

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

RE: Proposed Amendments to Delaware Shellfish Regulation No. 3716:
Crab Pot Number Buoys, Vessel Panel Color Code
and Number Requirements; AND
Proposed Amendments to Shellfish Regulation No. 3771:
Oyster Harvesting Licensee Requirements

Date of Issuance: April 15, 2008

Effective Date of the Amendment: May 11, 2008

I. 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.

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

Ahear\ Crab Pots 3716 and Oyster Lic.3771 Reg.Amdmts.08.Ord

MEMORANDUM

TO: John A. Hughes, Secretary

FROM: Lisa A. Vest, Hearing Officer

RE: Proposed Amendments to Delaware Shellfish
Regulation No. 3716: Crab Pot Number Buoys and Vessel
Panel Color Code and Number Requirements; AND
Proposed Amendments to Shellfish Regulation No. 3771:
Oyster Harvesting Licensee Requirements

DATE: April 15, 2008

I. 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 31, 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. Proper notice of the hearing was provided as required by law.

II. Summary of Hearing Record:

A. Department Presentation/Public Comment:

At the time of the hearing on March 31, 2008, Roy Miller, Fisheries Administrator with the Department's Division of Fish and Wildlife, offered

a brief explanation with regard to the reasoning behind the proposed amendments to these shellfish regulations, and submitted the Department's eight exhibits to this Hearing Officer for inclusion into the formal hearing record in this matter.

Mr. Miller began the Department's presentation by explaining that the proposed revisions to Delaware Shellfish Regulation No. 3716 would allow only one color code to be used per vessel, even if the allowable limit of up to three crab pot licensees fish their pots from the same vessel. This proposed change will facilitate enforcement of the pot limits, and simplify painting and retrieving of crab pot floats for those crabbers who routinely partner to fish from the same vessel.

With regard to the numbering system for each crabber, Mr. Miller explained there are no proposed changes, except that if two or three crabbers fish from the same vessel, then all numbers fished from that vessel must be displayed on the two-foot-by-two-foot marker panel displayed on that vessel. One of the numbers from a crabber on that vessel must be displayed on a color-coded buoy attached to each crab pot fished from that vessel. For example, if there are three crabbers fishing from the same vessel, only one number has to be on the crab pot buoy.

Mr. Miller also advised those in attendance at the public hearing on March 31, 2008 that these proposed amendments to Shellfish Regulation No. 3716 would go into effect on a delayed basis, to wit:

January 1, 2009, in order to give the crabbers an opportunity to repaint their floats, if necessary, to comply with the new regulation.

With regard to the proposed revisions to Delaware Shellfish Regulation No. 3771, Mr. Miller explained that it would modify the required procedures for applying oyster harvesting tags. Each tag issued by the Department must be cinched around the top of the oyster bag and locked, such that the bag may not be opened, nor oysters removed from the bag, without breaking the tag or seal. Said bags shall be tagged prior to the vessel leaving the shellfish harvest grounds and returning to port. This change will facilitate enforcement of tagging requirements, and should discourage the illegal (yet somewhat common) practice of reusing oyster tags after the bags are emptied. Unlike the other revisions proposed to Shellfish Regulation 3716, the revisions proposed to Shellfish Regulation 3771 would go into effect immediately upon promulgation.

In support of the above proposed revisions, Mr. Miller also provided a brief background regarding the same for the benefit of those in attendance at the hearing on March 31, 2008, and for inclusion into the formal hearing record regarding this matter. The proposed amendments to both Regulation Nos. 3716 and 3771 were requested initially by the Department's enforcement staff, and have been discussed in other public venues prior to the hearing held on March 31, 2008, to wit:

- On January 4, 2006, the Shellfish Advisory Council discussed the one-color crab pot color code per vessel concept. It was presented to the Advisory Council by Lieutenant John Rutherford of the Department's Fish and Wildlife Enforcement Section;
- On May 8, 2007, at the Department's public workshop on Oysters held at DNREC's R & R Auditorium in Dover, Delaware, a demonstration was given by Drew Aydelotte, one of the Department's Fish and Wildlife Officers, as to the proper way to tag oyster bags. It is that method of oyster tagging which is being proposed in the regulation at issue in this promulgation, i.e., cinching it around the top of the bag, putting the tag on the bag, and then locking it so that the bag cannot be opened or emptied without breaking the seal;
- On December 3, 2007, the Shellfish Advisory Council voted to approve the draft regulation proposed of only allowing one use of color code per vessel. The Shellfish Advisory Council considered the draft regulation and approved it by unanimous vote, thus giving the Department the directive to proceed with a public hearing on this matter;
- On February 19, 2008, notice was mailed to all licensed oystermen concerning the public hearing to be held on March 31, 2008. It was noted in that same notice that there

would be a proposed revision to the crab pot coloring code and a revision to the oyster code as well. Said notice was in the form of a letter addressed to oystermen initially for another subject, namely, regarding the public workshop that the Department held approximately two weeks' prior to the night of the March 31st public hearing;

- On March 13, 2008, an announcement was made at the Shellfish Advisory Council meeting of the public hearing to be held on March 31, 2008, and that consideration would be made at that time regarding the proposed revisions to the crab pot coloring code, as well as to the oyster tagging code.

Many persons attending the hearing that night offered their comments and concerns to the Department regarding the proposed amendments to both Shellfish Regulation Nos. 3716 and 3771. The Department satisfactorily answered all questions raised by the public at this hearing, and reminded the audience that the hearing record would remain open through close of business Wednesday, April 2, 2008 for additional public comment regarding this matter.

B. Department Review/Analysis Post-Hearing:

Following the hearing, the Department conducted a review of all of the comments received by the public in this matter. After its review, and based specifically on the feedback provided by several fishermen having attended the hearing on March 31, 2008, the Department decided to

withdraw certain language of its proposed revisions to Regulation No. 3716, as it was perceived to actually cause additional confusion to the public rather than clarify the existing regulation. Specifically, the language stricken was found in the final sentence of the last numbered section of Regulation 3716 (original section number 11.0, revised section number 13.0):

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.

The Department determined that the underlined portion of the above sentence inadvertently hindered more than helped the existing regulation, and, in the long run, caused concern among those most affected by this regulation. The existing code and regulations (as well as the proposed amendments to said regulations) allow that any combination of (up to) the three numbers that may be assigned to any one vessel be on a float attached to each pot that the vessel may fish, up to and including 500 pots. Delaware code already specifies that no one person may obtain a license to fish more than 200 pots, so the underlined portion of the above sentence is not only unneeded, but again, tends to cause more confusion than clarity to the reader.

Thus, the Department wishes to move forward with all other revisions as set forth at the time of the public hearing, but has stricken the underlined portion as shown above. This change to the Department's proposed revisions is not substantive, nor does it affect the existing code and/or regulation pertaining to this issue, and therefore further notice to the public regarding this particular change is not necessary in the scope and course of this regulatory promulgation.

For the Secretary's review, Delaware's proposed amendments to these regulations are expressly incorporated into this report and attached hereto as Attachment "A" for that purpose. It should also be noted that 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.

III. Conclusions and Recommendations:

Based on the above discussion, I conclude that the Department has provided sound and appropriate reasoning regarding the need for these proposed amendments to Delaware Shellfish Regulation No. 3716 concerning crab pot buoys and vessel panel color codes and number requirements, as well as to Delaware Shellfish Regulation No. 3771 regarding Oyster Harvesting Licensee Requirements, and has thoroughly addressed any public questions and/or comments provided during the

various phases of the record developed in this matter. Moreover, the proposed amendments to Delaware Shellfish Regulation Nos. 3716 and 3771 have been thoroughly vetted by the Department in several public forums since their inception. As a result, the Department obtained insightful feedback from the public concerning these proposed amendments, listened carefully to the feedback that was provided, and made changes where necessary to add additional clarity for the benefit of those most affected by the same.

Accordingly, I recommend promulgation of these proposed amendments in the customary manner provided by law.

Further, I recommend the following findings:

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. 3715 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 regulation, as published in the March 1, 2008 *Delaware Register of Regulations* and set forth in

Attachment “A” hereto, is adequately supported, not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, 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 shall submit the proposed regulation as a final regulation to the Delaware Register of Regulation for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

_____/s/ Lisa A. Vest_____.
LISA A. VEST
Hearing Officer

/ahear/Crab Pots 3716 and Oyster Lic.3771 Reg.Amdmts.08