

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Section 1902 (7 Del.C. §1902)

7 DE Admin. Code 3755

FINAL

Secretary's Order No.: 2024-F-0001

RE: Approving Final Amendments to 7 DE Admin. Code 3755:

Lobsters (Homarus americanus)

Date of Issuance: February 02, 2024

Effective Date of the Amendment: March 11, 2024

3755 Lobsters (*Homarus americanus*)

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC"), and pursuant to 7 Del.C. §1902, 7 Del.C. Chapter 60, 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 promulgation.

Background, Procedural History and Findings of Fact

This Order relates to the Department's proposed regulatory amendments to 7 DE Admin. Code 3755: *Lobsters (Homarus americanus)* ("Amendments"). The Department's Division of Fish and Wildlife ("DFW") is proposing to amend Delaware's existing lobster regulation to comply with the Atlantic States Marine Fisheries Commission ("ASMFC") Addendum XXIX to Amendment 3 to the American Lobster Fishery Management Plan ("FMP").

The ASMFC's American Lobster FMP requires all vessels with federal lobster permits to install and maintain an electronic tracking device that will transmit location data while the vessel is in the water. The FMP is requiring the electronic trackers because the same are now required by a National Oceanic and Atmospheric Administration ("NOAA") Fisheries federal regulation intended to reduce interactions between fishing boats and gear and the endangered North Atlantic Right Whale.

The North Atlantic Right Whale population is currently at an historically low level and has been listed as an endangered species under the federal Endangered Species Act. The federal agency overseeing the recovery efforts for the North Atlantic Right Whale, NOAA Fisheries, is attempting to reduce potential hazards to these whales.

Whale entanglement in the floating lines of lobster pot gear was identified as a major hazard and an important source of whale mortality. As a result, NOAA Fisheries has recently approved several rules intended to reduce whale entanglements in lobster pot gear. All federal lobster permit holders are required to install an approved device to collect and transmit spatial data in order to participate in the pot gear fishery in federal waters. Federally permitted vessels are required to install and activate an approved device prior to beginning a trip with lobster pot gear. The device must remain onboard the vessel and be powered at all times when the vessel is in the water unless the device is authorized to power down by the principal port state.

Addendum XXIX to the ASMFC American Lobster FMP requires all states with federal lobster permit holders to take complementary action to the above federal actions. Of note is the fact that the ASMFC is providing all lobster permit holders with funding for the tracking device that is being required, and the funding will also cover several years of service for the tracking device.

The Department's proposed amendments to 7 DE Admin. Code 3755 are contained within the new proposed Section 4.0, *Electronic Tracking Devices*. Section 4.1 provides that the aforementioned "Electronic Tracking Device" shall be defined as an electronic device approved by the ASMFC, used to track vessel location, and to collect and transmit such spatial data to the DFW in compliance with Addendum XXIX, as noted above. Section 4.2 provides that the tracking device shall be installed and activated prior to beginning a lobster fishing trip with pot gear onboard by a Delaware commercial lobster pot licensee operating any vessel named on a NOAA Fisheries limited access lobster permit, pursuant to 50 CFR §697.4, to fish trap gear for lobsters and Jonah crabs in the Exclusive Economic Zone. Additionally, Section 4.2 provides that all permit holders shall sign a written affidavit confirming the electronic tracking device has been installed. Lastly, Section 4.3 provides that the tracking device shall remain onboard the vessel and be powered on at all times when the vessel is in the water.

The Department has the statutory basis and legal authority to promulgate the proposed Amendments pursuant to 7 *Del.C.* §1902. The Department published the initial proposed Amendments in the December 1, 2023, *Delaware Register of Regulations* ("*Register*"). The virtual public hearing was held in this matter on December 21, 2023. No members of the public attended the hearing.

Pursuant to 29 *Del.C.* §10118(a), the hearing record ("*Record*") remained open for fifteen (15) additional days following the public hearing for receipt of public comment. The Record formally closed with regard to public comment on January 5, 2024. Only one written comment was received by the Department concerning this proposed regulatory promulgation, and the DFW's response to the same is discussed below. 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.

At the request of presiding Hearing Officer Lisa A. Vest, the Department's DFW prepared a Technical Response Memorandum ("*TRM*"). This TRM, dated January 11, 2024, provided a response to the sole comment received in this matter. Thereafter, Hearing Officer Vest prepared her Hearing Officer's Report ("*Report*") dated January 23, 2024. The Report expressly incorporated both the Department's proposed Amendments and the TRM into the Record generated in this matter, and attached both documents to the Report as Appendices "A" and "B," respectively. The Report documents the proper completion of the required regulatory amendment process, establishes the Record, and recommends the adoption of the proposed Amendments.

Reasons and Conclusions

Currently pending before the Department is the adoption of the proposed amendments to 7 DE Admin. Code 3755, *Lobsters (Homarus americanus)*. As noted previously, the proposed Amendments will enable the Department to comply with the ASMFC Addendum XXIX to Amendment 3 to the American Lobster FMP, which requires all vessels with federal lobster permits to install and maintain an electronic tracking device that will transmit location data while the vessel is in the water.

The Record reflects that only one comment was received by the Department in this matter. That commenter questioned the need for this particular regulation, not the content of the regulation itself. In the Department's TRM dated January 11, 2024, the DFW acknowledged receipt of this comment, and responded to the same by noting that the proposed promulgation is necessary in order for the Department to comply with the ASMFC Addendum XXIX noted above, and for Delaware's lobster fishery to continue to operate.

Based on the Record developed in this matter, I find and conclude that the Department has provided appropriate reasoning regarding the need for the proposed Amendments. Accordingly, I recommend promulgation of the Amendments to 7 DE Admin. Code 3755, *Lobsters (Homarus americanus)*, in the customary manner provided by law.

Further, 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 3755, *Lobsters (Homarus americanus)*, pursuant to 7 *Del.C.* §1902;
2. The Department has jurisdiction under its statutory authority, pursuant to 7 *Del. C.* Ch. 60, to issue an Order adopting the proposed Amendments as final;
3. The Department provided adequate public notice of the 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 proposed Amendments, including at the time of the virtual public hearing held on December 21, 2023, and during the 15 days subsequent to the hearing (through January 5, 2024), in order to consider all public comment on the same before making any final decision;
4. Promulgation of the proposed Amendments will enable Delaware to remain in compliance with the ASMFC Addendum XXIX to Amendment 3 to the American Lobster FMP, thereby allowing Delaware's lobster fishery to continue to operate;
5. The Department has reviewed the proposed Amendments in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104, and believes the same to be lawful, feasible, and desirable, that it will not establish substantive additional costs for individuals or small businesses, and that the recommendations as proposed should be applicable to all Delaware individuals or small businesses equally;
6. The Department's proposed Amendments, as published in the December 1, 2023, *Delaware Register of Regulations*, fully vetted to the public at the public hearing held on December 21, 2023, and attached to the Report as noted above as Appendix "A," are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, the same are approved as final Amendments, which shall go into effect ten days after publication in the next available issue of the *Delaware Register of Regulations*;
7. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary;
8. The Department shall submit this Order approving the proposed Amendments as final Amendments to the *Delaware Register of Regulations* for publication in its next available issue, and shall provide such other notice as the law and regulation require, as the Department determines is appropriate; and
9. The Department shall serve and publish its Order on its internet site.

Lisa Borin Ogden
For Shawn M. Garvin
Secretary

3755 Lobsters (*Homarus americanus*)

1.0 Lobsters Pot Design

(Penalty Section 7 **Del.C.** §1912)

- 1.1 It 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 is unlawful to use less than two (2) circular vents that are less than 2 5/8 inches inside diameter.
- 1.2 It 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.
- 1.3 It 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)

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

2.0 Lobsters Pot Season And Limits

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.
- 2.2 It 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 on any Sunday.
- 2.3 It 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.
- 2.4 It shall be 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.

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

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

3.0 V-notched Lobsters

(Penalty Section 7 **Del.C.** §1912)

- 3.1 It 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.
- 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)

4.0 Electronic Tracking Devices

4.1 Definitions

The following words and terms, when used in this regulation, have the following meanings unless the context clearly indicates otherwise:

"Electronic Tracking Device" means an electronic device approved by the Atlantic States Marine Fisheries Commission and used to track vessel location and collect and transmit this spatial data to the Division in compliance with Addendum XXIX to the Interstate Fishery Management Plan for American Lobster and Addendum IV to the Interstate Fishery Management Plan for Jonah Crabs.

4.2 An electronic tracking device shall be installed and activated prior to beginning a lobster fishing trip with pot gear onboard by a Delaware commercial lobster pot licensee operating any vessel named on a NOAA Fisheries limited access lobster permit, pursuant to 50 CFR § 697.4, to fish trap gear for lobsters and Jonah crabs in the Exclusive Economic Zone. All permit holders shall sign a written affidavit confirming the electronic tracking device has been installed.

4.3 The electronic tracking device shall remain onboard the vessel and powered on at all times when the vessel is in the water.

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

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

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

27 DE Reg. 686 (03/01/24) (Final)