

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Sections 1902(a) and 2106(d) (7 Del.C. §§1902(a) and 2106(d))
7 DE Admin. Code 3774

FINAL

Secretary's Order No.: 2016-F-0026
Date of Issuance: June 10, 2016
Effective Date of the Amendment: July 11, 2016

3774 Oyster Minimum Size Limits

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") pursuant to 7 Del.C. §§6006, 6010, and other relevant authority, the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced regulatory proceeding.

Background, Procedural History and Findings of Fact

This Order relates to proposed regulation Amendments to 7 DE Admin. Code 3774: Oyster Minimum Size Limit, promulgated pursuant to authority granted in 7 Del.C. §§1902(a) and 2106(d). The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2016-01 dated March 8, 2016. The Department published its initial proposed regulation Amendments in the April 1, 2016 Delaware *Register of Regulations*. The Department then held a public hearing on April 21, 2016. Consistent with 29 Del.C. §10118(a), the public hearing record remained open for public comment through May 6, 2016.

The purpose of this proposed regulatory promulgation is to adopt as final the aforementioned proposed Amendments to 7 DE Admin. Code 3774: Oyster Minimum Size Limit ("Amendments"). Delaware's Advisory Council on Shellfisheries requested the Department's Division of Fish and Wildlife ("Division") to consider this proposed regulatory action to allow Delaware's oyster harvesters to possess *de minimis* quantities of undersized oysters (less than 2.75 inches between the two most distant points on the edges of said oyster's shell, "undersized") that are inherent to the harvesting process.

Oysters typically grow in complex and densely packed reefs on Delaware's natural oyster grounds. When harvested, the oysters are brought aboard dredge vessels in asymmetrical clumps comprised of shell, varying sized oysters, and other organisms that are not easily separable. Market oysters (greater than 2.75 inches minimum size limit, "market") are singled and culled from the dredged material prior to landing, but some undersized oysters can inadvertently remain attached to the market oysters. Some shell breakage can also occur during the bagging and handling process, rendering a market oyster illegal. Furthermore, the incidental retention of spat, or small oysters (less than one inch in size, "spat", "small") attached to market oysters is practically unavoidable, particularly in years of high juvenile recruitment.

The Department's proposed regulatory action at this time would allow up to five percent (by number) undersized oysters per landed bushel. Attached spat or attached small oysters that cannot be removed from a market oyster without destroying either oyster could be retained, and would not count toward the five percent allowance. It should be noted that the proposed regulatory amendment is unlikely to increase costs or place additional burdens on the affected public. The proposed amendment provides a reasonable accommodation to harvesters, and establishes objective and enforceable criteria. Similar allowances are in place for conch (whelk), blue crab, and hard clam. It should also be noted that the proposed amendment is not expected to have detectable impacts to Delaware's oyster resource.

The above-referenced proposed Amendments were presented and thoroughly vetted by the Department at the public hearing on April 21, 2016. Members of the public attended the aforementioned public hearing, and comment was received by the Department regarding these proposed Amendments. Of note is the fact that all comment received by the Department regarding this matter was positive, and voiced strong support of these proposed Amendments while thanking the Department for undertaking this regulatory action at this time. All proper notification and noticing requirements concerning this proposed promulgation were met by the Department in this matter. Proper notice of the hearing was provided as required by law.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated June 2, 2016 ("Report"). The Report documents the proper completion of the required regulatory amendment process, establishes the record, and recommends the adoption of the proposed Amendments as attached to the Report as Appendix "A".

Reasons and Conclusions

Based on the record developed by the Department's experts and established by the Hearing Officer's Report, I find that

the proposed regulatory Amendments to **7 DE Admin. Code 3774**: Oyster Minimum Size Limit, are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed regulatory Amendments be promulgated as final.

I find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these regulatory Amendments. The adoption of these regulatory Amendments will enable the Department to allow Delaware oyster harvesters to possess up to five percent (by number) undersized oysters (i.e., less than 2.75 inches between the two most distant points on the edges of said oyster's shell) per landed bushel. Additionally, attached spat or attached small oysters (i.e., less than one inch) that cannot be removed from a market oyster (i.e., greater than 2.75 inches) without destroying either oyster may be retained, without counting the same toward the five percent allowance. As noted previously, this proposed promulgation provides a reasonable accommodation to harvesters, and establishes objective and enforceable criteria. Additionally, the proposed regulatory amendments are unlikely to increase costs or place additional burdens on the affected public, and are not expected to have detectable impacts to Delaware's oyster resource.

In conclusion, the following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to the proposed Amendments to **7 DE Admin. Code 3774**, Oyster Minimum Size Limits, pursuant to **7 Del.C.** §§1902(a) and 2106(d);
2. The Department has jurisdiction under its statutory authority, pursuant to **7 Del.C.** Ch. 60, to issue an Order adopting these proposed regulatory amendments as final;
3. The Department provided adequate public notice of the proposed regulatory amendments and all proceedings in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on the proposed regulatory amendments, including at the time of the public hearing held on April 21, 2016, and held the record open through close of business on May 6, 2016, consistent with **29 Del.C.** §10118(a), in order to consider public comment on these proposed regulatory amendments before making any final decision;
4. The Department's Hearing Officer's Report, including its established record, and the recommended proposed regulatory Amendments, as set forth in Appendix "A", are hereby adopted to provide additional reasons and findings for this Order;
5. The adoption of these proposed regulatory Amendments will enable the Department to (1) allow Delaware oyster harvesters to possess up to five percent (by number) undersized oysters (i.e., less than 2.75 inches between the two most distant points on the edges of said oyster's shell) per landed bushel; (2) allow attached spat or attached small oysters (i.e., less than one inch) that cannot be removed from a market oyster (i.e., greater than 2.75 inches) without destroying either oyster to be retained, without counting the same toward the five percent allowance; and (3) provide a reasonable accommodation to oyster harvesters, and establish objective and enforceable criteria, with no expectation of detectable impacts to Delaware's oyster resource;
6. The Department has reviewed these proposed regulatory Amendments in the light of the Regulatory Flexibility Act, consistent with **29 Del.C.** Ch. 104 (version applicable to all regulations initially published on or after January 1, 2016), and has selected Exemption "B1" regarding same, as this proposed regulation is not substantially likely to impose additional costs or burdens upon individuals and/or small businesses. Moreover, the Department believes these proposed regulatory Amendments to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;
7. The Department's proposed regulatory Amendments to **7 DE Admin. Code 3774**, Oyster Minimum Size Limits, as published in the April 1, 2016 Delaware *Register of Regulations*, and as set forth in Appendix "A" hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they are approved as final regulatory amendments, which shall go into effect ten days after their publication in the next available issue of the Delaware *Register of Regulations*; and
8. The Department shall submit this Order approving as final the proposed Amendments to **7 DE Admin. Code 3774**, Oyster Minimum Size Limits, 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.

David S. Small, Secretary

3765 Oysters
(Break in Continuity of Sections)

3774 Oyster Minimum Size Limit

(Penalty Section **7 Del.C.** §1912)

- 1.0 ~~It shall be~~ Except as provided in 1.1 and 1.2, it is unlawful for any person to possess any oyster harvested for direct sale from the State's natural oyster beds that measures less than 2.75 (2³/₄) inches between the two most distant points on the edges of said oyster's shell.

- 1.1 Oysters measuring less than 2.75 (2¾) inches shall not comprise, by number, more than 5.0% of any landed bushel bag or bushel sample(s) obtained from any landed multi-bushel cage.
- 1.2 Notwithstanding 1.1, a person may possess oysters harvested for direct sale from the State's natural oyster beds that measure at least 2.75 (2¾) inches and have attached oysters or attached spat that measure less than one (1) inch between the two most distant points on the edges of said oyster's shell and that cannot be separated without destroying either oyster.

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

20 DE Reg. 58 (07/01/16) (Final)