should be adopted as final regulation Amendments because Delaware will be able to (1) eliminate one of the major loopholes in Delaware's existing oyster regulations by making it illegal for oystermen to possess either broken or previously used oyster bag tags on the oyster vessel; (2) formally define "processing" and "processor" as it pertains to both shellfish and shellfish products, in order to provide clarification to existing regulations to promote a greater understanding of the same to oystermen; (3) more effectively and efficiently prevent the overharvesting of this natural resource by assisting the Department with its critical tasks of quota allocation, subsequent monitoring and enforcement efforts; and lastly, because (4) the amendments are well supported by documents in the record;
- 6.) The Department shall submit this Order approving the final regulation to the Delaware Register of Regulations for publication in its next available issue, and provide such other notice as the law and regulation require and the Department determines is appropriate.

Collin P. O'Mara, Secretary

3702 Definitions:

- 1.0 **"2 Consecutive Years"**, as it appears in 7 Del.C. §1918(c) shall mean any consecutive 24 month period.

"A Person's Intent to Sell Shellfisheries to Another" shall mean a person has in his possession a quantity of that species of shellfish in excess of the quantity specified under the definition of "Commercial Shellfishing" or this same person advertises for sale, offers for sale or completes the sale of any portion of that measure of shellfish to another person.

"Commercial Shellfishing" shall mean for any person to possess those species of shellfish in excess of the following quantities unless said person has a valid receipt for all shellfish above these quantities; or as otherwise provided by law or regulation:

- Oysters - one (1) bushel per vessel
- Blue Crabs - one (1) bushel per person
- Hard Clams - five hundred (500) clams per person
- Lobsters - two (2) lobsters per person

"Commercial Measure" shall mean that unit of measurement of a species of shellfish as described herein:

- Oysters - bushels
- Blue Crabs - bushels
- Clams - actual numbers or bushels
- Lobsters - actual numbers or pounds
- Blue Mussels - bushels or pounds

"Delaware Bay" shall mean all those waters and submerged lands under the jurisdiction of the State located within an area bordered on the North by a straight line drawn between Liston Point, Delaware and Hope Creek, New Jersey and bordered on the South by a line drawn from Cape May Inlet East Jetty Light to Cape May Harbor Inlet Lighted Bell Buoy 2CM; thence to the northernmost extremity of Cape Henlopen, but not including any tributaries thereto.

"Delaware River" shall mean all those waters and submerged lands under the jurisdictions of the State located within an area to the North of a straight line connecting Liston Point, Delaware and Hope Creek, New Jersey, but not including any tributaries thereto.

"New Licensee"

- shall mean for purposes of interpreting 7 **Del.C.** §1918(a), any person who has never been issued a commercial crab pot license or any person who has not been issued a valid commercial crab pot license by the Department before May 1, 1994 and annually thereafter when applying for the renewal of such license.
- shall mean for purposes of interpreting 7 **Del.C.** §1918(b), any person who has never been issued a commercial crab dredger's license or any person who has not been issued a valid crab dredger's license by the Department before May 1, 1994 and then annually thereafter when applying for the renewal of such license."

"Processing" shall mean, with respect to shellfish or shellfisheries products: Preparing, shucking, freezing, changing into different market forms, manufacturing, preserving, packing.

"Processor" shall mean any person engaged in the purchasing, or commercial, custom, or institutional processing of shellfish products.

"Recreational Purposes" shall mean the noncommercial use of shellfish that does not include the sale, trade or barter of shellfish in quantities less than the prescribed quantities for commercial shellfishing.

3771 Oyster Harvesting Licensee Requirements

(Penalty Section 7 **Del.C.** §1912)

- 1.0 It shall be unlawful for any person licensed to harvest oysters from the State's natural oyster beds to possess another person's oyster harvesting tags while on board the vessel listed on said person's oyster harvesting license unless the other person is on board said vessel while harvesting oysters.
- 2.0 It shall be unlawful for any person licensed to harvest oysters from the State's natural oyster beds for direct sale to not attach an current Department issued oyster harvesting tag in the locked position through the fabric of a bushel bag containing oysters. The tag shall be cinched around the top of the

bag and locked such that the bag may not be opened nor oysters removed from the bag without breaking the tag or seal. Bags shall be tagged prior to the vessel leaving the shellfish harvest grounds and ~~returning to any port~~ remain in place while being transported for processing.

- 3.0 It shall be unlawful for any person to possess a bushel bag that is empty or partially filled with oysters so long as an oyster harvesting tag is attached to said bag.

5 DE Reg. 2140 (5/1/02)

6 DE Reg. 1356 (4/1/03)

- 4.0 It shall be unlawful for any person to possess an oyster cage that is empty of oysters so long as an oyster harvesting tag is attached to said cage. A filled or partially filled oyster cage must have the appropriate number of tags attached in the locked position to reflect the number of bushels of oysters in the cage.

- 5.0 It shall be unlawful for any person licensed to harvest oysters from the State's natural oyster beds to possess, while on board any vessel listed on said person's oyster harvesting license, used or otherwise invalid oyster harvesting tags. A used tag shall mean any tag that has been locked or sealed and subsequently cut, broken, or made unusable.

- 6.0 Any processor receiving oysters that were harvested from the State's natural oyster beds must keep the oyster harvesting tag or tags in place until the container is broken open or emptied by the processor, at which time the processor must promptly remove and retain the tag(s) for a period of 90 days beyond the end of the calendar year, unless otherwise directed by authorized representatives of the Department.

- 6.1 It shall be unlawful for any person to process oysters aboard a vessel.

6 DE Reg. 1356 (4/1/03)

11 DE Reg. 1496 (05/01/08)

13 DE Reg. 1285 (04/01/10)

14 DE Reg. 117 (08/01/10) (Final)