

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Sections 1902(a), 1501, 1503, 2505 and 2507
(7 Del.C. §§1902(a), 1501, 1503, 2505 & 2507)
7 DE Admin. Code 3700

FINAL

Secretary's Order No.: 2019-F-0033

RE: Approving Final Regulations to Amend 7 DE Admin. Code 3700:

Shellfish: Adoption of (New) Section 3723 (Jonah Crab); and Amendments to existing Sections 3755 (Lobsters [Homarus americanus]), 3756 (Lobsters – Pot Design), 3757 (Lobsters – Pot, Season and Limits for Commercial Lobster Pot License), and 3758 (Possession of V-Notched Lobsters Prohibited)

Date of Issuance: August 14, 2019

Effective Date of the Amendment: September 11, 2019

3700 Shellfish

3723 Jonah Crab (*Cancer borealis*)

3755 Lobsters

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 and 6010, and all other relevant statutory 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 (“Amendments”) to 7 DE Admin. Code 3700: *Shellfish*. Specifically, the Department proposes to adopt new regulations for Jonah Crab within its existing *Shellfish* regulations (new Section 3723), and to amend existing Sections 3755 (Lobsters [*Homarus americanus*]), 3756 (Lobsters – Pot Design), 3757 (Lobsters – Pot, Season and Limits for Commercial Lobster Pot License), and 3758 (Possession of V-Notched Lobsters Prohibited).

This action is being taken by the Department to adopt provisions which will enable Delaware to (1) maintain consistency with the Interstate Fishery Management Plan (“FMP”) as approved by the Atlantic States Marine Fisheries Commission (“ASMFC”) with regard to the adoption of new Jonah Crab regulations; (2) provide additional clarity to the regulated community with regard to the existing American Lobster regulations; and (3) reformat the existing American Lobster regulations by consolidating 7 DE Admin. Code §§3756-3758 under 7 DE Admin. Code 3755, as referenced above.

The ASMFC approved an Interstate FMP for Jonah Crab in August 2015, under the authority of the Atlantic Coastal Fisheries Cooperative Management Act (1993). The goal of the FMP is to support and promote the development and implementation, on a continual basis, of a unified coastal management program for Jonah Crab, which in turn is designed to promote conservation, reduce the possibility of recruitment failure, and allow full utilization of the resource by the United States’ Jonah Crab industry.

Consistent with the mandatory elements of the aforementioned FMP and its addenda, the Department proposes to implement the following regulatory measures for Jonah Crab: (1) the establishment of incidental and directed landing permits based upon certain criteria; (2) the establishment of incidental bycatch limits; (3) the establishment of a minimum carapace width of 4 ¾ inches with no tolerance; (4) the establishment of conditions and limits on the retention of claws; (5) the establishment of a recreational possession limit of 50 Jonah Crabs per person per day; and (6) the prohibition of the retention of egg-bearing female Jonah Crab.

With regard to the management of American Lobster, the Department proposes to adopt provisions requiring the mandatory removal of lobster pots from February 1 through March 31, in accordance with Addendum XVII to Amendment 3 of the ASMFC’s FMP for American Lobster. Additionally, the Department proposes to clarify that two escape vents are necessary on lobster pots where circular style vents are used, and require that egg-bearing female lobsters be V-notched and immediately released.

Finally, consistent with the *Delaware Administrative Code Drafting and Style Manual*, the Department proposes to reformat the existing regulations pertaining to American Lobster by consolidating the following Sections under existing 7 DE Admin. Code 3755, Lobsters (*Homarus americanus*): 3756 Lobsters – Pot Design; 3757 Lobsters – Pot, Season and

Limits for Commercial Lobster Pot License, and 3758 Possession Of V-notched Lobsters Prohibited. The proposed reformatting will also provide additional clarity to the existing regulations, and is not intended to change meaning.

The Department has the statutory basis and legal authority to act with regard to the formal promulgation of these proposed Amendments, pursuant to 7 **Del.C.** §§1902(a), 1501, 1503, 2505 and 2507.

The Department published its initial proposed regulation Amendments in the May 1, 2019 Delaware *Register of Regulations*. Thereafter, the public hearing regarding this matter was held on May 23, 2019. There were no members of the public in attendance at the public hearing. Pursuant to 29 **Del.C.** §10118(a), the hearing record remained open for receipt of additional written comment for 15 days following the public hearing. The hearing record formally closed for comment in this matter at close of business on June 7, 2019, with no comment having been received by the Department during any phase of this formal promulgation.

It should be noted that all notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

Hearing Officer Theresa Newman prepared her Report dated August 1, 2019 ("Report"), which expressly incorporated the Department's proposed Amendments into the hearing record generated in this matter. 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 in the Division of Fish and Wildlife, and established by the Hearing Officer's Report, I find that the proposed regulatory Amendments to 7 **DE Admin. Code** 3700: *Shellfish*, are well-supported. I further find that the Department's Fish and Wildlife experts fully developed the record to support adoption of these Amendments. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed Amendments be promulgated as final.

The following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to this proposed regulatory promulgation, pursuant to 7 **Del.C.** §§1902(a), 1501, 1503, 2505, and 2507.

2. The Department has jurisdiction under its statutory authority, pursuant to 7 **Del.C.** Ch. 60, to issue an Order adopting these proposed Amendments as final;

3. The Department provided adequate public notice of the initial proposed Amendments and all proceedings in a manner required by the law and regulations, and provided the public with an adequate opportunity to comment on the same, including at the time of the public hearing held on May 23, 2019, and during the 15 days subsequent to the hearing (through June 7, 2019), before making any final decision;

4. Promulgation of the proposed Amendments to 7 **DE Admin. Code** 3700: *Shellfish*, will enable the Department to: (1) maintain consistency with the aforementioned Interstate FMP, as approved by the ASMFC, with regard to the adoption of new Jonah Crab regulations; (2) provide additional clarity to the regulated community with regard to the existing American Lobster regulations; and (3) reformat the existing American Lobster regulations by consolidating 7 **DE Admin. Code** §§3756-3758 under 7 **DE Admin. Code** 3755, as referenced above;

5. The Department has reviewed the proposed Amendments in the light of the Regulatory Flexibility Act, consistent with 29 **Del.C.** Ch. 104, and has selected Exemption "B5," as this regulation is required by federal law, pursuant to Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), 16 USC §§ 5101 – 5106, and has already complied with the federal Regulatory Flexibility Act, 5 U.S.C. §601, et seq.;

6. The Department's Hearing Officer's Report, including its established record and the recommended proposed Amendments as set forth in Appendix "A," are hereby adopted to provide additional reasons and findings for this Order;

7. The Department's proposed regulatory Amendments, as initially published in the May 1, 2019 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 the proposed Amendments as final regulatory 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.

Shawn M. Garvin
Secretary

3700 Shellfish
3723 Jonah Crab (*Cancer borealis*)

- 1.1 The Department may only issue a Directed Jonah Crab Landing Permit to those vessels and lobster permit holders that held a valid Delaware Commercial Lobster Pot License or federal lobster permit on June 2, 2015 or that can demonstrate to the Department, through valid reported landing reports or sales receipts, that they landed Jonah Crab or Jonah Crab claws in Delaware before June 2, 2015.
- 1.2 Unless otherwise provided, it is unlawful to possess or land Jonah Crab or parts thereof without a valid commercial foodfish license or a license to harvest shellfish for commercial purposes and a valid Directed Jonah Crab Landing Permit or an Incidental Jonah Crab Landing Permit issued by the Department.
- 1.3 Jonah Crab Landing permits are not transferable and automatically expire on December 31 of each calendar year.

2.0 Commercial Possession Limit

- 2.1 It is unlawful for a person issued a commercial foodfish license or a license to harvest shellfish for commercial purposes to possess more than 1,000 Jonah Crab per trip or more than 2,000 Jonah Crab claws per trip without a valid Directed Jonah Crab Landing Permit issued by the Department.
- 2.2 It is unlawful for a person issued an Incidental Jonah Crab Landing Permit and fishing non-lobster pot gear to possess a greater weight of Jonah Crab or Jonah Crab parts that exceed the weight of the target species for which the gear is set.
- 2.3 Persons issued a Directed Jonah Crab Landing Permit in accordance with subsection 1.1 may possess and land any quantity of Jonah Crabs or parts thereof.

3.0 Recreational Possession Limit

It is unlawful to possess more than 50 Jonah Crab per person per day, unless otherwise provided.

4.0 Minimum Size

- 4.1 It is unlawful to possess Jonah Crab measuring less than 4 ¾ inches at the widest part of its carapace.
- 4.2 It is unlawful to possess detached Jonah Crab claws measuring less than 2 ¾ inches along the longest axis of the propodus (the immovable component of the pinching claw) in a volume greater than five gallons.

5.0 Dismemberment

- 5.1 Except as provided in subsections 5.1.1 and 5.1.2, it is unlawful to possess Jonah Crab claws that are not naturally attached to the body (cephalothorax).
 - 5.1.1 A person with a valid Directed Jonah Crab Landing Permit or Incidental Jonah Crab Landing Permit issued by the Department may possess detached Jonah Crab claws in accordance with Section 2.0 and subsection 4.2 of this regulation.
 - 5.1.2 A person with a valid and corresponding receipt or bill of lading may possess detached Jonah Crab claws, provided said claws were lawfully harvested.

6.0 Egg-bearing Jonah Crab

It is unlawful to possess a Jonah Crab bearing eggs visible thereon or any Jonah Crab from which the eggs have been removed.

3755 Lobsters (*Homarus americanus*)

37561.0 Lobsters-- Lobster Pot Design

(Penalty Section 7 Del.C. §1912)

- 4.01.1 It shall be is unlawful for any person to set, tend or conduct shellfishing for lobsters with any pot or trap in the waters under the jurisdiction of the State unless said pot or trap has an escape vent, slot or port of not less than two (2) inches by 5 ¾ inches located in the parlor section of each pot or trap, or if a circular escape vent is used in the parlor section of any lobster pot or trap, it shall be is unlawful to use any less than two (2) circular vent vents that is are less than 2 5/8 inches inside diameter.
- 2.01.2 It shall be is unlawful for any person to set, tend or conduct shellfishing for lobsters with any pot or trap, not constructed entirely of wood, excluding heading or parlor twine and the escape vent, that does not contain a ghost panel covering an opening that measures at least 3 ¾ inches by 3 ¾ inches. A ghost panel means a panel, or other mechanism, designed to allow the escapement of lobsters after a period of time if the pot or trap has been abandoned or lost. The panel must be constructed of, or fastened to the pot or trap with, one of the following untreated materials: wood lath, cotton, hemp, sisal or jute twine not greater than 3/16 inch in

diameter, or non-stainless, uncoated ferrous metal not greater than 3/32 inch in diameter. The door of the pot or trap may serve as the ghost panel, if fastened with a material specified in this subsection. The ghost panel must be located in the outer parlor(s) of the pot or trap and not the bottom of the pot or trap.

~~3.01.3~~ It ~~shall be~~ is unlawful for any recreational or commercial lobster pot fisherman to set, tend or conduct shellfishing for lobsters with a lobster pot or trap with a volume larger than 22,950 cubic inches.

2 DE Reg 1898 (04/01/99)

10 DE Reg. 1034 (12/01/06)

~~37572.0 Lobsters – Pot, Lobster Pot Season And Limits For Commercial Lobster Pot License~~

(Penalty Section 7 **Del.C.** §1912)

2.1 Except as provided in subsections 2.1.1 and 2.1.2, it is unlawful to set or tend lobster pots or to take and reduce to possession or attempt to take and reduce to possession lobsters during the period February 1 through March 31.

2.1.1 A person with a valid Commercial Lobster Pot License may remove lobster gear from the water during the period February 1 through February 14; however, no lobsters may be reduced to possession.

2.1.2 A person with a valid Commercial Lobster Pot License may set lobster gear during the period March 25 through March 31; however, the gear cannot be tended and no lobsters may be reduced to possession.

~~4.02.2~~ It ~~shall be lawful~~ is unlawful for any person who has a valid Commercial Lobster Pot License to harvest lobsters in the waters under the jurisdiction of the State ~~at any time as permitted by law~~ on any ~~date~~ except Sunday.

~~2.02.3~~ It ~~shall be~~ is unlawful for any person who has a valid Commercial Lobster Pot License to set, tend or use in any manner in excess of fifty (50) lobster pots for the taking of lobsters in the waters under the jurisdiction of the State.

~~3.02.4~~ It ~~shall be~~ is unlawful for any person, licensed to catch or land lobsters for commercial purposes in this State, who uses gear or methods other than pots or traps outside the jurisdiction of this State, to land more than 100 lobsters per day for each day at sea during the same trip, up to a maximum of 500 lobsters per trip for trips 5 days or ~~longer~~ longer.

2 DE Reg. 1898 (04/01/99)

~~37583.0 Possession Of V-notched Lobsters Prohibited~~

(Penalty Section 7 **Del.C.** §1912)

~~4.03.1~~ It ~~shall be~~ is unlawful for any person to possess a V-notched female lobster. V-notched female lobster means any female lobster bearing a V-notch, a straight-sided triangular cut with or without setal hairs at least 1/8 inch in depth and tapering to a sharp point, in the flipper (uropod) next to the right of center flipper (telson) as viewed from the rear of the female lobster with the underside (ventral side) facing down. ~~V-notched female lobster also means any female lobster which is mutilated in a manner which could hide, obscure or obliterate such a mark. The right flipper will be examined when the underside of the lobster is down and its tail is toward the person making the determination.~~

3.2 Any person that catches an egg-bearing female lobster shall notch it as outlined in subsections 3.2.1 through 3.2.5.

3.2.1 The notch shall be made on the flipper (uropod) immediately to the right of the central flipper (telson) as viewed from the rear of the lobster with the underside (ventral side) facing down.

3.2.2 The notch shall be made by means of a sharp bladed instrument.

3.2.3 The notch shall be made at least ¼ inch in width along the outer margin of the flipper.

3.2.4 The notch shall taper to a sharp point at least ½ inch deep.

3.2.5 The lobster shall be immediately returned to the water upon completion of the notch.

3.3 It is unlawful to possess a female lobster that is mutilated in a manner that could hide, obscure or obliterate a V-notch.

2 DE Reg. 1898 (04/01/99)

11 DE Reg. 1662 (06/01/08)

23 DE Reg. 217 (09/01/19) (Final)