

# **DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL**

## **DIVISION OF FISH AND WILDLIFE**

Statutory Authority: 7 Delaware Code, Section 903(e)(2)(a), (7 **Del.C.** §903(e)(2)(a))  
7 **DE Admin. Code** 3716 and 3771

### **FINAL**

**Secretary's Order No.: 2008-F-0016**

#### **3716 Crab Pot Number Buoys and Vessel Panel Color Code and Number Requirements; and 3771 Oyster Harvesting Licensee Requirements**

Date of Issuance: April 15, 2008

Effective Date of the Amendment: May 11, 2008

##### **1. Background:**

A public hearing was held on Monday, March 31, 2008, at 7:00 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on proposed amendments to the existing Delaware Shellfish Regulation No. 3716: Crab Pot Number Buoys and Vessel Panel Color Code and Number Requirements, as well as proposed amendments to the existing Delaware Shellfish Regulation No. 3771: Oyster Harvesting Licensee Requirements. The proposed changes to Regulation No. 3716 would facilitate enforcement of existing regulations when up to three commercial crabbers fish off of the same vessel. Under the existing regulations, pots deployed from the same vessel may use up to three different color codes, thus making it very difficult for on-the-water enforcement of the 500 pot limit per vessel, because the enforcement officers would have to count the pots represented by up to three different color codes. If only one color code is allowed to be fished from a vessel, this will facilitate counting of the pots to ensure regulatory compliance. Additionally, this proposed change would benefit the potters who would like to take advantage of using a common color code with the other participants in the fishery using the same vessel.

There would be no changes proposed to the numbering of crab pots, except that any vessel that elects to fish more than one licensee's pots would be required to display each licensee's numbers on the color code panel that is mounted on the vessel. Any pot fished from such a vessel must have at least one color-coded buoy displaying the crab pot license number being used by any one of the crabbers fishing from that vessel.

It should be noted that implementation of these proposed amendments to Delaware's Shellfish Regulation No. 3716 would be delayed for one fishing season (until January 1, 2009) to give the crabbers enough advance notice to re-paint their corks as necessary to comply with the proposed changes.

The proposed revisions to Delaware Shellfish Regulation No. 3771 (Oyster Harvesting Licensee Requirements), on the other hand, would go into effect immediately upon promulgation. These proposed amendments would clarify how oyster tags must be applied to bushel bags containing harvested oysters. The tag shall be cinched around the top of the bag and locked, such that the bag may not be opened without breaking the tag or the seal. This change should help discourage the illegal practice of re-using the oyster bags and oyster tags in order to circumvent oyster harvest quotas. Delaware's oyster resource is quite limited, and non-compliance with tagging and reporting requirements places the remaining resource of harvestable oysters in jeopardy. Each participant is granted a finite number of bushels that may be harvested each year, which is determined by dividing the total allowable harvest by the number of participants in the fishery.

Commercial fishermen will be affected by the above-referenced proposed amendments to Delaware Shellfish Regulation Nos. 3716 and 3771. The Department has the statutory basis and legal authority to act with regard to these promulgations, pursuant to 7 **Del.C.** §§1902(a)(5), 2303(e), 2306(a), and 2106. No other Delaware regulations are affected by this proposal.

Numerous members of the public attended this hearing on March 27, 2008 to voice their concerns with regard to the Department's proposed changes to these regulations, and the same were taken into consideration during the Division's review of this proposed regulatory amendment. Afterwards, the Hearing Officer prepared her report regarding this matter and submitted the same to the Secretary for review and consideration. Proper notice of the hearing was provided as required by law.

## **II. Findings:**

The Department has provided a reasoned analysis and a sound conclusion with regard to the response given to each such comment, as reflected in the Hearing Officer's Report of March 31, 2008, which is attached and expressly incorporated into this Order. Moreover, the following findings and conclusions are entered at this time:

1. Proper notice of the hearing was provided as required by law.
2. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
3. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
4. The Department held a public hearing in a manner required by the law and regulations;
5. The Department considered all timely and relevant public comments in making its determination;
6. Promulgation of the proposed amendments to Delaware Shellfish Regulation No. 3716 would facilitate enforcement of existing regulations when up to three commercial crabbers fish off of the same vessel. Furthermore, the proposed changes should benefit the potters who would like to take advantage of using a common color code with the other participants in the fishery using the same vessel;
7. The implementation of the proposed amendments to Delaware Shellfish Regulation No. 3716 will be delayed for one fishing season, until January 1, 2009, in order to give the crabbers enough advance notice to re-paint their corks as necessary in order to avoid non-compliance with the proposed revisions;
8. The proposed amendments to Delaware Shellfish Regulation No. 3771 would go into effect immediately upon promulgation, thus helping to discourage the illegal practice of re-using oyster bags and oyster tags in order to circumvent oyster harvest quotas, as well as helping to protect the remaining (but limited) resource of harvestable oysters;
9. The Department has reviewed this proposed amendment in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;
10. The Department's proposed amendments to Delaware Shellfish Regulation No. 3716 and Delaware Shellfish Regulation No. 3771 are adequately supported, not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final regulations, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and that
11. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary.

## **III. Order:**

Based on the record developed, as reviewed in the Hearing Officer's Report dated April 15, 2008 and expressly incorporated herein, it is hereby ordered that the proposed amendments to State of Delaware Shellfish Regulation No. 3716, as well as Delaware Shellfish Regulation No. 3771, be promulgated in final form in the customary manner and established rule-making procedure required by law.

## **IV. Reasons:**

The promulgation of State of Delaware Shellfish Regulation No. 3716 will facilitate enforcement of the existing regulations, as well as provide better clarity to the public in general with regard to the specifics of the same. Additionally, the revisions to State of Delaware Shellfish Regulation No. 3771 will help discourage the illegal practice of re-using oyster bags and oyster tags in order to circumvent oyster harvest quotas. Delaware's oyster resource is quite limited, and non-compliance with current tagging and reporting requirements places the remaining resource of harvestable oysters in jeopardy. Thus, promulgation of these amendments to Delaware's existing regulations will better protect this species, and will help the Department to ensure that oysters will continue to be found in Delaware waters in the future.

In developing this regulation, the Department has balanced the absolute environmental need for the State of Delaware to promulgate regulations concerning this matter with the important interests and public concerns surrounding the same, in furtherance of the policy, purposes, and authority of 7 **Del.C.** §§1902(a)(5), 2303(e), 2306(a), and 2106.

David S. Small, in his official capacity as Acting Secretary

### **3716 Crab Pot Number Buoys and Vessel Panel Color Code and Number Requirements (Formerly S-29)**

(Penalty Section 7 Del.C. §1912)

*Proposed revisions to 3716 would take effect January 1, 2009.*

1.0 The color code assigned by the Department to a commercial crab pot licensee shall be displayed on each buoy or buoys attached to the line of each crab pot deployed in the water in the following order:

1.1 The first color in the color code sequence shall be on a buoy or buoys located the farthest from the crab pot (top).

1.2 The last color in the color code sequence shall be on the buoy or buoys located the closest to the crab pot (bottom).

1.3 Any second or third color in the color code sequence between the first and last colors shall be on a buoy or buoys in the same top to bottom order as in the color code sequence.

2.0 Each color coded buoy attached to a line of a commercial crab pot shall measure at least three (3) inches by three (3) inches by three (3) inches except that a separate buoy, located between the crab pot and color-coded buoy nearest the crab pot but no closer than five (5) feet to the color coded buoy nearest the crab pot may be of lesser dimensions.

3.0 Each color in a color code shall cover a contiguous area of at least 28 square inches on a buoy.

4.0 Each color coded buoy shall be visible on the water's surface when the tide is slack and the wind is less than ten (10) miles per hour.

5.0 Each color coded buoy shall have its color or colors recognizable at all times.

6.0 If more than one licensee elects to fish his or her crab pots from the same vessel, then all licensees who fish from that vessel, up to the maximum of three licensees per vessel, shall use the same color code on the pots fished from that vessel. Any licensee who subsequently elects to fish their pots on their own and not on a vessel with other licensees retains the right to use their originally assigned color code.

~~6.0~~ The color code assigned by the Department to a commercial crab pot licensee shall be displayed on the 2' x 2' panel on the licensee's vessel in a manner that when viewed from either side of the vessel, the sequence of colors shall be as follows relative to the vessel:

~~6.1~~ The first color in the color code sequence shall be on the panel in a vertical band closest to the stern of the vessel.

~~6.2~~ The last color in the color code shall be on the panel in a vertical band closest to the bow of the vessel.

~~6.3~~ Any second or third color in the color code sequence between the first and last colors shall be on the panel in vertical band(s) in the same stern to bow order as assigned in the color code sequence.

~~7.0~~ Each color coded panel shall be visible and the color(s) shall be recognizable at all times while tending crab pots.

~~8.0~~ Each color coded panel shall be displayed as vertical bands on the panel such that each color covers a contiguous area of equal size. The panel shall not display any color other than the colors in the assigned color code except for a color used to indicate the crab pot number.

10.0 If more than one licensee, up to the maximum of three licensees per vessel, elects to fish his or her crab pots from the same vessel, then that vessel shall display the same color code panel as on the pots fished from that vessel.

~~9.1.0~~ A number shall be assigned by the Department to each commercial crab pot license.

~~10.1.0~~ The commercial crab pot licensee's number shall be displayed on the color coded panel on the licensee's vessel with at least three (3) inch high contrasting colored Arabic numerals so that said number shall be visible from either side of the vessel. If more than one licensee elects to fish his or her crab pots from the same vessel then the color coded panel shall contain all of the numbers being fished from that vessel.

~~11.0~~ The commercial crab pot licensee's number shall be displayed on at least one color coded buoy attached to each crab pot displayed in the water in at least one (1) inch high Arabic numerals. The number shall be painted in a contrasting color, branded on or carved into the buoy. If more than one licensee elects to fish his or her crab pots from the same vessel, then one of the crab pot's license numbers assigned to that vessel shall be displayed on at least one color coded buoy attached to each crab pot fished from that vessel ~~although no one~~

~~licensee may fish more than 200 pots at any one time].~~

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

**3771 Oyster Harvesting Licensee Requirements (Formerly S-73)**

(Penalty Section 7 Del.C. §1912)

*Proposed revisions to 3771 would take effect immediately upon ratification.*

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 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.

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 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.

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